Turf Law Journal (TLJ)

The *Turf Law Journal* is a peer-reviewed and internationally indexed journal published by the School of Law of the University of Limpopo, South Africa. The purpose of the journal is to give a platform for high quality research on transformative and developmental perspectives about law in South Africa and beyond.

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Editorial

Hoolo 'Nyane
Editor-in-Chief

The *Turf Law Journal* is now in its fourth year of publication, having gone live for the first time in 2021. The journal has gone from strength to strength. True to its purpose of publishing high-quality articles that seek to reaffirm alternative thinking, the journal has thus far attracted contributions from across the continent. The current volume – volume 4 – is an incredible milestone for the journal. It is being published in the same year that the journal was indexed by African Journals Online (AJOL) under the two-star Journal Publishing Practices and Standards (JPPS). AJOL is a reputable indexer of African journals, offering a unique publication standards system to assess each journal based on relevant best practices and informed by globally, regionally and nationally accepted standards. Since AJOL indexed the *TLJ*, the journal's visibility has improved, resulting in more articles being submitted to the journal for consideration. This greatly encourages the editorial team to adhere to internationally acceptable publishing standards.

The current volume features carefully selected articles that showcase the journal's footprint throughout the continent. Voyo Peach's article, 'The Doctrine of Substantive Legitimate Expectation: A Missing Piece of the Puzzle in Modern South African Administrative Law', investigates an intriguing doctrine in South African public law: legitimate expectation. In particular, the author notes that legitimate expectation is well-established in South African administrative law as a double-pronged doctrine: with substantive and procedural aspects. A procedural legitimate expectation focuses on the procedure that a public authority follows before deciding, and a substantive legitimate expectation focuses on the actual decision made by a public authority. Since the doctrine was imported into South Africa by the celebrated decision in *Administrator Transvaal v Traub* 1989 (4) SA 731 (A), the doctrine has been accepted as fundamentally procedural. The author contends that the judiciary is uncertain about whether the second leg of the doctrine – substantive legitimate expectation – should form part of South African law. The article takes a cue from the much-touted tenets of transformative constitutionalism to advocate for the incorporation of substantive legitimate expectation into the evolving corpus of administrative law.

Noah Maringe's article, 'The Constitutional Protection of the Right to Collective Job Action in Zimbabwe: A Comparative Analysis', analyses a controversial notion in Zimbabwean labour law: the right to participate in collective job action. This is the most formidable weapon in employees' arsenal, without which workers' autonomy and democracy in the workplace would be under persistent onslaught. The author engages with the intractable question of whether Zimbabwe's constitutional protection of collective

job action accords with general trends in comparative jurisdictions such as South Africa, Kenya and Australia. While he lauds the relative progressiveness of the Zimbabwean jurisprudence on the matter, he also criticises it for failing to offer adequate constitutional protections and guarantees. There are also several discrepancies between the Constitution and the Labour Act. He finds further that Zimbabwe's legal and institutional framework does not keep up with other jurisdictions from which lessons can be drawn.

The article by Grace Arowolo, 'Children's Rights and the Pursuit of Intergenerational Climate Justice in Nigeria', grapples with the human tragedy of climate change, using Nigeria – Africa's most populous country – as a case study. The author notes that climate change is a significant challenge for environmental justice in general and environmental law in particular. It is an intergenerational problem that severely affects equity (justice) between present and future generations. Africa is one of the regions of the world most vulnerable to the impacts of climate change, owing to its high exposure and poor adaptive capacity. The author analyses the African continent, where climate change disproportionately affects vulnerable sections of society, resulting in food insecurity, population displacement, and a lack of water resources. The author cites the 2021 United Nations Children's Fund (UNICEF) report, one of many sources used in the article, which confirms that African children are most at risk of climate change. The report ranked Nigeria as second among the extremely high-risk countries where children are most at risk from climate change. Consequently, the author examines the impact of climate change on the rights of children in Nigeria and proposes measures for intergenerational climate justice, recommending, among others, adopting a children's rights-based approach to climate change mitigation and adaptation and integrating children's rights into Nigerian climate change responses.

The article by Obinna Emmanuel Nkomadu, 'The Impact of the Lomé Charter on Combating Trafficking in Persons at Sea: A South African Legal Perspective', analyses how the much-discussed Lomé Charter has addressed the problem of trafficking in persons ('TIP'). The author identifies a major maritime problem on the African continent as the widespread proliferation of threats to maritime security, including TIP at sea. To combat this scourge, South Africa promulgated the Prevention and Combating of Trafficking in Persons Act 7 of 2013. Other countries have taken varying measures, too. Nevertheless, the problem of TIP continues unabated. For that reason, and to address many other maritime security threats in Africa, in 2016, member states of the African Union adopted the African Charter on Maritime Security and Safety and Development in Africa ('the Lomé Charter'), which has yet to come into force. In this article, the author thoroughly analyses the relevant pre-existing international instruments, the TIP provisions of the Lomé Charter, and the South African legislation. Ultimately, the author recommends that legal steps be taken, such as adopting policies that guarantee the availability of resources, either from public funds or by forging public-private partnerships, to invest in equipment, operations and training to combat TIP at sea. In particular, the author recommends that South Africa join other state parties in adopting guidelines and modalities to assist them in fulfilling their obligations under the Lomé Charter.

Sabitiyu Abosede Lawal and Abubakri Yekini, in their article, 'The Legal and Institutional Frameworks Aimed at Curbing Human Trafficking in Nigeria,' flag an

issue that is increasingly becoming a matter of global concern: human trafficking. The authors use Nigeria as a case study. They contend that many people find themselves vulnerable in the wake of overpopulation and unfavourable economic conditions that lead to unemployment and insecurity in Nigeria. They are easily pushed into seeking better opportunities in Nigeria and across the Nigerian borders. This unfortunate situation has become a happy hunting ground for human traffickers. The authors contend further that they examine the legal and institutional frameworks for preventing human trafficking in Nigeria. The article finds that the penal provisions in the Nigerian Child Rights Act of 2003 are more stringent than those in the Trafficking in Persons (Prohibition) Enforcement and Administration Act of 2015. Furthermore, the paper observes that while anti-trafficking agencies are trying to combat human trafficking, more action is needed to address the high-profile individuals involved in human trafficking who evade legal consequences.

The editorial team hopes that readers will feel intellectually nourished by our curated contributions.

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The Legal and Institutional Frameworks Aimed at Curbing Human Trafficking in Nigeria

Sabitiyu Abosede Lawal* and Abubakri Yekini**

Abstract

Due to overpopulation and unfavourable economic conditions that lead to unemployment and insecurity in Nigeria, many individuals have been lured into seeking better opportunities in Nigeria and across the Nigerian borders. While some make this decision without being intimidated, others are lured by human traffickers. This paper examines the legal and institutional frameworks for preventing human trafficking in Nigeria. The paper analyses why people fall prey to human trafficking, the various forms it takes, and the legal and institutional frameworks established to combat it. The paper adopts a qualitative and doctrinal methodology and finds that Nigeria has adequate legislative provisions to address human trafficking, but these laws must be effectively implemented. The paper highlights that the penal provisions in the Child Rights Act of 2003 are more stringent than those in the Trafficking in Persons (Prohibition) Enforcement and Administration Act of 2015. Furthermore, the paper observes that while anti-trafficking agencies are trying to combat human trafficking, more action is needed to address the high-profile individuals involved in human trafficking who evade legal consequences. The paper offers recommendations to enhance the effectiveness of the legal and institutional frameworks and concludes that the laws should be implemented by an established institution to avoid bias.

Keywords

legal framework, institutional measures, children, human trafficking, Nigeria

1. Introduction

Due to overpopulation and unfavourable economic conditions that lead to unemployment, poverty, and insecurity in Nigeria, many individuals have tried to seek better opportunities across Nigeria's borders. While some make this decision without being intimidated, many others are lured away from home by human traffickers. Human trafficking is a crime and is widely regarded as 'modern-day slavery'. It is a pervasive crime that occurs worldwide, affecting individuals of all ages, origins and ethnicities. Thus, men, women and children from diverse backgrounds can be victims of human trafficking. In Nigeria, thousands of women and children are trafficked to other countries, especially European countries. This is not to say that the victims of human trafficking are only women and children, but many

* LLB (Hons), LL.M, PhD, Senior Lecturer in Law, Lagos State University, Lagos, Nigeria.
** LLB (Hons), LL.M, PhD, Lecturer in Law, University of Manchester, United Kingdom.

of the victims are females, and the trafficking of children is on the rise.[1] In September 2022, the Director-General of the National Agency for the Prohibition of Trafficking in Persons (NAPTIP),[2] Dr Fatima Waziri, stated that '[a]cross the country, we have seen an increase in the abduction of children'.[3]

Victims of human trafficking are recruited from within and outside Nigeria's borders for various exploitative purposes, including forced labour, prostitution and sex hawking, domestic servitude and bonded labour. Some are trafficked inside Nigeria, and others are taken from Nigeria to other African countries. In addition, children from neighbouring West African States, such as the Republic of Benin and Togo, are also brought into Nigeria for domestic servitude and forced labour.[4] Often, these children are cajoled into leaving their parents or guardians without their consent and contrary to the provision of the Child Rights Act (CRA) 2003;[5] the CRA provides that every child has a right to parental care and protection, and accordingly, no child shall be separated from their parents against the wish of the child.[6] However, there are exceptions to this rule, such as when a child's separation from their parents is deemed necessary for their education and welfare or in the exercise of a judicial determination in the child's best interest.[7]

In addition, Nigerians are trafficked to Europe, especially Italy and Russia, as well as the Middle East and North Africa for forced prostitution. While more recent comprehensive data is limited, it has been reported that, in 2016, approximately 181 436 refugees and migrants arrived in Italy by sea, with Nigeria accounting for 37 551 of them, representing 21%.[8] Equally, the United Nations Development Programme (UNDP) noted in 2019 that Nigeria accounted for 17% of all African migrants to Europe, making it the largest single source of migrants from Africa.[9]

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1 For instance, see the NAPTIP Annual Report 2021, which provides comprehensive age and sex distributions of rescued victims from January to December 2021 <https://naptip.gov.ng/download/naptip-2021-annual-report/> accessed 12 December 2024. The 2021 report represents the most recent publication by NAPTIP at the time of writing.

2 Hereafter referred to as 'NAPTIP' or 'the Agency'. The Agency was created on 14 July 2003 under the repealed Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003, s 2.

3 NAPTIP 'NAPTIP and Meta Partner to Tackle the Crisis of Missing Children, With the Launch of Amber Alert in Nigeria' (September 2022) <https://naptip.gov.ng/naptip-and-meta-partner-to-tackle-the-crisis-of-missing-children-with-the-launch-of-amber-alert-in-nigeria/> accessed 13 April 2024. Meta is the owner of Instagram, Facebook and WhatsApp.

4 NAPTIP Annual Report 2021 (note 1 above) 51, 55.

5 Hereafter referred to as 'CRA 2003'.

6 CRA 2003, s 14(1).

7 CRA 2003, s 14(a) and (b).

8 UNHCR Bureau for Europe 'Refugees and Migrants Sea Arrivals in Europe' 6 <https://data.unhcr.org/en/documents/download/53447#:~:text=Figure%2010%20%2D%20Country%20of%20origin,to%20Italy%20remain%20very%20low> accessed 9 December 2024. See also Ottavia Spaggiari 'Escape: The woman who brought her trafficker to justice' *The Guardian*, 27 August 2020 <https://www.theguardian.com/world/2020/aug/27/nigeria-italy-human-trafficking-sex-workers-exploitation-justice> accessed 10 December 2024.

9 NAPTIP 'NAPTIP National Action Plan on Human Trafficking in Nigeria: 2022–2026' <https://naptip.gov.ng/uploads/national_action_plan_2022-2026.pdf> accessed 12 December 2024.

The phenomenon of human trafficking has profound effects both on individual victims and on society at large. These effects are devastating. The effects of trafficking on victims include loss of fundamental human rights, severe mental disorder and depression.[10] The effects that it has on society include the separation of families, the erosion of social bonds and support networks, as well as insecurity and fear.[11] In order to mitigate these effects, Nigeria has ratified many of the international conventions and treaties against human trafficking,[12] and has also enacted national laws prohibiting such acts. The two principal statutes addressing the issue are the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 (TIPPEA Act)[13] and the Child Rights Act 2003. While the former Act addresses all persons regardless of age, the latter Act is particularly targeted at children. According to the definition section of the CRA 2003,[14] and the Child Rights Act (Enforcement Procedure) Rules, 2015,[15] a 'child' means 'a person under the age of eighteen years'. Therefore, once a child attains the age of 18, they cease to be a child and become a major.

This paper examines the Nigerian laws specifically enacted to combat the menace of human trafficking in Nigeria and the duties of the agency principally established to curb this problem. In doing so, the paper evaluates the provisions of the existing legal frameworks to determine their ability to combat human trafficking adequately. The paper also explores the challenges inherent in human trafficking legal frameworks in Nigeria and assesses the functions of the established agency on human trafficking in curbing this phenomenon.

10 For further details, see Osimen, GU, Pedro, O, Daudu, BO et al 'The Socio-Economic Effects of Human Trafficking in Nigeria' (2022) *IJRDO Journal of Social Science and Humanities Research* 1-22

11 For more detail, see Chia, BA 'Human Trafficking in Nigeria and its Effects on National Image: A Moral Appraisal' (June 2018) 4(2) *African Journal of Arts and Humanities* 1-16. See also Njoku, AO 'Human Trafficking and its Effects on National Image: The Nigerian Case' (2015) *International Journal of Multidisciplinary Academic Research* <www.multidisciplinaryjournals.com> accessed 20 March 2024.

12 Some of the international conventions that Nigeria has ratified include the United Nations Universal Declaration of Human Rights, 1948; the United Nations Convention on the Rights of the Child, 1989; the Forced Labour Convention, 1930; the ECOWAS Declaration and Plan of Action Against Trafficking in Persons, 2001; the United Nations Optional Protocol to the Convention on the Rights of the Child, especially on the Sales of Child, Child Prostitution and Child Pornography, 2002; and the Memorandum of Understanding (MoU) between Nigeria and Republic of Benin, 2003. See also Kigbu, SK & Hassan, YB 'Legal Framework for Combating Human Trafficking in Nigeria: The Journey So Far' (2015) 38 *Journal of Law, Policy and Globalization* 205-220.

13 Trafficking in Persons (Prohibition) Enforcement and Administration Act 4 of 2015, hereafter referred to as 'the TIPPEA Act 2015'. The Act is a federal law and applies to all 36 states in Nigeria, including the Federal Capital Territory, Abuja. The Act repealed the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003, as amended in 2005.

14 CRA 2003, s 277.

15 Hereafter referred to as 'the CRA Rules 2015', Ord 31, r 1.

This paper is divided into five parts. Part 1 is the introduction, while Part 2 analyses the causes of human trafficking. Part 3 examines the various provisions of the laws enacted to combat human trafficking. This part reveals that the CRA is enacted explicitly to protect children and imposes more stringent penalties than the TIPPEA Act 2015. In part 4, the institutional framework for combatting human trafficking in Nigeria is examined. In this part, key functions of the agency primarily established to detect and prosecute human traffickers are examined. This part considers the effectiveness of the agency in discharging its duties and makes recommendations to ensure efficient and effective implementation of the laws. Part 5 is the conclusion, which emphasises that combating human trafficking requires a collective effort; implementing the recommendations outlined in the paper could enhance Nigeria's reputation in combating human trafficking, and contribute to improved safety and security in Nigeria.

2. Causes of human trafficking

Human trafficking is a crime that involves compelling or coercing a person to provide labour or services, or to engage in commercial acts. Under Nigerian law, human trafficking is referred to as 'trafficking in persons',[16] and this nomenclature was confirmed by the US Department of Justice, when it stated that the crime 'human trafficking' is also known as trafficking in persons.[17] According to the United Nations Office on Drugs and Crime, human trafficking is the 'recruitment, transportation, transfer, harbouring or receipt of people through force, fraud or deception, with the aim of exploiting them for profit'.[18] Victims are lied to, assaulted, threatened or manipulated into working under inhuman, illegal or unacceptable conditions.[19] Under Nigerian law, section 64 of the TIPPEA Act 2015 defines trafficking as

> [a]ll acts involved in the recruiting, transportation within or across Nigerian Borders, purchases, sale, transfer, receipt or harbouring of a person, involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person whether or not in voluntary servitude (domestic, sexual or reproductive) in forced or bonded labour or in slavery-like conditions.[20]

From the above definition, it can be deduced that human trafficking is the business of stealing freedom for profit.[21] There are many reasons why people get caught up in human trafficking, some of which are examined next.

Poverty is one of the main reasons for human trafficking, particularly in Nigeria, where economic hardship is pervasive.[22] Given widespread unemployment and limited

16 TIPPEA Act 2015.

17 US Department of Justice 'What is Human Trafficking?' <https://www.justice.gov/humantrafficking/what-is-human-trafficking> accessed 24 April 2024.

18 United Nations Office on Drugs and Crime 'Human Trafficking' <https://www.unodc.org/unodc/en/human-trafficking/human-trafficking.html> accessed 20 April 2024.

19 National Human Trafficking Hotline 'Human Trafficking' <https://humantraffickinghotline.org/en/human-trafficking> accessed 24 April 2024.

20 TIPPEA Act 2015, s 64.

21 National Human Trafficking Hotline 'Human Trafficking' (note 19 above).

22 Manbe, DA 'Trafficking of Women and Children in Nigeria: A Critical Approach' (2016) 5(3) *American International Journal of Social Science* 20, 26.

opportunities, many graduates have no means of sustenance. In such circumstances, the promise of a better life abroad, often extended by traffickers, becomes irresistibly attractive.[23]

Besides, some parents are incapable of caring for their children, so they accept unlawful contractual terms from traffickers regarding their children. Thus, human trafficking emerges as a mechanism by which vulnerable individuals are exploited for cheap labour and sexual exploitation as an escape from extreme poverty.[24] The economic dimensions of this scourge are particularly stark. According to World Bank data,[25] Nigeria has one of the highest poverty rates globally, and this creates conditions that make individuals susceptible to trafficking networks.

Extreme poverty fuels broader *economic instability*, which creates a cyclical vulnerability that makes individuals increasingly susceptible to human trafficking. Nigeria's persistent economic challenges have dramatically increased citizens' susceptibility to human trafficking.[26] Potential trafficking victims are frequently enticed by promises of lucrative employment opportunities abroad, making them easy targets for unscrupulous traffickers who strategically manipulate economic anxieties.

Economic instability transforms traffickers' promises into apparent lifelines for individuals experiencing acute financial distress. The criminal networks effectively weaponise people's legitimate aspirations for economic mobility. Individuals, particularly youth and those who are economically marginalised become increasingly susceptible to deceptive recruitment strategies that present transnational migration as an escape from endemic poverty.[27]

Furthermore, the *lack of educational opportunities* also contributes greatly to the phenomenon of human trafficking. As a result, many younger victims are tricked, or in some cases, coerced by fake promises of education and sponsorships in the diaspora by people who fraudulently refer to themselves as educational agencies in the diaspora.

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23 Adepoju, A 'Issues and Recent Trends in International Migration in Sub-Saharan Africa' (2000) 52 *International Social Science Journal* 249, 384; Adibe, J, Baban'umma, MB & Prince, EH 'Illegal Migration to Europe and Nigeria's Policy Response: Trends and Analysis' (2023) 16 *African Journal of Politics and Administrative Studies* 156, 157; Darkwah, SA & Verter, N 'Determinants of International Migration: The Nigerian Experience' (2014) 62 *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* 321, 322.

24 Aluko, OI 'Human Trafficking as Kidnapping by Other Means' in Omotola, JS & Oyewole, S (eds) *The Political Economy of Kidnapping and Insecurity in Nigeria: Advances in African Economic, Social and Political Development* (Springer, 2024) 197-198; Mezie-Okoye, CC 'Human Trafficking: Slavery in the Modern Day and Economic Exploitation' (2023) 6 *International Journal of Management, Social Sciences, Peace and Conflict Studies* 169, 175-176.

25 In 2023, approximately 87 million citizens were experiencing extreme economic hardship. This figure represents roughly 38.9% of the population living below the poverty line, thereby positioning Nigeria as the country with the second-largest impoverished population globally, after India. See 'The World Bank in Nigeria' <https://www.worldbank.org/en/country/nigeria/overview> accessed 28 November 2024.

26 Manbe, DA 'Trafficking of Women and Children in Nigeria: A Critical Approach' (2016) 5(3) *American International Journal of Social Science* 20, 26.

27 Akwen, GT & Akwen, PI 'Human Insecurity and Trafficking in Persons from Nigeria via the Libya Transit Route' (2024) 2 *Journal of Political Discourse* 58, 62.

In many instances, individuals from *abusive homes* are significantly more susceptible to financial or emotional exploitation by traffickers. Victims of gender-based violence are particularly vulnerable as they can be easily targeted by traffickers and therefore coerced into sexual exploitation, child labour, and domestic or manual work under exploitative and minimally compensated conditions.[28]

Many victims of human trafficking are *deceived* into believing that there are opportunities beyond their homes. Victims may also be threatened by the traffickers, who lure them into doing what they do not want to do. Commenting on how traffickers lure their victims, the National Human Trafficking Hotline, a US-based body, states that '[t]raffickers employ a variety of control tactics, the most common include physical and emotional abuse and threats, isolation from friends and family and economic abuse. They make promises aimed at addressing the needs of their target in order to impose control.'[29]

The pervasive *lack of security* in Nigeria creates an environment that exponentially increases people's vulnerability to human trafficking. Persistent violence from Boko Haram insurgency and bandits, recurring religious and communal violence, and widespread security instability often force vulnerable populations to seek protection and economic survival through potentially dangerous migration.[30] These systemic security challenges effectively transform traffickers' promises of safety and opportunity into seemingly rational escape routes for those experiencing constant existential threats.[31]

Discrimination against minority tribes may also be a reason for victims' vulnerability to trafficking. Most people in the rural areas are lured to the urban cities for domestic servitude, forced and exploitative labour, and sometimes prostitution.

Natural disasters and widespread conflicts create catastrophic disruptions that render affected populations exceptionally vulnerable to human trafficking.[32] A natural disaster in any part of the country may force people residing in the affected areas to migrate to other parts of the country or even abroad. These displaced individuals become prime targets for traffickers who exploit their desperate circumstances. Having lost traditional support systems, economic resources and community protection, they are often compelled to ensure their survival through migration.[33] Unfortunately, in such situations, some vulnerable victims are lured into human trafficking.

Persistent dissatisfaction and a *desire for material advancement* can render individuals susceptible to human trafficking schemes. Continuous discontent with one's current

28 Kiss, L et al 'Violence, Abuse and Exploitation Among Trafficked Women and Girls: A Mixed-Methods Study in Nigeria and Uganda' (2022) 22 *BMC Public Health* 794.

29 National Human Trafficking Hotline 'Human Trafficking' (note 19 above).

30 See generally Kiss et al (note 28 above); NAPTIP 'Overview of Trafficking in Persons (TIP)' 44 <https://lms.naptip.gov.ng/public/uploads/file/28-05-2024/83f7e743df4daeb03a94d3465c69996f.pdf> accessed 2 December 2024.

31 See also Abosede, OB 'Human Trafficking and Transnational Organized Crime: Implications for Security in Nigeria' (2014) 46(1) *Peace Research* 61-84.

32 Worsnop, CZ & Vogel, KM 'The "Disaster Business": Natural Disasters and Human Trafficking' (2024) *Studies in Conflict and Terrorism* 1-26.

33 Aluko (note 24 above) 197-198; Nagy, R et al 'The Relationship of Environmental Migration and Human Trafficking Concerning Natural Hazards at the Affected Regions of Africa' (2023) 2 *Journal of Central and Eastern European African Studies* 17.

socio-economic status and an overwhelming desire to acquire resources beyond one's immediate means creates fertile ground for traffickers to exploit human vulnerabilities.[34] Such individuals often become targets for trafficking networks that manipulate these deep-seated desires using false promises of wealth, social mobility and great opportunities.

Many people who are unable to travel out of Nigeria and are eager to do so allow themselves to be trafficked, often enduring perilous journeys through the desert, via Libya and other routes. Along the way, they may exhaust their resources, and resort to prostitution and exploitative ways to keep themselves alive. In addition, some arrive in the diaspora without lawful immigration status. In such situations, they may accept whatever conditions are offered to them in order to stay, including exploitation.

Having examined the various conditions that can lead to vulnerability to human trafficking, the next question is: Are the legal frameworks regulating human trafficking in Nigeria sufficiently robust and effective? The next section of this paper analyses and evaluates the existing legal frameworks designed to address and mitigate human trafficking in Nigeria.

3. The legal framework for the prevention of human trafficking in Nigeria

The Constitution of the Federal Republic of Nigeria (CFRN), 1999[35] makes provision for protection against slavery and forced or compulsory labour, sexual exploitation and deprivation of personal liberty. Section 17 of the CFRN 1999 provides for social objectives by stating that the state's social order is founded on the ideals of freedom, equality and justice.[36] Therefore, in furtherance of these objectives, every citizen shall have equality of rights, obligations and opportunities before the law; the sanctity of human person shall be recognised; and human dignity shall be maintained and enhanced.[37] In addition, the CFRN provides that the exploitation of human beings, amongst others, in any form whatsoever shall be prevented, and the state shall direct its policy towards ensuring that 'children, young persons and the aged are protected against any exploitation whatsoever'.[38]

In addition to the above constitutional provisions, section 34 of the CFRN protects the right to dignity of human persons:

> (1) Every individual is entitled to respect for the dignity of his person, and accordingly
>
> (a) no person shall be subjected to torture or to inhuman or degrading treatment;
>
> (b) no person shall be held in slavery or servitude; and
>
> (c) no person shall be required to perform forced or compulsory labour.[39]

34 Ebingha, BN 'Migration and Female Exploitation in Two Select Novels by African Women' (2024) *Lwati: A Journal of Contemporary Research* 200, 207; Nwobodo, RE 'A Philosophical Discourse on the Implication of Modernism and Materialism on Nigerian Youths' (2024) 8 *Albertine Journal of Philosophy* 32, 35-36.

35 Hereafter referred to as 'CFRN 1999' or 'the Constitution'.

36 Ibid, s 17(1).

37 Ibid, s 17(2)(a) and (b).

38 Ibid, s 17(3)(f).

39 Ibid, s 34(a)-(c).

In a similar vein, the CRA 2003 aligns with the CFRN 1999 by applying Chapter IV of the CFRN 1999 or any successive constitutional provisions relating to fundamental human rights, as if the provisions were stated under the CRA 2003. This ensures that every child is granted the rights set out in both the Act[40] and the CFRN. Accordingly, section 11 of the CRA 2003 provides for children's right to dignity:

> Every child is entitled to respect for the dignity of his person, and accordingly, no child shall be–
>
> (a) subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse;
>
> (b) subjected to torture, inhuman or degrading treatment or punishment;
>
> (c) subjected to attacks upon his honor or reputation; or
>
> (d) held in slavery or servitude …[41]

Further to the provisions of the CFRN 1999 against human trafficking, section 42 makes an affirmative assertion regarding rights to freedom from discrimination.[42] The constitutional provisions assert that Nigerian laws are opposed to all forms of human trafficking, and any law that is inconsistent with the provisions of the CFRN shall, to the extent of its inconsistency, be void, and the CFRN shall prevail.[43] This is because the CFRN is supreme, and its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria.[44]

In Nigeria, besides the CFRN 1999, which lays down a concise legal framework on fundamental objectives and rights, human trafficking is principally regulated by the TIPPEA Act 2015 and the CRA 2003. On the one hand, the primary objectives of the TIPPEA Act 2015 are to provide an effective and comprehensive legal and institutional framework for the prohibition, prevention, detection, prosecution and punishment of human trafficking and related offences in Nigeria. The Act also aims to protect victims of human trafficking, whether young or old, and promotes and facilitates national and international cooperation in order to meet its primary objectives.[45] On the other hand, the objective of the CRA 2003 is to protect the best interests of children and to ensure that their interests are of paramount consideration in all actions, and for a child to be given the protection and care necessary for their well-being.[46] This Act specifically addresses the trafficking of children. According to section 11 of the Act, every child is entitled to respect for the dignity of their person, and accordingly, no child shall be–

40 CRA 2003, s 3.
41 Ibid, s 11(a)-(d) respectively.
42 CFRN 1999, s 42(2).
43 Ibid, s 1(3).
44 Ibid, s 1(1).
45 See generally TIPPEA Act 2015, s 1(a)-(c).
46 CRA 2003, ss 1 and 2.

> (a) subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse;
>
> (b) subjected to torture, inhuman or degrading treatment or punishment; or
>
> (c) subjected to attacks upon his honor or reputation; or
>
> (d) held in slavery or servitude ….[47]

Section 13 of the TIPPEA Act 2015 states that all acts of human trafficking are prohibited in Nigeria.[48] As noted above,[49] in an act of human trafficking, threats, the use of force, deception, coercion, abuse of power or being vulnerable are always present. Hence, section 13(4) of the TIPPEA Act provides that the consent of a victim of trafficking to the intended exploitation shall be irrelevant where any of the means set out in the Act has been used.[50] Moreover, the trafficking of a child for the purpose of exploitation shall be considered trafficking in persons even if it does not involve any of the means set out in the definition under the TIPPEA Act.[51]

Few scholarly works have been written on the TIPPEA Act 2015, which is unsurprising given that this is relatively new legislation. The response to the new legal framework has been mixed. While the Act has been generally praised as being progressive, some concerns have been raised as well.

Arinze-Umobi, Nwogu and Ojobor[52] critique the 2015 Act for its overly narrow scope, as it primarily focuses on victims under the age of 18. This limitation excludes vulnerable people such as recent graduates, students and older individuals facing economic hardship. The authors regard the Act's definitions of key trafficking offences as vague and therefore susceptible to legal manipulation. While they acknowledge the Act's improvements over the 2003 version, the authors strongly advocate for amending the age restriction[53] to better reflect Nigeria's current economic realities and the widespread vulnerability of individuals in different age groups.

Nwabachili and Iloka[54] argue for the continuous updating of the anti-trafficking laws to match evolving trafficker tactics. They note that the TIPPEA Act 2015 should be amended by imposing stricter sanctions and removing alternative sentencing options like fines for sex trafficking crimes. However, the authors do not consider the practicality of

47 Ibid, s 11(a)-(d).
48 TIPPEA Act 2015, s 13(1).
49 See section 1 above.
50 Ibid, s 13(5).
51 Ibid, s 13(6).
52 Arinze-Umobi, C, Nwogu, KC & Ojobor, LO 'Offences Created in the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2015: Towards the Fight against Human Trafficking in Nigeria' (2021) 2 *LASJURE* 132.
53 Although it should be noted that the Act does not provide age restrictions to several other offences created under the Act. For instance, see s 22(1)(a) – forced labour; s 23 – traffic in slaves; s 24 – slave dealing.
54 Nwabachili, CC & Iloka CP 'Trafficking of Women and Children Vis-à-Vis Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2015 and Other Relevant Laws' (2023) 5 *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law* 183.

imposing only custodial sentences, given that Nigeria grapples with the increasing prison administration costs. This view is shared to some extent by Oladele and Orifowomo.[55]

The criticism presented by existing scholarship on Nigeria's anti-trafficking legislation shows significant limitations in the current legal framework. Despite the insights from the existing literature, it is evident that there is a dearth of scholarship on the extant anti-trafficking legal frameworks in Nigeria. The existing literature offers limited engagement with the TIPPEA Act 2015. This paper aims to address this gap by providing an in-depth examination of the TIPPEA Act 2015, the CRA 2003 and other recently enacted legislation designed to regulate the various forms of human trafficking and modern-day slavery in Nigeria.

3.1 Forced or exploitative child labour

Some children are forced to take on menial jobs to fulfil unlawful financial obligations that have been imposed on them as a result of a lack of parental support. Both the CRA 2003 and the TIPPEA Act 2015 outlaw forced or exploitative child labour. The CRA 2003 makes it an offence for any child to be subjected to any forced or exploitative labour,[56] or to work or be employed in an industrial undertaking.[57] The contravention of this provision attracts a fine not exceeding 50,000 naira, or five years' imprisonment, or both a fine and imprisonment.[58]

Where such an offence is committed by a body corporate,

> any person who at the time of the commission of the offence was a proprietor, director, general manager or other similar officer, servant or agent of the body corporate shall be deemed to have jointly and severally committed the offence and may be liable on conviction to a fine of two hundred and fifty thousand naira.[59]

I believe that the monetary fine imposed on both individual and corporate human traffickers is too low, particularly as the Act states 'a fine not exceeding fifty thousand naira'[60] and pegs that of the corporate body to only 250,000 naira.[61] This means that, in the case of an individual trafficker, the court may award a fine of perhaps 10,000 or 20,000 naira, or even a lower sum, provided it does not exceed 50,000 naira, in its discretion; in the case of a corporate human trafficker, the fine is fixed at 250 000 naira, and no more. Given the current exchange rate, these penalties amount to approximately $50 and $250 for individual and corporate traffickers, respectively. Considering that human trafficking activities are cross-border in nature and that the perpetrators are connected to entities abroad, these penalties are grossly inadequate.

55 Oladele, GA & Orifowomo, OA 'Legal and Institutional Framework for Combating Trafficking in Persons in Nigeria' (2017) 5 *Africa Nazarene University Law Journal* 49.
56 CRA 2003, s 28(1)(a).
57 Ibid, s 28(2).
58 Ibid, s 28(3).
59 Ibid, s 28(4).
60 Ibid, s 28(3).
61 Ibid, s 28(4).

It is further noted that these paltry sums will not deter would-be offenders. Therefore, it is recommended that the fine for individual human traffickers should be increased to a minimum of 500,000 naira. With regard to a corporation, a minimum fine of 500, 000 nairas or five years' imprisonment should be imposed on all the officers who are complicit in the commission of the offence, and a minimum fine of 10 million nairas should be imposed on the company, with an option to seize the company. So, the corporation should also suffer a penalty. Furthermore, section 272 of the Act provides:

> If an offence under this Act is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of a body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, commit an offence and are liable to be proceeded against and punished accordingly.[62]

Section 29 of the CRA 2003 also makes provision for the application of sections 58 to 63 of the Labour Act 2004,[63] which prohibits the forced or exploitative labour of young persons, and the CRA 2003 reiterates that these six sections shall also apply to children under the CRA 2003.[64]

The TIPPEA Act 2015 forbids the employment, recruitment, harbouring, receiving, or hiring of children, notwithstanding their age, to do any work. That is exploitative, injurious, or hazardous to the child's physical, social, and psychological development. The sentence for such an offence on conviction is imprisonment for a minimum term of two years but not exceeding seven years, without the option of a fine.[65] It must be noted that where the law does not make provision for the option of a fine, the court does not have the discretion to award a monetary fine.[66] Notwithstanding the penalties attached to the offence, a convicted trafficker shall, in addition to the prescribed punishment, be liable to, first, a term of not less than two years imprisonment where the child is denied payment or reasonable compensation for services rendered or, second, a term of not less than three years where the child is defiled or suffers bodily harm.[67]

3.2 Involuntary domestic servitude

This is a condition of servitude induced by means of 'any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal purpose'.[68] Some children are trafficked and employed as domestic servants. Section 23 of the TIPPEA Act 2015 forbids the employment or hiring of a child under the age of 12 years as a domestic worker, and the penalty is

62 Ibid, s 272.
63 Labour Act, Cap. L1, Laws of the Federation of Nigeria, 2004.
64 CRA 2003, s 29. See also Ezinma, B 'Child Labour: Dilemma of Nigerian Government' *Saturday Independent*, 11 September 2010 at 11.
65 TIPPEA Act 2015, s 23(1)(b).
66 *State v Dr. Cosmos I. Okechukwu* (1994) 9 NWLR (Pt 368) 261 at 296.
67 TIPPEA Act 2015, s 23(2).
68 22 USC 7102 (6).

imprisonment for a minimum term of six months and not exceeding seven years.[69] In addition to the prescribed punishment, a convicted person shall be liable to, first, a term of not less than two years' imprisonment where the child is denied payment or reasonable compensation for services rendered; or, second, a term of not less than three years where the child is defiled or suffers bodily harm.[70]

Given the limitation of the exploitation of a child for domestic servitude to children under the age of 12 years, does this mean that a child between the ages of 12 and 18 years can be trafficked for domestic work without any penalty for the traffickers? No, it does not. The CRA 2003, which was specifically enacted for the protection of children, provides that no child shall be employed as a domestic help outside their own home or family environment.[71] The penalty for trafficking children for domestic work is the same as provided for traffickers engaged in luring children to perform forced or exploitative child labour under the CRA 2003.[72]

According to the CRA 2003, any other forms of exploitation of any child, aside from forced or exploitative labour and servitude, will result in a fine of 500 000 naira, or five years' imprisonment, or both.[73]

3.3 Exploitative adult labour

As a result of unemployment, discrimination, corruption and other societal vices that are prevalent in the country, some employers take advantage of the non-implementation of labour laws to exploit vulnerable workers to accept labour terms that violate human dignity, both locally and abroad. Immigrants are more vulnerable to forced labour as many of them are ready to accept any job opportunity in the diaspora, regardless of the wages, to sustain themselves. In Nigeria, it is an offence that is liable on conviction to imprisonment for a term of not less than five years and a fine of not less than ₦1 million if any person requires, recruits, transports, receives or hires out a person to be used for forced labour within or outside Nigeria, or permits any place or premises to be used for the purpose of forced labour.[74]

Forced child labour, involuntary domestic servitude and exploitative adult labour[75] can be regarded as labour trafficking, which the US Trafficking Victims Protection Act (TVPA) 2000[76] defines as 'the recruitment, harboring, transportation, provision, or obtaining of a

69 Ibid, s 23(1)(a).
70 Ibid, s 23(2).
71 CRA 2003, s 28(1)(e).
72 See 3.1 above.
73 Ibid, s 33.
74 See generally TIPPEA Act 2015, s 22.
75 See sections 3.1 to 3.3.
76 Hereafter referred to as 'TVPA 2000'. The TVPA is the first comprehensive federal law to address trafficking in persons in the USA, and this law was reauthorised by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, 2005, 2008, 2013, 2017 and 2018. See National Human Trafficking Hotline 'Federal Law' <https://humantraffickinghotline.org/en/human-trafficking/federal-law> accessed 21 April 2024. The TVPA 2000 makes provision for prevention, protection and prosecution regarding trafficking in the USA.

person for labor or services, through the use of force, fraud, or coercion[77] for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery'.[78]

3.4 Prostitution and sex work

Prostitution and sex work constitute a significant portion of the various forms of human trafficking and the 'majority of transnational modern-day slavery'.[79] On the one hand, some women, both young and middle-aged, cross the border in search of greener pastures, only to be confronted with stringent rules and regulations regarding employment opportunities in the country to which they have migrated, leaving them with no option other than to take up prostitution rather than returning home. On the other hand, some choose prostitution from the outset. Nigerian laws outlaw the procurement of children or adults for sexual exploitation.

Section 15 of the TIPPEA Act 2015 provides that any person who keeps, detains or harbours any other person with intent, knowing or having reason to know that such a person is likely to be forced or induced into prostitution or other forms of sexual exploitation with or by any person or animal, commits an offence and is liable on conviction to imprisonment for five years and a fine of ₦500 000.[80] While section 15 impliedly refers to engaging persons above the age of 18 years for prostitution and sex work, section 16 forbids the procurement of any child for sexual exploitation.

3.5 Exploitation of children for commercial sex

The exploitation of children for commercial sex is a form of human trafficking that is criminalised by both national and international laws. As a result of economic hardship in the country, which results in poverty, some mothers have forced their daughters into prostitution in order to provide food. According to the US Department of State, '[e]ach year, more than two million children are exploited in the global commercial sex trade. Many of these children are trapped in prostitution.'[81]

The TVPA 2000 defines sex trafficking as

> the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age.[82]

Nigerian laws make provision for the protection of children against exploitation for commercial sex. Section 16 of the TIPPEA Act 2015 forbids the procurement of any child

77 This means (a) threats of serious harm to or physical restraint against any person; (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process. See 22 USC 7102 (3).

78 TVPA 2000.

79 US Department of State 'Major Forms of Trafficking in Persons' <https://2009-2017.state.gov/j/tip/rls/tiprpt/2008/105377.htm> accessed 16 April 2024.

80 TIPPEA Act 2015, s 15(b).

81 US Department of State 'Major Forms of Trafficking in Persons' (note 79 above).

82 22 USC 7102(9).

for sexual exploitation by the use of deception, coercion, debt bondage or any means to induce such child, and the penalty for such an act is imprisonment for five years and a fine of ₦500 000.[83] Any person who procures or recruits a child to be subjected to prostitution or other forms of sexual exploitation with himself, any person or persons, either in Nigeria or anywhere else, commits an offence and is liable on conviction to seven years imprisonment and a fine of not less than ₦ 1 million.[84] It is also an offence to procure or recruit a child for pornography or a brothel.[85] Such an act attracts imprisonment for a term not less than seven years and a fine of not less than ₦ 1 million.[86] In addition to this penalty, a trafficker who is convicted under section 17(1)(b) is liable to a term of not less than one year's imprisonment where he administered or stupefied the victim with any drug substance.[87]

The CRA 2003 provides for more stringent penalties for using children for sexual exploitation, prostitution or pornography. The CRA 2003 provides that no child shall be procured or offered for prostitution, the production of pornography or any pornographic performance.[88] The contravention of the provisions results in imprisonment for a term of ten years.[89] Where a person unlawfully had sexual intercourse with a child, notwithstanding that the offender believed the child to be of or above the age of 18 years, or the sexual intercourse was with the consent of the child, such person commits the offence of rape and is liable on conviction to life imprisonment.[90] It is forbidden to sexually abuse or exploit a child in any other manner other than the sexual acts mentioned above; where such is committed, the offender shall be liable to imprisonment for a term of 14 years.[91]

As noted above, while the maximum term of imprisonment under the TIPPEA Act 2015 is seven years, the minimum imprisonment on conviction under the CRA 2003 is ten years. To deter traffickers from committing the crime of human trafficking, stringent penalties are required. Although the penal provisions under the TIPPEA Act 2015 are strict, stricter provisions are needed, such as those in the CRA 2003. I recommend that, when the issue of sexual exploitation, prostitution or pornography of children arises, traffickers should be prosecuted under the CRA 2003. The CRA is a state law, as provided for under the CFRN 1999, and must be adopted by states before it can be implemented; it is disheartening that not all states in Nigeria have adopted the Act. It is recommended that all states in Nigeria should adopt the CRA as state law in order to combat child trafficking, amongst others. Moreover, the TIPPEA Act 2015 should be amended to have the same penal provisions as the CRA 2003 to deter any would-be traffickers.

83 TIPPEA Act 2015, s 15(a).
84 Ibid, s 16(1).
85 See also CRA 2003, s 20(2)(e).
86 Ibid, s 17(1)(a) and (b).
87 Ibid, s 17(2).
88 Ibid, s 30(2)(a) and (e).
89 Ibid, s 30(3).
90 Ibid, s 31.
91 Ibid, s 32.

3.6 Forced marriages and child marriages

Forced marriage occurs when one or both parties to the marriage are forced into the union without consent. Forced marriage is not limited to children; adults have sometimes been forced to marry somebody whom they never consented to marry. In this kind of trafficking, the risk of sexual harassment and servitude is significant. Despite the general belief that child marriage occurs in less educated communities, even educated individuals, including Nigerian politicians, are involved in this practice. For instance, in 2010, Yerima, a former governor of Zamfara State of Nigeria and then a serving senator, married a 13-year-old Egyptian girl. Yerima's actions drew significant criticism from child rights activists, women's rights organisations and international human rights groups.[92] However, Yerima defended his actions by invoking religious and cultural justifications. He argued that child marriage was permissible under Islamic law.

Although the TIPPEA Act 2015 does not expressly provide for forced marriage as a form of human trafficking and modern-day slavery, section 15 provides for 'the use of deception, coercion … or any means, induces any person under the age of 18 years … to do any act with intent that such person may be, or knowing that it is likely that the person will be forced into illicit intercourse with another person'[93] and goes further to state that '[a]ny person who keeps, detains or harbours any other person with intent, knowing or having reason to know that such a person is likely to be forced or induced into prostitution or other forms of sexual exploitation'.[94] It can therefore be concluded that, while the first part of section 15 refers to illicit intercourse with any child, the second part refers to the other party involved.

Furthermore, there is an omnibus provision in the TIPPEA Act 2015 that may cover forced marriage. Section 13 of the Act states that

> [a]ll acts of human trafficking are prohibited in Nigeria,[95] and any person who harbours or receives any person by means of threat, or use of force or other forms of coercion; abduction, fraud, deception, abuse of power or position of vulnerability; or giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the exploitation of that person, commits an offence and is liable on conviction to imprisonment for a term of not less than two years and a fine of not less than ₦250 000.[96]

Despite the omnibus provision, it is recommended that the TIPPEA Act should be amended to accommodate an express provision on forced marriage. This amendment would eliminate any potential loopholes and ensure that the perpetrators of forced

92 Hirsch, A 'Nigerian senator who "married girl of 13" accused of breaking Child Rights Act' *The Guardian*, 25 July 2013 <https://www.theguardian.com/world/2013/jul/25/nigeria-senator-accused-child-bride> accessed 15 December 202); Igbinovia, J 'Groups fault Yerima on child marriage' *The Vanguard*, 23 July 2013 <https://www.vanguardngr.com/2013/07/groups-fault-yerima-on-child-marriage/> accessed 15 December 2024.

93 TIPPEA Act 2015, s 15(a).

94 Ibid, s 15(b).

95 Ibid, s 13(1).

96 Ibid, s 13(2)(a)-(c).

marriages are held accountable under specific provisions of the Act. This would also not allow frivolous defences to any trafficking offender.

The CRA 2003 expressly prohibits child marriage and betrothal, and it outlines the consequences of contravening these provisions. The CRA 2003 specifically provides that no child is capable of contracting a valid marriage, and a marriage so contracted is null and void, and of no effect whatsoever.[97] Similarly, no parent, guardian or any other person shall betroth a child to any person as such betrothal shall be null and void as well.[98] Where anyone contravenes these provisions, such person who marries a child; or to whom a child is betrothed; or who promotes the marriage of a child; or who betroths a child, shall be liable on conviction to a fine of ₦500,000, or five years' imprisonment, or both such fine and imprisonment.[99]

3.7 Purchase and sale of human beings for any purpose

The sale and purchase of human beings have become rampant in Nigeria. This is not limited to the sale and purchase of adults; it includes the sale of babies, toddlers and teenagers for monetary gain. The parents of some victims are sometimes associated with these illicit transactions. Section 21 of the TIPPEA Act 2015 provides that

> [a]ny person who buys, sells, hires, lets or otherwise obtains the possession or disposal of any person with intent, knowing it to be likely or having reasons to know that such a person will be subjected to exploitation, commits an offence and is liable on conviction to imprisonment for a term of not less than 5 years and a fine of not less than ₦2,000,000.[100]

3.8 Debt bondage or bonded labour

One way of keeping a person under subjugation is by using debt bondage or bonded labour.[101] This occurs where traffickers or recruiters unlawfully exploit an initial debt that the victim incurred prior to the migration as binding on them under the terms of their employment. Bonded labour occurs when a person has to work to pay back inherited debt arising from family indebtedness.[102]

According to US federal law, bonded labour is the status or condition of a 'debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined'.[103]

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97 CRA 2003, s 21.
98 Ibid, s 22.
99 Ibid, s 23.
100 TIPPEA Act 2015, s 21.
101 US Department of State 'Major Forms of Trafficking in Persons' (note 79 above).
102 See also World Vision Action 'Factsheet: Understanding Human Trafficking and Slavery' <https://www.worldvision.com.au/docs/default-source/buy-ethical-fact-sheets/understanding-human-trafficking-fact-sheet.pdf> accessed 10 April 2024.
103 22 USC 7102 (5).

In the case of debt bondage, a victim may take several years to settle the debt. Some victims of human traffickers from Nigeria have said that, once they reach their destination, their employers subject them to long-term work on the basis that their traffickers have collected large sums of money from the employers, together with the money used for transporting them to their destinations. They have to work for many years to settle the debt.

The TIPPEA Act 2015 outlaws debt bondage by referring to it as slave-dealing. Section 25 provides that:

> Any person who–
>
> (a) deals, keeps, receives or harbours any person for the purpose of holding or treating that person as a slave;
>
> (b) places, receives, harbours or holds any person as a pledge, pawn, in servitude or security for debt or benefits; whether due or to be incurred;
>
> (c) transports, transfers or in any way induces any person to come into Nigeria in order to hold, possess, deal or treat such person as a slave or to be used as a pledge or security for debt; or
>
> (d) enters into any contract or agreement with or without consideration for the purpose of doing or accomplishing any of the purposes enumerated in this section, commits an offence and is liable to imprisonment for a term of not less than 7 years and to a fine of not less than ₦2,000,000.[104]

Section 30 of the CRA 2003 states that no child shall be used as a slave or for practices similar to slavery such as debt bondage, among others.[105] Where these provisions are contravened by traffickers, they shall be liable on conviction to imprisonment for a term of ten years.[106] This is a better option in terms of punishment than under the TIPPEA Act 2015.

3.9 Armed conflict and child soldiers

Armed conflict may involve the recruitment of children through force or coercion. The recruitment of children in Northern Nigeria by the 'Boko Haram' sect constitutes human trafficking. Apart from this, the engagement of children in war, tribal or rebel groups and para-military organisations constitutes 'human trafficking'. Section 19 of the TIPPEA Act penalises traffickers by providing that '[a]ny person who trafficks any person for the purpose of forced or compulsory recruitment for use in armed conflict, commits an offence and is liable on conviction to imprisonment for a term of not less than 7 years and a fine not less than ₦1,000,000.00'.[107]

The CRA 2003 prohibits the recruitment of children into any of the branches of the armed forces of the Federal Republic of Nigeria, and obligates the government or any

104 TIPPEA Act 2015, s 25(a)-(d).
105 CRA 2003, s 30(2)(b).
106 Ibid, s 30(3).
107 TIPPEA Act 2015, s 19.

other relevant agency or body to ensure that no child is directly involved in any military operation or hostilities.[108] However, these legal provisions seem meaningless as many children in Nigeria have been recruited by militants to execute their hostile missions. Many of the leaders of Boko Haram who were arrested for trafficking were granted amnesty and not penalised as provided for by the law.

3.10 Organ harvesting

Nigerian laws have been enacted against the procurement or recruitment of persons for organ harvesting. Section 20 of the TIPPEA Act 2015 provides that any person who through force, threat, deception, debt bondage or any form of coercion abuses a position of power or situation of dominance or authority arising from a given circumstance, or who abuses a vulnerable situation for the purpose of removing someone's organ(s), commits an offence and is liable on conviction to imprisonment for a term of not less than seven years and a fine of not less than ₦5 million.[109]

The above penalty is also applicable to any person who, through the giving or receiving of payments or benefits in order to induce or obtain the consent of a person, directly or through another person who has control over the victim, enlists, transports, delivers, accommodates or takes in another person for the purpose of removing the person's organ(s).[110] The same penalty is applicable to a person who procures or offers any person, assists or is involved in any way in the removal of human organs, or in buying and selling human organs.[111] Furthermore, any person who enlists, transports, delivers, accommodates or takes in another person under the age of 18 years, for the purpose of removing the person's organ(s), commits an offence and is liable to the same penalty as above.[112]

However, it must be noted that the TIPPEA Act 2015 also recognises corporate offenders; it provides that where any of the offences under the Act committed by a body corporate are proved to have been committed on the instigation or with the connivance of, or are attributable to any neglect on the part of a director, manager, secretary of the body corporate, or any person who purported to act in any such capacity, the officer shall be liable on conviction to the same punishment as provided for an individual committing the offence. Notwithstanding this provision, such an individual officer shall not be liable if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the commission of such an offence. Nevertheless, where a body corporate is convicted of an offence under the Act, such body corporate is liable to a fine of ₦ 10 million; in addition, the court may issue an order to wind up the body corporate and its assets and properties shall be transferred to the Victims of Trafficking Trust Fund.[113]

108 CRA 2003, s 34.
109 TIPPEA Act 2015, s 20(a) and (b).
110 Ibid, s 20(b).
111 Ibid, s 20(3).
112 Ibid, s 20(3).
113 Ibid, s 31(1)-(3). The Trafficking Trust Fund is established under section 67 of the TIPPEA Act 2015.

The CRA does not make any express provision for child organ harvesting by traffickers, not because children are not victims, but because the crime of organ harvesting was not rampant when the CRA was enacted in 2003. As a result of this lacuna, how do we prosecute a child organ trafficker, bearing in mind section 274 of the CRA 2003, which provides that the provisions of the CRA supersede the provisions of all enactments relating to children?[114] Do we prosecute offenders under the TIPPEA Act 2015, or do we wait until the CRA 2003 is amended to provide for the offence of child organ harvesting before offenders can be prosecuted?

Section 274(2) of the CRA states that 'where any provision of this Act is inconsistent with that of any of the [other] enactments … the provision of this Act shall prevail and that other provision shall, to the extent of its inconsistency be void'. This is an area of concern. Nevertheless, since the provisions of the TIPPEA Act 2015 intend filling the lacunae in the CRA 2003, and it is the principal Act for eliminating human trafficking and is not inconsistent with the provisions of the CRA 2003, then the provisions of the TIPPEA Act 2015 should apply to all areas of child trafficking that are not provided for in the CRA 2003.

We now turn to consider the institution that is vested with the responsibility of curbing the menace of human trafficking. The basic institutional framework set up by the Federal Government of Nigeria and its functions are examined next.

4. The institutional framework for combating human trafficking

Both governmental and non-governmental bodies have been established to combat human trafficking in Nigeria. The only national body that is established solely for ending human trafficking in Nigeria is NAPTIP.[115] Sections 5 and 6 of the TIPPEA Act enumerate the functions and powers of the agency respectively. Some of the functions and powers of the agency are considered next; the efforts and limitations of the agency are also considered with recommendations to enhance the implementation of its statutory functions.

First, the agency ensures that laws enacted by the Nigerian government against human trafficking are enforced, by establishing a system of monitoring human trafficking activities on transborders, and to identify suspicious movements and persons.[116] By so doing, the agency can arrest, detain and prosecute trafficking offenders.[117] It is recommended that efforts should be increased to investigate, prosecute and convict traffickers, particularly those who engage children in domestic servitude, forced and exploitative labour, and debt bondage. Moreover, adequate penalties should be imposed, such as the terms of imprisonment under the CRA 2003.

Second, NAPTIP has adopted effective measures for the prevention and eradication of human trafficking and related offences in Nigeria.[118] For instance, the agency collaborates with the National Judicial Institute (NJI), judges and prosecutors to fight gender-based

114 CRA 2003, s 274(1).
115 TIPPEA Act 2015, s 2.
116 Ibid, s 5(a).
117 Ibid, s 6(c).
118 Ibid, s 5(c).

violence (GBV).[119] NAPTIP has also partnered with Meta[120] and the US National Centre for Missing and Exploited Children (NCMEC)[121] to tackle online child exploitation, since traffickers mostly use the internet[122] to trap their victims. According to the NAPTIP E-Digest, the agency launched the NAPTIP iReporter App in collaboration with the Canadian government.[123] In addition, the NAPTIP Service Charter, the NAPTIP Disability Inclusion Policy, policy documents and audio-visual materials have been translated into braille for the blind.[124]

Third, the agency rescues victims of human trafficking. For instance, in June 2018, during the World Cup, it was reported that NAPTIP officials blocked an attempt to smuggle ten children from Nigeria to Russia.[125] NAPTIP also protects victims and survivors of human trafficking. However, I suggest that efforts should be strengthened to identify human trafficking victims among children and more vulnerable persons. Furthermore, the agency should strengthen its efforts to recognise victims of human trafficking in general.

Fourth, NAPTIP investigates and prosecutes perpetrators of crimes who promote or are connected to human trafficking, either directly or indirectly.[126] According to a report, between 2004 and 2023, 599 human traffickers arrested by NAPTIP were found guilty,[127] and over 400 human trafficking offenders were sentenced between 2006 and 2023.[128] Nevertheless, it is believed that the rates of arrest and prosecution of traffickers remain low 'in relation to the size of the Nigeria as elsewhere'.[129] It is recommended that efforts should be increased to prevent, detect and prosecute human trafficking offenders.

Fifth, the agency counsels and provides rehabilitation programmes for survivors of human trafficking and modern-day slavery to enable them to heal mentally and emotionally.[130] The agency also teaches survivors of human trafficking vocational skills

119 NAPTIP 'NAPTIP in Collaboration with the National Judicial Institute Organises Technical Retreat for Judges and Prosecutors on the Prosecution of Sexual and Gender Base Violence Cases' (June 2023) <https://naptip.gov.ng/naptip-in-collaboration-with-the-national-judicial-institute-organises-technical-retreat-for-judges-and-prosecutors-on-the-prosecution-of-sexual-and-gender-base-cases/> accessed 13 April 2024.

120 NAPTIP 'NAPTIP and Meta Partner to Tackle the Crisis of Missing Children, with the Launch of Amber Alert in Nigeria' (September 2022) <https://naptip.gov.ng/naptip-and-meta-partner-to-tackle-the-crisis-of-missing-children-with-the-launch-of-amber-alert-in-nigeria/> accessed 13 April 2024. Meta is the owner of Instagram, Facebook and WhatsApp.

121 NAPTIP 'NAPTIP @ 20: Nigeria Has Taken the Lead in the Fight Against Human Trafficking Globally' (July 2023) <https://naptip.gov.ng/naptip20-nigeria-has-taken-the-lead-in-the-fight-against-human-trafficking-globally/> accessed 13 April 2024.

122 For instance, through emails and social media, such as Instagram, Facebook and WhatsApp.

123 NAPTIP *NAPTIP E-Digest* <https://naptip.gov.ng/edigest-august-2023/> accessed 13 April 2024.

124 Legit 'Full Meaning of NAPTIP in Nigeria and its Functions in 2023' (September 2023) <https://www.legit.ng/1137337-meaning-functions-naptip-nigeria.html> accessed 13 April 2024.

125 Ibid.

126 TIPPEA Act, s 6(a).

127 NAPTIP 'NAPTIP 2021 Data Analysis' <https://naptip.gov.ng/wp-content/uploads/2022/06/2021-data-analysis.pdf> accessed 12 April 2024.

128 Ibid.

129 Kigbu & Hassan (note 12 above) 208.

130 TIPPEA Act 2015, s 5(m)(i).

while they are being rehabilitated. Although the agency is obligated to enlighten the public on how to assist survivors of human trafficking heal their emotional and mental scars when they leave the rehabilitation centres, there has been little or no effort on the part of the NAPTIP with regard to this obligation. It is recommended that efforts should be increased to carry out this function. The Federal Government should also provide adequate funding to assist NAPTIP in implementing its statutory functions.

Sixth, NAPTIP has the power to deport anyone convicted of human trafficking.[131] For instance, on 8 March 2023, it extradited a high-profile female trafficker to Italy to serve a 13-year jail term.[132] This is made possible by the mutual legal assistance rendered by the Nigerian government and other countries to the agency, under the supervision of the Minister in charge of the extradition and deportation of people involved in human trafficking.[133]

Seventh, NAPTIP collaborates with government bodies having similar functions, inside and outside Nigeria, to combat human trafficking by facilitating the exchange of scientific and technical information.[134] Curbing the menace of human trafficking must be a joint effort, and all law enforcement agents in Nigeria, in particular, should work together with NAPTIP to achieve the objectives of the laws and the agency established to end human trafficking.

Eighth, section 5(h) provides that one of the functions of the NAPTIP is to create public enlightenment and awareness through seminars, publications, workshops, media programmes and other means aimed at educating the public on the dangers of human trafficking. In 2023, NAPTIP, in collaboration with the ARK Group, held a bus campaign, which taught people how to look for signs of human trafficking.[135]

There is also a need for awareness of the agency and its attempts to curb human trafficking. This means that communities, particularly rural communities, should be educated about its existence and functions. The lack of knowledge about its existence may result in victims being fearful about reporting, and this may hinder the arrest of traffickers. Therefore, it is recommended that NAPTIP should increase its efforts to educate the public about what constitutes human trafficking, how traffickers can be identified, and which authorities can be approached to report human trafficking.

As noted above, everyone has the obligation to report when there is any indication of trafficking. There are many signs that can help to establish that a person may be a victim of human trafficking. The US Department of State has offered some useful insights in this regard.[136] First, the victim often lives with the employer. Second, employers keep the

131 Ibid, s 5(s).

132 Africanews 'Nigerian Prostitution Mob Boss Extradited to Italy' <https://www.africanews.com/2023/03/10/nigerian-prostitution-mob-boss-extradited-to-italy//> accessed 13 April 2024.

133 Ibid.

134 TIPPEA Act 2015, s 5(q).

135 Legit 'Full Meaning of NAPTIP in Nigeria and its Functions in 2023' (note 124 above). The campaign was funded by Immigration, Refugees and Citizenship Canada, a department of the government of Canada.

136 US Department 'Identify and Assist a Trafficking Victim' <https://www.state.gov/identify-and-assist-a-trafficking-victim/> accessed 10 April 2024.

travel or identity documents of the victim. Third, the victim lives in fearful or submissive conditions. Fourth, the victim is unable to communicate with individuals while alone. Fifth, when a victim is questioned, their responses appear to have been scripted and rehearsed. Sixth, many victims of human trafficking live in poor conditions, and there are signs of physical abuse, cramped living spaces and meagre wages.

NAPTIP also conducts research on the factors responsible for internal and external human trafficking, and initiates programmes and strategies aimed at the 'prevention and elimination of the problem'.[137] For instance, NAPTIP statistics revealed that 'from 2019 to 2022, 61% of human trafficking cases occur within the country, while 39% are cross-border trafficking through land borders and by road transportation'.[138]

Aside from the recommendations above, the government should keep its promises by providing employment to youths and creating an enabling environment. Finally, every individual should avoid making their personal information available on social media. Where someone feels unsafe with anybody, they should speak out so that no one falls victim to human traffickers.

With regard to the brief examination of the functions and performance of the NAPTIP above, it would be unfair to state that the agency has not discharged its obligations at all. We can conclude that NAPTIP has improved the image of Nigeria with regard to human trafficking, and has prosecuted many human traffickers in accordance with the law. However, more needs to be done as many human traffickers continue to operate in clandestine networks, and many high-profile persons who participate in human trafficking are still able to avoid judicial scrutiny.

5. Conclusion

The causes of human trafficking in Nigeria are varied, and there are personal and socio-economic consequences for victims and society as a whole. Nigeria has functioning legal and institutional frameworks to combat the menace of human trafficking. While the TIPPEA Act 2015 was enacted for the protection of all in Nigeria, the CRA 2003 was specifically enacted to protect children, and has stricter penalties, in terms of imprisonment, than the TIPPEA Act. It is disheartening that not all states in Nigeria have adopted the Act; children's rights fall under the purview of the state in terms of the CFRN 1999, and the Act can be implemented only if it has been adopted. As a result, any human traffickers of children, in the states that have not adopted the CRA, would be prosecuted under the TIPPEA Act 2015. All states must adopt and implement the CRA 2003. Furthermore, NAPTIP should discharge its statutory functions in accordance with the laws of the land. If the recommendations made in this paper are implemented, Nigeria will improve its image, and safety and security against human trafficking will be the order of the day in Nigeria.

137 TIPPEA Act 2015, s 5(o).

138 NAPTIP 'NAPTIP, Development Partners and Stakeholders Re-strategize to Tackle Human Trafficking as Boot Camp for Members of State Task Forces Kicks off in Abuja' (July 2022) <https://naptip.gov.ng/naptip-development-partners-and-stakeholders-re-strategize-to-tackle-human-trafficking-as-boot-camp-for-members-of-state-task-forces-kicks-off-in-abuja/> accessed 13 April 2024.

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The Impact of the Lomé Charter on Combating Trafficking in Persons at Sea: A South African Legal Perspective

Obinna Emmanuel Nkomadu*

Abstract

A major maritime problem on the African continent is the widespread proliferation of threats to maritime security, including trafficking in persons ('TIP') at sea. The relevant South African legislation is the Prevention and Combating of Trafficking in Persons Act 7 of 2013. South Africa and other states on the continent have taken several steps to address this scourge; despite those steps, TIP continues. For that reason, and to address many other maritime security threats in Africa, member states of the African Union adopted in 2016 the African Charter on Maritime Security and Safety and Development in Africa ('the Lomé Charter'), which has yet to come into force. This article analyses the relevant pre-existing international instruments, the TIP provisions of the Lomé Charter and the South African legislation. The South African legislative provisions are then compared with the relevant provisions of the Lomé Charter to establish whether any legal steps are required to ensure that South Africa complies with its TIP-related obligations under the Lomé Charter should South Africa decide to ratify the Lomé Charter and should the Lomé Charter come into force. The legal steps required are that South Africa must, among others, adopt policies that guarantee the availability of resources, either from public funds or by forging public-private partnerships, to invest in equipment, operations and training to combat TIP at sea. In addition, South Africa should join other state parties in adopting guidelines and modalities to assist them in fulfilling their obligations in the Lomé Charter.

Keywords

cooperation, human trafficking at sea, legislation, Lomé Charter, maritime security, South Africa

1. Introduction

Many illegal activities take place at sea, including activities associated with trafficking in persons ('TIP'), such as forced labour, prostitution, slavery and the removal of human organs.[1] Victims are assaulted, injured or killed and often go missing.[2] In the first quarter of 2024, hundreds of migrants, including victims of TIP, died or went missing in the

1 See UNODC *Global Report on Trafficking in Persons* (United Nations, 2020) 84-87.

2 For example, see UN Doc S/2021/767, Implementation of Resolution 2546 (2020), Report of the Secretary-General of 2 September 2021, paras 18-20.

* LLB (EBSU), LLM(UI), LLD(NMU). Research Associate, Faculty of Law, Nelson Mandela University; affiliated with the Institute for Coastal and Marine Resources; Honorary Research Fellow, School of Law, University of KwaZulu-Natal <https://orcid.org/0000-0003-0948-7575> e-mail: obinnankomadu@yahoo.com

Mediterranean Sea. In March 2024, for example, over 60 migrants and victims of TIP died after a rubber dinghy ran into trouble in the Mediterranean Sea; 25 were rescued by the Ocean Viking, a vessel operated by the humanitarian group SOS Mediterranean.[3] In February 2023, 73 migrants and victims of TIP were declared missing and presumed dead following a shipwreck off the coast of Libya; only seven survived.[4] The previous year, more than 1,200 migrants had died in the Mediterranean Sea,[5] and in September 2021, a report of the Secretary-General of the United Nations confirmed that over 1,595 migrants and victims of TIP perished or went missing on the central Mediterranean route.[6] The report emphasised that this number does not account for those who died or went missing after they had been returned to their place of departure.[7] Africa, as a whole, recorded huge numbers of TIP victims, of whom 'children represent the majority of victims detected [...] in West Africa', while the victims in Southern African and East African countries tend to be predominantly adults.[8] Undoubtedly, parts of the African maritime domain have been and remain important transit points for TIP.[9] This state of affairs led the African Union ('AU') to call for

> a comprehensive regional and international approach involving countries of origin, transit, and destination, that includes measures to prevent [...] trafficking, [to] punish traffickers and to protect the victims of trafficking, including their human rights.[10]

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3 Beake, N & Plummer, R '60 migrants die in dinghy in Mediterranean' BBC News <https://www.bbc.com/news/world-europe-68564971.amp> accessed 23 August 2024.

4 Aljazeera 'UN says 73 people presumed dead in shipwreck off Libya' 15 February 2023 <https://www.aljazeera.com/news/2023/2/15/un-says-73-people-presumed-dead-in-libya-shipwreck> accessed 23 August 2024.

5 Sunderland, J 'Endless tragedies in the Mediterranean sea' Reliefweb, 13 September 2022 <https://reliefweb.int/report/world/endless-tragedies-mediterranean-sea#:~:text=More%20than%201%2C200%20people%20have,almost%2025%2C000%20deaths%20since%202014> accessed 23 August 2024.

6 For details of these routes, see UN Doc S/2021/767, Implementation of Resolution 2546 (note 2 above) para 17. However, human traffickers continue to use primarily rubber and wooden boats, as well as fibreglass boats, with migrant smuggling groups in the western launching area from Tripoli to Abu Kammash predominantly using wooden or fibreglass boats, and groups operating in the eastern launching region from Tripoli to Misratah mainly using rubber boats and occasionally fibreglass boats. The cost of travel by inflatable boat ranges from EUR 500 to EUR 1,400 and by wooden boat from EUR 800 to EUR 1,500, depending on the size of the boat and the number of people on board. With rubber boats being able to accommodate up to 120 persons, human traffickers and smugglers can earn up to EUR 168,000 per boat. See UN Doc S/2020/876, Implementation of Resolution 2491 (2019), Report of the Secretary-General of September 2020 para 8.

7 UN Doc S/2021/767, Implementation of Resolution 2546 (note 2 above) para 3.

8 UNODC, Report on TIP (2020) 165. UNODC 'Human trafficking in West Africa: Three out of four victims are children says UNODC report' <https://www.unodc.org/conig/en/human-trafficking-in-west-africa-three-out-of-four-victims-are-children-says-unodc-report.html> accessed 23 August 2024.

9 US Department of State '2021 Trafficking in Persons Report: Nigeria' para 45 <https://www.state.gov/reports/2021-trafficking-in-persons-report/nigeria/> accessed 23 August 2024.

10 See Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children, adopted by the Ministerial Conference on Migration and Development in Tripoli, 22-23 November 2006, preambular 4.

This is a huge concern for Africa as its ports and waterways continue to be used, *inter alia*, as destination and transit points.[11] In Southern Africa, the waters of the regional hegemon, South Africa, remain another transit point for TIP. A report confirms that South Africa is a primary destination for victims of TIP in the Southern African region and within Africa generally. South Africa is also an origin and transit country for trafficking to Europe and North America.[12] Indeed, forced labour has also been 'detected on fishing vessels in South Africa's territorial waters'.[13] The syndicates concerned recruit 'South African women to Europe and Asia, where traffickers force some into commercial sex, domestic service, or drug smuggling'.[14] In many cases, women and children are exploited 'aboard fishing vessels in South Africa's territorial waters'.[15] In the same way, traffickers 'exploit foreign male victims aboard fishing vessels in South Africa's territorial waters'.[16]

South Africa and many other African states have taken steps to address this scourge, but TIP still continues.[17] For that reason, and to combat several other threats to maritime security around the continent, a substantial number of AU members adopted, in 2016, the African Charter on Maritime Security and Safety and Development in Africa ('the Lomé Charter'),[18] which is yet to come into force.[19] This article sets out the relevant pre-existing international instruments, the TIP provisions of the Lomé Charter, and the South African legislation. The South African legislation is compared with the relevant provisions of the Lomé Charter to establish whether any legal steps are required to ensure that South Africa complies with its TIP-related obligations in the Lomé Charter, should it decide to ratify the Lomé Charter and should the Lomé Charter come into force.

2. International legal instruments on trafficking in persons

The 1982 United Nations Convention on the Law of the Sea ('LOSC')[20] provides that the passage of a foreign ship is considered to be prejudicial to the 'peace, good order or

11 US Department of State (note 9 above) para 45.

12 See UNODC 'South Africa launches Prevention and Combating of Trafficking in Persons National Policy Framework' <https://www.unodc.org/unodc/en/human-trafficking/glo-act/south-africa-launches-prevention-and-combating-of-trafficking-in-persons-national-policy-framework.html> accessed 18 August 2024.

13 *Ibid*.

14 See US Department of State '2021 Trafficking in Persons Report: South Africa' para 18 <https://www.state.gov/reports/2021-trafficking-in-persons-report/south-africa/> accessed 23 August 2024.

15 Ibid para 18.

16 US Department of State '2023 Trafficking in Persons Report: South Africa' <https://www.state.gov/reports/2023-trafficking-in-persons-report/south-africa> accessed 18 August 2024.

17 Singlee, S & Witbooi, E 'Trafficking In Persons and Forced Labour of Migrants in Fisheries: Law Enforcement Challenges in South Africa' (2018) 1 *Journal of Ocean Governance in Africa* 1 at 3-5. See also Oladele, G & Orifowomo, O 'Legal and Institutional Framework for Combating Trafficking in Persons in Nigeria' (2017) 5 *ANULJ* 49 at 54-61.

18 AU Doc. Ext/Assembly/AU/1(VI).

19 In terms of Art 50, the Lomé Charter will enter into force 30 days after the deposit of the 15th instrument of ratification. As of June 2022, only Togo, Benin and Senegal had ratified the Lomé Charter.

20 Opened for signature 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397 ('LOSC').

security of a coastal State if in the territorial sea it engages in' the loading or unloading of any person contrary to the immigration laws and regulations of the coastal state.[21] In such a case, passage is not innocent,[22] and the full criminal jurisdiction of the coastal state may be exercised with regard to the foreign ship and the persons on board.[23] The criminal jurisdiction of the coastal state cannot be exercised against a foreign vessel involved in TIP on board and passing through the territorial sea, unless the TIP 'extend[s] to the coastal State',[24] or 'disturb[s] the peace of the country or the good order of the territorial sea',[25] or 'if the assistance of the coastal State has been requested by the master of the ship involved in the TIP' or by a 'diplomatic agent or consular officer of the flag State'.[26] In the contiguous zone, the coastal state may exercise the control necessary to prevent a foreign vessel involved in TIP from loading or offloading traffickers or the victims of TIP, and to punish those involved in TIP.[27]

As far as slavery is concerned, states have an obligation to 'prevent and punish the transport of slaves in ships' and to prevent the use of their flags for the transport of slaves.[28] In that regard, a warship which encounters a ship engaged in the slave trade is justified in boarding, arresting and seizing such ship.[29] The term 'slave' is not defined in the LOSC; however, the term may include forcing victims by any means to submit to the control of another, as if that other person is the owner of that victim. The victims of TIP at sea are mostly found in such conditions, exploited and dehumanised, as they often do not have any choice but to submit to the control of the trafficker. Moreover, the term 'exploitation' includes 'slavery or practices similar to slavery',[30] and states have an obligation to prevent slavery and punish their ships engaged in slavery.

Six years after the LOSC came into force, the General Assembly of the United Nations adopted the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime ('the TIP Protocol'),[31] to which South Africa is a party.[32] For purposes of the Protocol, the term 'trafficking in persons' means

> (a) the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

21 LOSC, Art 19(2)(g).
22 LOSC, Art 19(1).
23 LOSC, Art 27(1)(a).
24 LOSC, Art 27(1)(a).
25 LOSC, Art 27(1)(b).
26 LOSC, Art 27(1)(c).
27 LOSC, Art 33(1).
28 LOSC, Art 99.
29 LOSC, Art 110(1)(b).
30 See the definition of TIP below; see also the discussion in UNODC *Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking* (2011) 23-57.
31 2237 UNTS 319. Adopted 15 November 2000; EIF: 25 December 2003.
32 South Africa acceded to the Protocol on 20 February 2004.

> receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
>
> (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article.[33]

Within these parameters, the objectives of the TIP Protocol are:

> (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
>
> (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
>
> (c) To promote cooperation among States Parties in order to meet those objectives.[34]

These objectives must be read jointly, in the sense that the TIP Protocol is applicable to the

> prevention, investigation and prosecution of the offences established in accordance with article 5 of th[e] Protocol, where those offences are transnational in nature and involve an organized criminal group.[35]

The range of activities and circumstances to which the TIP Protocol applies, as well as the exclusions to its application, are governed by Article 4 of the TIP Protocol and the 2001 United Nations Convention against Transnational Organised Crime ('CTOC').[36] The TIP Protocol supplements the CTOC and both are to be interpreted together.[37] The CTOC clarifies that an offence is 'transnational in nature' if

> (a) It is committed in more than one State;
>
> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
>
> (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

33 TIP Protocol, Art 3. In the same provision, the term 'child' means 'any person under eighteen years of age'.
34 TIP Protocol, Art 2.
35 TIP Protocol, Art 4.
36 TIP Protocol, Art 4 read with the CTOC, Arts 2 and 3.
37 TIP Protocol, Art 1.

> (d) It is committed in one State but has substantial effects in another State.[38]

An 'organised criminal group' means a

> structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with th[e] Convention, in order to obtain, directly or indirectly, a financial or other material benefit.[39]

The TIP Protocol is limited in scope; however, that limitation does not prohibit any state party from adopting legislative and other measures as may be necessary to establish as criminal offences any conduct in the definition of TIP.[40] Similarly, each state party is required to establish as criminal offences the following activities: attempting to commit, or participating as an accomplice, or organising or directing other persons to commit, any TIP offences.[41] In addition, all state parties can adopt stricter measures than those provided by the TIP Protocol and the CTOC; however, any such measure outside the scope of those instruments will not be covered by the various requirements on international cooperation.[42]

To effectively achieve those objectives, each state party is required to adopt efficient anti-TIP measures, regardless of whether the TIP occurs domestically or transnationally and regardless of whether the TIP is perpetrated by one individual or an organised criminal group.[43] These measures include preventing, as far as possible, any means of transport operated by commercial carriers from being used to commit TIP.[44] In addition, it must be ascertained that all 'passengers are in possession of the[ir] travel documents'.[45] The provisions deal only with 'commercial carriers'; however, this does not mean that the TIP Protocol does not apply to non-commercial carriers.[46] Secondly, the obligation is 'only to ascertain whether or not passengers have the necessary documents in their possession',[47] which does not compel carriers to prevent or combat TIP. The law enforcement structures of state parties are urged to cooperate by exchanging information to determine:

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38 CTOC, Art 3(2).
39 CTOC, Art 2(a).
40 TIP Protocol, Art 5(1).
41 TIP Protocol, Art 5(2).
42 See UNODC *Legislative Guide for the Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* 2020 (*Legislative Guide*) paras 74 and 80.
43 Ibid 81.
44 TIP Protocol, Art 11(2).
45 TIP Protocol, Art 11(3).
46 In the fishing industry, for example, forced labour and the sexual exploitation of crew on board fishing vessels are prevalent: see UNODC *Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking* (2011) 23. See also UNODC *Transnational Organized Crime in the Fishing Industry* (2011) 22-23.
47 See UNODC *TRAVAUX PRÉPARATOIRES of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) 409.

> (a) [w]hether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of [TIP];
>
> (b) [t]he types of travel document that individuals have used or attempted to use to cross an international border for the purpose of [TIP]; and
>
> (c) [t]he means and methods used by organized criminal groups for the purpose of [TIP], including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.[48]

Indeed, none of these provisions nor any of the TIP Protocol provisions refer to or mention TIP at sea, or compel state parties to cooperate in preventing or combating TIP at sea, like other similar transnational treaties that expressly make it obligatory for state parties to prevent and cooperate against vessels involved in similar crimes.[49] It is regrettable that the TIP Protocol does not expressly urge state parties to prevent TIP at sea. This is why most states, including South Africa, have not expressly included the prevention of TIP at sea in their relevant legislation.[50]

The other relevant instrument on TIP is the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ('STPC'),[51] to which South Africa is a party.[52] The STPC obligates parties to punish anyone who, to gratify the passions of another, '[p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person' or exploits the prostitution of another.[53] In addition, the STPC obligates parties to punish those who attempt to commit,[54] or intentionally participate in committing, any of those offences,[55] or who act in preparation for the commission thereof.[56] The parties undertake to take appropriate measures to ensure the supervision of seaports in 'order to prevent international traffic in persons for the purpose of prostitution'.[57] Nevertheless, the STPC is limited in scope as it does

48 TIP Protocol, Art 10(1).
49 See, for example, the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (the Migrants Protocol), particularly Arts 7, 8 and 9. See also the 1988 Drugs Convention, particularly Art 17.
50 For example, the Prevention and Combating of Trafficking in Persons Act of 2013 in South Africa incorporated the same provisions of the TIP Protocol. For other states that followed the TIP Protocol, see UNODC *Global Report on Trafficking in Persons* (2020) 137, 141, 148, 154, 159, 163 and 168.
51 Adopted in 1949 and entered into force on 25 July 1951.
52 South Africa became a signatory on 16 October 1950 and ratified the STPC on 10 October 1951.
53 STPC, Art 1.
54 STPC, Art 3.
55 STPC, Art 4.
56 STPC, Art 3.
57 STPC, Art 17(3).

not deal with all the elements of TIP, such as sexual exploitation, forced labour, slavery, practices similar to slavery, servitude, and the removal of human organs. However, parties, including South Africa, are required to cooperate in the prevention and suppression of the exploitation of the prostitution of others.

TIP is a criminal offence addressed by many international instruments and programmes, including the United Nations Global Initiative to Fight Human Trafficking ('UN.GIFT').[58] The UN.GIFT programmes aim to mobilise state and non-state actors to eradicate TIP and reduce potential victims' vulnerability and the demand for exploitation in all its forms. It ensures adequate protection of and support to victims, supporting the prosecution of criminals involved while respecting the human rights of all persons.[59] To actualise those objectives, the programmes increase knowledge, raise awareness of TIP, and foster new and innovative partnerships for joint action against TIP.[60] A key issue in the programme is technology, which is identified as both a help and a hindrance. Technology has given traffickers new and easier ways to recruit victims, particular by using social media.[61] On the other hand, advances in technology make it easier for advocacy agencies and law enforcement to monitor TIP, as different technological systems can be used to locate and rescue victims, as well as to analyse and collect data used to arrest and prosecute traffickers. Therefore, as far as TIP is concerned, technological advancements have 'prove[n] to be the quintessential double-edged sword'.[62]

At the continental level, the AU Agenda 2063,[63] which seeks to accelerate the implementation of past and existing continental frameworks and other similar initiatives for sustainable development,[64] recognises the need to eradicate threats that face the continent, including TIP at sea.[65] Regarding ocean affairs, Africa's Integrated Maritime Strategy 2050 ('AIMS')[66] provides a broad framework for the protection and sustainable exploitation of the African maritime domain for wealth creation,[67] including measures to address maritime security threats.[68] AIMS is structured to address contending, emerging and future maritime challenges and opportunities on the continent, taking into account the interests of landlocked countries.[69] It provides a clear focus on enhanced wealth

58 Launched on 26 March 2007; that date marked 200 years since the abolition of the trans-Atlantic slave trade.

59 UN.GIFT *Human Trafficking a Crime that Shames Us All* <https://www.unodc.org/documents/overview.pdf> accessed 23 August 2024.

60 *Ibid*.

61 UN.GIFT 'Technology – Abetting Traffickers and Eradicating Trafficking' <https://www.ungift.org/2017/09/23/technology-abetting-traffickers-and-eradicating-trafficking> accessed 19 May 2022.

62 *Ibid*.

63 Adopted in 2015 by the AU Assembly of Heads of State and Government.

64 African Union *Agenda 2063: The Africa we Want* (2015) 2.

65 African Union *Agenda 2063: The Africa we Want* (2015) 2, 18-19.

66 (2016) 1 JOLGA 202. See Vrancken, P 'Africa's Integrated Maritime Strategy and the Law of the Sea' (2016) 41 *SAYIL* 97-125.

67 AIMS paras 15-16 and 84-91.

68 AIMS paras 61-66 and 70-73.

69 AIMS para 11.

creation from the sustainable governance of Africa's inland waters and seas.[70] AIMS also integrates an operationalisation plan,[71] with a clearly defined vision, achievable goals, specific desirable objectives, and milestones towards attaining AIMS' goal of increased wealth creation in a stable and secure African maritime domain.[72] To supress human trafficking on the continent, the AU must encourage the regions to

> harmonize national maritime laws and to enhance bi-lateral and regional strategic synergies, including signing and ratification and accession by Member States of the relevant international maritime instruments.[73]

To prevent the scourge of TIP, a substantial part of the work comprises awareness-raising, through media and training workshops, and capacity-building in source and transit countries.[74] The AU must work towards addressing the root causes of human trafficking, which include

> poverty, unbalanced distribution of wealth, unemployment, armed conflicts, poor law enforcement system, degraded environment, poor governance, societies under stress, corruption, lack of education, lack of respect for universal human rights and discrimination, increased demand for sex trade and sex tourism.[75]

Similarly, the 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children ('the Plan')[76] urges each member state to introduce, where this does not exist, a comprehensive legislative and institutional framework that covers all aspects of trafficking in human beings in line with those instruments.[77] The Plan urges each member state to sign, ratify and fully implement the CTOC and its TIP Protocol, as well as other relevant continental and regional instruments.[78] The Plan further encourages each member state to create special units, within existing law enforcement structures, with a specific mandate to develop and effectively use operational activities to combat trafficking in human beings.[79] Member states are encouraged to enhance bilateral and multilateral co-operation between European and African countries, especially countries of origin, transit and destination to protect, prevent and combat TIP.[80] The Plan, however, is yet to achieve

70 *Ibid*. See also AIMS paras 83-84.
71 The AIMS Plan of Action for Operationalization was adopted at the African Union (AU) Commission Headquarters in Addis Ababa, Ethiopia, on 6 December 2012, by the 2nd Conference of African Ministers in Charge of Maritime Related Affairs organised by the African Union with the fifth African maritime cross-sectoral Experts Workshop, held on 3-4 December 2012, and the High Level African maritime cross-sectoral Senior Officials meeting which took place on 5 December 2012.
72 See AIMS annexure C (plan of action for operationalisation).
73 AIMS para 60.
74 AIMS para 76.
75 *Ibid*.
76 Adopted by the Ministerial Conference on Migration and Development, Tripoli, 22-23 November 2006.
77 Ouagadougou Action Plan 5.
78 Ouagadougou Action Plan 4.
79 Ouagadougou Action Plan 6.
80 Ouagadougou Action Plan 7.

its aims, especially as TIP on the continent remains a key issue at a global level.[81] Indeed, since the adoption of the Plan, TIP has, *inter alia*, worsened as a result of increased social, economic, environmental and political pressures on the continent, pushing vulnerable migrants into the clutches of international criminal networks that facilitate human trafficking and smuggling.[82] Ten years after the Plan was adopted, the AU adopted the Lomé Charter,[83] and one unique aspect of the Lomé Charter is that it is a legal binding instrument on maritime security. The Lomé Charter is discussed in detail in the following section.

At the regional level, in Southern Africa, the Southern African Development Community ('SADC'), of which South Africa is a member, developed several legal and policy instruments in response to the scourge of TIP.[84] One instrument is the 2016 Trafficking in Persons in the SADC Region: United to Fight 'Trafficking in Persons' in the SADC Region.[85] SADC encouraged member states to develop appropriate anti-TIP legal and policy instruments, as well as appropriate tools to facilitate the implementation of legislative frameworks. In addition, SADC encourages each member state to amend or strengthen existing TIP legislation to effectively integrate emerging issues in combating TIP.[86] The SADC further recommends the establishment of

> bilateral and multi-lateral cooperation between source, transit and destination countries extending beyond the SADC region.

Regional instruments, including AIMS, do not have the force of law, and there is no legally binding instrument at the continental and regional levels in Africa other than the Lomé Charter.

3. The Lomé Charter and trafficking in persons at sea

Africans have taken steps individually and collectively to prevent and suppress TIP, but, despite those steps, TIP continues.[87] To address the scourge, as well as other threats to maritime security, a substantial number of AU members adopted the Lomé Charter in 2016. The objectives of the Lomé Charter include establishing national, regional and continental institutions against TIP at sea, and ensuring the implementation of relevant policies to prevent and suppress TIP and related matters.[88] The Lomé Charter expressly urges each state party to

> develop and implement sound migration policies aimed at eliminating trafficking in human beings, especially women and children […] by sea.[89]

81 See 2019 African Union Draft Report of the Evaluation of the Implementation Status of the African Union's Ouagadougou Action Plan to Combat Trafficking in Human Beings 33-47.
82 *Ibid*.
83 Adopted by the Extraordinary Session of the Assembly, Lomé, Togo, 15 October 2016.
84 For example, the Harmonised SADC Regional Strategic Plan on Combating Illegal Migration, Smuggling of Migrants and Trafficking in Persons (2016-2020). See also the SADC Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation (SIPO).
85 Policy Brief, August 2016 <https://www.sadc.int/files/8414/7505/0081/SADC_TIP_Policy_Brief_-_English_FINAL.pdf> accessed 19 May 2022.
86 Trafficking in Persons in the SADC 7.
87 Singlee & Witbooi (note 17 above) 3-5. See also Oladele & Orifowomo (note 17 above) 54-61.
88 Lomé Charter, Art 3(e) read with Art 3(a).
89 Lomé Charter, Art 16.

The term 'trafficking in persons' in the Lomé Charter means the

> recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[90]

This definition is the same as in Article 3(a) of the TIP Protocol, and the term 'exploitation' in the Lomé Charter has the same meaning as in the TIP Protocol. However, one significant difference is that the Lomé Charter urges state parties to eliminate TIP at sea; on this, the TIP Protocol is silent. The Lomé Charter obligates each state party to develop a national legal framework to coordinate its action on TIP at sea.[91] The legal framework is required to incorporate international cooperation mechanisms,[92] which must be consistent with relevant instruments such as the LOSC and the TIP Protocol, or, where appropriate, the legal framework must be harmonised with such legal instruments.[93] Notwithstanding the differences in their legal frameworks, trafficking legislation

> shall guarantee joint investigation mechanisms, secure information exchange procedures, judicial requests, extradition and transfer of detainees and other related mechanisms.[94]

Similarly, the legislation must establish a national coordinating structure which may include a centre for awareness to ensure strong coordination and effective cooperation between the relevant national institutions to prevent and suppress TIP at sea.[95] State parties must 'strengthen law enforcement at sea, through the training and the professionalization of navies, coast guards, and agencies responsible for' the prevention and suppression of TIP.[96] In addition, state parties must 'maintain patrols, surveillance, and reconnaissance in' African waters for law enforcement measures on vessels engaged in TIP.[97] Furthermore, states parties must

> adopt policies that guarantee the availability of resources, either by public funds or by forging public-private partnerships, needed for investment in equipment, operations and training.[98]

Beyond those obligations, each state party

> shall cooperate on the basis of its bilateral or multilateral agreements, or in the absence of a cooperation agreement, on the basis of its national legislation.[99]

90 Lomé Charter, Art 1(1).
91 Lomé Charter, Art 39(1).
92 Lomé Charter, Art 39(2).
93 Lomé Charter, Art 8(a).
94 Lomé Charter, Art 40(3).
95 Lomé Charter, Art 7.
96 Lomé Charter, Art 6(b).
97 Lomé Charter, Art 6(c).
98 Lome Charter, Art 9.
99 Lomé Charter, Art 40(2).

In addition, state parties must take adequate measures, individually or collectively, to effectively fight TIP at sea, and to ensure that traffickers are effectively prosecuted and denied the proceeds of trafficking.[100] The phrase 'take adequate measures' includes developing a system of information-sharing, and integrating national, regional and continental structures aimed at

- preventing the commission of TIP at sea;
- the arrest and detention of individuals preparing to or committing TIP at sea; and
- the seizure or confiscation of ships and equipment used in the commission of TIP at sea.[101]

Also, state parties must share intelligence between national services and regional and continental agencies, including appropriate international specialised organs, to ensure the effectiveness of the obligations geared towards the fight against TIP at sea.[102] State parties

> shall also adopt guidelines and modalities to guide States Parties in fulfilling their obligations under th[e] Charter.[103]

State parties cannot fulfil their obligations if the Lomé Charter does not come into effect. At the continental and regional levels of Africa, the Lomé Charter is the only relevant legal binding international instrument against TIP at sea and it has not yet come into force. The Charter 'shall enter into force thirty (30) days after the deposit of the fifteenth (15th) instrument of ratification';[104] as of July 2024, only three states have ratified the instrument,[105] and that number does not include South Africa.

4. South African legislation on trafficking in persons

South Africa's legal framework on TIP is the Prevention and Combating of Trafficking in Persons Act[106] ('the TIP Act'). The objects of the Act are (a) to give effect to South Africa's international obligations concerning the trafficking of persons; (b) to provide for the prosecution of persons who commit offences referred to in the TIP Act and for appropriate penalties; (c) to provide for the prevention of trafficking in persons, the protection of and assistance to victims of trafficking; (d) to provide services to victims of

100 Lomé Charter, Art 32(2).
101 Lomé Charter, Art 33(2).
102 Lome Charter, Art 34.
103 Lome Charter, Art 46(4).
104 Lomé Charter, Art 50(1).
105 The states are Togo, Benin and Senegal. Togo signed the Lomé Charter on 15 October 2016 and ratified it on 16 January 2017; Benin signed it on 15 October 2016, and ratified it on 6 October 2016; and Senegal signed it on 30 January 2017 and ratified it on 11 February 2022. Thirty-five states have signed the Lomé Charter, but South Africa is yet to sign or ratify it: see Africa Union 'List of countries which have signed, ratified/acceded to the Lomé Charter' <https://au.int/sites/default/files/treaties/37286-sl-AFRICAN_CHARTER_ON_MARITIME_SECURITY_AND_SAFETY_AND_DEVELOPMENT_IN_AFRICA_LOME_CHARTER.pdf> accessed 23 August 2024.
106 Act 7 of 2013.

trafficking; (e) to provide for effective enforcement measures; (f) to provide for the co-ordinated implementation, application and administration of the TIP Act, including the development of a draft national policy framework; and (g) to combat TIP in a coordinated manner.[107] The TIP Act applies to anyone who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of South Africa by means of

> *(a)* a threat of harm;
>
> *(b)* the threat or use of force or other forms of coercion;
>
> *(c)* the abuse of vulnerability;
>
> *(d)* fraud;
>
> *(e)* deception;
>
> *(f)* abduction;
>
> *(g)* kidnapping;
>
> *(h)* the abuse of power;
>
> *(i)* the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
>
> *(j)* the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.[108]

The term 'exploitation' includes, but is not limited to

> *(a)* all forms of slavery or practices similar to slavery;
>
> *(b)* sexual exploitation;
>
> *(c)* servitude;
>
> *(d)* forced labour;
>
> *(e)* child labour as defined in section 1 of the Children's Act;
>
> *(f)* the removal of body parts; or
>
> *(g)* the impregnation of a female person against her will for the purpose of selling her child when the child is born.[109]

A person who adopts a child facilitated or secured through legal or illegal means or who concludes a forced marriage within or across the borders of South Africa for the purpose of exploitation of that child or other person in any form or manner is guilty of an offence.[110]

107 TIP Act, s 3.
108 TIP Act, s 4(1).
109 TIP Act, s 1.
110 TIP Act, s 4(2).

The TIP Act expressly prohibits the trafficking of a child by a parent, guardian or other person who has parental responsibilities and rights in respect of such child,[111] even if the conditions in paragraphs *(a)* to *(j)* are not met.

The captain of a ship who, on reasonable grounds, suspects that any passenger is a victim of TIP or ought reasonably to have known that the person is a victim must immediately report that suspicion to law enforcement for investigation.[112] A captain who fails to report is liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation or return of the victim to his or her country of origin or country or place from where the victim was trafficked.[113] A law enforcement officer to whom a report was made in respect of a child or an adult, or where the officer knows or ought reasonably to have known or suspected that the person is a victim of TIP on board a South Africa's vessel, may, where necessary, without a warrant, enter onto the vessel if, on reasonable grounds, it is believed that the safety of that person is at risk or that the person may be moved from the vessel. The officer may use reasonable force as may be necessary to overcome any resistance to entry onto the vessel provided that he or she audibly demanded admission to the vessel and notified the purpose for which he or she sought to enter the vessel.[114]

With regard to adjudication, a South African court has jurisdiction in respect of TIP committed at sea, if the trafficker is a citizen of[115] or ordinarily resident in South Africa,[116] or the trafficker has committed the offence against such a person.[117] The court also has jurisdiction if, after trafficking a person, the trafficker is found in South Africa, or on its territorial waters or onboard a ship, off-shore installation or fixed platform.[118] The person convicted for TIP at sea is

> liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.[119]

The court may, in addition to any sentence, order the trafficker to pay appropriate compensation to the victim for damage, injury or any other issue suffered by the victim.[120] The court may also order the trafficker to pay compensation to the state for any expenses incurred in connection with the care, accommodation, transportation, return and repatriation of the victim.[121]

With regard to international cooperation, South Africa is a party to the TIP Protocol; regardless of that membership, South Africa may enter into an agreement in respect of any

111 TIP Act, s 36.
112 TIP Act, s 9(1) and (2).
113 TIP Act, s 9(3) and (4).
114 TIP Act, ss 18(4)*(a)* and 19(5)*(a)*(i).
115 TIP Act, s 12(1)*(a)*.
116 TIP Act, s 12(1)*(b)*.
117 TIP Act, s 12(1)*(c)*.
118 TIP Act, s 12(1)*(d)*.
119 TIP Act, s 13*(a)*.
120 TIP Act, s 29.
121 TIP Act, s 30(1).

matter pertaining to TIP with a foreign state that is not a state party to the TIP Protocol.[122] South Africa may also enter into an agreement with a foreign state that is a state party to the TIP Protocol in respect of any matter relating to TIP for the purpose of 'supplementing the provisions of that protocol or to facilitate the application of the principles contained therein',[123] provided that such agreement is not in conflict with the provisions of the TIP Protocol.[124] The relevant provisions of the Lomé Charter do not conflict with any provision of the TIP Protocol, but supplement the TIP Protocol as far as TIP at sea is concerned. If South Africa ratifies or accedes to the Lomé Charter, only to the extent of TIP at sea, this will be a step in the right direction, especially as the Lomé Charter enhances the objects of the TIP Act.

5. Comparison between the Lomé Charter and South African legislation on trafficking in persons

The following are not the only similarities or differences between the Lomé Charter and the South African legislation on TIP, but they are the most relevant as far as TIP at sea is concerned. The Lomé Charter defines TIP,[125] whereas the TIP Act does not, but states when a person is guilty of TIP.[126] It is, however, submitted that the difference is immaterial, and the wording of these provisions is consistent with the definition in the TIP Protocol.[127] The TIP Act defines the term 'exploitation' whereas the Lomé Charter does not, but the Lomé Charter's definition of TIP is copied from the TIP Protocol, and the term 'exploitation' in the TIP Protocol also applies to the Lomé Charter; it is submitted that the difference is immaterial. The Lomé Charter expressly prohibits TIP at sea, whereas the TIP Act does not, but provides that the South African court has jurisdiction in respect of TIP committed outside South Africa, which includes TIP committed at sea.[128] The difference is irrelevant, as the TIP Act technically forbids TIP at sea.

The Lomé Charter provides for international cooperation for the suppression of TIP at sea,[129] which guarantees joint investigation, secure information exchange procedures, and cooperation in combating human trafficking at sea.[130] Other cooperation in the Lomé Charter includes maritime information sharing,[131] intelligence sharing,[132] establishing a framework for close cooperation in combating TIP at sea,[133] and other related cooperation that ensures the combating of TIP at sea.[134] The TIP Act allows South Africa to enter into an agreement in respect of any matter pertaining to TIP with a foreign state that is not

122 TIP Act, s 37(1)*(a)*.
123 TIP Act, s 37(1)*(b)*.
124 TIP Act, s 37(2).
125 Lome Charter, Art 1(1).
126 TIP Act, s 4.
127 TIP Protocol, Art 3.
128 TIP Act, s 12(1).
129 Lomé Charter, Art 39(2).
130 Lomé Charter, Art 32.
131 Lomé Charter, Art 33.
132 Lomé Charter, Art 34.
133 Lomé Charter, Art 37.
134 Lomé Charter, Art 40.

a state party to the TIP Protocol,[135] or with a foreign state that is a state party to the TIP Protocol 'for the purpose of supplementing the TIP Protocol or to facilitate the application of the principles contained therein'.[136] Such agreement cannot conflict with the provisions of the TIP Protocol;[137] the relevant provisions of the Charter do not conflict with any provision of the TIP Protocol but supplement the Protocol as far as TIP at sea is concerned.

6. Conclusion

As demonstrated earlier, the LOSC, to which South Africa is a party, is silent on the prevention and suppression of TIP at sea, and the LOSC does not urge state parties to combat TIP at sea or compel state parties to cooperate in combating TIP at sea. That gap is perceived to be filled by the TIP Protocol, to which South Africa is a party, which expressly urges state parties to prevent and suppress TIP. However, that Protocol is silent on human trafficking at sea, unlike other similar international instruments that expressly urge their state parties to combat similar crimes at sea. The STPC, to which South Africa is also a party, does not assist in this regard, as it only deals with prostitution, which is limited in scope. The other instruments, such as the AU Agenda, AIMS, and the Plan, are policy documents that do not have the force of law. The only relevant international instrument in Africa with the force of law that expressly urges state parties to prevent and suppress TIP at sea is the Lomé Charter, of which South Africa is not yet a party.

Should South Africa decide to ratify the Lomé Charter and should the Lomé Charter enter into force, South Africa must adopt policies that guarantee the availability of resources, either from public funds or by forging public-private partnerships, to invest in equipment, operations and training to address TIP at sea. In addition, South Africa should join other state parties in adopting guidelines and modalities to guide state parties in fulfilling their obligations in the Lomé Charter. South Africa should ratify the Lomé Charter only to the extent of TIP at sea, especially as the Lomé Charter does not conflict with any international legal instruments on TIP but heavily supplements the TIP Protocol and other relevant international instruments to combat human trafficking at sea.

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135 TIP Act, s 37(1)*(a)*.
136 TIP Act, s 37(1)*(b)*.
137 TIP Act, s 37(2).

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Children's Rights and the Pursuit of Intergenerational Climate Justice in Nigeria

Grace Arowolo*

Abstract

Climate change is a major issue in environmental law. It is also an inherently intergenerational problem, with extremely serious implications for equity (justice) between present and future generations and among communities in the present and the future. Africa is one of the regions of the world most vulnerable to the impacts of climate change owing to its high exposure and poor adaptive capacity. The scourge of climate change in Africa is hitting the most vulnerable hardest, and contributing to food insecurity, population displacement and stress on water resources. The 2021 report of the United Nations Children's Fund (UNICEF) confirms that African children are most at risk of climate change. The report ranked Nigeria second among the countries classified as extremely high-risk countries where children are most at risk of climate change, together with Chad, and after the Central African Republic, which ranked first. Nigerian children are found to be highly exposed to air pollution and coastal floods, which adversely affect their rights to life, survival and development, health and education, thus amplifying existing inequalities. Consequently, there is a need to invest in the services that children depend on to survive. This article examines the impact of climate change on the rights of children in Nigeria and proposes measures for intergenerational climate justice. It recommends, inter alia, the adoption of a children's rights-based approach to climate change mitigation and adaptation and integrating children's rights into Nigerian climate change responses.

Keywords

climate change, children's rights, intergenerational climate justice, Nigeria

1. Introduction

Climate change is a major issue in environmental law.[1] Outside of climate-specific legal issues, several other aspects of environmental law, including waste, air pollution, water, deforestation and biodiversity, are relevant to climate change. Environmental law and climate change law have a largely synergistic relationship, in that actions taken to protect the environment will generally assist efforts to tackle climate change.[2] Thus, the

1 Centre for Climate Engagement 'Environmental Law and Climate Change' <https://climatehughes.org/law-and-climate-atlas/environmental-law-and-climate-change> accessed 19 June 2024.

2 *Ibid*.

* LLB (University of Ife) LLM (Lagos State University) PhD (Ambrose Alli University) <https://orcid.org/0000-0002-4642-5157> Email: grace.arowolo@lasu.edu.ng.

established principles of environmental law are applied in the fight against climate change, and the climate crisis has provided impetus to increase the level of legal environmental protection.[3]

Growing concern over deteriorating environmental conditions has increasingly prompted legal systems around the world to recognise the interests of future generations and the corresponding responsibilities of present generations to protect them.[4] The rights of children and future generations to a sustainable future have been internationally recognised since 1987, when the World Commission on Environment and Development, known as the Brundtland Commission of the United Nations, published the report 'Our Common Future'.[5] The report contained prescriptions for long-term environmental strategies to achieve sustainable development that met the essential needs of the world's poorest people while ensuring intergenerational equity.[6] The rights of current and future children were subsequently reaffirmed in the United Nations Convention on the Rights of the Child (CRC), as articulated in Articles 1 to 42 of the CRC.[7] The rights include non-discrimination (Article 2), devotion to the best interests of the child (Article 3), the right to life, survival and development (Article 6), respect for the views of the child (Article 12), rights to health (Article 24), education (Article 28), protection from abuse (Article 19) and freedom from torture (Article 37).[8] All these rights equate with the right to a life-sustaining biosphere.[9]

The African Charter on the Rights and Welfare of the Child (ACRWC)[10] contains similar provisions to those of the CRC enumerated above. Both instruments were ratified and domesticated into the Nigerian Child's Right Act (CRA).[11] Although these conventions do not specifically provide for children's right to protection from climate change, the CRC explicitly addresses environmental issues in Article 24(2)(c), which obliges States to take measures to 'combat disease and malnutrition'. Article 29(1)(e) requires States to direct the education of children to the 'development of respect for the natural environment'. Under Article 11(2)(g) of the ACRWC, States must direct the education of the child to 'the development of respect for the environment and natural resources'. Section 13(3)(c) and (d) of the CRA on children's right to health requires Nigeria to provide adequate nutrition and safe drinking water, good hygiene and environmental sanitation for children.

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3 *Ibid*.

4 Science and Environmental Health Network, International Human Rights Clinic at Harvard Law School 'Models for Protecting the Environment for Future Generations' (2008) <https://hrp.law.harvard.edu/wp-content/uploads/2013/02/Models_for_Protecting_the_Environment_for_Future_Generations.pdf> accessed 18 June 2024.

5 United Nations Secretary General, World Commission on Environment 'Report of the World Commission on Environment and Development-Note by the Secretary-General' A/42/427, 1987.

6 *Ibid*.

7 GA Res.44/25, 1989. Nigeria ratified the CRC on 19 April 1991.

8 *Ibid*.

9 McGillivray, A 'Tales of the Apocalypse: The Child's Right to a Secure Climate' (2017) 25 *The International Journal of Children's Rights* 553-568.

10 OAU Doc CAB/LEG/24/49 1990. Nigeria ratified the ACRWC on 23 July 2001.

11 Child's Right Act 26 of 2003.

Nigeria is a party to major international laws that regulate climate change, especially the United Nations Framework Convention for Climate Change (UNFCCC)[12] and the Paris Agreement,[13] which both acknowledge that human rights, including children's rights, are affected during climate change. Despite the international and domestic efforts of States to tackle climate change, it has posed a serious crisis described as 'the defining human and child's right challenge of this generation'.[14] Climate change is the biggest global human health threat of the twenty-first century, and is currently having a devastating impact on children's health globally.[15] As climatic conditions change, the weather and climate hazards increase the risk of deaths and other health emergencies.[16] Reports indicate that 3.6 billion people already live in areas highly susceptible to climate change and, between 2030 and 2050, climate change is expected to cause approximately 250,000 additional deaths per year, from under-nutrition, malaria, diarrhoea and heat stress alone.[17]

According to Niang, Ruppel and Abdrabo, Africa is one of the regions of the world most vulnerable to the impacts of climate change, because of its high exposure and poor adaptive capacity.[18] Africa is exposed to damaging climate risks including extreme droughts, flooding and storms, making it vulnerable.[19] Adaptation refers to a wide range of measures to reduce vulnerability to climate change impacts.[20] Africa's poor adaptive capacity arises from its inability to reduce vulnerability due to weak economies, weak institutions and inadequately developed governance structures.[21] Therefore, the scourge of climate change is having a growing impact on the African continent, hitting the most vulnerable (especially children) hardest, and contributing to food insecurity, population displacement and diminished water resources.[22] From 1970 onwards, climate hazards in

12 Adopted by the General Assembly Resolution A/RES/48/189 1992. Nigeria ratified the UNFCCC on 29 August 1994.

13 Adopted by decision 1/CP.21 at the twenty-first session of the Conference of the Parties in December 2015. Nigeria ratified the Paris Agreement on 16 May 2017.

14 UNICEF 'The Climate Crisis is a Child's Right Crisis: Introducing the Children's Climate Risk Index' (UNICEF, 2021) 1-24.

15 Costello, A, Abbas, M & Allen, A 'Managing the Health Effects of Climate Change' (2009) 373 *Lancet* 1693-1733.

16 World Health Organisation (WHO) 'Climate Change' <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> accessed 8 August 2024.

17 *Ibid*.

18 Niang, I, Ruppel, OC & Abdrabo, MA 'Africa' in Barros, VR, Field, CB & Dokken, DJ (eds) *Climate Change 2014: Impacts, Adaptation, and Vulnerability Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 1199-1265.

19 World Economic Forum 'Why Africa is particularly vulnerable to climate change' <https://www.weforum.org/agenda/2015/05/why-africa-is-particularly-vulnerable-to-climate-change/> accessed 14 August 2024.

20 United Nations Development Project (UNDP) 'What is climate change adaptation and why is it crucial?' <https://climatepromise.undp.org/news-and-stories/what-climate-change-adaptation-and-why-it-crucial> accessed 2 July 2024.

21 African Climate Policy Centre (ACPC) 'Vulnerability to Climate Change in Africa: Challenges and Recommendations for Africa' <https://archive.uneca.org/sites/default/files/Publication_Files_policy_brief_2_ vulnerability_to_climate_change_in_africa> accessed 2 July 2024.

22 United Nations 'Climate Change is an Increasing Threat to Africa' (2020) <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa> accessed 17 November 2023.

Africa caused the death of over 730,000 people; by 2050 nearly 85 million people in North and sub-Saharan Africa might be forced to flee their homes due to high greenhouse gas (GHG) emissions and unequal development.[23]

Nigeria's climate has been changing rapidly and children are disproportionately affected.[24] The UNICEF report of 2021 ranked Nigeria as the second highest-risk country where children are vulnerable to the risk of climate change.[25] Across Nigeria, children's exposure to flooding, drought and rising temperatures threatens their rights to health and nutrition, and access to education, protection and water, sanitation and hygiene services.[26] Land, water and air pollution present increased risks to children's health, including gastrointestinal illnesses and damage to their cognitive functions and learning ability.[27] The Nigerian government, as well as different agencies, have engaged in various efforts to combat climate change and its impacts, but the results achieved to date are poor, indicating that the efforts of the government and other agencies in Nigeria are inadequate.[28] This is due to many factors such as a failure to fully implement the adaptation policy frameworks of Nigeria, lack of financial resources, technological needs and poverty.[29]

This article provides a brief analysis of the climate change situation in Nigeria. It examines the major rights of children that are negatively impacted, with a focus on children's rights to life, survival and development, non-discrimination, the best interests of the child, health and education. It proposes measures for combating climate change and achieving intergenerational climate justice, using a children's rights-based approach for adaptation and mitigation and the review of the basic climate regulatory laws of Nigeria and the CRA to include provisions that could advance intergenerational climate justice and the implementation of the laws.

2. Methodology

This article adopts the black letter research approach which focuses on the law found in legal texts, legal theories, statutes and court judgments. The article analyses the provisions of various international, regional and domestic laws and policies, and court cases relevant to the topic of the article (climate change, environmental law and children's rights).

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23 Sasu, DD 'Climate change in Africa – Statistics and Facts' (2024) <https://www.statista.com/topics/9715/climate-change-in-africa/#topicOverview> accessed 19 June 2024.

24 Haider, H 'Climate Change in Nigeria: Impacts and Responses' K4D Helpdesk Report 675, Institute of Development Studies (2019) 2.

25 UNICEF 'The Climate Crisis is a Child's Right Crisis (note 14 above).

26 United Nations Children's Fund (UNICEF) 'Climate Landscape Analysis for Children in Nigeria – Climate Action Plan for 2023–2027' (2023) <https://www.unicef.org/nigeria/media/8311/file/Climate%20Landscape%20Analysis%20for%20Children%20in%20Nigeria%202023.pdf> accessed 5 April 2024.

27 *Ibid.*

28 Nnadi, OI, Liwenga, ET & Lyimo, JG 'Impacts of Variability and Change in Rainfall on Gender of Farmers in Anambra, Southeast Nigeria' (2019) 5 *Heliyon*1-14.

29 Okeke, CU, Butu, HM & Okereke, C 'Climate Action Strategies, Practices and Initiatives: Challenges and Opportunities for Locally-Led Adaptation in Nigeria' APRI Short Analysis, March 2023 <https://afripoli.org/uploads/publications/Nigeria_Short_Analysis.pdf> accessed 21 June 2024.

3. Understanding the concept of climate change

Notable definitions include that of the UNFCCC, which states that

> climate change is a change of climate that can be attributed directly or indirectly to human activity which alters the composition of the global atmosphere and which is in addition to natural climate variability, observed over comparable time periods.[30]

The United Nations (UN) has defined climate change as long-term shifts in temperatures and weather patterns that may be attributed to natural or artificial (related to human activities) causes.[31]

According to both these definitions, the causes of climate change can be attributed to both natural and human causes. Historically, since the Industrial Revolution, human activities have released large amounts of carbon dioxide and other GHGs into the atmosphere, which have changed the earth's climate.[32] Natural processes, such as changes in the sun's energy and volcanic eruptions, also affect the earth's climate.[33] It is, however, agreed that human activities have contributed substantially to climate change through GHG emissions since the Industrial Revolution.[34] GHGs like carbon dioxide, methane and nitrous oxide concentrations are now found to be more abundant in the earth's atmosphere than at any time in the last 800,000 years.[35] These GHG emissions have increased the greenhouse effect and caused the earth's surface temperature to rise.[36] Due to the negative impact on human lives, the development and implementation of stronger standards for net-zero emissions by States and non-State entities are of the utmost importance.

4. Analysis of the impact of climate change on children globally

Climate change has been shown to have both a direct and indirect impact on a wide range of human rights, including the rights of the child.[37] It significantly undermines children's enjoyment of their rights, such as their rights to human dignity, health, an adequate standard of living, access to clean water, access to education, and the rights to life, survival and development, which are all fundamental.[38] The focus of this article is on children's rights to life, survival and development, non-discrimination, best interests of the child,

30 Article 2(1) of the UNFCCC.

31 United Nations 'What is Climate Change?' <https://www.un.org/en/climatechange/what-is-climate change> accessed 16 November 2023.

32 United States Environmental Protection Agency 'Causes of Climate Change' <https://www.epa.gov/cimate-change-science/causes-climate-change#3foot> accessed 16 November 2023.

33 *Ibid.*

34 *Ibid.*

35 National Academy of Sciences 'Climate Change: Evidence and Causes: Update 2020' (National Academies Press, 2020) B-2.

36 United States Environmental Protection Agency 'Causes of Climate Change' (note 32 above).

37 United Nations Office of the High Commissioner of Human Rights (OHCHR) 'The Impact of Climate Change on the Rights of the Child' <https://www.ohchr.org/en/climate-change/impact-climate-change-rights-child> accessed 22 November 2023.

38 Fambasayi, R & Addaney, M 'Cascading Impacts of Climate Change and the Rights of Children in Africa: A Reflection on the Principle of Intergenerational Equity' (2021) 21 *African Human Rights Law Journal* 29-51.

health and education. The right to life as enshrined in international law is regarded as a prerequisite for the enjoyment of all other rights.[39] As the Human Rights Council clearly articulates,

> climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life … implementation of the obligation to respect and ensure the right to life … depends, *inter alia*, on measures taken by States' Parties to preserve the environment and protect it against harm, pollution and climate change.[40]

According to the World Health Organisation (WHO), more than one in four deaths of children below five years of age are attributable to unhealthy environments such as indoor and outdoor air pollution, unsafe water, lack of sanitation and inadequate hygiene. This means that 1.7 million children under the age of five die every year.[41] According to UNICEF's recent report, climate change is the greatest threat to this generation and has created a children's rights crisis.[42] It is estimated that, over the next decade, approximately 175 million children per year will be affected by climate-related disasters;[43] in the next two decades, 37.5 to 125 million additional African children will be subjected to water scarcity;[44] and by 2050, an estimated 25 million more children will be undernourished as a result of climate change.[45] Global GHG emissions need to be halved by 2030 and cut to zero by 2050 to avoid the worst impacts, but most countries are not on track to meet these targets.[46] It is suggested that improving the resiliency of services that children need will be necessary, no matter what the future holds.[47] Three basic approaches to improving resilience have been identified as risk reduction, boosting access to resources associated with positive development and survival needs, including clean water, food, medical care and shelter, and mobilising powerful adaptive systems that buffer or protect against the harmful effects of adversity and drive positive adaptation.[48]

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39 Article 6(1) of the International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966.

40 Human Rights Council 'General Comment 36 on Art 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf> accessed 1 December 2023.

41 World Health Organisation (WHO) 'The Cost of a Polluted Environment: 1.7 million child deaths a year, says WHO'(6 March 2017) <https://www.who.int/news/item/06-03-2017-the-cost-of-a-polluted-environment-1-7-million-child-deaths-a-year-says-who> accessed 10 November 2022.

42 UNICEF 'The Climate-Changed Child: A Children's Climate Risk Index Supplement' (November 2023).

43 UNICEF 'Child Rights at Risk: The Case for Joint Action on Climate Change' (2014) <https://www.unicef-irc.org/article/928-child-rights-at-risk-the-case-for-joint-action-withclimate change.html#...> accessed 20 November 2023.

44 *Ibid.*

45 *Ibid.*

46 UNICEF 'The Climate Crisis is a Child's Right Crisis' (note 14 above).

47 *Ibid.*

48 Masten, AS 'Resilience of Children in Disasters: A Multisystem Perspective' (2021) 56(1) *International Journal of Psychology* 1-11.

In assessing the countries where children are very likely to be affected by climate change, UNICEF adopted the Children's Climate Risk Index (CCRI) model, which is a composite index that helps to explain and measure the likelihood of climate and environmental shocks or stresses affecting children or vulnerable households and groups.[49] The CCRI index seeks to: (a) identify which countries or areas are at risk of deepening child deprivations and humanitarian situations affecting children as a result of their exposure to climate and environmental shocks or stresses; and (b) understand the underlying factors that could contribute to these risks.[50]

The CCRI model reveals that, globally, 240 million children are highly exposed to coastal flooding, 400 million children are highly exposed to cyclones, and 600 million are highly exposed to vector-borne diseases. Also, 815 million children are highly exposed to lead and pollution, and 820 million children are highly exposed to heat waves. 920 million children are highly exposed to water scarcity and one billion children are highly exposed to exceedingly high levels of air pollution.[51] These findings reflect the number of children impacted as at 2021 and the figures are likely to worsen as the impacts of climate change accelerate.[52] For instance, it is estimated that, because of climate change, by 2030 almost 125 million children in Africa will be subjected to water scarcity, malnutrition and displacement.[53] According to the 2023 report of UNICEF, as at 2022, almost one billion children (953 million) are exposed to high or extremely high water stress, 739 million children are exposed to high or extremely high water scarcity, 436 million children live in areas with high or extremely high water vulnerability, while 470 million children face high or extremely high drought risk.[54] Mezmur posits that, based on the 2021 UNICEF report, 32 of the 45 countries identified globally in the CCRI as the worst affected by climate change are in sub-Saharan Africa.[55] Pandy also confirms that about 490 million children under the age of 18 in 35 African countries are at the highest risk of suffering the impact of climate change.[56]

WHO further predicts that the effects of climate change will be heavily concentrated in poorer populations at low latitudes, where the main climate-sensitive health outcomes (malnutrition, diarrhoea and malaria) are already common and where vulnerability to

49 UNICEF 'The Climate Crisis is a Child's Right Crisis' (note 14 above).

50 *Ibid.*

51 *Ibid.*

52 UNICEF 'Children in Nigeria at Extremely High Risk of the Impacts of the Climate Crisis – UNICEF' (2021) <https://www.unicef.org/nigeria/press-releases/children-nigeria-extremely-high-risk-impacts-climate-crisis-unicef> accessed 16 November 2023.

53 Mbey, A 'Nigerian Children Face High Risk of Climate Change Impacts' (2021) <https://nln24.com.ng/2021/08/21/nigerian-children-face-high-risk-of-climate-change-impacts-unicef/> accessed 18 October 2023.

54 UNICEF 'Child Rights at Risk' (note 43 above).

55 Mezmur, BD 'The Calm Before the Storm? Child Rights Climate Change Litigation in Africa' (2023) *De Jure Law Journal* 543-568.

56 Pandy, K, 'Climate Change: 490 million children in Africa most vulnerable' <https://www.downtoearth.org.in/africa/climate-change-490-million-children-in-africa-most-vulnerable-76595> accessed 28 June 2024.

climate effects is the greatest.[57] Hence, the total burden of diseases due to climate change appears to be borne mainly by children in developing countries.[58] This article focuses on the rights of children negatively impacted by climate change, as highlighted in the introduction.

5. The legal framework for climate change and children's rights in Nigeria

5.1 International instruments

This section discusses the major international instruments to which Nigeria is a party, and domestic laws that regulate climate change, environmental degradation and children's rights. The major international instruments that are relevant to Nigeria include the following:

5.1.1 United Nations Framework Convention on Climate Change (UNFCCC)

Under Article 2, the ultimate objective of the UNFCCC is to achieve the stabilisation of GHG concentrations in the atmosphere at a level that will prevent dangerous interference with the climate system to enable economic development to proceed in a sustainable manner.

With respect to children's protection from climate change, the UNFCCC has been criticised for only raising the human impact of climate change, without mentioning children in particular. This is evident from Article 3(1), which states:

> The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capacities.

Sanz-Caballero has rightly argued that Article 3(1) of the UNFCCC provides only for intergenerational justice, equity and differentiated responsibilities and capacities, although children are evidently part and parcel of the terms 'humankind' and 'present and future generations'.[59] The text of the UNFCCC does not pay explicit attention to children or youth. Human rights or children's rights dimensions of climate change are not raised either.[60] It can be stated however, that child-specific concerns and children's rights are encompassed in the foundational principle of inter- and intra-generational equity, as incorporated in Article 3(1) of the UNFCCC.[61]

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57 McMichael, AJ, Campbell-Lendrum, D & Kovats, S 'Global Climate Change: Comparative Quantification of Health Risks' <https://www.who.int/docs/default-source/climate-change/publication---global-climate-change-comparative-analysis.pdf> accessed 17 November 2023.

58 *Ibid.*

59 Sanz-Caballero, S 'Children's Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child' (2013) 13 *Ethics in Science and Environmental Politics* 1-14.

60 *Ibid.*

61 Ruppel-Schlichting, K, Human, S & Ruppel, OC 'Climate Change and Children's Rights: An International Law Perspective' in Ruppel, OC, Roschmann, C & Ruppel-Schlichting, K (eds) *Climate Change: International Law and Global Governance, in Legal Responses and Global Responsibility* (Nomos Verlagsgesellschaft mbH, 2013) 349-378.

It follows from the foregoing that children, including Nigerian children, should particularly benefit from the support, such as financial and technological support, to be provided by developed countries under Article 4.3 of the UNFCC to developing countries, if one considers that children in developing regions are particularly at risk.[62] Article 4.3 states that the developed countries listed in the Convention's annex II, such as Canada and Australia, shall provide 'new and additional financial resources' to meet (a) the 'agreed full costs' for the developing country obligations under article 12.1, referring to measures taken or anticipated for the implementation of the Convention, and (b) the 'agreed full incremental costs' of climate actions covered by article 4.1 on parties' commitments to the objectives, including costs of transfer of technology, needed by the developing country parties.

5.1.2 Paris Agreement

Article 2 of the Paris Agreement aims to strengthen the global response to the threat of climate change by keeping the global temperature rise this century to well below 2 degrees Celsius above pre-industrial levels, and to limit the temperature increase even further to 1.5 degrees Celsius.

The concern for children was elaborated upon in the Paris Agreement. It provides that, while addressing climate change, State Parties should respect and consider their respective obligations on human rights, including the rights of children and people in vulnerable situations.[63]

Although children are specifically mentioned in the Paris Agreement, this explicit commitment is found only in the Preamble and not in the body of the treaty. This only helps to identify the object and purpose of the treaty and its context, not to impose obligations on the parties.[64] Human rights law is not incorporated into the Paris Agreement either. Thus, the Agreement has been described as providing a rather weak follow-up to the growing recognition of the significance of the human rights dimensions of climate change and of the specific relevance of climate change action for children.[65]

5.1.3 Other environmental laws and soft laws

Other environmental laws and soft laws relevant to climate change control to which Nigeria is a party include the Convention on Biological Diversity (CBD).[66] Article 1 aims at the conservation and sustainable use of the components of biological diversity. Reference to children is implied in Article 2's definition of 'sustainable use' as the use of components of biological diversity to meet the needs and aspirations of present and future generations.

62 United Nations Inter-agency Group for Child Mortality Estimation (UN IGME) 'Levels and Trends in Child Mortality Report 2021' (United Nations Children's Fund, 2021) 5.

63 Paris Agreement Preamble 11.

64 Gardiner, R *Treaty Interpretation* (Oxford University Press, 2008) 186.

65 UNFCCC Conference of the Parties (COP) 'Report of the Conference of the Parties on its sixteenth session' held in Cancun from 29 November to 10 December 2010 (UN Doc FCCC/CP/2010/7/Add.1, 15 March 2011), especially the last preambular paragraph, paras 8 and 77, Appendix I(2)(c).

66 The Convention was first adopted on 22 May 1992 at the United Nations Conference on Environment and Development, Rio de Janeiro, United Nations.

The United Nations Convention to Combat Desertification (UNCCD) is aimed at mitigating the effects of drought, particularly in African countries in line with Agenda 21, with a view to contributing to the achievement of sustainable development.[67]

5.1.4 Sustainable Development Goals

The 2030 Agenda for Sustainable Development, adopted by all UN Member States in 2015, provides a blueprint for peace and prosperity for people and the planet, now and in the future.[68] At its heart are the 17 Sustainable Development Goals (SDGs).[69] Goal 13 requires countries, among others, to 'take urgent action to combat climate change and its impacts' by strengthening resilience and adaptive capacity to climate-related hazards and natural disasters, implementing the commitment undertaken by developed-country parties to the UNFCCC, and mobilising jointly $100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation.[70]

Despite this 'ambitious goal', the 2024 UN report on the progress made so far towards achieving SDG 13 states that:

> despite some reductions in greenhouse gas emissions in developed countries, greenhouse concentrations hit record highs in 2022, with real-time data in 2023 indicating a continued rise. Carbon dioxide levels have surged to 150% above pre-industrial levels. Public funding for oil, coal, and gas production and consumption more than doubled from 2021 to 2022 and tripled since 2015, hindering progress towards a net-zero transition…[71]

Children are particularly affected by sustainable development gaps.[72] Therefore, States must ensure that universal sustainable development which protect the rights of the child becomes a reality on the ground.[73]

5.1.5 United Nations Convention on the Rights of the Child (CRC)

From a human rights perspective, certain international laws to which Nigeria is a party protect children from climate change. The major international law is the CRC. The rights of children under the CRC were highlighted in the introduction to this article.[74]

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67 The General Assembly adopted Resolution 47/188 in December 1992. Nigeria ratified it on 7 August 1997.

68 United Nations 'Sustainable Development Goals' <https://sdgs.un.org/goals> accessed 21 June 2024.

69 *Ibid.*

70 United Nations Environment Programme (UNEP) 'Goal 13: Climate Action' <https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-13> accessed June 2024,

71 United Nations General Assembly Economic and Social Council 'Progress Towards the Sustainable Development Goals' Report of the Secretary-General A/79/79-E/2024/54l, para 4.

72 Arts, K 'Children's Rights and the Sustainable Development Goals' in Kilkelly, U & Liefaard, T (eds) *International Human Rights of Children* (Springer-Verlag, 2019) 537-561.

73 United Nations Office of the High Commissioner of Human Rights 'Child Rights and the 2030 Agenda for Sustainable Development' <https://sustainabledevelopment.un.org/content/documents/...> accessed 21 June 2024.

74 See the rights of children in Articles 2, 3, 6, 12, 19, 24, 28, 27 of the CRC (note 7 above).

Ruppel-Schlichting, Human and Ruppel rightly view the CRC as being of particular relevance by providing a sound basis for a human rights approach that acknowledges children as key role-players in policies and programmes aimed at achieving environmental protection.[75]

Furthermore, the assertion by UNICEF that children have the right to live in a decent environment with all that this implies is a legal commitment through the CRC.[76] For example, Preamble 5 to the CRC explicitly recognises the importance of the natural environment for the growth and well-being of children and requires specifically in Article 24(2)(c) and (d) that States must take account of the dangers and risks of environmental pollution and provide education on the advantages of hygiene and environmental sanitation.

5.2 General Comments of the United Nations Committee on the Rights of the Child (UNCRC)

General Comment No. 26 (2023) posits that the extent and magnitude of the triple planetary crisis, comprising the climate emergency, the collapse of biodiversity and pervasive pollution, is an urgent and systemic threat to children's rights globally.[77] The UNCRC calls for urgent collective action by all States to, among others, mitigate GHG emissions, in line with their human rights obligations and an urgent increase in the design and implementation of child-sensitive, gender-responsive and disability-inclusive adaptation measures and associated resources to avert the adverse impacts of climate change.[78]

Arts notes that some other General Comments of the UNCRC contain statements that are relevant to issues of climate change.[79] For example, the risks of pollution and disasters are emphasised in General Comment No. 9 and General Comment No.13, respectively, The former, on children with disabilities, explains that 'hazardous environment toxins also contribute to the causes of many disabilities' and refers to the state's role in preventing environmental pollution.[80] In General Comment No. 7, on early childhood, the Committee issues the following reminder:[81]

> The right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the convention, including rights to health, adequate nutrition, ... a healthy and safe environment, education and play.[82]

75 Ruppel-Schlichting et al. (note 61 above).
76 UNICEF 'Child Rights at Risk: The Case for Joint Action on Climate Change' <https://www.unicef-irc.org/article/928-child-rights-at-risk-the-case-for-joint-action-with> accessed 23 November 2023.
77 UNCRC 'General Comment No. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change' UN Doc CRC/C/GC/2para 1.
78 *Ibid* paras 95, 101 and 104.
79 Arts, K 'Children's Rights and Climate Change' in Claire Fenton-Glynn (ed) *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations* (Cambridge University Press, 2019) 216-235.
80 UNCRC 'General Comment No. 9 (2006) on the Rights of Children with Disabilities' UN Doc CRC/C/GC/9 (27 February 2007) 54.
81 Arts (note 79 above).
82 UNCRC 'General Comment No. 7 (2006) on Implementing Child Rights in Early Childhood' UN Doc CRC/C/GC/7/Rev.1 (20 September 2006)10.

This is indirectly reinforced in General Comment Nos. 11, 14 and 16. General Comment No. 11 points out that State Parties should closely consider the cultural significance of traditional land and the quality of the natural environment to uphold children's right to life, survival and development to the maximum extent possible.[83] General Comment No. 16, on the right to leisure, play, recreational activities, cultural life and the arts, specifies that an 'environment sufficiently free from waste, pollution, traffic and other physical hazards' is crucial for allowing children 'to circulate freely and safely within their local neighbourhood' and for allowing them opportunities 'to experience, interact with and play in natural environments and the animal world'.[84]

Finally, General Comment No. 1, on the right to education, emphasises the importance of Article 29(1e) on the role of education in developing respect for the natural environment. For example, education must link issues of environment and sustainable development with socioeconomic, sociocultural and demographic issues. Similarly, respect for the natural environment should be learnt by children at home, in school and in the community, actively involving children in local, regional or global environmental projects.[85] All these UNCRC General Comments are applicable to Nigeria.

From its inception as a party to the UNFCCC in 1994, Nigeria has made considerable progress through active participation in international climate policy negotiations, including those analysed above, so as to meet its reporting obligation under the UNFCCC. Nigeria submitted its Initial National Communication (INC) in 2003, its Second National Communication (SNC) in February 2014 and its Third National Communication (TNC) in April 2020.[86] In order to meet the emission reduction obligation, the Intended Nationally Determined Contributions (INDC) were submitted in 2015 to usher in the Paris Agreement, and Nigeria signed the instrument of ratification in 2016 and submitted its First Biennial Update Report (BUR1) in 2018.[87]

5.3 African regional instruments

Environmental issues in Africa are regulated within the general legal framework of the African Union (AU).[88] As a member of the AU, Nigeria subscribes to various laws and policies for combating climate change and protecting children from the impact of climate change. These include the following:

83 UNCRC 'General Comment No. 11 (2009) on Indigenous Children and their Rights under the Convention' UN Doc. CRC/C/GC/11(12 February 2009) 35.

84 UNCRC 'General Comment No. 17 (2013) on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (art. 31)' UN Doc CRC/C/GC/17(17 April 2013) 6.

85 UNCRC 'General Comment No. 1 (2001) on Article 29(1): The Aims of Education' UN Doc CRC/GC/2001/1(17 April 2001) 9.

86 Federal Republic of Nigeria 'Second Biennial Update Report (BUR2) to the United Nations Framework Convention on Climate Change, Federal Ministry of Environment, Abuja, Nigeria' <https:/unfccc.int/sites/default/files/resource/NIGERIA…> accessed 21 June 2024.

87 *Ibid.*

88 Ruppel, OC 'Environmental Law and Policy in the African Union' (2022) <https://www.researchgate.net/publication/359945319_Chapter_6_Environmental_Law_and_Policy_in_the_African_Union> accessed 20 June 2024.

5.3.1 African Charter on Human and Peoples' Rights (ACHPR) of 1981

The ACHPR is the continent's primary human rights document and the first international treaty to recognise the right of people to 'a general satisfactory environment favourable to their development'.[89] Article 24 provides for people's right to a general satisfactory environment for their development. Article 18 mandates States to protect the rights of children as provided under international instruments. This impliedly includes children's rights to healthy environment.[90]

Other documents include the African Convention on the Conservation of Nature and Natural Resources, 2003, which mandates the enhancement of environmental protection, conservation and sustainable use of natural resources by States in the interests of present and future generations.[91] The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa also requires States to prohibit, among others, the importation of all hazardous waste into Africa from non-contracting Parties.[92]

5.3.2 African Charter on the Rights and Welfare of the Child (ACRWC)

At the African regional level, the ACRWC makes provision for the protection of children's rights while also noting the impact of climate change on them. Preamble 3 to the ACRWC notes with concern that for most African children the situation remains critical due to some unique factors, including natural disasters. Article 4 provides that the best interests of the child are the primary consideration in all actions concerning children. This implies that in undertaking climate action at all levels, the best interests of children must be duly considered and consistently applied.[93]

Article 5 enshrines children's right to survival and development and consequently obliges State Parties to ensure the survival, protection and development of the child, while Article 14 provides for children's right to health. Parties must pursue the full implementation of this right by reducing the infant and child mortality rate, providing adequate nutrition and safe drinking water, and combating diseases and malnutrition. Article 3 provides for non-discrimination. Articles 7, 8 and 9 cover the rights to freedom of expression, association, conscience and religion. The right to education is covered by Article 11. Article 10 addresses the right to privacy while Article 12 covers the right to leisure, recreation and cultural activities. Article 26 protects children against apartheid and discrimination. Article 11(2)(g) requires State Parties to direct the education of the child to 'the development of respect for the environment and natural resources'. These provisions confirm that the ACRWC plays a critical role in addressing the rights of children and climate change.

89 Mezmur (note 55 above).
90 OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).
91 Adopted by the 2nd Ordinary Session of the Assembly, Maputo, Mozambique on 11 July 2003.
92 Adopted in Bamako, Mali on 30 January 1991. Nigeria signed the Bamako Convention on 22 December 2008.
93 UNCRC 'General Comment 14 on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (Art 3, para 1)' UN Doc CRC/C/GC/14 (2013) para 14(a).

5.3.3 Agenda 2063

Agenda 2063 is Africa's blueprint for transforming Africa into a global powerhouse of the future to deliver on its goal for inclusive and sustainable development.[94] The Agenda formulates Africa's aspirations for the future and identifies key activities to be undertaken in its ten-year implementation plans.[95] Concerning environmental issues, Aspiration 1 envisages a prosperous Africa based on inclusive growth and sustainable development where its environment and ecosystems are protected, with climate-resilient economies and communities. Aspiration 6recognisesthe need to put children first.[96] Aspiration 6 paragraph 53 of the Agenda explicitly provides that 'African children shall be empowered through the full implementation of the African Charter on the Rights of the Child'.

5.3.4 African Union Development Agency (AUDA-NEPAD)

The mission of AUDA-NEPAD is to provide a platform to foster the development of the continent through effective and integrated planning, coordination and the implementation of Agenda 2063 with the aim of accelerating regional integration to achieve 'The Africa We Want'.[97] Its priority targets for intervention include the Environmental Action Plan and Multilateral Environmental Agreements.[98] To achieve the goals of Agenda 2063 regarding children's rights, AUDA-NEPAD and UNICEF signed a Memorandum of Understanding in 2022 to address the education, nutrition and health care challenges facing children and young people in Africa.[99] With this development, it is expected that the ACRWC will be wholly applied to adequately protect African children from the adverse impacts of climate change.

Despite all the efforts of the AU to combat environmental degradation by enacting laws and policies, the challenges of addressing climate action are exacerbated by the lack of a self-standing regional legal and institutional framework on climate change.[100] African countries, including Nigeria, have been experiencing increasing temperatures and rising sea levels, changing precipitation patterns and more extreme weather; these all threaten human health and safety, food and water security, and socio-economic development in Africa.[101]

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94 Africa Union 'Agenda 2063: The Africa We Want' <https://au.int/en/agenda2063/overview> accessed 25 June 2024.

95 *Ibid*.

96 *Ibid.*

97 African Union Development Agency–NEPAD 'Annual Report 2019' <https://au.int/sites/default/files/documents/38048-doc-2019_auda-nepad_annual_report_en_final7_31.1.2020_web_version.pdf> accessed 20 June 2024.

98 *Ibid.*

99 AUDA-NEPAD 'AUDA-NEPAD and UNICEF sign MoU to promote child rights in Africa' <https://www.nepad.org/news/auda-nepad-and-unicef-sign-mou-promote-child-rights-africa> accessed 21 June 2024.

100 Fambasayi (note 38 above).

101 United Nations Climate Change 'Climate Change is an Increasing Threat to Africa' <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa> accessed 28 June 2024.

5.4 Nigerian laws

The key national legislative instruments on environmental protection and climate change mitigation in Nigeria include the following:

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

Section 20 of the Constitution requires the Nigerian government to 'protect the environment and safeguard the water, air, land, forest, and wild life'. The aim is to ensure a healthy environment (including an environment that is less vulnerable to climate change) for Nigerian citizens,[102] including children. The section, however, is non-justiciable under section 6(6)(c) of the same Constitution, which ousts the jurisdiction of courts in entertaining any questions relating to the implementation of issues listed under its fundamental objectives and directive principles of state policy.

5.4.2 Climate Change Act (CCA) 2021

The cumulative effect of sections 1 and 22 to 25 of the Act is to provide a solid framework for the climate action needed to achieve Nigeria's short-, medium- and long-term goals on climate mitigation and adaptation, and the obligations imposed on both the public and private entities, to promote a low-carbon economy and sustainable livelihoods. It imposes the responsibility on the Council and its Secretariat to partner with relevant stakeholders, especially civil society organisations (CSOs) for strategic advocacy on climate education and a sound legal foundation for potential climate litigation.[103]

Nigeria's revised National Climate Change Policy was adopted in June 2021 with the aim of establishing a well-defined national climate change implementation framework and programmatic action plan that incorporates short-, medium- and long-term mitigation and adaptation strategies to assist with building a climate-resilient nation.[104] These instruments indicate Nigeria's commitment to its treaty obligations under the Paris Agreement and the constitutional obligations placed on the Nigerian state by section 20 of the Constitution.

Prior to the foregoing, Nigeria also adopted a number of policies, strategies and action plans that are related to addressing the national development challenges of climate change.[105] The main ones are the Economic Recovery and Growth Plan (ERGP) 2017-2020, the Transformation Agenda (2011-2020) and Vision 20:2020.[106]

It is important to note, however, that the Nigerian laws and policies mentioned above make no adequate or specific provision for the protection of children's rights during climate change. Other Nigerian laws for environmental protection include the following:

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102 Federal Ministry of Environment, Department of Climate Change 'National Climate Change Policy for Nigeria: 2021–2030' <https://climatechange.gov.ng/wp-content/uploads/2021/08/NCCP_Nigeria_Revised_2-June-2021.pdf> accessed 11 July 2023.

103 *Ibid.*

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

5.4.3 National Environmental Standards and Regulations Enforcement Agency Act (NESREA Act) 2007

Section 7 provides the authority to ensure compliance with environmental laws, while section 27 prohibits and penalises the discharge, without lawful authority, on the Nigerian land and into Nigeria's waters or air, such harmful quantities of any hazardous substance.[107] The main problem with the NESREA Act is the inadequate enforcement of its provisions.[108]

5.4.4 Environmental Impact Assessment (EIA) Act

Section 2(1) prohibits the public or private sector of the economy from undertaking, embarking on or authorising projects or activities without prior environmental consideration at an early stage of such projects.[109] However, public sector projects in Nigeria are not environmentally friendly since EIAs are not usually conducted.[110]

5.4.5 Associated Gas Re-injection Act

Section 2 prohibits the flaring of associated gas without the written permission of the Minister of Petroleum Resources.[111] Despite this, Nigeria currently contributes significantly to the total amount of GHGs produced in Africa through unabated emissions from its oil and gas industry in the Niger Delta.[112]

5.4.6 Child's Right Act (CRA) 2003

With respect to the protection of children's rights, the CRA 2003 is the most comprehensive Act in Nigeria. Section 277 of the CRA defines a child as 'a person under the age of 18 years'. Like the CRC and the ACRWC which it domesticates, the CRA makes no express provision for the protection of children's rights during climate change. However, the CRA makes comprehensive provision for the rights of children with the best interests of the child being of paramount importance in all circumstances.[113] Other rights of children under the Act include: the right to life, survival and development; the right to a name; the right to private and family life; the right to dignity; the right to leisure, recreation and cultural activities; the right to freedom of association and peaceful assembly; freedom of thought, conscience and religion; freedom from discrimination; freedom of movement; the right to health care; the right to parental care, protection and maintenance; and the right to education.[114]

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107 This Act was officially gazetted by the Federal Republic of Nigeria on 31 July 2007. See Government Notice 61, Act No.25 Vol. 94, pages A635-655. Now Cap N164 Laws of Federation of Nigeria (LFN) 2004.

108 Olaoluwa, RO 'Assessment of Legal Frameworks on Environment and Climate Change Enforceable in Nigeria by the National Environmental Institution' (2019) 1(3) *IRLJ*81-90.

109 Cap E12 LFN 2004.

110 Olaoluwa (note 108 above).

111 Associated Gas Reinjection Act Cap A26 LFN 2004.

112 Afinotan, U 'How Serious is Nigeria about Climate Change Mitigation through Gas Flaring Regulation in the Niger Delta?' (2022)24(4) *Environmental Law Review* 288-304.

113 Section 1 of the CRA.

114 Sections 1-15 of the CRA.

The major challenge, however, is that the CRA has not been adopted by all the states of the Federation for a number of reasons. These include custom and religion being contrary to the tenor of the CRA, lack of political will by the government to promote the best interests of children, and the conflict between state governments and civil society groups.[115] These challenges have hampered the effective implementation of the CRA in Nigeria. The states that have adopted the CRA are also not effectively implementing the CRA.

6. Challenges and successes of climate change action in Nigeria

Despite Nigeria's efforts towards combating climate change under the UNFCCC and other international, regional and domestic laws and policies, some of which are analysed above, Nigeria is still struggling to achieve the desired results. Like other parts of Africa and many parts of the world, Nigeria is experiencing climate change.[116] In particular, the country is becoming warmer; various studies have shown that annual and seasonal time scales indicate a significant positive increase in temperatures in Nigeria.[117] The combination of rising heat and less rain has hastened desert encroachment, with the loss of the wetlands, and a rapid reduction in the amount of surface water, flora and fauna resources on the land.[118]

According to the UN, Nigeria has the highest rate of deforestation in the world.[119] Nigeria loses 3.7 percent of its forests every year; rising sea levels threaten southern cities such as Lagos and coastal areas, increasing vulnerability to flooding and waterborne diseases; droughts and reduced rainfall, with rising air temperatures, hinder agricultural production and fishing, reducing food security and negatively impacting health and nutrition.[120] The energy sector, deforestation and land-use change are the greatest contributors to Nigeria's GHG emissions.[121]

The challenges associated with climate change are not the same across the country. Nigeria has a tropical climate with two precipitation regimes: low precipitation in the North and high precipitation in parts of the Southwest and Southeast, which leads to aridity, drought and desertification in the North, and flooding and erosion in the South.[122]

115 Ladan, MT 'An Overview of the Child's Right Act, 2003' Paper presented at the all Judges' Conference of the Superior Courts organised by the National Judicial Institute 15–19 November, 2021, at the National Judicial Institute, Abuja <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015384> accessed 8 August 2024.

116 Federal Ministry of Environment (note 102 above).

117 *Ibid.*

118 Abdulkadir, A, Lawal AM & Muhammad, TI 'Climate Change and its Implications on Human Existence in Nigeria: A Review' (2018) 10(2) *Bayero Journal of Pure and Applied Sciences* 152-158.

119 United States Agency International Development (USAID) 'Nigeria Climate Change Country Profile' Fact Sheet 29 November 2023 <https://www.usaid.gov/climate/country-profiles/Nigeria> accessed 25 June 2024.

120 *Ibid*.

121 *Ibid.*

122 Akande, A, Costa, AC & Mateu, J 'Geospatial Analysis of Extreme Weather Events in Nigeria (1985–2015) Using Self-Organizing Maps' (2017) *Advances in Meteorology* 1-11.

As confirmed by the revised Climate Change Policy for Nigeria 2021–2030, the Northeast and Northwest geopolitical zones that constitute the arid and semi-arid areas of Northern Nigeria, and where most of the country's livestock are raised, are the most vulnerable to climate change.[123] This is because of the regions' low adaptive capacity, low sensitivity, high relative exposure and high relative vulnerability.[124] Within Southern Nigeria, the South-south (Niger Delta region) is the most vulnerable, due to the rising sea level, increased precipitation, coastal erosion and flooding, which have resulted in the displacement of many settlements.[125]

Climate vulnerability mapping of the arid and semi-arid Northern Nigeria indicates that Adamawa, Bauchi, Borno, Jigawa, Kano and Yobe States have high vulnerability to climate change, while Kebbi, Katsina, Sokoto and Zamfara States have medium vulnerability. Kaduna and Taraba States are areas of low vulnerability to climate change, relative to other parts of the arid and semi-arid Northern Nigeria.[126] The main cause of climate change in Nigeria is the high concentration of GHGs in the atmosphere.[127] The persistence of climate change is exacerbated by a lack of funding (for mitigation and adaptation); a lack of capacity-building and poor technical skills; a lack of synergy, coordination and collaboration by stakeholders; a lack of target setting, monitoring and evaluation; and poor communication.[128]

Despite the many challenges, a level of success has also been recorded. For instance, with the intervention of the World Bank through its Nigeria Erosion and Watershed Management Project (NEWMAP), more than 12 million people benefited from the $900 million project, which reinforced the country's ability to fight climate-induced erosion, natural hazards and disasters; 52,000 jobs in the sectors promoting climate adaptation, direct and indirect, were created through the first Sovereign Green Bonds; while 23 states adopted innovative integrated approaches for adaptive development based on community participation.[129] However, a significant impact is yet to be felt.[130]

123 Federal Ministry of Environment (note 102 above).

124 *Ibid.*

125 Matemilola, S 'Mainstreaming Climate Change into the EIA Process in Nigeria: Perspectives from Projects in the Niger Delta Region' (2019) 7(2) *Climate* 29.

126 Federal Ministry of Environment (note 102 above).

127 Badru, L 'Climate Change in Nigeria: Causes, Effects and Legal Framework' (2020) 4(1) *UNILAG Law Review* 186-203.

128 Federal Ministry of Environment, Department of Climate Change 'Nigeria's Adaptation Communication to the United Nations Framework Convention on Climate Change' (2021) <https://climatechange.gov.ng/wp-content/uploads/2021/12/Nigeria-Final-ADCOM-Report.pdf> accessed 30 June 2021.

129 A Sovereign Green Bond is a financial instrument that is issued by a sovereign entity, intergovernmental group, alliance or corporation. The proceeds from the sale of these bonds are earmarked exclusively for projects classified as environmentally sustainable. See Insights 'Sovereign Green Bonds' <https://www.printfriendly.com/p/g/gVZsr4> accessed 25 June 2024.

130 World Bank Group 'Land, soil and climate change: How Nigeria is enhancing climate resilience to save the future of its people' (2022) <https://www.worldbank.org/en/news/feature/2022/10/18/land-soil-and-climate-change-how-nigeria-is-enhancing-climate-resilience> accessed 30 June 2024.

7. The adverse impact of climate change on children's rights in Nigeria

The global UNICEF CCRI model considered earlier in this article indicates that of the 163 countries that were assessed, Nigeria and the Republic of Chad were both ranked the second highest-risk countries (after the Central African Republic) where children are susceptible to the impact of climate change.[131] According to the report, Nigeria's low rating was due to children's high exposure to air pollution and coastal floods.[132] The 33 extremely high-risk countries, including Nigeria, collectively emit just 9 per cent of global CO_2 emissions, yet Nigerian children are at a very high risk of being negatively impacted.[133] The report concluded that investment in social services, particularly child health, nutrition and education, could help to reverse the trend, safeguard children's future and provide better protection against climate change.[134] The affected children's rights identified for discussion in the introduction to this article are analysed here.

7.1 Right to life, survival and development

Nigerian children are among the most vulnerable group negatively impacted by climate change.[135] Records show that, due to climate change, 1.7 million children die every year as a result of avoidable environmental impacts, while millions of them are forced to leave their homes, missing school and suffering from diseases.[136] Respiratory diseases also increase in children from birth up to the age of 16 years.[137] In Nigeria, 78 per cent of air pollution-related pneumonia deaths are among children under the age of five, the highest proportion globally.[138] This contradicts the provisions of section 33 of the Constitution on the right to life and sections 3 and 4 of the CRA on the right to life, survival and development.

7.2 Right to health and health services

The right to survival and development and the right to health and health services are closely linked. Section 13 of the CRA provides for every child's right to enjoy the best attainable state of health. Section 13(3) requires Nigeria, *inter alia*, to reduce the infant and child mortality rate and provide necessary medical assistance and healthcare to

131 UNICEF 'The Climate Crisis is a Child's Right Crisis' (note 14 above).
132 *Ibid.*
133 *Ibid.*
134 *Ibid.*
135 Adat, L, Edward, A & Sani, AD 'Nigeria: The UN General Comment on Children's Rights and Environment with a Special Focus on Climate Change 2023: Implication For Nigeria' (2023) <https://www.mondaq.com/nigeria/climate-change/1338362/the-un-general-comment-on-childrens-rights-and-environment-with-a-special-focus-on-climate-change-2023-i> accessed 10 April 2023.
136 World Health Organization (WHO) 'The cost of a polluted environment: 1.7 million child deaths a year, says WHO' (2017) <https://www.who.int/news/item/06-03-2017-the-cost-of-a-polluted-environment-1-7-million-child-deaths-a-year-says-who> accessed 8 August 2024.
137 Ibraheem, RM, Aderemi, JA & Abdulkadir, MB 'Burden and Spectrum of Paediatric Respiratory Diseases at a Referral Hospital in North-Central Nigeria: A Five Year Review' (2020) 10(1) *Afr J Emerg Med* 3-7.
138 UNICEF 'Nigeria has highest number of air pollution-related child pneumonia deaths in the world' <https://www.unicef.org/nigeria/press-releases/nigeria-has-highest-number-air-pollution-related-child-pneumonia-deaths-world> accessed 25 June 2024.

all children. In spite of this provision, across Nigeria, children experience increased temperatures and polluted air leading to health problems such as asthma and other dangerous respiratory conditions.[139] Because of higher temperatures, water scarcity, flooding, drought and displacement, especially in Northern Nigeria, climate change negatively impacts agricultural production and causes a breakdown in food systems.[140] The consequence for children is malnutrition and exposure to diseases. According to the UNICEF Country Office Annual Report 2021,[141] Nigeria has the second highest burden of stunted children in the world, with a national prevalence rate of 32 percent of children under the age of five. An estimated two million children in Nigeria suffer from severe acute malnutrition.[142]

Children in Northern Nigeria form part of the 920 million children currently exposed to water scarcity (globally) and the situation is likely to worsen as climate change increases the severity of droughts and contamination.[143] This has resulted in children's constant battles with diseases like cholera, diarrhoea and bilharzia.[144]

7.3 Right to freedom from discrimination

Section 10(1) and (2) of the CRA prohibits any form of discrimination against children. The impacts of climate change on children exacerbate inequity as they often hit children the hardest.[145] Children are often the first and most severely impacted by climate change.[146] This clearly violates children's right to freedom from discrimination under section 42 of the Nigerian Constitution and section 10 of the CRA.

7.4 Best interests of the children

Section 1 of the CRA requires that the best interests of the child should be the primary consideration in all actions concerning a child.[147] This implies that, in taking climate action at all levels, the best interests of children must be duly considered and applied.[148] Climate change works in opposition to the actualisation of the best interests of children as it affects their rights and well-being.

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139 Ewepu, G 'Children Cry Out Over Negative Impact of Climate Change' <https://www.vanguardngr.com/2022/08/children-cry-out-over-negative-impact-of-climate-change/> accessed 12 October 2023.

140 Nigerian Tribune 'Climate Change and Health in Nigeria' (14 September 2017) <https://tribuneonlineng.com/climate-change-health-nigeria/> accessed 19 November 2023.

141 UNICEF 'Country Office Annual Report 2021-Nigeria' <https://www.unicef.org/media/116321/file/Nigeria-2021-COAR.pdf> accessed 8 September 2023.

142 *Ibid*.

143 UNICEF 'The Climate Crisis is a Child's Right Crisis' (note 14 above).

144 Chime, V 'Inside Story: How Climate Change Affects Child Education in Nigeria' (3 November 2021) <thecable.ng/special-report-how-climate-change-affects-child-education-in-nigeria> accessed 19 November 2023.

145 UNICEF Office of Research 'The Challenges of Climate Change: Children on the Front Line' Innocenti Insight (UNICEF Office of Research, 2014).

146 UNICEF 'Climate Landscape Analysis for Children in Nigeria' (note 26 above).

147 Section 1 of the Child's Right Act.

148 UNCRC 'General Comment 14 on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)' UN Doc CRC/C/GC/14 (2013) para 14(a).

7.5 Right to education

Section 15 of the CRA provides for children's right to education. Flooding and other environmental disasters cause displacement and prevent children's access to school.[149] In late 2022, the most devastating floods in a decade affected 4.4 million people across Nigeria, including 2.6 million children.[150] The flooding affected Kogi, Benue, River and Bayelsa States, leading to children's absence from school for a long period of time.[151]

The foregoing shows the grave effect of climate change on Nigerian children, which deserves urgent attention.

8. The perspective of intergenerational climate justice

Intergenerational justice is the idea that present generations have certain duties towards future generations.[152] This is central to the pursuit of sustainable development, and climate justice requires that we realise the human rights and development needs of present generations while safeguarding the rights of future generations.[153] According to Robinson,[154] climate justice as a moral argument has two parts. Firstly, it compels an understanding of the challenges faced by those people and communities most vulnerable to the impacts of climate change. Often the people on the frontline of climate change have contributed least to the causes of the climate crisis. This is a climate injustice that can only be rectified by swift and ambitious climate action, including reducing emissions to zero as rapidly as possible.[155] Secondly, climate justice informs how humans should act to combat climate change. It must be ensured that the transition to a zero-carbon economy is just and that it enables all people to realise their right to development. This requires that the global community acts in solidarity and ensures that the necessary resources are available to allow all countries and people to make the transition to clean, renewable energy on the same timescale.[156]

9. Recommendations for intergenerational climate justice for children in Nigeria

9.1 Addressing current challenges of climate change globally

Although the UNFCCC has served many important roles over the last three decades, from elevating the climate crisis and developing the international frameworks for action,

149 UNICEF 'Climate Landscape Analysis for Children in Nigeria' (note 26 above).

150 UNICEF 'Nigeria Flood Response Report, August 2022–June 2023' <https://www.unicef.org/media/150391/file/Nigeria-2022-Flood-Response-Brief-Aug%202022-to-June-2023.pdf> accessed 15 June 2024.

151 Adat (note 135 above).

152 London School of Economics and Political Science 'What is meant by intergenerational climate justice?' <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-meant-by-intergenerational-climate-justice/> accessed 18 June 2024.

153 Mary Robinson Foundation 'Pursuing Climate Justice within Environmental, Social and Governance Investment Frameworks' <https://media.businesshumanrights.org/media/documents/files/documents/Pursuing_Climate_Justice_within_ESG_Investment_Frameworks_FINAL.pdf> accessed 5 December 2022.

154 *Ibid.*

155 Earth in Common 'Restorative Climate Justice: A Concept to Place at the Heart of Foreign Aid and International Development?' <https://www.earth-in-common.org/restorativeclimatejustice> accessed 19 November 2023.

156 *Ibid.*

including the Convention in 1992 and the Paris Agreement in 2015, challenges still remain. According to the World Economic Forum, three key climate risks remain top global challenges for which urgent action is needed. These are extreme weather events, critical change to Earth systems and biodiversity loss.[157] The UN climate process must think about how it can move with the speed and urgency required and catalyse action from national governments.[158] At the same time, children's participation and respect for their views must be allowed in compliance with Article 12 of the CRC so as to protect their best interests.

9.2 A substantive regional convention that governs climate change

At the African regional level, the continent must adopt a substantive regional convention that governs climate change. It must be capable of driving regional solutions, standard-setting and oversight in the protection of vulnerable groups (including children).[159] In doing this, children's participation and views should be taken into account and respected. Furthermore, African countries must invest more in climate adaptation and shift to a low-carbon growth path to support sustainable development.[160]

9.3 Further action to mitigate climate change

At the national level and as a high-risk country, the Nigerian government must urgently take further action to mitigate climate change by limiting GHG emissions to prevent their negative impact on the rights of all citizens, including children, and future generations.[161] The protection of children's rights requires halting the development of the most carbon-intensive fossil fuels and transitioning to clean, renewable sources of energy.[162] Adequate resources should be directed towards efforts to promote non-discriminatory access to basic necessities and services for children. Investment in education and related infrastructure is a rights-based, cost-effective and sustainable method of empowering children, while health, water and sanitation, housing infrastructure and related services are also critical to children's adaptation and resilience.[163]

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157 World Economic Forum 'These are the top 3 climate risks we face and what to do about them' (2024) <https://www.weforum.org/agenda/2024/01/climate-risks-are-finally-front-and-centre-of-the-global-consciousness/> accessed 2 July 2024.

158 Cogswell, N & Warszawski, N '5 Challenges the UNFCCC Must Overcome to Spur Climate Action' (2022) <https://www.wri.org/insights/5-challenges-unfccc-must-overcome-climate-action> accessed 2 July 2024.

159 Jegede, AO 'The Climate Change Regulatory Framework and Indigenous Peoples' Lands in Africa: Human Rights Implications' (2016) *Journal of Environmental Economics* 238.

160 World Economic Forum '3 key fronts on which Africa must combat climate change' <https://www.weforum.org/agenda/2022/10/3-key-fronts-africa-climate-change/> accessed 24 June 2024.

161 United Nations General Assembly 'Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child: Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/35/13' (2017) 5-6.

162 *Ibid.*

163 UNCRC 'General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)' UN Doc CRC/C/GC/15 (17 April 2013) 40.

9.4 Environmental litigation

At the domestic level, those experiencing climate change must be allowed to institute actions against the perpetrators of climate change. Intergenerational climate justice has been described as a powerful way to attach legal responsibility to actors who fail to play their part in mitigating climate change.[164] Thus, based on the existing legal frameworks, in the international community, cases are being instituted for environmental protection.

With specific reference to the protection of children and future generations from the impact of climate change, children and their representatives have engaged in environmental litigation in some foreign jurisdictions. For example, in the 1994 case of Minors Oposa v Secretary of the Department of Environmental and Natural Resources,[165] the principal plaintiffs were all minors duly represented and joined by their respective parents, in conjunction with the Philippine Ecological Network, Inc (a non-profit organisation).[166] The plaintiffs sought an order that the government discontinue any existing and future timber licence agreements, alleging that deforestation was causing environmental damage. The trial court dismissed the complaint. On appeal, the Supreme Court reversed the trial court's decision, ruling, *inter alia*, that the plaintiffs had standing to represent their yet unborn posterity, that they had adequately asserted a right to a balanced and healthy ecology, that the grantees of the licenses should be impleaded, and that the issues raised were justiciable.[167] In B v R[168] the German Constitutional Court ruled that the German Federal Climate Law (Klimaschutzgesetz) violates the constitutional freedoms of future generations, enshrined in the Basic Law of Germany.

For the protection of general human rights against climate change, in State of the Netherlands v Urgenda Foundation,[169] the Dutch Supreme Court in 2019 upheld the lower court's opinion that the Netherlands has a positive obligation under the 1950 European Convention on Human Rights to take reasonable and suitable measures for the prevention of climate change by reducing its GHG emissions by at least 25 per cent by the end of 2020. No cases have been instituted specifically for children in Nigeria or on their behalf. For the protection of human rights generally from climate change impacts in Nigeria, in Jonah Gbemre v Shell Petroleum Nigeria Limited and Others,[170] the Federal High Court decided the case along the lines of the principles in State of the Netherlands[171] and in the absence of a constitutionally protected right to a healthy environment. The court concluded that illegal flaring of natural gas contravenes the right to dignity under the Constitution,

164 Meyer, K 'Courts Step Up on Intergenerational Climate Justice' (2021) <https://www.iucn.org/news/environmental-law/202108/courts-step-intergenerational-climate-justice> accessed 2 July 2024.

165 (1994) 33 ILM 173.

166 Judgment of Republic of the Philippines Supreme Court Manila En Banc <http://www1.umn.edu/humanrts/research/Philippines/Oposa%20v%20Factoran,%…> accessed 24 November 2023.

167 *Ibid.*

168 (2021) B v R 2656/18 1-270.

169 ECLI:NL:RBDHA:2015:7145.

170 (2005) AHRLR 151.

171 See note 169 above.

amounting to an affront to the constitutional right to human dignity.[172] This decision was never enforced as gas flaring continues, largely unabated, in the Niger Delta.[173]

The reason borders on the issue of non-justiciability of the right to environment under the Constitution. However, justiciability can be achieved if the courts give an expansive interpretation to the right to a protected and improved environment, and safeguarded water, air and land, forest and wildlife, as provided in section 20 of the Constitution. This means using the (non-justiciable) right to a healthy environment as an aid in interpreting the legally enforceable fundamental right to life, since the fulfillment of the right to life depends on living in a healthy and protected environment. This means that, in an action for the violation of the right to a protected environment, section 20 on the right to an environment, section 33 on the right to life, section 34 on the right to dignity, and Article 24 of the African Charter on the right to a favourable environment can be used in establishing the right to a healthy environmental life. The Charter is applicable in terms of section 12 of the Constitution to the Nigerian courts by virtue of its being enacted into law by the National Assembly. This would achieve the aim of making the right to a healthy environment justiciable.

The principles in Minors Oposa[174] and State of the Netherlands[175] discussed above can be extended to cases of Nigerian children once justiciability is achieved. Children are also covered by the human rights protection in the African Charter and fundamental human rights in chapter 4 of the Nigerian Constitution.

The decisions in these cases show the potential role of the judicial system in protecting children and general human rights from harmful activities, including those that contribute to climate change.[176] It is hoped that the Nigerian judiciary will be more proactive in defending the rights of children and future generations against those involved in harming the planet.

9.5 Application in Nigeria of the core human rights obligations of States in the context of climate change as outlined by the OHCHR

These obligations require States to take a human rights-based approach to protect those who are most vulnerable to climate change from its worst impacts.[177] A human rights-based approach analyses obligations, inequalities and vulnerabilities and seeks to redress discriminatory practices and unjust distributions of power.[178] A children's rights-based approach to climate change mitigation and adaptation builds on the essential attributes of human rights-based approaches, while incorporating the specificities of children's rights,

172 *Ibid*.
173 May, JR & Tiwajopelo D 'Dignity and Environmental Justice in Nigeria: The Case of Gbemre v. Shell' (2019) 25 *Widener Law Review* 267-268.
174 See note 165 above.
175 See note 169 above.
176 Meyer (note 164 above).
177 *Ibid*.
178 United Nations Research Institute for Social Development (UNRISD) 'The Human Rights-Based Approach to Social Protection' <https://socialprotection-humanrights.org/wp-content/uploads/2016/09/IB2-Human-rights-based-approach.pdf> accessed 22 November 2022.

needs and capacities.[179] The UNCRC has identified the four general principles of a children's rights-based approach: non-discrimination; the best interests of the child; the child's right to life, survival and development; and the child's right to express his or her views.[180]

A children's rights-based approach to climate change must take the following into account:[181] (a) the main objective of the formulation of climate policies should be to fulfill human rights, taking into account the specific risks faced by children; (b) children's active participation (guaranteed by Article 12 of the CRC) in relevant decision-making processes, including those related to climate adaptation and mitigation policies, must be ensured;[182] this provision should be incorporated into the CRA to enable the participation of children in decision-making on climate change; (c) the obligations and responsibilities of duty-bearers must be clarified; and (d) principles and standards derived from international human rights law, especially the Universal Declaration of Human Rights, should guide all policies and programming.[183]

9.6 Principle of intergenerational equity

The principle of intergenerational equity underlying these frameworks places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs.[184] Nigeria as a State Party has a moral and ethical obligation to place the needs of today's children and of future generations at the core of climate change policies and actions.

9.7 The CRA as a national framework

The CRA must be made the national framework for action for the protection of children's rights during climate change in Nigeria, complementing the Climate Change Act 2021 and the revised Climate Policy of 2021. All States of the Nigerian Federation, especially Northern Nigeria where climate change is more prevalent, must adopt the CRA. Secondly, the provisions of Article 29(e) of the CRC, which obligates State Parties to direct child education to the development of respect for the natural environment, needs to be incorporated into the CRA.

10. Conclusion

The analysis in this article has shown that the protection of children's human rights and the protection of the environment are inextricably linked due to the negative impact on children when there is a failure to protect the environment. The analysis also shows that children contribute the least to climate change but bear the greatest burden due to their

179 United Nations 'Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child' (note 161 above).

180 UNCRC 'General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child' UN Doc CRC/GC/2003/5 (27 November 2003) 12.

181 United Nations 'Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child' (note 161 above) 32.

182 *Ibid*.

183 *Ibid*.

184 *Ibid*, 35.

vulnerability. The adverse impacts of climate change on the African child, particularly the Nigerian child, are enormous and should be urgently addressed by the Nigerian government to prevent further calamities and the explosion of what Odumakin has described as a 'climate time bomb', especially as Nigeria has been declared to be an extremely high-risk country where children are highly susceptible to the adverse impacts of climate change.[185] Without stable and healthy environmental conditions, there is no foundation to support progress or development.[186]

Tackling climate change should be a joint responsibility of Western countries and African governments, including Nigeria, while steps are taken to develop comprehensive, all-inclusive national adaptation plans, and while also respecting what governments have already agreed to contribute to adaptation and mitigation budgets.[187] Governments are also encouraged to use existing funds with efficacy and purpose to protect and preserve the environment for the present and future generations.[188]

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185 Odumakin, JO 'Climate justice and accountability to African children' (2022) <https://guardian.ng/opinion/climate-justice-and-accountability-to-african-children/> accessed 15 September 2023.

186 Goodman, DL 'UNFCCC and Child Rights: An Intergenerational View of Global Environmental Policy' <http://www.earthchildinstitute.org/wp-content/uploads/2012/06/Goodman-UNFCCC-and-child-rights.final.pdf> accessed 1 August 2023.

187 Odumakin (note 186 above).

188 *Ibid.*

The Constitutional Protection of the Right to Collective Job Action in Zimbabwe: A Comparative Analysis

Noah Maringe*

Abstract

The right to participate in collective job action is the most formidable weapon in employees' arsenal, without which workers' autonomy and democracy in the workplace would be under persistent onslaught. This article assesses whether Zimbabwe's constitutional protection of collective job action accords with general trends in comparative jurisdictions such as South Africa, Kenya and Australia. Further, the article establishes that Zimbabwe's 2013 Constitution is progressive on the right to collective job action. However, it fails to offer adequate constitutional protections and guarantees for the right. There are also several disconnects between the Constitution and the Labour Act. Additionally, Zimbabwe's legal and institutional framework is lagging behind when compared to other jurisdictions from which lessons can be drawn. The article makes constitutional, legislative, institutional and administrative recommendations with a view to enhancing the protection, enforcement and promotion of the right to collective job action in Zimbabwe.

Keywords

Australia; constitutional protection; Kenya; right to collective job action; South Africa; Zimbabwe

1. Introduction

Section 65(3) of the 2013 Zimbabwean Constitution provides that various constituencies have the right to collective job action.[1] This provision is given legislative effect by the Labour Act.[2] The perceived incompatibility between these two provisions regarding collective job action makes the interpretation, enforcement and limitation of the right a highly contested terrain. While section 65 of the Constitution of Zimbabwe clearly protects the right to collective job action, it is hampered by many limitations in the Labour Act which make the right practically non-existent. Such a legal framework means that the right is very susceptible to violation, in both the private and public employment domains.

1 The Constitution of Zimbabwe (Amendment No. 20) Act, 2013 (the Constitution).
2 Part XIII of the Labour Act [Chapter 28:01].

* LLB (University of Zimbabwe) LLM LLD (University of South Africa). <https://orcid.org/0000-0003-4308-9087> Email: noah.maringe@gmail.com

The government's attitude to collective job action and the frequent litigation on labour matters highlight the weak and inadequate constitutional protection of the right.[3]

This article compares Zimbabwe's legal position with the position in the South African, Kenyan and Australian jurisdictions. Lessons are drawn from labour and human rights jurisprudence in these countries and some recommendations are made for Zimbabwe. Section 23 of the Constitution of South Africa is similar to section 65 of the Zimbabwean Constitution, and therefore it is useful to examine South African experiences. In order to provide the analysis with more insight, Australia, as a developed country, and Kenya, as a fellow African country, are also discussed.

2. The right to collective job action in the Zimbabwean Constitution

The right to collective job action in section 65(3) of the Constitution is one of the broad constitutional labour rights provided for in section 65. Numerous issues arise from a close reading of section 65(3) of the Constitution. Firstly, the provision states that members of the security forces cannot lawfully enjoy and exercise the right to collective job action.[4] Secondly, the express exclusion of members of the security forces suggests that any other employees in Zimbabwe can participate in collective job action, whether in the private or public employment sector. The third issue is that collective job action includes the right to strike, to sit-in, to withdraw labour, and to take other similar concerted action. Finally, the right to collective job action may be restricted or limited in order to maintain essential services.[5]

The Constitution of Zimbabwe is supreme, which is one of the basic tenets of Zimbabwe's new constitutional order.[6] This means that any unconstitutional decision, norm, practice, interpretation or law is trumped by a constitutional norm should a conflict between the two arise.[7] The effect of this is to give the courts jurisdiction to scrutinise any law, rendering such law unconstitutional should it be found to offend the constitutional right to collective job action. In the words of Michelman, constitutional supremacy sets 'a determinate hierarchical relation among legal norms emanating from various sources of law'.[8] These include statutes, common law, customary law, international law, customary international law and foreign law, if they affect the right to collective job action. Section 2(1) of the Constitution, as read with the Sixth Schedule, provides that even inconsistent and unrepealed provisions from non-constitutional sources should be read and construed in the light and spirit of the supreme Constitution.

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3 This refers to the role of Zimbabwean security services, ministers, courts and other state departments in handling matters concerning collective job action, as discussed below.

4 Section 65(3) of the Constitution.

5 *Ibid*.

6 Moyo, A 'Basic Tenets of Zimbabwe's New Constitutional Order' in Moyo, A (ed) *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (RWI Institute of Human Rights and Humanitarian Law, 2019) 10.

7 See *Pharmaceuticals Manufacturers Association of South Africa: In re: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

8 Michelman, F 'The Rule of Law, Legality and the Supremacy of the Constitution' in Woolman, S & Bishop, M (eds) *Constitutional Law of South Africa* (Juta & Co, 2014) 11.

The right to collective job action is situated at the heart of the declaration of fundamental rights and freedoms.[9] This entrenchment gives the right immunity and constitutional protection from the tendency of the legislature, the judiciary and the executive to play politics with constitutional rights.[10] The constitutionalisation of the right to collective job action also makes it part of the justiciable fundamental human rights and freedoms.[11] This denotes a complete break from the repealed Lancaster House Constitution, which relegated the right to a mere legislative right enjoying no direct constitutional protection. The placement of the right to collective job action in the declaration of rights is important also because the Constitution states that every natural and juristic person, all the three arms of the government, and all state agents at every level must respect, promote, protect and fulfil the rights and freedoms that it sets out.[12] This approach emphasises the horizontal and vertical applicability of the declaration of rights, reminding the relevant duty-bearers and other stakeholders of the importance of such rights.

The Constitution also instructs and guides the interpretation process of the right to collective job action and its constituent elements.[13] Any court or tribunal interpreting the declaration of rights must give full effect to the rights and freedoms therein.[14] This implies a delicate balancing of the right to collective job action with other fundamental rights and freedoms. The polymorphic nature, interdependence and interconnectedness of rights should be considered. Thus, collective job action can be used to address issues of health and safety in the workplace, increases in salaries and allowances, improved working conditions or the existence of a trade union, thus advancing causes which are established by other independent rights and freedoms in Chapter 4 of the Constitution. In so doing, constitutional values and principles must be considered.[15] Thus any interpretation which negates these values, principles and objectives ought to be challenged and removed from Zimbabwe's human rights and labour jurisprudence for want of compliance with the rules of interpretation. Values and objectives like labour and employment relations,[16] respect for human rights and freedoms, and respect for international law and the rule of law are important. Therefore, a teleological and value-coherent approach to collective job action should be embraced as the Constitution leaves no space for a value-free statutory construction.[17]

9 See generally Chapter 4 of the Constitution.
10 Hofisi, DT & Feltoe, G 'Playing Politics with the Judiciary and the Constitution' *Zimbabwe Electronic Law Journal* <http://www.zimlii.org> accessed 10 December 2022.
11 Kasuso, TG 'Constitutional Labour Rights: Judicial Interpretation of the Right to Fair Labour Practices in Zimbabwe' in Tsabora, J (ed) *The Judiciary and the Zimbabwean Constitution* (University of Zimbabwe Press, 2022) 187-188.
12 Sections 44 and 45 of the Constitution.
13 Section 46 of the Constitution.
14 Section 46(1)(a) of the Constitution.
15 Section 3 of the Constitution provides for values and principles while Chapter 2 stipulates national objectives.
16 Section 24 of the Constitution.
17 *Rattigan & Others v The Chief Immigration Officer & Others* 1994 (2) ZLR 54 (S).

It is submitted that the statutory construction of collective job action rights should be approached from a generous, value-laden and broader praxis. In addition, the Constitution is clear that the declaration of rights does not preclude any other rights which are recognised or can be conferred by law, provided that they are consistent with the Constitution. This avenue allows for the indirect constitutional protection of those other constituent elements of the right to collective job action which are not expressly provided for in either the Labour Act or the Constitution. The wording 'and other concerted actions' in section 65(3) of the Constitution can embrace collective job action like boycotts, go-slows, sit-ins and other actions falling within the ambit of concerted industrial action. Thus, a restrictive and formalistic interpretation is not only unacceptable in a civilised constitutional democracy like Zimbabwe but, for all intents and purposes, should be avoided.

It can therefore argue that the Constitution has introduced a new legal culture and is the foundational premise of legal reasoning because of its pervasive normative effect.[18] It entrenches the right to collective job action and makes it a human right. Such constitutionalisation provides a useful model for conceptualising how labour law should develop, while also enhancing the legitimacy of workers' demands for protection, giving credence to policymaking.[19] The Constitution is thus the cornerstone of labour rights discourse in Zimbabwe today and specifically the right to collective job action.

2.1 Limitation of the right to collective job action

The right to collective job action is not unlimited. It is imperative to recall that although the ILO Conventions allow for the limitation of collective job action in the case of essential and security services, much detail as to the limitations is left to national laws. The key issue is the impact of the wording of section 65(3) of the Constitution on the exercise of the right to collective job action. The express exclusion of members of security services presupposes that every other employee is entitled to the right to collective job action. However, this is not the case as the Labour Act, which is primarily enacted to give effect to section 65 of the Constitution, does not apply to state employees whose conditions of service are provided for by the Constitution.[20] Statutes like the Public Services Act [Chapter 16:04], which regulates members of the civil service, do not provide for the right to collective job action or any equivalent mechanism which is effective, inclusive and timely. This means that such employees must invoke the constitutional right directly. Madhuku opines that the position is not clear for certain appointments established in terms of the Constitution but whose conditions are not provided for therein.[21]

In addition to the internal limitations on the right to collective job action imposed by section 65(3) of the Constitution, there are external limitations which should accord with the general limitation provision in section 86 of the Constitution. Thus, the courts and all key institutions involved in various processes should ensure they do not unnecessarily

18 Moyo (note 6 above) 12.
19 Kasuso (note 11 above) 193.
20 Section 3 of the Labour Act.
21 Madhuku, L *Labour Law in Zimbabwe* (Friedrich Ebert Stiftung, 2015) 482.

stifle the exercise of the right to collective job action for malicious and unfounded reasons. It is important to ensure that the enjoyment of collective job action rights does not interfere with or infringe other rights and freedoms equally guaranteed and protected by the Constitution. The Constitution provides as follows:

> The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including …[22]

The term 'law of general application' means the existence of valid legal authority in the form of a statute or any other valid law upon which a limitation can be based and justified.[23] In *Majome v ZBC & Others* the court stated that there can be no justification of conduct for which no legal authorisation or rule of law exists.[24] A long line of cases has successively developed Zimbabwean and South African jurisprudence on this matter.[25] The plumb line of fairness, reasonability, necessity and justifiability in a democratic society has equally been dissected in many judicial pronouncements.[26] This threshold takes cognisance of the uniqueness of the circumstances of each case and extrapolates it to the values underpinning a democratic society. As stated in *Biti & Another v Minister of Home Affairs*,[27] determining what is a democratic society is a value judgment. Any legislative limitation imposed by the Labour Act or any law on the right to collective job action should fall squarely within section 86 of the Constitution.

2.2 Definition and scope of collective job action in the Labour Act

Part XIII of the Labour Act provides in detail for all matters concerning collective job action.[28] The consistent use of the term 'collective job action' throughout the Labour Act implies that Part XIII applies to all aspects of collective job action falling within the ambit of the definition of the term. Section 2 of the Labour Act provides as follows:

> Collective job action means an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment, and includes a strike, boycott, lockout, sit-in and sit-out, or such concerted action.[29]

22 Section 86(2) of the Constitution.
23 *Democratic Assembly for Restoration and Empowerment (DARE) & Others v Saunyama & Others* HH-589-2016.
24 *Majome v ZBC* (2016) ZWCC para 21.
25 See *Wekare v The State & Others* CCZ-9-2016; *August v Electoral Commission & Others* 1999 (3) SA 1 (CC).
26 *See Zimbabwe Development Party & Another v President of the Republic of Zimbabwe & Others* CCZ3-18. See also *In re Munhumeso & Others* 1994 (1) ZLR 49 (S).
27 *Biti & Another v Minister of Home Affairs & Another* 2002 (1) ZLR 197 (S).
28 Sections 102-112 of the Labour Act.
29 Section 2 of the Labour Act.

This definition is a bundle of several entitlements and concepts that need to be briefly unpacked. Firstly, the conduct should constitute an industrial action whose effect is to cause the disruption or stoppage of work.[30] Secondly, the collective job action should be directed towards a demand emanating from the subsistence of an employment relationship.[31] The third tenet is that the conduct should be coming from and directed against a party to the employment relationship.[32] The last component is that it should be concerted action.[33]

The definition of collective job action in section 2 of the Labour Act lists the right to strike as the first component. The second item is a boycott, which denotes the concerted refusal of employees or a union to deal with an employer.[34] The third aspect is a lock-out as defined in the Act.[35] Here the employer withdraws the opportunity for the workers to work by locking them out of the premises. The fourth component is sit-ins. The open-ended text 'and other concerted action' in the definition means that the scope of collective job action is unlimited. What is important is the compliance of that particular conduct with the four aspects of industrial action listed above.

2.3 The consequences of collective job action in Zimbabwe

The consequences of lawful collective job action which complies with the provisions of section 104 of the Labour Act are clear. The first one is that employees participating in a strike, boycott, sit-in or any form of collective job action are not entitled to the payment of wages and salaries for the period for which they were engaged in collective job action. This approach is based on the common-law principle of 'no work no pay'.[36] On a positive note, employees are protected from discipline and dismissal while workers' committees and trade unions are given immunity from civil liability or any proceedings emanating from the collective job action.[37] This immunity is lost only when wilful and deliberate acts of participants in the collective action destroy property, which is common with strikes.[38] Protection is also offered to employees where their employer locks them out, in that the locked-out employees cannot be replaced by scab labour.[39]

Participants in unlawful collective job action are subject to an array of criminal and civil penalties. In *Lancashire Steel (Pvt) Ltd v Mandevana & Others*, the court reiterated that participation in unlawful collective job action amounts to a material breach of the employment contract and justifies dismissal of the employee.[40] It should, however, be

30 *ZB Financial Holdings v Manyarare* SC 3/12, *Wholesale Centre (Pvt) Ltd v Mehlo & Others* 1992 (1) ZLR 376 (H).
31 *ZUPCO v Mabande & Another* 1998 (2) ZLR 150 (S).
32 *Rutunga & Others v Chiredzi Town Council & Another* 2003 (1) ZLR 197 (S).
33 *Tsingano & Others v Munchville Investments (Pvt) Ltd t/a Bernstern Clothing* SC 163/98.
34 Lesnick, H 'The Gravamen of Secondary Boycott' (1962) 62 *Columbian Law Review* 1364.
35 Section 102 of the Labour Act.
36 *National Railways of Zimbabwe v Zimbabwe Railways Artisans Union & Others* 2005 (1) ZLR 314 (S).
37 Section 108(2) of the Labour Act.
38 *Communications and Allied Workers Union of Zimbabwe v Tel One (Pvt) Ltd* 2005 (2) ZLR 200 (H); *Tel One (Pvt) Ltd v Communications and Allied Services Workers Union Zimbabwe* 2006 (2) ZLR 136 (S).
39 Section 108(5) of the Labour Act.
40 *Lancashire Steel (Pvt) Ltd v Mandevana & Others* SC 29/95.

noted that the dismissal must comply with a registered code of conduct or, in its absence, the national employment code of conduct. Otherwise, dismissals made in clear defiance of due process can be lawfully challenged as unfair dismissals in terms of section 12B(1) of the Labour Act. The persistent and recurrent summary dismissals of nurses, doctors and teachers by the Zimbabwean government ought to be scrutinised through this lens. Often, employers use the common-law selective dismissals of ringleaders and persons who are instrumental in the occurrence of collective job action.[41] It can be argued that such a selective approach affronts the cardinal principle of the equal protection of the law.

There are heavy criminal sanctions for an unlawful strike. The Labour Act casts a wider net to cover workers' committees, trade unions, employers' organisations or federations as responsible persons who should bear criminal liability. This is extended to every official or office-bearer of the responsible person. Several offences are listed in section 109 of the Labour Act.[42] The Labour Act creates further offences in section 112, including disobeying a show cause order, disposal or cessation order. Despite such measures being justified as mechanisms to combat unlawful collective action, they are highly susceptible to manipulation and being used against genuine employee interests. The discretion afforded to the Minister is too wide. A court that has convicted a responsible person has powers to also award damages to recompense the affected person who incurs loss of property or suffers bodily injury.[43] Section 109(6) apportions standalone civil liability to the responsible persons who bear joint and several liability.[44] Section 109(3) of the Labour Act also empowers the Minister to suspend trade unions from collecting subscriptions through check-off schemes if there is reasonable suspicion of participation in unlawful collective job action.

The stiff criminal and civil penalties provided for by the Labour Act are open to criticism. Firstly, the scope of offences is too broad and too vague to define and delimit, especially where there are no express legislative or judicial guidelines to assist in the interpretation process. In addition, the offences affect people or groups who are not direct parties to the employment relationship. It is further submitted that awarding damages and imposing long prison sentences deter people from exercising and enjoying the right to collective action. It allows for widespread victimisation and suppression of the civic space within which the right to collective job action should be exercised. This position is worsened by the manner in which the Labour Act provides that the test in the Public Order and Security Act[45] should be used to determine whether the responsible person realised

41 *Ibid*.

42 Section 109(1) of the Labour Act provides that any person 'who advises, encourages, threatens, incites, commands, aids, procures, organizes or engages in any collective action … shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.'

43 Section 109(7) of the Labour Act.

44 Liability under section 109(6) of the Labour Act is 'for any injury to or death of a person, loss or damage of property or other economic loss, including the perishing of goods caused by the employees' absence from work, or caused by or arising out of or occurring during an unlawful collective job action.'

45 [Chapter 11:17] (POSA).

the real risk or possibility that collective job action would occur.[46] Even though POSA has now been repealed, this reference can be construed as referring to the Maintenance of Peace and Order Act,[47] also accused of extensively stifling the enjoyment of most civil rights and freedoms. Such reference has a deterrent effect and is capable of demonising and sterilising collective job action rights. Gwisai, Mucheche and Matsikidze submit that the provisions are draconian in nature and act as a disincentive for employees to exercise their right to collective job action.[48]

2.4 Juxtaposing the Constitution and the Labour Act on collective job action

To appreciate the disparity between the Constitution and the Labour Act, it is germane to briefly consider the timelines of the two laws. The Labour Act was enacted in 1985 and was amended several times under the Lancaster House Constitution. As earlier stated, the Lancaster Constitution did not provide for the right to collective job action even on the basis of a broad, purposive or generous interpretation, save to the extent it provided for the freedoms of association and assembly.[49] The 2013 Constitution marked a clear departure from the erstwhile Westminster model Constitution, by constitutionalising labour rights and in particular the right to collective job action. It is argued that, having learnt from the period before 2013, the Constitution drafters ought to have embedded several constitutional protections for the right to collective job action, which would have broadly informed the legislation giving effect to the constitutional right. The 2013 Constitution was an opportunity to perfect the right to collective job action and other labour rights so as to cure historical and foreseeable defects.

The Labour Act is the law envisaged in section 65(3) of the Constitution to give life to labour rights and freedoms. As of 2022, the Labour Act had been amended twice under the purview of the 2013 Constitution, in 2015 and in 2016. This was also a timely opportunity to comprehensively align the Labour Act with the Constitution and synchronise legal disconnects between the two laws. Unfortunately, some issues remain unresolved to date, leaving the judiciary to address these with statutory construction. Some examples of unevenness between the Constitution and the Labour Act with regard to collective job action are discussed below.

By excluding members of the security service, the Constitution expressly gives 'every person' the right to form or join trade unions or employers' or employees' organisations, and to participate in the lawful activities of such organisations. In addition, the right to participate in collective job action is given to 'every employee'.[50] Given the direct

46 Section 109(2) of the Labour Act.
47 [Chapter 11:23] (MOPA).
48 Gwisai, M, Mucheche, C & Matsikidze, R 'The Right to Strike in the Context of the 2013 Context and International Law' (2018) *University of Zimbabwe Law Journal* 68.
49 Kasuso, TG & Tsabora, J 'Reflections on the Constitutionalising of Individual Labour Law and Labour Rights in Zimbabwe' (2017) 48 *Industrial Law Journal* 56.
50 Section 65(3) of the Constitution.

relationship between the right to organise and collective job action,[51] it is surprising to see that both employers and employees can form or join or participate in the lawful activities of such organisations, but at the same time only employees have the right to participate in collective job action. The seeming absurdity is that employers can join employers' organisations while trade unions can join confederations, but they do not have the right to participate in collective job action of these organisations because they are outside the definition of 'every employee'. Such a gap indicates the absence of the direct constitutional protection of an employer's right to collective job action. The uncertainty is worsened by the Labour Act, which provides that the right to collective job action includes the right to 'lock-out', a right which only employers can exercise.[52] This means that lock-out remains only a statutory and not a constitutional right.

The term 'every employee' also presupposes that the right to collective job action is extended to anyone who is not a member of the security services or essential services. This means that even state employees who are not covered by the Labour Act but rather by the Public Service Act have such a right. However, there is no legislation giving effect to the right of state employees to engage in collective job action like strikes, and they have to invoke and rely on the constitutional right. The right to collective job action is only available for employer–employee related issues, covering only disputes of interest after an unsuccessful bargaining and dispute settlement process.[53] Madhuku contends that the constitutional right to strike is severely limited by the Labour Act and lists several restrictions.[54]

In listing the constituent elements of the right to collective job action, the Constitution includes the right to strike, sit-in and withdraw labour. The Labour Act lists the right to strike, boycott, lock-out, sit-in and sit-out. Thus, where the Constitution provides for the right to withdraw labour, the Labour Act does not include this in its wording. Instead, the Labour Act introduces boycott, sit-out and lock-out, which are not mentioned in the Constitution. Lock-out is separately defined in the Labour Act as including one or more acts or omissions listed thereunder.[55] Both laws provide that the right to collective job action includes any other concerted action. This means any other collective action that is industrial action, between parties to the employment relationship and concerned with resolving an issue arising out of the employment contract. Thus, the list of what potentially constitutes collective job action is endless.

The Constitution indicates that a law may limit the right to collective job action in order to maintain essential services. This limitation is envisaged to be in conformity with the general limitation provisions in section 86 of the Constitution, as discussed above. The Labour Act provides for disputes in essential services to be resolved by compulsory

51 Even in international law, the right to strike is derived from the ILO Conventions on freedom of association, mainly the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

52 Section 2 of the Labour Act.

53 A certificate of no settlement is issued in terms of section 104(2)(b) of the Labour Act.

54 Madhuku (note 21 above) 441.

55 Section 102 of the Labour Act.

arbitration and it allows for immediate collective job action in the case of emergencies like occupational hazards.[56] There is no direct constitutional protection to safeguard the rights of employees when compulsory arbitration or the designation of essential services act as a clear impediment to collective job action in the face of a genuine and imminent threat, as posed by the Covid-19 pandemic, for example. For the security services, where the right to collective job action is precluded, it is unclear how employees can seek recourse if internal organisational mechanisms fail to act in good faith or are captured by the government as the employer.[57]

There are a number of differences between the Constitution and the Labour Act as regards the scope of the right to collective job action and its limitations. It may be argued that the Labour Act excessively limits, stifles and disincentives the right to participate in collective job action. On the other hand, the Constitution has a number of deficiencies in its endeavour to protect the right to collective job action. This is further demonstrated below, where other jurisdictions are examined.

3. Collective job action in selected comparative jurisdictions

This part analyses constitutional and statutory protection of the right to collective job action in selected jurisdictions, namely South Africa, Kenya and Australia. It interrogates the relevant constitutional and legislative provisions, institutional frameworks and selected court decisions from these countries. The constituent elements of the right to collective job action are discussed, together with enforcement mechanisms and limitations of the right in these countries. From the comparative analysis, the study draws lessons for Zimbabwe and makes some recommendations.

3.1 South Africa

3.1.1 The right to strike in the South African Constitution

The South African Constitution[58] provides for labour relations from which the right to strike (the equivalent of collective job action in Zimbabwe) is derived.[59] South Africa has constitutionalised labour rights, which means they can be enforced, interpreted and limited like any other fundamental constitutional rights and freedoms. The location of labour rights in the Bill of Rights imposes an obligation on the executive, the legislature, the judiciary and every natural or juristic person to respect, promote and protect the rights.[60] As in many jurisdictions, labour rights are largely matters between private persons, hence the rights are largely applicable horizontally. Labour practices, trade unions and employers' organisations, collective bargaining and strikes all relate to the mediation of private relationships on an individual or a collective basis.[61] Such mainly private conduct

56 Sections 93(5)(a) and 98 of the Labour Act provide for compulsory arbitration while section 104(4) of the Labour Act provides for collective job action in the case of occupational hazards.
57 Each security service department has a special commission to deal with employment issues.
58 Constitution of the Republic of South Africa, 1996.
59 Section 23 of the Constitution of South Africa.
60 Section 8(2) of the Constitution of South Africa.
61 Cooper, C 'Labour Relations' in Woolman, S & Bishop, M (eds) *Constitutional Law of South Africa* (Juta & Co, 2013) 53-3.

between employers and employees leaves little space for constitutional contestation in labour matters.[62]

In South Africa, everyone has the right to fair labour practices, while particular rights are afforded specifically for every worker.[63] In contrast, the Zimbabwean Constitution accords the right to collective job action to every employee. The constitutional use and scope of the term 'every worker' was explained in *National Defence Union v Minister of Defence & Another*.[64] The court's reasoning is appealing and highly instructive. The term 'worker' is broader than 'employee' and the two terms are not synonymous. Workers should thus be generously interpreted to include not only those persons who are formal employees in the strict sense of having a written employment contract, but also those in various typical work relationships, including those dependent and subordinate workers who might currently lack protection under the existing statutory framework. Cooper also notes that workers include those wrongfully treated as independent contractors, thus depriving them of the constitutional and statutory protection of labour rights afforded to workers, when in fact they are not such independent contractors.[65]

With regard to collective job action, the Constitution of South Africa expressly mentions only the right to strike as a right which is accorded to every worker.[66] It means other collective job action rights can be derived from legislative provisions or through a generous interpretation of the activities of trade unions which workers can participate in. This differs from the Zimbabwean Constitution which provides for several types of collective job action in section 65(3). It should be noted that the interim Constitution of South Africa[67] provided for the right to strike, but it curtailed the right as it restricted it to the confines of the currency of a collective bargaining agreement.[68] In departing from such a position, the Constitution of South Africa omitted the specific purposive context of collective bargaining, thus broadening the scope of strikes. The effect of such a deletion of the purpose was to embrace strikes or other forms of collective job action for social or economic advancement as envisioned by the ILO standards.[69] It should also be noted that the Constitution of South Africa removed the treatment of a lock-out as the employer's

62 *Ibid*.
63 Section 23(2) of the Constitution of South Africa.
64 *National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) para 22. The Court was called on to decide whether prohibiting members of the defence forces from forming and joining trade unions was an infringement of the right to freedom of association which applies to workers and employers.
65 Cooper (note 61 above) 53-4.
66 *Ibid*, where it is noted that the right to strike (with various qualifications) is enshrined in the constitutions of many countries, including Argentina, Bolivia, Chile, Colombia, Cyprus, Ecuador, Benin and France, among others.
67 Act 200 of 1993 (interim Constitution of South Africa).
68 Section 27(4) of the interim Constitution.
69 Gernigon, B, Odero, A & Guido, H 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 445. See generally the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

equivalent for striking employees, as was provided for in the interim Constitution. On that note, the Constitution of South Africa accords with ILO Convention No. 87.[70]

The Constitution of South Africa under 'Labour Relations' provides for the right of employers to join employers' organisations, which in turn can join federations, and to participate in the activities of such organisations. From the constitutional perspective, that open provision allows for collective job action like lock-outs to be effected by employers or employers' organisations. This position is substantially similar to that in Zimbabwe. Section 23 of the Constitution of South Africa does not expressly preclude members of the security services from enjoying collective job action rights, as is the case in Zimbabwe. Thus, as decided in *National Defence Union v Minister of Defence & Another*,[71] members of the South African Defence Force and the Police Service enjoy certain labour rights, like having their own trade unions and federations, and they can participate in their activities. However, their constitutional right to strike may justifiably be limited.[72]

An examination of the interpretation, enforcement and limitation of the right to collective job action in South Africa is germane to this paper. In interpreting collective job action rights, the South African courts are guided by the provisions of section 7 of the Constitution of South Africa, which restates that the Bill of Rights is a cornerstone of democracy.[73] Thus, the State must protect, promote and respect all the rights and limit them only as is consistent with constitutional limitation provisions. The Constitution of South Africa also states that all constructions of rights should promote the values underlying an open and democratic society based on openness, human dignity and freedom.[74] International law and foreign law are thus recognised to the extent that they conform to the Constitution of South Africa.

3.1.2 The Labour Relations Act 66 of 1995

The Labour Relations Act (LRA) gives effect to the constitutional right to strike. The long title specifies some objectives of the Act. These include regulating the right to strike and recourse to lock-outs, in conformity with the Constitution of South Africa. In addition, the LRA seeks to give effect to the public international obligations of South Africa with regard to labour relations. The LRA expressly mentions strikes and lock-outs as some of the industrial actions, while picketing is provided for as a complementary activity to strike action. Various provisions of the LRA are worth highlighting.

Firstly, the right to strike and recourse to lock-out are provided for in Chapter IV of the LRA. In section 213, the LRA provides a lengthy definition of a strike.[75] It can be observed from the definition that other constituent elements of industrial action like go-slows are covered by the word 'retardation' of work. Section 64, in particular, provides that every

70 Articles 2, 3 and 5 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (ratified by South Africa on 19 February 1996).
71 *National Defence Union* case para 27.
72 See Amendment to the General Regulations for the South African National Defence Force and Reserve, section 6.
73 Hennie, PPL *Injustice, Violence, and Peace: The Case of South Africa* (Rodopi, 1997) 195-208.
74 Section 39 of the Constitution of South Africa.
75 Section 213 of the LRA.

employee has the right to strike.[76] There is a difference in wording as to who has the right to strike. The Constitution of South Africa accords the right to every worker while the LRA gives it to every employee. The interpretative debates and differences between the use of the term 'employee' and the term 'worker' have been discussed above. It can therefore be argued that the LRA restricts the right to strike, compared to the Constitution of South Africa, which is expansive and generous.

The LRA prescribes numerous aspects which should be complied with in order to qualify for the right to strike or lock-out. These include a certificate of no settlement, the lapse of the 30-day period, adequate timelines for notice, and notification of all concerned parties.[77] Unlike Zimbabwe, South Africa recognises secondary strikes in section 66 of the LRA. There are also a number of procedural and substantive issues concerning the exercise of the right to strike and lock-out. There are no criminal offences and sanctions associated with strikes in South Africa, as is the case in Zimbabwe. Such a stance promotes the exercise and enjoyment of the right.

Secondly, every employer has a right to lock-out, in response to striking employees.[78] A lock-out is defined in the LRA.[79] The right to lock-out provided for in the LRA was equally provided as a recourse to employee strikes in the interim Constitution of South Africa, but both the right and its perceived equivalence to a strike were removed by the Constitution of South Africa in 1996. Thus, currently, the right to lock-out is expressly recognised as a legislative right enjoying constitutional protection only to the extent that it can be construed as consistent with being a recognised activity of an employees' or employers' organisation. That would depend on the interpretation afforded by the courts to determine if the right to lock-out can survive constitutional validity. Cooper observes that the general absence of a constitutional right or recourse to a lock-out reflects a worldwide trend.[80] In opposing the right to lock-out, she argues that an employee's right or freedom to strike is already balanced by the employer's right of property and its prerogative to hire and fire at will. Rycroft and Jordan argue that it is the employer's power to act unilaterally that is the true equivalent of the right to strike. Granting the employer an additional economic weapon in the form of the lock-out would upset the delicate balance created by the recognition of the right or freedom to strike.[81]

The Constitutional Court of South Africa had an opportunity to dissect the use of a lock-out as recourse to striking employees in its first *Certification* judgment.[82] The court rejected inserting the right to lock-out into the Bill of Rights, arguing that collective bargaining and strikes were important shields through which employees advance and defend themselves against the greater power of their employers. On the other hand, employers have a variety of remedies at their disposal to disempower workers,

76 Section 213 of the LRA.
77 Section 64 of the LRA.
78 Section 64(1) of the LRA.
79 Section 213 of the LRA.
80 Cooper (note 61 above) 53-57.
81 Rycroft, AJ & Jordan, B *A Guide to South African Labour Law* (2nd ed, Juta & Co, 1992) 141.
82 *Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa* 1996(4) SA 744 (CC) (first *Certification* judgment) paras 64-68.

including dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace.[83] Such a bold stance functions to expressly exclude the right to lock-out from the Constitution of South Africa and no reasonable interpretation of section 23 of the Constitution should read in the right to lock-out. Such rejection need not be construed as declaring the right to lock-out to be unconstitutional. It can thus be said that the right to lock-out does not enjoy direct constitutional protection in South Africa.

Thirdly, protest action covers several activities.[84] The LRA provides for protest action to promote or defend the socio-economic interests of workers.[85] This provision affords employees an alternative avenue to advance their economic and social interests which would otherwise not be acceptable under strike action. Zimbabwe has no such provision as collective job action is restricted to matters emanating from the contract of employment. Socio-economic interests can be advanced through a generous interpretation of labour rights in section 65 of the Zimbabwean Constitution. The right to picket is related to protesting.[86] Generally, this activity is regarded as complementary to strikes. The essence is to obtain the sympathy of other workers or the general public in the cause of the industrial action. With picketing, rules can be drafted by both parties and it can be done inside or outside the employer's premises. Picketing does not enjoy express constitutional protection in both South Africa and Zimbabwe.

The LRA defines essential services[87] in section 213. The definition in the LRA draws heavily on that provided in the ILO Conventions. The South African Police Service and the Parliamentary Service constitute essential services. There is also an Essential Services Committee which manages all issues relating to essential services, including designation and challenges thereof.[88] For essential services, industrial disputes are resolved through simple, impartial and accessible conciliatory and arbitration processes. On this it is important to draw comparison with Zimbabwe's Labour Act, which does not provide for an essential services committee. Zimbabwe gives the Minister very wide discretion to designate essential services as he or she wishes, and the Minister can choose whether to appoint an advisory council on essential services.[89] In addition, there is no requirement for technical expertise in labour matters required for members of the advisory council, unlike in South Africa, which lays down these prerequisites. The establishment of a permanent committee is important to provide checks and balances on the Minister, who can potentially abuse his or her wide discretionary powers. Section 103 of the Labour Act only provides for reactionary measures to challenge the designation of a service as an essential one, without giving many proactive measures. The term 'essential services'

83 *Ibid*.
84 Section 213 of the LRA.
85 Section 77 of the LRA.
86 Section 69 of the LRA.
87 'Essential service' means – (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Service.
88 Section 70 of the LRA.
89 Section 102 (definition of essential services as read with section 19 of the Labour Act).

should thus be narrowly construed. If left unchecked, the designation of essential services arbitrarily removes the right to collective job action.

3.2 Kenya

The Republic of Kenya introduced a new Constitution in 2010.[90] The preamble outlines the need to establish a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. This value system is important to the extent that it influences the interpretation of the Constitution and particularly the Bill of Rights, where the right to collective job action appears.[91] The Constitution of Kenya states that a court shall adopt the interpretation which favours the enforcement of a fundamental right or freedom. Article 4 of the Constitution of Kenya provides for the Bill of Rights. All enforcement and limitation of these fundamental rights and freedoms should be as provided for in the Constitution.[92]

The Constitution of Kenya provides for labour relations in Article 41. Only the right to strike is expressly mentioned as a constitutional right in Article 41(2)(d) of the Constitution. Any other constituent of collective job action can be inferred from a broad interpretation of every worker's right to participate in the activities and programmes of a trade union. The same applies to employers, who can participate in the activities of employers' organisations, to the extent that such organisations can initiate collective job action.[93] The old Kenyan Constitution did not provide for any specific right to collective job action, but only for the right of trade unions, freedom of assembly and association, from which collective job action could be derived. The constitutionalisation of the right to strike is thus a positive development which gives the right constitutional protection like any other fundamental right or freedom.[94] The wording and scope of the constitutional protection of the right to collective job action in the Kenyan Constitution is substantially similar to that of South Africa discussed above. The key difference from Zimbabwe is that the Zimbabwean Constitution lists several elements under collective job action, including strikes, sit-ins and the withdrawal of labour.

The Labour Relations Act of Kenya (LRA, 2007) gives effect to the provisions of Article 41 of the Constitution. The terms 'strike' and 'lock-out' are both defined in the LRA, 2007 with meanings materially similar to the terms used in Zimbabwe and South Africa. Whereas in Zimbabwe the Labour Court adjudicates matters relating to collective job action, in Kenya the Employment and Labour Relations Court was established pursuant to Article 162(b) of the Constitution. In *The County Government of Kakamega & Another v Kenya National Union of Nurses*, the court reiterated that it has jurisdiction to determine

90 Constitution of Kenya, 2010.

91 Yash, G 'Decreeing and Establishing a Constitutional Order: Challenges facing Kenya' <https://www.law.ox.ac.uk> accessed 21 December 2022.

92 Article 22 of the Constitution of Kenya provides for enforcement while Article 24 provides for the limitation of rights.

93 Article 41(3)(f) of the Constitution of Kenya.

94 Kabiru, MW 'Critical Analysis of the Right to Strike in Kenya: The Balancing Act between the Constitutional Right to Strike and the Constitutional Right to Economic Social Rights' (unpublished PhD thesis, Riara University School of Law, 2018) 36.

industrial disputes, including lock-outs and strikes, as provided for in the LRA, 2007.[95] Part X of the LRA, 2007 provides for strikes and lock-outs. The wording of the statute treats a lock-out as an employer's response to striking employees.[96] The debates about lock-outs have been discussed above under South African law. Similarly, the employer's right to lock-out in Zimbabwe is a statutory right. Statutory protections enjoyed by workers include immunity from dismissal or discipline for participating in lawful collective job action, and the dismissal of an employee lawfully engaged in collective action amounts to an unfair labour practice.[97] Kenya, like South Africa, does not impose criminal sanctions for merely participating in unauthorised collective job action like a prohibited strike or lock-out.[98] The person is only disciplined or loses certain benefits. In sharp contrast, Zimbabwe has stiff criminal penalties in the form of fines and imprisonment.

As to the minute detail of limitation and procedural issues, nothing is unique in Kenya. The right to strike or lock-out is also not available for essential services. Here there is a striking similarity with Zimbabwe on how the Minister may designate essential services. There are, however, two key differences. Firstly, the LRA, 2007 provides that where a strike or lock-out has persisted so as to endanger public life or health, the Minister may designate any other service as an essential service.[99] This section was explained in *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & Others.*[100] Here the rationale is to mitigate looming danger to the public, while not using the designation of essential services as a tool to frustrate collective job action without offering viable alternative mechanisms to resolve the dispute. Secondly, any dispute emanating from an essential service is resolved by adjudication in the Industrial Court.[101] This process seems expedient, compared to Zimbabwe which provides for arbitration processes which are likely to prolong the dispute, offending the need for expediency and efficiency in alternative methods of dispute resolution where the right to collective job action is restricted or totally curtailed.[102]

3.3 Australia

Australia is a federal state, whose federal Constitution of 1908, as amended, does not expressly provide for the right to strike.[103] The Fair Work Act provides the statutory framework for the right to strike in Australia.[104] It is imperative to note that this law does not apply to state employees, who are governed by state legislation and industrial instruments.

95 *The County Government of Kakamega v Kenya National Union of Nurses* [ELRC, Kisumu] 13 of 2016.
96 Article 76 of the LRA, 2007.
97 Article 46 of the LRA, 2007.
98 Article 80(1) of the LRA, 2007.
99 Article 81(2)(b) of the LRA, 2007.
100 *Joseph O Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & Another* [2017] eKLR.
101 Article 81(4) of the LRA, 2007.
102 Compulsory arbitration provided for in section 98 of the Labour Act is used to resolve disputes in essential services.
103 Neilson, A 'The Right to Strike in Australia' (2009) 16(4) *International Centre for Trade Union Rights* 6-7.
104 Act 28 of 2009.

The statute reflects the law of strikes at both the federal and state levels. This statute defines industrial action broadly to include strikes, lock-outs, work to rule, slow- downs and refusal to work overtime.[105] Strikes are only permissible during the period of negotiations concerning a proposed enterprise agreement. This means that a strike is restricted only to bargaining issues, hence for any industrial action outside the scope of bargaining, unions can be held liable and face dire consequences.[106] Such a restriction offends the possible use of a strike to advance other social and economic interests of workers. The statute also establishes a Fair Work Commission with wide discretionary powers to interfere with the exercise and enjoyment of the right to strike.

This Commission has powers to make orders which prohibit unprotected industrial action.[107] What is disturbing is its capacity to suspend protected or authorised industrial action if it considers that there is a threat to the life, safety, health or welfare of the population or part of it, or the Australian economy or an important part of it.[108] Such an order of suspension can be made by the Commission on its instance, or upon application by the Minister or other person so listed. In addition, any breach, however trivial, of the provisions of a collective bargaining agreement is met with the harsh penalty of rendering the whole industrial action illegal. The wording of section 424 of the Fair Work Act provides for a wide range of grounds, which are excessively broad and highly subjective. It is difficult to determine what constitutes the welfare of the population or a part of it or what can be said to affect the economy or part of it.[109] Such wording makes the statutory provision fertile ground for thwarting reasonable industrial action. The section is couched in broad terms and has little guide for its interpretation, thus heavily burdening the courts if they are to decide such a matter.

A look at a few cases decided by the Australian courts is important to understand the labour rights jurisprudence. Such an interrogation of case law serves to emphatically demonstrate the role of the courts, administrative institutions and the legislature in undermining collective job action rights. In *Esso Australia Pty Ltd v Australian Workers Union*, the court had to interpret section 413(5) of the Fair Work Act, which makes industrial action illegal for any breach of the terms of the bargaining agreement.[110] The lower courts held that the section meant that if the union rectified its breach, or was not in breach at the time it sought to take future industrial action, it could take protected

105 Section 19 of the Fair Work Act.
106 Section 408 of the Fair Work Act.
107 Section 418 of the Fair Work Act.
108 Section 424 of the Fair Work Act.
109 Jennings, K & Western, G 'A Right to Strike?' (1997) 4(4) *Nursing Ethics* 277-282.
110 It reads as follows: 'Compliance with orders:
(5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:
(a) if the person organizing or engaging in the industrial action is a bargaining representative for the agreement – the bargaining representative;
(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement – the employee and the bargaining representative of the employee.'

industrial action again.[111] Thus, any breach can be rectified and any previous breach cannot be relied upon as a ground for refusing to allow a protected industrial action to proceed.

However, on appeal, the High Court rejected the findings of the court *a quo*. It concluded that a bargaining representative could not meet the prerequisites to take protected industrial action if, at any point during negotiations for the agreement, they had breached any order of the Fair Work Commission or a court.

The court held that the right to take protected industrial action was a privilege. Therefore, the majority observed that the apparent purpose of the provision was to ensure that persons who have shown that they cannot be trusted to comply with orders relating to the agreement or matters arising from bargaining for the agreement, are not to be trusted with the immunity afforded in relation to protected industrial action.[112] It can be argued that regarding industrial action as a privilege is erroneous in law. At least, the court should have considered it as a statutory right capable of limitation in reasonable and justifiable circumstances. This finding effectively rules out protected industrial action for employees, regardless of whether the breach is minor, inadvertent or merely technical. Lawful industrial action is prohibited until bargaining commences for a subsequent agreement. Giving a dissenting judgment in the High Court, Gageler J observed that the approach created industrial outlaws, and was not consonant with a statutory scheme designed to be fair, flexible and efficient.[113] He reiterated that requiring strict compliance with all orders, on pain of loss of access to protected industrial action, has the effect in practice of further juridifying a system which should be flexible enough to accommodate the natural ebb and flow of industrial disputation that accompanies collective bargaining. It restricts access to the right to strike as a punishment for past transgressions, however minor.

The second decision with profound implications for access to the right to strike in Australia is *Sydney Trains v Railway, Tram & Bus Industry Union (RTBU)*.[114] The RTBU notified the employer of protected industrial action in the form of indefinite overtime bans, and a 24-hour work stoppage by its railway members. The Fair Work Commission suspended the industrial action, holding that such action could affect the economy, cause inconvenience to commuters, and would cause traffic jams if there were no trains, thus endangering public welfare, as provided for in section 424 of the Fair Work Act. Such a finding by the court defeats the whole purpose of collective job action which is to pressurise an employer or employee to concede to an employment demand. It is fear of the impending inconvenience and loss of business which can compel the employer to act, thus a finding that such an industrial action violated public welfare was misplaced, especially given the availability of alternative modes of transport for public use.[115] The court relied on precedent in *Monash University v NTEU* which concerned protected industrial action

111 *Esso v AWU* (2015) 253 IR 304; *Esso v AWU* (2016) 245 FCR 39.
112 *Ibid* at 34.
113 *Ibid* at 36.
114 *Sydney Trains v Australian Rail, Tram & Bus Industry Union (RTBU)* [2018] FWC 632.
115 Cooper, L 'The Right to Strike and Organise in Australia' <https://search.informit.org> accessed 22 December 2022.

by university lecturers.[116] The action was suspended because it was held that witholding exam results endangered the welfare of university students. Suspension of the action for two weeks meant that all results were released, and the impact of the strike was undermined. Here, it can be argued that the Commission failed to realise that lecturers do not constitute an essential service, so the withdrawal of their labour cannot endanger public welfare. The decision therefore failed to differentiate and reach a balance between the public interest and employees' right to collective job action.

There is no direct constitutional protection of the right to strike in Australia, unlike in Zimbabwe. The existing Australian statutory framework provides for the right to strike. However, this right is severely affected by draconian procedural and substantive requirements for the pursuit of industrial action. Of particular importance are the notorious sections 418 and 424 of the Fair Work Act, which lay down unrestricted grounds upon which collective action can be prohibited. This is coupled with the wide discretionary powers given to the Fair Work Commission to prohibit unprotected industrial action and to stop protected industrial action when it deems it fit to do so. The Australian courts have further shrunk the democratic space within which collective job action should be enjoyed by their interpretation of the Fair Work Act. Decisions like *Esso Australia Pty Ltd v Australian Workers Union* and *Sydney Trains v Railway, Tram & Bus Industry Union* and *Monash University v NTEU*, discussed above, are highly instructive. They provide a rich lesson for Zimbabwe on how various entities can work towards the progressive erosion of collective job action rights in a country. They reflect, firstly, the need for the legislature to protect, promote and enhance the right to collective job action through legislative measures. Legislation can be used as a tool to undermine and suffocate industrial action in a country, as in Australia, which makes it impossible to easily engage in industrial action. Secondly, the role of the courts to defend, enforce and protect the right to strike is demonstrated. A restrictive interpretation of the right to strike is prejudicial and offends the spirit of democratic and open societies. Thirdly, the need for independent, efficient, impartial and objective institutions in a country is apparent.[117] The Fair Work Commission, as a regulatory and expert body, is vested with wide discretionary powers, which it exercises in a manner that is prejudicial to the genuine need to advance employment causes through industrial action. It is concluded that where there is no costitutional protection of the right to collective job action, worsened by a draconian legislative framework, then democracy and collective job action in the workplace remain a dream.

4. Conclusion

The article has examined the right to collective job action in international law and in Zimbabwe. It compared Zimbabwe with South Africa, Kenya and Australia. It unpacked the constitutional protections and legislative framework providing for the right to

116 *Monash University v NTEU* [2013] FWCFB 5982.

117 Runciman, C 'The Double-Edged Sword of Institutional Power: COSATU, Neo-Liberalisation and the Right to Strike' <https://doi.org/10.15173/glj.v1Oi2.3585> accessed 22 December 2022.

collective job action and its constituent elements. The study also discussed the role of various institutions in the protection, promotion and enforcement of the right to collective job action. The article established that Zimbabwe is lagging behind in the constitutional and statutory protection of the right to collective job action. Several substantive and procedural limitations, coupled with criminal and civil sanctions on striking employees, practically remove the right to collective job action in Zimbabwe. In addition, limitations on the right to collective job action in the Labour Act should be revisited in order to harmonise the Labour Act and the Constitution. The proposed recommendations will enhance the promotion, protection and enforcement of the right to collective job action in Zimbabwe.

5. Recommendations

In light of the above discussion and the findings of the article, the following recommendations are made:

5.1 Constitutional reforms

The Constitution of Zimbabwe as it stands does not recognise the right of employers to participate in collective job action. It only recognises the right of employees to do so. At the same time, the Labour Act recognises an employer's right to lock-out. There is a need to expressly provide for the employer's right to collective job action as this will entrench the right and afford it direct constitutional protection, as is the case for employees.

The Constitution does not provide for constitutional guarantees and safeguards to enable members of the security forces to have expedient, efficient, independent and inclusive alternatives. The current commission system is not appropriate for junior employees to participate in the processes which affect their employment issues due to the nature of discipline and command inherent in the security services. Where a certain category of persons is deprived of the right to collective job action, constitutional guarantees and safeguards are needed to ensure the efficiency, objectivity and inclusivity of such alternative mechanisms.

The Constitution does not address the rights of senior state employees to collective job action. It excludes only members of security services, implying that any other employees, regardless of appointment or occupation, are entitled to the right to collective job action. Clear constitutional provisions are needed to address the plight of such state employees who are not members of the security services.

5.2 Legislative reforms

The Labour Act has several substantive and procedural issues which excessively shrink the right to collective job action and thus stifle the generous constitutional provisions on the right. The removal of draconian criminal penalties for offences in relation to collective job action is crucial. The imposition of fines and imprisonment limit the right to collective job action. Kenya and South Africa do not have such stiff measures, which should be purged from the Labour Act.

The Minister's discretionary powers in matters to do with collective job action, especially in the designation of essential services, are too wide and unchecked. The Minister is not obliged to consult with the advisory council, and there is no requirement of technical expertise in labour issues for members constituting the advisory council. As in South Africa, an essential services committee should be established that includes labour experts, to provide checks and balances on the Minister and to enhance broad stakeholder consultation.

The Labour Act restricts collective job action to industrial disputes only. Collective job action as the employee's most formidable defence should be used to pursue social and economic interests which the employer can address, as is the case in South Africa.

The Public Service Act should be amended to reflect the constitutional right to trade unionism and collective job action, giving effect to and creating relevant institutions for the realisation of the right and its various aspects. More importantly, it should address the right of senior state employees who are covered under the term 'every employee' and are not members of the security services.

5.3 Institutional conscientisation and capacitation

Without robust institutions, collective job action rights remain rights on paper only. Various institutions, like the legislature, ministries, the police, trade unions and employers' organisations, should be conscientised and capacitated to embrace the civil space within which collective job action should be exercised. The Fair Work Commission of Australia has very wide and unchecked powers which are prejudicial to the right to collective job action. Institutions monitor compliance, consult and research, and then recommend reforms. Their various roles are crucial for the right, therefore, conscientisation should enhance their professionalism, objectivity, impartiality and independence commensurate with constitutional values and a democratic society.

5.4 Intensification of citizen education and awareness

The state and all stakeholders should intensify educational campaigns to make citizens aware of their constitutional right to collective job action and the remedies available to them. The use of print media, electronic media and other technology networking platforms is crucial. Also, the mainstreaming of the subject area is key, given that every person can be an employer or an employee at some stage. An uninformed citizenry is disenfranchised and people's rights can be trampled upon with impunity and contempt. Enlightened people will be empowered to enforce their rights. Also, the state has a constitutional mandate to make known the declaration of rights.

5.5 Enhancing judicial scrutiny and independence

The judiciary is the ultimate bulwark in the protection and enforcement of the right to collective job action. There is a need to ensure compliance with the principles of professionalism, and to embrace institutional and personal independence and impartiality by courts and labour tribunals. As demonstrated by the Australian jurisprudence, judicial interpretation can be used to stifle, excessively limit and make it impossible to exercise the

right to collective job action. Politicisation, capture and weaponisation of the judiciary is a fatal blow to the enjoyment of the right to collective job action. Measures to ensure continuous independence and objectivity in the judiciary need to be intensified.

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The Doctrine of Substantive Legitimate Expectation: A Missing Piece of the Puzzle in Modern South African Administrative Law

Vuyo Peach*

Abstract

The doctrine of legitimate expectation is well-established in South African administrative law. The doctrine has two pillars: a procedural legitimate expectation focuses on the procedure that a public authority follows before deciding, and a substantive legitimate expectation focuses on the actual decision that a public authority makes. There is a paralysis within the judiciary when it comes to reflecting seriously upon whether substantive legitimate expectations should form part of South African law, perhaps influenced to some degree by judicial restraint. Against the backdrop of Administrator Transvaal v Traub 1989 *(4) SA 731 (A),* Meyer v Iscor Pension Fund *2003 (2) SA 715 (SCA) and obiter comments in* Bel Porto School Governing Body v Premier, Western Cape *2002 (3) SA 265 (CC), the article takes transformative constitutionalism as its point of departure in advocating for the incorporation of substantive legitimate expectation into the evolving corpus of administrative law. This development is long overdue. The article discusses values such as constitutional supremacy, the rule of law, fairness, the separation of powers and administrative justice, and the institutions that support these values.*

Keywords

transformative constitutionalism, values, paradigm, legitimate expectations, substantive, separation of powers

1. Introduction

The Constitution of the Republic of South Africa, 1996 and the Promotion of Administrative Justice Act[1] do not include the substantive legitimate expectation doctrine as a new ground for judicial review in South African administrative law, while the courts avoid using it in their judgments. Unlike the Interim Constitution,[2] the Constitution omitted the doctrine of legitimate expectation and does not define the term 'administrative action'. The definition provided by the Promotion of Administrative Justice Act is narrow, confusing, and difficult to understand.[3] Furthermore, the Promotion of Administrative Justice Act

1 Act 3 of 2000 (as amended).
2 Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution).
3 Hoexter, C *Administrative Law in South Africa* (2012) 194-196.

* Associate Professor, College of Law, UNISA. B.luris (Vista), LLB (Vista), LLM (PU for CHE), LLD (Unizulu), Pgd Diplomas: Human Rights Law (RAU), Contract Drafting & Inter (UJ), Labour Law Certificate & Adva. Certificate Labour Law (PU for CHE).

lacks the vision needed to transform South African administrative law, which provides the basis for the meaningful transformation of administrative justice.[4]

The courts have issued conflicting judgments. Some judgments find that applying the doctrine of legitimate expectation would mean fettering the discretion of administrative organs or the executive and over-riding the separation of powers doctrine. Other judgments find that the South African constitutional order hinges on the rule of law.[5] No decision grounded on the Constitution or law may be disregarded without recourse to a court of law.[6] For example, section 3(1) of the Promotion of Administrative Justice Act states, 'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'

This section is unclear and does not say whether legitimate expectations are procedural or substantive. The section gives effect to section 33(1) and (3) of the Constitution. In *Economic Freedom Fighters*, and *Democratic Alliance v Speaker of the National Assembly*,[7] the court granted the applicants a substantive expectation based on the supremacy of the Constitution. The applications before the Constitutional Court were 'based on the supremacy of the South African Constitution, the rule of law and considerations of accountability'.[8] The President was ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence.

2. The approach to substantive legitimate expectations: Developments in major Commonwealth jurisdictions

The doctrine of substantive legitimate expectation has been the subject of intense debate in major Commonwealth jurisdictions following its introduction in the seminal Court of Appeal case of *R v North and East Devon Health Authority ex p Coughlan*.[9] The appeal Court arrived at the decision that affirmed substantive legitimate expectation as a principle of judicial review in administrative law. This laid the jurisprudential basis for the doctrine of substantive legitimate expectation in England.

The Court of Appeal went on to refine the contours of the doctrine in the subsequent decade and a half.[10] In his summation of the *Nadarajah* case, Tomlinson[11] states that

4 *Ibid* 203-205.
5 *Corruption Watch v President of the RSA* 2018 (10) BCLR 1179 (CC) (*Corruption Watch*).
6 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance* [2016] ZACC 11 (*EFF*) para 74.
7 *Ibid* para 4. See also *Justice Alliance of South Africa v President of the RSA* [2011] ZACC 23; *President of the RSA v The Office of the Public Protector* (unreported case number 79808/16). *Corruption Watch* (n 5 above) is also known as the Nxasana judgment. It set aside the appointment of the National Director of Public Prosecutions and nullified the settlement agreement between Jacob Zuma and Nxasana. These cases dealt with substantive legitimate expectations, even though the phrase is not explicitly mentioned.
8 *Economic Freedom Fighters v Speaker of the National Assembly, Democratic Alliance* 2016 3 SA 389 580 (CC).
9 [2001] QB 213 (EWCA).
10 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 (*Nadarajah*).
11 Tomlinson, J 'The Narrow Approach to Substantive Legitimate Expectations and the Trend of Modern Authority' (2017) 17(1) *Oxford University Commonwealth Law Journal 75,* 82-83 and Tomlinson, J 'Do We Need a Theory of Legitimate Expectations?' (2020) 40(2) *Legal Studies* 286, 288.

Laws LJ pronounced that he was not satisfied with the current conceptual understanding of the doctrine of legitimate expectation as a tool of 'fairness', which existed to guard against the 'abuse of power'.

The Privy Council comprising Supreme Court Justices dealt directly with substantive legitimate expectation in *The United Policyholders Group v Attorney General of Trinidad and Tobago*.[12] In the absence of any clear statement from the Supreme Court on substantive legitimate expectations, the judgment in this case, particularly that provided by Lord Carnwath, provided a detailed, useful, and interesting review of the current state of the substantive legitimate expectation doctrine.[13]

Forsyth[14] is of the opinion that because there is so much uncertainty, there is a real danger that the concept of legitimate expectation will collapse into an inchoate justification for judicial intervention:

> [I]t seems to me that the time has come to return to fundamentals. So, we should ask fundamental questions about the justification and the task of the concept of legitimate expectations. That consideration of these fundamental issues leads me to conclude that legitimate expectations will end up with a narrower but still vital role.[15]

According to Tomlinson, the suggestion for developing 'a value pluralist account of the doctrine may be a preferable approach', and the 'alternative path is to continue to expand a theoretically refined body of scholarship with a baked-in ignorance'.[16]

3. The debate about substantive legitimate expectations and the separation of powers in administrative law

In *Fose v Minister of Safety and Security*,[17] the Constitutional Court said the following about a remedy which gives rise to substantive legitimate expectation:

> An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying, and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.[18]

Based on the literature discussed above, a view has emerged that if substantive legitimate expectation is not recognised in South Africa, citizens will not be able to enforce their constitutional right to fair administrative action.

12 [2016] UKPC 17.
13 Tomlinson 'The Narrow Approach' 76.
14 Forsyth, C 'Legitimate Expectations Revisited' (2011) 16(4) *Judicial Review* 429.
15 *Ibid* 430.
16 Tomlinson 'Do We Need a Theory' 288.
17 1997 (3) SA 786 (CC) (*Fose*) 826.
18 *Ibid*.

In *Administrator, Transvaal v Traub*,[19] Corbett CJ mentioned the two forms of legitimate expectation:

> Legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.[20]

On the other hand, in *Bel Porto School Governing Body v Premier, Western Cape*,[21] Chaskalson P cautioned the applicants as follows:

> The doctrine of substantive legitimate expectations was an ongoing issue, where there is no authority in the South African law, and in Meyer v Iscor Pension Fund,[22] the Supreme Court warned against incorporating the substantive legitimate expectations doctrine into South African law.[23]

Denying substantive relief for legitimate expectations is justified by South African courts on the following grounds:

> (a) The granting of substantive relief for legitimate expectations would amount to fettering the administrative organ's discretion, and allowing substantive legitimate expectations would entail that the courts would be allowed to intrude upon the separation of powers.
>
> (b) Substantive relief would overstep the boundaries of legality.[24]

The arguments raised in opposition to the recognition of substantive legitimate expectations mostly remain committed to an overtly conservative approach to administrative decision-making and lack a sincere commitment to constitutional transformation. Thus, for example, the argument in (a) fails to note that substantive relief merely relates to the issue of when the new policy choice is to take effect, not whether policies may be changed.[25] Furthermore, the denial of substantive relief for legitimate expectations does not take into account the principle of legal certainty.[26] According to this principle, government action should be predictable, and the government should act in a trustworthy manner, in the sense that the

19 *Administrator Transvaal v Traub* 1989 (4) SA 731 (A) (*Traub*).
20 *Ibid* 758.
21 2002 (3) SA 265 (CC) (*Bel Porto*) para 96.
22 2003 (2) SA 715 (SCA).
23 *Bel Porto* (n 21 above) para 96.
24 *R v Secretary of State for Transport, ex parte Richmond upon Thames London BC* 1994 (1) All ER 577; *Durban Add-Ventures Ltd v Premier of the Province of KwaZulu-Natal* 2001 (1) SA 389 (N) 510G-H. See also De Ville, J *Judicial Review of Administrative Action in South Africa* (2005) 123. The denial of relief for substantive legitimate expectations is usually justified with reference to the principle of legality and the prohibition on the fettering of discretion.
25 *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (QB) (*Ex parte Hamble*) 724B-C.
26 Compare *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47.

public can rely upon representations made by public authorities. In addition, the argument that substantive legitimate expectations would allow the courts to intrude upon the merits of a decision is unconvincing.

Our courts have not addressed these two conflicting judgments because of the inherent conservatism[27] of the South African judiciary, which is a barrier to recognising substantive legitimate expectations in South African administrative law. A comprehensive vision of constitutional transformation focused on fairness in public administration, as a dynamic concept for legal reform, has been largely absent from the theoretical underpinnings of the judiciary's task to develop South African common law in accordance with the aims and spirit of the Constitution.

The requirements of rationality and reasonableness in the Promotion of Administrative Justice Act belong to the same category of considerations that could possibly intrude upon the merits of a decision. Providing relief for substantive legitimate expectations does not do this to any significant extent. Substantive legitimate expectations merely require that if a legitimate expectation is created unless it is under exceptional circumstances, the public body should then fulfil such expectations, or the expectation should be taken into consideration when deciding.

Until now, most arguments in favour of substantive relief for legitimate expectations have been based on *ad hoc* considerations, lacking a comprehensive vision of the theoretical basis of constitutional development in South Africa.[28] However, rather than creating a principle of substantive legitimate expectation, some court decisions seem to have granted substantive benefits under the 'guise' of procedural legitimate expectations.[29] In *Premier, Mpumalanga*[30] the effect of the order by the court was substantive in nature, namely that the bursaries had to be paid until the end of the year. In *Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd*,[31] the legitimate expectation was based on the following:

(a) regular practice
(b) the *audi alteram partem* rule was not complied with, and
(c) the decision was found to be invalid.[32]

This matter was not referred to the administrator, as there had been an undue delay because of the Minister's failure to consider the matter for about 17 months, and his mind appeared to have already been made up. In effect, the ruling amounted to the granting of substantive relief.

27 Peach, V *Conservatism of the South African Judiciary: A Barrier of Recognising Substantive Legitimate Expectations in South African Administrative Law Under the 1996 Constitution* Mbali conference proceedings (2018).
28 *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) (*Premier, Mpumalanga*).
29 *Ibid*.
30 *Ibid*.
31 1992 (2) SA 234 (TkA) (*Inkosinathi Property Developers*).
32 *Ibid* 234-235.

4. Understanding the doctrine of separation of powers

The concept of separation of powers is understood by Motala as the best way to control an errant government's power by dividing its powers into different branches: the judiciary, the executive, and the legislature. Motala refers to authors who connect the doctrine to the notion of checks and balances, while others view it 'as an institutional arrangement of limiting government powers'.[33] The new South African legal order was established in line with this definition. The President is the head[34] of the executive, the Speaker chairs Parliament,[35] and the judiciary is headed[36] by the Chief Justice.[37]

5. The nature and functioning of the doctrine of separation of powers

The separation of powers doctrine remains part and parcel of the theory and philosophy of constitutional law and constitutionalism.[38] The objective of this doctrine is to prevent abuse of power by any one arm of government. In South Africa, this principle is constitutionalised. A system in which powers are separated is commonly known as a system of checks and balances. In other words, the different branches of government should control each other to ensure the effective and proper fulfilment of their various powers and functions.[39] Courts must know their constitutional position, particularly the doctrine of separation of powers. Courts have recently been unwilling to permit any subordinate authority to obtain uncontrollable power, which would exempt public authorities or other bodies from the jurisdiction of the courts, as this would theoretically be tantamount to opening the door to potential dictatorial power.[40] The courts in Malawi are also aware of the doctrine of separation of powers. In the Malawian case of *Nangwale v Speaker of the National Assembly*,[41] the court observed as follows:

> While [the] emphasis is on separation of powers, [the] dominant 'institution' to which all the three organs are subservient is the Constitution. The Executive must promote the principles of the Constitution, the legislature must further the values of the Constitution and the judiciary must protect and enforce the Constitution.[42]

33 Motala, Z 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the new South African Order' (1995) 112 *South African Law Journal* 503, 506. The author refers to the definition of Gwyn, WG *The Meaning of the Separation of Powers: An Analysis of the Doctrine From its Origin to the Adoption of the United States Constitution* (1965) fn 15.

34 Section 83 of the Constitution. In terms of this section: (a) the President is the Head of the State and head of the national executive; and (b) must uphold, defend, and respect the Constitution as the supreme law of the Republic.

35 Section 52 of the Constitution.

36 In terms of s 165(6) of the Constitution, the Chief Justice is the head of the judiciary.

37 Section 165 of the Constitution. In terms of this section, judicial authority is vested in the courts. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

38 Bekink, B *Principles of South African Constitutional Law* (2016) 47.

39 *Ibid* 48.

40 *Matambo v Speaker of the National Assembly* (MAHGB 13) BWHC 2 (28 January 2015) (*Matambo*) para 124.

41 [2005] MWHC 80 (*Nangwale*), available at https://malawilii.org/mw/judgment/high-court-general-division/2005/80 accessed 18 June 2022.

42 *Ibid*.

In *Callely v Moylan*[43] the court held that the basic test for allowing judicial review of political matters is whether the action or inaction of the political organs of the state touches upon citizens' constitutional rights. The inquiry was reviewable notwithstanding the separation of powers because it concerned the senator's constitutional right to the protection of his good name. The court held that the basic test for allowing judicial review of 'political' matters is whether the action or inaction of the political organs of the state concerns citizens' rights.

6. Separation of powers under the Interim Constitution

One constitutional principle that had a bearing on the structure of government in South Africa, as suggested by the Technical Committee on Constitutional Issues, was the separation of powers between the executive, the judiciary, and the legislature.[44] The certification process of the Constitution brought with it reference to the separation of powers. This doctrine was initially not included in the Interim Constitution. Even though this was not contained in the Interim Constitution, the constitutional principle which was an annexure to the Interim Constitution called for the separation of powers. In *In re Certification of the Constitution of the RSA*, *1996*,[45] the Constitutional Court did not hesitate to point out the mandate of the Interim Constitution in terms of the constitutional principles. Constitutional Principle VI mandated that there be a separation of powers between the legislature, the executive, and the judiciary.[46] The court went on to say that the language of Constitutional Principle VI was wide enough to cover the type of separation required by the New Text (NT). For this article, it is important to bear in mind which interpretation approach must be applied to the interpretation of the constitutional principles. Two observations can be made:

1. In terms of the constitutional principles the separation of powers must not be interpreted with technical rigidity; and
2. All 34 constitutional principles must not be read in isolation from the other constitutional principles which give meaning and context.

7. South Africa's constitutional state

The transformation of legal culture has become a topical issue in contemporary jurisprudence. Although transformative perspectives are not absent from libertarian jurisprudential theories, postmodern and socialistic theories, together with communitarian perspectives on justice, have impacted strongly on legal transformation theory. These theoretical points of view contain important perspectives for transforming the legal culture of the South African constitutional state – and public law.

43 [2011] IEHC 2 (*Callely*).
44 Van der Vyver, JD 'The Separation of Powers' (1993) 8(2) *South African Public Law* 177.
45 1996 (4) SA 744 (CC) para 113.
46 Constitutional Principle VI. The constitutional principles were described by the Constitutional Court in para 36 of this judgment as a broad constitutional stroke on the canvas of constitution-making in the future.

The provisions of both the Interim Constitution and the Constitution emphasise the Constitution's commitment to transformation. They require a radical move from the past and compel the transformation of the legislature, the executive and South African legal culture.[47] The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with reference to recognising substantive legitimate expectations. Klare describes transformative constitutionalism as a long-term project of constitutional enactment, interpretation and enforcement in order to transform a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.[48] In addition, Langa argues that a truly transformative South Africa requires a new approach to legal education, in that it should place 'the constitutional dream at the very heart of legal education'.[49] He confronts the inherent conservatism of the South African legal culture, which is based on formal, rather than substantive, reasoning. Considering this definition, my view is that to reform South African administrative law and recognise substantive legitimate expectations, there is a need to achieve transformation by implementing the values and aspirations enacted in the Constitution,[50] and to change the South African legal culture, to meet the standards for reforming administrative law. Although transformation is not the sole responsibility of the court, since it is the task of all three arms of government,[51] the greatest responsibility lies with the judiciary. Furthermore, the Constitution commits all the branches of government to the promotion of democratic values, human rights, and equality.

8. Transformative constitutionalism, the separation of powers and substantive legitimate expectations

Transformative constitutionalism is the underlying paradigm for reforming administrative law in South Africa, because of the transformative nature of the Preambles to both the Interim Constitution and the Constitution. Constitutionalism is viewed as a fundamental concept upon which the new South Africa as a country has been founded.[52]

The Preamble to the Constitution commits all South Africans to a democratic and open society in which government is based on the will of the people, and every citizen is equally protected by the law.

This Constitution, following in the footsteps of the Interim Constitution, aims to establish a society that is based on democratic values. These values enable the courts to engage in transforming the legal culture. In so doing, the courts will recognise substantive

47 Pieterse, M 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20(1) *South African Public Law* 155, 166.

48 Langa, P 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351, 356; Klare, K 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 151.

49 Langa *ibid* 356.

50 Klare (n 48 above) 151.

51 Langa (n 48 above) 351, 358.

52 Sibanda, S 'Not Purpose-made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22(3) *Stellenbosch Law Review* 482-500.

legitimate expectations in South Africa. According to Klare, '[t]he Constitution is an engagement with a future that it will partly shape; and has been welcomed as a document with a transformative vision looking at the advancing social justice and substantive equality'.[53]

The constitutionalisation further informs this of administrative law in terms of section 24 of the Interim Constitution and section 33 of the Constitution. This optimistic outlook is a result of the transfer of power from the apartheid regime to all South Africans as a whole and the complete eradication of the system of apartheid.[54] The basic principles of this new order are democracy, equality, human dignity, the supremacy of the Constitution, the rule of law (constitutionally entrenched in the Constitution), the separation of powers, and the Bill of Rights.

The pertinent question is what role constitutionalism can play in encouraging the courts to advance the values that underlie the Constitution by accepting substantive legitimate expectations as part of administrative law. The recognition of substantive legitimate expectations is based on the concept of transformative constitutionalism. In *S v Makwanyane*,[55] the court stated that the Constitution wants to achieve, with differing degrees of intensity, the shared aspirations of a nation and the values that bind its people.

In view of what the court stated, I argue that transformative constitutionalism is a vehicle for reforming administrative law through substantive legitimate expectations. *S v Makwanyane*[56] was one of the first constitutional cases that gave the Constitution its place in the South African legal system, and showed how the courts should interpret the values that underlie the new constitutional order. Constitutional supremacy dictates that the rules and principles of the Constitution are binding on all branches of the state and have priority over any other rules made by the government, the legislature, or the courts.[57] Transformative constitutionalism contains the values of the Constitution that must be considered by the courts in interpreting the Constitution, and in the adjudication of cases that come before the courts.

The new order fostered change, which is both inevitable and intrinsically important in providing a vehicle for creative renewal, something which is of profound benefit to mankind. Therefore, constitutional change and constitutional law are not synonymous. Constitutional change comes before formal legal changes, while legal changes invite constitutional changes. This article advocates both constitutional and legislative changes for the recognition of substantive legitimate expectations, to ensure that the legitimate expectation doctrine is a new ground for judicial review in South African administrative law.

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53 Klare (n 48 above) 150.

54 This was contained in the Record of Understanding dated 26 September 1992. This ANC strategic perspective was adopted by the National Executive of the African National Congress, which was held on 25 November 1992.

55 1995 (3) SA 391 (CC) (*Makwanyane*).

56 S v *Makwanyane and Another* 1995 3 SA 391 (CC) para 15.

57 Currie, I and De Waal, J *The Bill of Rights Handbook* (2015) 9. See also *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) (*Executive Council of the WC Legislature*) para 62.

The question is, therefore, whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with reference to recognising the role of substantive legitimate expectations in reforming administrative law. The courts must reject the notion of fettering another arm of government, in this case the executive, in favour of transformative constitutionalism based on the values of the Constitution. Transformation occurs when a court fully overturns an established doctrine but does not announce it has done so.

9. Substantive legitimate expectation doctrine

An argument that the incorporation of the doctrine of substantive legitimate expectation will violate the principle of separation of powers cannot be accepted without challenge. The reason is that the doctrine of separation of powers must be read and understood within the context of the rights contained in the Bill of Rights.

> All exercise of public power must have a rational basis, this is one of the foundations of legality, or lawfulness by section 33(a) of the Constitution. Justifiability which will be discussed below is required by section 33(d), demand something more substantial and persuasive than mere rational connection.[58]

In *Executive Council of the WC Legislature*,[59] the court held that any law or conduct that is not in accordance with the Constitution, whether for procedural or substantive reasons, will therefore not have the force of law. On the other hand, in *Minister of Health v Treatment Action Campaign*,[60] the court gave substantive relief to the respondents. This was an appeal against a High Court order issued against the government, because of the latter's failure to respond to HIV/AIDS challenges. The court *a quo* found that government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting HIV to their babies at birth. The government had acted unreasonably in refusing to make the antiretroviral drug Nevirapine available in the public sector where the attending doctor considered it medically indicated, and in not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV.[61] The government appealed against this order.

The government's defence was based on the separation of powers. This argument had two aspects:

1. The respect that courts should show to decisions taken by the executive concerning the formulation of its policies.
2. The competent order to be issued by the court in the event it found in favour of the respondents.[62]

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58 *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the RSA* 2000 (3) BCLR 241 (CC) paras 85 and 90.

59 *Executive Council of the WC Legislature* (n 57 above) para 62. See also Currie and De Waal (n 57 above) 9.

60 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) (*TAC*) paras 96-114.

61 *Ibid* para 2.

62 *Ibid* para 22.

The court considered the early judgment of *Government of the RSA v Grootboom*,[63] where the court had found that the state's housing policy in the Cape metropolitan area failed to make reasonable provision, given the available resources, for people in the area who had no access to land and no accommodation, and were living in intolerable conditions.[64] In the *TAC* case, the applicant's case was that under the separation of powers doctrine the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy. The court found that this argument lacked merit because there are no bright lines that separate the roles of the legislature, the executive, and the courts from one another. Some matters lie pre-eminently within the domain of one or other arms of government, but not others. This does not mean that courts cannot or should not make orders that impact on policy.

This case clearly negates the counterargument that the recognition of substantive legitimate expectations will interfere with the executive's prerogative, because section 7(2) of the Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Constitution'. How will the rights in terms of the Constitution be fulfilled if substantive legitimate expectations are not recognised as part of South African administrative law? What happens to the individual rights of citizens? My submission is that section 33 of the Constitution mandates the courts to accept the doctrine of substantive legitimate expectation in South African administrative law.

Considering this judgment, the courts are given the latitude to fashion substantive legitimate expectations as a new ground of judicial review where a litigant is claiming substantial relief. Ackerman J went on to state:

> In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying, and the rights entrenched in the Constitution cannot properly be upheld or enhanced. ... [W]hen the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.[65]

This innovation of recognising substantive legitimate expectations is not new in South Africa and it will not be the first time that South African courts break with the dichotomy of existing rights. At no stage does this offend the principle of separation of powers.

The court held in the *TAC* case that, when it is appropriate to do so, courts may – and must, if necessary – use their wide powers to make orders that affect policy as well as legislation.[66] Policies must be consistent with the Constitution and the law.[67]

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63 2001 (1) SA 46 (CC) (*Grootboom*).

64 Section 165(5) of the Constitution.

65 *Ibid* para 71. For a critical exposition, see Okpaluba, C 'Of "Forging New Tools" and "Shaping Innovative Remedies": Unconstitutionality of Legislation Infringing Fundamental Rights Arising from Legislative Omissions in the New South Africa' (2001) 12(3) *Stellenbosch Law Review* 462.

66 *TAC* (n 60 above) para 113.

67 *Ibid* para 114.

In the *EFF* matter,[68] the Constitutional Court dealt with the thorny issue of the separation of powers and exercised its full constitutional powers. The application was brought by the Economic Freedom Fighters (EFF), the third largest political party in Parliament, and concerned the upgrading and implementation of then President Zuma's private house in KwaZulu-Natal. The court had to decide whether the President as the head of the executive was bound by the remedial action of the Public Protector. To deal with this issue, the court had to encroach on the other two branches of government. The court reminded itself of its limitations:

> The judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution.[69]

The court did intrude in the process of the other two branches by holding that the President was bound by the remedial action of the Public Protector. Likewise, the court must intrude on the executive sphere if the argument is that, by recognising the doctrine of substantive legitimate expectation, the court will be overreaching, because the Constitution is the supreme law. It is binding on all branches of government and the same can be said about Parliament. The doctrine of substantive legitimate expectation was left to the courts to interpret and develop, as the courts did in the *Makwanyane* case about the death sentence. The drafters of the Constitution did not state whether the legitimate expectation doctrine is procedural or substantive. This sentiment was expressed in the court's decision in *Tlouamma v Mbethe, Speaker of the National Assembly of Parliament of the Republic of South Africa*,[70] where the High Court held that the Constitution did not expressly or impliedly require a secret ballot for the motion of no confidence in the President. Three political parties in Parliament – the Democratic Alliance (DA), the Economic Freedom Fighters (EFF) and the United Democratic Movement (UDM) – approached the Speaker of the National Assembly to schedule a motion of no confidence in President Zuma. The Speaker refused to allow a ballot and held that the National Assembly rules did not allow her to prescribe a secret ballot. The UDM sought direct access to the Constitutional Court (with the DA and the EFF intervening) to force the Speaker of Parliament of the Republic of South Africa to hold a secret ballot.[71] The court ruled in favour of the applicants and assisted the National Assembly with holding a secret ballot by providing guidelines. In the light of the two cases above, using the argument of separation of powers to deny litigants a substantive remedy cannot be supported.

10. Transformative goals

Klare states that the Constitution invites a new imagination and self-reflection about legal method, analysis, and reasoning, in line with its transformative goals. This can only be achieved with the correct judicial mindset.[72] Mlambo indicates that one of the mechanisms

68 See also Mhango, M and Dyani-Mhango, N 'The Powers of the South African Public Protector: A Note on *Economic Freedom Fighters v Speaker of the National Assembly*' 2020 13(1) *African Journal of Legal Studies* 1.
69 *EFF* (n 6 above) para 92.
70 2016 (1) SA 534 (WCC).
71 *United Democratic Movement v Speaker of the National Assembly* 2017 (8) BCLR 1061 (CC).
72 Klare (n 48 above) 150.

for transforming South African society is the entrenchment of socio-economic rights in the Constitution.[73] The democratic transition in South Africa was intended to be a bridge from authoritarianism to a new culture, in which every exercise of power must be justified.

The notion of incorporating transformative constitutionalism as a vision for developing South Africa's constitutional culture found support in the wording of the Preamble and other provisions of the Constitution. Section 1(a) proclaims fundamental values informing the South African vision of the Constitution. This section states what the new state should look like and further proclaims that human dignity, equality, and freedom are at the core of South Africa's vision of constitutionalism. According to Davis and Klare, in terms of transformative constitutionalism and common and customary law,[74] sections 8(3) and 39(2) of the Constitution can be viewed as development clauses. They state that South Africa cannot progress towards a society based on human dignity, equality and freedom with a legal system that rigs a transformative constitutional superstructure onto a common law- and customary law-based structure that has been inherited from the past and has been indelibly stained by apartheid.

Equality, freedom, and fairness are proclaimed as fundamental values that inform the South African vision of constitutionalism. Section 1 of the Constitution describes, with similar sensitivity, how constitutional values must be understood. Transformative constitutionalism is not a neutral concept but is intended to have a positive voice and to connote a social good. Furthermore, the South African people have chosen to move away from the supremacy of Parliament to constitutional supremacy, where judges are empowered to develop the law. Mureinik[75] indicates that being a conscientious judge in South Africa involves promoting and fulfilling, through one's professional work, the democratic values of human dignity, equality, and freedom, and working towards establishing a society based on democratic values, social justice, and fundamental human rights. To accomplish this, the state must respect, promote, and fulfil the rights contained in the Bill of Rights. The Constitution is full of broad phrases and is redolent with excellent hopes to overcome past injustices and move towards a democratic and caring society.[76]

At the heart of a transformative Constitution is a commitment to substantive reasoning to determine the underlying principles that inform laws themselves and the judicial reactions to those laws, and to upholding the transformative ideal of the Constitution, where judges transform the law to bring it in line with the rights and values contained in the Constitution.

In *Nyathi v MEC for Department of Health: Gauteng Province*,[77] the Constitutional Court declared the provisions of the State Liability Act,[78] which prevented the execution of orders

73 Mlambo, D 'The Pursuit of Meaningful Social Justice' Opening address delivered at the Law Society of the Northern Province's Annual General Meeting (AGM), Sun City, 9 November 2013.

74 Davis, DM and Klare, K 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26(3) *South African Journal on Human Rights* 403.

75 Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31, 31-32.

76 Klare (n 48 above) 148.

77 2008 (5) SA 94 (CC) (*Nyathi*).

78 20 of 1957.

against the property of the state, to be unconstitutional. Parliament was given 18 months to devise new legislation that would enable the effective enforcement of court orders.

Transformation requires a complete reconstruction of the state and society, including the redistribution of power and resources along egalitarian lines. Equity as a value and a right is central to the transformation task. Kriegler J observed that the Constitution is primarily and emphatically an egalitarian Constitution.[79] The supreme laws of comparable constitutional states may underscore other principles and rights. However, considering South Africa's own history and the South African vision for the future, a constitution was written with equality as its core value.[80] He added that '[e]quality is our Constitution's focus and its organising principle'.[81]

The doctrine of *audi alteram partem* in general, and in legitimate expectations in particular, has been closely associated with notions of fairness and natural justice. In *Attorney-General, Eastern Cape v Blom*,[82] the court alluded to the creative development of the *audi alteram partem* principle.[83] In *Traub*, the court, in a creative fashion, officially imported the doctrine of legitimate expectation, based on the duty to act fairly.[84]

11. Administrative law reform

Transformative constitutionalism, fairness and administrative law reform cannot be achieved in a vacuum. In South Africa, there are large disparities in terms of wealth. Millions of people are living in deplorable conditions and extreme poverty. There is high unemployment and inadequate social security, and many do not have access to clean water or adequate health services. These conditions existed when the Constitution was adopted, and a commitment to addressing them and transforming South African society into one where human dignity, freedom and equality lies at the heart of the new South African constitutional order. If these conditions continue to exist, these aspirations will have a hollow ring.[85] Transformative constitutionalism is an important vehicle for accomplishing transformation to address the issues mentioned above.

In the sphere of administrative justice in particular, transformative constitutionalism can be regarded as a constitutional philosophy that represents fairness in public administration. The notion that administrative justice is an expression of fairness is a novel idea in South African administrative law. South African courts have often reverted to the doctrine of fairness in English law. Fairness helps the English courts to realise substantive relief for legitimate expectations.

The Promotion of Administrative Justice Act plays a very important role in the transformation of South African administrative law. The purpose of the Act is to give effect to the right to administrative action, which is procedurally fair, as well as the right to written reasons for administrative action, as contemplated in section 33 of the Constitution.

79 *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) (*Hugo*) para 74.
80 *Ibid*.
81 *Hugo* (n 79 above).
82 1988 (4) SA 645 (A) (*Blom*) 648.
83 *Ibid* 660H.
84 *Traub* (n 19 above).
85 *Shabalala v Attorney-General of Transvaal* 1996 (1) SA 725 (CC) para 26.

This new order fosters change, which is both inevitable and intrinsically important in providing a vehicle for creative renewal, which is profoundly beneficial to mankind. Therefore, constitutional change and constitutional law are not synonymous. Constitutional change comes before formal legal changes, while legal changes invite constitutional changes. This article advocates both constitutional and legislative changes for the recognition of substantive legitimate expectations, to substantiate the position of the legitimate expectations doctrine as a new ground for judicial review in South African administrative law.

The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with reference to recognising the role of substantive legitimate expectations in reforming administrative law.

12. The separation of powers as a constitutional value for the recognition of substantive legitimate expectations

The executive as a collective and individual executing authority plays an important role in the affairs of the country and the livelihoods of its citizens. The Constitution permits the intrusion of the courts in cases where the executive does not fulfil its promises. The argument that substantive legitimate expectations will prevent the government from doing its work does not hold water in the sense that Constitutional Principle VI requires that:

> there shall be separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness.[86]

In terms of the separation of powers, it may be more important to protect citizens rather than the executive,[87] if accountability is to serve its purpose. Mogoeng CJ eloquently put the courts' assertiveness on the separation of powers to rest thus:

> Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved.[88]

Under constitutionalism, the judiciary is the main agency[89] for exercising control over civil and political rights. Therefore, it matters not that the executive will not be able to do its work, when the Constitution's values are undermined by those who control the levers of power. Those who are vested with a public mandate to control and run public offices are required by law to justify their actions and conducts through a forum that is pre-determined.[90] This will also be in the spirit of developing the common law in line with the Constitution. The Constitutional Court has the ultimate responsibility to enforce the Constitution and its values.

86 Economic Freedom Fighters v Speaker of the National Assembly, Democratic Alliance 2016 (3) SA 850 (CC).

87 Reinstein, RJ and Silverglate, HA 'Legislative Privilege and the Separation of Powers' (1973) 86(7) *Harvard Law Review* 1113, 1167.

88 *EFF* (n 6 above) para 93.

89 Motala (n 33 above) 503.

90 Munzhedzi, PH 'Fostering Public Accountability in South Africa: A Reflection on Challenges and Successes' (2016) 12(1) *Journal for Transdisciplinary Research in Southern Africa* 1-7.

13. Conclusion

Recognition of substantive legitimate expectations will assist with curbing the scourge of corruption that affects the poor directly. It will ensure the accountability and effectiveness of government and reduce maladministration. The Interim Constitution was consistent about making the judiciary the custodian of the Constitution. The separation of powers doctrine shaped the levels of government that citizens wished to have in the new democratic order and in a constitutional state. Besides the Bill of Rights, checks on power are needed to avoid an unjust government. Substantive legitimate expectations will work against a system of government in which the only constraints on the majority will are those of the Bill of Rights as interpreted by the courts. Substantive legitimate expectations will enable the government to govern, but will prevent it from ignoring the opinions, rights, promises and opposing views of citizens. Recognising substantive legitimate expectations will facilitate the nurturing of a human rights culture, increase the level of fairness applications, and promote administrative justice under section 33 of the Constitution.[91] The scope of judicial review will be widened to make accessible to the broader community to invoke the doctrine of substantive legitimate expectation whenever fairness and equity demand this.

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Editorial Policy

1. About the journal

The *Turf Law Journal* is a peer-reviewed journal published by the School of Law of the University of Limpopo, South Africa. The purpose of the journal is to give a platform for high quality research on transformative and developmental perspectives about law in South Africa. While the journal is mainly seeking to respond to legal questions in South Africa, contributions on perspectives from Africa and beyond are most welcome. The journal further welcomes contributions that take multi- and inter-disciplinary approaches to law. In particular, the journal is targeting high quality research from emerging scholars and non-conventional perspectives from established researchers.

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(a) For an article to be accepted for publication in the journal, it must meet high-level quality standards and it must be an original piece that has never been published or is not under consideration by another publication.

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The journal publishes articles, book reviews, case notes and comments. The journal welcomes articles of between 8 000 to 12 000 words, inclusive of references. Book reviews, case notes, and comments must be between 3 000 to 5 500 words, inclusive of references. All contributions to the *Turf Law Journal* will be subjected to a compulsory double-blind peer review.

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Manuscripts may only be submitted in electronic format (utilising MS Word) through an email to the editor. In addition, authors –

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