

THE STARLIGHT

No. 3, 2026

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The StarLight

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EDITOR-IN-CHIEF'S NOTE

It is with great pleasure that I welcome you to the third edition of The StarLight for 2026.

In this edition, we feature six compelling articles by law students across Africa, exploring a wide range of legal issues, from intellectual property and defamation to taxation, human rights, governance and international criminal law. We also bring you an inspiring interview with Aurello Matthaeus Pillay, an LL.B student at the University of Pretoria and Co-Founder/Chairperson of Mentors & Moot. The edition concludes with a news report on the Legal Writing Contest proudly sponsored by The People's Accolade Law Magazine (The PALM) at the Legal Luminary Mentorship Programme, 2026.



EZEKIEL ARCHIBONG

We begin the edition with God'sfavour Afor and Oluwanifemi Oladosu's article, "Copyright Law in Nigeria: Assessing Fair Use and Fair Dealing as Core Principles of Copyright Exception." The authors examine Nigeria's fair dealing regime under the Copyright Act 2022 and consider its relationship with the broader fair use doctrine. Also on Nigeria, Nwakpa JaneFrances Chibuzor explores the evolving landscape of Nigerian and transnational defamation law, with particular attention to established defences such as truth, honest opinion and privilege. On the other hand, Emmanuel Omole, considers the comparative advantages of the African Court on Human and Peoples' Rights in relation to the Nigerian courts, raising important questions about access to regional justice and the protection of human rights.

We turn to Kenya with Felix Oonge Oigoro's "Balancing Taxpayer's Right to Privacy and Fiscal Sovereignty in the Digitalized Tax Administration in Kenya." In the article, the author examines the tension between taxpayer privacy and the State's fiscal interests in an increasingly digital tax environment. In "The Rugged Road of Political Accountability: Navigating the Pact Between Leaders and the Led," Odhiambo Benson reflects on political accountability in Kenya through the lens of social contract theory. We rounded off the article section with Derrick Wamalwa's "The Psychology of Obedience and Command Responsibility in International Criminal Law: A Critical Analysis Through Milgram's Obedience Experiments". Derrick examines the psychology of obedience and command responsibility in international criminal law, advocating for a more psychologically informed understanding of individual culpability without excusing unlawful conduct.

For this edition, we feature an engaging interview with Aurello Matthaeus Pillay, an exemplary law student at the University of Pretoria, South Africa, and the Co-Founder/Chairperson of Mentors & Moot. His journey offers a powerful illustration of how mentorship, advocacy and student-led initiatives can create meaningful opportunities for growth and transformation within the legal profession.

We are also delighted to bring to you a news report on the Legal Writing Contest held under the 2026 Legal Luminary Mentorship Programme and proudly sponsored by The PALM. My warmest congratulations to Neo Jessica Lesekele, Winner; Lintle Ralikomiki, 1st Runner-Up; and Pontšo 'Mote, 2nd Runner-Up.

To our editors and contributors, thank you for contributing to the success of this edition. To our readers, thank you as you read and engage.

Cheer!

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COPYRIGHT LAW IN NIGERIA: ASSESSING FAIR USE AND FAIR DEALING AS CORE PRINCIPLES OF COPYRIGHT EXCEPTION.

OLUWANIFEMI OLADOSU & GOD'SFAVOUR AFOR

ABSTRACT

Copyright law in Nigeria occupies a central but contested space within the country's intellectual property framework, tasked with balancing creator protection against the broader public interest in access to knowledge. Exploring this tension, this article examines fair use and fair dealing as the principal doctrines of copyright exception, assessing their adequacy within the Nigerian legal context, particularly as they are contained and applied in the Copyright Act, 2022. Its analysis draws on a range of primary and secondary authorities, including Nigerian statutory provisions, Commonwealth and American case laws, comparative legislations from Australia, Canada, the United Kingdom, and the United States, as well as empirical studies on copyright compliance and piracy in Nigeria. Academic scholarship, including contributions from Maskus, Nimmer, and Balganes, is also consulted alongside reports from the Nigerian Copyright Commission. This article argues that while fair dealing and fair use share foundational objectives, they differ fundamentally in scope and flexibility; fair use operating as an open-ended, factor-based doctrine, and fair dealing functioning within a more restricted, purpose-defined framework. It further contends that Nigeria's adoption of the four-factor test within its fair dealing regime, though formally a dealing model, introduces functional flexibility resembling fair use analysis. The article finds that Nigeria's current fair dealing framework is ill-suited to the country's socioeconomic realities, contributing to pervasive piracy, stifling creative development, and failing to address the challenges posed by artificial intelligence and emerging technologies. It, therefore, recommends statutory expansion of permissible fair dealing purposes, adoption of a development-oriented interpretive approach, and complementary government initiatives, such as subsidised licensing and open-access repositories, to reduce economic barriers to legitimate content access.

Keywords: Copyright Exception, Fair Dealing, Fair Use, Copyright Act 2022, Piracy.

INTRODUCTION

Copyright, perhaps the most pervasive of all the intellectual property rights in Nigeria, covers the protection of creativity in its various forms of expression, from newspapers and books, to pictures, music and movies. According to a Justice of the Supreme Court, it is “the incorporeal right granted by statute to the author of certain works, whereby he is invested for a specified period with the sole and exclusive privilege of making copies, publish-

ing and selling same.” In Nigeria, this specified period spans the author's lifetime plus 70 years, presumably for the benefit of his estate.

However, during this period of protection, certain persons may wish to use the work for the furtherance of human knowledge among other reasons. If the protection were to rigidly prohibit all forms of copying and publishing, it would undoubtedly marginalise a vast

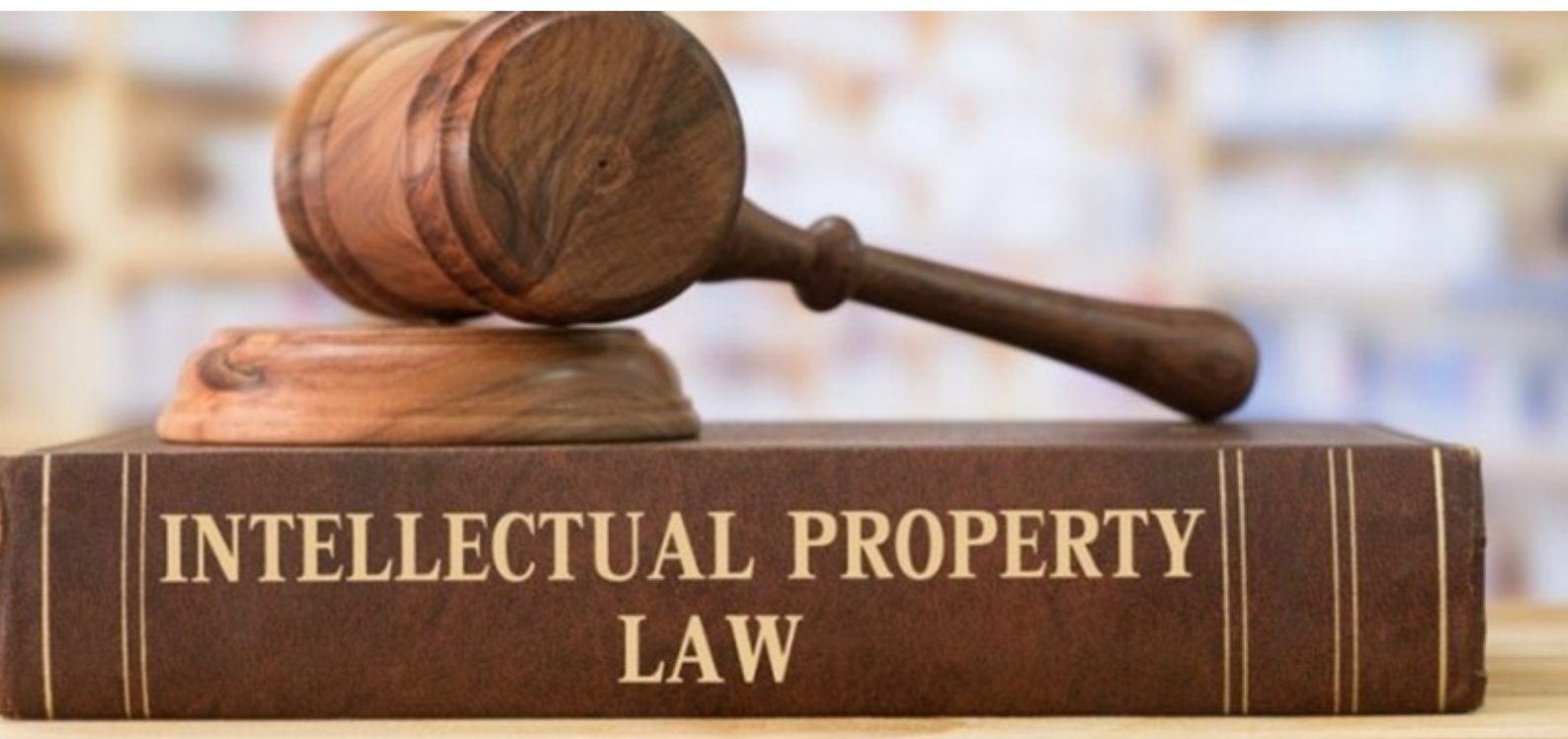


majority of the populace who are unable to reach out to the author for consent. For example, libraries would be unable to reproduce copies of worn-out books for public reading, and schools would be unable to reproduce portions of scholarly texts for instructional and examination purposes. Clearly, the strict enforcement of copyright would defeat an underlying principle of intellectual property, which is to ensure the continued production of works for public benefit.

The balance between protection and availability has thus been a core tension in IP regimes, which economists have critiqued for creating monopolies that generate deadweight loss through restricted access and higher prices. One prominent American economist, Keith E. Maskus, even notes that intellectual property rights, including copyright, “generate monopoly positions that reduce current consumer welfare” in exchange for potential future gains, often resulting in net welfare loss from monopoly distortions.

In Nigeria, these effects are already evident as studies show that high textbook prices and scarce library resources drive widespread photocopying and piracy among students. Putting it into perspective, a Nigerian university student may need an imported textbook whose cost is equivalent to several months’ or even a full year’s household income in local terms. This need, coupled with the unattainable cost of legitimate purchase, is likely to push him towards unauthorised platforms.

To mitigate these effects and balance creator-incentives with public benefit, Nigerian law recognises limitations on copyright through exceptions. These exceptions are certain circumstances where the use of copyrighted material does not amount to violation. Some popular examples are: educational instruction, private copying, first-sale doctrine, accessibility for disabled persons, fair use/dealing, etc. This article however, focuses on the latter exception—fair use/dealing. It undertakes to assess the principles of fair use and fair dealing as fundamental principles of copyright exception. Drawing insights from other jurisdictions and providing a concrete analysis of the Nigerian context, it sheds light on the differences between fair use and fair dealing, paving the way forward for a nuanced utilisation of copyright law to reward creativity and ensure continued public benefit.



FAIR DEALING

Fair dealing is a user's right in copyright law permitting the use of, or "dealing" with, a copyright protected work without permission or payment of copyright royalties. It enables the use of copyrighted materials for certain purposes, without having to contact the author or to provide remuneration. The concept of fair dealing originated in English common law and was first codified in the United Kingdom's Copyright Act of 1911, which provided in Section 2(1)(i) that: "Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary" shall not constitute an infringement of copyright. As a British colony, Nigeria inherited this framework when the 1911 Act was extended to the Southern Protectorate in 1912 via an Order-in-Council.

This Act provided the basis for incorporating this exception into contemporary copyright legislation especially in Commonwealth countries. While some countries, such as the UK, still retain fair dealing, in other countries, these purposes have become a non-exclusive list of examples. Still in other countries, legislatures have added factors that a court must consider in determining fair dealing. Fair dealing, therefore, is not an immunity but a legal protection available only in clearly defined circumstances.

It is also noteworthy that fair dealing, as a concept, does not apply worldwide; it applies only in certain jurisdictions such as

Australia, Canada, India, UK, New Zealand, South Africa, and Nigeria, though with slight variations. For instance, while countries like Australia, India operate a restricted closed-list system, other countries like Canada and Nigeria allow a more flexible approach. However, other countries like the United States employ a different and more open-ended approach known as fair use.

FAIR USE

As earlier noted, a very related yet distinct concept applied in other jurisdictions is what is termed "fair use." Fair use is a legal principle that allows limited use of copyrighted material without permission for purposes such as teaching, research, news reporting, or parody. It is a copyright exception that, although does not give carte blanche, provides broader flexibility than fair dealing. Unlike fair dealing, it does not list the specific purposes for which a protected work may be used without permission. Instead, what is considered "fair" is determined based on the facts and context of each case.

Despite its flexibility, fair use has regulations and measures for assessing fairness. The most common regulation in fair use countries is the four-factor test. Though it is contained in the US Copyright Act 1976, the four-factor test originated from the case of *Folsom v. Marsh*, where the defendant copied large portions of George Washington's letters for a biography without permission. In this case, Justice Story held that determining fair use requires considering the purpose of the use, the amount and value of the material taken, and whether the use harms the market of the original work. This dictum laid the foundation for the subsequent inclusion of fair use in the US Copyright Act, 1976.

Inspired by the approach adopted in this judgment, Section 107 of the US Copyright Act 1976, upon its enactment, expressly codified the factors for determining fair use, viz:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

While fair use operates in countries like the United States, Israel, the Philippines, and South Korea, Nigeria adopts a different approach rooted in the fair dealing tradition as discussed earlier.

FAIR DEALING IN THE NIGERIAN CONTEXT

In Nigeria, fair dealing was first introduced in Nigeria by the Copyright Act, 1990. However, the framework under this Act was relatively rigid, as it provided only limited exceptions for specific purposes and was in urgent need of reform. This need was

addressed with the enactment of the Copyright Act 2022, signed by the former President—late Muhammadu Buhari—which marked a turning point for the evolution of copyright law in Nigeria. Under this Act, the exceptions to Copyright are provided for under Part II, and Section 20(1) specifically provides for fair dealing. Notably, although the Act lists certain purposes for which fair dealing may apply, Nigeria still adopts the four-factor test to determine whether a particular use qualifies as “fair.” This Act puts it in the following words: “Provided that in determining whether the use of a work in any particular case is fair dealing, the factors to be considered shall include the—

- i. purpose and character of its usage,
- ii. nature of the work,
- iii. amount and substantiality of the portion used in relation to the work as a whole, and
- iv. effect of the use upon the potential market or value of the work.”

The implication of this provision is that, notwithstanding that the use of a work falls under any of the specified acts, it still would not qualify as fair dealing if, in consideration of the aforementioned factors, it would be held to have violated copyright protection.

CHALLENGES OF FAIR DEALING IN NIGERIA

Fair dealing provisions under Nigerian copyright law have remained a subject of debate. On the one hand, fair dealing is aimed at fostering educational development. It seeks to enhance creativity, allowing people to build on existing works. Essentially, the society wants creators to profit from their creativity but they also believe that there should be room for society to advance using the works of creators as a stepping stone.

Although on the flip side, it is intended to balance the rights of creators and the public interest, the current framework presents several challenges within Nigeria’s socio-economic context. These challenges include:

1. Unsuitability for a developing country

One of the major challenges critics have highlighted is that the current fair dealing model does not adequately reflect the realities of a developing country such as Nigeria. Over the years, there has been the constant struggle with limited access to

education, socio-economic constraints, and inadequate technological infrastructure. According to multiple studies, only 5% of students in Nigerian higher institutions can afford to purchase the textbooks they need. This financial constraint goes on to explain even more dismal figures: 85.3% of students had engaged in piracy, with books and journals at being the most pirated at 84.2%. A common thread runs through the data: Economic hardship and inflation are primary drivers of piracy in Nigeria, with 99% of participants in a particular survey choosing pirated products due to affordability. Therefore, fair dealing’s unsuitability for Nigeria’s developing realities does more to encourage than dissuade piracy. What Nigeria actually needs is a framework that expands educational access rather than restricting it.

2. This model encourages piracy

It is ironic to state, but quite realistically, that restrictive copyright laws can fuel piracy rather than curb it. When legitimate access to educational and cultural materials is expensive or limited, particularly in a country grappling the harsh realities of an economic downturn, individuals are forced to turn to pirated copies—both for personal use and for resale at lower prices. However, this is not to say that cost is the sole driver of piracy in Nigeria. In fact, even wealthy Nigerians buy pirated books, indicating that financial hardship alone does not explain piracy. A phenomenon equally to blame lies in lack of knowledge. Many Nigerians do not know that buying and selling pirated products is unlawful. This then inhibits compliance regardless of financial capacity, revealing a dismal reality where both factors foster a piracy culture both jointly and independently.

On October 29, 2025, Lynda Alphaeus, the Director of the Nigerian Copyright Commission (NCC) Lagos Office, noted during the IP National Convention that Nigeria loses billions of naira annually to piracy. This pervasive nature of piracy is almost commensurate to the dismal prevalence of poverty in Nigeria, making unlicensed content a go-to option for a large portion of the population. It follows, therefore, that the narrowness of fair dealing not only contributes to this illegal reproduction and distribution, but also undermines the very purpose of copyright protection.

3. **Narrow scope and potential to stifle creativity**

As an earlier writer succinctly noted, it is an undisputed fact that the greatest heritage of a nation remains the creativity of its citizens. Therefore, one of the primary functions of law is to protect the ingenuity, resourcefulness and innovation of the citizenry. A law that fails in this regard, we dare say, is bad law.

Nigeria's fair dealing provisions recognise only a narrow set of permissible purposes and any use outside these purposes, even if socially beneficial, could amount to infringement. This narrow scope of exception also nurses the potential to stifle and inhibit creativity and innovation. The need to obtain permission from copyright holders can serve as a substantial hurdle to aspiring creators. In fact, in many cases, permission may be withheld by copyright holders purportedly exercising exclusive control over their works. However, this exclusive control, while protecting the holder's rights, can unintentionally inhibit further creative development.

4. **Restrictive permission granting realities**

Worse still, many creators are discouraged, ab initio, from engaging with existing works due to the practical difficulties in securing permission. In the current regime, research confirms that without Collective Management Organisations (CMOs) acting as clearing houses, users of copyright works would find it nearly impossible to identify owners of protected works in order to clear the rights associated with them. However, these organisations are themselves geographically limited. For example, the licensing and enforcement operations Copyright Society of Nigeria (COSON) are found to be concentrated majorly in Lagos and Abuja, leaving the rest of the country largely unserved and without access to a functioning licensing system where these rights can be cleared to facilitate usage by intending creatives.

To drive the inefficiency of the current system home, Nigerian authors lose N4.55 billion annually to unlicensed use. This number is directly borne from the sheer volume of creators who regularly bypass preset licensing frameworks—a clear indication that current frameworks leave much to be desired.

5. **Failure to account for disruptive technology**

A question this analysis must not fail to consider is: "are the limitations on fair dealing effective in protecting these exceptions from proliferation, by disruptive technology such as artificial intelligence (AI) and other emerging technologies?" Sadly, the answer is no. The exceptions under Section 20 of the Copyright Act, 2022, despite being drafted in an era where AI was fast becoming commonplace, failed to integrate provisions for AI in its sections. Research reveals that fair dealing exceptions were designed for human use and permit only transient or incidental reproduction for limited technological purposes. Therefore, large-scale, commercial AI data usage, including AI training on copyrighted works, fall into a legal grey area under the extant law. This further underscores the unsuitability of current fair dealing exceptions for Nigeria's digital future.

However, far from being a completely closed list, Nigeria's open fair dealing provision gives courts flexibility to extend fair dealing to new technological uses as they emerge, without requiring legislative amendment each time. This notwithstanding, scholars have warned that any definition of fair dealing risks being too narrow to accommodate uses arising from new and rapidly developing technologies. Thus, legislative reform to current fair dealing exceptions is not just a recommendation; it is the copyright system's much-needed additive if it is to adapt to the digital realities of the present and future. Such reforms could add specific exceptions for text and data mining to complement the existing fair dealing provisions—something similar to the model of Singapore's recent copyright amendment.

RECOMMENDATIONS

Having examined the challenges associated with fair dealing in Nigeria, the following recommendations are proposed to address them effectively:

1. The Scope of Fair Dealing Should Be Widened Through Statutory Reform

Nigeria should build on the Copyright Act 2022 by expanding the permissible purposes, and by ensuring that uses which are socially beneficial are not treated as infringement merely because they are not listed in the Act. We need not necessarily switch radically from fair dealing to fair use. Instead, Nigeria could incorporate the approach used in the UK, where courts interpret the available defences broadly to permit fair dealing with copyrighted works. This judicial flexibility was applied in *Pro Sieben Media AG v Carlton UK Television Ltd*, among other cases.

2. Adoption of a Development-Oriented Framework

Nigeria should adopt a development-oriented fair dealing framework that aligns with its local context. The existing model, got from developed jurisdictions, does not reflect Nigeria's practical realities. Reforms should broaden educational exceptions and permit fair dealing where the use clearly serves the public interest, particularly in non-commercial teaching and research. Although the four-factor test should be retained, its application should prioritise educational objectives and national development.

3. Facilitate Access to Knowledge to Reduce Piracy

Reforming fair dealing alone will not eliminate piracy; hence, the government must also improve access. This can be done through subsidised licensing for educational institutions, digital repositories for academic materials, public-sector digitisation projects, and support for open-access publishing. For instance, the One Nation One Subscription (ONOS) scheme in India, launched in January 2025, which gives all centrally-run and state-run higher education institutions access to academic journals through a national platform managed by the Information and Library Network (INFLIBNET) is a good example. Although ONOS is new and its long-term impact on piracy is still emerging, it demonstrates a bold policy approach. Rather than relying only on copyright enforcement or fair dealing reform, the government reduces the economic barriers that push students and researchers toward illegal alternatives. Nigeria can adopt a similar strategy to make educational resources more accessible. When legitimate access is easy and affordable, the people will be less prone to use illegal alternatives.

CONCLUSION

In the final analysis, while the Copyright Act, 2022 marks progress in Nigeria's fair dealing regime, its narrow scope of exceptions remains misaligned with the country's developmental realities. Although Nigeria retains fair dealing in form, the incorporation of the four-factor test offers an opportunity for flexibility akin to fair use. To realise this potential fully, fair dealing must be interpreted and reformed in a manner that prioritises education, access to knowledge, and creative growth. Through widened statutory exceptions, development-oriented application, and improved access to lawful materials, Nigeria can achieve a balanced copyright system that protects creators while advancing the public interest.

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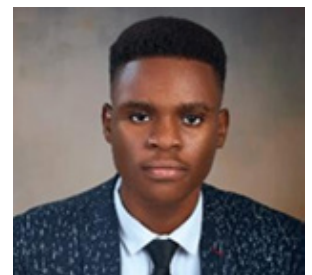
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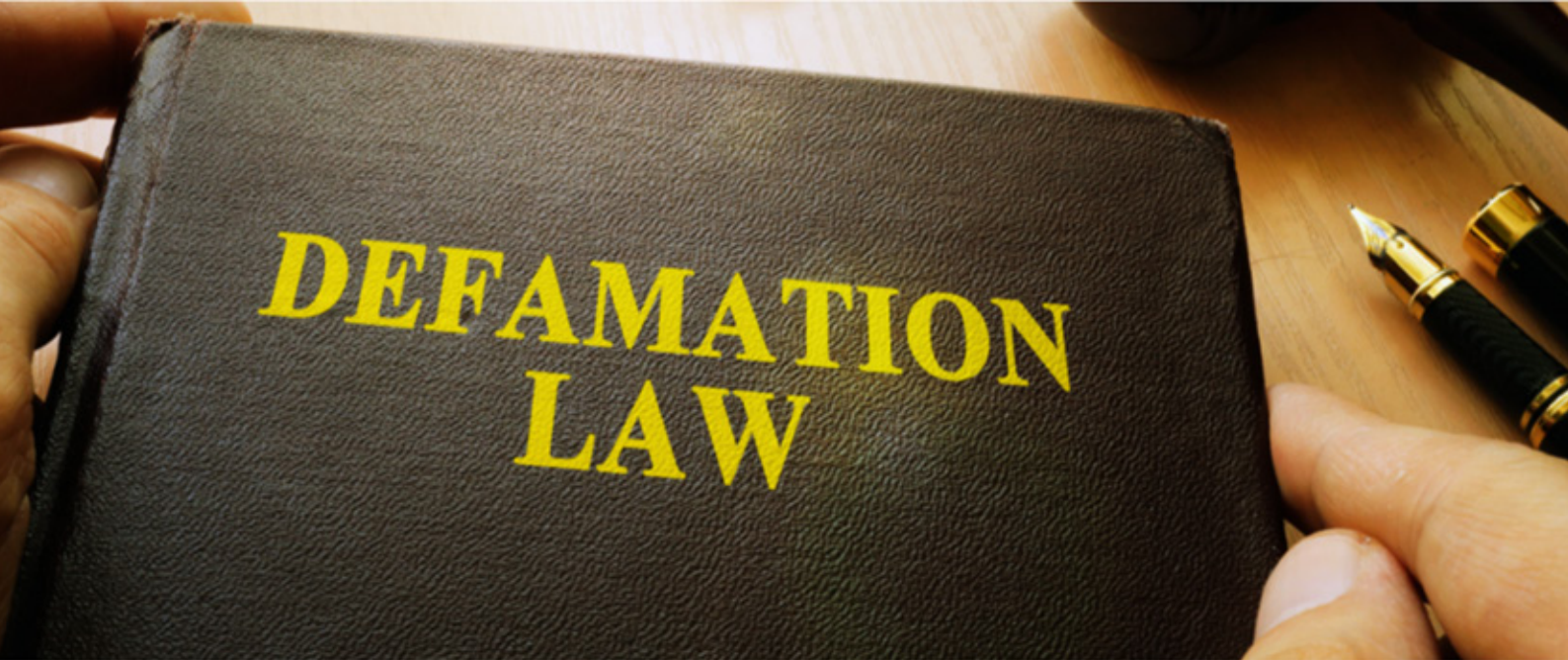
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DEFAMATION LAW

DOES THE USE OF THE WORD "ALLEGEDLY" EXEMPT ONE FROM LEGAL LIABILITY IN DEFAMATION?

JANEFRANCES CHIBUZOR NWAKPA

INTRODUCTION

The Global Wave and the "Allegedly" Myth.

The emergence of the digital age has fundamentally transformed the manner in which information is created, disseminated, and consumed. Through social media platforms, blogs, podcasts, online newspapers, and other digital channels, individuals now possess the ability to communicate with audiences on an unprecedented scale. While this technological advancement has significantly enhanced access to information and strengthened the exercise of freedom of expression, it has also facilitated the rapid spread of rumors, accusations, misinformation, and unverified claims.

Within this evolving communication landscape, one particular word has become increasingly prevalent: "allegedly." It is now common to encounter statements such as "the politician allegedly embezzled public funds," "the businessman allegedly committed fraud," or "the celebrity allegedly assaulted a colleague." The widespread use of this term has created a popular belief that its inclusion automatically shields a speaker or writer from legal consequences, particularly liability for defamation.

As a result, many social media users, bloggers, commentators, and even amateur journalists now treat the word as a form of legal insurance. The assumption appears to be that once an accusation is prefaced with the word "allegedly," the publisher can no longer be held accountable for any reputational harm that may result.

However, the law is rarely so simplistic. Courts are generally concerned with the substance, context, and effect of a publication rather than the presence or absence of a single qualifying word. Consequently, the legal significance of the word "allegedly" remains a subject worthy of examination.

In this article, we will examine whether the use of the word allegedly exempts a person from incurring legal liability for defamation or whether it merely creates an illusion of legal protection.

Foundational Doctrine: Defining Defamation

Before examining the legal significance of the word "allegedly," it is necessary to understand the concept of defamation itself.

Although there is no single universally accepted definition of defamation, regardless of how diverse the various definitions may be, they all share a common essence. In this light, the definition provided by Black's Law Dictionary will be adopted for the purpose of this discussion.¹

According to Black's Law Dictionary, defamation is the publication of a false statement concerning another person to a third party, which tends to injure that person's reputation.²

In this context, the term "publication" does not refer exclusively to newspapers, books, journals, blogs, or other written materials. In defamation law, publication simply means the communication of a statement to at least one person other than the claimant. Such communication may occur through written words, spoken words, broadcasts, online posts, gestures, signs, or any other medium capable of conveying meaning to a third party.

Traditionally, defamation is divided into two categories: libel and slander.

Libel

Libel refers to defamatory statements communicated in a permanent form. Examples include newspapers, magazines, books, letters, online articles, blog posts, social media publications, photographs, videos, and other recorded communications. Due to its permanent nature and capacity for wider dissemination, libel is generally regarded as the more serious form of defamation.

Slander

Slander refers to defamatory statements communicated in a temporary or transitory form, particularly through spoken words or gestures. Unlike libel, slander is ordinarily fleeting in nature, although modern technology has increasingly blurred the distinction between the two through the recording and storage of spoken communications.

For a statement to constitute actionable defamation, certain essential elements must be established.

1. False and Provable Statement of Fact

Firstly, the statement must be false and capable of being proven as a statement of fact. Defamation law is primarily concerned with false factual assertions that harm reputation. A statement that is substantially true will ordinarily not attract liability. Similarly, statements that cannot reasonably be proven true or false may be treated as opinions rather than statements of fact.

2. Reference to the Claimant

Secondly, the statement must refer to the claimant. The claimant need not necessarily be identified by name. It is sufficient if reasonable persons who encounter the statement are capable of understanding that it refers to the claimant.

3. Communication to a Third Party

Thirdly, the statement must be communicated to a person other than the claimant. This requirement is commonly referred to as publication. A statement communicated only to the claimant, however offensive, will generally not satisfy this requirement because reputational injury arises from communication to others.

4. Defamatory Nature of the Statement

Fourthly, the statement must be defamatory in nature. In other words, it must be capable of lowering the claimant in the estimation of right-thinking members of society, exposing the claimant to hatred, ridicule, contempt, or causing others to shun or avoid the claimant.

5. Fault on the Part of the Publisher

Fifthly, there must be fault on the part of the publisher. The degree of fault required varies across jurisdictions and according to the status of the parties involved. In some jurisdictions, a claimant may be required to prove negligence, recklessness, or knowledge of falsity. For instance, in the United States, public officials and public figures must satisfy the heightened standard of "actual malice" established in *New York Times Co. v. Sullivan* (1964), requiring proof that the publisher either knew the statement was false or acted with reckless disregard for the truth.³

Although Nigerian and English defamation law do not generally require proof of actual malice as

an element of the tort, questions of fault remain relevant in assessing damages, defeating certain defenses, and determining whether a publication was made responsibly.

The rationale behind defamation law lies in the protection of reputation. Reputation constitutes an important aspect of an individual's personal, social, and professional identity. Consequently, the law seeks to provide remedies where reputational harm has been wrongfully inflicted while simultaneously preserving freedom of expression.

Defamation Under Nigerian Law

Defamation occupies an important position within Nigerian law and may attract both civil and criminal consequences.

From a civil perspective, defamation exists as a tort under Nigerian common law. A person whose reputation has been damaged by a defamatory publication may institute an action seeking remedies such as damages, injunctions, apologies, corrections, or retractions. Nigerian courts have long recognised that reputation is a valuable asset deserving legal protection. Where reputation is unjustly harmed, the law aims to give individuals an effective remedy.

In determining whether a statement is defamatory, Nigerian courts generally consider whether the words complained of would tend to lower the

claimant in the estimation of right-thinking members of society or expose the claimant to hatred, ridicule, contempt, or avoidance. Courts examine the publication as a whole rather than isolated words or phrases. Consequently, the meaning conveyed by the entire publication is often more important than the presence or absence of any particular word.

In addition to civil liability, Nigerian law also recognises criminal defamation. Criminal defamation is provided for under Sections 373 to 381 of the Criminal Code, which applies in Southern Nigeria.⁴ Section 373 defines defamatory matter, while subsequent sections prescribe offences and penalties relating to the unlawful publication of such matter. Similarly, Section 391 and related provisions of the Penal Code, applicable in Northern Nigeria, criminalise conduct that unlawfully injures the reputation of another person.

Criminal defamation remains part of Nigerian law, though it continues to generate debate over its effect on freedom of expression. Consequently, a person may, depending on the circumstances, face both civil proceedings and criminal sanctions arising from the same defamatory publication. The law of defamation in Nigeria operates within a broader constitutional framework that seeks to balance two competing interests: the right to freedom of expression and the right to reputation. Section 39 of the Constitution of the Federal

Republic of Nigeria 1999 (as amended) guarantees every person the freedom to hold opinions and to receive and impart ideas and information without interference.⁶ However, this right is not absolute. The exercise of freedom of expression must be reconciled with the equally important societal interest in protecting individuals from unjustified attacks on their reputation.

Nigerian courts have therefore consistently sought to strike a balance between these competing interests. On one hand, the law encourages robust public debate and the free exchange of ideas. On the other hand, it recognises that false accusations can have devastating personal, professional, and social consequences. Defamation law thus serves as a mechanism through which this balance is maintained. The objective is not to suppress speech but to ensure that freedom of expression is exercised responsibly and without causing unjustifiable harm to others. The Nigerian position therefore demonstrates that liability for defamation is determined by substantive legal principles rather than linguistic technicalities. Whether a statement contains the word "allegedly" will not, by itself, determine liability. Rather, courts will examine the overall meaning and effect of the publication.

Transnational Defamation: Cross-Border and International Law

The rise of digital communication has transformed defama-

tion from a largely domestic issue into a transnational one. In many cases, defamatory statements are no longer confined within the borders of a single country. A social media post made in Nigeria may be viewed instantly by individuals in Ghana, the United Kingdom, the United States, or virtually any other jurisdiction connected to the internet.

This development gives rise to important legal questions. Where reputational harm occurs across multiple countries, which court has jurisdiction? Which country's law should apply? How should conflicting legal standards be reconciled?



Courts generally determine jurisdiction by considering factors such as the place of publication, the place where the harm occurred, and the location of the parties involved. Consequently, more than one jurisdiction may potentially claim authority over a particular dispute. ⁷

The challenges associated with transnational defamation have increased significantly with the rise of social media and digital journalism. Unlike traditional print publications, online content can be accessed simultaneously in multiple jurisdictions, each possessing its own legal standards and rules concerning defamation. This creates uncertainty for publishers who may find themselves subject to legal proceedings in countries they never intended to target.

Furthermore, courts are increasingly required to determine whether the mere accessibility of online content within a jurisdiction is sufficient to establish jurisdiction or whether additional factors, such as the location of the publisher, the intended audience, or the extent of reputational harm suffered within the jurisdiction, should also be considered. ⁸ As a result, transnational defamation continues to be one of the most complex and rapidly evolving areas of modern media law.

At the international level, the law seeks to balance two competing interests: freedom of expression and the protection of reputation. This balance is reflected in international human rights instruments such as the International Covenant on Civil and Political Rights, which protects both freedom of expression and the right to protection from unlawful attacks on one's reputation. ⁹

Despite differences among legal systems, courts across jurisdictions generally agree on one point: the mere use of the word "allegedly" does not automatically exempt a person from liability for defamatory publications.

Deconstructing the "Allegedly" Illusion: Why the Shield Fails (Revised)

Having examined the legal foundations of defamation, the central question remains whether the use of the word "allegedly" can exempt a person from legal liability. The answer, in most circumstances, is no.

The first reason lies in the ordinary reasonable reader test, which requires courts to assess how an ordinary person would understand the publication as a whole¹⁰

The focus is not on isolated words but on the overall impression created. The key issue is what meaning the publication conveys, not the linguistic caution used by the publisher.

Closely connected to this is the "sting" principle, which refers to the essential defamatory meaning carried by the publication.¹¹ If the defamatory sting remains intact, the insertion of words such as "allegedly" does not materially change the legal effect. Courts are concerned with substance, not cosmetic wording.

Another important principle is the repetition rule, which provides that repeating a defamatory allegation attracts the same liability as originally making it.¹² A publisher cannot avoid responsibility by attributing an allegation to another source or by framing it as hearsay.

These principles are reflected in judicial decisions such as *Lewis v. Daily Telegraph Ltd*¹³ and *Charleston v. News Group Newspapers Ltd*,¹⁴ where courts emphasized that publications must be assessed in their full context rather than through selective focus on individual words.

The implication is clear: the word "allegedly" has no automatic legal effect. At best, it signals that a matter has not been proven. However, if the overall publication conveys to readers that a person committed wrongdoing, liability may still arise regardless of such qualifiers.

Whether the word has any protective value depends entirely on context. Where it appears in a

fair and accurate report of official proceedings or verified allegations, it may support neutrality. Where it is used merely to soften an otherwise unverified accusation, it provides little or no legal protection.

Legitimate Defences Versus Linguistic Hedges

Having established that the word "allegedly" does not ordinarily provide automatic protection against liability, the next question becomes: what does?

The answer lies not in linguistic hedges but in recognised legal defences developed by courts and legislatures over many years. Unlike the word "allegedly," which merely modifies the manner in which a statement is expressed, legal defences provide substantive legal justification for the publication.

Truth or Justification

Truth constitutes one of the most important defences to defamation. The rationale is straightforward: the law protects reputation from false attacks, not from accurate statements. Consequently, a defendant who can establish that the allegedly defamatory statement is substantially true will ordinarily avoid liability.¹⁵

This defence reflects the principle that individuals should not be entitled to recover damages merely because truthful information about them is embarrassing or damaging to their reputation. Where the substance of the allegation is true, the law generally regards the public interest in truth as outweighing the claimant's interest in protecting their reputation.

Fair Comment or Honest Opinion

Another important defense is fair comment, now more commonly referred to in many jurisdictions as honest opinion. This defense protects opinions expressed on matters of public interest, provided that the opinion is honestly held and based upon facts that are either true or otherwise protected.¹⁶

The distinction between fact and opinion is particularly important. A person may lawfully criticize the actions of a politician, business executive,

athlete, or public institution if the criticism genuinely represents an opinion based upon disclosed facts. What the law generally prohibits is the presentation of false factual allegations disguised as opinion.

Privilege

The defence of privilege protects certain communications because public policy favours free and uninhibited discussion in particular settings. Privilege may be absolute or qualified depending on the circumstances.

Absolute privilege typically applies to statements made during judicial proceedings, legislative debates, and certain official governmental functions.¹⁷ In such circumstances, participants are granted extensive protection in order to facilitate the administration of justice and democratic governance.

Qualified privilege applies where a person has a legal, moral, or social duty to communicate information to another person who possesses a corresponding interest in receiving it.¹⁸ The protection may, however, be lost where the publication is motivated by malice or exceeds the scope of the privileged occasion.

It is important to appreciate that recognized defenses operate because the law considers certain communications worthy of protection. Truth is protected because the law does not punish the communication

of facts merely because those facts are damaging. Honest opinion is protected because public discourse requires room for criticism, evaluation, and debate. Privilege is protected because certain social and governmental functions depend upon open communication free from the fear of litigation.

These protections arise from carefully developed legal principles and have been refined through decades of judicial interpretation. They are therefore fundamentally different from linguistic devices such as "allegedly." While legal defenses provide substantive justification for a publication, linguistic hedges merely alter the manner in which a statement is expressed.

Within these contexts, the word "allegedly" may serve a useful journalistic purpose by indicating that a matter remains under investigation or has not yet been conclusively established. However, any legal protection ultimately derives from the underlying defense rather than from the word itself.

Practical Implications for Modern Media and Content Creators

The widespread misconception surrounding the word "allegedly" has significant practical implications for journalists, bloggers, influencers, content creators, and ordinary social media users. First, individuals should recognise that liability depends on substance rather than harmless merely because a

than form. A defamatory publication does not become legally qualifying word has been inserted into it. Courts are more concerned with the meaning conveyed to readers than with the particular vocabulary selected by the publisher.

Secondly, fact-checking remains indispensable. Before publishing potentially damaging allegations, writers should verify information through credible and reliable sources. In an era where information spreads rapidly and reaches vast audiences within seconds, the consequences of publishing false allegations can be severe and far-reaching.

Thirdly, particular caution should be exercised when reporting criminal allegations. Rather than merely stating that an individual "allegedly" committed an offence, responsible reporting requires reliance on verifiable and official sources. A journalist should, for example, report that a person has been arrested, charged, investigated, or arraigned before a court where such facts can be independently verified. This transforms the publication from the repetition of a rumor into the fair and accurate reporting of official proceedings.

Furthermore, content creators should understand that social media platforms do not exist outside the law. The informal nature of social media communication often creates the mistaken impression that ordinary legal rules do not apply online. In reality, statements

published on social media platforms are capable of attracting the same legal consequences as statements published in newspapers, books, or broadcast media.

Finally, writers should clearly distinguish between facts, allegations, and opinions. Expressions such as "in my opinion" may assist in identifying commentary as opinion, but such language will not automatically create a defence where one does not otherwise exist. What matters is whether the statement genuinely constitutes an opinion rather than a disguised assertion of fact.

Ultimately, responsible communication requires accuracy, fairness, diligence, and respect for the reputational interests of others rather than reliance upon so-called "magic words."

CONCLUSION

The evolution of modern communication platforms has fundamentally transformed the way information is created and shared, but it has not altered the core legal duty to respect the reputation of others. The widespread belief that the word "allegedly" functions as an automatic shield against defamation liability remains one of the most persistent and legally dangerous misconceptions of the digital age.

As demonstrated throughout this article, defamation law values substance over form. The ordinary reasonable reader test, the sting principle, and the repetition rule collectively ensure that courts focus on the real-world impact of a publication rather than superficial linguistic devices. Courts are concerned with what a statement communicates, not merely how it is phrased.

The analysis of Nigerian law further demonstrates that liability for defamation is determined by established legal principles rather than by the presence or absence of a particular word. Similarly, developments in transnational defamation reveal that courts across jurisdictions continue to prioritise the protection of reputation while balancing the equally important right to freedom of expression.

Consequently, the insertion of the word "allegedly" does not ordinarily exempt a person from legal liability. At best, it may indicate uncertainty regarding the truth of an allegation. At worst, it may create a dangerous illusion of legal protection where none actually exists. The legal consequences of a publication will always depend upon its overall meaning, context, and effect on the reputation of the person concerned.

Ultimately, there are no shortcuts, linguistic tricks, or magical words capable of bypassing the legal protections surrounding human reputation. True protection against defamation liability lies in recognised legal defences such as truth, honest opinion, and privilege. For journalists, bloggers, content creators, and ordinary social media users alike, the message remains clear: verify your facts, communicate responsibly, and remember that accountability attaches not to individual words, but to the overall meaning and effect of what you publish.

The word "allegedly" may be a useful tool of careful journalism, but it is not, and has never been, a licence to defame.

ENDNOTES

1. *Black's Law Dictionary* is globally recognized as a premier legal reference for defining core tortious and criminal concepts.
2. See *Black's Law Dictionary* (11th ed. 2019), defining "defamation" in terms of its publication and reputational injury requirements.
3. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This landmark U.S. Supreme Court decision established that public officials must prove "actual malice" to recover damages for defamation.

4. Criminal Code Act, Chapter C38, Laws of the Federation of Nigeria (LFN) 2004, Sections 373–381.
5. Penal Code (Northern States) Federal Provisions Act, Chapter P3, Laws of the Federation of Nigeria (LFN) 2004, Section 391.
6. Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 39 (guaranteeing the right to freedom of expression and the press).
7. This multi-jurisdictional reach introduces complex conflict-of-laws issues, typically governed by the principle of **lex loci delicti** (the law of the place where the wrong was committed).
8. See the seminal Australian High Court decision **Dow Jones & Co Inc v. Gutnick** (2002) HCA 56, which established that online defamation occurs where the material is downloaded and read, significantly impacting global internet jurisdiction standards.
9. International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 16, 1966, Art. 19 (protecting freedom of expression) and Art. 17 (protecting against unlawful attacks on honour and reputation).
10. The "ordinary reasonable reader" is a legal construct representing an individual of average intelligence who reads a publication with a normal degree of attention.
11. The "sting" of a charge is the core actionable accusation that damages the person's character, separate from surrounding narrative flourishes.
12. Under the common law repetition rule, "tale-bearers are as bad as tale-makers." Repeating a libelous statement is treated as a fresh publication.
13. **Lewis v. Daily Telegraph Ltd** [1964] AC 234.
14. **Charleston v. News Group Newspapers Ltd** [1995] 2 AC 65.
15. The defence of justification requires the defendant to prove that the factual sting of the allegation is true in substance and in fact.
16. To succeed, the honest opinion defence must rest upon true facts that were explicitly stated or sufficiently indicated at the time of publication.
17. Absolute privilege provides total immunity from civil litigation to ensure uninhibited official institutional operations, regardless of the speaker's motives.
18. Qualified privilege protects communications made in the discharge of a legal, moral, or social duty, provided the statement is made without actual malice.

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THE RUGGED ROAD OF POLITICAL ACCOUNTABILITY: NAVIGATING THE PACT BETWEEN LEADERS AND THE LED

ODHIAMBO BENSON

ABSTRACT

Kenya's Constitution provides for general elections every five years, guaranteeing regular renewal of political leadership. These five years of election and recall enable the electorate to judge their leaders based on their performance. This judgment might or might not get the incumbent re-elected. During elections, leaders pledge competent service and thus them and their people enter a social contract. The social contract is an expounded theory that John Locke explained comprehensively. The social contract theory posits that people voluntarily give up some of their freedoms to a government or authority in exchange for protection of their rights and the maintenance of social order. Elected politicians in Kenya have however breached this contract from time to time. This paper examines how public representatives in Kenya have crafted the illusion of democratic adherence to the social contract while in reality entrenching authoritarianism and curtailing citizens' rights and freedoms. The paper also commends strides made in dealing with persistent occurrences of breach of mutual accord between the government and the people. It concludes by suggesting potential remedies in order to restore this broken social bond.

INTRODUCTION

When leaders are elected, they are deemed to have entered a social agreement with their subjects. This agreement requires the leaders to perform obligations to the best interest of the subjects.

The obligations include maintaining justice, establishing and furthering development projects, obeying the constitution among other duties. John Locke argued that because humans are naturally free and equal, legitimate political authority arises only from a social contract in which individuals, living in the state of nature, voluntarily surrender certain rights to the government to secure the stable and peaceful enjoyment of their life, liberty, and property.

This transfer of rights, Locke opines, is conditional. The social contract is therefore a model of what a democratic nation should be anchored in. Theoretically, this is the kind of democracy Kenyans enjoy where leaders are elected, they perform their best to the nation and leave the stage when they have fulfilled these obligations. However practically, this is not what happens often. Leaders breach this contract and instead of being recalled, they sometimes get re-elected. This is an indication of the existence of a leadership model that should be re-examined.

The Breach of Public Trust

The electorate in Kenya, institute and forge a collective social agreement with public officers. It is the mandate of these public officers to preserve rights and freedoms after taking oath. State officers must undertake their duties in ways that ensure and maintain public confidence. According to article 260 of the constitution, state officers are public officers. State officers also include elected representatives, right from the president. Trust in the public officers cannot be built if these officers engage in actions that undermine rights and freedoms of individuals. So often, public officers have engaged in actions that sabotage the image of their offices, leading to loss of trust. These actions include corruption, abuse of power, unfulfilled promises and injustices such as participating in abduction of innocent civilians.

According to Amnesty International, for instance, at least 12 people were abducted in Kenya in the context of protests against the Finance Bill, which constituted arbitrary arrests and enforced disappearances as prohibited by the Constitution of Kenya under Article 29. These incidences of disappearances which are often accompanied by killings of innocent civilians are contraventions to the social covenant. It is the government's duty to safeguard citizens against unlawful killings and arrests. Occurrence of these contraventions worsen confidence that the people have in public officers.

Another transgression of the civic agreement is the unceasing misuse of public funds by public officers. Corruption and misappropriation of resources by leaders has been the greatest threat to devolution. Elected leaders cannot claim to be at the forefront of fighting corruption and bad governance if they are the perpetrators. Eliminating corruption has been the agenda of every person campaigning to be elected into office. However, elected administrators never deliver on this matter according to their well-polished manifestos during campaigns. When leaders fail to deliver, Kenyans often go to the streets to exercise their right to protest against unmet expectations as provided for by Article 33 of the Constitution. Kenyans protest not only against corrupt leaders but also against failing systems.

The 2024 Protests and the Failure of Leadership Promises

In June 2024, Kenyans took to the streets. Kenyans were tired of rotten leadership. They were exhausted of sweet promises that had never been honored. Kenyans were against the norm of elected leaders continuously making promises instead of fulfilling their duties. As a matter of reason, an elected leader should not promise that which they are mandated to do. It is only sensible that the particular leader assures citizens of completion time of that which they should do, but not performance of the action itself. A promise in the instance of a social contract especially after election parallels a mere favor because these obligations ought to be performed by the politicians by the virtue that they bid for offices and the public accepted their bids. Instead of fulfilling their campaign promises, some elected officials merely repackage and re-promise them while in power. They forget that performance is not favor.

Unfulfilled mandates foment remonstrations. When Gen Zs went to the streets, they were protesting against bad leadership. Ironically, this only attracted a rise in campaigns rather than good leadership. Some leaders came out aiming to be replacements of the president. The leaders never understood that the objective of the public was not to replace the president but to replace bad leadership with good leadership. At that point in 2024, it was just two years after general elections. It was a moment that should have been marked by intensive development projects rather than heated political campaigns.

It is an embraced norm in Kenya to hold political rallies that are not policy-oriented even after elections. This has always had the nation in constant political heat rather than focus on development. This culture of political campaigns throughout all periods by both those in government and those outside government should be exterminated. One reason for its extermination being the amount of funds spent during the political rallies, especially by those in government.

In a democratic nation, it is paradoxical that citizens must protest to claim what is inherently their right. The very need to demand what is constitutionally guaranteed suggests that someone holds those rights in custody, compelling the people to exert pressure to access them. A democratic nation is where the government exists for the people. Everything in a democratic nation is done in a way that is free and fair including elections, although elections alone cannot be equated to democracy. To the contrary, Kenya has had countable number of elections whose results were questionable, one being the presidential election in 2017 whose result was nullified.

If an election is found to have been rigged, it means that no popular sovereignty was exercised and right of citizens to vote was infringed. It only shows that even if citizens vote, their preferred candidate might not win if the holder of the "rigging machine" prefers otherwise. The person with the ability

If an election is found to have been rigged, it means that no popular sovereignty was exercised and right of citizens to vote was infringed. It only shows that even if citizens vote, their preferred candidate might not win if the holder of the “rigging machine” prefers otherwise. The person with the ability to rig an election and dictate its outcome therefore is the sole elector while the citizens are deceived that they are the electors. Contravening the right of citizens to vote for their preferred candidate voids the social contract since the element of consent disappears in such instances.

The five-year constitutional term granted to public officials provides ample time to deliver on their mandates. Consequently, leaders cannot credibly claim that the five-year term is inadequate for the completion of their projects or fulfilment of their duties. Comparatively, some jurisdictions such as the United States have shorter term lengths like four years for the president, even though the lengths of other positions may vary.

Elections serve to filter bad leaders and put the incumbent on toes. Leaders who snivel hoping to be reelected can be termed as political opportunists. Such leaders can deliberately not complete their projects and use them as campaign strategy. Nevertheless, under the social contract model, if projects remain incomplete despite genuine effort, a departing leader need not fear losing re-election. The succeeding officeholder, as the next party to the contract, would be obliged to continue and fulfil those responsibilities.

Recall, Impeachment, and accountability

Evidently, Kenya has a number of leadership issues. One contributing factor contributing to these challenges is the absence of an effective mechanism for constantly monitoring leaders' performance. Elected politicians do not satisfactorily account to the public for their behavior, performance, policies and use of resources. Sometimes bills in parliament, for example, are passed when legislators have only debated little about them and the citizens also have no knowledge of them.¹⁵ There is no lucid roadmap on how members of the public themselves can check these performances.

The question that remains unanswered is if there are solutions if leaders underperform. Recall and impeachment are some of the ways provided for by the constitution. Section 104 of the constitution provides that the people can recall a member of parliament if a petition supported by a significant number of registered voters is signed. Governors can also be impeached for gross violation of the Constitution, abuse of office, gross misconduct, or incompetence. However, these means are of complete removal and not constant tracking that can keep leaders on check. The

sequence leading to impeachment however is clear just on paper. In the practical world, the road to impeachment is arduously rugged. This is evident in the little number of impeached leaders as compared to the greater number of lodged complaints that have unfolded in the past. Recall has also not been a preferred remedy.

As of 2019, the IEBC had not received any recall petitions. The performance of elected parliamentarians had not been up to par either. This can mean that the public have not been sufficiently informed of how they can recall incompetent leaders.

Though its impact may vary, impeachment has historically served as an instrument that compels leaders to answer for their actions. Governor Kawira Mwangaza, for example, was impeached on grounds of gross violation of the law, misconduct, and abuse of office. The governor's counsels argued at the appellate court on the point that the impeachment was sub judice, therefore unfair and invalid. The court elucidated that parliamentary proceedings cannot be halted because of sub judice unless there stands critical risks of interfering with court proceedings. The impeachment was therefore upheld after the appeal was dismissed. Some governors have however survived impeachment despite overwhelming evidence against them. This raises the question as to whether impeachments in Kenya are political rather than democratic. Governor Mutai of Kericho pulled through impeachment. Although

A hand holding a sphere covered in business-related terms. The word 'GOVERNANCE' is prominently displayed in the center in large, bold, red capital letters. Other words visible on the sphere include 'company', 'guideline', 'policy', 'legal', 'process', 'law', 'compliance', 'regulation', 'protection', 'industry', 'motivation', 'skill', 'power', 'inspiration', 'goal', 'teamwork', 'concept', 'management', 'strategy', 'standards', 'finance', 'direction', 'control', 'partnership', 'ment', 'supervision', 'innovation', 'people', 'process', 'each', 'team', 'chief', 'inspiration', 'goal', 'team', 'chief', 'inspiration', 'goal', 'team', 'chief'. The words are in various colors (blue, green, orange, black) and sizes, creating a dense, textured surface. The hand is shown from the palm side, with fingers slightly curled around the sphere. The background is a plain, light color.

also had their names mentioned. Waiguru was later on cleared by the Ethics and anti-corruption Commission and was allowed to run for the Kirinyaga Gubernatorial seat.

When the presidency is incriminated with embezzlement just as during president Uhuru's time, it becomes difficult to uproot mismanagement from the whole system of governance. President Ruto's reign is no different. It is embroiled by equally threatening vices such as extra-judicial killings. The annual report by Missing Voices revealed that there was a total of fifty-five enforced disappearances and a hundred and four extra-judicial killings in 2024 alone. The report further indicates that these numbers collectively represent a twenty-four percent increase as compared to 2023.

Even as extra-judicial killings and other allegations continue to mount and mar the current president's reign, the electorate watches, and the general elections will be the moment of reckoning. While the prospects of his re-election remain uncertain, one thing is clear- it will unfold under markedly different circumstances. Yet, this pattern extends beyond a single leader. Kenya's political landscape continues to recycle even underperforming officials, a practice that starkly contradicts the very essence of the social contract and the mutual accountability it demands between leaders

and the electorate.

The resurgence of leaders linked to malpractice is not accidental; it is the product of calculated manipulation. Kenyan politicians have perfected the craft of deception by swaying voters through rhetoric, emotional appeals, and even the strategic use of religious symbolism to mask their true motives. It is not news to see politicians portray themselves as saints during campaigns. Some would regularly show up at church services aiming to appear 'godly' to the people.

However after the elections, they disappear and do the ungodly. As a nation, voting for someone because they appear to fear God is a misstep. One should be voted for based on their record of performance. It has been contended that no man should clinch office based only on how nice or religious the person is, he must also be an able man. An able man is one who performs. It benefits a country nothing if its leaders are prayerful yet incompetent. The persistent challenges stemming from underperforming leaders make it abundantly clear that systemic change is necessary. Kenya must prioritize mechanisms that hold leaders fully accountable for their actions and performance. Although the constitution provides mechanisms such as scrutiny done by the EACC which was established by Article 79, more need to be done. The National Assembly particularly needs to be kept vigilant to ensure it checks the actions of the executive. The house has at times displayed weaknesses.

In 2024, to illustrate, the house passed the widely opposed Finance Bill that led to protests and several deaths. If the members of the Assembly truly represented the views of their people without compromise, they should have reasonably perceived that their people were strongly and openly opposed to the bill. Perhaps other measures need to be introduced to keep the legislature sharp, one being bringing in term limits. Term limits may aid to get rid of floundering MPs. It is startling that members can sit in the parliament long as they would want and could influence making of detrimental laws for decades. The law is not static. Pound actually opines that: "Law must be stable, and yet it cannot stand still." Establishing term limits for MPs could therefore prevent the making of conservative laws that do not keep up with change.

The judiciary cannot be exempted from this reformation. The Judiciary has played critical roles at certain time in shaping democracy and leadership. The widely landmarked 2017 presidential election petition is a practical example where the judiciary stood tall and showed that it can restore justice with regards to elections. Notably, it was the first time in Africa when a sitting

president's re-election was annulled. The Kenyan Supreme Court, in the Odinga & another v Independent Electoral and Boundaries

Commission (IEBC) & 2 others, nullified the results because it found that the IEBC had committed "irregularities and illegalities" in the transmission and verification of results. The Court held that the election was not conducted in accordance with the Constitution and electoral law, particularly citing failures in the electronic results transmission system, lack of transparency, and inconsistencies in forms used to tally votes. These procedural flaws, the judges ruled, compromised the integrity and credibility. The decision signified a commendable stride made by the Judiciary.

However, more 'panel-beating' should be done to Kenyan judiciary. The judiciary has been accused of systemic corruption from time to time. It has also been under constant pressure and influence by the executive. The interference of the judiciary by the executive undermines check and balance of the arms of government. Article 160(1) of the Constitution plainly expresses that the Judiciary must be under no control by any individual or body. It is high time the judiciary be strengthened to ensure the check and balance system is maintained. This strengthening can be done by; adequate funding, transparent appointments, ethical oversight and, capacity building.

CONCLUSION

Finally, Kenyans as the electorate must also demonstrate their genuine zeal to extirpate bad governance. When inept leaders are elected, it is the people who suffer while the leaders they elect often dwell in opulence. Kenyans must cease choosing leaders with the fondness of who gave them some handouts during campaigns. The country has remained in disarray because the people elect unfit politicians rather than reformist leaders. The electorate has always picked leaders who can hold microphones and rebut speeches made by other politicians instead of furthering policies and development. The inclination towards politicians who know how to play car-rooftop intrigues without progressive ideologies should be annihilated. As George Orwell rightfully contends, “Those who elect corrupt politicians, impostors, thieves, and traitors are not victims but accomplices.” It is time Kenyans voted competence rather than deceit masked by sweet words, or else they will be remembered by generations to come as abettors of bad governance.

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AUTHOR

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INTERVIEW WITH AUERELLO MATTHAEUS PILLAY

Q Tell us about yourself and your accomplishments?

Answer: Dynamic and vibrant, I love being on the move and cannot stagnate. Mentorship is central to my being; I love learning, and I love teaching. In my free time, I enjoy watching long dramatic thriller series, like Teen Wolf and Shadowhunters; exercising; and embarking on evening escapades with my friends. Aesthetically, I believe in 'look good, feel good,' and so enjoy fashion.

I am a Toastmasters Global-accredited speaker, having won awards like Best Impromptu Speaker and Active Listener. With academic dedication as a crucial component of my identity, I have received subject prizes for being a top student in First-year Jurisprudence, as well as English Literature and Language.

Currently, I am ranked 5th in my cohort, as per the Dean's Merit List for 2025 LLB 2nd Year Results. I am also placed in the Top 1% of all students writing the 2023 IEB Further Studies English Language, English Home Language, Business Studies, Mathematical Literacy, and Life Orientation Examinations.

An avid writer, my first creative piece, titled 'Queer Quest,' was published in 2022 with the Centre for Sexualities, AIDS, and Gender in Social Justice Stories: Journeys to Justice. As a proponent of child-centric justice, I believe in not only engaging in academic discourse, but more importantly, engaging in tangible protest action and donation initiatives to ensure a practical realisation of rights — not just a theoretical one.

Q Have you always intended to study law, or was there a defining moment that shaped that decision?

Answer: TikTok played an unexpected, yet pivotal role in shaping my decision to study law. During the 2020 lockdown period, I grew progressively more conscientised as I was exposed to rigorous debates and stimulating infographics. I found passion in the nuance and the multiplicity of perspectives.

Q You have built a strong reputation for moot and mock trials. What sparked your interest, and how has your participation influenced your legal reasoning, research and oral advocacy?

Answer: With my parents having studied law and seeing my active involvement in high school public speaking and debating, they brought forward the idea of moot court to me. My mom, especially, has always pushed me to join oratory-enhancing extracurriculars. Added to that, many of my friends (and rivals) progressed to join moot. I considered it the next arena to test my argumentative abilities.

Moot, especially with the intensity of my renowned coach, Dunga, and esteemed co-counsel, Mazviita, has incredibly sharpened my legal research skills. It has enshrined the value of decorum when speaking before an honourable court. While I have always been detail-oriented — again, owing to my mother — I never knew how intricate and perfectionistic legal writing could be. My coach ensured our writing was refined, and I ensure I carry that with me and convey it to my mentees. With Mentors & Moot, it has emphasised the importance of proper time management, without compromising excellence.

Q What is your definition of leadership, and what key skills would you say distinguish a visionary leader?

Answer: To mobilise a team, a visionary leader must have merit. Motivational and meticulous, my definition of leadership refers to empowering a team to not only support an organisation and each other, but also to improve themselves and strive for success in every pathway. While my team of Peer Leaders (PLs) at Mentors & Moot fondly refer to me as the 'dictator,' I am a firm believer that we should platform the voices of those around us, especially within the teams you lead.

A good leader does not allow quiet voices to go unheard; a good leader amplifies the quiet voices to be heard in a noisy room. I believe visionary

leadership calls for a more integrated approach, with attentiveness that focuses on professional and (inter)personal experiences. As my dad often reminds me, strong leadership requires a teachable spirit. As my reading has informed me, a strong leader is a strong teacher.



leadership calls for a more integrated approach, with attentiveness that focuses on professional and (inter)personal experiences. As my dad often reminds me, strong leadership requires a teachable spirit. As my reading has informed me, a strong leader is a strong teacher.

Q Tell us about Mentors & Moot, and what inspired you to establish the organisation?

Answer: Noticing the exclusivity and accessibility difficulties that arise with moot court, my friends, now PLs, and I felt the need to make this exclusive arena more inclusive, while building upon the solid foundation of the legal profession. At Mentors & Moot, we provide tailored student-on-student coaching and guidance on a more intimate level. Each of our Peer Mentors (PMs) acts as an older sibling-like coach who extensively trains their mentees for a minimum of 4 hours per week. First, we host broad training sessions on legal research, writing, and oral advocacy — conducted by seasoned mooters and practitioners. Here, we set our organisational standards and expecta-

tions: hard work, energy, effort, ethics, and empathy.

Second, we extensively capture the personal data of prospective members and mentors, examining workshop attendance, academic performance, time management skills, dedication, interests, hobbies, and personal and professional needs. Third, we host two relationship-focused events — Bonding over Bonfire and Mingle & Moot. Bonding over Bonfire serves as a safe space where older students share their struggle to success stories with younger students. It is an extremely vulnerable event, demonstrating resilience and confidence. From that point, younger students share their personal stories. With tears all around, hot chocolates, and marshmallows in hand, our PLs carefully examine which mentees would be best suited to which PMs.

To ensure we reach students all over the country, we then host the Virtual Mingle & Moot Online Session with icebreakers and breakaway rooms for our members to connect on a deeper level. Thereafter, the intensity of competition really begins. While this requires 2a.m. practice sessions, endless research, and writing revisions to make certain every footnote is perfect and every submission is sound, we make sure that mental health is still a major consideration, especially that of our first-year mentees. We are confident that in fostering connections between our members, we equip them with a competitive yet comforting environment to Train, Transform, and Transcend.

Q You manage multiple leadership positions, including serving as the Chairperson of Mentors & Moot. How are you able to manage extra curriculum activities while maintaining academic excellence?

Answer: Practically, I time-block on the Calendar app and schedule my entire day — from the time I wake up, work out, shower, attend lectures, go to meetings, train teams, and study until I shower and sleep again. If something is not done by the time it needs to be, I won't sleep until that thing is done. Sleep is important, but Mentors & Moot (and

my academics) are more important to me.

More emotionally, my mentors, especially Frederic Augustyn, have always told me: if you love it, fight for it. If you don't love it (and you don't need it), leave it. Witnessing my first-year team win their Introductory League Finals, the Agency in Advocacy Award, and Best Heads of Argument, my role as a Peer Mentor has been a tremendously rewarding position. I have definitely experienced moments of being overwhelmed, immensely stressed, and felt physical brain throbs. That said, nothing warms my heart and satisfies my soul more than watching my mentees — my 'babies' — and PLs thrive at Mentors & Moot.

Q South Africa is experiencing heightened tensions around anti-immigration. What are your views about it and what role do you think law students can play in promoting informed conversation on immigration and other social developments?

Answer: It is important to engage in open dialogue with both undocumented immigrants and struggling South Africans, who are the people on the ground, actually enduring the hardships we tend to overlook. Inasmuch as statistics and research are pertinent, we cannot ignore the lived realities of African people when they are communicating what they feel is worsening their situations. To promote informed conversations, law students can volunteer at organisations like Sonke Gender Justice, which specifically cater to victims of gender-based violence and xenophobic hate crimes.

We can platform the voices of those faced with the lived realities of the existing employment and service provision problems, together with the administrative burdens that come with applications for documentation. Instead of emotionally absent commentary on academic papers and higher-level debates, we should be including voices of struggling Africans and hear them share their experiences before we judge and throw labels.

Q Looking back, which credential or experience had the highest leverage in opening doors for you and positioned you for national or international exposure?

Answer: Early curiosity is good. Early rigidity is not. I believe students should explore widely in their early years. Law is interconnected. Constitutional principles influence commercial transactions. Human rights inform criminal law. Specialisation should be informed, not accidental. When you have seen enough of the landscape, you can choose your mountain wisely.



Q Looking back, which credential or experience had the highest leverage in opening doors for you and positioned you for national or international exposure?

Answer: My non-academic high school leadership experience has influenced most of the skills that help me succeed. At Trinityhouse Randpark Ridge, being a 'Gees' (Spirit) Week leader — despite being the furthest thing from sporty — laid the groundwork for me to ignite my peers in achieving a unified vision. Together with the discipline-instilling 5:30a.m. swimming practices, 5-day hike camping trips with obstacle courses and what we termed 'DMCs' or 'Deep Meaningful

Conversations,' I learned the value of properly working in a team and communicating with others. Playing hockey and team sports, while mostly failing abysmally, taught me the importance of knowing my weaknesses, working to improve them, and playing to my strengths. At Reddam House Waterfall, I was subjected to intense and detailed feedback from Mrs Harvey, Mrs de Carvalho, and Mrs Tommei — my History and English teachers — all of whom never held back with drawing massive red lines through my essays, being blunt with feedback, and alerting me when my work was not up to standard. This, culminating in ranking in the Top 1% of IEB Further Studies English students, taught me the value of hard work, being receptive to critical feedback, and the importance of bouncing back when you are knocked down.

Q What significant initiatives or areas of work are you currently focused on, and what impact do you hope they will achieve?

Answer: We are currently working on the Mentors & Moot Seasoned Professional Mentorship (SPM) Programme that will bring students even closer to one-on-one engagements with esteemed advocates and attorneys. My attention lies with my first-year mentees and training them to be leaders. As we approach the end of our 2026 PL term, the next few months will primarily concern the more interpersonal skills development of our Mentors & Moot mentees — exploring networking skills, sponsorship acquisitions, judgement calls, ethical conduct, and consistent upliftment.

Q Finally, if you could leave aspiring advocates with one piece of advice, what would it be?

Answer: Be bold and courageous. Never fear failure. Conduct yourself with confidence. Speak with conviction. In the words of my Vice Chair, Jack Sargood, 'Never bow to bullies.' Above all else, lead with love.



IS THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS (AFCHPR) MORE EFFECTIVE THAN NIGERIAN COURTS?

EMMANUEL OMOLE

INTRODUCTION

'Cases have however shown that our courts are often very slow in this process of judicial legislation when minds are addressed to it at all.'

There are instances where a person may be wronged by other persons, institutions or governmental agencies. There are also instances where an institution may feel wronged by the acts of other institutions or governmental agencies. In these instances, should the method of resolution be the old 'an eye for an eye' rule or should there be recourse to an impartial, independent, qualified and expert body who would render a binding and prompt decision to settle the disputes without fear or favour? This is where a court steps in.

A court has been defined as a person or body of persons having judicial authority to hear and resolve disputes in civil, criminal, ecclesiastical, or military cases. It is one of the most effective inventions of civilisation and democracy. It has served as an avenue to settle disputes and to prevent Cain from taking Abel's life with his own hands. Accordingly, it is the pride of the common man and a supposed hope and refuge against the oppressor and the wicked. In Nigeria, it has been a platform to settle matters of human rights abuse, criminal and civil wrongs. A court may be different from a tribunal. A tribunal has been described as a special court or group of people who are officially chosen, especially by the government, to examine (legal) problems of a particular type. From this definition, it is apparent that a tribunal may perform the same judicial functions as a court. The functions of a tribunal have been called 'quasi-judicial'. Be that as it may, this paper treats a court and a tribunal in the same breath.

To operate, a court typically requires jurisdiction. In *Bronik Motors Ltd. v. Wema Bank Ltd*, it was held that jurisdiction is the bedrock of a court's exercise of its judicial powers. This simply means that a court may be nothing more than the proverbial toothless bull dog if it does not have jurisdiction, even in the face of clear and gross violation of rights, rules and laws. Jurisdiction has become the cryptonite to Superman. A lack of it instantly strips the court of all its powers, functions

and strengths. A court's jurisdiction is usually traceable to the Constitution, its enabling statute or other legal instruments. The problem of jurisdiction thus serves as the underlying problem this paper seeks to tackle. Countless human rights abuse cases have been thrown out of Nigerian courts simply because the court lacked the jurisdiction to hear the matter. The wolf of jurisdiction may come in the form of locus standi, non-justiciability of some rights, forum, or even technical matters such as the filing process. These issues shall be discussed accordingly in this paper, with copious judicial examples. The paper shall also proffer relevant recommendations which would help cure the debilitating issue of jurisdiction to Nigerian courts, while drawing on lessons from the The African Court on Human and Peoples' Rights (AfCHPR) (hereafter referred to as the 'African Court').

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS (AFCHPR)

The African Court is the judicial arm of the African Union, tasked with ensuring the protection of human, civil, political, and socio-economic rights across the continent. Headquartered in Arusha, Tanzania, it operates alongside the African Commission on Human and Peoples' Rights. Its origin traces to the Banjul Charter in 1981. It was not until 1998 however, that the Ouagadougou Protocol was adopted to establish the Court. Following the required 15 ratifications, the Protocol came into force on 25th January, 2004. The first judges were elected in January 2006, and the Court began functioning later that year. The African Court's contentious jurisdiction applies to all cases and disputes submitted to it in respect of the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol and any other relevant human rights instrument ratified by the states concerned.

When ascertaining the Court's jurisdiction, there are four tests involved. First, there must be material jurisdiction. This means that the allegations must relate to violations of human rights protected in the African Charter or any other human rights instrument ratified by the state concerned.

There must be personal jurisdiction. The applicants must be listed as one of the entities allowed to bring cases to the African Court from a country that has filed a declaration accepting the court's jurisdiction. There must also be temporal jurisdiction, in the sense that the alleged violations must have occurred after the state concerned had ratified the protocol establishing the African Court. Finally, there must be territorial jurisdiction. The alleged violations must have occurred on the territory of the concerned state. These tests are applied conjunctively, the failure of one is the damnation of the entire matter, no matter how serious it may be.

It is important to note that the African Court must be distinguished from the African Commission. The Court complements and reinforces the functions of the African Commission on Human and Peoples' Rights. While the African Court is a judicial body that renders binding legal judgements, the African Commission is a 'quasi-judicial' body that investigates and makes recommendations. For the Commission, individuals and NGOs can file complaints easily. To file a complaint in the African Court, the individual or NGO must have a special declaration from their state recognising the binding jurisdiction of the Court. Out of the 34 States that ratified the Ouagadougou Protocol, only eight have deposited the declaration recognising the competence of the Court to receive cases directly from NGOs and individuals. Also, while the African Commission has its headquarters at Banjul, The Gambia, the African Court has its headquarters located at Arusha, Tanzania. The scope of this paper does not purport to include the African Commission or its functions.

NIGERIAN COURTS

Nigerian superior courts of record have their origins traceable to the Constitution of the Federal Republic of Nigeria, 1999. While section 6(5) lists these courts, section 6(6) (a to d) delineate their powers. The most interesting paragraph to our discourse here is paragraph (C). It provides that the powers of the court shall not extend to determine the compliance with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution. This same

Chapter II contains most of the 'socio-economic' rights crucial to the development of any civilised society. These rights include the right to a safe and adequate environment, the right to basic education, the right to information among others. The Constitution meant to be the grundnorm for the protection and realisation of rights in Nigeria has opened the door to judicial impotence and infertility. As such, only the rights listed in Chapter IV are seemingly enforceable in Nigerian courts. Even these so-called enforceable rights have special and general claw-backs. It goes without saying that several cases have been flung out of the windows of justice in Nigeria, simply because the claimant based their claim on socio-economic rights listed in Chapter II. These cases are numerous.

In *Femi Falana v. Federal Government of Nigeria*, Falana filed a suit against the Federal Government seeking, among other things, a declaration that Nigerians are entitled to the best attainable state of physical and mental health as guaranteed by law. He argued that the failure of the government to repair and equip public hospitals and medical centres in Nigeria constitutes a violation of the right to protect the health of Nigerians and to ensure that they receive medical attention when they are sick. He then sought a court order directing the government to repair and equip the hospitals and another restraining public officers from accessing medical checkups in any foreign hospital and being treated at public expense in such hospitals. The trial court struck out the suit on the ground that the provision of adequate medical and health facilities is 'not justiciable' by virtue of section 6(6)(c) of the 1999 Constitution. The Court of Appeal equally dismissed his appeal.

In *Incorporated Trustees of the Nigerian Bar Association v. Attorney General of the Federation & 2 Ors*, The claimant questioned the legality of the dismissal of a policewoman who became pregnant when she was not married. The Federal High Court struck out the case on the ground that the police regulation under which she was dismissed is not unconstitutional. The court failed to engage with the Chapter II provisions on equal opportunities and the dignity of labour. This is particularly

alarming given that the related case of *Women Empowerment and Legal Aid (WELA) v. Attorney-General of the Federation* had already declared similar discriminatory police regulations unconstitutional under section 42 of the Constitution and under the African Charter.

When ascertaining the Court's jurisdiction, there are four tests involved. First, there must be material jurisdiction. This means that the allegations must relate to violations of human rights protected in the African Charter or any other human rights instrument ratified by the state concerned.

In *Ikechukwu Okpara & 7 Others v. Shell Petroleum Development Company of Nigeria Ltd & 6 Others*, the plaintiffs, filing on behalf of themselves and their respective communities, sought declaratory reliefs that gas flaring being carried out by the defendants in their communities violated their fundamental human rights to life and dignity of the human person. Claims founded in the environmental objective of Chapter II were treated as non-cognisable.

The issue of non-justiciability of socio-economic rights is just a mere part of the impotence demonstrated by Nigerian courts. There is also the poison pill of locus standi. Nigerian courts are still doggedly applying the old, archaic, unpalatable, regressive and prohibitory rule of locus standi as of the time of writing this paper. A person who has no direct interest in the litigation will be denied hearing even if the lives of poor victims were involved.

In *SERAP v. Federal Republic of Nigeria*, SERAP filed a case against Nigeria alleging human rights violations as a result of the government's failure to ensure adequate environmental protection in the Niger Delta due to oil spillage, alleging that decades of oil prospection had damaged the health and livelihoods of area inhabitants by denying them adequate access to clean water, education, healthcare, food and a clean and healthy environment. The Government contended that SERAP did not have standing to sue and that the Court did not have jurisdiction to rule on alleged violations of the relevant covenants. This case was taken to the ECOWAS Court precisely

because domestic Nigerian courts would have struck it out under section 6(6)(c) — section 20 being the only constitutional environmental protection provision, and it falls within non-justiciable Chapter II.



Similarly, in *SERAP v. Federal Republic of Nigeria & Universal Basic Education Commission*, although this case ultimately went in SERAP's favour at the ECOWAS Court, the litigation arose directly because the Nigerian Government argued before that Court that the educational objective in the Constitution of Nigeria is non-justiciable and that SERAP lacked standing since it was not directly affected by these laws.

This paper can in no way contain the sheer number of credible cases which have been dismissed in Nigerian courts for one technical reason or the other. Even in the cases that manage to be heard, the claimants would have become very old and senile before the judgement was given and the causes were heard. The *Falana* case on physical and mental health for example took more than 14 years from the trial court to the Court of Appeal, only for it to be thrown out. The landmark case of *Central for Oil Pollution Watch v NNPC*, being a laudable case showcasing the brilliant effort of the Supreme Court to tow the right direction concerning locus standi, took approximately 13 years to reach its final conclusion, only for the case to be thrown back to the trial court for retrial on the substantive issues. Practically, it was an inglorious waste of time and resources.

EFFECTIVENESS OF THE AFRICAN COURT

The African Court, on the other hand, has proven to be more innovative and effective. In *Centre for Human Rights (CHR), IHRDA and LHRC v. United Republic of Tanzania*, the Court found that Tanzania failed to ensure for children with albinism education that is sustainable, accessible and adaptable to their needs; failed to provide persons with albinism with the best attainable standards of health; failed to prevent the sale, trafficking and abduction of children with albinism; and failed to consider the best interest of the child in the operation of shelters devoted to children with albinism. The Court issued timebound reparation orders which Tanzania is required to implement. Within two years of notification of the judgment, Tanzania is required to promulgate and implement a national plan on the promotion and protection of the rights of persons with albinism in conformity with the African Union plan of action; take all necessary measures towards the full realisation of the right to education as it concerns persons with albinism, as well as the right to the best attainable standard of health; and formulate and execute strategies to ensure the full realisation of the rights and welfare of children with albinism. The Court further ordered Tanzania to establish a compensation fund and pay 10 million Tanzanian shillings as

compensation to persons with albinism who have been victims of violent attacks.

In *Tike Mwambipile & Equality Now v. United Republic of Tanzania*, Equality Now and its Tanzanian partner brought this landmark case against the Government of Tanzania regarding the Government of Tanzania's policy of permanently expelling pregnant girls from school, and banning adolescent mothers from attending school. The policy banned pregnant girls and girls who had given birth from returning to school on grounds of morality or marriage. High-level government officials voiced public support for the ban. The Court compelled Tanzania to reverse its policy: in November 2021, the Ministry of Education released Education Circular No. 2, reversing the policy by allowing students who had dropped out due to pregnancy to return within two years while receiving guidance and counselling. It must be recalled that similar issues arose in the Nigerian case of *NBA v AG*, where the Federal High court struck out the case without remorse.

It is important to note that there are almost no cases from Nigeria brought before the African Court. This is because Nigeria, though ratified the Ouagadougou Protocol, failed to issue a special declaration recognising the jurisdiction of the court in accordance with Article 34(6) of the Protocol. The cases of *Femi Falana v. African Union* and *SERAP v. Nigeria* were struck out by the African Court on account of lack of jurisdictional competence. This is because Nigeria has not complied with Article 34(6) of the Protocol establishing the African Court, which would permit NGOs and individuals to access the Court directly. The practical consequence is that a Nigerian citizen whose socio-economic rights are violated finds Chapter II non-justiciable at home and the African Court inaccessible. As such, recourse has been made to the African Commission. Some of the cases have been quite successful. The same cases were denied hearing in Nigerian courts.

At this juncture, one may ask: 'Are the courts in Nigeria not ineffective?' 'Is there still hope for the common Nigerian in Nigerian courts?' 'What is the way forward for Nigerian courts?' These questions are hereby answered.

PRACTICAL SOLUTIONS FOR NIGERIA

First, the Constitution must be amended. As difficult as this may practically sound, it is necessary. The socio-economic rights in Chapter II must be elevated to the status of the fundamental and enforceable rights in Chapter IV. Otherwise, the claw-back provisions of Section 6(6)(C) must be removed from the Constitution. Nigerian courts ought to have the jurisdiction to intervene in any credible case of human rights violation. It is not until there is loss

of lives before the court can act. Nigerian courts must be proactive and not reactive or compensatory. They must also employ the liberal cannon of interpretation to give effects to the provisions of the Constitution. The essence of the Constitution must not be slaughtered on the table of technical and regressive rules of locus standi, forum, non-justiciability and others. It is worthy of note that some courts in Nigeria have made laudable attempts to give effects to socio-economic rights.

The government of Nigeria must make the special declaration recognising the jurisdiction of the African Court, in line with Article 34(6) of the Ouagadougou Protocol. It is a cosmetic deception to ratify the Protocol without any intent to allow the enforcement of its provisions and its Court. This is against the principle of *pacta sunt servanda*. Making the special declaration will not only lessen the case burden of Nigerian courts but also help to realise the enforcement of human rights provisions guaranteed in the African Charter and in the Constitution. It is not enough to enter into an agreement, the agreement must be kept, realised and followed through to fruition. Nigeria as a country has received international sanctions, disgrace and ostracisation because of its brazen disregard to fundamental human rights. It was a Nigerian 'court' that sentenced Ken Saro-Wiwa to death despite several international calls against such disastrous action. Nigeria as a whole, through its government must do better in protecting and promoting the enforcement of human rights if it wishes to be rid

of the seemingly-everlasting stigma of being labelled as a Third World Country, more than sixty years after its independence.

The courts in Nigeria are notoriously slow in giving judgements. To resolve this, priority must be given to human rights cases, as envisioned by the Fundamental Rights Enforcement Procedure Rules 2009. Also, there is a need for a special court for human rights violation cases such as the environmental court. This would ensure that these cases are quickly resolved and dispensed with before the victims become too old to even remember their injuries. The courts in Nigeria must also do without the restrictive technical procedures that plague the filing of cases. Not all victims understand the meanings of originating summons, pleadings and others. Not all the victims of human rights abuse can even afford a legal practitioner to defend or represent them. As such, the court must allow public interest litigation in favour of these poor victims who may not even be aware of their rights. Otherwise, there must be provisions for pro bono legal representation. The expenses of the filing and hearing must also be borne by the state as a showcase of its goodwill in protecting human rights and fulfilling its obligations under multiple human rights treaties, conventions and charters.

Lastly, there must be judicial activism concerning socio-economic rights. These rights are as important as the fundamental rights. It is not a matter of second generation or first generation rights. To meaningfully enjoy a fundamental human right, the enforcement of a socioeconomic right is necessary. For instance, what is life without a safe, healthy, pristine and pollution-free environment? There must be nationwide education targeted towards governmental institutions and agencies, citizens and even students on the importance of socioeconomic rights to human survival and livelihood.

CONCLUSION

In conclusion, the court is an effective avenue for the fulfillment and enforcement of human rights in any civilised society. Where the court is efficient, innovative and proactive, the lives of the citizens are accorded more meaning and value, the society also grows without inhibition, there is also sustainable development. Any developed country has efficient courts that give enforcement to the rights of its citizens. Nigerian courts are established to give meaning and enforcement to the rights of the citizens of Nigeria, in line with its democratic role of interpreting the law. However, these courts have not lived up to the hopes of the common Nigerian for one reason or the other. The enabling statutes and the Constitution contain restricting and debilitating claw-back and non-justiciability provisions which hamper the unfettered exercise of the court's jurisdiction to hear and settle disputes. The courts still practise restricting common law rules of locus standi. Also, the courts are often very slow in deciding disputes concerning human rights violations. It is for this reason that the paper drew insights on the practices of the African Court of Human and People's Rights while also making recommendations from which Nigerian courts can learn from to cure their illnesses.

Thus, the paper gives recommendations such as making a special declaration recognising the jurisdiction of the African Court concerning human rights disputes emanating from Nigeria, in line with Article 34(6) of the Ouagadougou Protocol. The paper recommends the establishment of special human rights courts to aid with the speedy and timely delivery of judgements. It recommends judicial activism concerning the seemingly non-justiciable socio-economic rights among others. It is the belief of the writer that these recommendations, when efficiently and effectively carried out, will rid Nigerian courts of the problems and obstacles that prevent them from being the last hope and the haven of common Nigerians. The paper does not in any way attack the integrity or the capacity of Nigerian courts to serve their constitutional duties, it merely gives humble pieces of advice for serving these duties better, more efficiently and effectively.

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BALANCING TAXPAYER'S RIGHT TO PRIVACY AND FISCAL SOVEREIGNTY IN THE DIGITALISED TAX ADMINISTRATION IN KENYA

FELIX OONGE OIGORO

ABSTRACT

In 2012, Kenya introduced the digitalized tax administration system, while aspiring to promote efficiency and boost compliance in the sector. However, the proceeds brought about constitutional debates on the right to privacy and its limitations. This arose after the digitalized tax system's acquisition of taxpayer's private data was evidenced to infringe the right to privacy. The Kenya Revenue Authority (KRA) public notice dated 7th of November 2023, on the submission of sensitive medical data of the patients from the medical practitioners to the authority, brought about a big debate, of as to when is compliance deemed as an intrusion into citizens' privacy? In view to the same, this paper acknowledges fiscal sovereignty, taking into account its importance in economic development. However, it also looks into the need for adherence to the constitutional provisions on the right to privacy, and when to limit it. Consequently, the paper does not contend of the supremacy of one over the other but in the contrary, it argues for the balance between fiscal sovereignty and the taxpayers' right to privacy. It argues for the conformity of the principles on limitation of rights in order to ensure the waiver of right is within provisions of the law. In so doing the paper invokes a doctrinal method of research to draw analysis between the contending issues and thereafter gives out recommendations.

Key words: Taxpayer, Fiscal, Data privacy, Proportional, Just, Necessary.

INTRODUCTION

Digitalization of tax administration has greatly restructured the relationship between the state and the taxpayer. Across jurisdictions, the tax master has increasingly relied on large scale data aggregation, automated reporting systems and third-party reporting, with an aim of detecting non-compliance and broadening the tax base. While these mechanisms promote efficiency and reduce evasion, they largely expand the state's capacity on surveillance. In de jure democracies, these developments raise a question on how far the state can intrude into personal and commercial

data in pursuit of fiscal objectives without undermining the right that legitimizes it. Consequently, the modernization of Kenya's tax administration that draws a question on fiscal sovereignty and data privacy rights is caught up in this dilemma.

This paper critically examines whether Kenya's current tax administration framework satisfies the constitutional test of proportionality under article 24 in its limitation to rights. It looks into the existing statutory powers to examine if they are necessary and least reactive means of achieving compli-

ance. Exposing the country to comparative international standards, the study argues that while fiscal sovereignty is essential for state functioning, it must operate within constitutional discipline of proportionality, ensuring that tax payer data rights are integrated into fiscal policy design rather than treated as procedural afterthoughts.

Constitutional Tailoring of the Right to Privacy and Taxation in Kenya.

While the Kenyan legal framework provides for the limitation of right to privacy, provisions on the Tax Procedures Act poses a significant challenge on balanc-

ing, rather than overriding the rights of the taxpayer on confidentiality. The constitution recognizes the right to privacy and data protection. The same is subjected to limitation of rights expounded for under the Constitution. It is explicit that waiver of right by law is valid in a democratic society like Kenya. In the same accord the Tax Procedures Act under Section 58 provides for the arbitrary inspection of goods, records and premises, which when construed brings about a limitation to data privacy rights of the Kenyan people regarding tax. This is justified by the government's efforts to ensure tax compliance, to combat tax evasions and to meet revenue collection targets in a fiscal year. However, the question as to whether this justifies the waiver on data privacy is subject to debate. How does the government put a balance between Data privacy and tax obligations to the Kenyan taxpayers?

The Kenyan laws provide for the test on limitation on a right which must be just, proportional and necessary. However, the provisions on the Tax procedures under section 60 on the arbitrary data privacy breach without court warrant, excludes the process that would ensure the limitation to the rights is called for. As a result, this exposes the Kenyan taxpayers to an arbitrary process. Exploring cases such as Katiba Institute v Communications Authority of Kenya & 2 others, where justice Mwita of the high court then

declared the advancement of the authority in breach of data privacy, on the mandatory provision of the international mobile equipment identity (IMEI) by individuals and importers as unconstitutional. The case expounds more on the advancements of the breach of data privacy with the justification that it is exempted for by law. It shows the dangers of lacking a clear set guideline on how the limitation should be exercised.

Data Rights in Kenya's Fiscal Policy Design.

Digitalisation of tax administration in Kenya is said to bring efficiency and increased compliance among tax payers, yet it poses a great risk on data privacy. Its genesis, a failed manual system that brought forth losses in data return, the Kenyan government embarked on a more flexible system that would allow the taxpayers to file returns from their conformity hence promoting compliance. Established under section 75 of the Tax procedures act, electronic tax system is brought to promote efficiency in the tax administration. However, the bulk collection of transactional data, some that seem irrelevant to promoting compliance, are demanded by the authority in administration of their duty. Clear illustration from the case Kenya Medical Association V. Kenya Revenue Authority, not yet decided, the demand of sensitive patient data and invoice from their medications is a dire breach of privacy rights. This breaches the tax payer's rights against disclosure of their

information in a manner that will promote undue surveillance on their activities. The advancements depict a picture on how the authority is ready to pursue compliance in disregard of the privacy rights of the taxpayers.

Furthermore, the I Tax system amalgamates all the data in a centralized system, that makes it easier for the routine check on tax compliance; however, it poses greater risks of breaches or disclosure of personal information that may cause injury to the party involved. The danger of having a system that does not guarantee the safety of critical data, led to the discontinuation of the huduma number progression in the case Nubian Rights Forum & others V AG (2020). Worse of the case scenario, the KRA systems, in the year 2019, were hacked and sensitive information from the taxpayers such as the ID numbers, their location addresses were breached. The violation of the taxpayer's right is vividly depicted from the authority's lack of security enforcement in the systems yet it advances to amalgamate all the sensitive data.

The Kenya Revenue Authority is undoubtedly one of the authorities with access to the most crucial information of the Kenyan citizens in one place. This poses a potential misuse crepe, which the authority by itself testifies to do if need be. The transfer of the taxpayer's information to other governmental agencies without clear consent from the owner poses a

grievous breach on data privacy rights. Expounded under the Data Protections Act (2019), that the data processed by the authority should not be disclosed outside the body without the consent of the data subject. The rationale behind it being that the entrustment of the data is solely for the purpose of compliance and not to be used against the taxpayer for other purposes. The breach allows the government to misuse the taxpayer's data for the purposes not intended for.

Protection of data rights enshrines refrain from forcefully acquiring information of a third party from another person or entity, however, justifications on tax compliance ring again, raising out the question on the balance between the compliance and the taxpayer's rights. The tax administrator in Kenya is empowered to check on third party information through third party compliance enshrined under section 24 of the Tax Procedures Act, where banks, pensioners and employers are mandated to report on any taxable incomes of their consumers. Backed by the case Kenya Medical Association V. Kenya Revenue Authority, not yet decided, on the demand of sensitive patient data and invoice from their medications is a dire breach of privacy rights. The forceful acquisition without the data subject's consent goes in contravention to the rights on privacy and is not proportional to the intended purpose of tax compliance.

The Test on Proportionality.

It is clear that the concerns on data privacy in tax administration are all due to the limitation of rights enshrined under the Constitution in Article 24. In the same accord, the limitation must be construed and applied in a manner consistent with the guidelines under article 24, as explained by the Supreme Court ruling in the case Communications authority of Kenya V. Royal Media Services (2025). The court reiterated that constitutional rights are not absolute and are subject to limitation but justifications therein have to be met. Justification is the action of showing something is right or reasonable, where in limitation of rights context, it is a requirement that restricts limitation on rights not to be arbitrary but compelling. The limitation ought to have a legitimate aim, where for the fiscal policies, limitation of data

privacy rights aim at increasing compliance in tax administration.

Limitation of constitutional rights must also be necessary, based on public interest and that it is the least restrictive means to handle the situation at hand. In regards to this, the country's revenue to GDP declining from 15.4% in 2018/2019 fiscal year to 14.8% in 2019/2020 fiscal year, meant stringent policies had to be put in place to ensure compliance. However, looking at the claims by the tax payers, allocation and utilization of the public funds is the leading cause of non-compliance, and not mere defiance of the taxpayers due to the administration systems. It shows that the limitation of the right to privacy is not necessary as the government's prudent utilization of the funds may impact confidence in the taxpayers who will in turn perform their obligations. This shows that even with stringent measures like privacy rights limitation, that yields few results, the necessary action is for the government to prudently use the public funds in order to boost confidence of the taxpayers to comply as breaching their right to privacy is not the least restrictive means.

Comparison between Kenya and other Jurisprudence.

Kenya hails a strong constitutional grounding on taxpayer's data protection, yet unlike the European Union jurisprudence, it comparatively falls short for demand of execution of the right and the liabilities called for in breach. Attributed from strong standards on sanctions and data protection impact assessment (DPIA's) mandatory, the General Data Protection Rules (GDPR), protects the taxpayers in EU against breaches on data privacy, offering deserving punishments against the perpetrators. Although Kenya's provisions mirror this, it does not bring out strong measures that will curb instances of the breach against the data privacy. The KRA's mandate is to protect data in their possession and be hand them liability under circumstances of massive breach on the taxpayers' data. This will prompt them to work in realization of a strong digitalized system that is shy of outside breaches.

Furthermore, warranted third-party reporting in Kenya has failed to adequately protect the taxpayer's rights, this is different from the European Union (EU) that has codified its proportionality test to gauge on the justification, necessity and proportionality of it. The Tax procedures under section 59 provides for the warranties, but does not provide for the test of enforcement of the mandate. Even though the warranties prevent arbitrary processes by the authority, judicial decisions that are uneven provide confusion on the protection of the right.

Reimagining the Fiscal Policy Framework to Create a Balance in the Protection of Taxpayers Data Privacy.

Kenya should introduce a risk-based assessment as opposed to a random monitoring of tax payer's compliance. Provisions from the tax procedures promote generalized surveillance mechanism, that gives room for discretionary access to taxpayers' data, as a result promoting disproportionate intrusion of the tax payer's data privacy rights. Drawing reference from the Organization for Economic Co-operation and Development (OECD), Compliance Risk Management Framework that mandates the tax authorities to identify the high-risk taxpayers using the objective risk indicator whilst limiting intrusive audits to cases where credible non-compliance risk is demonstrated, Kenya can actualize it to ensure it cuts a balance between data rights



and its mandate to ensure taxpayer compliance. The method actualizes Article 24 of the Constitution of Kenya 2010, of the limitation being proportionate and justifiable.

Empirical studies demonstrate the importance of trust towards voluntary tax compliance as the one used in Kenya. Through institutional accountability and government expenditure, the reflection is clearly demonstrated on the compliance of the taxpayers. For instance, in Scandinavian countries like Sweden and Norway, high transparency in the public spending correlates with high tax morale and the compliance level. The reports from the national treasury expounds on the declining revenue to GDP ratio being attributed to the lack of trust in the public fund utilization that goes against the people's will as demonstrated in Article 201 of the Constitution of Kenya 2010. In the same accord, Kenya ought to introduce tax utilization transparency reports that link the tax payer's money to the government's utilization. The country should also put stringent measures to act on the reports given by the auditor general against all the misuse of public funds.

Integrating the digitalized tax administration system and the old manual system that has limited exposure to the taxpayer's rights on privacy. The tax system in Kenya is taking a voluntary approach, basing on the fact that it is the sole responsibility of the taxpayer to file returns to the authority. However, the transaction has brought about a dilemma on data privacy that arguably does not translate to all the transactions that happen within the authority. Drawing reference from the Russian cooperative compliance, a digital administration of taxation, that is not made mandatory giving the

taxpayers to opt for the old manual system that doesn't pose a risk to the data privacy infringement. Allowing the two systems to run in parallel will give a chance to the taxpayers to choose the most favorable system in relation to their data.

Additionally, Kenya should introduce a mandatory data protection impact assessment to all tax related policy reforms, to protect the taxpayers from progressive breach of their rights. As demonstrated by the General Data Protections Regulations (GDPR), the data privacy impact assessment comes into picture when the rights of the taxpayers are under risk of disproportional risk. The authority requires the purpose for the scope of the data collection, necessity and proportionality for the collection of the data, the evaluation of the potential risks to the rights and freedoms and also for the documentation of the compliance measures before implementation. Countries like France, Germany and Estonia have implemented the authority to reduce the chances of data breaches and strengthened institutional accountability.

CONCLUSION

Limitation on data privacy rights on justifications of compliance in the tax administration is not equal to the exposed harm. This paper denotes that notwithstanding the constitution provision on the rights to privacy and state's fiscal sovereignty, balance has to be drawn as to how necessary it is to limit the taxpayer's rights. Factors such as accountability of the government's expenditure lie at the middle of the tension, and the burden of resolving this depends on the good faith of the political class.

The findings show that digitalization of tax administration drives compliance but must be limited in a way that does not expose the tax payers to breach of their data privacy rights. This will come in handy in ensuring that while fiscal sovereignty is essential for state functioning, it operates within constitutional discipline of proportionality, ensuring that tax payer data rights are integrated into fiscal policy design rather than treated as procedural afterthoughts.

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THE PSYCHOLOGY OF OBEDIENCE AND COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW: A CRITICAL ANALYSIS THROUGH MILGRAM'S OBEDIENCE EXPERIMENTS

DERRICK WAMALWA



ABSTRACT

This paper examines the conflict between the psychological realities of obeying authority and the legal principle of command responsibility in international criminal law. It relies on Milgram's well-known theory and experiments on obedience. Specifically, this paper argues that the current framework of command responsibility, outlined in the Rome Statute of the International Criminal Court, does not adequately consider the social and psychological pressures that often push subordinates to follow illegal orders. The paper concludes by asserting that while individual criminal responsibility is essential in international criminal law, it is crucial to apply a psychologically informed perspective to accountability mechanisms for them to be fair and effective.

Keywords: command responsibility, obedience, Milgram, Rome Statute, international criminal law, superior orders.

INTRODUCTION

The question that the law tends to ask when soldiers violate international law is: Who is Responsible? Command responsibility is justified by the privileges, honours, and responsibilities that command entails. Its modern foundation can be found in the commission of Inquiry on the Responsibility of the Authors of the War in 1919 which opined that superiors could be held responsible for crimes of their subordinates where they knew them but did not intervene. The first modern case was the Yamashita case which laid down the Yamashita Standard, in that a military commander can be held responsible for war crimes committed by troops under their command.

Article 28 of the ICC statute provides that: "In addition to other grounds of criminal responsibility under this statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally

responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces.

The Trial Chamber Celebici helpfully elaborated the requirements of command responsibility. First, a superior/subordinate relationship, this means the prosecution must show that the accused had actual authority over the person who committed the crime, in the sense of being able to direct, control, or influence that person's conduct. This does not require a formal military rank or an official chain of command written down on paper. Instead, the tribunal in Celebici adopted a test of "effective control," meaning the superior had "a material ability to prevent or punish criminal conduct." In practice, this means the court asks whether the accused, in real terms, had the power to stop the crime before it happened or to punish the perpetrator afterward, whether that power came from an official military position, an informal position of influence within an armed group, or civilian authority over subordinates. Holding a formal title is one way of proving this ability, but it is not required. What matters is the practical relationship of control, decided case by case on the facts. Second, the "mental element", This asks what the superior knew, or should have known, about the crimes being committed by those under them. A superior does not need to have ordered the crime, or even to have known about it with absolute certainty, to be held responsible. It is enough that the superior either (i) actually knew, based on direct or indirect evidence, that subordinates were committing or about to commit crimes, or (ii) possessed information that should have alerted them to a risk of such crimes, information serious enough that it called for further investigation into whether crimes were happening. In other words, the law does not allow a superior to escape responsibility simply by claiming ignorance if the surrounding circumstances made it clear, or should have made it clear, that something unlawful was likely occurring. and third, a failure to take reasonable measures to prevent or punish since and is a helpful list of requirements, Even where a superior had control over subordinates and knew, or should have known, of the crimes, they will only be held responsible if they failed to act on that knowledge. This means the superior did not use the powers available to them, whether by intervening to stop the crime before or while it occurred, or by investigating and punishing those responsible afterward. What counts as a "reasonable" measure depends on what was genuinely within that superior's power and capacity to do at the time, not on some abstract or idealised standard of what a perfect commander might have done.

Together, these three requirements form a cumulative test: a superior-subordinate relationship establishing authority, a state of knowledge (actual or constructive) about the wrongdoing, and a failure to exercise the available power to prevent or punish it. All three must be proven before command responsibility under this doctrine attaches. Moreover, it is prudent to note that, Celebici based itself on a test of "effective control" defined as "a material ability to prevent or punish criminal conduct."

Nowadays, modern conflict is not always fought on the basis of clear formal chains of command. Nonetheless, substantive or informal influence alone is not enough to establish effective control; what is required is that the accused actually possessed, by virtue of his position within a formal or informal hierarchy, the material ability to prevent or punish the criminal conduct of the perpetrator.

A de jure senior position may be evidence of effective control. Issuance of orders, capacity to alter the command structures and remove people, as well as the ability to require people to withdraw from hostilities may also be evidence. The issue is decided on a case-by-case basis. Command responsibility also attaches to civilian superiors. The standard is "effective control," which is similar to the degree of control of military commanders, as determined in the Hadžihasanović Appeal. Article 33 of the ICC Statute stipulates that superior orders do not relieve a person of criminal responsibility for crimes

under the ICC's jurisdiction, reflecting a principle that predates the Rome Statute and is also found under customary international law and other international tribunals. The exception is limited to situations where the person: was obligated to obey; was unaware of the unlawfulness; the order wasn't illegal (manifestingly, that is) This framework aligns with the post-Nuremberg understanding that simply following orders does not excuse criminal actions. Yet psychology presents a more troubling perspective. In the early 1960s, Stanley Milgram carried out experiments at Yale University showing that ordinary individuals, when directed by authority figures, would administer what they thought were lethal electric shocks to innocent people. Thus, this posits some profound obligation to International Law. in the sense that, if obedience to an authority is a deeply conditioned human response as opposed to it being a deliberate moral choice, it then makes it hard for the law to be able to sustain its assumptions that, subordinates can and should refuse unlawful and illegal orders.

Ergo, basing and dissecting from the foregoing analysis, this paper critically examines the principle of command responsibility through the lens of Milgram's obedience studies, suggesting that international criminal law must seriously consider psychological evidence in evaluating culpability.

MILGRAM'S OBEDIENCE EXPERIMENTS: AN OVERVIEW

Milgram's Obedience Experiments: An Overview Milgram's 1963 experiments aimed to explore how far ordinary people would go in obeying authority, even when it involved causing apparent harm to others. Participants were told by an experimenter in a white coat to give increasingly severe electric shocks to a 'learner' (who was actually a confederate) who answered questions incorrectly. Despite hearing sounds of pain and eventual silence from the learner, about 65% of participants in the baseline condition administered the maximum shock of 450 volts, marked 'Danger: Severe Shock,' simply because the experimenter insisted they continue.

Building on this, Milgram (1974) explained compliance through the concept of the 'agentic state,' where people see themselves as instruments of authority rather than independent moral agents. In this state, psychological responsibility for outcomes shifts to the authority figure, reducing the subordinate's personal accountability. This behavior was not due to sadism or exceptional obedience; it appeared across different groups and settings, though some variations depended on proximity, the authority's legitimacy, and the institutional context.

Follow-up research has refined these findings. Burger in his seminal 2009 work partially replicated Milgram's studies under ethical guidelines and

found similar compliance rates, suggesting that this behavior is not a historical anomaly. Conclusively, these studies highlight the strong relevance to military hierarchies, where institutional identity is deeply ingrained.

COMMAND RESPONSIBILITY AND THE SUPERIOR ORDERS DEFENCE

The principle of command responsibility has deep historical roots in international humanitarian law (IHL). Its modern form arose from the Nuremberg and Tokyo trials after World War II, where senior military and civilian leaders were held accountable for atrocities committed by forces they controlled. The doctrine was later codified in the Additional Protocols to the Geneva Conventions (1977) and most thoroughly in Article 28 of the Rome Statute (1998). This article differentiates between military and civilian superiors and requires evidence that the superior knew or had reasons to know of crimes and failed to take appropriate measures to prevent or punish them.

The superior orders defense, the argument that a subordinate should not face criminal liability for following a lawful command, was rejected as a complete defense under Article 33 of the Rome Statute. Article 33(1) states that obeying a superior order does not relieve a person of criminal responsibility for war crimes or crimes against humanity, except in specific situations where the person did not know the order was unlaw-

ful and the order was not manifestly unlawful. This formulation assumes that subordinates can and should recognise manifestly unlawful orders and refuse them, an assumption that raises the question of whether such recognition and refusal is realistically conceivable within the pressures of a hierarchical command structure.

This assumption conflicts with Milgram's insights. The Milgram studies consistently showed that participants did not refuse evidently harmful instructions when the authority figure maintained institutional credibility. The social and psychological pressures within military hierarchies, where disobedience can lead to disciplinary actions, unit cohesion is valued, and institutional authority is reinforced through extensive conditioning, create a much more coercive environment than Milgram's study.

RULE 152 OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW.

While the Rome Statute provides the treaty framework, customary international humanitarian law operates as an independent and pervasive source of obligation. The International Committee of the Red Cross, in its landmark 2005 Customary IHL Study, identified Rule 152 as a norm of customary international law binding upon all parties to armed conflict, whether or not they are parties to the Rome Statute or other treaty instruments.

A. The Content of Rule 152

Rule 152 of the ICRC Customary IHL Study states that commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders. The rule applies to both military commanders and civilian superiors and covers instances where a superior-orders subordinates to commit war crimes. The rule is grounded in extensive State practice and *opinio juris*, evidenced by military manuals, domestic legislation, and international jurisprudence, including the Nuremberg Principles, Control Council Law No. 10, Article 7(1) of the ICTY Statute, and Article 6(1) of the ICTR Statute. Unlike the command responsibility doctrine for failure to prevent or punish (Rule 153), Rule 152 addresses direct causal command responsibility, the commander who

issues the unlawful order is criminally liable for the resulting war crimes. This is, in principle, the most straightforward head of command liability: the superior decides, issues the order, and the crime flows from that decision. Yet it is precisely at this intersection that the psychology of obedience becomes most troubling.

B. Rule 152 and the Subordinate's Dilemma

Rule 152 imposes criminal liability on the commander who orders war crimes. It does not, however, meaningfully engage with the psychological reality of the subordinate who receives and executes such orders. Read in conjunction with the superior orders provision of Article 33 of the Rome Statute and its customary law equivalent, the legal framework constructs a binary: the superior who ordered is responsible; the subordinate who executes is also responsible unless the order was not manifestly unlawful.

Yet Milgram's research fundamentally challenges this binary. Within an agentic state, the subordinate who executes an unlawful order may genuinely not perceive themselves as a moral agent at all; they experience themselves as an instrument of command, a mere conduit through which the will of the authority figure is carried out. Milgram observed that once an individual enters this state, personal responsibility for the outcome is not simply suppressed but psychologically relocated: the subordinate comes to believe, often sincerely, that the authority figure alone bears responsibility for what results. Crucially, this shift does not require malice, ignorance, or a weak moral character; Milgram's participants included ordinary, educated adults who nonetheless administered what they believed to be dangerous, and ultimately lethal, shocks simply because a legitimate authority instructed them to continue.

The "manifestly unlawful" standard, by contrast, presupposes a rational agent who, even while embedded within an institutional hierarchy, retains the cognitive and moral independence needed to (i) recognise that an order crosses a legal threshold and (ii) translate that recognition into refusal. This standard therefore assumes two capacities that Milgram's findings place directly in doubt: first, that moral judgment continues to



operate normally under authority, rather than being displaced by the agentic state; and second, that recognising unlawfulness is sufficient to produce refusal, when in fact Milgram's participants frequently expressed distress and disagreement while continuing to obey, showing that awareness of wrongdoing does not reliably translate into resistance. In military hierarchies, where obedience is reinforced through training, discipline, and the threat of sanction for insubordination, these psychological pressures are, if anything, more acute than the laboratory conditions Milgram studied. The "manifestly unlawful" standard thus maps poorly onto this psychological reality: it locates the failure to refuse in a deficiency of individual moral courage or perception, when the more troubling implication of Milgram's work is that even psychologically ordinary individuals, under institutional authority, are unlikely to convert recognition of unlawfulness into actual refusal. Rule 152 thus reinforces the gap by attributing liability upward to the commander-orderer without creating any mechanism for evaluating whether the subordinate's obedience was psychologically coerced rather than freely chosen.

THE PSYCHOLOGICAL GAP IN THE LEGAL FRAMEWORK

The Rome Statute's approach to mens rea, the mental element of criminal responsibility, is set out in Article 30, which requires that perpetrators act with intent and knowledge. "A superior may possess the mens rea for command responsibility where:

- (i) He had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes... or
- (ii) Where he had in his own possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates."

The superior orders provision in Article 33 acts as a limited excuse, not a full defense. This reflects a largely rational model of human behavior, assuming that individuals can make moral decisions even in high-pressure situations. However, Milgram's research suggests this assumption is psychologically unrealistic for many people under authority, since obedience in his experiments persisted even as participants recognised the harm they were causing, showed visible distress, and verbally objected, indicating that moral awareness alone does not translate into the capacity to act on it once a legitimate authority demands continued compliance.

This does not mean obedience should excuse wrongful actions. Rejection of the Nuremberg defense indicates a strong normative commitment: that crimes against humanity cannot be justified by citing chains of command. However, the issue of culpability--the level of criminal responsibility and the

appropriate punishment--is a separate matter. Psychological evidence of obedience induced agentic

states is relevant to individual liability, even if it cannot entirely absolve the actions taken. A more nuanced view might draw on Hannah Arendt's seminal work on the concept of the 'banality of evil,' her observation that Adolf Eichmann and others were not uniquely evil but rather ordinary bureaucrats who suspended moral judgment within institutional structures. Arendt's analysis prefigured Milgram's experimental findings and reinforces the argument that ordinary psychological processes, not extraordinary malice, underlie much mass atrocity. International criminal law, by focusing heavily on the most senior perpetrators and constructing a narrative of exceptional criminality, may systematically misrepresent the psychological dynamics through which atrocities actually occur.

Rule 152, as a norm of customary IHL, compounds this gap by its structural silence on the psychology of the subordinate. The rule is concerned with the criminal responsibility of the ordering superior and does not engage with the circumstances under which subordinates obey. This silence is not merely an oversight; it reflects the rationalist assumptions embedded in the Nuremberg framework from which modern command responsibility doctrine descends, assumptions shaped by the political imperative to establish accountability for those who ordered atrocity, without adequate jurisprudential engagement with the social psychology of those who carried those orders out.

The cumulative effect is a legal architecture in which commanders who order crimes bear criminal responsibility under Rule 152; subordinates who execute those crimes are presumed capable of refusing manifestly unlawful orders under Article 33; and the psychological mechanisms that systematically undermine this capacity, the agentic state, institutional conditioning, hierarchical authority, are nowhere acknowledged, let alone given normative weight. This is the psychological gap.

TOWARDS A PSYCHOLOGICALLY INFORMED FRAMEWORK

Bringing psychological insight into international criminal law doesn't mean abandoning individual criminal responsibility. Instead, it calls for a more nuanced account of how authority, identity, and institutional setting shape individual culpability. Several reforms deserve serious consideration.

First, sentencing guidelines at international tribunals should expressly acknowledge research on obedience as a mitigating factor, especially for lower-level perpetrators operating within entrenched military hierarchies. For example, soldiers trained to follow commands instantly may face pressures very different from those confronting senior planners. Second, the "manifestly unlawful" standard in Article

33 should be understood through empirical evidence regarding the circumstances in which unlawfulness is practically identifiable, rather than through an abstract rational agent model. Third, the strategy of the prosecution should put more emphasis on the psychological factors that lead to subordination when deciding what charges to bring.

This means making a clear distinction between those who planned the crimes and those who carried them out without thinking about it.

None of these changes would bring back the full superior orders defense. They would, however, yield results that are more in line with the actual distribution of moral responsibility in military atrocity situations and more in line with the criminal law's general goal of matching punishment to culpability.

The ICRC, in its advisory capacity and through future editions or supplements to the Customary IHL Study, should engage with the psychological dimensions of command responsibility for ordered crimes. Rule 152 should be elaborated with commentary acknowledging that the criminal responsibility of the ordering commander does not exhaust the moral complexity of atrocity, and that the circumstances under which subordinates obey warrant jurisprudential scrutiny.

CONCLUSION

Milgram's obedience experiments are still one of the best examples of how moral agency can be limited when there is authority. International criminal law, since Nuremberg, has largely ignored the psychological realities of individual responsibility. The doctrine of command responsibility and the limited superior orders defense collectively form a legal framework based on a more rational and voluntarist model of human behavior than psychology can substantiate. A serious look at the psychology of obedience will not make international criminal law weaker. Instead, it will make its system of accountability more honest, fair, and just in the end.

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THE PALM SPONSORS LEGAL WRITING CONTEST AT THE IHRL'S LEGAL LUMINARY MENTORSHIP PROGRAMME 2026

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THE PALM
PEOPLE'S ACCOLADE LAW MAGAZINE

For eight weeks, law students and young graduates from the National University of Lesotho and the University of South Africa (UNISA) had the opportunity to learn from lawyers working across different areas of the profession and different parts of the world.

On Saturday, 15th August, 2026, they came together once again, this time not for another mentorship session, but to mark the end of the programme. The Third Cohort of the Legal Luminary Mentorship Programme concluded with a virtual graduation ceremony held on Microsoft Teams from 15:00 to 17:00 SAST.

The programme which was organised by the International Human Rights Lab (IHRL) in partnership with International Supportive Futures (ISF), brought together law students and young graduates from Lesotho and South Africa for eight weeks of mentorship and professional development.

Furthermore, the ceremony was a chance to recognise participants who had distinguished themselves during the programme, while also celebrating the completion of what had been an intensive period of learning.

LEARNING OUTSIDE THE LECTURE HALL

One of the interesting aspects of the programme was the range of subjects introduced to the students. Rather than focusing only on the areas of law that students encounter most frequently at university, the sessions exposed them to fields including FinTech, nuclear law, immigration and policy advocacy. The programme also gave participants an opportunity to hear directly from practising lawyers from Lesotho, South Africa, Nigeria and Canada. For law students still considering what direction they want their careers to take, hearing from practitioners working in different jurisdictions and areas of practice can provide a useful perspective. It allows students to see some of the options available to them before they have to make those decisions for themselves.

The discussions also covered practical aspects of the profession, including courtroom strategy, professional development and building a professional presence. These are areas that sometimes receive less attention in the classroom but are increasingly important once a student begins looking for internships, professional opportunities and eventually employment.



THE PALM AND THE LEGAL WRITING CONTEST

The programme also featured a Legal Writing Contest which was focused on a densely researched law field, nuclear law. The contest received the support of The People's Accolade Law Magazine (PALM) through sponsorship. The contest gave the mentees an opportunity to demonstrate their ability to research a legal issue, develop an argument and communicate their position effectively through writing.

The PALM's support of the contest reflects the magazine's interest in encouraging young people to develop their voices as legal writers.

At the graduation ceremony, Mr. Sulaimon Badmus, a Deputy Managing Editor at The PALM presented the prizes to the top three contestants.

Neo Jessica Lesekele emerged as the winner and received R1,000. Lintle Ralikomiki, who came second, received R500, while Pontšo 'Mote, who placed third, received R250. In addition to the cash prizes, the students were presented with certificate of recognition, an internship opportunity at The PALM and opportunity for publishing their essays in the forthcoming edition of The StarLight.

For the mentees, the contest was another part of the programme that required them to put their knowledge into practice rather than simply listen to a lecture.



NEO JESSICA LESEKELE
WINNER



LINTLE RALIKOMIKI
1ST RUNNER UP



PONTS'O A 'MOTE
2ND RUNNER UP

RECOGNISING THE STANDOUT PARTICIPANTS

The awards ceremony also recognised participants who had made notable contributions throughout the eight weeks.

Chantel Nombili Ncube received the programme's highest individual honour, being named Legal Luminary of the Cohort. She also received the Excellence Award.

Mkhanyisi Meluzi Dzingwe was another double award recipient, receiving both the Advocacy Excellence Award and the Emerging Legal Leader Award.

Mpho Rabukana and Malehloa Sethuntsa were recognised for their participation and engagement, while Boitumelo Keele received the Most Improved Award.

Awards were also presented to Thato Mosotho, Senate Mopeli, Ntombifuthi Langagane, Phindile Mongatane and Relebohile Melaphe, recognising different qualities demonstrated during the programme, including determination, community-building and commitment to personal growth.

Other participants were recognised for their involvement and development during the programme.

WHAT COMES AFTER THE PROGRAMME?

For the mentees, the end of the eight-week programme is only one part of their legal education. The real value of a mentorship programme is often seen after the sessions have ended — when mentees begin to apply what they have learnt to their studies, career choices and professional relationships. The exposure to areas such as FinTech and nuclear law, for example, may encourage some participants to look beyond the more familiar career paths available to law graduates.

The opportunity to interact with lawyers from multiple countries may also give them a better appreciation of the different ways legal professionals build careers and contribute to their communities. And for those who took part in the writing contest, the experience may be the beginning of a greater interest in legal research and publishing.

A PROGRAMME IN ITS THIRD COHORT

This year's Legal Luminary Mentorship Programme was the third cohort organised by IHRL and ISF. Its continuation is significant because mentorship remains an important part of professional development for students who are still trying to understand the realities of legal practice. University can teach students how to read cases, interpret legislation and construct legal arguments. Speaking with people who are already practising can provide another kind of education — one centred on experience.

The Legal Luminary Mentorship Programme brought together law students and young graduates, and created an opportunity for them to engage with practitioners from different countries and areas of law. Now, with the programme concluded, the participants return to their universities or career with another

er eight weeks of experience behind them. Some may already have a clearer idea of the kind of lawyer they want to become. Others may still be exploring their options. Either way, the conversations, connections and experiences from the programme will form part of their developing professional stories.

For The PALM, supporting the Legal Writing Contest was an opportunity to play a critical role in encouraging aspiring or young lawyers to take writing seriously and as an important part of the profession. The Third Cohort has graduated. The work of becoming the lawyers they hope to be continues.

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