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# „A CRITICAL APPRAISAL OF RENT CONTROL IN SELECTED JURISDICTIONS: GERMANY AND CANADA IN PERSPECTIVE”

Issa Akanji Adedokun\*

## Abstract

It is axiomatic that the role adequate, healthy, and affordable housing plays in human life cannot be overemphasised. At first, housing was seen as a commodity that was available only to those who could purchase, and this put the financially handicapped at a disadvantage. However, the world underwent a series of wars, which served as eye-openers to the countries. Consequently, housing moved from being a commodity to a socio-economic right. The height of things was the sudden emergence of the COVID-19 Pandemic alongside the overcrowding practice by many countries in the world. Consequently, various legal frameworks were put in place to ensure the facilitation of this socio-economic right, but this has been undermined by neglect from many countries. Essentially, among the issues related to housing, rent control is crucial. There has always been a tussle between landlords and tenants on balancing their proprietary interests and fundamental rights, respectively. Against this backdrop, there have been some underlying theories that justify the need for government rent control mechanisms to resolve this clash of interests. On the other hand, some countries adopted legal frameworks to settle this structural and legal pandemonium completely. Flowing from this background, this paper employs a doctrinal method to critically appraise the rent regulation mechanisms of Germany and Canada, and comparatively highlights their approaches to rent control. At the end of the work, practical recommendations such as the adoption of flexible, context-responsive rent regulation models and the need to strengthen institutional enforcement, among others, are provided that can be used by less advanced countries to make their rent control mechanisms more effective.

**Key Words:** Canada, Comparative Housing Law, Germany, Rent Control, Tenancy Regulation.

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## **1. Introduction**

Over the years, matters relating to housing have been neglected. The surge in overcrowding and epidemics associated with poor urban living conditions reiterates this fact (Marcuse, P., Madden, D., 2016). However, human well-being is inseparable from an affordable and healthy place to dwell in with full security. The turning point of this problem was after World War II, when a large number of houses were bombed, and many people were made homeless (Beck, E. R., 2006). Furthermore, the aftermath of the war saw the few people whose houses were unaffected gain disproportionate control over displaced and impoverished populations (Downs, A. ,1977). In a bid to ensure that a proper housing strategy is in place, significant policy measures were introduced as timely responses to this crisis. For instance, Germany had a severe, acute housing problem following World War II. In the region that would become the Federal Republic, 22% of the housing stock in 1939 was completely destroyed or so severely damaged that it could not be repaired; another 23% sustained some degree of damage. The inflow of refugees from the east increased the number of homeless individuals even further. In North Rhine-Westphalia alone, around 600,000 refugees made their home between 1945 and 1950. Eleven per cent of them continued to live in camps or other emergency accommodation five years after the war. Politicians and planners were understandably distracted by these alarming statistics. However, they also saw the postwar housing crisis as a component of a larger, long-term housing issue in metropolitan Germany, at least among themselves (Egner, B., 2012). On the other hand, in Canada, the provinces were instructed to introduce rent control programmes as part of federal wage and price controls (Arnott, R.,1997).

Furthermore, in Europe and North America, advanced economies face rising housing costs and overcrowding, with some positive investment directed towards renovation and the prevention of homelessness. It is, however, regrettable that these efforts are often overshadowed by a focus on housing as a commodity, and this leads to increased affordability and quality challenges (UN-Habitat, 2011). Afterwards, some efforts have been exerted universally by the countries of the world to proactively change housing-related Matters from commodities to rights.

Hence, several international legal frameworks and policies have been put in place to address housing policy concerns. One of these laws is the Universal Declaration of Human Rights, in which Article 25 provides that:

*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

In the same vein, housing has been made to be a socio-economic right by virtue of Article 11(1) of the International Covenant on Economic, Social and Cultural Rights in the following words:

*The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising in this regard the essential importance of international co-operation based on free consent.*

Conversely, because of the fact that housing is regarded as a socio-economic right, many countries have made it non-justiciable (For instance, in Nigeria, Section 6(6)(c) makes Cap. 2 of the 1999 Constitution of the Federal Republic of Nigeria not to be justiciable. This by extension affects the rights to shelter under Section 16(2)(d) of the Constitution). And most of the countries that made it justiciable have a weak institutional framework for implementation (Diver, A., Miller, J., 2016).

In addition, a very important component of housing is rent control. In other words, rent control generated tension between tenant protection and landlord profitability (Bakr, A., 2025). Much scholarly and juristic ink has been devoted to reconciling the conflict of interests between landlords and tenants. Hence, rent regulation comes in to strike a balance between the constant warfare between the perspectives of market distortions, which grant landlords the freedom to determine how much they charge and their obligations towards their

tenants generally, and on the other hand, social equity, which clamours for fairness and affordability of housing facilities (Calma, E., 2025).

Upon this premise, this paper critically examines the legal and policy foundations of rent control, with a focus on Germany and Canada in the course of the analysis. The choice of the jurisdictions is based on the rationale that their systems are distinct. While Germany has a civil law legal system, Canada, on the other hand, with specific reference to Ontario and Alberta, its two largest provinces by economy and population, operates a common law legal system. Despite the sharp contrast in their legal systems, the rent control frameworks in these jurisdictions are commendable. In addition, the two countries have strengthened legal certainty. In the paper, their successes and failures are highlighted, and essentially, lessons that could be gleaned by most of the developing African countries that operate either common law or civil law legal systems.

## **2. Conceptual And Theoretical Framework**

### *2.1. Concept of Rent Control/Regulation*

In general parlance, rent control has been defined as a programme created by the government with the intention of reaching more affordable rental housing in some states and protecting tenants living in rental units with higher rents (Bitton, D., 2024). Similarly, rent control is said to be a government-imposed limit on the amount of rent that a landlord can charge for a housing unit. It is a type of price ceiling that is implemented to make housing more affordable and accessible, particularly for low-income individuals and families (Investopedia Team, 2025).

Moreover, the rationale for rent control stems from the need to reconcile housing as both a social good and an economic commodity (Epstein, R. A., 1988). At its core, rent regulation is designed to protect tenants from excessive rent increases and arbitrary eviction, particularly in contexts where housing demand significantly outstrips supply. In the same vein, it operates as a social safeguard against market failures that would otherwise exclude low- and middle-income earners from accessing decent accommodation (Peppercorn, I. G., Taffin, C., 2013). Glaringly, from an economic standpoint, rent control seeks to curb inflationary pressures in the housing market, stabilise rent fluctuations, and promote long-

term tenancy security. However, it also enhances broader public policy objectives such as urban stability, prevention of homelessness, and the maintenance of social cohesion. In jurisdictions where housing is recognised as a socio-economic right, rent regulation is an instrument through which governments fulfil their constitutional and international obligations to ensure adequate housing for all (Chenwi, L., Tissington, K., 2010).

Although there are no uniform rent control policies in the world, there are two generally recognised broad types of rent control. These are: hard and soft rent controls (Lind, H., 2001). The first is the hard rent control. This type of rent control is the most restrictive form of rent control. Under hard rent control, there are strict limits on how much a landlord can charge for rent. In some cases, rents are frozen for a certain period or are capped at a level below the market price. This form of rent control is intended to provide tenants with long-term rent stability. Still, it can often result in negative consequences, such as reduced incentives for landlords to maintain their properties or invest in new ones (Merrefield, C., n.d.). When rents are kept artificially low, landlords most of the time struggle to cover maintenance and improvement costs, leading to declining rental housing quality (Gilderbloom, J., Appelbaum, R. P., 1987). The other kind of rent control is the soft rent control. It is also known as rent stabilisation, as it allows for more flexibility than hard rent control. This policy permits landlords to increase rent, but only by a certain percentage each year, typically in line with inflation or an agreed-upon rate (MetroPlanning, 2023). In other words, it ensures that tenants are not subjected to sudden, excessive rent hikes while allowing landlords to increase rents in a controlled manner to reflect rising operational costs. While soft rent control offers a more balanced approach, it can still have drawbacks, such as creating an imbalance between supply and demand (Basu, K., Emerson, P. M., 2000).

## *2.2. Theoretical Underpinnings*

At this juncture, it is paramount to examine some of the theoretical underpinnings foundational to rent control in the context of this research.

### *2.2.1. Economic Theory of Regulation*

An analytical foundation for comprehending rent control as a government intervention in the housing market is provided by the economic theory of regulation. In other words, it

asserts that market flaws that result in socially unacceptable results are corrected by regulation (Noll, R. G., 1989). Furthermore, rent increases and home insecurity for low- and middle-income groups are frequently caused by the mismatch between supply and demand in the housing market. Thus, rent control serves as a corrective mechanism to guarantee distributive equality and allocative efficiency (Arnott, R. J., Shevyakhova, E., 2014). Within this framework, the issue of efficiency versus equity is *sine qua non*. The first side of the coin is efficiency. Its concerns arise from the need to allow market forces to determine rent levels that reflect real housing values and incentivise investment. Whereas, equity considerations focus on ensuring that access to decent housing remains affordable and fair for all segments of society (Vejchodská, E., 2022). According to this theory, when market forces are insufficient to ensure equitable access to necessities like housing, regulation is warranted. On its long-term effects, economic scholars disagree (The International Monetary Fund, 2024). Critics, however, claim that rent control confuses market signals, deters new investments, and decreases the supply of housing, while supporters maintain that it preserves consumer welfare and avoids monopolistic exploitation (Kholodilin, K. A., 2024). Thus, the theory portrays rent control as an essential, if not ideal, tool for striking a balance between efficiency and social welfare, where the aim is to align market dynamics with the larger societal goals of stability, inclusiveness, and justice rather than completely suppressing them.

### 2.2.2. Social Justice and Welfare Economics Theory

The social justice and welfare economics theory has a normative justification for rent control. This is because it emphasises equity, fairness, and human dignity in the allocation of housing resources (Slater, T., 2021). The theory places housing within the larger context of social welfare and distributive fairness, in contrast to the strictly economic justification (Bengtsson, B., 2001). Besides, it acknowledges that uncontrolled markets frequently put profit ahead of people, which marginalises disadvantaged populations that are unable to participate in housing markets with high levels of competition. Hence, rent regulation functions as a social policy tool to reduce inequality and encourage inclusive urban growth. It must be noted that a very crucial aim of this theory is the redistribution of resources and the shielding of tenants from predatory market practices, as such regulation improves societal welfare (Plerhoples Stacy, et al., 2023). Without an iota of doubt, this strategy supports the

idea that having access to decent housing is a socio-economic right and a fundamental human need, and not a result of purchasing power.

### 2.2.3. Property Rights and Constitutional Considerations Theory

Property rights, in the legal sense, denote a bundle of entitlements that determine the relationship between persons and things, particularly the power to use, enjoy, exclude others, and dispose of property. According to A.M. Honoré, these incidents include ownership, control, income, and transmissibility of property interests, all of which may be limited by law in the public interest (Honoré, A. M., 1961). In contemporary constitutional and human rights law, certain rights are subject to reasonable restrictions imposed for the public good rather than being unrestricted. One such restriction is the regulation of rent, which limits the amount of unrestricted control that landlords may have over rental prices in an effort to safeguard tenants and advance social welfare (Glassie, H. H., 1920). The idea that social responsibilities are correlated with property rights is reflected in this regulatory balance. Hence, rent regulation is a constitutional compromise that balances the state's obligation to provide enough housing and guard against economic exploitation with the sacredness of private property. Lucidly, the principle of proportionality states that any limitation on property rights must be reasonable, required, and appropriate to the goal of attaining social justice, and this is ultimately what gives such intervention its validity (Nwobike, J. A., 2023).

### **3. Rent Control/Regulation in Germany**

The German housing sector, profoundly characterised by its market-based character, derives from the Weimar Republic (1918-1933). Notably, the driving force behind the housing sector was to “*provide good housing at affordable prices, contrary to the capitalist system, where only either the 'poor and affordable' or 'good and expensive' seemed achievable.*” Tragedy struck, and an acute shortage of dwellings posed a significant challenge to Germany after the Second World War. For instance, in the early post-WWII period, West Germany faced a deficit of millions of dwellings, making housing a national priority. To tackle this challenge, the state organised a large-scale social-housing construction program and tightly controlled rents. The Local housing offices (Wohnungsamt) were empowered to register all available units, allocate tenants, control evictions and forbid rent increases under emergency laws (Cornelius, Rzeznik, 2015). This housing command

economy, locally known as “Wohnungszwangswirtschaft”, persisted into the 1960s. In 1950 and 1956, two early Housing Acts were enacted to subsidise newly constructed buildings for private investors. These two Acts formed the embodiment of the basis for the promotion of social policy by enabling easy accessibility to public funds. By the late 20th century, the system transitioned to a market-friendly social model where tenants remained strongly protected by law even as broad price controls eased. The whole trajectory of this transition will be examined in the context of the statutory provisions and judicial decisions (Cornelius, Rzeznik, 2015).

### *3.1 Legal Framework*

Germany has been increasingly active in protecting tenants from rent increases through various forms of generational rent controls. The ‘first’ generation model typically caps rents at a specific level relative to local market rents, whereas the ‘second’ generation typically limits rent increases within the period of the tenancy for individual tenants (Adedokun, I. A., 2023). The second-generation model has held a long-standing role in Germany’s rental markets and operationally restricts the scale of rent increases that can be applied during a tenancy. The landlord can determine the rent at the time the property comes to the market. The current system is such that the tenant and landlord agree the initial rent between them in a new lease agreement; rent increases every twelve months are set by reference to the average market rent in the locality, based on the official “Mietspiegel” (Tables Reflecting Local Rents), tables compiled by the local authorities. Obviously, this model is underpinned by strong tenancy rights. Today, German rental law is codified in the Bürgerliches Gesetzbuch (BGB).

Specifically, Sections 556 to 561 of the BGB outline basic rules on rent and cost allocation. The Section 556 typically governs passing on utilities to tenants, Section 558 allows rent increases up to the local comparative rent, Section 559 permits landlords to pass on part of modernisation costs, Section 560 covers changes of operating costs, while Section 561 grants tenants’ special right of termination after a rent increase. In the wake of 2015, the German parliament enacted Mietpreisbremse (“rent brake”), serving as an amendment to the BGB. The Mietpreisbremse grants authority to each federal state to legally set a maximum amount (cap) on new leases in designated tight markets. The major policy innovation since

2015 is the Mietpreisbremse (“rent brake”). Enacted as an amendment to the Bürgerliches Gesetzbuch (BGB), the Mietpreisbremse authorises each federal state to cap rents on new leases in designated tight markets.

In municipalities experiencing high demand for housing, landlords are prohibited from setting the initial rent more than 10% above the local average rent (Breidenbach, Eilers, Fries, 2019). This federal legislation gives the states (Länder) the authority to identify which cities are subject to this rent control cap. Essentially, the rent brake is a second-generation regulation that does not impact existing leases but specifically targets new tenancies. Since its introduction, about half of all German households rent their homes, meaning that even minor regulatory changes can significantly affect many people (Breidenbach, Eilers, Fries, 2019).

### *3.2 Case Law and Practice*

Article 14 of the Basic Law (Grundgesetz) stands as the constitutional source for the property guarantee, which the Federal Constitutional Court invoked in several cases, including BVerfGE 115, 97 (2 BvR 2194/99, judgment of 18 January 2006). In that case, the Court referred to the protection of the “core elements of ownership”, meaning the Constitution protects the essential content of property rights, while allowing legislative regulation as checks (Paragraph 110). German rent laws have traditionally been enforced through ordinary courts, but noteworthy new measures have recently been tested in the constitutional arena.

The most notable example is Berlin's Mietendeckel, or rent freeze, implemented in 2020. Berlin's state government enacted a law that froze all private-sector rents at mid-2019 levels and imposed strict caps on future rent increases, surpassing the federal rent brake. However, the German Federal Constitutional Court (BVerfG) ruled that the Mietendeckel was unconstitutional. The Court held that by attempting to regulate “commercial leasing” (Wohnungswesen), Berlin overstepped its authority and encroached on exclusive federal powers as defined in Articles 73–74 of the Basic Law (Grundgesetz), (Sardo et al., 2024).

Essentially, the rent freeze was deemed void due to a lack of state competence. The BVerfG's decision (BVerfGE 151, 1 (2021), widely known as the “Mietendeckel case”, has sparked widespread debate. Some critics argued that Berlin should have broader authority

over housing or that federal and state regulations could coexist. Nonetheless, this ruling points out the limitations of local rent control measures in Germany.

### *3.3 Evaluation*

#### 3.3.1. Achievements

German rent regulation has succeeded in stabilising rents for existing tenants. Under current law, landlords can increase a tenant's rent by no more than 20% over three years and must adhere to formal notice requirements (Breidenbach, Eilers, Fries, 2019). Due to these restrictions and the very low tenant turnover, many long-term tenants have experienced relatively modest rent increases: data shows that from 2010 to 2023, city-wide asking rents rose by approximately 30%, while rents for existing contracts increased by only about 10% (Breidenbach, Eilers, Fries, 2019). This means that while newcomers often face expensive new lease agreements, established tenants benefit from "rent inertia" and predictability in their housing costs. Additionally, by protecting many renters from bidding wars, the system helps to mitigate displacement in tight housing markets. Germany's comprehensive tenant protections, outlined in the BGB and housing statutes, reflect a social-market norm that dates back to the postwar period (Nwobike, 2023).

#### 3.3.2. Shortcomings

Nevertheless, some scholars have identified several weaknesses in the Mietpreisbremse (rent control regulations) in Germany. Firstly, empirical analyses indicate that the impact on rental prices has been minimal. For instance, a study found that the rent brake reduced rents by only about 2.5% on average, and this effect diminished over time (Kholodilin, 2022). In fact, despite the maximum limit set, rents continued to rise quickly across the city, particularly in areas with low vacancy rates. One major issue is the complexity of the regulations. The rent brake applies only in certain areas and specifically to older apartments; units constructed or refurbished after 2014 are exempt from these controls. Critics argue that this 'patchwork approach' creates loopholes and results in heavy bureaucracy (Kholodilin, 2022). Furthermore, it incentivises landlords to complete renovations or reclassify their apartments to evade the rent cap, which, in turn, reduces the number of rent-regulated units available. Economists have sternly warned that strict rent

controls can deter property maintenance and new rental construction, leading owners to exploit the system (Bundesverfassungsgericht [Federal Constitutional Court of Germany]. (2006, January 18). BVerfGE 115, 97 (2 BvR 2194/99).

Additionally, Germany's legal precedents suggest that overly aggressive measures, such as a rent freeze, could conflict with constitutional limits. In sum, while it is true that Germany's system provides stability for many tenants, it comes with an administrative burden that has been analysed above. These shortcomings have distorted the rental market and punctured the main goal: the overall affordability of rental price (Bundesverfassungsgericht, 2006).

#### **4. Rent Control in Canada**

High rents are a topic of frequent discussion in Canada. Although the media reports the financial struggles of the citizens alongside the political promises of the government daily, effective rent control, which stands as a viable solution to the problem, remains underdiscussed in some jurisdictions. With rising inflation, however, rent control has become one of the most pressing topics, requiring prompt attention from all provincial governments.

Thus, policies and regulations intersecting the realms of law, economics, and social policy are devised to balance affordability on behalf of the tenants against adequate supply of housing and private investment in housing on behalf of the landlords. These developments are in response to the high rate of inflation, which has persisted in the country since the 1970s.

##### *4.1. Evolutionary Trends of Rent Control in Canada*

World War II had the same effect on Canada as it had on other parts of the world, particularly concerning housing. Although the post-WWII era in Canada saw an increasing number of house ownerships, there were significant numbers of rentals, which stood at 42% of the total housing demands (Suttor, 2009).

Motivated by the high level of urbanisation and social change, both caused by human capacity development in economics, sciences, and technology, the rental rate in postwar Canada reached a greater per capita rate than in other territories such as Australia and the United States of America. (Suttor, 2009). The necessity which increased rental production

also called for the introduction of mechanisms through which housing supply and demand can be balanced. Consequently, following the war, the federal government devolved the responsibility of rent control to the province (Strong-Boag, 1991).

However, the response of each of the provinces varied. While some provinces revamped their rent control, others jettisoned rent control entirely. However, with the advent of the double-digit inflation of the 1970s (Strong-Boag, 1991), it became nearly impossible for any province not to adopt rent control as citizens were faced with high costs of living, a large sum of which went into housing. And particularly because housing generally has an inelastic demand, which means tenants would pay, notwithstanding how high the rents are, governments across the provinces realised rent regulation was necessary to prevent homeowners from unduly taking advantage of the common populace. Consequently, the 1970s marked the beginning of the mass adoption of rent control legislation by the provinces. Some examples include the Ontario Residential Premises Rent Review Act, 1975; the Manitoba Residential Rent Regulation Act, 1976; etc.

The rent control terrain in Canada has, however, been flawed with several criticisms, such that in the following decades, 1980s-1990s, political and industrial lobbyists, economists, and free-market proponents argued against rent control and sponsored its abandonment (Smith, L. B., 1981). Despite this setback, there was a resurgence of the control mechanism in the 2000s (Bundesverfassungsgericht, 2006). The current rent control landscape in Canada has a wider scope and application, covering the entire tenant-landlord relationship with detailed procedural requirements for eviction, rent increase, subletting, and dispute resolution. The Covid-19 pandemic created a rent increase in 2020, and this called for the issuance of guidelines to respond to the development. In Ontario, for instance, the government issued an annual rent increase guideline aimed at preventing outrageous rent increases (Tranjan, R., Vargatho, P., 2024). Although this guideline had existed prior to the advent of the COVID-19 pandemic, it was effective in alleviating the financial burden of getting affordable housing during the period.

The practice of rent control in Canada is not exclusively handled by the provincial government. The federal government is empowered through the National Housing Strategy adopted in 2017 to engage in housing matters indirectly. Thus, during the early years of the

COVID-19 pandemic, the Canadian government deployed rent freezes to stabilise rents (August, M., 2021). In today’s Canada, provincial responses to rent control have intensified with the introduction of diverse rent control legislation, policies, and guidelines.

#### *4.2. Legal Framework: Federal v. Provincial Autonomy in Housing Policy*

The constitutional system of government obtainable in Canada is the federal system, which allows legislative powers and responsibilities to be shared between the federal government and the component units. Under Section 92(13) of the Constitution Act, 1867, property and civil rights are assigned to the provincial governments, enabling them to oversee rent control within their jurisdiction. Thus, all matters relating to the tenant-landlord relationship of fundamentally local character are regulated on a provincial basis.

Within Section 91 of the Constitution Act, the federal government may intervene in rent regulation during emergency periods. This is tied to the Peace, Order, and Good Government (POGG) principle rooted in the Canadian constitutional construction. This doctrine gives statutory validity to the rent freezes orchestrated by the Canadian government post-WWII and the Covid-19 pandemic eras. Besides this arrangement, the involvement of the federal government in housing is indirect, with the provincial governments wielding the substantive powers to regulate rents within their jurisdiction.

Each province is empowered to decide its rent regulation mechanisms. For instance, while British Columbia has a robust rent control framework with no exception for any construction, rent control is a strange phenomenon in Alberta, given the reliance of the province on market dynamics to regulate rents (Dillon, T. et al., 1982).

This constitutional arrangement reflects the core quality of federalism, which allows experimentation by the subordinate governments with the central government playing the indirect role of an overseer but with no actual regulatory authority.

#### *4.3. Provincial Legislation: Ontario and Alberta as Case Studies*

Given the province-based approach to rent control in Canada, each province designs its statutory framework for rent regulation. In Ontario, rent control is principally governed by the Residential Tenancies Act, 2006. Since its enactment, the statute has operated through rent increase guidelines, issued annually. The annual rent increase is measured based on the

Consumer Price Index, providing a means through which housing supply can be balanced against demand. Landlords wishing to increase their rent above the one specified by the guideline must notify the Landlord and Tenant Board (LTB), requesting an Above-Guideline Increase (AGI). There are various instances in which an AGI may be requested, including an increase in utility costs, capital expenditures, municipal taxes, and other similar considerations. However, it is required that landlords satisfactorily prove that their issued rents are reasonable.

Trends have, however, shown that the average rent increase exceeds the guideline increase. For instance, while the guideline increase for 2022 was pegged at 1.2%, the average rent increase was about five times higher, standing at 6.1% (Canadian Centre for Policy Alternatives, n.d.). The situation was not any different in the following year, as the 2.5% guideline-prescribed increase appeared significantly lower than the 8.1% average rent increase (Canadian Centre for Policy Alternatives, n.d.). Although the AGI has been criticised as being an easy pass for landlords, particularly because of its flawed calculation formula, which allows landlords to push down costs on tenants (Zigman, P., August, M., 2021) the initiative remains operational within the province. However, since subsidised loans are made available to landlords by the federal and provincial governments, AGIs are suggested to be replaced with government support, conditioned on the strict adherence to the rent increase guideline issued annually.

The robust rent control mechanism obtainable in Ontario is in sharp contrast to what is practised in Alberta. Since the 1980s, rent control has been abandoned within the province (August M., 2021) with no trace of its re-emergence. However, there were traces of rent regulation in Alberta between 1977 and 1980 (August M., 2021). Although the regulation was short-lived, it provided the foundation for the full-scale adoption of rent control. Through the study conducted by the foremost housing corporation in the country, the Canada Mortgage and Housing Corporation (CMHC), it was discovered that the prevalence of rent control for a long duration has the potential to adversely affect the residential rental market (Kholodilin, 2022). However, the data gathered from the study showed that the existence of rent control, particularly during the three years in the late 1970s, did not appear to have

slowed down new housing construction. The validity of the data appears to triumph over the abstract conclusion, as recent evidence has shown (Kholodilin, 2022).

A comparative analysis of these jurisdictions shows that for rent controls to achieve any desired outcomes, government support and interest are a priority, especially in order to resolve the affordability challenges confronting many tenants.

#### *4.4. Institutional Mechanisms and Rent Control Evaluations*

Within the legal sphere of rent control in Canada are various institutional mechanisms, designed to respond to the interactions of housing demand and supply and issues arising from rentals.

One of such institutional mechanisms is rent increase caps, which specify the standard of increment by house owners. The most common factor for the determination of this mechanism is inflation, often based on the Consumer Price Index. The reason for this is not far-fetched; landlords respond to higher costs of maintenance, utilities, and taxes by fixing corresponding rents. The provincial governments intervene through their CPI measures, enabling cost recovery while preventing exploitative increases. Through the rent increase guidelines issued every summer in Ontario, for instance, relations between landlords and tenants are closely monitored. Thus, the caps exist as default maximum rates. Conversely, reality shows that landlords usually impose rent increases, having demonstrated higher expenditures on construction before the LTB. This makes the caps a floor rather than an actual ceiling.

Disputes are constant in tenant-landlord relations. The resolution of these disputes is handled by specialised administrative tribunals due to several considerations, including judicial backlog, the high cost of going to court, and the strict adherence to formalities in litigation.

An example of this administrative model is Ontario’s Landlord and Tenant Board, which is saddled with the responsibility of overseeing and presiding over tenancy matters, ranging from rent increase disputes to compensation claims and eviction applications. Another example is Quebec’s *Tribunal Administratif du logement*, an administrative set-up

which, unlike the Ontario LTB, conducts more formal hearings and gives decisions which are largely quasi-judicial in nature (Veilleux, G., 1969).

The fundamental importance of shelter to human security and dignity informs eviction protections as significant institutional mechanisms within the Canadian housing sphere. The ideal position under the Canadian law is that evictions can only be properly authorised by the courts or tribunals, not landlords (Vakili-Zad, C., 2004). This mechanism offers tenants a height of protection which their landlords cannot arbitrarily breach.

The Canadian rent control scheme, therefore, demonstrates both strengths and weaknesses. With regard to the former, rent control in Canada is a commendable effort given the predictability and planning that it affords. Both tenants and landlords have the opportunity to budget their expenses, knowing a rent increase is an annual outcome.

The eviction protection mechanism provides tenant accessible dispute resolution without excessive spending. Procedural fairness is also enabled as the delay associated with conventional litigation is absent. In the same vein, tenants are guaranteed the security of tenure under the Canadian rent control mechanism. Arbitrary evictions by landlords are outlawed.

Regardless of these benefits, the mechanism is criticised for causing supply constraints. Due to the absence of self-initiated rent increase, rent control has been argued to be less profitable, a point which many opponents state is responsible for the limited new rental housing construction in the country.

Likewise, rent control has been opined to deter landlords from carrying out maintenance on their houses, as landlords are denied the liberty of increasing rents for the purpose of recovering capital improvement costs. Gentrification is another weakness that has been tied to the rent control scheme in Canada. In response to migratory trends, landlords may carry out renovations and reconstructions, the rent of which may be burdensome for the existing residents of the locality to shoulder (Mendonça-Vieira, P., 2018). This way, rent control paradoxically displaces vulnerable and often racialised populations to accommodate affluent renters.

The non-uniformity of the provincial approach to rent control continues to hamper the effectiveness of the mechanism within the Canadian jurisdiction. This makes it difficult for residents in one province to easily adjust to the financial demands of housing in another province, especially where the rents in the receiving province are significantly higher than the rents in the province of origin.

## **5. Comparative Analysis of Germany and Canada**

### *5.1. Policy Philosophy*

Notably, Germany and Canada approach rent control from different ideological perspectives. Germany's system is rooted in the concept of the soziale Marktwirtschaft (social market economy), which views housing as a quasi-social good. German law, as reflected in Article 14 of the Basic Law, emphasises the social function of property and prioritises access to quality housing (Nwobike, 2023). In contrast, Canada, with its mixed economy and dual Anglo-French heritage, leans towards market solutions that are complemented by targeted welfare programs. After the post-war expansion, Canada has largely depended on private ownership and rent prices established by supply and demand, with the government intervening through subsidies or localised regulations. The separation of federal housing policy has resulted in Canada's lack of a cohesive housing strategy. Instead, provinces implement a combination of pro-tenant measures and pro-market policies, such as landlord/tenant law reforms and tax incentives, according to their individual needs (Hulchanski, J. D., 2003).

### *5.2. Legal and Administrative Design*

The structural differences between the rental regulations in Germany and Canada are crystal clear. Germany has a uniform federal code known as the BGB, which applies nationwide. Individual German states (Länder) can implement specific measures, such as the Mietpreisbremse, in selected regions. In contrast, Canada has a variety of provincial regimes, with each province creating its own Residential Tenancy Act (RTA) and guidelines. The enforcement mechanisms also differ between the two countries. German tenants can take legal action in regular civil courts or seek advice from local Mieterschutzvereine for assistance. Canadian tenants, on the other hand, primarily use specialised tribunals for rent

disputes (Musulan, A., 2022). German rental regulations tend to be more rigid, with fixed percentage caps and explicit exemptions laid out in legislation. In contrast, Canadian tribunals exercise discretion, often approving variances for specific hardships (Landlord and Tenant Board, 2020). Despite these differences, both systems strive to balance tenant protection with landlords' interests. Notably, German courts have affirmed that rent limits must enable landlords to achieve a "fair" return on their investments. For instance, the Federal Constitutional Court (BVerfG) has ruled that if a controlled rent is significantly lower than market levels, the resulting financial burden on landlords may be deemed unconstitutional. Similarly, Canadian laws generally permit landlords to apply for higher rents or evictions under certain conditions, reflecting an acknowledgement of their investment needs (Leon, S., 2021).

### *5.3. Socio-Economic Impact*

A convergent point is that Germany and Canada view rent regulation as part of a broader housing strategy. In Germany, the effects have been mixed. On one hand, the rental market is substantial, with approximately 52% of households renting, and rent prices, particularly for existing tenants, have remained relatively stable (Sardo et al., 2024, 221). This stability likely fosters social cohesion, allowing many families to stay in their homes. However, housing costs in major cities continue to rise, and critics cite supply constraints as a significant issue. Economists warn that strict rent laws can discourage maintenance and redevelopment, which could ultimately harm the quality and availability of housing (Bundesverfassungsgericht, 2006). In Canada, the outcomes of rent regulation vary by region. Studies, such as the one conducted by Clarke–Gold (2024), show that tenancy reforms have not driven up housing prices, suggesting that overall market affordability has not deteriorated due to regulation (Clarke, D. R., Gold, D., 2024). Nonetheless, localised shortages remain in cities like Vancouver and Toronto, where rent controls have not adequately addressed demand pressures. Both countries also employ subsidies or tax incentives to increase housing supply. Post-World War II Germany undertook extensive social housing construction, while Canada's Canada Mortgage and Housing Corporation (CMHC) traditionally funded social housing units (Wellesley Institute, 2011). Currently, the debate centres on whether stronger tenant protections should be accompanied by increased new construction, such as relaxed

zoning and incentives for affordable housing, to ensure a healthy overall supply (Wellesley Institute, 2011).

#### *5.4. Best Practices and Lessons*

Several lessons can be drawn from comparing Germany’s and Canada’s rent regulation systems. First, targeted controls tend to be more effective than broad freezes. Germany's current policy exempts new-build and renovated units from rent caps (Breidenbach, Eilers, Fries, 2019). which aims to maintain incentives for developers. Similarly, some stricter provinces in Canada, such as Quebec and British Columbia (until recently), allow for modest annual increases on existing contracts, while imposing fewer restrictions on new units. This also shows a mixed approach. Empirical research indicates that such "second-generation" measures, if well-designed, can effectively balance affordability and supply (Arold, B. W. et al., 2025). Secondly, integration with supply policy is of utmost importance. Germany's early successes resulted from combining rent controls with a substantial subsidy-driven building program (Glassie, 1920). Canada's later use of funding from the Canada Mortgage and Housing Corporation (CMHC) shows a similar intent (Clarke, Gold, 2024). Third, administrative clarity improves compliance. Both countries have taken major steps toward establishing clear rules, such as standardised leases and transparent guidelines, as well as accessible adjudication through courts or tribunals. This clarity improves predictability for both landlords and tenants. Finally, respecting legal boundaries is crucial to avoiding irreparable errors. Germany’s experience has shown the dangers of implementing local measures that fall outside constitutional authority, while Canada’s federalism limits what the federal government can mandate (Arold et al., 2025).

In conclusion, Germany’s and Canada’s rent regulations reflect their unique social and legal traditions. Germany emphasises long-term tenant stability through strict statutory limits (Bundesverfassungsgericht, 2006). whereas Canada relies on provincial guidelines and dispute resolution mechanisms to promote fairness (Arold et al., 2025). Each system has its strengths: for instance, Germany successfully achieves tenant rent stability, while Canada offers procedural remedies and adaptability. However, each system also comes with its peculiar disadvantages: Germany’s controls risk supply-side challenges, and Canada’s market-responsive rules can leave some tenants vulnerable. A balanced approach that

combines moderate rent regulation (to protect affordability) with incentives for new supply and clear enforcement mechanisms can be a way forward. When designed in tandem, controls and construction can strengthen each other, as vividly depicted by the post-war histories of both countries.

## **6. Conclusion and Recommendations**

Rent control remains one of the most enduring yet contentious housing mechanisms across the world, with countries such as Germany and Canada as avant-garde in formulating and enacting laws towards the ascertainment of its wholesome benefits. From the onset of World War II to the 21st century, these countries have tweaked their laws and policies from the federal to the provincial levels to provide simple and beneficial housing plans for their citizenry. Tenants are able to make long-term planning and predict housing costs, courtesy of a well-designed rent control mechanism.

The ups associated with rent control are not without downs. A strict rent control policy discourages new rental housing construction as homeowners explore unregulated environments where their investments can yield greater returns. Quality deterioration compounds the issues. Landlords become cautious of their expenditures on maintenance of houses, considering that improvement costs may be irrecoverable due to low rent increases.

These weaknesses are responsible for the non-adoption of rent control in some jurisdictions/provinces. Thus, it is apparent that the successful implementation of rent control depends on socio-economic considerations aimed at balancing investment incentives against tenant protection; proper legal enforcement through resource-rich administrative and legal institutions; and formulation and integration of comprehensive housing strategies to level housing demands against supply. Satisfying these conditions creates a fertile ground for the rent control mechanism to flourish.

At this juncture, it must be noted that the effectiveness of rent control in achieving the twin objectives of tenant protection and sufficient housing investment returns generation for landlords is based on various policy and legislative recommendations, some of which include the following:

### *6.1. Strengthening Institutional Enforcement*

To mitigate the negative consequences of rent control, it is not sufficient to make policies and guidelines without adequate frameworks for enforceability. In the absence of effective enforcement, even well-designed control schemes would fail. Constructive compliance monitoring is practicable with strengthened institutional enforcement, providing a means through which violations can be properly penalised.

To achieve a significant level of enforceability, administrative support, introduction of technological infrastructure, and constant investment in adjudicators must be prioritised. Recourse can also be made to alternative dispute resolution methods for any contractual disputes arising from the tenancy undertaking.

### *6.2. Adopting Flexible, Context-responsive Rent Regulation Models*

Rent control is designed based on context. It responds to housing market dynamics which vary across jurisdictions. For instance, the housing market in rural provinces interacts differently from the housing markets in urban provinces. Thus, the approach must be flexible and resonate with existing variables in the locality. The age and type of building may also demand flexibility. For relatively old buildings, for instance, rent control should be stricter, considering the house owner has had the luxury of time to recover their expenditures on the construction. Contrarily, newer buildings should attract relaxed rent control, allowing the landlord to recover costs of acquisition and other operational costs.

### *6.3. Enabling Public-Private Housing Initiatives*

Rent control tends to affect housing supply significantly, reducing it to the lowest possible ebb. To promote housing affordability, however, supply must expand. The availability of incentives sponsored by the government will encourage private investment in housing construction. For instance, tax abatements have enabled private players to take the central stage in investing in housing construction in the US. Also, given that governments across all levels hold and control vast land territories, land leases to co-operative housing organisations are a viable option to increasing housing supply.

### *6.4. Encouraging the Modernisation of Dwellings by the Landlord and the Tenant*

One of the common criticisms of rent control is that it would lead to a decline in the quality of the existing stock. The rationale behind this is that when rent is fixed at a ceiling

that does not account for the increasingly high demand, the landlord will reduce costs in the form of repair and maintenance expenses to maximise profits. The tenant must tolerate measures for the maintenance and/or adequate modernisation of the dwelling for energy and water saving or additional dwelling space. These measures have to be reasonable. Consequently, introducing the rent control regime in a country with a general shortage of residential accommodations, attracting high rents and a lack of affordable housing, is highly desirable. Such a regime of rent control should not only take cognisance of improvements made by landlords in the indexation of rent but also take cognisance of reasonable expectations from their investment. For instance, when modernisation takes place in a tenanted apartment, the landlord should be allowed to pass on the costs to the tenant and increase the annual rent by a certain percentage of the cost of the modernisation. This increase can occur in addition to a reasonable rent increase. This Energy efficiency regulation should be based on models which allow some operating cost recovery for landlords in the determination of rents. In a jurisdiction like Germany, this model ranges from allowing landlords to recover a portion or all of their operating expenses to one which enables landlords to fully recover all operating costs plus a reasonable profit.

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# “RECONSTRUCTING MEDICAL NEGLIGENCE FOR AI-DRIVEN CARE: TOWARD A NIGERIAN STANDARD OF REASONED JUSTIFICATION”

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## Abstract

Artificial intelligence (AI) is rapidly reshaping clinical judgment in Nigeria, yet it operates within a medico-legal framework designed for exclusively human decision-making. Existing negligence doctrines, *Bolam*, *Bolitho*, *Montgomery*, and their Nigerian articulation in *Okonkwo v Medical and Dental Practitioners Disciplinary Tribunal*, remain foundational but insufficient for hybrid human–machine clinical environments. As AI systems increasingly influence diagnosis, triage, and treatment, responsibility becomes distributed across clinicians, hospitals, and developers, exposing gaps in duty of care, causation, consent, and institutional accountability. This article argues that Nigerian health law must evolve from professional deference to reasoned accountability grounded in both constitutional values and African bioethics.

To address these emerging gaps, the article proposes the Standard of Reasoned Justification (SRJ), a four-pillar normative framework, empirical competence, logical defensibility, respect for autonomy, and institutional responsibility, rooted in *Okonkwo*’s mandate that practitioners act “competently, conscientiously, and guided by reason.” The SRJ provides a unified standard for evaluating AI-mediated clinical decisions, bridging doctrinal evolution with modern demands for transparency, explainability, and patient-centred governance.

The article demonstrates how AI challenges existing statutory regimes, including the National Health Act 2014, the Medical and Dental Practitioners Act, and the Nigeria Data Protection Act 2023, and identifies the structural weaknesses of Nigeria’s fragmented regulatory ecosystem. It concludes by recommending legislative and institutional reforms, including amendments to the Evidence Act 2011 and the National Health Insurance Authority Act 2022, and the establishment of a National Health Artificial Intelligence Governance Framework. Together, these measures would embed the SRJ into Nigeria’s legal order,

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ensuring that technological innovation remains accountable to the constitutional imperatives of dignity, autonomy, and justice.

**Keywords:** medical negligence; artificial intelligence; Nigeria; Standard of Reasoned Justification; Evidence Act s 84; SaMD; NHIA accreditation; ubuntu; autonomy; algorithmic accountability.

## **1. Introduction: The AI Disruption of Medical Judgment in Nigeria**

Artificial intelligence is advancing rapidly within Nigerian healthcare, transforming clinical decision-making while revealing persistent gaps in negligence doctrine and data governance. Building on the author's earlier analysis of *Bolam v. Friern Hospital Management Committee* (1957), *Bolitho v. City and Hackney Health Authority* (1998), and *Montgomery v. Lanarkshire Health Board* (2015), which track the doctrinal shift from professional deference to reason-based accountability, this article extends that trajectory to AI-mediated care. It argues that clinical legitimacy must now rest on a unified standard of reasoned justification across human and algorithmic decisions. The article proposes the Standard of Reasoned Justification (SRJ) to embed empirical competence, logical defensibility, and respect for autonomy within institutional responsibility.

Yet the rapid adoption of AI exposes doctrinal spaces that Nigerian negligence law was never designed to govern. Core statutes such as the Medical and Dental Practitioners Act (2004) and the Code of Medical Ethics in Nigeria (Medical and Dental Council of Nigeria, 2022) still assume that clinical judgment is exclusively human, leaving no framework for assessing the reasonableness of algorithmic recommendations. Because AI distributes decision-making across clinicians, institutions, and developers, the traditional model of individual fault is structurally incapable of allocating liability or ensuring patient protection. These gaps illustrate the urgent need for a unified standard capable of evaluating both human and machine-assisted decisions.

Nigeria's health system is innovating under conditions of strain. Workforce shortages, uneven digital infrastructure, and fragmented data systems slow diagnosis and impair coordination. To cope, hospitals and diagnostics centres increasingly deploy AI systems for triage support, imaging interpretation, and predictive modelling. As these tools shape clinical judgments, accountability becomes dispersed across clinicians, software developers, and institutions, even though governing frameworks, such as the Medical and Dental Practitioners Act (2004) and the Code of Medical Ethics (Medical and Dental Council of Nigeria, 2022), continue to assume a human decision-maker. This widening gap between technological

capability and legal oversight makes it urgent to rethink duty of care, informed consent, and liability for an AI-driven clinical environment.

Artificial intelligence is already reshaping the practice of medicine. It sharpens diagnostic accuracy, anticipates risks, and streamlines routine administrative and clinical tasks. In Nigeria, where delayed diagnoses, limited staffing, and siloed clinical data remain everyday barriers, these innovations could significantly strengthen clinical performance. Yet the promise of AI is tempered by the reality that existing legal, ethical, and institutional frameworks have not kept pace with the technology. Healthcare law still regulates human actors, not algorithms; data governance frameworks regulate personal data but not automated inference; and clinical standards remain grounded in human professional judgment rather than hybrid, machine-supported reasoning.

Nigerian medical negligence doctrine inherits the English common-law template. Under *Bolam* (1957), a clinician is not negligent if acting in accordance with a practice accepted by a responsible body of medical opinion. *Bolitho* (1998) refined this by permitting courts to reject expert testimony that fails logical scrutiny. The Supreme Court in *Montgomery* (2015) later shifted the standard toward patient-centred disclosure and autonomy. Nigerian jurisprudence has incorporated these principles, most notably in *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal* (1999), which emphasised competence, conscientiousness, and respect for informed choice. Together, these authorities form the doctrinal foundation against which AI-mediated clinical decisions must now be justified.

However, these human-centred standards now face an unprecedented test. AI introduces decision pathways that are statistical rather than intuitive, collective rather than individual, and frequently opaque even to their developers. When diagnostic or treatment recommendations derive from algorithmic reasoning, the *Bolam* assumption of medical-professional control becomes unstable. Courts can no longer assess negligence solely by comparing a clinician's judgment with that of peers; instead, the central question becomes whether reliance on a given AI system was itself reasonable. In this emerging landscape, the principles of logical defensibility (*Bolitho*, 1998) and meaningful disclosure (*Montgomery*,

2015) must evolve to assess both human conduct and the transparency, validity, and ethical deployment of machine intelligence.

These challenges are amplified by gaps in Nigeria's data-governance regime. The National Health Act (2014) recognises rights to information, consent, and confidentiality but contains no provisions on automated processing or algorithmic decision-making. The National Health Insurance Authority Act (2022) encourages digital platforms but does not address the ethical governance of AI-driven analytics. The Nigeria Data Protection Act (2023) secures privacy rights but remains largely silent on algorithmic transparency, fairness audits, and requirements for meaningful human oversight. The result is a rapidly expanding digital-health ecosystem, spanning NITDA frameworks, NHIA systems, and NCDC surveillance platforms, operating in a regulatory vacuum.

These gaps pose difficult jurisprudential questions. Can a clinician satisfy the duty of care by relying on an opaque algorithm? What does informed consent mean when neither clinician nor patient can explain how the model reached its conclusions? When harm results from an algorithmic recommendation, where does liability fall, on the clinician, the developer, or the institution that deployed the system? Meeting these challenges requires a shift from after-the-fact negligence review to proactive, risk-based governance.

Beyond conceptual uncertainties lie practical gaps. Algorithmic bias can reproduce or amplify existing social inequities, yet Nigeria's general constitutional protections for equality and dignity are too abstract to regulate automated decision systems. Assigning liability becomes more complex when responsibility is distributed across multiple actors. These realities demonstrate that traditional doctrines of fault, causation, and responsibility are insufficient for governing AI-driven healthcare.

Recent Nigerian scholarship highlights the regulatory vacuum surrounding AI in clinical practice. Ehirim (2025) identifies persistent gaps in patient-safety protections and informed-consent processes, while Akinpelu and Akintola (2023) outline the ethical and legal risks of bias, discrimination, and liability associated with AI-enabled care. These analyses map the landscape but do not articulate a doctrinal test for adjudication. Building on these

insights, this article advances the SRJ as a normative framework that transforms medical accountability into a logic-based, rights-conscious standard suitable for evaluating both human and algorithmic decision-making.

The SRJ extends the *Bolitho* requirement of logical defensibility to algorithmic reasoning, empirical validation, and institutional oversight. It grounds legitimacy in four mutually reinforcing pillars: empirical competence (validated evidence and reliable tools), logical defensibility (transparent and coherent reasoning), respect for autonomy (genuine patient understanding and meaningful choice), and institutional responsibility (robust governance, audit, and redress mechanisms). Embedded within Nigeria's hybrid legal environment, the SRJ harmonises statutory duties under the National Health Act (2014), ethical standards in the Code of Medical Ethics (Medical and Dental Council of Nigeria, 2022), and constitutional principles of dignity and fairness. Together, these dimensions shift health law from reactive negligence litigation to proactive, principled governance.

This article adopts a doctrinal-normative methodology, analysing Nigerian statutes and case law (e.g., National Health Act, 2014; NDPA, 2023; NHIA Act, 2022; Evidence Act, 2011; *Bolam*, 1957; *Bolitho*, 1998; *Montgomery*, 2015; *Okonkwo*, 1999), drawing on African bioethics, and engaging comparative regulatory instruments such as the WHO (2021) AI ethics guidance and the EU Artificial Intelligence Act (European Union, 2024). The sections that follow develop this framework systematically.

## **2. Legal Foundations of Clinical Decision-Making in Nigeria**

The regulation of medical decision-making in Nigeria draws heavily from English common law, where judicial precedent, rather than statute, governs negligence and professional liability. The underlying assumption is that medical reasoning is human reasoning: clinicians exercise judgment informed by expertise, experience, and ethics. Artificial intelligence (AI) unsettles this premise and exposes doctrinal gaps in how responsibility and reasoning are conceived within Nigerian health law.

### 2.1. *The Bolam Paradigm and Professional Deference*

The landmark case of *Bolam v. Friern Hospital Management Committee* (1957) established that a doctor is not negligent if acting in accordance with a practice accepted as proper by a responsible body of medical opinion, even if others disagree. This rule entrenched judicial deference to professional consensus, a principle long embraced by Nigerian courts. In *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal* (1999), the Supreme Court affirmed that practitioners must meet “the standard of care reasonably expected of a competent practitioner in that field.”

However, the *Bolam* test has been criticised for allowing the profession to define its own standards, producing what commentators call “paternalism by proxy.” In Nigeria, where independent expert testimony is scarce, this deference often makes negligence claims unsustainable without insider support. In the AI era, such deference becomes untenable: the “responsible body of opinion” may no longer comprise clinicians but algorithmic systems designed by software developers. The next judicial development, *Bolitho v. City and Hackney Health Authority* (1998), directly responded to this weakness by demanding that professional opinion itself be rational and defensible.

Nigerian anchoring in *Okonkwo*. Although *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal* (1999) does not cite *Bolitho* (1998) or *Montgomery v. Lanarkshire Health Board* (2015) by name, the Supreme Court’s reasoning tracks their core commitments. In *Okonkwo*, the Court overturned disciplinary sanctions where the physician respected a competent adult’s refusal of treatment on moral or religious grounds, holding that autonomy, informed choice, and good faith delimit professional judgment. The Court rejected paternalism and affirmed that a doctor’s discretion must be competent, conscientious, and guided by reason, while respecting a capacitated patient’s informed choice even where that choice carries material risk. In doctrinal terms, *Okonkwo* internalises the logical justification of clinical decisions (the spirit of *Bolitho*, 1998) and patient-centred disclosure and self-determination (the logic later crystallised in *Montgomery*, 2015). This is the domestic foundation on which the SRJ rests: empirical competence and respect for autonomy, exercised in good faith and open to scrutiny.

## 2.2. *The Bolitho Refinement: Logical Defensibility*

The decision in *Bolitho v. City and Hackney Health Authority* (1998) introduced a vital corrective: professional opinion must withstand logical scrutiny. Courts may reject expert testimony if it lacks a rational foundation. Nigerian disciplinary tribunals and appellate courts have echoed this stance, for example in *Medical and Dental Practitioners Disciplinary Tribunal v. John*, where both the tribunal and the appellate court held that medical conduct must be justified by science and logic, not by habit or hierarchy. The tribunal rejected an expert defence based on habit rather than science, affirming that acceptable practice must be rationally justified, an approach consistent with *Bolitho* (1998).

This shift from professional deference to logical defensibility parallels the modern logic of algorithmic accountability. AI-generated recommendations must be explainable, open to human scrutiny, and capable of rational justification. When algorithms function as opaque “black boxes,” they risk failing *Bolitho*’s test of logical defensibility. Thus, *Bolitho* foreshadows today’s jurisprudential demand for explainable AI and reason-giving as a legal standard. The insistence on logical justification also reframes how Nigerian courts may assess the reliability of algorithmic reasoning. Nigerian courts have travelled the same path: in *Okonkwo* (1999), clinical discretion was upheld only when exercised conscientiously and with respect for informed choice.

## 2.3. *Informed Consent and the Duty to Disclose*

Informed consent remains the cornerstone of patient autonomy in Nigerian law. Section 23 of the National Health Act (2014) guarantees patients the right to be informed of their health status, proposed treatment, and associated risks. The Code of Medical Ethics in Nigeria reinforces that consent must be both voluntary and informed (Medical and Dental Council of Nigeria, 2022). Nigerian scholars have similarly emphasised that genuine consent requires comprehension, not mere signature.

Yet AI complicates this process. Patients may be unaware that part of a clinician’s decision derives from automated analysis, and clinicians may lack the technical understanding to explain how the algorithm reached its conclusion. When disclosure becomes

impossible, consent risks devolving into ritual, a concern highlighted in *Montgomery v. Lanarkshire Health Board* (2015), which ties valid consent to understanding and personal choice. Nigerian law must therefore broaden informed-consent doctrine to include algorithmic transparency: disclosure not only of risks but also of the technological reasoning underpinning care decisions. The statutory framework reveals how fragile these principles remain when confronted with digital systems.

The shift toward patient-centred disclosure in *Montgomery v Lanarkshire Health Board* (2015) reflects a broader common-law trajectory visible in *Reibl v Hughes* (1980) in Canada and *Rogers v Whitaker* (1992) in Australia, both of which frame consent around material risks from the patient's perspective rather than professional custom. This trajectory reinforces the need for Nigerian law to interpret Section 23 of the National Health Act and the MDCN Code in a manner consistent with autonomy and understanding in AI-mediated care.

#### 2.4. *Statutory and Institutional Framework*

Nigeria's key statutory instruments, the Medical and Dental Practitioners Act (2004), the National Health Act (2014), and the National Health Insurance Authority Act (2022), all presume a human decision-maker at the centre of medical practice. None explicitly address algorithmic systems or digital decision support. Likewise, the Evidence Act (2011) contains only rudimentary provisions for electronic records and does not contemplate algorithmic audit logs or model explainability. This leaves both patients and practitioners vulnerable: patients face difficulty proving fault, while clinicians risk liability for outcomes partly generated by AI tools they cannot interrogate.

By contrast, jurisdictions such as South Africa and Kenya have begun to integrate data-governance principles into health regulation. South Africa's Protection of Personal Information Act (2013) and Kenya's Data Protection Act (2019) emphasise accountability and transparency in automated processing, signalling a more explicit recognition of algorithmic risks. The absence of equivalent safeguards in Nigeria widens the gap between technological innovation and legal protection.

### 2.5. *From Professional Deference to Reasoned Accountability*

Over time, Nigerian medical law has gradually evolved from deference to accountability. *Okonkwo* (1999) and subsequent decisions signal a shift toward reasoned justification, requiring practitioners to defend clinical choices on logical, ethical, and empirical grounds. AI extends this duty: both human and digital actors must now meet a shared threshold of reasonableness anchored in transparency, defensibility, and ethical oversight. The next section examines how AI disrupts existing liability frameworks and compels this doctrinal evolution toward shared accountability in healthcare.

## **3. The AI Challenge: Delegated Judgment and Shared Liability in Nigerian Healthcare**

Artificial intelligence (AI) is no longer a futuristic abstraction in Nigeria's health sector. Machine-learning tools now support radiological diagnostics, electronic prescribing, infectious-disease surveillance, and hospital management systems. By mediating, or even supplanting, human reasoning, AI blurs traditional boundaries of clinical responsibility. Nigerian negligence law, still anchored in the *Bolam* standard, presumes a direct causal link between a practitioner's judgment and patient harm. In AI-mediated care, however, decision-making becomes distributed across clinicians, institutions, developers, and regulators, each contributing to outcomes, but none solely accountable.

### 3.1. *AI as a Co-Decision-Maker*

AI systems increasingly act not merely as assistive tools but as inferential and decision-generating systems. Predictive algorithms deployed by the Nigeria Centre for Disease Control (NCDC) for epidemic modelling and by private telemedicine platforms for triage directly influence treatment pathways (NCDC, 2022). The clinician's discretion is shaped by algorithmic outputs, producing a hybrid model of clinical decision-making. When these outputs prove erroneous, attributing negligence under traditional doctrines becomes difficult because responsibility no longer maps neatly onto human agency.

### 3.2. *Diffused Duty of Care*

In negligence law, the duty of care is typically personal and relational (Adewale, 2020). AI introduces a triadic structure of responsibility:

- Clinician–Patient Duty – the clinician’s obligation to interpret, verify, and critically assess AI outputs.
- Institution–Patient Duty – the hospital’s duty to procure, validate, maintain, and supervise AI systems responsibly.
- Developer–User Duty – the software provider’s duty to design algorithms that are safe, explainable, and resistant to bias.

Currently, Nigerian law recognises only the first duty. Hospitals are rarely sued for defective digital systems, and developers typically fall outside health-specific regulatory oversight (Okeke, 2023). This asymmetry exposes clinicians to liability for outcomes beyond their control, emphasising the need to reconceptualise the duty of care as shared, networked responsibility.

### 3.3. *Product Liability and Defective Algorithms*

Under the Federal Competition and Consumer Protection Act (FCCPA, 2018), manufacturers and suppliers bear strict liability for defective products that cause injury. The statute was drafted with tangible consumer goods in mind. Its provisions on defect and fitness for purpose do not easily accommodate adaptive algorithms that update their decision rules after deployment. Consequently, AI decision systems, though capable of causing harm, do not fit comfortably within statutory definitions of “products.”

Similarly, neither the National Agency for Food and Drug Administration and Control (NAFDAC) nor the Standards Organisation of Nigeria (SON) currently certifies software as a medical device. Extending NAFDAC’s jurisdiction to Software as a Medical Device (SaMD) would permit pre-deployment validation analogous to pharmacovigilance (NAFDAC, 2021). This would create a statutory duty of safety for developers, functionally extending the neighbour-principle logic of *Donoghue v. Stevenson* (1932) into digital contexts.

A more immediately workable pathway is institutional negligence under Section 19 of the National Health Act (2014), which obliges every health establishment to “ensure the provision of quality health services.” This duty logically extends to digital infrastructure. When a hospital deploys unvalidated or biased AI systems without adequate oversight, the breach lies not in coding error but in negligent governance. Framed this way, institutional negligence modernises the *Bolam* model by shifting focus from individual professional fault to systemic accountability. This approach aligns with *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal* (1999), which emphasises competent, conscientious care, and with global trends recognising organisational responsibility for digital safety.

Sections 120–122 of the FCCPA (2018) impose strict liability for defective products. Extending strict liability to high-risk AI systems under a future Health AI Regulation Bill would incentivise “safety-by-design,” consistent with the SRJ’s empirical-competence and institutional-responsibility pillars.

#### 3.4. *Causation and Evidentiary Challenges*

Proving causation in AI-related medical harm remains a formidable challenge. Algorithms may rely on opaque datasets, undergo continuous retraining, or produce outputs that are difficult to audit. Although the Evidence Act (2011) recognises electronic records as admissible evidence, its provisions centre on conventional computer-generated documents and human-authenticated certificates. These rules do not contemplate dynamic, self-learning systems or the metadata trails essential for algorithmic accountability.

Section 84 of the Evidence Act (2011) admits computer-generated evidence only if accompanied by a human certificate attesting to its integrity. In learning systems, no single individual can credibly certify the entire process. This procedural rigidity renders Section 84 poorly suited to AI-related evidence and underscores the urgency of legislative reform to recognise audit logs, model cards, and metadata as self-authenticating records.

A feasible reform is the introduction of a reverse burden of proof: once harm is plausibly associated with an AI system, the deploying institution must demonstrate compliance with validation, monitoring, and audit obligations. This aligns with precautionary

reasoning in public-health jurisprudence and mirrors European risk-allocation models that assign responsibility to those best positioned to control digital systems (European Union, 2024).

### 3.5. *Institutional and Vicarious Liability*

Hospitals integrating AI within electronic medical records effectively embed algorithms into clinical governance structures. Section 19 of the National Health Act (2014) requires health establishments to maintain quality services, which extends to digital systems they deploy. Institutions that integrate unvalidated or biased algorithms may therefore be negligent for failing to ensure safe clinical infrastructure.

Section 24 of the Nigeria Data Protection Act (NDPA, 2023) requires “privacy by design and by default.” AI systems that expose patients to discriminatory or unsafe automated processing could attract both regulatory and civil liability. These obligations collectively establish an emergent form of institutional liability, reflecting the reality that decisions about technology procurement and governance are integral to patient safety.

### 3.6. *Professional Ethics and Oversight*

The Code of Medical Ethics in Nigeria requires practitioners to maintain competence and employ scientifically validated methods (Medical and Dental Council of Nigeria, 2022). Ethical oversight therefore requires clinicians to understand, question, and verify AI outputs rather than rely blindly on them. Uncritical dependence would breach professional duties. Institutions also share a complementary obligation to provide training, documentation, and transparency regarding AI systems. Together, these expectations form a dual responsibility: the clinician’s duty of informed oversight and the institution’s duty of technological stewardship.

### 3.7. *Shared Liability and Reform Imperatives*

Nigeria’s legal framework must evolve from the individualistic negligence model toward a regime of shared liability among clinician, institution, and developer. Legislative recognition of distributed accountability aligns with Section 17(2)(a) of the Constitution of the Federal Republic of Nigeria (1999), which enshrines social justice and equitable

governance. A dedicated Health Artificial Intelligence Regulation Bill could codify this framework, allocating duties according to control, capacity, and benefit. Such reform would harmonise clinical practice with the principle of reasoned justification that underpins the SRJ model.

#### **4. Ethical Foundations and African Bioethics in AI-Driven Healthcare**

Law without ethics risks losing moral legitimacy. In the age of intelligent machines, the ethical compass of healthcare becomes as vital as its legal scaffolding. Nigeria's pluralistic moral landscape, shaped by communal traditions, religious faiths, and constitutional ideals, offers a fertile foundation for ethical AI governance (Metz, 2011; Tangwa, 2000). African bioethics, with its emphasis on solidarity, relational personhood, and responsibility, provides not only a moral framework but also a culturally resonant guide for aligning technological innovation with human dignity (Metz, 2010; Tangwa, 2014).

##### *4.1. Communitarian Ethics and Solidarity*

African bioethics locates moral legitimacy in community rather than in isolated individuals. Personhood, in this tradition, is relational and is often captured in the concept of ubuntu, a philosophy of humanity and mutual care summed up in the expression "I am because we are" (Metz, 2011). It embodies mutual care and communal accountability and underpins the idea of relational autonomy in African bioethics. Decisions are evaluated not only by their impact on individuals, but also by their contribution to collective wellbeing. Within this framework, healthcare ethics demands that AI systems serve the social good, preserving trust and solidarity rather than deepening inequality.

Ubuntu, literally "humanity toward others", is not only an ethical aspiration but also a constitutional and legal mandate. Section 17(2)(a) of the Constitution of the Federal Republic of Nigeria (1999) requires the state to promote social justice and equality, while Article 16 of the African Charter on Human and Peoples' Rights guarantees the right to health (African Union, 1981). Embedding ubuntu's communitarian ethic within AI governance therefore transforms the ideal of solidarity into a public-law duty: participatory, inclusive decision-making in digital health becomes a constitutional obligation as much as an ethical one.

This communitarian logic provides an ethical counterweight to Western individualism. Whereas conventional bioethics often privileges autonomy as independence, African thought interprets autonomy as relational self-determination, freedom exercised within moral and social obligations (Tangwa, 2014; Metz, 2010). Ethical AI governance in Nigeria must therefore be participatory and inclusive: communities, not just regulators or developers, should be engaged in decisions concerning data use, algorithmic design, and clinical deployment. Involving patient groups, traditional leaders, and civil society in data-governance deliberations reflects the African ethic of solidarity and echoes global principles of participatory ethics (Ten Have & Gordijn, 2014).

#### *4.2. Autonomy and Dynamic Consent*

While Western bioethics prizes autonomy as individual self-determination, African thought reinterprets it as relational autonomy, freedom realised within social bonds and communal responsibilities (Tangwa, 2014). Dynamic consent operationalises this form of autonomy by allowing ongoing, context-sensitive control over data use, consistent with communitarian ethics in which freedom is exercised through mutual responsibility (Metz, 2011). Section 23 of the National Health Act (2014) protects patients' rights to information and informed consent, but genuine consent in AI-driven care also requires transparency about algorithmic involvement, data flows, and automated reasoning.

A dynamic-consent model, in which patients can grant, modify, or withdraw permission for data use and algorithmic participation over time, would give practical effect to this relational view of autonomy. Such an approach balances personal agency with communal accountability, ensuring that consent remains informed, contextual, and continuous rather than a one-off signature. It also resonates with Islamic and Christian ethics, in which moral choice is meaningful only when exercised with understanding and responsibility (Al-Bar & Chamsi-Pasha, 2015).

#### *4.3. Beneficence, Non-Maleficence, and Algorithmic Safety*

The twin duties to promote good (beneficence) and avoid harm (non-maleficence) remain central to medical ethics. When AI systems trained on foreign or non-representative

datasets are deployed without local validation, they risk misdiagnosing Nigerian patients due to contextual and epidemiological mismatch. The Code of Medical Ethics in Nigeria explicitly requires that medical methods be “scientifically proven and applicable to our environment” (Medical and Dental Council of Nigeria, 2022).

Validating AI tools on Nigerian data is therefore both an ethical imperative and a statutory duty. Hospitals and regulators must implement algorithmic vigilance analogous to pharmacovigilance, monitoring performance, bias, and safety outcomes throughout a system’s lifecycle (Federal Ministry of Health, 2020). In this respect, ethical governance converges with legal responsibility under the SRJ’s first pillar of empirical competence.

#### *4.4. Justice and Equity*

The right to health, guaranteed by Article 16 of the African Charter on Human and Peoples’ Rights and by Section 17(3)(c) of the Constitution of the Federal Republic of Nigeria (1999), demands fairness in healthcare access (African Union, 1981). Artificial intelligence can either bridge or deepen inequities depending on how it is governed. Algorithms trained predominantly on urban, affluent, or foreign populations may reproduce structural exclusion, disadvantaging rural and marginalised communities.

Ethical justice therefore requires proactive measures such as bias audits, inclusive datasets, and equitable deployment across regions. Ministries of Health and Education should prioritise AI literacy and infrastructure in underserved areas to prevent a “digital divide” in the quality of medical care. By embedding distributive justice into technology governance, Nigeria aligns AI deployment with its communitarian ethos, under which collective welfare validates innovation.

#### *4.5. Faith-Informed Ethics*

Nigeria’s dominant faith traditions, Islam and Christianity, converge on the sanctity of life, human dignity, and stewardship. In Islamic jurisprudence, the *maqāṣid al-sharī‘ah* (objectives of the law) include preservation of life (*ḥifẓ al-nafs*) and intellect (*ḥifẓ al-‘aql*). Medical technologies are permissible only if they uphold these objectives and promote *maṣlahah* (public welfare) (Al-Bar & Chamsi-Pasha, 2015). Christian moral theology

similarly frames technology as an instrument of stewardship, to be used for healing and service rather than domination.

Both traditions reinforce constitutional rights to life and dignity under Sections 33 and 34 of the Constitution of the Federal Republic of Nigeria (1999) and align with the African Charter's human-centred ethos (African Union, 1981). Framing AI ethics within these moral vocabularies fosters societal legitimacy and anchors regulation in Nigeria's moral consciousness rather than in imported norms alone.

#### *4.6. Embedding Ethics in Regulation*

Ethical reflection must precede technological adoption. The National Health Research Ethics Committee (NHREC) should expand its remit to require ethical impact assessments (EIAs) for AI systems, evaluating fairness, transparency, and social consequences prior to approval (NHREC, 2014). Hospitals should establish AI ethics committees or boards to monitor compliance, while professional councils integrate algorithmic ethics and explainability into continuing professional development (Ten Have & Gordijn, 2014).

Institutionalising ethics in this way ensures that moral reasoning is not an afterthought but a condition of innovation. It translates Africa's communitarian moral heritage into governance architecture, aligns with the SRJ's fourth pillar of institutional responsibility, and grounds Nigeria's digital health transformation in justice, empathy, and shared accountability.

### **5. Regulatory Imperatives and Governance Models for AI in Nigerian Healthcare**

Effective governance of artificial intelligence (AI) in healthcare requires coherent institutional coordination, consistent standards for safety and accountability, and a normative commitment to human dignity. Without a unified framework, AI systems risk operating in regulatory silence, advancing faster than the law can respond. Nigeria's health sector already possesses a dense network of regulators, but their mandates remain fragmented, reactive, and largely analog in orientation (Adejumo, 2023).

### 5.1. *The Fragmented Landscape*

Regulatory authority over digital health in Nigeria is dispersed across overlapping agencies:

- The Federal Ministry of Health (FMoH) oversees national health policy under the National Health Act (2014) but has no AI-specific jurisdiction.
- The Medical and Dental Council of Nigeria (MDCN) regulates practitioners, not technologies (Medical and Dental Council of Nigeria, 2022).
- The National Health Insurance Authority (NHIA) administers digital claims systems with no embedded algorithmic-ethics safeguards (NHIA, 2022).
- The National Information Technology Development Agency (NITDA) and the Nigeria Data Protection Commission (NDPC) supervise data protection under the Nigeria Data Protection Act (2023) but lack health-specific provisions.
- The National Agency for Food and Drug Administration and Control (NAFDAC) and the Standards Organisation of Nigeria (SON) regulate tangible medical devices, not software.

This diffusion of authority produces regulatory blind spots where AI applications may be deployed without validation, audit, or ethical oversight (Okeke, 2023). Fragmentation also creates “responsibility gaps”, situations in which no single body can be held accountable when algorithmic errors cause harm. These gaps call for a consolidated and anticipatory model of governance.

### 5.2. *A National Health Artificial Intelligence Governance Framework (NHAIGF)*

Nigeria should establish a National Health Artificial Intelligence Governance Framework (NHAIGF) under the FMoH to harmonise standards across the AI lifecycle, design, validation, deployment, and monitoring. The framework would integrate existing laws while filling normative gaps.

Operationally, the NHAIGF should mandate:

- pre-deployment certification using locally representative datasets;

- developer-supplied explainability documentation intelligible to clinicians and patients;
- continuous post-market audit with time-bound recertification; and
- ethical and human-rights impact assessments as conditions for approval.

Such a framework would embed ethical reasoning into regulatory architecture, an operational expression of the SRJ's pillars of empirical competence, logical defensibility, and institutional responsibility.

### *5.3. The National Health Data and AI Governance Council*

To ensure coherence, a National Health Data and AI Governance Council (NHDAIGC) should coordinate all relevant agencies: FMoH, NITDA, NDPC, NHIA, MDCN, NAFDAC, SON, and NHREC. The NHDAIGC could initially be established through ministerial regulation as an interagency council and later formalised through statute for legal continuity.

Beyond technical coordination, such a body would also fulfil constitutional and international obligations. Section 17(2)(a) of the Constitution of the Federal Republic of Nigeria (1999) mandates social justice, while Article 16 of the African Charter on Human and Peoples' Rights guarantees the right to health (African Union, 1981). Establishing the NHDAIGC therefore advances these public-law duties by ensuring that AI governance serves public welfare and equity, not only technological innovation.

The Council would:

- develop joint guidelines for algorithmic validation and data governance;
- harmonise ethics, data protection, and safety regulations;
- establish a shared repository for AI-related risk assessments; and
- advise the National Assembly on emerging legislative reforms.

This collaborative model mirrors international best practices such as the United Kingdom's AI and Digital Regulation Service and Singapore's AI Verify framework, while

grounding oversight in Nigeria's institutional realities (UK Government, 2022; Singapore IMDA, 2023).

#### *5.4. Regulatory Principles*

The governance framework should rest on five interlocking principles:

- Accountability by design assigns responsibility and traceability at every stage of development and deployment (Gasser & Almeida, 2017).
- Privacy by design, in line with Sections 24–27 of the Nigeria Data Protection Act (2023), embeds data minimisation, purpose limitation, and governance from the outset (NDPC, 2023).
- Transparency and explainability ensure that models are auditable and interpretable by clinicians and, where appropriate, by patients.
- Safety through local validation mandates testing on Nigerian datasets and explicit reporting of performance and bias metrics before and after deployment (FMoH, 2020).
- Human oversight preserves clinician primacy over care decisions, consistent with Section 23 of the National Health Act (2014), and requires documented escalation when AI outputs conflict with clinical judgment.

The right to health, recognised under Article 16 of the African Charter and Section 17(3)(c) of the Constitution of the Federal Republic of Nigeria (1999), requires equitable access to safe, high-quality healthcare (African Union, 1981). AI governance must therefore ensure fairness, inclusion, and protection against bias. Collectively, these principles reflect the ethical triad of beneficence, autonomy, and justice operationalised through law.

#### *5.5. Professional Regulation*

The MDCN and other health professional regulatory bodies should amend their codes of medical ethics. Institutional credentialing should be required for AI tools integrated into clinical workflows, and mandatory reporting of AI-related adverse events should become part of clinical governance. These obligations should extend to the Nursing and Midwifery

Council of Nigeria and the Pharmacists Council of Nigeria to ensure sector-wide accountability.

Professional councils should establish continuing professional development (CPD) modules on algorithmic safety and explainability, aligning with the SRJ's emphasis on empirical competence and informed oversight.

#### *5.6. Institutional and Corporate Liability*

Hospitals bear statutory duties under Section 19 of the National Health Act (2014) to maintain service quality. Failure to validate or audit AI systems constitutes institutional negligence. The NHIA could condition hospital accreditation and reimbursement on compliance with AI-governance standards, thereby embedding ethics within financial incentives (NHIA, 2022).

Corporate actors, developers and vendors, should be held jointly liable where algorithmic defects contribute to harm, reflecting product-liability principles under the Federal Competition and Consumer Protection Act (FCCPA, 2018). This integrated liability regime aligns responsibility with control and capacity, discouraging reckless technological deployment while preserving trust in digital medicine.

#### *5.7. Legislative Priorities*

Nigeria's legislative architecture must evolve to keep pace with algorithmic medicine. Fragmented provisions across the National Health Act (2014), the Medical and Dental Practitioners Act, and the Nigeria Data Protection Act (2023) leave AI-enabled care largely unregulated. A dedicated Health Artificial Intelligence Regulation Bill should therefore be enacted to provide a coherent statutory foundation.

This Bill should adopt global best practices, drawing on the EU Artificial Intelligence Act (European Union, 2024), to classify health-sector AI systems by risk, mandate pre-deployment certification, require explainability documentation, and institutionalise periodic audits and redress mechanisms. The legislation would give binding legal form to the SRJ's

four pillars of empirical competence, logical defensibility, respect for autonomy, and institutional responsibility.

The NHIA Act (2022) should be amended to make accreditation and reimbursement contingent on adherence to AI governance norms. Tying NHIA participation to ethical and safety certification would ensure that only validated, transparent, and accountable AI systems operate within Nigeria's health ecosystem.

Comprehensive reform should include:

- amending the Medical and Dental Practitioners Act to define AI-assisted practice and clarify reasonable reliance;
- amending the National Health Act (2014) to include digital-health certification, algorithmic transparency, and consent for data use;
- enacting a Health Artificial Intelligence Regulation Bill establishing risk-based categories and enforcement mechanisms consistent with the EU AI Act.

#### *5.8. Enforcement and Public Trust*

Enforcement must extend beyond paper compliance. Independent third-party audits, periodic publication of performance metrics, and accessible public-complaint mechanisms will strengthen transparency and legitimacy. Civil-society participation, including patient associations, academic experts, and the media, should be institutionalised through consultative forums (Transparency International, 2021). Trust is the currency of digital healthcare; without openness and accountability, even well-designed regulation may face public resistance.

#### *5.9. Human-Centred Governance*

Ultimately, AI regulation must remain human-centred, technology serving life, not the reverse. Ethical governance grounded in transparency, accountability, and community welfare will position Nigeria as a continental model for balancing innovation with justice. In doing so, Nigeria can realise the SRJ vision: law and technology aligned through reasoned justification, empirical competence, and respect for autonomy.

## 6. Toward a Nigerian Standard of Reasoned Justification (SRJ)

The SRJ is the doctrinal articulation of the *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal* (1999) standard when applied to algorithmic decision-making. Artificial intelligence (AI) disrupts the doctrinal and moral assumptions that have long anchored medical accountability. The common law's deference to professional judgment, established in *Bolam v. Friern Hospital Management Committee* (1957) and refined through *Bolitho v. City and Hackney Health Authority* (1998), remains valuable but incomplete once decision-making extends beyond human cognition. Nigeria therefore requires a framework that recognises distributed intelligence while preserving the moral discipline of reasoning. This section articulates the Standard of Reasoned Justification (SRJ), a composite legal-ethical framework that integrates empirical, logical, moral, and institutional duties to guide decision-making in AI-enabled healthcare.

### 6.1. Conceptual Basis

Doctrinally, *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal* (1999) provides the Nigerian articulation of reason-giving and autonomy on which the SRJ builds; normatively, the SRJ generalises those duties to hybrid human-machine decisions. The framework synthesises three normative trajectories that converge within Nigeria's legal and moral order:

- Jurisprudential reasoning. Precedents such as *Okonkwo* (1999) and *Bolitho* (1998) affirm that medical discretion must be reasoned rather than mechanical. Both hold that professional judgment requires justification grounded in competence, conscientiousness, and logic.
- African bioethics. Ethical legitimacy in Nigeria rests on beneficence, transparency, solidarity, and community welfare (Metz, 2010, 2011; Tangwa, 2000). Accountability is relational, rooted in collective wellbeing, not individual autonomy alone.
- Public-law governance. Nigerian constitutional thought conceives accountability as justification: state and institutional actions must be explainable to those affected (Constitution of the Federal Republic of Nigeria, 1999).

Together, these traditions establish a unified compass for human and algorithmic reasoning: a decision is legitimate only if it is empirically competent, logically defensible, respectful of autonomy, and institutionally responsible. In synthesising doctrine, ethics, and governance, the SRJ shifts medical accountability from professional deference to public justification, ensuring that reasoning, not automation, remains the benchmark of legitimacy.

By internalising the Supreme Court’s tripartite test of competence, conscientiousness, and reason in *Okonkwo* (1999), the SRJ emerges not as a foreign framework but as the logical extension of Nigeria’s own constitutional and professional duties.

Existing Nigerian scholarship diagnoses important gaps but does not articulate an adjudicative standard. Ehirim (2025) identifies serious risks for patient safety and informed consent under AI-assisted care but does not specify how courts should evaluate AI-mediated decisions. Akinpelu and Akintola (2023) map the ethical and legal risks of bias, discrimination, and liability but do not propose a unified test for allocating responsibility in hybrid decision-making.

The SRJ fills this gap by offering a four-pillar, rights-grounded standard, empirical competence, logical defensibility, respect for autonomy, and institutional responsibility, linking the doctrinal evolution from *Bolam* through *Bolitho* and *Montgomery* (2015) to *Okonkwo*, and adapting it to the accountability challenges of AI-driven care.

### 6.2. *Elements of the Standard*

The Supreme Court’s formulation in *Okonkwo* , that a practitioner must act “competently, conscientiously, and guided by reason” , mirrors the four pillars of the SRJ. “Competent” aligns with empirical competence; “guided by reason” with logical defensibility; “conscientious” with respect for autonomy; and institutional compliance with Section 19 of the National Health Act (2014) with institutional responsibility. The SRJ thus arises as an inevitable extension of Nigeria’s jurisprudence, not an imported doctrine.

The four pillars also reflect Nigeria’s constitutional and human-rights commitments:

- Empirical competence operationalises the right to health under Article 16 of the African Charter on Human and Peoples' Rights (African Union, 1981), requiring evidence-based and locally validated AI-assisted decisions.
- Logical defensibility advances constitutional guarantees of fairness by ensuring decisions, human or algorithmic, are rational, explainable, and open to review (*Bolitho*, 1998).
- Respect for autonomy is grounded in *Montgomery v. Lanarkshire Health Board* (2015) and reinforced by Section 23 of the National Health Act (2014) and the consent requirements of the Nigeria Data Protection Act (2023).
- Institutional responsibility embodies constitutional values of dignity and accountability under Section 17(2)(a) of the 1999 Constitution, requiring hospitals to organise and supervise health services, including digital systems, in ways that protect human dignity.

### 6.3. *Empirical Competence*

Decisions must rest on reliable and verifiable evidence. Section 20(1) of the National Health Act (2014) and Section 33 of the Constitution protect professional standards and the right to life. In AI-driven medicine, empirical competence requires local validation, adaptive calibration, and transparent reporting of performance metrics. Reliance on untested or imported algorithms breaches both the ethical duty of beneficence and the legal duty of care (FMoH, 2020).

### 6.4. *Logical Defensibility*

Borrowing from *Bolitho* (1998), decisions must withstand rational scrutiny. AI systems must therefore be explainable, with reasoning chains accessible for clinical and judicial review. Clinicians incur liability only where they rely uncritically on opaque outputs or ignore conflicts between algorithmic recommendations and clinical judgment. Where institutions deploy non-explainable systems, they bear primary responsibility for resulting harm.

### *6.5. Respect for Autonomy*

Autonomy, protected under Section 23 of the National Health Act (2014) and the MDCN Code of Medical Ethics (Medical and Dental Council of Nigeria, 2022) , requires disclosure of medical risks and AI involvement.

The Nigeria Data Protection Act (2023) requires specific, informed, and freely given consent. In digital care, this evolves into dynamic consent, enabling patients to review, adjust, or withdraw their data and algorithmic participation. Patients must retain the right to human review of automated decisions.

### *6.6. Institutional Responsibility*

Institutions must ensure ethical governance through oversight, validation, and transparency. Section 19 of the National Health Act (2014) mandates hospitals to maintain service quality, which includes algorithmic safety. Institutional responsibility includes:

- maintaining algorithmic audit trails;
- conducting periodic ethical and safety reviews;
- enabling complaint and redress mechanisms.

This pillar grounds the SRJ in Nigeria’s communitarian ethic and constitutional commitment to collective welfare.

### *6.7. Application and Enforcement*

The SRJ functions across three domains:

- Regulatory: adoption by MDCN, NITDA, NDPC, and FMoH as a benchmark for licensing and certification;
- Judicial: recognition by courts as a composite standard of reasonableness in AI-related negligence and data-governance cases;
- Institutional: operationalisation through hospital AI-oversight committees responsible for validation, training, monitoring, and risk mitigation.

This multi-level structure transforms the SRJ into a practical governance tool bridging ethics and enforceable law.

#### *6.8. Benefits of the SRJ*

The SRJ offers several advantages:

- **Clarity:** defines measurable duties for human and algorithmic actors.
- **Balance:** distributes responsibility among clinicians, institutions, and developers.
- **Adaptability:** accommodates evolving technologies through principle-based reasoning.
- **Cultural fit:** reflects Nigeria's plural moral traditions, communitarian, religious, and constitutional.
- **Judicial utility:** provides courts with an analytical structure for AI-related negligence and consent disputes.

These attributes make the SRJ both contextually Nigerian and globally relevant.

#### *6.9. Implementation Challenges*

Implementation faces structural and capacity constraints: regulatory fragmentation, low digital literacy, limited local datasets, and underdeveloped technical infrastructure. Overcoming these requires investment in judicial education, medical AI training, and research infrastructure. Cross-sector partnerships, among universities, regulators, industry, and civil society, can support local algorithm development and ethical-AI research (Adewale, 2022). National repositories for algorithmic validation, curated by FMoH, NITDA, and NHIA, would reduce reliance on foreign datasets and enhance epistemic independence.

#### *6.10. Normative Implications*

The SRJ restores reasoning as the essence of accountability. Legitimacy in healthcare arises not from professional deference or machine precision but from the capacity to explain and justify decisions. Law thereby re-centres conscience within cognition, bridging algorithmic efficiency with moral deliberation.

By embedding empirical competence, logical defensibility, respect for autonomy, and institutional responsibility into a unified normative matrix, the SRJ reconciles Nigerian legal tradition with its ethical heritage. It ensures that, even in the age of artificial intelligence, health law continues to protect human life, dignity, and justice.

Together, these elements translate Nigeria’s medico-legal evolution into a structured model of accountability. Tables 1 and 2 (below) summarise the jurisprudential trajectory culminating in the SRJ, consolidating doctrinal, ethical, and institutional reasoning into a single evaluative framework.

<b>Doctrine / Case</b>	<b>Core Judicial Principle</b>	<b>SRJ Pillar Reflected</b>	<b>Nigerian Relevance</b>
<i>Bolam v Friern Hospital Management Committee</i> [1957] 1 WLR 582 (QB)	Professional standard of care defined by a “responsible body” of medical opinion; judicial deference to expertise.	Contextual background to Empirical Competence and later rational scrutiny.	Early Nigerian negligence decisions adopted <i>Bolam</i> ’s professional-deference model.
<i>Bolitho v City and Hackney Health Authority</i> [1998] AC 232 (HL)	Expert opinion must be logically defensible; courts may reject illogical professional views.	Logical Defensibility	Anticipates algorithmic explainability as a criterion for medical-AI accountability.
<i>Montgomery v Lanarkshire Health Board</i> [2015] UKSC 11, [2015] AC 1430	Clinicians owe a duty of patient-centred disclosure; autonomy replaces paternalism.	Respect for Autonomy	Reinforces s 23 <i>National Health Act 2014</i> on informed consent and disclosure.
<i>Okonkwo v Medical and Dental Practitioners</i>	Doctors must act competently, conscientiously, and in	Empirical Competence and Respect for	Domestic articulation of reason-giving and patient autonomy;

<b>Doctrine / Case</b>	<b>Core Judicial Principle</b>	<b>SRJ Pillar Reflected</b>	<b>Nigerian Relevance</b>
<i>Disciplinary Tribunal</i> (1999) 9 NWLR (Pt 619) 1 (SC).	good faith, respecting informed refusal.	Autonomy	bridges common law and Nigerian ethics.
Standard of Reasoned Justification (SRJ) (this article)	Legitimacy requires decisions to be empirically competent, logically defensible, respectful of autonomy, and institutionally responsible.	Composite of all four pillars	Provides an indigenous, principle-based model for AI-enabled healthcare governance.

Table 1: Evolution of Doctrinal Standards and Correspondence with Standard of Reasoned Justification (SRJ) Pillars

The progression from professional deference to shared accountability also reflects a broader transformation in the moral and institutional foundations of healthcare governance. This trajectory, from professional dominance to distributed, ethical accountability, is illustrated in Table 2.

<b>Historical Phase</b>	<b>Core Accountability Model</b>	<b>Key Characteristics</b>	<b>SRJ Reinterpretation</b>
1. Professional Deference ( <i>Bolam</i> era, 1950s–1980s)	Accountability vested in professional consensus (“responsible body of medical opinion”).	Judicial restraint; minimal patient involvement; expert dominance.	SRJ narrows deference through empirical competence, accountability must rest on validated, transparent evidence.
2. Logical Scrutiny ( <i>Bolitho</i> refinement,	Accountability conditioned by	Courts begin to test expert opinion for	SRJ generalises this as logical defensibility,

Historical Phase	Core Accountability Model	Key Characteristics	SRJ Reinterpretation
1990s)	reason and logic, not mere conformity.	rational coherence.	extending scrutiny to algorithmic reasoning.
3. Patient-Centred Accountability ( <i>Montgomery</i> and human-rights era, 2010s)	Focus shifts to autonomy and informed consent.	Disclosure, shared decision-making, and dignity dominate the standard of care.	SRJ embeds respect for autonomy while recognising relational, community-based consent.
4. Institutional and Systemic Accountability ( <i>Okonkwo</i> and contemporary governance)	Institutions bear responsibility for ensuring ethical, safe practice environments.	Statutory duties (e.g., s 19 <i>National Health Act 2014</i> ); emerging regulatory oversight.	SRJ integrates institutional responsibility, mandating oversight, audit, and redress.
5. Distributed and Ethical Accountability ( <i>AI and SRJ era, 2020s–future</i> )	Accountability shared among clinician, institution, developer, and regulator.	Algorithmic reasoning, data governance, and ethical transparency determine legitimacy.	SRJ unifies all prior stages into a reason-based, human-centred framework balancing innovation with justice.

Table 2: Evolution of Medical Accountability and its Transformation under the Standard of Reasoned Justification (SRJ)

## 7. Conclusion

Artificial intelligence offers significant promise for Nigerian healthcare, with the capacity to enhance diagnostic accuracy, efficiency, and resource allocation. Yet, if allowed to mature within legal frameworks built solely for human judgment, AI risks eroding accountability and undermining public trust. The central question is therefore not whether Nigeria should integrate AI into clinical care, but how to govern these technologies in ways that safeguard life, dignity, autonomy, and justice. This article has argued that the most

coherent response lies in reconstructing medical negligence around a Standard of Reasoned Justification (SRJ), a framework that applies a unified principle of reasonableness to both human and algorithmically mediated decisions.

The analysis demonstrates that foundational doctrines, *Bolam*, *Bolitho*, *Montgomery*, and *Okonkwo*, remain indispensable, but they must evolve to address a hybrid model of responsibility distributed across clinicians, institutions, and developers. AI challenges traditional notions of fault and causation in ways that existing negligence and product-liability rules cannot fully capture. At the same time, Nigeria's communitarian moral philosophy and its constitutional commitments to dignity, social justice, and solidarity provide a culturally grounded basis for ethical and rights-respecting AI governance. The SRJ brings these doctrinal and ethical strands together through its four pillars, empirical competence, logical defensibility, respect for autonomy, and institutional responsibility, offering courts, regulators, and professionals a principled framework for evaluating AI-driven care.

Implementing this framework requires engaging realistically with Nigeria's institutional landscape. Regulatory mandates remain dispersed across agencies such as the NDPC, NITDA, NHIA, MDCN, and NAFDAC, whose overlapping responsibilities create gaps, delays, and inconsistencies. Constraints in funding, technical capacity, and judicial expertise further complicate oversight, and private-sector resistance to explainability and auditability threatens transparency. These structural barriers underscore the need for deliberate legislative intervention, coordinated governance, and targeted incentives to ensure that the SRJ becomes operational rather than aspirational.

A coherent reform agenda must therefore combine statutory updates, regulatory coordination, judicial adaptation, and professional reorientation. Legislative action should include a dedicated Health Artificial Intelligence Regulation Bill and amendments to the National Health Act, the Medical and Dental Practitioners Act, the Nigeria Data Protection Act, and especially section 84 of the Evidence Act, to recognise machine-generated audit trails and clarify duties in AI-assisted practice. Regulatory reforms should establish a National Health Artificial Intelligence Governance Framework and a National Health Data

and AI Governance Council to harmonise standards, mandate local validation, and provide coordinated oversight.

Judicial reform should incorporate specialised training on digital causation and may require recalibrating evidential burdens for institutions controlling AI systems. Professionally, AI ethics, data stewardship, and algorithmic safety must be integrated into education, accreditation, and disciplinary processes, with hospitals required to maintain registries and audits of deployed systems. Among these measures, tying NHIA accreditation and reimbursement to compliance with AI-governance standards offers the most effective enforcement lever by embedding the SRJ into financial and operational realities.

AI will not replace doctors, but it will redefine what responsible medical practice requires. The SRJ crystallises Nigeria's constitutional promise of dignity, the professional obligation to reason, and the ethical call of solidarity. By embedding its four pillars within statutory, regulatory, and institutional practice, Nigeria can move toward a jurisprudence of reasoned accountability in which technological sophistication remains bound by the law of conscience, and every act of healing, even when mediated by algorithms, remains justified in reason and guided by humanity.

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# **“LEGISLATIVE TREATMENT AND LEGAL-POLITICAL ASPECTS OF THE CRIMINAL OFFENCE OF DOMESTIC VIOLENCE IN MONTENEGRO”**

**Mustafa Grbović\***

## **Abstract**

This paper presents and analyzes the concept and constitutive elements of the criminal offence of domestic violence or violence within a family community in Montenegro, as a manifestation of the violation of fundamental rights and freedoms guaranteed by international law. Special attention is given to the theoretical-legal and positive-legal definitions of domestic violence. Within this framework, the paper provides an overview of the national legislation covering the period from 2002 to 2025, illustrated through a chronological review of the amendments to the Criminal Code of Montenegro. Furthermore, the paper addresses the legal and policy aspects of domestic violence, as well as specific issues identified in the practice of the Montenegrin judiciary.

**Keywords:** violence, domestic violence, family member safety.

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## **1. Introduction**

Domestic violence represents a specific and complex phenomenon, as it is both a global issue and a manifestation of the violation of fundamental human rights and freedoms in modern society. It is characterized by its universality, transcending geographical boundaries. Despite the fact that protection against domestic violence is a well-regulated area of law, it remains one of the most pressing social problems, assuming ever-greater proportions and increasingly becoming the predominant form of violence. It is important to emphasize that this phenomenon is as old as human society itself and constitutes one of the key factors contributing to the weakening of both the family and society at large. Rooted in a value system based on traditionalism and patriarchal principles, domestic violence deserves particular attention due to its specific nature and far-reaching consequences.

The perception of the family as a monolithic entity whose members possess distinct rights and obligations began to gain prominence in the mid-twentieth century with the development of human rights doctrine. Prior to that, domestic violence had long remained one of the most concealed forms of criminal behavior, resulting in a significant “dark figure” of unreported cases. Violence against family members was traditionally shrouded in silence, regarded as a private matter, and as such persisted as one of the most hidden manifestations of human rights violations. In this context, both the prevalence and concealment of domestic violence can be viewed as consequences of the patriarchal structure of society, which fostered a patriarchal model of the family. As Jaffe et al. (2004:188) note, “Problems within the family were considered to be private matters that took place behind closed doors, and any public response was deemed intrusive and inappropriate.” Similarly, Hester (2009:2) observes that “since the 1990s, a series of initiatives have emerged aimed at developing a criminal law approach to domestic violence.”

Recognizing this pathological social phenomenon and following the example of other states, Montenegro criminalized domestic or family violence in 2002. Subsequently, in 2010, it adopted a specific Law on Protection against Domestic Violence, thereby harmonizing national legislation and practice with international standards. The aim of these reforms was to ensure that institutions within the Montenegrin judicial system contribute effectively to reducing the number of perpetrators of this crime and to establishing consistent case law in

this field. Prior to its criminalization, domestic violence was a taboo subject within Montenegrin society, and therefore, statistical data and judicial decisions in this area cover only the past two decades.

The methodological framework of this paper is based on analytical-descriptive and comparative approaches, complemented by normative and historical-legal methods. Through the analysis of positive legal norms, the paper will examine the legal treatment of the criminal offense of domestic violence in Montenegro, as well as the principal legal and political challenges arising in its implementation.

The Montenegrin model of legal protection against domestic violence operates on a three-tiered system. In constructing this model, various modern European legal systems served as paradigms. Primary protection of the moral and physical integrity of family members is provided by the Criminal Code; secondary protection is afforded under the Law on Protection against Domestic Violence; and tertiary protection is established through the Law on Misdemeanors. In this manner, comprehensive legal protection has been ensured, consistent with international standards. This relatively recent incrimination plays a crucial role in both the social recognition of this deviant behavior and the appropriate response of the criminal justice system. As Judith (1997:20) notes, “This is a phenomenon that until recently was considered acceptable, desirable, and even normal behavior in the process of disciplining disobedient family members, primarily women and children.” Moreover, this criminalization facilitates the systematic collection of data and statistical monitoring of the prevalence of domestic violence. The pre-criminalization period carried significant risks of secondary and even tertiary victimization. However, with the adoption of numerous *de lege ferenda* proposals, the necessary prerequisites have been created for the criminal justice system—as the sole mechanism responsible for implementing the provisions of the Criminal Code—to establish coherent judicial practice in this area, with the ultimate goal of reducing this form of crime to a marginal level.

## **2. Chronological Overview of the Legal Treatment of Domestic Violence**

The criminal offense of violence within the family or family community was first incriminated in Montenegro in 2002, marking the beginning of the development of judicial practice in this area. The original legal definition, contained in the Criminal Code of

Montenegro (*Official Gazette of the Republic of Montenegro*, No. 70/2003 of 25 December 2003 and No. 13/2004), defined the basic form of this criminal offence as follows: “Whoever, by using gross violence or reckless behavior, endangers the peace, physical integrity, or mental state of a member of his family or family community shall be punished by a fine or imprisonment for up to one year.” The Law on Amendments to the Criminal Code (*Official Gazette of the Republic of Montenegro*, No. 47/2006 of 25 July 2006) modified the elements of this criminal offence by narrowing its scope—specifically, by omitting *reckless behavior* from the original legal definition. These amendments also introduced a special form of the offence, criminalizing the violation of protection measures against domestic violence imposed by the court pursuant to law.

Further amendments were adopted through the Law on Amendments to the Criminal Code (*Official Gazette of Montenegro*, No. 25/2010 of 5 May 2010), which refined the definition of the criminal act. The element of *endangerment* of physical or mental integrity was replaced with the term *violation*, and the perpetrator’s conduct was required to constitute *gross violence*. Moreover, the special form of the offence concerning the violation of protection measures was expanded to encompass not only court-imposed measures but also those issued by any other competent state authority.

The Law on Amendments to the Criminal Code of 2013 (*Official Gazette of Montenegro*, Nos. 40/2013 of 13 August 2013 and 56/2013 of 21 August 2013) introduced only legal-technical refinements, including the substitution of the plural term *family members* with the singular *family member* in the basic form of the offence, thereby ensuring greater linguistic precision and consistency within the Code.

A significant substantive change occurred in 2017 with the Law on Amendments to the Criminal Code (*Official Gazette of Montenegro*, No. 44/2017 of 6 July 2017). These amendments strengthened the penal framework by increasing the prescribed maximum penalty for the basic form of the offence from one year to two years of imprisonment, and for the special form—violation of protection measures—from six months to one year, which also represents the special legal maximum for this specific offence.

The most comprehensive reform of this criminal offence was introduced with the Law on Amendments to the Criminal Code of Montenegro (*Official Gazette of Montenegro*, No. 110/2023 of 12 December 2023). These amendments completely redefined the *actus reus* of

the offence and, for the first time, provided a statutory definition of the concept of “family member.” This new definition is considerably broader than that previously contained in the section on “meaning of terms” in the Criminal Code of Montenegro. Furthermore, the 2023 amendments significantly tightened the penal policy relating to this offence, reflecting the state’s enhanced commitment to combating domestic violence through stricter criminal sanctions and a more comprehensive legal framework.

### **3. Elements of the Criminal Offence**

The legislator stipulates that this criminal offence encompasses a basic form, three aggravated forms, and a special form. The basic form is prescribed under Article 220, paragraph 1 of the *Criminal Code of Montenegro*, which states: “Whoever lightly injures a member of the family or family community, or endangers his or her safety by threatening to attack the life or body of that person or a person close to him or her, shall be punished by imprisonment for a term of six months to five years.” A comparative analysis of this provision with the previous version reveals that the statutory penalty for this offence has been made considerably more severe. Moreover, the essential characteristics of the offence have been substantially modified (*Law on Amendments to the Criminal Code of Montenegro, Official Gazette of Montenegro*, No. 110/2023 of 12 December 2023, Article 49).

In essence, this is a commission offence, meaning that it presupposes an active conduct on the part of the perpetrator. As Stojanović (2015:106) observes, “The rule is that the act of committing a criminal offence, when prescribing its essence, is envisaged as an act of commission.” From a theoretical standpoint, however, there is no uniform position concerning the nature of the actus reus of this offence. One school of thought maintains that the defining element is *endangerment*, conceived in a consequential sense—implying the possibility that the offender’s conduct may harm legally protected personal interests. Nevertheless, the prevailing opinion in both theory and practice is that endangerment does not constitute an act per se, but rather the consequence of the criminal act. In this particular case, the legislator has formulated the act of commission in the alternative, which means that the existence of the offence is established if the perpetrator engages in *either* of the proscribed forms of conduct. Accordingly, the first form of action involves physical engagement by the perpetrator towards a family member, resulting in minor bodily injury.

The second form encompasses threatening behavior, whereby the perpetrator creates a sense of insecurity or fear in the victim through verbal or non-verbal communication that implies a threat to life or bodily integrity. In other words, the act of committing this criminal offence may consist either of a physical act, producing slight bodily harm, or a verbal act, generating a subjective feeling of endangerment in the victim. Both forms share a common denominator: an unlawful interference with the physical or psychological integrity of a family member, thereby breaching the fundamental principle of inviolability of family relations protected under criminal law.

With the most recent amendments to the *Criminal Code of Montenegro*, the legislator has expanded the scope of the actus reus to encompass cases involving the abuse of a family member or a member of the family community, as well as situations in which the perpetrator treats such a person in a manner that offends human dignity. The prescribed penalty for these acts remains identical to that provided for the basic form of the offence. As Stojanović (2008:424) explains: “Abuse implies the undertaking of certain actions that cause physical or mental suffering of a lesser intensity to the passive subject, which, however, do not constitute minor bodily harm. The concept of acting in a manner that offends human dignity can be understood very broadly and may encompass various types of conduct. As a rule, such conduct entails the undertaking of several successive actions, although this need not always be the case.” For this type of criminal offence to exist, it is necessary to establish that human dignity has been objectively violated. It is insufficient that the victim merely perceives the conduct as degrading or humiliating; rather, the assessment must be grounded in objective criteria, taking into account prevailing social norms within the relevant community. Thus, conduct constitutes a violation of human dignity when, viewed through the lens of contemporary societal standards, it is inherently capable of infringing upon that dignity.

A further significant modification of the criminal offence was introduced through the addition of a new paragraph to the relevant legal provision, which stipulates that the same punishment shall also apply to any person who repeatedly employs violence, makes threats, or—through insolent or reckless behavior—endangers or violates the physical or mental integrity of a member of his or her family or family community. This formulation not only consolidates the range of behaviors encompassed by the previously existing paragraphs but also broadens the act of commission. Specifically, it extends criminal liability to situations

involving recurrent acts of violence, as well as insolent or reckless conduct capable of endangering, or even violating, the mental integrity of a family member. By doing so, the legislator has demonstrated an intent to criminalize a wider spectrum of abusive behaviors that, although they may not result in visible physical harm, nevertheless undermine the fundamental values of safety, respect, and human dignity within the family unit.

The criminal interpretation of consequences has generated numerous theoretical and practical debates closely linked to the actus reus of this criminal offence. Given that this is a result-based offence, for its completion—and for an attempted act to be punishable—it is necessary that the required consequence actually occurs. In the basic form of commission, the consequence may consist of minor bodily injury (in cases involving physical violence) or the creation of a feeling of threat in the passive subject (in cases involving verbal or psychological violence). In some instances, the violation of human dignity may also constitute a consequence. A central challenge in determining the consequence arises when it manifests as a threat to, or violation of, the victim's physical or, in particular, mental integrity. In judicial practice, it is often difficult to establish precisely when the threat or violation of mental integrity has occurred. In such situations, the court of first instance is obliged to ascertain the mental condition of the passive subject—specifically, whether the individual's mental integrity has been objectively endangered or violated—by ordering a psychiatric evaluation. In legal theory, there is no universally accepted definition of when a person's physical or mental integrity is deemed to have been "violated." However, it may be inferred that such a state represents a degree greater than endangerment but less than serious bodily injury. As Ertan et al. (2020) emphasize, "It is also very important that the health consequences can last long after the abuse has ceased." This observation underscores the enduring nature of harm resulting from domestic violence, which may extend beyond the cessation of physical acts to include long-term psychological trauma.

The first aggravated form of the offence arises in situations where, in the commission of the acts described in paragraphs 1, 2, or 3 of Article 220, the perpetrator uses a weapon, a dangerous tool, or another means capable of causing serious bodily injury or significant harm to health, or commits the act in the presence of a child (*Criminal Code of Montenegro, Official Gazette of Montenegro*, No. 110/2023 of 12 December 2023, Article 220, paragraph 2). The determination of this qualified form is based on a modal criterion—namely, the

means of execution. Whether a particular means is capable of causing serious bodily harm or significant damage to health depends not only on its inherent nature but also on the manner in which it is used. As Lazarević (2006:111) explains: “For the purposes of this criminal offence, weapons are considered to include both firearms (e.g., rifles, pistols) and cold weapons (e.g., knives, bayonets, sabres). Tools are instruments that people use in professional or other activities and which are capable of causing injury, such as an axe, spade, hammer, shovel, scythe, or sickle. Other objects that may cause serious bodily harm or significant damage to health include stones, stakes, heavy vessels, and similar items.” A notable innovation in this provision is the explicit inclusion of cases where the offence is committed in the presence of a child, thereby recognizing the indirect victimization and psychological trauma that such exposure entails. The prescribed penalty for this aggravated form ranges from one to five years of imprisonment, reflecting the legislator’s intention to ensure stricter punishment for acts that display a heightened degree of danger or moral reprehensibility.

The second aggravated form of this criminal offence is prescribed alternatively in paragraph 5 of the same article. It exists: “if, as a result of the acts referred to in paragraphs 1 to 4 of this Article, serious bodily injury or serious damage to health has occurred, or if such acts have been committed against a minor.” In principle, for this aggravated form to exist, there must be negligence on the part of the perpetrator with respect to the serious bodily injury or serious impairment of health, while the basic form of the offence remains covered by intent. As Stojanović (2010:352) defines, “The most general term of physical injury can be understood as a violation of the physical integrity or health of a person, with the proviso that in the case of serious bodily injury, the violation must be of greater intensity—that is, it must constitute a serious violation.” Similarly, Lazarević (1995:230) explains: “Violation of bodily integrity represents damage to the human body, understood in its biopsychic unity, while impairment of health denotes the causing of a physical or mental illness, or the aggravation of an already existing condition.” Given that the age of the passive subject may represent a qualifying circumstance, for this aggravated form to be established it is necessary that the perpetrator’s intent encompass this characteristic—that is, that the perpetrator was aware that the victim was a minor. The legislator has prescribed a penalty of imprisonment from one to eight years for this form of the criminal offence.

The third aggravated form, which represents the most serious manifestation of this offence, exists: “if the act referred to in paragraphs 1 to 5 of this Article results in the death of a family member or a member of the family community” (*Criminal Code of Montenegro, Official Gazette of Montenegro*, No. 110/2023 of 12 December 2023, Article 220, paragraph 6). For this form to be established, it is necessary that negligence exist in relation to the consequence—death—since this constitutes an offence qualified by a particularly grave consequence. In contrast, if the death of a family member is intended by the perpetrator, the act would constitute aggravated murder under Article 144, paragraph 7 of the *Criminal Code of Montenegro*. The prescribed penalty for this most severe form of the offence is imprisonment from five to fifteen years.

The special form of the offence, contained in paragraph 7 of the same article, provides that: “Whoever violates the measures of protection against domestic violence ordered by a court or another state authority pursuant to law shall be punished accordingly.” (*Criminal Code of Montenegro, Official Gazette of Montenegro*, No. 110/2023 of 12 December 2023, Article 220, paragraph 7). The Law on Protection from Domestic Violence prescribes a range of protective measures, including: removal from an apartment or other residential premises; prohibition of approaching the victim; prohibition of harassment or stalking; mandatory addiction treatment; and mandatory psychosocial treatment (Article 20). By criminalizing the violation of these protective measures, the legislator sought to reinforce the authority of judicial and administrative decisions, particularly those issued by misdemeanor courts. This provision, however, extends its application to measures imposed by other competent state bodies as well. Since this represents a special (subsidiary) form of the offence, the legislator considered its lesser degree of social danger when prescribing the corresponding criminal sanction. Consequently, this form is punishable by a fine or imprisonment of up to one year, reflecting its comparatively milder gravity within the overall structure of the criminal offence of domestic violence.

This criminal offence represents a typical example of *delicta propria*—offences that may be committed only by persons possessing a specific personal capacity. Its distinctiveness lies precisely in the special status of both the active and passive subjects: the perpetrator must be a member of the family, and the offence must be directed against another member of the same family or family community. It is important to emphasize that the latest amendments to

the *Criminal Code of Montenegro*—specifically paragraph 8 of Article 220—provide an enumerative and substantially expanded definition of family members compared to the previous legal formulation found in the section on the *meaning of terms*. For the purposes of this Article, members of the family or family community are considered to include: a married or common-law spouse; their common children and the children of each of them; a same-sex partner in a life partnership and the children of each of the partners; blood relatives and relatives by adoption in the direct line without limitation, and in the collateral line up to the fourth degree; in-laws up to the second degree; a partner in an intimate relationship; persons living in the same family household; and persons who have a child together or are expecting a child, even if they have never lived in the same family household. Furthermore, the law explicitly provides that former family members—namely, a former married or common-law spouse, a former same-sex partner in a life partnership, former in-laws up to the second degree, and a former partner in an intimate relationship—shall also be deemed members of the family or family community (*Criminal Code of Montenegro, Official Gazette of Montenegro*, No. 110/2023 of 12 December 2023, Article 220, paragraph 8). This legislative innovation significantly broadens the personal scope of protection, aligning domestic criminal law with contemporary international and comparative standards that recognize diverse forms of family and intimate relationships. By extending the concept of “family member” to include former partners, same-sex unions, and individuals in non-marital intimate relationships, the Montenegrin legislator has ensured a more comprehensive framework for the criminal-legal protection of human dignity and security within private and family life.

#### **4. Legal and Political Aspects of Domestic Violence in Montenegro**

The criminal offence of domestic violence constitutes a substantial portion of the total number of criminal cases before Montenegrin courts, with a discernible upward trend over recent years. It can be argued that the judicial treatment of domestic violence largely determines its prevalence, as judicial practice both reflects and influences the extent of this phenomenon in society. An analysis of case law, particularly concerning the type and severity of sentences imposed, suggests that courts tend to apply lenient sanctions, which do not provide a sufficiently strong deterrent effect against this form of criminal conduct. Despite

the growing number of prosecuted cases across Montenegro, a persistent pattern of mild punishment remains evident. The increase in the number of adjudicated cases is, nonetheless, a clear indicator that domestic violence has been recognized as a serious social and legal problem within Montenegrin society. While the caseload of individual courts naturally varies in proportion to the population and number of families within their territorial jurisdiction, the general trend shows that domestic violence in Montenegro is on the rise, notwithstanding the formal judicial response to it. This observation supports the conclusion that the current penal policy, aimed at preventing and suppressing domestic violence, has not yielded satisfactory results. This shortcoming is not limited solely to the judicial penal policy (i.e., sentencing practices), but also extends to the legislative penal policy, which often serves as a limiting factor in ensuring an adequate and effective response by the Montenegrin judiciary to this form of deviant behavior. These developments clearly indicate the necessity of tightening penal policy, both legally—through legislative reform—and judicially, through more consistent and proportionate sentencing. Only through such a dual approach can domestic violence be reduced to a socially acceptable minimum within Montenegrin society. *Summa summarum*, certain nomotechnical amendments to the legal definition and structure of the offence, combined with their consistent application in judicial practice, represent the most efficient means of combating this deeply rooted social problem, thereby ensuring the protection of all individuals falling under the jurisdiction of the Montenegrin state.

In the majority of cases, courts impose suspended sentences upon conviction, raising critical questions regarding the effectiveness of this warning measure for both general and special prevention, particularly in terms of recidivism. Several factors may contribute to this phenomenon, one of the most significant being the prolonged duration of criminal proceedings—the often considerable lapse of time between the act of violence and the final adjudication. During this period, the relationship between the perpetrator and the victim frequently normalizes, leading the victim to alter his or her perception of the incident. In most cases, this change is manifested in the victim’s withdrawal from participation in the criminal proceedings, either by failing to join the prosecution or by not filing a property claim. This circumstance commonly serves as the primary mitigating factor considered by courts when determining the appropriate sentence. Consequently, such practices contribute to the overall

leniency of penal responses and, indirectly, to the ineffectiveness of general and special deterrence in the field of domestic violence.

In Montenegro, the problem of the so-called “*dark figure*” of domestic violence remains evident. The persistence of the patriarchal family system, deeply rooted in Montenegrin social traditions, continues to reinforce gender inequality, most notably reflected in the subordinate position of women relative to men. Empirical observations indicate that domestic violence is more frequently reported in urban areas than in rural communities. This discrepancy may be attributed to the enduring influence of tradition and patriarchal norms in rural settings, where domestic violence is often concealed and regarded as a matter of *personal or family shame*. In many cases, underreporting is also the result of distrust in state institutions, particularly law enforcement and judicial authorities. Moreover, victims frequently refrain from reporting domestic violence out of fear of retaliation from the perpetrator or concern that disclosure might jeopardize their economic survival or the welfare of minor children. To overcome these entrenched prejudices, it is essential to strengthen public awareness through sustained educational and preventive initiatives. Such programs must emphasize both preventive and repressive legal measures, ensuring that society recognizes domestic violence as a violation of fundamental human rights rather than a private family matter. From a normative standpoint, ratified international instruments, particularly the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (*Istanbul Convention*), play a decisive role in harmonizing judicial practice at both national and international levels. When assessing whether Montenegrin courts rely on the standards established by the Istanbul Convention in adjudicating domestic violence cases, the answer is affirmative. The Convention, as the most comprehensive international legal framework addressing violence against women and domestic violence, has prompted Montenegro to amend and modernize its national legislation in order to align domestic criminal law with the principles it proclaims, thereby satisfying the principle of legal equilibrium. By incorporating the Convention’s principles, Montenegro has effectively standardized its legislative framework, ensuring that domestic courts apply uniform legal norms, which in turn fosters greater consistency in judicial practice. Although Montenegro was among the first states to ratify the Istanbul Convention, it has not yet implemented the Law on Compensation of Damage to Victims of Violent Crimes, adopted following

ratification. The application of this law has been postponed until Montenegro attains full membership in the European Union, which raises legitimate concerns regarding its practical purpose and effectiveness, as it currently remains a dormant legal instrument within the national legislative corpus.

Regarding the *lex specialis* governing this field, namely the Law on Protection from Domestic Violence, it must be acknowledged that this law represents a significant step forward in the implementation of international standards within the national legal system. Nevertheless, analysis of this law, alongside the Law on Misdemeanors, which applies subsidiarily, reveals conceptual and procedural ambiguities in distinguishing between a criminal offence and a misdemeanor. The absence of clearly defined statutory criteria for differentiation has, in practice, compelled courts to rely heavily on judicial precedent, rather than on explicit legal provisions, when making such determinations. These difficulties were largely resolved through the latest amendments to the Criminal Code of Montenegro, which more precisely defined the act of commission for domestic violence and provided an enumerative definition of family members. As a result, ambiguity concerning whether a given act constitutes a criminal offence or a misdemeanor has been substantially reduced, ensuring greater legal certainty and consistency in judicial decision-making.

Considering comparative positive law, it may be concluded that Montenegro has made considerable progress in aligning its legal system with that of developed European jurisdictions, both in terms of the ratification of international standards and the adoption of corresponding national legislation. However, for these international norms to be implemented effectively in practice, it would be desirable to establish a specialized institutional body responsible for the monitoring, coordination, and supervision of their application. Such a body would ensure the consistent implementation of both international standards and national legal measures, thereby strengthening the overall efficacy and coherence of Montenegro's response to domestic violence.

## **5. Conclusion**

The criminal offence of domestic violence, or violence within a family union, was first criminalized in Montenegro in 2002 under Article 220 of the Criminal Code of

Montenegro, within the chapter “*Criminal Offences against Marriage and Family*.” Prior to its introduction into the national legislative framework, perpetrators of such acts were prosecuted under general provisions relating to crimes against life and bodily integrity. Over more than two decades of application, this offence has undergone numerous legislative amendments, addressing both its substantive elements and the severity of prescribed sanctions. The most significant reform occurred with the adoption of the Law on Amendments to the Criminal Code of Montenegro (2023), which comprehensively redefined the actus reus of the offence and, for the first time, provided a precise and exhaustive definition of family members.

Through the application of analytical-descriptive and comparative methods, this research has demonstrated that the aforementioned changes were both necessary and justified—primarily to establish clear criteria for distinguishing between a misdemeanor and a criminal offence of domestic violence, and to respond to the evident need for a stricter penal policy, given that domestic violence remains one of the most frequently prosecuted crimes in Montenegrin courts. Recognizing this problem, Montenegro has ratified a number of international legal instruments, most notably the Istanbul Convention, with the aim of aligning its national legislation with European legal and human rights standards. In doing so, Montenegro has adopted several complementary laws and undertaken significant reforms that have substantially altered the legal nature and structure of the offence. Nevertheless, the persistent challenge of the so-called “dark figure” of domestic violence—rooted in enduring patriarchal social structures characteristic of Montenegrin society—continues to hinder the full realization of legal protections in practice.

In summary, it may be concluded that Montenegro has achieved formal compliance with European legislative standards and established a comprehensive normative framework for the protection against domestic violence. However, the effective implementation of these norms remains the principal challenge in ensuring the genuine protection of human rights and the safety and dignity of family members within Montenegrin society.

#### Recommendations

To strengthen the overall response of the Montenegrin system to domestic violence, the following measures are recommended:

1. Tightening judicial penal policy

Courts should more consistently impose effective and proportionate sanctions, particularly in cases of repeated violence, to ensure adequate special and general prevention.

2. Establishing a specialized state body

A national coordination mechanism should be formed to monitor, evaluate, and harmonize the implementation of laws related to domestic violence and obligations arising from international instruments.

3. Improving interinstitutional cooperation

Stronger communication between police, social services, health institutions, and the judiciary would ensure faster protection and reduce secondary victimization.

4. Implementing the Law on Compensation of Victims of Violent Crimes

Its activation should not be conditioned exclusively on EU accession, as victims currently lack an important protection mechanism.

5. Strengthening public awareness and prevention programs

Educational campaigns should target patriarchal norms, promote gender equality, and encourage reporting of violence, especially in rural areas.

6. Continuous professional training

Judges, prosecutors, police officers, and social workers should receive ongoing specialized training on risk assessment, trauma-informed practice, and international standards.

7. Improved statistical monitoring

A unified database would enhance transparency, identify patterns of recidivism, and support evidence-based policy making.

These recommendations aim to enhance the effectiveness of Montenegro's response to domestic violence and contribute to protecting the safety, dignity and fundamental human rights of all family members.

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# **“JUSTIFYING THE PERMISSIBILITY OF MODERN FAMILY PLANNING FOR MUSLIM PATIENTS: A JURISPRUDENTIAL ANALYSIS”**

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## **Abstract**

Wrong misconception regarding permissibility of the modern family planning for Muslim patients is common in Muslim societies. This resulted into negative perception to the modern family planning practice by contraception. This is further aggravated by divergent opinions of scholars breeding controversy on this subject. This prompts this study to embark on the justification of the permissibility of the modern family planning for Muslim patients via jurisprudential analysis. The study adopts doctrinal method to analyse various provisions of the Qur'an and Sunnah as well as juristic opinion about contraception under Islamic law. The study asserts that the practice of family planning is age-long, pre-dating Islamic era. It contends that Islamic legislation does not condemn the contraceptive practices but modified it. The study finds that the issue of contraception split scholars of Islamic jurisprudence into two: the antagonists and the protagonists. The study finds that both sides of the antagonists and the protagonists relied on the provisions from the sources of law to strengthening their arguments. The study finds that the position of the protagonists of the contraceptive method of family planning is in line with the objectives of Islamic law. The study finds that there is justification for the permissibility of the modern contraception for Muslim patients in line with *maqasid* Shari'ah. The study recommends that Muslim patients have the duty to

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ascertain which type of contraceptive method is safe and devoid of risk from the medical experts while exercising their right to contraception.

**Keywords:** Justification, Rights of Muslim Patients, Modern Contraception, Family Planning, Jurisprudential Analysis.

## **1. Introduction**

Family planning is an omnibus term that encapsulates many meanings. It refers to connotations such as birth limitation, family limitation, child spacing, birth spacing and birth control (Nahar, *et al*, 2021, pp. 36-40 & Serour, 2025). However, family planning has been defined as plans and actions taken by using birth control measures which give the opportunity of decision making to the couples on whether to have children or not, when to have them and how many do they intend to have (Mare, *et al*, 2023, pp. 1-13). Birth control, which is also referred to as contraception or fertility control, has been defined to mean the methods or devices used in preventing pregnancies. It is also termed as birth spacing by the World Health Organization (WHO), who defines birth spacing as the practice of waiting between pregnancies. Woman body needs to rest in between pregnancies and WHO recommends 24 months between pregnancies to maintain adequate health care for the mother and her children (Seksualiteit, 2018, p. 3). This is in line with Qur'an provision (Qur'an Chapter 2 verse 233). Thus, the planning, provisions and the uses of birth control is what is called family planning (Nahar, *et at*, 2021, pp. 36-40).

In Islamic law, family planning is mainly addressed under the concept of Islamic family law. Because family is considered under Islamic Law as the basic unit of every society, which the husband and wife are identified as the principals of family formation. Islamic law considers marriage to be sacred; there are several Qur'an verses that attested to this fact (Qur'an Chapter 30 verse 21 & Qur'an Chapter 4 verse 1). Procreation is majorly expected in any marriage to maintain human race. But marriage under Islamic law is not only for procreational purpose. It involves another pivotal purpose i.e., tranquillity, which can only be derived through a valid and subsisting marriage as mentioned in the Qur'an (Qur'an

Chapter 7 verse 189). This implies that when procreation takes place, it should be in addition and endorsement to tranquillity rather than disrupting it. It is imperative to note that different families make a community while different communities make a state while different states make a nation and different nations of a particular geographical entity constituting the cosmopolitan part of the world. Since the world composition is formed by the basic unit (family) and the issue of birth control will affect the global world, then it must be taken care off at the family level (Silva & Tenreyro, 2017, pp.205-228).

Flowing from the foregoing, the topical issue of the right of Muslim patients to adopt contraceptive methods of the family planning has generated controversy among Islamic scholars (Najimudeen, 2020, pp. 90-93). This controversy has thrown Muslim patients into confusion as to the permissibility of contraception under Shari'ah (Najimudeen, 2020). While some parts of Muslim communities have negative perception to contraception, other parts have positive perception to it amidst confusion. Thus, the right to contraceptive methods of family planning is subjected to confusion. To justify the right of the Muslim patient to the contraceptive methods of family planning requires wholistic consideration of the controversy via jurisprudential approach.

Against the foregoing backdrop, the important question for consideration is whether there is justification for the right to contraception by Muslim patients in Islamic jurisprudence? The paper thus attempts to answer the question by setting out to discuss concept of family planning under Shari'ah, its emergence from *jahiliyyah* period up till the contemporary time and especially the position of Shari'ah on the practice as well as justification for use of contraception from Shari'ah standpoint.

## **2. Understanding Family Planning Under Islamic Law**

Family planning under Islamic Law comes under the concept of Islamic law of marriage most especially the pre-marriage guidelines. This is because, under Islamic law, family planning comes to play even before the marriage as opposed to the western ideology of family planning which begins after marriage (Ambali, 2014 p. 261). This is rooted in the clear position under Islamic law that a man who does not possess the capacity or means to

maintain marriage should not marry until Allah enriches him. There are numerous verses and Prophetic traditions that attested to this fact (Qur'an Chapter 2 verse 185 & Qur'an Chapter 24 verse 33).

The Prophet (PBUH) was reported by Abdullah Ibn Mas'ud, to have said to them that:

*O young men, those among you who can support a wife should marry, for it restrains eyes (from casting evil glances) and preserves one from immorality, but he who cannot afford it should observe fast for it is a means of controlling the sexual desires (Bulugh al-Mariam).*

The above cited Hadith implies that the believers are to get married if they intend to satisfy their sexual urges or procreation if they could maintain the wife and children up-keep (i.e. all the liabilities involved). And those who are not capable should abstain from marriage and fasting was recommended for them by the Prophet (PBUH) as a means of controlling their sexual desires and abstinence. This is a means of family planning in this regard for those that cannot maintain the marriage financially. However, a man who on the basis of economic factor that cannot maintain free-born should then marry what his right hand possesses (slave) (Qur'an Chapter 4 verse 25) because her maintenance is liberal and economically cheaper than that of a free-born woman.

Nevertheless, Shari'ah legislation recommends monogamy instead of polygamy based on the financial capability amongst other factors as pre-requisite conditions for polygamy. Basically, in the absence of financial capability, it is *haram* (forbidden) to have 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> wife as the case maybe (Qur'an Chapter 4 verse 3). The Prophet (PBUH) was also reported by Imam Abu Dawood to have encouraged procreation by saying: the believers should marry the child-bearers and fertile women in order to have more and more children and would feel proud over the multitude of his followers (Ummah) on the day of judgment (Muhammed-Mikaaeel & Salaudeen, 2024, pp. 124-140).

Though the Prophet (PBUH) encourages procreation, it should however be borne in mind that the father is duty bound to take good care of his wife and children according to his means. This comes under the concept of *an-Nafaqah* (maintenance) in Islamic family law (Qur'an Chapter 65 verse 7). The foregoing establishes the fact that the concept and notion of family planning is deeply rooted in Islamic jurisprudence.

### **3. A Brief Historical Exposition To Family Planning Practice**

Emergence of the practice of family planning is said to be as old as the advent of Islam itself (Mohammed, *et al*, 2025, pp. 65-78). The Arabs during the *Jahiliyyah* period (i.e. before the advent of Islam) were said to be practising birth control. Birth control was also said to have been practised after the advent of Islam among the Muslims. That is the Prophetic era. The Prophet (P.B.U.H) was said to have approved birth control but with moderation (Ajani, 2013 pp. 1-18). Thus, history of the family planning practice spans through the pre-Islamic era and Islamic era.

#### *3.1. Family Planning Method during Pre-Islamic Era*

The major family planning method used during the pre-Islamic Era was filicide (Omran, 1992, pp. 13-18). This method was resorted into three (3) different circumstances which were sacrifice or charity to a deity, claiming of false honour, and poverty (Omran, 1992). The pagan Arabs killed their children in order to appease their deities owing to their superstitious idolatries. This has been attested to by Qur'an verses (Qur'an Chapter 6 verses 137 and 140). There was also the practice of killing daughters in respect of false honouring (Najimudeen, 2020, p. 93). Women were killed ignorantly in this *jahiliyyah* period because they were considered to be ill-starred. Some tribes among Arabs even buried their daughters alive out of sheer shame and embarrassment (Omran, 1992). Allah stated that *He will bring those girls on the day of qiyamah (Last Day) standing against their parents who murdered them, and they will be asking on which account of guilt, they were killed? This query will be asked in order to punish those culprits who treated those children so inhumanly, and savage as stated in the Qur'an (Qur'an Chapter 6 verses 58-59).*

The case of poverty impoverishment was one of the reasons why the earlier Arabs in *jahiliyyah* period killed their children due to their impoverishment conditions. Their great fear then was how to feed themselves and their children and exercised apprehension on how to maintain the sustenance of their wards and dependants (Qur'an Chapters 6: 151 & 17:31). Meanwhile, Allah promised to provide for their needs if they consider those children to be priority. It is important to note that they were not actually afflicted with poverty. However, they were engulfed by the fear of poverty in their imagination. They continued to kill their

children in the circumstance for fear of poverty. Those Arabs then became criminals in the sight of Almighty Allah for these dastardly actions.

### *3.2. Family Planning Method during Islamic Era*

The Islamic era refers to the early stage of Islam during the lifetime of Prophet Muhammad (PBUH) (Sadiq, 2020, pp. 21-50). The method of family planning used at this era is called ‘*azl*.’ ‘*Azl* is an Arabic word which is translated to mean coitus interruptus or withdrawal, pulling out, or the pull-out method (Opeloyeru, 2023, pp. 1502-1515). It is a method in which a man during sexual intercourse withdraws his penis from woman’s vaginal prior to ejaculation and then directs his ejaculation (semen) away from the vaginal in an attempt or effort to avoid insemination. (Aboul-Enein, *et al*, 2025). Under Islamic law, it has been sanctioned as a legal means of birth control.

This is because under Islamic law, it is not all practices that preceded it that was abolished. Some of the practices were adopted with modification. Hence, the practice of family planning or birth control is one of such adopted practices with modification through tacit approval for *al-‘azl*. Some people believed that ‘*azl* is a specific word which signifies strictly a particular method of birth control; named coitus interruptus (contraception), withdrawal of the penis from the vaginal before ejaculation to prevent entrance of semen to the vaginal (Adamu, 2018, pp. 106-114). Thus, the main purpose of ‘*azl* is to prevent fertilisation of the egg by the sperm (Adamu, 2018). Analogically, any other methods that tend to achieve the desire outcome of *azl* (i.e., prevention of pregnancy) are of the same nature with ‘*azl*. Though, it is important to point out that that are certain modern contraceptive methods like intrauterine devices (IUDs) with different mechanisms than ‘*azl* (withdrawal method) involving implantable devices. Such inherent implantations are viewed differently by Islamic scholars (Shattnawi, 2021 & Fahrizen, *et al*, 2025). Nevertheless, modern contraceptive methods such as contraceptive pills, condoms, IUD, which are the most frequently used and effective method of contraception are also permissible (Sadiq, 2020).

It is a fact that ‘*azl* was practised among the Prophet companions (RA) during the lifetime of the Messenger of Allah (PBUH). On the authority of Jabir b ‘Abdullah, he said:

“we (the companions of the Prophet)’ used to practise *al-‘Azl* during the time of the Prophet (PBUH) when the Qur’an was being revealed.”

In another narration on the authority of Jabir who said: “we used to practise *al-azl* during the time of the prophet (PBUH). The prophet (PBUH) come to know about it, but did not forbid us” (Nuraini, 2024, pp. 31-38). The Prophet (PBUH) approved the practice of *azl* by his companions but with moderation. The moderation he did here was to approve ‘*azl* as measure of birth control. On the authority of Abu Sa’id, the Prophet (PBUH) was queried about *al-‘azl* and he said: “Not out of all semen a child is formed and if Allah willed to create something nothing would stop Him doing it (Nuraini, 2024).

#### **4. Family Planning Method Among Contemporary Muslims (*Tanzim Al-Ussrah*)**

Family planning or birth control (*Tanzim Nasl*) discussions is primarily concerned with contraception (*‘azl*). It is however to be noted that there is no specific verse in the Holy Qur’an in respect to ‘*azl*. But this does not mean that it should be abandoned because there is no clearer or direct reference from the Holy Qur’an. Allah (SWT) however provides certain basic guides for it in the Holy Qur’an. Thus, scholars are duty bound to examine the Qur’an verses in order to derive legal injunctions (Wani & Anjun, 2019, pp. 200-208). There are several Qur’an verses to this regard one of which is: “So, think deeply, O you who have understanding” (Qur’an Chapter 59 verse 2). There is one of the Qur’an verses that determines the fundamental policies of Islamic law with regards to all rules relating to family planning. This is the verse where Allah says: “... Allah desires ease for you, and He does not desire for you difficulty ...” (Qur’an Chapter 2 verse 185).

There are several Prophetic traditions in form of *Sunnah al-Qawliyyah* (express sayings) of the Prophet (P.B.U.H) and *Sunnah al-Taqrriyyah* (tacit approval i.e. something done in his presence and which he did not prohibit) that support the practice of ‘*azl* as a measure to family planning (Nuraini, 2024). This is coupled with the fact that the Qur’an is directly or explicitly silent on contraception or family control except breast feeding.

In any given case which is not specified in the Qur’an, though provides a very rich variety of specific rules and general principles, it does not directly address every possible challenge that may face a Muslim or mankind at large (Muhammed-Mikaaeel & Salman,

2021, pp. 1-29). For cases not explicitly addressed in the Qur'an, Islamic scholars look for possible solution in the Sunnah as the secondary source of guidance. If the Sunnah however leaves openly some questions of interpretation or application. Muslims step forward in such case to rely on *Ijtihad* and *Qiyas* (Muhammed-Mikaaeel & Salman, 2021).

Based on the above the scholars of Islamic law have contributed to *ijtihad* (independent research) with a view to solving the existing problems by addressing it jurisprudentially. This comes to the fore because of the flexibility of Islamic law which is not accidental (Alwani, 1993, pp. 6-9). To this end, different *ijtihad* by scholars of Islamic jurisprudence have produced arguments and controversy regarding the permissibility of contraception for Muslim patients. While some hold the view that family planning is permissible under Islamic law, others hold otherwise.

#### *4.1. The Antagonists of the Contraceptive Methods of Family Planning Practice*

Many Muslims and some scholars opposed the validity of contraception. Their arguments were based on their interpretation of some Qur'an verses, Prophetic traditions and Islamic principles. They based their opinion on the verse from the Qur'an where Allah says: "It is He who forms you from the wombs however He wills..." (Qur'an Chapter 3 verse 6). They interpreted this verse to mean that family planning is an attempt to interrupt with the plans of Almighty Allah. They believed that it is the Will of Almighty Allah for persons to have many children as He wants and that nobody should interfere with His Will.

Another verse relied upon by the antagonists is the verse where Allah (SWT) said one should not kill his children in fear of poverty (Qur'an Chapter 17 verse 31). They interpreted this verse to mean that family planning is losing of believers' trust and faith in Almighty Allah. Because birth control generally and contraception are based on unfounded fear that increase in population will result in a worldwide food shortage, al-Mawdudi concluded that birth control or family planning for economic reason is nothing but sheer destruction and stupidity (Mawdudi, 1996 pp. 122-125).

The antagonists also based their view on Prophet hadith reported on the authority of Judamah binti Wahab al-Asadiyyah (sister of 'Ukashah) who said, "I was among others in the Prophet's audience while he was saying: "I almost prohibited al-ghila then I considered the

Romans and the Persians and found that pregnant woman suckles their children without ill-effects.” Then they asked him about al-‘*azl*’ he said: “It is hidden infanticide (*al-wa’d al-khafiyy*) (Najimudeen, 2020). Some jurists lend their weight behind the antagonists. To this end, Imam ibn Hazm, a disciple of Zahirri School of Law, forbade contraception and abortion absolutely. His argument on these can be found in one his book *Al-Muhalla*. He argued in his book that numerous permissive Prophetic *ahadith* or a hadith concerning contraception belonged to the early stage of Islam. And all these *ahadith* which give permission to contraception have been abrogated by later *ahadith*. He quoted the Hadith of Judamah Binti Wahb where the Prophet was reported to have said “contraception is “*Al-Wa’d as-Sughra*” (Infanticide). He concludes that this tradition confirms the prohibition of (*azl*) which means this tradition was issued later after the permissive *ahadith* on contraception (Ibn Hazm, 1993, pp. 70-71). Ibn Hazm argued further that since the Qur’an prohibits infanticide (Qur’an Chapter 17 verse 31) in the strongest possible term and the Prophet (PBUH) called contraception hidden infanticide, this implies that contraception is also prohibited (Qur’an Chapter 16 verses 58-59).

Furthermore, some jurist opined that there is no difference between semen destruction (i.e. via contraception) and killing of children. They came to this conclusion when making comparisons with the widespread practice among Arabs in *jahiliyyah* period which is the killing of the female infants by burying them alive (female infanticide) (Qur’an Chapter 16 verse 58-59). These heinous and inhuman practices were so prevalent then because the Arabs fear humiliation if their daughters would be taken into captivity by enemies and subsequently raped and impregnated upon maturity. Another reason is fear of poverty because of the rising cost of providing for children’s needs. Ala Eddin Kharofa says in respect of this that the Arabs were the masters of violating women’s rights. They did consider some animals to have more greater value than women to the extent of surcharging them with animals. They also considered giving birth to a female offsprings as a shame to the father (Ibn Hazm, 1993, pp. 70-71).

#### *4.2. Protagonists of the Contraceptive Methods of Family Planning Practice*

The majority scholars including the four Sunni schools’ scholars held in favour of contraception. They relied on some Qur’an verses, Prophetic traditions and Shari’ah

principles in response to the opposing views. They relied on the commandment of Allah (SWT) where He instructed that mothers may breastfeed their children for two complete years with a view to completing the nursing [period]. In this case the father has financial burden to make provisions for the mother and the child by way of feeding, clothing and other basic rights in the liked terms. (Qur'an Chapter 2 verse 233; Qur'an Chapter 31 verse 14; Qur'an Chapter 46 verse 15). In these same verses referred, Allah (SWT) commands that the parents should avoid excessive hardship in rising of their children.

One of the leading jurists in Islamic jurisprudence, Imam al-Ghazali, recorded one of the Prophetic traditions (PBUH) which says, "a small number of children is a kind of affluence and large number of children is a kind of indigence "*Qillat al-'iyal yusr - wa kathratul 'iyal faqr.*" Similarly, Imam Abu Hanifah was reported to have said: "Multiplicity of dependent children is a burden to mind (*Kathrat al -'iyal tushawwish al-bal*)" (Omran, 1991, p. 172).

Some Islamic scholars such as those who belong to the Hanafi school of Damacus, for example, ibn al-Qayyim. In response to ibn Hazm's arguments on absolute prohibition of contraception pointed out that ibn Hazm's arguments in respect of the earlier quoted *ahadith* requires an exact historical date to prove that the validating *ahadith* were abrogated by the prohibiting *ahadith*. In respect of this, ibn Qayyim rejected ibn Hazm's claim that the hadith narrated by Judamah abrogated several other *ahadith* because ibn Hazm needed to support his claimed that those traditions have been abrogated by not providing exact dates of the abrogating hadith uttered by the Prophet (PBUH) which may not likely be possible. With this, ibn Qayyim concluded that *al-wa'd al-sughra* (infanticide) can only occur upon formation of foetus, or even upon the birth of the child (Omran, 1992, p. 172). Though, *al-wa'd al-sughra* (infanticide) was prohibited by the Prophet (PBUH) but contraception is clearly different and something else than infanticide (Ibn al-Qayyim, 1988, p. 5 and 145). Consequently, Ibn Qayyim considered that the use of contraception to prevent pregnancy is not tantamount to abortion. And as such, does not amount to murder or killing of one's future offspring, since the child is not yet in existence when such methods were used. Therefore, it is very wrong to interpret the Qur'an as stipulating that contraception is the same thing as murdering children. How can someone kill a non-existing child? Or how can a non-existing child be killed? Thus,

prevention against a woman to conceive cannot in anyway be compared to the act of killing a newborn baby or aborting a fully formed foetus (Ibn al-Qayyim, pp. 140-146).

Imam al Gazali allows ‘*azl* unconditionally to the discretion of husband against those who held that ‘*azl* must be done with consent of the wife. Though, it is important to note that the permissibility granted to Muslim patients (Muslim women) to exercise right to the modern contraception is not a unilaterally exercisable right according to *jumhur* (majority of the scholars) Such right cannot be exercised without the mutual consent of the husbands and wives (Habib, *et al*, 2020) Nevertheless, Imam Gazali viewed abortion (*ijhad*) as equivalent to *wa’d* (infanticide) because the two levels infliction of violence against *mawjud hasil* (an existing being) (Rahman, 1989, p. 115). In respect to the Prophetic *ahadith* reported by Jumadah, al Gazali stressed that the *ahadith* which are confirming the permissibility of ‘*azl* are in existence and much more reliable. Infact the phrase “hidden infanticide” in Jumadah’s report connotes disfavour and not prohibition in any form. Imam al Gazali also buttresses this fact by recalling Imam Ali Ibn Abi Talib (R A) the fourth *Amirul Mu’minin* who rejected description of ‘*azl* as minor infanticide, which is clearly based on the seven stages of foetus development in the womb before *wa’d* can be claimed (Omran, 1991, p. 172). Imam al Gazali asserts further on the permissibility of ‘*azl* by relying on the hadith and his biological knowledge. He contended that a living being undergoes an evolutionary process. The first and foremost is the union of male semen with the female egg in the womb “in order to receive life.” Killing this would be a crime when the embryo becomes *mudghah*, the crime is worse; however, when the body if formed and the foetus is ensouled, the crime becomes more serious. The highest of the criminal offence is to kill the child after birth (Al-Dawoody & Murphy, 2019, pp. 551-573).

Imam al Gazali concludes his argument by saying that the correct opinion is that contraception is absolutely permitted (*mubah*). He also supported his argument by analogical reason that a man may abstain from marriage, abstain from having sexual intercourse or having sexual intercourse without ejaculation. Although it is better and preferred to get marry, have intercourse alongside with ejaculation, abstinence from these acts is not in any way forbidden or unlawful. But abortion and infanticide are crimes committed against an existing being/soul. Hence, contraception is quite different from these two because a child

can never be formed only by mere ejaculation of a man or by his semen alone. But by the settling of the man semen in the womb i.e. a child can only be created by both parents through sexual intercourse, sperm and ovum's union (Doi, 1989, pp. 129-130).

## **5. Justification Of Contraception Under Islamic Law For Muslim Patients**

There are some recognised grounds as justifications for permissibility of the modern contraception for Muslim patients in Islamic jurisprudence. These justifications have been put forward by Islamic scholars recognising contraception as a form of family planning practice under Islamic law for Muslim patients (Doi, 1989, pp. 129-130). Some of the grounds/justifications are discussed below.

If the childbearing could endanger the life of the mother in any way, resort to contraception as a form of family planning is permissible (Qur'an Chapter 2 verse 195 & Qur'an Chapter 4 verse 29). This aligns with the *hifz nafs* (preservation of life) in Islamic jurisprudence (Nasreen, *et al*, 2024).

If the health of the child will also be in danger e.g. in case of a father or mother suffering from a contagious disease which may likely transmitted to the child. Ibn Sina, the great physician, concur to this justification that the physician may be obliged to prevent pregnancy of a young woman if she is likely to die in childbirth or in a woman who is suffering from a contagious disease or in a woman with weak bladder, in the latter case, the weight of the foetus may rupture the bladder, which is likely to result to lifelong inconvenience (Ibn Sina, 1993, p. 1655). This ground of justification also aligns with *hifz nafs* (preservation of life) under Shari'ah as parts of the higher objectives of Islamic law.

*Maqasid* Shari'ah (objectives of Shari'ah) justifies permissibility for Muslim patients to explore contraception in the modern medical realm. This is because the hallmark of *maqasid* Shari'ah is to promote *maslaha* (benefit) and prevent *mufsadah* (hardship) with respect to Muslims (Khan, *et al*, 2024). To this end, under *darurah* (necessity) to avoid the hardship of caring for a larger family beyond financial capability, which may likely compel parents to resort to illegal activities or exhausting themselves to earn a living to cater for their offspring, resort to contraception within the purview of *maqasid* Shari'ah is sanctioned (Qur'an Chapter 2 verse 184 & Qur'an Chapter 5 verse 6).

Contraception is justified to give the children proper education, rearing, religion training which are more feasible with a smaller or fewer children (Roudi-Fahimi, 2004). This justification favours the *hifz deen* (preservation of religion).

When there is fear that giving birth will burden the father and ultimately stops him from performing/fulfilling his religious duties. This reasoning tallies with Shari‘ah objectives of preservation of *deen* (religion) and *mal* (wealth) as well. Imam Abu Hanifah was reported to have said: “*kathratu al-Iyal Tushwish al-Bal.*” Multiplication of dependent children is perplexity (uncertainty) to the mind (Omran, 1992, p. 172).

The above justifications for permissibility of the modern contraception for Muslim patients encapsulates the need to avoid endangering of life, health factor, ensuring children’s proper upbringing, avoidance of hardship associated with procreating beyond financial means. These justifications align and resonate with the higher objectives of Shari‘ah which prioritise preservations of religion (*deen*), life (*nafs*), intellect (*‘aql*), lineage (*nasb*) and wealth (*mal*) (Fraser, 2020). From the justifications above, it is apparent the intendment of the modern contraception aligns most especially with preservations of religion (*deen*), life (*nafs*) and wealth (*mal*). By juxtaposition, resort to the modern contraception afford Muslim couple potentials to take properly care of themselves and their children within their wealth as mandatory religious duty on the husband. The foregoing thereby promotes good living in the family with relatively good sustenance (Suherman, 2022). This is the focal point of the main objectives of Shari‘ah regarding promotion of *maslaha* and prevention of *mufسادah*.

## **6. Conclusion**

Family planning is a concept that is not alien to Islamic jurisprudence. Though, there is no express provisions for it in the Holy Qur’an, there are several verses impliedly referring to the practice of family planning by couples. This is further strengthened by the fact that both the historical accounts from pre-Islamic and Islamic eras gave credence to the family planning practice. It is thus important to note that such practices during the pre-Islamic era were modified after the advent of Islamic era.

The bone of contention is the controversy among Islamic Scholars over permissibility of family planning practices (Saeedi, 2025, pp. 26-27). This controversy places Muslim patients into confusion with respect to the exercise of the right to contraceptive methods of family planning practice. The paper thus settles the controversy by justifying the permissibility to the modern contraception for Muslim patients based on the mutual consent of the desiring couples. The paper affirms the position of the protagonists over the antagonists. This is because the former's position aligns with the objectives of Islamic law. What Allah desires for the *ummah* is ease and not hardship that could be occasioned if contraception is outlawed in Islamic jurisprudence.

Therefore, the right of Muslim patients to contraceptive methods of family planning is justified under strict conditions including but not limited to avoiding economic hardship, to affording the children proper education and upbringing as well as risk factors. It is therefore important for Muslim patients to enquire from medical expert about the methods of contraception that does not pose risk to their life. This is because Islamic law tilts towards warding off hardship for Muslim patients and encouraging ease for them amongst others. By implication, the view of the antagonists is becoming a minority opinion in the face of the modern medical necessity.

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# **„TAMING THE MONSTER OF MICRO CORRUPTION IN THE PUBLIC SERVICE OF NIGERIA: CLEANING THE AUGEAN STABLES”**

**Okpako Omudhowo\***

## **Abstract**

Nigeria, the acclaimed giant of Africa is naturally and heavily endowed with immensurable resources which include solid and liquid mineral resources, land and high population. Nigeria is a leading crude oil producer both in Africa and the world at large. Many developed and industrialized nations are not naturally endowed like Nigeria but unfortunately, the country is regarded as the poverty capital of the world. This regrettable status is attributable to the impact of the menace of corruption on the economy which is sucking and drinking the health of Nigeria because where corruption thrives, poverty and not prosperity thrives. Nigeria is stigmatized on account of corruption even at the international level. The Nigerian government has enacted some anti-corruption laws and established some anti-corruption agencies but the monster is still very strong because it has pervaded every fabric of the Nigerian society including the private and public sectors. In the public service, there is hardly any office where corruption is nonexistent in Nigeria. Given the widespread of the virus of corruption in Nigeria, although it is possible to win the battle against it when appropriate measures are taken; its complete eradication would be like cleaning the Augean stable. Consequently, this article sets out to examine corruption in Nigeria vis-à-vis the fight against it which seems non-holistic. The doctrinal methodology is adopted through the study of statutory provisions etcetera from where some inadequacies were identified and recommendations which if implemented would force corruption on its kneel were offered.

**Keywords:** Augean Stables, Correlates, Corruption, Macro, Micro, Public.

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## **1. Introduction**

Nigeria is widely acclaimed as the giant of Africa on account of its large economy, natural endowments and its being the most populous country in the continent of Africa. Nigeria has abundant mineral resources, vast land mass and of course a leading oil producer in the world who was ranked the third largest producer of oil in Africa following Angola and Libya (Business Insider, 2023). Nigeria with an estimated population of 220, 005, 964 as at 2023 with 70% comprising youths is the 6<sup>th</sup> youth population in the world, the 1<sup>st</sup> being India (Worldometer, 2023). However, despite the immeasurable natural endowments in Nigeria, there is poverty in the land. The incidents of poverty and distress growth and development have manifested through high inflation, low revenue generation capacity and infrastructural decay. The resultant lack of significant progress and development in Nigerian has been attributed to being the repercussions of an increasing scale of corruption (Ighodaro, C. A., 2023).

Corruption is a very disturbing phenomenon which everybody including private individuals, corporate bodies and governments preach against yet it could be found in them in one way or the other. It is a great menace that has touched every fabric of our society. There is hue and cry about it such that the government is propelled to raise standards and forces against it but it appears that corruption is resisting all the forces against it and it cannot be said in a hurry that its defeat in Nigeria is in sight. The forceful resistance of corruption to the war against it is due to the fact that consciously or unconsciously, it is gaining support from everybody including the private individuals, religious leaders, traditional rulers, organizations and the State such that the “foot soldiers” or the “large army” of corruption is swelling every day.

Corruption is everywhere including the grassroots or localities of the Nigerian society and it is often addressed by names which tend to hide its bad and offensive nature. Such informal or nicknames include: “brown envelopes”, “greasing palm”, “inducements”, “tips”, “softening the ground”, “side payment”, “mobilization fee”, “padding”, “kickbacks” and “ghost fee”. In other words, this monster called corruption is in every sector of the Nigerian economy. In the public sector for instance, it is present in one form or the other in every

public office. If the countless number of offices where corruption is perpetrated in Nigeria, the countless number of persons involved in various acts of corruption and the diverse methods or techniques<sup>1</sup> that are used to perpetrate corruption in the public service are taken into consideration, the unfortunate temptation of regarding corruption as part of the culture of the Nigerian people may arise. Consequently, the fight against corruption and its ultimate defeat is a Herculean task but as Hercules was able to clean the stables in the old Greek story, so Nigeria shall be victorious in combating corruption when the right approaches are adopted.

Nigeria has over the years adopted many policies in combating corruption but has not succeeded in eradicating.<sup>2</sup> The fight against corruption took a new dimension when the Anti-Corruption Act (The Independent Corrupt Practices and Other Related Offences Act, 2000, Official Gazette No. 6, 2003) of 2000 which established the Independent Corrupt Practices and Other Related Offences Commission was enacted to enforce it. Other anti-corruption laws (The Economic and Financial Crimes Commission (Establishment) Act, 2004, Official Gazette No. 102, 2024; the Money Laundering (Prohibition) Act, 2011, Official Gazette No. 90, 2022) and agencies have been put in place for the war against corruption but the battle is yet to be won by the State because it appears that corruption is waxing stronger and the country is still being stigmatized by the international community which is indicative of the fact that the country's anti-corruption policies have not been effective.

Considering the resistance of corruption to the anti-corruption fight, it is important to remark that the fight against corruption in Nigeria has majorly been focused on the public sector and monetary or pecuniary indexes. The implication of this one sided fight is that non-monetary corruption and corruption in the private sector are inconsequential. This assertion may not be successfully controverted because most of the time, people see and discuss the concept of corruption only from the angle of public office holders<sup>3</sup> and monetary or financial

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<sup>1</sup> In some offices, there may be outright and direct demand for bribes. In other occasions, corruption would be perpetrated through unreasonable delays in attending to the legitimate need of a person such that he will be compelled through frustration to "dance to the unholy" music of "tipping" whoever that is in charge.

<sup>2</sup> Before the enactment of the Anti-Corruption Act, 2000, government policies with anti-corruption stance include: Jaji Declaration of Olusegun Obasanjo; Ethical Revolution of Shehu Shagari; War Against Indiscipline of Muhammadu Buhari; National Orientation Movement and Mass Mobilisation for Social Justice of Ibrahim Babangida and War Against Indiscipline and Corruption of Sanni Abacha.

<sup>3</sup> Corruption in the private sector like issuing over paid receipts or over invoicing; using fake motor parts in fixing a vehicle by a mechanic; illegal ticketing; using colors to change palm oil and unripe fruits and pepper; patching one hole in a tyre but charging for two or three holes by vulcanizers; selling fake, adulterated and

perspectives or terms. Non-monetary corruption and actions of private individuals, organizations and even the State that may be deadly and which may act as catalysts to corruption are often overlooked.

In conceiving the idea of making Nigeria a corruption free society, it must be realized that corruption is a “brand or species” of crime and it is not possible for any society to be free of crime. This was eloquently put by Emil Durkheim<sup>4</sup> who says, “Crime is normal because a society without it is utterly impossible. To classify crime amongst the normal phenomena of society is not merely to say it is inevitable, though regrettable phenomenon due to the incorrigible wickedness of man, it is to affirm that it is a factor in public health, an integral part of all healthy societies.” (Vejar, 2023) In other words, corruption is in every economy including the developed and developing societies and as stressed by Owolabi, “Corruption is a universal disease and every country is making effort to fight it.” (Owolabi, M. E. A., 2007). It follows realistically, that it is not possible to exterminate corruption completely but it can be tamed or control and brought to a level that can be tolerated with minimum discomfort. This was confirmed by former President Olusegun Obasanjo when he said, “We acknowledge that we may not be able to eradicate corruption in its totality over night, but we can at least begin by laying down the foundations of a moral and ethical society.”<sup>5</sup>

The menace of corruption in the Nigerian society may be defeated and brought to its’ kneel if and only if, a holistic approach in the fight against corruption is undertaken. This approach must simultaneously address both official and non-official corruption. It is only when corruption is tackled head-on from everywhere it is domicile be it in the public or private sector that its defeat can be at sight. It is needless to emphasize that the success of the above fight must be rooted in good governance.

In view of the foregoing, this study is conducted in ten sections. Introduction to the study is in section one and section two is devoted to conceptual analysis. The meanings of corruption and some species of corruption were discussed in sections three and four

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expired drugs; writing examinations in miracle centres, fake and arranged miracles in churches; referrals of patients from public hospitals by the Doctor to his own private hospital, etcetera, are often overlooked and trivialized.

<sup>5</sup> Being part of an address by the former President of Nigeria on the occasion of the formal signing into law of the ICPC Act, 2000. Federal Republic of Nigeria Official Gazette Nos. 5 of 2000; 6 of 2003 and 72 of 2009.

respectively. While section five treats the existing legal framework for combating corruption in Nigeria, section six discusses the institutional framework for the enforcement of corruption laws in Nigeria. Section seven considers the channels of micro corruption in Nigeria and section eight deals with the causes of corruption in Nigeria. In section nine, the impacts or consequences of corruption on the Nigerian society were identified while section ten was devoted to conclusion and recommendations.

## **2. Definitions / Conceptual Analysis**

Putting the theme of this discourse in proper perspective requires that some conceptual clarifications be made. Consequently, in this section of our study, we shall briefly examine the meaning of some concepts.

### *2.1 Augean Stables*

This is a concept coined after Hercules who cleaned a very large piece of stables in a day by making a river flow through them (Hornby, A. S., 2005) thus, denoting the performance of a large and unpleasant task or an extremely difficult and distasteful assignment that has long called for attention. It is variously referred to as, “Augean Task”, “Augean Labor”, “Augean Clutter”, or “Herculean Task”. The concept is used in this article to express the difficulties that are associated with fighting corruption or “cleaning the great filth” which corruption represents in Nigeria.

### *2.2 Economy*

In relation to a Community, Locality, State, Country or Region, economy means, the whole network of producers, distributors and consumers of goods and services. It refers to the interaction between all the participants or agents in the chain of production, distribution and consumption of goods and services. In Nigeria, the public service which is the focus of this article is a major component of one of the subdivisions of the economy. Essentially, it may be broadly divided into two namely the formal and informal sectors (Okpako, O., 2021)

### *2.3 Formal Sector*

This refers to that part of the economy or institutions, organizations and services which are monitored by the government and from which the government derives substantial part of its revenue through taxation. People working in the civil / public service, government

agencies / services, defence, private companies, multi-national companies, national companies, schools, colleges, research institutes, management organizations, banks etcetera are all in the formal sector. Although formal sector operators can be victims of corruption, they are the major perpetrators of corruption in Nigeria. The distinguishing characteristics of the formal sector (Okpako, O., 2021) include: (i) Organized system of employment whereby the rules of recruitment, engagement and job responsibility as well as discipline are clearly documented. (ii) Maintenance of a formal contract or agreement through which the employer cum employee relationship is standardised and regulated. (iii) Fixed working hours<sup>6</sup> for the employee who receives fixed salaries in addition to incentives and perks. (iv) The employees work under a decent work environment and are entitled to benefits such as leave, savings, loans etc. (v) The employees have an organized association or union<sup>7</sup> where their official grievances are addressed. (vi) The employees are covered under social protection benefits such as life insurance, health insurance, pension, gratuity etcetera. (vii) Lateness on duty and absent from duty are treated as disciplinary offences for which the defaulter may be punished when caught.

#### *2.4 Informal Sector*

Alternatively known as the informal economy or the grey economy, the informal sector<sup>8</sup> may be described as consisting of all economic and commercial activities in all sectors of the economy which operate outside the purview of government regulation. It is that part of the economy that is neither taxed nor monitored by the government of a country. The operators of the informal sector are people who work and earn their living through small scale businesses such as subsistence farming, street trading, hawking, small scale trading,

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<sup>6</sup> Although it is expected that working hours be fixed for the employees of the public sector, exigencies on account of inadequate manpower especially in the units and departments that perform or render essential services may compel their employees to work more than the fixed number of hours even without further remuneration. For instance, contrary to the eight hours that a policeman ought to work as contained in their training manual, many work for more than twelve hours. The situation has even gone worse such that some perform official duties for twenty-four hours a day even without allowances.

<sup>7</sup> Some agencies that render essential services such as the Nigeria Police Force have no unions where their official grievances can be addressed. This is essentially because where such is allowed the action of members of such union can be detrimental to the public and can fall within the criminal offences of unlawful assembly and mutiny.

<sup>8</sup> Other concepts and idiomatic expressions which can be used to describe the informal sector are: the “black market”, “shadow economy”, “agorism”, “underground economy”, “under the table”, “off the books” and “working for cash”.

home-based workmen, micro-entrepreneurs, rag-picking, cobblers, porters, laborers, and artisans etcetera. In Nigeria, the operators of the informal sector are the major victims of official corruption through their inducement into giving or offering gratification and bribes and by direct extortion. The characteristics of the informal sector include: (i) Non-existence of written rules or agreements between employers and employees. (ii) Most employees in the informal sector have no fixed wages or fixed hours of work and their income is mostly based on daily earnings. (iii) Most of the times and in most cases, the work atmosphere and environment are congested and unhygienic. (iv) The operators in the informal sector have poor awareness levels regarding social protection schemes and do not see the necessity of insuring themselves. (v) There is inability and unwillingness on the part of the operators of the informal sector to come together and address their problems through associations or groups. (vi) No official way of punishing a person who practices lateness on duty and absent from duty other than a kind of reduced earnings for such a person since in most cases he is a master of his own.

### *2.5 Society and Culture*

Society refers to the people in general that are living together in a particular community. Essentially, the people have some common or shared values which are referred to as culture which bind them together. Culture also includes customs, norms, beliefs, art and way of life and the social organization of the people.

## **3. Meaning of Corruption**

Corruption is a generic word that can be used to describe a variety of conducts. Therefore, the meaning which may be attached to the concept of corruption depends on how and where it is used but in all, it is used to refer to all forms of dishonest, illegal, or immoral<sup>9</sup> behavior as well as all unethical or untraditional changes. Consequently, in non-human objects such as culture and computer, while cultural corruption means changes in the traditional culture of the people to a form that is non-traditional or contrary to their shared

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<sup>9</sup> Ethically, there is the moral expectation that a man in his transaction or while acting as agent of the State or individual should observe good faith in his dealings which implies that acts leading to personal gain at the expense of his principal should be avoided. It is noteworthy that once an ethical value has been transmitted to law, its goodness or badness becomes irrelevant. See Anya, K. A. (2009). Moral rules, effective law and the Nigerian society. *Igbinedion university college of law journal*, vol. 8, 68-83.

values; corruption in a computer system refers to changes of information in the computer in such manner that can prevent the proper functioning of the system (Bryan A. Garner, 2004). On the other hand, in humans, corruption refers to all forms of dishonest, illegal and immoral behavior that are intended to give advantage which is inconsistent with an official duty or the right of others, to a person especially who is in authority.

Thus, the meaning of the concept of corruption may therefore be better comprehended if some forms of corruption like bribery, extortion and gratification are analyzed. It is however important to remark that under the Nigerian criminal jurisprudence, corruption is broadly classified into two namely, official and judicial corruptions. While official corruption involves employees of the public service in Nigeria other than in judicial capacity (Section 1 of the Criminal Code, Caps. 77 Laws of the Federation of Nigeria (LFN) 1990 & Cap. C38, LFN 2004) judicial corruption is the corruption that involves judicial officers in the performance of their judicial functions (Ibid., and section 98C (3)).

*A) Bribery:* This is a form of corruption consisting of a two way action which involves giving and taking. While giving of bribe refers to a situation whereby a person known as the giver, corruptly offers something of value especially money to another known as the receiver or taker in exchange for something which is beneficial to the giver (Criminal Code, Cap. C38, Laws of the Federation of Nigeria, 2004, section 98A.) receiving or taking of bribe refers to a situation whereby a person known as the bribe taker or receiver accepts something beneficial to him from another person for the purpose of his doing or not doing something which he ought to do in his official capacity. Essentially, it is where a public officer corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person on account of anything already done or omitted in the discharge of his official duties or in relation to any matter connected with a function, affairs, or business of a government department, public body or other organization or institutions in which he is serving as a public officer (Criminal Code, Cap. C38, Laws of the Federation of Nigeria, 2004, section 99 and 404).

*B) Extortion:* This is the taking or acceptance of any kind of reward other than proper pay and emolument by a public officer under the color of his employment or in the performance of his duty from any person through illegitimate means such as force,

persuasion, coercion or threat of any kind. (Criminal Code, Cap. C38, Laws of the Federation of Nigeria, 2004, section 98A.)<sup>10</sup>

*C) Gratification:* This is the voluntary giving of reward or recompense for a service or benefit. It refers to the pleasurable emotional reaction of happiness in response to the fulfillment of a desire or goal by which any corrupt payment whether pecuniary or otherwise is made. It essentially excludes casual gifts which may not result to the corrupt misuse or abuse of public office. In Nigeria, acceptance of gratification by public officers is criminalized (Code of Conduct for Public Officers. See paragraph 6(1); and sections 115-120 of the Penal Code, Cap. 89, Laws of Northern Nigeria, 1963).

#### **4. Other Forms / Correlates of Corruption**

The discussion of this section shall be centered on some other forms of corruption and some concepts that are closely related and connected to corruption.

*a) Macro and Micro Corruptions:* The adjective, “micro” refers to something that is small in scale and scope in contrast to “macro” which means something large in scale and scope (Hornby, A. S., 2005). Therefore, in relation to corruption, the concept of “micro corruption” is used to refer to corruption that is “petty, small in amount, in low places and which is very common in the public service of Nigeria”. In this work, it is used in relation to “junior and medium” levels public servants who are the “foot soldiers” of the public service of Nigeria. This is in contrast to the chief executives and public officers at the top of leadership positions in the public service of Nigeria and who have direct access to public funds or the Nigerian “common wealth”. While the private individuals especially those in the informal sector (Ighodaro, C. A., 2023) are the primary victims of micro corruption because it is their resources that are depleted, the general public is the victim of macro corruption since it depletes the common wealth (Ighodaro, C. A., 2023).

*B) Economic and Political Corruptions:* Although the concept of economic corruption is not defined in our statutes, it relates to the corruption that is inherent in the acquisition, distribution and consumption of economic resources when market or natural forces are not in charge. It thrives especially in a capitalist system and manifests when there is delegation of

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<sup>10</sup> Also see the cases of *R v Ezejiogwu* (1944) WACA 230; *Potts Johnson v COP* (1947) 12 WACA 198.

power, grant of monopolistic powers and positions to some firms and individuals who enjoy certain rights and privileges in dealing with economic matters and contracts (Bresson, J., 1997). On the other hand, political corruption takes place at the very high levels of political leadership and authority. It occurs when political decision makers or takers who ought to formulate law and policies for the general or overall good of the society circumvent and betray the trust reposed in them and tailor the laws and policies to benefit themselves and their cronies. Political corruption is any transaction at the political level through which collective goods are illegitimately converted into private regarding payoffs (Amundsen, I., 1999). Circumvention of due process is one of the tools of economic and political corruptions in Nigeria and they belong to the “macro or mega or grand” category of corruption.

*C) Hoarding and Corruption:* Hoarding means hiding of goods or resources to create artificial scarcity for personal gain of the hoarder especially during time of crisis. Hoarding and corruption are intertwined especially from economic and political perspectives. While corruptions create a fertile ground or opportunity for hoarding by which funds, goods, assets or resources are kept away from their targets leading to shortages, economic hardship and instability; hoarding exacerbates or brings the negative effects of corruption to the fore by facilitating rent seekers who exploit the opportunity offered by corruption and their position through which they are in possession or in contact with the goods in question to extract wealth for personal gain.

*D) Nepotism and Corruption:* Nepotism is the practice of favoring relatives and cronies for jobs and positions. It is a very dangerous species of corruption because it erodes meritocracy and emplaces inefficiency and ineffectiveness which will in turn destroy a society or an organization. It leads to distrust, creates unfair advantages and prepares the ground for illicit activities including bribery, embezzlement, extortion, impunity, oppression and tribalism.

*E) Fraud and Corruption:* Fraud is the act of cheating somebody in order to get money or goods illegally. It connotes lack of honesty of purpose or the act or omission of deceiving others with the intention of gaining something at the expense of another or other persons. The crimes of cheating and obtaining by false pretences are different species or forms of fraud which in turn is part of corrupt practices.

*F) Terrorism and Corruption:* Terrorism is the act of violence intended to cause serious fear and targeted primarily at coercing a civilian population and influencing the policy of government by intimidation. It affects the conduct of government by creating fear in the minds of people, assassination and abduction or kidnapping of both government officials and other persons in the society (Bamgbose, O., Akinbiyi, S., 2015). The acts of terrorism by which the policies and conduct of government are influenced otherwise than by lawful means are in themselves corruption but beyond this is, the fact that terrorism requires and involves huge amount of money and other resources which are often provided through corruption. Thus, it is the proceeds of corruption that could be easily employed in sponsoring terrorism since such proceeds are not often remitted through normal banking transactions because utmost secrecy is required to avoid detection. The consequence of this assertion is that where there is no corruption in a system, terrorism would not thrive.

*G) Money laundering and Corruption:* According to Garner, B. A., “Money laundering is the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced.” (Bryan A. Garner, 2004). Thus, money laundering is a concept used to describe the process whereby the proceeds of crime are converted to other forms or assets for the purpose of concealing or disguising their illicit origin. Corruption and money laundering are interdependent because the presence of one of them triggers or reinforces the other and they tend to occur together (Mugarura, N., 2010). It is pertinent to remark that the monster called corruption is central and a major facilitator of money laundering and other related or kindred crimes like terrorism, drug trafficking, human trafficking, illegal currency trafficking, and arms trafficking.

## **5. Existing Legal Framework for Combating Corruption in Nigeria**

Nigeria has not relented in its determination to end corruption within the country. This consistent battle has not only been fought through the enactment of much legislation that forbid corruption but also through the establishment of agencies whose mandate is the enforcement of anti-corruption laws in Nigeria. These laws include the Constitution of Nigeria (Constitution of the Federal Republic of Nigeria, 1999. Official Gazette No. 24 of 1999, May 5), the Criminal Code (Cap. C38, Laws of the Federal Republic of Nigeria, 1999),

the Penal Code (Cap. 89, Laws of Northern Nigeria, 1963), Advance Fee Fraud and Other Related Offences Act, Failed Banks (Recovery of Debt and Financial Malpractices in Banks) Act, the Banks and Other Financial Institutions (BOFI) Act, the Economic and Financial Crimes Commission (EFCC) Act (Economic and Financial Crime Commission (Establishment) Act, 2004. Official Gazette No. 1 of 2004), the Corrupt Practices and Other Related Offences (ICPC) Act (Independent Corrupt Practices and Other Related Offences Act, 2000. Official Gazette No. 5 of 2000, June 13) and the Money Laundering Act (Cap. M18, Laws of the Federation of Nigeria, 2004. Official Gazette No. 90 of 2022, May 14). It is germane to remark here that the anti-corruption laws in Nigeria appear to be more particular with “official corruption” which relates essentially to corruption in the public service. This may be the reason why the activities of anti-corruption agencies have been centered on the public sector. We shall briefly discuss some of the laws dealing with corruption in Nigeria in this segment of this study.

*A) The 1999 Constitution:* This is the supreme law of Nigeria and any other law within Nigeria that is inconsistent to it is void to the extent of its inconsistency (The Constitution of the Federal Republic of Nigeria, 1999, Part I of the Fifth Schedule) Provisions relating to corruption in the Constitution can be found in the Code of Conduct for Public Officers. Specifically, a public officer is charged never to put himself in a position where his personal interest conflicts with his duties or responsibility (Paragraph 1) and never to engage or participate in the management or running of any private business, profession or trade except farming (Paragraph 2(b). Similarly, public officers were prohibited from asking or receiving gifts or benefits in kind (gratification), (Paragraph 6(1), for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties while no person is allowed to offer a public officer any property, gift or benefit of any kind as an inducement or bribe (Paragraph 8) for the granting of any favor or the discharge in his favor of the public officer’s duties.

*B) The Criminal Code:* The Criminal Code (Cap. C38, Laws of the Federal Republic of Nigeria, 2004) is applicable to the southern part of Nigeria and it has provisions that prohibited official corruption and unjust enrichment of public officers. The Criminal Code is a double edged sword because it punished both the giver and receiver of bribe which is one of

the species of corruption. Specifically, the Criminal Code provides the punishment of seven years imprisonment for any public official who corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person on account of anything already done or omitted, or any favor or disfavor already shown to any person, by himself in the discharge of his official duties or in relation to any matter connected with his functions, affairs or business of a government department, public body or other organization or institution in which he is serving as a public official (Section 98). In like manner, the code provides the same punishment for any person who offers or gives a public officer bribe (Section 98A) and three years' imprisonment for extortion (Section 99) by public officers when he takes or accepts from any person for the performance of his duties such reward beyond his proper pay and emoluments or any promise of any reward. Other provisions relating to official corruption are found in sections 98B and 98C.

*C) The Economic and Financial Crimes Commission (EFCC) Act:* Although the EFCC Act (Economic and Financial Crimes Commission (Establishment) Act, 2004) which established the Economic and Financial Crime Commission (Section 1(1) did not specifically define the concept of corruption, it mandated the Commission to investigate (Sections 6 and 7) and prosecute (Section 13(2) all "economic and financial crimes" The Act identifies many economic financial crimes and corruption offences and provides punishment for their commission (Sections 18 and 32). The offences include: engaging in acquisition, possession or use of property knowing same to be derived from any offence under the Act (Section 18(1) (a)), engaging in the management, organization or financing of any offence under the Act; engaging in the conversion or transfer of property knowing that such property is derived from any offence under the Act; engaging in concealing the true nature, source or location of any property knowing same to be derived from any offence under the Act; and disposal or selling of any property which is a subject of attachment, interim order or final order without authorization of the Commission (Section 32(1).

*D) Anti-Corruption Law:* The ICPC Act (Independent Corrupt Practices & Other Related Offences Commission Act, 2000) established the Independent Corrupt Practices and Other Related Offences Commission (Section 3(1) and vested it with the responsibility of investigation and prosecution of persons who contravene the Act. It defines corruption to

include bribery, fraud, and other related offences (Section 2). The ICPC Act created and identified various offences which are regarded as corruption offences which include: accepting gratification (Section 8); bribery of public officer (Section 8); giving or accepting gratification through agents (section 9); failing to report bribery transaction (section 23) concealing offences relating to corruption (Section 11) fraudulent acquisition of property (Section 10) and fraudulent receipt of property (Section 13) amongst others.

## **6. Institutional Framework for the Enforcement of Corruption Laws in Nigeria**

In elementary political philosophy, it is the responsibility of the executive arm of government to implement the laws that are enacted by the legislative arm of government while the judiciary is to interpret the laws and decide whether or not the provisions of the law have been violated or contravened. Rising up to these mandates, the Nigerian legislature has enacted a number of anti-corruption laws such that it could be said without any fear of contradiction that Nigeria is not lacking anti-corruption laws because if the anti-corruption laws in existence so far in Nigeria are implemented in the spirit of their enactment, corruption would be prevented, frustrated and brought to its knees or to a point where its survival will be doubtful. Similarly, in trying to rise up to the challenge of executing anti-corruption laws in Nigeria, some agencies were put in place by the Nigerian government to assist the executive arm of government in achieving its mandate. Amongst others, the agencies that have been established for the enforcement of anti-corruption laws in Nigeria which would be discussed in this article include the Nigeria Police Force (NPF), the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and other Related Offences Commission (ICPC).

### **6.1 The Nigeria Police Force (NPF)**

The NPF is the lead internal security and law enforcement agency in Nigeria. Established in section 214(1) of the Nigerian Constitution, it is charged with the enforcement of all laws and regulations without any prejudice to the enabling Acts of other security agencies (Police Act, 2020, Official Gazette No. 2 of 2020, August 17. See section 4(d) thereof; and *Inspector-General of Police v Daniel Andrew* (2014) All FWLR 729 @ 1202) This statutory provision distinguishes the NPF and assigns it with the duty of enforcing all

laws inclusive of anti-corruption laws notwithstanding the fact that a specialized agency can be established for the enforcement of any particular law. In other words, the NPF can enforce by way of prevention and detection of crimes (Section 4(a)) as well as the prosecution of suspects in any court of law subject to the prosecution authority of the Attorney-General<sup>11</sup> and the professional restrictions imposed on police officers who are not legal practitioners (Section 66(1) (2)).

### **6.2 Independent Corrupt Practices and Other Related Offences Commission (ICPC)**

The ICPC was established by an Act of the National Assembly. It is the first specialized anti-corruption agency and by job description, it ought to be the war head of anti-corruption crusade that is saddled with the responsibilities of receiving and investigating reports of conspiracy, attempt to commit or the commission of any offence against the ICPC Act or any other law prohibiting corruption in Nigeria. In addition to the above, the ICPC is mandated to examine the practices, system and procedures of public bodies to ensure their non-facilitation or aiding of fraud and corruption; to instruct, advise and assist officers, agencies and parastatals on ways of eliminating or minimizing fraud and corruption; to advise heads of public bodies on ways and systems of reducing the likelihood of bribery and corruption and other related offences; to educate the public on and against bribery, corruption and other related offences; and to enlist and foster public support in combating corruption.<sup>12</sup>

### **6.3 Economic and Financial Crimes Commission (EFCC)**

Similarly, the EFCC was established by an Act of the National Assembly (The Economic and Financial Crimes Commission (Establishment) Act, 2004) The Commission is charged with the responsibility of the investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, future market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam etcetera (Section 6(b)) and the prosecution of offenders (section 13(2)) under the EFCC Act. The concept of “Economic and financial crimes” was defined in the Interpretation Section

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<sup>11</sup> For further information, see sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999; section 106 of the Administration of Criminal Justice Act, 2015, official gazette no. 49 of 2015, May 14; and section 66(1) of the Police Act, 2020, official gazette no. 2 of August 17.

<sup>12</sup> ICPC Act, section 1(a). There is no legal restriction as to the power of ICPC in investigating reports of corruption the immunity of some persons against criminal prosecution notwithstanding. Besides, so long as the conduct is against any anti-corruption law, the ICPC has a duty to step in or investigate.

(Section 46) of the Act to mean, “the non-violent criminal and illicit activity committed with the objective of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and *any form of corrupt malpractices*,<sup>13</sup> illegal arms deal, smuggling, human trafficking and child labor, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods etcetera.” Besides the duties as specified in sections 6 and 13(2) of the EFCC Act, the Commission has powers not only to conduct investigations into the property of any person if it appears to it that the person’s life style and extent of the properties are not justified by his source of income (section 7(1) (b)) but to also compound any offence punishable under the Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence (section 14(2)).

It is remarkable to state that corruption<sup>14</sup> appears to be waxing very strong in the faces of the anti-corruption laws and the anti-corruption agencies in Nigeria. This is the reason why the Nigerian society is still being perceived by many people, organizations and countries as highly corrupt.<sup>15</sup> While it is acknowledged that the anti-corruption agencies are doing their best, we can also conveniently say that their best is not good enough because corruption is still thriving as can be seen in Nigeria and by the corruption ranking of international bodies and organizations. The continuous existence and vigor of the monster called corruption in Nigeria can safely be attributed to the in-activities, inadequacies, inefficiencies and ineffectiveness of the anti-corruption agencies. This is because despite the anti-corruption laws and the efforts of the anti-corruption agencies, corruption is still very high, strong and robust drawing its vitality from unscrupulous individuals, corporate bodies and government

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<sup>13</sup> Italics, mine for emphasis.

<sup>14</sup> It must be emphasized that corruption is an issue that is very complex with different manifestations and impact on different societies. The ranking perception can vary depending on the indexes or indicators and methodologies that are adopted in the evaluation.

<sup>15</sup> In 2024, Transparency International ranked Nigeria 140 out of the 180 countries that were assessed. This indicates that Nigeria is perceived as a highly corrupt country. See Trading Economics Corruption Ranking by Country / Africa. Retrieved from <https://tradingeconomics.com> on 5/8/2025 at 1230pm.

officials at all levels of government in Nigeria. Therefore, much is needed to be done by the Nigerian government and its anti-corruption agencies in specific terms and all institutions and Nigerians in general terms.

## **7. Channels of Micro Corruption in Nigeria**

Channel of corruption is used in this article to mean the routes through which corruption is perpetrated. These routes are in the various departments, formations, and offices in the public service and government establishments. It must be stated here that it is doubtful if there is any public establishment in Nigeria where there is no corruption at all. This is because even when there may be some individuals who are incorruptible the number must be infinitesimal compared to the number of corrupt persons who perpetrate their acts by directly requesting for bribes, extortion and gratification; or indirectly by using delay tactics and frustration on their victims who would be induced to dance the “corruption music”.

Therefore, producing a catalogue of all the routes or channels of corruption is not feasible but they include: the Nigerian Armed Forces, the Nigeria Police and other paramilitary forces who extort money especially on the public highways all over the country and demand money before suspects are released or granted bail; the teaching service at all levels or the education sector where examination malpractices are encouraged with some centers flourishing as “miracle centers” and in other cases certificates and high grades being given to undeserving persons after some gratifications; and the customs service where smugglers are allowed to smuggle goods especially petroleum products out of the country thereby creating scarcity within the country and substandard goods into the country with reckless abandon after collecting money from the perpetrators and denying the State of the much needed revenue.

Others are the immigration service who collect money and allow illegal immigrants into the country to perpetrate evil and who use agents or touts to collect huge sums of money far above the official amount from persons who are desirous of preparing travelling documents; NNPC Mega Station that sell petroleum products to “black marketers” during period of fuel scarcity; the judiciary where unbelievable judgments are delivered and where the amount that is collected for preparation of affidavits and copies of judgments is different

from the amount that is written on the receipt; the legislative arm of the various levels of government where budget is padded and where projects are awarded based on favoritism; the Federal and State ministries where projects are awarded and money is paid without the execution of the job and on paper, the project has been completed and commissioned; just to mention but a few.

As can be seen from the above, the list is endless and all the above mentioned departments and establishments are littered all over the country such that corruption has spread its tentacles all over the country.

## **8. Causes of Corruption in Nigeria**

Nigeria is not in want of legislation or enactments to fight corruption. However, in the face of the numerous anti-corruption laws in Nigeria, corruption is still on the high side. The reasons for the stiff resistance of corruption to anti-corruption measures in Nigeria are as follows: (i) economic hardship on the citizenry; (ii) inflation that has reduced the value of earnings in Nigeria; (iii) non-availability of living wage for public servants; (iv) non-recognition and adequate protection of the welfare of retirees. This is very important because when serving public servant see and are aware that retirement is like using and “dumping” somebody, there will be no dedication and diligence in the performance of duty with the consequence that serving public servants would look for every avenue to enrich themselves and save for the rainy day; (v) lack or inadequate tools to work with in public offices; ineffectiveness and inefficiency in the enforcement of anti-corruption laws. This is essentially because most of the corruption law enforcers are corrupt or can easily be corrupted; (vi) perception of corruption only in monetary or pecuniary terms; (vii) perception of corruption from only the public service sector perspective; (viii) perceived use of anti-corruption agents against oppositions and non-investigation of persons accused of corruption who belong to the ruling party; (ix) weak traditional and religious institutions; (x) high regard for wealth irrespective of how it is acquired and accumulated; (xi) faulty electoral system giving rise to the election and empowerment of wrong persons as leaders; (xii) judicial system that is perceived to be for the elites and not the hope of the common man.

## **9. Consequences of Corruption on the Nigerian Society**

The impacts of corruption on the economic and socio-political development of any nation are indisputably myriad. Besides its ability to influence and penetrate the very root of an economy, corruption can impact negatively on the economic system through the erosion of property rights, distortion of economic forces, infliction and diversion of public policies and the straining of the political institutions (Ashour, A. S., Hoda, S. A., 2018). It undermines economic growth and development by distorting the rule of law and weakening the institutional foundation on which economic growth depends (Ighodaro, C. A., 2023). In Nigeria, corruption has caused the following specific impacts or consequences: (i) high level of poverty and unemployment; (ii) increase in crimes and criminality; (iii) communal clashes and increase in organized crimes including terrorism (iv) distrust on the electoral system and governance; (v) human rights violations with impunity and subversion of due process; (vi) reduction of accountability and poor representation of the interest of the masses; (vii) partial justice and compromise of the rule of law; (ix) infrastructural decay and collapse of the manufacturing sector; (x) reduction of investment attractiveness of the country and loss of pride in the comity of nations; (xi) much needed revenue of the State in few hands thereby increasing the inequality among the citizens; (xii) replacement of excellence and meritocracy with mediocrity; and (xiii) relocation of industries and other manufacturing concerns out of the country to neighboring countries.

## **10. Conclusion**

Corruption is an endemic problem that is in every jurisdiction in varying degrees. Nigeria as a country has not fared very well in corruption evaluation as it is assessed to be riddled with corruption by world bodies and international organizations. This calls for serious concern and urgent steps to be taken against corruption so as to launch Nigeria into the pride of place it deserves among the comity of nations. Nigeria has taken some positive and giant steps in the fighting against corruption through the enactment of anti-corruption laws, establishment of anti-corruption agencies; and arrest, investigation and prosecution of corruption offenders even till this moment. These efforts have not paid off because Nigeria is

still perceived to be highly corrupt. This situation needs a turn around so that Nigeria can be placed on the same pedestal with other respected countries in the world. An examination of the Nigerian criminal law as it concerns corruption reveals that corruption in Nigeria is seen only from the official perspective which is made up of official corruption comprising bribery, extortion and gratification on the one hand and judicial corruption on the other hand. This study has revealed that corruption in the private sector is a catalyst that has fueled corruption in the public sector. Consequently, although it is regrettable that it is not possible to eradicate corruption completely, it can be brought to a level that may not cause hardship to the citizens of Nigeria through a holistic fight against it. Some recommendations with deterrence potentials which if implemented could mark a turning point in the fight against corruption in Nigeria are hereby offered as follows:

i. There should be legal reforms through which corruption should be properly defined to enable a holistic fight against it. Consequently, corruption should be classified into three namely, private corruption, macro corruption and micro corruption.

ii. Private corruption should be defined to involve all corruptions that take place in the private sector such as cases involving private individuals who dishonestly and secretly buy petroleum products from filling stations or NNPC Mega station for hoarding and sale at the black market especially during scarcity of the products; selling of mints or new currency notes in ceremonies when they are not available in their official destinations; adulteration and faking of products or goods; etcetera.

iii. Mega corruption should be defined to address all corruptions involving public servants who have access to the common wealth or can disburse budgetary allocations or money belonging to the State at the Federal, State and Local Government levels.

iv. Micro corruption should be defined to deal with all official corruptions inclusive of judicial corruption other than those included in mega corruption. This involves all public servants at the senior, intermediate and junior cadres other than

the “chief executives” or those directly in charge of the allocations to their establishments.

v. Stiff penalties should be imposed on violators of the law of corruption. Consequently, any person who corruptly tempers with the common wealth and who is convicted of mega corruption should be sentenced to life imprisonment and the forfeiture of all his property to the State since he will be in custody for the rest of his life.

vi. Any person who is convicted of micro corruption or corruption in the public sector should be sentenced to a minimum of twenty five years imprisonments in addition to the restitution of the corruptly obtained benefit. No option of fine.

vii. Any person convicted of private corruption should be sentenced to a minimum of ten years imprisonment and forfeiture of the corruptly obtained property. No option of fine.

viii. Law enforcement agencies should be overhauled and reinvigorated. Necessary tools to discharge their duties should be provided by the government.

ix. Section 14(2) of the EFCC Act should be amended to disallow the agency from accepting money to compound any corruption offence. Accordingly, the punishment of plea bargain in connection with corruption cases should be abolished.

x. The fight against corruption must be anchored in good governance.

xi. Public servants must be given a living wage to be dissuaded from corrupt practices.

xii. The welfare of persons who have served the country meritoriously and retired without blemish must be paramount in the scheme of things. Priority should be given to the welfare of retirees so that those still serving would know that there is reward for meritorious service.

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# **“FOREIGN DIRECT INVESTMENT IN DEVELOPING COUNTRIES: LEGAL CHALLENGES AND ECONOMIC BENEFIT”**

**Amela Tahirbegović\***

## **Abstract**

Foreign Direct Investment (FDI) is a critical engine of economic growth in developing nations, providing transformative advantages such as financial inflows, technology improvements, infrastructure development, and job creation. However, FDI has substantial legal and regulatory concerns, such as political instability, poor institutional frameworks, and reliance on foreign money. This article investigates the dual nature of FDI, including its advantages, problems, and legal frameworks. The research illustrates the economic benefits presented by FDI while addressing the accompanying environmental, social, and governance concerns, using case studies such as Brazil's energy sector, China's infrastructure investments in Africa, and Peru's mining industry. Policy reform recommendations emphasise the need to streamline bureaucratic processes, increase environmental and labour rights, and strike a balance between investor protections and host nations' sovereignty.

**Keywords:** FDI, Developing Countries, Legal Frameworks, Sustainable Development, Bilateral Investment Treaties.

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## **1. Introduction**

Foreign Direct Investment (FDI) is widely recognized as a powerful driver of economic growth and development in many developing countries. By providing access to capital, advanced technologies, and managerial expertise, FDI addresses critical infrastructure gaps, fosters job creation, and promotes industrial growth. For example, China's Belt and Road Initiative (BRI) has significantly improved connectivity and trade in Africa through large-scale infrastructure projects, such as the Nairobi-Mombasa Standard Gauge Railway in Kenya (UNESCAP, 2019). Similarly, Brazil has leveraged FDI in its energy sector to boost technological advancements and strengthen its position in global markets (OECD, 2021).

However, FDI also presents substantial challenges. Political risks, such as policy instability and expropriation, can deter foreign investors. For instance, Venezuela's expropriation of ExxonMobil's oil assets highlighted the tension between national sovereignty and investor protections, with the dispute ultimately resolved through the International Centre for Settlement of Investment Disputes (ICSID, 2014). Weak institutional frameworks and corruption further complicate FDI, as evidenced in *Shell v. Nigeria*, where inadequate enforcement of environmental standards and governance issues undermined accountability (UN, 2011). Additionally, conflicts often arise between host nations' regulatory autonomy and obligations under international treaties, particularly in areas such as environmental protection and public health (Sornarajah, 2017).

This paper explores the dual nature of FDI in developing countries, analyzing its economic benefits and the challenges it poses. Case studies from Brazil, China, and Peru demonstrate both the opportunities and risks associated with FDI. These examples highlight how foreign investment can stimulate economic growth while exposing host nations to social, environmental, and economic vulnerabilities, such as resource dependency and labor exploitation (UNCTAD, 2021).

The research also offers actionable policy recommendations to enhance FDI's positive impacts. Key strategies include strengthening legal frameworks, streamlining regulatory processes, and aligning FDI policies with Sustainable Development Goals (SDGs). For instance, Rwanda's digitized investment processes have significantly improved its business environment, attracting substantial foreign investments (World Bank, 2020). Integrating

global standards, such as the UN Guiding Principles on Business and Human Rights, can further ensure that FDI contributes to inclusive and sustainable development (UN, 2011).

In addition to addressing these challenges, this paper identifies areas for further research, such as the role of digital transformation in shaping FDI flows and the potential of green investments to advance sustainable development goals. By providing a balanced perspective on FDI, this study aims to guide policymakers in developing countries to optimize the benefits of foreign investment while mitigating its risks.

### *1.1 Research Methodology*

This study employs a mixed-methods approach to explore the complex nature of Foreign Direct Investment (FDI) in developing countries. Through the integration of qualitative and quantitative methods, the research aims to address key economic and legal dimensions of FDI, guided by five central research questions.

a) Qualitative Analysis

To answer Research Questions 2 and 4—What legal and governance challenges do developing countries face in managing FDI? and What strategies can enhance the positive impacts of FDI while mitigating associated risks?—the study conducts in-depth case study analysis. This qualitative component provides detailed insights into the legal and governance contexts that shape FDI outcomes. Selected case studies include Venezuela’s expropriation disputes, Nigeria’s regulatory challenges, Brazil’s energy sector, China’s infrastructure projects in Africa, and Peru’s mining industry. These cases illustrate the intersection of political stability, institutional strength, and policy environments with FDI performance, and they inform recommendations for strengthening legal frameworks and governance practices.

b) Quantitative Analysis

Addressing Research Questions 1 and 5—What are the economic benefits of FDI for developing countries? and How do the impacts of FDI vary between developed and developing nations?—the quantitative component examines economic indicators across countries and regions. Data is sourced from international bodies such as UNCTAD’s World Investment Report and OECD policy reviews. Using metrics like

GDP growth, employment creation, technology transfer, and infrastructure development, the study employs statistical techniques to assess correlations between FDI inflows and sustainable development outcomes. Comparative analysis includes regions such as Africa and Latin America, as well as select developed countries, to evaluate disparities in regulatory efficacy and investment outcomes.

c) Policy Framework Review

To respond to Research Question 3—How can host countries balance investor protections with national sovereignty?—this section examines the role of international legal instruments, specifically Bilateral Investment Treaties (BITs) and Investor-State Dispute Settlement (ISDS) mechanisms. The analysis explores how these frameworks influence investor behavior and impact the policy autonomy of host countries. Attention is given to reform trends aimed at aligning investment agreements with national development goals and ensuring fair dispute resolution mechanisms.

d) Comparative Analysis

Supporting Research Question 5 further, the comparative analysis contrasts FDI patterns in developed and developing countries. It evaluates differences in regulatory approaches, sectoral dependencies, and policy resilience. Case comparisons such as Zambia’s resource-driven FDI reliance versus Australia’s legal capacity to navigate FDI disputes offer valuable insights into best practices and adaptive strategies for emerging economies.

## 2. Legal Frameworks Governing FDI

### 2.1. *Bilateral and Multilateral Investment Treaties*

Bilateral Investment Treaties (BITs) play a central role in regulating Foreign Direct Investment (FDI), particularly between industrialized and developing nations. They aim to create a stable investment climate by ensuring fair and equitable treatment (FET), protection against expropriation, and dispute resolution mechanisms. FET provisions, such as those in the US-India and China-Pakistan BITs, often require host countries to maintain a transparent legal environment for foreign investors. However, their broad interpretations sometimes lead to disputes, as seen in *Metalclad Corp. v. Mexico* (ICSID Case No. ARB/98/5), where a lack of regulatory clarity resulted in financial damages for the host country (Baughen, 2023).

BITs also provide protection against expropriation, ensuring that foreign investments cannot be nationalized without proper compensation. Additionally, they include Investor-State Dispute Settlement (ISDS) mechanisms, which allow investors to pursue claims against host nations in international forums like the International Centre for Settlement of Investment Disputes (ICSID). While these provisions help attract investment, they often limit the regulatory flexibility of host countries in areas such as environmental and public health laws (Sauvant & Sachs, 2009).

Multilateral treaties complement BITs by establishing standardized rules for investor protections. Examples include the ASEAN Comprehensive Investment Agreement (ACIA), which promotes investment within Southeast Asia (ASEAN, 2017), and the Energy Charter Treaty (ECT), which governs energy sector investments (Vadi, 2011). These agreements provide similar protections to BITs, including safeguards against expropriation and ISDS mechanisms. However, they also face criticism for limiting host countries' sovereignty. For instance, in the *Yukos v. Russia* case, the ECT's provisions enabled investors to claim compensation for the nationalization of assets, highlighting the tension between investor rights and state regulatory autonomy (Khor, 2007).

### *2.2. Balancing Investor Protections and Sovereignty*

While BITs and multilateral treaties aim to foster investment, they often constrain host countries' ability to regulate in the public interest. Cases like *Venezuela v. ExxonMobil* (ICSID, 2014) and *Metalclad v. Mexico* (ICSID, 1997) illustrate how overly rigid treaty obligations can lead to costly legal disputes and reduced policy space for developing nations. Therefore, there is a growing need for balanced legal frameworks that protect both investor rights and host country sovereignty. Examples include revising treaty language to allow for environmental and social regulations without breaching investment obligations. Such reforms can ensure that FDI contributes to sustainable development while respecting national priorities (Sornarajah, 2017).

### 2.3. Benefits of FDI in Developing Countries

Foreign Direct Investment (FDI) serves as a powerful catalyst for economic development in developing nations by addressing capital shortages, facilitating technology transfer, and creating employment opportunities. These benefits are outlined below:

#### *2.4. Capital Inflow*

FDI provides much-needed financial resources for infrastructure development, which is vital for economic progress in developing countries. For example, China's Belt and Road Initiative (BRI) has significantly improved connectivity and trade through large-scale infrastructure projects, such as the Nairobi-Mombasa Standard Gauge Railway in Kenya. This railway has reduced transportation costs and boosted regional trade, demonstrating how FDI-funded infrastructure can have ripple effects on broader economic activity (UNESCAP, 2019).

#### *2.5. Technology Transfer*

One of the most transformative benefits of FDI is the transfer of advanced technology, managerial expertise, and operational best practices to host countries. India's IT industry is a prime example, where partnerships with multinational corporations have provided access to cutting-edge software technologies and digital infrastructure. These collaborations have not only elevated India's status as a global IT hub but also enabled local businesses to adopt innovative practices, leading to sustained economic growth (WTO, 2020).

#### *2.6. Employment Generation and Skill Development*

FDI creates direct and indirect employment opportunities by bringing in multinational corporations that invest in local industries. These companies often train the local workforce, fostering skill development and enhancing productivity. For instance, Toyota's investment in Thailand has transformed the country into a key player in the automotive industry. Beyond immediate job creation, Toyota's training programs have improved the skills of the workforce, positioning Thailand as a regional manufacturing hub (ILO, 2019).

### *2.7. Industrial Growth and Export Diversification*

FDI fosters industrial growth by enabling the establishment of new industries and the expansion of existing ones. This contributes to export diversification and reduces reliance on commodity-based industries. For instance, Brazil's energy sector has attracted significant FDI, leading to advancements in oil and gas production. These investments have not only bolstered Brazil's export revenues but also enhanced the country's energy independence (OECD, 2021).

### *2.8. Improved Governance and Standards*

FDI often brings with it improved governance practices and adherence to international standards. Multinational corporations operating in host countries are typically held to higher environmental, labor, and operational standards. These practices can influence domestic firms and encourage governments to adopt better regulatory frameworks, ensuring long-term sustainable development (Muchlinski, 2007).

### *2.9. Challenges and Solutions*

While FDI offers numerous benefits, its effectiveness depends on the presence of robust legal frameworks and governance structures. Policies inspired by organizations such as the OECD and WTO ensure that investments align with national development goals while addressing social, environmental, and economic challenges. Effective regulation can maximize the positive impacts of FDI while minimizing risks, such as economic dependency or environmental degradation (OECD, 2021; WTO, 2020).

## **3. Case Study: The Impact of FDI on Brazil's Economy**

Brazil's energy sector demonstrates the significant benefits of Foreign Direct Investment (FDI), particularly through contributions from multinational companies like Shell and BP. These investments have generated substantial economic growth, with positive outcomes such as job creation, technological advancements, and increased tax revenues. For example, Shell's investments in offshore oil exploration have strengthened Brazil's position in the global energy market.

However, FDI in environmentally sensitive industries, such as oil and gas, has also raised challenges. Shell's operations in the Amazon faced legal and environmental scrutiny over allegations of deforestation and community displacement. This case highlights the critical need for strong regulatory frameworks that incorporate environmental safeguards and community protections (Kronfol, 2019).

To mitigate risks, Brazil has increasingly emphasized sustainable practices in its FDI agreements. Policies now aim to balance economic development with environmental sustainability, ensuring that FDI aligns with Brazil's broader goals of long-term growth and natural resource conservation (OECD, 2020; Kronfol, 2019).

#### **4. Challenges of FDI in Developing Countries**

Foreign Direct Investment (FDI) is a cornerstone of economic development in many developing nations, yet it presents numerous challenges that necessitate robust policy and institutional responses. These include political risks, regulatory hurdles, corruption, and economic dependency.

##### *4.1. Political Risks*

Political instability is a significant deterrent to FDI, as changes in regimes or policies can lead to abrupt expropriations. For example, Venezuela nationalized ExxonMobil's oil assets under its broader agenda of resource sovereignty, triggering a dispute resolved through the International Centre for Settlement of Investment Disputes (ICSID, 2014). While Bilateral Investment Treaties (BITs) protect investors from such risks, they often conflict with a nation's need to assert control over critical resources (Sornarajah, 2017).

##### *4.2. Weak Legal Institutions and Corruption*

Weak legal systems exacerbate FDI risks by fostering inconsistent contract enforcement and corruption. In *Shell v. Nigeria*, accusations of environmental degradation and human rights violations in the Niger Delta highlighted how inadequate regulatory frameworks undermine accountability (UN, 2011). Transparency International's Corruption Perceptions Index consistently flags developing countries such as Nigeria for poor

governance, which diminishes investor confidence and complicates compliance with international business standards (Transparency International, 2022).

#### *4.3. Regulatory and Bureaucratic Hurdles*

Complex and inconsistent regulations often deter FDI by prolonging approval processes and increasing costs. *Vodafone v. India* exemplifies this issue, as retroactive tax claims created uncertainty, leading to international arbitration. The Permanent Court of Arbitration (PCA) ruled in Vodafone's favor, emphasizing the detrimental impact of unpredictable legal environments on investor confidence (PCA, 2016). Simplifying bureaucratic processes, as Rwanda has demonstrated with its digitalized investment system, can significantly enhance a country's attractiveness to investors (World Bank, 2020).

#### *4.4. Economic Dependency*

Developing nations risk economic overreliance on FDI, especially in resource-dependent sectors. Zambia's economy, heavily reliant on copper mining, remains vulnerable to fluctuations in global commodity prices, underscoring the importance of diversification (UNCTAD, 2019). Moreover, multinational corporations often overshadow local industries, as seen in Colombia, where Coca-Cola faced accusations of monopolistic behavior that disrupted market competition (OECD, 2021).

#### *4.5. An Overview of Dispute Resolution and Arbitration Challenges*

While Foreign Direct Investment (FDI) is often hailed as a vehicle for economic development and technological advancement, it is not without significant shortcomings—particularly in the realm of dispute resolution. Disputes between investors and host states frequently arise due to issues such as regulatory changes, expropriation, or breaches of investment agreements. Arbitration, especially under mechanisms like Investor-State Dispute Settlement (ISDS), has become the dominant mode of resolving such conflicts. However, literature increasingly highlights several flaws in these processes that undermine both investor confidence and host country sovereignty.

**Imbalance of Power and Host Country Sovereignty:** A prominent criticism of arbitration under ISDS is the power imbalance it perpetuates between multinational investors

and developing countries. Many bilateral investment treaties (BITs) allow investors to bypass domestic legal systems and take disputes directly to international arbitration. This practice often undermines national legal institutions and diminishes the state's ability to regulate in the public interest (Van Harten, 2007). For instance, governments that enact environmental or public health regulations may be sued by investors claiming indirect expropriation or unfair treatment. The *Philip Morris v. Uruguay* case is emblematic, where the state was sued for introducing tobacco regulations, although it eventually won. The sheer cost and time involved in arbitration, however, often discourage countries from pursuing legitimate regulatory actions (Titi, 2014).

**High Costs and Protracted Proceedings:** Arbitration proceedings are notoriously expensive and lengthy, often taking several years and costing millions of dollars. According to the UNCTAD (2023), the average cost of an ISDS case exceeds \$8 million, with some cases reaching as high as \$30 million. This financial burden is particularly detrimental for developing countries, where legal and financial resources are already constrained. Moreover, these costs can dissuade states from defending themselves, sometimes opting for costly settlements to avoid reputational damage or economic retaliation.

**Lack of Transparency and Accountability:** Traditional ISDS arbitration is largely confidential, raising concerns about transparency and public accountability. Unlike domestic courts, arbitration tribunals are not bound to disclose proceedings or rationale for decisions, and arbitrators are not subject to standard rules of judicial conduct. This opacity erodes public trust and creates a perception of bias toward corporate interests (Bernasconi-Osterwalder, 2014). Recent efforts like the UNCITRAL Transparency Rules and the Mauritius Convention on Transparency have aimed to address these gaps, but adoption remains limited, and many BITs still prioritize investor confidentiality over democratic scrutiny (Gaukrodger & Gordon, 2012).

**Inconsistency and Lack of Precedent:** Another major shortcoming is the lack of consistency in arbitral decisions. Since arbitration panels are not bound by precedent, similar cases may yield wildly different outcomes, contributing to legal uncertainty. For example, the cases of *CMS v. Argentina* and *LG&E v. Argentina*, both concerning emergency economic measures, resulted in contradictory rulings on what constituted a breach of fair and equitable

treatment (Schreuer, 2005). This legal fragmentation complicates risk assessment for both investors and states.

**Regulatory Chill and Developmental Constraints:** The threat of arbitration can lead to regulatory chill, wherein governments refrain from enacting social or environmental regulations to avoid litigation. This dynamic undermines efforts toward sustainable development and disproportionately affects marginalized communities (Tienhaara, 2009). Developing countries in particular may be compelled to maintain investor-friendly but socially detrimental policies out of fear of being taken to international tribunals.

**Limited Recourse for Host Countries:** While investors can initiate claims, states have no equivalent mechanism to counter-sue investors for violations of national laws or contractual obligations. This one-sided framework contributes to a systemic asymmetry, allowing investors to hold states accountable while largely insulating themselves from reciprocal legal obligations (Van Harten, 2007).

#### *4.6. Recommendations for Mitigation*

Addressing these challenges requires a multi-faceted approach. Strengthening legal institutions to ensure consistent enforcement, adopting anti-corruption measures, and revising BITs to balance investor protections with national sovereignty are critical. Furthermore, aligning FDI policies with sustainable development goals—through frameworks like the UN Guiding Principles on Business and Human Rights—can enhance long-term benefits for host nations (UN, 2011; OECD, 2020).

## **5. Comparative Analysis: FDI in Developed vs. Developing Countries**

Foreign Direct Investment (FDI) varies significantly between developed and developing nations due to differences in economic goals, legal protections, and regulatory environments.

### *5.1. Investment Objectives*

In developing countries, FDI primarily targets natural resource extraction and infrastructure projects, addressing capital shortages and basic economic needs. For instance, the China-Pakistan Economic Corridor focuses on energy and infrastructure, essential for Pakistan's development (UNCTAD, 2019). Conversely, developed nations attract FDI in high-value sectors such as technology and advanced manufacturing, supported by robust intellectual property frameworks like the TRIPS agreement (WTO, 2020).

### *5.2. Regulatory Frameworks and Legal Protections*

Developed countries typically maintain stable regulatory environments and advanced dispute resolution mechanisms. In *Philip Morris v. Australia*, Australia upheld public health regulations against investor challenges, demonstrating the ability to balance sovereignty with investment protections (ICSID, 2014). Developing nations, on the other hand, often face inconsistencies and corruption, as highlighted by *Vodafone v. India*, where retroactive tax claims created uncertainty for investors (PCA, 2016). These discrepancies underscore the need for transparent and predictable legal systems in developing economies.

### *5.3. Dependency and Diversification*

Developing countries frequently rely on FDI in resource-dependent sectors, such as Zambia's reliance on copper mining, which exposes them to global commodity price fluctuations (UNCTAD, 2019). In contrast, developed economies attract diverse FDI across multiple industries, reducing vulnerability to sector-specific risks and external shocks.

### *5.4. Economic Impacts and Challenges*

While developed nations leverage FDI to enhance innovation and global competitiveness, developing nations often struggle with challenges such as environmental degradation and weak governance, which can undermine the benefits of foreign investment (Sornarajah, 2017). Addressing these issues through better regulatory practices and diversified investment strategies is critical for sustainable development. In conclusion, while developed countries benefit from strong institutions and diversified FDI portfolios, developing nations must improve legal frameworks, reduce dependency on single sectors, and align FDI with broader development goals to maximize its potential benefits.

## 6. Case Studies

The worldwide panorama of Foreign Direct Investment (FDI) demonstrates several examples of its transformational influence, while also emphasising the economic and legal complications it imposes. This section looks at two case studies: Chinese investment in African infrastructure and FDI in Peru's extractive industry. Each exemplifies the two-edged character of FDI, providing insights into both the economic benefits and the legal and ethical issues it can raise.

### *6.1. China's Investment in African Infrastructure*

China has emerged as a prominent African investor, notably in infrastructure development through the Belt and Road Initiative (BRI). Investments in nations such as Ethiopia and Kenya have boosted economic growth and increased regional connectivity. For example, the Nairobi-Mombasa Standard Gauge Railway in Kenya, which was sponsored and built by Chinese companies, has decreased transportation costs and increased commerce throughout East Africa (OECD, 2020). Similarly, Ethiopia's railway connecting Addis Ababa and Djibouti has increased access to global markets, demonstrating the power of FDI to reshape local economies.

However, such efforts have not gone without controversy. The *Zambia v. China Nonferrous Metal Mining Group* case exemplifies the issues of labour rights and environmental compliance. Zambian miners complained about dangerous working conditions and unjust treatment at Chinese-operated copper mines, prompting national and international condemnation. Environmental organisations also expressed worry about the impact of mining activities on local ecosystems, claiming breaches of Zambia's Environmental Protection and Pollution Control Act. These disagreements emphasise the dichotomy between economic development and the implementation of labour and environmental norms, emphasising the importance of host countries establishing strong legal frameworks to oversee foreign investments (UNCTAD, 2019).

### *6.2. Extractive Industry in Peru*

Peru's abundant natural resources have drawn significant foreign direct investment, mainly from the United States and China, propelling the nation to the top of the world copper and gold production rankings. While these investments have considerably boosted Peru's GDP and infrastructure development, they have also raised difficult legal and ethical issues.

The *Doe v. Newmont Mining Corporation* case demonstrates the negative aspects of FDI in the extractive industry. Local communities accused Newmont, a US-based mining company, of environmental degradation and human rights breaches at its Yanacocha mine, one of the world's largest gold mines. Allegations included water poisoning, forced displacement, and intimidation of environmental activists. The case highlighted the shortcomings of Peruvian environmental legislation and enforcement systems, as well as the restricted options for redress (EarthRights International, 2015).

This case highlights the need for better environmental and human rights safeguards in FDI agreements. It also emphasises the importance of international mechanisms such as the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights, which encourage both host countries and investors to maintain ethical and legal standards in foreign investments (OECD, 2021; UN, 2011).

These case studies highlight the enormous potential and hazards that come with FDI. While China's infrastructure investments in Africa demonstrate the potential for economic change, the Zambia and Peru instances highlight the vital need of striking a balance between development ambitions and strong environmental, labour, and human rights regulations. These instances emphasise the need of host governments implementing strong legislative frameworks and investors adhering to international corporate responsibility norms.

### *6.3. FDI in Bosnia and the Western Balkans: Impacts and Lessons*

Foreign Direct Investment (FDI) has played a crucial role in the economic recovery of Bosnia and Herzegovina and the broader Western Balkans. In Bosnia, ArcelorMittal's investment in the Zenica steel plant revitalized industry and created jobs, but also caused severe air pollution due to weak environmental regulation (FIPA, 2020; Hrnjić, 2019).

Similarly, the EFT Group's Stanari power plant improved energy capacity but increased carbon emissions (World Bank, 2017).

In Serbia, Fiat's investment in Kragujevac modernized the automotive sector and boosted exports, yet was heavily subsidized by the government and offered limited domestic supply integration (Jovanović, 2015). North Macedonia's industrial zones attracted firms like Johnson Matthey, fostering industrial growth, though with minimal local economic linkage (OECD, 2021). Albania's Trans Adriatic Pipeline improved infrastructure but raised concerns over land rights and short-term benefits (Energy Community Secretariat, 2020).

Overall, FDI has delivered jobs, technology, and export growth but often at the cost of environmental harm, low wages, and state-dependence. To maximize benefits, the region must enforce stronger governance, environmental safeguards, and sustainable investment policies.

## **7. Recommendations for Policy Reform in Developing Countries**

To reap the advantages of Foreign Direct Investment (FDI) while minimising its hazards, emerging nations must implement comprehensive policy changes. These changes should attempt to build legislative frameworks that are stable, transparent, and investor-friendly, while protecting the environment and human rights. The following are specific proposals supported by examples from nations that have achieved significant success in combining investment growth with sustainability and social fairness.

### *7.1. Reforming Investment Laws for Greater Stability*

Streamlined bureaucratic procedures are required to attract and maintain international investors. Complex and irregular regulatory regimes can dissuade investors by raising the cost and time necessary for project clearance. Rwanda is a prime example of successful change. The Rwanda Development Board has greatly improved the country's Ease of Doing Business ranking by digitising investment procedures and lowering bureaucratic barriers, attracting major FDI in sectors such as renewable energy and infrastructure (World Bank, 2020).

Other developing countries might follow Rwanda's lead by streamlining permission processes, establishing centralised investment agency, and encouraging openness in regulatory standards. Such safeguards not only boost investor confidence, but also limit potential for corruption, which is a chronic problem in many emerging economies.

### 7.2. Strengthening Legal and Environmental Protections

Developing nations must include strong environmental and human rights safeguards in their FDI legislation and bilateral agreements. Brazil's Amazon Fund, which was established to battle deforestation and promote sustainable development, serves as an example. The fund, which receives international contributions from countries such as Norway and Germany, illustrates how strong environmental policies may coexist with economic development in resource-rich regions (OECD, 2019).

Furthermore, including principles from international frameworks like as the Equator Principles and the United Nations Guiding Principles on Business and Human Rights can assist to guarantee that FDI projects respect local populations and ecosystems. Developing nations should also develop their domestic legal systems to enforce compliance and enable redress to impacted parties, as seen by Brazil's expanding environmental litigation framework.

Policy improvements in developing nations should prioritise balancing the facilitation of FDI with the enforcement of environmental, social, and governance regulations. Nations may establish an investment climate that attracts international capital while protecting long-term development and local people rights by streamlining bureaucratic processes and improving legislative safeguards. These measures not only strengthen economic resilience, but they also line with worldwide best practices, opening the road for equitable growth and long-term prosperity.

## 8. Conclusion

Foreign Direct Investment (FDI) is a vital engine of economic development for many developing nations, offering enhanced infrastructure, technology transfer, and job creation. However, challenges such as political risks, regulatory complexities, and economic dependency necessitate strategic policy measures to maximize benefits while minimizing

risks. Strengthening legal frameworks, simplifying bureaucratic processes, and curbing corruption are critical steps to creating a favorable investment climate.

To optimize FDI's potential, developing nations must diversify investments beyond resource-based industries and align them with Sustainable Development Goals (SDGs). Encouraging investment in technology, education, and renewable energy sectors can reduce vulnerabilities, enhance economic stability, and promote innovation. By fostering transparent and predictable regulatory environments, nations can attract sustainable and equitable investments that support long-term development objectives.

Regional cooperation, as exemplified by initiatives like the African Continental Free Trade Area (AfCFTA), can further bolster investment outcomes by harmonizing policies, facilitating trade, and creating shared infrastructure. These collective efforts can drive inclusive growth, strengthen regional economies, and position nations for greater resilience against global economic shocks.

FDI's transformative potential requires more than attracting capital; it demands robust governance, comprehensive reforms, and adherence to international standards. By addressing current challenges and implementing targeted strategies, developing nations can leverage FDI as a catalyst for sustainable growth, equity, and resilience.

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### **Other Relevant Frameworks/Principles**

Equator Principles.  
OECD Guidelines for Multinational Enterprises.  
UN Guiding Principles on Business and Human Rights.  
UN Sustainable Development Goals (SDGs).

