

## The Constitutionality of Fine Imposition Under the Nigeria Data Protection Act, 2023 and its Implications

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### ABSTRACT:

The Nigeria Data Protection Act, 2023 is a groundbreaking step in knowledge about Nigerian digital governance as it creates a legal regime for data protection and introduces penalties for those entities that fail to conform to the Act. Considering the constitutionality of fine imposition under the Act, this paper attempts to establish whether the imposition of a fine is in conformity with the constitutionally prescribed provisions of the rule of separation of powers, the right to a fair hearing, and the principle of proportionality. To what extent these provisions affect the individual and the corporate organisations forms another discussion of the paper. In respect of individuals, the Act promotes legal consciousness, alertness, and responsibility in data protection regimes. From a corporate standpoint, compliance is emphasised, apart from raising substantial financial, operational, and reputational consequences for noncompliance. Finally, this research recommends that legal modifications ensue to keep the judiciary involved in the imposition of fines.

**KEYWORDS:** Constitutionality, Nigeria, Data Protection Act

### 1. INTRODUCTION

Before The enactment of the Nigeria Data Protection Act (NDPA), 2023 is a landmark step in protecting individual's privacy and the demand of accountability in handling data. The Act was officially designed with the goal of offering a comprehensible legal regime to the handling, protection and processing of personal data and governing institutions which process sensitive data. It is equally relevant to both public and private bodies to maintain order with relevant data protection regulations. This is enhanced by the provisions that allow the imposition of fines and penalties for any illegal practices on data, which makes individuals respect the Act. The propriety of these fines has been subjected to various debates. Interestingly, the use of fines can be seen as violating individual rights such as the right of privacy and the right to a fair hearing provided in the Nigeria Constitution 1999. It unleashes certain issues of legal nature that relates to the constant tension between enforcement of the laws on the one hand and legal praising on the other hand. In another argument, invoking constitutional provisions strengthens the rationale and the stability of law enforcement thus enhancing the credibility and efficiency of the Act. Following this, this article tilts towards examining the constitutionality of fine imposition under the Act, as well as the accompanying implications of such power.

## 2. NORMATIVE STRUCTURE FOR FINE IMPOSITION UNDER NDPA, 2023

The NDPA, 2023 recognizes and sets out a legal regime for enforcing data protection standards. At the heart of this framework is the creation of the Nigeria Data Protection Commission (NDPC). Notably, the role of enforcement is one of the tasks performed by the NDPC. For instance, the Commission can make an order directing a data controller or data processor who has failed or is likely to fail to observe, respect any provision of the Act. These orders prevent and correct potential and real violations and range from recommendations against a particular breach to compliance with a specific legal provision. However, central to the core of this research, the NDPC is also charged with the responsibility of power to fine.

More certainly, the Act establishes the power of the NDPC to execute enforceable undertakings and penalties after investigation. This section presents a variety of sanctions with the shifts to financial aspects, namely the payment by an organization to compensate data subjects or loss of the gained profit based on breaching the rules. Financial penalties are one of the main innovations of the Commission's power, and they are divided into two levels. The "higher maximum amount" applies where the data controller or processor is a controller or processor of 'major importance' and is fixed, at the larger of, ₦10 million or 2% of the gross revenue for the year. In the case of less significant entities, the "standard maximum amount" is ₦2,000,000 or two (2%) percent of the entity's gross revenue for the year.

When imposing sanctions under Section 48, certain considerations are taken into consideration some of them include the following: nature of the infringement; seriousness of the infringement; the duration of the infringement; the intention or recklessness of the offender; the level of cooperation by the offender with the NDPC; and the kind of personal data that was infringed. This structured approach is marginal in ensuring that the penalties are a reflection of the nature of the offence more than attempting to make compliance difficult to discourage non-compliance. The Act also guarantees the right to judicial review, even after the imposition of fines or other enforcement procedures. Evidently, the NDPA's framework for fine imposition integrates preventive, corrective, and punitive measures to promote compliance and uphold data protection standards. However, there still exist debates as to its propriety.

## 3. EXAMINATION OF CONSTITUTIONALITY

The constitutionality of fine imposition under the Act has significant implications for the rule of law including key constitutional principles such as the separation of powers, the right to a fair hearing, and proportionality of the fine imposed.

### 3.1. SEPARATION OF POWERS

Nigeria operates a constitutional democracy in which the powers of government are divided between the three arms of government, namely: the legislature, the executive and the judiciary. Section 47 of the NDPA gives the Nigeria Data Protection Commission, an executive arm, the power to give directives and orders of compliance which include fines as well against data controllers or processors under the Act. In the same way, the Act legalizes the practice of imposing penalties after investigating by the NDPC. This leads to a very important question whether such administrative fines intrude into the jurisdiction of the courts.

As it is provided for under the Nigerian Constitution, the function of interpreting the law and making decisions, including penalties, belongs to the judiciary only. There are arguments that the power of the NDPC to fine offenders is an unjustifiable encroachment on judiciary powers hence the violation of the doctrine of separation of powers. The Court of Appeal case of *National Oil Spill Detection and Response Agency (NOSDRA) v. Mobil Producing Nigeria Unlimited (Mobil)* also echoes this where it stated that "by the imposition of the fine, the appellant (NOSDRA) acted in a judicial capacity, which they are not imbued with under the Constitution. By so doing, the appellant became a judge in its own cause, the complainant as well as the judge, contrary to the maxim *nemo iudex in causa sua*." Nonetheless, the supporters of the NDPA argue that the functions vested in the Commission are administrative rather than adversative or judicial in nature since the action of the Commission is more regulatory than punitive. In addition, Section 50 of the Act safeguards the right of the aggrieved parties to seek a judicial review to challenge the decisions made by the NDPC. This safeguard helps reduce the problem of excessive power of the executives by allowing the administrators decisions to be controlled by the judiciary. However, legal risks which could bring about constitutional innovations are possible when the enforcement measures applied by the NDPC are

viewed as operating extrajudicially, or where the actions encroach on the exclusive domain of the courts in matters of law in Nigeria.

### 3.2. RIGHT TO FAIR HEARING

The International Safe Abortion Day is celebrated worldwide on 28th September of every year. Reducing maternal mortality rate is one of the United Nations Sustainable Development Goals (SDGs) which necessarily implies the minimizing of deaths owing to unsafe abortions and unwanted pregnancies. WHO says that abortion care is an essential part of health care, which further is included in right to health. Guaranteeing safe abortion rights and safe abortion along with a comprehensive health plan involving abortion is the first step towards achieving the Sustainable Development Goals (SDGs) concerning good health and well-being (SDG3) and gender equality (SDG5). *Roe v. Wade* is the landmark case on abortion which was decided by the Supreme Court of United States giving the right to abortion to the petitioner by making it a part of Constitution of the United States under the fundamental right to privacy, thus striking down various laws which were restricting or abolishing the right of abortion by some of its states. It initiated a debate on the issue of abortion as to whether it should be allowed under the law or not and if allowed, up to what limit it should be regulated. In the present case, the court also remarked that abortion is not an absolute right as it is qualified by the condition of protection of concerned women's health and life. The decision developed a system of trimesters based on which the state can decide whether and when to allow or disallow the abortion in each case. The court held that during the first trimester, the woman has inviolable right to abortion if she wants to terminate the pregnancy, followed by the second trimester where the discretion of state comes in, regulating the abortion rights so that maternal health is not compromised and the final trimester where state can even prohibit the abortion totally considering the status of foetus. But this historic judgment has been overruled recently by *Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization et al.* in which the constitutional status given to abortion rights has been denied outrightly and instead held that states are free to restrict and enact laws on abortion.

The International Conference on Population and Development's (ICPD) Programme of Action 1994 was the first international instrument in which the states acknowledged reproductive rights as an essential part of human rights. It called upon the states to ensure and enact a comprehensive adoption care program for protecting women against unsafe abortion.

There are various regional international authorities which have recognized abortion rights as an essential corollary of human rights. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) has undoubtedly considered that abortion should be conferred as a right on women especially in cases of "sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."

As per the Population Research Institute however, it condemns abortion vehemently by interpreting article 6 of the International Covenant on Civil and Political Rights (ICCPR). "Article 6 of the ICCPR recognizes the inherent right to life for every human being. This necessarily includes the right to life of the unborn child and the human person in all stages of development and at the end of life." Thus, it holds that abortion is not a right recognized internationally. Abortion finds no mention in any of the widely claimed international treaties or agreements. There are frequent mentions of protection of maternal health and well-being along with the right to life of every individual, which usually is interpreted to include right to life of unborn person, thus questioning the legalizing of abortion process.

### 3.3. PROPORTIONALITY OF FINES

The principle of proportionality means that a punishment that is given for the offense must be directly proportional to the violation committed. The fines reaching the higher maximum of the NDPA are categorized at the significance of the violator while the fines that reach the standard maximum amount of the NDPA are considered at a lower level of the violator's significance. The maximum fine for major entities is ₦10 million or 2% of annual gross revenue, while that of smaller entities is ₦2 million or 2% of gross annual revenue.

Though these fines may be used to enforce compliance and to punish the defaulters, their imposition might well be challenged for being unconstitutional having regard to the principle of proportionality. Penalties may be considered and be unconstitutional especially where they are harsh and exceed the provisions of Section 34 of the Constitution

on cruel and inhumane treatment. For example, applying a penalty that is hefty compared to the financial means of a data controller can be considered as serving a penal purpose rather than a corrective one hence being unconstitutional.

Furthermore, the discretion that is given to the NDPC in the determination of fines is another factor that can lead to arbitrariness. For instance, the Act highlights aspects like the nature of the infringement, intention of the offender, and harm caused but it lacks specific guidelines for implementation hence increases the chances of unpredictability of the enforcement. This could open a stage for constitutional questions where fines are regarded as high, unjust or imposed selectively.

The NDPA's fee imposition provisions demonstrate a sincere attempt to uphold Nigeria's data privacy regulations. Its validity, however, rests on its respect to fundamental values including proportionality, the right to a fair trial, and the separation of powers. Although some worries are allayed by the presence of judicial review and procedural safeguards, the Act must be applied fairly and transparently in order to pass constitutional scrutiny.

#### 4. IMPLICATIONS OF FINE IMPOSITION UNDER THE NDPA

The enforcement of fines for breach involves far-reaching repercussions for individuals and corporate organizations. These implications influence legal understanding, operational tactics, and the culture of compliance, determining how data protection laws are understood and enforced in Nigeria.

##### 4.1. IMPLICATIONS FOR INDIVIDUALS

1. **Legal Awareness and Accountability:** The NDPA greatly increases the legal literacy of an individual in terms of his or her rights to data privacy. The public now possesses a greater understanding of their legal rights, including when and how to file a lawsuit for infringement of data rights. Altogether, through the sanctions for breaches and misuse, the Act does help people understand their role in making organizations responsible for data exposure. It also helps in creating the awareness needed for a society that will always respect the privacy of those using information. On the issue of fines and penalties, therefore, it can be said that because the NDPA has provided for them without any ambiguity, the message to individuals is to wake up and start paying attention to how their data is processed.
2. **Deterrent Effect:** The NDPA also acts as a deterrent for those who may be tempted to abuse or violate the rights of data privacy. Most unauthorized access, hacking, or other related data misuse today attract high fines making everyone avoid such incidences. Also, the possibility of fines means that during interpersonal interactions people also act carefully when dealing with such information. The Act seeks to respect the privacy of personal data and sends a word around that misusing this right will not go unnoticed.
3. **Encouragement of Vigilance:** The fines they give under the NDPA encourage people to be careful about how their data is processed. The public is expected to be more concerned about the records management of entities and would report any perceived violation to the Nigeria Data Protection Commission. It has a snowball effect that results into firms placing much emphasis in both the matters revolving around compliance and transparency. It allows people to call for answers themselves, which brought equal participation of both the public and the authorities in data protection and the corresponding legislation.

##### 4.2. IMPLICATIONS FOR CORPORATE ORGANIZATIONS

1. **Compliance Costs:** The NDPA costs corporate organisations a lot of financial and operational resources. The legal requirements are to recruit data protection officers, perform periodical assessments, institute effective safeguards for information, and educate people on the laws in data protection. These activities entail hefty cost implications, which could prove unsustainable for SMEs, especially due to a lack of enough capital or funds required to support them. Thus, although larger corporations may be able to take on these expenses, the smaller companies can be severely affected. For these businesses, regulatory compliance failure and associated penalties create another form of financial risk and therefore the need for preventive spending on compliance.
2. **Risk of Reputational Damage:** Failure to conform to the provisions of the NDPA leads to public reporting of violations with resultant reputational losses. These occurrences are likely to undermine consumer confidence, reduce stakeholders' confidence and attract unfavorable attention. For instance, a corporation

that has been penalized for failure on handling customer data may be boycotted, subjected to lawsuits, or loss of market share. Another concern that provides a good incentive for protection is the reputational risk.

To manage this risk, stakeholders within organizations need to be informed of what the organization does and the efforts it is willing to put in place to protect personal data.

3. **Economic Impact of Fines:** The penalties that have been laid down under the NDPA range from ₦10 million or 2% of an organization's annual gross revenue. Such fines may be a challenge especially to the SMEs who operate under a tight and constrained cash-flow situation since if such organizations have to pay such fines, it may collapse the business. For large businesses the issues of economic consequences are also vast. High fines have the potential to lower profitability as well as destabilize operations of the market and can drain resources. At times, fines inflicted results in organizational changes, including impact on employees, shareholders, and users. Moreover, organizations may also be at a high risk of losing credibility from the regulators and shareholders and the public in the event that they do not meet the new compliance measures; it will also make the organizational operations tough.

The ways by which the NDPA has formulated to impose fines are important for increasing data protection, and especially for making firms more accountable in Nigeria. That is why they help people become more cautious, attentive, and responsible for their data; at the same time, they force companies to pay attention to compliance. However, the framework gives rise to some problems, like considerable compliance costs for SMEs or financial/reputational losses for big organizations. To achieve its goal, the Act relies on proportional regulation, good communication, and cooperation among the parties involved in shaping the culture of responsible data processing in the digital age.

## 5. RECOMMENDATIONS

### 5.1 ENSURING CONSTITUTIONALITY

Revisions should clear up conflict with constitutional provision, and keep the judiciary involved in the imposition of fines. The inclusion of measures for the courts or independent panels to assess penalties would act as a protection measure to ensure that procedural fairness is observed as well as the implementation of the rule of law.

### 5.2 POLICING AND EQUITABLE OUTCOMES

There must be clear measure to proclaim dispositions mobilizing fines to avoid arbitrary decisions. This means that there is need for transparent appeal and review mechanism in order to safeguard the rights of stakeholders and public confidence on enforcement initiatives.

## 6. CONCLUSION

The Nigeria Data Protection Act symbolises a progressive achievement to the formation of a sound data protection framework in the nation. However, the imposition mechanisms for these fines need to be reviewed and fine-tuned in order adhere to constitutional provisions and hence fairly imposed. It is thus important to encourage forceful compliance while, at the same time, instituting measures that recognize legal entitlements and financial considerations. Finally, the reinforcement of regulators, businesses and the population themselves seem to be an imperative for the formation of an effective data protection environment in which no one will be able to act unilaterally. This balanced framework will not only protect people's data, but it will also create trust and confidence in the Digital Nigeria plan.

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