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Imperativeness of Making Renewable Energy an Option in Nigeria's Power Industry: The Legal Perspective

Olujobi, Olusola Joshua (Ph.D)[1]

Abstract

Non-renewable fuel has been the predominant source of the power supply in Nigeria and it constitutes a significant drain of the country's foreign exchange. The fact that Nigeria experiences erratic and epileptic poser supply is no longer a news. Many industries and factories, educational and social institutions that rely on constant and uninterrupted power supply have left the country or turn to non-renewable energy as a substitute. Most households and small scale businesses and individual citizens opt for alternative electricity and energy supply in form of electricity generating sets in spite of the fact that it is a major cause of environmental hazards due to the heavy discharge of greenhouse gases.

Energy sustainability and security have been a challenge to Nigeria fiscal growth owing to excessive reliance on non-renewable energy notwithstanding the apparent statistics that fossil fuel will rapidly turn out to be a substitute relinquished in the industry as energy has advanced from sustaining domestic necessities and commercial requests to conserving power bases for durability and conservation. This would have some effects on the country's petroleum industry owing to the present economic shocks and global decline in crude oil price. The world is moving towards embracing the design of a novel energy strategy which will act as a substitute or replace the current non-renewable energy. Nigeria as a country cannot be in isolation and must move towards embracing

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the new strategy of putting in place renewable energy that will be sustainable with less hazards on the environment.

This research paper appraised resource curse and sustainable development theories owing to their influences on renewable energy in the power industry. The research adopts a doctrinal approach with library-based legal research technique infused with the comparative legal method. The research reveals that there is absence of comprehensive legal regime to encourage the use of renewable energy in Nigeria and this is seen as a fundamental defect as there are no policies to drive the necessary push.

This research calls for reforms among which is the need to bring about policy formulations and legal framework that could drive the regulation, use and encouragement of renewable energy sources in Nigeria.

Keywords: **Fossil Fuel, Nigeria, Sustainability, Renewable Energy, Non-Renewable Energy.**

JEL Classifications: K12, Q5, K32, Q4, K2, K42

1.0 Introduction

Non-renewable fuel has to be the primary source of power supply globally owing to excessive reliance of several nations on fossil fuel as their primary sources of energy and foreign exchange incomes with the consistent oil surges. Non-renewable fuel usage has occasioned discharge of greenhouse gases which are untenable generally[2]. Thus, the ecosystem is under risk by crude oil explorations, production and the use of oil and thus, there is regular warming up of the earth's environment and exhaustion of the ozone layer occasioning amplified in greenhouse gases discharged into the ventilation. Also, human beings, the vegetation and the animals have seriously been affected by

[2] P Oniemola, and G., Sanusi, The Nigerian Bio-Fuel Policy and Incentives, a Need to Follow the Brazilian Pathway, (2007), available at www.igee.org/en/publication/newsletter (accessed August 27, 2020).

ecological deterioration and dilapidation occasioned by the oil exploration and similar activities in the Niger Delta Areas of Nigeria[3]. Therefore, there is a necessity for a new energy policy that will encourage renewable energy in Nigeria. Thus, the Nigeria power sector must move beyond mere denationalisation but should necessitate inevitable energetic and regulatory reformation for maintainable, ecological and public responsive energy laws in Nigeria. There are numerous capacities for renewable energy sources obtainable in the country's tropics, with its landmass widening amid latitudes 5 degrees south and 15 degrees north of the equator. Nigeria possesses excess sunlight[4] (Renewable Energy Policy of Nigeria 2006) particularly in the northern part of Nigeria where the sunlight can produce approximately 1850 X 103 GWh/yr of solar power which exceeded the present grid of energy consumption in the country[5]. This will promote efficient utilisation of solar power. Biomass is renewable, low carbon fuel that is widely accessible throughout the country and it will ensure continuous energy supply to rural areas however there is no comprehensible legal regime on renewable energy up till now in the country.

Conversely, the government has an enormous reserve of natural resources for alternative energy making such as productive cultivable fertile land, supportive climatic environments that is opulent in feedstock fabrication, for instance, cassava, maize, sugarcane, palm oil, among others.[6] The novel energy policy or strategy permits the many governments to deviate from the utilisation of fossil fuel, coal,

[3]O.J.,Olujobi, O.A., Oyewunmi, A.E., Oyewunmi, Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks, (2018), *International Journal of Energy Economics and Policy* 8(1), 220-226.

[4] Renewable Energy Policy of Nigeria 2006.

[5]O.J., Olujobi, The Legal Regime on Renewable Energy as Alternative Sources of Energy in Nigeria's Power Sector: The Impacts and the Potentials, (2020), Academy of Strategic Management Journal, 19(3), 1-19.

[6] O J Olujobi, D E Ufua, M Olokundun, O M Olujobi, Conversion of Organic Wastes to Electricity in Nigeria: Legal Perspective on the Challenges and Prospects, (2021), International Journal of Environmental Science and Technology, available at https://link.springer.com/article/10.1007/s13762-020-03059-3 or as a pdf (accessed December 9, 2020).

oil and natural gas to embrace substitute sources, for instance, renewable energy resources. Renewable energy sources include geothermal, biofuels, biomass, solar, wind, and hydropower among others. They can acquire from non-fossil and non-nuclear resources in methods that can be restocked; they are environmental responsive[7] This novel energy strategy or rule is a phenomenon. It is the panacea to one of the utmost difficulties battling the country and the world presently. Therefore, there is a need for production of energy or power devoid of fast-tracking climate change which may harm the ecosystem or damaging food production at any degree. Agreeing to the analysis of Jurgen Tritten past Germany's Federal Environmental Minister who orated that the use and growth of renewable energies is a state where the complete interested party will gain in one way or other comprising the developed jurisdictions and the developing nations. Renewable energy conserves the ecosystem, it eliminates deprivation, and it encourages novel technologies and initiates new job opportunities in the energy industry[8].

Similarly, the utilisation of renewable energy complies with the World Summit on Sustainable Development resolutions organised in Johannesburg, South Africa in 2002 where, over 30 countries stated their responsibilities in enhancing renewable energy resources use and in adjusting their energy synopsis in achieving this aim[9]. Consequently, numerous nations, for instance, Israel, China, Germany, Chile, Spain and Denmark, have embarked on a paradigm shift to new energy policy on renewable energy. For instance, Brazil has exhibited an absolute obligation to the development of renewable energy via the legislation on modern Hydropower rule and strategy,

[7] O J Olujobi, The Legal Sustainability of Energy Substitution in Nigeria's Electric Power Sector: Renewable Energy as Alternative, (2020), Protection and Control of Modern Power Systems, 5(32), 1-12.

[8] Y Oke, Nigerian Electricity Law and Regulation, Law, (2013), Lords Publication, 322.

[9] P Doran, World Summit on Sustainable Development (Johannesburg)-An assessment for IISD, (2002), Briefing Paper, available at https://www.iisd.org/pdf/2002/wssd_assessment.pdf(accessed April 9, 2020),6.

the Biodiesel Rule and the Ethanol Rule. The novel energy rule envisioned by the past United States of America President, Barack Obama, attempts to utilise additional alternate sources of energy is considered to be inexpensive and more ecologically responsive than crude oil and its associated commodities[10].Thus, the United States via her "Novel Energy Economy" attempt to put her populaces to reflect on clean energy financings appropriate circumstance, increasing attempts on fuel efficiency in cars and decreasing greenhouse gas discharge by safeguarding at least 25% of the country's electricity derives from renewable sources, for instance, geothermal, solar and wind[11].

The United Kingdom in 1990-2004 increased the current being produced from renewable energy in 12-folds. Kenya produced approximately 923 MW geothermal energy utilising wind and solar energy for electricity in 2010. The 2012 Kenyan Energy Rules required the compulsory installation of solar water heaters obligatory in all houses, particularly where there is an excess of 100 litres of water used per day. Effective incorporation of renewable energy into these nations' energy systems is achievable through strict and comprehensible implementation of their energy laws.[12]. Renewable energy is a unique way of developing energy industry in the country and to boost the advantages of renewable energy in Nigeria, it

[10] Obama, the All-of-the-Above Energy Strategy as a Path to Sustainable Economic Growth, (2004), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/aota_report_updated_july_2014.pdf (accessed September 10, 2020).

[11] R Lukman, US New Energy Policy a Threat to Nigeria's Oil and Gas Sector, (2009). a speech delivered at a roundtable meeting between US delegation and the Nigerian government officials, in Abuja on May 24, 2009, by the Honourable Minister of Petroleum, Rilwan Lukman, through his representative, the Special Adviser to the President on Petroleum Matters – Emmanuel Egbogah, available online at www.onlinenigeria.com, (accessed August 27, 2020).

[12]O J Olujobi, Legal Framework for Combating Corruption in Nigeria – the Upstream Petroleum Sector in Perspective, (2017), Journal of Advanced Research in Law and Economics, Viii, Summer, 3(25): 956 - 97.

necessitates appropriate planning with the robust legal framework on renewable energy to encourage investments in the industry.[13]

The trajectory and growth of electricity laws in Nigeria have been degenerating as regards the efficacy of regulatory and institutional legal regime that will enhance efficient management of electricity in the country. The obsolete National Electric Power Authority responsibilities on generation, conduction and allotment of electricity in Nigeria has been awful, erratic and defective as a plethora of legal regime and strategy legislated upon appear incapacitated of resolving the problems in the power sector. As the contemporary legal regime under the Electric Power Sector Reform Act 2005 presented, the Power Holding Company of Nigeria (PHCN) which was detached into 18 firms as part of the transformation activities of the industry has not developed to constant electricity supply in the country, thus the necessity for renewable energy to supplement the current sources of energy in Nigeria's power industry[14].Thus this paper shall consider the new energy strategy or policy in Nigeria.

2.0 Methodology

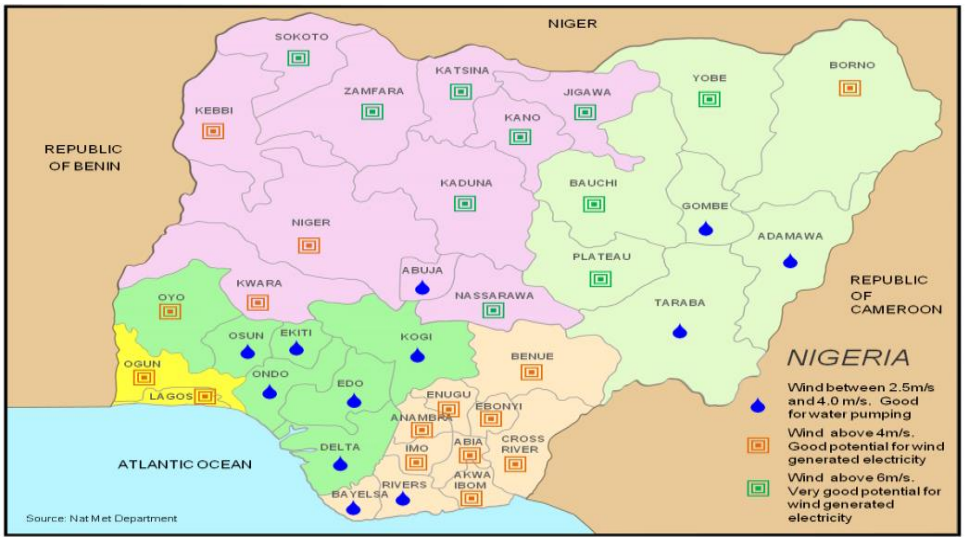
This study aims to implement the new energy policy that has been embraced by several countries in the world to promote energy security and sufficiency. The Federal Government of Nigeria must depart from the use of fossil fuel and embrace alternative source such as renewable energy resources to prevent depletion of the ozone layer. Similarly, man, flora and fauna have significantly suffered due to environmental pollution and degradation resulting from the incidence of oil exploration activities in Niger Delta Areas, Nigeria. To attain this creditable aim, the researcher explores the library-based doctrinal legal research method, validated by appropriate legal analysis, including a reference from internet sources, detailed evaluation of

[13]O J Olujobi, Nigeria's Upstream Petroleum Industry's Contracts: The Hurdles and the Legal Stopgaps, (2020), The Gravitas Review of Business & Property Law, 11(4), 170-186.
[14] *Ibid.*

academic literature, appraisal of case studies and the analysis of substantial judicial and statutory provisions with comparative analysis of the legal framework for promoting renewable energy in China, Spain, Germany and India among others.

The study adopts secondary sources, such as journals, textbooks and primary sources, such as case laws. Also, some unstructured interviews with some energy consumers and regulatory bodies in the sector were conducted to gain useful insights to suggest the need to use the lessons learnt in the selected case study countries to enact regulatory policy or legal framework on renewable energy for energy sufficiency and security in Nigeria.

Figure 1: Map of Nigeria Exhibiting Geographic Allotment of Nigeria's Compendium of Energy Sources[15]



[15]Renewable Energy Potentials, available at: https://www.get-invest.eu/market-information/nigeria/renewable-energy-potential/ (accessed August 27, 2020).

Table 1: The Matrix Nigeria's Renewable Energy Reserve per Capacities[16]

S/N	Energy Sources	Reserves
1.	Crop Scum	Eighty-three million tons/yr.
2.	Wave and Tidal Energy	150,000 Terajoule /(16.6 106 ton/yr.)
3.	Big hydro	11,235 megawatt
4.	Small hydro	3500 megawatt
5.	Animal desecrates	Sixty-one million tons/yr.
6.	Solar Energy	3.5–7.5-kilowatt-hours per day
	Wind	2–4 m/s at 10 m height

Table 2: Current and Future Electricity Mix in Nigeria[17]

S/N	Technology Type	Capacity (MW) 2003	Additional Capacity (MW) 2010	Additional capacity (MW) 2020	Additional capacity (MW) 2030
1.	Hydro	1920	Not Applicable	4740	5748
2.	Biomass	Not Applicable	Not Applicable	5	5
3.	Wind	Not Applicable	Not Applicable	20	20
4.	Solar PV	Not Applicable	Not Applicable	75	425
5.	Solar Thermal	Not Applicable	Not Applicable	1	20
	Total Calculation		7289	8280	12,858
	Aggregate Total	6472	13,761	20,276	29,394

[16] S A Abubakar, O D Joseph, K A Ibrahim, Current Status and Future Prospects of Renewable Energy in Nigeria, (2015), Renewable and Sustainable Energy Reviews 48, 336-346.
[17] Ibid.

3.0 Literature Review

Numerous scholars from the legal perceptive have written on the necessity for renewable energy sources in Nigeria. However, no one has contemplated the capabilities and the effects of renewable energy in the nation and the necessity for stringent compliance with the novel energy strategy or policy. Similarly, Omorogbe[18] deemed laws on renewable energy as inevitable for Nigeria's growth and the sustainability of Nigeria's energy industry. Over-reliance on fossil fuels as a source of energy is a significant concern due to its negative impact on the environment and its sustainability in the power sector[19].

According to Phebe Asantewaa Owusu and Samuel Asumadu-Sarkodie in their work "A Review of Renewable Energy Sources, Sustainability Issues and Climate Change Mitigation,"[20] Renewable energy sources replenished naturally devoid of depletion to satisfy human, social and economic development but fail to discuss the legal regime on renewable energy. Oke, in his work on "Essay on Nigerian Electricity Law"[21] opined that the fundamental challenge with the statutory and governance framework in the country is over-concentration of the management, tasks and organisational structures of the power industry instead of being decentralised which has assisted numerous nations in disabling electricity problem via off-grid renewable electricity generation, transmission, distribution for speedy

[18] Y Omorogbe, Promoting Sustainable Development Through the Use of Renewable Energy: The Role of the Law, in Beyond the Carbon Economy Energy Law in Transition, in D. N Zillman, C., Redgwell, Y.O., Omorogbe, L., Barrera-Hernandez, (2016), Oxford University Press, 39-59. Available at: https://www.researchgate.net/publication/290836523_Promoting_Sustainable_Development_through_the_Use_of_Renewable_Energy_The_Role_of_the_Law (accessed 20 Oct 2020).

[19] M F Akorede, O Ibrahim, S A Amuda, A O Otuoze, BJ Olufeagba, Current Status and Outlook of Renewable Energy Development in Nigeria, (2017), Nigerian Journal of Technology (NIJOTECH) 36,(1), 196 –212.

[20] P A Owusu, and S Asumadu-Sarkodie, (2016), A Review of Renewable Energy Sources, Sustainability Issues and Climate Change Mitigation, Cogent Engineering, 3:1, 1167990.

[21] Y Oke, (2016), Essays on Nigerian Electricity Law, Princeton and Associate Publishing Co. Ltd, Lagos, 93-113.

rural electrification for social, economic growth and comprehensive electricity governance in Nigeria.

Similarly, Oniemola, 2016[22] maintained that renewable energy advantages are more than its ecological and impacts. The current research opined that there is a necessity for model legislation with an incentive for the use of renewable energy as substitute sources of energy to promote investments in the industry. Similarly, Mallom[23] pinpointed the necessity for comprehensive policy growth and execution on renewable energy to encourage energy security and efficiency.[24] Oyedepo in his work opined that energy security is the cornerstone upon which every advanced economy is planned. However, the current research submits that affordability is the primary concern owing to persistent energy insecurity and inefficiency tolerated by energy consumers in Nigeria as a result of high tariff handed down *via* estimated billings so, there is the necessity for strict control via the instrument of laws to combat corruption and exploitation in the industry.[25]

4.0 Statement of Problems

Currently, the Federal Government of Nigeria has no comprehensive laws on renewable energy. Strategies and policies on energy are dispersed and are incoherent in Nigeria legal framework. The requests for electricity outweigh supply, and this has affected social and economic development in the country in the areas of commercial outputs, electricity customer well-being, human health via smoke breathing from domestic culinary and the usage of electricity generator sets to produce power. If this challenge is tackled, it will

[22] *Ibid.*
[23] K Mallon, (2006). Renewable Energy Policy and Politics, a handbook for Decision –Making. London: Earthscan
[24] S O Oyedepo, Energy and Sustainable Development in Nigeria: The Way Forward, (2012),Energy Sustainability and Society, 2(15), 1-17.
[25] *Ibid.*

have the capacity to lessen climate change consequences and to safeguard Nigeria's petroleum resources for sustainability.[26]

Numerous nations in the world, for instance, Germany, India and China and others are foremost trailblazers in renewable energy growth and utilisation. These nations have legislated on renewable energy utilisation and growth. unfortunately, the Federal Government of Nigeria is yet to legislate a comprehensive law on renewable energy. The predominant rules on renewable energy are dispersed in numerous policies and strategies papers, which are incoherent and ambiguous in scopes.

Furthermore, inefficient and inconsistent power supply configuration in Nigeria, have prompted losses of over 30% of the total energy generated. In addition to these shortcomings, the stability and availability of the installed energy production system are low. There is a critical problem of power inconsistency over the years such that many firms and wealthy families install pricey electricity generators set that cost over half of the total installed grid capacity. This constitutes enormous economic deficits to the Nigerian economy. The fundamental elements triggering irregularity and inefficiency in the power sector among other things are the persistent breakdown of generating plants and equipment owing to inadequate and insufficient repairs and absence of foreign exchange to acquire the required spare parts promptly, outdated transmission and distribution equipment which consistently break down, shortage of competent energy human resources plus deficiency of essential firms to service the industry.[27]

Pastoral inhabitants in Nigeria depend on crude energy systems such as indoor cooking devices which may occasion severe threat to human health via smoke inhalations which have triggered many avoidable deaths through stringent and coherent laws on renewable energy to

[26] *Ibid.*
[27] S O Oyedepo, Energy and sustainable development in Nigeria: The Way Forward (2012), Energy Sustainability and Society, 2(15), 1–17.

promote energy security, efficacy and sustainability[28] Renewable energies, for instance, wind, nuclear energy, biomass, solar and hydro, are used at the meagre ratio in Nigeria. At the same time, fossil fuels remain the primary sources of energy so, there is the necessity for intensive investments in the power industry to make renewable energy a substantial substitute source of commercial energy in Nigeria.

5.0 Theoretical Framework on Renewable Energy

Resource Curse Theory was formulated around 1970-1990. The principle assists the research by emphasising that emerging nations must safeguard the promotion and growth of renewable sources of energy via comprehensive laws that safeguard and highlight social, financial and ecological interests to satisfy the present necessity in addition to sustaining the same for upcoming generation's necessities. Emerging nations must guarantee that their extractive resources do not encourage under-development and other economic crises related to resources rich States, for instance, corpus poverty and low social infrastructures. The theories help the research by underlining the necessity to safeguard and protect the State's extractive resources for posterity needs. It also focuses on the need to boost the social and economic development of Nigeria via her copious petroleum resources for energy sustainability and the advantages of her populaces.[29]

The model assists in mitigating the consequences of climate change via the consistent implementation of the extant laws on energy in emerging petroleum exporting countries. It highlights that resources copious nations are mostly undergoing low economic growths. The theory emphasis that resources wealthy countries lacks economic prosperity and developments that are proportionate with their copious petroleum resources owing to predominant violent, corruption, failure

[28]O J Olujobi and T Olusola-Olujobi, the Appraisal of Legal Framework Regulating Gas Flaring in Nigeria's Upstream Petroleum Sector: How Efficient? (2019), International Journal of Civil Engineering and Technology, 10(5), 256-272.

[29] O J Olujobi, and O A Oyewunmi, Annulment of Oil Licences in Nigeria's Upstream Petroleum Sector: A Legal Critique of the Costs and Benefits, (2017), International *Journal of Energy Economics and Policy*, 7(3), 364-369.

to diversify their economies to another endowment such as agriculture, solid minerals among other things to supplement their industrial growths to tackle their numerous ecological problem.[30] It offers reasons for resources-rich countries underdevelopment due to failure to diversify timely and the prevalence of corruption in the nations. Therefore, there is need for strict enforcement of its existing laws on transparency in the extractive industries and other environmental laws to protect social, economic and other ecological interests in the industry[31].

Another pertinent theory adopted in this research is the Sustainable Development theory of 1980 which devised from Stockholm Conference on Human Environment in 1972 which provides that governments should utilise their extractive resources in a sustainable model for the growth that mollifies the existing necessities devoid of compromising the capacity and the inevitabilities needs of the upcoming generations. The theory assists the study in comprehending the necessity for efficient use of extractive resources, the strategy of financings, thrust of technological innovation and institutional, the legal framework in agreement with the international best practices for the sustainability of humankinds and nature. The theory underlines the need to utilise natural resources for the value and advantages of the present-day generations and upcoming generations without any detrimental effects on the ecosystems. Consequently, there is a necessity for the acceptance of renewable energy as alternative sources of energy in Nigeria's power industry to tackle the problem of epileptic power supply in the country. Nigerian policymakers must strive toward the greatest good for the most significant number by ensuring that their strategies and policies are fair and balanced to

[30] Ibid.

[31] O A Oyewunmi, O J Olujobi, Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-Engineering the Way Out? (2016), International Journal of Energy Economics and Policy, 5(4), 630-636

ensure energy security in the industry for the common good of Nigerians[32]

6.0. Legal Framework and Regulatory Agencies Regulating Renewable Energy

The 1999 Constitution of the Federal Republic of Nigeria (as amended) places electricity on the concurrent legislative list. This authorises all levels of governments to partake in significant phases of electricity distribution and allotment in the country, as stated in Paragraph 14 of Schedule II of the same Constitution.[33] Moreover, the Electric Power Sector Reform (EPSR) Act of 2005 underlines the meaning of renewable electricity in international energy mixture to ensure access to electricity in pastoral and remote areas. National Energy Policy of August 2003 stressed the full thrust of energy policy by safeguarding the best method for the utilisation of Nigeria's energy resources for sustainable development of the country's energy industry.

There are other energy policies such as the 2009 Draft Renewable Electricity Policy, the 2000 Renewable Action Plan and Renewable Energy Master Plan 2012, which encompasses plans for renewable energy in Nigeria's economy. Also, the National Energy Policy 2013, the Draft National Energy Master Plan (NEMP) 2014 which created the National Renewable Energy Development Agency with the statutory responsibility of making renewable energy a significant source of green energy in Nigeria's National Renewable and Energy Efficiency Policy (NREEP) 2015 and the reports on vision 2020.

The other regulatory institution in the industry is the Federal Ministry of Power and steel**,** and it has the following statutory tasks among other things: the power to recommend policy and to make recommendations to the Federal Government of Nigeria on laws,

[32]O J Olujobi, O M Olujobi, Re-Thinking and Optimizing Nigeria's Anti-Corruption Legal Framework: Upstream Petroleum Sector Corruption Evaluation (2020), Journal of International and Comparative Law, 8, 79-105.

[33]*Ibid.*

strategies and financings on renewable energy. It is authorised to monitor, appraise the application and performance of the policy within governmental agencies and in the electricity markets. To evaluate the performance of renewable electricity policy through an increase in access to electricity in rural areas in Nigeria is fundamental to boost the economy[34].

According to the new energy policy, the Federal Government through the Nigerian National Petroleum Corporation (NNPC) inaugurated Renewable Energy Division in NNPC to develop renewable energy initiative in August 2005 with the tasks of harnessing the bio-fuel in Nigeria for the satisfaction of energy customers. However, the division has not been efficient in carrying out this task. Lately, Nigeria approved a policy on bio-fuels called Nigeria Bio-Fuel Policy and Incentives 2007. The strategy was ratified by the Federal Executive Council on June 20, 2007, and gazetted as a National Bio-Fuels Policy. Under the policy, NNPC was to create an enabling environment for the commencement of a domestic ethanol fuel industry. Subsequently, Africa's first ethanol refinery was introduced in Ekiti State and Ondo State in 2009[35]. The aims were to reduce Nigeria's over-dependence on imported gasoline and to create a commercially sustainable energy industry that can employ the country's teeming youths. However, the reverse is the case currently in Nigeria's energy sector's slow development pace due to complete inefficiency in the industry.[36]

[34] Y M Ganda, B G Danshehu and I H Zarma, (2013), the Role of Renewable Energy in Improving Energy Access to Rural Areas in Nigeria, Being a Paper Submitted for World Energy Council DAEGU 2013 Congress From 13- 17. Available at: file:///c:/users/hp/downloads/theroleofrenewableenergyinimprovingenergyaccesstoruralareasinnigeria.pdf (accessed August 27, 2020).

[35] J Ben-Iwo, Biomass Resources and Biofuels Potential for the Production of Transportation Fuels in Nigeria,(2016), Renewable and Sustainable Energy Reviews 63, 172-192.

[36] O J Olujobi, A Adeniji. O A Oyewunmi, A E Oyewunmi, (2018), Commercial Dispute Resolution: Has Arbitration Transformed Nigeria's Legal Landscape?,

However, over US$4 billion has been earmarked for sugarcane-sourced ethanol project in Jigawa and Benue States, while cassava-sourced ethanol projects are to be established in Anambra and Ondo States. Also, the Bio-fuels Research Agency is to coordinate biofuel research in Nigeria and to work with the Ministry of Agriculture, Ministry of Science and Technology on crop production but the ministries have not been proactive in driving this projects due to lack of funds and the requisite technical know-hows on renewable energies. Furthermore, the Ministry of Science and Technology is to preserve records of all bio-fuel projects. Issue licenses to operators for the invention of fuel ethanol or biodiesel in the country. To enact, endorse financial, and other incentivise rules for the industry, among others. It is a trite fact that renewable energy will boost Nigeria's electric power industry since the current electricity supply satisfies only one-third of Nigeria's energy utilisation desires. It will preserve non-renewable energy sources for instance; it will preserve Nigeria's 36.5 billion barrels of crude oil reserves by shifting Nigeria's focus from crude oil to renewable energy thereby promotes clean, inexhaustible energy supply, protect the human and natural environment for socio-economic development. This will guarantee sustainable energy security in Nigeria.[37]

The Nigerian Electricity Regulatory Commission (NERC) is instituted by Electric Power Sector Reform (EPSR) Act 2005 to initiate, promote, and preserve efficient energy market structures for optimal utilisation of energy resources for electricity services. The commission is to improve access to energy services by boosting and empowering consumer connections to distribution systems in both countryside and city areas to guarantee a stable supply of electricity to consumers. However, the commission has not been efficient in this regard as several communities in Nigeria have not been enjoying

Journal of Advanced Research in Law and Economics, IX, Spring,1(31): 204 – 209.

[37]T S Akinyetun, Nigeria and Oil Production: Lessons for Future, (2016), International Journal of Multidisciplinary Research and Development, 3(5), 19-24.

constant power supply, and some have not been connected to the national grids for electricity supply. See the case of *Amadi v. Essein*[38] where the court affirmed electricity regulation, protection and the rights of electricity consumers in Nigeria's power industry.

Another institution is the Rural Electrification Agency established by the EPSR Act 2005 to extend the primary grid, to develop isolated, mini-grid systems and renewable energy for power generation. Also, the Energy Commission of Nigeria was inaugurated to conduct strategic planning and to harmonise domestic policies on energy. Other Agencies from which to seek advice in the execution of this rule are the Federal Government institutions, State Rural Electrification Boards and some relevant state agencies, organised private sector and Non-Governmental Organisations which are participants in the projects.[39]

Another law regulating the industry is the Nigerian Oil and Gas Industry Content Development Act, whose objective is to strengthen home-grown participation or to build local capacities in the Nigerian oil and gas industry. One of its regulatory tasks is to set the standards for local content, but this was not explicitly outlined under the Act. Sections 102 and 11(4) of the Act provide for the appraisal of the schedule to the Act every two years and the waiver clause on every three years after the enactment of the Act, but these have not executed to promote economic growth in the sector and to combat other uncertainties connected with the industry[40].

Furthermore, the proposed Petroleum Industry Governance Bill, (PIGB) 2017 emphasises on governance issues in Nigeria's oil and gas sector by separating the roles of the Nigerian National Petroleum Corporation (NNPC) from operating as a regulator as well as being a petroleum operator. To unbundling the corporation to two different limited liabilities firms. The purpose is to remove the discretionary

[38] (1994) 7 NWLR (Pt.354) 91 at 112.
[39] *Ibid.*
[40] *Ibid.*

power of the Minister of Petroleum to award oil licences or leases, but such authorities can only be exercised now based on the authorisation of the new commission called the Petroleum Regulatory Commission. It is the planned statutory body for the oil and gas industry. Expeditious passage of the bill into law by the current 9th National Assembly will encourage the desired reform in the industry in the areas of good governance, licensing, fiscal policy, restructuring of the corporation as a commercial legal entity to combat legal, regulatory challenges on gas utilisation, market, pricing and growth in Nigeria and Africa.

7.0. Results and Discussion of Findings

The research underlines the significance of renewable energy to sustainable electricity in Nigeria with emphasis on legal and policy framework that needs to be enacted to promote energy sufficiency and security via renewable energy. Nigeria's law for the utilisation and growth of renewable energy is incomprehensible and inadequate to meet the social, economic and environmental development needs of the country. The extant law for renewable energy is narrow in scope and not detailed. The Federal Government must do more to overcome all the challenges associated with the formulation of coherent legal regime on renewable energy to guarantee energy efficiency, security and sustainability in Nigeria. Many countries already mentioned in this study have enacted their laws on renewable energy use and development. Contrarily, the Federal Government of Nigeria which is yet to enact a coherent legal framework on renewable energy.

The existing policies on renewable energy are dispersed in numerous policy documents which are incoherent and narrow in scopes. Also, ineffective and erratic power supply structure in Nigeria has caused losses of more than 30% of the total energy produced. In addition to these inadequacies, the consistency and accessibility of currently installed electricity production system are very low. There is a severe problem of power irregularity over the years such that most industrial organisations and upper-income family circles install outrageous electricity generators set that cost over half of the total installed grid

capacity. This constitutes colossal economic deficits to the Nigerian economy. Therefore, there is a need for stringent enforcement of energy regulatory policies with incentives for the utilisation of renewable energy sources in Nigeria for rapid growth in the industry.

8.0. Renewable Energy as an Option for Nigeria's Power Sector

There are several new renewable energy prospects accessible in Nigeria. For instance, Biomass is a greener energy source that it is derived from plants. It can be utilised as bio-power or transformed into other energy commodities such as bio-fuel. It can reduce greenhouse gas emission. Bio-fuels are fuels made from biological sources. It is the cheapest and accessible source of energy because of the fuel-wood that readily available. It is derived from ethanol agitated and distillation of starchy cereals, grains and sugar crops such as beet, wheat, corn, sorghum and sugarcane[41]. This is the prospect of another investment which can produce good profits for Nigerians through investment in bio-fuel products.

Biodiesel is another source of energy which is drawn by converting oil-bearing crops such as coconut, soya, palm, rapeseed and sunflower to methyl esters to blend with conventional diesel. New biodiesel knows how to manufacture diesel fuels from wood and straw to gasification point[42].

Biomasses as a renewable energy source which can promote constant power supply to rural areas through rural electrification programme and improve the livelihood of the rural dwellers. Despite its comparative benefits and abundance in Nigeria, there is no legislation on biomass as a source of renewable energy; therefore; there is the

[41] A O Yusuf, The Nigerian Fuel Ethanol Industry, Presentation at the International Conference on Bio-Fuel Markets in Africa held in Cape Town, South Africa on November 30 to December 1, 2006. Available at: www.greenpowerconferences.com/biofuelsmarket/documents (accessed August 27, 2020).

[42] R Niculescu, A Clenci and V Iorga-Siman, (2019), Review on the Use of Diesel–Biodiesel–Alcohol Blends in Compression Ignition Engines, Energies, 12, 1194.

need for legal and policy framework on biomass in Nigeria.[43] Wind energy is another source of renewable energy that can promote stable electricity supply in Nigeria for meeting the needs of its electricity consumers primarily in the Northern part of the country where there is abundant wind energy at 4.0 to 5.12 m/s speed[44]. Wind energy is categorised as highly ecologically responsive resources of renewable energy. It involves the installation of wind turbines in a wind farm located in an area where winds are durable and persistent, for instance, in offshore and high-altitude locations[45]. The wind turbines run by airflows, and the power production depend on the cube of the wind velocity, as the wind velocity intensifies, the energy productions increases[46].

Also, biogas is another source of energy that is obtained from unprocessed and discarded materials such as animal faeces, decomposable manufacturing and domestic unwanted solid materials[47].

Another source of energy that is cheaper and easier to maintain is small hydropower**.** There are many forms of water energy: hydroelectric energy, micro-hydro systems, dam less hydro, oceanic energy, among others. The systems harness water to generate energy through technologies such as the dam, tidal power, and marine current power, among others.

[43] *Ibid.*
[44]O A Oluseyi and R O Fagbenle, *et al.*, Wind Energy Study and Energy Cost of Wind Electricity Generation in Nigeria: Past and Recent Results and a Case Study for South-West Nigeria, (2014), Energies (7), 8512.
[45] *Ibid.*
[46]*Ibid.*
[47] *Ibid.*

Figure: 2 Renewable Energy Sources and Power Targets[48]

Renewable Energy Master Plan Targets (MW)

Source	2007	2015	2025
Wind	1	20	40
Solar PV	5	75	500
Solar thermal	-	1	5
Small hydro	50	600	2000
Biomass		50	400
Total Renewables	56	746	
Total Electricity	7,000	14,000	29,000
% Renewables	0.8	5	10

Table 3: Existing Power Plants in Nigeria Utilising Renewable Energy Sources but not at Maximum Utilisation

S/N	Power Plants	Energy Sources	Category	Capacity	Situation	Date of Completion
1.	Mambilla Power Station	Hydro-electric	Reservoir	3050 MW	Functioning but not optimally	2018
2.	Kiri Power Station	Hydro-electric	Reservoir	100 MW	Functioning but not optimally	2016
3.	Zamfara Power Station	Hydro-electric	Reservoir	35 MW	Functioning but not optimally	2015
4.	Kano Power Station	Hydro-electric	Reservoir	100 MW	Work in progress	2015
5.	Shiroro Power Station	Hydro-electric	Reservoir	600 MW	Work in progress	1990

[48]G U Ugah, (2011), Renewable Energy Market and Policy Development in Nigeria, available at https://www.slideshare.net/Mathesisslides/renewable-energy-market-policy-development-in-nigeria (accessed August 27, 2020).

S/N	Power Plants	Energy Sources	Category	Capacity	Situation	Date of Completion
6.	Jebba Power Station	Hydro-electric	Reservoir	540 MW	Work in progress	1985
7.	Kainji Power Station	Hydro-electric	Reservoir	800 MW	Work in progress	1968

Solar energy is another fundamental source of renewable energy. It is obtained from the sun through solar radio-activities or radiation such as photovoltaic and heats. Other sources of solar energy are: space heating and cooling through solar designs, daylighting, and solar hot water, solar steaming and high-temperature practices for commercial energy usages[49].

Similarly, there is a geothermal energy source which is obtained by tapping the high temperature of the earth in kilometres deep into the earth's crust in some places of the earth or through some meters in geothermal temperature in all the places of the earth. This is abundantly present in Nigeria due to abundant amounts of sunshine, but all household has not entirely accepted the technology in the country despite efforts to create awareness on its utilisation and efficiency. This is another source of renewable energy that is cost-effective, and that can stimulate regular power supply and sustainable development in the rural areas in Nigeria[50].

8.1. The Merits of Renewable Energy Sources

As earlier indicated, there has been a strong new interest in renewable energy sources. This follows from the fact that renewable energy sources have some advantages which are not found in fossil fuel (Oke, 2016). Thus, the elements inspiring the growing interest in renewable energy include the following:

[49] *Ibid.*
[50] *Ibid.*

(a) Renewable energy improves energy security due to the decline in oil prices, crude oil theft and pipeline vandalism, reduction of oil reserves and the increasing cost of crude oil exploration activities which are all pointers to the fact that fossil fuel may not guarantee all-time availability of energy for human use. However, diversified energy programme would allay the fear of energy insecurity and sustainability in Nigeria.[51]

(b) Additional economic advantages of renewable energy are that the cost of extracting, tapping and harnessing energy from the renewable sources is relatively low in the long term utilisation compared to that of fossil fuel. Consequently, the supply of alternative energy is cheaper than that of fossil fuel. Environmental pollution and degradation, as well as the global warming of the atmosphere, are incidental to the exploitation and usage of fossil fuel which engender untold hazards to man, flora and fauna. Conversely, renewable energy is environmentally friendly. Thus, increasing the use of renewable energy will improve the quality of the environment by contributing to a global reduction in greenhouse gas emissions in Nigeria.

(c) Another benefit of renewable energy is the sustainability of the energy industry. Renewable energy has the capacity of being replenished by a natural technique at a cost that is equivalent to the energy being utilised. Also, the collection, transformation and consumption of renewable energy regularly occur in an environmentally friendly mode. I

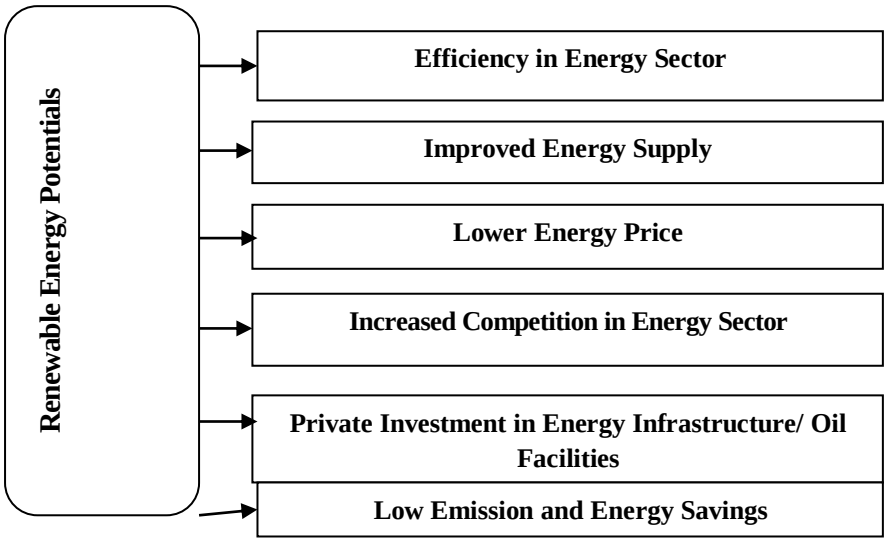
(d) It prevents damaging effects on the feasibility of the energy and the inherent privileges of the inhabitants in the societies

[51] Y Oke, (2016), Essays on Nigerian Electricity Law, Princeton and Associate Publishing Co. Ltd, Lagos, 93-113.

where it is utilised and natural environments different from fossil fuel sources of energy[52]

(e) Among other anticipated advantages of renewable energy sources especially, the biofuel programme is the growth of the rural economy, education in rural-urban migration and energy supply security and better ecosystem. Maximising carbon credits opportunities through the provisions of direct and indirect employments in the power industry. Free up more crude oil for exports. Boost Federal and States' Government tax revenues. Provide returns on investments to farmers and other stakeholders in the industry. It will create more opportunities for direct foreign investments into Nigeria's economy.

Figure 3: Merits of Renewable Energy



[52] *Ibid.*

8.2 Obstacles to Renewable Energy as an Option in Nigeria's Power Sector

Renewable energy has overwhelming benefits but does not devoid of side effects. Although renewable energy technologies emphasise the non-existence of air-pollutant discharges during their set-up, the process of energy production from some sources present pollution, for example, Bio-fuels may emit some pollution when combusted.[53] First, since the production of bio-fuels does not entirely remove the release of carbon dioxide and greenhouse gases, they still pose a minimal threat to the environment and human health.[54]

Second, in the bid to meet the demands for biofuels, the environment may degenerate through deforestation, erosion, among others. This is contrary to the aims of finding alternative sources of energy. Another problem is food security concerns; a recent United Nations report indicates that attempting to develop crops for substitute energy use may put a significant strain on dwindling water resources as well as arable land for food. The growth of crops for biofuels could endanger food security. It could lead to a shortage of food during the periods of droughts or famines. Land could be taken away, forcefully for biofuel production[55].

Third, the expansion of agricultural land for the production of biofuel crops could intensify the conflicts arising concerning land rights by the people. The circumstances could force many countryside inhabitants to migrate to urban areas when they lose vital access to their natural resources such as water due to intensification in agricultural activities for bioenergy resources..

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[53] R Steenblik, Liberalisation of Trade in Renewable Energy Products and Associated Goods: Charcoal, Solar Photovoltaic Systems, and Wind Pumps and Turbines, (2005), OECD Trade and Environment Working Paper.

[54] O J Olujobi and T Olusola-Olujobi, the Appraisal of Legal Framework Regulating Gas Flaring in Nigeria's Upstream Petroleum Sector: How Efficient? (2019), International Journal of Advanced Research in Engineering and Technology, 10(3), 234-250.

[55] Ibid.

Four, another major hurdle to renewable energy development in Nigeria is technology**.** Apart from hydropower, solar and bio-fuel technologies, no other renewable energy technology has been developed in Nigeria. Most of the technologies have to be imported into Nigeria at outrageous costs. Also, the level of mechanisation in the agricultural sector is lower than what is required for the improvement of farming practices to enhance quality and good yields[56].

Five, there is a problem of poor Infrastructures; the quantity and quality are deficient of enabling infrastructures, for instance, inadequate power supply, impassable road networks, low water supply these among others are required for production, processing and distribution of both agricultural produce and other materials related to the renewable energy programme success in Nigeria[57].

Six, low public awareness of renewable energy sources and technologies in Nigeria as a veritable energy source, and its advantages, economically and environmentally is mostly gloomy. Therefore, Nigerians are not well informed about pressurising the Federal Government to develop renewable energy resources and technologies for commercialisation in the domestic energy market in Africa[58].

Seven, unpredictable weather condition can halt energy supply. As renewable energy often depends on a variety of weather conditions, this may influence negatively on the consistency of energy supply. For instance, hydro generators need sufficient rain to fill dams for their

[56] K C Onuoha, What are the Prospects and Challenges of Biofuels in Nigeria? (2010), Available at SSRN: https://ssrn.com/abstract=1959778 or http://dx.doi.org/10.2139/ssrn.1959778 (accessed August 27, 2020).

[57] S S Abubakar, Strategic Developments in Renewable Energy in Nigeria, (2009), International Association for Energy Economics, available at file:///c:/users/hp/downloads/strategic_developments_in_renewable_energy_in_nige.pdf (accessed August 27, 2020).

[58] D E Ufua , O J Olujobi, M E Ogbari, J A Dada and O D Edafe , Operations of Small and Medium Enterprises and the Legal System in Nigeria, (2020), Humanities and Social Sciences Communications, 7(94),1-7.

supply of flowing water. Also, the wind turbines will need wind to revolve their vanes. Similarly, solar panels need clear skies and sunshine to get the temperature essential to generate electricity. It is hard to generate the same capacities of power as non-renewable sources. It can be challenging to produce the capacities of power that are as large as those being turned out by the conventional fossil fuel generators in Nigeria[59].

Figure 4: Renewable Energy Sources

Sources: Renewable Energy https://www.google.com/search?tbs=simg:caqspqijllhjnzjbra8amqilelcmpwgaygpgcamskokvwgrmaeovyqh3fu4v7xwsa_1gwgde8kleqsciwkoe3ycljnokn-tmama361t7ule8iay3omieumpwrn0c3t- (accessed September 10, 2020).

9.0. Conclusion

The study provides synopsis of the policy framework, legislative and regulatory measures that need to be taken to promote energy efficiency in Nigeria. It bridges the gap between theory and practice by identifying the challenges of renewable energy.

[59]J Greenleaf, R Harmsen, Analysis of Impacts of Climate Change Policies on Energy Security Final Report, (2009), available at https://ec.europa.eu/environment/integration/energy/pdf/cces.pdf (accessed August 27, 2020).

The study accentuates the significance of renewable energy to guarantee sustainable electricity in Nigeria with emphasis on legal and policy framework that needs to be enacted to enhance energy sufficiency and security via renewable energy. Considering inconsistent supply of electricity in Nigeria and the close to the non-existence of power supply in the countryside areas, the exigency for energy sources substitute cannot be ignored as wind turbine technology have significant impacts on energy sources in the country.

The various significant gaps in the existing legal framework and policies on renewable energy have been highlighted. The justifications for a new legal framework on renewable energy use, developments and sustainability in the country have been further emphasised. The new energy policy will negatively impact the Nigerian petroleum sector if Nigeria fails to diversify its economy to Agriculture or other extractive resources. The *sine qua non*-question that calls for response is: What is next after Nigeria implements the new energy policy like other countries in the world? There is the need for swift passage of the Petroleum Industry Governance Bill 2017 by the current 9th National Assembly to facilitate the smooth and seemles implementation of the policy.

10.0 Recommendations

Given the findings in this research work, the following candid recommendations are preferred: There is the necessity for a legal regime that is favourable to development and sustainability, and the enactment of the new energy policy should be prompt. The Federal Government of Nigeria should be dedicated to the new energy policy to help mitigate the upshots of the policy on the country petroleum sector, as Nigeria depend seriously on crude oil for her foreign exchange earnings so; there is the need for more sources of revenues to the Federal Government via renewable energy.

There is the necessity for continuous education of Nigerians on the new energy policy and the need for large scale marketing campaign for full acceptability of the energy policy by Nigerians.

The government should incorporate renewable energy into the country's energy system by making utilisation of renewable energy an issue of national importance to meet electricity demands with supplies. There is a need for political will and absolute commitment of the government for the sustainability of renewable energy systems in the country.

To develop a commercial energy market, therefore there is a need to strengthen investments in renewable energy development in the country, by enhancing services and training for the use of renewable energy technologies. Rural area energy consumers should be offered satisfactory repair and precautionary preservation of facilities locally.

There is also a need for education of consumers on necessary operation skills explicitly suitable electrical device set-ups and battery modus operandi, with consistent protection techniques specifically: filling batteries with water and dusting wind turbine vanes.

Operators' education should also include capacity guideline and training that can help energy consumers set their everyday energy use efficiently to eliminate the need for copious energy storage facilities for renewable energy systems in Nigeria.

There is the necessity for strong guidelines or standards for lawmakers on the best method to adopt for the enactment of legal framework and formulation of stringent policies on renewable energy use and developments with a clear understanding of the effects and the benefits of renewable energy utilisation in attaining energy security, efficiency and sustainability in Nigeria. Therefore, there is the need for model legal framework on renewable energy as proposed by this study

Jurisdiction Over Non-Muslim Personal Law Disputes in Northern Nigeria: Can the State High Court Be a *Forum Necessitatis?*

Abubakri Yekini, (PhD)[1]

Abstract

Right to a fair trial is one of the fundamental rights enshrined in the Nigerian Constitution. This right presupposes the existence of an impartial judicial body through which litigants can ventilate their grievances. To guarantee access to court and the right to a fair trial, the Constitution establishes a court system for all civil claims. The cultural and religious plurality of the Nigerian state requires the creation of different courts for certain subject matters. This gives way for a potential conflict of jurisdiction. One of such conflicts is seen in the choice of court for questions bordering on personal law. While some legal commentators have considered this issue broadly, there is an aspect which is yet to be addressed. This aspect concerns the appropriate court for customary law questions in states that have refused to establish Customary Courts and a Customary Court of Appeal. The focus of this paper therefore is to examine the conundrum arising from the delineation of jurisdictional powers between a State High Court and a Customary Court of Appeal as it affects states that have no Customary Courts. The paper finds that existing precedents- Supreme Court and Court of Appeal- failed to take cognizance of this practical legal problem thereby creating a problem of access to justice. It offers arguments to establish that a High Court, as a court of residual jurisdiction and as a forum of necessity, is an appropriate venue for customary personal law disputes in the northern states where customary courts are non-existent.

Keywords: Customary Law, Personal Law, Jurisdiction, *forum necessitatis*

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1.0. Introduction

The complex nature of the Nigerian society is reflected in the nature of its judicial system. There are 36 component states, 774 local government areas (LGAs) and one Federal Capital Territory.[2] The people of Nigeria, consisting of over 250 ethnic groups, are spread across the states.[3] It is common to see two or more distinct indigenous ethnic groups in any given state. Each ethnic group has its own native or customary laws. Religious laws are equally prominent in Nigeria because the vast majority of Nigerians profess one faith or the other.[4] Customary and religious laws (at least Islamic law) also exist alongside English law.

One major task for the drafters of the Constitution was the coordination of the competing laws and how to establish courts to administer these laws with minimal frictions. Unlike other federal systems where jurisdictional powers are broadly divided between federal and state courts, the Nigerian context demands a more nuanced approach. For instance, in the United States, the Constitution reserves certain matters for federal courts, while the non-reserved matters fall within the competence of the state courts.[5] There are other procedural mechanisms for the transfer of cases which are originally filed at the

[2] See First Schedule, 1999 Constitution (as amended).

[3] A A Oba 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004)52 *The American Journal of Comparative Law* 859, 859.

[4] M. Christian Green, 'Religion, Family Law, and Recognition of Identity in Nigeria' (2011) 25 *Emory International Law Review* 945, 947.

[5] For instance, Article III, section 2 of the US Constitution states that 'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects'.

state courts to federal courts.[6] A similar system exists in Australia where the federal court exercises jurisdiction over cases established by federal statutes or those closely connected to a federal statute.[7] Each state has a supreme court that entertains non-federal matters, matters established under the law of that state or those connected to that state.[8] One thing that is observed is that in these jurisdictions, there is a clear dichotomy between federal and state matters. Hence, if a case is established to fall under the competence of a state, there is always a court in that state to exercise jurisdiction.

In Nigeria, the issue is not straight forward both in theory and practice. The Constitution maintains a somewhat similar structure with the arrangements mentioned above. It establishes a Federal High Court with exclusive jurisdiction over certain matters that we can describe as federal matters for convenience.[9] Under the 1979 Constitution, a High Court was established for each state with 'unlimited' jurisdiction over civil and criminal matters - other than those exclusively vested in the Federal High Court.[10] Other courts such as the Shariah Court of Appeal and Customary Court of Appeal which are of concurrent jurisdiction to a State High Court, were also established. The Customary Court of Appeal and the Shariah Court of Appeal are specialised courts established for customary and Islamic personal law matters, respectively. Incidentally, they are not federal

[6]See the Judiciary Act of 1789; U.S. Code § 1441.

[7]Section 39B(1A)c of the Judiciary Act 1903 (Cth); Federal Court of Australia Act 1976; https://www.fedcourt.gov.au/about/jurisdiction (accessed 23 October 2020).

[8]Seehttps://www.supremecourt.vic.gov.au/about-the-court/how-the-court-works#:~:text=The%20Supreme%20Court%20hears%20among,Australia%20can%20review%20its%20decisions (accessed 23 October 2020).

[9] See section 251. Some of those matters include revenue of the Government of the Federation, taxation of companies, custom and excise duties, the operation of the Companies and Matters Act, intellectual property, admiralty, aviation, mines and minerals, drugs and poisons, bankruptcy and insolvency, citizenship and immigration matters, amongst others.

[10]See section 236, 1979 Constitution. However, under the 1999 Constitution, the word 'unlimited' was removed.

courts. The Constitution states that these courts may be established by any state that desires them.[11]

This paper seeks to examine the conundrum arising from the constitutional delineation of adjudicatory jurisdiction between the State High Court and the Customary Court of Appeal concerning questions of customary law. Part II identifies and discusses the problem of access to justice arising from the interpretation of this constitutional framework by the appellate courts. Part III considers the need for contextualism and instrumentalism in the interpretative function of courts. Part IV discusses the doctrine of *forum necessitatis* as a pragmatic solution to this problem while part V concludes the paper and offers some recommendations.

2.0. The Jurisdictional Conundrum

Certain problems have arisen from the constitutional framework highlighted in the preceding section. First, for decades, there have been several litigations concerning the boundary between the jurisdiction of the Federal and State High Courts despite the supposedly bright-line rules laid down by the Constitution. This issue has been treated by some authors and we shall not deal with it here.[12] Second, the delineation between the jurisdiction of the State High Courts and the Customary (including Shariah) Court of Appeal has equally been controversial.[13] While a few works have considered this

[11]Sections 6 (5), 280 of the 1999 Constitution.

[12]E., Essien, 'The jurisdiction of State High Courts in Nigeria' (2000) 44 *Journal of African Law* 264; Taiwo Osiptan and Abiodun Odusote, 'Reflections on Some Aspects of the Jurisdiction of the Federal High Court under the Nigerian 1979 and 1999 Constitutions: One or More High Courts?' (2016) 12 *Acta Universitatis DanubiusJuridica*; Joseph Mbadugha 'Outstanding Hire: A Simple Debt or Maritime Claim?' (2016) 7 *The Gravitas Review of Business & Property Law* 1.

[13]*Customary Court of Appeal Edo State v. Chief (Engr) E.A. Aguele&Ors*(2018) 3 NWLR (Pt. 1607) 369; *Adisa v. Oyinwola* (2000) 10 NWLR (Pt.674) 116; *Osungwu v Onyeikigbo* (2005) 16 NWLR (Pt. 950) 80;*Nwaigwe v Okere* (2002) FWLR (Pt.127) 1101.

issue broadly,[14] this paper seeks to investigate a specific aspect of the problem which has not been addressed. This problem concerns the appropriate court for customary law questions in states that have refused to establish Customary Courts and a Customary Court of Appeal. The recent Court of Appeal decision in *Yange v. Musa*[15]shall be used as a case study.

a. Case Study: *Yange v. Musa*

This case came up in Kebbi State, Northwest Nigeria. The state is predominantly populated by Muslims. Some writers suggest that the Muslim-Christian population ration is 84:16.[16] The appellant and the respondent are Christian residents of Kebbi State who got married under native law and customs. In February 2015, they agreed to separate because the marriage has broken down irretrievably. The couple executed a separation agreement wherein it was agreed that the wife, should have the custody of the sole child of the marriage while the father will have right of access at agreed time and locations.

On a particular Easter break, the father requested to see his son and the mother took the son to him. When she returned to collect the child, the father informed her that the child has been taken to Benue State. In a bid to enforce the agreement, the wife applied to the High Court of Kebbi State for an order awarding the legal guardianship of the child of the marriage to her, amongst others. The parties filed conflicting affidavit evidence and the court resolved the conflicts by oral evidence. The judge found that the child was born out of wedlock (for

[14]The few relevant works on this issue include: Enyinna Nwauche'Civil Questions Involving Customary Law as the Basis of Appellate Jurisdiction in Nigeria' (2015) *11 Acta Universitatis DanubiusJuridica* 38; A.A., Oba (n 2);Akintunde Obilade 'Jurisdiction in customary law matters in Nigeria: a critical examination' (1973) 17 *Journal of African Law* 227;

[15] (2018) LPELR-CA.

[16]E Okpanachi, 'Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria's Kaduna and Kebbi States' (2011) 25 *Emory International Law Review* 897, 900; Philip Ostien, *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* (Vol 1, Spectrum Book, 2007),xix.

instance before the solemnisation of the customary marriage) and before the blessing of the said marriage in a church. Thus, the trial court held that neither the customary law of custody nor the Marriage Act applied to the case. The judge awarded legal guardianship to the wife under common law.

The respondent challenged the decision of the trial court. The main ground of appeal concerns the legality of the trial court's assumption of jurisdiction having concluded that the parties conducted a customary marriage. The argument of the appellant was that by virtue of sections 270 and 272 of the Constitution, and sections 13 and 17 of the Kebbi State High Court Law 1996, a High Court lacks jurisdiction over customary marriage and ancillary issues (for instance custody). The Court of Appeal unanimously agreed with the appellant's submission. The relevant part of the judgment is reproduced hereunder:

> In view of the above, I cannot but agree completely with the submission of the learned appellant's counsel that the only reason why the learned trial Judge assumed jurisdiction was simply because there was no Customary Court in Kebbi State. ....
>
> If a court has no jurisdiction, it cannot exercise the powers granted to it by the Constitution or law to enable it exercise the jurisdiction. If a court lacks jurisdiction to entertain a matter whatever merit the matter may have under other laws cannot be enquired into as erroneously done in this case… It is therefore my respectful but firm view that the learned trial had laboured in vain as he cannot under whatever guise assume the jurisdiction that is exclusively reserved for Customary Court.

The appellate court allowed the appeal and set aside the decision of the trial court. The judgment implies that the parties are restored to their pre-litigation stage and the grievance remains unresolved. As noted in the trial court's judgment, while there is no Customary or Area Court in Kebbi State to adjudicate on customary personal law matters, especially for non-Muslims, the High Court is also excluded from taking up such cases. What should be the fate of non-Muslim litigants in northern states having a similar court structure?

3.0. The Need for Contextualism and Instrumentalism in Statutory Interpretation

The primary function of judges is to discover the intention of lawmakers and to declare and apply that intention.[17]. But this has always not been an easy job because judges need to balance the language of statutes, with legislative intent and policy objectives underlying statutes.[18]This task becomes more onerous since judges are not usually involved or consulted when laws are made. In this clime, it is also rare to see Hansard or parliamentary documents evidencing the history of legislative projects, debates and other works that parliament considered in the process of enacting laws.[19] No wonder, in some quarters, it is believed that the idea of a legislative intention may be a mirage because there may never be a collective conscious effort from parliamentarians at formulating one. Lord Simon of Glaisdale alludes to this point in *Ealing London Borough v Race Relations Board*[20]

[17] *Bello v. Yusuf* (2019) 15 NWLR (Pt. 1695) 250 at pp. 284-285, paras. E-A; *A.-G., Lagos State v. A.-G., Fed*. (2013) 16 NWLR (Pt. 1380) 249 at 303, paras. A-C*; Slok (Nig.) Ltd. v. Chief Judge, F.H.C., Nig*. (2020) 11 NWLR (Pt. 1735) 338 at 366, paras. F-G.

[18] L. M., Solan, 'Linguistic Issues in Statutory Interpretation' Brooklyn Law School Legal Studies Research Papers Accepted Paper Series Research Paper No. 254 October 2011, p.2.

[19] The best we have in Nigeria is a record of votes and proceedings. See Federal Republic of Nigeria National Assembly, 'Votes and Proceedings: 9th Assembly' available at <https://www.nassnig.org/documents/votes_and_proceedings> (accessed 24 October 2020).

[20] (1972) AC 342, 360.

when he declares that 'but the reality is that only a minority of legislators will attend the debates on legislation'.

Notwithstanding this criticism, deference to legislative intention remains the law. The way judges prefer to arrive at that intention is to refer to the clear, ordinary and grammatical meaning of words used in statutes.[21] This is often referred to as the literal interpretation and it is the preferred approach of the Nigerian courts.[22] This same approach is favoured in interpreting contractual documents.[23] Other canons of interpretation such as the golden and mischief rules are also applied where literal interpretation may produce problematic results.[24]

There is also a purposive rule of interpretation which is a strand of contextualism. This is better explained with a dictum of the former Chief Justice of Nigeria, Dahiru Musdapher in *Marwa v.Nyako*[25] as follows:

> Every legal document including the Constitution has a purpose without which it is meaningless. This purpose, or ratio legit, is made up of the objectives, the goals, the interests, the values, the policy and the function that by law it is designed to actualize. It is the duty of the judge to give the meaning of the words that best realizes its purpose and intent and intendment.[26]

When courts apply the purposive approach, they often consider the section in question in the light of other provisions of the statute or

[21]Bello v. Yusuf (supra); A.-G., Lagos State v. A.-G., Fed. (supra);Slok (Nig.) Ltd. v. Chief Judge, F.H.C., Nig.(supra). (1972) AC 342, 360.

[22]A.G. of Bendel State v. The A.G, of the Federation (1981) 10 SC 1; Alhaji Kashim Shettima & Anor v. Alhaji Mohammed Goni &Ors (2011) LPELR-SC.

[23] See Ashaka Cement Plc v Asharatul Mubashshurun Investment Ltd (2016) LPELR-40196(CA); Union Bank of Nigeria Plc v Ozigi (1994) 3 NWLR (Pt 333) 385; Isulight (Nig) Ltd v Jackson (2005) 11 NWLR (Pt 937) 631.

[24]A.D.H. Ltd. v. A.T. Ltd. (2006) 10 NWLR (Pt. 989) 635; I.N.E.C. v. Yusuf (2020) 4 NWLR (Pt. 1714) 374; Agbaje v. Fashola (2008) 6 NWLR (Pt. 1082) 90.

[25] (2012) 6 NWR (Pt 1269) 199.

[26]*Marwav.Nyako* (supra) 291, para D-E.

adopting an alternative interpretation that aligns more with what is considered the purpose or objective of the statute.[27]

Contextualism and instrumentalism are imperative in the interpretative functions of courts. While it is conceded that judges' role is essentially centred around the discovery of law, modern trend requires that they should consider the context, factual background of the law they are interpreting and the practical consequences of their interpretations.[28] The aspect of the dictum of Dahiru Musdapher CJN (as he then was) which emphasises the objectives, goals, interests, values, policy and function of statutes resonates this modern trend of contextualism. To what extent are courts prepared to engage the goals, interests, values and policy objectives are another question. Are these goals, values and policy objectives to be construed from purely rational and conceptual foundations or from practical legal problems and social facts?

Courts ought to pay attention to the context in which statutory frameworks are made, the needs of the end-users of the law and the changing circumstances. This thought is not strange to our courts, albeit it is not regularly engaged. Regina Obiageli Nwodo, JCA in *PDP v Saror & Ors*[29]noted this point while highlighting some of the principles derivable from the Supreme Court's precedent on the interpretation statutes thus: 'while the language of the Constitution does not change the changing circumstances of a progressive society for which it was designed, it can yield new and further import of its meaning'. In *FRN v Osahon*,[30] Belgore JSC also counselled that when the constitution (and by extension other statutes) are to be interpreted,'

[27]*Ibid.*, at 352, paras. C-G; *Abubakar v. YarAdua* (2008) 19 NWLR (Pt. 1120) 1 at pp. 135-136, paras. G-G.

[28]This approach has been adopted in Canada, Australia and a few other commonwealth jurisdictions. See generally. See Shalin Sugunasiri, 'Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability' (1999) 22 *Dalhousie Law Journal* 126; Jeffrey Barnes, 'Contextualism: the Modern Approach to Statutory Interpretation' (2018) 41 *University of New South Wales Law Journal* 1083.

[29] (2012) LPELR-CA.

[30](2006) 5 NWLR (Pt. 973) 361.

common sense must be applied to give meaning to all its sections or articles'. Thus, courts should not be fixated on textual analysis without looking at what the circumstances were when the law was made, the current realities, the practical implication of their interpretation and more importantly, its consequences. Courts need to integrate these modern techniques into the judicial decision-making process in general**.**

How do contextualism and instrumentalism affect the case of *Yange v Musa*? The starting point for analysing the jurisdiction of courts over non-Muslim personal law disputes in the northern part of Nigeria is the Constitution. Section 270 establishes a High Court for each state of the Federation. Section 272 and prescribes the jurisdiction of a State High Court as follows:

Subject to the provisions of *section 251 and other provisions* of this Constitution, the High Court of a State shall have jurisdiction to hear and determine *any civil proceedings* in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue.

Section 251 vests 'exclusive' jurisdiction in the Federal High Court over matters listed under that the section. Other relevant provisions, in this case, will be sections 280 and 282 which establish and vest jurisdiction in a Customary Court of Appeal of a State respectively. The provisions will be reproduced hereunder:

Section 280: *There shall be for any State that requires it a Customary Court of Appeal for that State*

s.282 (1): *A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdictions in civil proceedings involving questions of customary law.*

The background to the establishment of Customary Court of Appeal and Shariah Court of Appeal as courts of coordinate jurisdiction with

a State High Court has been addressed by some scholars.[31] Suffice to say that this seemingly convoluted regime was borne out of the need to preserve and insulate customary and Islamic law systems from possible interference or dominance of the common law. One other reason as documented in various academic sources and government reports is to guard against the imposition of a dominant legal culture (e.g. Islamic law) in any part of Nigeria on the minority groups.[32] Ideally, each state is expected to establish customary courts alongside the common law courts. The customary court system may be unitary (where customary law and Islamic law are administered together) or dualist (a separate court system for Islamic and customary laws respectively).

This was the social facts surrounding the above Constitutional framework as legislated under the 1979 Constitution and its progeny (i.e. the 1999 Constitution). It should not surprise anyone that section 282 used the expression '*any State that requires it'*. Based on this optional clause, southern states whose populations are largely Christians established only Customary Courts? In the same vein, most northern states whose populations are largely Muslims established Area Courts and Shariah Courts as the case may be.[33]

[31]N A Duson and S D James, 'Stultification of the Jurisdiction of Customary Court of Appeal in Nigeria: the Need to Jettison Restrictive Judicial Interpretation of Section 282(1) of the 1999 Constitution of the Federal Republic of Nigeria (as Amended)' (2020) 8 *International Journal of Business & Law Research* 41.; A.A., Oba (n 2); Mansur Noibi, 'Shari'a and the Nigerian Constitution: The Jurisdiction of the Shari'a Court of Appeal' (2004) Yearbook of Islamic and Middle Eastern Law, 97.

[32]S S Richardson "Opting Out": An Experiment with Jurisdiction in Northern Nigeria; David Nathan Smith, 'Native Courts of Northern Nigeria: Techniques for Institutional Development' (1968) 48 *Boston University Law Review* 49.

[33] A C Diala, 'A butterfly that thinks itself a bird: the identity of customary courts in Nigeria' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* 381, 382; A A Oba, 'Neither Fish nor Fowl': Area Courts in the Ilorin Emirate in Northern Nigeria' (2008) 40 *The Journal of Legal Pluralism and Unofficial Law* 69, 79.

Today, there are three different models for the administration of customary/Islamic law in northern Nigeria.[34] There is a Kano/Zamfara model where Area Courts have been abolished and replaced with Shariah Courts. The Shariah Court is the only court established for personal law disputes. Thus, there appears to be no court system for non-Muslim personal law disputes. There is a Kebbi/Niger model. In this model, the states have only Area Courts which operate more or less like Shariah Courts. They exercise jurisdiction over Muslims and non-Muslims who consent to be tried in the courts. However, it is doubtful whether non-Muslims would consent to the jurisdiction of those courts as seen in *Yange v Musa*. There is also a Kaduna/Gombe model. These states have sizable non-Muslim populations. They have in place Shariah Courts for Muslims and Customary Courts for non-Muslims.

Considering this context, especially the first two models which apply in most northern states, how should the Court of Appeal have approached the jurisdictional question posed in *Yange v Musa*? It is our considered view that the Court ought to have examined the texts of the Constitution, i.e. sections 270, 272, 280 and 282, and the practical legal problem before the court. Would it make more sense to simply tell the non-Muslim litigants that High Courts do not have jurisdiction over customary marriage where no other court has jurisdiction? Or are there other arguments that can sustain a different conclusion?

The position of the Court of Appeal reflects previous decisions of the Supreme Court which delineated the jurisdictional powers of the State High Courts and the Shariah/Customary Court of Appeal. Those decisions have been addressed elsewhere.[35] The decision in *Yange* further corroborates our arguments in that paper and now provides a

[34] R Suberu, 'The Sharia Challenge: Revisiting the Travails of the Secular State' in W Adebanwi, E Obadare (eds) *Encountering the Nigerian State* (Springer 2010) 229.

[35] K Olatoye and A Yekini, 'Islamic Law in Southern Nigerian Courts: Constitutional and Conflict of Laws Perspectives' (2019) 6 *Benin Journal of Public Law* 120.

northern Nigerian scenario. In *Babale v Abdulkadir*,[36] the Supreme Court held that the Shariah Court of Appeal is vested with exclusive jurisdiction over Islamic personal law matters. Thus, State High Courts are barred from entertaining those questions. The Court of Appeal also reiterated the same position in *Moriki v. Adamu*[37] that 'a Wakf gift under Islamic Personal law' comes 'within the exclusive jurisdiction of the Shariah Court of Appeal'.[38] The decisions apply to the Customary Court of Appeal *mutatis mutandis.* Indeed, the Supreme Court recently confirmed that the Customary Court of Appeal has exclusive jurisdiction over questions of customary law in *Customary Court of Appeal Edo State v. Chief (Engr) E.A. Aguele & Ors*[39]where Peter-Odili JSC held that:

> The provisions of Sections 245(1), 272(1) and 282 of the 1999 Constitution have clearly spelt out the exclusive jurisdictions of the Customary Court of a State and the Customary Court of Appeal having the exclusive jurisdiction to exercise appellate and supervisory jurisdictions in civil proceeding involving questions of Customary Law[40]

The first point to be noted here is that the word 'exclusive' was not used by the drafters of the Constitution in both sections 277 and 282. It was introduced by the courts. This can be contrasted with sections 251 and 254(c) where 'exclusive' was specifically used for the Federal High Court and the National Industrial Court, respectively. The decision in *Babale* and *Customary Court of Appeal Edo State* are in contrast with other decisions of the Supreme Court which held that 'exclusive' should not be read into the Constitution to deprive State High Courts of the residual jurisdiction granted to them by the same

[36] (1993) 24 NSCC (Pt I) 271.
[37] [2001] 15 NWLR (Pt 737) 666.
[38] Ibid, 680, para B-D.
[39](2018) 3 NWLR (Pt. 1607) 369.
[40]Customary Court of Appeal Edo State v. Chief (Engr) E.A. Aguele&Ors (supra) at p. 392, paras. E-F.

Constitution.[41] To cite just one instance, Ayoola JSC (as he then was) reiterated in *Abdulsalam v Salawu*[42]that 'only express words in the constitution vesting exclusive jurisdiction in another court will suffice to limit the jurisdiction of the High Court of a state'. Hence, what *Babale* and *Customary Court of Appeal Edo State* have done is to limit the residual jurisdiction of the High Court by reading 'exclusive' into the jurisdiction of Shariah Court of Appeal and the Customary Court of Appeal. The apex court with due respect ought to have foreseen that this interpretation would leave litigants in states that do not establish these optional (but exclusive) courts with no court to adjudicate their personal law disputes.

Second, it may be argued that what the drafters meant by the word 'shall' as used in section 282 is that only the Customary Court of Appeal should exercise jurisdiction over customary law disputes. This argument cannot fly because 'shall' and 'exclusive' do not mean the same thing. Otherwise, it would have been unnecessary to use 'shall' followed by 'exclusive' in sections 251 and 254c, respectively. Constitutional powers, being public powers ought to be interpreted broadly to achieve the policy objectives of the Constitution. Since there is nothing in the face of section 282 excluding other courts, a High Court being a court of general jurisdiction should be able to exercise that jurisdiction concurrently with the Customary Court of Appeal. This is no aberration as there are cases wherein both the Federal High Court and State High Courts concurrently exercise jurisdiction.[43]

It may further be argued that this proposal will lead to a conflict of jurisdiction and, therefore, conflicting judgments. In addition, it can

[41]Abdulsalam v. Salawu (2002) 13 NWLR (Pt. 785) 505; Adisa v. Oyinwola (2000) 10 NWLR (Pt.674) 116, Okulate v Awosanya (2000) 2 NWLR (Pt. 646) 530; Savannah Bank of Nigeria Ltd. v. Pan Shipping and Transport Agencies Ltd. (1987) 1 NWLR (Pt. 96) 212.

[42] (2002) LPELR-30(SC).

[43] For instance, on the enforcement of fundamental human rights, see *EFCC v. REINL* (2020) LPELR-49387(SC); for banker/customer relationship, see *Ecobank v. Anchorage Leisures Ltd &Ors* (2018) LPELR-45125(SC).

be argued that the arrangement can lead to the unnecessary rationalisation of customary laws from western perspectives by the common law courts (High Courts). While this is plausible, the Supreme Court may as well qualify extant precedents by holding that the assumed exclusive jurisdiction of Customary Court of Appeal applies only in a state where these courts have been established. This takes cognizance of the fact that section 282 only makes the establishment of these courts optional and in reality; they are not available in all states.

Thus, in *Yange*, while there is no customary court for non-Muslim personal law disputes, the Kebbi State High Court becomes the appropriate venue for such disputes. Besides, the same Constitution requires people learned in customary law to be appointed as justices of the Court of Appeal and Supreme Court. This will take care of the fear of rationalisation of customary laws from western viewpoint. This qualification will meet the constitutional objective of providing access to justice for all litigants. Access to justice is an inalienable right which is enshrined in section 36 of the 1999 Constitution as follows:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law

Right to a fair trial presupposes the right of access to a court through which the right to a fair trial can be activated. Fundamental human rights stand above ordinary laws of the country[44] and they ought to take priority over other laws, including other sections of the Constitution such as sections 277, 280 and 282. It goes without saying that if the courts have paid attention to the importance of section 36 of the Constitution, every dispute must fall within the jurisdiction of one of the courts established under section 270 (High Court), section 251

[44]*Onyiriuka v. A.-G., Enugu State* (2020) 11 NWLR (Pt. 1735) 383 at 405-406, paras. E-C.

(Federal High Court), section 254C (National Industrial Court), section 275 (Shariah Court of Appeal) or section 280 (Customary Court of Appeal). Moreover, sections 275 and 280 are appellate and not courts of first instance. There is, therefore, no legal justification to deny any litigant access to court. This is where the residual jurisdiction of the High Court of a State is activated because section 272 in providing for the original jurisdiction of the High Court states that 'the High Court of a State shall have jurisdiction *to hear and determine any civil proceedings* in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue'.

The next source of jurisdiction is the enabling statute. In this case, the relevant law is section 17 (b) of the Kebbi State High Court Laws, 1996. What should be the effect of section 17 of the Kebbi State High Court Laws which states that:

> 'The High Court shall not exercise original jurisdiction in any suit or matter which is subject to the jurisdiction of Area Court relating to marriage, family status, guardianship of children, inheritance or the disposition of property on death'.

This section purports to limit the jurisdiction vested in State High Courts under section 272 of the Constitution. It is doubtful whether a state law can limit the jurisdiction vested on a State High Court under s.272. A combined reading of sections 272, 273 and 274 suggest that the state may only confer additional jurisdiction on a State High Court but not to take away that jurisdiction.[45] What the enabling statute may also do is to distribute some of the matters to some other courts

[45] For instance, see s.10 of the High Court of Lagos State which incorporates common law jurisdictional rules. See A. O Yekini, 'Comparative choice of jurisdiction rules in cases having a foreign element: are there any lessons for Nigerian courts?' (2013) 39 *Commonwealth Law Bulletin* 333.

created under the state laws, e.g. Customary and Magistrate Courts.[46] This is what section 17(b) of the Kebbi State High Court Laws seeks to achieve by excising personal law matters from the jurisdiction of the High Court. To comply with section 272, the state needs to ensure that an Area Court (or Customary Court) which non-Muslims can access is established. However, this is not the case in Kebbi State because the Area Courts do not have compulsory jurisdiction over non-Muslims. To that extent, that section has not fulfilled the requirement of the Constitution.

4.0. *Forum Necessitatis* as an Alternative Solution

A brilliant attempt by the trial court to wriggle out of the conundrum was to assume jurisdiction on the basis that no other court is available to resolve the dispute between the parties. This is what is known as *forum necessitatis* (jurisdiction by necessity) in civil law jurisdictions. Unfortunately, the Court of Appeal failed to appreciate the ingenuity of the trial court. We are not aware of any Nigerian court decision which directly or indirectly referenced this doctrine. This case, therefore, provides us with an ample opportunity to introduce this concept to the Nigerian legal system.

Forum necessitatis is increasingly featuring in private international law discourse in recent time.[47]The concept is rooted in the right to a fair trial and the need to ensure that a litigant is not denied a forum to ventilate his grievances.[48] It is often invoked where a claimant is not able to sue in the appropriate forum for cogent reasons, or there is simply no forum created by law for the claim. While there is yet to be

[46] In Lagos State for instance, s.28 of the Magistrates' Court Law 2009 confers jurisdiction on Magistrate Courts in civil and commercial matters whose claim is not more than ₦10,000,000.

[47] See generally, Arnaud Nuyts, *Study on Residual Jurisdiction General Report* (Liedekerke 2007); ChilenyeNwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30 *Utrecht Journal of International and European Law* 24.

[48] M Sobkin, 'Residual Discretion: The Concept of Forum of Necessity under the Court Jurisdiction and Proceedings Transfer Act' (2018) 55 *Osgoode Hall Law Journal* 203, 204-205.

a global consensus on the requirements that a claimant must meet to enable a forum court exercise jurisdiction out of necessity, the doctrine is now available in many jurisdictions, both common law and civil law.

In Canada, section 6 of the Court Jurisdiction and Proceedings Transfer Act allows a court to be seized, out of necessity, of a matter even where it has no territorial jurisdiction. This has been applied in *Van Breda v Village Resorts Ltd*,[49] where an Ontario Court of Appeal aptly describes the normative basis for *forum necessitatis* as follows:

> The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace 'forum of last resort' cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.[50]

The application of the doctrine was equally confirmed by the Canadian Supreme Court.[51]

In the United Kingdom, a few cases indicate that the English courts would be prepared to assume jurisdiction even if England is not the natural forum. In *Michael Cherney v Oleg Deripaska*,[52] the English Court of Appeal affirmed the trial court's assumption of jurisdiction on the basis that the Claimant would not be able to get a fair trial in Russia which is the natural forum for the claim. *Alberta Inc .v*

[49]2010 ONCA 84. See also *West Van Inc. v. Daisley*, 2014 ONCA 232.
[50]Ibid., para 100.
[51]*Club Resorts Ltd. v. Van Breda*[2012] 1 SCR 572 at para 100.
[52][2009] EWCA Civ 849.

Katanga Mining Ltd,[53] suggests that where a natural forum is not available, the English court would assume jurisdiction. In this case, the Claimant was allowed to proceed with an action partly because of the absence of normal infrastructure of a State as a result of an ongoing war, the personal safety of the Claimant and the ends of justice.[54] This was at a time when the Democratic Republic of Congo was at war. Similarly, in *Ellinger v Guinness Mahon & Co*,[55] *a Jewish claimant was allowed to proceed with his action in England because the appropriate venue was Nazi Germany.*

In the European Union, jurisdiction based on the doctrine of *forum necessitatis* has been considered as a necessary obligation arising from Article 6 of the European Charter of Human Rights which guarantees right to a fair trial and access to justice.[56] This is similar to s.36 of the Nigerian Constitution. Right to a fair trial has been understood to include right to access to court and an effective remedy.[57] Thus, where a litigant has no practical alternative forum for his claim, a forum court may assume jurisdiction out of necessity. Arnaud Nuyts examined the residual jurisdiction rules of the 27 Member States of the European Union and has this to say:

> The lack of available or appropriate forum abroad is an autonomous ground of jurisdiction in 10 Member States. It is based on an explicit statutory provision in 6 of them, and on case law in the

[53][2008] EWHC 2679.
[54]Paras 33-35.
[55][1939] 4 All E.R. 16.
[56]D Augenstein, 'Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy' (2018) 18 *Human Rights Law Review* 593, 597.
[57]A Koprivica, 'Right to a Fair Trial in Civil Law Cases' in Rainer Grote, FraukeL chenmann, Rüdiger Wolfrum (eds) *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2015); Valesca Lima and Miriam Gomez, 'Access to Justice: Promoting the Legal System as a Human Right' in W. Leal Filho et al. (eds.), *Peace, Justice and Strong Institutions, Encyclopedia of the UN Sustainable Development Goals* (Springer Publishing 2020) 2.

> others… In the remaining 17 Member States, there is neither currently no statutory basis nor case law supporting the existence of such basis of jurisdiction. But that does not mean that the principle of forum *necessitatis* would necessarily be rejected by the court should a relevant case arises. Some national reporters expressly note that while there is currently no practice in their country, it could theoretically not be accepted, under general principles of law, that a party be deprived of the right of access to a court if this is necessary to vindicate his rights[58]

The doctrine has also been used to exercise universal criminal/civil jurisdiction under international law as well.[59]

5.0. Conclusion

The framers of the Nigerian constitution did not envisage that there would be a wholly domestic case without an appropriate court to be seized. This is realised by establishing superior courts for various subject matters with jurisdiction reserved for a State High Court for any civil claim that is not exclusively vested in other courts such as the Federal High Court and the National Industrial Court.

Except for those special courts created by the Constitution and those with exclusive jurisdiction, the Constitutional framework permits other courts to be created and jurisdictional grounds are not often couched in prohibitive language. For instance, section 282(b) empowers the State House of Assembly to confer additional jurisdiction on the Customary Court of Appeal. The same applies to the State High Court. This suggests that legislators may expand the

[58] Arnaud Nuyts (n 46) 64.
[59] Abhimanyu George Jain, 'Universal civil jurisdiction in international law' (2015) 55 *Indian Journal of International Law* 209, 224-226.

jurisdiction of courts or reorganise it as the case may be.[60] Where it is not so restricted, courts may exercise jurisdiction on some widely recognised principles of law provided the claim falls within the subject matter jurisdiction of the court.

For a State High Court, its subject matter jurisdiction is very broad and expansive. Unlike the Federal High Court and the National Industrial Court with specific subject matter jurisdiction, a State high Court is not so restricted. Its jurisdiction extends to *any* civil proceedings other than those allocated exclusively to the Federal High Court and the National Industrial Court.

The Kebbi State High Court Law cannot validly curtail the jurisdiction of the State High Court on personal law matters without creating an appropriate legal framework that takes care of personal law issues affecting both Muslims and non-Muslims. Thus, the available options are three. First, there is a need to set up Customary Courts for non-Muslims and a Customary Court of Appeal. Second, in the alternative, the Area Court Law must be amended to enable the Court exercise mandatory jurisdiction over non-Muslim personal law with an adequate guarantee for the application of customary law where non-Muslims are involved. Third, in the absence of the first two options, the High Court can exercise jurisdiction under section 277 of the 1999 Constitution as a court of residual jurisdiction or on the ground *forum necessitus.*

[60] *Customary Court of Appeal Edo State v. Chief (Engr) E.A. Aguele & Ors (supra)* at p. 397-398,paras. B-A.

A Critique of the Governor's Power on Revocation of Certificate of Occupancy under the Land Use Act, 1978

Prof. O. J. Jejelola[1]

Abstract

The general idea or motive behind the exercise of the power of revocation of the Land by the Governor is to give room for the government to accelerate the socio-economic developments in the country. It is primarily targeted towards overriding public interest and public needs of the State as dictated by the Land Use Act, 1978 and other reference statutes. The vexed issue of expropriation has more often than not created a lot of controversies on both sides of the divide. This is viewed against the backdrop of the fact that subjecting developmental activities of the State to trivial impediments could spell doom to the needed economic progress. However, the practical operation of this policy has sometimes left much to be desired such as being used as an instrument of political vendetta and as a means to amass wealth.

In this study, the Land Use Act, 1978, relevant judicial decisions and literature on this topic were both relied on as sources of information. This was done with a view to analysing the regime of expropriation in the country under the current legal framework as well as identifying loopholes that make it prone to controversies. It was discovered that the Land Use Act needed to be reformed in order to give room for 'just' and 'equitable' mode of revocation of Certificate of Occupancy.

The paper concluded that the current legal regime regulating the exercise of the power of the Governor to revoke certificate of occupancy is susceptible to abuses. Therefore, a reform of

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the extant laws in the country is imperative in order to insulate it from abuses.

Keywords: Revocation, Certificate of Occupancy, Public Purpose, Alienation, Compensation.

1.0. Introduction

Revocation of land rights is generally the process by which State compulsorily acquires land and premises for development purposes when they consider this to be in the best interest of the State. It is the power of government to acquire private rights in land for public purpose without the willing consent of the land owner when it considers this to be in the best interest of the State. This power to acquire private rights in land is also known as expropriation, taking, revocation or compulsory purchase depending on a country's legal traditions. In all cases, the owners or occupiers are denied their property rights for overriding public interest or public benefit. At times, acquisition is for direct government use for public purposes and often times for public-private use, for example when the land is required for the direct use of a private commercial enterprise for public benefit.

2.0. Nature and Purport of the Act.

The Land Use Act, 1978 is the main body of legislation governing private property rights to land in Nigeria. It is repeatedly and consistently described as the most revolutionary and controversial piece of legislation in Nigeria's legal history. The main purpose for the promulgation of the Land Use Act was for the provision of a uniform land tenure system in Nigeria, to make land easily and cheaply available to the citizens of Nigeria and to prevent fraudulent land practices within the country.

The Act vest all land in the territory of each State in the Governor of each respective State in the country and indicates that such land shall be held in trust and administered for the use and common benefit of

all Nigerians in accordance with the provisions of the Act.[2] By vesting all lands in the executive institution of Nigeria, the intention of the promulgators of the Act was the nationalization of all the land in the country by giving the State ownership rights to all land and leaving the private citizens of Nigeria with mere interests in land and mere rights of occupancy.

The promulgation of the Land Use Act extinguished all prior rights to land of all Nigerian citizens and substituted alienable rights with two types of rights of occupancy to land. The first type are Statutory Rights of Occupancy which are rights granted to the holder by the State's statutory law and the second type are Customary Rights of Occupancy which are rights granted to the holder under customary law.

The present laws governing rights to land in Nigeria bear a passing similarity to English law in relation to the rights or interests transferred to the people by their respective property rights laws. This similarity is superficial because, although all land in England and Wales are owned by the Crown[3] and as a result, all persons own 'merely' an 'estate in land' rather than the land itself, however, the rights to land conveyed under English land law make provision for a freehold estate in land despite the vesting of land in the office of the Crown unlike the Nigerian land law. The English freehold estate provides for free alienability of the holders of fee simple estates during the life of the estate owner thereby promoting easy alienation of the estate by way of sale, gift, mortgage or other transfer of property transactions. On death, the fee simple estate is also alienable by will or under the rules of intestate succession in circumstances where there is no will.

[2] Section 1 of the Land Use Act.

[3] Section 1 (1) Law of Property Act of England States 1925 states that: "the only estates in land which are capable of subsisting of being conveyed or created under law are an estate in fee simple absolute in possession and a term of years absolute".

In contrast, the Nigerian Land Use Act extinguishes all previously alienable freehold rights to land, ensuring that statutory and customary rights of occupancy, granted by the Governor of a State and the Local Government respectively are the only present and available individual rights to land. Further, these rights are not easily transferable between individuals within the ambit of the Act[4]. The downgrading of previously alienable rights of Nigerian citizens to rights of occupancy by the Act has served to limit the protection of the property rights of individuals afforded by Nigerian property law. Lack of protection of individual private property rights is also compounded by the fact that the Act does not define the meaning of the term 'rights of occupancy' within its statute[5].

3.0. Revocation Power of the Governor on Certificate of Occupancy

One provision of the Act which has encroached on the private rights of individuals to land in Nigeria and emphasized the dominance of the executive institution over the legislature and judiciary institutions is the revocation powers vested in the Governor by Section 28 of the Land Use Act[6].

Section 28 of the Act states that[7]: *"It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest".* The effect of the revocation power vested in the Governor by the Act has

4 I O Smith, Practical Approach to Law of Real Property in Nigeria (Ecowatch Publications, 1999). See also Section 22 of the Land Use Act, 1978.

5 Obaseki JSC in *Savannah Bank (Nigeria) ltd v. Ajilo* (1987) 2 NWLR [Pt. 571], P. 421 describes the revolutionary and controversial nature of the Land Use Act which eliminated all the unlimited rights and interests that Nigerians had to their land before its promulgation and substituted them with limited rights and rigid control over the use and disposal of their rights to the land. See also Nnamani A "The Land Use Act – 12 Years After*"* (1991) 11*Nigerian Law Journal* 105.

6 See Section 28 of the Land Use Act. (LUA)

7 Section 28 (2) of the LUA goes on to elaborate on the term 'overriding interest' to mean "the requirement of the land by the Government of the State or the Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation".

manifested in a plethora of cases where Governors have revoked individuals' rights to landed property by claiming that the relevant properties were compulsorily acquired "for public purposes" but in most instances it turned out that the revocation had been for improper motives[8]. The Act does not define all the circumstances that may constitute grounds for an application of the Governor's power to revoke a right of occupancy for "overriding public interest" or for "public purposes". The Act does however give instances of overriding public interest to include the requirement of land for "mining or oil pipelines or where the holder of the property alienates the land without the consent of the Governor"[9].

Unfortunately, the Nigerian Constitution also does not define the circumstances where land in Nigeria may be compulsorily acquired but it asserts that the right of an individual to own access and enjoy his/her property is guaranteed[10], and private property rights should be protected against governmental encroachment. The stance taken by the Constitution is that private property rights to land can be compulsorily acquired for "overriding public interest" provided "prompt compensation" is paid and "the right of access to court to challenge the quantum of compensation payable is not denied"[11]. The relevant issue becomes what the exact definition of the terms "overriding public interest" or "for public purposes" are in relation to the property rights of individuals. The purpose of this definition is to ascertain the limits, if any, to the powers of revocation vested in the Governor in a bid to prevent or curtail any abuses of the revocation powers exercised by the Governor. Due to the limitations imposed by the provisions of the Act, the powers of revocation vested in the

[8] See the case of *Awagbo v. Eze* (1995)1 NWLR, (Pt.372) ,p. 393. Several Governors were discovered to have compulsorily revoked land for private and fraudulent purposes such as acquisition for sale of land or for private use, revocation of land and allocation to wives, friends, and relations or for politically motivated reasons.

[9] See Section 28 (3) of the LUA 1978.

[10] See Section 43 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[11] See Section 44 (1) of the 1999 Constitution.

Governor and the ambiguous nature of the terms "overriding public interest" and "for public purposes", the judiciary has stepped in to mitigate the wide powers vested in the executive institution in order to qualify the executive revocation powers.

4.0. Legal Grounds and Means of Compulsory Acquisition of Land by Government

As earlier enunciated, it is every citizen's right to own land in any part of Nigeria and be equally protected from compulsory acquisition of such by government. Although, for specific purposes and in given manner, government has powers to compulsorily acquire any land. However, none observance of the legal grounds and means for compulsory acquisition of land by government, invalidates such compulsory acquisition. Below are the special cases under which government can exercise such powers: -

(i.) Legal Ground for Compulsory Acquisition of Land.

"Overriding public interest" is the sole and only purpose under the Land Use Act, upon which a Governor can compulsorily acquire the land of any person. "Overriding public interest" arises where;

(a) A statutory right of occupancy holder sells, mortgages, transfers or alienates his title without a prior consent of governor as demanded by the law; and

(b) There is a requirement of land by Federal Government or State Government or even Local Government for a "Public Purposes" in the federation or state respectively[12].

With reference to the provisions of Section 51 (1) (a) to (h) of the Land Use Act, "Public Purposes" include things that are: for exclusive government use or general use; for use by government companies, corporations, ministries, departments and agencies; for sanitation of environment, urban or rural planning and development; for mining, oil pipelines purposes and extraction of building materials; for economic,

[12] Section 28 of the Act.

industrial or agricultural developments and for construction of railways, road or other public works undertaken or provided by the government.

Unfortunately, the interpretation of the words "Public purpose" is too wide that many Governors have hibernated under them to wind up businesses of their opponents and enrich their own personal businesses. Under this vague expression, a Governor can compulsorily acquire someone's manufacturing company and turns it into swimming pool and restaurant while he turns a privately owned University into his Hotel. However, a Governor needs not give any further reason or report for his compulsory acquisition to any person or thing; once he tags it for "overriding public interest".

In the light of Section 44 of *Constitution of the Federal Republic of Nigeria, 1999* (as amended) the other grounds among which landed property can be compulsorily acquired are; (a) where there is prompt payment of compensation on such land/property (b) where the holder of right of occupancy of such compulsorily acquired property is afforded right of access for determination of his interest and compensation in a court of law (c) where land/property is in a dangerous state or injurious to the health of human beings, plants or animals (d) where land/property relates to enemy of state (e) where it is for execution of court judgment or (f) for imposition of tax, rate or duty, etc.

(ii.) Legal Means of Compulsory Acquisition of Land.

Once the need for a compulsory revocation of land is for overriding public interest, the means is very simple and easy. Where a Governor wants to compulsorily acquire land, the Governor (or through his staff) is to issue a "NOTICE" to the holder of the right of occupancy of the desired land. The Notice must declare that the land is required by the government for public purpose. At the issuance of such notice, the right of occupancy will be revoked. Once such is done, the Governor has compulsorily acquired the land. There cannot be a valid compulsory acquisition of land without a "Notice" to the holder of the

right of occupancy. EKO, J.S.C in *Orianzi* v. *A.G Rivers State*& ors.[13] affirmed that the title holder is not only entitled to the notice of the proposed revocation with the public purpose for the revocation clearly spelt out therein, he is also entitled to be heard on the proposed revocation of his title.

5.0. Executive Revocation Powers and Judicial Policy Trends

In considering the powers vested in the Governor by Section 28 of the Land Use Act, the judiciary, in a bid to act as an effective "check and balance" to the executive institution in accordance with the *separationist* concept of the Nigerian Federal States, has accorded a restrictive interpretation to the provisions of Section 28. The judiciary has achieved this by stipulating that in order to preserve a functional rule of law, every power should have a legal limit notwithstanding how wide the language of the empowering Act[14].

The strategy employed by the judiciary in dealing with the revocation of individuals' rights to property by the Governor for "public purposes" has been indirect. Rather than attack the inherent statutory power of the Governor to revoke interests in the land and acquire land "for public purpose", the judiciary has chosen to focus on strict compliance with statutory procedure which the Governor is obligated to adhere to in order to revoke such interests on land. This underscores the attitude of the judiciary to construe cases of compulsory land acquisition *fortissimo contra preferentes*[15].

[13] (2017) LPELR-41737(SC) Pp. 78-89, Paras. E-A

[14] O., Amokaye "The Land Use Act and Governor's Power to Revoke Interest in Land: A Critique in The Land Use Act" in Smith I.O (Ed) *The Land Use Act – Twenty Five Years After* (Department of Private and Property Law, University of Lagos, 2003).255. Oludayo states that: "the power granted by Section 28 to the Governor to revoke the proprietary interest in land should not be without limitation, circumscription or procedural rules which must be observed".

[15] Literarily implies 'Strictly against the acquiring authority but sympathetically in favour of the dispossessed person'.

This procedure is laid down in Section 28 (6) of the Land Use Act[16]. Attempting to curtail executive powers, the judiciary expressed its view that an Act or law that seeks to deprive an individual of his rights to property should be strictly construed against the acquiring authority[17]. With this as its focal point, the Supreme Court reiterated a litmus test to curb the Governor's powers of revocation. The first aspect of the litmus test expounded by the court[18] to mitigate the Governor's revocation power is the declaration that it is a question of law and not fact as to whether it is being done for public interest.

Further, the court asserts that the revocation of interest in land must be within the statutory definition and permissible purpose of the Act. In order to revoke a right of occupancy for public purposes, the court insists that the letter and the spirit of the laws must be adhered to. As the consequence of a revocation of a grant of a right of occupancy is severe, namely, the deprivation of the holder's proprietary interest, the terms of revocation must adhere with the strict construction of the provisions of the Act.

However, the judicial effort to limit executive dominance, though commendable, has been insufficient. The Nigerian judiciary is still unable to redefine or illuminate the scope of the term "for public purpose" or "overriding public interest". This has allowed a stem of recurrent and blatant abuses of power by some Governors who compulsorily revoke and reclaim rights to property vested in individuals and businesses while claiming such revocations to be "for

[16] The procedure for revocation of interest in land is laid down in Section 28 (6) of the Land Use Act. The procedure entails that the revocation be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice thereof given to the holder. The holder of the property's title is extinguished on the receipt by him of the notice or at such later date as may be stated in the notice. Where land is required by the Federal Government, the Governor is obliged to revoke a right of occupancy if a notice is issued by the Head of State or on his behalf if he declares the relevant land to be acquired by the Government for public purpose.

[17] *Peenock Investment Ltd v. Hotel Presidential* (1983)4 NWLR 122 at 168 or (1982) 12 S.C. P. 1.

[18] *Osho v. Foreign Finance Corporation Ors* (1992)1 N.S.C.C. at P. 521.

public purpose", but subsequently reallocating the rights to such land to government officials or other individuals in accordance with the Governors' fiats.

In the case of *Olatunji v. Military Governor of Oyo State*[19] the Governor exercised his power of revocation under Section 28 of the Act to acquire property which was privately owned and secured by a Mortgage Agreement. The Governor claimed the property was reclaimed "for public purposes" namely the erection of electricity grid and power stations but the Governor later reallocated the land to private individuals who converted the land for other purposes outside public purposes. The Court of Appeal held in this case that a property compulsorily acquired for public purposes but later directly or indirectly diverted to serve private needs does not amount to a valid acquisition[20]. The conclusion reached by the Court was that if the Governor could no longer find a public purpose for the land compulsorily acquired, the only avenue to be taken was to relinquish it and let the property revert back to the previous holder or holders of the rights of occupancy on the land. The issue remains uncertain because the courts have been unable to answer further questions as to whether a revocation by the Governor of property which is the subject of a right of occupancy vested in an original private holder, and, the subsequent reallocation by the Governor to another private individual who utilizes the property for a socially beneficial purpose will qualify under the term "for public purpose".

The second aspect of the litmus test applied by the judiciary to curb the Governor's power of revocation is more easily ascertainable than the first. It indicates that revocation of the rights of the holders of the right of occupancy in the property by the Governor must comply with the statutory procedure for revocation and service of revocation notice.

[19] (1995) 5 N.W.L.R. at 587.
[20] *Ibid.*

Yet again, the Nigerian judiciary, rather than challenge the Governor's statutory powers of revocation, have decided to focus on the procedure to be taken before a revocation may be validly implemented. The Court achieves this by establishing the procedure for revocation by a Governor. The Court insists that the Governor or any public officer duly authorized by him must duly sign the revocation notice and the notice must be properly served on the property owner. To determine "proper service" of the revocation notice, the Court generally focuses and insists on personal service on the property rights holder except in special circumstances where attempts to ensure that personal services are complied with have proved futile or impossible, only in those circumstances would the Court consider accepting substituted services[21] as stated in *Osho's case*[22].

The Nigerian courts have constructively decided to read into the Act the requirement that a notice of revocation must specify the reason for revoking a person's right of occupancy even though the Act does not expressly state that specific grounds must be stated in the notice[23]. This simply means that the courts have actively interpreted the Act by stipulating that the Governor's notice of revocation must spell out the public purpose which the Governor wishes to use the revoked land for in the notice.[24]in addition, the Supreme Court has added a new label to this requirement of putting a prospective dispossessed party on notice of an intended expropriation. In *Orianzi* v. A.G *Rivers State & ors*[25] , EKO, J.S.C affirms that the title holder is not only entitled to the notice of the proposed revocation alongside having the public purpose

[21] The Supreme Court held that the notice of revocation had not been duly served on the holder of the right of occupancy and did not amount to exceptional circumstances where substituted services may be accepted; therefore the revocation notice was declared invalid.
[22]*Supra* (n17)
[23] See the case of *Nitel v. Ogunbiyi* (1992) 7 N.W.L.R. [Pt. 255] 543.
[24]*Osho v. Foreign Finance Corporation & Ors* (*supra)*
[25]*Supra.*

clearly spelt out in the notice, such a dispossessed is also entitled to be heard on the proposed revocation of his title.

6.0. Preconditions for Compensation Upon Revocation Under the Act

The question that often arises is that when does the Governor duly and accordingly revoke the rights to land of the holder of a right of occupancy and what will the holder of the property rights to land left with? Answers to this highlights the next issue to be dealt with which is whether there is any compensation in all cases for revocation of property rights to land carried out by the State.

Compensation denotes some forms of restitutions which aim at placing a property owner, as near as possible to the position he would have been had his property not been acquired for public purposes. Compensation in cases of compulsory acquisition of land means the sum of money which is to be paid by public body carrying out some authorized undertaking under statutory powers in respect of the compulsory acquisition of land which is required for the purpose of the undertaking; and that (if any) injury resulting from the execution of the works to land which is not required for the purpose of the undertaking[26]. Garner[27] describes compensation as "a fair payment by the Government for property it has taken under eminent domain. The property's fair market value, so that the owner is not worse-off after the taking". Compensation serves to right what would otherwise count as wrongful injuries to persons or their property[28]. Compensation flows naturally from any act of compulsory acquisition.

In theory, compensation makes the injured person whole; it aims at repaying for losses and should therefore be guided by the principles of

[26]J P H Soper' Arbitration and Analysis' cited by O G Amokaye, 'Compensation for compulsory acquisition of land for mining activities in Nigeria: the Search for a viable solution' in Robert Home (ed), Local Cases Studies in African Land Law (PULP 2011) 179

[27] B A Garner, (1999) "Just Compensation" 7th Edition, West Group, St. Paul, Minnesota, P. 277.

[28] W L Prosser and J W Wade Reinstatement (Second) of Torts (ALI 1979) Sec 903.

equity and equivalence. It is ordinarily payable not only for the land taken by the State but also for other losses occasioned by the act and process of public acquisition of land[29] and this must have informed the provision of the Constitution[30] on prompt compensation and access to court for the determination of the adequacy or otherwise of the compensation payable.

Despite this right to compensation by the government, there are instances where the law deviates from the golden rule of compensation by denying land owners any compensation at all or paying what amounts to inadequate compensation for the loss occasioned by the acquisition. Section 1 of the Act provides:

Subject to the provisions of the Act, all land comprised in the territory of each State in the Federation are vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of Nigerians in accordance with the provision of this Act.

The Act in the above section vests all lands in every State of the Federation in the Governor of the State who holds same in trust and is enjoined to administer them for the use and common benefit of all Nigerians in accordance with the provisions of the Act[31]. By this Act, Nigeria now operates a contractual system of tenure validated by a Certificate of Occupancy which sets out terms of tenure including access, succession, duration and rents. What this means is that rather than own land in perpetuity, the citizen is granted a determinable right of use over the land. The effect is that total ownership of land is vested in the Governor and private persons are only entitled to a

[29] In the UK, there are in addition statutory entitlements to which the claimant may be entitled such as Home Loss Payments to a person who is displaced from a dwelling by compulsory powers or Basic Loss and Occupiers' Loss Payments to a person who is displaced from property or land other than a dwelling by compulsory powers.

[30] Section 44 Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[31] Section 1 of the Land Use Act, 1978.

leasehold interest through a right of occupancy; at least for now, for 99 years.

According to Nwabueze[32], the meaning and effect of vesting all lands in the government is that private ownership is hereby abolished and the title of the former private owners transferred to the Government. However, some commentators and academic writers like Omotola[33], James[34], Fekumo[35] and Smith[36], known as the private property right school, are of the view that the Act does not dispossess or extinguish individual rights to lands. Thus, the right of the citizen to enjoy his interest in land remains, and the right to alienate this interest is only impaired to the extent that the transaction relates to land coming under Section 36 of the Act. Omotola argues further that if the Governor is the owner of all lands in the State, it would not have been necessary to insert section 28 of the Act which gives the Governor the power of revocation.

Fekumo, in supporting the view of Omotola, opines that sections 24, 29 (3) and 35 of the Act recognize the various units of ownership before the Act; meaning that customary right of occupancy as defined in the real sense predates the Act. He therefore concludes by saying that a careful look at the whole context of the Act will appear to warn that there are three types of ownership: customary ownership, customary right of occupancy and statutory right of occupancy. According to him, what has happened under the Act is that the Governor, as trust-owner, has the radical title in the land, leaving the real ownership with the indigenous owners. These scholars argued further that the Governor is not the beneficial owner of the land by

[32] B Nwabueze "Nationalization of land in Nigeria" Paper Delivered at the Annual Bar Dinner, Onitsha Branch on 8th December, 1984 p.1.

[33] J A Omotola, "Does the Land Use Act Expropriate? *Journal of Private and Property Law* Vol. 3, 1985, P. 1.

[34] R W James, "*Nigerian Land Use Act, Policy and Principles"* Unife Press, 1987, P. 33.

[35] J F., Fekumo, "*Does land Use Act Expropriate? – A Rejoinder* "Journal *of Private and Property Law*, Vols. 8 & 9, 1988/89, PP. 5 – 20.

[36] I O Smith, "Practical Approach to Law of Real Property in Nigeria", 1999, Ecowatch, PP. 70 – 71.

virtue of section 1 of the Act, but only a trustee, as the section has created a trust in favour of all Nigerians.

According to Otubu[37], in all, the import of the provision of section 1 is that the legal status of the Nigerian land user becomes that of right of occupancy, not one of ownership; and the economic interest and benefits of occupancy are severely limited by law since proprietary interests in land are lost and claims are restricted to improvements made on the land. Otubu is therefore of the view that the Act stripped off ownership rights vested in individuals, families and communities prior to its enactment and vest the same in the Governor. Smith in his inaugural lecture[38] agrees to this where he said:

> Section 8 of the Land Use Act subjects an actual grant of statutory right of occupancy by the Governor to a fixed term. The term is usually expressed to be for duration of 99 years; it could be less. Because a fixed term will inevitably come to a end by effluxion of time, technically, all rights appertaining to the land reverts back to the reversioner i.e. the Governor, at the expiration of the term, and like the situation under a leasehold interest, the holder is expected to relinquish possession. Where there are no improvements on the land, no issue arises as to the status of the holder for, he owns not the land but only the improvements made thereon…

It is thus clear, that the Act nationalized all lands in favour of the State, whilst allowing private ownership of the improvements on the land. The argument of the private property rights school to the contrary failed to consider the import of the provisions of section 29

[37] T Otubu, "Compulsory Acquisition without compensation and the Land Use Act" *in bullet 2004/2003 @yahoo.com 2013* (accessed 7/8/2015).

[38] I O Smith, "Sidelining Orthodoxy In Quest For Reality: Towards an Efficient Legal Regime of Land Tenure in Nigeria". *An Inaugural Lecture delivered at the University of Lagos University of Lagos Press, 2008*, 20 – 21.

(1) and (4) which in reality divested private beneficial interest in land simpliciter and vests same in the State. The provision provides that the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements; and compensation under (1) of this section shall be, as respect the land, for an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy was revoked[39].

7.0. Circumstances Under Which Land is Revoked Without Compensation

Flowing from the foregoing, section 28 of the Act equips the State with the power to revoke rights of occupancy, whilst Section 29 requires it to pay compensation for the revoked occupancy rights. However, the grudge and criticism about this is that the Act declines payment of compensation in some instances and or pays what cannot be conceptually regarded as compensation in other circumstances. Instances of the revocation without compensation are discussed at length below.

According to the provision of section 34 (5) of the Act:

> Where on the commencement of this Act, the land in urban area is undeveloped, then –
>
> (a) one plot or portion of the land not exceeding half of one hectare in area shall continue to be held by the person in whom the land was so vested as if the holder of the land was the holder of a statutory right of occupancy granted by the Governor in respect of the plot or portion as aforesaid under this Act; and
> (b) and all the rights formerly vested in the holder in respect of the excess of the land shall on the commencement of this Act be extinguished and the

[39] Section 29(1) (4) of the Land Use Act.

> excess of the land shall be taken over by the Governor and administered as provided in this Act[40].

The Act further provides that Section 34 (5) (a) shall not apply where such person, upon the commencement of this Act, is also the holder of any undeveloped land elsewhere in any urban area in the State and in respect of such a person, all his holdings of undeveloped land in any urban area in the State shall be considered together such that one plot or portion not exceeding half a hectare in area shall continue to be held by such a person as if a right of occupancy had been granted to him by the Governor in respect of that part or portion.[41] And, the remainder of the land in excess of half a hectare shall be taken over by the Governor and administered in accordance with the provisions of the Act and the rights formerly vested in the holder in respect of such land will be extinguished[42]. The Act makes no provisions for any form of compensation to be paid to those affected by this provision and also forbids recourse to the courts to challenge these draconian provisions. Besides, this is a pure expropriatory act on the part of the State without compensation as it negates the compensation principles enshrined in the Nigerian Constitution[43].

Furthermore, there are certain circumstances under the Act where land and land rights are revoked or compulsorily acquired without compensation. These includes the followings-

(a) Revocation on Grounds of Alienation Without Requisite Consent[44]

One of the instances under which there can be a compulsory acquisition of private interest in land without provision for compensation under the Act is where the holder of either a statutory right of occupancy or a customary right of occupancy alienates the

[40] Section 34 (5) (b) of the Land Use Act.
[41] *Ibid*, s.34 (6).
[42] *Ibid.*
[43] Sections 43 & 44 Constitution of Federal Republic of Nigeria 1999.(as amended)
[44] *Ibid.* s. 28(2) (a) and (3) (d) of the Act.

whole or part of such right either by sale, assignment, mortgage, transfer of possession, sublease, bequest or by any other means without the requisite Governors' consent or approval. The Act prohibits and makes it unlawful for any person granted a right of occupancy by the Governor to alienate his right of occupancy or any part thereof without the consent of the Governor first had and obtained as failure of this renders any purported transfer of possession null and void[45].

Also, the holder of the right in addition stands to forfeit his right by outright revocation without any compensation. The application of this provision imposes double jeopardy on the parties to the transaction as the parties would not only have incurred losses on the account of the transaction being declared void for lack of requisite Governor's consent; but will also forfeit the land and the development thereon to the State without any corresponding obligation to pay compensation. The parties are not also allowed to remedy their wrongs by re-applying for the Governor's consent. This is indeed a pure case of double jeopardy.

(b) Revocation on Grounds of Breach of the Provisions Contained in the Right of Occupancy

By virtue of Section 28(5) (a) of the Act, the Governor may revoke a statutory right of occupancy if there is a breach of the provisions contained in section 10 of the Act. Section 10 of the Act provides thus:

> Every certificate of occupancy shall be deemed to contain provisions to the following effect: That the holder binds himself to pay to the Governor the amount found to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation; That the holder binds himself to pay to the Governor the rent

[45] *Ibid,* s. 22 (2).

> fixed by the Governor and any rent which may be agreed or fixed on revision in accordance with the provisions of section 16 of this Act.

Accordingly, where the holder fails to fulfil any of the above requirements, he stands the risk of revocation without compensation because the Governor has exclusive power to fix and review rents; it may revoke the right of occupancy for failure to pay imposed rent. This makes the Governor the law giver and enforcer at all times, thus leaving the holder of the right of occupancy at the mercy of the Governor and unjustly enriches the State at the expense of the right holder. In other to ensure equity and fairness in the exercise of this power, the court should be saddled with the responsibility to either revoke or otherwise order the judicial sale of the right of occupancy on the application of the Governor. And where sale is ordered, the State should deduct its accrued rents and any excess sum should be returned to the right holder. This will definitely afford justice to all parties concerned.

(c) Revocation On Grounds of Breach of Terms Contained in the Certificate of Occupancy or Special Contract by the Governor[46].

Where the holder of a certificate of occupancy fails to comply with the terms contained in the certificate of occupancy or the terms of a special contract entered into by him and the Governor regarding the land, as long as the terms are not inconsistent with the provisions of the Act, he stands the risk of revocation of his rights without any right to be compensated. According to Otubu, this provision is not only draconian, it is undemocratic. Why will the Governor revoke a right of occupancy for failure of the holder to comply with the terms of unknown special contract or even terms of the certificate of occupancy imposed on him without his consent?

[46] *Ibid*, s. 28(5) (b).

The provision gives no room for service of notice of breach and request to rectify the breach before the exercise of the power of revocation by the Governor. No opportunity is afforded the holder to be heard and, or make amends with respect to the alleged breach. This is a hazy provision and an example of excessive powers of the Governor to circumvent the protection of private property rights as envisaged under the Constitution.

(d) Revocation on Grounds of Refusal or Neglect to Accept and Pay for a Certificate of Occupancy Issued in Respect of a Right Of Occupancy[47]

By virtue of Section 9 (3) of the Act, if the person in whose name a certificate of occupancy is issued, without lawful excuse, refuses or neglects to accept and pay for the certificate, the Governor may cancel the certificate and recover from such person any expenses incidental thereto, and in the case of a certificate evidencing a statutory right of occupancy to be granted under paragraph (a) of subsection (1) the Governor may revoke the statutory right of occupancy. It follows therefore, that the Governor may compulsorily acquire land without the payment of compensation where the holder refuses or neglects to accept and pay for a certificate which was issued in evidence of a right of occupancy. Such a holder will not only lose his right of revocation at the instance of the Governor, but will also not be entitled to be compensated for the revoked right. In the opinion of Otubu, revocation without compensation on this ground is overkill as the Governor could at best exercise a right of lien on the property to the extent of the expense incurred in the process and probably with the interest at current bank rates.

8.0. Conclusion

The study concludes that the power of the Governors with regard to revocation of Certificate of Occupancies is not without its advantages particularly when viewed from the aspect of revocation on grounds of

[47]*Ibid*. s.28 (5) (c).

public interest which is done in good faith for the development of the society. However, the current legal regime of expropriation in Nigeria makes the exercise of this power susceptible to abuses. Therefore, it is imperative for the judiciary to continue its usual role as the final arbiter in this area of the law in order to checkmate the excesses of the executive powers to safeguard the fundamental human rights of the citizens as enshrined in the Constitution.

Determination of Contract of Employment in Nigeria

Ebenezer F. Adeojo[1]

Abstract

In employer and employee relationships just like in any human relationship, disputes are bound to arise and where the dispute is not properly managed, it may lead to the termination of employment by either the employer or the employee. Employment is a relationship between two parties, usually based on a contract where work is paid for and whose construction or determination is founded on due notice of the parties thereto. The law is well settled that, where there is an ordinary contractual relationship of master and servant, the master terminates the contract, the servant cannot obtain an order of certiorari or reinstatement. If the master rightfully ends the contract, there can be no complaint: if the master wrongfully ends the contract, then, the servant can pursue a claim for damages. Employment under public authorities, however, stands on a different footing from an ordinary master and servant relationship. This paper begins with the examination of the nature of the contract of employment and the laws that governed employment in Nigeria. This study also identifies ways to determine contract of employment as it relates to termination of Contract of Employment. The study is basically doctrinal and it relied on primary and secondary sources of information, judicial decisions and other legislations relating to industrial relations in general.

Keywords: Employment, Termination, Contract of Employment.

1.0 Introduction

The term 'contract of employment' is made up of two keywords: 'contract' and 'employment'. Apart from the definitions of the term in

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various labour statutes and judicial definitions, one can still derive the meaning of the term contract of employment by looking at the meaning of these two words that make up the term. A contract is defined as an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties. Garner[2] defines a contract as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The underlying principle in this definition is that any agreement which does not create obligations recognizable at law is not a contract. The second keyword is employment which is defined as a relationship between a master and a servant.

From the foregoing therefore, contract of employment can then be defined as a relationship which exists between an employer and an employee which the law recognizes as giving rise to a legal obligation between the both parties which said obligation is enforceable at law. The Labour Act[3] defines contract of employment to mean any agreement whether oral, or written, express or implied whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker. Implicit in this definition by the Labour Act is that a contract of employment may be entered orally without the necessity of writing. This is however subject to some statutory exceptions such as the requirements of writing in a contract of apprenticeship. This exception as provided in section 50 of Labour Act provides that:

> Every contract of apprenticeship and every assignment thereof shall be in writing; and no such writings shall be valid unless attested by and made with the approval of an authorized labour officer certified in writing under his hand on the contract or assignment.

[2] B A Garner, *Black's Law Dictionary* (8thEdn, St. Paul Minn: West Pub. CO; 2004) p. 341.
[3] Cap LI LFN, 2004 S. 91.

What the section of the Act depicts is that notwithstanding the general definition of contract of employment in the section of the Labour Act, the Act itself provides a statutory exception to the effect that a contract of apprenticeship cannot be oral but in writing. It is also worthy to point out here that a contract of employment may also be by implication of law, without parties agreeing on the terms and conditions of the contract but because they have acted overtime on an employment relationship exchanging the necessary indices of employment, the law will imply employment relationship between them. The court has also defined contract of employment thus:

> The Labour Act Cap 198 Laws of the Federation of Nigeria (now cap L1 LFN 2004) which applies to workers, strictly to the exclusion of the management staff, defines a contract of employment as any agreement, whether oral or written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker.[4]

Save the addition of the fact that the Labour Act that gives the above definition applies to workers strictly to the exclusion of management staff; the above definition is merely a judicial restatement of section 91 of Labour Act. On the form of a contract of employment and whether it can be inferred, the Court of Appeal, per Orji Abadua, stated that:

> Contract of employment may be in any form and it may be inferred from the conduct of the parties, it can be shown that such a contract was intended although not expressed. Contract of employment may arise out of the agreement which is not enforceable in the law Courts because it lacks consideration.[5]

[4]*Shena Security Co Ltd v. Afrapak (Nig*) [2008] 18 NWLR (pt 1118) 77 at p.84.
[5]*Johnson v Mobil Prod. (Nig) Unltd* [2010] 7NWLR (pt 1194) 471.

Notwithstanding the advantage the employer has over the employee and the predicament which the employee is put into in such situations, the common law recognises the interest of the employee amidst his 'beggar-has-no choice situation' immediately the employee agrees to enter into such relationship with the employer. A Contract of employment is built around two parties or better still, it is created by two parties called the employer and the employee subject however to who qualifies as an employer as well as an employee under the law.

Employment-Related Laws in Nigeria

i. **Labour Act**

The principal legislation governing employment issues in Nigeria is the Labour Act, Cap L1 LFN 2004 (the **"**Labour Act"). Section 91 of the Labour Act defines a "Worker", for purposes of the Labour Act, as:

> ... any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour ...

Section 91 of the Labour Act goes further to exclude certain categories of persons ("*persons exercising administrative, executive, technical or professional functions as public officers or otherwise*") from the above definition.

ii. **Pensions**

The Pension Reform Act 2014 (the **"**PRA") repealed the Pension Reform Act No. 2 of 2004 and makes provisions for a uniform contributory pension scheme for organizations in both the public and

private sectors in Nigeria. Section 2 of the PRA provides that the private sector employers with fifteen (15) or more employees must establish a contributory pension scheme for the benefit of their employees, wherefrom retirement benefits would be paid to such employees. However, Section 2(3) of the PRA also provides that, notwithstanding the prescribed mandatory minimum threshold stated above, private sector employers with less than three (3) employees or self-employed persons are also entitled to voluntarily established Schemes, in accordance with guidelines issued by the National Pension Commission. The minimum rates of contribution are – (1) ten percent (10%) of an employee's monthly emoluments, to be contributed by the employer; and (2) eight percent (8%) of an employee's monthly emolument to be contributed by the employee. An employer is duty-bound to deduct at source, the employee's contribution and within seven (7) days from the date of payment of salary, remit the employee and employer's contributions to the employee's preferred Pension Fund Administrator.

iii. **Employees' Compensation for Injuries**

The Employees Compensation Act 2010 ("**ECA**") provides the framework for employee compensation issues in Nigeria. The ECA applies to all workers employed in the private and public sector and provides for compensation for injuries sustained in the workplace or occupational diseases picked up in the course of employment whether at the usual place of employment or outside it. The ECA establishes an Employees' Compensation Fund to be administered by the Nigerian Social Insurance Trust Fund Management Board which is the authority responsible for implementing the provisions of the ECA. Employers are obligated to make a minimum contribution to the fund for the compensation of injured employees. The ECA also seeks to provide for the rehabilitation of injured employees and expands the scope of injury to workers by including for example compensation for mental stress. Every employer is required to pay a minimum of one percent (1%) of its annual payroll to the Fund in the first two (2) years of the enactment of the ECA. Subsequently, the applicable rate is

determined by the Nigerian Social Insurance Trust Fund Management Board.

iv. **Industrial Training**

The Industrial Training Fund ITF Act, Cap I9, LFN 2004, as amended by the Industrial Training ITF Amendment Act, 2011 (the "ITF Act") establishes the Industrial Training Fund. The purpose of the ITF is to promote the acquisition of relevant skills in industry or commerce to generate a pool of indigenous manpower to satisfy the needs of the economy. Every employer that is liable under the ITF Act must contribute one (1) percent of the amount of its annual payroll to the ITF. Employers that are liable to make contributions under the ITF are:

- Employers having five (5) or more employees in their establishment;
- Employers who have less than five (5) employees but having a turnover of fifty million Naira (₦50,000,000) and above per annum;
- Suppliers, contractors or consultants who bid for contracts from any federal government agency or parastatals or private companies; and
- Companies operating in the free trade zone which seek expatriate quota approval(s) or make use of any custom services.

In the determination of the contributions to be made to the ITF, all employees including those who work part-time and temporary employees are included in the assessment. Further, all the allowances and entitlements paid to such employees within or outside Nigeria are calculated when considering the total payroll of an employer. The ITF Act further imposes a duty on employers to provide training for their indigenous staff to improve their job-related skills. Furthermore, the ITF Act provides that the ITF's Council may make a refund of up to

50% of the amount paid by an employer where it is satisfied that its training programme is adequate. Failure to make contributions within the stipulated period in a calendar year attracts a penalty of five per cent (5%) of the amount unpaid for each month or part of a month after the date on which payments should have been made.

v. **Trade Unionism**

Section 1 of the Trade Unions Act, Cap T14 LFN 2004 defines a trade union as:

> any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers, whether the combination in question would or would not, apart from this Act, be an unlawful combination by reason of any of its purposes being in restraint of trade, and whether its purposes do or do not include the provision of benefits for its members.

Under Nigerian law, one of the fundamental human rights entrenched in and protected by the Constitution is the right to peaceful assembly and association. Specifically, Section 40 of the Constitution of the Federal Republic of Nigeria provides *inter alia* that *"Every person shall be entitled to assemble freely and associate with other persons, and in particular, he may form or belong to any political party, trade union or any other association for the protection of his interests..."*
Nigerian courts have upheld this right to freedom of association by holding that the right to form or join any political party or trade union is exclusively that of the individual citizen and not that of his employer. Accordingly, every worker or employee in Nigeria has the right to, in conjunction with others form a trade union or join an existing one. The decision whether or not to exercise this right rests solely with such an employee, and he can neither be compelled to

form or join a trade union nor can he be prevented by his employers from so doing.

Determination of a Contract of Employment

To determine a contract of employment means to bring to an end a contractual relationship between an employee and an employer. Most writers have never bothered to define this generic term. This notwithstanding, it is my considered opinion that the determination of contract of employment is an umbrella word, involving termination and dismissal. It means the act of bringing the existence of a contract of employment to an end. These two major branches of the term 'determination' have their various ways through which they occur.

Termination of contract of employment revolves around the contractual relationship between the parties governed by common law rules, statutes, and or agreement of the parties.[6] Termination could be by notice, the lapse of time, operation of law, subsequent agreement or repudiation. The most usual form of termination is by notice or payment in lieu of notice. The contract of service is the pivot bedrock or foundation upon which the employee must base his claim. He succeeds or fails upon the terms of the contract of employment. Where the contract of employment is reduced into writing, the courts, as well as the parties, are bound by these terms. The courts have no right to look outside the terms stipulated and agreed therein by the parties to the contract in determining the respective rights and obligations of the parties in a case of dispute on the contract. This has been given judicial vent in a plethora of cases. In the *Western Nigeria Development Corporation v Abimbola,*[7] the Supreme Court held that the provisions of a written contract of service bind the parties thereto

[6] S, Erugo, 'Security of Employment in Nigeria: A Case for Statutory Intervention', *NJLIR* Vol. 1 No. 1 (2007) , p.60

[7]Adewunmi v A-G Ekiti State [2002] 2 NWLR (pt. 751) 474

and it was outside the province of the court to look elsewhere for the terms.

Elias after referring to the determination of contract of employment as the cessation of employment stated that cessation, as used, includes certain situations in which the relationship between an employer and employee is severed.[8] He went further to posit that the true understanding of the expression 'cessation of employment' lies in the form it takes and the possible consequences for the parties. Termination of employment may occur by notice or payment in lieu of notice given by either the employer or the employee concerned, on terms and conditions well-known to the parties long before the need to terminate employment arises. The nature of a contract of employment determines the mode of its termination as well as the legal consequences of wrongful termination or an unlawful termination. By section 9(7) of the Labour Act,[9] a contract shall be terminated –

(a) by the expiry of the period for which it was made; or
(b) by the death of the worker before the expiry of that period; or
(c) by notice in accordance with section 11 of the Act or in any other way in which a contract is legally terminable or held to be terminated.

The foregoing provision recognizes expressly or by implication other modes of termination of contract generally by the tenor of the second limb of paragraph (c) of subsection (7) of section 9 of the Labour Act. According to Emiola:

> Unless a statute provides otherwise, the question as to the duration of an employment or the length and nature of the notice required to determine it will depend on the intention of the parties which may be gathered from the express or implied

[8]A O Elias, 'Summary Dismissal upon Allegation of Crime-An Overview', MRJFIL Vol. 3 No. 3 (2000) p. 134.
[9]Cap LI LFN, 2004.

> terms of the contract or may reasonably be inferred from the circumstances.[10]

It is worthy of note that different rules apply to the termination of the purely master-servant relationship and contracts with statutory flavour as regards the procedure to be followed and the consequence of the breach of the particular procedure. In a purely master-servant relationship, the contract of employment determines the procedure to be followed and breach of that procedure renders such removal of the employee wrongful.

In *Akinfe v UBA Plc,*[11] the Court of Appeal Lagos division had this to say:

> He who hires can fire; nevertheless, an employer must observe and adhere to the conditions under which an employee is hired before such an employee can be fired, otherwise the employer can *ipso facto* be held liable for unlawful termination of the services of employee.

Denton – West, J.C.A. stated:

> In fact, both at common law and even in this country, the power to arbitrarily dismiss those in one's employment is a power exercised in a great degree unfortunately over a vast number of persons like the artisans, the drivers, the house-helps, and indeed the down-trodden who are involved in menial duties and usually do not have recourse or access to redress at law. Nevertheless, an employer must observe and adhere to the conditions under which an employee is hired before such an employee could be fired

[10] A, Emiola, *Nigerian Labour Law*, (4thedn, Ogbomosho: Emiola Publisher Limited, 2008) p. 127.
[11] [2007]10 NWLR (pt. 1041) 186 at p. 189. *Garuba v K.I.C. Ltd* [2005]5NWLR (pt. 917) 160

> otherwise the employer can *ipso facto* be held liable for unlawful termination of the services of the employee.

It is obvious that the learned Justices of the Court of Appeal were interchangeably using unlawful termination in place of wrongful termination. Termination is wrongful if it is done in breach of the terms and conditions of the employment as agreed by the parties in their contract of employment while termination is unlawful if it is done in breach of terms and conditions as provided in a statute or regulation protecting employment.

In a contract backed by statute otherwise known as contract with statutory flavour, the employer is bound to adhere to the statutory procedure prescribed before he can validly terminate the employee's appointment. In *Evans Bros (Nig) Pub. Ltd v Falaiye,*[12] the Court of Appeal, Ibadan Division while ruling on the principles governing termination of contract of employment held that:

> Apart from employment with statutory flavour or governed by statutory provision as they are often described, where termination must follow the provisions of the relevant statutes, an employer in other cases can terminate the employment of an employee for good or bad reasons. He is in fact not bound to give any reason for terminating an employee's appointment. The only remedy open to an employee whose appointment is terminated in breach of the terms and conditions of his employment is damages. However, where a reason is given by the employer, the court will examine it with a view to determining whether such reason comes within the terms of the contract of employment.

[12] [2003] 13 NWLR (pt. 838) 568; *Layade v Panalpina World Transport (Nig) Ltd* [1996) 6 NWLR (pt. 456) 544;

This power of the employer to terminate the contract of employment of his employee without reason or good or bad reason is also reiterated by the court in the case of *Momoh .v C.B.N*[13] wherein the court stated that:

> Ordinarily, at common law, a master is entitled to dismiss his servant from his employment for good or bad reason or for no reason at all. In consonance with this principle, the courts rarely order specific performance of contract of employment so as not to create a situation whereby a willing employee will be foisted upon an unwilling employer, just as no employer-could be allowed to prevent an employee from seeking employment elsewhere. However, where there is a written contract of employment, statutory provisions and regulatory conditions of employment or service, equity demands that the courts should hold the parties bound by the terms of the employment agreement.[14]

In the same vein, the court in *NEPA v Eboigbe*[15]stated that:

> A private limited company or any employer of labour does not have any obligation to retain the services of any unwanted employee and may terminate the appointment of the employee without any reason given. In other words, an employer of labour is not bound to be saddled with an unwarranted staff and may terminate the services of such an employee without any reason for the termination. However, where an employer states a reason for the termination,

[13][2007]1 4NWLR208. See also *Obo v Comm. of Education Bendel State* [2001] 2 NWLR (pt. 698) 625

[14]Momoh v C.B.N, Supra.

[15] [2009] 8 NWLR (pt. 1142) 152. See also Angel Spinning & Dyeing Ltd v Ajah [2000] 13 NWLR (pt. 685) 532

> such reason must be plausible to justify such termination.

The import of the position distilled from the foregoing judicial authorities is that where an employment is governed by agreement of the parties, only the agreement dictates the procedure to be followed in removing an employee and where there is a breach of the procedure agreed by the parties, such breach will render the removal wrongful and an aggrieved employee will be entitled to damages only. Where the removal of an employee is contrary to the statutory prescription, it renders the termination unlawful and entitles the aggrieved party to an order of reinstatement. This is why the court in the case of *F.M.C. Ido-Ekiti v Olajide*[16] held that:

> Where the termination of an employment with statutory flavour is wrongful, the effect is that the employee never left his employment and would be entitled to all his salaries and allowances as was ordered by the trial court in favour of the respondent in the instant case.[17]

Following the same line, the Court of Appeal Ekiti division said:

> The origin of Government services is contractual. There is an offer and acceptance in every case; but once appointed to his office or post, the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules. In other words, the legal position of the government servant is more of one of statute than contract…[18]

[16] [2011]11 NWLR (pt. 258) 256.
[17]Governor, Kwara State v Ojibara [2007]All FWLR (pt. 348) 37
[18]F.M.C. Ido- Ekiti v Olajide, Supra.

As already stated, termination of a contract of employment with statutory flavour can only be unlawful and not wrongful as it entails a breach of statutory provision or provision of a regulation made pursuant to a power granted by a statute. Employment with statutory backing must be terminated in the manner prescribed by that statute. Any other manner of termination of the employment that is inconsistent with the relevant statute is null and void and of no effect.[19]

Termination occurs in three principal ways, viz.

a. By operation of law,
b. Intention of parties, and
c. By unilateral act of one of the parties.[20]

Under normal circumstances, an employment will be terminated either by effluxion of time if it is for a fixed period[21] or by notice if it is not for a fixed time.[22] But whatever be the intention of the parties, there are circumstances when a contract of employment has to come to an end because the law regards such contract as determined.[23] Termination by operation of law can arise in the case of death of one of the parties to a contract of employment or serious and protracted illness.[24] The sickness or death of a company may lead to the termination of the contract of employment of its employees. This is because a voluntary winding-up operate as a discharge of employees of the company just as it will in the case of a compulsory winding-up.[25]

[19]U.B.N. Ltd v Ogboh [1995]2NWLR (pt. 380) 647; Akintemi v Onwumechili [1985]1NWLR (pt. 1)68
[20] A, Emiola, Nigerian Labour Law, Op cit. p. 128.
[21]Ibid.
[22]Labour Act S. 9(7) C.
[23]Ibid, S. 9(7) 6. See also Mazin Engineering Ltd v Tower Aluminium (Nig.) Ltd [1993]5 NWLR (pt. 295)526.
[24]Southern Foundries Ltd v Shirlaw 1940) AC 701at p. 721.
[25]Fowler v Commercial Timber Co. Ltd (1930)2KB I CA.

A contract of employment can also be deemed terminated by operation of law as a result of frustration. This occurs when the performance of the contractual obligation is rendered impossible. The frustration of contract entails the premature determination of an agreement lawfully entered into between parties. This is owing to the occurrence of an intervening event or a fundamental change during its operation as to be regarded by law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement.[26] This doctrine of frustration applies to contract of employment as it applies to contracts generally.[27] The retirement of a partner in a partnership has the effect of dissolving the partnership and consequently determines the contract of employment of an employee in the partnership business. Also, where a company goes into liquidation and eventually dissolved or a partnership is dissolved, the contract of employment of an employee will be deemed terminated.[28]

Merger and acquisition of a business or bankruptcy of a master may have the effect of determining a contract of employment.[29] Other supervening events that may frustrate a contract of employment includes war,[30] destruction of the subject matter of instruction in the case of a contract for apprenticeship, serious illness etc. Termination by the intention of the parties usually arises from the terms of the parties' agreement or the conduct of the parties.[31] Different rules apply to each category or nature of terms of the contract of employment of parties. Where it is a contract for a fixed period, it is

[26]Warner & Warner International Associates v Federal Housing Authority [1993]6 NWLR (pt. 298)148.
[27]Daps Brown v Haco Ltd (1970)2 ALL N.L.R. 47.
[28]*Brace v Candler* (1895) 2 Q.B. 253 adapted from A, Emiola, *Employment Law, op cit* P. 132.
[29]*Noakes v.. Doncaster Amalgamated Collieries Ltd* (1940) A.C. 1014;
[30]*Dap Brown v HaCo Ltd Supra.*
[31]*Orient Bank (Nig) PlcvBilante International* [1997]8NWLR (pt. 515) 37.

determined by the expiration of the period and no formal notice is required.[32]

Where the terms describe the contract as 'permanent and pensionable', it does not mean employment for life,[33] but one which an employer is willing to keep as long as the employee is of good behaviour. Employment for life is one which is expected to last until retiring age subject to good performance and behaviour. It can be terminated for good cause where it is protected by statute. Where the inference of lifetime employment is not drawn, the presumption is that the contract is terminable by reasonable notice. At common law, the length of notice required, in a particular circumstance is that set out in the contract. But it has been held that the question of the length of notice would arise only after the termination of the employment had been established.[34]

Where the contract of employment makes no provision as to notice, the length of notice required will be that implied by custom or considered reasonable notice depending on the facts and circumstances of individual cases.[35] These facts and circumstances can be deduced by making recourse to the position of the employee, the duration of service put in by the employee and the salary of the employee. The consideration of the length of notice commensurate with the status of the employee is to give security of employment to the employee. This was stated with clarity by Agomo where the learned author states that:

> Security of tenure of employment of employees is governed by the contract of employment and numerous cases have made it clear that an employee enjoys the security of tenure commensurate with the

[32]Labour Act, *Op cit. S. 9(7)9, AdegbitevUnilag*[1970] NC.L.R. 346.
[33]*Ajayi* v *Texaco (Nig) Ltd* [1987] 3 NWLR (pt. 62) 577.
[34]*African Continental Bank Ltd v Ewarami (1978) ALL NLR 114.*
[35]*Imoloame v WAEC Supra, p303.*

> length of notice required to terminate the employment. Employment described as permanent or pensionable does not mean what it says, it does not mean that it continues until the employee reaches the retirement age or drops dead on the job.

This view shows that the highest security given to a contract of employment which is regulated by the contract of employment of the parties is the required procedure and length of notice required and nothing more; such contract even though described as permanent and pensionable is terminable by notice.[36]

However, an employment for life may arise where the right to terminate by notice is excluded by the parties. In *Salt v Power Plant Co. ltd,*[37] an employment for life was implied in a case where the contract stipulated an initial probationary period of 3 years, subject only to a right to terminate the contract if the employee ceases to perform his duties to the satisfaction of the employer.

Right to notice may be waived by a payment of salary in lieu of notice. The option of salary in lieu of notice is also sanctioned by the Labour Act[38] which provides that either party to a contract of employment may waive his right to notice on any occasion or accept a payment in lieu of notice. Where the option of payment in lieu of notice is chosen by the employer, payment must of necessity accompany the notice for the option to be validly exercised. In *Ben Chukwumah v Shell B.P. Dev. Co. Ltd,*[39] it was held that:

> Where a contract of service gives a party a right of termination of the contract by either giving a particular length of notice or payment of salary in lieu of notice

[36] *Abukogbo v African Timber & Plywood Ltd* (1966)2 ALL NLR 87.
[37] (1936)3 All. E.R. 322.
[38] *Op cit* S. 11(6).
[39] [1993] 4 NWLR (pt. 289) 512.

> and the latter course is chosen, the party seeking to put to an end the contract must pay to the other party the salary in lieu of notice at the time of termination.

This right of option of payment in lieu of notice is available to an employer as well as an employee.[40] We must express the concern that the option of payment of salary in lieu of notice does not afford security to the employee any longer in the circumstances of its abuse by multinational companies and other corporate bodies such as Banks who rely on it to relieve their employees of their employment when they think that the employee in question has grown so much in status that they can use his salary to pay for more workers whom they could train to do the same work that the employee in question can do. This has so much financial and socio-economic implication to the family of the employee and the society at large. The law on payment of salary in lieu of notice needs to be reviewed by statutory as well as judicial intervention as it may work in developed countries and not in a developing country such as Nigeria. Section 11 of Labour Act provides for the following periods of notice: one-day notice for a contract of employment lasting less than 3 months, one-week notice for a contract of employment which has lasted between three months and two years, 2 weeks' notice for a contract which had lasted between two years to five years and one month for five (5) years' service or more. A contract of employment may also be terminated by mutual agreement of the parties and/or by performance of the contract of employment.

An employee's contract may also be terminated when the employee is rendered redundant pursuant to the provisions of section 20 of Labour Act. Redundancy is defined to mean an involuntary and permanent loss of employment caused by an excess of manpower. Some salient points are implicit in the meaning of redundancy as defined. Redundancy entails the loss of employment by an employee. The loss

[40]*Alan Femilana v University of Ibadan* [1987]4NWLR (pt. 64) p.245.

is as a result of involuntary act of the employer and the loss is caused by excess of manpower. The provision above demands a reason before an employee can be declared redundant and any exercise of such power for any other reason other than excess of manpower will be declared invalid. For redundancy to be validly exercised, certain conditions must be observed. The conditions are provided in section 20(1) of Labour Act that:

In the event of redundancy –

(a) the employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy;
(b) the principle of 'Last in first out' shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skill, ability and reliability, and
(c) the employer shall use his best endeavours to negotiate redundancy payments to any discharged worker who is not protected by regulations made under subsection 2 of this section.

The provisions of the Act on redundancy are improvements on the common law position on termination of the contract of employment. The common law makes the position of an employee insecure and liable to indiscriminate termination of the contract of employment. Notice at the instance of the employee otherwise referred to as 'resignation' can also terminate employment. Where an employee gives notice of resignation or retirement and the employer rejects or refuses the notice, it will be inequitable and unconscionable for the employer to turn around and rely on the notice against the employee. Rather the employee is deemed to still be in the employ of the employer.[41]

[41]*Ondo State Housing Corporation .v. Shittu* [1994] 1NWLR (pt. 321) 476.

Conclusion

The law and practice of determination of contracts of employment in Nigeria is employer-friendly. The employer is free to determine the contract of employment of his employee for bad reasons or no reason at all. This is in contradistinction with the law and practice across the world. This shows that the law and practice of determination of contracts of employment differ with those of other countries. This difference is occasioned by the fact some countries across the world had moved away from the common law position that permits an employer to determine the contract of employment of his employee for bad or no reason at all. The new order started with the International Labour Organization which adopted ILO Termination of Employment Recommendation and ILO Termination of Employment Convention 158 of 1982. About 36 countries of the world have ratified the Convention while about fifty-five countries both those who have ratified the Convention and those who have not ratified the Convention have embraced the provisions of the Articles of the Convention which contains ILO standards on unfair dismissal. Despite this effort by the International Labour Organization towards ensuring a policy of fair dismissal of employees, Nigeria is still in full practice of the common law termination at the will of the employer.

The Extent of the Jurisdiction of the Customary Court of Appeal in Nigeria – Judicial Decisions

Hon. Justice Folashade Aguda-Taiwo (Rtd)[1]

Abstract

The Customary Court of Appeal in Nigeria was established primarily to aid the development of customary law and to assist in decongesting the appellate load of the High Court particularly in relation to appeals on issues of Customary Law emanating from the Customary Courts of the various States in Nigeria. Sections 267 and 282(1) of the 1999 Constitution of the Federal Republic of Nigeria vest both appellate and supervisory jurisdiction in civil matters involving questions of customary law in the Customary Court of Appeal. A careful examination of pronouncements of the Court of Appeal and the Supreme Court on the interpretation of the phrase 'questions of customary law' show that the jurisdiction of the Customary Court of Appeal was narrowed and stultified. This paper examines the jurisdiction of the Customary Court of Appeal with particular reference to the interpretation of Section 282(1) of the 1999 Constitution as amended as adopted by various decisions of the Court of Appeal and Supreme Court which do not promote the general purpose underlying the provision. Users in particular of the customary courts would like the Customary Court of Appeal to broaden the scope of its jurisdiction to deal with errors of customary law, misdirection of facts, weight of evidence or breach of procedural rules or complaint of bias arising from the subject matter of actions adjudicated upon by the trial customary courts. The paper suggests the need to therefore jettison the restrictive interpretation given by the courts and adopt a more liberal interpretation in relation to the jurisdiction of the Customary Court of Appeal allowing the court to entertain all issues arising from appeals on claims based on

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customary law regardless of how the Grounds of Appeal are formulated.

1.0. Introduction

Customary law is constitutionally recognized as one of the sources of law in the Nigeria legal system. It was given recognition under the 1999 Constitution of Nigeria. Customary law has been variously defined by many writers and jurists of repute. In this paper, we shall consider the definitions given by the superior courts. Tobi, JCA (as he then was) in the case of *Ojisua v Aiyebelehin*[2]defined customary law as:

> the law relating to the customs and traditions of a people. It affects the cultures and ethos of the people. It is a mirror of accepted usage. Not being common law or a law enacted by any competent legislature in Nigeria, it is however enforceable and binding within Nigeria as between parties to its sway.

Obaseki, J.S.C. in the case of *Oyewunmi v Ogunesan*[3] defined customary law as the:

> Organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that customs is a mirror of the culture of the people.

We can simply say therefore that customary law means the law relating to the body of norms, customs and traditions of the people. Customary law derived its strength from its acceptance by the

[2](2001) FWLR (pt. 66) page 710
[3](1990) 3 NWLR (Part 137) page 182 at page 207

community as mandatory on themselves. It is the law to which natives have subjected themselves to and they accept to be bound by it.

Characteristics and Nature of Customary Law

The following are the major characteristics of customary law:

a. It is in existence
b. It is largely unwritten
c. It is custom as well as law
d. It enjoys general application among the people
e. It is applicable within the area of acceptability
f. It is flexible and
g. It must pass through the test of time

The matters with which customary law is principally concerned are simple cases of contract (mainly debt), torts, land subject to customary law, family law and succession. Customary Courts apply customary law and the aim of the courts in the judicial process is to do substantial justice by adopting simple and informal procedure unlike the technical rules which are written. The Customary Court in cases brought before it therefore looks at the subject matter in litigation, the reliefs sought and the evidence tendered in support of the reliefs in arriving at its decision.

Specifically, in Ondo State, the civil jurisdictions of Customary Courts are stated in the second schedule made pursuant to Section 17 (2)[4]. The matters considered by the law as customary issues include matrimonial causes and matters between persons married under customary law or arising from a union contracted under customary law, custody of children under customary law, land matters in non-urban areas, administration of Intestate's estate under customary law, and other matters as the law provides. It is important to note that in the exercise of its jurisdiction, the Customary Court shall not enforce any rule of customary law which is:

[4] The Customary Court Law (Cap 41) Laws of Ondo State, 2006.

a) Repugnant to natural justice, equity and good conscience.
b) Incompatible with any written law for the time being in force; and
c) Contrary to public policy.

Section 18(3) of the Evidence Act 2011 provides that; *"In any judicial proceedings where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience".*

It must be observed that under Section 256 (1) of the Evidence Act, the Act is inapplicable in civil matters or causes before the Customary Court of Appeal, the reason being that customary law is presumed to be a question of fact before the court and not a question of law.
The rule is that all customs have to be proved. However where a custom has been so recognized by the courts; the court can take judicial notice of such particular custom and proof of it becomes unnecessary.

Section 16(1)[5] provides that; *"A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence".*

2.0. The Customary Court of Appeal (CCA)

The Customary Court of Appeal and the High Court of a State are courts of co-ordinate jurisdiction. Both courts are creations of the Constitution as contained in sections 270 (1) and 280 (1)[6]. The provisions of Sections 245 – 249 of the 1979 Constitution which gave recognition for the first time, to the Customary Court of Appeal were thereafter replicated under Sections 280 - 284 of the 1999 Constitution. The court is one of the superior courts of records established by Section 6 (h) and (i) of the 1999 Constitution. The CCA was listed in the 1979 Constitution as one of superior courts of record in Nigeria. The Constitution made the establishment of the

[5]Evidence Act, 2011.
[6] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended).

CCA for the Federal Capital Territory compulsory under Section 265 but optional under Section 280 for the States. The Constitution also spells out clearly the jurisdiction of the CCA of the FCT under Section 267 and that of the State CCA under Section 282(1) CFRN and from the enabling Statute of the respective States. See also Section 42 of the Customary Court Law of Ondo State 2007[7].

Section 270 of the 1999 Constitution provides that: "*There shall be a High Court for each State of the Federation.*

Section 265 (1) also states that: **"***There shall be a Customary Court of Appeal of the Federal Capital Territory,"*This is a mandatory provision. While **Section 280 (1)** on the other hand provides that: *There shall be for any State that requires it a Customary Court of Appeal for that State".*

This provision makes it optional for whichever State that requires a Customary Court of Appeal to establish one. In furtherance of the constitutional provision of Section 282 (1), Plateau State in 1980 became the first State to establish a Customary Court of Appeal followed by the Customary Court of Appeal of Edo State. Other states where Customary Court of Appeal had been established are Abia, Anambra, Adamawa, Bayelsa, Benue, Delta, Ebonyi, Enugu, Imo, Kaduna, Kogi, Nasarawa, Ondo, Osun, Rivers, Taraba, the FCT, Oyo and now Ogun State. Sadly, in December 2015, the law establishing the Customary Court of Appeal in Edo State (which was one of the earliest courts to be established) was repealed. The same repeal of the law took place in October 2017 in Anambra State.

Essentially, the repeal of the laws establishing the court in the two States was due to the limitation of the jurisdiction of the court which was responsible for the low returns of appeals emanating from the courts in the two States. Some Customary Courts of Appeal were

[7] *Supra.*

bombarded with queries by the NJC for explanation about the low return on cases emanating from the courts.

A Customary Court of Appeal of a State is created principally to decongest the volume of appeals that goes from the Customary Courts to the High Courts. Another reason for the creation of the court is to ensure expeditious dispensation of justice and to bring justice closer to the people at the grassroots and also espouse the customary jurisprudence of Nigeria customary law. Furthermore, the Customary Court of Appeal (CCA) of a State is established so that through its judicial pronouncements and decisions there will be a development of customary laws of the indigenous people thereby enhancing the status of the laws and the customary courts.

As a court of co-ordinate jurisdiction and of equal status with the High Court, the Customary Court of Appeal, while appeals in respect of customary law matters flow from the customary courts to the Customary Court of Appeal and in turn to the Court of Appeal, appeals from the High Court also goes to the Court of Appeal.

3.0. Nature of Jurisdiction in the Adjudicatory Process

Black's Law Dictionary[8] defines jurisdiction as *"Court's power to decide a case or issue a decree"* It is also the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. Jurisdiction defines the power of court to inquire into facts, apply the law, make decisions and declare judgment. It is the legal right by which judges exercise their authority. As a matter of law, a court must blindly follow and apply the jurisdictional limits and limitations as contained or provided for in a statute. In this regard, the statute either the Constitution or other legislation is the master and all that a court of law does is to interpret the provisions of a statute in order to obtain or achieve the clear intentions of the law makers. It should be noted that jurisdiction

[8] Bryan A. Gardner 8th Edition page 867.

and competence of a court are inter-related. When a court lacks jurisdiction, it also lacks competence. Jurisdiction is fundamental to adjudication. Any judgment or decision taken by a court without jurisdiction no matter how well conducted is subject to being declared a nullity on appeal.

4.0. Jurisdiction of the Customary Court of Appeal

Section 282(1) of the 1999 Constitution provides that: *"A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law"*

For emphasis, Section 41 (1) of the Ondo State Customary Court of Appeal Law 2007 provides that:

> Subject as otherwise provided in this law, the Customary Court of Appeal shall have jurisdiction to hear appeals from Customary Courts in the State in civil proceedings involving questions of customary law.

The combined interpretation of Sections 282 (1) of the 1999 Constitution and Section 41 (1) of the Ondo State 2007 Customary Court of Appeal Law is that appeal will lie only from the Customary Courts in Ondo State to the Customary Court of Appeal in the State in civil proceedings where the appeal raises **only** "questions of Customary Law". See the case of ***Edo State CCA v Aguele***[9]

Section 245 of the Constitution provides that;

> An appeal shall lie from the decisions of Customary Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of Customary

[9](2006) 12 NWLR Page 995 page 545

> Law and such other matters as may be prescribed by an Act of the National Assembly.[10]

The Customary Court of a State is an inferior court of first instance which deals with matters of customary law and hence appeals from the court flows to a superior court which is the Customary Court of Appeal and to the Court of Appeal and ultimately to the Supreme Court.

It is however very disturbing that since the inception of Customary Courts of Appeal in the country as originally provided for under the 1979 Constitution, its scope of jurisdiction is very limited because both the Court of Appeal and the Supreme Court had always given restricted interpretation of the scope of the jurisdiction of the court.

It appears from the provisions of law stated above that the Customary Court of Appeal has only appellate jurisdiction and no original jurisdiction in civil proceedings in respect of issues on customary law. Its appeal comes from Customary Courts of the State; even then not all grounds of appeals emanating from decisions from the Customary Courts can be entertained by the Customary Court of Appeal. In Ondo State for example, there are provisions relating to jurisdiction of Customary Court of Appeal provided for under Section 41 (1), (2) and (3) Ondo State Customary Court of Appeal Law[11]. For ease of reference, Sub sections (2) and (3) to Section 41 are reproduced hereunder.

Section 41(2) provides that:

> The Customary Court of Appeal shall have original jurisdiction in respect of Chieftaincy matters concurrently with the High Court of the State", while Section 41(3) provides that: "For the purposes of this section the Customary Court of Appeal shall exercise such jurisdiction and decide such questions as may be prescribed by the State House of Assembly".

[10]See the also the case of *Hirnor v Yongo* (2003) 9 NWLR (Pt 824) 77.
[11]2007

The question is whether from the above provisions, the Ondo State Customary Court of Appeal can hide under the provisions of subsections (2) and (3) and adjudicate on Chieftaincy matters within the State. Another question is whether or not all Chieftaincy matters are issues on customary law in different domains within the State?

The CCA of the FCT had since approached the National Assembly who promulgated the "Customary Court Law of the Federal Capital Territory Abuja (Additional Jurisdiction) Act 2009" This law conferred original jurisdiction on the court in disputes relating to chieftaincy matters within the FCT. Would Ondo State Customary Court of Appeal be in violation of the Constitution if trials in dispute in relation to chieftaincy matters are conducted in its court?

I am of the opinion that from the wordings of the Constitution (unless the Constitution is amended) and from case law all Customary Courts of Appeal have no original jurisdiction. Its jurisdiction is appellate and applies to appeals from only Customary Courts. The appeal must also emanate from claims based on customary law. In the interpretation of the extent of the jurisdiction of Customary Court of Appeal, both the Court of Appeal and the Supreme Court have consistently stated that in the determination of whether questions of customary law are raised in any matter before the Customary Court of Appeal, the court must examine the Grounds of Appeal alone and not the subject matter of litigation.

A close look at the provision of Section 282 (1)[12] contains nothing about the Grounds of Appeal being inquired into by the court to determine whether they contain question of customary law. The Court of Appeal and the Supreme Court have held that it is not material whether the subject matter of the case which gave rise to the appeal relates purely to customary law matters like customary marriage, succession and inheritance under customary law and customary land

[12] CFRN 1999 (as Amended).

law. It is also irrelevant that the matter on appeal emanated from a Customary Court. What determines whether or not an appeal is competent before the Customary Court of Appeal is the issue raised in the Grounds of Appeal which must relate to and raise questions of customary law. This narrow and restrictive interpretation has been adopted in a long line of cases which includes *Golok v Diyalpwam,*[13]*Pam v Gwom,*[14]*Hirnor v Yongo*[15] and *Nwaigwe v Okere*[16].

From the Supreme Court decision in the case of *Pam v Gwom*[17] it seems that a ground of appeal which raise a "question or issue of customary law" fit for the determination of the court only;

1) Where the parties do not agree on relevant customary law, and the court is called upon to determine what the relevant customary law is and its applicability to the dispute between the parties; and
2) Where the parties agree on the applicable customary law, but disagree on the extent to which such customary law regulates their relationship i.e. that is their rights and obligations under it.

Per Aji J.C.A. in the case of CCA *Edo State v Aguele & Ors*[18]stated as follows;

> It is trite that it is not the subject matter of the action in the trial court that automatically confers jurisdiction on the Customary Court of Appeal. It is the grounds of appeal that confers jurisdiction on the Customary Court of Appeal. The appeal therefore from the Area Customary Court to the Customary

[13](1990) 3 NWLR (Part 139) page 411 (1990) LPELR 1329 SC.
[14](2000) 2 NWLR (Part 644) page 322 or (2000) LPELR 2896 SC.
[15](2003) 9 NWLR (Part 824) page 77.
[16](2008) 13 NWLR (Part 1105) page 445 or (2008) LPELR -2095 SC.
[17] *supra.*
[18](2006) 12 NWLR (Part 995) page 545 and (2006) LPELR 7627.

> Court of Appeal is incompetent for reason of want of jurisdiction, by Section 245(1) of the 1999 Constitution; the right of appeal to the Court of Appeal from a decision of Customary Court of Appeal must be only in respect of questions of customary law alone

In the same case, Bulkachuwa J.C.A. stated that:

> Grounds 1 to 3 in the appeal to the Customary Court of Appeal from the trial court all relate to questions of fair hearing and service of process on the respondent at the trial court. None of them relate to question of customary law.

The learned jurist also stated further as follows:

> The general proposition of the law is that a court of co-ordinate jurisdiction does not have the jurisdiction to set aside the judgment of another court of similar jurisdiction but if the judgment is ab initio void, it could be set aside by another court of similar jurisdiction without much ado.

Sometimes, there are occasions where an appeal from the Customary Court complains about applicable customary law on some grounds while some grounds of appeal complain about procedure, weight of evidence, and other ancillary matters, only the grounds of appeal which is on customary law would be entertained while the remaining grounds would be struck out on the basis that the court lacks jurisdiction to entertain them.

It is also immaterial that the matter on appeal emanated from a Customary Court. It is not every mistake or error in a judgment of a Customary Court that will result in the appeal being allowed, it is when the error is substantial and has occasioned miscarriage of justice that the Customary Court of Appeal will intervene.

The restrictive interpretation of the jurisdiction of Customary Court of Appeal is illustrated in the case of *Golok v Diyalpwan*[19] which involved the interpretation of Section 224(1) of the 1979 Constitution (now Section 245 (1) 1999 Constitution). In the case, the plaintiff/respondent instituted an action in Area Court Grade 1 of Ron/Kulere in Plateau State against the defendant/appellant, claiming the recovery of a piece of farmland which the plaintiff alleged that the defendant borrowed from him about 15 years before the action came up.

The Area Court gave judgment for the plaintiff against the defendant. The defendant appealed to the Plateau State Customary Court of Appeal. The Customary Court of Appeal allowed the appeal and set aside the judgment of the Area Court. The Plaintiff/appellant then appealed to the Court of Appeal and filed four grounds of appeal that:

a. The judgment is against the weight of evidence,
b. The learned President and Justices of the Customary Court of Appeal erred in law by quashing the judgment of the trial court without more,
c. The President and Justices of the Customary Court of Appeal erred in law holding that the appellant (as plaintiff in the trial court) failed to prove his case and that
d. The learned President and Justices of the Customary Court of Appeal erred in law in considering matters and issues not raised or argued in the only ground of appeal.

The defendant/respondent at the Court of Appeal filed a preliminary objection pursuant to the provisions of Section 224 of the 1979 CFRN, in which he challenged the jurisdiction of the Customary Court of Appeal to hear the plaintiff/appellant's appeal. In a considered ruling by the Court of Appeal, it struck out Grounds 1 and 2 of the appeal as incompetent for having raised purely questions of fact and not customary law. However, it held that Ground 3 raised a question of

[19]*Supra.*

customary law and that Ground 4 raised the fundamental issue of jurisdiction of the Customary Court of Appeal. It therefore sustained Grounds 3 and 4 as competent. The defendant was dissatisfied with the ruling of the Court of Appeal and he appealed to the Supreme Court. The Supreme Court held as follows:

> By the provisions of Section 224 of the 1979 Constitution, there is only one right of appeal to the Court of Appeal from the decision of a State Customary Court of Appeal and that right is in respect of a complaint or Ground of Appeal which raises a question of customary law alone. That section does not accommodate any complaint or Ground of Appeal which does not raise a question of customary law.

The learned jurist also stated that:

> The court with regard to Ground 3 it pertains to the failure of the respondent as plaintiff to prove his case in the lower court. The proof of a case is undoubtedly a matter of law and since the Area Court administered customary law as it applied to borrowing of a piece of land, the question raised by the Ground of Appeal; relates to that customary law. The ground is therefore valid and the Court of Appeal was right in refusing to strike it out.

Uwais J.S.C. on page 419 also stated as follows:

> With regard to Ground 4, which has also been quoted earlier, the particulars thereof show that the nature of the complaints is general. It is therefore an omnibus ground which deals purely with facts and has no connection whatsoever with customary law. There

> cannot, on that ground, be an appeal as of right as envisaged by Section 224 (1) of the 1979 Constitution. The Court of Appeal should have struck it out.

Also, in the case of *Ahmadu Usman v Sidi Umaru*[20]**,** Bello CJN (as he then was) said at page 401 as follows:

> Firstly, it should be appreciated that the Constitution envisages a division of appellate jurisdiction on state matters between the High Court, the Sharia Court of Appeal and the Customary Court of Appeal in a State where the three courts have been established. …In my view, the provisions of the Constitution relating to the division of the appellate judicial powers between the three courts are clear and one court has no jurisdiction with the other.

In other words, the Supreme Court said that grounds of appeal from Customary Court/Area Courts which raise questions of customary law cannot be entertained at the High Court or Sharia Court of Appeal in a State that has established the Customary Court of Appeal. As simple as this may appear the criterion is not always easy to apply in practical terms. It may be easy where an appeal raises only questions of general law or Islamic law or customary law. What happens where an appeal raises both questions of general law, and Islamic law or issue of general principle of common law and customary law, are raised in which of the courts would the appeal go?

How does the court system resolve the dilemma of litigants who have different grounds of appeal in a suit, that is, where all the grounds of appeal are mixed? A perfect illustration is when a party files grounds of appeal at the Customary Court of Appeal. At hearing, some of the grounds which do not raise question of customary law are struck out

[20](1992) 7 NWLR (part 245) page 377

as incompetent while the others are heard but held to lack merit and the appeal is dismissed. Would this exercise not have amounted to a waste of time, resources, and injustice to the party who cannot re-litigate before another court that has jurisdiction on those grounds which were earlier struck out?

Sometimes there may be Notice of Appeal before Customary Court of Appeal raising issues of customary law and complaints which raise issues of fair hearing; and such cases like issues as an allegation of bias against trial court or generally complaints against the procedure adopted by the trial court in arriving at its decision. In such situations the grounds of appeal had been held to be incompetent and are usually struck out.

5.0 The Omnibus Ground of Appeal

Sometimes an appellant from the Customary Court files an omnibus ground of appeal to the Customary Court of Appeal. The Omnibus Ground of Appeal is also not recognized at the Customary Court of Appeal as a competent ground of appeal. Omnibus ground of appeal is a general ground of appeal. It states basically that the judgment of the trial court is against the weight of evidence. It is common ground that the omnibus ground of appeal is usually filed before the receipt of the record of appeal by counsel. The Supreme Court has held that this is not permissible as a Ground of Appeal to the Customary Court of Appeal. Supreme Court has stated that where the ground of appeal complains that judgment is against the weight of evidence, this ground deals purely with facts in the case and has no connection with customary law.

In the cases of *Golok*[21]and *Usman*[22]**,** the Supreme Court has held that a Ground of Appeal which complains of "weight of evidence" is incompetent before the Customary Court of Appeal.

[21]*Supra.*
[22] *Supra.*

The Supreme Court also stated in the case of *Osolu v Osolu*[23] that

> an omnibus ground of appeal implies that a judgment complained about cannot be supported by the weight of the evidence adduced by the successful party, or that the trial judge either wrongly accepted evidence or that the inference he drew or conclusion he reached based on the accepted evidence cannot be justified. An omnibus ground also implies that there is no evidence which if accepted would support the finding of the trial court.

This definition shows in essence that omnibus ground of appeal covers evaluation of evidence, and its ascription of probative value by the trial court.

My own contention is that when a judgment of a Customary Court is said to be against the weight of evidence, is the Ground of Appeal not querying the evidence of custom adduced in support of the customary law that the claim has set out to prove? The facts obviously need to be looked into at the appellate court.
Uwaifo JSC put the matter pointedly when he warned in *Hirnor's*[24] case thus:

> Legal practitioners should therefore, understand the futility of filing omnibus grounds of appeal from judgments of Customary Courts since it will only lead to a *cul-de-sac* in the judicial process to develop customary law precedents even by the highest court of the land.

In the case of *Nwaigwe v Okere,*[25] the court held that where the ground of appeal states that a decision is against the weight of

[23](2003) *6 SC (part 1) 1.*
[24] *Supra.*

evidence, is unreasonable, is unwarranted and cannot be supported by evidence having regard to the evidence, this is purely a complaint on facts with no connection whatsoever to questions of customary law or otherwise. This Ground of Appeal will not be a competent ground of appeal.

It is difficult to see why issues of fact is not considered as an issue of customary law since customary law itself has been held to be an issue of fact to be proved by evidence under the Evidence Act. For instance, section 16(2)[26]provides that; *"The burden of proving a custom shall lie upon the person alleging its existence.*"
However, in the same case, Onnoghen J.S.C. stated that since the concept of jurisdiction is of universal application unknown to customary law when applied to Customary Courts, an error of jurisdiction by a Customary Court or CCA which is intrinsic to the adjudication, is an issue of customary law within the meaning of Sections 247 (1) and 224 of the 1979 Constitution and therefore appealable as customary law up to the Supreme Court. To hold otherwise is to kill the development of that branch or system of adjudication in this country, as there would be no checking the excess or absence of jurisdiction in the relevant courts and thereby encourage adjudication far in excess of jurisdiction in the Customary Court, be it first instant or appellate.

6.0 Fair Hearing

The Benin Division of the Court of Appeal in the case of *CCA, Edo State v Aguele*[27] stated that:

> In the instant case grounds one to three in the appeal to the Customary Court of Appeal from the trial court all relating to questions of fair hearing and the service

[25] *Supra.*
[26] *Evidence Act (supra).*
[27] *Supra*

> of court process on the respondent before the trial court. None of them related to question of customary law.

This is rather a sad and unfortunate situation. Fair hearing means giving the parties to an action a fair and equal opportunity to present their respective cases. There is a Yoruba adage which says "*Agbo ejo enikan da agbaosika*". This literally means "an arbiter who pronounces a verdict after hearing only one party to a dispute is the most unjust person".

The principle of "*audi alteram partem*" meaning "hear the parties" is fundamental to the concept of justice. Where the concept of fair hearing is of universal application then it should be taken that it is known to any form or system of adjudication be it customary or English form of law.

By the provision of Section 36(1) of the Constitution[28] the right to fair hearing is a fundamental right founded upon the twin pillars of *audi alteram partem* and *nemo judex in causa sua*. The issue of fair hearing undoubtedly is the substratum and offshoot of any adjudicatory process which every court must observe in the dispensation of justice.

7.0 Observations

Customary Courts were introduced to protect customary law. Appeals lie to the High Court where common law rules of practice and procedure were adopted in measuring the validity of our customary law and where little attention was paid to civil appeals. To remedy this impasse, Customary Court of Appeal was established to cater exclusively for civil appeals from Customary Courts in respect of customary law claims with the latitude that the State House of Assembly could increase its jurisdiction. Unfortunately, with the restrictive interpretation given to Section 282(1) of the Constitution,[29] some appeals still go to the High Court while many grounds of appeal

[28] 1999 (as amended).
[29] *Ibid.*

are struck out at the Customary Court of Appeal for being incompetent at the Court of Appeal for a technical reason that the grounds of appeal do not *ex facie* raise questions of customary law.

8.0 The Way Forward

In order to satisfy the intention of the legislature in the promulgation of Section 282 (1) of the Constitution, and to avoid frustrating the genuine appeals from the Customary Courts and remove any possible impasse in proceedings before the Customary Court of Appeal, the Supreme Court should at the earliest opportunity give a more liberal and less restrictive interpretation to the provision of Section 282(1) of the Constitution.

The Customary Court of Appeal should be able to entertain all issues arising from appeals on all claims based on customary law without undue emphasis on how the grounds of appeal are formulated. With this approach, more cases would be handled at the Customary Court of Appeal. Secondly, the jurisdiction of the Customary Court of Appeal should also be widened through the Constitution amendment to give powers to the court to handle all appeals coming from our Customary Courts regardless of whether the appeal is on a question or issue of customary law or general law. This approach no doubt will reduce endless and overwhelming preliminary objections usually made by counsel for the respondents against the jurisdiction of the Customary Court of Appeal. It takes the court time trying to defend why it has jurisdiction to hear an appeal. Greater justice would be done to the litigants than the present state of affairs as observed in the cases of *Golok*[30]**,** and *Usman,*[31] and several others.

Majority of lawyers and litigants have been avoiding Customary Court of Appeal by cleverly framing their grounds of appeal in such a manner as to enable them file appeals in the High Court, even where the issues in the case clearly raise questions of customary law. This is

[30] *Supra.*
[31] *Supra.*

a very sad development in the quest for improvement and growth of Nigerian indigenous laws and to decongest the High Court.

9.0 Drafting Grounds of Appeal

Thirdly, there is need to be careful in drafting grounds of appeal. For the time being before the Supreme Court gives a more liberal interpretation to Section 282 (1)[32], legal practitioners are advised to be more careful in the drafting of Grounds of Appeal presented to the Customary Court of Appeal. Lawyers should avoid using general principles of English law expressed in Latin like *res judicata*, *locus standi*,*lispendes*, *stare decisis*, *res ipsa loquitur*,*restitutio in integrum non est factum,* among others. Lawyers raising preliminary objections will readily contend that such principles are unknown to customary law. Even English common law doctrines like the doctrine of standing by, laches and acquiescence when used should be explained and preceded with the wordings; "The trial court erred in customary law".

Instead of stating as a ground of appeal that the judgment of the court is against the weight of evidence, the ground of appeal can be drafted thus: "the learned trial Customary Court erred in law in holding that the plaintiff failed to prove his case".

Where that complaint relates to lack of fair hearing, it is better for counsel to state as a ground of appeal that under Yoruba Customary law in Ondo, for example, the trial court failed to take into consideration the evidence of the plaintiff being the head of the family in the sale of family property.

In the case of the omnibus Ground of Appeal, it is expedient to heed the advice of Uwaifo JSC in the case of *Hirnor v Yongo*[33]where the learned jurist had maintained that the omnibus ground of appeal can be avoided by merely stating that the plaintiff in the trial court failed to prove its case. In other words, counsel should be skilful in drafting his competent Grounds of Appeal to the Customary Court of Appeal

[32] CFRN, 1999 (as amended)
[33] *Supra.*

to meet appropriate grievances within the limitation imposed by Section 282(1)[34]. This is the most reassuring way of getting the best of the constitutional role which the Customary Court of Appeal are required to play. In establishing the different customary laws in a manner that they will eventually become so notorious that they would need no further proof.

9.1 Recent Supreme Court Decision in Edo State v Aguele & Ors (2018)[35] – A Ray of Hope

In this case, the issue of whether the principle of fair hearing applies to proceedings in the Customary Court was reconsidered. Happily, the issue of fair hearing has now been considered as a question of customary law appealable to the appellate courts. By the decision, the rule of fair hearing is well known to customary law and no decision can be reached without affording both sides equal opportunity of presenting their case.

Eko J.S.C. in a brilliant judgment stated as follows:

> The lower court like the trial court fell into the error of isolating the mandatory procedural rules of fair hearing or fair trial contained in Section 36(1) of the 1999 Constitution from civil proceedings at the Customary Court. The Customary Court is a court of record established by statute. It is imperative by virtue of Section 36(1) of the 1999 Constitution that the Customary Court established by law, in its adjudicatory function to observe and make affordable to all parties in the proceedings the right to fair hearing. It is the right the Customary Court cannot deprive any party to in any proceedings before it. Fair hearing, whether in the context of customary natural justice principles or under the express provisions of Section 36 (1) of the

[34] CFRN 1999 (as amended).
[35](2018) 3 NWLR Part 1607 page 369.

> Constitution, is inseverable from the proceedings before the Customary Court. It is now dictated and driven by Section 36(1) of the Constitution. It is also inherent in every Customary Law or proceedings before the Customary Court. Any rule of Customary Law that repudiates the principles fair hearing is invalid for being repugnant to natural justice, equity and good conscience. I dare say that rules of fair hearing either, as rules of natural justice or rules incorporated into Section 36(1) of the Constitution, are now integrated into customary law principles.

The apex court in the same case also considered whether the State High Court has appellate or supervisory jurisdiction over Customary Court of Appeal. It came to the conclusion that no appellate or supervisory jurisdiction or power has been conferred on the High Court subjecting the Customary Court of Appeal Edo Sate to the supervisory jurisdiction of the High Court. Both the High Court and the CCA are intended by the Constitution to be superior courts of record and courts of co-ordinate jurisdiction and that the appeal from both courts lies to the Court of Appeal.

The Supreme Court in **Aguele's** case also stated that the jurisdiction of CCA can only be extended or expanded beyond what is provided for under Section 282 (1) of the Constitution[36] or by an Act of the National Assembly.

It should be pointed out that section 267 of the Constitution[37] provides that; *The Customary Court of Appeal of the FCT, Abuja, shall* ***in addition to such other jurisdiction*** *as may be conferred upon it by an Act of the National Assembly, exercise appellate and supervisory jurisdiction in civil proceeding involving questions of customary law.*

[36] 1999 (as amended).
[37] *Ibid.*

Also section 282(2) provides that *"For the purposes of this section a Customary Court of Appeal of a State shall exercise and decide such questions as may be prescribed by the House of Assembly of the State for which it is established",*

Another decision of the Supreme Court in relation to the application of, and interpretation of Sections 240 and 245 of the Constitution as it affects the Customary Court of Appeal and the Court of Appeal is the case of *Ozoemena v Nwokoro.*[38]

Previously, Customary Court of Appeal had the final say when issues other than issues of customary law are brought before it from the Customary Court for determination. The implication of this is that issues on procedure, evaluation of evidence, and the interpretation of the judgments of lower courts could be heard and determined by the Customary Court of Appeal but these issues could not be sent on appeal to the Court of Appeal. In *Ozoemena'scase*, the Supreme Court per Ejembi Eko J.S.C has lifted the limitation placed on the right to appeal on issues other than issues of customary law from the Customary Court of Appeal to the Court of Appeal. The apex court succinctly made the point that the intendment of the Constitution was not to deny any party the right of appeal or the right to appeal from the Customary Court of Appeal to the Court of Appeal on the ground of any question, including matters of procedure or issues other than questions of customary law.

Per Ejembi Eko J.S.C. stated as follows:

> It is clear from the provisions highlighted particularly Section 240 thereof, that any party aggrieved with the decisions of the Customary Court of Appeal on any question has a right to appeal to the Court of Appeal for redress. He appeals "as of right" by dint of section 245(1) of the Constitution,

[38](2018) 17 NWLR (Part 1648) page 203.

> if his ground of appeal raises any question of customary law or such other matters as may be prescribed by an Act of the National Assembly

The Learned Justice of the Supreme Court in the lead judgment further stated as follows:

> I agree, as submitted by the learned appellant's counsel on the authority of Tiza vs Begha that there has not been any Act of the National Assembly yet, vesting on any person the right to appeal as of right to the Court of Appeal from the decision of the Customary Court of Appeal on any "other matters" than "any question of customary law". The absence of such an Act of the National Assembly, in regards to Section 245(1) of the Constitution does not, however foreclose or put in abeyance the right of appeal from the decision of the Customary Court of Appeal, in any civil proceedings, to the Court of Appeal under Section 240 of the Constitution.

The implication of this judgment was that the grounds of the respondents' appeal from the Customary Court of Appeal to the Court of Appeal which were basically on the evaluation of evidence and reliefs sought from the trial Customary Court were all valid notwithstanding the fact that they were not strictly on questions of customary law per se.

Another ground breaking *ratio* from the decision in *Ozoemena's* case is that every appeal can lie, either as of right or with leave, from the decision of the Customary Court of Appeal to the Court of Appeal and then the Supreme Court. This case is one of the revolutionary decisions that have ensured a slight break from of the strong limitation of the strict interpretation of the constitutional provision of the jurisdiction of the Customary Court of Appeal which was the last

court of appeal in matters that come before it and which are not on "Questions of Customary Law".

10.0 Conclusion

These recent decisions of the Supreme Court in ***Aguele's and Ozoemana's*** cases have charted new course in the jurisdiction of the Customary Court of Appeal. The principles enunciated in those decisions having come from the apex court have expanded the frontier of the jurisdictions of the CCA and if properly followed by the lower courts, it will assist in curbing the challenges being currently experienced in relation to the jurisdiction of the CCA, and will eventually ensure justice and fair trial which are the bedrock of our judicial system.

Legal Issues Arising From Ebola Virus and Other Epidemiological Outbreak in Nigeria

Fasilat Abimbola Olalere[1]

Abstract

The contagious Ebola virus disease made its inroad into Nigeria in July, 2014. It raised some public law issues which this article seeks to examine. Particular consideration is given to the fundamental rights issue and the existing institutional framework responsible for dealing with the virus. The Quarantine Act 1926, which is the main legislation on contagious diseases, raises devolution of power challenges between the federal and states governments. It also confers extra-territorial powers on the president, contrary to international customary law principle of States' territorial sovereignty over their domestic jurisdiction. Measures adopted to prevent the spread of the disease included, restriction of movement and compulsory Ebola test in public places. These measures are at variance with fundamental rights provisions in the Constitution. However, it is argued that, in as much as government is empowered to restrict individual right on public health grounds, it must be done in accordance with the law. Also, the outdated Quarantine Act should be amended to bring it in line with present day realities.

1.0. Introduction

Ebola is a form of viral infection of high fatality rate. Also known as Ebola hemorrhagic fever, the virus is a contagious disease which is transmitted from one person to another upon an uninfected person's exposure to the blood samples, secretions, tissues, organs, and body fluid of infected persons who are either dead or alive.[2] Humans are suspected to have been exposed to the virus through contact with

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[2] A I Oluwaseun, 'Knowledge and Hygiene Practices for the Prevention of Ebola Virus Infection in Selected Communities in Ghana and Nigeria', (2019) 1 (2) *Transatlantic Journal of Rural Research* 1, 2.

blood or body fluids of infected animals, particularly fruit bats and monkeys.[3] Ebola virus derives its name from the River Ebola, located in the Democratic Republic of Congo, where the first ever incident of Ebola infection in human occurred. It is a Marburg virus of the filoviridae specie. The word, 'filoviridae', has a Latin root of "filum", which means "threadlike".[4] "It is a thread-like, non-segmented negative sense, single-stranded RNA virus. They are virulent, highly pathogenic, causing hemorrhagic fever and resulting in fulminant septic shock".[5]

The disease is typically dominant in the tropics of Sub-Saharan Africa.[6] From its outbreak in a remote community in Guinea, around December 2013, the disease spread rapidly to other countries in the West Africa region, including countries such as: Guinea, Liberia, Senegal, Sierra Leone and later, Nigeria.[7] Even the United State of America was not spared of the scourge of Ebola. By the first week of September 2014, it was reported that there were 1848 confirmed cases of Ebola infections, out of which 370 persons died.[8] By March 13, 2016, the figure shot up to 28,639 infected persons and 11,316 recorded deaths.[9] The quick spread of the disease was compounded by the fact that, it was the first instance of epidemic spread within the West African region; hence these countries were ill-prepared for this

[3]S O Martins & A.O., Osiyemi, 'Hand Hygiene Practices Post Ebola Virus Disease Outbreak in a Nigerian Teaching Hospital', (2017) 15 (1) *Annals of Ibadan Postgraduate Medicine* 16, 16.

[4]U J Odidika Umeora, N B Emma-Echiegu, M C Umeora and N Ajayi, 'Ebola Viral Disease in Nigeria: The Panic and Cultural Threat', (2014) 13 (1) *African Journal of Medical and Health Sciences* 1, 1.

[5]*Ibid*.

[6]S O Martins n. 3.

[7]United Nations Office of the High Commissioner for Human Rights – West Africa Regional Office, 'A Human Rights Perspective into the Ebola Outbreak', (2014). 2. <www.globalhealth.org/A-human-rights-perspective-into-the-Ebola-outbreak.pdf> (accessed May 16, 2020).

[8]World Health Organization, 'Global Alert Response EVD Outbreak – West Africa', (2014). <http://www.who.int/csr/don/2014_09_04_ebola/en/> (accessed May 16, 2020).

[9] O A Folarin, *et al*, 'Ebola Virus Epidemiology and Evolution in Nigeria', (2016) 214 (3) *The Journal of Infectious Diseases* 102, 102.

eventuality.[10] Based on the World Health Organization's (WHO) declaration, Ebola was pronounced as a Public Health Emergency of International Concern.[11]

Ebola virus has an incubation window of between two to twenty-one days; on the average of eight to ten days.[12] Within this period, the virus undergoes rapid duplication within its host, while aiming for the hepatocytes mononuclear phagocytes and endothelial cells.[13] This pattern has informed the measures which have been put in place to monitor prevent and control the virus. The standard medical practice which Nigeria and most other countries adopted include: identifying and placing infected persons in isolation centres to avoid further transmission to other persons; contact tracing with infected persons within the incubation period; investigate previous and existing cases to determine their chain of transmission; identify Ebola – induced deaths and ensuring safe handling of cadavers during burial; and issuing public report of confirmed cases on daily interval.[14] While the foregoing measures were targeted at curbing the virus and preserving public health, it revealed the possible clashes and implications that might arise in law, particularly on the aspect of human rights,[15] patients' confidentiality, state devolution of power, etc. The Ebola outbreak in Nigeria has put to test the effectiveness of the existing laws and preparedness of institutions to tackle threat to public health and safety in Nigeria. The foregoing informs the concerns of this paper.

[10]Akaninyene Otu, et al,, 'An Account of the Ebola Virus Disease Outbreak in Nigeria: Implications and Lessons Learnt', (2018) 18 (3) Public Health 1, 2.
[11]Ibid.
[12]Odidika U J Umeora, n. 4, 2.
[13]Ibid.
[14]Ibid. 4.
[15]T E Durojaiye & G Mirugi-Mukundi, 'The Ebola Virus and Human Rights Concerns in Africa', African (2015) 19 (3) Journal of Reproductive Health 18, 18.

2.0. Ebola Outbreak in Nigeria

Ebola made its inroad to Nigeria via aviation travel, when an infected person entered Nigeria through a commercial aircraft from Liberia and landed at the Murtala Mohammed International Airport, Lagos, on the 20th July, 2014.[16] The aviation traveller, Patrick Sawyer, was a Liberian-American citizen who contracted the infection in Liberia through his sister, who was one of the confirmed cases in Liberia that eventually turned fatal. Sawyer was not only involved in the funeral activities of his sister; he also stayed with her in the hospital shortly before her death.[17] Upon his arrival at the Nigerian Airport, he exhibited symptoms of serious illness, as he vomited and collapsed at the exit terminal of the airport. He was given some assistance while he was chauffeur driven to a private hospital in Lagos Island.[18] Sawyer did not disclose his health status to the health care givers and even denied having earlier contact with an infected person. Since he claimed to be suffering from malaria, the health care givers were not alerted on the need to wear the necessary protective accoutrement to prevent the transmission of Ebola Virus.[19]

It was on the 23rd July, 2014, three days after his admission into the hospital, that it was established that he had been infected with the virus.[20] Patrick Sawyer passed-on two days after he was diagnosed of Ebola.[21] Shortly thereafter, the protocol officer who assisted him out of the airport also died of Ebola. Few weeks thereafter, nine medical personnel, constituting of doctors and nurses who gave care to the

[16] O A Folarin, n. 9.
[17] J Oduwole & A Akintayo 'the Rights to Life, Health and Development: The Ebola Virus and Nigeria' (2017) 17 *African Human Rights Law Journal* 194, 195.
[18] *Ibid*.
[19] World Health Organization, 'Nigeria is Now Free of Ebola Virus Transmission', Press Release (2014) <http://www.who.int/mediacentre/news/ebola/20-october-2014/en/index1.html> (accessed May 19, 2020).
[20] J Oduwole n. 17.
[21] O O Oleribe, M M E Crossey, S D Taylor-Robinson, 'Nigerian Response to the 2014 Ebola Viral Disease Outbreak: Lessons and Cautions', (2015) 22 (Supp 1) 13 *Pan African Medical Journal* 1, 1.

index case, were infected with the disease.[22] Four of them, including the lead, Dr. Ameyo Adadevoh, died as a result of the disease.

On the day the index case was diagnosed for Ebola virus, the Nigeria Centre for Disease Control (NCDC), declared Ebola emergency in Nigeria.[23] The virus spread its tentacles beyond Lagos to other Nigerian cities of Port Harcourt and Enugu.[24] The total number of infected persons was twenty and eight of them could not survive the disease.[25] This translates to a fatality rate of 40% in Nigeria. In the course of curtailing the viral spread, there was vigorous contact tracing of about 900 persons; many of which were quarantined and isolated as a disease prevention and control method.[26] This was the major measures that the Nigerian health sector established to curb the spread of the disease.[27] The Ebola Incident Management Centre established on 23rd July, 2014 was borne out of joint effort of the federal government, the Lagos State government and international collaborators.[28] Apart from treatment centres that were set up in Lagos and Port Harcourt, the Federal Government of Nigeria charged each State government to create Ebola Treatment Centres in standby for early detection and investigation of suspected cases and management of confirmed cases.[29] These measures aided the quick tackling of Ebola virus to the utter shock and amazement of the world. Apart

[22] World Health Organization, n. 19.
[23] O O Oleribe, n. 21.
[24] United Nations Development Group, Socio-Economic Impact of Ebola Virus Disease in West African Countries A Call for National and Regional Containment, Recovery and Prevention, (2015) 7. <https://www.undp.org/reports/ebola-west-africa.pdf> (accessed May 16, 2020).
[25] O O Oleribe, n. 21.
[26] *Ibid*.
[27] C Shelley-Egan, and J Dratwa, 'Marginalisation, Ebola and Health for All: From Outbreak to Lessons Learned', (2019) 16 *International Journal of Environmental Research and Public Health* 3023, 3027.
[28] F Shuaib*et al*, 'Ebola Virus Disease Outbreak – Nigeria', (2014) 63 Morbidity Mortal Weekly Report 867, 867.
[29] D Ogoina, A S Oyeyemi, O Ayah, A A Onabor, A Midia and W T Olomo, 'Preparation and Response to the 2014 Ebola Virus Disease Epidemic in Nigeria: The Experience of a Tertiary Hospital in Nigeria', (2016) 11(10), PLoS ONE 14, 15.

from applauding the efforts of the Nigerian government in tackling the virus, the WHO declared Nigeria free from Ebola on the 20th October, 2014, on the lapse of 42 days without a record of any new case of Ebola in Nigeria.[30]

3.0. Institutional Framework to Counter Ebola Spread in Nigeria

Section 17 (3) (c) of the Constitution of the Federal Republic of Nigeria urged the State to ensure that its policy directive is geared towards facilitating the health, safety and welfare of its citizens. This also entails the provisions of adequate medical facilities to meet the health needs of its citizens.[31] 'State' as used therein is construed to mean government.[32] In that wise, government comprises of the tripod structure of federal, state and local government authority as captured in the Constitution. The implication is that the three tiers of government have a duty to guarantee the health of its citizens. This is more so as health is not a subject matter within the exclusive legislative competence of the federal, state or local government. Section 17 of the Constitution is non-justiceable because it falls within chapter II of the Constitution.[33] In other words, citizens cannot approach the court to enforce any of the provisions therein,[34] as its actualisation are at the mercy of the political will and desires of the government.[35] However, on the authority of the Supreme Court, in the case of *Adebiyi Olafisoye v. Federal Republic of Nigeria*,[36] seriousness and imperativeness would be given to any Chapter II

[30]C L Althausa, N Lowa, E O Musab, F Shuaibc and S Gsteigera, 'Ebola Virus Disease Outbreak in Nigeria: Transmission Dynamics and Rapid Control', (2015) 11 Epidemics 80, 80.
[31]Section 17 (3) (d) 1999 Constitution (as amended).
[32]*Ibid*, s. 315 (1).
[33]*Ibid*, s. 6(6) (c).
[34]*Uzuokwu v. Ezeonu II* (1991) 6 NWLR (Pt. 200) 708, 761-762.
[35] P Oniemola and O Tasie, 'Engendering Constitutional Realization of Sustainable Development in Nigeria', (2020) 13 (1) *Law and Development Review* 159, 181.
[36](2004) 4 NWLR (Pt. 864) 580.

provision which the National Assembly gives legislative expression pursuant to powers derived from the Constitution.

In view of the foregoing, the National Assembly enacted the Nigerian National Health Act on the 31st day of October, 2014, just few days after Nigeria was declared free from Ebola virus. In the same wise, the constituent states of the federation have enacted laws regulating the health institutions in their respective states.[37] It is customary for the President to assign one of the ministers appointed pursuant to Section 147 (1) of the Constitution with the portfolio of Minister of Health. The State governments also appoint commissioners, one of which is the state equivalent of Minister of Health. These executive officers are regarded as the executive heads of the Federal and State Ministry of Health respectively. The officers and institutions ensure the execution of health policies of the government at the federal and state levels of government as the case may be. Health authorities are established at the Local Government level to administer primary health care centres and facilities established for each locality. However, the Federal Ministry of Health is to coordinate the health authorities in the States, Local Government Areas and private health subsector for the purpose of having a comprehensive and uniform national health information management system in the country.[38]

Even though there is no constitutional support for exclusive federal legislative powers for the health sector, the constitution conferred the federal government with the exclusive legislative powers on the subject matter of quarantine pursuant to item 54 of the Exclusive Legislative List contained Part I of the 2nd Schedule to the Constitution. The implication of this constitutional provision is that only the National Assembly can make laws on matters connected to quarantine and isolation for public health purpose for the entire federation. Consequently, only the federal executive organ,

[37]See for instance, Public Health Law Cap. P16 Vol. 9 Laws of Lagos State, 2015.
[38]Section 35 (1) National Health Act 2004.

represented by the Federal Ministry of Health, would solely be in charge of disease prevention and control for the entire federation.

Even though the Federal government has been magnanimous in sharing powers with constituent States regarding disease control in Nigeria, it had ensured that the National Centre for Disease Control (NCDC), one of its agency, have been the coordinating institution. During the spate of the Ebola virus, the NCDC was in charge of the detection, prevention and control of the disease across the country. Daily statements and updates on the Ebola were only issued from the stable of the NCDC. As at then, the NCDC was a department in the Federal Ministry of Health. It was not until November, 2018 that the NCDC Act was enacted and signed into law.[39] This Act conferred statutory flavour and legal personality on the NCDC. Even though the NCDC now enjoys some level of autonomy from the Federal Ministry of Health, it still works in close coordination with the ministry.

The constitutional inclusion of quarantine in the exclusive legislative list is the basis for the establishment of the Quarantine Act and the Animal Diseases (Control) Act by the National Assembly. The former is a colonial relic enacted since 1926; while the later was a military decree promulgated in 1988. Even though these Acts preceded the 1999 Constitution, they are deems as existing laws enacted by the National Assembly by virtue of Section 315 of the 1999 Constitution. The Quarantine Act is the basic law that regulates imposition of quarantine for the purpose of prevention and control of "dangerous infectious diseases" in Nigeria. According to the Act, "dangerous infectious disease" includes cholera, plague, yellow fever, smallpox and typhus, and any disease which the President pronounces to be a "dangerous infectious disease' by a written instrument in that regard.[40] This power also extends to the designation of a place, either within or

[39]Nigeria Centre for Disease Control, 'About the NCDC', <https://ncdc.gov.ng/ncdc> (accessed May 21, 2020).
[40]Section 2 Quarantine Act 1926.

outside Nigeria, as an "infected local area".[41] It is doubtful whether the President of Nigeria can make a pronouncement of inter-territorial effect in the view of the international customary law principle of state sovereignty and domestic jurisdiction of states' over their territorial integrity.[42] At best, such declaration can only be for the purpose of determining Nigeria's foreign relationship with that of other countries. For instance, the President can ban inter-territorial migration between Nigeria and that country.

It is curious to note that the President did not exercise his powers under Section 2 of the Quarantine Act to declare Ebola to be a dangerous infectious disease. Neither was Lagos, Port Harcourt or other West African countries, that were the epicentre of the virus, declared as infected local area of the virus. However, the NCDC simply declared Ebola Emergency in Nigeria. Despite the timely and utilitarian value of this emergency declaration, it was done in gross violation of the constitution. Section 305 (1) of the Constitution specifically confers the President with the power to declare a state of emergency in Nigeria or in any of its constituent states. This power can, amongst other situation, be exercised when there are circumstances that could lead to breach of public safety, disaster or natural calamity affecting the federation or any part thereof.[43] The essence of such declaration is to ensure that extraordinary measures are put in place to forestall such danger.

The President is conferred with the powers to make delegated legislations for the purpose of prevention and control of any contagious infection in Nigeria or giving effect to the implementation of the Act.[44] This provision of the Act enabled the establishment of the Quarantine (Ships) Regulations. In gross deviation from the constitutional conferment of exclusive powers on quarantine to the

[41]*Ibid*. s.3.
[42]See, *Island of Palmas* case, (1928) 2 RIAA 829, 838.
[43]Section 305 (3) (c) and (e) 1999 Constitution (as amended)
[44]Section 4 Quarantine Act 1926.

federal government, the Act delegated same powers to the State Governors in the instance that the President fails to exercise his powers under the Act.[45] It is therefore, argued that Section 8 of the Quarantine Act is unconstitutional to the extent that it confers on the Governors, the powers which are constitutionally exercisable by only the President. In view of the supremacy clause contained in Section 1 (3) of the Constitution, the said provision of the Quarantine Act is null and void to the extent of its inconsistency.

On the other hand, it may be argued that the Governors are not exercising substantive powers to make law on quarantine, but only exercise delegated powers enabled by the same Act which was to be exclusively administered. Hence, such state exercise of power was in order. This argument can be countered on the grounds that even though such powers were conferred by the Quarantine Act, it was not rightly conferred on the State Governors. This is because the Quarantine Act cannot rightly deviate from the Constitution, from which it obtained recognition and existence.

Unlike the situation in the Ebola case, the current scourge of corona virus in Nigeria has witnessed the gross misapplication of Section 8 of the Quarantine Act leading to legal cacophony on the subject matter in Nigeria. Pursuant to this provision, there has been a proliferation of declarations and regulation by governors across the several states of the federation despite the President's earlier declaration and regulation in that regard. On 30th March, 2020, President Buhari issued the COVID-19 Regulations. In the said regulations, the President made specific provisions restricting movement and imposing lockdown, as preventive mechanism against the spread of corona virus in Lagos State which is the epicentre of the contagious COVID 19 in Nigeria. Shortly thereafter, the Lagos State Governor established the Lagos State Infectious Disease (Emergency Prevention) Regulations 2020 to that same effect pursuant to Section 8 of the Quarantine Act. Some

[45]*Ibid,* s. 8.

other States of the Federation have also replicated similar regulations[46] notwithstanding that Section 8 of the Quarantine Act only empowers the Governors to make such regulations where the President fails to so act.

Apart from being offensive to the Quarantine Act, States' enforcement of those regulations are legally questionable, in view of the constitutional doctrine of covering the field. The doctrine first entails that: "other legislation on the same field whether by the Federal/State government must bow to the dictate of the Constitution".[47] On the second count, whereas the State and the Federal Government have legislated on similar subject matter, "the State Legislation is in abeyance and becomes inoperative for the period the Federal Legislation is in force".[48] Since both laws cannot coexist, it therefore means that, the regulations created by the Governors of various States went into abeyance as soon as the regulations made by President Buhari came into effect. Similarly, in the case of *Attorney General of Ogun State v Attorney General of the Federation*[49], the Supreme Court declared that the Public Order Act 1979 repealed all existing State laws on public order.

In as much as it has been argued that the federal government has exclusive powers on control of contagious diseases in Nigeria, it is unsatisfactory that only the federal government should have the statutory powers to do so. It is difficult to imagine how the federal government can effectively and rapidly respond to contagious diseases ravaging interior areas which have complex geographical terrain that are not easily accessible. One would query whether this does not defeat the essence of the constitutional creation of States and Local Government authorities which is to ensure convenient administration of the Nigerian federation. A centralised approach of dealing with the

[46]Rivers, Kaduna and Akwa Ibom States have also made regulations on Covid-19.
[47]*Saraki v. Federal Republic of Nigeria* (2016) LPELR-40013(SC) 77, Paras. A-C
[48]*Attorney-General of Ogun State v. Aberuagba* (1985) 1 NWLR (Pt. 3) 395.
[49](1982) 1-2 S.C. (Reprint) 7.

Ebola virus and other contagious disease also has the tendency to count against the urgency needed in addressing public health emergency situations.[50]

The Quarantine Act is a colonial legacy enacted since 1926, which is deemed to have outlived its usefulness and relevance in modern times. The amount of ₦200,[51] being penalty fixed for non-compliance with regulations made pursuant to the Act,[52] is not a sufficient fund to command compliance in present day Nigeria, it is a fact that the value of Naira has crashed drastically. This has made the Governors to fix applicable fines at ₦100,000.00[53] in recent regulations. This, of course, is illegal as the delegated powers must not derogate from the parent legislation. Also, smallpox, which is designated as a "dangerous infectious disease" under the Act, has been totally eradicated from Nigeria for more than 35 years now.[54] Since the disease is no in longer existence, it is not dignifying to continue to retain it in the statute book.

4.0. Human Right Concerns Arising from Ebola Prevention and Control Methods

As noted earlier, the modalities for tackling the Ebola virus entails imposition of restrictions on movements and restraining persons from maintaining close contact in order to avoid easy spread. Quarantine and isolation was the most effective means, given the contagious nature of the virus and the fact that no known cure for the virus existed at the time. Quarantine entails separation and restriction on the movement of persons suspected to have been infected while they are

[50] A C Ekechi-Agwu, 'Regulating Public Health Emergencies in Nigeria: Prospects and Constraints', *Journal of Law and Judicial System* (2019) 2 (I4) 9, 15.
[51] The Dollar equivalent is less than US$1.
[52] Section 5 Quarantine Act 1926.
[53] This is equivalent to US$257.92 as at 21st May, 2020.
[54] O A Makinde and C O Odimegwu, 'A Qualitative Inquiry on the Status and Adequacy of Legal Instruments Establishing Infectious Disease Surveillance in Nigeria', (2018) 31 (22) *Pan African Medical Journal* 1, 5.

yet to exhibit symptoms of infection.[55] On the other hand, isolation entails separation and restriction of the movement of persons who exhibit symptom of infection, in order to prevent spread to healthy persons.[56] Other modalities of dealing with the Ebola virus may include compulsory vaccination, treatment or disclosure of the identity of infected persons to enable members of the public exercise precaution. Each of these methods has the tendency to impugn on the fundamental rights of persons guaranteed by the constitution[57]

Chapter IV of the 1999 Constitution[58] provides some fundamental rights guarantees of persons which the State is bound to uphold and protect. Specific provisions which have direct bearing on the methods adopted in the prevention and control of the spread of Ebola include Sections 35, 37, 40 and 41. Section 35 provides for the freedom of personal liberty. Section 37 protects the privacy of citizens in respect of their homes, correspondence, and electronic communications. Section 40 guarantees the freedom to assemble and association; while Section 41 protects freedom of movement.

However, these fundamental right guarantees are not cast in iron. Hence, the same constitution has provided circumstances wherein the state may derogate from the fundamental right provisions. This is contained in Section 45 (1) (a) of the Constitution which provides that the State may deviate from the provisions of Sections 37, 38, 39, 40 and 41 of the Constitution pursuant to laws enacted to protect "public safety, public order, public morality or public health". Effectively, this provision has ranked public health and safety above the personal fundamental rights contained in sections 37, 40 and 41. Although, the right to personal liberty escaped the overriding powers of Section 45, it was caught by the web of Section 35 (1) (e) of the Constitution

[55]Melissa Markey *et al*, 'Ebola: A Public Health and Legal Perspective', *Michigan State International Law Review* (2016) 24 (2) 433, 434.
[56]*Ibid*.
[57]*Ibid*.
[58]Chapter IV of the Constitution comprises of Sections 33-46 of the Constitution of Nigeria, 1999 (as amended).

which allows the breach of the right to personal liberty "in the case of persons suffering from infectious or contagious disease… for the purpose of their care or treatment or the protection of the community". It must be noted that the deviation from the fundamental right must only be pursuant to the provisions of laws made for that purpose. Ebola prevention and control measures must not be arbitrarily imposed by the executive arm of government, no matter how well conceived the intentions may be. It is important that the laws purporting to restrict the fundamental rights of persons must be "reasonably justifiable in a democratic society".[59] The Quarantine Act 1926 and regulations made thereto for the prevention and control of contagious diseases can rightly limit the constitutional rights of individuals.

The challenge is not so much as to whether the rights of individuals can be restricted under such emergency public health situations. The concerns have been on the need for enforcement officers not to transcend the bounds of the law in the course of imposing such restrictions.[60] For instance, part of the protocol at the Murtala Muhammed International Airport, Lagos, during the beehive of the Ebola virus, was that air travellers were subjected to open screening, in order to determine their Ebola status. Persons found to exhibit symptoms of the virus were instantly separated, thereby exposing their status to public knowledge.[61] This could be regarded as a breach of a patient's right to confidentiality which must be respected by medical professionals.[62] Such breach has the tendency to expose patients to stigmatisation.[63] This in turn would infringe on the right of persons to be free from discrimination pursuant to Section 42 of the Constitution,

[59]Section 45 (1) the Constitution of Nigeria, 1999 (as amended)
[60]Chinelo A Ekechi-Agwu, n. 50, 12.
[61] G C Nwafor, 'Protection of the Right to Healthcare of People Infected with Ebola Virus Disease (EVD): A Human Rights-Based Approach', (LL.M Thesis, University of Venda, 2016) 115.
[62] Section 23 National Health Act 2004.
[63] G C Nwafor, n. 61, 77.

which cannot be derogated from based on Section 45 of the Constitution.

The prior informed consent of patients must be obtained before diagnoses or treatment should be carried on the body of a person. In *Georgina Ahamefula v. Imperial Medical Centre*,[64] the Lagos High Court held that the unauthorised testing of HIV status of a patient amounts to a violation of the person's privacy and bodily integrity. This case was the resurgence of the *Okekearo v. Tanko's Case*[65] where a doctor was held liable for the tort of battery, due to the amputation of a boys arm without his consent. The International Convention on Civil and Political Right, of which Nigeria is a signatory party, requires that even where circumstances warrant State parties to derogate from the fundamental rights of citizens, such derogation should not be discriminatory mainly on the grounds of race, colour, sex, language, religion or social origin.[66] Even though the Convention has not been domesticated in line with Section 12 of the 1999 Constitution, Nigeria cannot rely on its domestic law as a basis to deviate from its obligations under international law.[67] By virtue of ratifying the convention, Nigeria is duty bound to take cognisance of this instrument in its policies formulation and implementation.

5.0. Conclusion

This paper examined the rise and fall of the Ebola scourge in Nigeria and how the rapid response and approach were responsible for dealing with it. Apart from examining the legal and institutional structures that were in place to contain the virus, it was found that the approach may have been in violation of some fundamental rights provisions of individuals. While it is settled that public health concerns are grounds for deviation from these rights, it was also contended that such

[64]Suit No.ID/16272000. Judgement delivered on September 27, 2012 by the Lagos State High Court.
[65](2002) 9-11 SCNJ 1; (2002) NWLR (Pt. 791) 657.
[66]Article 4 International Covenant on Civil and Political Rights.
[67]*Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, (2009) AHRLR 331 (ECOWAS 2009).

deviation must be exercised within the bounds of enabling laws; it must not also be exercised in a discriminatory manner. Response to the Ebola virus and other contagious diseases that may arise in the future can be effectively tackled by a viable public health system enabled by laws that have regards to fundamental rights.[68] Hence, there is a need to reform the legal framework for public health management. This will necessarily begin with the repeal of the Quarantine Act 1926 and re-enactment of an Act suitable for an ideal federal system of government which Nigeria claims to run.

[68] F Shu-Acquaye, 'The Ebola Virus Prevention and Human Rights Implication', (2017) 12 (1) *University of Massachusetts Law Review* 1, 66.

An Examination of the Legal Framework for Cyber Security in Nigeria

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Abstract

With the advent of the computer age, legislatures in most parts of the world have been struggling to redefine the law to curb crimes perpetuated by cyber criminals. This crime is amongst the newest and most constantly evolving in numerous jurisdictions. The citizens of Nigeria, like other nations of the world have access to the global telecommunications infrastructure which includes computers, mobile phones and the Internet. However, one of the consequences of this unlimited access is the issue of cybercrime. The novelty of this kind of crime poses challenges for the Nigerian legal system as well as for law enforcement. The Cybercrimes Act, 2015 was signed into law in order to create a legal framework for prosecuting and mitigating cybercrimes in the country. This paper examines the provisions of the Act and other related laws, with a view to demonstrating the necessity for an effective legal framework for cyber security. The paper also analyses the relevant national, regional and international laws in order to underscore the need for creating a robust legal regime on the subject matter.

1.0 Introduction

The proliferation of digital technology and the convergence of computing and communication devices have opened a vast array of possibilities for people in different nations to have access to the world from their homes, cars, offices, relaxation parks, cyber cafes and so on.[2] While overwhelmingly positive, these huge advances in

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[2] E Casey, *Digital Evidence and Computer Crime*, (Elsevier Press, St. Louis, MO 2004), 34.

technology also have negative consequences. One major consequence has been a considerable rise in the incidences of cybercrimes.[3]

Numerous crimes of varying dimensions are committed daily on Internet worldwide.[4] Cybercrime is a fast growing pattern of crime. More and more criminals are exploiting the speed, convenience, anonymity of Internet to commit a diverse range of criminal activities that know no borders, either physical or virtual; cause serious harm and pose real threat to victims worldwide.[5] For example, a report indicated that Nigeria is losing about $ 80 million (₦11.2 billion) yearly to copyright privacy.[6] Furthermore, the Nigerian Ministry of Communication reported that Nigeria is losing about ₦78 billion annually to activities of cyber criminals who target financial institutions, ministries, departments and agencies.[7]

At the international level, cybercrime has acquired vast and complicated dimensions beyond the identity and financial crimes which are common in Nigeria.[8] For example, in 2012, a self-replicated virus attacked Saudi Aramco, the world's largest oil company. The cyber-attack deleted completely all software and every line of code on as many as 30,000 company computers. This was followed shortly by similar occurrences in the United States, when another unidentified virus attacked Bank of America, Wells Fargo and a number of other major United States' banks. Added to this was the Stuxnat virus that

[3] Clough, *Principles of Cybercrime*, (Cambridge University Press, Cambridge 2010), 12.

[4] Y Majid, *Cybercrime and Society*, (SAGE, London, 2006), 47.

[5] Accessed from http://www.interpol.int/crime_area/cybercrime/crime on 20th June 2019.

[6] O Ayantokun, "Fighting Cybercrimes in Nigeria" available at http://www.tribune.com.ng (accessed 28th June 2019).

[7] This statement was credited to the erstwhile Nigerian Minister of Communication, Mr Adebayo Shittu at a workshop for Nigerian Universities in FCT, Abuja. See also Okeke, C.C (2016) "Nigerian loses ₦78 Billion Yearly to Cybercrimes" Daily Trust, 16th January, 2016 at www.dailytrust.com..

[8] K Okafor, "An Appraisal of the Legal Regime for Cyber Security in Nigeria", (2017) 8(3) *Gravitas Review of Business and Property Law*, 3 at 17-20.

wiped off more than 1,000 centrifuges of Natanz, the location of Iran's nuclear program.[9]

It is needful to stress here that these powerful cyber weapons have the capacity to wipe out a country's power grid, water supply, air traffic control, financial institutions and civilian and military installations, without revealing the identity of the attackers.[10]

2.1 Conceptual Clarifications

An elementary understanding of the key concepts related to cybercrimes, cyber activities and the important issues which they raise are crucial to the overall objectives of this paper.

a. Defining Cybercrime

What is cybercrime? The development of technology has, directly or indirectly, created the definitions of computer crimes or cybercrimes. The Council of Europe Convention on Cyber-crime of 2011[11] in its Articles 2-10 on substantive criminal law, defines cybercrimes as consisting of *four* different categories; namely: i) offences against the confidentiality, integrity, and availability of computer data and systems; ii) computer related offences; iii) content related offences, and iv) offences related to infringements of copyright and related rights.

Cybercrime involves information technology infrastructure, including illegal access, illegal interception (by technical means of non-public transmission of computer data to, from or within a computer system); data interferences (unauthorised damaging, deletion, deterioration, alteration or suppression of computer data); systems interferences (interfering with the functioning of a computer system by in-putting, transmitting, damaging, deleting among others). It also involves forgery (identity theft) and electronic fraud.[12]

[9] *Ibid.*
[10] *Ibid.*
[11] L Ani, "Cyber Crime and National Security: The Role of the Penal and Procedural Law", (2011) *Nigerian Institute of Advanced Legal Studies (NIALS),* Lagos, 197.
[12] *Ibid at p 199.*

Generally, it is hard to classify cybercrimes into particular groups, as the crimes assume many shapes and could occur anytime or at any place. Besides, cyber criminals employ different methods to achieve their goals, depending on their skill set and objectives. However, Wall's[13] classification would be helpful to this paper. He categorised cybercrime into *four* legal subdivisions; namely:

- *Cyber trespass:* crossing boundaries into properties belonging to others and/or causing damage, e.g. hacking, defacement, viruses.
- *Cyber deceptions and thefts*: stealing money or property, e.g. credit card fraud, violation of intellectual property/piracy.
- *Cyber pornography*: breaching laws on obscenity and decency.
- *Cyber violence*: causing psychological harm or inciting physical harm against others, e.g. hate speech, stalking among others.

It should also be noted that cybercrime could also occur in the context of crime against the State- e.g. terrorism, espionage and disclosure of official secrets.

b. Definition of Cyberspace

This term pertains to networked computer sustained, computer accessed and computer generated multi-dimensional artificial or virtual reality.[14] It has been defined as "a computer network consisting of a worldwide network of computer networks that use Internet Transmission Control Protocol and Internet Protocol (TCP/IP) networks to facilitate data transmission and exchange".[15] In current usage, it means the global network of interdependent informational technology, infrastructures, telecommunication networks and computer processing system.[16] Cyberspace affords user the chance of getting involved in activities carried on via electronic fields whose special domains go beyond traditional, territorial, governmental, social and economic limitations; thereby creating fresh opportunities for

[13]*Ibid at p 201.*
[14] D Wall, *Cybercrimes and the Internet* In Wall, D (ed) "Crime and the Internet", (Routledge, London, 2001), 21
[15]Accessed from http://www.audioenglish.net Accessed on 11th July 2019.
[16]*Ibid.*

contest, conflict, pursuit of power and control, fostering interactions that materialise to ideas, cross-fertilization of ideas, exchange of information, access to expanded knowledge and alternative modes of thinking; amongst others.[17]

2.2 Nexus between Cybercrime and National Security

It has been stated, and rightly too, that it is difficult to over-emphasise the potential dangers cybercrime poses to Nigeria. It is necessary to put it bluntly that the incidences of cyber-attacks have assumed an unimaginable level of sophistication in recent times and it is expected to grow.[18] Invariably, there is a nexus between national security and cybercrime. Basically, the nature of threats of cybercrime to the nation's security can be encapsulated into *three;*

i) threats against the private sector, for instance, banks and other financial institutions;

ii) threats to the nation's critical infrastructure; mainly, the industrial control system that drives the material processes of aviation, railways, telecommunication, state media, power grid and pipelines, among others; and

iii) Intellectual property theft and supply chain risks.[19]

3.0. Examination of Legal Framework for Cyber Security in Nigeria

Having good legislation in place is one of the effective means of creating and maintaining cyber security. In 2004, the Nigerian government established the Nigerian Cybercrime Working Group which composed of representatives of the government and entities from private sector, purposely to develop legislation on cyber security.[20] Also, in 2007, the government founded the Directorate of

[17] Okafor, K, Op.cit at 1.

[18] International Communication Union, Understanding Cybercrime Phenomenon: Challenge and Legal Response, (LexisNexis Butterworth's, London, 2012), 34-35

[19] *Ibid.*

[20] O S Adesina, ''Cybercrime and Poverty in Nigeria" (2017) 13(4*) Canadian Social Science*, 25.

Cyber Security (DfC), a body charged with the task of responding to security issues linked with growing usage of internet and other information and communication technologies (ICT) in Nigeria.[21]

Most significantly, apart from the official initiatives referred to above, there are legislation, though not directly related to cybercrime but are enforced to tackle the menace; and ultimately in 2015, a law (usually referred to as Cybercrime Act 2015), specifically designed to tackle cybercrime and related offences, was enacted. Some of these laws are examined below:

(i).The Nigerian Criminal Code Act[22]

The above mentioned legislation regards any kind of stealing, and deemed it a punishable offence.

Although, cybercrime is not specifically mentioned under the legislation; it is a form of stealing deemed punishable under the legislation. More precisely, Chapter 38 of the Act relates to *Obtaining Property by false pretences; cheating*. The particular provisions dealing with cybercrime is section 419 thereof, while section 418 defines what constitutes an offence under the Act. Section 418 states thus:

> *Any representation made by words, writing, or conducts, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true.*

While section 419 states that: *Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a felony, and is liable to imprisonment for three years*.

[21]*Ibid.*

[22]Cap C38, Laws of the Federation of Nigeria, 2004.

(ii) The Economic and Financial Crimes Commission (EFCC) Act, 2004[23]

In response to the devastating effects of economic and financial crimes, the Federal Government of Nigeria enacted the *Economic and Financial Crimes Commission Act*. *The EFCC (Establishment) Act, 2004* was assented in June 2003. It repealed the *EFCC No 5 of 2002* and establishes a Commission for economic and financial crimes. Part 2 of the Act set out some of the responsibilities of the Act as follows:

- The investigation of all financial crimes, including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instrument, computer credit card fraud, contract scam among others.
- The coordination and enforcement of all laws against economic and financial crimes laws and enforcement functions conferred on any other person or authority.
- The examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies, or groups involved;
- Undertaking research and similar works with a view to determining the manifestation, extent, magnitude and effects of economic and financial crimes and advising government on appropriate intervention measures for combating same;
- Taking charge of, supervising, controlling, coordinating all the responsibilities, functions, and activities relating to the current investigation and prosecution of all offences connected with or relating to economic and financial crimes, in consultation with the Attorney-General of the Federation;
- The coordination of all investigating units for existing economic and financial crimes in Nigeria;
- The Commission is further charged with the responsibility of enforcing the provisions of the Money Laundering Act 1995; the Advanced Fee Fraud and Other Fraud-Related Offences Act

[23]Cap E1, Laws of the Federation of Nigeria, 2004.

1995; the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994, as amended; the Banks and other Financial Institutions Act 1991, as amended; and Miscellaneous Offences Act.[24]

(iii) The Advance Fee Fraud and Other Fraud Related Offences Act, 2006

As a response to advance fee fraud and other related crimes, the Nigerian government enacted the Advance Fee Fraud and Other Related Offences Act (AFFA) 2006.**[25]** The Act repealed the Advance Fee Fraud and Other Fraud-Related Offences Act No 13 of 1995 and the Advance Fee Fraud and Other Fraud-Related Offences (Amendment) Act, 2005. The Act was intended to provide remedy to the inadequacies and shortcomings of the provisions of the existing penal legislation on fraud and related crimes. Advance Fee Fraud has been defined as the non-violent economic and financial crime encompassing various forms of fraudulent acquisition of wealth and other forms of obtaining financial advantages through deceit.[26] The Act provides for the offences[27]of obtaining property by false pretences, other related offences, use of premise, fraudulent invitation, receipt of fraudulent documents by victim to constitute attempt, possession of fraudulent documents, laundering of funds obtained through unlawful activity, conspiracy, aiding, among others alternative offences, offences by bodies corporate, electronic telecommunication offences.

The EFCC is trying hard to combat cybercrimes in form of advance fee fraud particularly those that fall under the rubric of: *obtaining*

[24]Part 2, EFCC Act, 2004.

[25]Cap A6, Laws of the Federation of Nigeria, 2004.

[26] B O Longe, and C S Chiemeke, "Crime and Criminality in Nigeria: What Roles are Internet Access Points Playing?" (2008) 6 (4) *European Journal of Social Sciences*, 132-133.

[27]See sections 1-12 thereof. B O Longe, and C S Chiemeke, "Crime and Criminality in Nigeria: What Roles are Internet Access Points Playing?" (2008) 6 (4) *European Journal of Social Sciences*, 132-133.

[27]See sections 1-12 thereof.

property by false pretence, use of premises (or permission for premises to be used) for any purposes constituting an offence under the Act, fraudulent invitation, receipt of fraudulent document by victim to constitute attempt, possession of fraudulent documents and electronic telecommunication offence; to mention a few.

(iv) Cybercrimes (Prohibition, Prevention) Act, 2015

As stated earlier, before 2015, in the absence of a purposely designed and comprehensive cyber law, penal legislation earlier examined above were relied on to curb cybercrimes and related offences. The Police and the EFCC had the duty of implementing the laws. However, it was obvious that the novelty and complex character of cybercrime made it difficult for those agencies to effectively tackle the menace of cybercrime. The consequence of this was the establishment, in 2004, of the Nigerian Cybercrime Working Group (NCWG) by the Federal Government.

The Group was mandated to design an adequate and effective legal and institutional framework for cyber security in the country. The efforts of the Group finally yielded a result when, on 5th February 2015, the President approved and launched the first National Cyber Security Policy and Strategy; the content of which declared cybercrime, cyber espionage, cyber conflict, cyber terrorism, child online abuse and exploitation as threats to the development and security of the country.[28] Inevitably, the Cybercrime (Prohibition, Prevention) Act, 2015 was enacted and was signed into law on 15th May, 2015.

The Act[29] provides for an effective and unified legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria, ensure the protection of critical national information infrastructure and promote

[28]K Okafor, *Op.cit,* 5-6..

[29]Officially titled "An Act to provide for the Prohibition, Prevention, Detection, Response, Investigation and Prosecution of Cybercrimes and for other Related Matters, 2015". Assented to by the President of the Federal Republic of Nigeria in May, 2015.

cyber security and protection of computer systems and networks, electronic communication, data and computer programme, intellectual property and privacy right.[30] The Act is the first legislation in the country that deals purposely with cybercrimes and cyber security. It prescribes stringent penalties for offenders and perpetrators of cybercrimes.

The Act is divided into 6 parts and 59 sections. Part 1 deals with the object and application of the Act. Part 2 is related to the protection of critical national information infrastructure. Part 3 provides for the offences and punishments, while Part 4 deals with the obligations of financial institutions. Part 5 provides for the administration and enforcement of the law; while Part 6 is concerned with arrest, search and seizure.

4.0. Highlights of the Provisions of the Act

Broadly speaking, cybercrimes can be categorised into two:

- *Core computer crimes*: These attack computers, networks or devices directly. Sections 3 to 10 of the Act fall into this category. They relate to crimes like unlawful interference with critical national infrastructure[31], unlawful access to a computer[32], unlawful interception of computer communications[33], unlawful alteration or destruction of computer data[34] and misuse of devices.[35]
- *Computer related crimes:* These include fraud[36], forgery[37], impersonation[38], pornography[39], terrorism[40], and the dissemination of racist or offensive material.[41]

[30]See section 1 of the Cyber Crimes Act, 2015.
[31]*Ibid.*, ss. 3 and 5 of the Act.
[32]*Ibid.* s. 6(1).
[33]*Ibid* .ss. 9 and 12.
[34]*Ibid.* s.8.
[35]*Ibid.* s.28.
[36]*Ibid*. s.14.
[37]*Ibid*. s.13.
[38]*Ibid*. s.22.
[39]*Ibid.* s.23.

4.1. Core Computer Crimes

Under the first category, *unlawful interference with critical national infrastructure* comes first. These provisions are meant to protect certain installations that are central to national security. Critical infrastructure has been defined under the Act as systems and assets that are so vital to the country that the destruction of such systems and assets would have an impact on the security, national economic security, national public health and safety of the country[42]**.** Such critical national infrastructure include air space, national elections, state buildings, monuments, air ports, power grid, etc. Section 5 of the Act prescribes the punishment for the offenders. It is also necessary to indicate that the destruction of such installations also amounts to an act of terrorism under section 1(3) (c) of the Terrorism Prevention Act 2011 as amended by the Terrorism (Prevention) (Amendment) Act, 2013.

Unlawful access to a computer and unlawful system interference is provided for as an offence under section 6. The section describes the offence as an unauthorised intentional access to a computer system or network or fraudulent purposes and the obtaining of data vital to the national security. The penalty prescribed under the section ranged from 3 years to 7 years imprisonment, with an option of fine.

Misuse of Devices as an offence is provided for in section 28 of the Act. The section prohibits the importation and fabrication of e-tools in a manner that contradicts the provision and intendment of the Act.

4.2. Computer Related Crimes

Under this category, the first offence mentioned is *Computer Forgery*. This involves inputting, altering, deleting or suppressing of data resulting in counterfeit data. The crime is committed where a person accesses a computer or network with the intention that the counterfeit

[40]*Ibid.* s.18.
[41]*Ibid.* s.26.
[42]A Adekunle, "A Review of the Cybercrime Act 2015" In A Adekunle (ed) (2017) *Combating Cybercrimes in Nigeria: Trends and Issues,* Nigerian Institute of Advanced Legal Studies (NIALS), Lagos, 6.

data is taken as genuine. The penalty for the crime is a term of imprisonment of not less than three years.

Computer Related Fraud is another crime provided for under section 14 of the Act. It involves unlawful alteration, erasing, inputting or suppression of any data held in any computer, irrespective of whether or not the offender intends to confer any economic benefit on himself or a third party. The penalty is a term of imprisonment of not less than three years or to a fine of not less than ₦7, 000,000.00, or both fine and imprisonment.

Identity Theft and Impersonation is another crime highlighted in the Act as such offences that have the ingredients of fraud, identity theft and impersonation. These include: Theft of terminals and Automated Teller Machines[43] (ATMs); Manipulation of Automated Teller Machines (ATMs), and Points of Sale (POS);[44] E-card dealing;[45] and Fraudulent issuance of electronic instructions.[46]

Cyber Terrorism is another act which the Act criminalises under section 18 of the Act, in the following context: "a person who accesses any computer….or network for purposes of terrorism, commits an offence and is liable on conviction to life imprisonment….".

Although, the Act does not spell out what constitutes "terrorism" in that regard, but it refers to the Terrorism (Prevention) Act (TPA), 2011 for the definition of "terrorism". Under TPA terrorism is defined as a contemplated act deliberately done with malice, unduly compelling a government from performing any act; among others. Such acts are designed to create fear, intimidation, destruction and death.

[43]Section 15 of the Cybercrime Act 2015.
[44] *Ibid.* s. 30.
[45] *Ibid*. s.33.
[46]*Ibid*. s.20.

5.0 Other Categories of Crimes Outlined in the Act

Apart from the above outlined crimes dealt with under the various provisions of the Act, it also makes specific provisions on the following crimes; among others:

Pornography Crimes

The Act specifically prohibits child pornography, and provides for punishments of imprisonment for a term of 10 years or a fine of not less than ₦20,000,000.00 or to both fine and imprisonment, depending on the nature of the offences; which include: producing, procuring, distributing and possession of child pornography; among others.[47]

a. Cybersquatting

The Act also outlaws cybersquatting, which is registering or using an Internet domain name with bad faith with intent to profit from the goodwill of a trademark belonging to someone else, or to profit by selling to its rightful owner. The prescribed penalty is a term of imprisonment not less than two years or a fine of not less than ₦5,000,000.00 or both fine and imprisonment.[48]

b. Cyber-stalking and Cyberbullying

The Act also criminalises the acts of threatening or bullying another person by means of a computer. The penalty ranges from a fine of not less than ₦2, 000, 000, .00 or imprisonment of not less than a year, or to both fine and imprisonment up to a term of not less than ten years or a fine of not less than ₦25, 000, 000.00 or to both fine and imprisonment; depending on the gravity of the offence.[49]

c. Racism and Xenophobic Crimes

The Act further forbids the distribution of racist and xenophobic material to the public by means of computer system or network. It also outlaws abuses, or threats on the grounds of race, ethnic origin,

[47]See generally, sections 23 of the Cyber Crime (Prohibition, Prevention) Act 2015.
[48]*Ibid*, s. 25.
[49] *Ibid*, s. 24.

religion, colour or descent; or distribution of material that justifies genocide or crime against humanity. Offenders are liable on conviction to imprisonment for a term of not less than five years or to a fine of not less than ₦10, 000, 000 .00 or to both fine and imprisonment.[50]

6.0 Appraisal of the Cybercrime Act, 2015.

It is important to stress that the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 is a major milestone in the bid to tackle the menace of cybercrime and associated offences. This is on account of the comprehensive nature of the legislation, with respect to criminal online actions. Besides, it prescribes legal procedures for investigation, prosecution and enforcement of the provisions of the legislation. More significantly, it gives attention to the "dual criminality challenge" regarding international legal cooperation and mutual assistance.

Besides addressing national security issue like *terrorism*, the Act prescribes severe punishments for offences relating to critical national information infrastructure; thus giving pre-eminent consideration for national security.[51]

Furthermore, the Act addresses the issues of threats to economic security and commercial safety in the country by criminalising acts such as cyber-wars, cyber-frauds, unlawful destruction or hacking of electronic mails through which money or other information is conveyed, wilful misdirection of electronic messages with an intention of fraudulently securing financial gains or hinder the process with a view to cause delay or speed the messages, or misdirection or obstruction which defeats the purpose of the messages. The bottom line of all these is that the Act seeks to criminalise undue obtaining of economic advantages and benefits at the expense of another party; an

[50] *Ibid,* s.26.
[51] *Ibid,* s. 5.

act that is not only fraudulent but could also be injurious to economic security and commercial integrity.[52]

Again, the Act also criminalises the acts of manipulating a computer or other electronic devices, by any one in private or public employ, with an intention to defraud or with intent to short pay or over pay or actually short pays or over pays any employee in the private or public sector. Obviously, these provisions are meant to check the unwholesome practices in both the private and public sectors of the country which make employees, particularly in the public sector, hapless victims of illegal deductions in their remunerations.

Finally, the Act creates a duty, incumbent on anyone that operates a computer system or network to report to the National Computer Emergency Response Team Coordination Centre of any attack capable of obstructing the proper functioning of the computer system or network, to enable the Centre to solve the problem. In the event of the operator failing to make such report within the stipulated time, he would not only be fined, but his access to the Internet will also be restricted. These salutary provisions, would no doubt go a long way in providing for the country a reasonable measure of cyber security the country actually desire and also deserve.

7.0. Challenges Limiting the Efficacy of the Legal Framework for Cyber Security in Nigeria

There are identifiable challenges which bedevil the effectiveness of the existing legal framework put in place to establish cyber security in the country. Some of these challenges are examined hereunder:

i. Problems of Investigation.

It is essential to discover who a cyber-criminal is before effecting an arrest. However, as far as online crime is concerned, there are various ways of hiding one's identity; in that, there are numerous services that will conceal a user's Internet Protocol (IP) address by writing traffic through different servers, usually for a fee, thus making it hard to

[52]*Ibid*, ss. 6, 8, 11 and 14.

track down the criminal. Simply put, cyber criminals exploit the rights and privileges of a free society, including anonymity, to benefit themselves.[53] Section 45 of the Cybercrimes Act makes provisions for the powers of arrest, search and seizure. The powers to prosecute are vested in the relevant *law enforcement agencies*, subject to the consent of the Attorney-General of the Federation.

ii. Elusive Evidence

Another problem associated with the investigation and prosecution of cybercrimes is the character of the evidence. Digital evidence is, by nature, fragile and can be easily lost, altered or tampered with. This inevitably would impact, negatively, on investigation and ultimately hamper an effective and thorough prosecution. However, computer forensic has come up with tools that could allow investigators examine digital evidence without tampering with it; thereby reliably preserving it for presentation as evidence in the course of proceedings in court.

iii. Shortage of Manpower/Personnel

Apart from the challenges identified above, another difficulty encountered on the issue of cyber security in the country is the shortage of trained staff or personnel with the requisite technical skills, know-how or resources needed for thorough investigation and successful prosecution of offenders. The fact that cybercrimes are information and intelligent based undertakings means only those knowledgeable in the field could competently handle the investigation of the crimes and effectively prosecute arrested suspects. The lack of an established knowledge base on computer crimes has created the potential for an ineffective response to the challenge of cybercrimes.

[53]S S Dzever, "An Appraisal of the Legal Framework for Combating Cybercrime at the International Level" (2011) 4 (3) *International Journal of Humanities and Social Sciences*, 7 at 11-16.

iv. Corruption, Poverty and High Rate of Unemployment

Available statistics[54] show that a larger percentage of those involved in the perpetration of cybercrimes in the country are the youth; this is especially reflected in the current demographics of the nation's population which heavily favours the youth[55],the problem is made worse by the high rate of poverty and unemployment. Furthermore, the high level of poverty is engendered by the corrupt practices of those in government, thus breeding impunity and criminality.

v. Absence of Public Awareness of the Dangers of Cybercrime

The fact needs no further proof that most Nigerians are either completely ignorant of or have little awareness of the concept of cybercrimes and the dangers it poses to the security and well-being of the country. This is demonstrated by the fact that victims of cybercrimes, particularly corporate bodies cover up computer crime cases and hardly report to the relevant law enforcement agencies to take necessary action against the culprits. Accordingly, a thorough reporting outlet is essential to aid prevention, investigation and prosecution of the crimes.

8.0. Recommendation

In view of the highlighted challenges, the following recommendations are considered useful to tackle the challenges.

- There is a need for further amplification of the Cybercrimes Act, 2015 to specifically address emerging cyber offences and to harmonise the same with best global practices. This is in view of the fact that new cybercrimes keep emerging from time to time, and Nigeria cannot be isolated from the rest of the world in tackling these challenges. Accordingly, reduction of cybercrimes and criminality is not the only goal, but also the provision of security and safety in cyberspace.
- Adequacy of law enforcement personnel with the necessary skills and technical know-how required for effective

[54] O S Adesina, *Op.cit* at 23.
[55] *Ibid* at 25.

investigation and successful prosecution of cases. In tackling these challenges, education and human capacity development are key requirement and are also one of the most potent strategies.

- The government must show seriousness and commitment in tough enforcement of the anti-cybercrime laws, regardless of the status of the offenders; and it should also provide the enabling environment for the law to operate without let or hindrance.
- Public enlightenment campaigns on self-protection, training and identification of exposures shall prove useful in helping vulnerable individuals and corporate bodies.
- Provision of gainful employment and poverty-alleviation initiatives, not only by the government, but by wealthy individuals and corporate bodies would go a long way in reducing the incidences of cybercrimes in the country.

9.0. Conclusion

The paper has discussed the existing legal framework for providing cyber security in Nigeria. It is an inescapable fact that cybercrimes are not going to disappear, as long as computer technology and the connectivity provided by the internet are still much here with us. The paper has discussed the nature of cybercrimes, the diverse means, in form of legislation, by which the menace has been confronted, prior to the enactment of Cybercrime Act, 2015: legislation specifically designed to combat the scourge of cybercrime in its various dimensions and manifestations. Undoubtedly, the challenges surrounding the enforcement of the laws directed at combating cybercrimes in their various forms and patterns are daunting. Nevertheless, the paper, having recommended measures considered potent enough to overcome these challenges, concludes on an optimistic note. The campaign for cyber security must be engaged by nation-states, corporations and individuals. Indeed, all hands must be on deck to mitigate the damaging effects cyber risks pose to the security and safety of nations and their peoples.

Examination of the Legal Regime for Informational Privacy, Data Protection and Enforcement of Sanctions in Nigeria

M. A. Lateef (PhD)[1] and I. O. Taiwo (PhD)[2]

Abstract

In the wake of the global Covid-19 pandemic, digital technology have proven to be a popular tool for governments across the world to monitor and contain the coronavirus spread. This 'new normal,' as the trend now builds, has raised concerns on issues of information privacy and individual data protection. The privacy issues of the moment are numerous and include concerns for the contact tracing apps and mobile location data tracking. Data and technology are necessary tools of this age, but the question of protection and restriction on sensitive data is no less critical. An important aspect of information privacy and data protection is the enforcement of sanctions whenever a breach occurs. In Nigeria, enforcement of sanctions by regulatory agencies has been a subject of intense debate and controversy in recent times. There are conflicting decisions of the Court of Appeal, the court immediately below the Supreme Court of Nigeria in the jurisdictional hierarchy, on the powers of regulatory agencies of government to enforce sanctions against breaches of infractions created under their enabling laws.

Using a doctrinal research methodology of relying on primary and secondary sources of information - comprising Nigerian statutes, case law, and regulations, this paper examines the existing legal regime for the protection of information privacy and individuals' data in Nigeria. On enforcement of sanctions by agencies of government, the paper examines the three leading decisions of the Court of Appeal on the subject. Despite the contradictory decisions

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and seeming lack of clarity in the law, it is safer to conclude that the National Information Technology Development Agency ("NITDA"), the statutory agency saddled with the responsibility for data protection in Nigeria, can exercise powers to enforce sanctions stipulated under the provisions of the NITDA Act, 2007.

Keywords: **Data Protection, Enforcement, Information Privacy, Sanctions.**

1.0. Introduction

In Nigeria, concerns for the protection of informational privacy and data security have been on the rise in recent times. With COVID-19 pandemic now being a primary concern of every nation at the moment, the risk of violation of informational privacy and security of associated private data has become even more uncertain. Like the rest of Africa, Nigeria is currently witnessing a boom in technological development and deployment. From distributed ledger technology to financial technology, Internet of Things, and artificial intelligence, technology continues to change the way we live and work - it is aiding the reconceptualization and delivery of goods and services, changing the dynamics of how we relate with our environment, and generally making the lives of the people a lot easier.

But technology, especially those that can be related with through digital interfaces, generates and are driven by enormous amount of data (data streamed from credit cards, wearable devices, sensor networks, internet activities, televisions and computers, infrastructure of cities, and the over five billion mobile phones around the world).[3] By leveraging advanced computing power and new analytical techniques, these data can now be analysed and combined in ways that reveal the minutest details about individuals' location trajectories, tendencies, and habits. Whether personal or personally identifiable, the sheer volume and variety of data now available and the movement

[3] Shaw Jonathan (2014), Why "Big Data" Is a Big Deal. Harvard Magazine. Weblog. [Online] Available from: http://harvardmagazine.com/2014/03/why-big-data-is-a-big-deal (accessed: June 10, 2020).

of information over arbitrary paths has major implications on individual's right to privacy. It is no wonder, then, that the constitutions of most countries, regional agreements and regulations, and international treaties recognize and protect individual's right to privacy.

So if there is more risk of violation because of the emergency of the moment, what then becomes the fate of victims of violation or abuses arising from invasion of informational privacy and data abuse? Put differently, what is the legal remedy, if any, available to victims of violation of informational privacy and data protection? Also, what consequences, if any, await those who violate or intrude into the informational privacy of others without due process?

Although the right to privacy is a constitutionally protected right in Nigeria, there is no any comprehensive informational privacy and data protection legislation in the country as yet. However, there are various sector-specific legislations with informational privacy and data protection provisions.[4] Meanwhile, the NITDA Act 2007[5] establishes the National Information Technology Development Agency (the "NITDA" or "Agency") in Nigeria as the statutory agency saddled with the responsibility for data protection, through constant development of regulations for electronic governance and monitoring of the use of information technology and electronic data.

[4] For instance: The Cybercrimes (Prohibition, Prevention) Act, 2015; Sections 14 & 16, Freedom of Information Act, 2011 (FOI Act); National Identity Management Commission (NIMC) Act 2007; Sections 9 & 10, Nigerian Communications Commission (registration of telephone subscribers) Regulation 2011; National Health Act 2014 (NHA); Federal Competition and Consumer Protection Act, 2019; Section 8, Child Rights Act 2003 guarantees a child's right to privacy subject to parent or guardian rights to exercise supervision and control of their child's conduct; Sections 5 & 9 Credit Reporting Act 2017. Section 9 in particular provides the rights of data subjects (i.e. persons whose credit data are held by a credit bureau) to privacy, confidentiality and protection of their credit information.

[5] The 2007 NITDA Act No. 28 on National Information Technology Development Agency (Published in the Federal Republic of Nigeria Official Gazette No. 99 Vol. 94, Lagos, 5th October 2007).

The extent of the powers of NITDA to protect informational privacy and data security has been a subject of debate, particularly with the power to enforce sanctions in the event of breaches. This has therefore made it imperative to examine the legal regime of the powers of NITDA to protect information privacy and data on the one hand, and to enforce sanction whenever a breach occurs or is reported on the other hand. The most significant justification for the discussions in this paper is the need to identify and discuss the challenges to security of informational privacy and data protection of persons at a time like this. COVID-19 is ravaging the world and the impacts on human rights, people and societies, as a result of government regulations and other emergency measures, are worrisome.

This paper is divided into six parts. Part I provides the introductory background to the discussion in the paper by clearly identifying the issues, research methodology, as well as the significance of the discussions. Part II provides the theoretical framework for understanding the concepts discussed in the paper. Thus, the theoretical underpinnings of the concepts of privacy, right to privacy, information privacy, as well as data protection were clearly explained. Part III discusses the importance of a data protection regime in any society. Part IV examines the entire gamut of the legal framework for informational privacy and data protection in Nigeria. Thus, several guidelines as well as regulations issued pursuant to the NITDA Act were identified and their contents highlighted. The constitutionality of the NITDA Act was also examined in this part. Part V examines the powers of NITDA to enforce the sanctions imposed for punishment of data breaches under the Act. This part also examines the conflicting decisions of the Nigerian Court of Appeal on the issue of powers of an agency of government to impose penalties and sanctions provided under their enabling law. Thus, powers of NITDA to issue the Nigeria Data Protection Regulations and as well impose stipulated penalties for non-compliance were clearly examined. Part VI concludes the paper by noting that security of informational privacy and data protection in Nigeria are covered by the Constitution and other

legislations like the NITDA Act. Also, the powers of NITDA to impose penalties and enforce sanctions are provided for under the Act.

1.1. Conceptual Clarifications of Terms

a. Privacy and Right to Privacy

There are age-long conceptual difficulties in defining what precisely privacy and the right to privacy mean. It is not within the scope of this paper to delve into the controversies on that. Without a doubt, privacy is a multi-faceted concept that transcends legal to psychological, social, and cultural and political aspects.[6]However, the right to privacy is at the core of fundamental human rights. It stems from the traditional notion of a natural right and has enjoyed recognition in all societies in history. Thus, the importance of privacy has been recognized for the individual, the family unit, and the entire community.[7] With the advancement of technology, and the continuous expansion of the scope of the spheres of human influence and their impacts on the privacy of individuals, it becomes more difficult to precisely define the legal right to privacy. Therefore, it suffices to restrict ourselves, where necessary, to the characteristics[8] of right to privacy as contained in constitutions, statutes, and other instruments of interest in this paper.

To start with, Black's Law Dictionary defines right to privacy as:

> Right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live

[6] E L. Bloustein, "Privacy as an Aspect of human Dignity," (1964) *NYUL Rev.*, pp. 962-963.

[7] A Westin (ed). 1984. "The Origin of Modern Claims to Privacy," in Ferdinand Davis Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984), pp. 56-61.

[8] That is, various aspects of the interests that national constitutions, statutes, and other international instruments seek to protect as individual privacy. For example, the constitution often protects the dignity of the human person as a variant of private rights. Yet, other laws also offer protection against trespass, bodily injury, assault, and nuisance, among others. These multitudes of interests, therefore, make it challenging to have a precise definition of privacy.

> without any unwarranted interference by the public in matters with which the public is not necessarily concerned.[9]

Article 12 of the United Nations Universal Declaration of Human Rights 1948 (UDHR) provides thus on the right to privacy:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[10]

Article 17 of International Covenant of Civil and Political Rights (to which Nigeria is a party) states that: *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation*.[11]
Article 8 of European Convention on Human Rights states that:

> Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of

[9] B A Garner and H C Black, *Black's Law Dictionary*. (Thomson West, 8th ed). 2004, p1233.
[10] United Nations Organisation (1948). Universal Declaration of Human Rights. Weblog. [Online] Available from: https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (accessed 10 May 2020)
[11] United Nations Organisation (1966), International Covenant of Civil and Political Rights. Weblog. [Online] Available from: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf (accessed: May 10, 2020).

> health or morals or for the protection of the rights and freedoms of others.[12]

Under the Nigerian law, privacy of an individual is a constitutional right provided for under section 37 of the 1999 Constitution of the Federal Republic of Nigeria.[13]Section 37 guarantees a general right to privacy and family life to citizens. Although the Constitution does not define the scope of "privacy" or extent of its protection, it provides clearly thus: *The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.*[14]

While our focus in this paper is on the control that individuals exercise over their personal information, also known as informational privacy, the right to privacy guaranteed under the above provision of the Constitution and other international instruments earlier referred to is broader as it encompasses, among other things, freedom of thought, control over one's body, solitude in one's home, control over personal information, and freedom from surveillance. That said, the Courts in Nigeria have generously interpreted section 37 of the Constitution to protect the privacy of citizens from invasion of governments, persons, or other authorities. In the case of *Medical and Dental Practitioners Disciplinary Tribunal .v. Dr. John Emewulu Nicholas Okonkwo*,[15] the Supreme Court of Nigeria held that the right to privacy implies a right to protect one's thought conscience or religious belief and practice from coercive and unjustified intrusion; and, one's body from unauthorised invasion.[16] It must be pointed out, however, that the above constitutional right to privacy is not absolute and is therefore

[12]European Court of Human Rights (1950). European Convention on Human Rights. Weblog. [Online] Available from: https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed: May 10, 2020).

[13]The 1999 Constitution of the Federal Republic of Nigeria (as amended) Act No. 24, 5 May 1999.

[14]*Note* 11.

[15] [2001] FWLR (PT. 44), p.542.

[16]*Ibid.* p542

derogable. To this end, section 45 (1) of the same Constitution provides thus:

> 45(1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society
>
> (a) In the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons.[17]

The above simply means there is an exception to the right to privacy and family life in Nigeria. Thus, the National Assembly can enact laws, for the purpose or interest of national security, defence, public order and safety, to interfere with the right to privacy. Consequently, as much as they are willing to protect the privacy of citizens, the courts in Nigeria have also been consistent in holding that the right to privacy under section 37 of the constitution is not absolute and therefore subject to derogation.[18] The Court of Appeal in the case of *FRN v. Daniel*[19]accepted derogation to the provision and held thus:

> Undoubtedly, by virtue of the provision of section 37 of the 1999 constitution, the privacy of every Nigerian Citizen, the home, correspondence, telephonic and other telegraphic communications are cherishingly guaranteed and protected. It was submitted on behalf of the Respondent that the fundamental rights which cannot be waived (as was held in *Gani Fawehinmi v. Nigeria Bar Association*) include the right of privacy of citizens and their homes, preserved under section 37 of the 1999 constitution. However, notwithstanding the

[17]*Note* 12.
[18] See also *Badejo v. Minister of Education* (1996) 9-10 S.C.N.J. 51
[19] [2011] LPELR-4152(CA)

> provision of section 37 (*supra*), section 45(1) of the 1999 constitution has provided in unequivocal terms that nothing in sections 37, 38, 39, 40 and 41 thereof shall invalidate what appears to be reasonably justifiable in a democratic society…ln view of the unequivocally far-reaching provision of section 45(1) of the 1999 constitution as alluded above, I think it would be apt to hold, as rightly contended by the Appellant's learned counsel, that section 41 of the National Drug Law Enforcement Agency Act, CAP. N30, Laws of the Federation of Nigeria 2004, is reasonably justifiable in the interest of public safety and public health.[20]

Notwithstanding the above possibility of derogation from section 37 of the Constitution, it is given that right to privacy is both constitutional and protected in Nigeria. In the case of *Emerging Markets Telecommunication Services Ltd v. Eneye*[21] the Court of Appeal held that, when a telecommunication company gives a customer's mobile contact to unknown persons and organizations who then send unsolicited text messages or adverts to the mobile phone of the customer, it amounts to a violation of the customer's right to privacy guaranteed by section 37 of the Constitution, which includes the right to the privacy of a person's telephone line.[22] From the foregoing discussions, it is also clear that all issues of right to privacy in Nigeria, including data protection, stem from and are protected by the Constitution.

b. **Information Privacy**

As a peculiar variant of the right to privacy generally, informational privacy or personal information has been defined as a person's right to choose to determine whether, how, and to what extent information

[20] Per Saulawa, J.C.A. pp21-23, paras. E-C.

[21] [2018] LPELR-46193(CA)

[22] Per Hassan, J.C.A. *Ibid.*19.pp. 25-29, paras. C-C.

about himself is communicated to others, especially sensitive and confidential information.[23]Put differently, informational privacy entitles an individual to control how, and with whom, his information is shared, what data they share, who can use their data, and for what purpose(s) their data can be used. This is where data protection comes in - as the legal mechanism that ensures protection of informational privacy. Meanwhile, it should be noted that informational privacy is not all about private data or data privacy alone and data protection is also not about private data or data privacy only. Informational data about a person may be both privately or publicly held information about that person. Thus, data protection legislation seeks to or must aim to protect both the private and public data concerning a person.[24]

At the theoretical level, several theories of privacy generally and informational privacy in particular have been canvassed in the literature.[25] But the theory on informational privacy proposed by *Tavani*[26] called Restricted Access/Limited Control (RALC), otherwise also known as the RALC theory of privacy appears most widely accepted. "RALC defines privacy in terms of protection from intrusion and information gathering by others".[27]According to the restricted access component of the theory, people have informational privacy when they are able to limit or restrict others from access to

[23] *Black's Law Dictionary*. *Op cit.*7. p.1233.

[24] The confusion that often arises from the erroneous interchangeable use of the terms "data privacy" and "data protection" is unnecessary. Both terms are not the same as a person's publicly held data is still personal and thus entilled to some protection under a data protection legislation. Article 14 of the European Union's 2018 *General Data Protection Regulation (GDPR)* clearly draws this line when it states that a person should be informed even when their data is accessed from 'publicly accessible sources'. See *GDPR.EU. 2018. General Data Protection Regulation. Available from:* https://gdpr.eu/ [accessed: May 12, 2020].

[25] For example, a 2005 article by Floridi discusses two informational privacy theories namely: the reductionist interpretation and the ownership-based interpretation. See Floridi, L., 2005 "The ontological interpretation of informational privacy," *Ethics and Information Technology*, 7(4), pp. 185–200.

[26] H Tavani, 2007, "Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy,'' *Metaphilosophy*, 38(1), pp. 1-22.

[27] Tavani. *Note* 25. p.11.

information about them. To do so, "zones" of privacy (specific contexts) need to be established. In the limited control component however, personal choice is important and having privacy is directly linked to having control over information about oneself. The key component stressed by *Tavani* is that RALC distinguishes between the condition of privacy and a right to privacy. Thus, three important components of RALC are outlined namely:

- Privacy is defined in terms of protection or limitation of access by others in the context of the situation.
- An individual has normative privacy when there are explicit norms or laws protecting them.
- Policies provide individuals with the limited control necessary to manage their privacy.[28]

Furthermore, what the RALC theory does is to also distinguish between a violation of privacy and loss of privacy, while addressing the informational privacy issues. It explains the tension or conflict arising from the desire to interact with others in a society and share certain private information with them, and the inevitable exposure to risks of violation of privacy through social interactions with others. This is what *Acquisti*[29] aptly captures when he posits thus:

> In an information society the self is expressed, defined, and affected through and by information and information technology. The boundaries between private and public become blurred. Privacy has therefore become more a class of multifaceted interests than a single, unambiguous concept.[30]

However, given the broad nature of the requirements of a RALC, it is not exactly clear what the specifics of the above three components

[28] *Note* 25. P.7.
[29] A Acquisti, (2004), Privacy in Electronic Commerce and the Economics of Immediate Gratification. In Proceedings of the 5th ACM Conference on Electronic Commerce, (pp. 21–29). New York, NY: ACM.
[30] Acquisti. *Note* 28. p. 22.

are.[31]The question is thus raised: what type of information is private and to what extent can the law protect them? While it is easy to answer the first leg of this question by simply stating that there is no exhaustive list of private information about self (such as academic records, medical records, financial data, criminal records, political records, business related information or website data), it is not so with the second leg as there is really no any definitive position of the law on the extent of protection that is possibly conceivable, particularly in the face of rapid technological developments and incessant incursion into the traditional boundaries of privacies.

By its very nature, technological advancement is intrusive and will tend to push and increase possibilities for violation of privacy, and challenge the development of law to provide protection and determine remedies that may be available to victims of privacy violation and data abuses. Undoubtedly, the system of information technology has facilitated surveillance, enhanced collection, storage and analysis of information through profiling, data mining and aggregation. As such, there is a need for a satisfactory legal regime and philosophical comprehension of right to privacy, with a view to protecting the fundamental values at risk in data collection and management. Our next paragraph briefly highlights the importance of a data protection legal regime in a polity.

2.0. The Importance of a Data Protection Legal Regime

At the core of data protection legislation is the ambition to protect individual's right to informational privacy and secure lives and property this is achieved through a series of measures designed to curb unauthorized access to or disclosure of personal information and

[31]As a matter of fact, Tavani also admits that the RALC theory does not provide a satisfactory explanation of informational privacy. See H T Tavani, "Informational privacy: Concepts, theories, and controversies," in K E Himma & H T Tavani Eds, *The handbook of Information and Computer Ethics* (Hoboken, NJ: John Wiley & Sons, 2008), pp. 131–164.

incidences of cyber breach in a growing (and progressively volatile) data environment. Asides this, data protection legislation provides a legal basis for challenging excessive collection and unlawful use of data, negligent data handling, incorrect documentation of sensitive information, and growing corporate and state-sponsored surveillance activities.

Now that the dominant business model requires maximum data collection, behaviour tracking, and fostering of addiction, many countries are making efforts to safeguards the value of citizens' personal data, and so most data protection regimes now identify a white list of countries that is, countries with basic data protection law and which affords Data Subjects the privilege to enforce their rights, either in such country or in the international courts. An adequate data protection regime guarantees an inclusion in this white list and essentially eases the inbound transfer of data, which is essential for virtually every form of trade powered by technology.

In terms of economic implications, the existence of a certain data protection regime fosters the integrity and growth of commerce, generally improves the ease of doing business and forms the backbone of a thriving digital economy: without it, it would be practically impossible to conduct economic activities in a world where data is fast becoming the most valuable economic resource. On a related note, a data protection regime also provides businesses with the opportunity to improve brand perception by turning respect for personal information into competitive differentiators.

3.0. Legal Framework for Informational Privacy and Data Protection in Nigeria

We have explained earlier that the 1999 Constitution of Nigeria is the primary legal foundation of informational privacy and data protection in the country. Similarly, we have pointed out that whereas there is no any comprehensive informational privacy and data protection legislation in Nigeria as yet, there are various sector-specific legislations with privacy and data protection provisions. One of such

other legislations, and the one that is particularly relevant to the objectives of this paper, is the NITDA Act, 2007.[32]

3.1. The NITDA Act 2007 and the Issue of its Constitutionality or Otherwise

The NITDA Act came into force in 2007 and provides for the establishment of the NITDA as a statutory federal agency saddled with nationwide regulation of data usage and protection. However, since the enactment of the Act by the National Assembly over a decade ago, a question regarding the Act's constitutionality has been asked. But before we examine the arguments, it is important to state that Nigeria is a Federation[33] with a bicameral national legislature comprising the Senate (Upper Chamber) and the Federal House of Representatives (Lower Chamber) at the federal level. Then there are also the federating units comprising several states[34] and their respective Unicameral Legislature Houses of Assembly. The legislative powers of the federation, that is, the powers to make laws, are also divided between the Federal Government through the National Assembly on the one hand, and the States through their respective Houses of Assembly on the other hand.[35] These powers and their components are also classified into *Exclusive Legislative List*[36] and *Concurrent Legislative List*[37] by the Second Schedule of the Constitution.[38] For ease of reference, the legislative powers of the National Assembly are replicated below:

[32]NITDA Act. *Note* 4.

[33]*Note* 12. S.2.

[34]There are 36 sub-national States in Nigeria with a Federal Capital Territory in the city of Abuja.

[35]*Note* 12. S.4.

[36]Matters stated under this list are for the exclusive legislative competence of the National Assembly.

[37]Matters stated under this list are for both the National Assembly and the Houses of Assembly of the States. However, in the event of any conflict between an Act of the National Assembly and a Law of the House of Assembly of a State over the same subject matter, the Act of the National Assembly shall supersede.

[38] *Ibid. Note* 12. S.4.

> The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the *Exclusive Legislative List* set out in *Part I of the Second Schedule* to this Constitution.[39]
>
> In addition and without prejudice to the powers conferred [above], the National Assembly shall have power to make laws with respect to the following matters, that is to say:- (a) any matter in the *Concurrent Legislative List* set out in the first column of *Part II of the Second Schedule* to this Constitution to the extent prescribed in the second column opposite thereto; and (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.[40]

The argument about the constitutionality or otherwise of the NITDA Act stems from the above provision. It is said that the statutory functions[41] of NITDA to monitor, govern, and regulate information technology systems and practices, use and exchange of electronic data, and the internet are not matters specifically contained or contemplated by both the *Exclusive Legislative List* and the *Concurrent Legislative List* of the Constitution under which the National Assembly may enact any federal legislation such as the NITDA Act. Consequently, it has been argued that the powers to enact on such matters are *residual*[42] and thus reserved for Houses of Assembly of the States in Nigeria.

[39]*Ibid. Note* 12. S4 (2).
[40]*Ibid. Note* 12. S 4(4).
[41]NITDA Act. *Note* 4. S.6.
[42] By established constitutional practice in Nigeria, the legislative Houses of Assembly of the States have the residual powers to make laws on any matter not

To be sure, a thorough examination of the items in the *Exclusive* and *Concurrent Lists* as set out in Part I and Part II of the Second Schedule of the Constitution respectively shows that nothing in the lists expressly mentions or impliedly references information technology, internet governance, data protection, privacy, or electronic communication. Indeed, there is no mention of the word "internet", "electronic data", "information technology", or even "computer" in the entire Constitution. It is therefore against the above background that the arguments about the constitutionality or otherwise of the NITDA Act has gained currency.[43]

However, no State or House of Assembly in Nigeria has yet challenged the National Assembly or enacted any law on the same subject matter of the NITDA Act. Also, considering that the National Assembly is 'supreme' in its wide and exclusive law-making powers, the legitimacy or legality of any law it makes is a subject or question for the judiciary to decide and answer. To put in a proper perspective, only the Constitution is superior to the National Assembly and where the National Assembly exceeds its powers under the Constitution, it is only the judiciary that can reverse it. In effect, therefore, until it is challenged and declared null, void, or otherwise unconstitutional, the NITDA Act is a valid and subsisting law that must be complied with by all affected persons and entities in Nigeria.

specifically covered by the Exclusive and Concurrent Legislative Lists of the Constitution.

[43] However, it can also be argued that the powers of the National Assembly to legislate on the matters in questions may be derived from a liberal reading of items 66 (wireless, broadcasting and television other than broadcasting and television provided by the Government of a state; allocation of wave-lengths for wireless, broadcasting and television transmission) and 68 (any matter incidental or supplementary to any matter mentioned elsewhere in this list of the Exclusive Legislative List).

3.1. The Role of NITDA in Data Protection in Nigeria

The National Information Technology Development Agency (NITDA)[44] was established by the NITDA Act of 2007 with a clearly stated comprehensive mandate including but not limited to the following under section 6 of the Act: Functions of the Agency. The Agency shall:

(a) Create a frame work for the planning, research, development, standardization, application, coordination, monitoring, evaluation and regulation of Information Technology practices, activities and systems in Nigeria and all matters related thereto and for that purpose, and which without detracting from the generality of the foregoing shall include providing universal access for Information Technology and systems penetration including rural, urban and under-served areas;

(b) Provide guidelines to facilitate the establishment and maintenance of appropriate for information technology and systems application and development in Nigeria for public and private sectors, urban-rural development, the economy and the government;

(c) Develop guidelines for electronic governance and monitor the use of electronic data interchange and other forms of electronic communication transactions as an alternative to paper-based methods in government, commerce, education, the private and public sectors, labour, and other fields,

[44] Interestingly, NITDA was actually created in 2001, six years before the NITDA Act was enacted by the National Assembly.

> where the use of electronic communication may improve the exchange of data and information.[45]

The Agency's power to protect private data (informational privacy) procured by persons, governments and institutions has been particularly anchored on its mandate "to create a framework for the planning, research, development, standardization, application, coordination, monitoring, evaluation and regulation of Information Technology practices in Nigeria by developing standards, guidelines and regulations for that purpose."[46] Consequent upon this statutory mandate and the concerns around privacy and protection of personal data and the grave consequences of leaving personal data processing unregulated, NITDA has different regulations with the following core objectives:

a) to safeguard the rights of natural persons to data privacy;
b) to foster safe conduct for transactions involving the exchange of Personal Data;
c) to prevent manipulation of Personal Data; and
d) to ensure that Nigerian businesses remain competitive in international trade through the safeguards afforded by a sound data protection regulation.[47]

3.2. NITDA Guidelines on Data Protection (NGDP) 2013

In furtherance of its mandate under the Act to "develop guidelines for electronic data interchange and other forms of electronic communication",[48] the Agency first published in 2013 the NITDA

[45]NITDA Act. *Note* 4.
[46]NITDA Act. *Note* 4. S.6(a). See also, NITDA (2020). Weblog. [Online] Available from: https://nitda.gov.ng/nitda-act/# (accessed March 29, 2020).
[47]These were the objectives contained in Paragraph 1.0 of the 2019 Guidelines.
[48]NITDA Act. *Note* 4. S.6(c)

Guidelines on Data Protection (NGDP).[49] Guidelines issued by statutory agencies of government in Nigeria, pursuant to the provisions of their enabling principal laws, are by their very nature regarded as subsidiary legislations.[50]Thus, such subsidiary legislations have the same force of law as the principal legislations under which the powers to issue them were derived. Consequently, compliance with the NITDA Guidelines on Data Protection is binding as a requirement of law.

Key Features of the NITDA Guidelines on Data Protection (NGDP) 2013

Paragraph 1.3 of the Guidelines states the scope of authority and application as follows:

> These guidelines are mandatory for Federal, State and Local Government Agencies and institutions as well as other organizations which own, use or deploy information systems within Federal Republic of Nigeria.[51]

Furthermore, the 2013 NITDA Guidelines define the following terms which are fundamental to understanding its provisions.

i) **Personal Data:** This is any information relating to an identified or identifiable natural person, whether it relates to his or her private, professional or public life. It includes any information which can be used to distinguish or trace an individual's identity, such as names, addresses, photographs, email address, bank

[49] National Information Technology Development Agency (2013) NITDA Guidelines on Data Protection 2013. Weblog. [online] Available from: https://nitda.gov.ng/standards-guidelines/ (accessed: May 10, 2020).

[50] The 1964 Interpretations Act, CAP 123 L.F.N 2004. This Act defines a subsidiary legislation as any order, rules, regulations, rules of court or bye-law made in exercise of powers conferred by an Act.

[51]NITDA Guidelines 2013. *Note* 48.

details, social networking details, medical information or computer IP address.

ii) **Data Controller:** Refers to the person or entity who, whether alone or with another, determines the purposes and means of processing personal data. Generally speaking, the organisation which collects personal data is the Data Controller.

iii) **Data Subject:** Refers to an identifiable person or one who can be identified directly or indirectly by reference to an identification factor. The Guidelines contemplate only natural persons as data subjects.

iv) **Processing of Personal Data:** Processing of personal data refers to any operation which is performed on personal data. It includes collecting, recording, organising, storage, adapting, retrieving, consulting, transmission, dissemination of data. In practical terms, every way in which an organisation handles personal data amounts to processing.

v) **Sensitive Personal Data:** This includes data relating to religious or other beliefs, sexual orientation, health, race, ethnicity, political views, trade union membership, and criminal records. These sets of data are classified as special and have more stringent conditions attached to their collection and processing.

3.3. Principles of Data Protection

Paragraph 4 of the Guidelines specifies at least seven principles for data protection in Nigeria. The highlights are as follows:

Principle 1: Personal Data must be Processed Fairly and Lawfully

Data Controllers are required to process personal data in the manner prescribed by the Guidelines. This includes disclosing to data subjects the purpose for which data is being collected and, if personal data is to be transferred to a third party outside the country, notifying data subjects of such transfer. For compliance with this principle,

organisations are advised to provide general data protection and privacy policy statements to provide information on what data the organisation collects, why the collection is made and how the data collected would be used. The policy statement should also include information on which such data might be shared with. Where Closed Circuit Television (CCTV) footages are taken, for example, the data collector's privacy policy statement should be conspicuously displayed.

Principle 2: Personal Data Should be Used only in Accordance with the Purpose for which it was Collected.

Data controllers have a duty to ensure that data collected for one purpose is not used for a different purpose. This principle prevents the use of personal data in any manner different from the purpose disclosed to the data subject at the point of collecting the data. To avoid breach of this principle, organisations are advised to have, in their general data protection and privacy policy statements, a wide description of the purpose for the data collection.

Principle 3: Personal Data must be Adequate, Relevant and Not Excessive

This principle prevents organisations from obtaining data without a real or specific purpose. That is, only data which is specific to the stated purpose should be collected.

Principle 4: Personal Data Must Be Accurate and Where Necessary Kept Up to Date

Data Controllers are required to have in place arrangements that enable data subjects to update their personal data.

Principle 5: Personal Data Must Be kept for No Longer than is Necessary

Data Controllers must ensure that personal data is not retained for longer than necessary, with reference to the purpose for which the data was obtained. Although the Guidelines do not prescribe a timeframe for data retention, this principle places a burden on data controllers to develop a retention policy for personal data.

Principle 6: Personal Data Must Be Processed in Accordance with the Rights of Data Subjects

Institutions and organisations, as data controllers, must respect the rights of Data subjects. These rights include a right to obtain information on the purpose of data collected and to request a copy of their personal data in a usable form from data controllers. Such requests are to be attended to promptly and the data provided to the data subjects within seven days of such requests. Data subjects are also entitled to the opportunity to object to the processing of data for direct marketing purpose.

Principle 7: Appropriate Technical and Organisational Measures Must Be Established to Protect the Data

All Data Controllers are required to implement technical and organisational measures to ensure security of personal data. The Guidelines prescribe some organisational measures including, developing an organisational policy for handling personal data, personnel training on data protection, conducting privacy and data protection assessments, appointing a Data Security Officer to have direct responsibility for ensuring the organization's adherence to data protection policies, etc. Technological solutions necessary to avoid data security breaches, for instance data encryption, setting up firewalls, are also recommended.

Furthermore, personal data must not be transferred outside Nigeria unless adequate provisions are in place for its protection. Thus, Data

Controllers have an obligation to ensure that personal data is not transferred to a country which does not ensure, at the least, the same level of protection as imposed by the Guidelines. However, the burden of compliance with the Guidelines is on the Data Controller. This burden remains with the Data Controller even when personal information is transferred to a third party for processing. Data Controllers are therefore required to enter into contracts with third-party data processors to restrain the third-party data processor from dealing with the data otherwise than as instructed by the data controller and imposing such restrictions as the Guidelines impose on the Data Controller.

4.0. Nigeria Data Protection Regulation (NDPR) 2019[52]

On 25th January 2019 NITDA issued the Nigeria Data Protection Regulation ("NDPR"), in furtherance of its mandate under the NITDA Act to develop regulations for electronic governance and monitoring of the use of information technology and electronic data.[53]The 2019 Regulation was issued to replace the NITDA Guidelines 2017. Primary objective of the Regulation is to capture international best practices regarding the following specific objectives: (a) safeguarding the rights of natural persons to data privacy; (b) fostering safe conduct of transactions involving the exchange of personal data; (c) preventing manipulation of personal data; and (d) ensuring that Nigerian businesses remain competitive in international trade through the

[52] National Information Technology Development Agency (2020). Nigeria Data Protection Regulation 2019. Weblog.[online]Availablefrom:https://nitda.gov.ng/wpcontent/uploads/2019/01/NigeriaDataProtectionRegulation.pdf (accessed: June 17, 2020).

[53] Section 6 (c) of the NITDA Act vests the Agency with the powers to '[d]evelop guidelines for electronic governance and monitor the use of electronic data interchange and other forms of electronic communication transactions as an alternative to paper-based methods in government, commerce, education, the private and public sectors, labour, and other fields, where the use of electronic communication may improve the exchange of data and information'. Section 6 (n) also gives the NITDA the general power to 'perform such other duties, which in the opinion of the Agency are necessary or expedient to ensure the efficient performance of the functions of the Agency'

safeguards afforded by a just and equitable legal regulatory framework on data protection and which regulatory framework is consistent with global best practices.[54]

The Regulation seeks to further promote the fundamental right of citizens to their privacy. The key highlights of the Regulations includes the requirements and provisions for privacy policy[55]; data security[56]; third party data processing contracts[57]; data subject's right of objection[58]; penalty for defaults[59]; transfer to a foreign country.[60]By September of the same year, the NITDA organized a Data Breach Investigation Team, a group of professionals who will work with the Nigeria Police and other law enforcement agencies to investigate cases of alleged data breaches, among others. Currently, the Agency is promoting a National Data Protection Advisory Council which would be an inter-ministerial organ to give advice on effective implementation of the NDPR.[61]

Since the issuance of the NDPR 2019, the Agency has devoted a lot of time and resources to ensuring compliance with the Regulation and investigation of cases of alleged data breaches. Some examples of such cases will suffice here. First, in January 2020, the Agency said it was investigating possible security and breach of data belonging to thousands of betting customers on the Sure Bet 247 platform.[62]The breach here allegedly affected over 32GB of backups across 6

[54] *Ibid*, paragraph 1.0. *Note* 51.
[55] *Ibid*, paragraph 2.5. *Note* 51.
[56] *Ibid*, paragraph 2.6. *Note* 51.
[57]*Ibid*, paragraph 2.7. *Note* 51.
[58]*Ibid.* P. 2.8. *Note* 51
[59] *Ibid,* P 10. *Note* 51.
[60] *Ibid*., P. 11. *Note* 51.
[61] K I Abdullahi (2019) Data Protection: Making a Fair Deal for all Nigerians. Weblog. [Online] Available from: https://nitda.gov.ng/data-protection-making-a-fair-deal-for-all-nigerians/ (accessed: June 10, 2020]
[62] F Eleanya. (2019) NITDA moves to investigate alleged leak of Surebet 247 Customers' Data. Business Day. Weblog. [Online] Available from: https://businessday.ng/technology/article/nitda-moves-to-investigate-alleged-leak-of-surebet247-customers-data/ (accessed: June 10, 2020).

databases of various online betting assets. Second, in July 2019, the Agency announced that it had commenced investigations into the alleged violations of the NDPR by banks, FinTech firms, and telecommunication companies among others including the Nigeria Immigration Service.[63] Third, in September 2019, the Agency commenced a probe into the call filtering service provider - True caller - for alleged breach of Nigerian users' privacy rights.[64] Fourth, in December 2019, the Agency announced its intention to investigate the Lagos State Internal Revenue Service for alleged breach of taxpayers' data in the State.[65]

5.0. Guidelines for the Management of Personal Data by Public Institutions in Nigeria 2020[66]

In May 2020, NITDA issued another Guideline for the implementation of the Nigeria Data Protection Regulation (NDPR) 2019, within public institutions[67] in Nigeria. Like all the previous Guidelines, the authority to issue the 2020 Guideline stems from the

[63] A Adepetun. (2019) Banks, Fintechs, Telcos under Investigation for Data Privacy Breaches. The Guardian. Weblog. [Online] Available from: https://guardian.ng/business-services/banks-fintechs-telcos-under-investigation-for-data-privacy-breaches/ (accessed: June 10, 2020)

[64] N Isaac. (2019) Nigeria: NITDA Investigates True caller Over Alleged Privacy Rights Breach. allAfrica. Weblog.[Online] Available from: https://allafrica.com/stories/201909240227.html (accessed: June 10, 2020)

[65] N Onyedika-Ugoeze. (2019) NITDA to investigate breach of data protection regulation by Lagos State Internal Revenue Service. The Guardian. Weblog. [Online] Available from: https://guardian.ng/news/nitda-to-investigate-breach-of-data-protection-regulation-by-lagos-state-internal-revenue-service/ (accessed: June 10, 2020).

[66] National Information Technology Development Agency. 2020. *Guidelines for the Management of Personal Data by Public Institutions in Nigeria 2020.* [online] Available from: https://nitda.gov.ng/wp-content/uploads/2020/05/GuidelinesForImplementationOfNDPRInPublicInstitutionsFinal.pdf (accessed: June 22, 2020)

[67] Paragraph 9.0 of the Guideline defines Public Institution in the regulation as *"Ministry, Department or Agency of the Federal Government, State Government Local Government or any venture funded either completely or partly by government or a company with government shareholding either at the State and Federal levels."* See 2020 Guidelines. *Note* 65.

provision of section 6 of the NITDA Act 2007 and the NDPR 2019. Paragraph 1.2 of the 2020 Guideline states its purpose to be a *"guidance to Public Officers on how to handle and manage personal information in compliance with the NDPR, acknowledging that Governments at all levels are the biggest processors of personal data of Nigerians and in Nigeria."*[68]For its application, Paragraph 1.4 states as follows:

a. This Guideline applies to all Public Institutions in Nigeria, including Ministries, Departments, Agencies, Institutions, Public Corporations, publicly funded ventures, and incorporated entities with government shareholding, either at the Federal, State or Local levels, while processing the personal data of a data subject.

b. This Guideline shall operate for the purpose of the implementation of the Nigeria Data Protection Regulation, 2019. This therefore implies that the principles and core requirements for protection of personal data remains applicable. This Guideline governs the roles and responsibilities of public officers and public institutions with regards to the processing and management of personal data.

In essence, the 2020 Guidelines focus on public institutions and is therefore a major improvement on the previous Guidelines in that regard. The Guidelines also recognize the need for collaboration between the public and the private sectors in handling interventions for the benefits of the citizens, and provide a strict framework for such collaborations to ensure that the privacy of Nigerians was not unduly infringed. A major highlight of the Guidelines is contained in Paragraph 2.6 which provides that every public institution shall, within 90 days of the issuance of the Guidelines, designate an official who shall act as the Data Protection Officer (DPO) for the Institution.

[68]NDPR 2019. *Note* 51.

A DPO is required, among other duties, to inculcating data protection as a culture in the Institution.

6.0. Powers of NITDA to Enforce the Penalties Imposed under the NITDA Act

The NITDA Act makes contravention with the Actor Regulations made pursuant to it punishable. Thus, failure to comply with the guidelines and standards prescribed by the Agency constitutes offences with stipulated penalties for culpability. For instance, the following sanctions are provided under the Act.

> Any company, agency or organisation that fails within two months after a demand note, to pay the levy or the import duty imposed under section 11 of this Act commits an offence and is liable on conviction to a fine of not less than ₦1,000,000.00 and the Chief Executive Office of the company, Agency or Organisation shall be liable to be prosecuted and punished for the offence in like manner as if he had himself committed the offence, unless he proves that the act or omission constituting the offence took place without his knowledge, consent or connivance.[69]

> Except as otherwise provided in this Act, anybody corporate of person who commits an offence under this Act where no specific penalty is provided, is liable on conviction: (a) For a first offence, to a fine of ₦200,000.00 or imprisonment for a term of 1 year or to both such fine and imprisonment; and (b) for a second and subsequent offence, to a fine of ₦500,000.00 or to imprisonment for a term of 3 years or to both such fine and imprisonment.[70]

[69] Section 16 (5) of the NITDA Act. *Note* 4.
[70] *Ibid*, s. 18 (1), *Note* 4.

Furthermore, the NDPR 2019 stipulates certain penalties for default in compliance with its provisions. Where for example, the rights of a Data Subject is breached, the following penalties apply: (a) in the case of a Data Controller dealing with more than 10,000 Data Subjects, payment of the fine of 2% of annual gross revenue of the preceding year or payment of the sum of 10 million naira whichever is greater; (b) in the case of a Data Controller dealing with less than 10,000 Data Subjects, payment of the fine of 1% of the annual gross revenue of the preceding year or payment of the sum of 2 Million Naira whichever is greater.[71] These penalties are in addition to any other criminal liability.

However, following recent judicial decisions on the power of an agency of government to impose penalties for offences created under its establishing Act, questions have been raised on the competence of the NITDA to enforce any of the sanctions imposed by the NITDA Act. There are conflicting decisions of the Courts on this issue. A quick analysis of the contrasting decisions in the cases of *National Oil Spill Detection and Response Agency (NOSDRA) v. ExxonMobil Producing Nigeria Unlimited (ExxonMobil)*[72], *Moses Ediru v Federal Road Safety Commission and 2 Ors ("FRSC")*[73], and *Corporate Affairs Commission ("CAC") v. Seven-up Bottling Co.*[74]provide some contexts.

(i) NOSDRA .v Exxon Mobil (2018)[75]

Following an incidence of oil spillage in ExxonMobil's Qua Iboe facility, NOSDRA levied a penalty of ₦10 Million against ExxonMobil for an alleged contravention of Section 6 (2) & (3) of the National Oil Spill Detection and Response Agency Act, 2006

[71] Paragraph 2.10, NDPR 2019. n 51
[72] [2018] 13 NWLR (Pt.1636) 334
[73] [2016] 4 NWLR (Part 1502) pg. 209
[74] [2017] 5 N.W.L.R page 241
[75] (*supra*) n 71.

("NOSDRA Act").[76]The section is replicated below for ease of reference:

> An oil spiller is by this Act to report an oil spill to the Agency in writing not later than 24 hours after the occurrence of an oil spill, in default of which the failure to report shall attract a penalty in the sum of five Hundred Thousand Naira (₦500,000.00) for each day of failure to report the occurrence. (Section 6(2)). The failure to clean up the impacted site, to all practical extent including remediation, shall attract a further fine of one million Naira. (Section 6(3).

NOSDRA then instituted an action at the Federal High Court ("FHC") to claim the penalty. The FHC held that the imposition of penalty on ExxonMobil by NOSDRA was ultra vires its powers, since it is not a court of law and had no recourse to the court before imposing the penalty. NOSDRA appealed to the Court of Appeal, arguing that the NOSDRA Act empowers NOSDRA to impose penalties for breach ExxonMobil contended that NOSDRA, being an administrative agency, has no inherent powers in itself or from the provisions of the NOSDRA Act to impose fines and/or penalties.

Again, the Court of Appeal held in favour of ExxonMobil. The court was of the view that a person or entity must have been found guilty of a contravention of a law before a fine or penalty can be imposed. And that only judicial body have the powers to conduct fact-finding and impose penalties. NOSDRA is not a judicial body. The Agency was adjudged to have acted as the accuser, the judge, and the executioner all at once to deny ExxonMobil a right to fair hearing, contrary to the rules of natural justice and fairness.

At the risk of oversimplification, NOSDRA seems to have lost because the NOSDRA Act did not expressly grant NOSDRA the

[76] National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act, CAP 157 LFN 2006.

power to impose penalties (and the court seemed to have construed the contravention of the NOSDRA Act as an exclusively criminal offence, leading to the conclusion that NOSDRA is not a judicial body that can determine criminal culpability, even though nothing in Section 6 (2) & (3) of the NOSDRA Act brands oil spillage as an offence).

(ii) ***Moses Ediru v FRSC (2016)***[77]

In September 2007, Moses Ediru instituted an action against the Federal Road Safety Commission ("FRSC") for the enforcement of his fundamental rights. Among other reliefs, he claimed an order enforcing his fundamental rights to fair hearing; a declaration that the imposition of penalties by the FRSC without an opportunity to be heard was illegal and unconstitutional; and a declaration that only the court can impose penalties for offences prescribed by the FRSC Act. In October 2009, the trial Judge, Hon. Justice Aisha M Mohammed, delivered judgment in favour of FRSC. Moses Ediru then filed an Appeal at the Court of Appeal. The Court of Appeal determined all the issues against the appellant and held in favour of FRSC. The court held inter-alia that the FRSC Act[78] gives the Agency the right to impose and enforce penalties and this power does not derogate from the judicial powers of the court as enshrined. In reaching its decision, the Court held thus:

> These anatomised provisions, amply, demonstrate that the respondents are within the four walls of the law to enforce the penalties relative to the alleged offences. The point must be made that the respondents (FRSC) are not the imposers of the penalties. It is the statute promulgated by the legislature… Put the other way round, there is no confluence point where the powers of the respondents and the court meet. The powers of both are not coterminous. They are mutually exclusive

[77]Moses Ediru v. Federal Road Safety Commission (FRSC). Note 72.
[78] Federal Road Safety Commission (Establishment) Act, CAP 141 LFN 2007

> such that the respondent's power of enforcement is not an usurpation of the judicial power of the court…The foregoing settles the other issue, id est, the fines must not be imposed on conviction at all event.[79]

It should be noted that this case can easily be distinguished and does not really help in establishing the fine-or-penalty-imposition power of a regulatory agency because, in reaching its judgment, the Court of Appeal reasoned that the issuance of notice of offence ticket by FRSC is not conclusive of imposition of fines, and that it is, at best, a mere notification to either pay the fines or face prosecution. Thus, the confusion or controversy persists.

(iii) CAC v. Seven-up Bottling Co. (Seven-Up) (2017)[80]

Pursuant to its power to regulate the affairs of companies and mandate to undertake such other activities as are necessary or expedient for giving full effect to the provisions of the Companies and Allied Matters Act ("CAMA")[81], the Corporate Affairs Commission (CAC) imposed a fine of ₦955,000.00 (Nine Hundred and Fifty Five Thousand Naira) on Seven-Up, its eight (8) Directors and the Company Secretary, in accordance with the provision of section 631 (1) of CAMA, for failure to paint or affix the name of the company in the place of business in the manner directed by the Act. The relevant provision of section 631 (1) of CAMA is reproduced below for ease of reference:

> If a Company fails to paint or affix, and keep painted or affixed its name in the manner directed by this Act, it shall be liable to a fine of ₦100 for not so painting or affixing its name, and for every day during which its name is not so kept, painted or affixed, and every director and manager of the

[79]Moses Ediru v. Federal Road Safety Commission (FRSC). Note 72.
[80]CAC v. Seven-up Bottling Company. Note 73.
[81] Companies and Allied Matters Act, CAP C20 LFN 2004.

> company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.[82]

Seven-Up challenged the fine at the FHC, Abuja, seeking, among other things, a declaration that the act of the CAC imposing fine on it and its principal officers was unlawful and unconstitutional. The FHC delivered judgment in favour of Seven-Up. Dissatisfied, CAC appealed. At the Court of Appeal, CAC argued that the relevant section which created the sanction for non-compliance did not contemplate that a defaulting company should be first prosecuted and convicted before a fine can be imposed. The Court of Appeal agreed and held in favour of CAC

Ordinarily, it should be easy to conclude that the decision in NOSDRA v ExxonMobil is currently the law. However, the two other decisions of the Court of Appeal have equal force and a court below, the Court of Appeal is entitled to freely elect which of the conflicting decisions of the same Court to follow. Similarly, when faced with conflicting decisions, other divisions of the same Court of Appeal are entitled to reach their own new decision or elect which of the conflicting ones to follow.

The effect of the above conflicting decisions of the Court of Appeal on the powers of an agency of government to impose sanctions for breach of its regulations or guidelines is the basis of the present question mark on the competence of the NITDA to enforce any of the sanctions imposed by the NITDA Act. The Supreme Court of Nigeria has not yet been presented with the opportunity to make a final decision that will lay to rest the ghost of the conflicting decisions. Until then, the controversies may yet continue. Nevertheless, there are some conclusions that can be safely drawn from the Constitution as follows:

[82] *Ibid*, s. 631 (1). *Note* 80.

i. By the combined reading of sections 36(1)[83] and 36(2)[84] of the Constitution and based on judicial precedence, where a law makes an actor omission a civil infraction, an agency established to supervise and enforce compliance with the law can impose the penalty prescribed for such civil infractions, especially where the law expressly confer the agency with the power to impose the penalty and provided that a platform is established to observe the principles of natural justice; and

ii. Where a law expressly makes an act or omission a criminal offence, any person or entity suspected to have committed the act or made the omission may be tried before a competent judicial body. Where found guilty, the court may then impose the fine/penalty prescribed under the law.

Regarding point 1 above, it appears that the lack of the creation of a platform established to ensure fair hearing in most laws may still constitute an hindrance for regulators in future matters. Going forward, it may be best for laws stipulating demands on persons and entities and establishing regulatory agencies to create independent forums—such as a tribunal or commission—within the agency. For example, there is a Tax Appeal Tribunal in relation to disputes on tax matters and imposition of fine by the tax authorities. Also, there is the Federal Competition and Consumer Protection Tribunal under the Federal Competition and Consumer Protection Act (FCCPA) 2019. The Act expressly vests the Tribunal with the power to *"adjudicate*

[83] This provision entitles a citizen to a right to fair hearing before a court of law or other tribunal established by law, in the determination of his civil rights and obligations.

[84] This provision provides that a law will not be invalidated merely because it confers on any government or authority powers to determine questions that may affect the civil rights or obligations of a citizen.

over conducts prohibited under the (FCCPA)"[85] and *"impose administrative penalties only for: (a) a prohibited practice under the Act and (b) contravention of, or failure to comply with, an interim order of the Tribunal".*[86]

As things stand, it appears that the NITDA, being an administrative—as against a judicial—body does not have the ultimate or unilateral powers to impose or enforce the penalties stipulated under its establishing Act and may have to go through the court where it perceives that any entity or organization to whom the Act is applicable has committed a breach. Put differently, because a breach of the Act would qualify as an "offence", a competent judicial body must determine the culpability of an alleged offender before any penalties under the NITDA Act can be imposed on such offender.

However, since the NITDA Act is a valid and subsisting law in Nigeria, until its provisions on imposition of fines is challenged and declared null, void, or otherwise unconstitutional by the court, it is easy to conclude that NITDA does possesses the power to issue the NDPR and create civil penalties under it. Indeed, section 10(2) of the Interpretation Act[87] also supports this conclusion. The section provides that *"an enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to the doing of it."*[88] Furthermore, section 12 (1)(c) of the Interpretation Act provides that *"where an Act confers a power to make a subsidiary instrument, proclamation or notification, the power shall include… power to prescribe punishments for contravention of provisions of the instrument"*.[89] Thus, although the NDPR 2019 does not expressly vest the NITDA with the power to enforce the penalties stipulated under the Regulations, it appears that the Agency is still competent enough.

[85] Section 39(2), Federal Competition and Consumer Protection Act, 2019.
[86] *Note* 84.
[87] Interpretation Act. *Note* 49.
[88] *Ibid*, s.10 (2). *Note* 49.
[89] *Ibid*, s.12 (1) (c), *Note* 49.

Perhaps in an attempt to reinforce its authority and satisfy the jurisprudential requirement of fair hearing, the NDPR 2019 also establishes the Administrative Redress Panel (the 'Panel")[90] whose duty includes the following:

a) Investigation of allegations of any breach of the provisions of this Regulation;
b) Invitation of any party to respond to allegations made against it within seven days;
c) Issuance of Administrative orders to protect the subject-matter of the allegation pending the outcome of investigation; and
d) Conclusion of investigation and determination of appropriate redress within Twenty-Eight (28) working days.[91]

The establishment and powers of the Panel does not detract from a Data Subject's right to seek redress in a court of competent jurisdiction.

7.0. Conclusion

The fundamental objective of every data protection legal regime or regulation should be to safeguard the informational privacy and protect the data rights and privileges of persons whether real or corporate. Thus, all public and private institutions who exercise any form of control over such data in their custodies are required to have data protection policies. Protection of the privacy of persons is a constitutional right in Nigeria. To protect the constitutional right to privacy an aggrieved person can precede under the Fundamental Rights (Enforcement) Procedure Rules made pursuant to section 46 of the 1999 Constitution. The said section provides that any person who alleges that any of the fundamental human rights has been is being or likely to be contravened in any state may apply to the High Court in that state for redress. Similarly, with specific reference to data protection, an aggrieved person can make a resort to NITDA for

[90] *Ibid*, s.3.2. *Note* 51.
[91] Paragraph 3.2.1 (a)-(d). *Note* 51.

enforcement of sanctions against breaches. From the analysis above, it is safe to conclude that: Nigeria does have an informational privacy and data protection law; the NITDA Act is a valid and subsisting law; the NDPR 2019 was validly issued and the NITDA does have the powers to enforce the penalties stipulated under the regulations.

Rethinking the Controversial Land Use Act and the Courts

Jide Soroye, (PhD)[1]

Introduction

It is not an overstatement to say that the most controversial law made by the military government is the Land Use Decree. (hereinafter referred to as the Land Use Act). The law has been subjected to various criticisms. The coming into being of the Act was the sole prerogative of the Military government who believed that the law would serve public interest. The law no doubt is alien to African idea of land holding system. Originally, under customary law, land belonged to the community or the family and this was the position met by the British colonialists and as confirmed by Lord Haldane in the case of *Amodu Tijani v Secretary of Southern Nigeria* where he held as follows:

> The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have equal right to the land but in every case the Chief or headman of the village or community or head of the family has charge of the land and in loose mode of speech is sometimes called the 'owner'. He is to some extent in the position of a trustee and as such holds the land for the use of the community or family. He has control of it and any member who wants a piece of it to cultivate or build upon goes to him for it. But the land so given remains the property of the community or family.[2]

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[2] (1921) A.C. 399, p 404 A family is defined as a collection of persons living together under one head. A family may also be defined as a group of people affiliated by consanguinity, affinity, and co-residence. According to Article 16(3)

The above represented the position of the land tenure system until the colonialists came and brought into the country the English legal system. However the first comprehensive legal document which drastically and completely changed the land tenure system in Nigeria is the Land use Act of 1978. The rationale for the Act among other things include

a. To facilitate easy acquisition of land
b. To break the backbone of Land speculators
c. To protect and preserve the rights of Nigerians to hold, use and enjoy land.
d. To harmonize the various land tenure system in Nigeria among others.

With the promulgation of the Act, all Land comprised in the territory of each State in the Federation are vested in the Governor of that State who hold such Land in trust and administers same for the use and common benefit of the citizens of the State. The Governor is expected to exercise his power of control over the land in accordance with the provisions of the Act. The controversial nature of the Act and its ambiguous provisions has culminated into various litigations whereby people have challenged the provisions of the Act including various powers exercised by the Governor. This has given the court the opportunity to consider certain provisions of the Act and thus interpret them accordingly. The purpose of this paper therefore is to examine the Act and the power of the Governor as a trustee for the citizens in respect of statutory rights of occupancy, the extent of such power, and limitations thereon as judicially pronounced.

The Effects of the Act on Land Tenure System

Prior to the promulgation of the Land Use Act 1978, there were in existence various modes of acquisition of land in the country, thus for a person to lay a valid claim to any land, he must establish evidence to

of the Universal Declaration of Human Right, a family is the natural and fundamental group unit of society and is entitled to protection by the society and the State.

prove ownership. Courts have reiterated in plethora of cases[3] that there are 5 ways by which a party can prove ownership of land. They can be broadly outlined as follows:

a. By traditional evidence[4]
b. By production of documents of title[5]
c. By proving acts of ownership (such as selling, leasing, renting out or farming on all or part of the land) extending over a sufficient length of time, or which are numerous and positive enough as to warrant the inference that the person is the owner.
d. By proving acts of long possession and enjoyment of the land.[6]
e. By proof of possession of connected or adjacent land in circumstances rendering probable that claimant is also owner of such adjacent land.[7]

[3] See the cases; *Okpuruwu v. Chief Okpokan* (1988) 4 NWLR (pt 90) 554, *Idundun v. Okumagba* (1976) 1 NMLR 200, *Mogaji v Cadbury Nig. Ltd.* {1985} 2 NWLR (Pt 3) 393.

[4] Where a party had set out to establish title by traditional history, all he needs do is to prove his title by conclusive and cogent evidence of tradition. See the cases *(Ariri v Erhurhbara* (1993) 3 NWLR (t. 123) 252; *Dike v. Okoloedo* (1999) 10 NWLR (Pt. 624) 359.

[5] This may be in form of Purchase Receipt, Survey Plan, Deed of Conveyance *e.t.c.* Such documents must however be admissible in evidence by Court to be able to establish a prima facie proof of ownership.

[6] Where acquisition of title by settlement is pleaded, all that the Plaintiff will be required to prove to succeed, with the traditional history as to who first settled on the land, providing fitting background to the evidence of length of time acts of ownership had been taking place on the land. It is right to use recent facts as a test of the probability of traditional history, but such recent facts must be of such quality and character as would lead to the probability of traditional history.

[7] See section 35 of the Evidence Act, 2011 which states that acts of possession and enjoyment of land may be evidence of ownership of a right of occupancy not only of the particular piece or quality of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.

The pertinent question that has been the basis of controversy among jurists is whether the Act had abolished customary tenancy that was in operation prior to the advent of the Act. Omotola commented on this as follows:

> **"….** It seems clear that the Land Use Act does not intend to abolish customary law rules. Indeed in some parts, the rules are assumed. It may be emphasized that any attempt to discharge the customary tenant of liability to pay rent will lead to hardship on the part of the customary overlord. It will amount to re – writing the agreements for the parties to this mode of tenure without express authority in the Act. This must be avoided in the interest of justice and fair play."[8]

The Land Use Act was promulgated with a view to making land available to all Nigerians irrespective of where they live. The Act recognizes the rights and obligations of the land holdings before it came into operation whether they constituted grant by communities, local governments or State governments.[9] Section 4 of the Act provides that:

> Until other provisions are made in that behalf and subject to the provisions of this Act, land under the control and management of the Governor under this Act shall be administered – (a) in the case of any State where the Land Tenure Law of the former Northern Nigeria applies, in accordance with the provisions of that Law; and
>
> (b) in every other case, in accordance with the provisions of the State Land Law applicable in respect of State

[8] Omotola: The Land Use Act – its application and problems in Nwogugu (ed) Nigeria. 1988, p. 267

[9] Section 4 of the Act.

> land in the State, and the provisions of the Land Tenure Law or the State Land Law, as the case may be, shall have effect with such modifications as would bring those Laws into conformity with this Act or its general intendment.

The aim and philosophy behind the making of the Act can be deduced from its introductory part i.e. the preamble that reads thus:

> WHEREAS it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law, And whereas it is also in the public interest that the right of Nigerians to use and enjoy land in Nigeria and natural fruits thereof in sufficient quantity to enable them provide for the sustenance of themselves and their families should be assured, protected and preserved.

With the advent of the Land Use Act, it became possible for individual to apply for grant of land from Government for agricultural, residential, and industrial and for any other use beneficial to mankind. Where such application is granted, the Governor issues a certificate of occupancy accordingly.

Right of Occupancy – Statutory and Customary

By virtue of section 5(1) (a) of the Act, the power to grant statutory right of occupancy to any person for all purposes, whether in urban area or not vested in the Governor.

Similarly by virtue of section 6(1) of the Act, the local government is granted the power to grant customary rights of occupancy in respect of land not in urban area.[10] A right of occupancy is a right granted by the Local Government Authorities or granted by the Governor of a State to individuals in respect of land to which the Land Use Act applies in

[10]*See Adisa v Oyinwola* (2000) F.W.L.R (P art 8) p 1349 on interpretation of section 39 and 41 of the Act.

Nigeria. This right of occupancy is a mere possessory interest in land. It does not confer absolute ownership. Unlike the concept of the common law fee simple.[11]

In the case of *Salami v Oke,*[12] the Supreme Court held:

> Absolute ownership of land is no longer possible since according to the provisions of section 1 of the Act, all land comprised in the territory of each state in the federation are hereby vested in the Governor of the state and such land shall be held in trust and administered for the common benefits of all Nigerians.

J.A .Omotola, held the same view when he submitted that a right of occupancy is neither a proprietary right known to property law nor a personal right[13]

The individual, group or community can acquire Right of Occupancy. In the case of *Ojemen & Ors v Momodu II Ogirrua of Irrua & Ors,*[14] the Supreme Court ruled to the effect that the fact that all lands have been vested in the Governor of a State does not prevent the community to own land and that such a community can be a holder of the statutory right of occupancy.[15]

[11] Fee simple is the entire and absolute interest in land and is the nearest approach to absolute ownership that common law feudalism allows. The word 'fee' signifies its inheritability while the word 'simple' indicates that it is inheritable by the general heirs of the current owner, whether they are descendants, ascendants or collateral relations.

[12] (1987) 9, 11 S.C. 43. See also section 1 of the Act.

[13] J A Omotola, Essays on The Land Use Act, 1978, University of Lagos Press, 1980.

[14] (1983) 3 S.C. 173, at 187.

[15] For detail study on the certificate of occupancy, see 'The certificate of occupancy: Nature and Value contained in Smith I.O. (ed), "The Land Use Act -Twenty Five Years After" edited by I. O Smith, a publication of the Department of Private and Property Law, Faculty of Law, University of Lagos.

Power of Governor on Statutory Right of Occupancy under the Act as Interpreted by Courts

a. **The Governor Must Act in the Interest of the Public.**

It is very clear that the powers vested in the Governor by the Act in dealing with the Land entrusted to him is a public and not a private power which he must exercise for the use and the common benefit of the Nigerians. The law empowers the Governor to grant right of occupancy to any citizen on request. This is done through the issuance of certificate of occupancy popularly called "C. of. O." The Governor is expected to be objective and should have only the interest of the public in mind when considering the option to grant or refuse the grant of C of O. To do otherwise will defeat the basic aim of the Act. The same principle is applicable to grant of consent to any alienation of land by the Governor.

Under the Act, the Governor is the appropriate authority to grant certificate of occupancy and to give consent to any alienation of land, however, the Act permits the Governor to delegate any of the powers conferred on him by the Act to a Commissioner and any act performed by such Commissioner shall be deemed to be the Governor's acts.[16]

Anybody who is aggrieved or wronged as a result of any act performed by the Governor or deemed to be performed by him has the right to challenge the action in the High Court of the State involved.[17]

[16] Section 45 (1) The Governor may delegate to the State Commissioner all or any of the powers conferred on the Governor by this Act, subject to such restrictions, conditions and qualifications, not being inconsistent with the provisions, or general intendment, of this Act as the Governor may specify. (2) Where the power to grant certificates has been delegated to the State Commissioner, such certificates shall be expressed to be granted on behalf of the Governor.

[17] Section 39 (1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings- (a) proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph, proceedings includes proceedings for a declaration of title to a statutory right of occupancy; (b) proceedings to determine any question as to the persons entitled to compensation payable for improvements on land under this Act.

The implication therefore is that the Act itself has created a possibility for judicial review of the Governor's act whenever the need arises.

2. Evidential Nature of Certificate of Occupancy-

In the case of *Lababedi v. Lagos Metal Industries (Nig) Ltd*,[18] the Court held that a certificate of statutory right of occupancy issued under the Land Use Act by the Governor is not conclusive evidence of any right, interest or valid title to land in favour of the grantee. It is at best only a prima facie evidence of such right. It may be effectively challenged and rendered invalid, null and void.

Similarly, in *Ogunleye v. Oni*,[19] the Governor purported to grant a right of occupancy on a land on which a prior right of occupancy subsisted in another person; the court held that the later grant did not confer on the grantee any right superior to that of the original owner. Supreme Court per Nnaemeka - Agu J.S.C. held as follows:

> Indeed, a certificate of occupancy properly issued under section 9 of the Land Use Act ought to be a reflection and an assurance that the grantee has to be in occupation of the land. Where it is shown by evidence that another person had a better right to grant, the court will have no alternative but to set aside the grant, if asked to do so….

3. Issuance of a Right of Occupancy on a Vested Right

Under section 34 of the Act,[20] developed land shall continue to be held in the person in whom it was vested immediately before the commencement of the Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Government under the Act. Subsequent issuance of the certificate of occupancy to another person on the same land cannot defeat such a vested right unless such vested Right is first revoked under section 28 of the Land Use Act.

[18] {1973} N.S.C.C 1 at page 6.
[19] (1990) 2NWLR (Pt 135), pg. 745.
[20] Section 34 of the Land Use Act.

This is the position of the Court in the case of *Olohunde v. Adeyolu.*[21]

In the case of *Kyari v. Alkali,*[22]it was found that another person had a subsisting right over the land as at the time the Governor issued the certificate of occupancy, the Supreme Court held that the certificate of occupancy is merely a prima facie evidence of title and no more… and the court held defective and invalid the certificate of occupancy which was issued while the customary title was first in time and was never revoked.

4. Issuance of Two Certificates of Occupancy on the Same Land

When the certificate of occupancy is granted to two different persons in respect of the same land, the person who proves a better title would be granted the right against the second claimant who has not proved a better title. The certificate granted the second claimant would be deemed to be defective and to have been granted erroneously, against the spirit of the Land Use Act and the holder of such a certificate would have no legal basis for a valid claim over the land it is issued. The court may have no option but to set aside the grant or otherwise discountenance it as invalid, defective and spurious as the case may be.[23]

Similarly in the case of *Dantsoho v. Muhammad,*[24] Kano State Governor granted two parties the certificate of occupancy on the same Land. The commencement date on the Appellant certificate read

[21]*Olohunde v Adeyolu* (2000) 10 NWLR Pt (676) 562 at 597. In Ezenna v Atta, (2004) All FWLR, (Pt 202), p 1,858, ratio 7 the Supreme Court held " A certificate of occupancy properly issued by a competent authority raises the presumption that the holder is the owner in exclusive possession of the land in respect thereof. Such a certificate also raises a presumption that at the time it was issued there was not in existence a customary owner whose title has not been revoked. The presumption is however rebuttable because if it is proved by evidence that another person had a better title to the land before the issuance of the certificate of occupancy then the court can revoke it."

[22] (2001) 1 NWLR. Pt (724), pg 412.

[23]*Ogunleye v Oni* (1990) 2 NWLR (Pt. 135) 745; *Dzungwe v. Gbishe* (1985) 2 NWLR (Pt. 8) 528 at 540 .

[24] (2003) Vol. 6 M.J.S.C P. 97.

18/2/81 while the commencement date of the Respondent certificate read 15/5/78. Supreme Court in a unanimous decision held that where two contesting parties trace the title in respect of the same piece of land to the same grantor, the latter in time of the two parties to obtain the grant cannot maintain an action against the party who first obtained a valid grant of the land from such a common grantor because the grantor (Governor) having successfully divested himself of his title in respect of the piece of land in question by the first grant would have nothing left to convey to a subsequent purchaser (grantee) under the principle of *Nemo Dat Quod Non Habet.* This is because no one may convey what no longer belongs to him.

5. Alienation of Statutory Right of Occupancy

By the provisions of both sections 22 and 26 of the Land Use Act, a holder of a right of occupancy statutory or otherwise is prevented from alienating his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise without the consent of the appropriate authority first had and obtained.[25] Where the consent was not sought and the transferee or mortgagee was handed the C.of.O by the original owner, legally speaking, nothing is thereby transferred.

The meaning of the phrase "First had and obtained" presupposes that there can be no valid transfer until the Governor's consent is obtained and this should be done prior and not subsequent to the purported transfer. The Courts have maintained in several cases that unless section 22 is complied with, the transaction is void.

[25]Sec 22 (1) It shall not be lawful for the holders of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever, without the consent of the Governor first had and obtained."
It must be stressed that the fact that there must be consent of the Governor prior to the alienation by way of transfer, mortgage *among others* does not prohibit the preparation of deed of agreement to be executed by parties prior to the receipt of the Governor's consent. This is the usual practice between the transferor and the transferee.

The provision of the Act in section 26 states: *"Any transaction of any instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void."*

The above section 26 has been misconstrued as not permitting any document evidencing the transfer of the interest in land until the governor's consent is obtained[26] but this apparent ambiguity has been cleared in the case of *Awojugbagbe Light Ind. v Chinukwe.*[27] The effect of the Supreme Court's decision in the case is that a conditional agreement executed by the parties prior to the receipt of the Governor's consent is efficacious. In other words, it is not illegal to execute documents in preparation of the transaction before the receipt of the consent.

6. Consent Certificate must be signed by the Governor

Before there could be a valid alienation, consent must be given to the alienation and such consent must be signed by Governor or by appropriate delegated authority otherwise the Court shall invalidate it.[28] In the case of *Union Bank Ltd v Ayo Dare & Sons Ltd*[29] the company took loan facility from the Bank and used two properties as collateral securities. The two properties were covered by statutory and customary right of occupancy. Deeds of Legal Mortgage were prepared accordingly by both parties and consent was obtained. When the borrower defaulted, the Bank decided to exercise its right of sale under the legal mortgage. The plaintiff went to court to restrain the

[26] It is the practice that deed of assignment or deed of transfer of title is usually executed between parties prior to the time the consent of the Governor is procured.
[27] 1995) NWLR (Pt. 390) 379.
[28] Consent signed by any appropriate authority duty authorized to sign on behalf of Governor is valid provided there is a law. Where the power is delegated to such appropriate body. In *U.B.N Plc v Ishola* (2001) 15 NWLR (Part 735) P 47, the Court upheld the consent approved by Hon. Commissioner for Land since there was a Law (delegation of powers) Notice, 1982 where the Governor delegated his powers under the Act to him.
[29] (2000 **)** FWLR (Part 12) page 971.

Bank claiming that the two Deeds of Legal Mortgage were not signed by the appropriate authority.

The trial court found that the Deeds were actually signed by Acting Land Officer for Permanent Secretary and Director General respectively. There was no evidence that they were authorized by law to sign for the Governor. It was submitted in court that since it was the borrower that obtained the consent themselves, it would be wrong for them to turn round to claim that the consent was not proper. Notwithstanding the apparent logic in this argument the trial judge gave judgment in favour of the Plaintiff (borrower), and declared the Deed of Legal Mortgage null and void. Dissatisfied, the Appellant (Bank) appealed to Court of Appeal. Unanimously, the higher court in dismissing the appeal remarked among other things as follows:

> Though it is despicable and morally wrong for a party who had initiated wrong doing and after obtaining benefit to resile from the same, yet the law under peculiar facts of the case must be applied. The transaction in this case is null and void.

7. Power of Revocation by Governor

Section 28 of the Land Use Act stipulates the power of the Governor concerning revocation of right of occupancy as follows;

(1) It shall be lawful for the Government to revoke a right of occupancy for overriding public interest.

(2) The Governor shall revoke a right of occupancy in the event of the issue of a notice by or on behalf of the President if such notice declares such land to be required by the Government for public purpose.[30]

[30] Section 28(4) of the Act makes it mandatory on the Governor to oblige the request of the Federal Government whenever such a request is made, In the case of *Attorney General of Lagos State v National Electric Power Authority* Suit No

(3) The Government may revoke a statutory right of occupancy on other grounds as contained in section 28(5) of the Act.

(4) This revocation of right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Government and notice thereof shall be given to the holder.

(5) The title of the holder of a right of occupancy shall be extinguished on receipt by him of a notice given under subsection (6) of this section or on such later date as may be stated in the notice."

It is clear from the above that the Governor has the power to revoke a Certificate of Occupancy earlier granted by him. However, in doing this, the law expects him to be guided by the provision of section 28 above and non - compliance with it renders the action of the Governor challengeable in court and consequently nullified.

8. Requirements for a Valid Revocation by Governor

The first requirement for a valid revocation is that such revocation must be for overriding public interest.[31]Where the Governor acts out of personal interest or is guided by any extraneous consideration, his act will fall short of the requirement stipulated in the Act thereby making his act challengeable in court. In the case of *Osho v. Foreign*

LD/372/81, Oluwa J, retired, held that it is imperative on the Military Governor to revoke any certificate of occupancy it had previously issued in respect of any piece of land whenever the federal Government issued a notice that it requires the land for public purpose. A F Oluyemi, "Revocation of Rights of Occupancy: Legal Framework in Nigeria", Lagos State Ministry of Justice Law Review Series, 2007.

[31] Section 28 (1) of the Act defines overriding public interest in the case of a statutory right of occupancy as:

(a) The alienation by the occupier by assignment, mortgage, transfer of possession, sub-lease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made there under,

(b) The requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation

(c) The requirement of the land for mining purposes connected therewith.

See also section 28 sub section 2.

Finance Corporation,[32] the court held that the power of the Governor to revoke a right of occupancy must only be for overriding public interest and for requirement by the Federal Government, for public purposes.

> The Power to revoke any statutory right of occupancy under section 28 of the Act was granted to the Governor in his official capacity and is therefore a public right, the exercise of which constitutes a public act in the public interest. It is not and cannot be a private act in the interest of the person of the Governor himself. In the exercise of the powers by the Governor under the Act, the Governor was acting for and on behalf of Nigerians directly under his administration and therefore on behalf of his State Government, which he can properly be sued in his official capacity.

There have been a lot of controversies on what amount to overriding public interest or public purpose. However, the position of the court has always been very strict in construing what qualifies to be a public purpose and this is usually done by considering the peculiarity of each case. In the case of *Bello v. Diocesan Synod of Lagos & Ors,*[33] the acquisition was for the extension of a church and in the body of the notice it was stated that the Lagos Executive Development Board required the land for public purpose. The court berated the Respondent in a clear and un-ambiguous language that the act was nothing falls short of an abuse of power.

> *....It is well settled that a public body invested with the statutory powers must take care not to exceed its powers. It must keep within the limits of the authority*

[32] {1991} 4 NWLR (Pt 184) at 157.
[33] (1973) ANLR 196 p.218.

> *committed to it. It must act in good faith. And it must act reasonably.*

Another example of wrongful exercise of revocation power is the case of *Lagos State Development & Property Corporation v Foreign Finance Corporation*[34] where the Lagos State government revoked the plaintiff's right of occupancy and allocated the same land to a private company for the same purpose. The court held this to be an abuse of statutory power and the revocation cannot be justified either as for public purpose or overriding purposes.

This position of court has however been modified in view of the dynamism of the society in that where a right of occupancy is revoked by Governor and the interest conferred on another private company for the purpose of carrying out on behalf of the State any of the public purpose under the enabling law, the revocation would be held appropriate.[35]

It is therefore settled law that any revocation for purposes outside the ones prescribed by section 28 of the Act is against the policy and intention of the Act and can be declared null and void by a competent court.[36]

[34] (1987) 1 NWLR (pt 50), 413.

[35] See the case of Lawson *v Ajibule* (1977) 6 NWLR (pt 507) p. 14. Here, the government revoked the land belonging to one person and granted same to another person who was a developer. The Supreme Court noted that this practice is in order as it allows private sector participation in the orderly development of both urban and rural areas. Therefore, acquisition of land compulsorily and leasing same to developers for housing estate, economic, industrial or agricultural development is in order.

[36] In the book Revocation of Certificate of Occupancy: Legal Framework in Nigeria supra, the learned author, Atinuke Fadeke Oluyemi, submitted that the exercise of the power of revocation by the Governor is limited by three factors namely:

i. The constitutional right of the citizens to own property.
ii. The right to payment of compensation and
iii. The said revocation must be strictly in accordance with the law.

Secondly, before there could be a valid revocation by the Governor, the requirement of adequacy of notice must be complied with. This may be summarized as follows:

a. The holder of the right of occupancy being revoked must be notified in advance of the revocation and such notice must state the reason or reasons for the revocation.

In *Obikoya &Sons Ltd v Governor of Lagos State*,[37] the plaintiff's right of occupancy was revoked and among other things, he contended that the notice of revocation given to him did not bear the specific public purpose for which the land was to be used. The Court of Appeal while upturning the judgement of the High Court, stated as follows:

> To publish a blanket notice of revocation of a man's right of occupancy which notice fails to state what type of public purpose as categorized under section 50 (1) of the Act, for which the revocation is being made will make it impossible for the person affected to know when and on what ground to object to the revocation and thereby stultify his exercise of his rights under section 33(2)(a) of the 1979 constitution to make representation against the revocation.

The position of the law is that where the notice was not given or the notice given is inadequate or not in compliance with the provisions of the Act, it will render the revocation invalid.

[37](1987) 1 NWLR (pt. 50) 385.

Other Requirements Regarding a Valid Notice

a. The notice of acquisition of property must be specific and precise as to the property acquired therefore require personal service on the holder;[38]
b. The particulars of the public "purpose" for which such property is acquired must be given and;[39]
c. Notice of intention to acquire the property must be given to the existing owner before publishing it in the gazette.[40]

Non-compliance with any of the above requirement renders the action of the Governor on revocation null and void and of no effect.

9. Right to Compensation

Both acquisition of the land and revocation of the right of occupancy under the Act entitle the holder and the occupier to compensation for the value, as at the date of revocation or acquisition of their unexhausted improvements. When the Governor revokes a right of occupancy, compensation is paid in accordance with the provision of the Act.[41] In case of any dispute arising from compensation, such dispute shall be referred to the appropriate Land Use Allocation Committee[42] and by virtue of section 47(2) of the Act; no further appeal shall lie from the decision of the Committee.[43]

This Act shall have effect notwithstanding anything to the contrary in any law or rule of law including the Constitution of the Federal republic of Nigeria, and without prejudice to the generality of the foregoing:

[38] Service of the notice must be personal unless where this is impossible that the government may resort to any form of substituted service like posting or newspaper advertisement.
[39] In *Osho v Foreign Finance case*, (1991) 4 NWLR (Pt 184) p 157 at 195 Supreme Court stated that where a right of occupancy is stated to be revoked for public purposes, there is need to spell out the public purpose in the notice of revocation.
[40] *Nigeria Engineering Works Ltd v Denap Ltd* (2001) 18 NWLR, (pt 746) at 726.
[41] See generally section 29 of the Act for details.
[42] See section 2 of the Act.
[43] Section 47(2) of the Act.

1. No court shall have jurisdiction to inquire into:

   (a) any question concerning or pertaining to the vesting of all and in the Governor in accordance with the provisions of this Act; or
   (b) any question concerning or pertaining to the right of the Governor to grant a statutory right of occupancy in accordance with the provisions of this Act; or
   (c) any question concerning or pertaining to the right of a local government to grant a customary right of occupancy under this Act.

2. No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act.

Compulsory Acquisition of Property under the 1999 Constitution

The provision of the Act in respect of acquisition of property particularly section 47(2) conflicts with the constitutional provisions regarding the compulsory acquisition of property. Section 44 of the 1999 Constitution categorically provides concerning acquisition of property thus:

> No movable or any interest in any immovable property shall be taken possession of compulsorily in any part of Nigeria except in the manner and for the purpose prescribed by a law that among other things:
>
> *(a) requires the prompt payment of compensation therefore; and*
> *(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.*

The above constitutional provision not only makes it mandatory for the government to compensate, also provide that such compensation

should be prompt and adequate and the person claiming compensation shall have the right of access to court to ventilate his grievance arising from the compensation. This is however subject to subsection 2 there-under.[44]

It is submitted that the inconsistency between section 47 of the Act and the section 44 of the Constitution is noticeable in two ways:

a. The Act refers any dispute arising from the Governor's act to the Allocation Committee which members are appointed by the Governor (thereby being judges in their own cause) therefore offend the provision of section 36 of 1999 Constitution.[45]

b. The decision of the Allocation Committee is not subject to judicial review contrary to section 44 of the Constitution, which grants such person a right to a court of law.

10. Controversy on the Inclusion of the Land Use Act in the Constitution

The inclusion of the Act in the Constitution has given way to another controversy. It has been argued in some quarters that the provision of the Act ranks equal with the provision of the Constitution and that the Act is an integral part of the Constitution in view of the provision of section 274 (5) of the 1979 (now section 315 (5) of 1999 Constitution) which expressly provides:

[44] Section 44 subsection 2 provides among other things the exceptions i.e. any law imposing tax, rate or duty, imposition of penalties or forfeitures for the breach of any law under civil process or after conviction for an offence; any law relating to leases, tenancies or bills of sale, execution of judgments or orders of courts, law for the taking of possession of property that is in a dangerous state or is injurious to health of human beings, plants or animals *among others.*

[45] Section 36 of the 1999 constitution provides as follows:
In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.

"Nothing in this Constitution shall invalidate the following enactments, that is to say:

(a) The National Youth Service Corps Decree 1993;
(b) The Public Complaints Commission Act;
(c) The National Security Agencies Act;
(d) The Land Use Act.[46]

And the provision of those enactments shall continue to apply and have full effect in accordance with their tenure and to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of section 9 (2) of this Constitution."

However this apparent controversy had been laid to rest by the Supreme Court in the case of *Adisa v Oyinwola,*[47] Per Iguh J.S.C as follows:

> I think with respect that is a misconception to suggest that the Land Use Act, 1978 is part of the constitution by virtue of the provision of section 274(5) of 1979 constitution[48]. This is because it is now settled that notwithstanding the fact that pursuant to section 274 (5) of the constitution became an extra ordinary statute by virtue of its entrenchment in the constitution, it still remains essentially a Federal Act or enactment… where therefore, its provisions are inconsistent with that of the constitution, such provisions are to the extent of such inconsistency void....

The above pronouncement confirmed the status of the Act as being a federal law thus inferior to the Constitution. Also in the case of

[46] The same provision occurs in section 274(5) of 1979 Constitution.
[47](2000) 10 NWLR (pt. 674) 116.
[48] section 315 (5) of 1999 Constitution.

Kanada v Governor of Kaduna State,[49] the Court of Appeal held inter alia that section 47(2) of the Act, which purportedly denies any person claiming compensation on his property, the right to sue for the determination of his interest in the property and the adequacy of the compensation is void.

Conclusion

This paper has briefly discussed and analyzed some salient provisions of the Act. There is no doubt the fact that Land Use Act is one of the most controversial laws made during the Military era. The Act was badly drafted and its provisions are ambiguous. In spite of the fact that the courts have lived up to their responsibilities being the last hope of the aggrieved citizens, the Act still remain a monster devouring any person that falls its prey. The subsisting criticisms against the Act include the following:

(a) That the Act is believed to be nothing but undue usurpation of the powers and rights of Nigerian citizens over customary ownership of Land.

(b) The processes of obtaining Governor's consent and right of occupancy are rigorous, costly and the system does not allow liberalization of land use.

(c) The Act has been subjected to misuse in a number of cases by government.[50]

(d) Revocation of right of occupancy earlier granted is done at the whims and caprices of the Governor in most cases without compensation.

[49] (1986) 4 NWLR (pt. 35) 361.

[50] Lands have been acquired from rightful owners in the guise of public purpose whereas in most cases the underlining factors are personal interest and greed for material acquisition of those at the helm of affairs.

It is disheartening to note that many citizens have suffered untold hardship and deprivation as a result of the implementation of the Act. Only few Nigerians who are well informed of their right and who possess the economic power to institute action in court against the government can eventually obtain judicial redress. Majority due to their inability to seek redress automatically resign to faith.

Notwithstanding the aforementioned, the Nigerian courts have exhibited a lot of courage to interpret the ambiguous provisions of the Act with a view to curing its inherent defects. While applauding the efforts of the judiciary in its bid to defend the Constitution and ensure justice, it is suggested that a law reform committee be set up by the Government to see to the amendment of the Act with a view to correcting the noticeable anomalies and incorporate the judicial interpretations accordingly.

Acquiescence to Domestic Violence in Matrimonial Setting and the Effect on Women's Mental Health

Ibidun O. Olude[1] and Tumininu O. Ife-Folabi[2]

Abstract

Following from Karl Marx's celebrated dictum, religion is the opium of the masses'; it can no longer be ignored that religious and cultural indoctrination plays a huge role in determining the behavioural patterns as well as the laws that are acceptable to various societies. African societies, being patriarchal in nature have pushed many women to remain silent and in so doing consent to all forms of abuse against their persons, as it is also hinged on their cultural and religious beliefs, which is sublime in nature. Interestingly, the courts have pointed out that the position of international law as reflected in the wordings of Article 18(3) of African Charter on Human and People's Rights should be construed to mean that even if the victim's behaviour seems to acquiesce to such violation of her rights, the law must protect those rights. Most women condone and consent to violence against them because they fear separation from their spouses. In some cases they acquiesce to the violence meted unto them and continue to endure violence due to economic reasons. The fear of being separated from their children also is another causal factor. Many of these women are suffering from mental health and psychological trauma that deprived them of capability to make informed decision. This paper discusses the issue of domestic violence and reasons or factors leading to women acquiescence to the violence. Effects of the violence on their mental and psychological health are being discussed. The paper recommends that an adequate legal

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framework be developed to protect and save women from those factors that contribute to their acquiescence to violence.

Keywords: Patriarchal Society, Violence, Mental Health, Women's Right

1.0 Introduction

A woman is defined as the feminine component of humans who is an enabler of human lives; manufacturer, consumer as well as an enriched embodiment with the capability to nurture wholesome political, social and economic development in the society.[3]

Violence is defined as the deliberate exertion of power or force, threatened or actual against one or another or on a group of persons yielding or has a tendency of resulting in injury or death, psychological harm, mal-development or deprivation. Women as human beings possess fundamental human rights including freedom from violence without any trace of discrimination or deprivation[4]. Studies reveal that about 2.5 million women experience violence annually, with an equal probability of it being perpetrated by a relative or intimate, acquaintance or stranger. Hence, 1 out of 3 women experiencing violence are related to or know the perpetrators of the violence[5]while 3 out of 4 women experiencing violence resisted the action either physically or verbally.[6] Annually, comparing males to females, females have been identified to experience violence ten times more than males, especially from their intimate partners and it was also identified that women reported their victimization, as they felt the

[3] J Ogwu 'Women in Development: Options and Dilemmas in the Human Rights Equation' (1999) 12(9) *Perspective on Human Rights, Lagos,* Kalu A and Osinbanjo Y, Fed. Ministry of Justice, 143 (accessed 15 August 2020).

[4] World Health Organization, 'World Report on violence and Health: Summary: Geneva: WHO' (2002).

[5] World Health Organization, 'World Report on violence and Health: Summary: Geneva: WHO' (2002).

[6] National Institute of Justice, 'Full Report of the prevalence, incidence and consequences of violence against women' (2000) (accessed 10th October 2020).

need for the offenders to be punished, regardless of the existing intimacy or familial ties between them[7].

Domestic violence or intimate Partner Violence (IPV) encapsulates 'all forms of behaviour including physical, sexual, psychological /mental abuse and controlling behaviours being perpetrated by an intimate partner or ex-partner.'[8] It has prevailed in Africa matrimonial setting and women continue to endure various forms of domestic violence due to deep-seated dogma that it is a taboo for a woman not to have a husband usually referred to as her crown (*oko l'ade ori aya*).[9] In some parts of Africa, there are women who consent to all forms of abuses against their persons due to sublime religious and cultural beliefs that allow a husband to mete out discipline on an erring wife. Such women believe that violence against their persons by the intimate partners is justified.[10] Traditionally, in Nigeria, like with many other African countries, discipline is instilled in children and wives through the act of beating which is categorized under physical form of abuse.[11] Many see wife beating as a way of curbing indiscipline, and in situation whereby the woman is economically dependent on the man, the wife is regarded as a child, and is not above any form of abuse from the man.[12] Frequent occurrences and an existing culture of silence leave many women injured and to be suffering in silence.

Many indigenous women are not aware of alternatives to outright divorce such as judicial separation. Societal condemnation of such

[7]Supra.
[8] WHO 'Violence against women'. WHO fact sheet (2020) (accessed 10th October 2020).
[9] A Yoruba adage which literarily means a husband is the crown on the wife's head
[10] Delaet, Debral & Mills, 'Discursive silence as a global response to sexual violence: From title ix to truth Commissions' (2018) 32(496–519) Glob. Soc (accessed 10 October 2020)
[11]D Oluremi, 'Domestic Violence Against Women In Nigeria' (2015) 2 EJPR (accessed 10 October 2020).
[12]O Aihie, 'Prevalence of Domestic Violence in Nigeria: Implications for Counselling' (2010) 2 (1-8) EJC (accessed 30 May, 2020).

practice can actually stop an abusive partner but threats of separation from children (because a man owns the children in a patriarchal society) have made many women to condone such practices against their persons. A yoruba adage which says "*Ile oko, Ile Eko*"[13] insinuates that a woman's matrimonial home is a place of training and education. Training in traditional context is inclusive of discipline of which caning or physical beating is allowed. Another pervading dogma is that silence is condonation and one cannot complain of an injury which one consents to *(volenti non fit injuria).* In fact, women who live according to certain dogma that recommends total and unconditional obedience to the husband are therefore seen to be consenting to any violence done to them. Customarily, when a woman is not in total obedience to the husband, she is seen as not being 'submissive or virtuous', such women are forced to 'endure' until it is too late or they get to the point of provocation as seen in recent cases of wives killing their husbands.[14]

2.0 Enforceability of Women's Rights in a Patriarchal Society

Women's rights have a wide spectrum, some of which include the human and social rights of women. This encapsulates the work done in the achievement of equality for women and the elimination of gender discrimination occasioned by certain laws, institutions and behavioural pattern in the society. In some African societies, the fight for the attainment of this equality, most of the time, positions the woman in opposition to existing structures such as the family as well as social networks wherein defined roles and rights for the woman are predetermined. Due to this, the woman seeks to avoid empowerment and freedom, which is likely to put her in a position where she is

[13] Literal meaning - A woman's matrimonial home is her school

[14] https:// punchng.com/ibadan-husband-killer-bags-seven-years-for-manslaughter/ Accessed 17/01/2019

against her kin. Hence, innovative ways are required for the protection of women against abuses.[15]

Women experience inequalities in many facets of socio-economic and political life, these include holding public offices; working to have fair wages or equal pay with men, to own property; their right to education; to serve in the military, their tight to enter into legal contracts; and marital, parental and religious rights[16].

3.0 Theoretical Framework on the Reasons for Violence Against Women

Several theories exist under the flagship of explaining reasons for violence against women. A school of thought is of the position[17] that men beat women because such men are psychopathologic or they possess poor impulse control. Others propose social or political reasoning such as violence against women occurs from a sense of gender – power disparities, as well as a patriarchal family construction. Recently, with the advancement of knowledge, theorists began postulating a multi factorial operation for the explanation of gender abuse.[18]

Part of the existing theories postulators, were the feminists[19]. They expressed reluctance in the acceptance of other factors other than patriarchal in the explanation of abuse. They believe male dominance is a key factor, but they fail to explain the reason why women are

[15] D Fox, 'Women's Human Rights in Africa: Beyond the debate over the universality or relativity of Human rights' (1998)2(3) ASQ 30 May 2020

[16]F Hosken, Towards a Definition of Women's Rights, (1981) 3(1-10) HRQ Quarterly, (accessed May 30 2020).

[17]https://shodhganga.inflibnet.ac.in/bitstream/10603/128502/15/12_chapter%203.pdf Accessed on 10/10/2020 at 15.55 WAT

[18]Crowell, Burgess 'Understanding Violence Against Women' (1998) https://www.nap.edu/read/5127/chapter/1 (accessed 30 May, 2020).

[19]D Fox 'Women's Human Rights in Africa: Beyond the debate over the universality or relativity of Human rights' (1998)2(3) ASQ 30 May 2020.

persistently the target.[20] This reluctance was also based on a slow rated acceptance of key factors such as gender inequalities[21]. Although, male dominance is the bedrock of the realist theory, but in reality, it is tagged as inadequate, as it did not explain why men became violent, and women, the object of the violence. The resolution lies in an ecological approach which described violence as a multifaceted concept, which is a medley of personal, situational and socio cultural factors.[22] It has also been established that the feminists would not endorse postulations or theories that do not exhibit an in depth understanding or description of how the male specie contributes significantly to gender based abuse[23.]

4.0 Legal Framework for Eliminating Violence against Women

The United Nations defines violence against women as any act of gender based violence that results in or is likely to result in physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life[24]

Several international instruments as well as conventions, which sanctions gender discrimination and inequalities exist. One of which is Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and it defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by

[20] S Schechter, 'Women and Male Violence. South End Press' (1982) (accessed 30 May, 2020).
[21] L Heise, 'Violence Against Women: An Integrated, Ecological Framework' (1998) 4(3) VAW,4(3), (accessed 30 July, 2020).
[22] *Ibid.*
[23] L Heise 'Violence Against Women: An Integrated, Ecological Framework' (1998) 4(3)VAW,4(3), (accessed 30 July, 2020).
[24] WHO Factsheet. https://www.who.int/reproductivehealth/topics/violence/en/#:~:text=The%20United%20Nations%20defines%20violence,public%20or%20in%20private%20life.%22 Accessed 10/10/2020 at 3.52pm WAT

women irrespective of their marital status on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural and any other field.[25] A number of states have national legislations that reflect these provisions such as the Protection of Women from Domestic Violence Act 2005 in India. This is an Act of the Parliament of India enacted to protect women from domestic violence. The Violence against Women Act of 1994 is a relevant U.S Federal law. However, wife beating had been declared illegal in all States of the U.S since 1920.

The relevant provisions on Domestic Violence in Nigeria are contained in the Constitution, the Penal Code, Protection against Domestic Violence Law (PADVL)[26], and Violence Against Persons (Prohibition) Act (VAPPA)[27]. The PADVL was passed in 2007 and is applicable only in Lagos. It comprehensively specifies the different types of domestic violence as including starvation, verbal abuse, economic abuse and denial of basic education, sexual exploitation, intimidation and harassment.

Also, the Violence Against Persons (Prohibition) Act (VAPPA) was passed in 2015. It addresses issues of sexual abuse, rape, domestic violence and other related crimes. Though it applies only to Abuja, it has provided a basis for other State Legislatures to align their laws on the management and regulation of domestic violence, a fast growing menace in recent times. The provision of the Penal Code however, appears to be discriminatory. It is detrimental to the protection of the fundamental human rights of the married women in Northern Nigeria who are governed by the Penal Code. Section 34 of the Nigerian Constitution, 1999 (as amended,) states that a person is entitled to respect for the dignity of his person and no person shall be subject to torture or inhuman or degrading treatment; neither shall any person be

[25]Adopted 18th Dec 1989, entered into force 3rd Sept 1981. G.A. Res 34/180, 34 UN GA OR supp (No 46) UN DOC A/34/46 at 193, (1979) reprinted in 19 ILM 33 (1980)

[26] Protection Against Domestic Violence Law of Lagos State, 2007

[27] Violence Against Persons (Prohibition) Act, 2015 (VAPP), Nigeria.

held in slavery or servitude; and no person shall be required to perform forced or compulsory labour.

Section 55(1)(d) of the Penal Code of Northern Nigeria provides that an assault by a man on a woman is not an offence if they are married, if native law or custom recognizes such "correction" as lawful, and if there is no grievous hurt.

It is clear from Section 42(1) of the Constitution of Nigeria, 1999 (as amended) which expressly states that:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: -(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject .

Interestingly, the courts have held that the position of international law as reflected in the wordings of Article 18(3) of African Charter on Human and People's Rights that "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."

The Nigerian Constitution provides that persons living in Nigeria, shall have a right to life and no one shall be deprived intentionally of his life unless in execution of the sentence of a court of a criminal offence of which he has been found guilty. This can be construed to mean that even if the victim's behaviour seems to acquiesce to such violation, she must not be deprived of her life. Most women condone and consent to violence against them when they are threatened with separation from their children or with forfeiture of property jointly owned with their spouses in patriarchal societies. If such women are seen as not being mentally healthy or psychologically balanced

enough to make decisions for themselves, then there is a need to legally protect and enforce such existing protection.

Sex discrimination in laws purporting to address violence, or silence on the issue within the law may be encouraging violence against women and girls because nothing tangibly deters the perpetrators from committing such crimes. Violence is disproportionately inflicted upon women and adolescent girls with laws like this. Such laws which allow men to 'discipline' their wives can be said to enhance violence using the cover of the law. Hence, the law may be perceived to be inadvertently perpetuating domestic violence against women and girls.

5.0 Examining the Factors Responsible for Acquiescence among Women Experiencing Violence

a. Patriarchal Society

In a patriarchal society like Nigeria, certain beliefs are ingrained into the very fabric of our culture that even those meant to enforce the law are not free from such fundamentally misguided concepts which are clearly inconsistent with human rights. The social context of violence against women in Nigeria portrays the patriarchal society, as a definition for the gender power structure. It is expected of a woman, to surrender to her husband's exclusive sexual right upon marriage. As a result of this, numerous men have capitalized on this, and hence, violate or batter their wives if he judges her as inadequate in the fulfilment of her obligation.[28] In the Nigerian setting, studies have also revealed a negative association between battering of women with education.[29]

[28] O Isiugo-Abanihe, 'Perceptions of Nigerian Women on Domestic Violence: Evidence from 2003 Nigeria Demographic and Health Survey'(2005) 9(2) ARH.

[29] Weitzman Abigail, 'Does increasing women education reduce their risk of Intimate Partner Violence? Evidence from an education Policy reform'. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6779421/ (Accessed 10 October 2020).

The law has always tried to keep up with customs that originated from acceptable practices. It is obvious however, that some customs are repugnant to law. Such laws are then said to originate from either divine law or natural law. It is therefore germane that law must be able to regulate the factors that shape behavioural patterns and customs.

b. Lack of Education or Unequal Access to Empowerment Opportunities

Economic reasons play a lead role among the factors that cause women to condone the violence (Domestic or Intimate Partner) that they experience. Whenever a woman in a patriarchal community in Africa condones violence against her person either by not reporting it, excusing it away or even taking the blame for it, she actually does so to survive. She is desperately trying to hold on to whatever is left of what she has acquired and the investments she has made usually in collaboration with her husband.

An average African housewife mostly acquires material wealth (indirectly but jointly) by sacrificing her own dreams to support a bread-winner husband by serving the needs of the family as the cook, launderer, dishwasher, gardener and cleaner. These sacrifices/services though usually not recognised by most African men as a form of economic contribution, they are indeed valuable services rendered for free thereby freeing up extra resources that would otherwise have been required to pay alternative service providers.

It was reported that a woman who was a victim of domestic violence [30] who had been physically abused and battered by her husband refused to be counselled to leave the husband due to survival instinct. She responded, 'I know I made him angry, besides, we built this house together. If I leave now, he will take it all and isolate me from my property and children. I don't want to lose everything so let me

[30] The woman is from South west Nigeria and of the Yoruba tribe.

endure." This is a gory example of the dilemma of a woman in a patriarchal society.

c. Domestic Violence and Health of Women Victims

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Mental health is an integral part of overall health as reflected in the WHO definition of Health.[31] Mental health can be defined as a person's condition with regard to their psychological, social and emotional wellbeing. It affects how we think feel and act. It also helps determine response under stress or extreme pressure. At the World Health Assembly in May 2016, member states endorsed a global plan of action on strengthening the role of health systems in addressing interpersonal violence in particular against women; girls and children.[32]

A number of studies, globally, have evaluated the impact of violence on the health and wellbeing of women and their families. As it is widely known globally, intimate partner violence is the commonest form of violence against women, and presents a medley of health problems – injuries, chronic diseases, reproductive health problems, severe mental health conditions such as posttraumatic stress disorder (PTSD), depression, anxiety, eating disorders, suicide or homicide, amongst many others. In fact, studies have also revealed from global evaluation of murders involving women, 38% of these murders were committed by a current or former intimate partner[33]

[31] Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" https:// www.aho.int/about/mission/en/ (accessed 17 January, 2019)

[32]https://www.who.int/news/item/27-05-2016-sixty-ninth-world-health-assembly-update, (accessed 30 November 2020).

[33] Ellsberg, Jansen , Heise , Watts and Garcia-Moreno C, 'Intimate Partner Violence and Women's Physical and Mental Health in the WHO Multi-Country Study on Women's Health and Domestic Violence: An Observational Study' (2008) 371 Lancet 116;

'Pallitto CC, García-Moreno C, Jansen HAFM, Heise L, Ellsberg M, Watts C and WHO Multi-Country Study on Women's Health and Domestic Violence, "Intimate Partner Violence, Abortion, and Unintended Pregnancy: Results from the WHO

Several causal factors have been accrued to Intimate Partner Violence (IPV) victimization. Some of the known individual level risk factors range from being of a young age, little or no education, financial dependence on partner, unemployment, alcohol use and the attitude towards IPV.[34] Growing evidence exists in establishing an association between justification and exposure to IPV, as a means of describing

Multi-Country Study on Women's Health and Domestic Violence" (2013) 120 Int. J. Gynecol. Obstet. 3, http://www.ncbi.nlm.nih.gov/pubmed/22959631 (accessed 14 January 2019).

Coker AL, Davis KE, Arias I, Desai S, Sanderson M, Brandt HM and Smith PH, "Physical and Mental Health Effects of Intimate Partner Violence for Men and Women." (2002) 23 Am. J. Prev. Med. 260, http://www.ncbi.nlm.nih.gov/pubmed/12406480 (accessed 14 January 2019).

Ludermir AB, Schraiber LB, D'Oliveira AFPL, França-Junior I and Jansen HA, "Violence against Women by Their Intimate Partner and Common Mental Disorders" (2008) 66 Soc. Sci. Med. 1008, http://www.ncbi.nlm.nih.gov/pubmed/18178299 (accessed 14 January 2019).

Devries KM, Mak JYT, Child JC, Falder G, Bacchus LJ, Astbury J and Watts CH, "Childhood Sexual Abuse and Suicidal Behavior: A Meta-Analysis" (2014) 133 Pediatrics e1331, http://www.ncbi.nlm.nih.gov/pubmed/24733879 (accessed 14 January 2019).

Devries K, Watts C, Yoshihama M, Kiss L, Schraiber LB, Deyessa N, Heise L, Durand J, Mbwambo J, Jansen H, Berhane Y, Ellsberg M, Garcia-Moreno C and WHO Multi-Country Study Team, "Violence against Women Is Strongly Associated with Suicide Attempts: Evidence from the WHO Multi-Country Study on Women's Health and Domestic Violence against Women" (2011) 73 Soc. Sci. Med. 79, http://www.ncbi.nlm.nih.gov/pubmed/21676510 (accessed 14 January 2019).

Devries KM, Mak JY, Bacchus LJ, Child JC, Falder G, Petzold M, Astbury J and Watts CH, "Intimate Partner Violence and Incident Depressive Symptoms and Suicide Attempts: A Systematic Review of Longitudinal Studies" (2013) 10 PLoS Med. e1001439, http://www.ncbi.nlm.nih.gov/pubmed/23671407 (accessed 14 January 2019).

[34] Jewkes R, "Intimate Partner Violence: Causes and Prevention" (2002) 359 Lancet 1423, https://www.sciencedirect.com/science/article/pii/S0140673602083575 (accessed 14 January 2019).

Lawoko S, "Predictors of Attitudes Toward Intimate Partner Violence" (2008) 23 J. Interpers. Violence 1056, http://journals.sagepub.com/doi/10.1177/0886260507313972 (accessed 14 January 2019). Uthman *et al.*

attitude towards IPV. Studies acclaim an attitudinal variation to IPV, occurring among African men and women[35]

The public or society's attitude is also a factor found significant, as it attributes the cause of the violence, to the victim. This in turn depicts a lack of sympathy or insensitivity towards the victim, as the victim is blamed for the violence[36]. In the event of this, the resultant effect are the belittling of subsequent incidences, perception of the events as being 'deserving' by the victims or 'understandable' - for example in the case of proactive behaviour by the woman, violence by the man is justified and therefore legitimate, as well as making excuses for the perpetrators of the violence, by the victims.[37]

In the Nigerian setting, more women than men have justified IPV or viewed it as deserving especially when they commit atrocities like leaving the house without informing their husbands, or in the case of

[35] O.A., Uthman, S., Lawoko and T., Moradi, "Factors Associated with Attitudes towards Intimate Partner Violence against Women: A Comparative Analysis of 17 Sub-Saharan Countries" (2009) 9 BMC Int. Health Hum. Rights 14, http://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/1472-698X-9-14 (accessed 14 January 2019).

[36]Kogut T, 'Someone to Blame: When Identifying a Victim Decreases Helping' (2011) 47 J. Exp. Soc. Psychol. 748, https://www.sciencedirect.com/science/article/pii/S0022103111000394?via%3Dihub via (accessed 14 January 2019).

[37] Stockman JK, Lucea MB, Bolyard R, Bertand D, Callwood GB, Sharps PW, Campbell DW and Campbell JC, "Intimate Partner Violence among African American and African Caribbean Women: Prevalence, Risk Factors, and the Influence of Cultural Attitudes" (2014) 7 Glob. Health Action 24772, http://www.ncbi.nlm.nih.gov/pubmed/25226418 viewed 14 January 2019;

Gracia E and Herrero J, "Acceptability of Domestic Violence against Women in the European Union: A Multilevel Analysis" (2006) 60 J. Epidemiol. Community Heal. 123, http://www.ncbi.nlm.nih.gov/pubmed/16415260 viewed 14 January 2019;

Abramsky T, Watts CH, Garcia-Moreno C, Devries K, Kiss L, Ellsberg M, Jansen HA and Heise L, "What Factors Are Associated with Recent Intimate Partner Violence? Findings from the WHO Multi-Country Study on Women's Health and Domestic Violence" (2011) 11 BMC Public Health 109, http://www.ncbi.nlm.nih.gov/pubmed/21324186 viewed 14 January 2019.

them, neglecting their children[38]. Although, in some circumstances, more men justified IPV than women. Younger men in the same setting seem to justify abuse and this view can be explained by the Social learning theory which describes that young people learn and accept physical abuse of women as a punishment for their bad behaviour.

According to WHO, half of mental health disorders start at adolescence but most cases go undetected and untreated?[39] This is because people ignorantly attribute mental ill health to outright insanity or lunacy. If these early cases of mental ill health which manifest in form of depression, anxiety disorders, eating disorders, schizophrenia, and addictive behaviours are left untreated, they extend into adulthood and thereafter affect educational attainments, employment, relationships and even parenting.

In a reported study, the presence of psychiatric illness among women and the acceptance of the opinion that their husband can beat them have been found as predictors to violence.[40] Another study with the same view reported that women with Chronic Mental Illness (CMI) were two to five times more likely to experience emotional, physical and sexual IPV than men with CMI. The case of sexual IPV against women had the highest prevalence rate. When the data of women with CMI was compared with women without CMI, the same study found out that 30 in 1000 women with CMI reported sexual assault by a

[38] Okenwa-Emegwa L, Lawoko S and Jansson B, 'Attitudes Toward Physical Intimate Partner Violence Against Women in Nigeria' (2016) 6 SAGE Open 215824401666799, http://journals.sagepub.com/doi/10.1177/2158244016667993 viewed 14 January 2019.

[39] https://www.vanguardngr.com/2018/10/half-of-mental-health-disorders-start-at-adolescence-who/

[40] Almiş BH, Kütük EK, Gümüştaş F and Çelik M, "Risk Factors for Domestic Violence in Women and Predictors of Development of Mental Disorders in These Women." (2018) 55 Noro Psikiyatr. Ars. 67, http://www.ncbi.nlm.nih.gov/pubmed/30042644 viewed 14 January 2019.

partner, as compared to 4 in 1000 women without CMI within a one year period.[41]

The question is 'How does the law protect a woman who believes due to her poor state of mental health or chronic mental illness that she deserves to be punished or violated by an intimate partner due to her misconduct?'

Another case study in Nigeria is that of a woman who confessed to her husband that she was unfaithful to him and could not keep it on her conscience anymore. She begged for her husband forgiveness. The husband violently abused her after this confession at any slight opportunity. When the woman sought counselling, she believed that the abuse she was facing was due to her own fault and that it was actually God's way of punishing her. Even though everyone has a past, however due to some error in religious ideologies or mental malady, certain victims of abuse are convinced that the abuse they are experiencing is justified. Abusers take advantage of this dysfunctional state of mind. According to one victim of violent abuse, she said, 'until I started believing in my heart that I am worthy of love, respect and dignity, I was not able to deliver myself from my abusers.'[42]

d. Religion and Domestic Violence

Violence against women has prevailed in Africa due to deeply ingrained dogma reinforced by the belief that condoning such violence is a sign of "deep spirituality" on the part of the violated women due to the patriarchal nature of society. A study among the Catholics in Kenya revealed that pre-marital counselling programmes did not reduce the incidence of domestic violence, among the couples, after engagement in marital union. A high prevalence rate of violence

[41]Khalifeh H, Oram S, Trevillion K, Johnson S and Howard LM, "Recent Intimate Partner Violence among People with Chronic Mental Illness: Findings from a National Cross-Sectional Survey." (2015) 207 Br. J. Psychiatry 207, http://www.ncbi.nlm.nih.gov/pubmed/26045349 viewed 14 January 2019.
[42]Abiola, A., Abuse is Never Justified: Realities of Change. (2018) St. Paul's publishing house,ISSN:978-978-52519-0-6, 72-75

against women occurred among the Catholic Church faithful within the age bracket 18 -35 years[43].

Other contributing factors linked to justification of abuse by victims, include the protection of the marriage institution from collapsing regardless of the presence of abuse. Certain Christian women are of the perceived concepts of 'women submission' and male leadership, the notion of the sanctity of marriage, and the connection between the values of suffering, to the virtue of forgiveness.[44]

Another study on Christian male perpetrators of domestic violence revealed that the men saw masculinity and power as being interrelated, and their spouses in support of the perpetrated abuse deferred to submission and male leadership. The concept of wifely submission to husbands as the head of their home, was one of the factors that informed their decision to either remain in or returned to marriages that had husbands perpetrating domestic violence[45].

Against the above background therefore, there is a need to identify and eradicate religious practices that justify, brainwash or erroneously orientate women to believe that certain abuses against them are deserved by enacting legislation that regulate the contents of faith based counselling sessions, by providing training in human rights and protect women even when they acquiesce to violence. While the law must allow for freedom of religion, there must be pro-activeness on

[43] E.N., Mburu 'Catholic Church's Pastoral Counseling Role in Addressing Domestic Violence against Women in Marriage in Muranga County, Kenya' (2018) 5 African Res. J. Educ. Soc. Sci. 5(2), 2018, http://arjess.org/social-sciences-research/catholic-churchs-pastoral-counseling-role-in-addressing-domestic-violence-against-women-in-marriage-in-muranga-county-kenya/ viewed 14 January 2019.

[44] N., Knickmeyer, Levitt H and Horne SG, 'Putting on Sunday Best: The Silencing of Battered Women within Christian Faith Communities' (2010) 20 Fem. Psychol. 94, http://journals.sagepub.com/doi/10.1177/0959353509347470 viewed 14 January 2019.

[45] *Ibid*.

the part of the law to regulate and rule out practices that stem from religious or cultural beliefs but which conflict with human rights.

6.0 Conclusion and Recommendations

Every human being is a product of intercourse between the gametes whether there is a social relationship or it is purely scientific. Stable and mentally balanced individuals are raised by either a woman or a man or both sexes. Since the quality control of humans is largely left at the mercy of families, there is a need to provide the necessary education required to operate such an institution as marriage. The education cannot be left to religious bodies without State input and regulations that will ensure that the content of such information is consistent with the principles of natural justice, equity and good conscience.

It is strongly recommended that mental health status checks be embedded into such pre-marital education as well as marital counselling to promote healthy lifestyle choices amongst partners and spouses.

States are enjoined to provide regulatory framework not just to regulate customary practices but faith based marriage counselling done in "spiritual" houses that encourage and promote dogma which reproduce paradigms that cause the woman to perceive any form of violence done against her as deserved.

Adherence to the Rule of Law: From Associated Gas Re-Injection Act 2004 to Flare Gas (Prevention of Waste and Pollution) Regulations 2018

Temilade O. Jolaosho (Ph.D)[1]

Abstract

The rule of law is intrinsically correlated with the effective implementation and enforcement of relevant laws. The World Justice Project Rule of Law Index 2019, through the use of expert surveys which evaluated the rule of law adherence worldwide by measuring performance across regulatory enforcement and other factors, found that regulatory enforcement was one of the chal-lenges the international community was confronted with. With inference to this paper, by anchoring on the 6th World Justice Project index (regulatory enforcement), the extent to which legislation addressing gas flaring are enforced was examined. Laws regulating gas flaring in Nigeria, such as the Associated Gas Re Injection Act 2004 and the Flare Gas (Prevention of Waste and Pollution) Regulations 2018 were examined. The paper found that there has been lax enforcement of the legislation, showing qualitatively comparable but quantitatively improved effects on gas flaring redu-ction in Nigeria. It concludes that strict adherence to the rule of law is paramount to effective enforcement of the laws.

Keywords: Associated Gas Re-Injection Act 2004, Flare Gas (Prevention of Waste and Pollution) Regulations 2018, Gas flaring, Regulatory Enforcement, Rule of law.

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1.0 Introduction

The origin of the rule of law can be traced to Edward Coke, the Chief Justice of England during the reign of King James I. Thereafter, the doctrine of the rule of law was advanced by A.V. Dicey.[2] Dicey stated that the rule of law meant that no one is above the law; hence the law is paramount over government. Deliberations on the rule of law are complemented with justice reflections. Justice is a recurring discussion in diverse legal contexts which involve health, environment and the use of natural resources. The term "justice" is an ambition by itself and crucial for the effectiveness of policies and laws meant to protect health and the environment of people regardless of their age, race, pigmentation.[3]

The rule of law index is a quantitative tool for measuring adherence to the rule of law in practice. The World Justice Project Rule of Law Index is the world's leading source for original and independent data on the rule of law. World Justice Project defines the rule of law as 'a durable system of laws, institutions and community commitment where the four universal principles of accountability, just laws, open government and accessible and impartial dispute resolution are upheld.'[4]

The World Justice Project (WJP) released the World Justice Project Rule of Law Index 2019, which is an evaluation of rule of law adherence worldwide, based on expert surveys in 126 countries.[5] The index report measures countries' rule of law performance across eight

[2]AV Dicey, An Introduction to the Study of the Law of the Constitution (3rd Edition London Macmillan and Co and New York 1889) 171-192.

[3]J Ebbesson 'Dimensions of justice in environmental law' in J Ebbesson and P Okowa (eds.) *Environmental Law and Justice in Context* (Cambridge University Press 2009) 1-3.

[4]What is the Rule of Law ?- The World Justice Project <http://www.worldjusticeproject.org/about-us/overview/what-rule-law> accessed 27 July 2019.

[5]WJP Rule of Law Index 2019-World Justice Project <https://www.worldjusticeproject.org/wjp> accessed 27 July 2019.

primary rule of law factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice.[6] 'Regulatory Enforcement' is the 6th indicator (the WJP Rule of Law Index and it measures the extent to which regulations are fairly and effectively implemented and enforced.

Gas flaring has remained a recurring decimal in Nigeria. Nigeria has estimated natural gas reserves of approximately 190.4 trillion cubic feet (tcf) and 37.0 thousand million barrels of proven crude oil reserves with a production capacity of two thousand, one hundred and nine (2,109) thousand barrels per day as at end of 2019.[7]The U.S Energy Information Administration stated that Nigeria ranked fifth highest natural gas flaring country, down from the second position it held in 2011.[8]

Nigerian government had enacted several laws and regulations to curb gas flaring namely the 1969Petroleum (Drilling and Production) Regulations, the Associated Gas Re Injection Acts *etc*. However, despite these laws, gas flaring has continued and it is attributable to challenges encountered with enforcement of laws,[9] [10] the non-

[6] World Justice Project (WJP) Rule of Law Index 2019 <https://www.worldjusticeproject.org/rule-of-law- index> accessed 25 July 2019.

[7] Full Report- British Petroleum (BP) Statistical Review of World Energy 2020 69th edition<https://www.bp.com/pdfs> <https://www.bp.com/statisticalreview> accessed 20 June 2020.

[8] United States Energy Information Administration 'Nigeria Remains a Top Gas Flaring Country says EIA' The Guardian June 1, 2016 <http://w.guardian.ng>business-services>Nigeria> accessed 16 May 2018.

[9] CD Elvidge, MD Bazilian, M Zhizhin, T Ghosh , K Baugh and F Hsu, 'The Potential Role of Natural Gas Flaring in Meeting Greenhouse Gas Mitigation Targets' (2018) 20 Energy Strategy Reviews 156-162.

[10] E Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2(1) Journal of Energy, Climate and Environment 97-126.

deterrence of sanctions imposed for gas flaring[11] and insignificant monetary penalties.[12]

Strong rule of law requires that regulations are effectively enforced, while weak rule of law suggests the crucial requirement for adherence to the rule of law.[13] The scores from the WJP Rule of Law Index indicated a decline rather than improvement by additional countries in the overall rule of law performance for the second year in a row. This revealed an adverse descent toward weaker rule of law globally.[14] Neukom stated that "effective rule of law is the foundation for communities of justice, opportunity and peace." He also stated that "no country has achieved a perfect realisation of the rule of law. The WJP Rule of Law Index is intended to be a "first step in setting benchmarks, informing reforms, stimulating programs, and deepening appreciation and understanding for the foundational importance of the rule of law."[15] With respect to examining adherence to the rule of law on regulating gas flaring in Nigeria, this paper therefore examines the Associated Gas Re Injection Act 2004 to the Flare Gas (Prevention of Waste and Pollution) Regulations 2018, with a view to determine whether or not the rule of law has been adhered to and enforced.

[11]T O Jolaosho, 'Legal Framework for Gas Flaring Reduction in Nigeria' (Ph.D Thesis, University of Ibadan 2019).

[12]OJ Olujobi and T Olujobi,'Comparative Appraisals of Legal and Institutional Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector: How Satisfactory?' (2020) Environmental Quality Management <http://doi. org/10.1002/tqem.21680>accessed 29 July 2020.

[13]World Justice Project Rule of Law Index (n 5).

[14]'Rule of Law continues negative slide worldwide' WJP Rule of law Index 2019: Global Press Release 27 February 2019 <https://www.worldjusticeproject.org/news/wjp-rule-law-index-2019-global-press-release> accessed 27 July 2019.

[15]WH Neukom, (World Justice Project Founder and CEO) 2019. WJP Rule of Law Index 2019: Global Press Release 27 February 2019 <https://www.worldjusticeproject.org/news/wjp-rule-law-index-2019-global-press-release> accessed 27 July 2019.

2.0 Materials and Methods

The methodology adopted by this study was doctrinal. The doctrinal approach was complemented with the use of key informant interviews (KII) and questionnaire. Officers in the Department of Petroleum Resources, Nigerian National Petroleum Corporation and some legal experts were interviewed.

The primary sources consulted were the Constitution of the Federal Republic of Nigeria 1999 (as amended) and various statutes regulating the gas sector in Nigeria such as Flare Gas (Prevention of Waste and Pollution) Regulations 2018, Associated Gas Re Injection Act 2004, Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 2004. Secondary sources consulted were relevant law text books, proceedings of national and international conferences, peer reviewed journals, annual reports of multinational oil companies, newspaper reports, reported cases and internet materials related to the subject matter.

For the purpose of the study, purposive sampling was applied. A search engine *hg.org legal resources* was engaged. *Hg.org* is one of the very first online law and government sites, founded in 1995. The sample frame was drawn from the Nigeria National Petroleum Corporation Abuja, Department of Petroleum Resources, Lagos and some leading oil and gas legal consultants in Lagos, precisely Lekki, Victoria Island and Ikoyi areas. Firms such as Advisory Legal Consultants (ALC), Lekki, who prepared the National Gas Policy 2004, and which firm also negotiated the first gas supply transaction under the National Gas Master Plan (NGMP) were visited. Others were Century Energy Ltd. Lekki, AELEX Legal Practitioners and Arbitrators, Ikoyi, Templars, Victoria Island and Streamsowers and Kohns Legal Practitioners and Arbitrators, Victoria Island, who all provided the richest possible sources of information.

2.1 Data Collection

For this study, the data collection technique was through key informant interviews (KII) with four oil and gas legal experts and administration of a questionnaire to purposively selected respondents. Prior to conducting the interviews, the informed consent of the participants was obtained in line with the requirements of the University of Ibadan Social Science and Humanities Research Ethics Committee (SSHREC) which reviewed and gave full ethical approval for the study.

3.0 Nigerian Legal Framework

It is imperative to start by examining the Constitution of the Federal Republic of Nigeria, which is the grundnorm and supreme law, to which every existing legislation must conform, rather than being in breach of its provisions contained therein.[16]

3.1 Constitution of the Federal Republic of Nigeria 1999 (as amended)

Chapter two of the Constitution of the Federal Republic of Nigeria 1999 (as amended) conveyed fundamental objectives and directive principles of state policy. Section 17 (1) discussed the social objectives and directed that the national societal mandate was instituted on principles of liberty, impartiality and fairness. By virtue of the provisions of Section 17 (2) (d), gas flaring infringes on the rights of the people. The section provided that in continuance of societal order, exploitation of human or natural resources in any method whatsoever, for reasons other than the communal respectability or morality, will be prohibited.

Section 20[17] provides that the state would protect and improve the environment and also safeguard the water, air and land, forest and wild life of Nigeria. Distinguishing Section 17 from Section 20 draws

[16]Constitution of the Federal Republic of Nigeria1999 (as amended) s1(3).
[17]Constitution of the Federal Republic of Nigeria1999 (as amended).

attention to a cursory enquiry into the intendment of the law. Reference is made to the prohibition of exploitation of human or natural resources, which result in negative externalities, and by virtue of Section 162, legislative relief can be incorporated through the principle of derivation. By virtue of Section 6 (6) (c) however, a major shortcoming of the provisions of
Section 20 and 17 is revealed. They are non-justiciable due to the fact that they form part of the fundamental objectives and directive principles of state policies contained in Chapter 2 of the Constitution.

Section 20 referred to the responsibility of the state to protect, improve and safeguard the environment. Section 44 (3) provided that:

> the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Sections 20 and 44 (3) read together point to the salutary role of government in protecting the environment and safeguarding the natural resources deposited therein. Clearly, there is a clash of interests, as government is concurrently responsible for upholding the rights of all Nigerian citizens and indirectly involved in the exploitation. In essence therefore, government itself, apart from regulating the activities involved in the oil and gas sector, needs to be regulated.

3.2 Associated Gas Re-Injection Act[18]

This Act was transmitted as a decree in 1979. Section 3 (1) provides that by January 1, 1984, gas flaring is prohibited except with approval of the Minister of Petroleum in writing.

Section 3 (2) stated that:

> where the Minister is satisfied after January 1, 1984, that utilisation or re-injection is not appropriate or feasible in particular field(s), then he may issue a certificate in respect of the company specifying the terms and conditions as he may at his discretion choose to impose for the continued flaring of gas and also permit the company to continue to flare gas in the particular field(s) if the company pays the prescribed fees as the Minister may from time to time prescribe.

Oche[19] observed that Section 3 (2) (b) of AGRA rendered little assistance in actualising the endeavour to abolish flaring of gas in Nigeria. The said paragraph authorised the flaring of gas on the payment of the prescribed fees. Oche was however of the opinion that it appeared unfavourable to the objectives of the Act.

Section 4 (1) provided that authorisations for holders within precise fields with respect to the grant of such concessions should be penalised. Under circumstances where felonies were committed pursuant to Section 3, such person concerned was to ordinarily act in accordance with the statutory requirements. Subsection 2 required that the Minister might mandate the censorship of the entire privileges or portion of same with reference to any unusual individual in the direction of the fee for accomplishment and execution of an

[18]Cap A25 Laws of the Federation of Nigeria 2004.

[19]PN Oche, *Petroleum Law in Nigeria: Arrangement for Upstream Operations* (Jos Mono Expressions Limited 2003) 161.

anticipated scheme meant for re-injection or the mending or renovation of any tank situated within the field, apart from fines indicated in subsection 1, adhering strictly to good oil-field practice. Section 5 discussed the authority of the Minister to make regulations.

The Act purposed to exterminate flaring of gas in Nigeria. Etikerentse[20] stated that primarily, the emphasis of the law was for gas flaring to completely cease by January 1984. This however did not cease because all oil operators were excluded. He opined that the resolve of the ownership of associated gas was imperative for a truthful acquiescence with the requirements of the Act to be achieved. Atsegbua[21] stated that the Act was abortive in realising its resolve because oil companies found flaring of gas inexpensive than engaging in expensive gas re-injection projects.

3.3 Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 2004

The AGRA regulations of 1984 came into force on January 1, 1985.[22] Section 1 deals with the conditions for issuance of certificate for continued flaring of gas as follows:

a. Where more than 75 percent of the produced gas is effectively utilised or conserved.
b. Where the produced gas contains more than 15 percent impurities such as: N_2, H_2S, $C0_2$*etc.* which render the gases unsuitable for industrial purposes.
c. Where an on-going utilisation program is interrupted by equipment failure, provided such failures do not occur too frequently, from point of

[20]G Etikerentse, *Nigerian Petroleum Law* (London and Basingstoke Macmillan Publishers Ltd 1985) 114.
[21]L Atsegbua, *Oil and Gas Law in Nigeria: Theory and Practice* 2nd Edition (Benin New Era 2004) 199.
[22]Now contained in the Laws of the Federation of Nigeria 2004.

view of the Minister, and the period of interruption is not more than 3 months).

d. Where the ratio of the volume of gas produced daily to the distance of the oil field from the nearest gas line or possible utilisation point is less than 50,000 standard cubic feet / kilometre.
e. Where the Minister in appropriate cases as he may deem fit, orders the production of oil from oil fields that do not satisfy any of the conditions specified in these regulations.

The authorities to evaluate, modify, rework, augment or erase some of these rules and guidelines as the Minister might reckon to be apt, were dealt with in Section 2. These regulations modified the present statute to offer half-finished insusceptibilities for flaring in definite situations. Another amendment additionally braced the provisions of the law in 1985 [23] and fortified an acceptable sum of 2 kobo for each 1000 standard cubic feet (scf) of gas flared. Afterwards, the fine was increased in 1988 to $11dollars per 1000 scf of gas flared. Thereafter, AGRA 2004 and AGR (Amendment) Act 2004 were enacted. The submission of detailed plans for gas utilisation by IOCs involved in operations in the country, by virtue of the statutes was mandatory. The flaring of associated gas devoid of the inscribed authorisation of the Minister of Petroleum Resources (MPR) was outlawed by virtue of the statutes. These measures, nonetheless, were not deterrent enough to eradicate flaring of gas by the oil companies.

In the case of *Jonah Gbemre vs. SPDC &Ors.*,[24]the plaintiff, Jonah Gbemre represented the Iweherekan community in the implementation of their fundamental rights against Shell, NNPC and the A.G

[23]Associated Gas Re-Injection (Amendment) Decree 1985.

[24]Unreported Suit No..FHC/B/CS/53/05. This was the historic judgment pronounced against Shell, and by which Shell was compelled to end the flaring of gas which had, all along, been declared illegal in Nigeria. This decision was however overturned on appeal at the Court of Appeal.

Federation as respondents. In his assertion, the plaintiff purported that the unremitting flaring of gas of the 1st and 2nd respondents while carrying out their oil survey and manufacture undertakings, is a desecration of their right to existence and self-respect under the provisions of the 1999 Constitution (as amended) and buttressed by Articles 4, 6 and 24 of the ACHPR. Additionally, the plaintiff declared that Sections 3 (2) (a), (b) of the AGRA and Section 1 of the AGR Regulations, which allowed unrelenting flaring of gas in Nigeria, remain impulsive with reference to the aforesaid applicant's rights. The court further held that Section 3 (2) (a) and (b) of the AGRA and Section 1 of the AGR (Continued Flaring of Gas) Regulations were insignificant and invalid for their discrepancy with the applicant's prerogative to existence and self-esteem of mortal persons, as protected in the constitution. The court ordered for the defendants to be controlled from further flaring gas in the affected community.

3.4 National Environmental Standards Regulations and Enforcement Agency (Establishment) Act and Amendment[25]

NESREA is the key federal organisation empowered with the fortification and improvement of Nigeria's environment. Section 7 deliberately eliminates the oil and gas segment from the NESREA's authority. However, by virtue of Section 21 of the Act, with respect to ozone protection, National Oil Spill Detection Response Agency (NOSDRA), another relevant authority, was empowered over oil companies, where harmful substances released to the environment had effects which may reasonably be anticipated to endanger public health.

The Act which was first enacted in 2007, was amended in November 2018, by the NESREA (Establishment) Amendment) Act (Amendment Act) to further empower the NESREA in the protection

[25]NESREA Act No. 25 2007 was amended by NESREA (Establishment) Amendment) Act (Amendment Act) 2018.

and development of the environment. The Amendment Act gave the agency discretionary powers and authority to tackle environmental crimes, review the conditions of appointment of some council members, increase penalties and permit the search of premises without warrant.

3.5 Flare Gas (Prevention of Waste and Pollution) Regulations 2018

The regulations were issued on June 28, 2018 and made available by the Federal Executive Council. These regulations remain pertinent to owners of oil fields, comprising borderline field owners. The intendment of the regulations was to make available a legal framework to fortify the environment against the effects of gas flaring, avert unending discard of associated gas and generate societal and profitable paybacks from gas flared.[26] Flaring of gas is unambiguously outlawed and the regulations further presented reporting obligations, whereby gas producers were authorised to make flare gas data available at any given time, while similarly yielding once-a-month reports to the Department of Petroleum Resources.[27]

The regulations assured the utilisation of flare gas by authorising the Minister to award certifications which would absolutely license holders of such permits to take flare gas for and as representatives of the Federal Government of Nigeria, from one or more sites.[28]The Flare Gas (Prevention of Waste and Pollution) Regulations 2018 provide for $2 for every 1,000 scf of gas flared payable by gas producers who account for over 10,000 barrels of oil production daily. However, producers who do not yield up to 10,000 barrels of oil production daily are to pay 50 cents per 1,000 scf of gas flared. A supplementary disbursement of $2.50 for letdown to yield precise flare statistics, make available right of entry to flare sites and append signature on link pacts.

[26]Regulation 1 (a) – (d) Flare Gas (Prevention of Waste and Pollution) 2018.
[27]Regulation 16 and 17 Flare Gas (Prevention of Waste and Pollution) 2018.
[28]Regulation 2 (2) Flare Gas (Prevention of Waste and Pollution) 2018.

In accordance with the reporting obligations introduced by the regulations, it is mandatory for gas producers to keep, maintain daily record of date, time, duration, rates, volume, gas source and flare type and yield the respective records once a month to DPR. Flare Gas Permit Bid rounds were discussed in detail in the regulations. The regulations cater for attractive punitive measures such as fines, custodial sentences, suspension of operations and or revocation of the functional license or permit.

The recent position on the proficiency of Nigeria with respect to harnessing flared gas to stimulate economic growth and drive investments in oil producing communities was initiated when the Federal Executive Committee approved the Nigerian Gas Flare Commercialisation Programme (NGFCP). The initiative was launched by the Minister of State for Petroleum Resources on December 13, 2016.[29]The initiative promises to bring on board economically viable gas flare capture projects, wherein flare gas would be offered for sale through transparent and competitive bid processes.[30]

4.0 The Flare Penalty System

The flare penalty scheme in Nigeria was established in 1979, with the enactment of the AGRA 1979 by the federal government. A flare-out date of January 1, 1984, prescribed by the Act, made it unlawful for any company to flare gas beyond the flare-out date without the authorisation of the Minister. The AGRA suggested endorsements[31] for letdown to stand by the requirements of the Act, but these were refuted by ensuing guidelines which brought about the monetisation of gas flaring.[32]

[29]Nigerian Gas Flare Commercialization Programme (NGFCP) 2016 <http://www.ngfcp.gov.ng> accessed 7 March 2019.
[30]ibid
[31]Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 2004 s 4(1).
[32]A fine of ten naira per 1,000 scf of gas flared was imposed since 1998.

The AGR (Continued Flaring of Gas) Regulations 1984 was carefully shadowed by the AGR (Amendment) Decree 1985. Nwanji[33] opined that the Act and the ensuing guidelines did not seek to outlaw gas flaring, rather, that the Act and the regulations purposed to regulate gas flaring to a very large extent. He opined that the resolve of the Act and regulations was revealed both in the draftsman's expression of the provisions of the law and in its application since inception.

This latter legislation allowed continued flaring of gas after January 1 1984 by international oil companies, in fields that the Minister was contented that utilisation or re-injection of the gas created was not practicable, consequently resulting in the issuance of a certificate (known as 'Gas Flaring Certificate' or 'GFC').

The yardstick for the issuance of the gas flaring certificate is distinct. Flaring of gas is allowable where above 75 percent of the gas manufactured is commendably utilised or preserved and where the manufactured gas is comprised of above 15 per cent scums such as: N_2, H_2S, $C0_2$, which brand the gases inapt for industrial purposes. Flaring is similarly allowable where on-going utilisation programs are interjected by equipment failure with the proviso that such failures do not ensue too recurrently, from the Minister's view point, and the period of disruption does not exceed 3 months, and in cases where less than 50,000 standard cubic feet/kilometre is the proportion of gas produced daily, in relation to the expanse of the oil field from adjoining gas lines or possible utilisation points. Flaring is also allowable in applicable circumstances, where subject to the Minister's discretion, orders the manufacture of oil from oil turfs which contravene the state of affairs specified in the guidelines.

The author describes the provision as lopsided and unrealistic because equipment failures occur often times as a result of unforeseen circumstances caused by wear and tear. In reality, equipment failures

[33]U E Nwanji, 'Gas Flaring: Legal and Environmental Perspectives'(2009) 1(1) Nigerian Journal of Petroleum Natural Resources and Environmental Law 26-44.

are emergency cases and the preventive measure which the IOCs and indigenous companies can undertake, is to ensure that their equipment are properly maintained and serviced regularly. This would guard against unnecessary interruption or equipment failure.

Nwanji[34] argued that the AGR (Continued Flaring of Gas) Regulations 1984 made pursuant to the AGRA was a rehash of the earlier legislation, although it further highlighted restrictive provisions which specified when gas flaring may be permissible. He further argued that the provisions of Section 4 (e) dampened the notable provisions of the regulations. He pointed out that subsection (e) stands as a falsification to attaining gas flare out and that the 1984 regulations would have excluded the legislative basis for gas flaring in Nigeria. Arguing further, Nwanji was of the view that it was erroneous for the law to grant the Minister extensively wide and far reaching powers to order production of oil from fields which do not meet up with any of the conditions in the regulations, without specifying a time frame.[35] He argued that this provision completely disparaged the legislation. The law would have been better suited if the regulations imposed pegs or limitations on the wide discretionary powers of the minister.

AGRA and the regulations made pursuant thereof with the Flare Gas (Prevention of Waste and Pollution) Regulations are the main legislation which specifically address the issue of gas flaring in Nigeria. Two prominent points which are noteworthy about the AGRA, are that it allowed permissible flaring of gas and fixed a date (Jan 1 1984) for the stoppage of all impermissible gas flaring. With respect to permissible gas flaring, the legislation provided that with the prior approval of the minister through the issuing of a gas flaring certificate, a gas producer may flare gas. While on the other hand, it prohibited the flaring of any kind of gas, devoid of the minister's prior acquiescence.

[34]ibid 31.
[35]ibid 32.

It is instructive to note that despite the provisions of the AGRA, gas is still habitually being flared in Nigeria and in lieu of the gas certificate regime; there is an administrative monetary penalty regime in place. Although the law prescribed sanctions and penalties, these have however failed as they have not deterred defaulters. Also, most IOCs and indigenous companies have initiated inexpensive means to pay the fine and flare gas, than invest in gas utilisation infrastructure. In essence therefore, one can say that it has not been as effective as it ought to be perhaps due to non-adherence in terms of the confines, to the requirements of the law by those answerable to implement it.

Bamisile[36] alluded to the fact that the AGRA was the key legislation which purposed to abate gas flaring and opined that the Act had not been fruitful at ending gas flaring in Nigeria. Udok and Akpan[37] examined the legislative procedures necessary for regulating the oil and gas industry. They were however of the view that there is absence of explicit lawful structure barring gas flaring in Nigeria. They opined that AGRA and regulations made there under were not effective as they merely provided monetary penalties for the unrelenting flaring of gas by the IOCs and indigenous companies operating in Nigeria. The authors also argued that presently in Nigeria, the environmental fortification against the effect of gas flaring had no legislative backing, except for the judicial proclamation made in the case of *Jonah Gbemre,* which decision, was later reversed on appeal.

Dimowo[38] argued that the gas re-injection project from late 70s to late 80s was merely a formation which required statutory backing and guarantee on the both the sides of the government and the oil companies. Dimowo drew attention to the provisions of section 3 (1) of the AGRA and opined that this was the toughest provision of the

[36]A Bamisile, 'A Critical Review of Petroleum Industry Bill 2012 Provisions on Gas Faring in Nigeria'(LL.M Dissertation, Aberdeen Business School 2015).
[37]U Udok, and EB Akpan,'Gas Flaring in Nigeria: Problems and Prospects'(2017) 5(1) Global Journal of Politics and Law Research 116-128.
[38]F Dimowo, 'The Liquefied Natural Gas Act and 2004 Gas Flaring Deadline in Nigeria Oil Industry' (2008) 9(1) Nigeria Education Law Journal 189-204.

Act as firms affianced in the production of oil and gas were prohibited after January 1st, 1984 from flaring associated gas.[39]Ayoola[40] examined the hypothetical perspective for gas flaring and its consequence for ecological accounting. Evaluation criteria were based on environmental policies, objectives and targets, emission information and negative information and also environmental audits. Ukala[41] maintained that gas flaring eradication was inefficacious because of the failure to implement gas flaring legislation in Nigeria. Ukala noted the first attempt by the federal government around 1979, to explicitly tackle the issue of gas flaring, by articulating the AGRA.

5.0 Assessing the Laws Aimed at Reducing Gas Flaring In Nigeria

Gas utilisation schemes have been encouraged and promoted. With the need to attain the national mandate for flare out by 2020, Nigeria has prioritised the commercialisation of gas flared towards streaming to the internal marketplace through the ongoing NGFCP initiated by the Minister of Petroleum Resources.

This paper, while aligning with previous studies, also contends that the AGRA and Regulations made pursuant thereto, mainly addressing gas flaring in Nigeria, did not effectually tackle gas flaring in Nigeria. This paper suggests that the problem may be attributed to the approach of government at the time. The approach taken by government was warped and there was a lack of foresight on the prospects of the natural gas market in Nigeria. This is because at the onset of oil operations in Nigeria, oil was the main focus and natural gas was discovered coincidentally in the process, moreover, 'zero flare regime' did not exist and the utilisation of gas was not a

[39]ibid 192.

[40]T J Ayoola 'Gas Flaring and its Implication for Environmental Accounting in Nigeria' (2011) 4(5) Journal of Sustainable Development 244-250.

[41]E Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2 Washington and Lee Journal of Energy, Climate and Environment 97-126.

condition of the licences of the IOCs at the time of the grant of such licences. Subsequently, attempts to impose a 'zero flare regime' have proven difficult and have been faced with much resistance from the IOCs who prefer to pay the fine than comply with the 'zero flare policy.' Ighalo et al[42] examined the negative effects of gas flaring and captured the present initiative of government to harness the enormous gas reserves in terms of Nigeria's socio-economic environment.

On the ways the laws have discouraged gas flaring, one of the senior management officials interviewed at the Department of Petroleum Resources (DPR) Headquarters, Lagos said: " The Associated Gas Re-Injection Act discouraged gas flaring. The prohibition date for flaring gas was 1984. It was later shifted several times and the latest flare out date is 2020. However, although the Act itself provides for stiff penalty for flaring of gas without exemption certificate, we have not been able to enforce that penalty. The Act further provided for forfeiture of lease."

The respondent further said:

> Lack of political will to enforce the law is another issue. To get exemption certificates, the law would charge some money. The Associated Gas Re-Injection Act prescribed ten (10) naira per 1,000 scf of gas flared, for exemption certificates. This was however not prohibitive enough as most international oil companies (IOCs) prefer to flare and pay the fine rather than stop the flaring. We tried to increase it to $3.50 by government policies, but this move faced a lot of resistance from the international oil companies. Government was not consistent and the will to enforce was absent, those are some of the reasons why gas

[42]J O Ighalo, WP Enang and QA Nwabueze, 'Re-evaluating the Problems of Gas Flaring in the Nigerian Petroleum Industry' (2020) 147 World Scientific News 76-87.

> flaring has not stopped all this while. When licenses were issued, there were not enough clear programs for gas utilisation because the interest then was in oil. Then we had licenses granted from 1960s downward. For example, the case of Shell and other international oil companies (IOCs), wherein it was initially not a condition of their license that they must utilise gas. The idea of utilisation of the gas was very recent and to get them to utilise gas was very difficult.

In discussing other means of discouraging gas flaring, he further said:

> The law prescribed sanctions and penalties. These have however failed as they have not deterred defaulters. Alternatively, we are now looking at a commercial arrangement (currently in place), whereby someone else can take the gas on behalf of the government to utilise and turn it to money.

On the efficacy of the AGRA, one of the management officials interviewed at The Department of Petroleum Resources (DPR) Headquarters, Lagos said:

> I am not aware if there is any study, report or assessment of the legislation discussing the efficacy of the AGRA. However, two very important points to note about the AGRA are that it allowed permissible gas flaring and secondly, it set a date (Jan 1 1984) for the stoppage of all impermissible gas flaring. What is permissible gas flaring?? With respect to permissible gas flaring, the legislation provides that with the prior approval of the minister through the issuing of a gas flaring certificate, a gas producer may flare gas. While on the other hand, it prohibited the flaring of any kind of gas, without the

> prior permission of the minister. Secondly and importantly, note that despite this Act however, gas is still routinely being flared in Nigeria and in lieu of the gas certificate regime, there is in place an administrative monetary penalty regime in place. In essence, it has therefore not been as effective as it ought to be perhaps due to the non-adherence in terms of the limitations, to the provisions of the law by those responsible to enforce it.

The respondent concluded by saying: "Obviously, no, the law has not been able to adequately regulate gas flaring in Nigeria as already mentioned." A principal consultant at one of the oil and gas advisory firms visited in Lagos said: "No, the laws have not been able to meritoriously control gas flaring in Nigeria. The law does not say much and is not exactly targeted at penalising gas flaring, even at that, the government has not really been able to effectively and satisfactorily regulate gas flaring in Nigeria."

Some of the inherent flaws enumerated by the respondents were; meager gas infrastructure or derisory endowment to embolden investment because the fiscal terms relating to gas utilisation are not full-bodied enough for the licensees to put in the requisite resources needed to utilise gas; the historic fusion of oil and gas production has hindered gas production and as a result, gas flaring has been difficult to curtail because it is a consequence of oil production; dearth of penalties ample to dissuade flaring; lack of clear and concise provisions for the utilisation of gas to encourage utilisation and discourage flaring; under development of local gas market; lack of inducements to utilise gas; poor monitoring and implementation of the extant laws to ensure maximum compliance and absence of political resolve on the part of the federal government through the regulatory bodies in ensuring compliance with the existing laws.

One of the management staff of Nigeria National Petroleum Corporation (NNPC) Abuja said:

> In my opinion, the major challenge faced with stopping gas flaring is the lack of infrastructure necessary for monetisation or utilisation of gas particularly for the domestic gas market. The control of the production of gas by the international oil companies who have a bias for export of gas predominantly in the form of liquefied natural gas (LNG) has restricted the entrance of new players as most of the gas resources are currently within existing oil mining leases held by the international oil companies (IOCs). Perhaps a provision in the Petroleum Industry bill for gas mining leases, separate from oil mining leases would be helpful particularly for the large volumes of non-associated gas lying in situ within existing oil mining leases.

A management official at the Department of Petroleum Resources (DPR) Lagos said: "Initially, there was no zero flare. It was not part of the condition of their license at the time of grant to regulate gas flaring. So trying to regulate now is difficult. It would have been very difficult for the IOCs to aggressively pursue and implement gas utilisation projects in the first place. The federal government did not envisage the necessity for this at the initial stage when they were granting the licenses. Secondly, the sanctions are not adequate." An intermediate cadre private practitioner of one of the firms visited said:

> In my opinion, the Associated Gas Re-Injection Act is grossly insufficient to address the problem of gas flaring in Nigeria. It creates a duty for implementation of the re-injection of all associated gas by a certain date. The penalty is for revocation of concessions granted to the companies. It is however, a notorious fact that the cut-off date for implementation has continued to

> be shifted and the penalties have never been implemented against any offenders, yet companies operating in the oil and gas sector continue to flare gas.

It is instructive to note from the above statements, that penalties not being implemented against any offenders and failure to compel international oil companies (IOCs) to obtain exemption certificates reveals the lack of political will on the part of government to put an end to gas flaring in Nigeria. When there is a failure on the part of the international oil companies (IOCs) to obtain exemption certificates, that automatically implies that implementing penalties against offenders would be an herculean task for the regulatory bodies.

In order to reduce gas flaring, a flare penalty was introduced. However, the sanctions were clearly inadequate and also not deterrent enough. Initially, the penalty started at one (# 1) naira per 1,000 standard cubic feet (scf) of gas. It was thereafter increased to ten (₦10) Naira. There was an attempt to increase the fine to US dollars three and fifty cents ($ 3.50) by government policy, but this move faced a lot of resistance from the affected companies. There was obviously no moral justification to increase the penalty and government was not consistent with the attempt to eradicate gas flaring. Under the flare penalty regime, industry operators are required to individually evaluate their respective flare penalties. This voluntary evaluation has however not been verified to be ideal, in the face of the current realities, where input variables for assessing and paying the flare penalty are inconsistently applied by the operators. Some have been found to pay less than the required amounts due while others pay excessively.

An intersection of functions exists between some of the regulatory agencies and the occasioning conflict in authority leads to upheaval in efforts to address gas flaring activities within the oil and gas industry in Nigeria. In order to prevent clash of functions, clearly indicated

functions for each regulatory agency connected with oil and gas operations, is very imperative.

Poor reporting and monitoring of flared gas have posed a major challenge to tackling gas flaring in Nigeria. The practice in the industry is, that DPR, has the fiat to track and measure the volume of gas flared in order to impose proportionate fines. It is therefore imperative that DPR has the requisite material and human capacity to independently report and monitor gas flares. Onyeabor and Agu[43] argued that current legal mechanisms had failed to provide adequate economic incentives to curtail environmental pollution and further advocated for an archetype shift to economic based regulation which would result in optimal environmental protection in Nigeria.

In relation to the challenges encountered with regulating gas flaring in Nigeria, a management official of the Department of Petroleum Resources (DPR) Lagos said:

> First, is the lack of willingness on the part of gas producers to aggressively pursue and implement gas utilisation projects, either for domestic or export purpose. Secondly, there is the lack of political will on the part of government to enforce the provisions of the law, which is the implementation of the gas flaring certificate regime and the enforcement of the penalty regime in the law, which provides for the revocation of the gas field(s) from which unauthorised gas is flared. Concerning monetary penalty for gas flaring in Nigeria, the issue
> to note is that there is no legislative basis for any kind of monetary penalty in Nigeria because the

[43]E Onyeabor, and H Agu'Economic-based Approach to Environmental Regulation as a Panacea to Effective Environmental Management in Nigeria,' (2015) 42Journal of Law, Policy and Globalisation8-17.

> existing legislation did not provide for monetary penalty. Rather it provided for the forfeiture of field(s) from which the unauthorised flaring is carried out.

A senior management official of the Department of Petroleum Resources (DPR) Lagos said:

> It was not made part of the condition of their licenses at the time of the grant to regulate gas flaring. So, trying to now regulate it subsequently becomes difficult. It should have been a condition of their license at the time of the grant, that they should provide utilisation plan in case they find gas. There was clearly a lack of foresight on the part of government at the initial stage. The sanctions are not adequate, that is not deterrent enough. Initially it started with one (1) naira per 1,000 scf and then it was later increased to ten (10) naira. There was also no moral justification to increase the penalty. 2) Lack of political will of the government to regulate gas flaring. To me, that $ 3.50 is enough to serve as a punitive measure. If you cannot pay then shut down and stop production. This would unfortunately affect government revenue. Probably its too high and so we look at the economics. We would invariably force them out of business.

The interviewee added: "Implementation is one thing. Maybe the law has not taken the right approach. The law did not take into account or consider the business environment of the licensees. Rather than provide for forfeiture of concession, it should have been market oriented. The law should make provision for what we can really enforce. The law's approach was wrong. However, I believe the gas

commercialization programme presently been worked out by the government, would address the lingering problem."

In conclusion, the interviewee said: "I would say that lack of adequate infrastructure, no gas market and lack of political will of the government, are the major challenges encountered with regulation of gas flaring in Nigeria so far." Another respondent, a principal consultant in one of the firms visited in Lagos said: "The challenges are; poor reporting and monitoring; low penalties; lack of a domestic gas market hence few gas projects utilising gas and lack of gas infrastructure."

6.0 From Associated Gas Re-Injection Act 2004 to Flare Gas (Prevention of Waste and Pollution) Regulations 2018

An overview of the AGRA 2004 and FG (PWP) Regulations 2018 indicate that the FG (PWP) Regulation is more or less a rehash of the earlier legislation on gas flaring in Nigeria. In purpose, the laws are qualitatively comparable. However, this new law lacks strength over the old law, except on the issue of the revised penalty for gas flare from #10 (ten naira) to $2 (two dollars) for every 1,000 standard cubic feet (scf) flared, with a supplementary disbursement of $2.50 for letdown to yield precise flare statistics, make available right of entry to flare sites and append signature on link pacts; and the newly imposed reporting obligations. The law had previously prescribed that records of date, time, duration, rate, volume and source of flaring should be yielded to the Department of petroleum Resources or the nearest National Environmental Standards Regulations and Enforcement Agency (NESREA) or National Oil Spill Detection and Response Agency (NOSDRA) offices. However, there has been zero-compliance with this mandate and the sanctions have not been deterrent enough. The purported increment of the flare penalty still appears to be non deterrent. However, the laws are quantitatively divergent in the sense that AGRA 2004 to FG (PWP) Regulations

2018 has witnessed a reduction in the amount of gas flared in Nigeria.[44]

This paper opines that the proposition of the World Justice Project Rule of Law Index on regulatory enforcement, with reference to this study is that theoretically, if the laws in Nigeria are effective in reducing gas flaring, then an increase in the number of laws in effect from 2004 to 2018 would automatically translate to a decrease in the volume of gas flared. In reality however, although a decline in the volume of gas flared has been witnessed in Nigeria, the decline is not attributable to the effective implementation or enforcement of regulations. On the contrary, regulatory enforcement has been lax as the rule of law has not been strictly adhered to.

The reduction in the amount of gas flared in Nigeria can be attributed to the operation of a hybrid approach comprised of command and control approach and market based approaches to regulating gas flaring.[45] It is instructive to note that due to its rigidity, the command and control approach hitherto adopted in Nigeria did not result in as much positive environmental outcomes as is being witnessed presently through the adoption of the current hybrid approach in practice, hence the decline in the volume of gas flared in Nigeria is attributable to the operation of the hybrid approach.[46]

7.0 Conclusion

With reference to gas flaring regulation in Nigeria, the rule of law has not been strictly adhered to. Strict adherence to the rule of law would be evident in regulatory compliance and enforcement. No significant discussion in terms of regulatory enforcement can be validly held without first addressing the salutary role the rule of law plays in

[44]Global Gas Flaring Tracker Report July 2020 <http://www.pubdocs.worldbank.org>accessed 25 September 2020.
[45]T O Jolaosho 2019 'Legal Framework for Gas Flaring Reduction in Nigeria,'(Ph.D Thesis, Faculty of Law University of Ibadan 2019).
[46]ibid.

effective environmental regulation. The findings showed that Associated Gas Re Injection Act (AGRA) 2004 failed to effectively phase out gas flaring, provide incentives to stop gas flaring, but rather allowed permissible and impermissible flaring of gas concurrently. The Flare Gas (Prevention of Waste and Pollution) Regulations 2018 is more or less a rehash of the AGRA, having shown qualitatively comparable but quantitatively improved effects on gas flaring reduction in Nigeria. Non compliance of oil and gas companies with legislation and the non implementation of the flare penalty regime indicate lax regulatory enforcement. Consequently, the integration of the rule of law in Nigeria's environmental agenda is paramount to effective regulation of gas flaring. Strict adherence to the rule of law in Nigeria is therefore recommended.

Review of the Child Rights Law of Lagos State *vis - Aa-vis* the United Nations Guidelines for the Alternative Care of Children

F.A.R. Adeleke[1]

Abstract

Article 20 of the CRC categorically provides: *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. In term of the above article 20, Children who cannot live with their parents for whatever reasons should be made to grow up in a loving home and enjoy all their inalienable fundamental rights. The UN Committee on the Rights of the Child felt concerned therefore has drawn up a set of Guidelines for the Alternative Care of such Children. The Guidelines are intended to help everyone who is responsible for the care and wellbeing of children. In line with the global practice, Lagos State promulgated Child Right Law in 2007 which is a very comprehensive law on the right of the children and the best in Nigeria. This law of Lagos State similarly among other things contains provisions relating to alternative care for deserving children. This paper focuses on the assessment of the textual and conceptual framework of the Child Rights Law of Lagos State vis-a-vis the normative framework and practice direction provided by the United Nations Guidelines for the Alternative Care of Children. The work takes a look at the obligations of Lagos State under the law and the Guidelines under reference. The practical implementation and the enforcement of the normative framework envisaged and targeted by the Guidelines is evaluated to see how far or near Lagos State is to the realization of the aim and objectives of the UN Guidelines for the Alternative care of children..*

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Keywords: Alternative Care, Child Rights Law, Kafalah, UN Guidelines, Family.

1.0. Introduction and Background to the Making of the Guidelines by the United Nations

Children who cannot live with their parents should still grow up in a loving home and enjoy all their rights. Children are no doubt the potential future generation whose existence must not only be protected but nurtured in a way that will ensure sustainability of the present generation. Children's rights are equally human rights and all rights that are recognized, protected and enforceable both vertically and horizontally with respect to adults are equally applicable to children. The issue of Child rights has been given a priority at the United Nations and consequently, an impressive range of international norms that define the rights of, and offer protection for, children have become part of the global human rights discourse,[2] thus leading to the promulgation of many international instruments in order to offer legal recognition and protection to the rights of the child being one of the most important human rights segments at the United Nations.

One of the most prominent among those instruments is the Convention on the Rights of the Child (CRC).[3] It has been described as the most widely ratified of all international legal instruments having been signed by 196 states and it has three optional protocols.[4]Article 20 of the CRC categorically provides:

[2] F Jamal (2014), "International Protection of Children: A Legal Appraisal", *International Journal of Law and Legal Jurisprudence Studies*, August 2014 (Vol. 1, Issue 5), p1.

[3] CRC was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 on November 20, 1989and entered into force on September 2, 1990.

[4] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force January 18, 2002; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000),

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
2. States Parties shall in accordance with their national laws ensure ***alternative care for such a*** *child.*
3. Such care could include, inter alia, foster placement, Kafala of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Against the backdrop of the above provision, the Guidelines was promulgated for the purpose of enhancing the implementation of the Convention on the Rights of the Child and other prominent international instruments that are in existence regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so.

2.0 The United Nations Guidelines for the Alternative Care of Children *UNGA 2010*

There have been a plethora of international instruments on the rights of child. These include Declarations, Conventions, Principles and Guidelines. As with all internationally agreed standards and principles, the real test lies in determining how they can be made a reality. That is by translating the theoretical writings into practice. It is significant to point out that the *Guidelines* are by no means addressed to States alone: they are to be taken into account by everyone, at every level, who is involved with issues and programmes providing alternative care to children. A cursory view of the Guidelines reveals

entered into force February 12, 2002; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, G.A. Res. 66/138, U.N. Doc. A/RES/66/138 (2012).

its wide coverage and comprehensive provisions regarding children in need of alternative care. The Guidelines contains 167 paragraphs otherwise referred to as principles. The Guidelines are available online. It is written in friendly, simple and non-legalistic language. Its provisions cover a wide range of issues all centred on the best interest of children in need of alternative care.

Principles 3 to 10 cover issues relating to the child and the family.

Principles 11 to 20 details circumstances when the need for Alternative care may arise.

Principles 27 to 31 touch on the scope of the Guidelines and its limitations in coverage.

Principles 32 to 38 are very germane in that they deal with issues that could promote parental care thereby preventing the need for alternative care.

Principles 39 to 48 in the same vein concentrate on prevention of family separation.

Principles 49 to 52 promote family reintegration.

Principles 57 to 68 are on determination of the most appropriate form of care.

Principles 137 to 152 centre on provision of care for children outside their country of habitual residence among others.

3.0. Overview of the United Nations Guidelines

The guidelines are targeted at all those involved in running institutions (private or public, governmental and non- governmental) providing care to children who inevitably find themselves out of their natural family setting and thereby deprived of parental care. It unequivocally encourages States to take the principles in the Guidelines into account and to bring them to the attention of the relevant executive, legislative and judicial bodies of government, human rights defenders and lawyers, the media and the public in general.[5] Thus, the guidelines are addressed to the state and are expected to be the manual for the

[5] See the United Nations Resolution 64/142 of 24th February 2010 to which the Guidelines for children in Alternative care is annexed in its paragraph 2.

implementation of the CRC provisions and other laudable international instruments on the rights of the child. The purport of the United Nations Guidelines on Alternative care of children therefore, is that it should form the basis for the formulation of legislation, and to evolve requisite public policies and ideas necessary in the promotion and protection of children's rights. A succinct appraisal of the Guidelines reveals two basic goals:

a. ensuring that children do not unnecessarily find themselves in out-of-home care and,
b. ensuring that the type and quality of out-of-home care provided is appropriate to the rights and specific needs of the child concerned.

4.0 Who Are the Children Entitled to Alternative Care?

The present Guidelines apply to the appropriate use and conditions of alternative formal care for all persons under the age of 18 years, unless, under the law applicable to the child, majority is attained earlier.[6]Accordingly, the following categories of children are captured as being entitled to alternative care**.**

(a) Children without parental care: all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances.

(b) Alternative care may be either informal or formal in line with the provision of the Guidelines.

While (i) Informal care refers to any private arrangement provided in a family environment, whereby the child is looked after by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body;

[6] Principle 27.

(ii) Formal care on the other hand refers to all care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures.[7]

4.1. Limitation on Applicability of UNGA 2010

Principle 30 states that the alternative care envisaged by the Guidelines does not extend to:

> *(a) Persons under the age of 18 years who are deprived of their liberty by decision of a judicial or administrative authority as a result of being alleged as, accused of or recognized as having infringed the law.*
>
> *(b). Care by adoptive parents from the moment the child concerned is effectively placed in their custody pursuant to a final adoption order.*[8]

[7]With respect to the environment where it is provided, alternative care may be:
(i) Kinship care: family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature;
(ii) Foster care: situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care;
(iii) Other forms of family-based or family-like care placements;
(iv) Residential care: care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes;
(v) Supervised independent living arrangements for children;
(*d*) With respect to those responsible for alternative care:
(i) Agencies are the public or private bodies and services that organize alternative care for children;
(ii) Facilities are the individual public or private establishments that provide residential care for children. See Principle 28.

[8] The Guidelines are, however, applicable to pre-adoption or probationary placement of a child with the prospective adoptive parents, as far as they are compatible with requirements governing such placements as stipulated in other relevant international instruments.

The Guidelines provides that before making the decision to separate a child or adolescent from his or her family, there must be certainty that all possibilities for the child or adolescent to continue to live with his or her family of origin have been exhausted. And separation from the family of origin should be for the shortest time possible. However at all times while accessing the care, the guidelines provides that they shall be protected from all forms of exploitation and abuse, and it shall be ensured that all of their rights are protected, particularly the rights to health, housing, education and inheritance.[9] Paragraph 47 provides that

Any decision to remove a child against the will of his/her parents must be made by competent authorities, in accordance with applicable law and procedures and subject to judicial review, the parents being assured the right of appeal and access to appropriate legal representation.

.

5.0 Types of Alternative Care Envisaged by the Guidelines

These include Foster Care, Kinship Care[10] and Kafalah in Islamic Law or Tenet.

i. Foster Care

Children under three years old should be placed exclusively in family based care (foster family, kinship care). Foster care can be described as a kind of family- based care in which the child becomes part of a family without the family's daily routine being significantly disrupted. The family continues with its everyday dynamics and structure assuming responsibility for the integral protection of the child for as long as necessary. In general, the child is fostered until he or she is

[9] Attention must be paid to promoting and safeguarding all other rights of special pertinence to the situation of children without parental care, including, but not limited to, access to education, health and other basic services, the right to identity, freedom of religion or belief, language and protection of property and inheritance rights. See Principle 16

[10] Principle 29.

reinserted in his or her family of origin, after the situation that gave rise to the separation is resolved.[11]

Selection Criteria of Foster Care:

Foster families should be subjected to a comprehensive selection process, additional checks (police and health checks) and regular assessments in order to assess their suitability to work with children and adolescents separated from their birth families. The decision to place a child/adolescent with a specific foster family should be carefully planned by qualified and experienced professionals taking into account the specific needs of the child and the profile of the foster family.

ii. Kinship

The Guidelines define kinship care as family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature. It likewise defines foster care as situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care.[12] Placement in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes termed Residential care and supervised independent living arrangements are other types of alternative care envisaged, albeit limitedly.

6.0. Limitations on the Use of Residential Care:

a. Placements in residential care should be limited to situations where it is specifically appropriate taking into account the needs and care plan for the child or adolescent in alternative care, and in such instances the residential facility should provide special care and benefits to his or her development.

[11]Ibid.
[12]Ibid.

b. No child less than three years old should be placed in residential institutions and all efforts should be made in such cases for infants and young children to be looked after exclusively in family based care. Where unavoidable, stay in residential institutions should be temporary and for as short a period as possible until a family based care alternative is available.

7.0 Summary of Obligations of Lagos State Arising From the Guidelines -- The Core of Actions.

As pointed out above, The *Guidelines* have been created to ensure respect for two basic principles of alternative care for children, namely: that such care is genuinely needed (the '**necessity principle'**), and that, when this is so, care is provided in an appropriate manner (the '**suitability principle'**).

a. Respecting the 'Necessity Principle'

Acting on the 'necessity principle' first involves **preventing situations and conditions** that can lead to alternative care being necessary or required. The range of issues to be tackled is considerable: from material poverty, stigmatisation and discrimination to reproductive health awareness, parent education and other family support measures such as provision of day-care facilities. It is worth noting that, during the drafting process of the Guidelines, government delegates expressed interest in ensuring that preventive measures were given the most comprehensive coverage possible.

The second action point for the '**necessity principle'** concerns the establishment of a robust '**gatekeeping**' mechanism capable of ensuring that children are admitted to the alternative care system only if all possible means of keeping them with their parents or extended family have been exhausted. The implications here are twofold, requiring adequate services or community structures to which referrals can be made, and a gatekeeping system that can operate effectively regardless of whether the potential formal care provider is public or private.

b. Respecting the 'Suitability Principle'

If it is determined that a child does indeed require alternative care, it must be provided in an appropriate way. This means that all care settings must meet general minimum standards in term of conditions and staffing, regime, financing, protection and access to basic services (notably education and health). To ensure this, a mechanism and process must be put in place for selecting care providers on the basis of the established criteria, and for carrying out subsequent inspections over time to monitor compliance.

The second aspect of 'suitability' concerns matching the alternative care setting with the individual child concerned. This means selecting the care arrangement that will, in principle, best meet the child's needs at the time. It also implies that a range of family-based and other care settings are in place, so that a real choice exists, and that there is a recognized and systematic procedure for determining which is most appropriate. In developing this range of options, priority should clearly be given to 'family and community-based solutions' (Principle 53). At the same time, the *Guidelines* recognise family based settings and residential facilities as complementary responses (Principle 23), provided that the latter conform to certain specifications (Principles 123 and 126) and are used only for 'positive' reasons.(Principle 21)).

7.1 Non-Binding Nature of the UNGA 2010

Regrettably, the *Guidelines* is a non-binding international instrument in the same class with declarations and rules. Therefore while their general merit for informing the approach to alternative care for children is clearly recognised, they constitute no obligations on the part of States or any other concerned parties. In order to infuse these guidelines with a force of law, it is recommended that salient points in the guidelines be taken into cognizance in the on-going amendment of Child Rights Law of Lagos State or be captured in its subsidiary legislation as a guide for action.

8.0. Lagos State Child Right Law (CRL) in Conformity with the United Nations Guidelines on Alternative Care

With respect to the core obligations as enunciated by these two principles, there are many provisions of the extant Child Rights Law of Lagos State that are in line and in conformity with the United Nations Guidelines for children in need of alternative care. These provisions are many, detailed and clearly made with a view to translate many of the principles in the guidelines into action by the state. As it is definitely impossible to quote verbatim all these provisions here**,** it will suffice to highlight some of the salient provisions that are directly relevant and applicable.

a. The best interest principle as the primary consideration when acting in respect of a child reverberates throughout the Lagos State Child Right Law herein called CRL beginning from section 1. For instance, it is also a consideration in decision to separate a child from the parents (section 13 CRL) and in choosing the appropriate alternative care arrangement.
b. The protection and care of a child must also be such that is necessary for their wellbeing in accordance with the rights and duties of the body responsible for the child including parents and which must all conform to the standards laid down by the appropriate authorities, particularly in the areas of safety, health, welfare, and suitability of their staff and competent supervision. (Section 2 CRL)
c. Section 182 CRL also imposes duties on the state to oversee and regulate the provision of accommodation made for children by voluntary organisations to ensure that they promote the welfare of the child
d. Section 166 CRL places a duty on the State Government looking after any child to - safeguard and promote the welfare of the child giving due consideration to the age and understanding of the child, to such wishes and feelings of any person including the child, his parents or guardian, to the religious persuasion, racial origin, ethnic, cultural and linguistic background of the child.

e. Separating the child from the parents is discouraged as much as possible, with Section 13 (1) CRL emphasizing the child's right to parental care and protection. Section 24 CRL forbids such separation against the will of the child's parents.
f. Keeping siblings together, ensuring nearness of alternative care arrangement to former residence of child as means of promoting family cohesion is also provided for in CRL Section 163(7) (a) and (b)
g. A wide range of alternative care arrangements options are provided for in the Lagos Child Right Law to wit: fosterage, living in families, with relatives, voluntary homes, community homes and registered children's homes.
h. Very detailed provisions to ensure adequate protection and care of children in alternative care can be found in sections 95 – 108 CRL which make regulations for fosterage including qualified persons, number of children who can be fostered, conditions for revoking foster orders, duties of state to monitor the welfare of fostered children including visits of state officers and so on, section 183 – 189 CRL contains similar regulations for children's homes.
i. A most comprehensive list of children in need of care and alternative child care arrangements are also found in sections 44 and 93 CRL.[13] To a large extent, the list captures most of the categories of children the Guidelines in principle 9(b) recommend to be in need of care.[14]
j. Sections 158 to 161 CRL deal with children with special needs. Of significant note is section 162 to 166 that impose duties upon

[13]Section 93. A child who may be fostered under this Law is a child who— (a) is abandoned by his parents; (b) is an orphan and is (i) deserted by his relatives, (ii) voluntarily presented by his relatives for fostering; (iii) voluntarily presents himself for fostering, where no relatives of his can be found; (c) has been abused, neglected or ill-treated by the person having care and custody of him; (d) has a parent or guardian who does not or cannot exercise proper guidance over him; (e) is found destitute; (f) is found wandering, has no home or settled place of abode, is on the street or other public place, or has no visible means of subsistence.

[14] Principle 9 (b) To provide appropriate care and protection for vulnerable children, such as child victims of abuse and exploitation, abandoned children, children living on the street, children born out of wedlock, unaccompanied and separated children, internally displaced and refugee children, children of migrant workers, children of asylum-seekers, or children living with or affected by HIV/AIDS and other serious illnesses.

the state to make certain provisions for the children in need. For instance, providing accommodation (Section 163 CRL). Where a child is disabled such accommodation is expected to conform to the child's particular needs. (Subsection 8).

k. Section 170 CRL also shows the resolve to treat children needing care on an individual basis as recommended in the Guidelines[15] by empowering the Commissioner to make regulations requiring the case of each child who is being looked after by the State Government to be looked into for the purpose of being reviewed in accordance with the provisions of the regulations.

l. Sections 171 to 173 CRL are very significant as they provide that: Where it appears to the State Government that any authority or other person mentioned in subsection (3) of this section could, by taking any specified action, help in the exercise of any of its functions under this Law, it may request the help of that other authority or person, specifying the action in question.

In general, the Lagos Child Rights Law has made useful provisions regarding the welfare, education, health and general care of the children in alternative care homes. This includes setting up a family court to look after their affairs when such involve seeking or securing judicial authorization or sanctions. In fact, the law in the determination to offer all round protection to children appears to have gone beyond its legislative power by inserting section 195 CRL which states as follows:

Section 195.(1) There shall be established, in the Nigeria Police Force a specialized unit, to be known as the Specialised Children Police Unit (in this Law referred to as "the Unit") which shall consist of police officers who:

(a) Frequently or exclusively deal with children; or *(b)* are primarily engaged in the prevention of child offences.

(2) The Unit shall be charged with the following functions:

(a) The prevention and control of child offences;

[15] Principle 6

(b) The apprehension of child offenders;
(c) The investigation of child offences; and *(d)* such other functions as may be referred to the Unit by this Law.

It is doubtful if Lagos State is empowered under the constitutional arrangement in Nigeria to wield this enormous power with regard to the Police force. Nevertheless, one should laud and commend Lagos State for having blazed the trail in the protection of children in line with global best practices. Conclusively, all the rights, protections, welfare, educational opportunities, health care, vocational skill acquisition and many lofty programmes envisaged by Lagos Child Right Law apply generally to all children and do not discriminate against any child whether living with parents or in homes or to those with special needs, the protection and welfare of children living in alternative care arrangements are already captured substantively in the current Child Rights Law of Lagos State.

9.0. Noticeable Gaps in Lagos State Child Rights Law Vis-a -Vis United Nations Guidelines for the Alternative Care

Guided by series of spotlight papers developed by Family for Every Child, a global alliance of national civil society organisations[16] and a comparative assessment of same with the Lagos State Child Rights Law, its substantive provisions, provisions relating to implementation and enforcements, the following are observed:

For a foster care to achieve its essence, it must be infused with effective mechanisms, structures and resources. The Lagos Child Rights Law (CRL) provides a legal framework for foster care but the question remains whether it has adequately provided for the core components that all foster care programmes must have to ensure that they are safe and effective in meeting children's needs. These include mechanisms for careful decision making about placement of children into foster care. It needs be emphasized that placement should be the

[16] See generally Spotlight paper available at https://familyforeverychild.org/wp-content/uploads/2015/05/A-spotlight-on-foster-care.pdfaccessed 1st June 2020.

last resort and should be only when separation from families is necessary and in the child's best interest. Decisions about placing children in foster care should be made carefully, in full consultation with children, families, social workers and other stakeholders. In this respect, Lagos State CRL places too much emphasis on court or judicial order. A court of law will lack the requisite capacity to achieve the obligations imposed on the State as per the underlined above. It is submitted that this is only achievable in a less formal though official setting.

9.1 Alternative Child Care Agency

In order to achieve the aims and purpose of the Guidelines, there is need to establish an agency to be called Alternative Child Care Agency**.** The following objectives espoused in the principles are considered best taken care of by the proposed Alternative Child Care Agency.

i. Appropriate matching of children to foster carers based on a consideration of the capacities of foster carers to meet the individual needs of each particular child is key to achieving the purpose of alternative care. A court of law cannot be in the position to evaluate the need of the child vis-a-vis the particular home the child should be sent to. On site assessment, evaluation, facilities available and other necessary details will inform the suitability of such care home for the particular child involved. While the court may easily identify the child that needs care it may not be in position to adequately and effectively match the homes or foster carer with the child. This shall be the work of the Agency.

   The Guidelines reiterate that the decision to remove a child from the parents is to be carefully taken and various factors to be put into consideration. The above strengthens our argument that the decision to remove the child should be taken by an authority/Agency other than judiciary though to be subject to

judicial review unlike what obtains in Lagos law where courts are saddled with such responsibility.

ii. Alternative care providers must be engaged and trained appropriately and they must have access to specialist help and advice, as well as financial support. While Lagos State may be commended on the various steps taken to achieve this obligation, the effort of the state is not adequate. Although there are some provisions in the Lagos Child Right Law, obligating the state to partner with the foster homes or institutions with respect to provision of requisite facilities and capacity building, the main thrust of the UN Guidelines is to empower the state to act more in the capacity of a regulatory body.

iii. There is need for support for children in alternative care, including efforts to respond to the damaging effects of separation from family. Support services may include associations of children in foster care, complaint mechanisms, specialised therapeutic and counselling services and attachment to specific social workers. It is submitted that such support services are still in very low gear in Lagos State.

iv. The 3 Rs – Reinsertion, Reintegration and Reconnection.

Reinsertion*:* This refers to return after alternative care, both of the child to his environment and of the family to its community of origin. Reintegration: After the act of reinsertion comes integration, that is, the creation of meaningful ties with persons and the community, while

Reconnection refers to the task of reconstruction of the links (ties) with those who were significant to the children and adolescents who were deprived of continuity in living in their family and community environment.

It is an obligation on the part of the state through an appropriate agency to help children reintegrate into their families as soon as the conditions for such integration become conducive.

Provisions in this respect is substantially lacking in the structure of the Child Right Law of Lagos State.

v. Also, *kafalah, which* is recognised in the UN Guidelines as an 'appropriate and permanent solution' for children who cannot be kept in, or returned to, their original families[17] is not at all within the contemplation of the Lagos Child Rights Law.
It is therefore necessary to consider the recommendation of *Kafalah* as envisaged by the UN Guidelines below:

9.2. What is *Kafalah*?

*Usang M Assim and Julia Sloth-Nielsen in their article titled "*Islamic *kafalah* as an alternative care option for children deprived of a family environment"[18] *explained that kafalah* is traced to the Islamic law of obligations, which 'permits a person to enter into a contract committing himself to certain undertakings in favour of another person provided that person has a material or moral interest in such undertaking'.[19] Through *kafalah,* a family takes in an abandoned child, a child whose natural parents or family are incapable of raising him or her or who is otherwise deprived of a family environment, but without the child being entitled to the new family name or an automatic right of inheritance from the new family.[20] By definition, *kafalah* is 'the commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way as a father would do for his son.' In other words, *kafalah* is the provision of alternative care without altering the child's original kinship status because in Islam; the link between an adopted child and his biological parents must remain unbroken.[21]

[17]Para 2(a) UN Guidelines.
[18](2014) 14 *AHRLJ* 322-345.
[19]*Ibid*, at p.329.
[20] This is in accordance with the Islamic legal principle, such a child cannot inherit the "father" who offered him such a protection and care,
[21]K., Nundy 'The global status of legislative reform related to the Convention on the Rights of the Child' (2004) vii http://www.unicef.org/policyanalysis/files/ The_Global_Status_of_Legislative.

9.3. Islamic *Kafalah* as an Alternative Care Option

There are certain principles of Islamic *kafalah* which are in conformity with the intention and spirit of the child's best interest principle. They are the fact that a child in *kafalah* arrangement still maintains his original family ties and is also not discriminated against in the *kafalah* arrangement. Second, there is provision for him in the wealth of the new father by way of gift or through a will. Third, the child still retains his family name. The new family takes care of the child as an act of personal charity in most cases and may even be by way of compensation.[22]

The highest court in Italy recognized the right of a couple under *kafalah* who are legal immigrants in Italy to request a visa for their child to join them, The court, among others, relied on the fact that since *kafala* is recognized in some international instruments, the child may be granted visa notwithstanding the fact as argued by the Ministry of Foreign affairs that *kafalah* was not known to the Italian law but foster parentage. The Court pointed out that *kafalah* was expressly recognised by Child Right Convention (CRC) and Moroccan law and, as such, preventing the child from joining her guardians 'would penalise all legitimate or abandoned children coming from Islamic countries, and therefore violate the principle of equality'. The Court noted further that, 'for many of those children, the *kafalah* represents their only protection from abandonment'.

I strongly recommend that Lagos State being a state with a large and impressive number of Muslims should recognize *kafalah* and make it available as an alternative care option as recognized in various international laws and these UN guidelines in reference**.**

[22]For example, one means of rewarding men who survived the battle of *Uhud* was by allowing them to take responsibility over wealthy orphans and control their wealth.

10.0 Conclusion and Recommendations

In order to deliver the above components of effective and safe alternative care, certain mechanisms and structures need to be in place by Lagos State. These include:

a. Strong legal and policy frameworks rooted in the Guidelines for the Alternative Care for Children (UN 2010) and the Convention on the Rights of the Child (UN 1989), and with the best interests of the child as the primary consideration;
b. Sufficient financing of alternative care, and of other child welfare services, including support to families of origin and a range of care choices for children;
c. Adequate numbers of trained child welfare workers who are appropriately supported in their efforts to manage alternative care programmes.
d. Lagos State must invest in alternative care as part of a holistic national child care system which prioritises efforts to prevent family separation, and also provides a range of alternative care choices for children.
e. Ensure that all alternative care arrangements are properly regulated and monitored, and evaluated periodically to be in line and in conformity with the best practices envisaged by the Guidelines.

Finally, in as much as one would commend Lagos State which through the instrumentality of a robust and comprehensive law like the current child rights law and other programmes and activities, structures and otherwise, have being foremost in promoting child rights in a manner that few countries can match, it is necessary to mention that the Child Rights Law of Lagos State is too unwieldy. The law deals with many issues that are more befitting of policies and procedural rules rather than remaining a part of the substantive law. It is advised that all rules and procedures in the law should be removed and be consigned to a subsidiary legislation to the main Child Rights law.

Alterations to Wills in Nigeria: A Guide From *Mudasiru vs Abdullahi* (2011) All FWLR Part 639 P. 1128

Yusufu Y. Dadem PhD*

Abstract

A Will is sacred; because it contains the directives of a testator to be carried after his death, it is required to be executed and attested according to law. Alterations made on the text of Wills often raise suspicion if indeed they are the acts of the maker of the Will. The main issue to consider about disputes on alterations to Wills is whether the corrections were indeed the act of the testator. If they are not, the courts are unwilling to give effect to the altered words. If however, they are found to be, the courts will effectuate the altered words. This paper advocates for a more settled approach by the courts when dealing with alterations made to the text of Wills and the need to give effect to the intention of the testator at all times. The duty on a solicitor drafting Wills and the need to employ technology to reduce the risk of alterations to Wills is emphasised. This reduces the potential of disputes on Wills due to any alteration, with the attendant consequences.

1.0 Introduction

A document drawn as Will may contain mistakes appearing on the text.[1] Where the mistake is detected at the point of drawing up a Will,

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[1] A Will is the written directive of a person (testator/testatrix), which is to be given effect after the death of the maker. It encompasses his wishes often relating to the distribution of his properties and other directives that may not be related to

the mistake is easily corrected. Where the mistake is discovered at the point of executing a Will, the testator may also effect corrections before executing it. Where the alterations are made after execution of a Will, it is important to comply strictly with the laws regulating alterations to Wills. The Wills Law Lagos State 2004 section 14, for example provide the following clause on alterations of Wills:

> No obliteration, interlineations, or alterations made in any Will after the execution thereof shall be valid or have any effect except in so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as is herein before required for the execution of the Will. Provided that the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witness be made in the margin or some other part of the Will opposite or near to such alteration or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the Will.[2]

property. A Will has many advantages such as the right to make positive display of wishes appoint, choose the executors to the estate, appoint trustees and displace the application of the rules of intestacy. It is thus important to have a properly and meticulously drafted Will to encompass the directives of the testator.

[2]WLLS 2004, section 14 (2); similar provisions are contained in the Wills laws of the states in Nigeria, such as the Wills Act of 1837; Wills Law, Cap. 163 Laws of Kaduna Sate 1991. Wills and Wills-making is a residual matter and within the legislative competence of states. Many states of the Federation have legislated on the matter. The various laws applicable to the states contemplate only alterations made after the execution of the Will. It would, therefore, seem that any alteration made before execution, is effectual and there is no need for the execution and attestation of such alterations. Kole Abayomi, *Wills: Law and Practice* (Mbeyi & Associates Nig. Ltd., 2004) p. 201. The provisions of WILLS 2004, section 14 on alteration of Wills is typically found in many of the Wills laws of the States.

The decision of the Court of Appeal Lagos Division,[3] in the case of *Mudasiru v Abdullahi*[4] dealt with the approach required to make corrections by makers of Wills. While the case deals with other issues on Wills,[5] for which there is much judicial precedence and which are well-treated in other works;[6] the minuscule issue that interests us relate to corrections made to Wills by way of alterations, interlineations and obliterations. This interest is borne out of the fact that many cases dealing with alterations to Wills are decisions of foreign courts.[7] *Mudasiru v Abdullahi*[8] presents a local example and precedent on the issue, the attitude of the courts on the matter and the lessons discernable from the court's approach. The limitation of the case though deals with alterations made at the point of signing a Will. When the decision of the court is juxtaposed against the requirement of statute on the matter, some salient questions become pertinent. Must every alteration be initialed and attested to (apart from the general execution of the document)?

At what point should the alteration be executed and attested to? While the lead judgment of the court applied the correct position of the law, some dicta in the supporting opinion seemingly digressed from it,

[3] The Court of Appeal is the penultimate court before the apex court, the Supreme Court. It determines appeals from the courts lower to it, such as the High Court, the Federal High Court, the National Industrial Court, the Customary Court of Appeal and the Sharia Court of Appeal.

[4] *Op. cit.*

[5] These issues include whether the Will was validly executed due to the fact that the testator's signature was not engrossed in the place reserved for it and whether the trustees in the suit (having regards to the interpretation to be given to the wordings of the Will) could be regarded as executors to the Will.

[6] Leading cases that deal with the principles of execution of Wills, include In the *Estate of Randle* (1962) 1 ANLR, p. 130; *Nelson v Akofiranmi* (1959) LLR, p. 143. For other texts on the subject see Kole Abayomi, op. cit.; FJ Oniekoro, *Wills, Probate Practice & Administration of Estates in Nigeria* (Chenglo Limited, 2007); Felicia Omonigho Eimunjeze, *Real Property Law and Practice in Nigeria* (Malthouse Press Limited) 2014.

[7] For instance in Shearn, Re (1880) 50 LJP, 15.

[8] *Op. cit.*

casting some doubts on the chief opinion.[9] We posit in this paper that in order to guarantee the sanctity of the testator's wishes in a Will, a correct and settled approach by the courts should be adopted to give effect to the tenor of the law on alterations to Wills and effect the intentions of the testator of a Will.

2.0 Facts of *Mudasiru v Abdullahi*

The testator in this matter (*Air Commodore Gbolahan Adio Mudasiru*) died in London on 23rd September 2003; he had made a Will dated 24th June 2001. While the appellants (testator's family members) were making preparations for his burial, the 1st to 5th respondents, applied to the probate registry Lagos for the reading of the Will. Thereafter, the 1st – 5th respondents (claiming to be trustees and executors under the said Will) instituted an action against the appellants seeking to conduct the burial rites of the deceased. The respondents also applied for a grant of probate, which was opposed by the appellants, who then challenged the validity of the Will and sought for declarative, injunctive and other reliefs against the respondents before the High Court of Justice, Lagos State. The appellants premised their case on the grounds that "The testator did not make the said Will or that if he made it, he did not sign the Will and further, that the signature found on the Will is not that of the testator and further still, that it was not signed at the appropriate position."[10]To establish their case further, the appellants argued that the irregularities on the Will with respect to the alterations, omissions, and corrections, were not the traits of the testator, thus making the Will not his act.

[9] A Court of Appeal is duly constituted when it is made up of a minimum of three Justices to hear and determine a matter. The lead opinion is always the judgment of the court, where another justice supports the lead opinion; to constitute the judgment of the court, a majority must rule on the issues in dispute.

[10]*Okoro, JCA*, p. 1141.

3.0 Relevant Holdings in the Case

1. Where the contents of a document does not adequately communicate or represent the intentions of the maker, the maker would expectedly take steps to see that a correction is effected. So long as such corrections do not result in the mutilation of the document, it is acceptable. The provision in section 14 of the Wills Law [Lagos State] acknowledges this and provides for the procedure, which authenticates any corrections effected. In the words of the court, "Although the appellants tried to assert that the alteration made in the Will were outside the character of the testator… the testator used to make cancellation and alterations in documents after which he would initial the portion altered; this is consistent with the method adopted in the disputed Will. The 1st Appellant admitted that there are initials at every alteration made."[11]

2. Whether the alterations were made before or after the Will was executed in this particular case, the truth is that it (i.e., the alterations) complied with section 14 of the Wills Law of Lagos State *(supra)* since the testator initialled all alterations. That although the court below observed that it may be true that the testator was meticulous to a fault, this is a characteristic known to the appellants. The court as an independent arbiter is not privy to this character trait. The appellants were under obligation to present credible, cogent and convincing evidence in proof of this unique character trait of the testator. For the appellants to have thought that the court would rely on their *ipsi dixit* on the issue were asking for too much. Although the court may indeed rely on the *ipsi dixit* of a witness, it is only in some circumstances, of which this is not one.

3. The Will was validly executed; the evidence of the witnesses to its execution was not contradicted. On what it means by the clause that "No form of attestation and publication is necessary" appearing in section 14 of the law, the court reasoned that this excludes the need to

[11] *Ibid.*

sign the Will by the testator in the place reserved for it. The court observed "there is no longer any formal requirement that the signature should be at the foot or end of the Will but in so long as it is apparent in the face of the Will that the testator intended by his signature to give effect to the Will."[12]

4. On the question of whether the trustees were executors in the Will, the court held that although the respondents were only explicitly named as trustees and not executors in the Will, they are regarded as such [executors] because his (testator's) funeral was "to be organised exclusively by [his] trustees and conducted in the sense of the grail message" and also to take "every step legally necessary to effect the wishes of the testator when the objects of any bequest were located in an entity in which he owned majority shares."[13]

4.0 Analysis of the Decision

To effectively analyse the correctness or otherwise of the decision of the court in *Mudasiru v Abdullahi*,[14] it is important to set out and expatiate on the settled principles on alterations to Wills. Generally, corrections on the text of Wills are treated as obliterations, interlineations or alterations and may consist of additions, modifications, and any changes, which the testator desires, to be reflected in the Will as his intentions.[15] It involves changing or amending the written syntax and wordings of a Will.[16]Where alterations to Wills are not executed and attested, there is the presumption that it must have been made after the execution of a

[12] Per *Okoro, JCA*, p. 1144.
[13] *Ibid.*
[14] *Op. cit.*
[15] Obliteration is intended to make a part of the Will ineffective; the intention to revoke it must exist; interlineation is the insertion of words between the written lines or words in the Will. Alterations encompass any corrections and amendments on the Will.
[16] K Abayomi, *op. cit.*, p. 201.

Will;[17] as such, alterations that are not executed by the testator and attested to by the witnesses, after a Will is executed, are not valid.[18]This is because the execution of a Will is the approval and validation of its contents as the act of the testator and anything done to the text of a Will without authentication is presumed not to be his act.

The "basic rule is that alterations are not valid if they are made after execution; the words of the Will are fixed at execution, and anything added afterwards will not have been executed and therefore cannot be admitted to probate."[19]Consequently, alterations that do not raise much query are those made before execution and attestation of a Will; any alteration after the execution of a Will should be signed or initialled by the testator and attested in like manner as required for the execution of a Will.[20] This requires affixing to the altered words or altered parts the signature of the testator and the subscription of the witness in the margin or some other parts opposite or near to such alteration or at the foot or end of the alteration or opposite the altered words or executing and attesting a memorandum (codicil) referring to such alteration.[21]

Three scenarios are thus treated when analysing a Will that has been altered. First, if the alteration was made before the execution of a Will, the alteration is valid and the statutory provision would not apply.[22] The reason being that at this point, the document is not yet a Will but the written instructions of the testator; it only becomes a Will

[17] Felicia Omonigho Eimunjeze, *op. cit.*, p. 213. This presumption is however rebuttable if it can be shown that the alteration was executed before the final execution of the Will.

[18] YY Dadem, *Property Law Practice in Nigeria* (4th Ed. Jos University Press Limited) 2018, p 306.

[19] Caroline Sawyer, *Succession, Wills and Probate* (Cavendish Publishing Limited, 1994) p. 153.

[20] A Will is duly executed where the testator appends his signature or acknowledges his signature or directs another person to execute a signature on his behalf in the presence of at least two witnesses who equally append their signatures.

[21] A codicil is a mini Will and is useful for many purposes; it may be used for example to alter, revoke, revive or republish Wills.

[22] That is section 14 Wills Law of Lagos State.

when it is executed and attested according to law. Second, if a Will had been duly executed and attested and the alteration was made after that and duly executed with the accompanying witnesses, the alteration is valid.[23]Accordingly, validity would not be given to the alteration if there is only the signature/initial of the testator and that of one of the witnesses or those of two witnesses without that of the testator.[24]Third, whether the alteration has made a part of the Will not apparent and the intention of the maker is to revoke the unapparent part, that part is revoked.[25]

The altered words before such alteration shall also not be apparent. The question here is the interpretation to be given to the phrase "apparent"? Any alteration is apparent "if the original text can be seen or deciphered by natural means."[26] If the original text were apparent, probate would be granted to a Will as if there had not been alteration; and where the text is not apparent and the alteration has made the part of a Will unreadable, the unattested parts become valid and that part of the Will is destroyed.[27]

Did the court in *Mudasiru v Abdullahi*,[28] correctly interpreted and apply the law to the facts of the case in view of the principles enunciated? In the instant case, the evidence showed the testator only initialed the altered parts, without the accompanying attestation of witnesses. Indeed, "both parties at the trial leading to [the] appeal were in accord that there were alterations in the Will- exhibit c 1."[29] The alterations were done before the final execution and attestation of

[23] In this instance, the altered words or parts are executed and attested in like manner as the execution of the Will. This requires the testator and witnesses to affix their marks or signatures as close to as possible to the altered parts or to draw a memorandum, itself attested, referring to the alterations. Sawyer, C. at p. 154.
[24] K Abayomi, *op. cit.* p. 204.
[25] R Kerridge, *Parry & Clark: The Law of Succession* (11th Ed. Sweet & Maxwell, 2002) p. 141.
[26] K Abayomi, *op. cit.*, at 203.
[27] Id.
[28] *Op. cit.*
[29] P. 1155, para. c.

the Will by the testator. The gleaned evidence, which was unchallenged, bore this out:

> I remember that when we arrived at the home of the late Air Commodore Gbolahan Adio Mudasiru, he ushered all three of us into his study, which was on the ground floor of the house. There, he went through the final copies of the Will in my presence and in the presence of my two colleagues, all four of us, sitting around a table in his study. Ongoing through, he made a few minor corrections by his hand, initialled the corrections he made, then proceeded to execute about 4 copies of the Will in the presence of all three of us, with my colleagues signing as his two witnesses before him and each other.[30]

This uncontroverted evidence on the manner of alteration of the Will in dispute falls under the first scenario; that the alterations occurred before the final execution and attestation of the Will. In that way, the testator and the witnesses are deemed to have validated the entire contents of the document. The altered words are deemed as forming the true and complete reflections of the intentions of the testator. The fact that the witnesses did not initial their marks after the mark of the testator at that time was of no consequence. If the evidence had shown that the alterations occurred after the execution and attestation of the Will, the failure of the witnesses to input their marks after the testator, opposite or near the altered parts, would have been consequential, maybe fatal to the altered parts. However, the effect of not having the witnesses initial their signatures, in certain cases, would place the burden on the *propounders* of the Will to rebut the presumption that the altered parts had been made after the execution and attestation of the Will; and also to prove that the altered parts constituted the complete intentions of the testator before he executed the Will, a

[30] At p. 1143.

burden that wouldn't have arisen if the witnesses had affixed their marks.

Premised on the above, the dictum of *Danjuma JCA* respectfully is seemingly contradictory of the position we have laid out.[31] In his supporting opinion, he had noted that:

> …. the snag in this matter, which is the pith and reason for my emphasis is that the alterations so initialled by the testator have not been shown in evidence at the trial to have had a corresponding initialling or signature of a witness thereto and as near as possible or close as possible or any memorandum to the alteration or a memorandum referring to the amendment containing the signatures of the testator and witnesses.[32]

Danjuma's dictum calling for the amendment of the Wills Law for a stricter clause to altered words in a Will,[33] must accordingly be regarded as obiter and not rightly located to the facts of the case on appeal and one to be discountenanced. His Lordship had noted that:

> it will not be out of place for a court of equity and good conscience acting as the custodian of public morals to call for the amendment of the provisions of section 14 (2) of the Wills Law W2, Laws of Lagos State, 2004, in a manner that the validity of a Will shall be dependent on the signing of all alterations by the testator and witnesses as close as possible or near as possible to the alterations or a memorandum relating to the alterations signed in like manner, notwithstanding that due execution of

[31] Per *Danjuma JCA* is one of the justices that determined the appeal. Although his opinion is in support of the lead judgment delivered by *Okoro, JCA* (as he then was), in truth, that point digresses from the grain of the lead judgment.
[32] At p. 1155.
[33] Pp. 1154-1155.

> the Will has ordinarily been made. This will, in my view, ensure the specific, certainty of alterations and specifically assure their genuineness…[34]

This call is needless and respectfully, does not holistically contemplate the provisions of section 14 of the Wills Law Lagos State; having regards to the lead opinion of *Okoro JCA*, the dictum is otiose. By his appreciation of the law, *Danjuma JCA* has not, respectfully, properly located the facts of the case that the "few minor corrections" made by the testator was done before the execution and attestation of the contents of the Will. Further, the validity of the Will may be separate from the validity of the alterations on it. A Will may be valid and admitted to probate, while the altered words may not be admitted to probate. The validity of a Will is not dependent simply on the alterations made to it, but on the testamentary capacity of the testator, whether the Will was duly executed and testamentary freedom of the testator. The challenge is simply (as we would point out), the need for a solicitor drafting a Will to be extremely meticulous and avoid mistakes that would require alterations or a semblance of alterations to a Will.

Are mistakes totally avoidable to warrant alterations? In the case under review, the omissions were "a few minor corrections"[35] and spotted at the point of execution. In practice however, "small alterations are often made before execution" being necessary to reflect the true intentions of the testator.[36] The court in *Mudasiru v Abdullahi*[37] did not make much fuss of the "few minor corrections" and did not mention what they were. To completely avoid the type of situation in this case, we recommend that where a solicitor prepares a Will, it should be executed and attested only in the office of the solicitor, except there are compelling reasons against that. In such a

[34] *Id.*
[35] P. 1143
[36] Caroline Sawyer, *op. cit.*, at p. 153.
[37] *Op. cit.*

case, if the testator observes a mistake or omission (however little or minor) on the text of a Will, the mistake could easily be corrected on the computer and reproduced for execution and attestation.

There is also the need for the solicitor to draw up a Will in perfect and incomplete compliance with the instructions of the testator and ensure greater scrutiny before final execution. If alterations are unavoidable and computer corrections are impossible, the altered parts or words should be executed and attested by the testator and witnesses to avoid raising suspicions and dispense with the need to rebut the presumption that the altered words were inserted after the execution of the Will.

In the final analysis, the court was right when it concluded that:

> Given a literal interpretation of the above section, it clearly excludes any alteration made before the Will was executed. After all, courts are to give words used in statutes their ordinary grammatical meaning where they are clear and unambiguous…A casual perusal of the Will in dispute will disclose that all the alterations made in the Will are initialed by the testator…. There is no evidence that the alterations were made "after the execution" of the Will. Rather there is abundant evidence that the alterations were made and initialed before the Will was executed…. Whether the alterations were made before or after the Will was executed in this particular case, the truth is that it (i.e., the alterations) complied with Section 14 of the Wills law.[38]

5.0 Conclusion

Alterations to Wills are inevitable in the process of making Wills. The statutory provision regulating alterations of Wills are intended to ensure that a Will reflects the complete and true intentions of the testator.

[38] Per *Okoro, JCA*, at p. 1145.

Mudasiru v Abdullahi[39] constitutes a local precedent on alterations. It falls within the scenario in which the signatures of the testator and witnesses are not required; a good example of correctly applying the law to the facts of the case. By not vitiating the minor alterations, the court seems more concerned with the intentions of the testator-to give effect to it-an imperative for judges when construing the text of Wills. This however should not be a licence for a solicitor to be cavalier when drawing up a Will to risk the problem of having to alter the contents of the Will at the point of execution or after execution. If it becomes necessary and inevitable after a Will is executed for some alterations to be effected, it is advisable that the altered parts are duly executed and attested or a memorandum be drawn by way of a codicil to confirm the corrections. This would obviate the type of complaint raised by the appellants in *Mudasiru v Abdullahi*. To conclude, not every alteration needs to be executed so long as it was done before the final execution of a Will. Alterations could be made at any time; if however they are after the execution of a Will, they should be strictly executed and attested according to the tenor of the law regulating alteration of Wills.

[39] *Op. cit.*

Environmental Public Interest Litigation in Nigeria: The Paradigm Shift in *COPW V. NNPC (2019) 5NWLR (Pt. 1666) 518.*

Bolaji S. Ramos*

Abstract:

Until 2018, public-spirited individuals and NGOs who were not able to show direct damage or injury to them or their sufficient interest in the public interest lawsuits had their suits struck out on the grounds of lack of locus standi. Overruling a number of its existing decisions by implication on the subject of locus standi, the Supreme Court of Nigeria in its recent landmark decision in the case of Centre for Oil Pollution Watch v. NNPC (2019) 5NWLR (PART 1666) 518 revisited the jurisprudential scope of locus standi. The decision of the Supreme Court in this case is that public-spirited individuals and NGOs can now institute environmental public interest lawsuits on behalf of affected third parties, even when such NGOs and individuals have not suffered any damage or injury whatsoever. To achieve this paradigm shift, the Supreme Court redefined the concept of 'sufficient interest' in a broad and liberal way. This paper reviews the case, highlighting its landmark contributions and significance to constitutional and environmental law in Nigeria, especially in the area of environmental human rights, public participation in environmental governance and Nigeria's international environmental obligations. The paper recommends, inter alia, statutory codification and recognition of the rules of locus standi in Nigeria and timely adjudication of environmental pollution cases.

1.0. Introduction

Public interest litigation has been described as suits '*brought by a plaintiff who, in claiming the relief he or she seeks, is moved by a*

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desire to benefit the public at large or a segment of the public. The intention of the plaintiff is to vindicate or protect the public interest, not his or her own interest, although he or she may incidentally achieve that end as well'.[1]

In Nigeria, public interest law suits have, to a very large extent, had their days in courts. From the time the Supreme Court decided the case of *Adesanya v. President, Federal Republic of Nigeria*[2] in 1981 up till now, a good number of public interest lawsuits have been instituted and decided by courts in Nigeria. There is, however, a dearth of environmental public interest lawsuits (EPILs) in Nigeria as a sub-stratum of public interest litigation. EPILs can be identified by the reliefs sought before the court. When the reliefs sought in a public interest lawsuit are in pursuance of environmental protection and/or legally recognised interrelatedness of the people around the environment, such lawsuit will qualify as EPIL.[3] Presently and to the best of our knowledge, there are four recorded EPILs in Nigeria—two of which were decided in Nigeria[4] and the other two decided by regional courts in Africa?[5]

The most recent among these EPILs is *Centre for Oil Pollution Watch (COPW) v. NNPC*[6] which, for the first time, offered the Supreme Court the opportunity to adjudicate on EPIL in Nigeria and made landmark pronouncement on a number of both emerging and recurring

[1] South African Law Commission: Project 88, 'The Recognition of Class Actions and Public Interest Actions in South African Law'. Available at http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf. Accessed 10 October 2020.

[2] (1981) 2 NCLR 358.

[3] See for example: *Centre for Oil Pollution Watch v. NNPC (2019)5 NWLR (Pt. 1666) 518; Gbemre v.Shell Petroleum Development Company & Others,* Suit No. FHC/B/CS/53/05, judgment delivered on 14 November 2005;(2005) AHRLR 151 (NgHC 2005).

[4] See *Centre for Oil Pollution Watch v. NNPC (ibid); Gbemre v. Shell Petroleum Development Company & Others (ibid);*

[5] *SERAC& CESR v Nigeria* (Communication No.155/96:2002); *SERAP v. Federal Republic of Nigeria (ECW/CCJ/JUD/18/12).*

[6] *Supra, n 4.*

issues on public interest litigation in Nigeria. The focus of this paper is to carry out a review of the case with a view to highlighting and discussing the paradigm shift it has occasioned in EPILs, vis-à-vis its significance for jurisprudential development in Nigeria, especially in the areas of Environmental, Constitutional and Administrative Law. The paper is divided into six parts. The first part is this introduction.

The second part takes on a brief overview of existing EPILs in Nigeria while the third part discusses the case in review. In the fourth part, the significance of the case is examined in the light of its contributions to jurisprudential development in Nigeria. The critique of the case is carried out in part five, and part six concludes the paper with recommendations made.

2.0. Overview of Existing EPILs in Nigeria

Prior to the decision of the Supreme Court in *COPW*, there were three known and recorded EPILs in Nigeria. The first was *SERAC & CESR v. Nigeria*[7] decided in 2001 by the African Commission on Human and Peoples' Rights. In that case, SERAC & CESR, on behalf of the Ogoni People of Niger Delta approached the Commission and alleged, inter alia, that oil exploration operations by Shell, which were sanctioned by NNPC, had caused environmental degradation in Ogoni land and health problems to Ogoni People. In particular, SERAC & CESR alleged violation of Articles 16 and 24 of the African Charter on Human and Peoples' Rights. The Commission found that, indeed, the Nigerian Government, was in breach of the rights of the Ogoni People to health and satisfactory environment, and appealed to the Government to '*ensure protection of the environment, health and livelihood of the people of Ogoni land*'.[8]

In 2005,*Gbemre v. Shell Petroleum Development Company & Others*[9] was decided by the Federal High Court, the first EPIL on record

[7] *Supra,* n 6.
[8]See p 15 of the Ruling of the Commission.
[9]*Supra,* n 4.

decided in Nigeria. In that case, the Plaintiff, representing a community in Delta State, alleged violation of, *inter alia,* Articles 16 and 24 of the African Charter on Human and Peoples' Rights and sections 33 and 34 of the 1999 Constitution (as amended) by the Defendants by way of gas flaring. The Plaintiff sought declaratory and injunctive reliefs to perpetually stop gas flaring. The court granted the reliefs, and particularly ordered the 1st and 2nd Defendants to stop further gas flaring in the Plaintiff's community.[10] The third case, *SERAP v. Federal Republic of Nigeria*,[11] was decided by the ECOWAS Court of Justice in 2012. In that case, SERAP, on behalf of the people of Niger Delta, approached the court and alleged, *inter alia*, violation of Articles 16 and 24 of the African Charter on Human and Peoples' Rights by the government. The court found that the Nigerian Government violated Article 24 of the African Charter, and ordered that '*all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta'*[12] and '*to prevent the occurrence of damage to the environment' be taken by the government*'.[13]

In all these three cases, the Supreme Court, being the apex court in Nigeria, never had the opportunity to make a pronouncement on some of the issues raised, as there was no appeal to the Supreme Court. Apart from the settled fact that the pronouncement of the Supreme Court comes with finality, the importance of having a Supreme Court pronouncement on principles governing EPILs in Nigeria is that it is only the Supreme Court that can overrule itself or create a new path that the emerging field of EPILs may take pending the time there will be a legislative enactment on EPILs. This is exactly what the Supreme Court did in *COPW*.

[10] See p 31 of the certified true copy of the Judgement.
[11] *Supra*, n 6.
[12] See para. 121 of the Judgment
[13] *Ibid.*

3.0. *The Case of COPW v. NNPC*

a. The Facts

Crude oil substance was noticed by members of the Acha Community of Isuikwuato Local Government Area of Abia State of Nigeria, circulating and drifting on top of community streams. In a matter of days, the magnitude of the oily substance had increased to an unbearable proportion, and it had moved unto the adjoining land, estuaries, creeks and mangroves. It was discovered that oil spillage came from the Respondent's oil pipelines beneath, around and beside Ineh and Aku streams and rivers in Acha Community which had been constructed over 25 years ago. COPW, a registered environmental-spirited NGO whose function is, inter alia, to ensure reinstatement, restoration and remediation of environments impaired by oil pollution, filed a suit at the Federal High Court and sought the following reliefs:

i. Reinstatement, restoration and remediation of the impaired or contaminated environment in Acha Autonomous Community of Isiukwuato Local Government Area of Abia of Nigeria, particularly the Ineh and Aku streams which environment was contaminated by the spills complained of.
ii. Provision of portable water supply as a substitute to the soiled and contaminated Ineh/Aku streams, which are the only and/or major source of water supply to the community.
iii. Provisions of medical facilities for evaluation and treatment of the victims of the after negative effect of the spillage and/or the contaminated streams.

In defending the allegations, NNPC raised an objection in its Statement of Defence on the grounds that the COPW lacked the requisite *locus standi* to institute the suit. A motion on notice was subsequently filed by NNPC in this regard. The motion was heard, and in its ruling, the Federal High Court held that COPW lacked necessary *locus standi* to institute the suit. COPW was dissatisfied and

appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal held, inter alia, that:

> ….there is nothing in its pleadings to show that the appellant or any of its unspecified members suffered as a result of the alleged oil spillage. Besides, the members of the community itself are better placed, positioned and armed with the standing to sue the respondent for any damaged caused.[14]

COPW was still dissatisfied, and subsequently filed a further appeal at the Supreme Court. The Supreme Court distilled only one issue for determination which is whether the Court of Appeal was right in dismissing the Appellant's appeal for want of *locus standi* to maintain the suit. In determining the appeal, the Chief Justice of Nigeria invited five *amicus curiae*[15] to also address the court on the issue raised and on whether the court should expand the rules of *locus standi* in EPILs.

b. Arguments of the Parties

The arguments of the COPW were based on three sub-headings— (a) *locus standi* on environmental matters; (b) civil rights and obligations; and (c) need to extend the scope of *locus standi* in Nigeria. With respect to the first sub-hearing, COPW argues that pressure groups, NGOs and public-spirited tax payers that maintain EPILs, without any private interest or benefit attached, should be cloaked with *locus standi*, even when they have not suffered any injury at all, not to talk of injury above every member of the society in respect of the subject matter of the suit., especially if the suit seeks to vindicate the rule of law. In respect of the second sub-heading, COPW relies on section 6(6)(b) of the Constitution and some earlier Supreme Court decisions,

[14] Paras. C-E, p. 579.

[15] The amicus curiae are the Attorney General of Federation, Mr. Abubakar Malami, SAN; Chief Wole Olanipekun, SAN; Asiwaju A.S Awomolo, SAN; Mr. A.B Mahmoud, SAN (NBA President at the time); and Mr. L.C Nwosu, SAN. See *COPW*, para. F, p. 575.

and posits that every Nigerian citizen has standing to commence an action in respect of issues affecting their civil rights and obligations, and that the rights include ensuring that the laws of Federal Republic of Nigeria are enforced in respect of public matters, public law and, in some instances, private law.[16]

Finally, COPW contends that the Supreme Court can introduce a qualification or exception into the meaning of *locus standi*, as presently understood in Nigeria jurisprudence, or extends the meaning to the extent that a plaintiff who files an EPIL with the aim of vindicating the rule of law will have standing, even when he did not suffer any injury.[17]

The crux of NNPC's arguments is that the law on standing in Nigeria, which requires proof of injury, damage or sufficiency of interest, has never changed, and there should be no room for adopting perceived modern approaches found in England and Australia.[18] On whether section 6(6)(b) of the Constitution confers standing on COPW, NNPC argues that the section cannot be invoked as a ground for standing because the Supreme Court in *Adesanya,*[19] made a clear distinction between standing in constitutional litigation and non-constitutional litigation.[20]

The arguments and submissions of the five amici curiae can be classified into two categories— those who did not favour the expansion of the jurisprudence of *locus standi* in Nigeria, even when the suit is an EPIL and those who favoured possible expansion in EPILs.[21] The summary of the arguments of the former is that, in the absence of injury, harm or benefit to the person bringing the action,

[16]*COPW*, paras.D-F, pp. 552-3.
[17]*COPW*, para. C, p. 554.
[18]*COPW*, paras. C-F, p. 555.
[19] *Supra*, n 3.
[20]*COPW*, para. F, p. 555.
[21] In favour of expansion are Messrs. A.B Mahmoud, (SAN); Lucius Nwosu, SAN; and Adegboyega Awomolo, (SAN). Those that did not favour expansion are the A.G Federation and Mr. Wole Olanipekun, (SAN).

such a person will be likened to a busy-body who lacks the requisite *locus standi* to initiate the suit.[22] In addition, there are available statutory remedies on environmental degradation, and if at all damage is done to the environment, only the Attorney General of the Federation has the right to ventilate violation of public rights and institute actions in respect of same.[23] For the *amici curiae* that supported the possible expansion of *locus standi* in Nigeria, they argue that the court should relax the rules of *locus standi* and grant NGOs and public-spirited individuals standing where the action filed seeks to expose illegality and bring immeasurable environmental benefits that would have gone un-redressed.[24] Considering the provisions of certain existing laws[25] and the reliefs sought and its pleadings before the court, especially as it pertains to the interest of the mentioned 2000 members, it was argued that the court should make a finding of *locus standi* in favour of COPW.[26]

c. Decision of the Court

The singular issue raised by the Supreme Court is whether the court should expand the rules of *locus standi* in EPILs. To answer this question, the court delved into many areas of interest such as the meaning and origin of *locus standi*,[27] the distinction between the requirements of *locus standi* in private law and public law,[28] constitutional or statutory foundation of *locus standi* in Nigeria,[29] and modern approaches to *locus standi* in other common law jurisdiction

[22]*COPW*, paras. B-F, p. 556. This was the position of the Attorney General of the Federation, represented by Solicitor-General of the Federation.
[23]*COPW*, paras. G-B, pp. 556-558. This was the position of Wole Olanipekun, SAN.
[24]*COPW*, paras. A-B, pp.558-9. This was the position of Adegboyega Awolmolo, SAN.
[25] Reference was made to the 1999 Constitution (as amended); the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and the Oil Pipelines Act.
[26]*COPW*, paras. D-G, pp. 559-560. This was the position of A.B Mahmoud, SAN.
[27]*COPW*, para. C, p. 561.
[28]*COPW*, para. H, p. 561.
[29]See generally *COPW*, paras. H-B, pp. 562-8.

such as England, United States, Australia, Canada and Indian.[30] The holdings of the Supreme Court in these areas may be summarized thus:

i. *Locus standi* requirements in private law domain are different from the requirement in public law domain. While determination of *locus standi* in private law is and should be based on existence or non-existence of cause of action (the cause of action test), there is no such requirement in public law. The cause of action test in private law (and not public law) is the one based on 'interest' and 'injury' test. Nigerian courts, however, would appear to have merged the narrow and restrictive cause of action test in private law with the requirements of standing in public law.[31]

ii. The case of *Olawoyin v. Attorney General of Northern Region*[32] seems to be the first Nigerian case that the court applied the interest-injury test in private law to determine the question of *locus standi*, even though the case is purely on public law. [33] This misconceived development was followed in subsequent cases on the issue of *locus standi*, including *Adesanya*.[34] The concept of *locus standi* was developed by the English courts in the context of private litigation, without regard to public interest litigation.[35]

iii. The rules relating to *locus standi* in Nigeria cannot be found in any statute whatsoever, as those rules were historically made by judges.[36] Section 6(6)(b) of the Constitution is primarily

[30]*COPW*, para. F, p. 568; para. G, p. 567.
[31]*COPW*, para. H, p. 561
[32] (1961) 2 SCNLR 5.
[33]*COPW*, para. H, p. 561. In the lead judgment of the court delivered by Nweze JSC, His Lordship made reference to the Indian case of *Gupta v. President of India &Ors (1982) 2 SCR 365*, where per Bhagwati remarked that locus standi '*is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born*.' See *COPW*, para. C, p. 561.
[34]*COPW*, paras. A-B, p. 562.
[35]*COPW*, para. E, p. 584.
[36]*COPW*, Para. D, p. 561 (per. Nweze. JSC); para. G, p. 576 (per Muhammad, JSC); para. B, p. 584 (per Kereke-Ekun, JSC); para. B, p.594 (per Eko, JSC). Eko, JSC,

designed to describe the nature and extent of judicial powers vested in court, and not to grant *locus standi* to litigants in Nigeria.[37]

iv. It is wrong to say that there is no room for the Supreme Court to adopt modern views on *locus standi* in England and Australia. The Supreme Court has always taken such views in deserving circumstances such as the present case. A plaintiff will have *locus standi* if its action will vindicate the rule of law and it will ensure that the respondent complies with sections 13 and 20 of the Constitution and other relevant laws.[38]

v. Besides, paragraphs 1 and 2 of the amended statement of claim and the reliefs sought show that COPW has *locus standi*. In EPILs such as this, NGOs, such as COPW, have requisite standing to sue. There is considerable force in the view that it is by liberalizing the rules of *locus standi* that it is possible to effectively police the corridors of powers and prevents violation of law.[39]

vi. The combined reading of section 17(4) of the Oil Pipelines Act, section 33 of the Constitution and section 24 of the African Charter on Human and Peoples' Rights (Ratification and Domestication) Act[40] recognizes the right of the citizenry to a clean and healthy environment to sustain life.[41]

vii. There is no provision in the Constitution that says, through a relator action, that the Attorney General is the only proper person that is clothed with standing to enforce performance of public duty.[42]

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however, stated that the Rules of Court of the various States in Nigeria have provisions on judicial review, prescribing *locus standi* for judicial review of administrative actions.

[37]*COPW*, paras. H-F, pp. 562-7.

[38]*COPW*, paras. C-F, p. 587

[39]*COPW*, paras. F-B, pp. 568-571 (per Nweze, JSC); paras. C-D, p.572 (per Onnoghen, CJN); para. B, p. 577 (per Muhammad, JSC)

[40] African Charter.

[41]*COPW*, paras. C-F, p. 587.

[42]*COPW*, para. D, p. 596.

4.0. Significance of the Decision

The decision of the Supreme Court in *COPW* came at a time when environmental protection and management in Nigeria and the need for Nigeria to meet its national and international environmental obligations are on the brink of collapse. This decision has substantially contributed to Environmental, Constitutional and Administrative Law in Nigeria in the following core areas:

b. Encouragement of Public Participation in Environmental Governance Through EPILs

The practice of involving members of the public in the agenda-setting, decision-making, and policy-forming activities of institutions responsible for policy development is otherwise known as public participation.[43] Litigation generally (and public interest litigations in particular) is one of the many vehicles of public participation in environmental governance.[44] It may come in form of private civil actions, public civil actions and judicial reviews against some other persons, corporation or public authorities.[45] Participation of the citizens, especially public-spirited individuals and NGOs in environmental management is a legal right and/or obligation recognized in Nigeria under national[46] and international law.[47]

Notwithstanding this, there has been no federal statute in Nigeria that explicitly recognizes the right of the citizens to participate in environmental governance either through decision/law making or contributions to policy formulation.[48] This situation has now been

[43] G., Rowe and L.J., Frewer, A Typology of Public Engagement Mechanisms' (2005), *Science, Technology and Human Values*, 252.
[44] A.R., Lucas, 'Legal Foundations for Public Participation in Environmental Decision making' (1976) 16 *Nat. Resources* J.I 73.
[45] Ibid.
[46] Infra n.68 and 69.
[47] See Article 16 (1)(c) & (d) and Article 17(3) of the African Convention on the Conservation of Nature and Natural Resources (revised) 2003. This Convention has been ratified by Nigeria.
[48] Compare this to the position under Environmental Protection and Management Law of Lagos State 2017 where this right is explicitly recognized.

remedied by *COPW* with its decision that public-spirited individuals and NGOs may bring public interest actions in court to demand compliance and ensure protection, restoration and remediation of the environment. The definition of 'sufficient interest' offered by the court in the case per Eko, JSC, is a trail blazer, and it will continue to serve as encouragement and *locus standi* foundation for NGOs and public-spirited individuals to participate in environmental governance in Nigeria through litigation, especially through PILs.

c. Affirmation and Promotion of Environmental Rights as Fundamental Human Rights

The fundamental human rights expressly listed in the Constitution are right to life,[49] right to dignity of the human person,[50] right to personal liberty,[51] right to fair hearing,[52] right to private and family life,[53] right to freedom of thought, conscience and religion,[54] right to freedom of expression,[55] right to peaceful assembly and association,[56] right to freedom of movement,[57] right to freedom from discrimination[58] and right to acquire and own immovable property anywhere in Nigeria.[59] As can be seen from the above list, the Nigerian Constitution does not make any explicit provision for environmental rights as fundamental human rights.

The Supreme Court, in *COPW*, has now pronounced that the fundamental right to life of all the citizens in Nigeria under section 33 of the Constitution recognizes and encompasses '*the fundamental rights of all the citizenry to a clean and healthy environmental to*

[49] Section 33, 1999 Constitution (as amended).
[50] Ibid, s.34.
[51] Ibid. s.35.
[52] Ibid. s.36.
[53] Ibid. s.37.
[54] *Ibid.* s.38.
[55] *Ibid*. s.39.
[56] *Ibid.* s.40.
[57] *Ibid*. s.41.
[58] *Ibid*. s.42.
[59] *Ibid*. s.43.

sustain life'.[60]This pronouncement represents a significant expansion of environmental and constitutional jurisprudence in Nigeria. Even though the Federal High Court in *Gbemre*[61] appears to be the first court in Nigeria to hold that continuing flaring gas in the course of oil exploration and production activities by Shell in the Applicant's community was a gross violation of their constitutionally guaranteed rights to life (including healthy environment) and dignity of human person, the jurisprudential finality in the judicial system that comes with the pronouncements of the Supreme Court settles the view that right to a clean and healthy environment is a fundamental human right in Nigeria, and it is an integral part of fundamental right to life.

d. Overruling Requirements of Relator Action in Public Nuisance and Environmental Suits

A relator action is simply an action brought by the Attorney General on behalf of a citizen(s) who would not ordinarily be able to bring a proceeding before the court owing to want of *locus standi.*[62] The origin of this proceeding in Nigeria is undoubtedly rooted in its inheritance of common law as part of Nigerian law. In Nigeria, only the Attorney General could institute an action in respect of public nuisance as a relator. For private persons to sue for public nuisance or environmental damage, such persons must have suffered personal or peculiar damage or interference in respect of the alleged breach of public right.[63]

With the decision in *COPW*, the requirement of a relator action as a vehicle for private persons to seek justice in court has now been removed or overruled. In that case, the Supreme Court has pronounced that there is no provision whatsoever in the Constitution which provides that it is only the Attorney General that has standing, through

[60]*COPW*, paras. E-F, p. 587 (per Kekere-Ekun, JSC); para. H, p.597 (per Eko, JSC).
[61]*Supra*, n 4.
[62]*Ware v. Regent's Canal Co(1858)* 3 De G. & J. 212, 228.
[63]See in particular *Ipadeola v Oshowole* (1987) NWLR (Pt. 59) 18; (1987) 5 S.C 376. See also *Adediran v. Interland Transport Limited* (1991) NWLR (Pt.214) 155.

as relator action, to institute a case in respect of a breach of public duty or violation of a public right.[64] In effect, cases of public nuisance, which in most situations are environmental nuisance, can now be instituted by private persons, whether they have personally suffered a peculiar damage or not. This can be done through the vehicle of EPILs or other civil (environmental) actions.

e. Re-echoing Nigeria's National and International Environmental Commitments

As pointed out earlier, Nigeria, as a country, has enacted a number of laws on environmental protection, and it is a signatory to number of international instruments on environmental protection at the national and international levels. All these laws and treaties impose certain environmental obligations on Nigeria, some of which are expected to be fulfilled within certain periods of time. With assertive references to and notable pronouncements on the environmental protection, *COPW* re-echoes the need by the government to protect the environment from degradation, and, at the same time, reminds the government of its obligations towards the environment.[65]

5.0. Critique of the Decision

As earlier indicated, the question the court set out to determine is whether the Court of Appeal was right in dismissing COPW's appeal for want of *locus standi* to maintain the suit. To answer this question, the court traced the origin of application of *locus standi* in Nigeria. The finding of the court in this regard, as echoed by four of the seven justices that decided the case, is that the rules of or definitive backing for *locus standi* cannot be found in any known statute in Nigeria.[66] This finding appears to be faulty, as it does not represent the true position of statutory or constitutional foundation of *locus standi* in Nigeria.

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[64] See (n 43).
[65] See generally paras. E-F, p.584 (per Kekere-Ekun, JSC), paras. H-A, pp. 591-592 (per Okoro, JSC), para. F, p. 601 (per Eko, JSC).
[66] See (n.37).

Apart from the *locus standi* provisions in the *Fundamental Rights (Enforcement Procedure) Rules (FREP Rules) 2009*[67]made pursuant to the Constitution, the *Environmental Protection and Management Law of Lagos State (EPML) 2017* is a good example of a law in Nigeria that explicitly recognizes citizens' right or standing to sue any government authority or persons responsible for contravention of any environmental laws in Lagos State.[68] In addition to this, a reliable reference can also be made to the *Freedom of Information Act (FIA)2011*. Section 7 of the Act unequivocally gives *locus standi* against a public authority to any person whose request for public information, whether on environmental matters or generally, has been refused by the public authority. Even though the FREP Rules 2009, FIA 2011 and EPML 2017 were not in force when the suit was filed by COPW in 2003, the appeal was heard and judgment delivered by the Supreme Court in 2018 when these laws are already in force.

While the whole Justices seem unanimous in the inclusion of sufficiency of interest as a requirement for *locus standi*, they do not seem unanimous in the inclusion of indicators such as ill motive test, duty of care test, damage-injury test, object of incorporation test and bona fide test introduced by different Justices, even though they claimed to have read in advance and adopted the reasoning and conclusions in the lead judgment. The first problem that may arise in the future in respect of reliance by lower courts, the Court of Appeal and even the Supreme Court itself on this case as an authority for the doctrine of *locus standi* in Nigeria is whether the different indicators

[67] See section 3 (e) of the Preamble to the Rules. It provides that 'the Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant.'

[68] See section 212(1) of the Law. The section provides that 'any person who, after lodging a complaint of the contravention of the provision of this Part to the appropriate enforcing authority or Commissioner and no action is taken after fourteen (14) days by the appropriate enforcing authority or Commissioner may commence proceedings for an injunctive order against the contravener.'

identified by the Justices in their opinions are to apply conjunctively or they are meant to be picked at the pleasure or discretion of a judge of a High Court or justice of the appellate court based on circumstances of each case. The tendency that this impasse will create problems among lawyers, judges of lower courts, the Court of Appeal and the Supreme Court itself in the future, just like the *Adesanya* case, is very high.

Nweze, JSC read the lead judgment which all the other six Justices confirmed to have read in advance and to be in concurrence with. In his review of the arguments and submissions of counsel to the parties and those of the amici curiae, he was very clear that the main objective of the court was to determine whether the *locus standi* rules should be extended or expanded to accommodate environmental PILs.[69] This main objective was misunderstood by some of the Justices. Affirming the main objective, Muhammad, JSC remarked that:[70]

> The issue at hand, therefore, is whether in the peculiar circumstance of the appellant, this court should liberalize the criteria it holds a plaintiff must satisfy to acquire *locus standi* to maintain an action against the respondent herein…

In a very sharp contrast to this, Onnoghen, CJN set out his own perceived main objective as follows:[71]

> The issue in this case…is not whether the coast of locus standi should be broadened or expanded but whether appellant can be said to have disclosed sufficient interest in the subject matter to be accorded standing…

And then, Aka'ah, JSC introduced another understanding to the main objective which is really not on all fours with the lead judgment that

[69] See pages 550-568 of the judgment, *COPW.*
[70] *COPW*, para. H, p.576.
[71] *COPW*, para. D, p.575.

he said he concurred with. His reference to *Adesanya* is also, with respect, baseless. On his own understanding of the appeal, he remarked thus:[72]

> What is at stake in this appeal is whether the gradual approach should be adopted as decided in *the Senator Abraham Ade Adesanya v. President, Federal Republic of Nigeria & Anor* (1981)Vol.1 ANLR 1;(1981) 2 NCLR 358 or the liberal approach, which was adopted in Chief Gani *Fawehinmi v. Akilu & Anor* (1987) 4 NWLR (Pt. 67) 797.

The reference to gradual approach and its linkage to *Adesanya* is out of place with respect to what the Supreme Court set out to do in this case, as can be gleaned from the lead judgment of Nweze, JSC.[73] Surprisingly, the Supreme Court in *Adesanya* also did not apply or define what the so-called gradual approach is, even though the word 'gradually' featured in the opinion of Nnamani JSC. Contrary to Aka'ah JSC's claim, the court in *Adesanya* claimed to have applied or, at least, followed the path of the liberal approach.[74]

Notwithstanding the foregoing identified gaps, the decision of the Supreme Court in this case has undoubtedly contributed immensely not only to the understanding and jurisprudence of *locus standi* in Nigeria, but also to environmental and constitutional jurisprudence in Nigeria. What will appear to be the most remarkable aspect of the decision is the pronouncement on the age-long conception that it is only the Attorney General of the Federation or State (as the case may be) that can institute actions in the area of public interests or to protect violation of public rights. In this landmark case, the Supreme Court

[72] *COPW*, para. A, p. 578
[73] *COPW*, pp. 548-571
[74] See the dictum of Nnamani JSC in *Adesanya* in para. 3, p 396.

per, Onnoghen CJN and per Eko JSC, reversed the position and set the record straight.[75]

The issue of whether the Attorney General was the only person that can institute an action in respect of refusal to carry out a public duty or violation of a public right came up in the *Adesanya*.[76] The court, however, did not make any pronouncement on it. This present case addresses the issue, and with the holdings on it, it can be safely said that the issue has been brought to a close - the position now is that public spirited individuals and NGOs have standing to institute an action in respect of failure to execute a public duty or violation of public rights, especially in the area of environmental law.

The case, in a paradigm shift, expands the frontiers of *locus standi* in Nigeria with reliance on constitutional and statutory provisions, and, in doing so, the court holds that constitutionally-guaranteed fundamental human right to life under section 33 of the Constitution, by extension, apparently includes right to a clean and healthy environment.[77]The court, however, and rightly so, pointed out that section 6(6)(b) of the Constitution should not, by any stretch of imagination, be taken as a constitutional authority that grants *locus standi* to litigants in Nigeria.

While the issue of sufferance of damage or injury as a requirement for *locus standi* was done away with by six of the seven Justices in this present case, the issue of having sufficient interest as a consideration for determining the standing of a party was reflected in all the opinions of the Justices, and it was taken as paramount. To determine what constitutes sufficient interest in the case, the Justices relied substantially on COPW's pleadings and the reliefs by it, especially paragraph 2 of its Amended Statement of Claim where it pleaded that it is an environmental NGO incorporated with the main aim of ensuring restatement, restoration and remediation

[75] See COPW, para. C, p. 575 and para. D, p. 596.
[76] *Adesanya* (n 3) paras. 8-9, p. 370, paras. 1-9, p. 371, paras. 1-5, p. 372 (per Fatayi-Williams, CJN)
[77] *COPW*, paras. C-G, p. 587 (per Kekere-Ekun, JSC); paras. H-E, pp. 597-598.

environmental pollution or spillage. With reliance on these and relevant provisions of the Constitution and certain laws, all the Justices found in favour of the Appellant, but Eko JSC laudably went on to lay down the principles to be used in determining what sufficient interest is in (environmental) PILs when he held that NGOs and public-spirited individuals will have sufficient interest if their intention is to ensure that authorities comply with the rule of law.[78]

This remarkable pronouncement completely expands the frontiers of the 'sufficient interest' test. This expansion extends the horizon of *locus standi* in public law domain in Nigeria from its traditionally shallow scope, which often leads to injustice and inequitable results, to modern standards. With this pronouncement, prospective public-spirited litigants need not prove or show again that the breach of public duty or violation of public right is personal or peculiar to them before they can institute actions against the violators.[79]It will be safe, therefore, to say that the present case overrules the position of the majority of the Justices in the *Adesanya* case on the issue of personal damage or peculiar sufferance of injury before *locus standi* is conferred in law. The modern standards applied in *COPW* may be seen as opening the door wide and criticized on the basis of inviting unintended results such as floodgates of frivolous actions by busy bodies and vexatious litigants. Fatayi-Williams CJN, in *Adesanya*, however, gave a clue on how this could be dealt with when he said that 'it is better to allow a party to go to court and to be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the free-for-all in the media as to which law is constitutional and which law is not. In any case, our courts have

[78]*COPW*, paras. E-F, p. 597.

[79] In *Adesanya*, the position of the majority of the Justices (Sowemimo, JSC, Bello JSC, Uwais JSC, Nnamani JSC, Obaseki JSC and Idigbe, JSC), was that the appellant must show that the alleged infringement is personal and peculiar to him. It will appear that Fatayi-Williams, CJN, was not of the majority view. He also held that the appellant did not have standing, but this was majorly based on the grounds that the appellant as a Senator took part in the Senate proceedings that he eventually came to court to complain about. See paras. 2-7, p. 378.

inherent powers to deal with vexatious litigants on frivolous claims'.[80]

In the present case, unlike *Adesanya*, the court made a clear, expository distinction between the rules of *locus standi* in the public and private law domains,[81] and highlighted how wrong application of the damage-injury test (cause of action test) applicable in private law has over the years been wrongly applied by the courts in Nigeria to cases bothering on public law, including EPILs.[82]

6.0. Conclusion and Recommendations

The Supreme Court of Nigeria finally bites the bullet by removing the damage-injury requirement[83] and opening the doors of *locus standi* in Nigeria to public-spirited individuals and NGOs, who may not have suffered any personal or peculiar injury or damage, to institute public interest actions in respect of a breach of public duty or violation of public rights, or uphold the rule of law.

While the court retains sufficiency of interest as a test for standing in EPILs or actions in public law, the apt definition of what constitutes 'sufficient interest' and the linkage of right to life to right to a clean

[80] *Adesanya*, para. 9, p.373 (per Fatayi-Williams CJN)

[81] While a clear distinction can be easily made between a case on public law (for example, the *Adesanya* case) and the one on private law (for example *Lakanmi v. A.G Western Region (1974) 4 ECSLR)* by looking at the parties and the reliefs sought before the court, there are instances where a case combines both features of private law and public law. Distinctive classification of such a case as private or public law may prove a bit difficult. A good example is the case of *Adediran &Anor v. Interland Transport Limited (1991) 9 NWLR (pt. 214) 155*. Even though the parties in the case are both private parties, the first relief claimed before the court looked like a public law remedy. That is why the parties joined on the issue of public nuisance and the mandatory or otherwise of joining the Attorney General in the suit.

[82] *COPW*, paras H-G, pp. 561-562.

[83] As earlier shown, it was only Kekere-Ekun, JSC that included the damage-injury test in his opinion. This cannot be regarded as the decision of the court since it is not the opinion of the majority of the Justices. On the point of whether the damage-injury test is still to be regarded as an existing test, the reasonable view should be that Kekere-Ekun JSC's opinion on this point should be treated as dissent.

and healthy environment introduce a laudable addition to the jurisprudence of *locus standi,* public law, human right law and environmental law in Nigeria. As it is now, 'every person including NGOs, who bona fide seeks in the law court the due performance of statutory functions or enforcement of statutory provisions of public laws, especially laws designed to protect human lives, public health and environment, should be regarded as proper person clothed with standing in law to request adjudication on such issues of public nuisance that are injurious to human lives, public health and environment'.[84]

Despite certain noticeable drawbacks in the decision as shown in this paper which will need revisiting, the significance of the decision still unarguably outweighs its inadequacies. The significance may be seen more in the core areas of encouragement of public participation in environmental governance through environmental PILs, affirmation and promotion of environmental rights as fundamental human rights, overruling the common law requirement of relator action in public nuisance and environmental suits and re-echoing Nigeria's national and international environmental obligations and commitments, especially under the United Nations Framework Convention on Climate Change, the Paris Agreement. Agenda 30, Agenda 63 and Vision 20:20. Unhindered access to court and environmental justice are modern values that can foster sustainable development and inclusive environmental governance. To achieve this, all the tiers and branches of government have roles to play.

The judiciary, through the Supreme Court, has taken a laudable step to judicially expand the frontiers of *locus standi* in EPILs and the linkage of fundamental human right to environmental right. The National Assembly also has a role to play in this regard. Judicial proclamation of certain rights and duties without explicit legislative or statutory recognition of such rights and duties may lead to a state of uncertainty

[84]*COPW*, para. C, p. 595 (per Eko, JSC).

and foster situations of conflicting judicial decisions. It is recommended, therefore, that the rules of *locus standi* in public law be codified by the National Assembly in line with the decision of the Supreme Court in *COPW* or with such modifications as may be necessary. This will make the position of the law on *locus standi* in public law cases, which courts in Nigeria have been battling with since *Olawoyin*[85] was decided in 1961 and mostly applying wrong tests and principles, ascertainable to all stakeholders in Nigeria's justice system. The House of Assembly of Lagos State took this step in 2017 when it enacted the *Environmental Protection and Management Law,* and expressly gave right of action (*locus standi*) to any person in respect of all environmental matters, rights and duties in Part 7 of the Law.

On a final note, it should be reiterated that environmental pollution, especially water pollution through oil spillage, is capable of causing colossal or irreparable damage to environmental biodiversity and ecosystem. As such, restoration and remediation of environmental pollution is arguably a state of emergency that requires urgent attention. The timeline of *COPW* shows that a period of 14 years and three months was spent on the determination of the preliminary point of *locus standi* alone from the Federal High Court to the Supreme Court,[86] and since pollution is the subject matter of litigation, all actions are expected to be stayed by the parties, including temporary remediation, reinstatement and restoration of the stream, pending the determination of the substantive suit. It is beyond doubt that the biodiversity and ecosystem of the community and the polluted stream cannot be the same again. The question is: Is an award of damages or order of restoration enough to compensate for permanent loss of biodiversity? I think not. It is, therefore, recommended that cases of environmental pollution should be treated as fast-track cases by the

[85] *Olawoyin* (n 33).

[86] Pollution of the Acha Community Stream was noticed on 23rd May, 2003. The suit was instituted at the Federal High Court on 23rd April, 2004. The Supreme Court finally decided the *locus standi* objection on 20th July, 2018.

courts to avoid a possible situation of permanent destruction of *res* before judgment of court.

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