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A Comparative Analysis of the Role of the Court in Plea Bargain Agreements in Nigeria, South Africa and the United States. - **Abiodun Ashiru***

1.0 Abstract

The issue of plea bargaining occupies a central position among those concerned with the administration of the criminal justice system. There appears to be some uncertainty and confusion on the part of the administrators and the public as to the nature, scope, purpose, and value of plea bargaining as a form of case resolution in our system. The role of the trial judge in plea bargaining is often limited to an inquiry after the guilty plea is tendered into the due process requisites of a valid plea. The general consensus seems to be that trial judges should not participate in the pre-trial negotiations between the prosecutor and the accused. This paper carries out a comparative assessment of the role of the court in plea bargaining in Nigeria, the United States and South Africa. The paper finds that the South African approach to the subject matter of inquiry is more desirable for its flexibility in allowing parties to re-present their agreement even when due process was not followed initially. The paper recommends that Nigeria should adopt a more comprehensive legal framework which should not prevent the parties from appealing any agreement they may have entered into during a plea bargain arrangement.

Keywords: Plea bargaining, judicial participation, judicial ascertainment, guilty plea, voluntariness, fair hearing.

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1.1. Introduction

The standard answer to the question of what role judges have in determining the appropriateness of criminal charges is "virtually none." On the one hand, it is "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions."[1] On the other, at least with respect to the fairness of charges that are the basis of prosecutions, the scope of judicial authority is quite limited, because prosecutorial charging discretion is "almost limitless"[2] and "governmental investigation and prosecution of crimes is a quintessentially executive function.[3]

Plea agreements are closely bound up with charging decisions—they often involve dismissing some charges or substituting one charge for another, and partly for that reason, the judges' role often remains largely "Passive."[4] While practitioners commonly perceive plea bargaining as effectuating justice, numerous commentators have called this proposition into question. Some scholars argue that plea bargaining results in criminals receiving undeserved leniency, while others argue that plea bargaining subjects Defendants to unjustifiable pressure to forego their constitutional right to a jury trial.[5] After reviewing some of the cases resolved by plea bargain in Nigeria and the punishments imposed in those cases,[6]Adeleke and

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[1] See *United States v. Nixon*, 418 U.S. 683, 707 (1974).
[2] See *State v. Kenyon*, 270 N.W.2d 160, 164 (Wis. 1978).
[3] Brown Darryl, 'The Judicial Role in Criminal Charging and Plea Bargaining', [2018] (46) (1), Hofstra Law Review, 63; See also *Morrison v. Olson*, 487 U.S. 654, 706 (1988).
[4] Abraham S. Goldstein, 'The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea' (1981) (27) (1) SAGE Journal of Research in Crime and Delinquency, 192.
[5] F. Andrew Hessick and Reshma M. Saujani, 'Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge', (2002) (16) (2) B.Y.U. Journal of Public Law, 189.
[6] For instance, Dieprieye Alamiesieigha, former Governor of Bayelsa State, was convicted of stealing public assets worth over US$100 million and got away with imprisonment for two years and an order of asset forfeiture for only those assets

Olayanju noted that plea bargaining is a means by which the rich who stole the lifeblood of the poor are made to return only part of it and are then let off the hook.[7]

Mordi argued that the practice violates the fundamental human rights of the accused by the inducement of confession of guilt and a trial waiver for the promise of a reduced sentence.[8] We do not agree with the position of this writer in totality. One of the legal safeguards provided under the plea bargain guidelines under the statutes[9] is that the Judge must ascertain the voluntariness of the plea entered into by the Defendant. In doing so, if the Defendant complains to the court that the plea was induced, the Judge will have no option than to reject the plea. We shall examine these guidelines in detail in a later part of this paper. Okwori argues that plea bargain violates some rights under the American and the Nigerian Constitutions such as the right to be presumed innocent until the contrary is proved, the right to fair hearing in public, the privilege against self-incrimination and the right to examination of witnesses.[10] Other scholars from foreign jurisdictions have also

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that were traced. Lucky Igbinedion, former Governor of Edo State, was given a fine of less than US$20,000 upon conviction for theft of public assets and breach of public trust. Tafa Balogun, former Inspector-General of Police, a lawyer, stole assets worth over US$130 million and was sentenced on conviction to imprisonment for a mere six months. Mrs Cecilia Ibru, Chief Executive Officer of Oceanic Bank, was convicted of stealing assets worth over $2billion and was sentenced to six months imprisonment, a term that was mostly served in one of the best hospitals in the country. See F A R Adeleke and O F Olayanju, 'The Role of the Judiciary in Combating Corruption: Aiding and Inhibiting Factors in Nigeria', Commw L Bull [2014] (40) (4) 601-602.

[7] *ibid.*

[8] Chinwe A. Mordi, 'The Use of Plea Bargain in Nigerian Criminal Law', (2018) (9) Beijing Law Review, 156.

[9] For instance, see s.270 of the Administration of Criminal Justice Act 2015.

[10] Okwori, Nicholson Alechenu, Plea Bargaining: A Trial Procedure that Negates Fundamental Rights of the Accused Person (2013). Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629255&download=yes> accessed on the7 July 2020.

argued in this line.[11] The United States Supreme Court has however discountenanced the arguments that plea bargaining is unconstitutional in a host of cases.[12]

Despite the various arguments trailing the practice, plea bargaining has its benefits and its desirability depends on the perspective of the parties involved. For example, for prosecutors, a lightened caseload is equally attractive. But perhaps more importantly, plea bargaining assures a conviction, even if it is for a lesser charge or crime. Prosecutors benefit from plea bargains because the deals allow them to improve their conviction rates. Some prosecutors also use plea bargains as a way to encourage Defendants to testify against Co-defendants or other accused persons. Plea bargains allow prosecutors to avoid trials, which are shunned because they are time-consuming, labour-intensive, and costly but carry no guarantee of success. Through the *rationale* use of plea bargaining, prosecutors can ensure some penalty for offenders who might be acquitted on technicalities. Although prosecutors cannot negotiate every case (because that would incur public ire), they can bargain away routine cases or those characterized by weak evidence or other difficulties, saving their time and resources for cases that demand more attention.[13]

Plea bargaining allows defense attorneys to increase their efficiency and profits, because they can invest less time on plea-bargained cases. Disposing of cases efficiently is important for both public and private attorneys. Public defenders are sometimes responsible for handling huge case – loads, and private attorneys

[11] Thomas R. McCoy and Michael J. Mirra, 'Plea Bargaining as Due Process in Determining Guilt', [1980] (32)Stan. L. Rev., 887.
[12] See for instances, *United States v Mezzanatto*, 513 U.S. 196 (1995); *United States v Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v Hayes*, 434 U.S. 357 (1978); *Alabama v Smith*, 490 U.S. 794 (1989).
[13] Benefits of Plea Bargaining: <https://www.britannica.com/topic/plea-bargaining/Benefits-of-plea-bargaining> accessed on the 6 July, 2020.

can make more money by bargaining than by going to trial. When prosecutors issue charges that are arguably unmerited, defense attorneys can use negotiation to achieve charge reductions. Defence attorneys may threaten to file many pretrial motions or to present an exceptionally zealous defense if prosecutors will not cooperate.[14]

Notwithstanding the fact that in plea bargaining judges are a bit handicapped in the negotiation,[15] they also benefit from plea bargaining. The practice allows judges to preside over trials which make the practice to be efficient *i.e.* to minimize the risk of rulings being overturned on appeal, and to avoid the necessity of making rulings during trial. Most important to some judges, however, is that plea bargains remove the burden of determining guilt, and the practice allows them to share the responsibility for sentencing with the attorneys who fashioned the bargain. Although plea bargains must be approved by judges before whom they are brought, judges rarely refuse approval unless they feel that the defendant is legally innocent or has been coerced into pleading guilty or unless the bargain calls for a penalty that the judge believes is excessively harsh or lenient.[16]

Defendants, of course, also benefit from plea bargains, because they can limit the severity of the sanctions they face and add certainty to an otherwise unpredictable process. Some defendants plead guilty to avoid the stigma of trial, because trials are open to the public and may be reported in the media. Guilty defendants sometimes use the threat of trial to persuade prosecutors to reduce the severity of penalties they face. Some defendants, both guilty and innocent, may accept bargains that seem beneficial to them,

[14] *Ibid.*
[15] F A R Adeleke and O F Olayanju, *Supra* n.6 at 601.
[16]Benefits of Plea Bargain: <https://www.britannica.com/topic/plea-bargaining/Benefits-of-plea-bargaining> accessed on the 4 July, 2020.

especially if they have been detained before trial and if accepting the bargain would mean getting out of jail (*e.g.* an offer of "Time Served").

Sometimes even victims prefer plea bargains to trials. Plea bargains allow victims to avoid testifying in court, which may be frightening or upsetting, especially for victims of violent crimes. Some victims also appreciate the certainty provided by plea bargains; they need not worry about the emotional trauma of dealing with the acquittal of someone they feel is guilty.

Plea agreements are a common instrument in criminal procedure. They enable the prosecutor and the accused or his counsel to negotiate and settle an agreement on plea and sentences. Plea bargaining in pure form places the criminal proceeding, fact-finding, legal consequences and even legal judgement at the parties' disposal.

In this paper, plea bargain and plea bargaining are used interchangeably and so is a court and a judge.

2.0 Conceptualizing Plea Bargaining

Plea Bargaining is not a monolithic concept.[17] Its definition is not as simple as the meaning of a crime. The term can be used to describe many different situation and relationships. The definition of plea bargaining varies depending on the jurisdiction and on the context of its use. Plea bargaining has been defined as a process through which a defendant pleads guilty to a criminal charge with the expectation of receiving some consideration from the State by way of a lighter sentence.[18] It is touted as a tool for decongesting

[17]Peter Clark, 'The Public Prosecutor and Plea bargaining', (1986) (60), Australian Law Journal, 199.
[18] Linus Y.Akor, 'Plea Bargain and the Anti-Corruption Campaign in Nigeria', (2014) Global Journal of Interdisciplinary Social Sciences, 118.

the prisons as well as save the State, enormous resources and time involved in putting an accused through a full trial

In *Santobello v. New York,* the Supreme Court of the United States defined plea bargaining as the disposition of criminal charges by agreement between the prosecutor and the accused.[19] Similarly, in the case of *People v. Orin*,[20] the court defined plea bargaining as a method of disposing of criminal prosecutions which is an agreement negotiated by the people (the prosecutor) and the defendant and approved by the court. Ferguson and Roberts defined the concept as a practice whereby the accused forgoes his right to plead not guilty and demand a full and fair trial and instead uses a right to bargain for a benefit. It means the accused person's plea of guilty has been received for it.[21]

A plea bargain is a negotiation, between the Defendant and his lawyer on one side and the prosecutor on the other, in which the Defendant agrees to:

i. reveal the identity of other offenders; or/and
ii. whereabouts of evidence relevant to a case; or/and
iii. plead guilty to some offences;

In return for:

i. reduction of the severity of the charges;
ii. dismissal of some of the charges;
iii. the prosecutor's willingness to recommend a particular sentence;
iv. or some other benefit to the defendant.[22]

[19] (1971) 404 U.S. 257, 260.
[20] (1975) 13 Cal. 3d 937, 942.
[21] Ferguson and Roberts, 'Plea Bargaining; Directions for Canadian Reforms', (1974)(52) Canadian Bar Review, 497.
[22] Bob Osamor, Criminal Procedure Laws and Litigation Practices (2nd Edition, Dee-Sage Books Prints, 2012) 366.

According to C.W. Wigwe, plea bargain is a deal offered by a prosecutor as an incentive for an accused to plead guilty.[23] The Black's Law Dictionary defines it as "the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that position for the grave charge.[24]

From the various definitions given to the concept above, plea bargaining may be defined as an arrangement or agreement whereby a person who is accused of committing an offence and who is charged before a competent court of law admits to the charge on the condition that the prosecutor will reduce his sentence or vary his charge and such arrangement or agreement is approved by the court.

2.1. A Brief Overview of Plea Bargain Agreement under the Administration of Criminal Justice Act 2015.

The purpose of the ACJA 2015 is to ensure that the system of administration of criminal justice in Nigeria is efficient in the management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interest of the suspect, the defendant and the victim.[25]By virtue of Section 270 of the Act, the Prosecutor may with the consent of the victim or his representatives consider, offer or accept a plea bargain from a defendant. The prosecutor must ensure that the acceptance of such plea bargain is in the interest of justice, the

[23]Christian Wigwe, 'The Law and Morality of Plea Bargaining', (2013) (l5) (l) Port-Harcourt Law Journal, 1.
[24] Bryan A Garner and Honey Campbell, Black's Law Dictionary, (8th Ed., West Publishing Co, 2004)1190.
[25]Administration of Criminal Justice Act 2015, s.1.

public interest, public policy and the need to prevent abuse of legal process. In determining whether it is in the public interest to enter into a plea bargain, the prosecution must weigh all relevant factors, including:

i. the Defendant's willingness to cooperate in the investigation or prosecution of others;

ii. the Defendant's history with respect to criminal activity;

iii. the Defendant's remorse or contrition and his willingness to assume responsibility for his conduct;

iv. the desirability of prompt and certain disposition of the case;

v. the likelihood of obtaining a conviction at trial, the probable effect on witnesses;

vi. the probable sentence or other consequences if the Defendant is convicted;

vii. the need to avoid delay in the disposition of other pending cases ;and

viii. the expense of trial and appeal.

ix. The Defendant's willingness to make restitution or pay compensation to the victim where appropriate.

Where it is reasonably feasible to afford the victim or his representative the opportunity to make representations regarding the contents of the agreement and the inclusion in the agreement of compensation or restitution order, such agreements between the parties must be in writing and signed. The presiding Judge or Magistrate is not permitted to be part of the discussions.

Where there is an agreement between the parties, the prosecutor shall inform the court of the agreement reached by the parties, it is

the duty of the presiding Judge or Magistrate to inquire from the Defendant to confirm the correctness and the voluntariness of the agreement. After considering the agreed sentence, the presiding Judge or Magistrate may impose the sentence agreed upon, or impose a lesser sentence. Where a presiding judge or magistrate is of the view that the offence requires a heavier sentence, than the one agreed, he is to inform the Defendant of his view. The Defendant may decide to abide by his plea of guilty and accept the sentence by the Judge or Magistrate, or he may decide to withdraw from his plea agreement. If he does so, the trial precedes *de novo* before another presiding Judge or Magistrate.[26]

3.0. Parties to a Plea Bargain

Traditionally, there are three persons involved in a plea bargain procedure, and they are the prosecutor, the Defendant, and the court. However, it is not out of place to involve the victim of the crime in the agreement. This is usually the practice in the United States. While the business of this paper is to analyse the roles of the court in a plea bargaining procedure, we, however, consider it imperative to briefly discuss the roles of the other parties to a plea bargain.

3.1 Role of the Prosecutor in a Plea Bargain

Traditionally speaking, the prosecutor has three main tasks: to investigate crimes, to decide whether or not to instigate legal proceedings and to appear in court to prosecute the case to its conclusion. The prosecutor investigates crimes together with the police. He or she shall have contact with the person suspected of the crime, the victim and witnesses, and have close contact with the police. Once the preliminary investigations have been completed,

[26] See generally the Administration of the Criminal Justice Act 2015, s.270.

the prosecutor decides whether there is sufficient evidence to bring the case to court. If it is a minor crime, and the suspect admits his or her guilt, the prosecutor imposes a fine.[27] This is referred to as an order of summary punishment, and no trial will be held. If an action is initiated there will be a trial in a court of law. At this stage, the task of the prosecutor is to prove that the suspect has committed the crime. He or she questions the suspect, the witnesses, and experts in order to establish that the suspect is guilty.[28]

During prosecution of a case, the prosecutor is expected to be fair and impartial as he must ensure that his primary interest is to present the facts as they are, to see that justice is done and not to secure a conviction at all cost.[29] In addition to this, the prosecutor must ensure that any evidence favourable to the defendant's case is made available to him. This is to safeguard the right of the defendant to adequate time and facilities which is provided for under the various legal instruments.[30] The prosecutor must ensure the disclosure of such evidence; hence he will be sanctioned.[31]

During a plea bargaining, the role of the prosecutor is not so different from the role which he performs in the usual course of prosecution. Plea bargain is a prosecutor's strategy. Every prosecutor is mindful of the cost of criminal prosecutions both in terms of money, time, and facilities. Therefore, any strategy that

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[27] Summary Punishment: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/decision-to-prosecute/summary-punishment/> accessed on the 5 of July, 2020.
[28].The Role of the Prosecutor in Plea Bargaining: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/. Accessed on the 4 July, 2020>.
[29] See *R v Sugarrman* (1936) 25 Cr. App. 109.
[30] See for instance, s36 (6) (b) of the 1999 Constitution of Nigeria (hereinafter CFRN, 1999); See also the Sixth Amendment to the American Constitution.
[31] See Rules of Professional Conduct for Legal Practitioners 2007, Rule 37 (6).

lawfully saves money, time and facilities for the prosecution is a welcome advantage.[32]

Statutorily, the whole of Part 28 of the Administration of Criminal Justice Act 2015 (hereinafter ACJA 2015),[33]contains the provisions relating to plea bargain and plea generally. Similarly, Part 8 of the Administration of Criminal Justice Law of Lagos State 2011 (hereinafter ACJL 2011)[34] contains provisions relating to plea bargain. A combined reading of the provisions of these laws relating to plea bargain will reveal that the summary of the roles of the prosecutor in plea bargaining are:

a. to receive and consider plea bargain
b. to offer a plea bargain to a defendant charged with an offence
c. to enter into plea bargaining with the defendant with the consent of the victim or his representative.
d. to consult with the police responsible for the investigation of the case and the victim or his representative.
e. to negotiate the plea bargain etc.

The Administration of Criminal Justice Act provides for the plea bargain guidelines in details but not without a *lacuna*. The Act provides that the prosecutor may enter into plea bargaining with the defendant with the consent of the victim or his representative where the evidence of the prosecution is insufficient to prove the offence charged beyond a reasonable doubt.[35] One cannot help but wonder

[32] *Supra* note 4 at 367.
[33]Administration of Criminal Justice Act 2015. Part 28 comprises of Sections 270-277. The Act is applicable in the Courts of the Federal Capital Territory and other Federal Courts in Nigeria. ACJA repealed the Criminal Procedure Act, the Criminal Procedure Code and the Administration of Criminal Justice Commission Act.
[34]Administration of Criminal Justice Law of Lagos State 2011. Part 8 comprises of Sections 75 and 76.
[35]ACJA 2015, s.270 (2) (a).

the essence of such a provision. The whole essence of a criminal prosecution is to ensure that a wrongdoer is punished for his wrongdoing while the victim of the crime is compensated if compensation is practicable. It would be unreasonable and unjust for a person to be convicted of a crime which the prosecution is unable to prove. In the case of *Danjuma v State*, the Supreme Court opined that it is now well settled in our criminal jurisprudence that in order for the prosecution to succeed whenever the commission of a crime is in issue against an accused person, he is under a duty to establish its case beyond reasonable doubt.[36] Similarly, in *Musa Ikaria v The State*, the same court held thus:

> "It is trite that the law requires the respondent to prove its case against the appellant beyond reasonable doubt. The quality of evidence the Respondent adduces invariably determine if that burden has been discharged. …"[37]

It is our humble but candid submission that this provision as contained in the Act is a misnomer, hence, should be amended.

3.2 Role of the Defendant in a Plea Bargain

Plea bargain is all about defence options. For the Defendant, the main benefit of plea bargain is the reduction of the penalty based on a less severe charge than the earlier one. The roles the Defendant plays in a plea bargain procedure is like that of the prosecutor, i.e. offer plea bargaining, receive plea bargaining and negotiate the plea bargain. The Constitution guarantees an accused person the right to be represented by an advocate.[38] This includes right to effective assistance of a counsel, taken with attorney-client privilege, act to ensure that an accused receive professional advice

[36] (2019) LPELR-47037 (SC).
[37] (SC.652/2013) NGSC 29; See also *Kareem Olatinwo v The State* (2013) LPELR-19979 (SC).
[38] CFRN, 1999, s36 (6) (c)

exclusively from his attorney. Prosecutors have to make all plea offers to the accused person's attorney and not to the accused directly. It is important to however note that the Defendant has the right to refuse any plea which he may have been offered by the prosecutor. After all, he is presumed innocent until the contrary is proved.[39] The defence counsel must provide effective assistance to his client. As a result, the defence counsel is the only party who knows all the information necessary to access the case and to recommend the best course to his client. Counsel must inform his client about the consequences of pleading guilty and trial decisions. The failure of the defence counsel to advise his client diligently may result in a professional misconduct which may be punished or redressed by the court.[40]

4.0. The Role of the Court in Plea Bargaining

Reviewing prosecutors' decision to charge or not to charge in the light of public policies and resources is only one aspect of criminal prosecution. The judicial role is on a stronger legal footing after the prosecutor's charging document has been filed and the court thus is seized of jurisdiction.[41] The important question to be answered here is how do judges carry out their responsibility "to do justice in criminal prosecutions" where the case is to be resolved by party-negotiated dispositions.

4.1. Judicial Participation in the Discussion of Offer or Acceptance of a Plea Bargain

The principle of law in this regard is that a judge does not take part in the discussion that leads to plea bargaining. Judges have a relatively little legal basis for policing the fairness of parties'

[39] *Ibid*, s.36 (5).
[40] Rules of Professional Conduct for Legal Practitioners 2007, Rule 14 (5).
[41] Brown Darryl, 'The Judicial Role in Criminal Charging and Plea Bargaining', (2013) (l5) (l) Hofstra Law Review, 77.

negotiation tactics, in particular, the prosecutors' tactical conduct in the plea bargaining process.[42]

In Nigeria, both the substantive and procedural criminal laws are divided; there is no uniform criminal procedure law in Nigeria. Section 270 of ACJA provides thus:

> "The presiding judge or magistrate before whom the criminal proceedings are pending shall not participate in the discussion contemplated in subsection (3) of this section".[43]

Similar provision to the above is made under the ACJL.[44]

In the United States**,** the most definitive statement in prohibiting judges from participating in plea negotiations is contained in the Federal Rules of Criminal Procedure**.**[45]The pertinent rule 1l(e) (10) was firmly interpreted in *U.S. v. Werker.*[46]*The Werker* decision stemmed from a refusal of a U.S. Attorney to agree to recommend ten years as a maximum sentence in a pending case. The district judge was aware of the U.S. Attorney's unwillingness to plea bargain. He inspected a presentence report on the defendant and indicated that he would inform the defendant of the sentence to be imposed if he were to plead guilty. The U.S. Attorney opposed this action. The Second Circuit upheld the U.S. Attorney on two grounds: first, "The promise by a judge of a specific sentence for a subsequent plea of guilty falls within the explicit proscriptions of Rule 11(e);" and second, "That such a judicial intervention is inconsistent with the proper administration of criminal justice."

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[42] *Ibid.*
[43]ACJA 2015, s270 (8).
[44]ACJL, s76 (5).
[45] The Federal Rules of Criminal Procedure are the procedural rules that govern how federal criminal prosecutions are conducted in the United States district courts and the general trial courts of the U.S. government enacted by the United State Congress and published by the United State Government Publishing Office.
[46] 535 F.2d 98 (1976).

In South Africa, the Criminal Procedure Act[47]is the procedural law which regulates the administration of criminal justice in the State. Section 105Aof the Act provides that the court shall not participate in the negotiations contemplated in subsection (1) of the section. The sub-section (1) deals with plea bargaining.[48]

From the provisions above, it is evident that the three jurisdictions examined prohibit the judicial participation of any sort when the parties are discussing the plea bargain arrangement i.e. the prosecutor and the defendant are negotiating and discussing as to the terms of the plea bargain agreement. However, a careful consideration would reveal that the Lagos State criminal justice law is wider in scope and it allows for a judicial participation to the extent that the parties may approach the judge as to their rights under the agreement and the judge may address the parties in general terms and in an open court as to the extent of their legal rights including possible advantages of discussions, possible sentencing options or the acceptability of the proposed agreement.

4.2. Judicial Ascertainment of the Defendant's Admission of Allegation in the Plea

The power to ascertain whether the defendant admits the allegation in the charge to which he has pleaded guilty and whether the defendant entered into the agreement voluntarily and without undue influence is provided for under the various criminal procedure statutes.

In Nigeria, the Administration of Criminal Justice Act[49]provides that the presiding judge or magistrate shall ascertain whether the defendant admits the allegation in the charge to which he has pleaded guilty and whether he entered into the agreement

[47]The Criminal Procedure Act 51 of 1977.
[48] *Ibid*, s105A (3).
[49] See ACJA 2015, s270 (10).

voluntarily and without undue influence. Similarly, the criminal justice Law of Lagos[50] makes provision for this requirement in exact wordings.

The law is basically the same in South Africa**.** The criminal procedure law in South Africa provides thus:

> (6) (a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether:
>
> (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
>
> (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and
>
> (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.[51]

In the United States, the rule is not different. Rule 11 of the Federal Rules Criminal Procedure provides that before accepting a plea of guilty or *nolo contendere*, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).[52]

4.3. Fact-Finding Power of the Court in Plea Bargaining

In the United States**,** Rule 11 outlines the duties of the judge in the plea bargaining process. The judge has to ensure that the plea is voluntary, has a basis in fact, and would further the administration

[50] See ACJL 2011, s76 (7).
[51] The Criminal Procedure Act 51 of 1977 s.105A (6).
[52] See Rule 11 (2) of the Federal Rules of Criminal Procedure.

of justice. The judge's position is supervisory; he cannot participate in the plea bargaining itself. However, once the plea is entered the judge has broad discretion over accepting or rejecting the plea.[53]The Supreme Court in the case of *North Carolina v. Alford*[54] held that Rule 11 requires judges to find a factual basis for the guilty plea before the court can enter a judgment against the Defendant. This is a role which is mandatory for the court to play. The judge must ensure that not only did he ascertain that the plea of the Defendant was offered or accepted freely but the judge must also ensure that there is a basis for the defendant's plea. This in effect will guarantee that the defendant is not punished for an offence which he did not commit by the mere fact that he pleaded guilty to a charge.

Similarly, the Nigerian Criminal Justice Act[55] requires that the judge should be satisfied that the defendant is guilty of the offence to which he has pleaded guilty. This requirement could be interpreted to mean that the judge should ensure that from the fact of the case which is presented to him, the defendant is guilty of the charge based on the evidence which is presented by the prosecutor. This is also expressly provided for in the ACJL.[56]

The position of the law in South Africa does not differ from the above provisions as it is in Lagos and in the Federal Courts of Nigeria. The Act provides that:

> (7) (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the

[53] F. Andrew Hessick andReshma M. Saujani, 'Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge', (2002) (16) (2) BYU Journal of Public Law, 224.
[54] 400 U.S. 25, 39 n. 10-11 (1970).
[55]ACJA 2015, s.270 (10) (a).
[56]ACJL 2011, s.76 (7) (a).

offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.

The South African law, however, is a bit more detailed in this regard. The Act provides thus:

(b) For purposes of paragraph (a), the court

(i) may (aa) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and (bb) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; and

(ii) must, if the offence concerned is an offence

(aa) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act 105 of 1997); or (bb) for which a minimum penalty is prescribed in the law creating the offence, have due regard to the provisions of that Act or law.

The South African law gives the direction as to what the court should do to satisfy itself that the accused is indeed guilty of the offence which he is pleading guilty to. To plead guilty freely and voluntarily is a fundamental principle of South African criminal procedure. This was held in the case of *Chetty v Cronje*.[57] The implication of this is that if the court fails to satisfy itself using the above conditions, then whatever sentence the court enters may be declared null and void if challenged in a competent court of law.

Both the Nigerian law and the United States rule failed to make provision for this. However, the practice directions of the various courts take care of what may seem as a lacuna in the laws.

[57]1979 (1) SA 294 (O) p. 297g-h.

4.4. Judicial Confirmation of Compliance with the Requirement of a Valid Plea Bargaining

One of the features which distinguish the South African law from that of Nigeria and the United States is that in South Africa, the court has the power to confirm whether the plea bargaining agreement complies with the requirement which is set out by the law. For clarity, Section 105A (4) is reproduced below:

> (a) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then
>
> (i) require the accused to confirm that such an agreement has been entered into; and
>
> (ii) satisfy itself that the requirements of subsection (1) (b) (i) and (iii) have been complied with.
>
> (b) If the court is not satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall:
>
> (i) inform the prosecutor and the accused of the reasons for non-compliance; and
>
> (ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.

This provision gives the South African courts broader power in participating in a plea bargaining agreement. While the other jurisdictions provide that the courts should be satisfied that the defendant is guilty of the charge, the South African courts must ensure that the agreement presented before it complies with the laid down rules and regulations regarding plea bargaining under the Act. Further, the South African court has the power to order the prosecutor and the accused to go back and comply with the

requirements concerned. This affords the parties to regularise the defect in the agreement. This is as against the practice of entering a not-guilty plea for the accused and then the case proceeding to trial. The latter is the practice in Nigeria. When the judge realises that the plea bargaining agreement presented before it has not complied with the procedure as provided by the law, the judge usually enters a not-guilty verdict for the accused and the judge will require the prosecution to prove its case beyond reasonable doubt.

There is no doubt that the South African approach in this regard is desirable as it affords the parties the opportunity of rectifying the errors which they may have made during the plea arrangement.

4.5. Judicial Power to Dismiss the Plea Bargain or Convict the Defendant

In all the three jurisdictions considered in this paper i.e. Nigeria, the United States and South Africa, the courts have the power to either convict the Defendant based on his plea or the court may reject the plea.

In Nigeria**,**[58]when the judge is satisfied that the defendant is guilty of the offence to which he has pleaded guilty, the judge can convict the defendant on his plea of guilty to that offence. However, the procedure is slightly different in South Africa**.** In the latter, the court does not convict the accused person upon the finding that the accused is indeed guilty of the offence coupled with his plea of guilty but the court must consider the appropriateness or otherwise of the proposed sentence for the offence. This is what distinguishes South Africa from the other jurisdictions in this regard. In the other jurisdictions, the judge convicts before considering whether the sentence is appropriate or not but the South African court would

[58] See ACJA 2015, s.270 (10) (a); See also ACJL 2011, s.76 (7) (a).

only convict the accused person upon the finding that both the plea and sentence is 'Just'.[59]

While the other jurisdictions adopts the word 'Appropriate', the South African law made use of the word 'Just'. In the case of *S v Sassin*,[60] the court considered the meaning of the word 'just' and consulted the Oxford English Dictionary which defines 'Just' as 'Morally right and fair, appropriate or deserved'. At first glance it might appear that the legislature simply opted for the use of plain English, but in the opinion of Steyn, the word 'just' was particularly chosen in order to compel the presiding officer to not only consider an appropriate sentence based on the nature of the offence but to take other factors into consideration in sentencing in terms of this provision.[61]

We agree with Steyn when she noted that the distinction between 'Appropriate' and 'Just' would be that a presiding officer has to consider more than the traditional factors in order to determine the justness of a sentence.[62]In the case of *S v Esterhuizen*,[63] the court opined that the function of the court in considering the justness or unjustness of a plea and sentence agreement made under s 105A encompasses the following:

> 1. The consideration of the well-known triad as set out in *S v Zinn* 1969 (2) SA 537 (A).
> 2. The taking of a broad overview of the facts admitted and the crimes admitted to having been committed together with the proposed sentence to be imposed, all with a view to

[59] See South African Criminal Procedure Act, s105A (8).
[60] [2003] 4 All SA 506 (NC) at 510.
[61] Esther Steyn, 'Plea-Bargaining in South Africa: Current Concerns and Future Prospects', (2007) (20) (2) S Afr J Crim, 214.
[62] *Ibid*; See also *S v Zinn* 1969 (2) SA 537(A).
[63] 2005 (1) SACR 490 (T) at 494-495.

establishing whether the sentence agreed upon and its effective content bear an adequate enough relationship to the crimes committed taking into account all of the agreed facts, both aggravating and mitigating, so that it can be said that justice has been served.

The United States Criminal Procedure Rules does not expressly provide for the procedure but it could be implied from the section below:

> A Defendant may withdraw a plea of guilty or *nolo contendere*:
>
> (1) before the court accepts the plea, for any reason or no reason; or
>
> (2) after the court accepts the plea, but before it imposes sentence (underlining ours for emphasis).[64]

While both the Nigerian and the American laws mandates the judge to consider whether the sentence agreed to by the prosecutor and the Defendant is 'Appropriate', the South African court requires the presiding officer to consider whether the sentence is 'just'. It is our humble submission that going by the definition of 'just' provided above, the South African approach is better, hence, there is a need for these other jurisdictions to borrow the jurisprudence.

A careful reading of the underlined words will reveal that if the judge convicts the Defendant and he discovers that the sentence is inappropriate, the proper thing to do would be for the judge to require the Defendant to withdraw his plea.

4.6. Judicial Decision Upon Rejection of the Plea Bargaining Agreement

[64] Rule 11 (d) of the Federal Criminal Procedure Rules.

In Nigeria, where the judge or magistrate thinks that the defendant cannot be convicted of the offence in respect of which the plea bargaining agreement was reached and to which the defendant has pleaded guilty or that the agreement is in conflict with the defendant's rights under the agreement, the judge shall not record a plea of guilty in respect of such charge and the judge shall order that the case should proceed to trial.[65]

In the United States, the procedure is somewhat different. The rule provides thus:

> If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):
>
> (A) inform the parties that the court rejects the plea agreement;
>
> (B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and
>
> (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.[66]

While the Nigerian law provides that the case should proceed to trial upon the rejection of the plea by the court, the American approach to such a situation differs. The last paragraph of the rule shows that once the court rejects the plea, it may still decide

[65] See ACJA 2015, s270 (10) (b). See also ACJL 2011, s76 (7) (b).
[66] Rule 11c (5) of the Federal Criminal Procedure Rules.

whether to convict the defendant since the court is empowered to dispose of the case.

The procedure is fundamentally different in South Africa**.** Once the court opines that the sentence agreed upon by both the prosecutor and the accused is unjust, the court shall inform them of its findings and the court shall also offer them the sentence which it considers just.[67] One may logically conclude that the South African court allows for greater participation of the court in a plea bargaining agreement. Once the prosecutor and the accused both agree to abide by the sentence which the court considers just, then the court can convict the accused and then impose the sentence which it considers just.

4.7. Judicial Variation of the Sentence Agreement

The position of the law regarding sentencing in the South African jurisdiction has been discussed above.

In Nigeria**,** where a defendant has been convicted upon his plea of guilty to the charge, the presiding judge or magistrate shall consider the sentence as agreed upon by the prosecutor and the Defendant and if the court is satisfied that the sentence is appropriate, the judge shall impose the sentence but if the judge is of the view that if the defendant was to be tried in the normal court using the normal course of trial, he would have imposed a lesser sentence than the one agreed by the parties, then the judge may impose such lesser sentence. This provision allows the court to impose such sentence without informing the parties. However, if the judge is of the view that the offence requires a heavier sentence than the one agreed to by the parties under the plea agreement, the judge shall inform the defendant of such heavier sentence which he considers to be appropriate. At this juncture, the judge is giving the

[67]See South African Criminal Procedure Act, s105A (9) (a).

Defendant the opportunity to withdraw from the agreement or the parties to go back and amend the agreement.[68]

5. 0. Plea Bargaining and the Right of Appeal in Nigeria

The need for an efficient and effective administration of justice has made the establishment of hierarchy of courts and provision for appeal from one court to the other within the hierarchy not only desirable but also expedient. Judges as humans are not infallible.[69]Oputa J.S.C., in *Oredoyin v Arowolo*[70] described an appeal as an invitation to a higher court to find out whether on proper consideration of the facts placed before it, and the applicable law, the lower court arrived at a correct decision. In Nigeria, the right of a litigant to appeal, the jurisdiction of the appellate court to entertain such appeal and the procedure to be followed are governed by the Constitution and other statutes (including subsidiary legislations such as rules of courts).[71] The superior courts mentioned under the Nigerian constitution can all serve as appellate courts.[72]

Appeal may lie to a court as a matter of right in which case the aggrieved party (the appellant) may appeal directly to the appellate court without the leave of such a court. For instance, Section 232, sub-section (2) of the Nigerian Constitution provides for the instances when an appeal shall lie to the Supreme Court from the

[68] See ACJA 2015, s270 (11) (a-c); See also ACJL 2011, s76 (8) a-c.
[69]I.O Alimi, Appeals, available at <http://www.alimiandco.com/publications/APPEALS.pdf> accessed 6July 2020.
[70][1989]4 NWLR (pt.114)172 at 211.
[71]Alimi, *Supra* note 69.
[72]For the list of these courts, See CFRN, s6 (5).

Court of Appeal.[73] On the other hand, appeal may lie to a court of law with the leave of the court which decided the case. In such instances, the appellant must first seek the leave of the court that tried the matter before it appeals to the appellate court.

The right to appeal a judgment of a court of law forms part of the right to fair hearing which an accused person is entitled to under the constitution. ACJA provides that the judgment reached by a court in a plea bargaining agreement cannot be appealed.[74] In our opinion, this is a flagrant disregard for the constitutional protections of the rights of an accused person in Nigeria. It is not out of place for the prosecutor to bring baseless and multiple count charges against an accused person with the intention of overwhelming him with the charges hoping that he may plea bargain to any of the charges. The helpless accused may have no option than to plead guilty to counts attracting lesser sentence. To put it in a strict sense, the accused may have pleaded guilty to the plea under duress. There may be no enough evidence for the accused to establish his innocence at the trial whereas there may be such opportunity on appeal. When the accused complains of duress or procedural irregularities, there is only one way to find out if he indeed pleaded under duress or not, and that is by him filing an appeal. In all the jurisdictions examined in this paper, it is only the ACJA that contains such provision and we cannot help but to wonder why such a draconian provision is included in the ACJA.

6.0. Recommendations

From the comparative analysis attempted above, it is hereby recommended thus:

1. The Administration of Criminal Justice Law of Lagos State law which allows the parties to approach the court

[73] CFRN, s.232 (2) (a-f).
[74] ACJA 2015, s.270 (18).

concerning the contents of a plea agreement should be adopted under ACJA and in the other jurisdictions. The judge has the power of informing the parties who have approached him regarding the contents of any of the agreements and he may inform them as to the possible advantages of discussions, possible sentencing options or the acceptability of the proposed agreement. This provision will further guarantee the right to a fair hearing of the defendant.

2. In South Africa, the law requires that to ascertain whether the plea of the accused was made voluntarily or not, the court could ask certain questions from the accused. The other jurisdictions provided similarly but the provisions are only to the effect that the judge should ascertain the voluntariness or otherwise of a plea without providing for the mode of the ascertainment. It is recommended that the other jurisdictions should borrow such jurisprudence from South Africa to define the scope and provide a limitation to the power of the court in this regard.
3. The practice in Nigeria whereby the case will proceed to trial once the court opines that the defendant cannot be convicted should be amended. The parties should be allowed to re-present the plea agreement once the proper procedure has been followed.
4. It is hereby recommended that the provision of section 270 (2) (b) of ACJA should be immediately amended. The provision negates the principle of fair hearing and it may not stand a judicial verdict if challenged in a court of law.
5. There is an urgent need for ACJA to be amended to allow appeals of a plea bargaining agreement.

7.0. Conclusions

The judiciary has some authority and capacity to play a supervisory role in criminal charging and plea negotiations. Judges play many roles. They interpret the law, assess the evidence presented, and control how hearings and trials unfold in their courtrooms. Most important of all, judges are impartial decision-makers in the pursuit of justice. We have what is known as an adversarial system of justice – legal cases are contests between opposing sides, which ensures that evidence and legal arguments will be fully and forcefully presented. The judge, however, remains above the fray, providing an independent and impartial assessment of the facts and how the law applies to those facts. The roles which the court plays in plea bargaining is somewhat supervisory and less participatory. The paper observes that across the jurisdictions considered, the role of judges in plea bargaining is limited compared to the roles they play in the usual course of trial.

Gross Abuse of Constitutional Guidelines and Procedural Regulations on the Removal of Elected Public Officers in Nigeria: Lessons from other Jurisdictions*

Oyesola Animashaun (PhD)

Abstract

The term 'Impeachment' is a very popular word among the Nigeria media, the academic community, the politicians and the general public. It is erroneously used to refer to removal of public officers from office. Even learned writers writing for referred journals and books prefer the high sounding impeachment to removal from office and erroneously used the term interchangeably. The term "Impeachment" is mentioned but the meaning is ambiguous and held not to be a substitute for removal under the 1999 Constitution, as decided in Inakoju v Adeleke (2000) All FWLR (Pt 353) 80. This paper reveals that the two words removal and impeachment are not the same and thus cannot be used interchangeably, The paper discusses various incidents of removal of public officers from offices in Nigeria and in United States to show the differences between removal and impeachment. Adopting the doctrinal methodology, the study found that removal from office in Nigeria's Fourth Republic (1999-Date) is fraught with a lot of anomalies. It is quite different from what is acceptable under democratic dispensation and usually violates the provisions of the 1999 Constitutional and all known extant Regulations. The paper finally dwells on the practice in other jurisdictions and makes appropriate recommendations.

Keywords: Removal, Court, Impeachment, Misconduct, Public office.

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1.0. Introduction

The removal of the elected public officers from office under various Nigerian Constitutions is predicated on the fact that certain public officers are endowed with immunity; such public officers are immune from prosecution unless they are successfully removed from office.[1] Public officers who enjoy absolute immunity under the Nigeria Constitution are the President, Vice President, State Governor and Deputy Governor.[2] However, it is necessary to state that both the legislature and the judiciary also have immunity with regards to their official acts in the parliament and in the course of their judicial functions respectively.[3] The court have always shied away from interfering in cases involving the removal of executives by virtue of section 143 (10) and similar provisions of the 1999 Constitution,[4] however in certain cases, the courts have questioned the process of such removal and invalidate the removal of elected public officers due to certain anomalies, such as removal of executive without the requisite quorum. It is on the premise above that the article distinguished between impeachment and removal from office; and how the process of impeachment could validly lead to the removal of a public officer. The article also compares the removal process in Nigeria with the practice in other jurisdictions and drew the appropriate lessons.

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[1] *Colonel Oluwole Rotimi v MacGregor* (1974) 11 SC 133 (Nigeria); Held that pursuant to section 161 (1) of the 1963 Constitution an action hitherto maintained against a person who was newly appointed Military Governor must be discontinued due to the newly acquired immunity attached to the status.

[2] Section 308 of the 1999 constitution.

[3] See *Floyd v Barker* 77 ER 1305(1608); *the case of Marshalsea* 77 ER 1027(1610); *Fred Egbe v Justice A. Adefarasin & anor* (1985) 1 NWLR 549 (Nigeria).

[4]See similar provisions in sections 132(10) & 170 (10) 1979 Constitution; see also *Balarabe Musa v Auta Hamzat (*1982) 2NCLR 299 (Nigeria); *Kalu Anya v AG Borno State* Suit no FCA/K/141/82.

2.0. Impeachment and Removal from Office Contrasted

Impeachment is a formal process in which a serving official in any arm of government is accused of unlawful activity, the final outcome of which, depending on the country, can lead to the removal of that official from office. Iimpeachment does not necessarily result in removal from office; it is only a legal statement of fact parallel to an indictment in criminal law.[5]Although impeachment processes are applicable to only the executive officials in Nigeria, however in other jurisdictions, such as the United States of America, judges undergo impeachment procedure. Impeachment is used for discrediting a person, calling the integrity or ability of the office holder into question; imputation of fault or lack of effective performance.[6] Impeachment means a solemn accusation of a great public offence, especially against the minister of the crown.[7] According to the Black's Law Dictionary, impeachment 'is the act (by legislature) of calling for removal from office of a public official accomplished by a written charge of the official's alleged misconduct especially the initiation of a proceeding in the US House of Representatives against a Federal official such as the president or a judge'.[8] Case law defines it as the act (by legislature) of calling for the removal from office of a public official accomplished by presenting a written charge of the official alleged misconduct.[9]

It should not be confused with recall election or vote of no confidence. The former is usually initiated by voters and can be

[5] Mamman Lawan (2010).The Journal of Modern African Studies Vol. 48, No. 2, pp. 311-338.
[6]L.B. Curzon, Dictionary Of Law 208 (6th ed. 2002, International Law Book Services); RotimiAkeredolu, Supreme Court On Impeachment Proceeding (1st ed. 2007, St. Paul's Publishing House).
[7] Mick Woodley, Osborn's Concise Law Dictionary 170 (11th ed. 2009).
[8] Bryan Garner, Black's Law Dictionary 678 (8th ed. 2004, Thomson West).
[9]*Jimoh v. Olawoye* (2001) 10 NWLR, pt. 828,307 at 336.

based on political charges.[10] The latter is the norm in Westminster Parliamentary System, whereby a vote of no confidence is returned on the incumbent office holder to vacate office, usually with a simple majority. Impeachment and trial by the Senate are analogous to an indictment in a regular court proceeding, and a trial by a judge and jury in regular court respectively.[11] Article 4 of the United States Constitution provides that "the President, Vice President and other civil officers of the U.S shall be removed from office on impeachment for and in connections with treason, bribery and other high crime and misdemeanor". The implication of this, is that the president and civil officials of the US are liable to removal from office on commission of grave offences, with impeachment as the first step in the process.

3.0. Historical Antecedents of Removal of Public Officers

Man in his quest to control the rulers against despotism and absolutism have unwittingly introduced the removal clause in order to get rid of such rulers in case they go against the norms of the society, even when such rulers have a term certain or when the term of office is even for life.

In the traditional African society, i.e, pre-colonial Nigeria, the *Alaafin* (the King and Overlord) in the Old Oyo Empire, for instance, was the repository and epitome of legislative, executive and judiciary powers in the kingdom. He could however be forced to abdicate the throne or made to commit suicide.[12] This instrument

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[10]Gareth Griffith and Lenny Roth Recall Elections. E – Brief NSW Parliamentary Library Research Service (February 2010) E-Brief 3/2010 (Jan. 27, 2020, 12.23 PM),https://www.parliament.nsw.gov.au/researchpapers/Documents/recall-elections/Recall%20Elections%20E%20Brief.pdf;Anne Two meyThe Recall of Members of Parliament and Citizens' Initiated Elections. *UNSW Law Journal* 34 (1) 41–60.

[11] *Ibid.*

[12]Ajaka was dethroned and later recalled after the death of his brother, Alaafin Sango- See details in Samuel Johnson, The History of the Yorubas 148-54 (Revised Ed. 1973, CSS Bookshop).

is meant to be sparingly used and was reserved for extra ordinary crimes and extra ordinary occurrences.[13] Notwithstanding, between 17 and 18th century, the power to remove the incumbent Alaafin from office was abused by one *Bashorun Gaha* (the equivalent of today's Prime Minister) who precipitates a constitutional crisis thereby removing four Alaafin in quick succession. This constitutional crisis consumed the Bashorun himself and led to a civil war, which further weakened the Empire.[14]

Impeachment was first used in the British Political system by the English Parliament against Baron Latimer in the second half of the 14th century. Following the British example the Constitution of Virginia (1776) and Massachusetts (1780) other states in the United States of America adopted the devise. In the United Kingdom(UK), it is the House of Commons that hold the power to initiate an impeachment proceeding. Any member may make an accusation of any crime against another, support the charges and move for impeachment. If the Commons carries the motion the mover raises orders to go to the ban at the House of Lords. The Lords thereafter sets a date for trial while the Commons appoint managers who act as prosecutors in the trial. The accused may be defended by counsel. The House of Lords hears the case. In the procedure the Lord Chancellor presided or the Lord High Steward, if the defendant is a peer. After voting, if the Lords find the defendant guilty, the Commons may move for judgment. The Lords would not declare punishment until the Commons have so moved.

After the reign of Edward IV, impeachment fell into disuse, the Bill of Attainer become the preferred form of dealing with an undesirable subject of the Crown. In Warren Hastings, the Governor General of India who was impeached in 1788**,** the Lords

[13]May Law Erskine, Privileges, Procedures and Usage of Parliament 734 (20th ed. 1983, Lexis Nexis,).
[14] Johnson, *Supra* Note 12, at 178-89.

found him not guilty in 1795 and Henry Durdas in 1806.Impeachment has fallen into disuse in the U.K., the preferred mode for removal for political office holder being vote of no confidence.[15]

Article 1 Section 2 of the U.S. Constitution states that the 'House shall have the sole power of impeachment' and the 'Senate shall have the sole power to try all impeachments'. Impeachment does not necessarily result into removal from office; it is only a legal statement of charges similar to an indictment in criminal law.[16] Thus, in the US, the House of Representatives has the sole power to bring an indictment against the President, Vice President and any officer of the United States including Federal Judges. But such official faces another ordeal when the matter is referred to the Senate. The trial is held in the Senate with the Chief Justice of the U.S Supreme Court presiding. The actual trial is akin to a courtroom trial with legal representations, examination and cross examination of witnesses. After the argument and evaluation of the evidences, the Senate deliberated behind closed doors and votes in an open session whether to convict or acquit the already impeached official. Two third majority vote of the Senate is needed to remove the incumbent from the office.

There have been four presidential impeachment proceedings in the US and none has led to removal from office. In 1868, Andrew Johnson was impeached for allegedly violating of the Tenure of Office Acts; he was acquitted on May 26, 1868 by the US Senate. Similarly, in 1974 President Richard Nixon was impeached for Watergate cover up allegation.[17] Richard Nixon however resigned the American Presidency before his trial in the Senate; and in 1999

[15]History Channel "This Day in History" (July 20, 2020, 10:30 AM) https://www.history.com/this-day-in-history/president-clinton-impeached
[16] US Constitution art. I, & III.
[17]Ambrose, Stephen E. (1989). Nixon: The Triumph of a Politician 1962–1972. Volume II. New York: Simon & Schuster.

against Bill Clinton for alleged perjury and obstruction of justice. He was acquitted on February 12, 1999 by the US Senate.[18] The first attempt at impeachment was in the case of President John Tyler which was defeated 1842 by a vote of 127−83 on the floor of the House of Representatives.[19] The most recent case was the impeachment of the current America President Donald Trump in 2019, which resulted in an acquittal in the senate. There have been a few impeachments of elected and appointed federal and state officials in the US. In *United States v. Nixon*,[20] the Court rejected President Nixon's claim to an 'absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances'.[21] This case must be distinguished from *Nixon v. United States*,[22] where the United States Supreme Court held that the decision to determine the question of whether the Senate had properly tried an impeachment of a judicial officer or even any impeachable officer for that matter, was a political question, and could not be resolved in the Courts.

4.0. Removal from Office in the First Republic Under the Nigerian Independence (1960) and the Republican (1963) Constitutions.

Nigeria was operating the parliamentary system of government in the first republic (1960-1966). The Governor -General who was the representative of the Queen of England was the Head of State.[23] There was the Prime Minister who was appointed by the Governor General from among Members of the House of Representatives. [24]

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[18] See https://www.washingtonpost.com/politics/clinton-impeachment/senate-acquits-president-clinton/ accessed October 15th 2020.
[19] Oliver Perry Chitwood, John Tyler, Champion of the Old South 303 (2d ed. 1964).
[20] (1974) 418 U.S. 683.
[21] *Id.*
[22] (1993) 506 U.S. 224 .
[23] 1960 Constitution s. 78(1) &(2).
[24] 1960 Constitution s. 81(1) &(2).

This is replicated at the regional level with the Governor and the Premier. The removal of the Prime Minister or Premier is executable by the Governor- General or the Governor of the respective regions respectively either by a simple majority of House of Representatives[25] or Member of House of Assembly[26] passing a vote of no confidence on the Prime Minister or the Premier. Afterwards, the Governor General or the Governor, if it merely appear to him that the aforestated officer no longer commands the support of majority of Members of the Federal House of Representatives or Members of the Regional House of Assembly as the case may be. The vote needed to remove the Prime Minister or a regional Premier was wrongfully prescribed as 2/3 of the Members by a learned author,[27] whereas the Privy Council held that a notice dated 21st May 1962 signed by 66 out of 124 members of the Western Region House of Assembly was valid in removing the Western Region's Premier.[28] Thus the vote necessary to remove an elected officer in the first republic was a simple majority. It is devoid of the cumbersome mode applicable in the Presidential system but nonetheless rancorous.

Removal from office in Nigeria has always been acrimonious. The removal of the Western Region's Premier was laced with serious violence that led to so much ominous problems such as declaration of state of emergency, military *coup*, wide spread electoral malpractices, assassination of certain political leaders from certain parts of the country and eventually the Nigeria/Biafra civil war.[29] The Privy Council interpreting the provisions of sections 33(10)

[25] 1960 Constitution s. 81(10).
[26] Each Region has its own Constitution, see the 4th Schedule to the Nigeria (Constitution) Order in Council 1960.
[27] Akin Ibidapo-Obe, Impeachment of the Rule of Law: The Future of Democracy in Nigeria 46-77 (Lai Olurode ed., Faculty of Social Science Unilag, 2007) at 57-58.
[28] *Adegbenro v Akintola and Aderemi*(1963) 3 WLR 63 (Nigeria).
[29] Frederick Forsyth, The Making of An African Legend: The Biafran Story 27 (2nd ed. 1977, Penguin Books).

and 31(4) of the Constitution of the Western Region 1960, however decided in *Adegbenro v Akintola*[30] that it is the prerogative of the Governor to remove the Premier if it appears to him that the Premier have lost the confidence of the majority of Members of the House of Assembly irrespective of whether a vote of no confidence was passed in the parliament or not. There was however no provision in the 1960 Constitution for the removal of Governor or Governor General; it only provided that he shall be appointed by Her Majesty the Queen on the advice of the Prime Minister;[31] the President is elected by a majority of parliamentarian at a joint sitting by secret ballot under the 1963 Constitution. [32] The Governor of a region is appointed by the President on the advice of the Premier.[33]

Under the 1963 Constitution, the Governor General is replaced by the President who is the ceremonial head of state while the Prime Minister continues as the head of government. The 1963 Constitution did not provide expressly for the removal of Prime Minister from office. It only provided for the appointment of the Prime Minister by the President and such a person who likely to command the support of majority of Members of the House of Representatives. The Constitution however provided for the removal of the President from office. [34]

5.0. Removal From Office Under the 1979 Constitution.

After the military takeover in 1966, the military ruled till 1979 when the reins of government were handed over to the civilian.

[30] (1963) 3 WLR 63 (Nigeria).
[31] 1960 Constitution s.33.
[32] 1963 Constitution s. 35.
[33] Constitutions of the Northern, Eastern and Western Regions of Nigeria s. 1(1). Fourth Schedule to the CFRN 1963.
[34] 1963 Constitution § 38.

Sections 132,[35] 170,[36] 46(2)(c),[37] and 86 (2)(c)[38]of the 1979 provided for the removal of elected officers from office.

The well-known and much orchestrated removal from office in the second republic was that of Kaduna State Governor, Balarabe Musa who was removed on mundane grounds that did not amount to 'gross misconduct' by any standard. The main charge against him was that he was that he was 'stubborn, obstinate and abusive', that he abolished the emirate council system and imposed cattle tax.[39] In *Balarabe Musa v Speaker Kaduna State House of Assembly*,[40] the court held that a public officer properly and legally removed from office according to the dictates of the 1979 Constitution falls outside the purview of judicial redress, irrespective of the motive, it is a trial by the legislature and the law administered is *lex* parliament. [41] The Deputy Governor of Kaduna State also brought an action[42] stating that the office of the Governor was not vacant as the Governor was not legally removed and that he cannot be compelled by this reason to assume the office. The court held that the Governor was legally removed from office and that the Deputy Governor was duty bound to present himself to be sworn in as the Governor. Similarly the Deputy Governor of Kano state was held to be validly removed on the allegation that he failed to perform the

[35] The procedure for the removal of the President and his deputy were prescribed here.
[36] The procedure for the removal of the Governor and his deputy were prescribed here.
[37] The procedure for the removal of the President and the Deputy President of the Senate; the Speaker and the Deputy Speaker of the House of Representatives were prescribed here.
[38] The procedure for the removal of the Speaker and the Deputy Speaker of the State House of Assemblies were prescribed here
[39]Derin Ologbenla, Impeachment of the Rule of Law: The Future of Democracy in Nigeria 81 (Lai Olurode ed., Faculty of Social Science Unilag, 2007).
[40] (1982) 3 NCLR 229 (Nigeria).
[41]*id* per Ademola JCA at 245.
[42] *Abba Musa Rimi v Dan Musa, & ors*. (1982) 3 NCLR 467 (Nigeria).

functions delegated to him by the Governor.[43] It should be noted that the power of the legislature to remove public officers (the Governor or President and their deputies) as the case may be, is unfettered and what constitute misconduct is not subject to judicial interpretation. Thus, the specified elected officers could be removed for a good or a bad reason subject only to the observance of the laid down constitutional prescriptions. It is pertinent to state here that the Speaker of Ondo State House of Assembly, Richard Jolowo was the first officer to be removed from office in the Second Republic on being found guilty on charges of dishonesty, high handedness and gross misconducts.[44] There were threats against second republic Governors of Lagos and Cross Rivers States.[45]

6.0. Removal From Office Under the 1999 Constitution

The provisions dealing with removal of elected officers from office under the 1999 Constitution is similar to the 1979 Constitution-sections 143, 188, 50(2)(c) 92(2)(c) of the 1999 Constitution deals with for the President and the Vice President; Governor and the Deputy Governor; Senate President, Speaker of the House of Representatives and their deputies; and the Speaker and Deputy Speaker of the State House Assemblies respectively.

The powers of the Nigerian President are vast thus no president of the federation or the national head of government has ever been removed from office, although there have been threats. The bicameral nature of the National Assembly, the vast power of patronage and resort to sheer violence using the state machinery

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[43] See Jadesola Akande, Introduction to the Constitution of the Federal Republic of Nigeria 1999 170-71 (1st ed., 2000,MIJ Publishers).

[44] Jaafar Jaafar, *The 'fowl' play of Impeachments,* PEOPLES DAILY (Jan 29, 2020, 10:30AM) *http://www . peoplesdailyng.com/the-fowl-play-of-impeachments/* .

[45] Ademola Popoola, *Supra*, at 261.

stood the President in good stead. This is however not the lot of the state Governors. However, some Governors with the support of the Presidency or their ethnic militia have unleashed terror thereby preventing processes that might have led to their removal.

There was a gale of removal of elected officers in the fourth republic (1999 till date). The courts held that there was no remedy of judicial review in *Enyi Abaribe v the Speaker of Abia State House of Assembly and anor,* [46] as he was held to be properly removed from office by the legislature abiding with the appropriate dictates of the Constitution. Similarly, Iyiola Omisore was removed from the office as a Deputy Governor, so was his counterpart in Anambra state. Deputy Governors Aluko[47] and Oluyomi both of Ekiti State were equally removed; similarly the Deputy Governor of Bayelsa state, Peremobowei Ebebi, was removed from office. However Deputy Governors Ekpeyong and Nsima Ekere (Akwa Ibom) and Akerele-Bucknor and Femi Pedro (Lagos State) resigned their offices before the process of their removal was completed. An ironic drama was however engaged in on August 2, 2010, when the Abia State House of Assembly removed the Deputy Governor, Chris Akomas three days after he had resigned from office![48]

The court have however set aside and reinstated certain elected public officers that were removed from office without following the procedure laid down under the appropriate sections of the Constitution. In *Inakoju v Adeleke*[49] the Supreme Court held that the refusal of the factional majority Leader of House of Assembly of Oyo state to hold the meeting on the floor of the state House of

[46] (2002) 14 NWLR (pt. 788) 466 (Nigeria).
[47]M.P. *Ogele v Hon Justice Oyebisi Omoleye* (CJ Ekiti State) Suit No HAD/702/2005 (Nigeria).
[48] Leke Baiyewu, *Incessant Impeachment, a Blot on Nigeria's Democracy,* THE PUNCH, July 20 2014, at 15.
[49] Suit No SC 272/2006 (Nigeria).

Assembly, [50] absence of and failure to serve the notice of allegation on the Governor; and the failure to obtain the constitutional majority of 2/3 among others, renders the removal of the Governor of Oyo State from office null, he was therefore reinstated as the Governor. In this case Niki Tobi (JSC) who read the lead judgment decried the free use of the term 'impeachment' when section 188 provided for 'removal' in the main body and the marginal note, the fact that the term 'impeachment' was mentioned in section 191(1) and 191(3)(a) made no impression on him; he insisted that it is not the same thing as removal from office as it is branded; it was also mentioned in sections 146(1) and 146 (3)(a) with regards to the removal of the President and his Vice. Similarly in *Dipianlong and others v Dariye & anor*,**[51]** the Supreme Court reasoned that 8 out of 24 members of the Plateau State House of Assembly did not constitute the 2/3 majority as prescribed by the 1999 Constitution; and that the acting Chief Justice of Plateau State in defiance of the pending suit for an injunction to restrain him from acting on the request of the minority members, in the Plateau State High Court,[52] which he had notice, among others, invalidated the removal of the Governor. He was therefore reinstated as the Governor of Plateau State. The removal of the Governor of Bayelsa State, D.S.P Alamieyeseigha for various acts of misconducts including money laundering, jumping bail among others were grave but could not have been achieved but for the arm twisting tactics of the Presidency through the Economic and Financial Crime Commission (EFCC). [53] The besieged State Governor Alamieyeseigha was imprisoned immediately on other fraud related crimes and abuse of office after his immunity was removed

[50] This reasoning is in tune with the decision of the Federal Supreme Court in *Akintola v Adegbenro*, Supra 440@443 but conflicts with the decision on appeal in the same case *Adegbenro v Akintola* (1963) 1 All NLR 299 (Nigeria).
[51] (2007) 8 MJSC 140; see also *Dapianlong v Dariye* (No 2) (2007) 8 NWLR (pt. 1036) 332.
[52] *Rufus Bature & ors v Michael Dipianlong & ors* Suit No PLD/J 423/2006.
[53] Baiyewu, *supra*, note 48.

following his removal from office. Any reasonable man would find the behavior of Governors Dariye and Alamieyeseigha indeed deplorable, amounting to gross misconduct by any standard but the moral barometer of the political operators in these states did not find their misconduct of looting the state treasury, money laundering, jumping bail in a foreign country among other charges, distasteful.

The removal of the Ekiti state Governor Ayo Fayose from office during his first term in office involved great tragic-comedy melodrama, even tarnishing the state judiciary image. The Chief Justice of the state Kayode Bamishile was said to empanelled card carrying party members and the Governor's relatives to investigate the latter's alleged misconducts against the constitutional stipulations the relevant part being section 188 (1) and (5) which provide thus:

188 (1) 'The Governor or Deputy Governor of a state may be removed from office in accordance with the provisions of this section'.

188(5) 'Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section'.

The said panel sat for less than thirty minutes and found Fayose not guilty.[54] The State House Assembly illegally, dismissed the Chief Justice and installs their own acting Chief Justice Aladejana who was instructed to constitute a fresh panel, which he did and

[54] Ibidapo-Obe, *supra* note 27 at 63

this panel found the Governor guilty; the Deputy Governor was also tried by the panel, found guilty and removed by the State House of Assembly. The Speaker was then declared the Acting Governor and sworn in; meanwhile the Deputy Governor insisted that she was the Governor. The Federal government thereafter declared a State of Emergency and assumed emergency powers by appointing a Sole Administrator for the state. It should be noted that the 1999 Constitution departed from the 1979 Constitutional provision in subsection (5) where it replaced the President of Senate/Speaker of the State House of Assembly with the Chief Justice of Nigeria and Chief Judge of a State, purportedly to introduce objectivity, neutrality and probity in constituting a panel; however the compromising and partisan role of the Chief Judges of Ekiti, Oyo, Bayelsa, Plateau, Anambra, Adamawa and other states leaves much to be desired.

Under very tight security provided by the Federal Government of Nigeria, the Adamawa State Governor was removed from office by a panel constituted by the Chief Judge of the State, who was arm twisted by the State House of Assembly and other powerful actors.[55] The whole procedure was done in a hotel[56] on a public holiday allegedly declared by the Governor to stall the proceeding. The effort to remove the Governor of Nasarawa State failed as the panel of inquiry found him not guilty of the allegation levied against him, to the chagrin of the State House of Assembly which threatened to institute another panel. The Ekiti saga with the second coming of Fayose witnessed the strong arm twisting tactic whereby the minority members (Seven) of the House of Assembly expelled the majority (Nineteen) and hound them out of the state. The Governor passed his budget and appointed state functionaries

[55]Sanni Tukur, *Nyako's Impeachment: What Nigeria Law States* PREMIUM TIMES, July 15, 2014 at12.

[56] On the authority of *Inakoju v Adeleke*, supra note 3, this is an anomaly, but there has been no challenge against this removal by the erstwhile Governor.

illegally with the instrumentality of the minority seven members in an Assembly consisting of sixteen (16) members! The effort of the majority that were 'suspended', to serve the Governor with impeachment notice and initiate the procedure for his removal was met with crude and violent resistance bordering on life threatening plot.[57] In April 2015, Ali Olanusi the Deputy Governor of Ondo State was removed from office.[58]

The removal of the heads of legislative houses is most rampant and pedestrian since the process is less laborious. Senate Presidents-Evans Enwerem, Chuba Okadigbo and Adolphus Wabara[59]were removed in quick succession. The Speakers of the House of Representatives Salisu Buhari resigned both the speakership and membership of the House amidst scandals while Patricia Eteh was removed. The Speakers of Enugu, Delta, Ondo, Benue and Kano among others were all removed.[60]

7.0. Purported Removal From Office and Gross Violation of the Constitution

The discussion above shows how the legislators who were supposed to be lawmakers and the executives in gross violation of the clear and unambiguous provisions of the extant laws and moral restraint used state might to their respective advantage. The use of this rather drastic and extraordinary device (the procedure leading to removal from office) that should be sparingly employed is quite unfortunate and the problem is at the doorsteps of all the three arms

[57]Ade Taiwo, Fayose- the Rainmaker This Day (Feb22, 2020,11.12AM) http://www.thisdaylive.com/ articles/fayose-s-impeachment-police-commercial-drivers-cyclists-lay-siege-to-assembly/210915/

[58]Dayo Johnson, *Ondo Deputy Governor Impeached,* Vanguard, (Feb. 22, 2020, 1100 AM), http://www. vanguard ngr.com/2015 /04/breaking-news-ondo-deputy-governor-impeached/

[59] Wabara resign hurriedly to avoid being removed

[60] Michael Abiodun Oni, *Judicial Review of Governors' Ladoja and Obi Impeachment in Nigeria's Fourth Republic* SING. JBEMS 117(2013)

of government. The author finds that the executive is lawless, autocratic, arbitrary and grossly corrupt. Even, in genuine cases they go to a reckless extent to frustrate the act of the legislature by intimidation, locking of the parliamentary building, refusing the lawmaker access to the state and so on. For instance, Governor Fayose (Ekiti State) threatened and refuse the state legislature access to enter the state or the State House of Assembly. Furthermore, the executive burdened themselves with many level of security operatives that it is impossible to serve them the mandatory notices except by the more expensive, time consuming and laborious, substituted service method.[61] The legislators in gross violation of the process and procedure enumerated in the constitution hurriedly and illegally remove the executives in inauspicious venues, time and places. The judiciary that is supposed to be an independent arbiter and referee is patently partisan in certain cases as shown earlier in this paper. Corruption is widespread and pervasive among the three tiers of government thus making it extremely difficult for one arm to be a check on the other. The moral barometer of the populace is also very low as crowd could be rented for pittance; some Ijaw youth took to the street to protest that should any proceeding be brought against Governor DSP Alameiyeseigha they would be willing to avert it with their own life notwithstanding the disgraceful behaviour of the Governor and the Bayelsa State House of Assembly adjourned *sine die*[62] to prevent processes that might lead to his removal. The Governor despite his unbecoming behaviour argued shamelessly thus 'if I am corrupt, did I steal Federal Government money? Or is my state complaining that I stole its money?'[63] Such was the depravity pervasive in the country especially among the political

[61]*Alamieyeseigha v Yelwa* (2002) 7 NWLR (pt 767) 581 (Nigeria).

[62] Jackson Ola, *Musings on the late DSP Alamieyeseigha*, Daily Trust, (Feb. 22, 2020, 10.00AM), https :// www.dailytrust.com. ng/news/ opinion/musings-on-the-late-dsp-alamieyeseigha/115468.html.

[63]Adaora John, *Alamieyeseigha Talks,*Tell Magazine, November 28, 2005, at 22.

elite. The said Alamieyeseigha who stole billons from the treasury was immediately given a state pardon by President Goodluck Jonathan![64]

8.0. Removal of Elected Officers in Other Jurisdictions

As shown above, the removal of elected public officers are seldom done in the US and usually for reasons bordering on gross abuse of the constitution, term and oath of their office; though a few state Governors are victims but most prefer resignation, no US President has ever been removed from office since the Constitution became operative among the original thirteen states in 1790. It is pertinent to note that the US Constitution did not provide expressly for executive immunity but case law grants executive immunity to the US elected executives in the course of their duties. The immunity however is not absolute, with regards to criminal suits, the President's immunity may be waived as decided in *Nixon v Administrator of General Services*.[65] The President of the United States however enjoy absolute immunity with regards to civil suits. In *Nixon v Fitzgerald*,[66] the US Supreme Court held that the President has absolute immunity with regards to executive decision, in this case the dismissal of an Air Force department employee.

By 1912 about eleven U.S. state Governors have faced impeachment trials; few led to removal from office, the twelfth, Governor Lee Cruce of Oklahoma, escaped conviction by a single vote in 1912. Several others, in recent time, such as Connecticut's John G. Rowland, resigned rather than face impeachment trial, when events seemed to make it

[64]Jon Gambrell, *Nigeria pardons ex-governor who stole millions,* YAHOONEWS**,** (Feb. 22, 2020, 10.00 AM), https://www.yahoo.com/news/nigeria-pardons-ex-governor-stole-millions-085453960.html.
[65] (1977) 43 US 425.
[66] (1972) 457 US 731.

inevitable.[67] Governor Rod Blagojevich was removed on corruption charges on January 14, 2009, when the Illinois House of Representatives voted 117-1 to impeach; he was subsequently removed from office and barred from holding future office by the Illinois Senate. He was the eighth state Governor in American history to be removed from office.[68]

The provision for the Removal of the South African President ran thus: [69]

89. (1) The National Assembly, by a resolution adopted with a supporting vote of at least
two thirds of its members, may remove the President from office only on the grounds of —
(a) a serious violation of the Constitution or the law;
(b) serious misconduct; or
(c) inability to perform the functions of office.
(2) Anyone who has been removed from the office of President in terms of subsection
(1)(a) or (b) may not receive any benefits of that office, and may not serve in any
public office.

Although the removal process in South Africa is simple not as complicated as the Nigeria process, yet the operators use it appropriately. In South Africa, ex-President Thabo Mbeki, on 20 September 2008, announced his resignation after being recalled by the National Executive Committee of the ANC, following a decision by Nicholson J. of improper interference in the National

[67] William Yardley Connecticut's Governor Steps Down: Overview; Under Pressure, Rowland Resigns Governor's Post. New York Times(Feb. 22, 2020, 11.00AM),https://www.nytimes.com/2004/06/22/nyregion/connecticut-s-governor-steps-down-overview-under-pressure-rowland-resigns.html
[68] *Ibid.*
[69] Constitution of the Republic of South Africa 1996.

Prosecuting Authority, although, the Supreme Court of Appeal unanimously overturned this earlier judgment.[70]

10.0 Conclusions

There is a need for the Nigerian legislature to learn that sections 143, 188, 50(2) (c) 92(2)(c) of the 1999 Constitution are provisions that should be employed in only grave and very grim circumstances and for the executive to understand that the executive powers should not be employed to oppress the legislature. The above provisions are not censure device to be used by the legislature at the drop of the hat**.** It is submitted that the removal of Balarabe Musa from office for mere political differences with the legislature did not amount to gross misconduct predisposing the incumbent to removal from office and that the refusal of the court to set the purported removal aside is misdirected. One could see that even in other jurisdictions where there is even wider discretion at the disposal of an office holder to remove another from office it is rarely abused. I thereby conclude in the light of the facts stated above that it is not the Constitutional provision that is faulty but the operators, that is, the officials of the three arms of government and the general public.

[70]Adriaan Basson *Judge Nicholson red-carded by SCA,* Mail& Guardian, (Feb. 24, 2020, 10.00AM), available at: https:/ mg.co. za/article/2009-01-12-judge-nicholson-redcarded-by-sca (accessed Feb. 24, 2020).

Legal Connotation of Crime Against Humanity as a Subject Matter of Jurisdiction of the International Crimimal Court.

Olaoluwa Rufus Olu[1]
Opawoye Lukman .[2]

Abstract

The human existence is based on the principle of humanity either from the perspective of legal considerations or other principles available in human society. The breach of this principle has cost human society hardships occasioned by wars or other means of violence. Human society through ages of interaction has searched and still searching for the best way(s) to live in peace and harmony. The quest by the human society to put an end to errant impunities in the prosecution of wars and/or armed conflicts reaches a crescendo with the establishment of the International Criminal Court (ICC). This work considers the meaning of crime against humanity which is one of the jurisdictions of ICC with a view to appreciate and understand better, the workings of the Court. Crime against humanity is a package of actions violating fundamental human rights and human dignity even in times of armed conflict. The work adopts a textual and doctrinal approach for a proper understanding of the conceptual analysis of crime against humanity as provided in the Rome Statute. The work

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examines the various elements of this crime and considers the arguments against some of these elements as canvassed by scholars and defense attorneys to the defendants in some judicial authorities. The paper further examines some of the challenges faced by the ICC in interpreting and implementing some of the provisions of the International Humanitarian Law (IHL) instruments establishing this crime. Recommendations are offered for a review of ICC Statute to accommodate a broader practical approach in the implementation of International Humanitarian Law.

Keywords: Crime against Humanity, International Criminal Court, Violation, International Humanitarian law.

1. Introduction

Conceptually, a crime is a socially harmful act or omission that breaches the values protected by a state. It is an event prohibited by law, one which can be followed by prosecution in criminal proceedings and, thereafter, by punishment on conviction. The state criminalises certain conduct due to burgeoning public pressure to proscribe certain immoral harms. However, criminality shall not be confused with immorality: they are related but not synonymous terms. A lion's share of immoral acts is not criminalised, as well as not all criminal acts are immoral. It is within the discretion of a state to construe which acts require to be criminalised and incorporate such prohibitions into its respective criminal laws.[3]

In the same vein, International Humanitarian Law (IHL), also known as the laws of war or the law of armed conflict, is the legal framework applicable to situations of armed conflict and occupation. As a set of rules and principles, it aims for

[3] I., Marchuk (2014) *The Concept of Crime in International Criminal Law* in: The Fundamental Concept of Crime in International Criminal Law. Springer, Berlin, Heidelberg pp 69–114.

humanitarian reasons to limit the effects of armed conflict on all persons and objects without distinction. It is axiomatic that judicial proceedings connote the existence of law. It is such a law that sets parameters for the prosecution of an offender. It is also the same law that sets procedural safeguards for a defendant**.** It may therefore be safely postulated that the existence of a law is a *sine qua non* for the just administration of justice in general and criminal justice in particular. In a municipal system, the process of law making may be a subject of statutes or legislation. This does not however derogate from the fact that such laws may not meet the acid test of acceptability and legality**.** Indeed, the making of a law is very different from its enforceability.

2. The Expression - Crimes Against Humanity Under International Criminal Court

In the opinion of Judge Robinson: The proper meaning of a crime against humanity is not that it is a crime against the whole of humanity, but rather that it is a crime, which offends humanness i.e. a certain quality of behaviour.[4] According to Egon Schwelb,[5]the two meanings of the term "humanity" in crimes against humanity are (i) the human race or mankind as a whole and (ii) humanness that is a certain quality of behaviour – it is the latter, which is applicable. To the then Secretary General of the United Nations: Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[6]

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[4] *Ibid.* at 3.
[5] Schwelb, "Crimes against Humanity": 23 BUYIL 178 (1946) p. 195.
[6] Report of the Secretary General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704; separate opinion of Judge Robinson in *Prosecutor v. Dusko Tadic, supra* at 2.

It is respectfully submitted that crimes against humanity as part of the jurisdictions of the International Criminal Court are those acts against human beings, which derogate from the humanity in the victim. They are acts, which are repugnant to the human and universal conscience**.** The concept of crimes against humanity seems to have its antiquity in customary international law. The crime was, however, first codified in the Nuremberg Charter in 1945. There is, however, a raging controversy as to whether it was a legislative act creating a new offence or simply a reaffirmation of an existing crime under customary international law among scholars.[7] It is respectively submitted that it was merely a reaffirmation of an existing crime under customary international law.

This contention derives support from the general principles of law recognized by the comity of nations as evidenced in many international instruments, which expressly mention the laws of humanity. They include, the "Martens Clause" of 1899 and 1907 Hague Conventions,[8] which made reference to the "Laws of Humanity"; the Joint Declaration of May 28, 1915, which condemned "crimes against humanity and civilization.[9] The 1919

[7]See Rikhof J., "Crimes against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda," 6 Nat' L. J. CONST. L. 231(1995).

[8] The preamble to the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, and the Preamble to the Convention Respecting the Laws and Customs of War on Land, with Regulations annexed, Oct 18, 1907, 36 Stat. 2277, 1 Bevans 631 which provided that in cases not included in the Hague Regulations "The inhabitants and belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and dictates of public conscience."

[9]The Joint Declaration of France, Great Britain and Russia denounced the massacre of Armenians in Turkey as crimes against humanity and civilization, and warned of prosecutions; see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission,* 35(1948); Schwelb E., *op cit.,* p. 181.

Report of the Commission on the Responsibility of the Authors of War, which advocated individual criminal responsibility for violations of the "Laws of Humanity**."** After the First World War, the 1919 Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, recommended the establishment of a tribunal to try persons belonging to enemy countries who were guilty of "Offences against the laws and customs of war or the laws of humanity". This was vehemently opposed by the United States representative on the grounds that the laws of humanity could not be sufficiently ascertained.[10] Against this background, the drafters of the Nuremberg Charter found themselves confronted with an appalling "Policy of atrocities and persecutions against civilian populations", which could not fit the definition of war crimes but nevertheless, ran contrary to the dictates of public conscience and general principles of law recognized by the comity of Nations.[11]

The drafters therefore, had to coin a definition, which would encompass these norms. Crimes against humanity were formally defined, after the Second World War, in the Nuremberg Charter. This, according to Judge Robinson, was:

> *To fill the lacuna in international law left by the limited coverage of war crimes in respect of acts committed principally against combatants and prisoners of war of the other belligerent nations and civilians in occupied territory, crimes against humanity were introduced to prosecute atrocities by*

[10] See Cherif Bassiouni, Crimes Against Humanity in International Criminal Law. (2nd edn). The Hague: Kluwer, 1999, pp 553-565.

[11] See the United Nations War Crimes Commission, *op. cit.,* pp. 174-77; Bassiouni, at 69-86; Robinson, defining Crimes Against Humanity at the Rome Conference," 93 AJIL 44 (1999).

Germany against its own nationals, particularly Jews and anti-Nazi German politicians and intelligentsia.[12]

The Nuremberg Charter, in addition to restating the principles underlying war crimes, sought to provide a definition of crimes against humanity and crimes against peace. It introduced for the first time direct international criminal responsibility for acts committed by a country against its own nationals. The noticeable flaw in the definition of crimes against humanity is its linkage to other crimes within the tribunal's jurisdiction, which restricted crimes against humanity to wartime crimes**.** According to Article 6(c) of the Charter, the Nuremberg Tribunal was to have jurisdiction over crimes against humanity, which included: Murder, Extermination, Enslavement, Deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where it was perpetrated.[13]This definition was incorporated with some modifications in the Tokyo Charter. The linkage with armed conflict was not reflected in the definition of crimes against humanity in Allied Control Council Law No. 10, which was adopted to make a uniform legal basis for the prosecution by occupation courts in Germany of war criminals, apart from those tried by the international Military Tribunal.[14]

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[12] Sentencing judgment, separate opinion of Judge Robinson in *Prosecutor v. Dusko Tadic,* Case No. IT-94-1-A, Judgment, 15 July 1999;; ICTY, Trial Chamber IIbis.

[13] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1944.

[14] Art. II (I) (c) of the Allied Control Council Law No. 10, Dec. 20, 1945.

Subsequently, when the General Assembly of the United Nations espoused the "Principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal in 1946"[15] the definition of crimes against humanity, as formulated by the International Law Commission conformed to the original provision**.** Happily, subsequent international instruments eliminated the linkage only to armed conflict. A good instance is the Genocide Convention, which is to the effect that "The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent or punish."[16] The fact that the Genocide Convention has dispensed with the requirement of armed conflict is most relevant as crimes against humanity overlap to a considerable extent with the crime of genocide. In the view of Theodor Meron: Indeed, the latter can be regarded as species and progeny of the broader genus of crimes against humanity.

The latter UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that it applies to crimes against humanity, whether committed in time of war or in time of peace[17] whereas the Apartheid Convention, which declares that Apartheid is a crime against humanity, simply makes no reference to armed conflict.[18] Thereafter, efforts to formulate a generally accepted definition of crimes against humanity were not successful. But specific or particular species of crimes against humanity like genocide, apartheid and enforced disappearance were identified in subsequent international instruments. According to Darryl Robinson: The next

[15] G.A. Res. 95(I) UN Doc. A/64/Add. 1, at 188 (1947).
[16] Convention on the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948.
[17] Convention on the Non-Applicability of Statutory limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, Art 1.
[18] Robinson D., "The Humanization of Humanitarian Law,"American Journal of International Law Volume 94 Issue 2. English p. 264.

major development was the adoption by the Security Council of the ICTY and ICTR Statutes in 1993 and 1994, respectively. The definition of "Crimes against Humanity" in each Statute contains a list of inhumane acts, prefaced by a chapter that describes the circumstances under which the commission of those acts amounts to a crime against humanity.[19] However, there are differences between the definitions proffered by the two statutes. For instance, while the existence of an armed conflict is required to constitute a crime against humanity in the ICTY Statute; the ICTR Statute requires the existence of a discriminatory motive.

It is unquestionable that the establishment of the two (2) ad hoc Tribunals acted as a springboard for the development of international jurisprudence on crimes against humanity, which formed the bedrock of the Rome Statute of the International Criminal Court. Article 5 of the ICTY Statute defines crimes against humanity subject to the jurisdiction of the Tribunal as crime "Committed in armed conflict, whether international or internal in character."[20] However, the former U.N. Secretary-General in his reaction to the Statute seemed to have abandoned the nexus to armed conflict. According to him: Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.[21]

In P*rosecutor v. Dusko Tadic*,[22] the prosecutor had contended before the ICTY that the requirement of an armed conflict by the Nuremberg Charter was not intended as an inherent or general restriction on the scope of crimes against humanity under general

[19] Robinson, "Defining Crimes Against Humanity," O*p. Cit.*, at 45.

[20] Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), SC Res. 827, annex. Art 5, UN SCOR, 48th Session, Res. & Dec., at 29, UN Doc. S/INF/49 (1993).

[21] Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 47 (1993).

[22] No. IT – 94 – 1 – T, Response on Jurisdiction at 54 (July 7, 1995).

international law, since the *ad hoc* jurisdiction of the Tribunal was limited to the just and prompt trial and punishment of the major war criminals of the European Axis. The Appeals Chamber upheld this submission and opined that, it is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[23]

It is submitted that this decision among others to the effect that the existence of an armed conflict is not necessary to constitute crimes against humanity under customary international law is most laudable. This decision and the others have largely helped to shape the Rome Statute. Article 7 of the Rome Statute defines crimes against humanity for the purposes of the Statute as "Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[24] From the foregoing, it is evident that crimes against humanity under the ICC Statute are not restricted to the existence of internal wars. They can be committed in both international and internal armed conflict and in peacetime situations. According to Darryl Robinson[25] the most significant features of Article 7 of the ICC Statute are: (i) The absence of a requirement of a nexus to armed conflict, (ii) the absence of a requirement of a discriminatory motive, (iii) the widespread or systematic attack" criterion, and (iv) the element of *mens rea.*

[23] *Ibid.*
[24] Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9 (hereinafter referred to as "the ICC Statute").
[25] Robinson, note 19 aqbove, at 45.

3. Nexus of Crime Against Humanity to Armed Conflict

One thing that stands out from the Rome Statute of the International Criminal Court is that in its definition of crimes against humanity, no reference was made to armed conflict. That invariably means that crimes against humanity can be committed not only during armed conflicts but also during times of peace or civil strife. The struggle against the apartheid regime in South Africa was characterised by both civil actions, civil unrest and armed conflict tactics. The policy of the Apartheid regime was a complex one and all means of attack were deployed against it. The African States, the International community and the United Nations Organization[26]. The International Convention on the suppression and punishment of the Crime of Apartheid provides that Apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination … are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

This Convention seeks to punish those leaders guilty of the crime against humanity under the rules of human rights law as against international humanitarian law. However, it is a great step forward for humanity when a crime which seemed to have been fully taken care of is being provided for in a more elaborate way in the Rome Statute of the international criminal court almost thirty years later. It is submitted that this feature will ensure the efficacy of the ICC in dealing with leaders of states or countries who commit atrocities

[26] Article 1, International Convention on the suppression and punishment of the Crime of Apartheid adopted by the General Assembly of the United Nations on 30th November 1973.

against their populations at the slightest opportunity and for no just cause.

4. Discriminatory Motive:

Another knotty point that confronted the Rome Conference was whether the definition of crimes against humanity should include a discriminatory motive, *i.e*. that the crime should be committed on national, ethnic, political, religious or racial grounds**.** The participants unanimously came to a consensus that the specific crime of persecution needed a discriminatory motive (as discrimination is the basis of the crime of persecution), but the majority felt that not all crimes against humanity required a discriminatory motive. While the existence of a discriminatory motive could be interpreted as an essential ingredient of all crimes against humanity, under the Nuremberg Charter, that interpretation has been roundly condemned and the prevailing view seems to be that discriminatory motive is not an element of the crime of persecution.[27] As earlier observed, this requirement was expressed in the ICTR Statute and although, the ICTY Statute does not contain such a requirement, it was applied by the ICTY in *the Dusko Tadic Case*,[28] based on statements by members of the Security Council and an observation in the report which the Secretary-General submitted to the ICTY Statute. In adopting this approach, however, the ICTY Trial Chamber II conceded that the requirement does not seem to be supported by the relevant international instruments like the Nuremberg and Tokyo Charters; the Allied Control Law No. 10; the Genocide Convention; the

[27].Robinson D., *Op. Cit*. at 46, it should be mentioned that when the ILC draft Code of Crimes of 1954 recommended that discriminatory motive was a requirement for all crimes against humanity, it was roundly denounced for misconstruing the Nuremberg Charter in D.H.N. Johnson's "Draft Code of Offenses Against the Peace and Security of Mankind," 4 Int." L & Comp. L.Q. 445(1955). Due to the wide endorsement of Johnson's interpretation the subsequent ILC draft codes omitted this requirement.

[28] *Dusco Tadic Case, Supra* at para. 652.

Apartheid Convention and the ILC draft Code of crimes.[29] The outcome of this is that a discriminatory motive is not an element of all crimes against humanity. It is submitted that this approach is laudable as it avoids the imposition of a heavy and needless burden on the prosecution. As, Darryl Robinson[30] rightly observes: The requirement of a discriminatory motive, particularly when coupled with a closed list of prohibited grounds, could have resulted in the inadvertent exclusion of some very serious crimes against humanity.

5. Widespread or Systematic Attack

After much negotiation, the Rome conference finally agreed that not every inhumane act constitutes a crime against humanity and that "Stringent Threshold Test is Required" The conference adopted two expressions from the jurisprudence of international tribunals and other sources, namely, the qualifiers, "Widespread" and "Systematic**"**. To Darryl Robinson: The term "Widespread" requires large scale action involving a substantial number of victims whereas the term "Systematic" requires a high degree of orchestration and methodical planning. In the ICTR decision in *Prosecutor v. Akayesu*,[31]the Tribunal stated: The concept of "widespread" may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims; the concept as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.

One of the issues that generated the greatest storm of controversy at the Rome Conference was whether the qualifiers in the definition of "crimes against humanity" should be interpreted conjunctively (i.e. "widespread" and "Systematic") or disjunctively (i.e.

[29] *Ibid.* paras. 650-652.
[30] Robinson, note 19 above at 50.
[31] ICTR – 96 – 4 – T.

"widespread" or "systematic"). At the conference, a group composed mainly of members of "the like-minded group" strenuously argued that a disjunctive test had already been established in existing authorities. For instance, the ICTR Statute requires that the inhumane acts be committed "As part of a Widespread or Systematic Attack against any Civilian Population". Another sizable contingent felt that as a practical matter, a disjunctive test would be inappropriate. A poser was raised as to whether the "widespread" commission of crimes was sufficient to constitute crimes against humanity, since a spontaneous wave of widespread, but completely unrelated crimes does not constitute a "Crime against Humanity" under existing authorities.

A compromise was found to these seemingly irreconcilable differences by the formulation of Article 7(2) (a) which defines an "attack directed against any civilian population" as "A Course of Conduct Involving the Multiple Commission of Acts Referred to in paragraph 1 against any Civilian Population Pursuant to or in Furtherance of a State or Organizational Policy to Commit such Attack." Article 7(2) (a) was meant to strike a balance by stating that "an attack against any civilian population" should involve some degree of scale, and a policy element. The provision was meant to be a compromise between the restriction of a conjunctive test and broadness of a disjunctive test. Indeed in the *Dusko Tadic* Case,[32] the ICTY held that the term "Is Intended to Imply Crimes of Collective Nature and thus Exclude Single or Isolated Acts." As Darryl Robinson rightly observes: As a result, the prosecution must establish an "attack directed against any civilian population", which involves multiple acts and a policy element (a conjunctive but low threshold test), and show that this attack was either widespread or systematic (higher threshold) but disjunctive

[32] *Supra,* Para. 647, the ICTY Trial Chamber II had confirmed that "in addition to the Report of the Secretary-General numerous other sources support the conclusion that widespreadness and systematicity are alternatives."

alternatives. If the prosecutor chooses to prove the "Widespread" element, the concern about completely unrelated acts is addressed, because of the policy element. If the prosecutor chooses to prove the "Systematic" element, some element of scale must still be shown before ICC jurisdiction is warranted because a course of conduct involving multiple crimes is required.[33] There are also two special features of the test identified as follows: The first is that this test does not reintroduce the "Widespread" criterion as a mandatory requirement in all cases. "Widespread" is a high threshold test, requiring a substantial number of victims and "Massive", frequent, large scale action, whereas the term "Course of Conduct" and the reference to multiple acts were regarded as presenting a lower threshold. The second point is that it needs not be proven that the accused personally committed multiple offences; an accused is criminally liable for a single inhumane act (e.g. Murder), provided that the act was committed as part of the broader attack.[34]

This view cannot be faulted, as the jurisprudence of the ICTY shows. In the *Dusko Tadic Case*,[35] the Tribunal had taken the same position by holding thus: Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. The literal interpretation of the phrase "attack directed against any civilian population" seems to require the element of planning or direction (the "Policy Element"); this position is supported by existing authority.[36] The requirement of a policy element has been endorsed in the work of the International Law

[33] Robinson, *op. cit.,* at 51.
[34] *Ibid*. at 48.
[35] *Dusco Tadic, Supra*, at para. 649.
[36] See the excerpts of the Nuremberg judgment in the United Nations War Crime Commissions, *op. cit.,* at 194-95; the decision of the United States Military Tribunal in Nuremberg in *the Altsotter Case*, 6 Law Reports of the Trials of Major War Criminals I, 79-80 United Nations War Crimes Commission, 1948.

Commission (ILC), the decisions of the ICTY and the writings of jurists. The ILC draft Code of crimes provides that all crimes against humanity must be "Instigated or Directed by a Government or by any Organization or Group."[37] According to the ILC, it is the direction or instigation that "Gives the Act its Great Dimension and Makes it a Crime against Humanity".[38] The requirement of a policy element in crimes against humanity seems to have received the approval of not only national courts but also international tribunals.[39]

In the *Dusko Tadic* opinion and judgment,[40] the ICTY, construed the phrase "Directed against a Civilian Population" to mean that "There Must be some Form of Governmental, Organizational or Group Policy to Commit these Acts". From the foregoing it is clear that there is ample authority for recognizing the policy element as an essential ingredient of crimes against humanity**.** In the words of M. Cherif Bassiouni,[41] the policy element is "The Essential Characteristic of "Crimes against Humanity" investing the

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[37]1996 ILC Report, at 93, 95-96.

[38]*Ibid.*, at 96; see also Keenan T. B. and Brown B. F., *Crimes Against International Law*, (Washington: Public Affairs Press, 1950), pp. 79-80.

[39] For example, the decision of the French *Cour de Cassation* in *the Barbie and Touvier Cases*, Barbie Cass. Crim., Dec. 20, 1985, Bull. Crim., 1985 Bull Crim. No. 407, at 1053; Touvier, Cass. Crim. Nov. 27, 1992, 1992 Bull. Crim. No.394, at 1085, is to the effect that the criminal acts be accomplished in the name of "a state practicing a policy of ideological hegemony." The Netherlands *Hoge Raad* in *the Menten Case* (*Public Prosecutor v. Menten)* 75 ILR 362, 362-3 (1981) opined that the "concept of crimes against humanity" also requires that "the crimes in question form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people". Equally the Supreme Court of Canada in *Regina v. Finta* (1994) 1SCR 701, at 814, came to the conclusion that "what distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race"

[40] *Dusko Tadic* at 644, 36 ILM at 941.

[41] Bassiouni, *Op. Cit.*, at 244, 247.

otherwise domestic crimes the requisite "International Element." The other issue worthy of note is whether an official (or state) policy is a constituent element of the crime. This inquiry is necessary because as the ICTY rightly observed in *the Dusko Tadic* opinion and judgment,[42] "The Traditional Conception was in fact, not only that a Policy must be Present but that the Policy must be that of a State".

The modern view seems to be that customary international law has evolved in such a way that reference only to a state policy would be too restrictive. However, the dominant view is that some level of organization is still required. Indeed, in *the Prosecutor v. Nikolic*,[43] the ICTY held that crimes against humanity "need not be related to a policy established at a state level, in the conventional sense of the term" but "they cannot be the work of isolated individuals alone". This approach is commendable as organizations or groups in *de facto* control of territories, like rebel forces or liberation groups, are liable to prosecution for crimes against humanity. It must be emphasized that the requirement of the policy element does not reintroduce the "systematic" criterion as a mandatory requirement in all cases. The expression "Systematic" has been construed by the ICTR as meaning "Thoroughly Organized and Following a Regular Pattern on the Basis of a Common Policy Involving Substantial Public or Private Resources."[44] The word "Policy" seems to have more flexibility and it needs not be formalized.[45]

It has been argued that proof of radio broadcasts advocating mass murder would likely be adequate proof of a "Policy".[46] Equally, it

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[42] *ibid* at Para. 654, 36 ILM at 944.
[43] Review of the indictment pursuant to Rule 61, No. IT-94-2-R61, Para. 26(Oct. 20, 1995); see the *Dusko Tadic* opinion and judgment, *supra* at paras. 654-55; 36 ILM at 944-45.
[44] *Prosecutor v. Akayesu*, *supra* at 614.
[45] See *Dusko Tadic* Opinion and Judgment, *supra*, para.653, 36 ILM at 944.
[46] Robinson, Op. Cit. at 51.

seems that the existence of a policy can be inferred from the way and manner in which attacks take place.[47] Another noteworthy issue is the meaning ascribed to the expression "Any Civilian Population" in sub-paragraph 2(a) of paragraph 1 of Article 7 of the Rome Statute. The use of the word "Any" means that the civilians need not be nationals of another country. All civilians are accorded protection. Naturally, the provision excludes attacks against armed forces or bands of armed groups. In *the Dusko Tadic* Opinion and Judgment,[48] the ICTY made reference to a "Predominantly" civilian population and also approved the opinions in the Barbie Case,[49] that the members of an armed resistance group could be victims of crimes against humanity in appropriate cases. The word "Population" encapsulates the collective nature of the objects of attacks. It must be pointed out that to constitute a crime against humanity, intention or knowledge on the part of the accused is necessary.

The prosecution has the duty of establishing the elements of the offence, including the *actus reus* and *mens rea*. This is a reaffirmation of the Latin maxim; *actus non facit reum nisi mens sit rea* (an act does not itself constitute guilt unless the mind is guilty), which has been described as the "Golden Thread" which runs through the gamut of English criminal law.[50]

Indeed, in *Regina v. Finta*,[51] the Supreme Court of Canada after carrying out a survey of relevant jurisprudence observed: These cases make it clear that in order to constitute a crime against humanity – there must be an element of subjective knowledge on

[47]See Dusko Tadic Opinion and Judgment, *supra*.
[48] *Ibid.* Para. 638 – 42, 36 ILM at 939 – 41.
[49] *Supra.*
[50]*Woolmington v. Director of Public Prosecutions* (1935) App. Cases 462 (HL); *Younghsband v. Lufigi* (1949) 2 KB 354.
[51] *Supra* p. 819.

the part of the accused of the factual conditions which render the actions a crime against humanity. The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of crimes against humanity**.**

From the ICTY jurisprudence it can be deduced that a single inhumane act (e.g. murder) by the accused is enough to constitute a crime against humanity, provided that the other requirements of Article 7 are satisfied. In *the Dusko Tadic* Opinion and Judgment,[52] the ICTY stated: "Clearly, a Single Act by a Perpetrator taken within the Context of a Widespread or Systematic Attack against a Civilian Population Entails Individual Criminal Responsibility and an Individual Perpetrator Need not Commit Numerous Offences to be Held Liable".[53]

6. Acts Constituting Crimes Against Humanity

The Statute of the ICTY gives a list of acts regarded as crimes against humanity. According to Article 5 of the Statute: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: Murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious ground, and other inhumane acts*"*. As earlier stated the ICTR Statute is in *pari materia* with the ICTY Statute except that the former has omitted the requirement that the crimes be committed in an armed conflict. Similarly, each of the said crimes listed in the ICTR Statute must be "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

[52] *Supra,* para. 649.
[53] *Supra,* para. 649, 36 ILM at 943.

Defining crimes against humanity, Articles 7(1) of the Statute of the International Criminal Court states that a **"**Crime against Humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape; sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecutions on political, racial, national, ethnic, cultural, religious, gender or other grounds; (i) enforced disappearance of persons (j) apartheid; (k) other inhumane acts, which cause great suffering or serious injury to both physical or mental health. Murder, extermination, enslavement, deportation, persecution and other inhumane acts were included in the Nuremberg and Tokyo Charters. Rape, imprisonment and torture were added in the Control Council Law No. 10 to a list, which has been accepted as part of Customary International Law. The ICTY and ICTR Statutes contain the same list. The crime of apartheid and enforced disappearance were added to reflect the modern thinking of the international community on the matter. It is commendable that the list of prohibited acts is more comprehensive than in other previous international instruments like the Nuremberg and Tokyo Charters, and the ICTY and ICTR Statutes respectively.

The provision has gone further to eliminate ambiguities, which might give rise to practical difficulties of construction. It is submitted however, that the discrepancies in the definition of

crimes against humanity by the various international instruments[54] demonstrate that the exact parameters of crimes against humanity are far from being settled. The Rome Statute does not stop at providing for the list of crimes against humanity, it goes on to provide clarifications to preclude inappropriate restrictive interpretations of some terms. The crime of "murder" was said not to need any additional clarification as it was to be understood by reference to the applicable sources of law.[55] For avoidance of doubt, the term "Imprisonment" is with reference to "Other Severe Deprivation of Physical Liberty".[56]

The term "Extermination" includes "The Intentional Infliction of Conditions of Life…Calculated to Bring About the Destruction of Part of a Population."[57] The word "Enslavement" means "The exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such powers in the course of trafficking in persons, in particular women and children,"[58] This definition is an improvement on the Slavery Convention of 1926**,** which does not make specific reference to trafficking in women and children. This is a reflection of the current attitude of the international community which has of recent been subjected to the ugly spectre of women and children trafficking across continents. The term "Deportation" under

[54] Instances are the Nuremberg Charter; Tokyo Charter; ICTY Statute and ICTR Statute.
[55] Under Article 21 of the Statute, the ICC is to apply: (a) the Statute's "Elements of Crimes" (to be adopted by the Assembly of states parties and the Rules of procedure and Evidence; (b) applicable treaties and principles and rules of international law; and (c) failing that, general principles of law derived from national laws of legal systems of the world.
[56]Article 7 (1) (e) Rome Statute. It also provides that either of these activities must be "in violation of the fundamental rules of international law". This proviso is necessary because imprisonment *simpliciter* is permissible in virtually all legal systems of the world.
[57]Article 7 (2) (b) Rome Statute. The language was borrowed from the Genocide Convention, 1948.
[58] *Ibid.* Paragraph 2(c).

subparagraph 1(d) of Article 7 includes "Deportation or Forcible Transfer of Population", which under subparagraph 2(d) is defined as "Forced displacement of persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under International Law". "Torture" under subparagraph 2(e) is defined as "The intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pains or suffering arising only from, inherent or incidental to, lawful sanctions."[59]

This definition however makes a departure from that contained in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment in two ways. Firstly, under the Convention, the torture must be aimed at a particular purpose, as for example extracting a confession or imposing punishment. Secondly, the torture must be carried out "By or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity." These requirements are absent in the definition of torture, whether as a crime against humanity or war crime, in the Rome Statute of the ICC. The definition in the Rome Statute is broader in scope as it not only covers torture committed at the instance of officials of a state for some ulterior reasons but also torture carried out for purposeless reasons, by individuals or groups, in their private capacities. In the opinion of M. T. Ladan: The Rome Statute's definition of torture

[59] This definition was lifted from Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Dec. 10, 1984, 1465 UNTS 85. The only difference is that the ICC Statute is not restricted to acts of public officials only, as crimes against humanity may be committed at the instance of states; see also Article 5 of the Universal Declaration of Human Rights; Article 7 of the International Covenant on Civil and Political Rights; Article 3 of the European Convention on Human Rights; Article 5 of the African Charter of Human and Peoples" Rights; Article 5 of the American Convention on Human Rights.

better reflects the reality that torture is committed frequently by people who are not "officials" and who may have no purpose in torturing someone (other) than to inflict severe pain and suffering and States Parties incorporating this crime into their laws should follow the Rome Statute's definition.[60]

These views can hardly be faulted, as events in several African, Latin American and Asian countries tend to show that, some sadistic individuals derive pleasure from deliberately inflicting pain and suffering on others just for the sake of them. It is noteworthy that there is a difference between torture and cruel, inhuman, or degrading treatment or punishment. In *Ireland v. United Kingdom*,[61] the European Court declared that the distinction "derives principally from a difference in the intensity of the suffering inflicted". "Rape" is classified by paragaph 1(g) of the Rome Statute along with "sexual slavery, enforced prostitution, forced pregnancy,[62] enforced sterilization, or any other form of sexual violence of comparable gravity."

In the *Furundziija C*ase,[63]the trial Chamber of the ICTY identified the following as elements of rape: (i) the sexual penetration, however slight; (a) of the vagina or anus of the victim by the penis

[60] Ladan M.T., "An Overview of International Criminal Law-The Work of the Rwandan Tribunal" Afe Babalola University: Journal of Sustainable Development Law and Policy Vol. 1 Iss. 1 (2013) p.3.

[61]25 Publication of European Court of Human Rights., ser. A. para. 167(1978).

[62] Subparagraph 2(f) provides that "forced pregnancy" has three elements namely: (a) unlawful confinement, (b) of a woman forcibly made pregnant, and (c) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. The same sub-paragraph 2 (f) states that the provision" shall not in any way be interpreted as affecting national laws relating to pregnancy" The provision is included to affirm the agreements reached in U.N. Department of Public Information Platform for Action and the Beijing Declaration: Fourth world conference on women, Beijing, China, UN sales No. E. DPI/1766 (1996); see Meron T., "Rape as a Crime under International Humanitarian law" 87 AJIL 424, (1993).

[63]*Prosecutor v. Furundziija,* IT-95-17/1-T, para. 185.

of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or third person. However, in the *Akayesu* Case[64] the trial Chamber of the ICTR defined rape as a physical assault of a sexual nature, committed on the victim under coercive circumstances. As to what amounts to coercion, the ICTR stated: Coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence.[65]

Another term, which generated a considerable storm of controversy, was the offence of "Persecution". Under Article 6(c) of the Nuremberg Charter, persecution to be a crime must be committed on political, racial or religious grounds. However, according to Article 7(1) (2) (g) of the Rome Statute, "persecution" is the "intentional and severe deprivation of fundamental rights contrary to International Law" against "any identifiable group or collectivity"(on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognized as impermissible under international law). Thus, though the crime of persecution had been recognized in the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes, those instruments had not broadly defined it as the Rome Statute. Predictably, there had been apprehensions at the Rome Conference that any discriminatory practices could be treated as "Crimes against Humanity" by an activist court. It was based on this that a common ground was reached that the court's jurisdiction covered only serious violations of international criminal law, not international human rights law. It

[64] *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, Para. 688.
[65] *Ibid.*

was also commonly agreed that while discrimination *per se* may not amount to crimes against humanity, extreme forms of discrimination, which amount to deliberate persecution, might be criminal. According to Darryl Robinson: It was eventually agreed that the recognition of "Persecution" as a crime was justified by the deliberate severity of the violations, the international discrimination on prohibited grounds, and the connection with other enumerated acts.[66]

Another knotty issue was whether the crime of persecution could be committed only in the context of other crimes? That is whether "persecution" must be linked to other crimes to amount to a crime. The Nuremberg and Tokyo Charters had provided that "persecution" was only a crime if it was linked to other crimes within the jurisdiction of the respective Tribunals. However, the ICTY and ICTR Statutes have no such requirement. Indeed in *the Dusko Tadic* Opinion and Judgment,[67] the ICTY held that "It is not necessary to have a separate act of an inhumane nature to constitute persecution". It was felt by many delegates at the Conference that a connection was a necessary element of the crime to avoid ambiguity and confusion. This position was supported by Bassiouni who opines that "there is no crime known by the label "persecution" in the world's major criminal justice systems nor is there an international instrument that criminalizes it."[68]

It is submitted that the requirement of a link between the discrimination and international crimes tends to negative the objective behind the prohibition. It is in this light that the decision in *the Dusko Tadic* opinion and Judgment[69] is commendable. Persecution alone should be enough to constitute a crime against humanity. Darry Robinson also argues that it is not intended that

[66] Robinson, Op. Cit. at 53-54.
[67] *Supra*, para. 697, 36 ILM at 956.
[68] Bassiouni, Op. Cit. at 318.
[69] *Supra*.

the connection between inhumane acts and the discrimination must be on a widespread or systematic basis; all that is required is a nexus between the persecution and other inhumane acts, which need not amount to a crime against humanity on their own.[70] It is submitted that the contention that the persecution must be linked with other inhumane acts to amount to crimes against humanity does not hold water. It is true that persecution without more is not an offence. However, where the persecution is on a widespread or systematic scale, it should be enough to constitute a crime against humanity.

Furthermore, apartheid is a crime against humanity under Article 7(2)(h) of the Rome Statute. The provision defines the crime of apartheid to mean, inhuman acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.[71] The essence of this is that to amount to a crime, the systematic oppression or domination of a racial group by another, must be committed as part of a widespread or systematic policy. The phrase "enforced disappearance of persons" was included as an inhumane act, similar in nature and gravity, to the other crimes. According to Article 7(2)(i) of the Rome Statute: "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them

[70]Robinson, Op. Cit. at 55.
[71]This re-echoes Article 1 of the Convention on the Suppression and Punishment of the Crime of Apartheid; see also Article 1(b) of the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, UNTS 73.

from the protection of the law for a prolonged period of time. This was necessitated by the fact that it had been identified as a crime against humanity in previous international instruments.[72] Under those instruments, only states could be held responsible for committing or abetting the crime of enforced disappearance.

However, the Rome Statute has enlarged the scope of the persons who can commit this crime, by including political organisations. The Rome Statute has also added the concept of prolonged detention, which had been absent in previous international instruments. This is apparently aimed at drawing a line between other forms of illegal detention and enforced disappearance. Clearly, state or political party sponsored prolonged detentions of persons, holding of persons incommunicado and without trial are envisaged under the provision. The phrase "other inhumane acts" had appeared in other previous international instruments,[73] so, many delegates therefore took the position that the provision must be preserved. Other delegates had misgivings about the inclusion of that phrase in a criminal law statute because of its imprecise and open-ended nature.[74]

Based on the foregoing, the delegates at the Rome Conference agreed to include the label, but subject to the *proviso* that the acts must be of a character similar to that of other enumerated acts and they must be aimed at causing great suffering or serious injury to

[72]UN Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, UN GAOR, 47th Sess. Supp. No.49, at207, UN Doc. A/47/49(1992); Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, OEA Doc. AG/RES. 1256(XXIV- 0/94). The Nuremberg Tribunal had held the Nazi practice of enforced disappearance to be a crime against humanity.

[73]. For instance the Nuremberg Charter, the Tokyo Charter, Control Council Law No. 10 and the ICTY and ICTR Statutes.

[74].Bassiouni, *op. cit.* at 320, suggests that the category "other inhumane acts" must be carefully construed if it is not to violate the principle of legality.

mental or physical health. Good instances were violent assaults and unlawful human experimentation.

7. Conclusions

Having analysed one of the cardinal crimes provided for by International Humanitarian Law especially under the Rome Statute of the International Criminal Court, that is, Crimes against humanity, with corresponding analysis of the past instruments and institutions such as the Nuremberg and Tokyo Charters and their Tribunals pronouncements, the ICTY and ICTR Statutes and their Tribunals with their pronouncements, we have come to some conclusions. One is that the Rome Statute of International Criminal Court has enlarged the scope of crimes against humanity to a better level for implementation of International Humanitarian Law. Second, it has also introduced new concepts, which reflect the concern of the present international community such as the crime of apartheid. This provision helped the South African people to triumph over apartheid regime although the apartheid regime in South Africa crumbled with the help of other States and the United Nations[75]. The struggle against apartheid predated the commencement and entering into force of the Rome Statute and the International Criminal Court. Third, the International Convention on the suppression and punishment of the Crime of Apartheid laid a good foundation for the similar and far reaching provisions in the Rome Statute.

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However, it is obvious that from the various definitions of the crime against humanity ranging from the Nuremberg and Tokyo Charters, the ICTY and ICTR Statutes and the ICC Statute, there is yet to be a common agreement on the scope of crimes against humanity as these set of crimes keep on expanding as States and

[75]Article 1, International Convention on the suppression and punishment of the Crime of Apartheid adopted by the General Assembly of the United Nations on 30th November 1973.

Organisations' interactions deepen and expand. It is hoped that diligent implementation of the Rome Statute of the Criminal Court, by the Court itself and States Parties and Non-Parties will better clarify the provisions of the all-important Statute and the Court once and for all. The adherence of all parties and all non-parties is based on the general principle of International Law to the effect that all States whether members or non-members of the United Nations Organisation shall be bound by the Charter of the United Nations if the matter relates to peace and security[76]. It should also be noted that all rules of International Humanitarian Law are, among others, based on the principles of *ius cogens* and those of *ius in bello and ius ad bellum*. The combination of these rules and that of the principles of international law as provided for in the UN Charter coupled with the rules of Customary International Humanitarian Law (CIHL) are rules that cannot be derogated from, making them biding on all states and organisations worldwide whether they are parties or otherwise. It should also be specially recognised that the rules of customary international law do not require ratification or acceptance before they become biding. The above make all the provisions under the crimes against humanity binding on all States and organisations either in time of armed conflict or in peace time.

It is therefore, strongly recommended that the provisions of the crimes against humanity should be interpreted broadly to ensure substantive and equitable justice, in all appropriate cases.

[76] Article 2 (6) UN Charter 1945.n

Amendment of the Rules of Professional Conduct in the Legal Profession in Nigeria: Are there Romantic Powers Between The General Council of the Bar and the Attorney-General of the Federation?

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Abstract

The preamble to the Rules of Professional Conduct for Legal Practitioners 2007 contains personalized wordings seemingly vesting the power of amendment of the Rules of Professional Conduct for Legal Practitioners 2007 on the President of the General Council of the Bar. This paper will examine whether or not it is the President of the General Council of the Bar or the General Council of the Bar itself as a body that has the power to issue, make or amend the Rules of Professional Conduct for Legal Practitioners. Where it is the former who makes and amend the rules, what are the implications for the legal profession being an appointee of the President of the Federal Republic of Nigeria. The paper made recommendations in line with global practices taking cue from other jurisdictions.

1.0. Introduction

Many lawyers in Nigeria woke up on the 12th day of September, 2020 to see the purported Rules of Professional Conduct (Amendment) 2020 dated 3rd September, 2020 allegedly amended

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by the Honourable Attorney General of the Federation pursuant to section 12 (4) of the Legal Practitioners Act 2004 as amended. The Notice comes with Serial Number S. 1 No. 15 of 2020 which contains only provisions purported to have deleted Rules 9(2), 10, 11, 12 and 13 of the Rules of Professional Conduct for Legal Practitioners 2007. The second provision is to the effect that the amended Rules may be cited as the Rules of Professional Conduct, 2020. It is no gain saying the fact that the Rules of Professional Conduct for Legal Practitioners is very vital to the practice of law in Nigeria and beyond. This paper will examine the *modus operandi* for the amendment of the Rules of Professional Conduct for Legal Practitioners in Nigeria and other jurisdictions and make recommendations on the ways to avoid problems created via the wordings of the Preamble to the Rules of Professional Conduct for Legal Practitioners 2007.

2.0. Establishment and Composition of the General Council of the Bar[3]

In his paper, Akintayo traced the history of the General Council of the Bar to the English legal profession to the Bar Committee formed in England in 1883 to coordinate the activities of the profession especially the four Inns of Court.[4] According to him, the Bar Committee in England soon became moribund due to inactivity and it metamorphosed into the Bar Council in 1893 with about 800 barristers voting in attendance.[5] In Nigeria, the General Council of the Bar was originally called the Nigerian Bar Council and established in 1959 to pre-empt the Unsworth Committee recommendation of 1959 which was specifically asked to consider the possibility of setting up a General Council of the Nigerian Bar

[3]Section 1(2) of the LPA.
[4] Akintayo J O A, The General Council of the Bar: A Call for New Temple. Ibadan Bar Journal, (2003) Vol 3, No 1, p. 35.
[5] Jackson R M, The Machinery of Justice in England, p 431 cited by Akintayo JOA, *Ibid.* p.35.

and the powers and functions of such a Council.[6] The establishment of the General Council of the Bar had its tap root in the recommendations of the Unsworth Committee.[7] Part V of the Unsworth Committee Report had dealt with the General Council of the Bar. Akintayo gave a detailed insight to the workings of the Committee in this respect when he stated that there were issues around governmental control over an association of lawyers with statutory bodies for its regulation made by the parliament and which may eventually hunt the independence of the Bar.[8]

The General Council of the Bar it is submitted had a misguided focus from its inception.[9] It was observed that the Bar Council was in the original section 1 of the Legal Practitioners Act 1962 and the Legal Practitioners Act 1975 was not authorized to regulate or manage the legal profession. Rather, the Bar Council was intended to regulate or manage the affairs of the Nigerian Bar Association.[10] This is not in tandem with the intentions of the draftsmen of the Constitution of the NBA. The controversies of the 1960s would later come to hunt the legal profession in 2020s. The position of the Bar Council in 1975 has been carried down to the 1990 and 2004 provisions of the Legal Practitioners Act.

Section 1 of the Legal Practitioners Act 2004 as amended established the General Council of the Bar otherwise known as the Bar Council. Prior to the amendment of the Legal Practitioners Act 2004, the General Council of the Bar was first established under section 1 (1) of the Legal Practitiners Act 1962 and later replaced

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[6] Akintayo J O A., Towards a Better Regulation of the Bar. Current Issues in Nigerian Jurisprudence. Essays in Honour of Chief Adegboyega Solomon Awomolo SAN, Chapter 5, p. 136.
[7] See Government Notice 915 of 26th April, 1959.
[8] Akintayo J O A, The General Council of the Bar: A Call for New Temple. Ibadan Bar Journal, (2003) Vol 3, No 1, p. 41.
[9] *Ibid*. Akintayo.
[10] *Ibid*.

by the Legal Practitioners Act 1975[11]. The quorum of the Bar Council shall be eight and the Council may make standing orders regulating procedure and proceedings of the Council.[12]

The General Council of the Bar is comprised of the following persons:

i. The Attorney-General of the Federation as President;
ii. The Attorneys-General of the States;
iii. Twenty members of the Bar.[13]

It is observed that membership of the Bar Council as it is presently constituted tilts heavily in favour of the unofficial Bar and this is not healthy for the independence of the Bar being a profession meant to entrench rule of law and good governance in any State. In the legal profession, the above composition is a body of eminent personalities who are vested with powers to among others act as one of the gate keepers of the legal profession. They work hand in hand with eminent bodies such as the Body of Benchers and the Nigerian Bar Association to mention a few. The office of the Honourable Attorney – General of the Federation (HAGF) is one of the highly revered bodies in the legal profession and the nation as a whole. The HAGF is a custodian of the values and ethics of the legal profession. Above all other considerations, the HAGF is '*the legal gate keeper'* of the constitution of the nation. He can only exercise powers conferred on him by statute and no more, being a creation of statute himself.

3.0. Functions of the General Council of the Bar

A major function of the General Council of the Bar is its power to make and revise the Rules of professional Conduct in the legal

[11]Now Cap 11, LFN 2004.
[12] Section 1 (4) of the Legal Practitioners Act Cap L11 LFN 2004.
[13] .. of which not less than 7 of them shall be less than 10 years post call. Section 1 (3) [b] of the LPA 2004.

profession from time to time.[14]Akintayo calls this, the legislative powers of the Bar.[15] The Bar Council also liaises with the NBA in fixing the annual practising fee for members of the Bar. The Bar Council makes the Legal Practitioners Accounts Rules and oversees the inspection of Solicitor's accounts from time to time among other statutory functions.[16]

It is interesting to note that in making the rules of accounts for legal practitioners by the Bar Council under section 20 of the Legal Practitioners Act 2004 as amended, the office of the Attorney – General and the Bar Council work together but there is no express powers granted the Attorney – general to act alone except the HAGF has given a six months' Notice to the Bar Council and it refuses to act, the HAGF can go ahead and amend the rules governing keeping of accounts by legal practitioners. For the avoidance of doubts, section 20 (2) and (3) is reproduced below:

> Rules made under subsection (1) of this section shall not come into force until they are approved by order of the Attorney – General, either without modification as he thinks fit; but before approving any such rules with modifications the Attorney – General shall afford the Bar Council an opportunity of making representations with respect to the proposed modifications and shall consider any representations made in pursuance of this subsection.

It is clear that the Attorney – General will give effect to the amendment to the rules of accounts of legal practitioners before it

[14].See section 12 (4) of the Legal Practitioners Act (as amended by the Legal Practitioners (amendment) Decree 1994.
[15] Akintayo J O A, The General Council of the Bar: A Call for New Temple. Ibadan Bar Journal, (2003) Vol 3, No 1, p. 54.
[16] Section 20 of the LPA Cap 11, LFN 2004.

can take effect.[17] However, the HAGF cannot unilaterally modify such rules without recourse to the Bar Council. Let us take a further look into subsection 3 of this section under consideration. The subsection states:

> (3) If it appears to the Attorney – General that any rules should be made, revoked or altered in exercise of the powers of the Bar Council by this section, he shall make a recommendation in that behalf to the Bar Council; and if within the period of six months beginning with the date of the recommendation the Council has not acted in accordance with the recommendation, the Attorney – General may, within the period of twelve months beginning with that date, make rules giving effect to the recommendation.

From the foregoing, it is obvious that there are romantic powers between the office of the Attorney – General of the Federation and the Bar Council in the making and revising the rules of accounts for legal practitioners. It is observed that the HAGF does not enjoy sole powers of making the rules of accounts but in giving effect to the rules, the power is solely exercised by his office. Arrogating exclusive power of rule regularization and ratification to the HAGF seems not to take into consideration the fact the HAGF is not excluded in the composition of the Bar Council and he is of course the President of the Bar Council.[18] We are of the opinion that this portends dangers for rule making. This is because where the HAGF cannot have his way on any issue raised at the meeting of 8 members he could go ahead and ratify his wishes to become the law. The powers of HAGF and Bar Council are not competitive but cooperative towards the harmonious regulation of the legal profession.

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[17] Section 20 (2) of the LPA as amended by LPA 1994 as amended.

[18] Akintayo J O A, The General Council of the Bar: A Call for New Temple. Ibadan Bar Journal, (2003) Vol 3, No 1, p. 55.

4.0. Power to Make and Revise the Rules of Professional Conduct for Legal Practitioners

The importance of the Rules of Professional Conduct for Legal Practitioners cannot be over emphasized. It is one of the spines upon which the legal profession leans. The same importance is given to the Rules of Professional Conduct for Legal Practitioners across several jurisdictions outside Nigeria. Lawyers should not play politics with it under any guise. We should faithfully adhere to its tenets and principles. It is either the Rules or nothing. Akintayo identified two sources of the powers of the Bar Council to be the Legal Practitioners Act and the NBA Constitution.[19] It is important to state that the Rules are made by virtue of the powers conferred on the General Council of the Bar by section 12 (4) of the Legal Practitioners Act 2004.

Section 12(4) of the Legal Practitioners Act 2004 provides as follows:

> *It shall be the duty of the Bar council to make rules from time to time on professional conduct in the legal profession and cause such rules to be published in the Gazette and distributed to all the branches of the Association.*

Given the literal interpretation of the provision quoted above, it is the Bar Council that is vested with the power to make the Rules of Professional Conduct for Legal Practitioners.

5.0. Amendment of the Rules of Professional Conduct in the Legal Profession in Nigeria: Myths and Realities.

[19] J.O.A., Akintayo, Towards a Better Regulation of the Bar. Current Issues in Nigerian Jurisprudence. Essays in Honour of Chief Adegboyega Solomon Awomolo SAN, Chapter 5, p. 136.

Being a Council of distinguished legal luminaries, the functions of the Bar Council cannot be hijacked by any individual member of the Council. It is on this basis that the powers of the Bar Council to make and revise the Rules of Professional Conduct in the Legal Profession cannot be delegated to a single member of the profession except the Council in a quorum of 8 of its membership agrees in writing. Such delegation of powers on behalf of the Bar Council cannot be delegated in our view.

Hence, the fact that the Preamble to the Rules of Professional Conduct for Legal Practitioners 2007 is couched as reproduced below does not make it lawful or the norm. An office holder cannot exercise the powers he does not have. The preamble to the RPC 2007 is reproduced below for our examination:

> In exercise of the powers conferred on me by section 12(4) of the Legal Practitioners Act 1990, as amended, and of all other powers enabling me in that behalf, I, BAYO OJO, Attorney-General of the Federation and Minister of Justice/ Chairman, General Council of the Bar hereby make the following Rules:

The fact that no one has challenged the way and manner the above is drafted does not render nugatory section 12 (4) of the Legal Practitioners Act 2004 as amended. For the avoidance of doubts, section 12 (4) of the LPA 2004 as amended is reproduced below:

> (4) It shall be the duty of the Bar Council to make rules from time to time on professional conduct in the legal profession and cause such rules to be published in the Gazette and distributed to all the branches of the Association.[20]

[20] Section 12 (4) of the LPA as amended by LPA 1994 as amended.

Unlike the powers of the office of the Chief Justice of Nigeria to make Rules for the proceedings of the Legal Practitioners Disciplinary Committee under section 10 (7) of the LPA 2004 as amended and the powers to suspend an erring Legal Practitioner for a specified period of time vested in the CJN by virtue of section 13 (2) of the LPA 2004 as amended, the HAGF cannot unilaterally make the Rules of Professional Conduct for Legal Practitioners because neither the HAGF or the Attorney – General of the various states of the Federation are so conferred. Besides, the law has made it easier for the Bar Council to operate smoothly with just Eight (8) members out of a total 57 membership. Forming a quorum by the Bar Council may need an upward review of about one – third or minimum or Fifteen (15) members in our view but definitely that is the position of the law as of today.

Let us state here that the intention of this paper is not to critique the allegedly deleted provisions of the Rules 9(2), 10, 11, 12 and 13 of the Rules of Professional Conduct for Legal Practitioners 2007 but to offer an opinion as to the proper perspective in the powers to make and revise this vital regulation for the noble profession in Nigeria. In the making and revision of the RPC, until the amended RPC is gazetted and distributed in line with the spirit and legislative intent of section 12 (4) LPA 2004 as amended, it is of no effect.

According to Osigwe, the Attorney General of the Federation has no unilateral right to amend the Rules of Professional Conduct because it will only be seen as a move to usurp the entire Bar Council.[21] Recently, the President of the Nigerian Bar Association, Olumide Akpata reiterated the fact that the decision to amend the Legal Professional Conduct (LPC) can only be

[21]https://www.thebreakingtimes.com/osigwe-challenges-agf-says-he-has-no-unilateral-power-to-amend-rules-of-professional-conduct/ Accessed 13 September, 2020.

taken by the General Council of the Bar.[22] Taking it further, Chief Mike Ahamba, faulted the HAGF's action saying there was no basis for it. He said: "I think the Bar has told the Attorney General of the Federation (AGF), Abubakar Malami (SAN) it will not accept the amendment and I don't think I have a contrary view.[23] "Besides, I don't think there is any reason for the AGF to carry out such action. The rules were not made by lawyers themselves but by the Council of the Bar. So, I don't think the AGF has the power to unilaterally amend the law. Even, if he has the power to do so, he needs to consult with people."In the words of Ozekhome said: "No, the Attorney-General of the Federation (AGF) cannot single-handedly amend the Rules of Professional Conduct (RPC) for Legal Practitioners.[24]

In the same vein, the Executive Director of the Socio-Economic Rights and Accountability Project (SERAP), Adetokunbo Mumuni said the AGF had no power to unilaterally amend the Rules of Professional Conduct for Legal Practitioners.[25] He said: "When the AGF said he is amending the Rules of Professional Conduct for Legal Practitioners, he said he was exercising the powers by virtue of Section 12 (4) of the Legal Practitioners Act. 'What does the section say? Section 12 (4) of the Legal Practitioners Act said the body that could amend the Rules of Professional Conduct for Legal Practitioners shall be a General Bar Council. This means an individual cannot act in place of the Council.'[26] The convener, Mission Against Injustice in Nigeria (MAIN), Ige Asemudara, also countered the AGF's action,

[22]https://www.ripplesnigeria.com/malami-lacks-power-to-amend-lawyers-rules-of-professional-conduct-nba/ Accessed 14 September, 2020.
[23]https://www.barristerng.com/disquiet-over-malamis-amendment-of-rpc/ Accessed 22 September, 2020.
[24]*Ibid*.
[25]*Ibid*.
[26]*Ibid*.

saying the purported amendment was of no importance.[27] He said: "My quick reaction is that the Honourable Attorney General of the Federation lacks the power to unilaterally amend the Rules of Professional Conduct for Legal Practitioners.[28] He continued thus: 'Even the NBA has no such power. The only body empowered by the Section 12(4) of the Legal Practitioners Act, purportedly relied upon by the AGF, is the General Council of the Bar.'[29]

In a slightly different view, Olukayode Ajulo opined that it is the General Council of the Bar that could complain if its procedures and processes are violated.[30] He stated further that the Attorney – General of the Federation would not knowingly violate the Legal Practitioners Act especially when the LPA provides that the quorum of the Bar Council is Eight (8)[31] Kazeem Oyinwola recently argued that the General Council of the Bar no longer possessed the powers to issue, make and revise the RPC.[32] According to him, section 12 (4) of the LPA as contained in Decree 21 of 1994 is no longer the law. He cited the decision in Akintokun vs LPDC[33] to buttress his views. According to Oyinwola, the Supreme Court maintained that the Revised Edition (LFN) Act, 2007 is the Act that gave effect to the Revised Edition of the Laws of the Federation, 2004 and this commenced on 25th May, 2007. Thus, the Supreme Court held that the Legal Practitioners Act 1975 in the LFN 2004 (being the

[27] *Ibid.*
[28] *Op cit.*
[29] *Ibid.*
[30] https://dnllegalandstyle.com/2020/its-uncharitable-to-crucify-malami-for-amending-nba-rules-kayode-ajulo/ Accessed 15 September 2020.
[31] *Ibid.*
[32] http://pointblanknews.com/pbn/articles-opinions/the-general-council-of-the-bar-gcob-is-not-vested-with-the-power-to-issue-rpc/ Accessed 20 September, 2020.
[33] (2014) LPELR-22941(SC)

later law) implicitly repealed the Legal Practitioners (Amendment) Act (Decree No. 21, 1994). Recall that it was in section 12(4) of the Legal Practitioners (Amendment) Act (Decree No. 21, 1994) that the power to issue RPC was vested in the GCoB but the said Decree is now deemed repealed by the Legal Practitioners Act Cap L11 LFN 2004.[34] With due respect to Oyinwola, the mischief which occurred in Aladejobi v NBA and *Akintokun v LPDC* has been cured by the revised provisions of the Legal Practitioners Act 2004 as amended during the tenure of Mohammed Adoke as the Attorney – General of the Federation.[35] In his Foreword to the Revised LPA, the former AGF cited section 2 of the Revised Edition [Laws of the Federation] Act, 2007 which provides that any inadvertent omission, alteration or amendment of any statute shall not affect the validity and applicability of the statute. Per Onoghen [CJN] (as he then was) recognised this position in the case of *Nwalutu v NBA*[36] when the Supreme Court recognized the revised provisions of the Legal Practitioners Act 2004 as amended.[37]

From the views expressed above, we therefore recommend that the Preamble to the RPC 2007 as stated above should be drafted thus:

> *In exercise of the powers conferred on the Bar Council by section 12(4) of the Legal Practitioners Act 1990, as*

[34]http://pointblanknews.com/pbn/articles-opinions/the-general-council-of-the-bar-gcob-is-not-vested-with-the-power-to-issue-rpc/ Accessed 20 September, 2020.

[35] The Foreword to the Revised LPA 2004 written by Mohammed Adoke in his capacity as the then AGF states in its Introductory Paragrah as follows: In keeping with the constitutional responsibility of my office as the Chief Law Officer of the Federation and the mandate of the Federal Ministry of Justice to ensure that legislation in the public domain are comprehensive, certain and predictable, I have found it extremely imperative to harmonise the Legal Practitioners Act, CAP L11 LFN, 2004 with the Legal Practitioners (Amendment) Decree, 1994 [No. 21].

[36] [2019] NWLR (Part 1673); (2019) LPELR – 46916 (SC).

[37]*Ibid*.

amended, and of all other powers enabling the Bar Council in that behalf, the, General Council of the Bar hereby make the following Rules:

The legislative intent of the LPA is not to personalize the powers to make and amend the RPC to the office of the President of the Bar Council but to ensure that the various stakeholders in the private and public Bar are represented in the making of the rules which regulates the profession. A look into a few jurisdictions outside Nigeria in terms of the procedure for amendment of the Rules of Professional Conduct for lawyers will assist our view on the essence of this paper.

6.0. Comparative Perspectives to Amendment of Rules of Professional Conduct in Selected Jurisdictions

As seen above, a major statute regulating the making and amendment of the Rules of Professional Conduct for lawyers in Nigeria is the Legal Practitioners Act. In South Africa, a major legislation in this respect is the Legal Practice Act No 28 of 2014. The South African equivalent of the Bar Council in Nigeria is the South African Legal Practice Council. Section 6(1) (a) of the Legal Practice Act 2014 provides:

> In order to achieve its objects referred to in section 5, and, having due regard to the Constitution, applicable legislation and the inputs of the Ombud and Parliament, the Council may—
> (b) In order to achieve its objects referred to in section 5, and having due regard to the Constitution, applicable legislation and the inputs of the Ombud and Parliament, the Council must —

(i) develop norms and standards to guide the conduct of Legal Practitioners, candidate Legal Practitioners and the legal profession;[38]

The Code of Conduct is made and revised by the South African Legal Practice Council and applies to all Legal Practitioners (Attorneys and Advocates) as well as all candidate legal practitioners and juristic entities as defined, and is effective from date of publication in the Gazette.[39] In its recent amendment of the Code of Conduct for Attorneys and Advocates, all interested parties were called upon to submit their comments in writing by 7 February 2019.[40] This is in line with section 36 (1) (4) & (5) of the Legal Practice Act No 28 of 2014. These comments were considered by the Legal Practice Council when it drafted the final version now being published as Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities in Government Gazette No. 42337.[41] A draft amendment must be in the public domain for at least 30 days before the final publication in the Gazette.[42] There is no such provision in Nigeria which may encourage publication by ambush without inputs from the Bar except its representatives where notified.

In Canada, in October 2011, the Law Society's Professional Regulation Committee in Ontario Province began reviewing the Model Code for the purposes of implementation and sought the comments and views of lawyers on the proposed changes between

[38]Https://Www.Gov.Za/Sites/Default/Files/Gcis_Document/201409/3802222-9act28of2014legalpracticeacta.Pdf Accessed 28 August 2020.
[39]http://pabasa.co.za/wp-content/uploads/2019/05/lpa-code-of-conduct-2019.pdf accessed 30 August 2020.
[40]*Ibid*.
[41]*Ibid*.
[42]Sections 36 (5) And 38 (2) of the Legal Practice Act No 28 of 2014.

June and August 2012.[43] The amended Lawyers' Rules of Professional Conduct were approved at October 2013 Convocation.[44] In essence, Convocation is empowered to amend the Rules for Legal Practitioners and paralegals in the region of Ontario. It is pertinent to note that amendment of the Rules of Professional Conduct for Legal Practitioners is not done by any single individual or office in Canada. It is not done in Nigeria as well.

In the United Kingdom, the Bar Standards Board is a specialist regulator focusing primarily on the regulation of advocacy, litigation and legal advisory services.[45] The regulatory objectives of the Bar Standards Board are derived from the Legal Services Act 2007. It is not the sole prerogative of the head of the Bar Standards Board to amend the Rules of Professional Conduct for Barristers in the United Kingdom.

Proposed amendments to the Rules of the North Carolina State Bar are published for comment during the quarter after the Council of the North Carolina State Bar approved their publication. In the State Bar of North Carolina in the United States of America, the proposed amendments of the Rules of Professional Conduct for Advocates are published in the North Carolina State Bar's Journal and on the website.[46] After publication for comments, the proposed rule amendments are considered for adoption by the Council at its next Quarterly meeting. If adopted, the rule amendments are submitted to the North Carolina Supreme Court for approval.

[43]https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct. Accessed 29 August 2020.
[44]*Ibid*.
[45]https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/3adac38c-72c3-4744-b8357e693ebbd785/second-edition-test31072019104713.pdf Accessed 27 August 2020.
[46]https://www.ncbar.gov/for-lawyers/ethics/proposed-amendments-to-the-rules-of-professional-conduct/ Accessed 21 August 2020.

Amendments become effective upon approval by the court. Unless otherwise noted, proposed additions to rules appear in bold and underlined print, deletions are interlined. Proposed amendments to the Rules of Professional Conduct appear at the end of the page. As it is with Nigeria, there are processes and procedures to be followed in the State Bar of North Carolina in the United States of America before amendment can be effected to the Rules of Professional Conduct in the State.

7.0. Conclusions

Though, the HAGF being President of the Bar Council can preside and give directives during the meeting of the Council, the power to make and revise the RPC is vested in the Bar Council as a body and not the HAGF as an office created by law and known to law. It is therefore mythical and misleading to presume that the preamble to the RPC 2007 as couched is right in law when the searchlight of the provisions of section 12 (4) of the LPA 2004 as amended is beamed in that direction. As stated above, the intention of the writers is not the propriety or otherwise of the subject of amendment but to reflect proper legal perspectives in terms of who is empowered to make and revise the RPC. The subject of amendment is a discourse for another day. In all the jurisdictions examined in this paper, there is none where an individual or office makes and revises the rules of professional conduct for lawyers. Adequate notice and publicity should therefore be given to members of the legal profession and the Bar Council when any need arise for the amendment of the RPC. The concluding part of the provisions of section 12 with regard to gazetting and circulation to all branches of the NBA cannot be overlooked in order to give legality to the proposed amendment of the Rules of Professional Conduct for Legal Practitioners in Nigeria. Conclusively, the powers of the HAGF and the Bar Council are romantically cooperative and not competitive for the good of the legal profession. However, for a sustained independence of the Bar, we feel it is unhealthy to hand

over the affairs of amendment of the RPC for a better independence to a Council whose majority dominance in terms of membership is in the hands of members of the unofficial Bar. A review in this respect is therefore suggested.

An Examination of the *Sui Generis* Features of Election Litigation in Nigeria

REMI P. OLATUBORA*

Abstract

Election cases are very technical as the procedure applicable in post – election legal actions weigh heavily against the petitioners. Many otherwise facts-supported and meritorious cases that would ordinarily have led to the reversal of rigged election returns by election tribunals have failed largely owing to the strict and peculiar rules applicable in election cases which distinguish them from ordinary civil proceedings. The aim of this article is to, in summary but with sufficient clarity, point out certain peculiar procedural and evidentiary rules in election litigation so as to enable litigation counsel avoid the pitfalls that have, before now, unnecessarily ruined many election cases and by implication, the immediate political aspirations of election disputants. This article contains highlights of some of the very peculiar procedural and evidentiary issues such as the place of the polling stations as the foundation of election and post-election disputes; statutory rules which distinguish pre-election from post-election disputes; and the Independent National Electoral Commission (INEC) as well as the declared winner of an election as indispensable statutory respondents in election litigation. It further accentuates the peculiar rules of pleading such as those requiring grounds of election petition to be couched in the langauge of the Constitution or the Electoral Act and highlights the central place of certain INEC's documents such as Forms EC.8A, EC.4A among others in proving Electoral Act non-compliance.

Part 1

1.0. The Concept of Election in the Context of Election Petition

Election has been defined as the process of choosing, by popular votes, a candidate for political office in a democratic system of government.[1] The concept of election denotes a process which includes accreditation, voting, collation, recording of the scores of the candidates in the prescribed forms and declaration of result.[2] Voting therefore is only a species of the genus, which is election.[3]Casting votes alone therefore does not constitute election.[4] Observance of the rules and regulations governing the conduct of elections is important towards ensuring that elections are free and fair. In the context of election litigation, the grounds for challenging elections in the election tribunals or court must be applicable to the actual conduct of elections or must be in relation to events which were contemporaneous with the conduct of elections. Allegations constituting the basis of an election petition must be connected with activities which took place in the process of the conduct of an election by election officers, political party agents, voters, security

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[1]*Marwa v Nyako* (2012) 6 NWLR (Pt. 1296) 199, 357; Ojukwu v Obasanjo (2004) 12 NWLR (Pt. 886) 169 ; *Buhari v Obasanjo* (2005) 2 NWLR (Pt. 910) 241.

[2] In *Ogboru v Uduaghan* (2011) 2 NWLR (Pt. 1232) 538, 589, the Court of Appeal held:"The law, as we understand it, is that the word "election" is a generic term; a process which embraces the entire gamut of activities ranging from accreditation, voting, collation to recording on all relevant INEC forms and declaration of results. See also *INEC v Ray* (2004) 14 NWLR (Pt. 892) 92, 123; Agoda v Enamuotor (1999) 1 LRECN 205, 219; (1999) 8 NWLR (Pt. 615) 407.

[3]*Aondoaka v Ajo* (1999) 3 LRECN 380, 402; (1999) 5 NWLR (Pt. 602) 206.

[4]*Aondoaka v Ajo* (1999) 3 LRECN 380, 402; (1999) 5 NWLR (Pt. 602) 206; Agbaso v Ohakim (2008) 1 LRECN
317, 371.

agents and other persons who played some roles in relation to the election.[5]

The INEC Form EC.8A is the primary evidence of votes cast in a polling station in an election and it is the foundation or base on which the pyramid of an election process is built.[6]

2.0. Polling Stations as the Concrete Foundation of Election

From the procedure for voting stipulated in sections 48-70, Electoral Act, 2010 (as amended), it is clear that the most critical aspects of elections, which is the voting processes, take place at the polling stations. Subsequent processes such as collation of results at the Ward, Local Government and other levels rely on primary results and materials forwarded from the polling stations. In election petition, complaints against conduct of elections are, in the majority of the cases, directed at the events that took place at the polling stations.[7]

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[5] In election petition, there is a world of difference between an allegation that *"no elections... were conducted"* on the one hand, and an averment stating that *"there was no voting in the polling booths"* on the other hand. Different legal consequences attend to each of these averments. A positive assertion (usually made by respondents to election petitions) that election was duly conducted, is, in law, understood as placing on the pleader the burden of proof on the pleading; to plead and prove the constitutive activities that define an election. The party must plead the INEC forms which show that result sheets were issued and; the INEC forms which show that result sheets were distributed before the results in the INEC forms EC.8A were recorded. See *Ogboru v Uduaghan* (2011) 2 NWLR (Pt. 1232) 538, 593; *Amgbare v Sylva* (2009) 1 NWLR (Pt. 1121) 1.

[6] *Nwobodo v Onoh* (1984) 1 SCNLR 1;*Ogboru v Uduaghan* (2011) 2 NWLR (Pt. 1232) 538, 592- 593.

[7] In *Nwobodo v Onoh & Ors*(1984) NSCC (Vol. 15) 1, 23.[7] Bello, JSC, held:"With the necessary data available, to wit, the undisputed results at the polling stations, not only the trial court and the Federal Court of Appeal but any reasonable person with a little effort in arithmetic calculations may determine the correct result of the election. Polling stations are the concrete foundation on which the pyramid of an election process is built. Primary and secondary

Activities and Events Constituting Pre-election Matters

In election litigation, it is necessary to have a good understanding of the activities and events which are preparatory to the conduct of election and those that are connected with the actual conduct of poll; the rules regulating these activities and events as well as the remedies provided by the law for the breach of these rules. Classification of processes into pre-election matters and events contemporaneous with conduct of poll may sometimes be very difficult. Certain processes which are broadly classified as pre-election matters with respect to their timeline are also inextricably connected with the actual conduct of poll such that improper handling of such processes may have grave impact in the quality of election and ultimately resonate in post - election legal disputes and contestations. The following are some of the activities which constitute pre-election matters, namely; voters registration,[8] continuous registration of voters or updating of voters' register,[9] qualification for registration,[10] transfer of registered voters,[11] demand for information regarding registration,[12] printing and issuance of voters' register[13], printing and issuance of voters' cards,[14] custody of voters' register,[15] issuance of duplicate of voters' cards,[16] display of the copies of the voters' list,[17] notice of election,[18] nomination of candidates,[19] submission of list of

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collation centres are administrative machinery devised by the FEDECO in order to enhance efficiency and speedy declaration of the final result of an election."

[8] Section 9, Electoral Act, 2010 (as amended).

[9] *Ibid.* ss. 10 and 11.

[10] *Ibid.* s. 12.

[11] *Ibid.*s.13.

[12] *Ibid.* s.14.

[13] *Ibid.* s.16.

[14] *Ibid.* s.15.

[15] *Ibid.* s.17.

[16] *Ibid.* s.18.

[17] *Ibid* .s.19.

[18] *Ibid.* s.30.

[19] *Ibid.* s.32.

candidates and their affidavits by political parties,[20] changing of candidates,[21] publication of nomination,[22] withdrawal of candidate,[23] and procedure to follow in the event of the death of a nominated candidate.[24]

Causes of Action, Fora for Redress and Remedies in Pre-election Matters

In relation to some of the pre-election activities and events, the law provides specifically for administrative and judicial fora in appropriate cases for redress where infractions on the rules occur. For example, during the period for the display of voters' list, any person may raise objection against the inclusion of the name of a person on the supplementary voters' register on the grounds that the person is not qualified to be registered as a voter.[25]

It follows from the foregoing that, where a person does not possess any of the qualifications listed in section 12 (1) (a) (b) (c) and (e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), it is objectionable to have such person's name in the voters' list. Objection to the voters' list may be raised on the ground that the names of deceased persons are included in the

[20] Section 31, Electoral Act, 2010 (as amended).
[21] *Ibid.* s. 33.
[22] *Ibid.* s.34.
[23] *Ibid.* s.35.
[24] *Ibid.* s.36.
[25] Qualifications for registration as a voter are set out in the Electoral Act. Section 12 (1) and (2) Electoral Act, 2010 (as amended) provides:"12. (1) A person shall be qualified to be registered as a voter if such a person: (a) is a citizen of Nigeria; (b) has attained the age of eighteen years; (c) is ordinarily resident, works in, originates from the Local Government/ Area Council or Ward covered by the registration centre; (d) presents himself to the registration officers of the Commission for registration as a voter; (e) is not subject to any legal incapacity to vote under any law, rules or regulations in force in Nigeria..(2) No person shall register in more than one registration centre or register more than once in the same registration centre."

voters' register. Such objection is administratively required to be made in a prescribed form which shall be addressed to the Resident Electoral Commissioner through the Electoral Officer.[26] Again, claims for and objections to entries in or omission from preliminary list of voters are required to be made to a Revision Officer appointed to hear and determine such claims and objections.[27] There is a right of appeal within 7 days against the determination of the Revision Officer to the Resident Electoral Commissioner.

Section 35 (1) Electoral Act, 2010 (as amended) requires a political party intending to participate in an election to submit list of its candidates to the Independent National Electoral Commission (the INEC) not later than 60 days before the date appointed for such election. The list or information submitted by each candidate is required compulsorily to be accompanied by an affidavit sworn to by the candidate at the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, indicating that he has fulfilled all the Constitutional requirements for election into the relevant office.[28] What is of interest here is that the Electoral Act grants to any person the *locus standi* to bring to justice any intending candidate for an election, where such person has reasonable grounds to believe that any of the information given by the candidate is false. The appropriate forum for such third party action is either the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory.[29]

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[26] Section 19, Electoral Act, 2010 (as amended).
[27] *Ibid.* s.21 (1).
[28] *Ibid.* s. 31 (2).
[29] *Ibid.* s. 31(5). In Olofu v Itodo (2010) 18 NWLR (Pt. 1225) 545, 577, the Supreme Court held:"By constitutional arrangements, election matters are the exclusive concern of election tribunals and not the regular courts. However, where the matter involves issues of pre-election, the regular High Courts have jurisdiction to handle them."

A distinction must be drawn between issue of non-qualification or disqualification which is a ground for presenting an election petition and the procedure for scrutiny of the particulars of candidates for an election pursuant to section 31 (5) Electoral Act, 2010 (as amended). The provisions of section 31 (5) of the Act are meant to prevent a situation in which a perjurer is allowed to contest an election. It is important to note, however, that a determination of a false claim against an intending contestant is as terminal as when a ground of non-qualification is upheld by an election tribunal or court.[30]

The Nigerian electoral law system is well structured with provisions for the followings: namely; a schematic timeline for all pre-election events; outlining of activities associated with or

[30]In *Udeagha v Omegara* (2010) 11 NWLR (Pt. 1204) 168, 203-204.the Court of Appeal drew a distinction between provisions of section 32 (5) Electoral Act, 2006 [which is *in pari materia* with section 31 (5) Electoral Act, 2010 (as amended)] on the one hand and the provisions of sections 66 and 106, Constitution of the Federal Republic of Nigeria, 1999, and held: "It is clear that the Electoral Act 2006 provides that a candidate is given the opportunity to scrutinise the personal particulars of an opponent as soon as it is received and published by INEC. After the scrutiny, an opponent who has grounds to believe that any information given to INEC is false may file a suit at the State or Federal High Court against a candidate seeking a declaration that the information in the affidavit is false. That should be done before the election is held. I agree with the respondents that the provision is different from the incidents of non-qualification provided for by S.66 and S. 106 of the 1999 Constitution which should be tried by Election Petition Tribunal...The truth of the matter is that the issue of false declaration in nomination forms arises before the election and the Electoral Act says the State High Court or Federal High Court has jurisdiction. This was actually to prevent a situation in which an obvious perjurer is allowed to contest the election. The person may not have fallen under any of the incidents of non-qualification provided by the Constitution but may have given false information i.e. regarding extent of educational qualification, false local government origin, extent of financial interest etc. All these are supposed to be determined before the election actually takes place. This is different from the circumstances which can enable a party present a petition on the ground provided under S.145 (1) of the Electoral Act." See also Section 31 (6) Electoral Act, 2010 (as amended) provides: "31. (6) If the court determines that any of the information contained in the affidavit or any document submitted by that candidate is false, the court shall issue an order disqualifying the candidate from contesting the election."

connected with the conduct of poll; designation of the fora for the redress of pre-election matters which are quite distinct from the fora for the redress of issues arising from the actual conduct of poll. Whereas actions arising from pre-election matters are redressed administratively or through litigation in the regular High Courts i.e., State High Courts or Federal High Court or High Court of the Federal Capital Territory, with opportunities for appeals to the Court of Appeal and ultimately to the Supreme Court, events that are contemporaneous with the actual conduct of poll are litigated in election tribunals or courts established by the Constitution (or States Laws in the case of Local Government Councils' elections).[31]

Problems of Characterization of Certain Issues as Pre-election Matters

A strict compartmentalization of certain issues as pre-election matters may sometimes appear very difficult or unrealistic. For example, where a person who does not possess the required academic qualification falsely claims such qualification in the particulars and information supplied to the INEC vide section 31 Electoral Act, 2010 (as amended), such person may be proceeded against and got disqualified through the procedure for scrutiny contained in that section. Where the procedure in section 31 of the Act is not invoked under such situation, lack of qualification for the election remains a competent ground by virtue of section 138 (1) (a) Electoral Act, 2010 (as amended).

[31]In *Ibrahim v INEC* (1999) 8 NWLR (Pt. 614) 344, 531. the Court of Appeal held:"...grounds recognised for the purpose of presenting an election petition are acts or omissions that was (sic) comtemporareneous with the conduct of election. Election tribunal has no power to investigate matters which took place before the conduct of the election." See also *Amaechi v INEC* (2007) 18 NWLR (Pt. 1065) 170, 196.

Again, whereas registration of non-qualified persons as voters, inclusion of the names of deceased persons and fictitious names in voters' register are valid grounds for raising claims and objections to the Revision Officer and the Resident Electoral Commissioner as pre-election issues in the manners provided for in sections 19 and 21, Electoral Act, 2010 (as amended), the use of a register of voters with integrity or credibility problem of infusion of non-qualified voters or dead persons' names or fictitious names constitutes an act of corrupt practice or non-compliance which is a ground for questioning election pursuant to the provisions of section 138 (1) (b) Electoral Act, 2010 (as amended). Therefore, in determining whether or not an election tribunal has the jurisdiction to entertain matters relating to manipulation of voters' register, a distinction must be drawn between the occurrence of acts amounting to injection of fictitious names in a voters' register and the use of such manipulated voters' register in an election. While the former are acts done prior to the conduct of an election, the latter is an act contemporaneous with the conduct of poll. Consequently, while unlawful injection of fictitious names into voters' register prior to election constitutes a pre-election matter over which an election tribunal has no jurisdiction, the use of the register with the names unlawfully injected for the conduct of poll is a form of electoral non-compliance or corrupt practice over which an election tribunal has jurisdiction.[32]

[32] In *Akeredolu v Mimiko* (2014) 1 NWLR (Pt. 1388) 402, 443-444. the Supreme Court held:"Whereas the process of compiling a voters register is a pre-election matter, the use to which an alleged fundamentally defective voters register so compiled is put to in an election which may substantially affect the result of the said election is clearly an issue of non-compliance with the provisions of the Electoral Act, which constitutes a ground for challenging an election in a petition under section 138 (1) (b) of the Electoral Act, 2010 (as amended)."

Again although the issue of nomination is essentially a pre-election matter, unresolved nomination crisis may resurrect in the form of post-election dispute.[33]

One other issue which also serves to accentuate the fine distinction between pre-election and election matters is the claim of unlawful exclusion from an election. Nomination of a candidate for an election is, no doubt, a pre-election matter as all processes relating to the nomination of candidates are required by the provisions of the Electoral Act to have taken place before the conduct of an election. However, the exclusion of a validly nominated candidate

[33] In *Olofu v Itodo* (2010) 18 NWLR (Pt.1225) 545.the 1st respondent was duly nominated and had his name submitted to the INEC as Peoples Democratic Party's (PDP's) candidate for an election. The 1st respondent was duly screened and cleared by the INEC to contest the election. The election was held, but after the election, the INEC refused to release the certificate of return to the 1st respondent on the ground that the PDP intended to substitute the 1st respondent with another candidate, 3rd appellant. At pages 577 to 578 of the report, the Supreme Court held:"From the above facts it is very clear that this is a post election matter as there was an election duly conducted by the appropriate authority on the 26th day of July, 2008 and which by Exhibit "2", the certified true copy of the result of the election; the 1st respondent won. At that stage it is too late to be talking of nomination of a candidate for the election in question, which is purely a pre-election matter. It should be noted that nomination is either by the original act of the party or by way of substitution. From the record, particularly exhibit "2", election had been concluded and the name of the candidate who won same is the 1st respondent. It follows therefore that appropriate venue for the trial of the issues arising from that concluded election is the appropriate election tribunal, not the regular High Courts. It is at the tribunal that the electoral body concerned is to tell Nigerians why, the respondent who contested and won the election in issue is refused a certificate of return which certificate is rather issued to a total stranger, 3rd appellant. This clearly is a case of undue return of the 3rd appellant who was not even a candidate at the election by the case of the 1st respondent, not wrongful substitution. If there was any such substitution in accordance with the provisions of section 23 of the law, the name of the 1st respondent would not have been reflected in exhibit "2".

in an election is a ground for questioning the return in such election in an election tribunal.[34]

PART 2

Statutory Respondents Under Electoral Act, 2010 (as amended)

In relying on case law authorities in relation to the statutory respondents in election petition, practitioners and judges alike must be careful so as not to apply to cases coming up under the Electoral Act, 2010 (as amended), certain decisions based on earlier electoral statutes, when it is clear that some serious reform has been effected on the old position of the law by virtue of the provisions in section 137 (2) and (3) of the Act.[35]

It is clear that the slicing of the provisions of the law on statutory Respondents into two subsections, that is, subsections (2) and (3), with the latter further broken down into sub-paragraphs (a) and (b), in section 137, Electoral Act, 2010 (as amended) is to make for specificity and certainty as to the statutory respondents in election petition. It is also certain that the intention of the Legislature is to

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[34]*INEC v Action Congress* (2009) 2 NWLR (Pt. 1126)524;*Obot v Etim* (2008) 12 NWLR (Pt. 1102) 754.

[35]Section 137 (2) and (3) Electoral Act, 2010 (as amended).provides: "137. (2) A person whose election is complained of is, in this Act, referred to as the respondent.(3) If the petitioner complains of the conduct of an Electoral Officer, a Presiding or a Returning Officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the commission shall, in this instance, be-(a) made a respondent; and; (b) deemed to be defending the petition for itself and on behalf of its officers or such other persons. In *Nwobodo v Onoh* (1984) 1 SCNLR 1, 25, the Supreme Court warned that: "In the application of the provisions of a statute to a particular case, a court should not blindly adhere to the ratio decidendi of a previous case founded on the interpretation of a former statute without having first carefully examined that statute and meticulously compared it with the statute governing the case for determination by the court in order to ascertain whether the two statutes are in *pari materia*. It is only when the two statutes are similar and identical that the interpretation placed on one can be a precedent to the interpretation of the other."

state clearly that it is no longer necessary to join an Electoral Officer or a Presiding Officers or a Returning Officer against whom complaints are made in the conduct of an election notwithstanding the nature of the complaint provided the INEC is joined as a Respondent**.** Consequently, case such as Onugha v Ezeigwe,[36] in which it was held that where the conducts complained of in relation to officers of the INEC verged on criminal offences, the principle of agency could not be stretched to hold the INEC responsible for the conduct of such officers, is no longer good law.

Where a petition complains of the conduct of the listed INEC officers, it is now compulsory that the INEC must be joined as a respondent.[37] In *APGA v Uba*,[38] the Court of Appeal held that by virtue of section 137, Electoral Act, 2010 (as amended) and paragraph 51 (1) First Schedule to the Act, the joinder of the INEC officers in an election petition, no matter the nature of complaint made against them is unnecessary once the INEC is a party in the petition; as the INEC is deemed to be defending the petition for itself and on behalf of its officers against whom allegations have been made. It was further held, in that case, that the issue of fair hearing as it pertains to the INEC officers against whom allegations

[36] (2011) 12 NWLR (Pt. 1263) 184.

[37]In *Ngige v Akunyili* (2012)12 NWLR (Pt. 1323) 343, 374-375.the Court of Appeal held:"Section 137 of the Act [Electoral Act, 2010 (as amended)] while stipulating that the person whose election is complained of shall be referred to as "the respondent" goes further to provide for the joinder in the petition of other I.N.E.C. officials against who the petitioner complains of their conduct in the election as respondents. The provisions of section 137 of the Electoral Act are however clear that once I.N.E.C. is joined as a respondent in a petition, there is no need to join any of its officials the petitioner complains of the conduct in the election as I.N.E.C. having been made a Respondent therein, shall be deemed to be defending the petition on its behalf and on behalf of its officers, no matter the nature of the complaints against such officials."

[38] (2012) 11 NWLR (Pt. 1311) 325.

are made in a petition but not joined as parties, does not arise for consideration at the stage when objection is taken to the competence of the petition. The same conclusion was reached by the Court of Appeal in *Eluemunoh v Obidigwe*,[39].

It is submitted that, notwithstanding the decisions in *Ngige v Akunyili*[40] *APGA v Uba*[41] and *Eluemunoh v Obidigwe*[42]; where the delinquent officers of the INEC are not joined as parties, and the INEC as well is not made a respondent, the paragraphs of a petition in which allegations are made against the INEC officers are incompetent. The word used by the Electoral Act, 2010, is *"shall"* which connotes the compulsory nature and pre-emption of the requirement. Where therefore a petitioner makes allegations against the listed officers of the INEC and fails to join the INEC, the omission may be fatal to the petition. Where the delinquent INEC officers are joined as respondents notwithstanding that the statute prescribes that *"it shall not be necessary to join such officers",* failure to join the INEC as a respondent may not be fatal to the petition.

It is clear that the provisions of section 137 (2) and (3) do not properly capture the category of respondent, which, in section 133 (2) Electoral Act, 2002 and section 144 (2) Electoral Act, 2006, was referred to as *"any other person who took part in the conduct of the election."*[43] Again in *Uzodinma v Udenwa*,[44] the Court of Appeal

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[39] (2012) 13 NWLR (Pt. 1317) 369, 387.
[40] (*Supra)*
[41] *(Supra)*
[42] *(Supra)*
[43]In *Obasanjo v Buhari* (2004) 17 NWLR (Pt. 850) 510, 582. the Supreme Court held that: "any other person" in section 133 (2) Electoral Act, 2002...will cover only a person who was assigned to take part in the conduct of the election. Such person need not be an Electoral Officer, a Presiding Officer or a Returning Officer but, any other person who took part in the conduct of the election."
[44] (2004) 1 NWLR (Pt. 854) 303. See also Buhari v Yusuf (2002) 14 NWLR (Pt. 841) 446.

held that the expression *"any other person"* in section 133 (2) can only be interpreted in the light of the electoral officers set out immediately before it, and would not include private persons. Section 137 (3) Electoral Act, 2010 (as amended) glibly refers to *"persons"* between *"or"* and *"notwithstanding"* and the words *"other persons"* in the last line of section 137 (3) (b); but these references cannot by any stretch of interpretation be considered as creating a category of other persons (whether they be officers of the INEC or not) as statutory respondents in an election petition in the manner in which the phrase *"any other person who took part in the conduct of the election"* was interpreted under the Electoral Act, 2002 and the Electoral Act, 2006. The word and phrase *"persons"* and *"other persons"* respectively in section 137 (3) Electoral Act, 2010 (as amended) are idle and very superfluous.

It is now settled that any person by whatever description or responsibility in relation to an election outside of an Electoral Officer or a Presiding Officer or a Returning Officer, against whom complaint is made in an election petition, must be joined separately as necessary espondent irrespective of whether the INEC is made a party or not. Finally, private persons against whom complaints are made in an election petition must be joined as necessary respondents otherwise the paragraphs containing such complaints will be rendered incompetent under the Electoral Act, 2010 (as amended).[45]

Where allegations, criminal or civil, are made against private persons in an election petition and such private persons are not

[45]In *Ubom v Anaka* (1999) 6 NWLR (Pt. 605) 99, 112. the Court of Appeal held: "It must be borne in mind that election petitions are sui generis, while ordinary civil actions are not. Non-joinder of a necessary party in an election petition is fatal to the petition, as it robs the tribunal of jurisdiction. But in ordinary civil action, non-joinder of a necessary party does not have the same effect as the court can adjudicate upon a cause or matter without a joinder."

made respondents to the petition, the paragraphs in the petition containing such allegations are incompetent and must be struck out for being in violation of the right of those persons to fair hearing as guaranteed by section 36 (1) Constitution of the Federal Republic of Nigeria, 1999 (as amended).[46]

[46]*In Kalu v Chukwumereije (2012) 12 NWLR (Pt. 1315) 425, 459.the Court of Appeal held:* "…the unnamed military personnel in paragraphs 4 and 18 (a), the unnamed police and SSS personnel in paragraphs 4 and 16 (d) and 14 (c), Mr. Okoroagha Uka (in paragraph 14 (c), Mr. Onyejiocha in paragraph 18 (a), Rev. Dimanoches Ndeke in paragraph 18 (b), His Royal Highness, Luke Uche (Naka Eze) in paragraph 18 (c), Eze Moses Onyia in paragraph 18 (d), Mr. V.C. Ngwu and Mr. Ugochukwu Okpara in paragraph 18 (b) (i) (d) etc. were not shown to be and cannot be presumed to be agents of INEC as to come within the provision of section 137 (3) of the Electoral Act. As they are necessary and proper parties, to the petition, their non-joinder provided legal justification for the tribunal to strike out the paragraphs relating to serious and criminal allegations against parties that were not joined in the petition. This is because, it would otherwise be futile to proceed to adjudicate on the issues in controversy in the absence of parties who are not joined and who serious and criminal allegations have been made against." The reasoning in *Kalu v Chuckwumereije* (supra) is consistent with established principle that a person who is not a party to a suit cannot be proceeded against by virtue of section 36 (1) Constitution of the Federal Republic of Nigeria, 1999.[46] In *Biyu v Ibrahim* (2006) 8 NWLR (Pt. 981) 1, 33.the Court of Appeal held: "…a person who is not a party to a suit cannot be proceeded against by virtue of section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999, it will amount to a breach of his fundamental right of fair hearing should that be done. The proceeding against him will be a nullity." Again in *NEC v Izuogu* (1993) 2 NWLR (Pt. 275) 270, 295.theCourt of Appeal held, per Sulu-Gambari, JCA, as follows:"I shall abide by my opinion in the case of *Maikori v Lere* (1992) (*supra*) that a court as well as a tribunal will not make an order to give judgment that would affect the interest or right of a person or body that is not a party and who has not been heard in the matter. Any person to be directly affected by an order of the court ought to be heard by that court before such order is made and indeed; section 33 (2) (a) of the 1979 Constitution emphasized the need to provide any person whose rights and obligations may be affected an opportunity to make representations before a decision or order affecting him is made."

In addition to the requirement of the Constitution on the right to fair hearing the necessity of joinder of persons against who allegations are made, in election cases is rooted in the rule of natural justice usually denoted by the expression *"audi alteram partem"* which requires an adjudicator to hear the other side.[47]

PART 3

Pleading in Election Petition

As it is in the general rules of pleading in civil actions, so also it is in election petition that pleading is to consist of statement of all material facts on which the party pleading proposes to rely upon but not the evidence on which the petition is to be proved or on which the respondent relies upon for his defence or the provisions of the Electoral Act and the Constitution. It is therefore, inconceivable to suggest that the bare assertion of non-compliance in an election petition, without more, is sufficient pleading to sustain the petition. If that were so, then practically every election petition would succeed, in that, there is, in practice, no election without one form of non-compliance or the other.[48]

In the context of election petition, material facts are those facts that are necessary to substantiate the claim of the petitioner or the defence of the respondent. A petitioner must plead material facts to either show that (i) the respondent was not returned on the basis of majority of lawful votes or, (ii) that the election was marred or vitiated by corrupt practices or substantial non-compliance with the Electoral Act which substantially affected the result of the election or, (iii) that the respondent was not qualified to or was disqualified from contesting for the particular office in contention or, (iv) that

[47] See *Ajadi v Ajibola* (2004) 14 NWLR (Pt. 892) 14, 32.
[48] *Ojukwu v Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50, 113.

the petitioner was validly nominated by his political party but was unlawfully excluded from the election by the INEC.[49]

The major function of pleading is to give the adverse party the opportunity to know the case of his opponent.[50]All facts which a party relies on in a civil matter before a superior court of record must be clearly pleaded in numbered paragraphs. The same applies to election petitions so that the paragraphs set out in the petition will indicate the facts the petitioner relies on for his petition. The reason for this principle of practice is that no party should take advantage of lurking away facts from his pleading and unleashing surprises in the court by evidence on a matter not pleaded.[51]Facts are the fountain head of pleading as they are the basis of pleading. A party cannot lead evidence on fact not pleaded.[52] The primary function of pleading is to define and delimit, with clarity and precision, the real matters in controversy between the parties upon which they prepare and present their respective cases and upon which the court will be called upon to adjudicate between them.[53] In pleading, there must be full disclosure of facts.[54]

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[49]Section 138 (1) (a)-(d) Electoral Act, 2010 (as amended) and; sections 65, 66, 106, 107, 131, 137, 177 & 182,
Constitution of the Federal Republic of Nigeria,1999 (as amended).

[50]*Ogu v Ekweremadu* (2006) 1 NWLR (Pt. 961) 255, 278.

[51]*Buhari v Obasanjo* (2005) 13 NWLR (Pt. 941) 1, 70; *Emegokwe v Okadigbo* (1973) 4 SC 113 and; *Pascutto v Adecentro (Nig.) Ltd.* (1997) 11 NWLR (Pt. 529) 467.

[52]*Okpala v Ibeme* (1989) 2 NWLR (Pt. 102) 208; *S.P.D.C.N Ltd. v Nwakwa* (2003) 6 NWLR (Pt. 815) 184; *Ojukwu v Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50, 125.

[53]*Atolagbe v Shorun* (1985) 4 SC (Pt. 2) 250; (1985) 1 NWLR (Pt. 2) 360; *Ojukwu v Yar'Adua* (2009) 12 NWLR
(Pt. 1154) 50, 125-126.

[54]In *Buhari* **v** *Obasanjo*(2005) 13 NWLR (Pt. 941) 1, 200-201, the Supreme Court held: "In all civil matters in superior courts of record, all facts a party relies upon must be pleaded clearly in numbered paragraphs. The same applies to election petitions so that the paragraphs set out seriatim will indicate the facts the petitioner relies for his petition…The reason for this principle of practice is that

Where the pleading in a petition is generic and vague, the respondent will be put at liberty to make a general traverse and therefore prevent the petitioner from adducing evidence on specific allegations which are not clearly made out in the petition. Where a petitioner is alleging that the respondent was not elected by the majority of lawful votes, he ought to plead and prove the votes cast at various polling stations; the votes illegally credited to the candidate declared the winner; the votes which ought to have been credited to petitioner and the votes which should be deducted from that of the supposed winner in order to see if it will affect the result of the election. Where these are not done, it will be difficult for the court to effectively address the issue.[55]In the practice and procedure relating to pleading, it is important to distinguish material facts from evidence by which they are to be proved.[56]

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no party should take advantage of lurking away facts in his pleadings and unleashing surprise in court by evidence on a matter not pleaded. It has been with us since colonial days and it is not unreasonable. The attainment of justice is that all parties to a suit must in their pleadings make full disclosure of facts they intend to rely for their case. In that case, each party will readily prepare for the case he is to meet. By not pleading a fact and coming to court to offer evidence on it, is wrong in principles of jurisprudence. There should be no evidential ambush for a fact not pleaded. Thus, pleadings are matter of full disclosure, not the Trojan Horse!"

Nadabo v Dubai (2011) 7 NWLR (Pt. 1245) 185; *Awolowo v Shagari* (1976) 6-7 SC 51.

[56]In the context of documents used in the conduct of election, the Court of Appeal, in *Ajadi v Ajibola*(2004) 16 NWLR

(Pt. 898) 91, 170, enumerated some guides as follows:"A document or information which the court can take judicial notice of need not be pleaded or proved. However, it is basic principle of pleading that only material facts and not evidence in proof of such facts that are required to be pleaded. There are instances when documents which are material must be pleaded as opposed to documents which are not material. Where a document or series of documents are relied upon, it is always necessary to distinguish those which constitute material facts from those that are mere evidence to establish facts in issue. Documents which have the former effect must bepleaded, while those of the latter need not be pleaded."See also Kurfi v Mohammed (1993) 2 NWLR (Pt. 277) 602; *Hashidu v Goje*(2003) 15 NWLR (Pt. 843) 352.

Where a petitioner is relying on INEC Forms EC.8A, EC.8B, EC.8C and EC.8D [(or EC.8A(1), EC.8B (1), EC.8C (1) and EC.8D (1)] to establish claims of unjustified reduction of his votes between polling stations and collating centres or unjustifiable enlargement or increment of the votes of the party whose election is being challenged or; to show conclusively that the petitioner scored the highest number of lawful votes cast in the election, the petitioner is bound to plead the result forms in his petition and lead evidence on them in order to succeed.[57]The INEC uses different numbering for election documents and result forms in relation to different elections. Where for instance, senatorial and the House of Representatives elections are held together, as it is quite often the case during general elections in Nigeria, counsel charged with the responsibility of the settlement of pleading must be conversant with the specific number assigned to the result forms used for each of the elections. Where the forms used for a particular election are the EC.8A, EC.8B, EC.8C and EC.8D series that is what must be pleaded. If in error, forms EC.8A (1), EC.8B (1), EC.8C (1) and EC.8D (1) are pleaded, forms EC.8A, EC.8B, EC.8C and EC.8D will be held to be at variance with the pleading and therefore inadmissible.[58]

As a rule, a party in an election petition is not to plead provisions of the Electoral Act or the Constitution but facts on which the application of the Electoral Act or the Constitution can be based. Consequently, a petitioner needs not allege in his petition that the respondent's conduct during the election was unlawful and contrary to the Electoral Act. He cannot plead that by the provisions of the Electoral Act, the INEC was under a duty to do certain things which were left undone during the election or that the INEC did

[57]*Hashidu v Goje* (2003) 15 NWLR (Pt. 843) 352, 382-383.
[58]*Hashidu v Goje*(2003) 15 NWLR (Pt. 843) 352, 400-401.

something during the election which was contrary to the Electoral Act or the regulations made pursuant to the enabling provisions of the Act. The petitioner is required to plead only relevant facts from which the lawfulness or wrongfulness of the acts or omissions of the INEC or other respondents could be inferred.[59]Similarly, in election petition, documents or information which the court can take judicial notice of need not be pleaded.

Requirements of Pleading where a Petitioner Alleges Falsification of Election Results

A petitioner challenging an election result on the ground of falsity of the result is required to plead two sets of results. The first would be the genuine or correct result while the other would be the false result.[60] It is the two sets of results that would be compared to determine the falsity or otherwise of the result.[61] The corollary of this requirement is that, to prove falsification of election result, it is basic that there should be in existence at least two results out of which one could be stigmatised as false and the other characterised as genuine.[62]

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[59]In *Ngige v Obi*(2006) 14 NWLR (Pt. 999) 1, 160, the Court of Appeal held: "This means that where a petitioner claims he is duly elected it means that he is elected in a proper manner, in accordance with legal requirements. In our present case, since the 1st respondent has pleaded that he was duly elected, it therefore follows that he was elected in accordance with legal requirements i.e. of S. 179 (2) (a) and (b) of the 1999 Constitution. The effect of pleading that he was duly elected is that the 1st respondent has satisfied the requirements of S. 179 (2) (a) and (b) that he has the highest number of votes cast at the election and has not less than ¼ of all the votes cast in each of at least 2/3 of all the Local Government Areas of Anambra State."

[60]*ANNP v INEC* (2010) 13 NWLR (Pt. 1212) 549, 612.

[61]*Ojo v Esohe* (19991) 5 NWLR (Pt. 603) 444.

[62]*Sabiya v Tukur* (1983) NSCC 599; Nwobodo v Onoh (1984) 1 SC ; *ANPP v INEC* (2010) 13 NLWR (Pt.1212) 549.In *Ojo v Esohe* (1999) 5 NWLR (Pt. 603) 444 , 453the Court of Appeal held: "In the instant appeal, the appellant failed to plead and adduce evidence on the result characterised as genuine as well as the one considered fake or false. The appellant neglected to pursue the substance by so doing and made for the shadow. The purported collation of AD 45, APP 1,281

In summary, pleading in election petition is similar to pleading in civil matters and the functions of pleading in election petition are:(a) to inform the other side of the nature of the case he is to meet in order to be prepared for same as distinguished from the mode in which the case is to be proved; (b) to prevent the other side from being taken by surprise and to save unnecessary expenses; (c) to enable the opponent know what evidence he ought to prepare for at the trial; (d) to limit the generality of the pleading or of the claim or of the evidence; (e) to limit and define the issues to be tried and to which discovery is required and; (f) to tie the hands of each party so that he cannot without leave of court go into matters not formally included therein.[63]

Ground(s) of a Petition must come within either the Electoral Act or the Constitution

An election petition is an originating process by which an unsuccessful candidate in an election or his political party seeks to question the return of a successful candidate as undue, either because the person who has been returned was, at the time of the election, not qualified to stand for the election; or because a substantial number of votes by virtue of which the winner was declared is invalid; or because the petitioner was validly nominated to run for an election but was unlawfully excluded from the election; or that the election is invalid as a result of non-compliance with the Electoral Act or corrupt practices which substantially

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and PDP 1,521 pleaded in the petition in respect of ward 9 cannot be found on any official result sheet. It is appellant's view of what the result should be, it is neither the genuine results which are invariably the presiding officer's counting of votes at the polling booths nor the results considered as falsified or falsely credited to the first respondent which in this case is 1,562. Since these two basic sets of results are not pleaded and proved the petition is not established as required and it is bound to fail as it did."

[63]*Ogu v Ekweremadu* (2006) 1 NWLR (Pt. 961) 255, 279.

affected the result of an election. An election petition is meant to question the election of a candidate as victor. It must be shown that the purported election or return was void or that the winner was not returned by a majority of lawful votes.[64] For a complaint against a return or election to be competent, it must be cognizable either under relevant provisions of the Constitution or the Electoral Act. It has been held[65] that a ground contending that a person was at the time of the election a member of two political parties (NRC and SDP) at the same time is not competent ground upon which an election petition can properly be based.

Ground complaining that the Person whose Election is Questioned was, at the Time of the Election, not Qualified to Contest

The Constitution of the Federal Republic of Nigeria, 1999 provides for the qualifications of persons seeking election to the offices of the President, Vice President, member of the National Assembly, Governor, Deputy Governor and member of a State House of Assembly. Sections 65 and 66 specify the qualifications and disqualifications for membership of the Senate and House of Representatives respectively. Sections 106 and 107 stipulate the qualifications and disqualifications for membership of the House of Assembly. Sections 131 and 137 provide for the qualifications and the disqualifications for the offices of the President and the Vice President respectively and sections 177 and 182 stipulate the qualifications and the disqualifications for the offices of the Governor and the Deputy Governor respectively.

[64]*Ezeke v Dede* (1999) 5 NWLR (Pt. 601) 80 and; *Ezeobi v Nzeka* (1989) 1 NWLR (Pt. 98) 478.
[65]*Adebiyi v Babalola* (1993) 1 NWLR (Pt. 267) 1.

Apart from the requirement of age[66] which differs from one political office to another and the limitation of tenure to two terms of four years in the case of the offices of the President and a Governor, the requirements of qualifications and disqualifications to all other elective offices are basically the same. Where a candidate fails to fulfill any of the qualifications or suffers any of the disqualifications stated in the Constitution, a valid cause of action lies at the petition of any unsuccessful candidate.

Ground that the Election was Invalid by Reason of Corrupt Practices or Non-Compliance with the Provisions of the Electoral Act

The two sub-heads of corrupt practices and non-compliance with the provisions of the Electoral Act are inter-related and can be discussed together. Allegations of non-compliance with the Electoral Act or of corrupt practices in connection with an election will, invariably, if proved, establish the return of invalid votes. Again, every established act of corrupt practice amounts to non-compliance with the provisions of the Electoral Act, but, it is not every act of non-compliance that would amount to corrupt practice because corrupt practice imputes a criminal element, the burden of which is proof beyond reasonable doubt.[67]

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[66] 35 and 30 years for membership of the Senate and House of Representatives respectively; 30 years in the case of
membership of a House Assembly and 35 years in the case of the positions Governors and Deputy Governors. See Sections 65, 106, 131 and 177 Constitution of the Federal Republic of Nigeria, 1999.

[67]In *Oraekwe v Chukwuba* (2012)1 NWLR (Pt. 1280) 169, 216. the Court of Appeal held: "The two grounds have a common base. Every established act of corrupt practice amounts to non-compliance with the provisions of the Electoral Act, but it is not every act of non-compliance that would amount to corrupt practice because corrupt practice imputes a criminal element, the burden of which is proof beyond reasonable doubt. In effect, the burden of proof in any allegation of corrupt practice is higher than the burden on a petitioner who alleges a mere non-compliance with the provision of the Electoral Act."

Requirement of Pleading Substantial Non-Compliance

Crucial to pleading in election petition is the provision of section 139 (1) Electoral Act, 2010 (as amended) which stipulates:

> "139. (1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."

This provision in the Electoral Act has been described as the cynosure or cornerstone of election petition which must be pleaded by the petitioner.[68]Non-compliance with the Electoral Act in relation to an election may simply be defined as the conduct of an election contrary to the prescribed mode under the Act or the rules and regulations made thereunder. Non-compliance may result, not only from the degree of, but also from the nature of a complaint, and the question in every case is; whether or not, in view of the findings, the constituency as such was allowed to elect its representative.[69]

Ground that the Petitioner or its Candidate was validly nominated but was unlawfully excluded from the Election

Where a petitioner's complaint is that he was excluded from an election, after having been presented by his party to the INEC as a

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[68]*Ojukwu v Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50, 126, per Niki Tobi, JSC.

[69]*Nwole v Iwuagwu* [2004] 15 NWLR (Pt. 895) 61. In *Swem v Dzungwe* [1966] 1 SCNLR 111, 117. the Supreme Court, per Coker, JSC, held: "*Non-compliance may result not only from the degree of, but also from the nature of a complaint and the question in every case is whether or not in view of the findings the constituency as such was allowed to elect its representative."*

candidate and duly screened as well as cleared for the election by the INEC, there is a valid cause of action. In *Owuru* v *INEC* & 2 *Ors*,[70] the appellant/petitioner filed a petition challenging the election of the 3rd respondent into a senatorial seat. His grouse was that he was the nominated candidate of the Peoples' Democratic Party (PDP). He was screened and cleared by the 1st and 2nd respondents for the election, but the 3rd respondent fraudulently presented himself with the connivance of the officers of the INEC to stand for the election.

It was the contention of the appellant/petitioner that the PDP did not, at all material times, nominate the 3rd respondent as its senatorial candidate especially for the River State East Senatorial District, which was in contention. The 3rd respondent in one of his grounds of objection to the competence of the petition contended that the petition did not complain of undue election or return of any candidate in respect of a particular senatorial district and therefore was not in compliance with section 75, National Assembly (Basic Constitutional and Transitional Provisions) Decree No. 5, 1999, which is *in pari materia* with section 138 (1) of the Electoral Act, 2010 (as amended). It was held that the petition was competent because the appellant's complaint was that he was duly screened and cleared to contest the election by the INEC but was unlawfully excluded at the election in which the 3rd respondent was unduly returned. It was further held that the appellant/petitioner fell within the class of a petitioner who has the right to present election petition as a person claiming to have had a right to contest or be returned at an election or a candidate at the election.

The omission of the result of a candidate in an election in the final result without explanation from the person that conducted the election constitutes without more conclusive evidence of

[70] [1999] 10 NWLR (Pt. 622) 201.

exclusion.[71] It is not only a candidate whose exclusion is formally communicated that can bring a claim for unlawful exclusion. A candidate who is not given notice and whose result is withheld by the INEC without justification can file a petition on ground of unlawful exclusion as there is no ground for questioning an election on account of non–release of result other than the charge of unlawful exclusion, otherwise, a candidate so affected will be left without a remedy.[72]

Ground that the Respondent was not duly Elected by Majority of Lawful Votes Cast at the Election

A petitioner who alleges that the declared winner of an election was not duly elected by the majority of lawful votes cast in an election may ask for relief that he be returned in the stead of the candidate who had been declared the winner by the INEC. Where a petitioner is asking to be returned as the person who won the majority of lawful votes, he must plead the particulars of the result of polling stations which he would want the tribunal or court to nullify out of the votes attributed to the declared winner.[73]

A petitioner may challenge an election on this ground and call for ballot recount on a claim that the number of valid votes cast in his favour exceeds that of the declared winner by at least one. That will be cognisable under this ground being discussed as our electoral system is principally based on the principle of first-past-the-post in

[71] *INEC v Action Congress* (2009) 2 NWLR (Pt 1126) 524 and; *Effiong v Ikpeme* (1999) 4 NWLR (Pt. 606) 260.

[72] *INEC v Action Congress* (2009) 2 NWLR (Pt. 1126) 524.

[73]In *Nadabo v Dubai* (2011) 7 NWLR (Pt. 1245) 155, 177, the Court of Appeal held: "...when a petitioner is alleging that the respondent was not elected by majority of lawful votes, he ought to plead and prove that the votes cast at the various polling stations, the votes illegally credited to the "winner," the votes which ought to have been credited to him and also the votes which should be deducted from that of the supposed winner in order to see if it will affect the result of the election. Where this is not done, it will be difficult for the court to effectively address the issue. See *Awolowo v Shagari* (1976) 6-9 S.C.51."

which one vote difference is monumental. In *Ogboru v Uduaghan*,[74]it was held that where a petitioner is challenging an election on the ground that the declared winner was not elected on the basis of the majority of lawful votes, allegations of non-compliance amounting to a violation of election rules or corrupt practices are excluded.

With due respect to the Court of Appeal in its decision *Ogboru v Uduaghan*[75]; in practice several election petitions have successfully been contested on combination of ground that the respondent was not returned on the basis of the majority of lawful votes in addition to ground(s) containing allegations of non-compliance as well as corrupt practices. Two examples would suffice on this point.[76]*Agagu v Mimiko*[77] was premised on litany of non-

[74] In *Ogboru v Uduaghan* (2012) All FWLR (Pt. 651) 1475, 1508. the Court of Appeal held: "Where an election is contested on the ground that the respondent was not duly elected by majority of lawful votes cast at the election, allegations of corrupt practices and non-compliance with the provisions of the Electoral Act are excluded. This is the difference between section 138 (1b) and section 138 (1c) of the Electoral Act. Section 138 (1c) of the Electoral Act has to do with errors of collation, miscalculation or exclusion of lawful votes to the disadvantage of the petitioner. (Without allegation of non-compliance with the provisions of Electoral Act or of corrupt practices). It seems to me that invalidation of votes can only come up when there are either non-compliance with the provisions of the Electoral Act or corrupt practice. *Anozie v Obichere* (2006) 8 NWLR (Pt.981) 144."

[75] *Supra.*

[76]. The grounds on which *Agagu v Mimiko* (2009) NWLR (Pt. 1140) 342.was contested are: (1) that the declared winner was not elected on the basis of majority of lawful votes and (2) that the election in certain polling stations and wards was invalid for non-compliance and corrupt practices. At pages 408-409 of the report, the Court of Appeal held: "The remaining results of the units in the other Local Governments were determined on ground of discrepancies between electoral materials such as voter's registers, Form EC.8A, EC.8B, accounts of used ballot papers vis-a-vis scores recorded either on Form EC.8A or Form EC.8B or contemplation of the pleadings of the first respondent. In the circumstances, this court affirms the decision of the tribunal nullifying the votes

compliance or corrupt practices for which reason the Court of Appeal upheld the decision of the election tribunal which invalidated Agagu's election and declared Mimiko as the duly elected Governor of Ondo State. Again, in *INEC v Oshiomhole*,[78] the petition was contested and won on a combination of grounds alleging that the respondent was not elected on the basis of majority of valid or lawful votes and of corrupt practices as well as non-compliance. After the tribunal nullified votes affected by non-compliance and corrupt practices, Oshiomhole was returned in the stead of Prof. Oserheimen Osunbor.

While it is conceded that the point being argued was not raised in *Agagu v Mimiko*[79] and *INEC v Oshiomhole*[80] there is absolutely nothing in the Electoral Act that can be interpreted as making allegation that a declared winner of an election was not elected on the basis of majority of lawful votes exclusive of grounds of corrupt practices and allegations of non–compliance. There is absolutely nothing wrong, in point of principle, if a petitioner challenges some heads of votes on allegation of corrupt practices or non-compliance and prays to be returned in the stead of the declared winner after the subtraction of the contested heads of votes from the result of the election particularly where after such deduction the petitioner would come up with the highest number of lawful votes cast at the election. Where the petitioner comes out after such contest as the winner of the majority of lawful votes and satisfies the requisite requirements of the Electoral Act and the Constitution (where applicable) the petitioner should be returned. It is hoped that in future, the Court of Appeal will have the

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of the units' results, which are without Form EC.8A or where they were in conflict with result shown in form EC.8B."

[77] *Agagu v Mimiko* (2009) NWLR (Pt. 1140) 342.

[78] (2009) 4 NWLR (Pt. 1132) 607.

[79] *Supra*

[80] *Supra*

opportunity of revisiting the decision in *Ogboru v Uduaghan*[81] on this point. In truth, invalidity or unlawfulness of votes can only logically have arisen from corrupt practices or non-compliance with the Electoral Act in relation to the conduct of election in the relevant polling stations or wards.

Where the election being challenged is governorship or presidential election, the petitioner must also plead specific facts, which, if proved, would show that he won the majority of lawful votes and satisfied the constitutional requirement as to geographical spread as well.[82] Relevant to our consideration here are the provisions of sections 134 (1) and (2) and 179 (2) Constitution of Federal Republic of Nigeria, 1999 (as amended).

A calm view of sections 134 (1) (2) and 179 (2) of the 1999 Constitution *vis-a-vis* section 138 (1) (c) Electoral Act 2010 (as amended) would show clearly that section 134 (1) (2) and 179 (2) of the Constitution is wider in scope than section 138 (1) (c) of the Electoral Act. As a matter of strict law, election petition challenging a return in a governorship or presidential election must, in addition to challenging the election on the basis of the majority of lawful votes cast, challenge the election on the basis that the candidate returned did not score one-quarter of the total votes cast in at least two-thirds of the number of local government areas in a States in the case of governorship election or the number of States in the Federation in the case of a presidential election. Neither a governorship petition nor a presidential petition can find adequate comfort in section 138 (1) (c) Electoral Act, 2010 (as amended).[83]

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[81] *Supra.*
[82] *Ngige v Obi* (2006) 14 NWLR (Pt.999)1.
[83] In *Ogboru v Uduaghan* (2012) All FWLR (Pt. 651) 1475, 1515. the Court of Appeal held: "Section 138 (1) (c) of the Electoral Act appears to be much

The provisions in sections 134 (1) and (2) and 179 (2) of the 1999 Constitution with respect to territorial spread of votes for a presidential or a gubernatorial candidate could lead to some difficulties in application when, for example, the number of States of the Federation or the number of Local Government Areas in a State is not divisible by three and the result of an election by the margin of a win turns on the mathematics vis-à-vis legal interpretation of these constitutional requirements. This was amply demonstrated in the case of *Awolowo v Shagari*.[84]

PART 4

Documentary Evidence in Election Litigation

Elections and the judicial proceedings arising from them are basically wars of documents. In election cases, the decision of the court, particularly when the issue is as to who had the majority of lawful votes, is based largely on documentary evidence, mainly election result forms. So the question of the appraisal of the oral evidence and demeanour of witnesses is not much in issue.[85]Election documents admitted in evidence is the best form of

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narrower than section 179 (2) of the Constitution and cannot definitely stand with it in terms of election petition in respect of election to the office of a Governor. Having regard to the provision of section 1 (3) of the 1999 Constitution which states that the provisions of the Constitution shall prevail if any other law is inconsistent with it, it is my respectful view that section 138 (1) (c) of the Electoral Act cannot be an appropriate ground to question a governorship election. Due election by majority of lawful votes cast must be coupled with having not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the state for Governor of a State to be deemed to have been duly elected under section 179 (2) of the 1999 Constitution. What that means is that a governorship election in which two or more candidates contested can only be challenged for non-compliance with section 179 (2) of the Constitution instead of section 138 (1) (c) of the Electoral Act (without prejudice to other grounds in section 138 (1) (a) (b) and (d) of the Electoral Act, as amended."

[84] (1979) NSCC 87.

[85] *Ngige v Obi* (2006) 14 NWLR (Pt. 999) 1, 233.

evidence and may become the yardstick or hanger by which the veracity of oral testimony or its credibility can be assessed.[86] In Fayemi v Oni,[87]the Court of Appeal was very far reaching in its rating of documentary evidence when it held that the most reliable, if not the best evidence, is documentary evidence.

Documents used during elections in Nigeria are fashioned and prescribed by the INEC.[88]In the *Manual for Election Officials, 2011*, issued pursuant to the sections 76 and 153 of the Electoral Act, 2010 (as amended) the following are some of the forms and documents prescribed for the conduct of elections:(1) Voters' cards, (2) Ballot papers, (3)Voters' Register, (iv) EC.1A (1) (Tendered Vote List), (4) Form EC.17 – (Oath/ Affirmation of Neutrality) (5) EC.25B – (Electoral Material Receipt), (6)Form EC.40A – (Ballot Paper Account and Verification), (7) EC.40B – (Statement of Invalid, Rejected and Cancelled Ballot Papers), (9) EC.40C – (Statement of Unused and Spoilt Ballot Papers), (10)Form EC.40D–(Undertaking with Regards to Impersonation), (10) EC.40E – (Authority to Remove Persons mis-conducting Themselves), (11) EC.40F (Tendered Ballot Statement), (12) EC.30A (1) – (Polling Station Poster), (13) EC.30A (1)- (Polling Station Information Poster), (14) EC.30B – (Polling Zone Poster), (15) EC.30C – (Voting in Progress Poster), (16) EC.60E – (Notice of Result of Poll Poster), (17)Form EC.8A, (18) Form EC. 8A (I), (19)Form EC.8A (II), (20) Form EC.8B, (21) Form EC.8B (I), (22)

[86]*Ejiogu v Onyeagoucha* (2006) All FWLR (Pt. 317) 467, 487 and; *Ogbeide v Osifo* (2007) 3 NWLR (Pt. 1022) 423, 441.

[87] (2009) 7 NWLR (Pt.1140) 223,291. See also *Akinbisade v The State* (2006) 17 NWLR (Pt.1007) 184; *Aiki v Idowu* (2006) 9 NWLR (Pt.984) 47, 65.

[88]Sections 76 and 153, Electoral Act, 2010 (as amended) provide : "76.The forms to be used for the conduct of elections under this Act shall be determined by the Commission....153. The Commission may, subject to the provisions of this Act, issue regulations, guidelines, or manuals for the purpose of giving effect to the provisions of this Act for its administrationthereof."

Form EC.8B (II), (23) Form EC.8C, (24) Form EC.8C (I), (25) Form EC.8C (II), (26) Form EC.8D, (27) Form EC.8D (I), (28) Form EC.8D (II) (29) Form EC.8E, (30) Form EC.8E (I), (31) Form EC.8E (II) and so on.[89]Out of the above enumerated INEC documents, voters' register, the polling units result forms and the electoral material receipt forms are very important as they have been given judicial recognition as forming the foundation of any election.[90] Election documents are crucial in the prosecution and determination of post election disputes.[91]

Although, election result forms carry numbers ascribed to them in accordance with the INEC manual for elections and specify the particular elections they are designed for, it is the law that, where a form originally designed for a particular election is subsequently improvised for another election, that does not, *ipso facto*, amount to a wrongful practice unless it is shown by credible evidence that it was done deliberately to give advantage to one party against another or that it has led to a miscarriage of justice.[92]

The Law of Signature, Unsigned and Improperly Signed Documents in Election Petition

[89]This sub-topic proceeds on the assumption that the reader is familiar with the use for which each of the above forms isprescribed. These forms are specifically set out and their respective functions explained in the *Manual for Election Officials,2011.*

[90]In *Igbeke v Emordi*(2010) 11 NWLR (Pt. 1204) 1, 48. [90] the Court of Appeal held: "In particular and very importantly, voters register, list of voters and Forms EC.8A and EC.25. The former form is the foundation of any election result, while the latter is the only authentic proof of distribution and receipt of election materials to the presiding officers. In other words, Form EC.25 is the acknowledgement of receipt of election materials by relevant INEC officials."

[91]In *Obun v Ebu*(2006) All FWLR (Pt. 327) 419, 442, it was held: "It is now well settled law that the only way one can
question lawfulness of some of the votes cast at an election is to tender in evidence all forms used and call witnesses to testify as to the misapplication of votes scored by the contestants."

[92]*Dantiye v Kanya* (2009) 4 NWLR (Pt. 1130) 13, 36.

In election cases, there are certain documents for example, ballot papers, election result forms, election materials receipts forms which are required by law to be signed by certain officers of the INEC. Some election documents require the signatures of political parties' agents in addition to the signatures of the relevant INEC officers. It is common in election cases to find situations in which documents that are required by the Electoral Act to be signed not signed. There are yet cases of disputes as to who signed certain election documents. It is therefore important in discussing documentary evidence in election petition to explore applicable legal principles in respect of signatures, unsigned or improperly signed documents.

To sign a document is to affix signature to the document. Signature may be in the name or any mark which is identifiable or recognized as the act of the party who signed the document.[93] A person's signature, written names or mark on a document not under seal, signifies an authentication of that document that such a person holds himself as bound or responsible for the contents of such a document. An unsigned document lacks probative value, has no origin and is bereft of legal efficacy. Such document may be rendered inadmissible and, where admitted, no probative value would be attached to it.[94] In *Aiki v Idowu*,[95] the Court of Appeal held that where a document which ought to be signed is not signed, its authenticity is in doubt. In *Attorney General of Abia State v Agharanya*,[96] the Supreme Court held: "It is well settled that an unsigned document is worthless and void." Election result which is

[93]*Tsalibawa v Habiba* (1991) 2 NWLR (Pt. 174) 461;*Adefarasin v Dayekh* (2007) 11 NWLR (Pt. 1044) 89.

[94]In *Omega Bank (Nig.) PLC v OBC Limited* (2005) 8 NWLR (Pt. 928) 547, 582, the Supreme Court held: "A document which is not signed does not have any efficacy in law. As held in the cases examined, the document is worthless and a worthless document cannot be efficacious"

[95](2006) 9 NWLR(Pt. 984) 47, 65.

[96](1999) 6 NWLR (Pt. 607) 362, 371.

not signed by party agent is invalid except the agent refused to sign.[97]

Where a party alleges that a person or witness wrote his name and signed on a document, the burden is on that party to prove that the other person or witness did write his name and append his signature.[98] Where a signature is in dispute but there are other signatures on documents with which the disputed signature can be compared, an election tribunal has inherent power to examine and compare the disputed signature against other relevant documents in forming an opinion on the disputed signature.[99] Where a person who has no *locus* to sign an election result signs it, that signature invalidates the election result.[100] In addition to the principle that a document is rendered invalid when signed by a person who has no *locus* to sign it, the wrongful signing of the document rebuts the presumption of regularity which such document could qualify to enjoy under the Evidence Act.[101]

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[97]*Ajadi v Ajibola* (2004) 16 NWLR (Pt. 891) 91, 168; Section 74, Electoral Act, 2010 (as amended).

[98]*Ezike v Ezeugwu* (1992) 4 NWLR (Pt. 236) 462.

[99]Section 101 Evidence Act, No. 18, 2011 provides: "101. In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal, or fingrer impression has not been produced or peoved for any purpose."

[100] In *Otito v Odidi* (2011) 7 NWLR (Pt. 1245) 108, 125.the Court of Appeal held: "The evidence on record as per Exhibit E showed that a Policeman, ASP Christopher Oloyede, signed an election result sheet as a party agent on behalf of the PDP. This is an illegality and violation of electoral rules both by INEC and the Police. ASP Oloyede behaved disgracefully and abused his position. Neither INEC nor the Police could defend this illegality that ought to have been sanctioned."

[101]In *Moss v Kenrow (Nig.) Ltd* (1992) 9 NWLR (P. 264) 207, 222. the Supreme Court held: "It is also well to remember that the presumption of regularity is rebuttable. The facts hereinbefore adduced are in my view ample for the

The signatures of the Presiding Officer and political parties' agents in a polling station's result constitute a clear evidence of the scores of the candidates stated in it. In *Eruotor v Ughumiakpor,*[102]the Court of Appeal held that polling stations are the root or base of the pyramid of the whole electoral process and that documents emanating from the polling stations on which the total votes scored by candidates in an election are recorded and signed by the Presiding Officers and parties' agents are the strongest evidence to establish the votes scored by the various contestants.

Importance of Date in Documentary Evidence

Election results and reports are very important documents. The dates on them are of great significance in proof of their contents and many issues flow from the dates they are executed. It has been held that an undated election report should be treated with suspicion.[103]Date in a document is very important as failure to date a document may be fatal. In *Omorinbola II v Military Government of Ondo State,*[104]the Supreme Court held that the presumption in section 130 of the Evidence Act [now section 162 of the Evidence Act, 2011] cannot avail an undated document more than 20 years

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presumption, where it arises, to be deemed rebutted. The conclusion therefore must be that the Public Trustee had no locus whatsoever to execute Exhibit C. His so doing is a very serious defect to the document and makes it unarguably a nullity. The fact that any or all the parties acted on an invalid document cannot make it valid."

[102](1999) 9 NWLR (Pt. 619) 460, 467.

[103]*Ogbahon v Reg. Trustees C.C.C.* (2002) 1 NWLR (Pt. 749) 675; *Amizu v Nzeribe* (1989) 4 NWLR (Pt. 118) 755 and; *Adighije v Nwaogu* (2010) 12 NWLR (Pt. 1209) 419. In *Adighije v Nwaogu*(2010) 12 NWLR (Pt. 1209) 419, 481.[103] the Court of Appeal held: "…election petition results and reports are very important documents. The date on them is of great significance in proof of their contents and many issues flow from the date it [sic] was executed. Without having the date of execution of Exh. 30 how can the tribunal know that it was made contemporaneous [sic] with the date the results were declared? It may be of probative value if the maker gives parol evidence of the date it was executed. Where such a report is undated, it should be suspect."

[104](1995) NWLR (Pt. 418) 201, 222.

old and whose authors are not known. A document which bears no date of execution or date when it came into operation is invalid and unenforceable.[105]However, parol evidence of the date left out in a document is admissible to show when the document was written and from what date it is intended to operate.[106]

Legal Status of Finger-Printed Ballot Papers which are Required to be Thumb-Printed

Where election regulations prescribe that ballot papers should be thumb-printed, ballot papers fingerprinted are invalid. In *Buhari v Obasanjo*,[107] the Supreme Court held that a finger is quite distinguishable from a thumb. Consequently, thumb-printing is distinguishable from finger-printing. In that case it was held that where the guidelines for the conduct of an election stipulate that ballot papers should be thumb-printed, it is a violation of the guidelines to finger print ballot papers and that finger-printed ballot papers vitiate the scores derived from them.

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[105]*Ogbahon v Reg. Trustees, C.C.C.* (2002) 1 NWLR (Pt. 749) 675.

[106]In *Ogbahon v Reg. Trustees, CCC* (2002) 1 NWLR (Pt. 749) 675, 704.the Court of Appeal held: "As regards Exhibit D2 which is alleged to have been undated and unstamped, I have perused it and it is apparent that the deficiencies referred to are obvious. It is settled that a document as in this case, which bears no date of execution or date when it comes into operation, is invalid and unenforceable. See *Amizu v Nzeribe* (1989) 4 NWLR (Pt. 118) 755 at 770. Succour appears to have been provided in the same case where parol evidence on the date left out in the document is admissible to show when the document was written and from what date it is intended to operate. See also *Worm v Studd & Mulungton* (1813)2 Ch. 648. In the instant case the D.W.6 who is an officer of the 1st respondent provided the much needed parol evidence when he confirmed the testimony of the D.W. 5 that he sold the house in dispute to the respondents on 15/11/94. The sale was backed by an agreement (Exhibit 2) and the land had since been in possession of the respondents. It therefore follows that Exhibit D2 has its operative date of sale, purchase and execution as 5/11/94. Accordingly Exhibit D2 becomes valid and enforceable."

[107](2005) 13 NWLR (Pt.941) 1, 511.

Forms EC.8A as the Basis for the Validity of Collated Result Forms

In the hierarchy of election result forms, Forms EC.8A or EC.8A (i) or EC.8A (ii) being polling station result sheet occupies the base of the election result pyramid and it is essential that they are produced in evidence to prove that election was held. It is also the foundation material on which all collated results at the ward, local government and other collation levels are constructed.[108]

Conclusions

It has been shown that some of the very peculiar procedural and evidentiary issues such as the consideration of the importance of polling stations as the foundation of election and post-election disputes and the Independent National Electoral Commission (INEC) as well as the declared winner of an election as indispensable statutory respondents in election litigation, distinguish election cases from ordinary civil actions. Peculiar rules of pleading such as those requiring grounds of election petition to be couched in the langauge of the Constitution or the Electoral Act and the central place of certain INEC's Forms EC.8A, EC.4A in practice and procedure relating to evidence have also been highlighted. A calm considerations of the issues highlighted in this piece will hopely provide some guide through the dangerously mined field of election litigation in Nigeria.

[108] *INEC v Ray* (2004) 14 NWLR (Pt. 892) 92, 137.

Compulsory Land Acquisition in Nigeria and Incidents of Executive Recklessness: An Imperative for Legal Reforms

Joseph I. Aremo, (PhD).[109]

Abstract

The focus of compulsory land acquisition has been on the laudable goals of expropriation power of the State as a mechanism for government to acquire land without difficulty for the execution of projects in the common interest of the populace. The crux of the exercise of this power has been for overriding public interest which is predominantly determined by public purpose or public need as provided by the Land Use Act, 1978. Notwithstanding, instances of political interference with the law and amongst other factors sometimes breed greed, vindictive revocation and corruption which often repel the lofty goals of expropriation. Thus, this paper undertook an examination of compulsory land acquisition within the provisions of the nation's Constitution, Land Use Act, 1978 in addition to case laws. It was found that in some instances, landowners are displaced from their property for the public need without commensurate compensation; forceful take-over of private property in the guise of public purpose requirement but later allocated to a third party (cronies of the political class) and sometimes, revocation for political reasons. Though, the goals of the expropriation power of the State are quite commendable, instances of abuse of the power are worrisome, thereby calls for setting up of acquisition guides and monitoring mechanisms to forestall abuses. With the foregoing put in place, both policy

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makers and the legislature are expected to afford themselves of the wherewithal for the required legal reforms.

Keywords: Compulsory Acquisition, Public Purpose, Overriding Public Interest,

1.0 Introduction

Nigerian citizens have inviolable right to acquire and own moveable property or any interest in immovable property including landed property in any part of the country.[110] Such property or interest cannot be denied any Nigerian except where it is compulsorily acquired or taken over by the state government in line with the processes and the purpose allowed by a prescribed law.[111] This power has been variously described as compulsory purchase[112], expropriation[113], eminent domain[114], resumption[115], land acquisition,[116] compulsory acquisition or revocation[117]. The different names ascribed to the concept across the jurisdictions are mere issue of nomenclature. It is nothing more than the extinction of private ownership of land when it conflicts with public interest in the land.[118] Expropriation therefore, is not novel as it is a critical power of the government necessary to facilitate and protect interests in land development. It is traceable to the regime of colonial administration under the State Land Law, Public Lands

[110] Section 43, Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended)
[111] Section 44 (1) of CFRN, 1999 (as amended)
[112] As in United Kingdom, New Zealand, Ireland
[113] As in France, Italy, Mexico, South Africa, Canada, Brazil, Portugal, Spain, Chile, Sweden
[114] As in USA, Philippine
[115] As in Australia, Hong Kong, Uganda
[116] As Singapore, India.
[117] As in Nigeria.
[118] For example, in South Africa, it has been judicially defined as a means of dispossessing or depriving an owner of his property: *Benckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (1) at 515 A.

Acquisition Act and Land Tenure Law. In all these statutes, the phrase used to justify revocation is 'Public Purpose or Interest'. The Land Use Act, 1978 (LUA) introduces for the first time the word 'Overriding Public Interest' to qualify 'Public Interest'.

The fulcrum of overriding public interest is predominantly sharpened by public purpose or public need of the State. It is statutorily guided by the provision of section 51 of the LUA. Despite this, acquisition of land for public use is one of the most contentious undertakings primarily because of the intractable problems to which it often gives rise. These include excessive bureaucracy and delays in compulsory land acquisition projects, weak coordination between actors, inadequacy of compensation and weak institution for handling disputes arising from the exercise. The existing legal regime of compulsory land acquisition in Nigeria is prone to some abuses more importantly executive impunity and recklessness.

Therefore, some acquisitions have largely been done under the pretext of public purpose in order to dispossess private individuals of their properties, thereafter; it turned around to be for personal aggrandisement. Sometimes, vindictive revocation and political differences coupled with corruption drive the *rationale* for land compulsorily acquired by the government. These lead to abuse of the law on compulsory land acquisition in Nigeria. As a result of this and amongst other issues, it has become imperative to look into some instances of executive recklessness and impunity in the exercise of the State expropriation power as well as some of the loopholes in the enabling laws. This is with a view to isolating the compulsory land acquisition power of the State from susceptible abuses.

2.0 Rationales for Compulsory Land Acquisition Power of the State

The expropriation power of the State is a necessary tool for the societal infrastructural and economic development. Since the object of such exercise of power is for promotion of the public needs, it is justified as a creation of community's benefits. In addition, a combination of some philosophical assumptions put together underscores the significant reasons for vesting the State with such enormous power. In the interest of the general will and collective desires of the people, the State as a sovereign is empowered to allocate any property within its territory to advance the welfare and common purpose of its people. Some of the philosophical assumptions include the following:

2.1 Theory of Social Contract

Expropriation is hinged on the notion of Social Contract theory to the effect that each man alienates by social pact only that part of his power, his goods and liberty which is the concern of the community and that the sovereign alone is a judge of what is of such concern.[119] Rousseau[120] postulated that:

> …whatever services the citizen can render to the State, he owes whenever the sovereign demands them, but the sovereign, on its side, may not impose on the subject any burden which is not necessary to the community; the sovereign cannot, indeed, even will such a thing, since according to the law of reason no less than to the law of nature nothing is without a cause…

Therefore, as part of the social contract, the individual surrenders to the sovereign authority part of his absolute rights over land for

119 Adapted from JJ Rousseau, The Limits of Sovereign Power, The Social Contract BK II chapter 4

120 *Ibid.*

infrastructural development and provision of social and basic amenities such as schools, road constructions, building of police stations, army barracks, provision of social services in return for protection from foreign aggression and internal insecurity.

2.2 Theory of Collective or General Will

Munro[121] in his postulation on the general will asserts that it is a collective held will that aims at the 'common good or common interest'[122] whilst Aristotle has asserted that only matters of the common good are right.[123] From the era of the ancient Greek city-States through contemporary political philosophy, the idea of the common good has pointed towards the possibility that certain goods can only be achieved through collective action.[124] The basic idea is to ensure maximum benefit for the largest number of people.[125] This benefit in certain cases cannot be given unless a privilege of another is taken away.[126] It is in the light of this that the expropriation power of the State cannot be challenged successfully where it is so exercised in conformity with the enabling statute.

2.3 Sovereignty Theory

[121] A., Munro, 'General Will Philosophy of Rousseau' *Encyclopaedia Britannica* (2018) <https://www.britannica.com/topic/general-will > accessed 20 November 2017

[122] Common good or interest is that which benefits society as a whole, in contrast to the private good of individuals and sections of the society.

[123] Culled from A Munro, *op.cit*. (n12)

[124] *Ibid.*

[125] K.R., Kale. 'Concept of Public Purpose: It's Importance in Present Legal Scenario' (2017) 2 (5) *International Journal of Innovative Studies in Sociology and Humanities* 9

[126] *Ibid.* As remarked by Kale, this attitude was seen to be legitimized by *Nehru* (the first prime minister of India) where he reportedly said, '[a few] must make sacrifices for the development for the nation' at a speech for the *Hirakud* Dam Foundation Laying Ceremony few months after Independence.

The power of compulsory acquisition as an essential attribute of sovereignty is rooted in the idea of eminent domain. This flows from the notion that the sovereign can do anything if his act involves public interest. Thus, expropriation power is hinged on the maxims *salus populiest supreme lex*[127] and *necessita public major est quam private*[128].

In Nigeria, the constituents of overriding public interest are defined in sections 28 (2) and (3) and 51 of the LUA. It has been observed that the practice of compulsory acquisition has been fraught with problems and conflicts. The implication of this is that this system is subject to a double regime of processes. These are the formal and informal customary law procedures. The resultant effect of the foregoing therefore is that it is fraught with incidences of abuse of power and corruption in the government acquisition process.[129] Notwithstanding, the State is duty bound to compensate the dispossessed in line with the enabling law.

2.4 The Theory of Functional Allocation of Uses

The classical theory of proprietary right is hinged on the notion of absolute enjoyment of one's property to the exclusion of others. This position is affirmed by Amokaye,[130] but, he further noted that where there are no externalities, it expected of the direct user to

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[127] Literary means "the interest and claim of the whole community is always superior"

[128] Literary means " public necessity is greater than private interest and claim of an individual"

[129] The incident of the Marako land that was acquired by the then Military Administration of Lagos State was reference point. The exercise led to the displacement of the downtrodden and was compounded when it was reallocated to some wealthy people and land developers. Worst still, many of the original landowners are yet to be compensated.

[130] OG Amokaye, 'The Land Use and Governor's Power to Revoke Interest in Land: A Critique' in I O Smith (ed), *The Land Use Act- Twenty Five Years After* (Department of Private and Property Law, Faculty of Law, University of Lagos 2003) 250

have the privilege to so use it for his own benefits.[131] The community as a whole is contented to have the property allocated to whomever among such competing exclusives. This classical assumption is rooted in the theory of Functional Allocation of Uses which presupposes that private ownership will allocate and reallocate resources to socially desirable uses.[132]

It therefore follows that, there is a justification for the State in her exercise of expropriation's power for overriding public interest. Infrastructure such as health facilities, schools, housing schemes, corporations, road networks and amongst other things are necessary components of living standards of the people in every society. Where the government is in the readiness to provide any of the above infrastructure, it may proceed from acquiring private land to meet its obligations to the citizens but such powers become validly exercised when it is in conformity with the enabling statute.

2.5 Welfarism Theory

Attaining a welfare state is one of the cardinal objectives of most of the modern governments and one of its core processes is embedded in expropriation. Kale whilst examining the concept of welfare state, observed that the basic idea behind "public purpose" is to ensure the creation of maximum benefit for the largest number of people.[133] The maximum benefit to a group of people, in certain cases, cannot be given unless a privilege of another is taken away.
Jhering and Proponent of Sociological jurisprudence whilst basing his postulation on law as expressed in its purpose asserts the protection of the interests of society and the individual by coordinating those interests, thus, minimizing circumstances likely

[131] *Ibid.*
[132] *Ibid.*
[133] KR Kale, *op.cit.* (n16) 9.

to lead to conflict.[134] Therefore, law has placed the interest of society first in the event of conflicts, the needs of individuals within the society were placed second, but in all, his concept of law is synonymous with the needs of man in society.[135]

Traditionally in Nigeria, land is seen as God's gift to the whole society. It could thus not be the subject of individual ownership to the exclusion of others. It belonged to the community in general and the family in particular and therefore, there was a regulation to the use to which land could be put, and alienation without the requisite consents would vitiate such transaction.[136] With the advent of the Europeans, all lands became vested in the Queen and individual ownership of land over times was made possible, notwithstanding the customary land holding system.[137] At independence, the situation remained largely the same even though there was a limited constitutional right to property.[138] In this direction therefore, the Land Use Act has declared each Governor a trustee in respect of lands in its territory with the object of the trust to benefit the citizens. [139] With the underlining principle of pursuit of the common benefit of the people, expropriation power of the State for common benefits of the citizenry is justified.

3.0 Challenges of Compulsory Land Acquisition in Nigeria

The inherent defects in the existing legal regime of compulsory land acquisition in Nigeria have the propensity of repelling against the lofty goals of compulsory acquisition. A worrying dimension in expropriation is lack of accountability and transparency in the

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[134] Culled from JN Egwummuo, *Focus on Law and Jurisprudence* (Academic Publishing Co, Enugu, 2007) 152
[135] *ibid*.
[136] *Tijani v. Secretary, Southern Nigeria* (1921) 2 AC 399
[137] KM Mowoe, *Constitutional Law in Nigeria* {Lagos, Malthouse Press Ltd. 2008) 512.
[138] Section 31 of the 1960 and 1963 Constitutions of Nigeria respectively
[139] See section 1 of the LUA.

process. Using Lagos State for an illustration, Amokaye in his observation found that, there were several instances where peasant farmers had been deprived of their farmland through large scale acquisition of land for commercial agriculture, with compensation covering only the so-called economic crops on the land, or the improvements that have been made as stipulated by the LUA. He cited a classical example of executive insensitivity of the designation and acquisition of all lands as urban area in Lagos State by gazetted Executive Order without serving the affected communities with notice of revocation or compensation. Subsequent policy to excise small areas of land for the affected communities is fraught with delay, corruption and cost.

3.1 Public Purpose

For obvious reasons the incentive to misuse eminent domain is especially pronounced by the political class under the guise of public purpose. The major factor that drives the exercise of the power of compulsory land acquisition by government has been the doctrine of utility of "Public Purpose" or "Overriding Public Interest". However, this has been the subject of controversy, and in some cases, court actions at the instance of aggrieved persons adversely affected by the exercise of such measures. The controversies surrounding the interpretation and meaning of the two concepts have brought about its being used as an instrument of oppression by unscrupulous government functionaries and political opponents[140].

It should be noted that the history of eminent domain in Nigeria is a saga of unmitigated abuse of the law. The operative word "includes" in section 51 of the Act to list the items of "public

[140]B.A., Mban, "The Problems of Land Acquisition and Administration in the Public Sector" in *The Land Use Act: Proceedings of Third National workshop* held at the Nigerian Institute of Advanced Legal studies, University of Lagos from April 9- 11,1990 (Lagos, University Press) op.cit at p.94.

purposes" tends to make the revocation power of the government prone to abuses. The meaning of "public purposes" is elastic, and therefore the list is not exhaustive. The court has been apt in pointing out that the acquiring authority cannot rob *Peter to pay Paul* by divesting one citizen of his interest in a property and vesting same in another person[141]. An acquisition will be held invalid if a property is ostensibly acquired for public purposes and subsequently diverted to serve a private need.

When a statute includes an explicit definition, the definition must be followed even if it varies from that term's ordinary meaning[142]. As a rule, a definition which declares what a term "means" excludes any meaning that is not stated[143]. Law cannot serve the purpose of defining and limiting power if the definitions upon which it is based are vague, arbitrary, changing, or subject to the whim of either a judge or a jury. The only way to limit power is to define ALL things to which a law applies and exclude all others by implication in order to ensure consistent application of the law to all of its intended subjects and objects[144].

Applying the *ejusdem generis*[145]rule in contradistinction to *expressio unius est exclusio alterium*[146] rule of interpretation of

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[141] *Olatunji v. Military Governor Oyo State* [1995] 5 NWLR (Pt.397) 586

[142] S*tenberg v. Carhart*, 530 U.S. 914 (2000); *Meese v. Keene*, 481 U.S 465, 484-485 (1987).

[143] *Colautti v. Franklin*, 439 U.S.379 (1979).

[144] *Ibid.*

[145] The term denotes a canon of construction simply means that in interpreting the provisions of a statute general words which follow particular and specific words of the same nature as themselves take their meaning from those specific words. See *Buhari v. Yusuf* [2003] 14 NWLR (Pt.841) @ 536 para B-D; *Ehuwa v. Osie* [2006] 18 NWLR (Pt.1012) 544.

[146] A canon of construction denoting that to express (or include) one thing implies the exclusion of the other, or of the alternative. E.g., the rule that "each citizen is entitled to vote," naturally implies that non-citizens are not entitled to vote. See Black's Law Dictionary, 9th Edition 2009 @ 594 and 661.

statutes, those items listed in the Act as constituents of *public purpose* have to be strictly construed. However, it is pertinent to reiterate that the application of the *ejusdem generis* rule, is not as a matter of course; not automatic. The court is required to exercise an extra caution, most especially in view of the fact that it is merely a presumption in the absence of other indications of the intention of the legislature[147]. Thus, in essence, there must be a distinct genus (category) before the rule can be invoked.[148]

There have been so many compulsory acquisitions attempted by governments outside the above list that would not even as much as come near the meanings in the list, applying either the *ejusdem generis rule* or even common sense.[149] The court in *Olatunji v. Military Governor, Oyo State*,[150] categorically held that:

> although the section opens with the words "public purpose includes" which words convey that the definition of public purpose therein may not be exhaustive, it seems to me that other public purposes not stated under section 51 have to take their coloration or meaning from the public purposes stated therein. Such public purposes must be those similar to those stated in the section

[147] *FRN v. James Ibori & ors* (2004) LPELR -23214 (CA) pp.55-58
[148] *SPDC* v. *FBIR* (1996) 8 NWLR (Pt.466) p.256 at p.290 ; *Anderson v. Anderson* (1895) 1 QB 749 at pp. 753 & 755.
[149] W Babalakin, "Key Constraints of Real Estate Development in Nigeria". Retrieved from www.babalakinandco.com acessed on the 15/01/2015
[150] [1995] 5 NWLR (pt.397) 586.

An exercise in compulsory acquisition may be more likely to be regarded as legitimate if land is taken for a purpose clearly identified by law[151]. A specific "Public Purpose" list reduces ambiguity by providing a non-negotiable inventory beyond which the government is prohibited from acquiring land[152]. A clear conceptualization of public purpose allows for acquisition decisions to be subject to judicial review. Lindsay[153], argues that, although a limited definition of public purpose provides a greater degree of certainty and prevents expansion of government compulsory land acquisition power, potentially preventing the executive branch from abusing its acquisition power, exclusive lists of public purposes may suffer from excessive inflexibility and fail to account for the full range of public needs. Governments may retroactively decide that land is needed for a public purpose, which was not contemplated at the time the compulsory land acquisition law or notice was passed[154]. On the other hand, laws that grant the executive branch broad discretion to determine what constitutes a "*public purpose*" create the potential for abuse of power, since the law potentially allows for executive branches to acquire land under the pretext of a public purpose, when the actual purpose will not serve public interests.

Unlike in advanced countries where the motive for compulsory acquisition is hardly questioned, there is clearly a serious abuse of power of eminent domain in Nigeria as the interpretation of the

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[151] Food and Agriculture Organization of the United Nations (FAO). (2009) Compulsory acquisition of land and compensation. FAO Land Tenure Studies 10
[152] *Ibid.*
[153] J. Lindsay, Compulsory Acquisition of Land and Compensation in Infrastructure Projects. *World Bank PPP Insights*, (2012) *Vol. 1 Issue 3* retrieved from http://ppp.worldbank.org/public privatepartnership/sites/ppp.worldbank.org/files/documents/Compulsory%20Acquisition%20of%20Land%20and%20Compensation%20in%20Infrastructure%20Projects.pdf.
[154] *Ibid.*

provision of section 51 of the Act is nevertheless complicated. Besides, public acquisitions for companies' uses are restricted to only those who the government has shares, stocks or debenture[155] and by implication are engaged in activities from which the public can benefit directly[156]. Nonetheless, the States may acquire land for all sorts of activities of companies, including those ones which could not remotely serve any public purpose. In 2015, scores of complaints over forceful acquisition of land by the Lagos State Government were widely reported and that the reportedly allegation of illegal land acquisition of the Ibeju-Lekki community's land by the government resulted in a deadly crisis.[157]

3.2 Vindictive Revocation

[155] Section 51(1)

[156] Such as housing for workers, setting up of schools and hospitals, etc.

[157] The Managing Director of Lekki Free Zone, Tajudeen Disu, was reportedly shot dead by the clash between Ibeju-Lekki villagers and mobile policemen on Monday, 12th October, 2015 on the *Channel Television* and also available online *www.channelstv.com/2015/10/12/lekki-free-trade-zone-boss-tajudeen-disu-shot-dead/* In a petition issued on behalf of the leaders of the communities by their lawyers, Paul Ogundele, accused Alhaji Dangote of the Dangote Oil Refinery Company of using the police and army to abuse locals' fundamental human rights. They accused the controversial businessman of planning to use a section of the land to build a petrochemical plant and refinery without paying compensation, sparking anger in local residents. The copy of the petition read: "..That the purported acquisition is not for overriding public purposes under section 28(1) &(2) Land Use Act, 1978 in view of the fact that incorporated documents of your company overwhelming showed that a China Company, Ccecc-Beyond International Investment and Development Company Ltd. are the two companies behind the Lekki Free Trade zone Ltd. ..the two Directors of the Lekki Worldwide Investment Ltd are subordinates of former Governor Asiwaju Bola Ahmend Tinubu, namely Mr. Gawando Olusegun Abayomi and Mr. Oworu Oyeniyi. In essence, the purported acquisition is not for Lagos State Government but tailored towards enriching some individuals…That presently your company namely Lekki Free Trade Zone Ltd and Lekki Worldwide Investment Ltd are perpetuating fraud through issuance of Sublease Agreements to private companies and commercializing our clients land.—" See Sahara Reporters at http//saharareporters.com/2015/08/18/ibeju-lekki-land-grab-community-accuses-companies-illegal-trespassing-brutalization-land.

The operative words, "Public Purpose" may also serve as a template for the government to over shoot its boundary in the exercise of the power of *eminent domain*. As noted by Mban once the government conjures the all-embracing "public purpose" and "Overriding Public Interest" sections of the acquisition laws, it can proceed to acquire the land of her citizens unimpeded.[158] As observed earlier, the definition of public purposes is very elastic and under it Government can hide to acquire land purely as a punitive measure.

Examining political abuse of the power of *eminent domain*, Nelson has identified as a failure of purpose a situation where part of the land was used for the public purpose and the remnant shared by the acquiring authority to private individuals or allocated to private interest[159]. Also, as noted by Mban, communities' leaders with access to the corridors of power could influence the compulsory acquisition of disputed lands of their neighbouring communities[160]. All these tactics and antics bring about friction to the realisation of some of the lofty goals of public acquisition of private property for public use.

3.3 Greed and Personal Aggrandisement

It is not unusual to find Governors either directly or indirectly revoking a right of occupancy of a landowner for the use of the public but while allowing the property to lie fallow for sometimes, re-allocate same property for their use[161]. Offodile while

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[158] BA Mba, *op.cit.* (n26) at p.96.

[159]Nelson, D. Revocation of Rights under the Property Law in Nigeria, *African Journal of Law and Criminology (AJLC)* (2015) Vol. 5 No.2 p.104

[160] BA Mban, op.cit (n31) at p.96.

[161] Hon. Chudi Offodile, lawyer and former member of the House of Representatives in August 2012 called for the resignation of the Governor Peter Obi of Anambra State citing 'gross' abuse of office. Addressing journalists at a press conference, Offodile accused the Governor of revoking a parcel of land for supposedly overriding public interest only to turn around and emerge the beneficiary of the revocation. He raised this issue among others in his

condemning this abuse, submitted that it would amount to an act of illegality to revoke a parcel of land for overriding public interest and grant the same parcel of land to a private company and that it becomes an act of immoral and symptomatic greed, avarice and a capricious abuse of state power when the beneficiary of a public revocation is the Governor himself[162].

Greed and personal aggrandisement may prompt up abuse of expropriation power, which could result in public mistrust, tenure insecurity, displacement, and other negative outcomes[163]. It is quite reprehensible that the 1st defendant in S*todic Ventures* Ltd. v. *Alamieyeseigha*[164], who was the Governor of Bayelsa State as at the time the said compulsory land acquisition was made seemingly for an overriding public interest later allocated the said land to himself and his wife. Restating the position in *Wuyah* v. *J'Ama's Local Government, Kafancha*[165], the court held that the law does not grant licence to anybody, an individual, constituted authority or government to acquire compulsorily or otherwise any land that belongs to a person and alienate or transfer it to another private individual or body for his or its private use.

Besides, as noted by Akomolede,[166] many States of the Federation have either deliberately or inadvertently neglected the constitution of the Land Use Allocation Committee and as a result, Governors have continued to singularly exercise the right to allocate land in

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publication: 'Anambra: oil Prospects and Brewery Scandal' in the Sun Newspaper of 28th August, 2012.

[162] *Ibid.*

[163] N., Tagliarino, 'Encroaching on Land and Livelihoods: How National Expropriation Laws Measure up against International Standards' (World Resources Institute: Washington, DC, USA, 2016.)

[164] (2016) 4 NWLR (Pt. 1502).

[165] [2013] All FWLR 1171.

[166]K., Akomolede, "Land Allocation Abuse in Nigeria" available online @hhtp://koaakomolede.com/land-allocation-nigeria/ accessed on 08/10/2015.

their territory to whoever pleases them. This has made it possible for them to allocate land to their cronies with a waiver of statutory payments. Complaints against the some unscrupulous act of the political class in handling issue of land redistribution has been hampered by non-existing Committee to handle such grievances, thereby, making some aggrieved dispossessed to resign to their fate.

3.4 Ideological Differences and Political Intolerance

The vesting of all lands within the territory of a State in the Governor except such lands that were hitherto vested in the Federal Government has bred much furore. Commenting on the relationship between the Federal and State Governments on land management, Oretuyi[167] noted that the fact that the Federal Government has no control over land vested in the State Governor does not mean that the latter has to beg the State Governor for its need for public purpose. Section 28(1) and (4) of the LUA mandates the Governor to decide whether or not to revoke a right of occupancy for the need of Federal Government's public purpose[168]. The provisions can best be described as a peremptory statement or command which allow for no refusal or denial. This position is strengthened by Parke in *Chapman v. Milvain[169]:*

> The Governor shall revoke a certificate of occupancy in the event of the issue of a notice by

[167]S.A., Oretuyi, 'Public take over- Federal and State Government Rights over Land- the Conflict' in J.A., Omotola (ed), The Land Use Act: Report of a National Workshop (Lagos, University Press 1982) p.76.

[168] *Ibid.* s. 28(1) of the Act provides; it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest while s.28(4) provides: 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 purposes.

[169] (1850) 5 Ex.61 a 64 .155 E.R. p.32.

> or on behalf of the President, if such a notice declares such land to be required by the Government for public purpose

Dosumu, one time Minister of Housing and Environment when Late Chief Bola Ige was the Executive Governor of Oyo State expressed the view that the LUA:

> gives the Federal Government powers under section 28(4) to acquire the land on which the official residence of Chief Bola Ige stands if it so wishes and there is nothing the Governor or any person can do about it under the Land Use Act[170].

This statement shows the extent to which the Federal Government could go where there is unhealthy rivalry and ideological differences between her and a State Governor. It is however submitted that the above conception is wrong as the section does not even by mere imagination vest such power on the Federal Government. Oretuyi argues that the Governor of a State is the legal owner of the land comprised in the State and all other persons and organisations derive their titles from him and the forms of rights of occupancy[171]. The lands vested in the State Government are not rights of occupancy but absolute ownership in the form of a fee simple. A Governor cannot grant a certificate of occupancy to a government of which he is the head as this will lead to the ludicrous situation under which the Governor is the grantor as well as the grantee of a right of occupancy[172].

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[170] See *Daily Times* of 26th February, 1981 cited in SA Oretuyi, op.cit. (n51) at p.77.
[171] *Ibid.*
[172] *Ibid.*

As already observed, the elastic nature of the definition of the term "Include" as the definition word for the "Public Purposes" is susceptible to abuse. The Act broadens the scope of the words, "Public Purposes' and "Overriding Public Interest". During the President Shagari-led administration, some State Governments reportedly acquired the properties of their political opponents compulsorily for public purpose and overriding public interest[173]. Influential political opponents are known to influence the acquisition of land and property of opposing individuals and communities and the practice runs foul to the underlying philosophy of the enactment itself.

It is easier for communities' leaders with access to the corridors of power to influence the compulsory acquisition of disputed lands of their neighbouring communities[174]. Haruna, Ilesanmi and Yerima in their joint study point out that some of the proposed developmental projects which purportedly necessitated compulsory land acquisition by the government do not rank high in the priority needs of the communities where the land is acquired.[175] Governors have used the Land Use Act to acquire land for selfish interest. In this sense, acquisition of land for public interest is a device to acquire land cheaply in order to reward party loyalists.[176] Thus, there is politics in government land acquisition policy, the reality for most State Governments were that they lack a sufficient mandate, capacity, financial control or political influence to coordinate and execute decisions that would allow for core functions and services to be delivered efficiently.

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[173] See BA Mba, op.cit. (n31) p. 96.
[174] *Ibid.* pp 96-97.
[175] A., Haruna, FA Ilesanmi, and B.D., Yerima, "Problems of Formal Land Acquisition Policies in Nigeria: The Case of Jimeta-Yola, Adamawa State" (2013) 3 (11) *Nigeria Journal of Environment and Earth Science* 8 and also available online @www.iiste.org Accessed on 13/06/2019.
[176] *Ibid.*

Commenting on the abuse of the exercise of power of *eminent domain* of some the Governors, Umezulike noted that Governors sometimes cling unto their revocation power as if that was the only approach to dealing with the land reform question[177]. It appears that their target is always aimed at the right of occupancy belonging to their political opponents. Thus, *idiosyncratic revocations* have seriously impaired security of interests existing on land in some States with the cumulative effect of impeding economic and property development.

Ideological differences coupled with political intolerance especially between the Federal and State Governments provide a template of what can be termed "Vertical Antagonism" to smooth administration of land in the public sector[178].The second republic witnessed physical destruction of Federal Government properties and structures by functionaries of State Governments which later led to litigations[179]. In 2013, the Federal Government through the Minister of Federal Capital Territory revoked the land allocated to Rabiu Musa Kwankwaso over alleged misapplication[180]. It was widely reported that the revocation was done as a vendetta against the *G7 Governors* who took up issue against the leadership of the

[177] I.A., Umezulike, Nigeria's Major Land Reform and Adaptive Strategies of Harnessing its Social Justice Objectives (Lagos, Nigerian Institute of Advanced Legal Studies 2011), pp.36-37.

[178] There is the creation of three tiers of governments in Nigeria: Federal, State and Local Governments. The structural arrangement is termed "vertical" which in most of the times breeds rivalry.

[179] Adapted from Mba, B.A., op.cit (n31) at p 102. During the second republic, the unhealthy rivalry and political intolerance between the then NPN and UPN jeopardized the housing scheme of the Federal Government most especially in the old Western region which was dominated by the late Obafemi Awolowo-led UPN

[180]See the Vaguard Newspaper of October,15, 2013 available online@ www.vanguardngr.com/2013/10/revocation-kwankwasos-plot-vindictive-kano-govt accessed on 30/09/15.

ruling Peoples's Democratic Party and broke away from the party in August, 2013[181].

3.5 Corruptions

Corruption has been a persistent, notorious reoccurring and progressively worsening social problem in Nigeria from colonial times to the present which forms a kind of social virus which is a hybrid of traits of fraudulent anti-social behaviour derived from British colonial rule and those derived from, and nurtured in the indigenous Nigerian context[182]. Consequently, the national wealth has mostly disappeared into the private bank accounts of military leaders, politicians, civil servants and their collaborators in the private sector[183]. The consequence of this menace is felt not only on the socio-economic system of the nation, but also, most of the lands compulsorily acquired by the government for public purpose are left fallow since there is a paucity of funds to develop same for

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[181] *Ibid*. It was reported that an official of the Ministry of F.C.T. who pleaded anonymity said: 'it was wrong for the F.C.T Minister, Bala Mohammend, to revoke plots of some targeted Governors while they were away on religious pilgrimage' The official further stated: 'As we speak my Governor id outside the country and no notification has been given to him or any official of the Kano State Government on why it became imperative for the FCT to revoke the plot duly allocated to the Governor.'

[182] S.O., Osoba, Corruption in Nigeria historical perspectives, Review of African Economy, 1996, 23 p.372 cited in Akingbade, O.A., Navarra, D.D., Georgiadou, P.Y., Impact of Abuja Geographic Information Systems on Corrupt Practices in Land Administration in the Federal Capital Territory of Nigeria, being an article presented at the ICT and Development- Research Voices from Africa.International Federation for Information Processing (IFIP), Technical Commission9- Relationship between Computers and Society, Workshop at Makerere University, Uganda. 22-23 March 2010, available

[183]D., Olowu, E.,Otobo, & M., Okoonline@http://www.researchgate.net/publication/228356909. toni, "Issues in Nigeria Public Administration System" cited in in Oyewo,O., Constitutions, Good Governance and Corruption: Challenges and Prospects for Nigeria" P.15. Retrieved online online@www.nigerianlawguru.com/articles/constitutionallaw/constitutions,good governance and corruption, challenges and prospects for nigeria accessed on 03/10/2015.

the public use. In some cases, there is no political will by the government to develop the acquired land even in the face of strong demand for such development. This shows government insensitivity to development issues where on the other hand corruption in governance does not give room for capital development projects to be undertaken.[184]

4.0 Conclusions and Recommendations

Compulsory land acquisition is a key scheme for provision of not only some basic infrastructure for the public but also an essential catalyst for the economic development of every nation. The constituents of the term "Public Purpose" as guides to the limit of the expropriation power of the State may not reflect the current reality in the society in the wake of neo-liberalised economy driven by the policy of public-private partnership (PPP). Besides, the current legal regime of compulsory land acquisition in the country is not well developed. Thus, the legal framework regulating the exercise of the expropriation power is susceptible to abuses with the propensity to undermine the laudable objectives of the laws.

Recommendations

In order to tackle the inherent challenges in the existing regime of compulsory land acquisition in the country, the current legal regime needs to be overhauled. Specifically, the LUA and other relevant expropriation laws should ensure a precise definition of "public purpose" as well as subjecting it to judicial review in addition to the need for a proportionality test to ascertain the balance of convenience. In addition, expropriation power should only be resorted to whenever voluntary initiatives have failed. Consented acquisitions should be encouraged, most importantly, for projects undertaken by the public-private partnership scheme.

[184] *Ibid.*

Though, there is no statutory nor known judicial authority to the effect that a public acquisition has been declared invalid on account of being done *mala fide*. The dictum of Coker, JSC that the court should not enquire into the reasonableness, the polity, the sense or any other aspect of the exercise of a Governor's power so long as there is no proof of *mala fide* becomes a subject of critical analysis. The court tends to conclude that the actions or regulations emanating from administrative agency or authority are more of policies. It is recommended, that judicial review of the expropriation power of the State should be accorded a vantage position in enabling statutes of compulsory land acquisition to address incidents of probable abuses.

Ultimately, the LUA should be delisted from the CFRN, 1999 (as amended) to pave way for easier and accelerated amendments to incorporate all those recommendations proffered. The loft goals of compulsory acquisition of private property for the public use are too sacrosanct to be jettisoned or hampered. Expunging the LUA from the Constitution is a first impetus to achieving the anticipated reform of the major legal regulator of expropriation in the country. Legal reform will only be as successful as long as the government and its agencies charged with implementing the laws desire it to be.

Developing the Concept of Conscientious Objection in Nigerian Jurisprudence

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***Abstrac*t**

The concept of Conscientious Objection is almost non-existent in Nigerian jurisprudence. This is particularly noticeable in the healthcare system and military or paramilitary service. While conscientious objection has a long history in the West, dating back to the time of colonial militias, and has almost reached the status of a recognized right for individuals it is barely recognized in Nigeria. This paper examines the level of recognition and development of conscientious objection as a human right concept in the western world particularly in the area of military service, healthcare system which include medical vaccination, blood transfusion, and child treatment. The paper concludes that Nigerian government and policy makers should come up with a legal framework that recognizes these evolving human right issues in order to be at par with other countries. The paper further notes that though conscientious objection may present some danger to the fulfillment of professional obligation of medical practitioners to provide the treatment that patients deserve, the paper however implore the government to be responsible for making sure that the right of doctors and that of patients are in balance and do not excessively infringe on each other.

Keywords: Conscientious Objection, Military Service, Healthcare System, International Human Rights Instruments.

1.0. Conceptual Clarification

The word Conscience is not of a precise definition. It has been defined in philosophy and jurisprudence in various ways.[1] Every man has a conscience which censures his action and behaviour as being good, acceptable or otherwise based on certain conviction or belief that is anchored on religion, culture or personal creed. This conscience comes into play to censure every act of human being and in his private and professional dealings his actions are judged by the unseen inner conscience implanted in him. Thus he attempts to satisfy this conscience by doing or refrain from the doing of an act. According to Kant in one of his treatises,

> Every man has a conscience, and finds himself observed by an inward judge which threatens and keeps him in awe (reverence combined with fear); and this power which watches over the laws within him is not something which he himself (arbitrarily) *makes*, but it is incorporated in his being.[2] Immanuel Kant further describes conscience as an "internal tribunal" in which the judge and the accused are one and the same person… "is the inward judge of all free actions."[3]

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[1] Commenting on conscience, Rousseau stated: "There is therefore at the bottom of our hearts an innate principle of justice and virtue, by which, in spite of our maxims, we judge our own actions or those of others to be good or evil; and it is this principle that I call conscience." (Rousseau 1921 [1762]: 253) Jurisprudentially, Conscience is defined thus: 'The moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong...' Bryan A. Garner, Black's Law Dictionary (11th Edition)<https://thelawdictionary.org/conscience/>accessed on 26 October, 2020.

[2] Immanuel Kant, *The Critique of Pure Reason, The Critique of Practical Reason, and other Ethical Treatises*, Encyclopedia Britannica 1952, p. 379.

[3] *Ibid*.

In a bid to satisfy this ever present inner conscience regarding its permissibility or otherwise of an act, a person is bound to object to taking part in certain activities he is legally obligated to perform. Therefore, it is correct to label that objection as conscientious objection.

2.0. The Concept of Conscientious Objection

The term came into common usage first in the late 1890s during the First World War to describe pacifist resistance to military conscription. Although, the term is sometimes still associated with pacifism, it applies more generally now to any person's principled refusal to follow an injunction, directive or law on grounds of steadfast personal conviction.[4] It later became progressively recognized as a right issue which featured prominently in the healthcare practices where the health practitioners object to participate in certain medical practices or procedure which they believe to be conflicting with their personal religious or secular conscience. Examples of such medical practices include partaking in assisted suicide or euthanasia, procuring willful abortion for women, sterilization and artificial insemination, a pharmacist refusing to dispense contraceptives or abortifacient drugs, the religious patient who refuses a blood transfusion, a government worker in the marriage registry who refuses to administer services involving same-sex marriage among others.[5]

3.0. International Human Right Instruments Relating to Conscientious Objection

There are plethoras of international instruments that accommodate the concept of conscientious objection. Many of these instruments do not specifically provide for the right to Conscientious Objection,

[4]Kimberley Brownlee,'Conscientious Objection and Civil Disobedience', (2012) Vol.15 University of Warwick School of Law, Legal Studies Research Paper, p 10 <http://ssrn.com/abstract=2091045> accessed on 25 October 2020.
[5] *Ibid.*

However, the courts have often interpreted the right to freedom of thought, conscience and religion as covering the right to conscientious objection.

Mostly, Conscientious Objection is an objection on moral or religious grounds. An objector seeks to avoid acting the way the law requires him or her to do and asks that this be allowed. Strictly speaking, conscientious objection does not challenge the law as such even though it does implicitly censure the law's immorality. Nor does it represent an organized programme of resistance or challenge to authority. Conscientious objection consists in affirming the supremacy of individual conscience *vis-à-vis* authority and the law, and the right of individuals to determine whether what is being asked of them is compatible with the moral principles which they feel ought to guide their conduct.[6]

Various International Instruments provide for the right to freedom of thought, conscience and religion. We shall examine a few of them and see how these rights tie in with the right to Conscientious Objection.

4.1. Universal Declaration on Human Rights (UDHR) Article 18 thereof provides[7]

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

[6] General Bioethics Commission, 'Conscientious Objection' (2015) <https://ohsjd.org/resource/obiezioneleone-iannone_ing.pdf> accessed on 26 October 2020.
[7] Universal Declaration on Human Rights, (UDHR) 1948, Art.18. Res /217 A 111 of 10 December, 1948.

The right to manifest one's belief in practice would envelop the right to conscientious objection as many conscientious objectors do so based on religious belief. Some religions require that their adherents refrain from participating in certain activities such as war or performing abortions. In order to freely practice their belief, objectors would have to refuse to perform certain duties required of them by the law. This same provision is duplicated in the ICCPR and ICESCR as discussed below.

4.2 Article 18, International Covenant on Civil and Political Rights (ICCPR)[8] reads *inter alia* as follows:

> 1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

4.3. Article 6 of the International Covenant on Economic, Social and Cultural Rights[9]guarantees the "Right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". This supports the right to conscientious objection in that a

[8] International Covenant on Civil and Political Rights, 1976, United Nations, Treaty Series, vol. 999, p. 171.
[9] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

person can choose not to do any work which he feels is contrary to his religion, belief system or conscience. An example of the above is somebody who may conscientiously object to serving in the military.

4.4. Article 8 of the African Charter on Human and People's Right[10]of the ACHPR[11] provides:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

Although in the African Charter (as is the case in other international and regional treaties), there is no express mention of the term: 'conscientious objection', the right to freedom of conscience and free practice of religion can be said to be supportive of the right to conscientious objection. This work intends to discuss Conscientious objection in Military service and in healthcare system to show the existing robust and developed jurisprudence on it in various countries.

5.0. Conscientious Objection to Military Service in the International World

5.1 European Union

Treaties and government bodies of both the European Union and the Council of Europe have in some measure claimed or protected the right of conscientious objection. These, however, are not unanimously unambiguous in their claims. The European Union

[10] The African Charter on Human and Peoples' Rights (ACHPR) 1981, which entered into force in 1986, is Africa's oldest human rights instrument.
[11]Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Constitutional Treaty, Part II: The Charter of Fundamental Rights of the Union: Title II – Freedoms, Article II-70 provides:

> Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

Significantly, Paragraph 2 of this Article makes specific mention of the right to conscientious objection: "The right to conscientious objection is recognized." However, rather than establishing a body-wide standard of respect for the right, it leaves implementation of this right to the states: the right is recognized "In accordance with the national laws governing the exercise of this right."

As already explained that Freedom of thought, conscience and religion includes the freedom to act in accord with one's beliefs. No one is to be coerced to contradict those beliefs. The only restriction on these freedoms are those necessary to protect public safety, order, health and morals—in other words, the fundamental rights and freedoms of others. The question is, does the duty to defend ones country supersede one's right to conscientious objection to such military duty? The United Nations Human Rights Committee answered this question in its General Comment 22. Although the Covenant does not explicitly refer to a right to conscientious objection, the Committee however believes that such a right can be derived from Article 18, in as much as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.[12]

[12] Human Rights Committee General comment No. 22, paragraph 11.

The Committee's comment, however, does not demand that State Parties implement domestic law to recognize conscientious objection or that they provide alternative civilian service in states with compulsory military service. Instead they comment that "when this right is recognized by law or practice" that there can be no differentiation in treatment between different beliefs and there can be no discrimination against conscientious objectors[13].

5.2. Other Climes

According to Steve Clarke *et al,* Conscientious objection in relation to military service has received quite extensive discussion by legal thinkers, human rights activists, and philosophers.[14] The concept is accepted in many countries and recognized as a human right in various national and international charters and instruments. He noted that in countries like USA, Canada, and Australia among others there were policies put in place that recognise the rights of objectors. In such countries, objection to military service will be allowed after the objector has met certain requirements. However the objector though may be permitted to object to be a frontliner in the military service, he will be assigned another duties in lieu of active participation in military service. In Australia, the United Kingdom (UK) and the United States of America (USA), they have been assigned non-combatant roles within their nation's military services, or be made to perform other civic roles which contribute to the well-being of their society (e.g. serving in public libraries, healthcare institutions among others). The alternative service is

[13] Kathleen Wetzel Apltauer, 'Can Conscientious Objectors Be Good Citizens: A Look at Relationship between Freedom of Conscience and Duty to the State' https://www.academia.edu/5201407/Conscientious_Objection_to_Military_Service accessed on 26 October, 2020.

[14] Steve Clarke, Alberto Giubilini, Mary Walker Jean, 'Conscientious Objection to Vaccination' (2017), Vol. 31, Issue 3, Bioethics, p. 155 <https://ssrn.com/abstract=3588669> or <http://dx.doi.org/10.1111/bioe.12326> accessed on 26 October 2020.

generally for at least the same duration, but can be up to twice as long, as conscripts to the military are expected to serve.[15]

5.2.1. Australia

Australia recognised the validity of conscientious objection to military service. Australia's Defence Act 1903 was the first national legislation to grant total exemption from military service on the grounds of conscientious belief[16] for those who could prove that the 'doctrines of their religion forbade them to bear arms or perform military service'[17] Conscientious objectors are typically required to demonstrate that their objection is genuine. In Australia, a Conscientious Objection Tribunal assesses cases of Conscientious Objection (CO) during wartime. Usually, the tribunal aims to test the sincerity (i.e. whether the objector truly holds beliefs inconsistent with participating in military service) rather than validity (the rationality or reasonability of the explanation the objector provides).[18]

5.2.2. United States of America

Under the Military Selective Service Act 50 App USC s. 456 (j) no person is required to be subject to combatant training and service in the armed forces, *'who by reason of religious training and belief, is conscientiously opposed to participation in war in any form'. Political, sociological or philosophical views are not included.* The

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[15] Report of research carried out by Derek Brett, 'Military Recruitment and Conscientious Objection: A thematic global survey' (2006), Conscience and Peace Tax International <https://cpti.ws/cpti_docs/brett/recruitment_and_co_A4.pdf>.

[16] Hugh Smith, 'Conscience, Law and the State: Australia's Approach to Conscientious Objection since 1901'(1989) Vol. 35, Issue. 1 Australian Journal of Politics and History, p. 13.

[17] Australia's Defence Act 1903, s. 61.

[18] Nadia N. Sawicki, 'The Hollow Promise of Freedom of Conscience' (2012) Vol. 33, Cardozo Law Review, p.1389. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666278> accessed on 26th October 2020.

Supreme Court, however, has expanded the criteria for conscientious objector status from religious to non-religious, moral or ethical objection.[19] A member of the armed forces may seek either separation or assignment to non-combatant duties for reasons of conscientious objection. This is achieved by administrative discharge and is discretionary within the military service concerned.[20]

5.2.3. United Kingdom

The Human Rights Act of 1998 implements the European Convention on Human Rights and Fundamental Freedoms. Article 9 guarantees the 'right to freedom of thought, conscience and religion'. The Advisory Committee on Conscientious Objectors (ACCO), set up in 1970, advises on all conscientious objection claims to further service from Service personnel on grounds of conscience that have not been accepted by Service authorities.[21]

5.2.4. South Korea

In the South Korea case of *Oh Seung-hun*a, a South Korean Jehovah Witness who objected to the two years compulsory military service required of all able- bodied males between 18- 35 years of age[22]. South Korea's Supreme Court ruled on 1st November, 2018 that moral and religious beliefs are valid reasons

[19] Charles C. Moskos and John Whiteclay Chambers, *The New Conscientious Objection From Sacred To Secular Resistance*, (1st Edition, Oxford University Press, 1993).

[20] US Department Of Defense Directive Number 1300.6, 20 August 1971 <https://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d13006p.pdf>accessed on 26th October 2020.

[21]Advisory Committee on Conscientious Objectors, <https://www.gov.uk/government/organisations/advisory-committee-on-conscientious-objectors> accessed on 26th October 2020.

[22] Some 65 years after the end of the Korean War, nearly every able-bodied South Korean male between the ages of 18 and 35 must still complete around two years of military service.Anyone refusing the call-up has usually ended up in prison for 18 months, with more than 19,000 conscientious objectors jailed since 1950, most of them are Jehovah's Witnesses.

to refuse the country's mandatory military service. The court further held that the authorities have to provide an alternative to joining the military.

Above discussion shows that many countries of advanced and liberal democracies have provided a robust legal framework and deserving policies on the issue of right to object to military service in their countries. This is largely absent in Nigeria or practically non-existent.

6.0. Conscientious Objection to Service in the Armed Forces and NYSC[23] in Nigeria

Service in the National Youth Service Corps (NYSC) in Nigeria had been a source of a lot of controversy amidst certain Christian Religious Sects in Nigeria. Some persons have refused to serve because of their belief that wearing the NYSC uniform is sinful for them as ladies. They believe that it is in contradiction to their religious belief to put on trousers as women because they want to serve their country.[24] Is there a leeway for persons who fall under this category? Can they apply for exemption on the basis of their religious beliefs?

[23] Mandatory one year youth service for persons 30 years of age and below (in Nigeria) at the time of graduation from a tertiary institution.

[24] An example of this is the story of Ekundayo who refused to put on the required NYSC on the basis of her religious beliefs. A member of the National Youth Service Corps (NYSC) scheme, Miss Tolulope Damilola Ekundayo, recently caused a stir at NYSC orientation camp, Shagamu, Ogun State, when she vehemently refused to wear trousers, which is part of the scheme's dress code, on account of her religious beliefs. Consequently, Ekundayo was asked to leave the camp for flouting the camp rules, which donning the NYSC kit is part of. Honorable Fortune, '*Objection to NYSC Dress Code*', Nigerian Best Forum, (Nigeria, 29 March 2013) <https://www.nigerianbestforum.com/index.php?topic=209224.0;nowap> accessed on 26th October 2020.

According to Section 17 of the National Youth Service Corps Act[25], they cannot. Although there is a right to exemption, this right is entirely at the discretion of the Directorate and subject to the approval of the National Defence and Security Council. Section 17 provides:

> Notwithstanding anything to the contrary, the Directorate may, with the prior approval of the National Defence and Security Council, by an order published in the Gazette exempt any person from all or any of the provisions of this Act, and may subject thereto and with such approval impose, in relation to any exemption, such conditions as it may think fit.

It is obvious from the foregoing that exemption is strictly within the control of the directorate. Furthermore the NYSC website states what categories of persons are entitled to apply for exemption. It states:

With effect from 1st August, 1985, a person shall NOT be called upon to serve in the service corps if, at the date of graduation or obtaining his diploma or other professional qualification:

1. He is over the age of thirty (30) years
2. He has served in the Armed Forces of the Federation or the Nigeria Police Force for a period of more than nine months; or
3. He is a member of staff of any of the following:
   - The Nigerian Security Organization or
   - The State Security Service, or
   - The National Intelligence Agency or
   - The Defence Intelligence Service
4. He has been conferred with any National Honour.

[25] National Youth Service Corps Act, Cap 84, LFN 1990.

These categories of persons are therefore exempted from service and issued with the Certificates of Exemption[26].
The above list is exhaustive and on the strength of the above we see that there is no room for a person to object to National Youth Service on grounds of his religious belief.

Looking at the Nigerian Constitution[27], it is doubtful whether a person in the military can validly exercise his right to freedom of conscience. Although Section 34(2) (c) of the Constitution provides narrowly for an alternative to pure military service, it is not clear how this objection may be evaluated or how this right may be exercised. An indepth study of the Nigeria Constitution is imperative here. As hereunder presented below:

Section 34. (1) Every individual is entitled to respect for the dignity of his person, and accordingly -

(a) no person shall be subject to torture or to inhuman or degrading treatment;

(b) no person shall he held in slavery or servitude; and

(c) no person shall be required to perform forced or compulsory labour.

Section 34 (1)(c)‘ however provides that “For the purposes of subsection (1) (c) of this section “forced or compulsory labour” does not include-

> In the case of persons who have conscientious objections to service in the armed forces of the Federation, any labour required instead of such service’.

[26] Available at:<https://www.nysc.gov.ng/certcollectexp.html> accessed on 26 October 2020.
[27] *Constitution of the Federal Republic of Nigeria*, 1999 (as amended).

The above means that under Nigerian Law, a person conscripted to serve or who is serving in the armed forces may validly object to military service, however, such person would be required to perform alternative work and such work will not be regarded as forced labour. The Constitution does not go on to stipulate as is obtainable under other international instruments that such work must not be punitive in nature and the conscientious objector must not be discriminated against on the basis of his objection.

It is obvious from the above that Nigerian Jurisprudence on conscientious objection falls short of international standard and needs a lot of development.

7.0. Conscientious Objection in Healthcare System

There are a lot of cases in which healthcare providers and medical doctors do raise conscientious objection. Prominent in this area are Reproductive health services which involve many emerging controversial issues of health and medical practices. These include issues involving, non-theurapetic abortion, sex change, contraception, Family planning, Sterilization, Vaccination and new technologies such as gamete selection and manipulation, in vitro fertilization and surrogate motherhood. Others include artificial fertility control and medically assisted reproduction among others. Many religionists and conservative practitioners are opposed to some or all of these medical practices and more often than not do object to participate in the treatment involved. Other paramedical officers may similarly object to participate for instance, refusal to serve meals to abortion patients, refusal to type abortion referral letters, refusal to dispense emergency (post-coital) contraceptives and drugs for medical (i.e. non-surgical) abortion.[28]

[28]. Bernard M. Dickens, 'Reproductive Health Services and the Law and Ethics of Conscientious Objection', (2001) Medicine and Law. Journal<https://www.researchgate.net/publication/11849940_Reproductive_healt

Healthcare providers have the right to object to participate in any treatment or medical procedure listed above that runs contrary to their individual conscience. This is debatably said to be accommodated even under the Hippocratic Oath they sworn to upon graduation from the medical school. Where such treatments are contrary to their belief or conscience they may refuse to participate but the rule of professional ethics demands that they direct the patients concerned to another doctor who can provide the needed treatment to the patients.

Objection however is not without criticism. Some critics have condemned objection as a failure on the part of the doctors or healthcare providers to live up to their responsibilities which runs contrary to the ethics of the profession *i.e* the duty to provide care to the patients at all times to the best of their abilities.

Opponents of conscientious objection's contention is that whenever a conflict occurs between doctors' beliefs, religion or conscience and that of their patients, they (doctors) should give priority to that of their patients.[29] Many countries have developed robust legal framework to deal with this controversial concept and this paper shall discuss two cases where the courts have developed a very comprehensive framework for dealing with conscientious objection by the Medical Practitioners.

7.1. Case Law on Conscientious Objection in Healthcare

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h_services_and_the_law_and_ethics_of_conscientious_objection> accessed on 26th October 2020.

[29]Stephen J. Genuis, Chris Lipp, 'Ethical Diversity and the Role of Conscience in Clinical Medicine' (2012) International Journal of Family Medicine <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3876678/> accessed on 26/10/2020.

7.1.1 *Ramirez Jacinto v. Mexico*[30]

In the case, a 13-year-old Colombian rape victim became pregnant and complying with the requirements set by the Constitutional Court on lawful abortion, requested through her mother that the government health authority schedule abortion for her. Her hospital declined, and she was referred successively to four further healthcare facilities, each of which declined on the grounds that none of its gynecologists would undertake an abortion. She sought redress in court and lost at the lower court. On appeal to the Constitutional Court, the lower court decision was reversed. The court ruled that the constitutional rights of the lady had been violated by denial of lawful abortion, and ordered the governmental health authority to pay compensation.

- In reaching its decision, the Court made legal rulings affecting how healthcare systems should accommodate both conscientious objection and patient's right to lawful care. The Court's principal ruling includes:

- That the human right to respect for conscience is a right enjoyed by natural human beings but not by institutions such as hospitals. The Court found that, by allowing their gynecologists' conscientious objections to limit their services, hospitals were unlawfully asserting conscientious objections of their own.
- Hospitals whose physicians object to undertaking procedures on grounds of conscience must have staff or by other means, available physicians to whom patients have convenient, timely access who do not object.

[30] *Ramirez Jacinto v. Mexico*, Petition 161-02, Inter-Am. C.H.R., Report No. 21/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007) Represented.

- Physicians who invoke the rights of conscientious objection may do so only on grounds of their religious convictions which they must explain individually in writing.
- Conscientious objection cannot be invoked with the effect of violating women's fundamental rights to lawful healthcare.
- Women denied abortion services on grounds of conscience must be referred to physicians willing and able to provide such services. Individual objecting physicians have a duty of immediate referral, and institutions must maintain information of non- objecting physicians to whom patients can be promptly referred.
- The defaulting healthcare facility is liable to pay compensation for the breach of fundamental human rights.
- The hospital may recover damages from the defaulting physician who failed to refer the patient promptly.

The above case is very instructive. It shows that doctors should not allow conscientious objection to prevent the patient from receiving quality health care. It also shows that the conscientious objectors sense of morality cannot be imputed on the hospital.

7.1.2. *Noesen v Wisconsin Department of Regulation and Licensing Pharmacy Examining Board*[31]

In March 2005, a married woman with four children submitted a prescription for the morning-after pill. The pharmacist, Neil Noesen, not only refused to fill it, but also refused to transfer the prescription to another pharmacist or to return the prescription to the customer.

The Wisconsin Court of Appeal affirmed the Pharmacy Board's disciplinary action against Noesen holding that while Noesen had a

[31]*Noesen v. Wisconsin Department of Regulation & Licensing, Pharmacy Examining Board*, 751 N.W.2d 385 (Wis. App. 2008).

right to refuse to fill the prescription, he engaged in "Unprofessional Conduct" by refusing to transfer it. The court held that when transfer is not possible, particularly in life-and-death circumstances, an objecting provider is typically obligated, despite her conscientious objection, to provide the desired treatment[32].
Thus the case confirms that while the right to conscientious objection is recognized, this right must be balanced against the patient's right to access healthcare.

7.2. Conscientious Objection to Vaccination

With regard to vaccination, there are two ways to look at this, vaccination of infants or minors and that of adults. In case of the children who are not mature to take decision, their parents may exercise conscientious objection on their behalf. This must never be construed as a straight forward simple action from the parents; it has been argued that not in all circumstances those parents can take decision concerning their children particularly when it involves a non-therapeutic medical treatment or emergency situation. Writing on male circumcision and the decision of the parents to take decision on their children, Adeleke and Ogboye noted as follows:

> Legally speaking, where the child is too young to give personal consent, the law presumes that parents are legally protected and are free to give informed consent on behalf of their children/neonates even for religious, traditional or cultural reasons. Equally, parents may exercise

[32] Thaddeus Mason Pope, Conscientious Objection by Healthcare Providers, January 2011, Page 2. Available at: https://www.researchgate.net/publication/228207105. Accessed on 11/12/19 at 09:08 pm.

conscientious objection to allowing their infants to be vaccinated[33]

What then happen in cases of vaccination against contagious diseases for family planning purposes or for population control? Can parents (either for themselves or for their children) exercise objection to this vaccination? This will appear to be problematic in countries where such vaccination is legally made compulsory as objection may be difficult to exercise. Some countries however have made laws concerning this. For instance, in Australia parents can refuse vaccinations for their children by filling in an Immunisation Exemption Conscientious Objection Form in which they declare that they hold a personal, philosophical, religious or medical belief involving a conviction that vaccination of their children under the National Immunisation Program should not take place.[34] Upon filling the form the objector is free to refuse the vaccination. This is not the case in Nigeria and the legal *lacunae* has to be filled in order to further develop the right to conscientious objection which has been recognized in all of the instruments cited above to which Nigeria has subscribed to in the international world.

7.3. Conscientious Objection and Blood Transfusion

Adherents of Jehovah Witness faith throughout the world are known to object to treatment involving blood transfusion either for themselves or on behalf of their children. While it is not contentious that parents can make informed decision concerning the medical treatment of their children, the law remains that in life threatening cases, doctors may refuse to allow such refusal by the parents. Some countries have developed a legal framework and

[33] See generally the work of F.A.R. Adeleke and L Ogboye, Male Circumscision, Sexual and Reproductive Health perspective, Journal of Oriental and African Studies, Greece Vol 19 (2010) pp.225 – 240.

[34]http://www.nevdgp.org.au/info/immunisation/ conscientious-objection-form.pdf accessed 25th October 2016.

policy to deal with the situation for instance McQuoid-Mason wrote on how the situation is dealt with in South Africa thus:

> It seems common practice that, when parents refuse blood transfusions for their children solely on religious grounds, doctors and health authorities apply for a court order to overturn such refusals. However, since the implementation of the Children's Act of 2005, it may be that the onus is no longer on doctors and authorities to apply to court to reverse the decision of parents and guardians. It can be argued instead that the burden has shifted to the parents to apply to court for an order to overrule the decision of doctors, by proving to the court that alternative choices are available.[35]

For example, in a Gauteng High Court case, which was decided prior to the introduction of the Children's Act, where the parents had refused to consent to a life-saving blood transfusion for their baby, a pediatrician applied for an urgent order to allow her to give the child a transfusion. The parents opposed the doctor's application on religious grounds and because they were worried about the risks of infection associated with blood transfusions. The doctor had mentioned in her court application that if the transfusion was not given the baby would probably die. The High Court held that in light of the evidence, the parents' the parents' religious beliefs were not more important than the baby's right to life and other Constitutional rights, including the 'best interests' of the

[35] D J McQuoid-Mason, 'Parents refusing blood transfusions for their children solely on religious grounds: Who must apply for the court order?' (2020) Vol. 110, Issue 2, South African Medical Journal https://doi.org/10.7196/SAMJ.2020.v110i2.14486 accessed on 26th October 2020.

child. Accordingly, the Court made an order allowing an immediate blood transfusion.

It is pertinent to note that there is a very robust legal framework on this area of controversy in South Africa. In section 31(1) of the South African Constitution, persons belonging to a religious community may not be denied the right to practise their religion provided such religious beliefs are not '*exercised in a manner inconsistent with any provision in the Bill of Rights*.'[36] The Constitution further states that everyone has the right of access to healthcare[37]and that, children, in particular, have the right to healthcare[38]. Children, like everyone else, also have the right to life as is provided for in section 11, and the right not to be refused emergency medical treatment[39]. Furthermore, the Constitution in Section 28(3) clearly states that the 'best interests' of the child 'are of paramount importance in every matter concerning a child.'

8.0. Conscientious Objection as a Human Right Issue

All the discussions above have clearly shown that conscientious objection has been elevated to the issue of human rights. It is highly respected in many countries of advanced democracy and a clear cut legal framework has been developed to take care of the grey areas to settle the controversy inherent in its recognition. Generally, from the established jurisprudence, conscientious objection will be allowed in healthcare sector where:[40]

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[36] Section 15(1), *Constitution of the Republic of South Africa* [South Africa], 1996.
[37] *Ibid.* s. 27(1).
[38] *Ibid* . s. 28(1) (c).
[39] *Ibid.* s. 27(3). *Ibid.* s. 27(1).
[39] *Ibid* . s. 28(1) (c).
[39] *Ibid.* s. 27(3).
[40] J Med Ethics 2012;38:18e21. doi:10.1136/jme.2011.043646 p19

a. Providing health care would seriously damage the health professional's moral integrity by constituting a serious violation of a deeply held conviction.
b. The treatment is not considered an essential part of the health professional's work.
c. The objection has a plausible moral or religious *rationale*.

The burdens to the patient are acceptably small. The burden of the patient will be considered small where (a) The patient's condition is not life-threatening. (b) Refusal does not lead to the patient not getting the treatment, or to unacceptable delay or expenses. (c) Measures have been taken to reduce the burdens to the patient. and (d) the burdens to colleagues and healthcare institutions are acceptably small.

This robust jurisprudence and practice direction is conspicuously missing in Nigeria both in the actual legal framework, public policy and rules of engagement in healthcare practice.

8.1. Limit of Parental Objection on Children's Treatment

Helstein had contended that if parents are allowed to decide what is best for their children on the basis of their religious or cultural identity, there would be no justification for stopping them cutting off their children's ears, fingers, or noses if their religious and cultural beliefs demanded so…[41] In the same vein, while commenting on consent for circumcision, David Richards asserted that all human beings have a right to bodily integrity and that parental permission for medical treatment on the children must be grounded in the assumption that the treatment will result in a

[41] S K Hellsten *et al,* 'Rationalising Circumcision: from Tradition to Fashion, from Public health to Individual Freedom? Critical notes on Cultural Persistence of the Practice of Genital Mutilation' (2004) Volume 30 Journal of Medical Ethics,P. 249.

benefit that supersedes the negative of invading a child's personal integrity.[42]

The point here is that for the parents to object to vaccination on behalf of their children, such objection must be in the overall interest of the children and should not be anchored on the belief religious or conscience of the parents *stricto sensu*.

9.0. Special Limitation on the Recognition of Conscientious Objection

In the Western Europe, it appears that recognizing conscientious objection may be limited when such objection is made to any law or public policies that hinge on equality. It is contended that since equality laws in liberal democracies reflect moral-liberal values, conscientious objections to equality laws rely, almost by definition, on unjustly intolerant, anti-liberal and morally repugnant values[43] as a result, conscientious objections to equality laws should normally not be tolerated or accommodated by the state.[44] An example of an equality law is the law recognizing same sex marriage. To allow persons to object to this will amount to allowing them to discriminate against the gay and Lesbians. This will go to the root of the law of equality itself.

Jurists have therefore advocated that the state should restrict such freedom of the objectors by ignoring the moral content of the values on which the claim for the 'Freedom to Discriminate' is based. The state should rather take into account content-neutral considerations, such as:

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[42] D. Richards, 'Male circumcision: Medical or Ritual?' (1996) Volume 3, Issue 4J Law Med,P. 371.

[43] Nehushtan, Y., 'Conscientious objection and equality laws: Why the content of the conscience matters' (2019), Law and Philosophy Journal Volume 38, P. 227https://doi.org/10.1007/s10982-019-09347-5 accessed on 26th October 2020.

[44] *ibid.*

(a) who will be harmed more – those who discriminate against others if they are not allowed to discriminate – or those who will be discriminated against if the discrimination against them is allowed;
(b) whether there are alternative service providers;
(c) is the service provider or the service itself public or private;
(d) the sincerity of the values held by the discriminator;
(e) whether the service is offered to the general public; among others.[45]

There are many prominent cases in Europe that confirmed that the state would automatically limit or restrict the right or freedom to object to any equality law or any public policy made towards guaranteeing of equality of the citizens. Few of those cases are presented below:

9.1. *Islington London Borough Council v Ladele*

Lillian Ladele was a marriage registrar employed by a London local authority (the London Borough of Islington). She was designated to register and perform civil partnership ceremonies by the local authority, contrary to her religion and conscience. She refused, and this led to her being disciplined and subsequently was forced to resign. She claimed religious discrimination in the national courts and won. The judgment was reversed at the appellate level, and she took her case to the European Court of Human Rights, where she also lost.

The Master of the Rolls (with whom Dyson and Smith LJ agreed) in the judgment stated at paragraph 52 thus:

[45] Nehushtan, Y., 'Conscientious objection and equality laws: Why the content of the conscience matters' (2019), Law and Philosophy Journal Volume 38, P. 227 https://doi.org/10.1007/s10982-019-09347-5 accessed on 26th October 2020..

> ….Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served.

The Master of the Rolls went on to hold that Article 9 of the European Convention on Human Rights ("ECHR") which guarantees freedom of thought, conscience and religion, together with the Strasbourg jurisprudence on Article 9, supported the view that Ms Ladele's desire to have her religious views respected should not be allowed "to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community".[46]

9.2. ***Matthews v Northamptonshire County Council***,
A council employee who refused to be involved in the council's adoption process, insofar as it might have led to children being adopted by same-sex couples, was held to have been lawfully dismissed from her employment[47]

9.3. ***McFarlane v Relate Avon Limited***[48]
McFarlane was employed by Relate Avon Limited as a relationship counselor. He was a Christian and sought exemption from any obligation to counsel same-sex couples on sexual matters as he believed that he should do nothing to condone same-sex sexual

[46] *Ladele [2009] ECWA civ 1357, [2010] IRLR 211. Para 57.*

[47](16 November 2010), 1901629/2009 (Employment Tribunal)

[48]*Mcfarlane V Relate (Avon) Ltd*, [2010] Ewca Civ 880, [2010] Irlr 872 [*Mcfarlane*]. 54.

activity. This was refused and he was dismissed for gross misconduct. The dismissal letter went on to state that the applicant's actions "Constituted gross misconduct and in the circumstances you cannot be trusted to perform your role in compliance with Relate's Equal Opportunities policy and Professional Ethics policy".

The Employment Tribunal rejected his claims for unfair dismissal and religious discrimination, a decision upheld by the Employment Appeal Tribunal. McFarlane sought permission to appeal to the Court of Appeal. Laws LJ stated that the facts of this case were not sensibly distinguishable from the decision of the court in Ladele and therefore refused the application.

9.4. The Case of *Bull v Hall*

Hazelmary and Peter Bull refused to let civil partners Steven Preddy and Martyn Hall stay in a double room at Chymorvah House in Marazion in Cornwall in 2008. In 2011 a judge at Bristol County Court concluded that the Bulls had acted unlawfully and ordered them to pay a total of £3,600 damages. The following year the Court of Appeal dismissed an appeal by the Bulls following a hearing in London. The couple later filed at the Supreme Court to overrule the Court of Appeal.[49] Five Supreme Court justices denied the appeal and confirmed that the action of the couple in rejecting the civil partners to stay together in the same room is discriminatory against them.

10. 0 Conclusions

49 Bull and another (Appellants) v Hall and another (Respondents) [2013] UKSC 73.

Nigeria is a signatory to most of the international instruments that recognize and accommodate this evolving human right. It is however regrettable that the right to conscientious objection is conspicuously undeveloped in the Nigerian health sector and in the military services. There is no clear cut jurisprudence or a legal framework on it therefore, many potential objectors are systemically deprived of their rights to conscientiously object to practice that runs contrary to their belief. However, with respect to Military Service, conscientious objection is allowed under section 34(2) (c) of the 1999 Constitution which provides for alternative labour to be given to those who have conscientious objection to serving in the armed forces of the Federation. Thus, section 34(2) can be comfortably read into section 38 of the 1999 Constitution that equally guarantees freedom of religion. Freedom of religion embraces freedom of belief.

It must be mentioned that during the first and second world war in which Nigeria participated up to some level, there was forced conscription and the issue of Conscientious Objection did not even arise as the literacy level during those periods was relatively low. Furthermore, those conscripted were mostly illiterates.[50] Forced conscription was also an issue during the Civil War especially on the part of the Biafrans who forced children and men above the active age into fighting during the civil war spanning from 1967-1970.[51] It is hereby humbly submitted that had these wars been more closely monitored by the international community, this issue of forced conscription of children, especially, would have been

[50] Enlistment to the armed forces was supposed to be voluntary. However, a good deal of pressure was also employed through local chiefs, and forced labour was used in mining and agricultural areas.

[51] Uchendu E, "Recollections of Childhood Experiences During the Nigerian Civil War" (2007) 77 Africa.393<https://www.cambridge.org/core/journals/africa/article/recollections-of-childhood-experiences-during-the-nigerian-civil-war/7c8ced017fdfa9389a75bf2cded74eb3> . accessed on 26th October 2020.

reduced. As for the first and second world wars, Nigeria was still under the control of its colonial masters therefore exploitation of our human resources was very much the order of the day. Most of our rights were thereby not recognized.

With regards to conscientious objection in the health sector, Nigeria is also lagging behind other countries. It is however the writers' position that the right to freedom of conscience, thought and religion is very much entrenched in Section 38 of the 1999 Constitution of the Federal Republic of Nigeria and therefore the right to Conscientious objection is subsumed there under. Be that as it may, healthcare providers have the right to object to rendering services that run contrary to their conscience at the same time the patients too have the right not to succumb to any medical treatment that are against their conscience. Nevertheless a balance must be struck. This is where there is a need to immediately provide a robust and comprehensive legal framework and policy statements to ensure the balance between the right of the practitioners and the patients.

The case of *Medical and Dental Practitioners Disciplinary tribunal v. Okonkwo*[52] is the closest we have to conscientious objection in Nigeria. The respondent was a medical practitioner from whom medical assistance was sought by a couple who were Jehovah Witnesses. The couple gave the respondent written instructions that he was not to perform any blood transfusions on the patient. He proceeded to treat her without transfusing blood, and the patient died. The respondent was charged before the Medical and Dental Practitioners Disciplinary Tribunal (the appellant), for contravening Section 16 of the Medical and Dental Practitioners Act, Cap. 341, Laws of the Federation of Nigeria, 1990. The board found him guilty but the Court of Appeal overruled the decision of the

[52] (2001) 10 WRN 1 SC at 41.

Tribunal and found in favour of the Medical Practitioner. On further appeal to the Supreme Court, the Practitioner was found not guilty for respecting the wish and belief of the deceased against blood transfusion.

Supreme Court per Ayoola JSC explained the need to balance the several interests involved as follows:

> It is expedient at the outset to recognise that a consideration of a religious objection to medical treatment involves a balancing of several interests, namely the constitutionally protected right of the individual; state interest in public health, safety and welfare of society; and the interest of the medical profession in preserving the integrity of medical ethics and, thereby, its own collective reputation.
>
> To give undue weight to one of these other interests over the rights of the competent adult patient may constitute a threat to liberty of the individual, unless legally recognised circumstances justify that weight should be ascribed to one over the others….in my judgment, any rule of ethics or professional conduct that ignores the need to balance these interests or that gives undue weight to any of them without regard to individual circumstances will be out of touch with reality and may lead to unjust consequences.[53]

In all, it is submitted that Conscientious Objection in Nigeria is plagued with a dearth of case laws and jurisprudence.

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[53] Per Ayoola JSC in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo* (SC 213/1999) [2001] 10 (02 March 2001).

Recommendations

It is hereby recommended that more clear-cut laws be made relating to conscientious objection in Nigeria. It is further recommended that a set out procedure be laid to ensure that healthcare professionals are well informed about their right to conscientiously object and procedures are laid down for so doing. Finally, structures should be laid down during peace-time for alternative civilian service which may be required of persons who might object to military service so that during times of armed conflict, any person conscripted who has an aversion to taking an active part in actual fight is allowed to play other roles.

The Trajectory of the Practice of Female Genital Mutilation in Nigeria: Looking Beyond Criminalisation*

Oluseyi Olayanju

Abstract

The criminalisation of Female Genital Mutilation (FGM) is not devoid of criticisms. Some of these criticisms especially with regards to Nigeria, form the basis of some of the questions sought to be answered in this paper. One, is criminalisation one of the obligations of States with respect to the practice such that Nigeria has to comply with it especially in the light of opposition to the eradication of the practice by cultural adherents or are there other reasons? Two, if it is found to be an obligation, do the provisions of the law adequately satisfy the obligation (compliance with international law standards/ structures supporting criminalisation approach) Three, against the background of these criticisms, can Nigeria's action therefore be regarded as a contribution to the protection of human rights and especially women's rights in the country?

1.0 Introduction

In many circles, particularly outside dedicated women's sexual and reproductive health and rights fora, Female Genital Mutilation (FGM) is no longer considered to be a problem women face especially because it is believed that the Islamic religion, which many FGM adherents hid under to perpetrate the act, has been shown not to require the fulfillment of such a tenet.[1] However, women's human rights scholars and advocates, and other stakeholders in the medical and anthropological fields contend that

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[1] Akin-Tunde Odukogbe and others, 'Female Genital Mutilation/ Cutting in Africa' (2017) Trans lAdrol Urol 6(2) 138-148. doi:10.21037/tau.2016.12.01

it is still a problem.[2] According to the United Nations International Children's Emergency Fund (UNICEF), FGM is practiced in 31 countries in Africa, Middle East and Asia but has the highest support in Somalia, Egypt, Mali, Sierra Leone and Guinea.[3] Also in Nigeria, many states in the south especially Osun, Ekiti, Ebonyi, Lagos, Imo and Oyo states and almost all of the Northern states practice FGM in various forms.[4] In 2015, apparently, in acknowledgement of the role of law in bringing about social change, Nigeria adopted for the first time a federal legislation prohibiting violence against persons, which among other things prohibits female genital mutilation.[5] This occurrence is acknowledged as being due to the cumulative efforts of the various actors in the violence against women and FGM abolition campaign.[6] Hence, the Violence Against Persons Prohibition Act (hereafter VAPPA) makes it an offence for anyone to perform or engage anyone to circumcise or mutilate a woman or girl.[7]With this action, Nigeria joined the list of states which have criminalised the

[2] See for example Cristina Hermidadel Llano, 'Female Genital Mutilation from a Multidisciplinary Perspective' (2018) 21 Annale Universitatis Apulensis Series Jurisprudentia 64. Also Zimran Samuel, *Female Genital Mutilation Law and Practice*, (Bristol, Jordan's Publishing, 2017)

[3] UNICEF, Female Genital Mutilation, (2020) available at https://data.unicef.org/topic/child-protection/female-genital-mutilation/ accessed 15 October 2020.

[4] Federal Ministry of Health, National Policy and Plan of Action for the Elimination of Female Genital Mutilation in Nigeria 2013-2017. See also UN Population Fund (UNFPA) Nigeria 'An Activist's Story of FGM https://nigeria.unfpa.org/en/news/activists-story-fgmaccessed 20 October 2020.

[5] Although since 1998, the country had adopted a policy on FGM which was reviewed in 2013. See Federal Ministry of Health (Nigeria), National Policy and Plan of Action for the Elimination of Female Genital Mutilation in Nigeria 2013-2017. Also some component states of the federation had adopted anti FGM laws since 2000.

[6] Chibueze Ngozi *et al*, The Violence Against Persons Prohibition Act, the Maputo Protocol and the Rights of Women in Nigeria' (2018) Statute Law Review 39(3) 337-347.

[7] Violence Against Persons Prohibition Act, 2015.

practice. Female Genital Mutilation, Medicalisation, Criminalisation, International Obligation, Abolitionists

2.0 **Definition of FGM**

The term 'Female Genital Mutilation'[8] describes all procedures involving partial or total removal of the external female genitalia or other injury to the female genital for non-medical reasons.[9] Four types of female genital mutilation have been identified:[10] Type 1: Cloridectomy: This involves partial or total removal of the clitoris and/or the prepuce, Type II: Excision: This involves partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora, Type III: Infibulation involves narrowing of the vaginal orifice with creation of a covering seal by cutting and positioning the labia minora and/or the labia majora, with or without excision of the clitoris, Type IV is referred to as other/unclassified. Type IV is a general category ranging from pricking, piercing or incision of the clitoris and or the labia including but not limited to burning, cauterisation of the clitoris

[8] Female Genital Cutting (FGC), Female Circumcision (FC), Female Genital Ritual (FGR) are other terms used to describe the practice. The term employed is often an indication of the inclination of the author. While FGC, FC, FGR are more favoured by non –abolitionist, FGM is more favoured by the eradication movement who believe that to use any other appellation is misleading. See Bettina Shell-Duncan and Reshma Naik and Charlotte Feldman-Jacobs, 'A State-of-the-Art-Synthesis on Female Genital Mutilation/ Cutting: What do we know now?' (2016) (Update)
<https://www.popcouncil.org/uploads/pdfs/SOTA_Synthesis_2016_FINAL.pdf> accessed 10 August 2019.
In this work, the term 'FGM' is employed because it is the more popular term.

[9] WHO, Eliminating Female Genital Mutilation: An Interagency Statement. UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNHCHR, UNICEF, UNIFEM, WHO.
2008 <http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf> accessed August 6, 2019.

[10] Although subdivisions of each of the various types exist and are used when it is necessary to distinguish the major variations of each. Ibid.

and surrounding tissue.[11] Type I and II are reportedly the most commonly done.[12] In Nigeria, all the types are practiced. Type I is most common in the South. Types II and III in all parts of the country while the more invasive ones are prevalent in the Northern part of the country.[13]

3.0 Origin, Prevalence, Reasons and Consequences of Female Genital Mutilation

It is something of a consensus among writers in the FGM field that the exact beginning of the practice, though not known, is rooted in antiquity. There has been evidence that the practice was being carried out in Egypt as far back as 5000 years ago as archeological discovery of an Egyptian mummy showed.[14] FGM was also practiced at some time in history in other parts of the Arabian Peninsula, in Asia, and some western countries such as Australia, France, England, and the United States. It is reported that in these western countries up till the middle of the 20th century FGM was carried out for sterilisation purposes and to cure epilepsy and masturbation.[15]

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[11] One that does not involve cutting is the labia elongation called *Kuvuta Matunya* in *Swahil*i practiced in *Mtwara*, Tanzania and the Lake Region. See Camilla Yusuf and Yonathan Fessha, 'Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the law Against Female Genital Mutilation in Tanzania' (2013) 13 AHRLJ 356-382.

[12] Bettina Shell-Duncan and Reshma Naik and Charlotte Feldman-Jacobs (n8).

[13] Federal Ministry of Health (n 5).
TC Okeke, and USB Anyaehie and CCK Ezenyeaku, 'An overview of Female Genital Mutilation in Nigeria' (2012) Ann Med Health Sci Res 2(1) 70 -73.

[14] Jewel Llamas, 'Female Circumcision, the History, the Current Prevalence and the Approach to a Patient' (2017) University of Virginia Medical School available at https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf accessed 6 September 2019

[15] P. Moszynski, 'Sudan to tighten law on female Genital Mutilation, (2003) BMJ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1140691/> accessed 4 November 2019.
See also Kisanet Abraha Seare, Dealing with Female Genital Mutilation/ Cutting in Western Europe: Achieving Zero Tolerance (LLM Research paper, Institute of

3.1 Prevalence of the Practice

On a global scale, the practice of Female Genital Mutilation has reportedly been undergone by 140 million girls and women.[16] UNICEF estimates that yearly 3.6 million girls are at risk of undergoing the procedure and that about 70 million in the 0-14 age bracket have their genitals cut already.[17]

In what has caused the global manifestation, adherents of the practice from Africa, Middle East and South Asia have migrated to Europe, Australia and the Americas taking the practice with them. In Africa prevalence ranges from as low as 5% in Uganda, Cameroon, Ghana and Democratic Republic of Congo, to 98% in Somalia, Djibouti, Sierra Leone, Egypt and Guinea.[18] Additionally it is reported that two-thirds of all women have undergone FGM live in only four countries: Egypt, Ethiopia, Nigeria, and Sudan.[19]

3.2 Reasons for the Practice

The reasons for the practice are numerous[20] but they revolve mainly around culture and religion, though the latter is being

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Social Studies Hague, 2012) <https://thesis.eur.nl/pub/13066/> accessed 12 September 2019.

[16] World Health Organization, "Female Genital Mutilation and other Harmful Practices: Prevalence of FGM" <http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/>accessed 20 January 2018.
This number has been revised to at least 200 million as Indonesia, a country with high prevalence was not included in that figure. UNICEF, "Female Genital Mutilation/Cutting: A Global Concern" <http://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf> accessed 20 January 2018

[17] United Nations Children's Fund "Female Genital Mutilation/Cutting: What might the future hold?" (2014) New York.

[18] T C Okeke (n 13)

[19] *Ibid*

[20] Such as hygiene, purity, chastity, transition to adulthood, good luck etc. See Yusuf and Fessha (n11)

increasingly discredited.[21] Other reasons include moral, social, financial and sexual reasons as well as aesthetics and cleanliness. [22] Though, reasons vary from one community to another, the underlying reasons such as need to protect cultural identities, desire to control female sexuality, hygiene are similar.[23] In some communities it is a kind of rite of passage where the girl passes from childhood to adulthood. Sometimes it is tied to eligibility for marriage[24] and in some communities it is a means of gaining respect, acceptance and a status.[25] Non-conformity may incur sanctions such as low bride price, non-marriageability, loss of status in family or community or even ostracisation.[26]

3.3 Effects of Female Genital Mutilation

The practice is the cause of many long term and short term debilitating health problems to its victims. While severe pain, hemorrhage, shock, risk of infection are the immediate effects of

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[21] Jacquelyn Shaw, 'Sacred Rites, Sacred Rights: Balancing Respect for Culture and the Health Rights of Women and Girls in Islamic Canadian Communities Seeking to Practise Female Genital Mutilation' (2004) 3 J Law & Equal 31.

[22] Yusuf and Fessha (n 11).

[23] The names by which the practice is known in some African communities portray this similarity in conception. In Sudan excision is called *'taour'* from Arabic word *'tahara'* meaning 'to purify' in Igbo it is called '*Isa aru or Iwuaru'* meaning 'having a bath', in Bambara '*bolo koli'* meaning 'washing of one's hands' and in Sarakole '*salinde'* meaning 'the washing of one's hands to access prayer' See Kisanet Abraha Seare, (n15)

[24]Examples are the Rendille of Kenya and the Edo ethnic group in Nigeria. Jewel Llamas (n14). See also Nowa Omoigui, Protest Against Bill H22 Outlawing "FGM" in Nigeria, (2001) J. Culture & Afr. Women Stud. 1 http://www.africaknowledgeproject.org/index.php/jenda/article/view/38. cited in Nnamuchi Obiajulu, 'Circumcision or Mutilation - Voluntary or Forced Excision - Extricating the Ethical and Legal Issues in Female Genital Ritual' (2012) 25 JL & Health 85.

[25] Examples include the Bondo cult of Sierra Leone. See Owolabi Bjalkander and others, 'FGM in Sierra Leone, Forms, Reliability of Reported Status, and Accuracy of Reported and Health Survey Questions' (2013) Obstetrics and Gynaecological International https://doi.org/10.1155/2013/680926 accessed 24 October 2020.

[26] T C Okeke (n 13)

the practice, those who undergo the procedure may experience long term complications such as cysts, infections, urinary tract problems, vaginal stenosis, painful menstruation, anaemia, infertility, painful intercourse, prolonged labour and so on.[27] Loss of lives following haemorrhage, sepsis or prolonged labour has also been known to take place. [28]

The effects have the potential to impair the physical, psychological, sexual, reproductive and indeed overall wellbeing and health of women, and the girl child[29]

4.0 FGM as a Violation of Women's Human Rights

From the human rights perspective, it clearly constitutes a threat to the rights to life, physical integrity and health of women. Additionally, the rights to equality and freedom from discrimination are considered to be violated by the practice as the practice attempts to control the sexuality of women only. This view is supported by the European Court of Human Rights which considers it an infringement of the right to Freedom from torture as 'the act constitutes deliberate inhuman treatment causing very serious and cruel suffering"[30] – a description which fits the account of FGM victims.[31] As a recognised harmful cultural practice,[32] the

[27] Kirsten Lee, 'Female Genital Mutilation, Medical Aspects and the Right of Children', (1994) 2 Int'l J. Child. Rts. 35.
[28] *Ibid.*
[29] A large percentage of FGM victims are between the ages of 0 and 15 putting them within the children age bracket. (Article 1 of Child Rights Convention and Article 2 of African Convention on the Rights and Welfare of the Child define children as persons less than 18 years of age)
[30]Omeredo v Austria Application No. 8969/10, European Court of Human Rights 2011
[31] See for instance, Sonia Moghe '3 US Women share the horrors of female genital mutilation' CNN May 11, 2017 https://edition.cnn.com/2017/05/11/health/fgm-us-survivor-stories-trnd/index.html accessed 26 October 2020
[32] Article 5 Protocol to the African Charter on the Rights of Women in Africa. OAU doc/CAB/LEG/66.6. Adopted September 13, 2000.

right to freedom from harmful cultural practice of women is considered to be violated by the practice.

FGM is also particularly marked down as a violation of both reproductive and sexual rights of women especially in the areas where the action inhibits the attainment of the highest standard of sexual and reproductive health. [33]

5.0 History of Eradication Efforts and Opposition to Eradication

The United Nations (UN) can be described as the most formidable force in the effort to eradicate FGM. Per the United Nations, the campaign against the practice of FGM is hinged on two main issues i.e. the health risks it poses to women and the human rights of women which it violates.

It is notable that efforts to eradicate female genital mutilation in Africa are reported to have been on the table since the early 20th century when missionaries and colonial governments tried to stop the practice.[34] But, UN involvement in FGM eradication began in 1952 when the UN Commission on Human Rights raised the issue, and the World Health Organisation (WHO) has been charged with studying this phenomenon ever since. The adverse effects of the

[33] There are reports of resultant infection in the reproductive tract due to unhygienic environment and tools. Some research have also made the link between maternal morbidity and FGM. See A Kaplan and S. Hechavarria,and M Martin et al, Consequences of Female genital Cutting/ Mutilation in the Gambia, Evidence into Action, (2011) 8 (26) Reprod.
Health<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3195700/> accessed 4 November 2017.
WHO, 'Health: Female Genital Mutilation'
<http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/>
Accessed 4 November 2018.
[34]Kisanet Abraha Seare, (n 15) Also P. Moszynski, (n 15)

practice on the health of women formed the initial basis of the eradication campaign. They therefore focused on discouraging the practice by drawing attention to and raising awareness in respect of the health problems victims may encounter as a result of the often unhygienic and unsterilised circumstances and the medically inexperienced persons who carry out the procedure. This campaign was described to have achieved limited success because as reported, instead of promoting eradication it led to medicalisation of the practice.[35] Medicalisation is described as the engagement of qualified medical personnel to perform the procedure and having it done in health clinics and hospitals.[36] However, though the foregoing is what medicalization is supposed to entail, some writers have described it as a situation where FGM is performed by a health care provider of any level of qualification and without any particular regard for the type of environment where it is done.[37]

Other basis of criticisms of medicalisation was that instead of eliminating FGM, it simply focused on making it a healthy procedure thus legitimising it and thereby encouraging its continuation.[38] In 1976, the first move to prohibit medicalisation was taken when[39] the WHO banned health providers from engaging in the practice.[40] With time, other UN Bodies, international and non-international human rights organisations took up the gauntlet

[35] Yusuf and Fessha (n11)
[36]Obiajulu Nnamuchi, The Goose and the Gander: A Jurisprudential Defense of Female Genital Ritual
(2012) 17 Mich. St. U.J Med & L 197-230
[37] Yusuf and Fessha (n11). Kisanet confirms it is done in other environments which are not medical however mentions that the use of antiseptics is common in these 'other places.'(n15).
[38]UNFPA, Joint Interagency Statement on Eliminating FGM (1995) Also Kisanet, ibid.
[39] The prohibition of medicalisation has been till the present, a debatable step. See for instance, Obiajulu Nnamuchi (n 36)
[40] WHO 'Global Strategy to stop Health Care Providers Performing Female Genital Mutilation (2010) http://whqlibdoc.who.int/hq/2010/WHO_RHR _10.9_eng.pdf accessed 23 September, 2019

against medicalisation of FGM especially as medicalisation made FGM appear as if it posed no further harm to women as long it was medicalized. The human rights approach which focused on eradicating the practice by drawing attention to the human rights of women which were being violated by the practice was turned to. By this, FGM was mainly projected as a violation of the human rights of women.

5.1 Opposition to Eradication and Criminalisation

It is however worthy to note that opposition to the abolition of FGM is as old as the eradication effort. The opposition is strong and subsists up till the present and is not the least promoted by the womenfolk whom FGM is supposed to be harmful to. While some opponents are concerned with ensuring cultural continuity through preservation of the procedure, some complain about the method by which the eradication is being achieved. Thus, it is not unusual to find women from practicing areas who agree that the practice should be stopped but are opposed to the type of approbation it attracts especially from the non-adherents. They are opposed to the 'bad name calling' in order to hang it. Indeed sociologists and other researchers have found that most women from the societies where FGM holds sway hold deep seated convictions about the practice. Thus they resent the view of those, especially Westerners, who see them as helpless beings in need of liberation.[41]

It is also their contention that going by the descriptions 'outsiders' give of the practice it is clear they do not leave any room for an understanding of their culture. It is especially clear that the issue of voluntary submission to the practice is not considered. The 1980 meeting where 4 African women openly expressed their disapproval to the ethnocentric and insensitive manner by which

[41]Nasra Abubakar 'Female Genital Mutilation: Why Does it Continue to be a Social and Cultural Force?' (Masters Thesis University of Toledo 2012)

FGM is condemned is a notable example.[42] That FGM is known by other appellations such as Female Circumcision, Female Genital Cutting (FGC), Female Genital Ritual (FGR) and so on is also testimony of these varying schools of thought over the subject. In recent times, there have even been threats of violent protests from practicing communities such as the Bondo Society in Sierra Leone.[43] There are also allegations of exaggeration of figures relating to prevalence rates,[44] unfounded claims of certain harmful health effects in medical studies and presentation of non-existent researches all being put together in order to secure the conviction of the international community.[45]

A substantial part of the opposition relates to the adoption of criminalisation as a tool to eradicate FGM. Criminalisation is described as the strongest form of censure in any society. A successful prosecution has multiple implications on the accused which is not restricted to the sanction or even the conviction but includes also the prosecutorial process. In the case of FGM, criminalisation is justifiable as a means to protect those who are compelled to submit because this may scare their oppressors. It can

[42] Four African women activists attended the UN Mid-Decade conference on Women and the NGO Forum in Copenhagen in 1980 to address a panel on female circumcision. In that conference, the indigenous African women criticised the approach adopted by outsiders to stop the practice. Susan Deller Ross, *Women's Human Rights: the International and Comparative Law Case Book* (University of Pennsylvania Press 2013) 476.

[43] Umaru Fofana 'Captured and Cut: FGM returns to Sierra Leone despite Official Ban' The Guardian UK, Thursday 29th September 2016. https://www.theguardian.com/global-development/2016/sep/29/female-genital-mutilation-returns-sierra-leone-official-ban accessed 26 October 2020.
See also Johanna Horz 'Dissecting the link between FGM and Politics in Sierra Leone' (2019)London School of Economics Blog available at https://blogs.lse.ac.uk/internationaldevelopment/2019/05/03/dissecting-the-link-between-female-genital-mutilation-and-politics-in-sierra-leone/ accessed 26 October 2020

[44]Abraha Kisanet (n15) says it is an estimation based on another estimate

[45] Obiajulu Nnamuchi 'Hands off My Pendulum:A Critique of the Human Rights Approach to Female Genital Ritual (2011) 15 Quinnipiac Health L J 243

also provide a screen shade or excuse for those who for fear of societal censure were previously afraid to voice their non-support for the practice. Nonetheless, there are criticisms. Not only has the method been accused of driving the practice underground as in the case of Uganda,[46] it is also held up as a violation of a number of human rights, notably the right to participate in culture and the right to privacy of consenting adults.[47] It is also accused of running against the 'social mores'[48] of practicing societies with the inevitable consequence of lack of societal support for such law, the attendant tendency to create criminals where there should be none and a law more observed in breach.[49] Indeed according to UNICEF, experience, however, has proven that failure to take into account the level of consensus on and social acceptance of FGM can render laws, particularly those purely punitive in nature, ineffective[50]

6.0 Obligation of States to Protect Women from FGM under International Law

As an issue considered inimical to the enjoyment of several internationally recognised human rights, prescribed actions relating to FGM are derived from the provisions of relevant binding and non-binding international and regional human rights instruments. It is also trite that governments are the primary guardians to which these human rights instruments and documents address

[46] Yusuf and Fessha (n11)

[47] Though there are arguments in relation to children, they are too controversial and will not form part of this discussion. See for example, Obiajulu Nnamuchi Harm or Benefit? Hate or Affection? Is Parental Consent to Female Genital Ritual Ever Defensible? (2013) VIII Journal of Health **&**Biomedical Law, 377-441

[48] C. Guiliani "Female Genital Cutting in Africa: Legal and Non Legal Strategies to abandon the Practice" quoted in Abrahakisanet (n 15)

[49] UNICEF "Female Genital Mutilation/Cutting: What might the future hold?" (2014) https://www.unicef.org/media/files/FGM-C_Report_7_15_Final_LR.pdf accessed September 2019.

[50] *Ibid*

themselves.[51]And there are a plethora of binding and non-binding international and regional instruments addressing the prohibition of FGM, however the focus in this section are the binding instruments to which Nigeria is subject. Nevertheless, it must be stated that as non-binding instruments (Soft Laws) such as general comments/recommendations of treaty monitoring bodies, are especially important for their role in clarifying the often bare and sometimes vague provisions of binding instruments, they facilitate comprehension of the specific obligations attached to ratifying the instruments. States also adhere to their stipulations although mainly out of goodwill. However, it is clear that they are non-binding and their violations therefore attract less sanction.[52]

To locate binding international human rights obligations in relation to FGM to which Nigeria is subject, 3 categories of international and regional instruments could be consulted: one, instruments which guarantee specific human rights whose breach are associated with the practice, two, instruments prohibiting harmful customs, traditional or cultural practices and three, instruments which specifically prohibit the practice.

For the first category, as mentioned earlier, FGM is considered as a violation of certain human rights, these include the **right to life**

[51] There are also other actors on whom the duty to protect human rights have been thrust which include private persons and organisations, the international community, civil society

[52] Other reasons like having too many details, there are many of it from different treaty monitoring bodies and other UN or regional bodies. To mention a few, we have Commission on the Status of Women. Resolution on Ending Female Genital Mutilation. E/CN.6/2007/L.3/Rev.1, Beijing Declaration and Platform for Action of the Fourth World Conference on Women, General Assembly Declaration on the Elimination of Violence against Women, 20 December 1993, A/Res/48/104, Programme of Action of the International Conference on Population and Development (ICPD)

when the procedure leads to the death of the victim.[53] The right to life is guaranteed by Article 2 of the Universal Declaration of Human Rights (UDHR),[54] Article 6 of International Covenant on Civil and Political Rights (ICCPR),[55]Article 5 of African Charter on the Rights and Welfare of the Child (ACRWC)[56], Article 4 of Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol),[57]Article 2 of European Convention on Human Rights (ECHR),[58] Article 4 of African Charter on Human and Peoples Rights (ACHPR or African Charter)[59]and Article 6 of Child Rights Convention (CRC)[60] all of which protect the right of a person to live and not have his/her life ended unlawfully.

FGM also violates the **right of women to bodily integrity** as it constitutes an unauthorised and unwarranted invasion of women's bodies. It also denies the women autonomy or the right to make decisions in respect of their bodies. The right to bodily integrity is protected by Articles 4 Maputo Protocol, Article 4 ACHPR, Article 3 ECHR; Freedom from torture- Article 5 ACHPR, Article 4 Maputo Protocol, Article 16 ACRWC and Articles 37a and 39 of CRC.

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[53] OHCHR and others, Eliminating Female Genital Mutilation: An Inter Agency Statement https://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf Accessed October 2020.

[54] Adopted by General Assembly Resolution 217 A (III) of 10 December 1948.

[55] G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16 at 52 ,U.N. Doc. A/6316, 1966. Nigeria ratified it on 19th July 1993.

[56] OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force 29th November 1999. Nigeria ratified it on 23 July 2001.

[57] Adopted September 13, 2000. OAU doc/CAB/LEG/66.6. Nigeria ratified it on 16 December 2004

[58]ETS 5, Entered into force 3rd September1953.

[59]OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982). Nigeria ratified it on 22nd June 1983.

[60]GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167 U.N. Doc. A/44/49 (1989). Nigeria ratified it on 19 April 1991.

A violation of the right to the highest attainable standard of physical and mental health including the right to sexual and reproductive health also occurs through the FGM procedure. As indicated in 3.3 above, FGM has been found to be a cause of both short and long term physical and mental ill health to its victims. The right to health is guaranteed by Articles 12 ICESCR,[61] Art 14 ACRWC, Art 14 Maputo Protocol, Article 12 CEDAW[62]Article 24 CRC.

The rights to equality and non-discrimination guaranteed by Article 3 ICCPR, Articles 3 and 18(3) ACHPR, Article 2 of Maputo Protocol and Article 2 and 3 of CEDAW are also breached as FGM evidences inequality and unequal balance of power between the sexes.

Under the second category are instruments which prohibit harmful cultural practices which FGM has been identified to be, Article 2 of CEDAW,[63]Article 2 Maputo Protocol, Article 21 of ACRWC require that States act (and using the words of CEDAW) to 'modify or abolish existing customs and practices which constitute discrimination against women'. The Maputo Protocol in particular obligates states to take action to achieve the elimination of 'harmful cultural and traditional practices'[64]and provides a telling definition of 'harmful practices' which the descriptions of FGM fits. It states "Harmful Practices mean all behaviours, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity"[65]

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[61] G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 6 ILM 68(1967). Nigeria ratified it on 29 July 1993.
[62] G.A. Res. 34A, U.N. GAOR, Supp. No. 21, U.N. Doc. A/34/180 (September 3, 1981).Nigeria ratified CEDAW on 13 June 1985
[63] Paragraph f.
[64] Article 2(2).
[65] Article 1 (g)

The third category are instruments which specifically prohibit the practice is exemplified by only one instrument[66] the Maputo Protocol and in its Article 5 provides

> States parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States parties shall take all necessary legislative and other measures to eliminate such practices, including: … prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.

8.0 Nigeria's Compliance with International Law Obligations on FGM

One of the objectives of Nigeria's Policy and Plan of Action for the Elimination of Female Genital Mutilation was to bring about the enactment of the Violence Against Persons Prohibition Act[67] and in 2015, that was achieved. The Violence Against Persons Prohibition Act in respect of FGM provides inter alia:

> Prohibition of female circumcision or genital mutilation

[66] The Council of Europe's Convention on Combating Violence Against Women and Domestic Violence applicable to its member states, also specifically prohibits FGM. Article 38 states 'Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: (a) excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; (b) coercing or procuring a woman to undergo any of the acts listed in point a; (c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a.'

[67] Objective 3.

> 6. (1) The circumcision or genital mutilation of the girl child or woman is hereby prohibited.
> (2) A person who performs female circumcision or genital mutilation or engages another to carry out such circumcision or mutilation commits an offence and is liable on conviction to a term of imprisonment not exceeding 4 years or to a fine not exceeding N200,000.00 or both.
> (3) A person who attempts to commit the offence provided for in subsection (2) of this section commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding ₦100,000.00 or both.
> (4) A person who incites, aids, abets, or counsels another person to commit the offence provided for in subsection (2) of this section commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding ₦10,000.00 or both.

By this development, Nigeria joined the league of states, who in a bid to fulfill their legal and human rights obligation to eradicate FGM have criminalised the practice.[68] It is however to be noted that prior to this, law since 1999, some of the component states in the federation had made laws specifically prohibiting the practice.

[68] Criminalisation of FGM has been done through different means in various countries- constitutional provisions (Ghana); criminal legislations further categorised into: specific legislations (United Kingdom, Kenya, United States Benin Cote D'Ivoire), specific provisions in criminal codes, (Ghana, Guinea, Senegal, Tanzania, Ethiopia) specific provisions in Prohibition of Violence Laws (Nigeria, Ghana), general provisions in criminal codes governing assault (South Africa, France) child protection laws (South Africa, UK, France) and others like Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 of South Africa. See Laws of the World on female Genital Mutilation <https://cyber.harvard.edu/population/fgm/fgm.htm> accessed 6 November 2018.

The states include Bayelsa,[69] Edo,[70] Cross River,[71] Enugu State[72] Ebonyi,[73] and Rivers State.[74]

9.0 Any Justification for Criminalisation of the FGM Practice?

The first question this paper seeks to discuss is whether Nigeria is in order fulfilling her obligation under the international law by legislating against FGM? To lay a background, in relation to countries where FGM is being practiced, there are three main legal regimes governing the FGM issue, the first refers to those countries where the law does not concern itself with the practice of FGM because the practice is seen as cultural and traditional rites which the law has no business interfering with. In those countries, there are no laws prohibiting the practice of FGM. The second regime concerns those countries that regulate the practice of FGM through medicalisation. The third legal regime concerns those countries that criminalise the practice. The three regimes are discussed briefly hereunder.

First Legal Regime - No Prohibition of FGM

a. It is a fact that one of the main reasons why FGM is prevalent in most countries where it is practiced is that there is no law prohibiting it. Those states believe that FGM is a cultural rite and as such it is not the function of the state to interfere with it. It is also believed that state has a duty to uphold the cultural belief of its people and respect their tradition as a result, it is not appropriate to

[69] The Female Genital Mutilation (Prohibition) Law Bayelsa State 2000.
[70] A Law To Prohibit Female Circumcision & Genital Mutilation, Edo State 1999.
[71] A Law to Prohibit Girl Child Marriages and Female Circumcision or Genital Mutilation in Cross River State 2000.
[72] Female Genital Mutilation Prohibition Law 2004, Enugu State.
[73] Law Abolishing Harmful Traditional Practices Against Women and Children 2001Ebonyi State.
[74] Child Rights Act of Rivers State 2009.

make any law on FGM. However, since it is clear that FGM is a violation of human rights as in the case of non-consenting adults and children and is capable of posing health risks, where there is no law on FGM, it is nothing short of an abdication of duty by such a state. States exist to cater for the needs of their citizenry which include protection of their dignity and preservation of lives.[75]Laws exist to regulate the relationship between members of the society and are often called upon to protect the weak against the strong. The argument that the state is also obligated to protect cultural rights must as well be balanced against provisions that stipulate that states should balance cultural rights against other rights.[76]Therefore those states with no law on FGM have failed on this front. This writer is of the opinion that Nigeria is in perfect order by taking a bold step to prohibit the FGM.

b. Another way of regulating the FGM practice is through Medicalisation. This has been defined as an approach that allows the female circumcision to entail a symbolic cutting or less invasive cutting (instead of the traditional cutting) and also to be performed in a safe and clean environment.[77] The complaint that FGM was carried out by untrained medical personnel and making it a source of various maladies and even death birthed the idea that the risks posed by FGM could be eliminated if carried out by medical personnel. Some countries therefore adopt this approach by allowing FGM to be conducted by the medical experts. To them the health risks will be minimal if at all there is any risk. Medicalisation, has however generated controversy with the FGM abolitionists insisting that it is against core medical ethics for medical personnel to remove perfectly healthy and useful body

[75]Steven J Heyman The First Duty of Government: Protection, Liberty and the 14th Amendment (1991) 41 Duke Law Journal, 507-571.
[76]Kisanet Abraha (n 15), Section 21 1999 Constitution of Nigeria, Cap C23 LFN 2004.
[77] Bettina Shell-Duncan and Reshma Naik and Charlotte Feldman-Jacobs, (n8).

parts[78] and that medicalisation has only served to perpetuate the FGM practice. Nevertheless those who support the medicalisation have also responded with arguments relating to cosmetic surgery, which often entail removal of perfectly healthy parts.[79] Additionally, they allege that there is insufficient evidence that medicalisation is indeed inimical to FGM eradication.[80]

Notwithstanding the argument for and against the medicalisation approach through the WHO, the United Nation has proscribed the performance of the procedure by medical personnel. In statements issued in 1982, 1992 and 1997, the UN directed all health professionals not to perform FGM in any form or in any setting - including hospitals or other health establishments.[81] Among other reasons, it indicated that medicalisation had the effect of legitimising rather than eliminating the practice. This line of action is also supported by the International Federation of Gynaecologists and Obstetrics (FIGO), American Medical Association (AMA), who issued similar directives to their members.[82] This was codified into the corpus of international human rights law by the Maputo Protocol which require states parties to prohibit'…medicalisation and para-medicalisation of female genital mutilation …in order to eradicate the practice.'[83] From the foregoing, it is clear that medicalisation of FGM is a breach of international human rights

[78]Non maleficence and Utilitarian considerations. See WHO ' Female Genital Mutilation: An overview' (1998) available at https://apps.who.int/iris/bitstream/handle/10665/42042/9241561912_eng.pdf?sequence=1&isAllowed=y accessed 23 October 2020.
[79] Marge Berer 'The History and Role of the Criminal Law in anti-FGM Campaigns: Is the Criminal Law what is needed, at least in Countries like Great Britain?' (2015) 23(46) Reproductive Health Matters 145-157.
[80]Obiajulu Nnamuchi (n 36).
[81] WHO ' Female Circumcision: Statement of WHO Position and Activities 1982.
[82] WHO ' Female Genital Mutilation: An overview' (n 91).
[83] Article 5(b).

law and allowing it would therefore not amount to compliance with international human rights obligations on the subject.

c. Though the criminalisation option has been taken by Nigeria in apparent fulfillment of its obligation to protect women from FGM. The question is whether the basis of Nigeria following this option to comply with the directive of the international human rights law instruments or as a result of pressure from the international donor? As mentioned above, Article 5 of Maputo Protocol, enjoined states to criminalise and sanction the practice of FGM. Thus there is incursion of the criminal law into family settings through this criminal sanction. Most FGM settings involve family, parents, relatives, guardians of victims. It would suffice to apply the imagination to the repercussions of a parent(s) or even whole families being imprisoned on account of carrying out FGM on their children.

It is pertinent to mention that many advanced countries have also criminalised FGM. Examples of such countries include French as far back as 1983 when the French Criminal Section of the Court of Cassation, established the principle that the ablation of the clitoris, resulting from willful acts of violence, constitutes mutilation.[84] United Kingdom followed suit especially as they were urged by the

[84] It was on the basis of Article 312-3 of the old *Code Penal* which inter alia penalised willful assault and battery resulting in death without intent, stated that the person guilty of assault and battery is liable to a term of imprisonment if the offence has resulted in the mutilation, amputation or deprivation of the use of a limb, blindness, the loss of an eye or other permanent disability or death without intent". (the victim in question was a baby with Malian parents who bled to death following cutting of the clitoris) See Thompson Reuters Foundation, "France Reduces Genital Cutting with Preventions and Prosecutions" Lawyer, <http://news.trust.org//item/?map=france-reduces-genital-cutting-with-prevention-prosecutions-lawyer/> accessed 4 November, 2018.
The UK had also made FGM a criminal offence as far back as 1985 via the Prohibition of Female Circumcision Act.

European parliament to adopt specific laws punishing FGM.[85] Many EU countries: Austria, Belgium, Cyprus, Denmark, Italy, Norway, Portugal, Spain, Sweden have specific criminal provisions relating to FGM. Additionally, on the global level, in the mid - 1990s, the United Nations passed a legislation tying foreign aid from Western controlled IMF and World Bank to developing countries with the existence of anti-FGM policies to eliminate the practice in those countries.[86] Based on the foregoing, it is correct to say that Nigeria had promulgated the Violence Against Persons Act 2015 in line with the global direction of the international comity of nations and based on the pressure of the international donors agencies that are Nigerian benefactors.

Criminalising FGM Through the Violence Against Persons Prohibition Act – A Critique

Before concluding this paper, it is important to consider the law promulgated on the FGM in Nigeria which is Violence Against Persons Prohibition Act as produced above in this paper.

The first inadequacy noticeable in the Act is the definition of the Female Genital Mutilation which is not comprehensive. The law ought to contain a definition of FGM that leaves no one in doubt of the procedures the law is proscribing and should take into cognisance cultural nuances which may enhance better understanding.[87] The WHO definition recognizing different types should have been adopted. Nigeria's Violence Against Persons Prohibition Act merely provides 'circumcision of a girl or woman means cutting off all or part of the external sex organs of a girl or

[85] In the resolutions of 2001 (Resolution 1247 of the Council of Europe Parliamentary Assembly) and 2008 (European Parliament Resolution 2008/2071/(INI))
[86] Obiajulu Nnamuchi (n45),
[87] *Ibid.*

woman other than on medical ground'. Therefore, though FGM is mentioned in the body of the law, it omits its definition and only defines female circumcision which does not adequately capture the actual description of FGM.

The second anomaly in the Act concerns the identification of potential defendants. VAPPA should give a clear indication of those to be punished and their likely liabilities. Also, to achieve its impact it is advisable that the net of the law be as wide as possible,[88] in which case victims may also be offenders. The VAPPA identifies anyone who performs female circumcision or genital mutilation, anyone who engages another, incites, aids, abets or counsels another person to carry out such circumcision and mutilation as offenders though with varying terms of punishment. The net is not wide enough to make the victim or person who willing allows herself to be circumcised. In other words, though Nigeria's VAPPA punishes those who engage the circumcisers, it is unclear whether the law applies to the victim where she is the one who engages the circumciser or voluntarily submits to the procedure.[89]

In comparison with what obtains in other countries such as Uganda where the law covers the victims as offenders and further punishes anybody who discriminate against or stigmatize a female who has not undergone female genital mutilation by excluding them from any economic, social, political or other activities in the community.[90]

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[88] *Ibid.*

[89] On an objective note, the inclusion of this may be problematic. While international human rights law on children protects anyone under 18, under criminal law depending on the jurisdiction, it starts much earlier meaning that a child can become an offender rather than a victim under laws that punish victims without age distinction.

[90] Section 12 of Prohibition of Female Genital Mutilation Act 2010 of Uganda

Thirdly, Institutional support for implementing the law appears problematic. In Nigeria, the police is vested with the powers to enforce this law. The nature of FGM being part of the fabric of the society requires a reorientation of all parties as to the criminal status of the practice. The police, being members of the society are not excluded. Many cases are frustrated or swept under the carpet by the police because they do not identify with the seriousness the law espouses. Dearth of FGM prosecutions in Nigeria, in spite of persistence of the practice since the promulgation of the law, may be an indication that FGM is yet to be understood or accepted by the law enforcers as an offence.[91] In fact it has been noted that the law has no provisions for complementary measures such as training relevant professionals and educating the community.[92] These were contained in the policy. However, as a policy remains an executive order and does not command compliance like the law, this is an institutional failure and compliance in this regard may be considered less than adequate

10.0 Conclusions

This article has shown that the criminalisation of FGM through relevant provisions in the VAPPA though seen as a welcome development is not yet perfect. VAPPA has not adequately addressed all relevant and critical areas relating to the practice of FGM. Also, the implementation challenges envisaged must be taken seriously so as to eradicate the menace in the society. By and large, Nigeria has risen to the challenge of FGM practice in line with the global call for its eradication. The law if amended along the criticisms above will no doubt greatly assist in the protection of the women's sexual and reproductive health

[91] See UK Home Office, Country Policy and information Note, Nigeria Female Genital Mutilation(FGM) > accessed October 2020.
[92] Akin-Tunde A Odukogbe and others (n1).

Issues and Challenges of Dissolution of Statutory Marriage in Nigeria

Olajumoke Shaeeb[1]and Olanike Adelakun-Odewale[2]

Abstract

There are emerging legal issues in the dissolution of statutory law marriages in Nigeria. The Marriage Act recognizes the solemnization of statutory marriage between same couple and this is what is known as double – deck – marriage but never envisaged the consequences of such marriage. New trend shows the difficulties in determining such marriage while the courts have to adopt either the conversion theory or co- existence theory thereby leaving the parties to the incidence of such determination, for instance settlement of property and custody of children. The limping marriages is another legal issue that is paramount in the society today, marriages are validly contracted in one jurisdiction, but cannot be recognized in another because it is contrary to public policy of that state and as such dissolution of such marriage will not be recognized let alone of enforcement. Such type of limping marriages is the same sex marriage that is prohibited under the Nigerian law. This paper investigates the legal issues in the dissolution of statutory marriage in Nigeria. The method of this study is the doctrinal approach by relying on primary and secondary sources. The main primary sources examined in this paper include the Matrimonial Causes Act and case law. This paper further relies on existing literature and media reports in making its findings. The paper concludes by recommending a reform that could effectively protect the rights of spouses and stakeholders in situations where statutory marriages are dissolved in Nigeria.

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1.0. Introduction

Marriage is a universal institution, which is recognized and respected all over the world. Therefore, marriage is a contract whereby the parties enter into a legal relationship involving rights and obligations. As a social institution, marriage is governed by the social, religious and legal norms of the society. Consequently, the sanctity of marriage is a well-accepted principle in the world community. Marriage is perceived as the root of the family and of society and consequently, dissolution of marriage has its great implications; it causes great emotional stress to the couples, their children and relations. Most of these children develop psychological problems or even health problems. Such children may eventually become criminals due to lack of parental care as a result of the broken home syndrome.[3]

This article is divided into six parts. Part one examines the concept of statutory marriage from the Nigerian legal perspective. Part two examines the requirement for the dissolution of marriage in Nigeria while the third part investigates the legal issues involved in the dissolution of statutory marriage in Nigeria. Part four discusses the major challenges associated with dissolution of marriage, followed by the concluding and recommendation parts.

1.1 Concept of Marriage

Marriage has been defined as the civil status condition or relation of one man and one woman united in law, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.[4] By 2004,

[3] J.S. Mbiti, *Love and Marriage in Africa* (London, United Kingdom: Longman 1973) 132.

[4]H.C. Black, *Black's Law Dictionary* 4th ed. (USA: West Publishing, 1968) 1123-1124.

the 8th edition of Black's Law Dictionary defined marriage as 'the legal union of a couple as husband and wife.'[5] Marriage has also been described as 'a culturally approved and legally binding set of formal relationships of one man and one woman'.[6]

A popularly cited definition of marriage is provided by Lord Penzance in *Hyde v Hyde*[7] when he said:

> *I conceive that marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others. Four basic conditions of marriage are apparent within this definition: the union is generally intended for life; the marriage reflects real consent; the union is intended to be monogamous; it is heterosexual.*[8]

Lord Penzance's definition falls within the category of the conjugal view of marriage which sees marriage as 'the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally fulfilled by bearing and rearing children together.'[9] Another view on marriage is the revisionist view which defines marriage as 'the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life.'[10] In 2014, the 10th edition of Black's

[5] B. A. Garner (ed), *Black's Law Dictionary* 8th ed. (USA: West Group, 2004).
[6] A.C. Osondu, *Modern Nigeria Family Law* 1st ed (Lagos: Printable Publishers, 2012) 126.
[7] (1886)LR 1P &D 130 at 133.
[8] *Supra.*
[9] S. Girgis, R.P. George and R.T. Anderson, 'What is Marriage?' (2011) 34(1) *Harvard Journal of Law and Public Policy* 245, 246.
[10] *Ibid.*

Law Dictionary modified the definition of marriage in line with the revisionist view to be 'the legal union of a couple as spouses.'[11]

A notable point in the approach to define marriage by many scholars is the attempt to define marriage from a single perspective based on the presumption that all marriages are similar in the light of a legal arrangement between two people of opposite sex. This approach has limited the description of marriage to monogamous marriage without paying attention to cultural diversity and changing trends in marriage institution and composition around the world. With the 2014 definition by Black's Law Dictionary and the global attention on new trends, it is believed that the trend in the definition of marriage will change over time.

In the context of family law, the term marriage is used in three specific contexts: to indicate an institution within society as a whole; to name a ceremony resulting in a change in the legal status of the parties; and to refer to the joint status husband and wife.[12] Thus, marriage, in the Nigerian context, involves a fusion of social, political, sexual and legal principles, although a number of these principles appear to have been found increasingly unacceptable, giving rise to questions as to their relevance for contemporary life and law.[13]

While the union between one man and one or more women is recognized as a valid marriage within the customary marriage institution in Nigeria, the focus of this article is on statutory marriage. Though the Marriage Act[14] does not provide a definition

[11] B.A. Garner (ed), *Black's Law Dictionary* 8th ed. (USA: Thomson Reuters, 2014).
[12] M.O. Shaeeb, 'Contemporary Legal Issues in Dissolution of Statutory Law Marriage in Nigeria: Problems and Prospects' (2015) Unpublished Master's Dissertation, University of Ilorin, 12.
[13] Osondu, 126.
[14] Marriage Act, Cap M6, Laws of the Federation of Nigeria, 2004.

as to what statutory marriage is in Nigeria, clues have been taken from the definition given by Lord Penzance in *Hyde v Hyde*[15] as a voluntary union of one man to one woman to the exclusion of others. Thus, the Interpretation Act of 2003 defines a monogamous marriage as 'a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.'[16]

2.0 Dissolution of Marriage in Nigeria

There is a considerable difference between dissolution of marriage celebrated under customary law and that contracted under the Acts. Unlike the customary law where dissolution of marriage can be obtained extra-judicially, a statutory marriage can only be dissolved in a court having jurisdiction under the Matrimonial Causes Act (MCA)[17], that is, in the High Court of any State in the Federation.

Most of the provisions on dissolution of marriage contained in the MCA have been borrowed with certain modifications, partly from the Matrimonial Causes Act, 1959 of Australia and partly from the Divorce Reform Act, 1969 of England, particularly when the latter Act was at the bill stage.[18] Till date, these provisions have not been modified in Nigeria, even when the countries or origin have made several modifications in their marriage dissolution laws.

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[15]*Supra.*
[16] Interpretation Act, 2003.
[17]Matrimonial Causes Act, Cap M7, Laws of Federation of Nigeria, 2004.
[18] U. Anozie-Ayoka, 'Exposition on the Dissolution of Marriage under the Matrimonial Causes Act' (2017) https://uzormacfins.wordpress.com/2017/05/26/exposition-on-the-dissolution-of-marriage-under-the-matrimonial-causes-act/ (accessed 12 January 2018).

A person seeking to have a statutory marriage dissolved must first pay attention to the limitation on the time for the commencement of an action to dissolve the marriage. This is otherwise known as the 'two years' rule.'[19] Under section 30(1) of the MCA, proceedings for dissolution of marriage shall not be instituted within two years of the marriage except with the leave of court. Thus, where there is a dire need to seek for dissolution of marriage within two years of the celebration of the marriage, the party seeking for such dissolution must first obtain the leave of court, in the absence of which s/he must wait till after two years before instituting an action in court. This provision was justified on the basis of deterring people from rushing into ill-advised marriages and to prevent them from rushing out of the marriage.[20]

Prior to 1970, dissolution of marriage was based on matrimonial offences like adultery, cruelty or desertion, in line with the English Matrimonial Causes Act, 1965, which applied to Nigeria then. However, under the MCA, a marriage can be dissolved on the sole ground that the marriage has broken down irretrievably.[21] Instances that could lead to an irretrievable break down of a marriage are provided for under section 15(2) of the MCA. It has been argued that the instances of section 15(2) connotes grounds for dissolution of marriage but Omo, JCA (as he then was) in *Harriman v Harriman*[22]stated that:

> 'there is only one ground for the dissolution of marriage under the Matrimonial Causes Act, to wit, "the marriage has broken down irretrievably" vide S. 15(1) of the Act. The

[19] I.E. Nwogugu, *Family Law in Nigeria* 3rd ed. (Ibadan: HEBN Publishers, 2014) 170.
[20] Bucknill, L.J. in *Fisher v Fisher* (1948) P 263 at 264.
[21]Section 15(1) MCA.
[22] (1989) 5 NWLR [pt. 119] 6 at 15.

> sub-paragraphs of sub-section 2 thereof, eight of them – (a) to (h) are only various species of breakdown…'[23]

Thus, to establish that a marriage has broken down irretrievably, a petitioner must establish one or more of the listed facts in section 15(2) of the MCA which are:

a. Willful and persistent refusal to consummate marriage;
b. Adultery and intolerability;
c. Behaviour of the respondent;
d. Desertion;
e. Living apart;[24]
f. Failure to comply with a decree of restitution of conjugal rights; and
g. Presumption of death.

Where a petitioner for dissolution of marriage is able to successfully prove any or more of the above instances, the court, if satisfied, may dissolve the marriage. However, a respondent to such an action may raise some defences which could prevent the court from dissolving the marriage at the instance of the petitioner. These defences available to the respondent are termed 'bars to a petition for divorce.'[25] These bars could be absolute or discretionary. Where the respondent is able to prove an absolute bar, then the court has no choice but to refuse to dissolve the marriage and dismiss the petition. But where the defence raised by the respondent qualifies as a discretionary bar, the court will exercise its discretion in choosing to either dissolve the marriage or not. Condonation, connivance and collusion are absolute bars while

[23] *Ibid.*
[24] Living apart mustr fulfil the requirement of section 15(2)(e) or section 15(2)(f).
[25] Nwogugu, 214.

petitioner's adultery, petitioner's desertion and conduct conducing are discretionary bars.[26]

The bars to a successful petition for divorce have been criticized as being punitive in nature. The bars have been argued to be based on the matrimonial offence theory which had been eliminated from the MCA.[27] The consideration in deciding to dissolve a marriage should be based on interests of the parties, the children to the marriage and the public and not as a means of punishment. Thus there have been calls for the abolition of this aspect from the MCA.[28]

2.1 Legal Issues In Dissolution of Statutory Marriage in Nigeria

a. Double-Deck Marriage

There are unresolved legal issues in the dissolution of statutory law marriages in Nigeria. The Marriage Act recognizes the solemnization of statutory marriage between same couple who already have a valid customary law marriage in place[29] and this is otherwise referred to as double deck marriage. Though neither the Marriage Act nor the Matrimonial Causes Act defined what a double deck marriage is, Onokah defined the concept as 'the celebration by the same couple, of a marriage under one system and their subsequent marriage under another system.'[30] The term has

[26] *Ibid*, 214-220.
[27] Nwogugu, 222.
[28] *Ibid.*
[29]Section 35 of the Marriage Act.
[30] M.C. Onokah, *Family Law* (Ibadan, Nigeria: Spectrum Books Ltd., 2012) 143.

further been described as 'a vehicle with two decks or a sandwich with two layers of filling.'[31]

This definition has been illustrated as 'different or separate compartments but in the same bus and piloted by the same driver or separate layers of filling accommodated in one loaf.'[32] In reality, double deck marriage in the Nigerian context can be said to be the legal recognition and permission of two separate forms of marriage (in terms of requirements and celebration) between the same parties. It has become a common practice in Nigeria for parties who intend to contract a statutory marriage to marry first under customary law before the solemnization of the statutory marriage. This practice may be justified by the fact that though Western civilization and culture have permeated Nigerian society, most people, even the most sophisticated, understandably regard themselves as bound by the customary laws of their place of origin. Another justification for double deck marriage lies in the fact that some spouses believe that the customary marriage is not sufficient to guarantee their legal status and thus embark on statutory marriage to strengthen their marital and legal status under the law.[33] The Nigerian Marriage Act has given validity to this practice by allowing such parties to further celebrate their marriage under the statute, provided it is between the same parties married to each other under the customary law.[34]

Trends show the difficulties in determining double deck marriages while the courts have to adopt either of the theories of either conversion or co-existence and leaving the parties to the incidence

[31].Lexicon Publications, *Webter's Dictionary of the English Language* International Ed. (New York: Lexicon International Publishers, 280).
[32]C.E. Ochem and C.T. Emejuru, 'Dissolution of Double-Decker Marriage under the Nigerian Law' (2016) 2(1) *Savant Journal of Social Science and Humanities* 1.
[33]Shaeeb, 60.
[34]*Ibid.*

of such determination for instance settlement of property, custody of children. The conversion theory supports the fact that an earlier customary law marriage has been converted to a statutory marriage by subsequently celebrating a marriage with the same spouse according to the law. The co-existence theory on the other hand recognizes the existence of both forms of marriages as existing side by side.[35] Thus, it can become problematic to determine double deck marriages because of pluralism of the incidence of the two marriages and this has been one of the problems petitioners face in the law court.

b. Limping Marriage

The Limping marriage is another legal issue that is paramount in the society today. Marriages are validly contracted in one jurisdiction, but cannot be recognized in another because it is perceived as being contrary to public policy of that state[36] and consequently dissolution of such marriage will not be recognized let alone of enforcement of such dissolution. Such type of limping marriages is the same-sex marriage that is prohibited under the Nigeria law[37] and common law union (cohabitation) which is not recognized under Nigerian law. In the same way that the law refuses to recognize a limping marriage, the law will also refuse to recognize dissolution of same.

A typical example of limping marriage is the case of *Padolechia v Padolechia*[38] where the husband was domiciled in and married in Italy in 1943 but subsequently obtained a divorce in Mexico and contracted another marriage in England. In a petition to annul the marriage on the ground that they contracted another marriage in

[35]Shaeeb, 63-64.
[36]. Section 3 of Same Sex Marriage (Prohibition) Act, 2014.
[37] *Ibid*, s. 1
[38] (1943) Fam 145.

England, the petition was on the ground that the first marriage was valid and subsisting; the court upheld the submission and held that situations where it will be unjust and inappropriate for the decree to be binding extra territorially, a limping marriage will be created. Similarly in *Kendall v Kendall*,[39] the husband's lawyers deceived the wife into applying for a divorce which she was not desirous of obtaining. The processes were filed in a language she did not understand. The recognition was withheld in England on grounds of public policy. Thus, to reduce the incidence of limping marriages, it is necessary to establish cognizable universally acceptable standards regulating recognition of decrees granted pursuant to the Matrimonial Causes Act instead of the present situation which leaves parties to a marriage contract to the whims of each nation and the uncertainty that is foisted on parties extra territorially.

c. Presumption of Death

Section 15 (2) (h) of the Matrimonial Causes Act states that where a party to the marriage has been absent from the petitioner for such a time and in such circumstance as to provide reasonable grounds for presuming that he or she is dead, the court is inclined to granting a dissolution of the marriage using the following circumstances as a premise:

(i) Where for a period of seven years immediately preceding the date of the Petition the other party to the marriage was continually absent from the petitioner and there is no reasonable ground for believing that he was alive at any time within the said period unless the presumption is rebutted.[40]

[39] (1977) Fam 208.
[40] Section 16 (2) (a) of the MCA.

(ii) Attempts must have been made by the Petitioner to make contact with the other party to no avail and it must be impracticable to determine his where about.

(iii) There must be no connivance between the parties to conceal the whereabout of the Respondents. The relief is distinct from dissolution of marriage because it predicated on providing a basis for a partner who is unable to find his spouse to obtain relief. It provides a safeguard against a situation that could arise if the party that is presumed dead rebuts that presumption by showing up and establishing that he is very much alive.

The exercise of the jurisdiction of the court to entertain the proceeding for presumption of death and dissolution of the marriage is dependent on the domicile of the Petitioner in any state in Nigeria on the date of commencement of the proceedings and the Petition must be instituted in the High Court of any state whether the Petitioner is domiciled in that particular state or not.[41] Thus if a spouse has disappeared, but cannot be conclusively proved to be dead, except by the production of a death certificate, the other spouse, may petition to have the marriage dissolved under the MCA on the allegation that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

It has been argued that when the presumed dead person is shown to be alive, the court will rescind the decree *nisi* but what happens in a situation where the petitioner had obtained a decree absolute of the dissolution? Can it be said that the court must reverse its decision

[41] Section 2 of the MCA.

and declare a dissolved marriage undissolved? Onokah is of the view that the basis of Section 16 (2)(a) of the Matrimonial Causes Act is 'presumption' and not 'certainty' of death of the other party and this requires reasonable satisfaction of the court that the other party is presumed and not certified dead.[42]

A Romania court was faced with this problem where a man that had been declared dead, upon application by his wife, returned after 20 years; the court refused to overturn its decisions and maintained that the man is officially dead.[43]

2.2 Major Challenges associated with Dissolution of Statutory Marriage in Nigeria

In the Nigerian situation, dissolution of marriage is seen as a situation that brings about enmity between the parties. The circumstances surrounding dissolution of marriage do not usually end on a friendly note where relationships can be maintained. Rather parties become adversaries and go to the extent of doing things that could hurt each other, such as getting the most out of the marriage. Some major challenges in dissolution of statutory marriage in Nigeria will be considered in this section.

a. Financial Challenges

Due to poor planning, misunderstandings and inequitable arrangements between spouses, many divorcing couples face severe financial problems after the dissolution of their marriage coupled with the emotional stress of divorce, these financial crises can lead to bankruptcy, foreclosure, repossession of vehicles and damage to

[42] Onokah, 231.

[43]The Associated Press, 'Dead Man Walking: Court Rejects Romanian's Claim he's Alive' (16 March 2018) New York Times, https://www.nytimes.com/aponline/2018/03/16/world/europe/ap-eu-odd-romania-dead-man-walking.html (accessed 26 March 2018).

both spouses' credit scores.[44] In situations of joint accounts with credit facilities, inadequate immediate arrangements on how to settle debts (particularly debts revolving around credit cards) may create long term financial problems.[45]

Additionally, the legal expenses involved with dissolution of statutory marriage as well as the burden of maintaining two household on the same income that previously maintained a single household will create additional financial strain on the divorced couple. Thus, the parties will be forced to lower their standard of living or increase means of income.[46]

b. Psychological Challenges

Generally, studies have shown that individuals who witnessed the divorce of their parents tend to become troublesome, sexually active, lapse into alcoholism and even go through divorce themselves.[47] The negative effect starts to show its ugly head when these children reach the age of twenty and thirty. These individuals would sometimes feel their inadequacy to hold on to a long term relationship and they become depressed or despondent. Furthermore, spouses of terminated homes become depressed and may lead to sickness and diseases. It may also result in death.[48] Some may become mentally unstable as a result of persistent thinking. Children of divorce couple suffered from depression, fail in school, and get in trouble with the law.[49] Children with depression and conduct disorders indicates of those problems because there was parental conflict.[50]Parties to a divorce process often face varying degrees of psychological trauma. The

[44]Shaeeb, 83.
[45]*Ibid.*
[46]*Ibid,* 84.
[47]Shaeeb, 86.
[48]*Ibid.*
[49]*ibid*
[50]*Ibid.*

psychological challenges of statutory divorce in Nigeria manifests in two ways – psychological effect on the children and psychological effects on the children of the marriage.

The dissolution of a marriage is not usually the problem but the manner in which the dissolution is handled by the parties is always a great challenge.[51] Parties, especially respondents, usually find it difficult to accept the fact that they have lost a loved one. The divorced couples' ability to manage the stages of the divorce process and the acceptance of the loss of the marriage greatly influence the rate of adjustment and their ability to offer adequate parenting to their children.[52]Where the divorced couples have a difficult time adjusting to their new status, this could lead to insecurity in relationship attachment and this resonates through the family system.[53] The parents with custody may, in effect, detach themselves from their children[54]which will consequently affect the child's attachment equilibrium, hence, the child thereafter carries this into his/her adult relationship and the process is recycled.[55]The psychological effects of divorce are more pronounced in Nigeria due to the fact that there is no institutional structure that offers counselling for divorcing couples. As a matter of fact, the MCA needs to be reviewed to include compulsory psychological therapy sessions at various stages of the divorce process. This should be a condition precedent to the issuance of the absolute decree.

c. Inadequate//Lack of Maintenance

[51]B. Spadling and H.G. Pretorius, 'Experience of Young Adults from Divorced Families' (2001) 6:3 *Health SA Gesondheid* 75, 77.
[52] *Ibid.*
[53] J. Tordorski, 'Attachment and Divorce: A Therapeutic View' (1995) 22 *Journal of Divorce and Remarriage* 189, 195.
[54] M. Gurian, *Mothers, Sons and Lovers: How a Man's Relationship with his Mother affects all his Relationships with Women* (London: Shambala, 1994) 56.
[55]Spadling and Pretorius, 77.

Another prominent challenge of divorce of statutory marriage lies in the maintenance recovery as ordered by the court. There appears to be a societal mindset that all maintenance matters relating to children in Nigeria will be decided in favour of the mother. While it is true that under most customary law systems in Nigeria, the father is duty bound to pay child maintenance, this is not uniform or universal and does not apply to any statutory marriage under the MCA.[56]Maintenance obligation naturally depends on the parent who has custody of the child.[57] It is immaterial whether the parent with custody is the mother or father of the child. Statutory marriage accord equal rights on the spouses and as such, the court could order either party to pay maintenance in respect of child(ren) of a dissolved marriage.[58]While a court may order a party to pay maintenance in respect of the other spouse and/or the child(ren) of the marriage, the issue of enforcing or recovering the maintenance is another process. Where a party has defaulted in paying maintenance as ordered by the court, the aggrieved party can apply to the High Court for an attachment of earnings order.[59] The affidavit in support of the application shall state the particulars of the maintenance order, the amount of the arrears due to the applicant under the maintenance order, particulars of any proceedings taken by the applicant to enforce the maintenance order, particulars of the employer of the defendant to the application and particulars of the defendant and of his work.[60]Also, by virtue of section 4 of the third Schedule to section 92 of the MCA, where a person has been in default of payment of maintenance to the tune of four payments in the case of a weekly payment or two payments in any other case, or where it can be

[56] O. Adelakun-Odewale, 'Recovery of Child Support in Nigeria' in P. Beaumont, *et al The Recovery of Child Support in the EU and Worldwide* (United Kingdom: Bloomsbury Publishing, 2014) 241.
[57]*Ibid.*
[58]Section 70 of MCA.
[59]Section 92 of MCA.
[60]Order XVII Rule 8 of the Matrimonial Causes Rules.

shown that the defendant has willfully and persistently refused to pay maintenance, the court may give an order to the person who appears to be the defendant's employer in respect of his earnings or part of his earnings to take out of the earnings the payment as prescribed by the court.[61]

However, in reality, the process could be cumbersome and the aggrieved party who seeks to recover maintenance will also have to employ the services of a lawyer to comply with the recovery procedure. It may be easy to recover maintenance where the paying parent is in salaried employment. However, where the party is self-employed, the recovery of maintenance may pose a great challenge. In short, payment of maintenance is based on willingness on the party required to pay and experience has shown that most parents under the obligation to pay maintenance deliberately refuse to obey the court order in a bid to punish the parent with custody.[62]

3.0 Conclusions

Marriage is seen as involving a commitment to permanency. It has also been defined as the civil status condition or relation of one man and one woman united in law, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. Dissolution of marriage usually is not an easy choice to make especially in the African parlance. Anyone suing for dissolution of marriage must have taken considerable time to weigh its pros and cons before deciding on it and it is only when there seems to be no alternative in sight that they can resort to it. Dissolution of marriage is usually

[61] *Bairbre Oloyede v Hector Oloyede* (1971) 2 UILR 13.

[62] This is common where the custody of the child(ren) was contested by the parents and the parent under obligation usually refuses to pay maintenance in a bid to force the parent with custody to give custody to the other parent, especially where the parent with custody lacks the financial capacity to care for the child(ren).

the culmination and result of problems evident in the marriage. This invariability takes their toll on the parties even after the dissolution of the marriage. Most times, parties to a divorce do not remain friends. Parties have been shown to suffer some degree of trauma especially the one who alleges cruelty on the part of the other or go through a series of emotional stress and psychological problems, for instance insecurity, or feeling of helplessness.

One of the most essential steps toward the solution of the divorce problem is a better understanding of marriage, both as to its physiological basis and its demand for mental companionship and spiritual harmony. It has been said that the future of the country depends on the way in which children are brought up. They are best brought up in the happiness and security of a sound family life. This in turn rest on the maintenance of the institution of marriage; thus, it must be noted that in more than a quarter of divorces, children are mostly involved. They become tools or weapons of fight against each other. This article investigated the legal issues involved in the dissolution of statutory marriage in Nigeria as well as the challenges surrounding the dissolution of such marriage.

Recommendations

Based on the findings of this research, the following recommendations are essential to improve the legal framework for dissolution of statutory marriage in Nigeria:

- The MCA, which is a law enacted in 1970, has outlived its purpose. The MCA, as it is presently, does not meet the social demands of the changes that have happened over the past decades in the country. There is a need to review the law to reflect and accommodate the changes

and evolving trends in the family structure across Nigeria.

- In reviewing the MCA, the procedure for divorce should be modified to require parties to attend certain required number of sessions before, during and after the divorce proceedings. The counselling session should be an annex of the court system to ensure adequate monitoring and effectiveness.
- Where children are involved in the divorce proceedings, the nature of counselling should be of higher degree to make parents realize that the fact that their marriage did not work out does not avail them outright negligence of their parental responsibilities.
- There is a need to have special family courts across the country with expert judges trained on family issues. The sensitivity of family issues requires expertise on the part of the judge and should not be treated like any other legal dispute.

Constitutionality of Caretaker Committees in Local Government Councils in Nigeria*

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Abstract

This paper examines the legality of caretaker committees administering Local Government Councils in Nigeria with a focus on Oyo State. It examines the provisions of the Constitution of the Federal Republic of Nigeria on Local Government System and the Local Government Law 2001 (amended) of Oyo State. It shows that section 7(1) of the Constitution and section 3(1) of the Local Government Law 2001 of Oyo State guarantee democratically elected Local Government Councils and not unelected caretaker committees as it operates in Oyo State and some other States in Nigeria. It considers the factors responsible for the prevalent appointment of caretaker committees including lack of Local Government autonomy, failure of the Federal Government to challenge the appointment of caretaker committees and slow pace of determination of political matters by courts of law in Nigeria. It concludes that until these factors are addressed and in particular, autonomy granted to Local Government Councils, there will continue to be setbacks as a result of the administration of the Councils by committees that are not accountable to the people and do not seek the development of the Local Government but only pursue their personal interest.

Key Words *– Caretaker Committee; Constitution; Democratically Elected; Elections; Local Government Councils.*

1.0 Introduction

Local Government Council is the third tier of government in Nigeria. It is the closest government to the people, established to promote development of Local Areas.[63] Local Government Councils are vested with powers to exercise control over the affairs of the people in a locality. It was created to promote democratic ideals, coordinate development programs at the local level as well as serve as a driver of socio-economic growth at the grassroot level.[64]

The Constitution of the Federal Republic of Nigeria provides for the existence of democratically elected Local Government Councils and mandates State Government to ensure their existence under a law which provides for their establishment, structure, composition, finance and functions.[65] Thus, State Governments are under obligation to ensure that only democratically elected Local Government Councils are in office at any point in time. To achieve this, elections must be conducted statutorily to usher in democratically elected Local Government Councillors.

Elections into Local Government Councils are conducted by the State Independent Electoral Commission into the offices of Chairman, Vice Chairman and Councilors.[66] Section 7(4) of the Constitution provides that the Government of a State must ensure that every person who is entitled to vote or be voted for at an

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[63]TC Adetiba,"Existentiality of Local Government in Nigeria an Answer to Grassroots Development, but for Unsolicited Socio-Political Factors"(2017), 9(2), Acta Universitatis Danubius 25.

[64]A E Obidimma and E O Obidimma,"Legality of Caretaker Committees to Manage Local Government Councils in Nigeria"(2016) 5(5) International Journal of Innovative Research & Development 203.

[65] Constitution of the Federal Republic of Nigeria Cap. C23 Laws of the Federation of Nigeria 2004, Section 7(1).

[66]*Ibid*, section197(1)(b) and section 5 of the State Independent Electoral Commission Law, Cap. 154 Laws of Oyo State 2000.

election to House of Assembly, shall have the right to vote or be voted for at an election to a Local Government Council. Unfortunately, in Oyo State and some other States in Nigeria, the State Governors have devised the unconstitutional pattern of appointing caretaker committees and other similar committees to administer the affairs of Local Government Councils instead of conducting elections and ensuring that only democratically elected Councils are in office.

In Oyo State, Local Government Law 2001 (as amended) does not empower the Governor to appoint caretaker committees. Section 3(1) of the Local Government Law, 2001 (as amended) provides that the system of Local Government shall be by democratically elected Local Government Councils. There is therefore no legal basis for appointing caretaker committees to administer Local Government Councils in Oyo State.

However, past and incumbent State Governors in Oyo State[67] had for years appointed caretaker committees to operate Local Government Councils. Some other States such as Ekiti State had even gone as far as enacting laws that empower the State Governor to dissolve elected Local Government Councils and replace them with caretaker committees.[68] This is done irrespective of the fact that the Constitution of the Federal Republic of Nigeria does not give State Governors such powers. Appointing caretaker committees or other similar committees to administer Local Government Councils is a departure from democratic process and

[67] PM News Nigeria, August 8, 2011, "Ajimobi Swears-In LG Caretaker Chairmen" <https://www.pmnewsnigeria.com/2011/08/08/ajimobi-swears-in-lg-caretaker-chairmen/>accessed 10 March 2019.

[68]Section 23B and of the Local Government Administration (Amendment) Law, 2001 amended the Local Government Administration Law, 1999 of Ekiti State to the effect that the State Governor can dissolve Local Government Councils in Ekiti State and replace them with caretaker committees.

has defeated the purpose for which Local Governments Councils were created in Nigeria.

In the light of the above, this paper examines the legality of administering Local Government Councils through caretaker committees. It examines the relevant provisions of the Constitution and the Local Government Law 2001 of Oyo State on Local Government System. It considers the factors facilitating the appointment of caretaker committees and the negative effects on the Local Government Areas. It makes recommendations on necessary measures such as amendment of the Constitution to grant autonomy to Local Government Councils and speedy trials of matters on dissolution of elected Local Government Councils and their reinstatement by the court amongst other measures, for curbing the illegal trend of administering Local Government Councils through caretaker committees in Nigeria.

Local Government System in Nigeria

Local Government is a political authority which is created by law for local communities by which they manage their affairs within the limits of the law.[69] It was created mainly for the following reasons – (a) citizenship participation in the management of local affairs; (b) efficient and equitable provision of essential services; (c) resources mobilization for developmental purposes.[70] The strength of the local government as a democratic instrument is its closeness to the people, its elected status and the opportunities it provides for public participation in democratic process.[71]

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[69] K. T., Osuebi *et al* Local Government Administration and Political Accountability in Nigeria: Contending Issues and the Way Forward" (2019) 4(1) Journal of Public Administration and Social Welfare Research 24.

[70] *Ibid.*

[71] P O., Oviasuyiand L Isiraojie,"Appointment of Local Government Caretaker Committees: An Aberration in Local Government Administration in in Nigeria" (2017) 2(1) International Journal of E-Government & E-Business Research 2.

The elected status of the Local Government Councils have however, been jeopardized by State Governors who dissolve elected Local Government Councils and appoint caretaker committees in their stead. This has made Local Government Councils inefficient and ineffective, thereby crippling the desired progress and development of Local Government Areas.

Composition of Local Government Councils

Local Government Councils comprise of executive and legislative arms. The executive arm comprises of the Chairman, Vice-Chairman, Supervisory Councilors and Secretary to the Council. In Oyo State, the law governing Local Government System is the Local Government Law, 2001 (as amended). Section 14 of the law establishes the offices of the Chairman and Vice-Chairman. Elections are conducted into the offices of Chairman and Vice-Chairman. This is because section 18(1) of the Local Government Law provides that the offices of Chairman and Vice Chairman are subject to elections and no Chairman can contest for elections without a Vice Chairman.

The Chairman assigns to the Vice-Chairman specific responsibilities in respect of the business of the Local Government including membership of the Security Committee.[72] The Chairman presides over meetings of the Local Government Council.[73] The Secretary[74] and Supervisory Councilors are not elected into office, they are appointed by the Chairman. However, the appointment of Supervisory Councillors is subject to the confirmation of the Local Government Legislative Council made up of the Councillors.[75] Section 47(1) of the Local Government Law allows the Chairman

[72] Local Government Law, 2001 (as amended) of Oyo State, section 24(1).
[73] *Ibid*, section 24(3).
[74] *Ibid*, section 50(1) establishes the office of the Secretary to the Local Government.
[75] *Ibid*, section 47(2) establishes the office of Supervisory Councillor.

to appoint a minimum of three and maximum of five Supervisory Councillors. The Chairman assigns responsibilities to the Supervisory Councillors including administration of any department of the Local Government.[76] The Secretary performs various duties including – (a) serving as the Secretary and Chief Administrative Adviser to the Local Government Chairman and to the Council's Finance and General Purposes Committee; (b) coordinating the activities of all departments of the Local Government; (c) servicing the meetings of the Chairman and the Supervisory Councillors wherever necessary; (d) interacting with the Councillors; (e) keep the records of the Local Government; (f) perform other duties as may be assigned to him from time to time by the Chairman of the Local Government.[77] In running the affairs of the Local Government, the executive arm is assisted by career officers, the principal among them is the Head of Local Government Administration. He is in charge of the administration of the Local Government. All Heads of Departments in the Local Government and the Treasurer of the Local Government (Director of Finance) are under the supervision of the Head of Local Government Administration.

With respect to the legislative arm of the Local Government, it comprises of elected Councillors which form the Local Government Legislative Council.[78] Councillors are elected into the Council from each ward of the Local Government.[79] In the Local Government Legislative Council, there is a Leader and a Deputy Leader who are elected among the Councillors.[80] Functions of the Legislative Council include – confirming the appointment of

[76] *Ibid*, s. 24(2).
[77] *Ibid*, s.51.
[78] *Ibid*, s. 33(1).
[79] *Ibid*, s. 27.
[80] *Ibid*, s. 34(1).

Supervisory Councillors;[81] approving the budget of the Local Government;[82] and passing laws called bye-laws which are assented to by the Chairman.[83] However, where the Chairman withholds his assent, the bye-law can be passed by two thirds majority of the Council and the assent of the Chairman shall not be required.[84] The Council also has the power to summon anyone to appear before it and explain issues concerning the Local Government Council.[85]

Functions of Local Government Councils

The functions of Local Government Councils in Nigeria are contained in the Fourth Schedule of the Constitution.[86] These functions are also stated in the Local Government Laws of various States. For example, they are contained in section 6 of the Local Government Law, 2001 of Oyo State. The main functions of Local Government Councils are - (a) consideration and the making of recommendations to a State commission on economic planning or any similar body on - (i) the economic development of the State, particularly in so far as the areas of authority of the council and of the State are affected and (ii) proposals made by the said commission or body; (b) collection of rates, radio and television licences; (c) establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm; (d) licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts; (e) establishment, maintenance and regulation of slaughter houses, slaughter slabs, markets, motor

[81] *Ibid*, s. 47(2) establishes the office of Supervisory Councillor.
[82] *Ibid*, s. 42(3).
[83]*Ibid*, s. 41(4).
[84] *Ibid*, s. 46(6).
[85]*Ibid*, s. 42(4).
[85]*Ibid*, s. 42(4).
[86] note 3, Constitution of the Federal Republic of Nigeria, Section 7(5) provides that the functions of the Local Government Council must include those set out in the Fourth Schedule to the Constitution.

parks and public conveniences; (f) construction and maintenance of roads, streets, street lightings, drains and other public highways, parks, garden, open spaces or such public facilities as may be prescribed from time to time by the House of Assembly of a State; (g) naming of roads and streets and numbering of houses; (h) provision and maintenance of public conveniences, sewage and refuse disposal; (i) registration of all births, deaths and marriages; (j) assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State; and (k) control and regulation of (i) out-door advertising and hoarding, (ii) movement and keeping of pets of all description, (iii) shops and kiosks, (iv) restaurants, bakeries and other places for sale of food to the public, (v) laundries, and (vi) licensing, regulation and control of the sale of liquor.[87]

Other functions of Local Government Councils are - participation in the government of a State with respect to the following matters - (a) the provision and maintenance of primary, adult and vocational education (b) the development of agriculture and natural resources, other than the exploitation of materials; (c) the provision and maintenance of health services; and (d) such other functions as may be conferred on a Local Government Council by the House of Assembly of the State.[88]

Elections into Local Government Councils

Statutorily, in every State of Nigeria, the State Independent Electoral Commission conducts elections into Local Government Councils. The Commission is established under section 197(1)(b) of the Constitution. In Oyo State, the State Independent Electoral

[87] *Ibid*, Paragraph 1 of the Fourth Schedule.
[88] *Ibid*, Paragraph 2 of the Fourth Schedule.

Commission is established under section 3 of the State Independent Electoral Commission Law of Oyo State.[89]
Under the Constitution of Nigeria, the duties of the State Independent Electoral Commission are to – (a) organise, undertake and supervise all elections into Local Government Councils within the State;[90] (b) render necessary advice to the Independent National Electoral Commission on the compilation of the register of voters as applicable to Local Government elections in the State.[91] The same duties are stated in section 5 of the State Independent Electoral Commission Law of Oyo State.

In the year 2018, the State Independent Electoral Commission of Oyo State conducted elections into the 33 Local Government Councils and the 35 Local Council Development Areas in the State.[92] Elections were conducted into the offices of - Chairman, Vice Chairman and Councillors.

Caretaker Committees in Local Government Councils
Most States in Nigeria including Borno, Oyo, Kogi, Ondo, Rivers States had for years operated Local Government Councils through caretaker committees. In Borno State, the Governor -Babagana Zulum had since his assumption of office in May 2019 administered Local Government Councils through caretaker committees.[93] This had been the case in Borno State for over ten

[89] State Independent Electoral Commission Law Cap. 154, Laws of Oyo State 2000.
[90]note 3, Constitution of the Federal Republic of Nigeria, Paragraph 4(a), Part II of the Third Schedule.
[91]*Ibid*, Paragraph 4(b), Part II of the Third Schedule.
[92] Punch Newspaper, 13 May 2018 "APC Sweeps Oyo LG Poll, Wins All Chairmanship, Councillorship Seats" <https://punchng.com/apc-sweeps-oyo-lg-poll-wins-all-chairmanship-councillorship-seats/>accessed 10March 2019).
[93]Pulse.ng, 11 July 2019 "NULGE Renews Call for Conduct of Council Elections in Borno" <https://www.pulse.ng/news/local/nulge-renews-call-for-conduct-of-council-elections-in-borno/hggkrxq> accessed 15 August 2019.

years.[94] In Kogi State, the State Governor - Yahaya Bello had administered Local Government Councils through committees referred to as "administrators" since the year 2016 when he assumed office.[95] In Ondo State, in the year 2017, the State Governor - Rotimi Akeredolu appointed caretaker committees to administer Local Government Councils in the State.[96] In October 2018, he dissolved the caretaker committees and inaugurated new ones,[97] which he also dissolved in June 2019 and replaced with yet another one.[98]He has since been operating Local Government Councils through caretaker committees till date. In Rivers State, Governor Nyesom Wike appointed caretaker committees in the year 2015 after he assumed office.[99]This was also the case with his predecessor in office - former Governor Rotimi Amaechi.[100]

In Oyo State, in May 2019, the Governor of Oyo State - Engr. Seyi Makinde dissolved all elected Local Government Councils in the

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[94]*Ibid*.

[95]Pulse.ng, 6 May 2016, "Governor Appoints Caretaker Committees for Each of 21 LGs in Kogi" <https://www.pulse.ng/news/politics/yahaya-bello-governor-appoints-caretaker-committees-for-each-of-21-lgs-in-kogi/c3wyclp> accessed 6 June 2019.

[96] The Guardian, **"**Akeredolu Inaugurates Councils' Caretaker Chairmen, as Assembly Elects Speaker**"** <https://guardian.ng/news/akeredolu-inaugurates-councils-caretaker-chairmen-as-assembly-elects-speaker/> accessed 11 September 2019.

[97]The Hope, 14 December 2018, Akeredolu Appoints New LG Caretaker Committees <https://www.thehopenewspaper.com/akeredolu-appoints-new-lg-caretaker-committees/> accessed 10 March 2019.

[98] Sahara Reporters, 13 June 2019 "For Third Time in Two Years, Gov. Akeredolu's Government Sacks Local Government Caretaker Chairmen" <http://saharareporters.com/2019/06/13/third-time-two-years-gov-akeredolus-government-sacks-local-government-caretaker-chairmen>accessed 10 August 2019.

[99] Vanguard, "Wike Swears in 22 LGs Caretaker Committee Chairmen on July 9, 2015" <https://www.vanguardngr.com/2015/07/wike-swears-in-22-lgs-caretaker-committee-chairmen/> accessed 10 August 2019.

[100] The Tide, 2 June 2014, "Amaechi Swears in 21 LG CTC Chairmen" <http://www.thetidenewsonline.com/2014/06/02/amaechi-swears-in-21-lg-ctc-chairmen/> accessed 10 August 2019.

State notwithstanding the fact that they were democratically elected.[101]He later appointed caretaker committees to administer the Councils. This was in clear breach of section 7(1) of the Constitution and section 3(1) of the Local Government Law, 2001 (as amended) Oyo State. This position was affirmed in the case of the Governor of Ekiti State & Ors V. Olubunmo & Ors,[102] where the Supreme Court of Nigeria held that State Governors do not have the power to dissolve elected Local Government Councils. In that case, the Governor relied on section 23(b) of the Ekiti State Local Government Administration (Amendment) Law, 2001 of Ekiti State to dissolve elected Local Government Councils in the State before the expiration of their tenure and appointed caretaker committees in their stead. The Supreme Court invalidated this law and held that the Governor had no power to dissolve elected Local Government Councils and replace them with caretaker committees. The decision of the Supreme Court is premised on section 1(3) of the Constitution which provides that the Constitution prevails over every law and any law that is inconsistent with the provisions of the Constitution is null and void to the extent of its inconsistency. Therefore, any action taken under such a law is unconstitutional. Thus, appointing unelected committees to administer Local Government Councils whether backed by a State law or not, is absolutely illegal**.**

Factors that Facilitate Appointment of Caretaker Committees to Administer Local Government Councils in Nigeria

In Nigeria, certain factors are responsible for the appointment of caretaker committees by State Governors. These factors are considered below.

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[101] Vanguard, 23 December 2019 "Makinde Inaugurates 68 LGAs, LCDAs Caretaker Chairmen in Oyo on December 23, 2019" <https://www.vanguardngr.com/2019/12/makinde-inaugurates-68-lgas-lcdas-caretaker-chairmen-in-oyo/> 23 December 2019.

[102] (2016) LPELR-48040 (SC).

1. Failure of the Federal Government to Challenge the Operation of Local Government Councils by Caretaker Committees

The Federal Government of Nigeria has not effectively risen up to its duty to defend constitutional provisions regarding elected Local Government Councils. Section 7 of the Constitution clearly provides that only elected Local Government Councils should be in office. Thus, no Governor has the power to unilaterally alter the provisions of the Constitution by dissolving elected Local Government Councils and replacing them with unelected caretaker committees. The problem however, is that, State Governors do this illegal act and yet they have not been challenged in Court by the Federal Government of Nigeria for not conducting elections as statutorily required. This has facilitated the continuous appointment and re-appointment of caretaker committees by State Governors in defiance of the provisions of the Constitution. The Federal Government of Nigeria should challenge this unconstitutional act in Court and ensure that State Governments comply with the provisions of the Constitution.

2. Slow Pace of Court Trials

Generally in Nigeria, the pace at which matters are determined by Courts of law is quite slow. Thus, in cases where elected Local Government Councils are illegally dissolved and the State Governor replaces them with caretaker committees, the tenure of the Councils would have lapsed before judgment is given. By the time further appeals are made to the appellate Courts, their tenure would have long expired. This restrains the Courts from reinstating the dissolved Councils but rather award damages and orders the payment of their allowances and emoluments. For example, in the case of *Eze v. Governor of Abia State*,[103] the appellants were sworn

[103] (2014) 14 NWLR (Pt. 1426) 192.

into office in June 2004 for a term of three years. On 16 June, 2006 all elected Local Government Councils in Abia State were dissolved by the 1st respondent, the State Governor. The trial court gave judgment in October 2007 and further appeals were made up to the Supreme Court which gave its judgement in the year 2014. By the time the trial court gave its judgment, the tenure of the Council had already expired. This made the Court order the payment of their allowances and emoluments for the unexpired period of their tenure and this was upheld by the appellate Courts. The judgement of the Courts would have been different if the trial was speedily done and judgment delivered within the period of their tenure. The Court would have ordered the reinstatement of the Councils and the immediate removal of the caretaker committees.

3. Political Interest

In States where caretaker committees are appointed, those appointed are usually from the same political parties with the State Governor. In cases where elected Local Government Councils are dissolved and replaced with caretaker committees, those dissolved belong to a different political party from that of the Governor and are replaced by caretaker committees who are in the same political party with the State Governor. This is because it is generally believed that members of the opposition party will not serve the interest of the Governor. So, by appointing those in the same political party, members of the committee will be loyal and obedient to the dictates of the Governor.

4. Lack of Local Government Autonomy

Lack of Local Government autonomy has affected the performance of many Local Government Councils in Nigeria. It has made it impossible for them to administer the Councils independently and effectively. The State Governments meddle in the affairs of the Local Government as a result of some provisions of the Constitution which give State Government power to create new

Local Government Councils under section 8(3) of the Constitution, adjust the boundaries of Local Government Councils under section 8(4) of the Constitution, conduct elections into Local Government Councils under sections 7(4) and 197(1)(b) of the Constitution and distribute revenue from federation account under section 162(5) of the Constitution. Many State Governors hide under these constitutional provisions to perpetrate undemocratic atrocities such as appointment of caretaker committees. This is largely due to lack of autonomy of Local Government Councils in Nigeria. Sections 7, 8 and 162 of the Constitution clearly place Local Government Councils under the complete control of the State Governments by giving them such wide powers that are now being abused. This situation is exacerbated by the fact that revenue allocation from the federation account is disbursed by the State Government to all Local Government Councils. This evidently subjects Local Government Councils to the whims and caprices of the State Government since they are in control of the revenue of the Local Government Councils and without revenue, no meaningful development can take place in the Local Government Areas. Thus, when loyalists are appointed as caretaker committees to administer Local Government Councils, they simply play along with the maneuverings of the State Government.

It is therefore important that the National Assembly expedites action on amendment of the Constitution to grant autonomy to Local Government Councils in Nigeria. This will give them the power to take decisions independently within the ambit of the law and receive revenue directly from the federation account for the development of their localities. In addition, Local Government autonomy will give independence in clearly defined terms and

separate the legal identity of Local Government Councils from other levels of government.[104]

5. Insecurity and Other Factors

Some State Governments in the North claim they did not conduct elections into Local Government Councils because of insecurity created by insurgency in their States.[105] This excuse is untenable because general elections into Federal and State offices took place in those States despite the insecurity challenge. There is therefore no acceptable excuse for not conducting regular elections into Local Government Councils. Also, some State Governments in the South claim they do not have sufficient funds to conduct elections into Local Government Councils.[106] The truth however, is that all States in Nigeria receive revenue from the Federation Account and also generate internal revenue out of which funds can be deducted to conduct elections. They however, deliberately refuse to conduct elections in order to appoint their loyalists into Local Government Councils, so that the interest of the State Governor can be protected.

Another reason given by State Governments for appointing caretaker committees is expiration of the tenure of elected Local Government Councils. In such cases, the State Government appoints transition committees to administer the Councils afterwards, do not conduct elections till the end of the tenure of the Governor. Ideally, similar to what is done during general elections, when elections are conducted few months to the expiration of the

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[104] OO Samuel, "Local Government Autonomy as an Imperative for True Federalism in Nigeria"(2016) 3(1) Journal of Good Governance and Sustainable Development in Africa 87.

[105] note 31, Pulse.ng, 11 July 2019 "NULGE Renews Call for Conduct of Council Elections in Borno".

[106] J O Olaniyi, "State Independent Electoral Commissions and Local Government Elections in Nigeria" (2017) 5(1) Africa's Public Service Delivery and Performance Review 139.

tenure of Federal and State elective political offices, the State Independent Electoral Commission should conduct elections into Local Government Councils few months before the expiration of their tenure in order to usher in new elected officers. This will ensure that only elected Local Government Councils are in office.

Negative Effects of Caretaker Committees in Local Government Councils

Appointment of caretaker committees to administer Local Government Councils have negative effects on the legal system, locality and people. These effects are examined below.

a. Violation of the Constitution of the Federal Republic of Nigeria

The Constitution lays down the process of filling the office**s** in the Local Government Councils which is by election. Appointment of caretaker committees is a violation of the provisions of the Constitution under section 7(1) of the Constitution which guarantees democratically elected Local Government Councils in Nigeria. Thus, such appointments should be challenged in the court of law.

b. Suspension of the Local Government Legislative Council

The legislative powers of a Local Government can only be exercised by the Local Government Legislative Council, consisting of elected Councillors. For example, in Oyo State, section 27 of the Local Government Law, 2001 (as amended) establishes the office of the Councillor. Section 33 vested the Council with legislative powers and section 41 gives them power to make bye-laws. However, when elected Local Government Councils are not in office, the legislative functions of the Council are suspended. This is because unelected committees such as caretaker committees cannot perform the functions of Councillors, as a result, no law can

be passed by them. This has led to a lot of drawbacks and exploitation by the State Government, who sometimes uses such opportunities to mis-manage the revenue of the Local Government Councils and/or usurp some of the functions of the Councils which yield substantial internal revenue.

c. Bad Governance

Caretaker committees and other similar committees appointed to administer Local Government Councils are usually not accountable to the people. Rather, their loyalty is to the State Governor who appointed them. Some engage in all manner of corrupt practices in order to enrich their pockets. This is because they were not elected by the people unlike elected Local Government Councils who stand the risk of not been re-elected if they do not attend to the needs of the people and develop the areas This compels them to put in their best and be accountable to the electorate when they are in office. Thus, appointing caretaker committees leads to bad governance and lack of accountability on the part of the committees.

d. Absolute Control of State Government over the Affairs of the Local Government

State Governors appoint caretaker committees in order to have total control over Local Government Councils. This is politically unhealthy, bearing in mind that the Local Government is the third tier of government in Nigeria and should not be under the absolute control of the State Government which is the second tier of government, but should operate independently. Nigeria operates a federal system of government and for there to be true federalism, no tier of government should be completely subsumed by the other. To achieve this, autonomy of Local Government Councils must be enshrined in the Constitution through an amendment of same by the National Assembly of Nigeria.

e. Appointment of Caretaker Committee Truncates Democratic Process

Appointment of caretaker and other similar committees is undemocratic. It is even more so, when democratically elected Local Government Councils are dissolved and replaced with such committees. The people elected into the Councils are deprived of their rights to govern. Also, the citizens who voted them in are robbed of their rights to be governed by those they elected, while unelected persons are imposed on them. Such unelected persons are never committed to developing the Local Government Areas, improving the lives of the people and good governance, rather their commitment is always to the Governor who appointed them and their personal interest which is to the detriment of the people. This violates the right of the dissolved Councils to participate in government under Article 13(1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of Nigeria[107] which provides that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the law.

Conclusions

Caretaker committees are not recognized by the Constitution of the Federal Republic of Nigeria. They are a creation of State Governments. The Constitution only guarantees democratically elected Local Governments Councils. Thus, any appointment or law inconsistent with the provisions of the Constitution is null and void. The Federal Government of Nigeria should as a matter of urgency challenge this illegal act in Court and expedite action on

[107] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A 9 Laws of the Federation of Nigeria 2004.

the amendment of the Constitution to grant autonomy to Local Government Councils in order to stem the trend of appointment of caretaker committees in Nigeria.

Recommendations

The Federal Government of Nigeria should challenge in Court, the operation of Local Government Councils by caretaker committees and other similar committees. Courts of law in Nigeria should speedily determine matters on dissolution of elected Local Government Councils and their replacement by caretaker committees. The dissolved Councils should be reinstated and where none exists, the court should compel the State Government to conduct Local Government elections to usher in democratically elected Local Government Councils as guaranteed by the Constitution. The Constitution of Nigeria should be amended to guarantee Local Government autonomy. All the provisions that subject Local Government Councils to the whims and caprices of State Governments should also be expunged. Local Government autonomy should be all encompassing to impact on all the critical aspects of administration of local communities.

Local Government elections should be conducted along with general elections. The dates for the elections should be scheduled to hold immediately following gubernatorial elections. While the Independent National Electoral Commission conducts general elections, the State Independent Electoral Commission should be equipped to conduct Local Government elections. This will ensure that only elected Local Government Councils are in office.

Finally, the Federal Government and State Governments should address the issue of insecurity and insurgency which has plagued many States in Nigeria. Also, political thuggery and other challenges of democratic process should be address, so that Local

Government elections can be held statutorily and regularly, in a free and fair manner.

The Controversial Doctrines of *Ultra Vires* and Constructive Notice in the Context of the Companies and Allied Matters Act 2020 – Dead Or Alive?

B. S. Shoroye

Abstract

The object clause of the Memorandum of the company contains the object for which the company is formed. An act of the company must not be beyond the objects clause otherwise it will be ultra vires and, therefore, void. This was the position of the courts which is in tandem with the common law principle and same was the practice for a very long time. Courts were ready to declare ultra vires any act of the company whenever such company undertook any business outside the object clauses. This is what is referred to as the strict judicial approach to ultra vires doctrine in the paper. This paper discusses the trajectory of the ultra vires doctrine from the judicial strict approach to liberal judicial approach to ultra vires doctrine where the courts had held to be valid transactions which would otherwise had been void for being businesses that were not authorized by the memorandum of the company. The paper examines various case laws on the subject matter to show the progression of the application of the doctrine over the time and the significant changes in the application and effect of this doctrine. With the statutory intervention via the company Act, there was the assumption that the doctrine was dead and abandoned. This paper shows that the ultra vires doctrine and the constructive Notice are

far from being dead but still living in view of the provisions of the Company and Allied Matters Act 1990 and 2020.

1.0. Introduction

The objects for which a company is formed are normally spelt out in its Memorandum of Association. These are called the objects clause. It is a general rule that a company cannot legally carry out activities which are not expressly or impliedly authorized as its object. This rule was laid down by the House of Lords in the English case of *Ashbury Railway Carriage & Iron Co. Ltd. v Riche.*[108] The principle or the rule is that where a company deviates from its objects and acts outside of its business, i.e stated purposes or objects, or exceeds its powers, that act is regarded as *ultra vires* and therefore, null and void. Naturally the law will regard and treat an *ultra vires* act as creating no legal rights against the company[109] and the company cannot claim on it.[110]

2.0. The Doctrine of *Ultra Vires*

In most commonwealth jurisdictions the doctrine of *ultra vires* is ubiquitous in any legal discussion on company law. The principle behind the doctrine is to the effect that all registered companies must be strictly guided and adhered to the operational guidelines in terms of their business dealings. Any business that is not set out nor contained in its objects clause is outside the company's capacity or

[108] (1875) L.R. 7 H.L. 653, (1875) 33 L.T. 450.
[109] *Re: Jon Beauforte (London) Ltd.* (1953) C.L. 131.
[110] *Bell Houses Ltd. v City Wall Properties Ltd*. (1966) 10 B. 207.

ultra vires the company and thereby void. The company is simply incapable of entering such an arrangement and so it is treated as a contract that could never have existed.[111] The expression "*ultra vires*" consists of two words: '*ultra' and 'vires.' 'Ultra' means beyond and 'Vires' means powers*. Thus the expression *ultra vires* means an act beyond the powers. Here the expression *ultra vires* is used to indicate an act of the company which is beyond the powers conferred on the company by the objects clause of its memorandum.***[112]***

A learned author makes a distinction between an act which is ultra vires and the act which is illegal thus:

> The *ultra vires* act or transaction is different from an illegal act or transaction, although both are void. An act of a company which is beyond its objects clause is *ultra vires* and, therefore, void, even if it is legal. Similarly an illegal act will be void even if it falls within the objects clause.[113][114]

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[111] See Dr LE Talbot, *Critical Corporate Governance and the Demise of the* Ultra Vires *Doctrine***.** Warwick School of Law p2. Electronic Copy available at: http://ssrn.com/abstract=1396588.
[112] *Raghvendra Singh Raghuvanshi & Nidhi Vaidy,* Applicability of Doctrine of *Ultra Vires* on Companies. *p2.*
[113] *Ibid p3.*
[114] *Ibid,*

An act of a company can be declared *ultra vires* on two grounds. So, the act can be either substantially *ultra vires* or it can be procedurally *ultra vires*. Substantive *Ultra vires* occurs when the company does not have the power or authority to act or it acts in breach of the Objects clause or it acts for a purpose which is not provided in the Objects clause. And the company is not bound by such acts as every person doing business with the company is expected to know the purpose for which the company was being formed. *Ultra vires* acts can be of three categories: a) Act that are *ultra vires* the Companies Act, b) Act that are *ultra vires* the Memorandum of Association, and c) Act that are *ultra vires* the Articles of Association. The effect of each of these types of *ultra vires* is the same.

3.0. .Purpose of the Rule of Doctrine of Ultra Vires

The House of Lords have stated the dual purpose of the rule as the protection of both investors and creditors. Lord Chelmsford stated thus:

'…… the incorporation of a company with limited liability is entirely the creature of statute. It was necessary not only for the protection of those who might join such companies, but also of persons who might enter into contracts with them that the privilege of creating them should only be obtained upon conditions which should be made known to the public.[115]

[115] (1875) 33 Law Times at 453.

According to Lord Parker;

> " the question of whether or not a transaction is *ultra vires* is a question of law between a company and a third party, the statement of a company's objects in its memorandum is intended to serve a dual purpose. First, it gives protection to subscribers who learn from it the purposes to which their money can be applied. Secondly, it gives protection to persons who deal with the company and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum, the less the subscriber's risks, but the wider such objects, the greater the security of those who transact business with the company.[116]

It has been said that the doctrine of *ultra vires* was developed to protect the investors and creditors of the company. It prevents a company from employing the money of the investors for a purpose other than those stated in the objects clause of its memorandum. This doctrine similarly protects the creditors of the company by assuring them that the funds of the company to which they must look for payment are not dissipated in unauthorized activities. The wrongful application of the

[116]*Cotman v Brougham* (1918) A. C. 514.

company's assets may result in the insolvency of the company, a situation when the creditors of the company cannot be paid.[117] In addition, the doctrine prevents directors from departing from the object for which the company has been formed and, thus, puts a check over the activities of the directors. The directors are guided and strictly piloted to engage in those things that they originally set out to do and are not allowed to stray or veer away from those objectives.

4.0 The Strict Judicial Approach to *Ultra Vires* Doctrine

This age long principle binding the company to limit its business activities strictly to those things contained in its object clause was laid down in the popular case of *Ashbury Railway Carriage & Iron Co v Riche.*[118] In this case a company incorporated under the Companies Act 1862 stated its objects as '„to make, sell, lend or hire, railway carriages, wagons plant machinery etc". The company subsequently engaged in a contract to finance the construction of a Railway. The House of Lords declared the contract as *ulta vires* the company's act and therefore void. The main reason was that the said contract did not fall under the main objects of the company. The position is that such contract cannot be ratified by the company.

The position is that an *ultra vires* act or contract is always void in its inception and it is void because the company had not the

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118 *Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7 HL 653.

capacity to make it and since the company lacks the capacity to make such contract, how it can have capacity to ratify it.

Prior to the enactment of the Companies and Allied Matters Act (CAMA) 1990, the Doctrine of *ultra vires* had always been in operation in Nigeria.[119] Nigerian Courts were most obliged to interpret the objects clause of companies strictly so as to determine whether a particular business transaction is within the powers (or vires) of the company[120] otherwise the act would be declared *ultra vires.* The *ultra vires* doctrine has been adopted and applied in decided cases in Nigeria. For instance in *Continental Chemists Ltd v Dr. lfekandu*, the Supreme Court declared that a contract outside the objects of an incorporated company is *ultra vires*, invalid and unenforceable. Also in the case of *Metalimpex v Leventis and Co. Nigeria Ltd*, the court held that where the contract is *ultra vires* the company, neither the company nor the other party can enforce it. In *Okoya and others v Santilli and Others*, the court stated that a company conducting its affairs otherwise than on the basis of its true memorandum and articles of association acts *ultra vires.*

4.1 The Liberal Judicial Approach to *Ultra Vires* Doctrine

Over the years the courts had developed and recognized certain principles which tend to broaden the capacity of the company to

[119]As a received law; part of the colonial heritage from Great Britain.
[120]*Continental Chemists Ltd v Ifekandu* (1966) 1 ALL N. L. R. 1.

carry on businesses beyond what are listed in the memorandum of association thereby relaxing the strict application of the rule. These include the following:

a. Exercise of those powers that are expressly mentioned in the company Act and those powers that are implied by the statute. In other words even if such act is not covered by the objects clause in the memorandum of the company, provided the act is permitted by the company Act and any statute, the company may exercise such powers.

b. The principle of implied and incidental powers - This principle has been established in the case of *Attorney General* v *Mersey Railway Co***.** According to this principle a company, in addition to the powers conferred on it by the objects clause of its memorandum has power to do all those acts, which are:
(a) necessary for carrying out any objects listed in the memorandum of association,
(b) any power incidental to, or
(c) any power consequential upon, the exercise of those powers contained in the memorandum.

The case of *Attorney General* v *Mersey Railway Co.* [121] *was very instructive and actually a locus classicus on this principle of ultra vires* particularly in the area of liberal judicial approach to *ultra vires* rule. The facts of the case runs thus:

[121] **1907) 1 Ch. 81.**

There was a company incorporated for carrying on a hotel business. It entered into a contract with some third party for purchasing furniture, hiring servants and for maintaining omnibus. The purpose or object of the company was only to carry on a hotel business and it was not expressly mentioned in the objects clause of the memorandum of the company that they can purchase furniture or hire servants. This deal was challenged and was sought from the court that this act of the directors be held as *ultra vires*. The court held that a company incorporated for carrying on a hotel business can purchase furniture, hire servants and maintain bus to attend at the railway station to take or receive the intending guests to the hotel because these are *reasonably necessary to effectuate the purpose for which the company has been incorporated* and consequently these are within the powers of the company, although these are not expressly mentioned in the objects clause of the memorandum of the company, or the statute creating it.

According to a learned jurist while explaining that a company will have power to carry out the objects as set out in the objects clause of its memorandum, and also everything, which is reasonably necessary to carry out those objects. He gave an example that a company which has been authorized by its memorandum to purchase land had implied authority to let it and if necessary, to sell it.[122] Similarly, in the case of *Cotman v Brougham* the House of

[122] *Gujarat Mining& Manufacturing Company* v. *Motilal H.S. Weaving Company*, AIR 1930 Bom. 84.

Lords upheld an objects clause which allowed multi-clauses to be treated as independent clauses, not ancillary to a main clause.[123]

5.2. The Subjective Objects Clause - Bell Houses Clause

In order to escape being caught by the doctrine of *ultra vires*, certain clauses are used in the objects clause. The practice is to include in the objects certain clauses e.g, inserting a provision that the company may engage in *carrying on of any business which the company or directors think fit.* Or *that the company may do all such other things as are incidental or conductive to the attainment of the objects specified in the memorandum.*

In the case of Bell Houses Ltd., v *City Wall Properties Ltd*[124] *a* company was authorized by the objects clause of its memorandum to carry on any other trade or business, which could, in the opinion of the directors be advantageously carried on by the company in connection with its general businesses. This clause was held valid. The court held that if there is such a clause and the directors decide to carry on a business which can be carried on advantageously in connection with or ancillary to the main business will be *intra vires* and not *ultra vires* even if it has no relationship with the main business of the company.

However, the Supreme Court of Nigeria has occasion to construe a similarly worded objects clause in *Continental Chemists Ltd v Dr.*

[123] 8 [1918] AC 514.
[124] **(**1966) 2 WLR 1323**.**

Ifekandu. The clause in question stated that *the company could enter into any business which the directors think will increase the profits of the company*. . .The Supreme court held that the clause was indefinite and useless.

5.0 Relationship between the Doctrine of Constructive Notice and *Ultra Vires*

The Doctrine of Constructive Notice states that third parties who enter into business transactions with a company are deemed or presumed to have notice of its objects and other registered documents such as the Memorandum and Articles of Association, Special resolutions and the register of particulars of charges.[125]. This is generally regarded as a negative doctrine because it acts as a booby trap against third parties. Third parties who entered into business transactions with a company are presumed not to have only read the documents of the company but to have understood same.[126]

There is a relationship between the doctrine of constructive notice and that of *ultra vires* in the company law. The Doctrine of *ultra vires* was generally a nuisance both to the companies and third parties since it sometimes results in injustice to creditors. In *Re: Jon Breauforte London Ltd,*[127] a company formed to carry on the business of costumiers and gown makers deviated to the

[125]*Irvine v. Union Bank of Australia* (1877) 2 App. Cas. 366,
[126]*Oakbank Oil v. Crum* (1882) App. Cas. 65 at 71 per Lord Selborne L C.
[127](1953) C.L. 131.

manufacture of veneer panels which was outside its objects clause. The company entered into contracts with third parties for the construction of a factory for the manufacture of veneers and purchase of coke. When the company went into liquidation, the builders of the factory and suppliers of the coke brought claims against the company. The claims were rejected because the third parties were presumed to have known that the business were outside the objects of the company and therefore *ultra vires*, null and *void*. The presumption of knowledge was based on the doctrine of constructive notice. Thus the doctrine of Constructive Notice further compounded the problems created by the Doctrine of *ultra vires* which has been variously described as a "booby trap", "landmine" and "pitfall."

What obtains thereafter is the actual knowledge of the contents of the registered documents and this is aided by the presumption of regularity also known as the rule in *Royal British Bank v Turquan.*[128].

Rule In Royal British Bank v. Turquand

Prior to the promulgation of CAMA in Nigeria, it was possible for the company to escape liability under the common law rule that persons dealing with a company are presumed to have actual or constructive knowledge of its objects clause. So that any act which is outside the stated objects clause will not bind the company. The view was that the registration of the public documents in the

[128](1856) 6 E & B., 327.

Companies Registry constituted notice to the whole world about the existence of the documents.[129]

As we have pointed out earlier, the doctrines of *Ultra vires* and Constructive Notice brought hardship and injustice to creditors and third parties. This injustice and hardship was greatly alleviated by the rule in *Royal British Bank v. Turquand*[130]. In this case, the Royal British Bank (Creditors) sued Turquand who was the liquidator of Coal-brook Company. Two directors of Coal-brook had signed a bond acknowledging the indebtedness of Coal-brook Co to the Royal British Bank in the sum of £2000.00. The Articles of Association of Coal-brook Co. provided that the directors can only borrow after a resolution authorizing them to do so. There was no resolution in this case.

It was held that where a person acts consistently with the public document of a company, and in compliance with those documents, the outsider or third party is entitled to assume that matters of internal management of the company have been complied with unless he has knowledge to the contrary or there are suspicious circumstances which put him on notice. According to the court, the requirement of a resolution in the case of Coal-brook Co. was a matter of internal management. This is called the Indoor Management Rule. The rule in Turquand's case is called the

[129]Akanki, Essays on Company Law, 1992, University of Lagos press, p. 122.
[130]Akanki, *Ibid*

Presumption of Regularity Rule. But the presumption is rebuttable where:

(a) The third party had actual knowledge that the conditions laid down by the company were not followed.
(b) The third party is an insider.
(c) The circumstances are suspicious.
(d) There is fraud.

The rule has been substantially codified by statute and third parties or outsiders dealing with a company are entitled to presume that all is regular that appears regular with the company except the third party or outsider had actual knowledge to the contrary or if, having regard to his position with or relationship to the company, he ought to have known the contrary.[131]

Rights of the Other Party under the Ultra Vires Doctrine

The learned authors Prof Idubor and Matthew Adefi appeared to have captured the rights available to a third party under the doctrine of *ultra vires*[132]as follows:

- ..if money is lent to a company on an *ultra vires* borrowing and the company uses it or part of it to pay off legitimate indebtedness the lender is entitled to equity to rank as creditor to the extent which the money has been so applied. In other words he is subrogated to the right of the legitimate creditors who have been paid off.

[131]*Supra.*
[132] In their paper titled Trends in the Concept of *Ultra Vires:* The Nigerian Rethink, Global Journal of Politics and Law Research Vol.3, No.3, pp.121-128, June 2015.

- the lender in an *ultra vires* loan transaction has the right at common law and inequity to trace his money since the money has always been his own as the company cannot be a party to an *ultra vires* act[133]
- if the money is used to purchase a particular asset, he is entitled to recover the property purchased.[134]
- the third party may have a personal claim against the directors or other agents of the company for restitution.

Reform of Doctrine of *Ultra Vires* and Constructive Notice

The hardship and injustice arising from the twin doctrines of *ultra vires* and constructive notice led to widespread agitation for reform. The courts on their part tried to ameliorate the harshness by narrowing the scope; e.g. by distinguishing between objects and powers and deciding that whatever may fairly be regarded as incidental to or consequential to the attainment of its authorized objects ought not (unless expressly prohibited) be held by judicial construction to be *ultra vires.*[135]

In 1944 the Cohen Committee described it as an "illusory protection for the shareholder and yet may be a pit-fall for third parties dealing with the company"[136]. The Jenkins Committee described it as "a trap for the unwary third party and a nuisance to

[133] *Sinclair v. Brougham* (1914) AL. 398 p126.
[134] *Supra.*
[135]A. *G. v Great Eastern Railway Co* (1880) 5 App. Cases 473.
[17]n.13.

the company itself"[137]. The Nigerian Law Reform Commission also considered it and came up with a reform of the doctrine. In review of the negative relevance of the doctrine, there was statutory intervention as can be seen in the provision of the Companies And Allied Matters Act (CAMA) 1990. It states:

> "Except as mentioned in section 223 of this Act, regarding particulars in the register of particulars of charges, a person is not deemed to have knowledge of the contents of the memorandum and articles of a company or of any other particulars, documents, or the contents of documents merely because such particulars or documents are registered by the commission or referred to in the particulars or documents so registered, or are available for inspection at an office of the company"[138]

The above statutory provision effectively abolished the constructive notice doctrine as far as presumption of knowledge is concerned. Consequently, the following statutory provisions were enacted; S.43 (1) of CAMA which provides *inter alia*:

> "Except to the extent that the company's memorandum or any enactment otherwise

[18]n.13.
[138]S. 92 Companies And Allied Matters Act 2020.

> provides, every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity"[139].

Prima facie, this provision codifies the common law position[140]. The company now has full powers of a natural person of full capacity in the attainment of its set goals. This need not be expressed in its memorandum or articles of association as it would always be implied as incidental or necessary. Power is the means to achieving an end which is the object of the company; i.e. the purpose for which the company was formed. Implying or attributing the power becomes automatic to enable the company achieve its goal. The proper exercise of the company's power is thus no longer subject to the *ultra vires* doctrine leaving the doctrine to focus on the company's objects which we will now consider.

In relation to Objects S.44 (1) CAMA provides that: "*A company shall not carry on any business expressly prohibited by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act"*[141].

S. 44 (2) CAMA provides that:"*A breach of sub-section (1) may be asserted in any proceeding under sections 344-354 of this Act or under subsection (4) of this section*"[142].

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[19] S. 43(1) Companies And Allied Matters Act 2020.
[140]n.16.
[21]S.44(1) Companies And Allied Matters Act 2020.
[142] *Ibid.* s. 44(2).

S. 44(4) CAMA provides that;

"On the application of-

(a) any member of the company, or

(b) the holder of any debenture secured by a floating charge over all or any of the company's property or by the trustee of the holders of any such debentures, the Court may prohibit, by injunction, the doing of any act, conveyance or transfer of any property in breach of subsection(1)..

What the above means is that an object will be considered *ultra vires* when the memorandum expressly prohibits it and where there is no such restriction, the company is not limited in its object. Is it then safe to say that a company need not state a list of objects as what is now required is a list of prohibited objects? In other words, is a company free to embark on any venture as long as it is not expressly prohibited?[143]

S. 35(1) CAMA provides as follows; "*Unless a company's articles specifically restrict the objects of the company, its objects are unrestricted*."[144]

Before a conclusion can be drawn on whether there is still need for company objects to be stated, it is necessary to consider other sections of the act namely;

S.36 (1) To register a company under CAMA, "the memorandum of association shall be delivered to the Commission together with

[143]S. 44(4) Companies And Allied Matters Act 2020.
[144]*Ibid* s. 35(1) .

an application for registration of the company, the documents required by this section and a statement of compliance".[145]

And S. 27(1) provides that the memorandum of association of every company shall state-

the nature of the business or businesses which the company is authorised to carry on, or, if the company is not formed for the purpose of carrying on business, the nature of the object or objects for which it is established;"[146]

Section.41(1) provides that the Commission shall register the Memorandum and Articles unless in its opinion-

(b) the business which the company is to carry on, or the objects for which it is formed, or any of them, are illegal;…..(5) Upon registration of the memorandum and articles, the Commission shall certify under its seal- (a) that the company is incorporated;"[147]

An analysis of the above shows that to register a company, a memorandum of association is required and the memorandum must have an objects clause. The Act also provides that a company shall not engage in prohibited acts and where it does, the court on the application of any member, may by injunction or by declaration

[145]*Ibid* s.36(1).
[146]S. 27(1) and © Companies And Allied Matters Act 2020.
[147]*Ibid*, ss. 41(1) and (b),5 and (a).

restrain the company from doing so[148] What then is the effect of S.35 (1) CAMA which prescribes unrestricted objects for the company.?

Under S.35 (2) CAMA, a company is obliged to notify and register with the Commission, an alteration of its statement of objects. This further confirms the need for a company to have a list of objects. However, S.44 (3) provides that;

> Notwithstanding the provisions of subsection (1), no act of a company, conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was not done or made for the furtherance of any of the authorized business of the company or that the company was otherwise exceeding its objects or powers.[149]

It is submitted that SS.35 (1) and 44(3) CAMA are in direct conflict with the *ultra vires* doctrine coming short of abolishing it. While the same sections provide for a list of objects and codify the doctrine[150] It makes the company's objects open ended and saves otherwise *ultra vires* transactions that have been consummated. So the *Ultra Vires* rule is expressly retained as an internal corporate

[148]*Ibid*, s.44(1),(2),(4) and (5).
[149]S. 44(3) Companies And Allied Matters Act 2020.
[150]*Ibid*. ss. 35(2) and 44(1)

management policy under S.44 (1) and all *Ultra Vires* acts are validated as regards third parties by S.44 (3) and without actual notice by S.93 (a).[151]

The strongest protection for the creditor who deals with a company is contained in S.44 (3) the effect of which is that the common law position that a contract which is *Ultra vires* is void has been reversed.

It is therefore submitted that the combined effect of S35(1), S.92, S.93 and S.44 (3) is that a person dealing with the company in good faith is protected from *ultra vires* acts of the company and its directors. The company's objects are no longer restricted and need not be long.

So when asked whether the Companies and Allied Matters Act, 2020 abolished the doctrine of *ultra vires*, the answer is neither a categorical YES nor NO.

Conclusions

The clear position is that though S.44 (1) half-heartedly retains the doctrine of *ultra vires*, it is now restricted to internal management policy and cannot affect outsiders who engaged in business with the company in good faith. The restraint provided by S.44 (1) is relaxed by S.44 (3) which expressly protects third parties dealing with the company in good faith from *ultra vires* acts of the company and its director.

[151] *Ibid.* s. 93(a).

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