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Editor's Note

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The BIUJPPL recognizes the importance of diverse areas of law to the body of legal knowledge. Hence, we have an excellent array of authors presenting different and related perspectives on contemporary issues of law. The different articles discuss emerging trends and challenges in the areas of access to the sea by Landlocked states, Contemporary Judicial interpretation of Oil and Gas Drilling contracts, Enhancing access to essential medicines, the remuneration and promotion possibilities of judges, Offshore jurisdiction Dichotomy , the burden and standard of proof in electoral cases, Polluters liability in Oil pollution cases, Sexuality education, Domestic violence, Rape, Trade Unions, Ownership claims in Outer space, the relationship between IHL and IHRL during armed conflicts and the exemptions to the right of access to information under the FOI Act.

Therefore, Volume 2 of BIUJPPL is an invaluable compendium of intellectual research which our readers will find very useful. We hope you enjoy this Volume and consider submitting your own article for future publication in our journal.

Ndubuisi J. Madubuike-Ekwe

Editor-in-Chief

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ACCESS TO THE SEA BY LANDLOCKED STATES: AN EXAMINATION OF THE RELEVANT RULES IN INTERNATIONAL LAW

A.K. Anya*

N.J. Madubuike-Ekwe**

Abstract

Landlocked state is a state which has no sea coast. Landlocked states get access to the sea through the territory of their neighbouring states known as transit states. This paper examines the problem of Landlocked states both in terms of access to the sea and the freedom of transit through neighbouring transit states under the United Nations Convention on Law of the of Sea (UNCLOS). The authors argue that the right to free access to the sea is basically derived from a fundamental principle of international law premised on sovereign equality of all states. The paper focuses on the access to and from the sea by landlocked states under UNCLOS III. It examines the rights of a landlocked state to access the sea and freedom of transit provided for in the Convention. Furthermore, the authors also discussed other incidental rights associated with landlocked states, which invariably relates to the freedom of the high seas as a common heritage of mankind. In considering the foregoing, the authors focused on the relevance of bilateral and multilateral agreements between the landlocked states and the neighbouring transit states as a high threshold in enabling the landlocked states enjoy the full benefits of the rights conferred on it by the provisions of the convention. The authors conclude by highlighting the importance of the UNCLOS to the plight of landlocked states and recommended that to enjoy these rights, a landlocked state must enter into a bilateral and multilateral agreements with the neighbouring transit state. Furthermore, it is maintained that even if an agreement exists, the enjoyment of these rights is determined by the relationship between the landlocked state and the neighbouring transit state.

Keywords*: Agreements, Landlocked, State, Coastal, Transit, Sea, Freedom, bilateral, multilateral*

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I. Introduction

The sea is second to none among God's endowment to man. It plays a very important role in international intercourse because of manifold uses to mankind. The seas have historically performed two important functions: first as a medium of communication, and secondly as a vast reservoir of resources, both living and non-living. Both of these functions have stimulated the development of legal rules governing the seas.[1] Among these, currently, the most relevant one is the United Nations Convention on the Law of the Sea.[2] Nearly One-fifth of the states of the international community are states without access to or from the sea, that is to say, states that do not possess a coastline.[3] By virtue of their geography, these states do not have access to marine resources.[4] Notwithstanding this inadequacy, the regime of Public international Law has strived to correct these factual inequalities by establishing a specific legal regime in favour of these states without access to and from the sea to provide freedom of access and the right to use the sea.[5]

The aim of this article is to examine the rules relating to Access to the sea by landlocked states under the UNCLOS and how these states may realise these rights conferred on them in practical terms. The paper will not focus on a particular landlocked state but rather on the problem of

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[1] Malcolm N. Shaw, International Law, 5th ed. (United Kingdom:Cambridge University Press; 2003) p. 490

[2] The United Nations Convention on the Law of the Sea, 1982 (UNCLOS) at http://www.un.org/Depts/los/convention-agreements/texts/unclos/unclos_e.pdf Accessed 03/05/2019 (Hereinafter UNCLOS, 1982)

[3] Afghanisatan, Andorra,Armenia, Artsakh, Austria, Azerbaijan, Belarus, Bhutan, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Czech Republic, Ethiopia, Hungary, Kazakhstan, Kosovo, Kyrgyzstan, Laos, Lesotho, Liechtenstein, Luxembourg, Macedonia, Malawi, Mali, Moldova, Mongolia, Nepal, Niger, Paraguay, Rwanda, San Maino, Serbia, Slovakia, South Ossetia, South Sudan, Swaziland, Switzerland, Tajikistan, Transnistria, Turkmenistan, Uganda, Uzbekistan, Vatican City, West Bank, Zambia, Zimbabwe: See Central Intelligence Agency, The World Factbook **at** https://www.cia.gov/LIBRARY/publications/the-world-**factbook/fields/print-2060.html** accessed 24/05/2019 See also World Population Review, " Landlocked Countries, 2019" at worldpopulationreview.com/countries/landlocked-countries/ accessed 24/05/2019.

[4] Uprety, Kishor (1994) "Landlocked States and Access to the Sea: An Evolutionary Study of a Contested right", Penn State International Law Review, vol. 12 no. 3, Article 2, p. 12.

[5] Ibid.

landlocked states in general. The paper is divided into six parts. Part I is the introduction. Part 2 is the definition of concepts such as landlocked states, transit states etc. Part 3 discusses the rights of landlocked states to and from the sea under the UNCLOS III. Part 4 examines the other rights of Landlocked states including those related to the freedom of the High seas and the common heritage of mankind. Part 5 discusses the relevance of bilateral and multilateral agreements between the Landlocked states and the neighbouring transit states. Finally, Part 6 concludes the paper by highlighting that these rights are dependent upon an agreement between the Landlocked states and the neighbouring transit states. As such, even where an agreement exists, the enjoyment of these rights by Landlocked states are determined by the relations between the landlocked state and the neighbouring transit state.

1. Definition of Concepts

Article 124 (1) (a) of the UN Convention of the Law of the sea defines a landlocked state as 'a state which has no sea-coast.' This simply means that a land-locked state is a state without a sea coast; instead, it depends on its neighbouring state (s) to have access to the sea.[6] In other words, landlocked states rely on "transit states" which is 'a state with or without a sea coast, situated between a landlocked state and the sea, through whose territory traffic in transit passes[7]. Thus landlocked states are those states which get access to the sea through the territory of their neighbouring states known as transit states. They move persons, baggage, goods and other freights through the land of transit states. For example, Cameroon is a transit state for Chad, Tanzania is a transit state for Uganda, Rwanda and Burundi. India and Bangladesh are transit states for Nepal, Argentina together with other South American states is transit state for Bolivia and Djibouti is also the most important transit state to Ethiopia. The "means of transport" means 'railway rolling stock, sea, lake and river craft and road vehicles; where local conditions so require, porters and pack animals.'[8] However, landlocked states and transit states may by agreement between them include as a means of transport pipelines and gas lines and

[6] E. Bayeh, The Rights of Land-locked States in International Law: The role of Bilateral/Multilateral Agreements.Vol. 4, No. 2, 2015, pp. 27-30 at http://www.sciencepublishinggroup.com/j/ss accessed 23/08/2018
[7] Article 124 (1) (b) of UNCLOS
[8] Article 124 1 (d) (i) and (ii) of UNCLOS.

means of transport other than those included in Article 124 (1) of the UNCLOS.[9]

2. The Rights of access to and from the Sea and freedom of transit

Article 125 of the UNCLOS guarantees the right of access to and from the sea and freedom of transit to landlocked states. It clearly provides that this right of access and freedom of transit shall be for the purpose of exercising the rights provided for in the convention such as 'the freedom of the High seas and the common heritage of mankind'. Thus, Article 125 provides:

> *"1.Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the High seas and the common heritage of mankind. To this end, land-locked states shall enjoy freedom of transit through the territory of transit States by all means of transport.*
> *2. The terms and modalities for exercising freedom of transit shall be agreed between the landlocked States and transit States concerned through bilateral, sub-regional or regional agreements.*
> *3. Transit States, in the exercise of their full sovereignty over their territory shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for Land-locked States shall in no way infringe their legitimate interests."*

Additionally, UNCLOS provides for equal treatment of ships flying the flag of landlocked states:

3.1. Article 131- Equal treatment in maritime ports

> "Ships flying the flag of land-locked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports."

Freedom of transit is further ensured by the provisions of the UNCLOS that prohibit transit states to levy customs duties, taxes, and other charges on traffic in transit,[10] or to subject means of transport in transit to

[9] Ibid, Art. 124 (2)
[10] Article 127 (1) of UNCLOS

higher taxes or charges than those customary in the transit state;[11] preferential treatment of specific nations is prohibited as well.[12]Transit states have the obligation to 'take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit'[13] If such delays or difficulties occur anyway, the authorities of the transit state are asked to cooperate in eliminating such difficulties.[14] These minimum requirements however, do not preclude agreements between transit and landlocked states to go beyond what is provided for in the Convention.[15] Accordingly, in addition to the means of transport listed in the UNCLOS (railway rolling stock, sea, lake and river craft, road vehicles, porters and pack animals)[16] the states in question may also agree to include pipelines and gas lines as well as other means of transport.[17]

Thus, landlocked States are to enjoy freedom of transit through the territory of transit States by all means of transport. A transit state in this sense means a state with or without a sea-coast, located between a landlocked state and the sea, through whose territory traffic in transit passes.[18] The right of access to and from the sea and freedom of transit are concomitant of other rights guaranteed by the Conventions. Such other rights include those relating to the freedom of the High Seas and the Common heritage of mankind. Thus where such other rights guaranteed by the Convention are to be exercised, the right of access to and from the sea and freedom of transit will follow.

Therefore, landlocked states have the right of access to and from the sea and freedom of transit to enjoy rights conferred on them by the Convention. This right has also been reaffirmed by the United Nations General Assembly in Res. 46/212 of 20 December, 1991.[19]

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[11] Ibid, article 127 (2)
[12] Ibid, article 126
[13] Ibid, art. 130(1).
[14] Ibid, art. 130 (2).
[15] Ibid, arts. 126, 129, and 132.
[16] Ibid, art. 124 (10 (d)
[17] Ibid, art. 124 (2).
[18] Ibid, article 124 (1) (b).
[19] Bayeh (n.6)

3.2. Right of Access and Transit under Customary Law

Prior to the UNCLOS III a right of transit might be posited as a general principle of law in itself [20] or on the basis of principle of servitudes [21]or other general principles of Law. By Treaty or otherwise, a state might have accommodation rights over the Territory of a neighbour in the form of a right of way, user of a railway station or port facilities, maintenance of wireless station, customs houses, or military bases, and so on. Again, the rights might take the form of an obligation on a neighbour to abstain from building in a given zone or from militarization of a defined area. However, notwithstanding this, it was controversial whether there was a general right of access under customary international law. In any case, there was no such customary right that did not require reciprocity, other compensation, or specific agreements between landlocked and transit states. Frequent denials of transit rights on the one hand and considerable treaty practice in this regard on the other suggested significant doubt on the existence of customary law in general. However, local customary rules may have existed and were also confirmed by the International Court of Justice in the *Right of Passage Case*[22] in 1960.[23]

With the codification of the right of access to the sea and the freedom of transit in the UNCLOS, these very rights may have become customary international law. Firstly, because the UNCLOS as a whole is considered by some to have gained the status of customary international

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[20] See Farran, 4 I.C.L.Q. (1955) 294 at 304.

[21] The title "servitudes" denotes only an area of problems, and its use as a legal category is a matter of controversy. The subject has been regarded with great caution by tribunals, although they have not rejected the concept in principle- see The North Atlantic Fisheries Arbitration (1910) R.I.A.A. XI 167. See also, Judge Moreno Quintana's dissenting opinion in The Right of Passage Case, I.C.J. Reports (1960) p. 90. Helen Dwight Reid in International Servitudes In Law And Practice (1932) p. 28 defines an international servitude as "a real right whereby the territory of one state is made liable to permanent use by another state for some specified purpose. The servitude may be permissive or restrictive, but does not involve any obligation upon either party to take positive action. It establishes a permanent legal relationship of territory to territory, unaffected by change of sovereignty in either of them, and terminable only by mutual consent, by renunciation on the part of the dominant state, or by consolidation by the territories affected".

[22] Right of Passage Case (Portugal v India) 12 April, 1960, ICJ Rep. 6.

[23] R.R.Churchill & A.V. Lowe, *The Law of the Sea, 3rd ed.* (Manchester; Juris Publishing Inc., 1999) p. 440; D.R.Rothwell and T.Stephens (Oxford; Hart Publishing, 2010) p. 197.

law[24]and secondly, because of the widespread practice between landlocked and transit states and the assumption of *opinion juris* based therein[25].

4. Other Rights of Landlocked States Under UNCLOS

Article 125 (1) of the Convention provides that "*Landlocked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind".* Hence, to understand the rights of landlocked states on the sea, it is necessary to look at their rights on the different maritime zones.

4.2. **Territorial Sea/ Right of Innocent Passage**: The Convention guarantees in favour of ships of every state, including landlocked states, the right of innocent passage through the territorial sea. The Territorial sea extends up to 12 nautical miles, measured from the baselines determined in accordance with this Convention.[26] Article 17 provides that: *"Subject to this Convention, ships of all states, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea."* Landlocked states also enjoy the right of transit passage through straits[27] which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.[28] Therefore landlocked states have a right of innocent passage through the territorial sea. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state[29] and must be in accordance with the UNCLOS and other rules of international law.[30]

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[24] For e.g., Sohn, L.B., (1984-1985) *The Law of The Sea: Customary International Law Development*. In: 34 Am.U. L. Rev. 271, p. 271-273.

[25] Anina Maurer, "Landlocked States and the Protection of the Marine Environment- with Special Emphasis on Switzerland" (2012) Masters of Laws in Law of the Sea, Faculty of Law, University of Tromoe; Shaw, M., *International Law*, 5TH ed. (United Kingdom: Cambridge University Press, 2003) p. 80; B. Chang, 'Opinio juris: A Key Concept in International Law that is Much Misunderstood', in *International Law in the Post-Cold War World* (eds. S. Yee and W. Tieya) London, 2001, p. 56; See The *Lotus Case*, PCIJ, Series A, No. 10, 1927, p. 18; 4 A.D., p.153.

[26] Article 3 of UNCLOS

[27] Article 38(1)

[28] Article 37

[29] Article 19(1)

[30] Ibid.

4.3. **Exclusive Economic Zone**: Article 57 extends exclusive economic zone up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In the Exclusive economic zone (EEZ), landlocked states can exercise right of access under two instances provided by articles 58 and 69 respectively.

A. **Enjoyment of Three Freedoms in the EEZ**

Article 58(1) provides:

> *In the exclusive economic zone, all states, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.*

Article 87 guarantees six freedoms of the High seas which are exercisable by all states, whether landlocked or coastal, in the High Sea which excludes the exclusive economic zone.[31] Thus, out of the six freedoms of the High seas, article 58(1) provides for the first three to be exercisable in the exclusive economic zone by all states, whether landlocked or not. These three freedoms are: Freedom of navigation; freedom of overflight and freedom to lay submarine cables and pipelines. Article 88 to 115 of the Convention and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with Part V which deals with exclusive economic zone.[32]

The enjoyment of the three freedoms in the EEZ and their related internationally lawful uses carry with it some correlative duties. The landlocked or other states shall have due regard to the rights and duties of the coastal state.[33] Also, such landlocked state must comply with the laws and regulations adopted by the coastal state in accordance with the

[31] Article 86 of UNCLOS

[32] Article 58 (2) of UNCLOS

[33] For the Rights, jurisdiction and duties of the coastal state in the exclusive economic zone to be taken into consideration, see Article 56 of the Convention.

Convention and other rules of international Law. Such laws and regulations adopted by the coastal state must not be incompatible with the provisions of the Convention on the exclusive economic zone.[34]

B. Access to exploitation of Surplus Living Resources of the EEZ Left unexploited by Coastal states

Where a coastal state does not have the capacity to harvest the entire allowable catch in the EEZ, it shall by agreement give landlocked states access to the surplus. Thus, Article 69(1) provides:

> Landlocked States shall have the right to participate on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of the coastal states of the same sub region or region, taking into account the relevant economic and geographical circumstances of all the states concerned and in conformity with the provisions of this article and of Articles 61 and 62.

However, the right guaranteed to the landlocked states by Article 69 (1) is restricted to surplus of the living resources of the EEZ of the coastal state.[35] Geographically disadvantaged states have the same right.[36]To enjoy these rights, a landlocked state must comply with some conditions:

(a) The coastal state concerned must be within the same sub-region or region.
(b) The relevant economic and geographical circumstances of all the states must be taken into account by the landlocked states.
(c) The participation in the surplus is on equitable basis.

[34] Article 58 (3) of UNCLOS
[35] Shaw (n.1) p.542.
[36] Article 70 (1). Geographically disadvantaged states are defined in article 70(2) as 'states, including states bordering enclosed or semi enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other states in the subregion or region for adequate supplies of fish for nutritional purposes of their population or parts thereof, and coastal states which can claim no exclusive economic zone of their own'.

(d) The exercise of right to participate in the surplus must not go contrary to the provisions of Articles 61 and 62 of the Convention. Article 61, inter alia, gives the coastal state the right to determine the allowable catch of the living resources in its EEZ.[37] Article 62 (2) enjoins then coastal state to ensure through proper conservation and management measures that the maintenance of the living resources of the EEZ is not endangered by over-exploitation. Thus, where the participation in the surplus by a landlocked state will result in over exploitation, the coastal state is not likely to give access to such landlocked state to participate in exploitation of the surplus of the living resources. The coastal state must determine its capacity to harvest the living resources of the EEZ,[38] and must promote the objective of optimum utilization of the living resources in the EEZ

However, where the coastal state does not have the capacity to harvest the entire allowable catch, such coastal state shall give landlocked states access to the surplus of the allowable catch.[39] The giving of access to the surplus of the allowable catch may be by agreement or other arrangement.[40] In giving access to the surplus of the allowable catch regard must be had to the provisions of Articles 69 (on landlocked states) and Article 70 (on geographically disadvantaged states) especially in relation to the developing states mentioned therein[41]

The coastal state must consider some factors in giving access to landlocked states for the purpose of participating in the surplus of allowable catch in its EEZ. These factors include:

(a) The significance of the living resources of the area to the economy of the coastal state concerned and its other national interests.
(b) The provisions of Articles 69 and 70.

[37] Article 61(1) of UNCLOS
[38] Article 62(2) of UNCLOS
[39] Ibid.
[40] Ibid.
[41] Ibid.

(c) The requirements of the developing states in the sub region in harvesting part of the surplus.
(d) The need to minimize economic dislocation in states whose nationals have habitually fished in EEZ or which have made substantial efforts in research and identification of stocks.[42]

Onerous duty of compliance with the conservation measures and with other terms and conditions established in the laws and regulations of the coastal state is placed on the nationals of any landlocked states fishing in the EEZ.[43] Due notice of such conservation and management laws and regulation must be given by the coastal states.[44]

For purposes of granting access to landlocked states to partake in exploitation of surplus living resources, the concerned states are enjoined to establish, through bilateral, sub regional or regional agreement, the modalities and forms of participation of landlocked states in the unexploited surplus of the living resources of the EEZ.[45] In entering such agreement, the following factors should be taken into account:

(a) The need to avoid effects detrimental to fishing communities or fishing industries of the coastal state;
(b) The extent to which the landlocked state is participating pursuant to Article 69 or is entitled to participate under existing bilateral, sub- regional or regional agreements in the exploitation of living resources of the exclusive economic zones of coastal states;
(c) The extent to which other landlocked states and states with special geographical characteristics are participating in exploitation of living resources of EEZ of the coastal state and the consequent need to avoid a particular burden for any single coastal state or part of it;
(d) The nutritional needs of the populations of the respective states.

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[42] Article 62 (3) of UNCLOS
[43] Article 62 (4) of UNCLOS
[44] Article 62 (5); Ogundele, O.L., "A critical examination of the rules relating to Access to the Sea by Land-locked States", A Seminar paper presented to the LL.M. Class on Law of The Sea , 1995, Faculty of Law, Obafemi Awolowo University, Ile Ife, p. 23.
[45] Article 69 (2) of UNCLOS

Therefore landlocked states shall have the right to participate on an equitable basis, in the exploitation of an 'appropriate part of the surplus of the living resources' of the exclusive economic zone of coastal states.

4.4. High Seas

> The High seas means, "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal n waters of a state, or in the archipelagic waters of an archipelagic state".[46] Like other maritime zones, the high sea are a regime where landlocked states are allowed to exercise considerable rights. The high seas are beyond the national jurisdiction of any state. Article 89 of the convention provides that no state can claim sovereignty over any part of the high seas. Article 87 affirms that , "the high seas are open to all states, whether coastal or landlocked." The convention under the same provision guarantees the freedom of the High seas for both coastal and land-locked states thus:
>
> > (a) Freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; € freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII.

These freedoms are to be exercised with due regard for the interests of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under the Convention regarding activities in the international Seabed Area.[47] Therefore landlocked states have significant rights on the high seas equal to that of coastal states.[48] Furthermore, Article 90 of the Convention provides that: " *Every State, whether coastal or landlocked, has the right to sail ships flying its flag on the high seas."* Thus the convention allows landlocked states to equally sail ships flying their

[46] Article 86 of UNCLOS
[47] Article 87(2); Shaw (n.1) p.543.
[48] Bayeh (n.6)

flags on the high seas as coastal states.[49] Given that no state can claim exclusive jurisdiction over the high seas.[50]

4.5. The Area/ International Seabed Regime

Under the convention, the Area[51] and its resources are deemed to be the common heritage of mankind[52] and no sovereign or other rights may be recognized[53]. Thus:

> *All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this part and the rules, regulation and procedures of the Authority.[54]*
>
> *No state or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise no such claims, acquisitions or exercise of such rights shall be recognized.[55]*

Therefore landlocked states have the same rights as coastal states in the resources of the Area. More importantly, article 148 of the convention promotes the effective participation of landlocked states in the activities of the Area having due regard to their special need. It states that:

> *The effective participation of developing states in the activities in the Area shall be promoted as specifically*

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[49] Ibid
[50] UNCLOS, art. 89.
[51] The Area is defined in article 1 as the 'seabed and ocean floor and subsoil thereof beyond national jurisdiction'. This would start at the outer edge of the continental margin or at least at a distance of 200 nautical miles from the baselines. See also Shaw (n.1) p. 561; Madubuike-Ekwe, N.J., "The Freedom of the High Seas: Development and Perspectives in International Law" in Chris C. Wigwe (ed.), *Readings in Law and Contemporary Issues* (Port Harcourt, Faculty of Law, Rivers State University,2018) 145.
[52] UNCLOS art. 136.
[53] Ibid, art. 137(1).
[54] Ibid, art. 137(2).
[55] Ibid, art.137 (3).

> *provided for in this Part, having due regard to their special interests and needs and in particular to the special need of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.*

Therefore landlocked states can effectively participate in the activities in the Area. With regard to the provisions concerning the international seabed regime, Article 152 of the Convention provides that the authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area. "Nevertheless, special considerations for developing states, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided for this Part shall be permitted".[56]

5. The Relevance Bilateral and Multilateral Agreements

All aspects of the freedom of transit mentioned above are limited by the fact that transit states exercise full sovereignty over their territory. Thus a transit state may act to protect its legitimate interests and based on that insist that agreements regarding terms and conditions for exercising the freedom of transit be made.[57] According to Bayeh "To enjoy all those rights mentioned above, landlocked states need to make agreement with the transit states. Securing access to the sea is the backbone of enjoyment of the entire rights on the sea."[58]

Though landlocked states are given the legal right of access to and from the sea and the freedom of transit under article 125 (1), such rights can only be given effect through bilateral, sub regional or regional arrangements.[59] Hence, section 125 (2) provides that '*the terms and modalities for exercising freedom of transit shall be agreed between the landlocked States and transit States concerned through bilateral, and sub-regional agreements.'* Thus, even though one cannot deny the relevance of

[56] Article 152 (2); See also articles 160 and 161
[57] Ibid art.125 (2)-(3).
[58] Bayeh (n.6) p. 29.
[59] UNCLOS art. 125 (2).

international law of the sea to the land locked states' overall rights on the sea, the fact remains that the very enjoyment of those rights is contingent upon the negotiation to be made between land-locked and transit states.[60] According to Shaw, "it will thus be seen that there is no absolute right of transit, but rather that transit depends upon arrangements to be made between the landlocked and transit states. Nevertheless, the affirmation of a right of access to the sea coast is an important step in assisting landlocked states."[61]

Thus, the rights provided for in Article 125 (1) is not an absolute right but should be considered along with sub article 2 and 3 of the same article.[62] Article 125 (3) states that *"transit states in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for landlocked States shall in no way infringe their legitimate interests."* Therefore, it is arguable that the Convention does not put a commitment on the transit states to refrain from creating constraints for landlocked states as sub article 3 gives complete rights to the transit states to take all measures necessary to ensure that the transit of landlocked states in no way contravenes their legitimate interests, though whether it is possible to totally stop passage or on certain occasions is not clear.[63] Hence, the legal, administrative and political adjustments in the neighbouring states can be hindrances to the landlocked states access rights under the guise of legitimate interest.[64]

Access to the sea opens the door for international trade. For landlocked states, access to the sea is linked to the question of transit. Persons and property originating from landlocked states and directed toward the coast or entering landlocked states from the sea must pass through the territories of bordering countries.[65] In other words, the access of these states to the principal maritime ways always is naturally indirect;

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[60] Bayeh (n.6), p. 28.
[61] Shaw(n.1) p. 541
[62] Diba, Bahman Aghai, (2014) "Iran and Landlocked States" at http://www.payvand.com/news/14/dec/1111.html. Accessed 24/02/2019
[63] Bayeh (n.6) p.28.
[64] Ibid.
[65] Uprety, Kishor (1994) "Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right," Penn State International Law Review: Vol.12 No.3, Article 2 available at http://elibrary:law.psu.edu/psilr/vol12/iss3/2 accessed 15/06/2019

their position obliges them to borrow the territory of other states.[66] All aspects of the freedom of transit mentioned above are limited by the fact that transit states exercise full sovereignty over their territory. Therefore a transit state may act to protect its legitimate 'interests' and based on that insist that agreements regarding terms and conditions for exercising the freedom of transit be made.[67]

The language of Article 125 is rather ambiguous. It guarantees an apparently enforceable freedom of transit, but one that can only be given effect through bilateral, sub-regional or regional arrangements.[68] Freedom of access to the sea for landlocked states is balanced against territorial sovereignty of transit states. Hence the freedom of transit exists independently of any arrangement between landlocked and transit states, but exactly such agreement is necessary for freedom to be given effect to in practice. For example, Ethiopia is dependent on the transit routes of Djibouti to access the sea when it became a landlocked state following the secession of Eritrea and because of the Ethio-Eritrean war.[69] The bilateral agreements between Ethiopia and Djibouti helped Ethiopia to enjoy the port of Djibouti and other related services.[70]

Landlocked countries depend on strong political relations with transit countries.[71] If a landlocked country and its transit neighbour are in conflict, either military or diplomatic, the transit neighbour can easily block or adopt regulatory impediments to trade. Even when there is no direct conflict, landlocked countries are extremely vulnerable to the political vagaries of their neighbours.[72] The problems arising from this situation may be illustrated by the experience of Nepal to show how much a Landlocked country suffers from economic or political pressures exerted by a neighbouring country over which the majority of its foreign trade must travel. In 1950, through a bilateral trade treaty, the Indian government recognized the full, unrestricted right of transit to Nepal over

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[66] Ibid.
[67] Art. 125 (2) and (3).
[68] Maurer (n.25) p. 10.
[69] Bayeh (n.6) p. 29.
[70] Ibid.
[71] M. L. Faye *et al*., "Challenges facing Landlocked Developing Countries" Journal of Human Development vol. 5, No. 1, March 2004 at https://doi.org/10.1080/1464988031000166020l accessed 02/05/2019
[72] Ibid.,p. 45.

Indian territory.[73] In 1960, this treaty was replaced by the Treaty of Trade and Transit, which posed the idea of a common market between the two countries. The Treaty was to expire on October 31, 1970.[74] During the 1960's political relations between Nepal and India were harmonizing, whereas Sino-Indian relations had deteriorated.[75] Nepal however, desired to open new avenues to and to strengthen relations with China. A new trade route toward the north was therefore opened. This resulted in a declaration in 1970 negating the idea of a common market between India and Nepal.[76] Because of Nepal's refusal to consent to the formation of a common market and because of the uncertainty of Sino-Indian relations, India refused to negotiate a new trade treaty. This had a very serious effect on the Nepalese economy.[77]

Similarly, Ethiopia, the most populous landlocked country on earth with a population of over 100 million, lost access to its coastline when Eritrea seceded in 1993 following its conflict with Eritrea.[78] This impeded its economic growth and limited Ethiopia's efforts to achieve middle income status via export oriented industrialization. [79] Furthermore strained relations between Addis Ababa and Asmara forced Ethiopia to rely on neighbouring Djibouti for most of its trade. Infact, 95% of Ethiopia's imports and exports pass through this country of less than one million.[80]

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[73] Treaty of Trade and Commerce, July 31, 1950, India-Nepal. The Indo-Nepal Treaty established Nepal's right to trade with overseas countries through any indian port and territories. The government of india agreed to allow goods imported through any indian port for export to Nepal to pass without the payment of duties. See Uprety(n 65) p. 406.
[74] Treaty of Trade and Transit, Sept. 11, 1960, India and Nepal, reprinted in D. Bhattarai and P. Khatiwada, Nepal-India: Democracy in the Making of Mutual Trust 214-18 (1993). This Treaty provided for mutual, duty-free and license-free access to the respective markets of india and Nepal for goods originating in either country intended for consumption in the territory of the other. See Uprety (n.65)
[75] Uprety, ibid.
[76] Ibid
[77] Ibid.
[78] Keshay Rastogi, " An Emerging and Troubled Power: Overcoming Ethiopia's Landlocked Geography" at http://harvardpolitics.com/columns-old/an-emerging-and-trouble Accessed 27/04/2019
[79] Ibid.
[80] Ibid.

As noted above, under article 69(1) of the UNCLOS, "the landlocked states also have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZs of coastal states in the same sub region or region, taking into account the relevant economic and geographic circumstances of all the states concerned…." The terms and conditions of such participation shall be established by the states concerned through bilateral, sub-regional or regional agreements.[81] Thus, even though Landlocked states have a right of access to and from the sea secured under UNCLOSS III, it's 'right to participate' in the exploitation of the living resources of the EEZ is dependent on agreement with the Coastal state of an exclusive economic zone. It should be noted that the living resources of the sea are negligible compared with its mineral resources, for which the provisions of the UNCLOS III give no right at all.[82] Moreover, this prioritization, defined in relation to an elusive "equitable basis" and in respect of a remnant of resources, the very nature of, which is dependent upon crucial decisions of the coastal state, ensures only an imperfect right.[83]

Therefore, although, there is a legal basis for the rights of landlocked transit as outlined in Article 125 (1) of the United Nations Convention on the Law of the Sea, 1982, in practice, this right of access must be agreed upon with the transit neighbour[84] and is determined by the relationship between the countries.

6. Conclusion

The 1982 United Nations Convention on the Law of the Sea (UNCLOS III) is a welcome development as it has gone a long way in guaranteeing the right of access to and from the sea and the freedom of transit of landlocked states. The right to participate in the exploitation of the surplus

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[81] Article 69 (2) of UNCLOS

[82] K. Uprety, "From Bacelona to Montego Bay and Thereafter: A Search for Landlocked States Rights to Trade through Access to the Sea- A Retrospective Review" (2003) 7 SJICL p. 217-218.

[83] I.J. Wani, "An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States", (1982) 22 Virginia J. Int'l L. 649; Oppenheim*, International Law*, 9th ed., Vol. 1, Sir R. Jennings and Sir A. Watts, eds., at 799.

[84] Article 125(2) and (3) of UNCLOS; See Faye,(n.71)

living resources of the Exclusive economic zone (EEZ) guaranteed by the Convention also goes a long way in alleviating the economic and nutritional needs of such landlocked states. However, these rights are not absolute in that they are dependent upon an agreement between the landlocked states and the coastal states. In other words, for a landlocked state to enjoy these rights it must enter into an agreement with the neighbouring transit state. Furthermore, even if an agreement exists, the enjoyment of these rights is determined by the relationship between the landlocked country and the neighbouring transit Country.

CONTEMPORARY JUDICIAL INTERPRETATION OF OIL DRILLING CONTRACTS IN DISPUTES BETWEEN PARTIES ENGAGED IN THE NIGERIAN OFFSHORE EXPLORATION AND PRODUCTION SECTOR.

Olumide K. Obayemi*
Kelly A. Agbonze**

ABSTRACT

Nigeria's crude oil and gas deposits are now being found in substantial proportion in its deep waters, offshore, and in the territorial sea, and exploration of these offshore petroleum deposits involve the use of oil drilling rigs, which may lead to disputes among the major oil players. Thus, this paper discusses contemporary rules that may guide Nigerian courts and all stakeholders towards solving disputes arising from the leasing, use and operation of oil drilling rigs. Generally, in Oil and Gas (O&G) Exploration and Production (E&P) transactions, contracts are entered into among the major players, under which oil rigs are hired by contractors, from the owners, for drilling oil wells. There have been disputes as to whether "repair rates," "breakdown rates" or "spread costs" are recoverable where the Blow Out Preventer ("BOP") stack in the rig is defective. Therefore, this paper carries out a comparative analysis of governing rules on the above subjects by critically comparing contemporary British common law rules viz-a-viz Nigerian contractual law. In conclusion, the paper proposes that since parties to E&P contracts are always highly sophisticated, Nigerian courts in (i) interpreting E&P contracts; (ii) their awards of damages; and (iii) apportioning liability, must always enforce clear and unambiguous contractual terms that are meant to equally apportion rights and liabilities in the agreements (a knock-for-knock provision scheme), i.e., contractual provisions that are designed to complement each other, containing a detailed and sophisticated scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance.

Keywords: Oil Drilling, offshore, exploration, Contracts, energy, gas.

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I. Introduction

This paper discusses the applicable contemporary rules that *ought* to govern Nigerian courts and all stakeholders in the resolution of disputes arising from the leasing, use and operation of oil drilling rigs. Generally, in Oil and Gas (O&G) Exploration and Production (E&P) transactions, where contracts are entered into among the major players, under which oil rigs are hired by contractors, from the owners, for drilling oil wells, there have been disputes as to whether "repair rates," "breakdown rates" or "spread costs" are recoverable where the Blow Out Preventer ("BOP") stack in the rig is defective.

Over the past fifty (50) years, the O&G drilling business has been on a boom-and-bust roller coaster ride, and the sudden increase of oil prices in the 1970s[1] and the resulting energy crisis transformed a comparatively stagnant business into one of the major international growth industries of that decade.[2] Higher energy prices resulted in increased demand for new and more sophisticated drilling rigs for both onshore and offshore development,[3] and while this demand has been softened over the years, the public's demand for energy brought unprecedented prosperity to the O&G drilling business, [4] with the resulting energy boom greatly increasing the bargaining power of drilling contractors in negotiating drilling contracts. [5] The shortage of drilling rigs, coupled with what seemed to be an unending increase in demand for rigs, drove drilling

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[1]. Dele Sobowale, "From boom to gloom or doom –The Story of Oil (1)," *Vanguard (Nigeria) Newspaper* (Lagos, Nigeria, September 29, 2014). Available at: https://www.vanguardngr.com/2014/09/boom-gloom-doom-story-oil-1/. Accessed on August 28th, 2018.

[2]. Owen L. Anderson, "The Anatomy of an Oil and Gas Drilling Contract," (2013) Vol 25 *Tulsa Law Journal* 359-531, at 362. ("Anderson").

[3] . "Saipem awarded $240m oil drilling contracts." January 18, 2017. Available at: http://www.tv360nigeria.com/saipem-awarded-240m-oil-drilling-contracts/. Last accessed on August 28th, 2018.

[4]. Femi Asu. "Chevron, Shell plan drilling in Nigeria, award contracts," *Punch (Nigeria) Newspaper* (Lagos, Nigeria, July 13, 2017). Available at: http://punchng.com/chevron-shell-plan-drilling-in-nigeria-award-contracts/. Last accessed on August 28, 2018.

[5]. Anderson, *supra* note 2, at 362.

prices to all-time highs,[6] and, thus, drilling contracts, traditionally operator-oriented, have been modified to include more and more provisions favouring the drilling contractor.[7] For some time, there was an oversupply of rigs and the increase in regulation and litigation, leading drilling operations to become riskier and less profitable for the drilling contractor, and although lean times in the oil patch have prompted the O&G industry to increase its efficiency, delays in drilling operations and unanticipated costs are still a major concern to both operators and drilling contractors,[8] with drilling contracts becoming much more detailed in addressing the rights and liabilities of the parties, and, predictably, the party with the greater bargaining power tending to shift most of the risks and burdens onto the other party.[9]

Nigeria is home to several offshore oil drilling and gas development activities requiring the use of exploration equipment and properties, such as oil submersible and semi-submersible drilling rigs. Thus, this Paper attempts to unravel the impact of the recent decision in ***Transocean Drilling UK Ltd v Providence Resources Plc***,[10] and how courts would generally apportion rights and liabilities among owners and hirers of oil rigs in offshore drilling contracts. Offshore drilling contracts take place when contractors (who make holes for the purpose of finding oil) enter into contract with others such as rig owners, professionals, etc, and the equipment used are called "drilling rigs" which help in finding the oil. Drilling rigs come in all shapes and sizes and work both in land and offshore. Drilling rig contracts, which take a similar format around the world, have for years been construed by many as entitling the owners of the drilling rigs (the Hirer), to be paid a day rate—known as a "breakdown" or "repair" rate—while fixing equipment failures which

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[6]. Michael Smith, "Deepwater rig market expected to boom," *Oil & Gas Journal* (Washington, DC, June 15, 1998). Available at: http://www.ogj.com/articles/print/volume-96/issue-24/in-this-issue/drilling/deepwater-rig-market-expected-to-boom.html. Last visited on August 28, 2018.

[7]. Anderson, *supra* note 2, at 362.

[8]. Tom Randall and Blacki Migliozzi, "Watch U.S. Oil Drilling Collapse—and Rise Again," *Bloomberg* (New York, March 2, 2017) available at: https://www.bloomberg.com/graphics/2017-oil-rigs/. Last accessed on August 28, 2018.

[9]. Anderson (n.2) 362.

[10]. ***Transocean Drilling UK Ltd v Providence Resources Plc*** [2016] EWCA Civ 372 (13 April 2016). (***Transocean 2016***).

may have been caused by the owners' own poor maintenance practices.[11] Such a rule also entitles the contractors (lessees) to be paid "spread costs."[12] A typical exclusion clause in the oil rig contract usually states that the owner of the rig would be entitled to repair/breakdown rate irrespective of a pre-existing defect/malfunction in the rig, as the owner would not to be liable for:

> "loss or deferment of production; loss of product; loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials, and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties); loss of business and business interruption; loss of revenue (which for the avoidance of doubt shall include payments due to the owner by way of remuneration under this contract); loss of profit or anticipated profit; loss of and deferral of drilling rights; and/or loss, restriction or forfeiture of license, concession or field interests."[13]

Whether such a rule is counterintuitive, dangerous and contrary to the intention of the parties remains dicey. Part I of this paper is the Introduction. Part II reappraises the nature of Offshore Drilling Contracts. Part III discusses the need to have clear and definitive rules that will govern parties' rights and obligations under oil drilling contracts. Part IV and V examine the London Commercial Court and the Court of Appeal's decisions in *Transocean Drilling UK Ltd v Providence Resources plc*, respectively. Part VI provides the lessons for Nigerian courts. Part VII is the Conclusion.

II. Nature of Offshore Drilling Contracts

Offshore refers to areas of exploration that are situated at sea some distance from the shore, since Nigerian federal law is applicable to the

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[11]. Ted Greeno, "Industry Pulse: Drilling Rig Contracts: No More Paying For Nothing," (2015) Vol. 88(11) *Exploration & Production: World Coverage* 8-9. ("Greeno").

[12]. The spread costs which a lessee of an oil rig may seek to recover are the costs of personnel, equipment and services contracted from third parties which were wasted as a result of the delay

[13]. ***Transocean 2016***, *(n.10)* 3.

coast offshore areas not within unit states' boundaries to the extent permitted by customary international law or treaty and as conferred by Parliament.[14] Pursuant to the United Nations Conference on the law of the Sea (LOS Convention),[15] a coastal state may extend its physical boundaries seaward for up to 12 nautical miles. Nigeria has done so, and consequently, the Nigerian federal government has absolute ownership of the sea and seabed and its content in the territorial sea (being the area extending 12 nautical miles offshore from a baseline drawn along the coastal low water mark and across inlets, but not departing appreciably from the direction of the coast) and exclusive jurisdiction to legislate over this area.

Also, pursuant to Article 77(1) of the LOS Convention and a similar provision in Article 2(1) of the 1958 Geneva Convention on the Continental Shelf,[16] a coastal state has sovereign control but not ownership over the living and non-living resources in its Exclusive Economic Zone (out to 200 miles) and a limited right of sovereignty over non-living resources only on the continental shelf beyond the 200-mile limit.[17] A coastal state also has rights to the natural resources of the Continental Shelf and, specifically, exclusive sovereign rights for the purpose of exploring it and exploiting its natural resources, including mineral resources of the seabed and subsoil.[18] States other than the coastal state are entitled to certain non-exclusive rights on the Continental Shelf, such as navigation, cable laying and fishing rights.[19] Drilling contractor refers to those individuals or group of individuals

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[14]. The ***Franconia case (The Queen v. Keyn (1876), 2 Ex. D. 63)*** set out the basic requirements for domestic law to be applicable in the territorial sea; first, there must be a customary international law or treaty permitting the practise; and second, there must be an Act of Parliament which confers domestic jurisdiction.

[15]. United Nations Conference on the law of the Sea, UN Doc.A/CONF.62/122 (1982) not yet in force [LOS Convention].

[16]. Geneva Convention on the Continental Shelf, 29 April 1958, online: <www.oceanlaw.net/ texts/genevacs. htm>.

[17]. Al Hudec and Van Penick, "British Columbia Offshore Oil and Gas Law," (2003) Vol 41(1) *Alberta Law Review* 101-157, at 109-110. ("Hudec & Penick").

[18]. See, the Lead Judgment by Hon. ML Shuaibu, JCA in ***Lagos State Waterways Authority & Ors vs National Inland Waterways Corporation & Ors.***, Unreported decision of the Nigeria Court of Appeal, EAL NO.: CA/S/886/2014, delivered on July 17, 2017.

[19]. Hudec & Penick (n.17) 110.

who own a drilling rig. Drilling contractors contract their services mainly for drilling wells. Drilling contractors also provide equipment, people and the expertise to drill wells, which can be either offshore or onshore. It is based on this that drilling and exploration are carried out in the Nigerian deep waters, offshore, and in the territorial sea.

In Nigeria, because offshore drilling are usually carried out by International Oil Companies (IOCs), and with such IOCs usually being foreign companies, that have already concluded all the exploration contracts offshore, it follows necessarily that foreign fora and foreign laws are usually designated by the parties as the choice of law and fora to govern all litigation that would arise from such exploration contracts. As a result, there is a dearth of legislative and judicial authorities on the apportionment of damages and/or liabilities that usually arise from drilling contracts, especially where the oil rigs are defective.

The above apart, in Nigeria,[20] if the wording of the clause in a contract is unclear and ambiguous, the *contra proferentem* rule of interpretation shall apply[21] – i.e., it shall be interpreted against the interest of the party seeking to rely on it.[22] Yet, there are questions:

> "Can an exemption clause cover a fundamental breach or a complete non performance by a party? Whilst there is no absolute principle that says such situations cannot be covered, there is a school of thought that argues that such exemption clauses deviate from the whole concept of binding contracts and makes its imply a statement of intent."[23]

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[20]. Ayuli Jemide, "Drafting Boilerplate Clauses in Commercial Contracts 2,"*Detail Solicitors Newsletter* (April 2014). Available at: http://www.detailsolicitors.com/media/archive1/articles/article20.pdf. Last accessed on July 14th, 2018. ("Jemide"); See, also, Azeez Alatoye, et al, "Interests on Intercompany Loans are Allowable Deductions under PPTA - Tax Appeal Tribunal Ruled" *Ascension Newsletter* (2015) Available at: http://ascensioncsng.com/publications/InterestsonIntercompanyLoansareAllowableDeductionsunderPPTA-TaxAppealTribunalRuled.pdf. Last accessed on July 14th, 2018. ("Alatoye").

[21]. See ***Tai Hing Cotton Mill Ltd V Liu Chong Hing Bank Ltd*** (1984) 1 Lloyd's Report 555.

[22]. Jemide (n.20) 3.

[23]. *Ibid*.

Hon. Olatawura JSC has held in ***Kusfa v. United Bawo Construction Co***,[24] that the law should not assist parties to break their contracts with impunity. The extent of the reach of the holding in the ***Transocean*** case is therefore important for the Nigerian stakeholders.

III. The Need To Have Clear and Definitive Rules That Will Govern Parties' Rights and Obligations Under Oil Drilling Contracts

The need to have clear and definitive rules that would govern the interpretation of parties' rights and obligations under oil drilling contracts in the exploration sector is highly necessary, especially since the Nigerian O&G industry is over 60 years old and has grown steadily since the first significant oil find in 1956 into becoming the mainstay of the Nigerian economy, and with 28.2 billion barrels of proven crude oil reserves and total proven gas reserves of 165 trillion standard cubic feet (scf), including 75.4 trillion scf of non-associated gas, Nigeria is often referred to as a gas province with pockets of oil.[25] Nigeria has a maximum production capacity of 2.5 million bpd. Government participation in the industry is through the national oil company—the Nigerian National Petroleum Corporation (NNPC).[26] Nigeria has 34 pieces of legislation, excluding regulations and directives, regulating various aspects of the industry, and in this regard, the Petroleum Industry Bill (PIB) of 2012 and the improved 2017 Petroleum Industry Governance Bill (PIGB)[27] aims to harmonize all the legislation and

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[24]. [1994] 4 NWLR (Pt. 336) 1.

[25]. Israel Aye et al., "The Oil and Gas Law Review- Nigeria," in Christopher B. Strong (ed) *The Oil and Gas Law Review*, 4th ed., (London: Law Business Research; 2016) 206-218. ("Aye et al").

[26]. The NNPC has 13 subsidiaries, among other ventures, through which it fulfils all of its commercial and statutory functions.

[27]. The PIB was first proposed in 2007 and has undergone several revisions. The most recent draft was updated 2012. The Nigerian government intends to break the PIB into three separate bills to deal with the industry reform, fiscal framework and revenue management of the oil and gas industry. These bills are yet to be presented on the floor of the National Assembly for consideration and eventual passage into law. It has now been replaced by the Petroleum Industry Governance Bill (PIGB) of 2017.

significantly restructure the industry, particularly the functions of the various regulatory agencies, with a view to eliminating overlaps.[28]

Relatedly, the indigenous entrepreneurship in the upstream E&P sector has commenced in earnest in Nigeria.[29] Since the Nigerian Constitution vests ownership of mineral resources, including oil and gas, exclusively in the federal government[30] and further confers on the federal government exclusive powers to make laws and regulations for the governance of the industry,[31]the indigenous entrepreneurship policy was begun in 1989 by

Based on the above, it is safe to project that litigation and disputes among the major players in the E&P Sector will increase as more entrants are joining the sector, and so the English Court of Appeal's decision in *Transocean Drilling UK Ltd v Providence Resources plc*,[32]provides useful guidance for Nigerian courts in handling claims for damages that may arise with high increase of activities in the sector. Therein, the English Court of Appeal overturned the London Commercial Court's decision by deciding that a "consequential loss" clause prevented a claim for "spread costs" from being brought against a contractor. The decision is significant for the supply chain activities of Exploration & Production companies and their contractors in the Oil and Gas industry. Thus, with the dearth of Nigerian legal authorities on the proper interpretation of oil drilling contracts in Nigeria, it is this writer's submission that a critical discussion of the ***Transocean*** case will be of general academic and practical values fir all stakeholders in the Nigerian E&P sector.

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[28]. Aye et al, (n.25) at 206.

[29]. See, Godfrey Etikerentse, *Nigerian Petroleum Law*, 2nd edition, (Dredew Publishers, United Kingdom, 2004) at vii. (Etikerentse).

[30]. Constitution of the Federal Republic of Nigeria 1999 (as amended), at Section 44(3) ("CFRN"); See also, Petroleum Act, Cap P10, Laws of the Federation of Nigeria (LFN) 2004, Section 1(1).

[31]. *Ibid.* per CFRN, Item 39, Second Schedule, Part 1.

[32]. The 2014 Commercial Court's decision is reported at [2014] EWHC 4260 (Commercial Court) (***Transocean 2014***); and ***Transocean 2016*** (n.10).

IV. The London Commercial Court's Decision in *Transocean Drilling UK Ltd v Providence Resources plc*

In ***Transocean***, the Owner—Transocean Drilling UK Ltd ("Transocean") provided the drilling unit GSF Arctic III ("the Rig")[33] to the contractor—Providence Resources plc. ("Providence") pursuant to a drilling contract dated 15thApril, 2011 (the "Contract"). Subsequently, a dispute arose, relating to the financial consequences of delays which occurred to the drilling of an appraisal well in the Barryroe Field off the South coast of Ireland between November 2011 and March 2012. The Blow Out Preventer ("BOP") stack in the rig was defective, even though the BOP was successfully function-tested on a number of occasions prior to the commencement of the drilling.[34]Various defects and malfunctions were also identified, including problems with the blue pod, leading to a period of some five weeks of repair, i.e., until the rig could resume drilling again from where it had left off. Drilling re-commenced, however, after the 5-week wait, *however* support services and other "spread costs" were incurred by the contractor (Providence). The Owner—Transocean claimed a daily "repair rate." Providence withheld payment of the "repair rates," for which Transocean then claimed in proceedings initiated before the London Commercial Court.

Justice Andrew Popplewell, held that the BOP was defective at the time that the rig was delivered, with the blue pod misaligned and its functionality impaired because there was debris in the stinger segment cavities, and that this was caused by a failure to implement an adequate maintenance program on the pods, along with other defects in the BOP stack. Although Transocean argued that it could still claim "day rates" during the period of delay and that it was not liable for any spread costs by virtue of an exclusion clause in the contract, the Judge held that the delivery of the rig with a defective BOP was a breach of the drilling contract. Transocean also argued that the contract contained a "complete code," which provided for the rates payable per day in all eventualities, including the period when the rig was broken down and being repaired,

[33]. The Rig was a six-leg semi-submersible drilling unit built in 1984.

[34]. The BOP was subsequently found to be defective and had to be recovered to the surface for repairs.

and that it did not matter that repair was required even if Transocean had failed to maintain the BOP properly. In response, Providence argued that Transocean could not benefit from its own breach of the contract, since it could not have been intended that Transocean could actually earn more from the contract by breaching it and then collecting daily rates during a period of repairs necessitated by its own failure to maintain the rig—based on the principle of law that a contract will not be construed as enabling a party to benefit from its own breach.[35] The trial Judge agreed with Providence's construction of the agreement and so held that Transocean was not entitled to payment of a daily rate during the periods when the rig could not be used as a result of Transocean's breach of contract.

As to Providence's claim for spread costs, Transocean argued that it was insulated from any liability for the wasted spread costs based on a new exclusion clause. The exclusion clause was in a form habitually used by Transocean which was an adaptation of a standard clause developed for the North Sea. It provided that Transocean was not to be liable for:

> loss or deferment of production; loss of product; loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials, and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties); loss of business and business interruption; loss of revenue (which for the avoidance of doubt shall include payments due to [Transocean] by way of remuneration under this contract); loss of profit or anticipated profit; loss of and deferral of drilling rights; and/or loss, restriction or forfeiture of license, concession or field interests.

Transocean relied in particular on the words: "loss of use" as excluding liability arising from inability to use the rig for whatever reason. If this were right, however, the Judge observed that the exclusion

[35] *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

would cover all losses that Prudence might conceivably suffer as a result of a breach of the agreement. This could not have been intended.[36]The judge held that there were a number of primary obligations under the contract that must have been intended to have some force of law, and so, if a failure to satisfy these obligations had no consequences, such obligations would be reduced to mere statements of intent. Therefore, he held that these should be construed narrowly as referring only to loss of expected profit or benefit to be derived for the use of the property or equipment. Justice Popplewell's decision at the first instance has been hailed as a landmark decision for the E&P industry—i.e., since day rates for an offshore drilling rig can be enormous--$250,000 per day in the ***Transocean*** case:

> … but the significance of this decision goes much farther, or at least it should. If contractors have little or no liability for the consequences of their actions, they will have less incentive to take care. And if, as Transocean argued in its case against Providence, the contract entitled it to be paid a day rate while fixing a defect that was caused by its own failure to maintain the rig properly, the incentive is reversed. In other words, it would be in the contractor's financial interest not to maintain the rig so that it would be able to charge for the time it would take to repair it in addition to the time taken for conducting drilling operations. The consequences for safety and environment of such a reverse (and perverse) incentive are obvious."[37]

The scope of the exclusion clause was later reconsidered by the Court of Appeal.[38] It must be noted that Transocean did not appeal Justice Popplewell's decision on whether the rates clause is a complete code, which would then allow for the contractor to charge a rate regardless of whether the time needed for the repair has been caused by its own breach of contract.[39] In the final analysis, Justice Popplewell held thus:

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[36]. Greeno (n.11) at 9.
[37]. *Ibid*.
[38]. *Transocean 2016* (n.10)
[39]. Greeno (n.11) at 9.

i. The rig had not been in good working condition on delivery, contrary to the terms of the contract, because there had been a build-up of debris in a component of the blow-out preventer known as a 'stinger';
ii. The defect caused a loss of time of over 27 days. He also found that an additional 10 hours' delay had been caused by the failure of a member of the crew to tighten a blanking plug properly;
iii. Transocean was in breach of contract in both respects;[40] and
iv. In those circumstances Providence was entitled to recover spread costs for the period of delay, notwithstanding the terms of the contract on which Transocean relied as excluding any liability for losses of that kind.

V. The Court of Appeal's Decision in *Transocean Drilling UK Ltd v Providence Resources plc*

Dissatisfied with the lower court's decision, Transocean appealed, and the Court of Appeal[41] noted that the appeal involved whether wasted spread costs incurred by Providence as a result of Transocean's breaches of contract were "consequential losses" within the meaning of Clause 20 (the Exclusion Clause), since the terms of the clause, the nature of the costs and the circumstances in which they came to be incurred all suggesting that they were. Thus, the appellate court carried out a review of the entire structure of the contract:

Before turning to the specific clauses on which Transocean relies, it may be helpful to say something about the structure of this particular contract, which provides an important part of the context in which those clauses must be construed. The parties to the contract are described in the contract as 'the contractor' and 'the company'. Clause 4 sets out the contractor's general obligations, which include obligations to provide the rig in good working condition, maintain it and carry out the work with all

[40]. There is no appeal against that part of the judge's conclusions
[41]. Lord Justice Moore-Brick, and Justices McFarlane and Briggs, presiding.

due skill and care. By clause 13 the contractor was to be paid at daily rates set out in a separate section of the contract, which varied in accordance with the activities being undertaken at any given time. There was, for example, a 'Daily Operating Rate' payable while work was being carried out, a 'Standby Rate', a 'Moving Rate', a 'Repair Rate' (applicable when there was a shutdown of operations caused by a failure of the contractor's equipment) and so on.[42]

Thereafter, the court noted that Clause 18 was important, because by means of a complex series of indemnities it allocated losses arising from or relating to the performance of the contract between the two parties, regardless of cause. Thus, by clause 18.1 the contractor accepted responsibility for loss of or damage to its own property, for personal injury to any of its employees and for similar loss and for damage suffered by third parties (i.e. persons other than the company) insofar as it might be caused by its own negligence or breach of duty.[43]Similarly, by clause 18.2 Transocean accepted responsibility for loss and damage to its own property and employees and for loss and damage suffered by third parties (i.e. persons other than the contractor) as a result of its own negligence.[44]

By clauses 18.3 and 18.4, Transocean accepted responsibility for loss caused by pollution, other than pollution originating from the hull of the rig, for which the contractor accepted responsibility. By clause 18.5, Transocean undertook responsibility for damage to the property or equipment of the contractor which occurred while in-hole or below the rotary table, unless due to fair wear and tear or the contractor's negligence. Clause 18 contained other provisions of a similar kind relating to damage to the well, blow-outs, fires and explosions and damage to the geological formation and the marking and removal of any wreck or debris.

Finally, clause 18.8 provided that the exclusions and indemnities for which clauses 18 and 20 provided were to apply irrespective of cause and notwithstanding the negligence, breach of duty or other failure of the

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[42]. ***Transocean 2016*** (n.10) at 5.
[43]. *Ibid.* at 6.
[44]. *Ibid.*

indemnified party and irrespective of any claim that might otherwise arise in law.[45]

The appellate court also considered clause 19.1, under which the contractor was required to procure and maintain, for the benefit of both parties, a wide range of insurance cover as described in detail in clause 19.2.[46]Further, Clause 20 contained mutual undertakings by Transocean and the contractor to indemnify each other against, and hold each other harmless from, its own consequential loss, as defined in that clause. Although couched in the form of an indemnity, it was common ground that its effect was to exclude liability for losses of that kind.[47]This also buttressed the fact that the entire agreement was a "*knock-for-knock provision scheme*," and so, the appellate court re-iterated that:

> As can be seen from this brief summary of their provisions, clauses 18-20, which were clearly designed to complement each other, contained a detailed and sophisticated scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance. Sometimes called 'knock for knock' provisions, the scheme as a whole provides an important part of the context in which clause 20 is to be construed.[48]

With this finding, the court held that the whole agreement must be considered as a whole, since the entire agreement constituted a "sophisticated 'knock for knock' provisions in a scheme" and that Clause 20 dealing with "repair rates" and/or "breakdown rates" must be interpreted within the context of the entire agreement wholistically—and not in isolation.

The court thereafter considered the issue of 'Spread costs.'[49] The claim was put in Providence's pleading as one to recover the wasted cost

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[45]. *Ibid.*
[46]. *Ibid.* at 7.
[47]. *Ibid.* at 8.
[48]. *Ibid.* at 9.
[49]. Examples were well logging, well testing and cementing, mud engineers and mud logging services, geological services, diving and ROV (remotely operated vehicle) services, weather services, directional drilling services, and running casings. The spread costs which Providence sought to recover were described as the costs of personnel, equipment and services contracted from third parties which were wasted as a result of the delay.

of third party equipment and services which had been supplied and paid for, and were described in its evidence as "costs of third party suppliers which have been incurred and paid by Providence, but which would not have been incurred but for Transocean's failures."The spread cost claim was to recover the cost of goods and services supplied by third parties which was wasted, either in the sense that Providence had no use for them while drilling was suspended or in the sense that they did not contribute to the process of completing the well.[50]Thus, in determining whether consequential losses were claimable, the court had to consider Clause 20 of the agreement:

> 20. CONSEQUENTIAL LOSS
>
> For the purposes of this Clause 20 the expression "Consequential Loss" shall mean:
>
> (i) any indirect or consequential loss or damages under English law, and/or
>
> (ii) to the extent not covered by (i) above, loss or deferment of production, loss of product, loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties), loss of business and business interruption, loss of revenue (which for the avoidance of doubt shall not include payments due to CONTRACTOR by way of remuneration under this CONTRACT), loss of profit or anticipated profit, loss and/or deferral of drilling rights and/or loss, restriction or forfeiture of licence, concession or field interests whether or not such losses were foreseeable at the time of entering into the CONTRACT and, in respect of paragraph (ii) only, whether the same are direct or indirect. The expression "Consequential Loss" shall not include CONTRACTOR'S losses arising in connection with (1) failure by COMPANY to provide the letter of credit as required by Clause 3.13 of Section

[50]. ***Transocean 2016*** *(n.*10) at 10.

> III or resulting termination of this CONTRACT or (2) any termination of this CONTRACT by reason of COMPANY'S repudiatory breach.
>
> Subject to and without affecting the provisions of this CONTRACT regarding (a) the payment rights and obligations of the parties or (b) the risk of loss, or (c) release and indemnity rights and obligations of the parties but notwithstanding any other provision of the CONTRACT to the contrary the COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from the COMPANY GROUP'S own consequential loss and the CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY GROUP from the CONTRACTOR GROUP'S own consequential loss.[51]

The Court noted that although the definition of "consequential loss" occupies the first, and longer, part of the clause, the operative part is contained in the second part, under which the contractor and Transocean each agreed to indemnify and hold the other harmless from their consequential losses and thus to accept full responsibility for them. Together with clause 18, therefore, clause 20 represented an important element in the sophisticated allocation of losses between the two contracting parties.[52] Therefore, the Court held that:

> Although it was common ground below that clause 20 is an exclusion clause, it has certain characteristics which differ from a typical exclusion clause, by which a commercially stronger party seeks to exclude or limit liability for its own breaches of contract. In this case the parties are of equal bargaining power and have entered into mutual undertakings to accept the risk of consequential loss flowing from each other's breaches of contract. As I have already pointed out, the clause is to be seen as an integral part of a broader scheme for allocating losses between

[51]. *Ibid.* at 11.
[52]. *Ibid.* at 12.

> the parties. It is not, therefore, a simple exclusion clause of a kind which at one time the courts were willing to construe restrictively in order to avoid commercial oppression.[53]

Further, in denying the claim that Clause 20 was actually a "sophisticated allocation of losses between the two contracting parties" and not an exclusion clause, the Court further held that since the decision in *Photo Production Ltd v Securicor Transport Ltd*, [54] courts have recognized that artificial approaches to the construction of commercial contracts are to be avoided in favour of giving the words used by the parties their ordinary and natural meaning, and that more recently the principle that the court should give the language used by the parties the meaning which it would be given by a reasonable person in their position furnished with the knowledge of the background to the transaction common to them both has received support from a series of decisions of the highest authority, from *Chartbrook Ltd v Persimmon Homes Ltd*,[55]to *Arnold v Britton*.[56]Further, the appellate court also held that most recently the English Supreme Court in *Arnold v Britton* has re-emphasized that particular importance must be given to the language chosen by the parties to express their intentions.[57] Therefore, the Court held that the starting point in construing clause 20 must be the language of the clause itself,[58] and the only question is whether the expression "consequential loss" is apt to encompass the spread costs which Providence seeks to recover,[59]since the critical words are:

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[53]. *Ibid.* at 14.
[54]. [1980] AC 827.
[55]. [2009] UKHL 38, [2009] 1 AC 1101.
[56]. [2015] UKSC 36, [2015] AC 1619.
[57]. See Lord Neuberger of Abbotsbury P.S.C. in ***Arnold v Britton*** [2015] UKSC 36, [2015] AC 1619.at paragraphs 15-20
[58]. ***Transocean 2016*** (n.10) at 14.
[59]. *Ibid.* at 15.

> " . . . loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties), loss of business and business interruption . . . "[60]

While noting that "loss of use" naturally refers to the loss of the ability to make use of some kind of property or equipment owned or under the control of the contractor or Transocean, as the case may be, the court noted that in the present case, the parties have made it clear by the words in brackets that follow that its scope is intended to be wider than that. For example, it extends to the loss of use or cost of use of property, equipment and materials and to the loss of use or cost of use of services provided by contractors, sub-contractors and third parties. Moreover, it must be borne in mind that this forms part of the definition of losses which flow from (in this case) the contractor's breach of contract, but are not the immediate consequence of it. Thus, the appellate court held that there has to be loss of some kind to engage clause 20 at all and the words "loss of use or the cost of use of property, equipment, materials and services...provided by contractors or subcontractors of every tier or by third parties" are plainly apt on the face of them to cover costs of that kind.

Further, the appellate court noted the lengths to which the parties have gone to emphasize the width of the clause: twice within the same passage in brackets they have used the expression "without limitation" to make the point,[61]and as a result, the court of appeal rejected the lower court's finding that "a party relying on an exclusion clause must establish that the words show a clear intention to deprive the other party of a remedy to which he would otherwise be entitled." In support of that proposition, the lower court had relied on the well-known observation of Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd,*[62] that there is a presumption that neither party to the contract intends to abandon any remedies for its breach which clear

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[60]. *Ibid.* at 16.
[61]. *Ibid.* at 17.
[62]. [1974] A.C. 689, 717H.

words are required to rebut. However, the court of appeal held that it was wrong to invoke the *contra proferentem* principle in this case, as it is an approach to construction to which resort may properly be had when the language chosen by the parties is one-sided and genuinely ambiguous, i.e., equally capable of bearing two distinct meanings, since in such cases, the application of the principle may enable the court to choose the meaning that is less favourable to the party who introduced the clause or in whose favour it operates.[63]Thus, the appellate court in ***Transocean*** rejected the *contra proferentem* rule:

> It has no part to play, however, when the meaning of the words is clear, as I think they are in this case; nor does it have a role to play in relation to a clause which favours both parties equally, especially where they are of equal bargaining power. In the case of a mutual clause such as the present clause 20 it is impossible to say who is the proferens and who the proferee.[64]

To conclude, since the decision in *Photo Production* any presumption that parties to a contract do not intend to give up their right to claim damages for breach of contract must also give way to the language of the contract. In any event, it is clear that in agreeing to clause 20, the parties in ***Transocean*** intended to give up some of their rights, and the only question on appeal was whether Providence intended to give up its right to recover damages in the form of wasted or additional spread costs.[65]In the final analysis, the Court of Appeal held that Transocean was entitled to "repair" or "breakdown" rates, while rejecting Providence's arguments, and in doing so it made some

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[63]. ***Nobahar-Cookson v The Hut Group Ltd*** [2016] EWCA Civ 128 per Briggs L.J. at paras 12-20.

[64]. ***Transocean 2016***, *supra* note 10, at 20. Also, the appellate court did not accept that resort to the *contra proferentem* principle can be justified by reference to ***Gilbert-Ash***, as Lord Diplock's observation must be read and understood in context because their Lordships were concerned in that case with the question whether, by agreeing to pay the contractor against certificates issued by the architect under a building contract, the contractor had agreed to forego its right of abatement or set-off under the general law. Such rights have a particular importance and it is no doubt correct to presume that parties do not intend to give them up unless they have made that intention clear, but that is to say no more than their intention to do so must be apparent from the language they have used, fairly construed.

[65]. ***Transocean 2016***, *supra* note 10, at 21.

important points concerning the construction and interpretation of "consequential loss" exclusion clauses:

1. The starting point to interpreting all clauses is the natural and ordinary meaning of the words used;
2. The *contra preferentum* principle has no part to play where the meaning of the words is clear and the clause is not "one-sided";
3. The principle in ***Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Limited***,[66] that a party should not be taken to have surrendered valuable contractual rights in the absence of clear language, is to say no more than that the surrender of rights must be apparent from the language used (fairly construed).

VI. Lessons for Nigeria

There is a dearth of authorities on the current subject, because, in Nigeria, offshore drilling are usually carried out by IOCs, and with such IOCs usually being foreign companies, that have already concluded all the exploration contracts offshore, it follows necessarily that foreign fora and foreign laws are usually designated by the parties as the choice of law and fora to govern all litigation that would arise from such exploration contracts. As a result, there is a dearth of legislative and judicial authorities on the apportionment of damages and/or liabilities that usually arise from drilling contracts, especially where the oil rigs are defective. Therefore, in Nigeria, there is a need to move the law beyond the grey area of "reasonableness" in this regard, especially, in light of the fact that Nigeria is currently experiencing a boom in foreign investment and there is a surge in novel and sophisticated cross-border transactions, this is an important consideration.[67] Agreed damages clauses and their validity become extremely important in cross-border transactions

[66]. [1974] AC 689.

[67]. Oluwadamilola Odetola, "Penalties and Liquidated Damages in a Changing World: Rethinking the Common Law Position," (2015) Vol. 6(1) *Afe Babalola University Journal of Sustainable Development Law & Policy* 247-271, at 271. (Odetola).

because parties are understandably nervous to leave damage assessment to courts of unfamiliar territories.[68]

Nigerian courts have examined contractual agreements severally. For instance, in *Oyeneyin v Akinkugbe*,[69] Hon. Adekeye JSC, held that penalty clauses are sanctions which are imposed "in the event of allowing a situation that could be prevented from happening." [70] Presently, the Nigerian government has also indicated that it would be putting out a comprehensive set of policies covering the oil and gas industry. Accordingly, a national oil policy, national gas policy and a fiscal policy, which are expected to underpin the legal framework, have been drafted and are being made available to stakeholders and the public for consultation. [71] With regard to petroleum refining, the federal government has awarded licenses to 24 Nigerian companies to construct and operate refineries (conventional and modular). Interestingly, work is still ongoing on Dangote's refinery project, expected to commence commercial production by 2018. While the NNPC leadership is committed to revamping the existing government-owned refineries, it is expected that these refineries will soon be operating at full capacity.[72] In sum, there will be growing activities within the sector, necessitating the need to clearly identify and demarcate the rights, responsibilities and duties of the major oil players in their respective contracts and the bring Nigerian law on E&P contracts at par with contemporary common law systems. There are many unfolding changes in policy flowing from the recent change in government in Nigeria, and it is anticipated that there will be more changes in due course.[73]

With ***Transocean***, most oil drilling stakeholders will need to reassess their contract making models, and be aware that traditional rules of fairness and *contra proferentem* may not be useful in the

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[68].*Ibid*. per Odetola at 266; See, also, ***N.A.C.B Ltd v Achagwa*** (2010) 11 NWLR (Pt 1205) 339 C.A; ***G.M.O.N & S Co Ltd v Akputa*** (2010) 9 NWLR (Pt 1200) 443 SC; ***Oyeneyin v Akinkugbe*** (2010) 4 NWLR (Pt 1184) 265 (SC); ***G. Chitex Industries v. Oceanic Bank Intl***, (2005) CLRN 11, at 12.

[69]. (2010) 4 NWLR (Pt 1184) 265 (SC).

[70]. *Ibid*. at 292.

[71]. Aye et al (n. 25) 217-218.

[72]. *Ibid.* at 218.

[73]. *Ibid*.

interpretation of drilling contracts. The courts will start to take cognizance of the sophistication of the parties. In effect, the attendant choice of law and forum that makes the parties choose foreign law and courts over Nigeria will be missing, as there will be no incentive for the IOCs to choose foreign courts over and above Nigerian courts. Thus, Nigerian lawmakers and judges must move at the same pace as other advanced western courts and inculcate the rationale of the ***Transocean*** courts that always enforces clear and unambiguous contractual terms that are meant to equally apportion rights and liabilities in the agreements (a *knock-for-knock provision scheme*), i.e., contractual provisions that are designed to complement each other, containing a detailed and sophisticated scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance. The above rule will make Nigerian forum more competitive as other fora.

Foreign investors will also become more emboldened to enter into the Nigerian business environment and take opportunity to carry on business in Nigeria, since they will be assured that Nigerian laws will afford them similar protection for recovery of damages as in other jurisdictions. Generally, the choice of form (daywork, footage, or turnkey), the risk allocation/indemnification provisions, and the technical specifications are the most important matters concerning drilling contracts, and of these, the risk allocation/indemnification provisions are critical.[74] The most significant variations in contracts will be encountered in, and the most costly litigation is likely to arise from, these provisions, and if the operators decide to place more risk on drilling contractors, it appears that the indemnity provisions in the contracts are less likely to be mutual except where required by statute. However, this trend is likely to change only when the demand for rigs dramatically increases.

The decision in ***Transocean*** is fair so that it ought to be benchmarked and incorporated into future agreements. Yet, we recognize that future oil drilling agreements may be clearly worded in such a way as to circumvent the likelihood of the court arriving at the position stated in ***Transocean***. However, it is clear that such a departure will defeat the *laissez faire* environment in which exploration occurs.

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[74]. Anderson (n.2) 462.

Nevertheless, as Nigerian indigenous and marginal operators become experienced and more sophisticated in handling oil drilling contracts, it is expected that the parties abide by the parameters laid down in *Transocean*.

VII. Conclusion

With great emphasis on, by the present government, to increase Foreign Direct Investment and to make the Nigerian business environment more competitive, there is now a strong drive to amend old and archaic business laws so as to make the Nigerian business terrain more attractive to local and foreign businesses. One of the ways of achieving these goals is by bringing Nigerian law of contract up to date and by borrowing from more advanced western common law regimes. Therefore, in Nigeria, sophisticated parties cannot escape their obligations to commercial agreements.[75]

It is not unthinkable that Nigerian judges (despite being faithful to long standing principles of common law) also show commitment to achieving commercially sensible results, as some cases have shown an inclination towards the commercial justification test.[76] While a surgical break from the hold of the age-old dichotomy may not be on the front burner of Nigerian law reform, however, with the exponential increase in multijurisdictional commercial transactions, financial innovations and complex contractual arrangements, there is reason to believe that this change may come sooner than later.[77] The decision in the ***Providence*** case will help to rebalance the incentive for contractors to maintain rigs properly. While the ability to insure against losses must be taken into account in apportioning the risk of a failure, such should neither be wholly insulated from liability nor have an economic incentive to under-maintain equipment, with potentially catastrophic consequences. [78] Contractual structures can shape and drive behaviours. In the

[75]. *Abuja International Hotels Ltd v Meridien Sas* [2012] EWHC 87 (Commercial Court).
[76]. Odetola (n.67) 271.
[77]. *Ibid.*
[78]. Greeno (n.11) 9.

downstream industry, there is more awareness of the risk of encouraging unsafe practices through contractual indemnities and exclusions.

In concluding, it is this author's view that irrespective of ***Transocean***, a contractor may be able to succeed against the Owner, based on a claim for Deceptive Trade Practices—Consumer Protection, which can be used by an operator who is the victim of a deceptive trade practice.

THE REMUNERATION SYSTEM AND PROMOTION POSSIBILITIES OF JUDGES IN NIGERIA

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Abstract

An effective and efficient judiciary is the major tool for justice and accountability and the live wire of any nation. But this can only be achieved where the judiciary is independent and exercises a certain level of autonomy as a distinct arm of government from the Executive and the Legislature. In view of the above, this paper examines the remuneration system and promotion possibilities of judges in Nigeria and how the Nigerian system reward efficient and independent decisions. The paper notes that the judiciary does not control its budget; therefore remuneration is decided by the executive. It observes that the salaries and emoluments of judges in Nigeria are poor and should be improved as the lean salaries have been noted as one of the reasons for the brazen corruption in the judiciary. On the issue of promotion of judges, the paper notes that promotion is based on the Federal Character principle enshrined in the Constitution and further notes that this has enthroned mediocrity as promotion is based on openings and quota system. This has not encouraged the quest for excellence in the judiciary. On the reward of efficient and independent decisions, the paper notes that this appears to be herculean task as such bold judges are either suspended or queried for daring to give judgments that challenge the status quo. The paper finally notes that the problems that have been raised can be addressed if the judiciary takes complete charge of it affairs. The paper strongly advocates that the Federal Character rule should not be used in appointing or promoting judges rather appointments and promotions should be based on merit, which would include integrity and the track record of the individual that will be appointed to the Bench.

Keywords: Independence, Judiciary, Remuneration, Promotion, Decisions, Executive, Legislature

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I. Introduction

This paper examines the remuneration system and promotion possibilities of judges in Nigeria. In addition, it examines how and whether independent and efficient decisions are rewarded in the judiciary. These issues are hinged on the fact that an efficient, independent and impartial judiciary will ensure the stability of any nation. Again, the integrity of judges are crucial in the stability of social order as the judiciary is the last hope of the common man.

A judiciary or judges that lack integrity will subvert justice and this will eventually throw up a system of lawlessness which is usually the case when the people lose faith in the justice system.

In Nigeria, there are no judges that preside exclusively over civil cases or criminal cases. Judges in their courts preside over civil and criminal cases alike but recently, the chief justice of Nigeria is proposing to create criminal courts that would exclusively preside over criminal cases especially corruption cases. A lot has been said about the integrity of the judiciary especially when in 2016/2017 some judges were arrested, prosecuted and either sacked or suspended for receiving bribes[1]. Some people traced this to the poor salary of judges in Nigeria while some others thought that it was a reflection of the lack of independences of the judiciary

[1] Department of State Security (DSS) embarked on an unprecedented raid of homes of numerous judges, arresting several of them, including two Supreme Court justices directly linked with alleged electoral judgment fraud in Rivers and Akwa Ibom states.The judges named in a confidential list sent to President Muhammadu Buhari include Justices Nwali Sylvester Ngwuta and John Inyang Okoro of the Supreme Court, Justice Muhammad Ladan Tsamiya of the Court of Appeal, Ilorin Division, Justice Uwani Abba-Aji of the Court of Appeal, Justice Adeniyi Ademola of the Federal High Court, Justice Mohammed Yunusa of the Federal high Court, Justice Kabir Auta of the Kano State High Court, Justice Munir Ladan of the Kaduna State High Court, Justice Bashir Sukola of the Kaduna State High Court, and Justice Mu'azu Pindiga of Gombe State High Court. Other high profile judges named in the confidential memo include Justice Zainab Bulkachuwa, the current President of the Court of Appeal, Justice Ibrahim Auta, the Chief Judge of the Federal High Court, Justice Abdul Kafarati of the Federal High Court, Justice Nnamdi Dimgba and Justice Anwuli Chikere of the Federal High Court. http://saharareporters.com/2016/10/16/names-nigerian-judges-under-investigation-revealed. Accessed 13th November, 2018

as the politician and the other two arms of government i.e. legislature and executive seem to be exerting so much influence on the judiciary. These and some other issues will be discussed in this paper. In view of the above, the paper is divided into six parts. Part I introduces the paper and Part II examines the concept of separation of powers under the Nigerian Constitution. Part III examines the remuneration and promotion possibilities of judges viz-a-viz the several allegation of corruption against the judiciary. Part IV therefore examines judicial independence in Nigeria and whether judges are bold enough to give efficient and independent judgments and the resultant effects of such independent decisions. Part V looks at factors that inhibit judicial independence and ways of improving the independence of the Nigerian judiciary. Finally, part VI concludes the paper.

II. Separation of Powers and the Judiciary in Nigeria

Separation of powers can be described to be the division of governmental authority into three branches of government- legislative, executive and judicial- each with specified duties on which neither of the other branches can encroach. The doctrine of separation of powers is based on the acceptance that there is a division of governmental powers into the three branches of legislative, executive and judicial powers, each to be exercised by a separate and independent arm of government as a preventive measure against abuse of power, which will occur if the same person or group of people exercises the three powers.[2]

Its justification was based on the natural law philosophy traceable back to Plato and Aristotle and later articulated by the 16th and 17th centuries French Philosopher Jean Bodin and British politician John Locke. The concentration of power in one branch can cause grave hardship on the citizens thereby jeopardizing the idea of democratic value and constitutionalism. With the changing needs of the society, it is important that reasonable restrictions be placed upon the executive, legislature and the judiciary in a compartmentalized form albeit not a water tight one.[3] Checks and balances can be defined as a system that allows each branch of

[2]Malemi E., *The Nigerian Constitutional Law* (Lagos: Princeton Publishing Co.; 2006) p. 65
[3]Kolawole, B. "Separation of Power: A Comparative Study" http://www.academia.edu/5440511/Separation _of_power_A_comparative_study . (Accessed on 14th OCT., 2017)

a government to amend or veto acts of another branch so as to prevent any one branch from exerting too much power.[4] The principle of separation of power presupposes that the three branches or arms of government have separate and independent powers, to concentrate on distinct responsibilities, especially in a presidential system of democracy, which Nigeria operates. And in doing so, there are checks and balances among them, to ensure that no one arm overshadows others or usurps the duties/responsibility of others.

In Nigeria, the 1999 Constitution (as amended) provides for separation of powers among the Executive, Legislature and Judiciary, as seen in sections 4 and 5 and 6. Indeed, while Section 4 and Section 5 dwell on the Legislature and the Executive, Section 6 talks about the Judiciary and these arms of government have their functions. To be sure, whereas the Executive branch ensures that the laws of the nation are not only followed but also that the "responsibilities of government are fulfilled," the legislature makes laws. The judiciary, on its part, interprets as well as applies the laws/constitution of the country[5]. When there is usurpation of duties among them, outside the provision of the doctrine of checks and balances, the government suffers.

There is a gratuitous face-off between the Presidency and the National Assembly. Owing to the conduct of officials of the Executive, most especially, encouraged by those who do not love democracy, the two branches of government have been operating like enemies in a democracy, at a time when synergy is needed, for the attainment of a common goal.[6] The quest for good governance in Nigeria has been threatened more by the unending conflicts between the legislature and executive who are often entangled in a constant battle for supremacy and control of the policy making and implementation process, thereby jettisoning the tenets of the principles of separation of powers which clearly states that the three arms of government namely, legislature, executive and judiciary shall be

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[4] Merriam- Webster "definition of checks and balances" https://www.merriam-webster.com/dictionary/checks-and-balances/ (Accessed 7th October, 2018)
[5]Onuoha, U. "Presidency, senate and the doctrine of separation of power" https://www.sunnewsonline.com/presidency-senate-and-doctrine-of-separation-of-power/ (Accessed on 14th October, 2018)
[6] *Ibid*

independent of the control of each other.[7] Nigeria as a country is bedeviled by the problem of bad governance, attributed to the conflicts of the executive and legislative arms of government.

The powers of the executive[8] and the judiciary[9] are contained in the Constitution. In essence, while the legislature is the law making arm of the government, the executive implements the law while the judiciary are the interpreters and the judges of the law. Separation of powers is necessary as it allows the various arms to act as a check and balance mechanism over one another and curtail excesses and abuses that may occur. How well this exercise of independence has been practiced with respect to the judiciary is the big question. Can one really say that the judiciary is independent of the other arms of government in Nigeria? The paper will deal more with this issue in subsequent sections. Although the various arms of government should work independently, the independence of the judiciary has been eroded by the Executive and the Legislature and this has given the Nigerian judiciary a negative image. *Joseph Daudu*[10] reiterates the earlier position of this paper when he affirmed that:

> The judiciary is not only the last hope of the common man; it is the only hope of government and concepts such as the Rule of Law. Modern democratic society as we know it today will cease where confidence is lost in the judiciary. No one wants to go back to those days of autocracy and dictatorship.[11]

The judiciary must be allowed to conduct its business without undue interference from the other arms of government. They should not go

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[7]Momodu, A. Jude, Matudi G. I. "The Implication of Executive-Legislative Conflicts on Good Governance in Nigeria" *Public Policy and Administration Research* (2013) Vol.3 No.8 p.30

[8] Section 5, CFRN 1999 as amended 2011.

[9] Section 6, CFRN 1999 as amended 2011.

[10] *Daudu, J* was the former President of the Nigerian Bar Association. Paper titled 'The Independence of the Judiciary in the Light of Emerging Political and Security Challenges' presented at the NBA Maiduguri Branch. See also *Onanuga, A* et al "How to Ensure Judicial Independence by Lawyers" https://www.thenationonlineng.net/how-to-tensure-judicial-independence by lawyers. (Accessed 6th January, 2018).

[11] *Ibid*

cap in hand begging the other arms of government for assistance because when this happens, their independence would be compromised.

III. Remuneration and Promotion of Judges in Nigeria

Amongst the various challenges of judicial independence, this is the most experienced challenge. It is rather unfortunate that in Nigeria the power of remuneration resides in the Executive and Legislature as this hampers the independence of Judiciary.

Although Sections 84 (2) (4) (7) and 121 (3) of the Constitution[12] ostensibly grants financial autonomy to the Judiciary by providing that the recurrent expenditure of judicial officers of the Federation and the States shall be a charge upon the Consolidated Revenue Fund of the Federation or State, there does not appear to be any provision in the constitution that specifically ensures the proviso of capital expenditure for the Judiciary. More so, that which is directly provided for in the aforementioned sections, the Executive arm of the Government still has to approve how many Judges will be appointed and catered for by the Government. However, the definition of judicial officers in Section 318 of the constitution[13] excludes judicial officers of the inferior courts and non-judicial staff. Further, Section 80 (4) of the constitution[14] provides that no moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation except in the manner prescribed by the National Assembly. The question then rises up that what if the National Assembly refuses to prescribe a manner, what then happens? At the moment, Section 2 (2) of the Public Funds of the Federation (Disbursement) Rules made pursuant to Section 23 of the Finance (Control and Management) Act requires a warrant issued by the Minister of Finance. Another question is this, what then happens in the event that the Minister of Finance fails to issue a warrant?

In summary, it is rather unfair that the Executive arm determines the army of officers it maintains every year and the Legislature makes laws about the disbursement of revenue. Of course the Legislature and the executive between them can always vote what they want for themselves; whilst the judiciary, the 'third arm' is allocated what the other two deem

[12] Constitution of the Federal Republic of Nigeria 1999 as amended 2011
[13] *Ibid*
[14] *Ibid*

fit. It leaves the judiciary in a position of going on bended knees to request for whatever it needs. If anything at all, the situation discussed above does not make for the independence of the Judiciary.

Basically, judges in Nigeria receive their remuneration based on the position they occupy in their various courts. For instance, the Chief Justice of Nigeria is the highest paid judicial officer in the country. Although he sits at the Supreme Court, yet his salary is different from that of his fellow judges at the Supreme Court. In this section, we are going to group the judges and try as much as possible to articulate their remuneration based on available documents gathered in the process of this research. Examining the remuneration of the bench has become necessary as it has been alleged that the bench is poorly remunerated and this has led to corruption and the absence or lack of integrity on the part of the judges.

Evidence shows that in the year 2016, the Nigerian Judiciary, i.e. Federal and State judicial officers spent a total sum of N33.47 billion as emoluments and other allowances.[15] The reports emanating from the Economic Intelligence Magazine show that the sum is made up of annual salaries; regular and non-regular allowances of all the judicial staff in the country.[16] Apart from the Chief Justice of Nigeria who has an annual salary of N3.36 Million, 25% of his annual basic salary goes for personal assistants and outfit, his annual leave attracts 10%, severance gratuity 300% and vehicle loan which is optional is put at 400% of his annual salary. His duty tour allowance is N50, 000 a night if he is within Nigeria while he receives $2000.00 a night as Estacode if he is abroad. He also earns half of his annual salary valued at N1, 681,986.25 as hardship allowance. His furniture and accommodation is provided for by the government.[17] The annual emolument of the other judges of the Supreme Court and the President of the Court of Appeal is placed at N2.477.110.00 i.e. N2.47 million each. Other justices of the Court of Appeal including the Chief Judge of the Federal High Court, the Chief Judge of the Federal Capital

[15] "Remuneration for CJN, other Judicial officers hit N33.47bn", http://www.econimic confidential.com/financial/facts-a-figures/judicial-officers-salary-nigeria-pdf (Accessed 20th January, 2018). See also https://www.economicconfidential.com/up-content/upload/2016/09/Econiomic -confidential-judicial-officers-Remuneration-in-Nigeria.pdf. (Accessed 10th January, 2018).

[16] Economic financial magazine has put the number of judges at 934 but there are other reports that have put the number at 1,050.

[17] *Ibid*

Territory, Judges of the Federal High Court; President of the National Industrial Court, the Grand Khadi of the Federal Capital Territory (FCT) Sharia Court of Appeal, President FCT Customary Court of Appeal, Chief Judges of States, Grand Khadi, State Sharia Court of Appeal (where it exists) President State Customary Court of Appeal (where it exists) earn an annual salary of N1.995.430.00million and a break down brings it to the sum of N908,273.67 monthly.[18]

Judges of the Federal High Court, judges of National Industrial Court, judges of FCT Court, Judges of State High Court, Grand Khadi, FCT Sharia Court, Judge of the FCT Customary Court of Appeal, Khadi of the State Sharia Court of Appeal and Judges of State Customary Court of Appeal all have an annual basic salary of N1.804, 740.00 or N1.8million annually and a monthly emolument of N661, 738.00.[19] It is also evident that all the judges in Nigeria except the Chief Justice of Nigeria are entitled to 75 percent of their annual salary for vehicle maintenance and fuelling, 25 percent for Personal Assistants; 50 percent for hardship allowance, 75percent is for domestic staff. 45 percent id reserved for entertainment, 30 percent for utilities, and 25 percent for wardrobe and 15percent for newspapers. With respect to non regular allowances, all judges are entitled to 200% of their annual basic salary for accommodation annually, 300percent for furniture, 10percent for annual leave and 300percent for severance gratuity while 400percent which is optional is for vehicle loan.[20]

For the second category of judges whose annual basic salary is placed at N1.99millions, they are also entitled to N30, 000 per night as duty tour allowance within the country and $1,100 as Estacode. For the judges within the category of annual basic salary of N1.8million, their duty tour allowance per night within Nigeria is placed at N25, 000 and $800 per night as Estacode.

A Senior Advocate of Nigeria, *Mike Ozekhome* has opined that judges' salaries in Nigeria are poor. In his words he posits that, "Poor remuneration and unfavourable conditions of service for judicial officers

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[18] *Ibid*

[19] *Ibid*. See also "Remuneration for Chief Justice, other Judicial Officers Hit N33.47bn Yearly"; https:www.vanguardngr.com/2016/09remuneraiton-chief-justice-judicial-officers-act-n33-47bn-yearly. (Accessed 2nd January, 2018)

[20] *Ibid*

should be President *Buhari's* headache, not the judges themselves".[21] The learned Senior Advocate called on all those responsible to better the lot of judicial officers, increase their salaries and allowances and provide them with retirement homes.

The lean resources or package received by judges have been linked to the corruption in the Nigerian judiciary but the former President of the NBA, *Joseph Daudu* noted that "the choice to go to the Bench is a conscious one. It is not taken just as a means of livelihood or as a last resort by well connected persons. It ought to be seen as a reverent calling".[22]

Interestingly, *Abdullahi Ibrahim*[23] believes that salaries of judges of the superior courts have greatly improved although he believes that there is room for more improvement. He opined that the major problem is with judges of the lower courts who are not covered by the term judicial officers and they include the Magistrates, Area and Customary Court judges and Sharia Court judges.[24] The appointment, promotion and disciplinary control of these officers are in the hands of the State's Judicial Service Commission.[25] According to him, these judges at the lower rung of the ladder in the judiciary or judges of inferior courts receive peanuts as salaries he stated. Salaries, allowances, work environment and social facilities to enhance their job performance are pathetic.[26] This, the learned author believes paves way for corruption, ineptitude and general lack of seriousness to work by the affected staff.[27]

a. **Corruption in the Judiciary**

Generally speaking, corruption is "the abuse of entrusted power for private gain". Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.Grand corruption consists of acts committed at a high level of

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[21] *Bamgboye, A* "Judges Poor Salary should be Buhari's Headaches-Ozekhome", https://www.dailytrust.com/ng/news/judges-poorsalary...be---s/136958. html. (Accessed 2nd Janaury, 2018).
[22] *Daudu, J*. (n.4)
[23] *Abdullahi, I*. "Independence of the Judiciary in Nigeria: A Myth or Reality? *International Journal of Public Administration and Management Research (IJPAMR)*, (2014), Vol. 2, No. 3 pp. 55-56 at 61
[24] Ibid
[25] *Abdullahi (n.* 23) 61.
[26] Ibid
[27] Ibid

government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.

Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth

The two most common types of judicial corruption are *political interference* and *bribery*. Political interference is when politicians or staff from the legislative or executive branch meddle in judicial affairs or collude with judges in fraudulent schemes. Despite efforts in many countries to isolate the judiciary from politics, judges and other court personnel still face significant pressure to rule in favor of powerful political or business entities rather than in accordance with the law. A malleable judiciary can be used by those in power to provide protection for and lend legitimacy to fraudulent acts. Judges might also collude with politicians in a variety of different white-collar crimes, such as extortion, money laundering and embezzlement.

The second most common form of judicial corruption is bribery. Judges or other court officials might accept bribes to exercise their influence over a case in a way that benefits the briber. For example, a judge might delay or accelerate cases, accept or deny appeals, or simply rule in a particular way in exchange for kickbacks. Recently, precisely in 2016, so many judges were arrested and put on trial on various charges of corruption and this to a very large extent affected the image of the Nigerian judiciary. On the 8th of October, 2016, the Department of State Security (DSS) raided the homes of some judges and arrested two Supreme Court justices[28] on the allegation that they were linked with the electoral fraud in

[28] The Supreme Court Justices arrested are *Nwali Sylvester Ngwuta* and *John Inyang Okoro*. See *Daniel, S* "Two Supreme Court Judges, 5 others arrested over Alleged corruption on October 8 2016", https://www.vanguaged.com/20166/10/two-supreme-court-judges-5-others-arrested-alleged-corruption Accessed 11th April 2018.

Rivers and Akwa Ibom States of Nigeria. There were several other justices arrested. One of the arrested judges – *Justice Chikere* was accused of receiving cash for a pre-election matter[29] Justice Rita Ofili-Ajumogobia also stood trial for corruption matter[30]. *Justice Abdul Kafarati* is alleged to have a long list of corruption reports against him. The Economic and Financial Crimes Commission discovered over ₦2 billion in the judges account although, he claimed to have earned the money from his farming business in Yobe State[31]. Justice *Adeniyi Ademola* was also arrested on grounds of various allegations of corruption. For instance, he was accused of accepting a $200 thousand bribe to discharge a garnishee order against the Delta State House of Assembly[32].

He was also alleged to have used his position as a judge to secure the position of Head of Service of Lagos State for his wife and other allegations against him. He was subsequently arrested and a whooping sum of $500,000.00 was found in his possession and he also had two unlicensed pump Action Riffles in his home in Abuja. The judge claimed that part of the money in his possession belonged to another judge *Justice Auta* who happens to be the Chief Judge of the Federal High Court.[33] *Justice Ademola* was subsequently suspended but the National Judicial Council had recalled him with five other judges. He was recalled after he was found not to be guilty of the allegations and was discharged and acquitted by the court.[34]

The Chief Justice of Nigeria, *Justice Walter Onnoghen* in his reaction to these allegations criticized the politicians for constantly trying to compromise the integrity of the judiciary and the judicial process. He cited

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[29] Sahara Report "Names of Nigerian Judges under investigation Revealed", https://www.saharareports.com/2016/10/16/names-of-Nigerian-judges-under-investigation-revealed. 11th April 2018

[30] "The decision was sequel to the petition written against her by one Victoria Ayeni alleging misconduct and injustice on the part of Hon. Justice Ofili-Ajumogobia for failing to deliver judgment in Suit No. FHC/AB/CS/31/2011, a pre-election matter between Victoria A. A. Ayeni and Olusola Sonuga," NJC spokesman, **Soji Oye**, said in a statement.

[31] *Ibid*

[32] https://www.premiumtimesng.com/accessed 14th November 2018

[33] *Ibid*

[34] *Okakwu, E*, "Updated; suspended Nigerian Judges Recalled. Three others placed a Watch List" https://www.premium timesng.com/news/top-news/232945-breaking-njc-recalls-justice-ademola-five-other-judges-accused-of-corruption.html (Accessed 12th January, 2018.

examples of cases where politicians had attempted to bribe officials of the bench and warned the politicians to stop interfering with the judiciary.[35] *Philip Aka*[36] in his contribution to the literature opines that the most common form of criminal corruption among judges is bribery in election petition tribunal cases. He further posits that ethical corruption or judicial corruption occurs when a judge violates the code of judicial ethics or where he injects arbitrariness into the judicial process by assuming jurisdiction when he ought not to do so or the abuse of misuse of the issuance of ex-parte orders. This form of ethical corruptions he asserts is an endemic problem in the Nigerian judiciary[37].

Abdullahi noted that two factors may compel a judicial officer to engage in corruption and they are: Greed and Habit[38]. *Azinge and Rapu*[39] noted that the integrity of the Bench carries with it the responsibility of every member of the judiciary to perform his duties with priority. They further affirmed that the slightest suspicion of corruption of an individual judge tarnishes the reputation of other members and brings the entire institution into disrepute. This is the exact situation that the Nigerian judiciary has found itself in today. The integrity of the judiciary is at its lowest and most Nigerians have lost confidence in the system. The learned authors noted that judges must be men of probity and of impeccable character and that no aspect of a judge's conduct should give cause for concern. This is timely as the society may go back to the days of jungle justice and self help if the trend is not nipped in the bud.

b. **Promotion of Judges in Nigeria**

The Nigerian Constitution makes provision for the appointment of judicial officers for the Supreme Court; it further provides that the

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[35] *Azu, C.J.* "Why CJN Rebuked Nigerian Politicians" May 23 2017, https://www.dailytrust.com.ng/news/law/why-cjn-rebuksed-nigerian-politicians/198817.htnl (Accessed 4th April, 2018).

[36] *Aka, P.C.* "Judicial Independence Under Nigeria's Fourth Republic Problems and Prospect" *California Western International Law Journal* (2014), Vol. 45, No.1, pp1-78 at 56, 57.

[37] Ibid, p. 57

[38] When a judge is greedy, he would want to style himself after the ostentations lifestyles of politician by wanting to own duplexes and sky scrapers in Dubai. They also want to go on vacations and visit places like France and the USA and also invest in all known businesses. On the issue of habit, he opines that some judges carried it over from the lower Bench.

[39] *Azinge, E and Rapu, J.F* "Roadmap to Judicial Transformation: Through the Lens of Retired and Serving Jurists of the Supreme Court", in *Azinge and Idonigie* (eds.), *The Supreme Court of Nigeria 1990-2012* (Lagos: NIALS Press; 2012) at 514-655

appointment of a person to the office of Chief Justice of Nigeria shall be made by the President on the recommendations of the National Judicial Councils[40] subject to confirmation by the Senate.[41] For the other judges of the Supreme Court, the same process is followed.[42] No person is allowed to be appointed or elevated to these positions except he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period not less than fifteen years.[43]

For the President of the Court of Appeal, such an appointment shall be made by the President on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the Senate.[44] The appointment of other justices of the Court of Appeal follows the same process.[45]

A person to be appointed as the President of the Court of Appeal or a judge in the court must be a qualified legal practitioner in Nigeria and must have been so qualified for a period of not less than twelve years.[46] The Constitution also made provisions for the appointment of the Chief Judge[47] and Judges[48] of the Federal High Court and they must have been qualified as legal practitioners for a period of not less than ten years. The procedure for the appointment of the judges of the High Court of the FCT,[49] Sharia Court of Appeal of the FCT[50] and the Customary Court of Appeal of the FCT[51] is as laid down in the Constitution of Nigeria. The appointment of

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[40] The Honourable Court in *Nwaogwugwu v. President F.R.N.* **(**2007) ALL FWLR (Pt. 358) 1327 at 1356, paras D - F (CA), held that the National Judicial Council is a creation of the Constitution. Its traditional role is as defined by the Constitution and it includes inter alia to make appointments and to exercise disciplinary control over judicial officers. *Per GALINJE, J.C.A*. in Page 45, paras. E-F, in the case of *OPENE v. NJC & ORS*. (2011) LPELR-4795(CA**)** further held that Section 158 (1) of the Constitution has clearly provided that the National Judicial Council (NJC) shall not be subject to the direction and control of any other authority in exercising its power to make appointments or to exercise disciplinary control over judicial officers.

[41] Section 231 (1) CFRN 1999

[42] Section 231 (2) CFRN 1999

[43] Section 213 (3) CFRN 1999

[44] Section 238 (1) CFRN 1999

[45] Section 238 (2) CFRN 1999

[46] Section 238 (3(CRRN 1999

[47] Section 250 (1) CFRN 1999

[48] Section 250 (2) CFRN 1999

[49] Section 256 (1) – (3) CFRN 1999

[50] Section 261 (1) – (3) CFRN 1999

[51] Section 266 (1) – (3) CFRN 1999

the Chief Judge and other judges of the State High Court[52], Sharia Court of Appeal of a State[53], and Customary Court of Appeal of a State[54] are made by the Governor of the state on the recommendation of the National Judicial Council and subject to confirmation by the House of Assembly of a State.

Going through the provisions of the Constitution one would discover that promotion of judges can be achieved in several ways. One of such ways would be when a particular office is vacant because the holder of the office is unable to perform the functions of that office. In some other instances, judges move up the ladder not because they are intellectually sound but based on date of appointment. In consideration of the topic under discussion, one must not fail to point out that the federal character criterion has also been applied in the appointment and promotion of judges and it is the fundamental rule that is applied when considering appointments and promotion of judges. The Constitution, in support of the federal character posits that: "the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice".[55]

It further provides that the:

> Composition of the government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the Federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that government or in any of its agencies.[56]
>
> The composition of the government of a state, a local government council or any of the agencies of such government or council and the conduct of the affairs of the government or council or such agencies shall be carried out in such a manner as to recognize the diversity of the people within its area of authority and the need to promote a sense

[52] Section 271 (1) – (3) CFRN 1999
[53] Section 276 (1) –(3) CFRN 1999
[54] Section 281 (1) – (3) CFRN 1999
[55] Section 14(1) CFRN 1999
[56] Section 14 (3) CFRN 1999

> of belonging and loyalty among all the peoples of the federation.[57]

In order to give teeth to the above provisions, the Constitution in the Part 1(C) of the third schedule created the Federal Character Commission and it provides that:

> 8 (1) in giving effect to the provision of section 14(3) and (4) of this Constitution, the commission shall have the power to:
>
> (a) Workout an equitable formula subject to the approval of the National Assembly for the distribution of all cadres of posts in the public service of the federation and of the states, the armed forces of the Federation, the Nigerian Police Force and other government security agencies, government owned companies and parastatals of the states;
>
> (b) Promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of governments;
>
> (c) Take such legal measures, including the prosecution of the head or staff of any ministry or government body or agency which fails to comply with any federal character principle or formula prescribed or adopted by the Commission; and
>
> (d) Carryout such other functions as may be conferred upon it by an act of National Assembly.
>
> (2) The posts mentioned in sub-paragraph (1) (a) and (b) of this paragraph shall include those of the permanent secretaries, Director-Generals in Extra-Ministerial departments and parastatals, Directors in Ministries and Extra-Ministerial Departments, /Senior Military Officers, senior diplomatic posts and managerial cadres in the Federal and State Parastatals, bodies, agencies, and institutions.
>
> (3) Notwithstanding any provision in any other law or enactment, the commission shall ensure that every public company or corporation reflects the federal character in the appointments of its directors and senior management staff.

[57] Section 14 (4) CRFN 1999

> 9. It shall be the duty of the Board of Directors of every state owned enterprise to recognize and promote the principle of federal character in the ownership and management structure of the company.

A careful reading of the above constitutional provision would reveal that the aim of the federal character principle is to avoid situations of tribal or regional domination of government agencies. The aim is laudable but it has been inappropriately applied in Nigeria and this has led to the enthronement of mediocrity, tribal domination, and lack of transparency, inequality and corruption. One would have thought that the essence of the federal character principle would be to ensure the protection of the minority groups in Nigeria but surprisingly, the principle protects the majority ethnic groups who have used it to circumscribe the otherwise perceived goal of the principle.

If religiously adhered to, the federal character principle ought to ensure equity and fairness in appointments into government agencies that would recognize geographic, religious, ethnic and linguistic diversities existing in the country. Linking this to appointments and promotion of judges, we earlier noted that promotions/elevations in the judiciary primarily is based on vacancy and or seniority in addition to the quota system introduced by the federal character principle.

Consequently where a vacancy exists at the Supreme Court or Court of Appeal on the ground that the holder of such office is unable to perform the functions of his office either because the person has died, resigns or retires, the President of the court would be required to send a list of candidates to the NJC from which it would recommend a suitably qualified candidate usually from the state of the retired or deceased judge and the newly elevated judge steps in to take the position vacated by his state or geopolitical zone[58].

This practice poses a great danger to the judiciary. One of such dangers is that highly intellectual and morally sound judges are likely to be

[58] President of the Court of Appeal, Justice Zainab Bulkachuwa has dismissed insinuations that appointment of 14 justices into the bench did not follow due process. Justice Bulkachuwa explained that the appointments were to fill vacancies which arose from retirement, demise and elevation of some justices of the Appeal Court to the Supreme Court. She stated this during the opening ceremony of the 2017 Court of Appeal Judges Conference, which held at the headquarters of the court in Abuja http://sunnewsonline.com/appointment-of-court-of-appeal-justices-south-east-not-short-changed-president Accessed 14th November, 2018

excluded in the process for the singular reason that no vacancy exists for his state or geopolitical zone. Conversely, the NJC ends up promoting a judge who is not the most qualified thereby enthroning mediocrity at the Bench. This system or pattern of promotion in the Bench has been criticized by Justice James Ogebe of the Supreme Court during his valedictory. He stated emphatically that:

> Appointment to the apex court should not be based on Federal Character which breeds mediocrity and distorts the well cherished values of merit and seniority at the Bar, with resultant inefficiency in the system. The best available materials at any given time should be appointed to the apex court regardless of where they come from.[59]

It is important to note that while the principle of federal character may *prima facie* be noble, it is advised that it should not be extended to the Bench. Promotion to the Bench should be based on experience, professional competence, judicial temperament and integrity. The NJC is very much involved in the appointment and promotion of judges; they must craft their own rules on how this process should be carried out. This they can do by looking at other jurisdictions where the judiciary is independent, efficient and effective.

IV. **Judicial Independence in Nigeria**

Judicial independence or independence of the judiciary in Nigeria ought not to have been a part of this paper if all things were equal. The focus of this section would have been on mechanisms for rewarding efficient and independent decisions in the judiciary but as everything depends on something, rewarding independent and efficient decisions in the judiciary is also dependent or hinged on the pillar that Nigeria has an independent and efficient justice system. Therefore, the extent of the independence of the judiciary from the other arms of government would invariably affect the quality of judgments from the Bench. Hence, it is pertinent that we look at the independence of the Nigerian judiciary and in so doing; we shall be able to determine whether the judges can give independent decision and how the Nigerian system rewards such judicial boldness.

[59] *Azinge and Rapu*, (n.39) p. 120.

What is judicial independence? The Black's Law Dictionary defined independence "as the state or quality of being independent especially a country's freedom to manage all its affairs, whether external or internal, without control by other countries."[60] It is a state of freedom from outside control or support. While the judiciary is a system of courts of law or a branch of government in which judicial power is vested.[61]

Taking the two words together, judicial independence would be the ability of a judicial tribunal, qualified by law, to make decisions free of undue pressure from outside sources especially the executive and legislative arms of government.[62] It is the freedom of judges in a judicial system to "decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason.[63]

The International Bar Association Minimum Standard of Judicial Independence[64] provides that judicial independence can be said to exist when individual judges have three types of independence, i.e. personal, substantive and internal. It posits that personal independence exists when "the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control".[65] Substantive independence exists where in the discharge of his/her judicial function, a judge is subject to nothing but the law and the commands of his or her conscience"[66] and internal independence would be in existence when "in the decision making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.[67]

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[60] *Garner, A.B Blacks Law Dictionary*, 9th edn., (St. Paul, MN: West Publishing Co; 2009) p 838.

[61] Merriam-Webster on Line Dictionary, 2018.

[62] *Aka, P.C*. "Judicial Independence under Nigeria's fourth Republic: Problems and Prospects", *California Western International Law Journal* (2014) Vol. 45, No. 1 p.9.

[63] Basic Principles on the Independence of the Judiciary, Preamble, UN Human Rights Commission Press 40/32 (Nov. 29, 1985) and 40/146 (Dec 13 1985. The principles were adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, from August 26-Septemebr 6, 1985 and endorsed by the General Assembly Resolution 40/32 of Nov 1985 and 40/146 of Dec, 1985. S.2.

[64] Section 1(a) International Bar Association Minimum Standard of Judicial Independence (Int'l Bar Assn. 1982) as cited by *Aka* (n.62) p. 9

[65] Ibid , S 1(b).

[66] Ibid S.1 (C),

[67] Ibid S. 47.

It is important to note that at this point that the three categories of independence discussed above must exist in order to ensure the rule of law and effective protection of the fundamental rights and freedoms of the human race.[68]

This paper earlier discussed the doctrine of separation of powers and it is trite to reiterate that judicial independence has its roots in the doctrine of separation of powers which enables the three arms of government-Executive, Legislature and Judiciary to act or function independently and at the same time act as a check and balance mechanism with the objective of preventing abuses of governmental powers which may have negative effect on the society which ought to be a free society. Substantive independence indicates that the judge is subject to nothing in discharging his/her judicial functions except the law and his/her conscience. If this theory is anything to go by it means that the judges cannot act arbitrarily when deciding cases before them. They cannot decide cases based on their personal choices or preferences but must always remember that their duty is and remains the application of the law to all cases irrespective of the persons involved.

Sadly, judges are not always allowed to perform their judicial duties in the spirit of true independence. In many societies, they suffer undue pressure ranging from inappropriate criticisms on their persons, transfer of sensitive cases from their courts. They may be dismissed or suspended and sometimes are physically attacked.[69]

Despite the need for the judges to carry out their duties independently, it is not a secret that judges are often put under undue pressures of different sorts with the objective of making them to compromise.[70] The Chief Justice of Nigeria, Justice Walter Onnoghen has criticized the political class for constantly aiming to compromise the integrity of the judiciary. In the words of the CJN he said:

> Politicians, stop interfering with the judiciary. I have to say this because it is becoming too much. When you get a

[68] *Azinge and Rapu* (n.39) p.70

[69] Ibid

[70] After the October 8, 2016 raid of judges homes by the DSS, two of the arrested judges accused two serving ministers of visiting their homes at the Judges' quarters in Abuja with a request to influence some pending 2015 governorship elections petition in some states. The immediate past CJN, *Mahmud Mohammed* proactively rescheduled Supreme Court proceedings to last till midnight with pleadings and decisions taken on the same day. This he did to avoid pressure from politicians.

> judgment, take it as it is because that is what it is, particularly from the Supreme Court Bench. I want to let you know that there has been security breach in this case and it should not repeat itself: and we will investigate. Why should you be interested in what we decide? You have brought your case here, filed your pleadings, and many of your lawyers are before us arguing your case. Why you should now bribe court officials and try to know what the judgment is and who is writing which judgment? Because the problem we are facing in the judiciary is that of the politicians and perception by the public. So that nobody loses a case and believes that it is in accordance with the facts of the case and the law. What is happening?"[71]

As earlier noted, where the judiciary is not adequately remunerated, it may lead to situations that would threaten the independence of the judiciary as it may entrench corruption and we have situations where judgment will always be in favour of the rich as he who pays the piper dictates the tune.

Sometimes judges are subjected to public criticism with the sole aim of intimidating them and the profession.[72] It is important to note that until judges are able to perform their duties freely, impartially and independently, the rule of law will gradually be a dead letter law. The Executive and Legislature must be prepared also to allow the judiciary the independence it requires to function effectively.

V. **Problems Militating Against the Independence of the Judiciary in Nigeria.**

Having noted earlier in the paper that the Nigerian judiciary is grappling with some issues which have affected its public image, this section would examine some of the problems that hinder judicial

[71] *Azu,* (n. 35) p.2. The statement was made by the CJN while ruling in the suit by "Peoples Democratic Party (PDP) governorship candidate, *Uche Ogah*, against Governor *Okezie Ikpeazu* of Abia state.

[72] It is reported that some chieftains of PDP and APC criticized the Supreme Court when its decision did not go the way they wanted.

independence in Nigeria and also make recommendations on the way forward.

A. Problems of the Judiciary

Some of the issues to be considered include i.e. but not limited to:

1. Separation of power
2. Unfettered authority
3. Executive Interpretation of Court decisions
4. Qualifications for appointment
5. Funding/fiscal autonomy
6. Guaranteed or security of tenure

1. Separation of Power

Earlier in this paper, it was noted that separation of power is necessary if the judiciary will function independently. This is not to say that there would be no checks and balances from the other arms of government. It only means that the authority of the judiciary be separated formally from that of the other arms of government and the executive and legislature must cease from doing anything or taking action that would likely jeopardize the independence of the judiciary and the judges.[73] The Basic Principles on Judicial Independence reiterated this when it advised that judicial independence should be guaranteed by the state and enshrined in the Constitution of the country.[74] Nigeria has enshrined the separation of powers in the 1999 Constitution as amended but guaranteeing the independence so enshrined has been a herculean task. It should be noted that one of the objectives of this doctrine is to shield the judiciary from abuses arising from unrestrained exercise of powers from the other arms of government. The question would then be whether the judiciary can operate without the executive and the legislature. This is not the intendment of the constitutional provision; it envisages the independence of all the arms of government and also ensures that in the process there are proper checks and balances. The Constitution does not provide for water tight separation of powers. Each arms of government works co-operatively with other arms for effective governance.

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[73] *Keith, C.L*, "Judicial Independence and Human Rights Protection around the World, *Judicature* (2002) Vol. 85, p195.

[74] Basic Principles on Judicial Independence (n. 63) section 1.

2. Unfettered Authority of Judges

Here it is required that the judges should have unfettered authority to decide cases that are brought to their courts based on their competence as judges and should be free from any forms of pressures from all quarters. The Basic Principles on Judicial Independence provides that "the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issues submitted for its decision is within its competence as defined by law."[75] For the judiciary to be truly independent the judges must not be influenced by any external powers and there should not be any appearance or perception of such influence. In this case, the courts must have no contact or connection with any political party. If there is an appearance of such affiliation, then they would be considered to be bias in their decisions if they make pronouncements or issue decisions/judgments that favour such a political party especially when the political party is in control in the state.

Again judges should not be reached outside official channels. This affects the independence of the judiciary in Nigeria. As earlier noted in the paper, the fact that some government officials visit judges at home gives a negative impression and this ought not to be. Two judges that were arrested by the DSS in 2016 accused two serving Ministers of the All Progress Congress (APC) of visiting their residences at the judges quarters in Abuja with a request to influence pending 2015 governorship election petitions in some states. Given that the APC is the party in control at the centre, the authority of the judges to independently decide the case will be fettered and this is an ugly trend for the judiciary. This has to stop. Access to judges outside official mediums must be discouraged. Some lawyers try to reach the judges through their staff and sometimes through some senior members of the bar. For instance, law enforcement agents alleged that Justice Ibrahim Auta of the Federal High Court once accepted ₦500, 000 from Mr. Rickey Tarfa[76] a Senior Advocate of Nigeria.(SAN)

3. Executive Interpretation of Courts Decisions

Basically once a court gives a decision; such a decision can only be upturned on appeal as provided by the law. Courts decisions must be final

[75] Ibid, section 3.
[76] Sahara Reporters (n. 29)

and not to be subjected to vagaries of interpretation by the other arms of government especially the executive arm. The Basic Principles of Judicial Independence once again provides that "there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.[77]

This is to enable the judges' carryout their functions without interference from other quarters. For instance, under *President Olusegun Obasanjo's* regime, court decisions were subjected to "executive interpretations and the administration became notorious for choosing which court decision to obey.[78] Some of such decisions or executive review of court decisions include the voiding of the purported impeachment of former Oyo State Governor *Rashidi Ladoja* and the Supreme Court decision on the seizure of Lagos State's Council Fund by the Presidency[79].

4. **Qualifications for Appointment**

There are different authorities that are in charge of selection and appointment of judges in Nigeria. The Federal Judicial Service Commission advises the National Judicial Council on nomination of people for their appointment as: the Chief Justice of Nigeria, a Justice of the Supreme Court, a President of the Court of Appeal, a Justice of the Court of Appeal, the Chief Judge of the Federal High court, a Judge of the Federal High Court, the President and Judges of the National Industrial Court, the chairman and members of the Code of Conduct Tribunal as well[80].

For the Federal Capital Territory, the Judicial Service Committee of the Federal Capital Territory recommends to the National Judicial Council appropriate people for nomination as: the Chief Judge of the Federal Capital Territory, a Judge of the High Court of the Federal Capital Territory, the Grand Kadi and a Kadi of the Sharia Court of Appeal of the Federal Capital Territory, the President and a Judge of the Customary Court of Appeal of the Federal Capital Territory.[81]

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[77] Basic Principles on Judicial Independence, section 4

[78] *Onanuga, A, et al.,* "How to Ensure Judicial Independence by Lawyers' http://www.thenationonline.net/how-to-ensure-judicial-independence-by-lawyers (Accessed 6th January, 2018).

[79] Ibid

[80] Sections 231, 238 and 255 of the Constitution of the Federal Republic of Nigeria

[81] Sections 250, 256 and 270 of the Constitution of the Federal Republic of Nigeria

The State Judicial Service Commission advises the National Judicial Council on suitable persons for nomination to the office of the Chief Judge of the state, the Grand Kadi of the Sharia Court of Appeal of the state, the President of the Customary Court of Appeal of the state, Judges of the High Court of the state, Kadis of the Sharia Court of Appeal of the state and Judges of the Customary Court of Appeal of the state. After the nomination by the Federal Judicial Service Commission, the Judicial Service Committee of the Federal Capital Territory and the State Judicial Service Commission respectively, the National Judicial Council then recommends to the President of Nigeria, from the list of people suggested/advised by the Federal Judicial Service Commission and the Judicial Service Committee of the Federal Capital Territory. It also recommends to the Governor of each state from the list suggested/advised by the State Judicial Service Commissions. It is the President and the Governors of each state that conduct the final appointment of judges. Finally, the President of Nigeria appoints the Justices of the Supreme Court as well as the Chief Justice of Nigeria. This he does on the recommendation of the National Judicial Council and it is subject to confirmation by the Senate.

To have a judiciary that is alive to its responsibilities, selection and appointment of judges must be based on merit. Those to be appointed must be duly qualified, competent and of high integrity. If need be appointment should be done or conducted by an independent body and not the government. In Nigeria, the President appoints judges on the recommendation of the NJC subject to the confirmation by the senate.. Another dangerous trend in Nigeria is the issue of federal character which throws up quota system in the appointment of judges. The paper has noted that the federal character principle should not be applied in the judiciary as it has enthroned mediocrity rather than excellence which should be the hall mark of any judiciary

> *Azinge and Rapu*[82] in their contribution noted that:
> There is a recent pervasive perception that sublime considerations in the appointment of persons into the judiciary have been compromised. Persons who in the arena of law can hardly tell a B from a Bull's eye have strayed into the lofty Bench. The sad fact is that there are several judges on Nigeria's Bench

[82] *Azinge and Rapu*, (n.39) p.6

> who are not versed in the rudimentary maters of the law let alone tasking matters of judex, and thus have easily succumbed to subtle manipulations of very crafty and brilliant members of the bar.

The learned authors further noted that:

> Gone, it appears, are the beautiful days where a judge of the lower court in Nigeria will confidently deliver his/her ruling/judgment with the firm conviction that should any smart lawyer desire, he/she may appeal same to the highest court of the land, the judgment would not be upturned either on substantial gravamen of the law or even on supercilious technicalities because the *judex* concerned was sure of his foundation in the law.[83]

They noted that there is great danger where judges are appointed not on merit but on the basis of "who know man" and this has in no small measure contributed to the back log of cases in courts. Because of the obvious inadequacies of the judges, they either would not sit or they adjourn cases unnecessarily after lobbying their ways to the Bench[84].

It is trite to note that the Executive or the President is not bound to appoint a person that the NJC has recommended and submitted to them. So even where the candidate may be the best considering all the criteria, he/she may not be appointed or promoted as the case may be. Where this is the case, the President or the Governor may ask the NJC to recommend another person. At this point, it becomes a matter of politics and excellence is relegated. Sometimes, a judge is appointed or promoted in acting capacity and where the Executive does not want that particular candidate to continue, the President will not confirm the appointment but would allow a period of three months to elapse after which the President would appoint the candidate of his choice based on the recommendation of the NJC. As it were, the NJC ultimately does not have the final say in the appointment or promotion of judges as political interests must be served.

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[83] Ibid

[84] Azinge and Rapu (n.82)

5. Funding

Funding is very crucial for the success of any organization. For the Nigerian Judiciary, fiscal autonomy is very crucial if it must attain the level of independence it seeks. The judiciary must be given adequate resources to enable it properly carry out its duties and to ensure that it does not suffer any financial distress which may arise from the other arms of government. When the judiciary is adequately funded, it would be able to perform effectively. Adequate funding or judicial autonomy exists when the salaries or budgets of the judiciary are shielded from reductions by the executive and the legislature and also when the judiciary is allowed to run their own budget. In 2016 up to 2017, the judicial workers went on strike demanding judicial (fiscal) autonomy in Nigeria. This affected judicial functions as the courts were shut down for months and as at the time of writing this paper, fiscal autonomy of the judiciary is yet to be achieved in Nigeria.

> The Constitution provides that:
> Any amount standing to the credit of the judiciary in the consolidated revenue fund of the state shall be paid directly to the heads of the courts concerned.[85]

The budget of the Courts is controlled by the Executive and obedience to the above constitutional provision is non-existent. Essentially, the judiciary is not able to perform its duties as it is starved of funds. Basic infrastructures[86] that would aid the court are usually nonexistent due to lack of funds. No nation can make progress when the judiciary is neglected or starved of funds.

6. Security of Tenure of Judicial Officers

Removal of judges in Nigeria is done either by the President or the State Governor as the case may be. Before a judge is removed, two third majority of the appropriate legislative arm must support such removal. A judge may be removed on grounds of misconduct or inability to perform

[85] Section 121 (3) CFRN 1999 as amended
[86] Such as Court halls, chambers, registries, and offices for support staff etc.

the functions of his office. Removal of judges in Nigeria today is in the hands of the political class. If the judiciary in Nigeria will be independent, the judges' terms of office must be guaranteed and same should apply to their appointment, discipline and removal from office. This is needful as it would ensure that the judges are protected from possible personal and professional abuse from the other arms of government and to reduce other improper influences that may interfere with the impartiality of the judiciary.

If the tenure of office of judges is not secured, they would become puppets in the hands of the Executive as they would always seek to do the bidding of the Executive in order to retain their jobs and this breeds sycophancy.

B. Are Judges Rewarded for Independent and Efficient Decisions?

It is observed that the method of appointment of judges in Nigeria is faulty. Most judges are not appointed on the basis of merit or intellectual prowess but on the ground that they meet the criteria of quota system that is operative. Where judges are appointed by the executives, such judges would want to remain loyal to the government of the day and would ensure that decisions from the court are in line with the expectations of the political party as a judge may be risking his/her job when he/she does otherwise. Nevertheless, some judges have stood their ground and have suffered untold hardships in the hands of the political class.

A case in point to be discussed here *albeit* briefly would be the case of the former President of the Court of Appeal, Justice *Isa Ayo Salami*. Prior to the suspension of Justice Isa Ayo Salami, there was a plan to move him from the Court of Appeal to the Supreme Court, this planned move seemed good and harmless as the Supreme Court is the Apex Court of the land and most Judges would want to end their careers at the Supreme Court level. The news of the suspension was reported in the dailies.[87] It was alleged that the plan to move *Justice Salami* was perfected in January 2011 at the meeting of the Federal Judicial Service Commission headed by the CJN Justice *Katsina- Alu*. The CJN had argued that the experience of Justice *Ayo Salami* would be an added advantage to the Supreme Court as it would strengthen the Supreme Court. It was contended that such a move was novel in the history of Nigeria judiciary and the Bar and the general public

[87] The Nation Newspaper, February 4 2011, p. 1

reacted to this move. The objection was borne out of the fact that a top leader of the National Assembly allegedly invited *Justice Ayo Salami* for interaction in order to discover the reason why the Court of Appeal had been delivering judgments that are not in favour of the ruling party- the Peoples Democratic Party (PDP) in some states.

In addition to this, five justices[88] of the Court of Appeal received queries by the NJC over the verdict of the Court in Ekiti and Osun States Governorship Election Petition. Justice *Isa Salami* protested the alleged plan to move him to the Supreme Court in a letter titled "offer of appointment to Supreme Court–Rejection. The reference number of the letter is PCA/5.25/Vol.1/143 dated 4th February, 2011. Justice *Salami* contended that it was an unholy move to push him out of the Court of Appeal. He further contended that the purported move had no procedure in the legal history of Nigeria. In addition to this Justice *Salami* filed a suit against the CJN, the Federal Judicial Service Commission, the National Judicial Council and the Attorney General of the Federation. He also deposed to an affidavit wherein he averred *inter alia* that after he had set up the Sokoto state governorship election petition appeal panel, parties had filed and exchanged briefs; and the briefs had been adopted by the parties while judgment was reserved. He averred that the CJN summoned him to his office and asked him to disband the panel he had set up for the appeal on the ground that if the panel allowed the appeal and removed the governor, the effect would be that the Sultan of Sokoto would be removed. He averred that since the reasons proffered by the CJN was not convincing, he declined the request. He also averred that the CJN in alternative requested that he "direct the panel of justice to decide against the appellant", a request that he also turned down.

As expected the CJN in a Counter-Affidavit on the 7th of March 2011 denied all the allegations against him by Justice *Ayo Salami.* Eventually, a Committee was set up by the NJC to look into the matter. Subsequently the Committee cleared both the CJN and the PCA of any misconduct in relation to the Sokoto appeal but however noted that the CJN "as the chairman of the NJC had no power to interfere with any proceeding in any court"[89] as

[88] These justices include: *Clara Bata Ogunbiyi. M.R Garba, P.A. Galinje, C.C. Nwabueze and A. Jaure*. See the Nations Newspaper, February 6, 2011, p. 4

[89] *Shehu, A.T* and *Tanum, M.K* "Suspension of Justice Ayo Salami: Implications for Rule of Law, Judicial Independence and Constitution", *African Journal of Criminology and Justice Studies (AJCJS)* (2016), Vol. 9 Issue 1, pp. 41-60.

was done in the Sokoto appeal petition. However, the Supreme Court went ahead to dismiss the appeal even through it was not pending before it. As at the material time all appeals except that of the presidential election terminates at the court of Appeal.[90]

Eventually, the NJC after deliberating on the reports of the committees it set up, absolved the CJN of any judicial misconduct and stated that the behaviour of Justice *Ayo Salami* was a misconduct contrary to Rule 1(1) of the Code of Conduct for Judicial officers of the Federal Republic of Nigeria and directed Justice *Ayo Salami* to apologise to the CJN in writing and the NJC within one week from the 10th of August, 2011. Justice *Salami* did not apologise but headed to the Federal High Court to challenge the scheme to remove him from the Bench. While the suit was still pending the NJC suspended Justice *Ayo Salami* and made a recommendation to President President *Goodluck Jonathan* to retire him from service.

After the CJN retired at the compulsory age of 70 on 28 August, 2011, the suspension of Justice *Ayo Salami* remained despite the call from the public for his reinstatement. Subsequently, the NJC recommended for his reinstatement and forwarded the recommendation to the President but President *Goodluck Jonathan* refused to reinstate Justice *Ayo Isa Salami*. The President *Goodluck Jonathan's* refusal to recall the PCA Justice Ayo Salami was challenged in court by concerned citizens who saw the action of the President as an agenda to rid the judiciary of radical and activist judges and make the judiciary an agent or appendage of the executive to always answer to the bidding of the Executive.[91] This reiterates the fact that independent decisions by radical judges in Nigeria would either be rewarded with queries, suspensions or early retirement from service.

It is worthy to note that Justice *Ayo Salami* is not the only judge that has suffered this kind of fate for daring to give decisions based on law and his conscience in line with the principle of substantive independence.

VI. **Recommendations and Conclusion**

The paper critically examined the remuneration system and promotion possibilities of judges in Nigeria. It was observed that the topic under discussion would not have been properly addressed without looking at some critical issues that are at the root of judicial independence in

[90] Section 246 (1) (b) CFRN 1999

[91] See *Shehu and Tanum* (n.89) for a detailed account of the saga.

Nigeria. The paper observed that separation of powers as enshrined in the Constitution must be adhered to strictly if the judiciary will make progress. On the remuneration of judges, it was observed that the salary of the judicial staff of the higher Bench appears to have improved but the lower Bench is still grappling with the issue of remuneration and this has given rise to cases of corruption both at the higher and lower benches. The paper therefore calls for the improvement of the salaries and emoluments of judges at all level. On appointment and promotion at the Bench, the paper observed that appointments can either be made by the President or the state Governor on the recommendations of the NJC and that promotions are principally based on vacancies and where such vacancies exist, it is filled by a quota system bearing in mind the federal character principle. This, the paper notes is not healthy as it has enthroned mediocrity in the judiciary. The paper therefore recommends that federal character principle should be jettisoned with respect to promotions in the judiciary. It is also advised that a private organization be saddled with the responsibility of recruiting judges of high moral and intellectual standing if the Nigerian judiciary will be independent.

The paper further noted that judges must have exclusive authority to decide cases that come before their courts and that the executive must cease from giving interpretations to court decisions. Where they are not satisfied, they should make use of the appellate courts. Funding is one key area that the paper noted could make the judiciary to succumb to pressures from the other arms of government. A judiciary that is starved of funds can achieve little therefore the judiciary should be given financial autonomy and be allowed to be in charge of their affairs. The tenure of office of judges must be secured by law and their remuneration guaranteed if the Nigerian judiciary will compete favourably with their counterparts from other parts of the world where the judiciary is revered.

Finally, on the reward of independent and efficient decision by judges, the paper examined the case of the former President of the Court of Appeal, the paper noted that for daring to hold an opinion which was against the ruling party, he was suspended and subsequently retired. Five other Court of Appeal Judges were queried for giving independent judgments. The paper concludes that this is a dangerous trend as the Nigerian judiciary has lost its pride of place in the eyes of the citizen essentially where the judiciary is seen as an appendage of the Executive coupled with the various arrests made by the government involving judges

for corruption and some judges aver that their arrests were based on the fact that they gave judgments that were not favourable to the ruling class in the past and that they are being haunted for that. This is the time for the judiciary to stand and save itself from what has held it down. The judiciary is the fortress for the citizens against oppressive laws and government. The importance of this arm of the government cannot be overemphasized because an independent judiciary is a great asset to any nation.

ENHANCING ACCESS TO ESSENTIAL MEDICINES: EXAMINING PATENTS AND THE TRIPS AGREEMENT FROM A PUBLIC WELFARE PERSPECTIVE

Jennifer Heaven Mike*

Abstract

This Article evaluates the role and function of the patent system, with particular focus on the public welfare aspect, to reveal the social welfare purpose of patent law. It examines the basic underpinnings of the patent system, from a public welfare perspective, to promote better access to pharmaceuticals. It also analyses and questions the underlying justifications and assumptions and the purpose of the patent system in both the TRIPS Agreement to reconceptualise the links between pharmaceutical patents and access to medicines. The Article argues that the patent system exists to not only grant rights to patentees, but also, ensure that the public can benefit from the result of the patent holder's ingenuity. This argument is particularly relevant in light of the effect of patent right on accessibility to medicines.

Keywords: *Access to Essential Medicines, Nigeria, Patent Rights, public health, public welfare, TRIPS Agreement.*

I. Introduction

A commonly perceived notion of a patent is that the intellectual protection is instrumental to promoting innovation, technological advancement and scientific progress for public benefit.

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From a pharmaceutical patent standpoint, a patent is also assumed to play an important role in encouraging pharmaceutical Research and Development (R&D), technology transfer (TT) and foreign direct investments (FDI) which, in turn, facilitate the availability of important medicinal resources to society. These assumptions are encapsulated in the theoretical justifications underpinning the patent system and the Intellectual Property (IP) rights of inventors.

This article assesses these philosophical supports of patent rights and argues instead for a need to focus on the public welfare benefit of having a patent system. This welfare-purpose-driven approach to patents is to gain a contextual appreciation of the advantage that patent law and system offer to society from a user's point of view. It is argued that approaching patents from a public welfare perspective would give the Nigerian policymakers, the courts and other relevant authorities' greater flexibility to formulate, implement and interpret pharmaceutical patents in the interests of the public and also fulfil the objective of enhancing access to essential health treatments.

This paper is divided into five parts. Part I is the Introduction. In this introductory section, an overview of the study is provided. Part II provides a contextual base and lays the foundation for analyzing the issues that run through the paper. Particularly, the various theoretical justifications of the Patent system provide the reader with the essential context necessary to analyze the basic underpinnings of the patent system. Part III approaches the patent system from a public welfare perspective. In this section, an alternate conceptualization of the patent system and law in a social welfare and development context is provided to promote an enhanced access to essential medicines in Nigeria and other developing countries. Part IV provides an overview of the international framework for patents. The section highlights the policy context, scope and objective for the existence and protection of patents at international level, specifically, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). This exposition aims to provide a base to analysis of the relationship between patents, the problem of access to medicines and the available health-related flexibilities that can be utilized to safeguard public health. Part V narrows the scope of the study to Nigeria and argues for the design, interpretation of patent rights, and the full incorporation of

the TRIPS Flexibilities to enhance access to medicines from a public welfare perspective.

II. Defining Patents

A patent is a legal protection or government-granted authority that confers its owner with certain, limited exclusive rights,[1] namely, to exclude others from using, making and/or dealing with the patented invention/product without a license or permission of the owner, for a specified limited period of time, within the territory it is granted.[2] This exclusive and monopoly authority essentially permits the inventor to 'exclude competitors from the marketplace' and control unauthorized access to the patented invention.[3]

Patents are not granted for every invention. The invention must satisfy the pre-determined conditions for the grant of a patent right to inventors, which dictate that the inventors or invention address an identifiable problem or provide a new and useful solution that is of high inventive quality.[4]

To justify the existence of the patent system, it is commonly argued that a patent's exclusivity and monopoly rights will not only encourage innovation and reward inventors; it also facilitates the availability of the invention and also spurs others to further invent around the disclosed invention.[5] And in the international WTO trade platform, patents as well as

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[1] Cynthia Ho, *Access to Medicine in the Global Economy: International Agreements on Patents and Related Rights* (Oxford, Oxford University Press 2011) 17.

[2] Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford, Oxford University Press 2014) 375; Kieran Comerford, *R&D and Licensing: Building Value through Intellectual Assets* (Elsevier 2007) 97.

[3] Charlotte Waelde and others, *Contemporary Intellectual Property: Law and Policy* (Oxford, Oxford University Press 2016) 519.

[4] John H Barton, 'Non-Obviousness' 43(3) (2003) IDEA 475, 476.

[5] Waelde and others (n 3) 371; Robert P Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press 2011) 31-102; Christine Greenhalgh and Mark Rogers, *Innovation, Intellectual Property, and Economic Growth* (New Jersey: Princeton University Press 2010) 32-39.

other IPRs, would promote economic and social development, rapid technology transfer trade and the attraction of FDI.[6]

However, among IP specialists, Industry Specialists and Commentators, the widely unsubstantiated view that a patent is the ideal mechanism for encouraging innovation and technological development, is not universally accepted, especially considering the underlying adverse implication for competitions, incremental Research and Development (R&D), public health and consequently, the enhancement of human development.[7]

III. Theoretical Justifications of the Patent System

3.1 The Natural Law and Labour Theory

The Natural Law theory is rooted in the recognition of the inherent natural rights of inventors to their ideas and the products of their mental and intellectual labour.[8] Proponents therefore, argue for the moral right of an inventor to control their inventions and reap the results of their intellectual efforts.[9]

The most influential argument for natural rights emerged from the writings of John Locke who believed in the natural entitlement to life, liberty and personal 'labour of property.'[10] To the philosopher Locke, a human being is born with a set of natural rights which entitles him to the

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[6] Laurence Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Law Making' 29(1) (2004) *Yale Journal of International Law* 1, 2-3. See also the Preamble of the Trade-Related Aspects of Intellectual Property Rights 1994 (Annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994 U.N.T.S. 299, 33 I.L.M. 1197 (1994)) (Hereinafter referred to as the TRIPS Agreement.)

[7] Helfer, ibid

[8] Bently and Sherman (n. 2) 379; Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' 10 (1950) *Journal of Economic History* 1, 10-17; See also Edwin Cameron, 'Patents and Public Health Principles, Politics and Paradox in D Vaver, *Intellectual Property Rights: Critical Concepts in Law, Volume 4* (Taylor & Francis 2006) 444.

[9] Edwin C Hettinger, 'Justifying Intellectual Property' in David Vaver (ed) *Intellectual Property Rights: Critical Concepts in Law, Volume 1* (Taylor & Francis 2006) 103; Lior Zemer, *The Idea of Authorship in Copyright* (Aldershot: Ashgate 2007) 11; Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (OxFord, Oxford University Press 2007) 30-31

[10] John Locke, *Two treatises of Government* (Whitmore and Fenn, and C. Brown 1821) 209-210.

enjoyment of these rights including the preservation of his property.[11] Locke's main proposition is that every man has a natural right to the earth given by God 'in common.'[12] However, when a person appropriates a natural endowment by mixing his labour with it, he adds something of his own to it which ought to be protected from exploitation by others.[13] Accordingly, therefore, man has a natural right to the products of his labour, a right which should be protected by society.[14] Locke also argues in his labour theory that the right to property is justified because every man has a property in his own person.[15] The natural law/labour principle is therefore premised on the ontological assumption that people have a right to property, to the exclusion of all others, to the extent that they have expended their labour to it.

The proposition that a man owns a property right by removing something out of the state of nature and mixing his labour to it has been questioned by other commentators. Robert Nozick dismisses this labour premise by asking why a person acquires ownership by mixing his labour with something in common, instead of losing his labour. He uses an analogy of a person pouring a can of tomato juice into the ocean. He asks if a person, through the act of pouring the juice and 'mixing one's labor' with the ocean, acquires the ocean or loses his can of tomato juice?[16] The question essentially raises issues with the conceptualisation that a person owns a right to a property by mixing his labour with a common endowment.

The labour and natural right argument has been extended to intellectual property rights (IPRs), including patents, as a consequence of intellectual labour. As a natural right, this theory presupposes that society, represented by the state, is duty bound to recognise, protect, and enforce the natural rights and interests of patentees.[17] This argument is often

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[11] ibid; John Locke, 'Two Treaties of Government' extract in Michael DA Freeman*, Lloyd's Introduction to Jurisprudence,* 9th edn (London: Sweet & Maxwell 2014) 132.
[12] Locke (n.10) paragraph 26.
[13] ibid paragraph 27.
[14] Sigrid Sterckx, 'The Moral Justifiability of Patents' 13 (2006) *Ethical Perspectives* 249, 250.
[15] Locke (n.10) paragraph 27. Hettinger (n 10) 100.
[16] Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books 1947) 175.
[17] Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (Vancouver, BC: UBC Press 2006) 19.

canvassed with regards to the human rights entitlement of patent holders and other IPRs.[18]

Nevertheless, the notion that patent rights are the inherent rights of an inventor which the state recognizes, finds strong opposition.[19] The primary shortcoming in applying the 'natural' theory to patents is the nature of the protection itself. A patent, previously mentioned, is basically a statutory instrument granted by the state.[20] A number of scholars reject this argument and criticize the inherent natural law postulate for failing to reflect the essential statutory creation and nature of patents, which is fixed and limited to specific exclusive privileges.[21] For instance, the UN Secretary-General echoes the point that 'patent legislation has never been based solely on the concept of the patent as the confirmation of an inherent, rather than the creation of a statutory, property right.'[22] The Secretary-General further reasons that 'such a concept would have left no room for statutory limitations on patent rights such as the fixed term of a patent, its forfeiture for failure to work them, its exclusion for inventions in certain fields.'[23]

3.2 The Contract and Incentive-to-disclosure Theory

Another support for patents is the 'Social Contract/Public Disclosure of Secret' justification. As Waelde and others in *Contemporary Intellectual Property: Law and Policy* identify, a patent is often defined as 'a form of social contract between the patentee and the state, whereby the award of a patent monopoly is given in return for public disclosure of the invention.'[24] The contract theory therefore hypothesizes that a patent is a contractual agreement, in which the state grants temporal property rights in exchange for securing the disclosure of the innovative knowledge and advantages of an intellectual endeavour.[25] The crux of this *quid pro quo*

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[18] This justification is also at the root of the moral and material human rights prescription of Intellectual Prpperty.
[19] Helen E Norman, *Intellectual Property Law* (Oxford: Oxford University Press 2011) 16.
[20] See the preceding section.
[21] Mgbeoji (n.17) 19-20.
[22] United Nations, *The Role of Patents in the Transfer of Technology to Developing Countries: Report of the Secretary-General* (New York: Martinus Nijhoff 1964) 9.
[23] ibid
[24] Waelde and others (n. 3) 371.
[25] ibid; Vincenzo Denicolò and Luigi Alberto Franzoni, 'The Contract Theory of Patents' 23 (2004) *International Review of Law and Economics* 365, 366.

social contract reasoning is that this public disclosure also presents an opportunity for others to invent further around the disclosed invention; thus a patent is presumed to be a catalyst for incremental technological scientific and industrial progress, as well as conferring a public benefit (the so-called 'teaching function').[26]

There are, however, shortcomings in this theory. The theory erroneously assumes that patent protection is the only reason why inventors disclose their inventions to the public and consequently, the ideal mechanism for the encouragement of further innovations and ensuring public access. According to the observation by IP scholars, 'the inventor discloses his secret only if he expects his profits from a temporary monopoly enforced by the state to be greater than those from an uncertain monopoly guarded by a tenuous secrecy.'[27] Opponents of the disclosure theory, therefore, object to the incentive function the disclosure is presumed to present by suggesting that, without patent, important inventions and their benefits would remain a secret.[28] Pharmaceutical companies, for example, are mainly corporate entities whose 'disclosure' of their medicinal products is driven by profit incentives.

In another instance, the disclosure/contract rationale presupposes that innovations are products of a necessary infrastructure (patents) and the welfare cost of the monopoly is worth the increased benefit to a particular technical/scientific field.[29] This assumption is however, called

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[26] Waelde and others (n 3) 371; Alexandra Zaby, *The Decision to Patent* (Heidelberg: Physica-Verlag 2010) 1-2; Hestermeyer (n.9) 30-31; Machlup and Penrose (n.8) 26.
The contract theory also finds support in case law. In the US for example, the US Supreme Court in the case of Universal Oil Products v. Globe Oil & Refining made the observation that:
As a reward for inventions and to encourage their disclosure, the United States offers a seventeen-year monopoly to an inventor who refrains from keeping his invention a trade secret. But the quid pro quo is disclosure of a process or device in sufficient detail to enable one skilled in the art to practice the invention once the period of the monopoly has expired, and the same precision of disclosure is likewise essential to warn the industry concerned of the precise scope of the monopoly asserted.
Universal Oil Products v Globe Oil & Refining [1944] 322 U. S. 484.
[27] Machlup and Penrose (n. 8) 27.
[28] Luigi Alberto Franzoni, 'The Contract Theory of Patents in Perspective' in Thomas Eger, Claus Ott and Jochen Bigus (eds*), Internationalization of the Law and its Economic Analysis* (Heidelberg: Springer-Verlag 2008) 106.
[29] Waelde and others (n.3) 371.

into question considering the long term detrimental welfare cost to health and human development in poorer countries.[30] Also this assumption may ignore the fact that a monopoly can be used to block competition and reduce access to the disclosed invention.[31]

Irrespective of the inherent limitations of this theory of patents, the importance of public disclosure should not be underestimated.[32] The disclosure and enablement requirements in patent applications lie at the heart of patent law and the hypothetical 'bargain' aspect of the patent system as protection-for-disclosure.[33] In this sense, the exclusive rights to exclude others from illegally appropriating a patented invention are not merely conferred as gifts; it is assumed that the right is in exchange for the disclosure of the invention and how it is practiced to the general public.[34] From the point of view of society at large, the disclosure requirement is useful for securing the public returns of patent and innovations.[35] It can be said that, from the public's perspective that disclosure and statutory enablement conditions for patents require that society gains something from the disclosed invention. Ideally, the disclosure criterion is intended to benefit the public by encouraging improvements or follow-on designs around the patent; 'thus bringing a flow of innovations to the marketplace.'[36] Consumers should then benefit from the availability of useful technologies and products, such as essential pharmaceuticals, whose development was facilitated by the disclosed invention.

However, many proponents of the disclosure theory seem to focus on the 'inventive' or 'teaching' function of patent specification from the patentee's perspective rather than looking at the benefit that society can get from the disclosed invention. Beyond the theoretical foundations of the

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[30] ibid; Poku Adusei, *Patenting of Pharmaceuticals and Development in Sub-Saharan Africa: Laws, Institutions, Practices, and Politics* (New York: Springer 2013) 119.
[31] Waelde and others (n 3) 371; Wesley M Cohen, Richard R Nelson and John P Walsh, 'Protecting their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (Or Not) [2002] National Bureau of Economic Research Working Paper 7552, 25.
[32] Waelde and others (n.3) 372.
[33] ibid; Bently and Sherman (n.2) 406.
[34] Bently and Sherman (n.2) 537.
[35] ibid
[36] Peter K Yu, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Westport: Greenwood Publishing Group 2007) 115.

contract theory, it is important to recognize the importance of the disclosure from a public welfare standpoint. This study argues that users would derive better benefits from this patent advantage if they could access and use the products that have been disclosed.

3.3 The Best Incentive-to-Innovate Theory

Another view of the patent system holds that patents present an opportunity for inventors to invest in innovative enterprises and, consequentially, disclose the knowledge and result for public benefit.[37] The incentive theory, according to Machlup and Penrose, supposes that the patent system creates the necessary incentive for inducing an adequate amount of desirable inventions to society.[38] For his part, Adusei adds that the patent system is seen to provide an important inducement for inventors to make available to society, particular beneficial objects.[39] In this manner, the inventive argument theorizes that patents are fundamental incentives to encourage inventive undertakings, technology transfer, and facilitate R&D and economic development.[40]

The underlying rationale for this utilitarian justification and economic incentive argument is straightforward: without patents, inventors — and, in the case of medicines and vaccines, pharmaceutical companies, — who invest time and ingenious efforts in medical R&D to produce efficacious drugs, will not get a return on their investments.[41] One scholar summarises the basic assumption of this 'encouragement-to-invent' argument thus: '[w]ithout the prospect of an exclusive right to use the invention, and hence a possibility of recouping the money invested

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[37] This literature is summarised in Machlup and Penrose (n 8) 10, 21-25; Fritz Machlup, *An Economic Review of the Patent System: Study of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, Study No 15* (U.S. Government Printing Office 1958) 33; Sigrid Sterckx 'Patents and Access to Drugs in Developing Countries: An Ethical Analysis' 4(1) (2004) *Developing World Bioethics* 58, 66-67.

[38] Machlup and Penrose (n 8) 21-22; Hestermeyer (n.9) 31; Joo-Young Lee, *A Human Rights Framework for Intellectual Property, Innovation and Access to Medicines* (Aldershot: Ashgate Publishing Ltd 2015) 47.

[39] Adusei (n.30)121.

[40] Ibid.

[41] Adam B Jaffe and Joshua Lerner, *Innovation and its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do About It* (New Jersey: Princeton University Press 2004) 8.

in the development of the invention, too little inventing would be done.'[42] From this perspective, increased profit from a patent's exclusivity privilege is an incentive to innovate since inventors are most likely to invest in R&D and inventive enterprises because they are guaranteed a monopoly over the invention. A patent protection which guarantees profits on investments is therefore, a stimulus to the availability of new, innovative products.[43] For example, studies indicate an increase in the use of patents as an investment strategy, and its importance in the decision to invest in a particular innovative activity such as pharmaceuticals R&D.[44] As a corollary therefore, the patent system further encourages the patent owner to invest in the creation of additional inventions.[45]

As with the public disclosure rationale, the incentive justification presumes that patent protection further stimulates innovation around the available invention which, in turn, provides a useful avenue for public utility.[46] By linking a patent to its contribution to economic efficiency and technological progress, this utilitarian argument of the patent system tends to bring the benefit of a patent closer to the general social and public good.[47] Within the narrow incentive view, therefore, patents are assumed to be the reason why people invest in innovation.[48] Not surprisingly,

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[42] Sterckx (n.14) 259.

[43] Thomas Pogge, 'The Health Impact Fund: Better Pharmaceutical Innovation at Much Lower Prices' in Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds), *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge: Cambridge University Press 2010) 136.

[44] Brownwyn H Hall, 'Patents and Patent Policy' 23 (2007) *Oxford Review of Economic Policy* 574; Edwin Mansfield, 'Patents and Innovation: An Empirical Study' 32(2) *Management Science* (1986) 173, 174; Richard C Levin and others, 'Appropriating the Returns from Industrial Research and Development' 3 (1987) *Brookings Papers on Economic Activity* 783-831.

[45] Lee (n. 38) 47-50.

[46] The importance and effect of patents on inventiveness and creativity is best represented in the views by Professor JB Clark in his 'Essentials of Economic Theory' (ch. xxi) that the patent system is important because without the system, there would be little inventing, and that there would be very little adoption of the invention by other producers. John Bates Clark, *Essentials of Economic Theory* (New. York: The Macmillan Company 1907); Arnold Plant, 'The Economic Theory Concerning Patents for Inventions' in David Vaver (ed), *Intellectual Property Rights: Critical Concepts in Law, Volume 3* (London: Routledge 2006) 50.

[47] AC Pigou, *The Economics of Welfare* (Palgrave Macmillan 2013) 185.

[48] Ikechi Mgbeoji, 'Beyond Patents: The Cultural Life of Native Healing and the Limitations of the Patent System as a Protective Mechanism for Indigenous Knowledge on the Medicinal Uses of Plants' 5(1) (2006) Canadian *Journal of Law and Technology* 1, 4.

proponents of patents argue that 'without patent protection, the world would have been deprived of the innovative medicines which have saved countless of lives.'[49] As Oguamanam also puts it, 'the wheel of creativity will falter or ultimately grind to a halt' without this incentive system.[50]

The 'Encouragement-to-Innovate' justification is however, questioned for failing to establish a clear evidential connection between the grant of patents and inventive progress.[51] For example, Mgbeoji noted that:

> The most fundamental difficulty in making any rational claim for or against the alleged relationship between patents and inventiveness is the impossibility of separating out other factors contributing to technological inventiveness, such as 'local resource endowment, education of the labour force, availability of capital, and dynamism of the local market.'[52]

As with the disclosure theory, ironically, patent protection, by building a monopoly fence around some core inventions, can create an obstacle to the improvement of the patented invention by others and the benefits that flow from the widespread use of the patented article.[53] This has led some scholars to argue that a patent's monopoly right has stunted more innovations than it encouraged.[54] Also, the exclusive privilege has 'caused more brilliant schemes to be put aside than the want of them could ever have induced men to conceal.'[55] On the contrary, advocates of the patent system argue that a patent comes at no cost to anybody since it does not deprive others of anything that they had before or anything that is not the property of the inventor.[56] Rather, the patent system only delays the unlicensed use of the right holder's invention to the public for a limited

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[49] Ellen FM 't Hoen, *The Global Politics of Pharmaceutical Monopoly Power: Drugs Access, Innovation and the Application of the WTO Doha Declaration on TRIPS and Public Health* (Diemen: AMB Publishers 2009) 79.

[50] Chidi Oguamanam, 'Patents and Pharmaceutical R&D: Consolidating Private–Public Partnership Approach to Global Public Health Crises' 13(4) (2010) *The Journal of World Intellectual Property* 556.

[51] Mgbeoji, 'Beyond Patents: The Cultural Life of Native Healing and the Limitations of the Patent System as a Protective Mechanism for Indigenous Knowledge on the Medicinal Uses of Plants' (n.48) 4.

[52] Mgbeoji (n.17) 21; ibid

[53] Machlup and Penrose (n.8) 23-24.

[54] ibid 24.

[55] ibid 24.

[56] ibid

period of time, after which others are welcomed to use it as they deem fit.[57] On the other hand, however, it is argued that, the patent system could actually deprive others of the opportunity to prospect, discover and use the same idea that the patent holder was fortunate enough to have conceived before others, or was the first to file for patent protection, as the case may be in some jurisdictions.[58] Furthermore the argument is limited in assuming that the exclusive privilege will 'cost nothing' to society.[59] A patent gives an exclusive privilege to the original inventor and so it can affect how others can use the patented invention. For example, inventors, who are mainly pharmaceutical companies in the case of pharmaceutical patents, might want to make the most of the monopoly privilege during the short period of the patent term, including charging high prices for the patented invention or licence. The exercise of this right can have an effect on accessibility to essential medicines, especially for the poor in developing countries.[60]

3.5 The Reward Theory

In a similar argument to the inventive theory, a patent is seen to offer a reward for inventive enterprise by securing the proprietary rights and interests of the inventor to capture a return on their investment in the inventive activity.[61] This 'reward theory' maintains that a patent is a reward by government for creating a novel invention and disclosing a useful innovation that would otherwise remain a secret.[62] This view essentially emphasizes the bestowal of a patent as a reward or 'prize' for an inventor's intellectual and creative genius effort, [63] or as one commentator puts it, '[o]pportunities to gain a reward in the market-

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[57] ibid
[58] ibid
[59] See Jeremy Bentham, *The Rationale of Reward* (London: R Heward 1830) 318.
[60] International Center for Research on Women, Trade Liberalization Women's Reproductive Health: Linkages and Pathways (International Center for Research on Women 2009).
[61] Edmund W Kitch, 'The Nature and Function of the Patent System' 20(2) (1977) *Journal of Law and Economics* 265, 266; A Samuel Oddi, 'Un-unified Economic Theories of Patents - The Not-Quite-Holy Grail' 71 (1996) *Notre Dame Law Review* 267, 275-78. See also Hestermeyer (n 9) 31.
[62] Nuno Pires de Carvalho, 'The Primary Function of Patents' (2001) *Journal of Law, Technology & Policy* 27, 29.
[63] Adusei (n.30) 118.

place.'[64] To the supporters of this reward approach, a patent is an important incentive for an inventor to apply human ingenuity and introduce a new solution to human problems. Conversely, without the 'prize' or 'award' incentive of patents, important inventions would not be made or offered to the public, as inventors only come forth with their inventions because they are guaranteed a reward.[65] That is, like the disclosure rationale, the reward theory reasons that, without the reward and incentive that a patent exclusive right confers, inventors would not carry out research or disclose the results for society's benefit. As Bentham argues, '[a]n exclusive privilege is absolutely necessary in order that what is sowed, may be reaped.'[66] Accordingly, without patents, anyone could easily imitate or duplicate other's inventions and competition resulting from this imitation would reduce earnings on the investment. [67]

To further quote Jeremy Bentham on the issue,

> […] that which one man has invented, all the world can imitate. Without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all the *deserved* advantages, by selling at a lower price.

Bentham concludes that:

> An exclusive privilege is of all rewards the best proportioned, the most natural, and the least burdensome. It produces an infinite effect, and it costs nothing.[68]

From a pharmaceutical patents standpoint, the strength of Bentham's argument is that it advocates the granting of patent protection as a reward to innovators, which is a form of a return on their inventive activities, especially in cases where huge cost has been expended in, for example, the pharmaceutical R&D process for new medicines. This reward rationale justifies the granting of patents because it would be unfair to allow others, who have not invested the time, labour, money, ingenuity and

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[64] Zemer (n.9) 12.
[65] ibid
[66] Bentham (n.59) 318.
[67] James Bessen and Eric Maskin 'Sequential Innovation, Patents, and Imitation' 40(4) (2009) *RAND Journal of Economics* 611.
[68] Bentham (n.59) 318.

effort to develop the invention, a 'free ride' on the invention.[69] As revealed in the next section, this 'freeriding' and piracy concerns presented a compelling argument for the inclusion of IP rights within the multilateral trade fora and influenced the argument by developed countries, prominently as the US, for the adoption of the TRIPS Agreement.[70] Besides preventing others from unduly misappropriating the invention, this patent reward it is argued, provides a utilitarian avenue for society as a whole to benefit from the invention.[71]

The reward theory has also been criticized for assuming that it is the profit award which drives innovation.[72] It has been pointed out that several inventions and inventive activities have been and would be undertaken without the consideration of a patent 'reward.'[73] Another major critique of the reward and incentive-to-innovate approaches is that it does not give a complete view of the function of the patent system by assuming that a patent is a reward for an incentive for inventive activity.[74] Patent does not exist solely as a reward mechanism to patentees or to confer rights to inventors. As will be shown below, the patent system essentially exists to confer a benefit on both inventors and the public. Equally, approaching patents from the right holder's perspective gives greater weight to the instrumentality of the patent holders, and the sanctity of patent right to innovation to measure the appropriateness of the patent system. Adopting a concept of patents solely from the right holder's point of view focuses attention on the need to prevent patent infringements and the appropriation of the right holder's intellectual creations and inventions; this can obfuscate the importance of actually extracting the social benefit of the patent system to the public and consequently, to users and consumers.

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[69] Sterckx (n.14) 255.
[70] For example, the Preamble to the TRIPS Agreement highlights this objective by explicitly referring to the need to protect private interests. The Preamble states thus: '[d]esiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights.' See for example, IIPA, Piracy of US Counterfeited Goods in Ten Selected Countries (IIPA 1985)
[71] Machlup and Penrose (n. 8) 20-21.
[72] Adusei (n 30) 118; Mgbeoji (n.48) 4.
[73] Adusei (n 30) 118.
[74] Kitch (n.61) 266; de Carvalho (n.62) 27-36.

IV. An Argument for the Conceptualization of Patent Law in a Social Welfare and Development Context

While this study shares the view that the theoretical justifications for the patent system are not always satisfactory, it is not disputed that in its own terms, the patent system could provide an important utilitarian means for securing the dissemination of technological knowledge embedded in an invention and the availability of important technologies such as medicines.[75] For example, Lord Oliver in the United Kingdom (UK) case of *Asahi Kasei Kogyo KK's Application* aptly captured this objective thus:

> The underlying purpose of the patent system is the encouragement of improvements and innovation. In return for making known his improvement to the public the inventor receives the benefits of a period of monopoly during which he becomes entitled to prevent others from performing his invention except by his license.[76]

Along this line, patents and other IPRs protect the economic investment efforts expended in the development of the invention; thus, a patent is a means to stimulating the innovation of essential products for society's benefit.[77] However, there is a need to focus on the public advantage of the function of the patent system to society.

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[75] However, it appears that patents may be more effective in bringing the product to the market than actually encouraging increased R&D in itself. This is more obvious in the case of neglected diseases majorly affecting poorer parts of developing countries. See JH Barton, 'Patent Scope in Biotechnology' 26 (5) (1995) *International Review of Industrial Property and Copyright Law* 605, 614.

[76] *Asahi Kasei Kogyo KK's Application* (1991) RPC 485 (HL) cited in Bently and Sherman (n.2) 485.

[77] Brett M Frischmann 'Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property' (2014) *Cardozo Legal Studies Research Paper No. 442* 4. Available at SSRN: <http://ssrn.com/abstract=2500196> accessed 17 March 2015; Keith E Maskus, *Intellectual Property Rights in the Global Economy* (Institute for International Economics 2000) 41-43.

Though the patent system and the economic incentive implications of guaranteeing protection may encourage innovation and promote the development of new and useful products, it is argued in this study that patent essentially serves a larger societal purpose. In other words, the public and social benefit derivable from the patent system is not a mere incidental aspect of patent law. Broadly speaking, a patent aims to confer as much privilege and benefit to the public, including other inventors/researchers, users and consumers, as it does the patent right holders. The public policy and social development element of a patent system lie in the reasons and threshold principles for the grant of the patent and the requirement for disclosing the result of the innovation and technology in an enabling manner, in the patent claim. As aforementioned, a patent is not merely granted in recognition of an inventor's ingenuity and scientific/ technological progress. There is a belief that the scientific and technological advancement is original, useful and significant enough to be protected and that it contributes to the field of knowledge, thus patents aim to promote social goals.

Apart from the public welfare and health benefits accruable from innovation such as essential medicines, the policies underpinning the novelty requirement, which aims to prevent others from monopolizing matters already existing in the public domain, bears further emphasis. The underlying rationale for the novelty standard is to prevent the appropriation of 'prior art,' that is, knowledge that is already publicly available, patented, published or in use before a patent application was filed.[78] It can be argued that this requirement takes into account public considerations. This patentable requirement illustrates that the patent system considers the public's welfare and acknowledges the importance of ensuring that society is not prevented from having access to an existing public or common knowledge. In this sense, society is only willing to strike a bargain of granting monopoly rights to the inventor in exchange for disclosure after they determine that the invention is innovative (i.e new or a significant improvement) and would not otherwise be publicly available more 'quickly.'[79] This point is important to understanding that the patent

[78] Waelde and others (n 3) 436-437; Bently and Sherman (n 2) 529, 532, 537; Bengt Domeij, *Pharmaceutical Patents in Europe* (Stockholm: Kluwer Law International 2000) 159.

[79] Bently and Sherman (n 2) 530. The use of the word 'quickly' here is deliberate. It is assumed that an invention is a solution to a technical problem or a satisfaction of society's needs posed by consumer demand. As 'necessity is the mother of invention,' it is

system contemplates the public and its welfare. Why then should the patent system be used to constitute a barrier to public welfare?

Furthermore, the underlying basis of the inventive step is to determine whether the patentee makes a substantial contribution by advancing the state of art or field of technological and scientific knowledge, which would benefit society.[80] The requirement of the inventive step is significant to the argument in this study that patent is purpose-driven, the purpose being to encourage the development and availability of new and significant technologies and inventions. Thus, a patent, as aforementioned, is more than a reward or an incentive for inventive activity. The patent system anticipates that the invention itself must have a significant purpose and confer a substantial advantage to society. However, it is argued that the benefit accruable to the public would have a better development impact if the public were able to access the invention. For example, a ground-breaking drug for the treatment of HIV/AIDS-related complications would no doubt, be useful to public health. An inventor who has brought about this new therapeutic treatment and seeks a patent in return for making it available will be offering a significant advantage to society. Its therapeutic benefit to society would, however, be better enhanced if patients were given the opportunity to access and use the drug to ameliorate their health.

From a public policy point of view, the industrial applicability criterion also establishes that patents should satisfy some social function and contribute to societal goals and welfare through its utility and industrial applicability purpose. This is a point supported by Kuanpoth, that, the requirement of industrial applicability aims to enhance industrial and economic progress from the application of new technologies to practical spheres of development in a manner that responds to the needs of society.[81] In a related manner, the invention must indicate that it serves

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conceivable that others would arrive at the same solution to the problem at a later time than the patentee did. However, having found a solution to the problem first (or indicated interest to seek patent protection first), the inventor promises to disclose his invention sooner rather than later, before others arrive at, or disclose the same result. Machlup and Penrose (n 8) 28.

[80] Waelde and others (n.3) 448-449.

[81] Jakkrit Kuanpoth, *Patent Rights in Pharmaceuticals in Developing Countries: Major Challenges for the Future* (Cheltenham: Edward Elgar 2010) 77.

a useful and meaningful purpose.[82] In the case of medicines, for example, a patent application for an HIV/AIDS medicinal treatment would indicate that the invention serves some curative or health sustenance purpose. Likewise, the invention must be capable of being replicated and reproduced through the same means. This requirement is fashioned to ensure that a patented invention not only indicates an important advancement but that it can also be made and used in at least one field of scientific, industrial, technical and agricultural activity.[83] This means that innovators do not invent 'in the dark.'[84] The patent system expects that their inventions should have some public interest connotations and be a response to society's welfare needs.

Thus, a patent is another mechanism for guaranteeing the public access to a new and significantly useful invention. Rather than being seen as a mere system for conferring and recognition of patentee's rights, as Bently and Sherman put it, the 'patent registration should be seen as a process in which policy goals are implemented and enforced'.[85] This point has been articulated by the United States (US) Supreme Court in *United States v Masonite Corp.*[86] The US Supreme Court took the view that '[t]he promotion of the progress of science and the useful arts [i.e. technologies] is the "main object" [of the patent system]; reward of inventors is secondary and merely a means to that end.'[87] In line with this assertion, the US Supreme Court in *Motion Picture Patents Co. v Universal Film Mfg. Co.* shared a similar view that 'the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is "to promote the progress of science and useful arts.'[88] The court's logic makes sense within the context of the public-related patents argument in this study.

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[82] Bently and Sherman (n.2) 440.
[83] Ibid, 440-441.
[84] de Carvalho (n.62) 27.
[85] Bently and Sherman (n.2) 375.
[86] [1462] 316 U.S. 265 278, 62 S.Ct. 1070, 86 L.Ed. (Quoting from Pennock v Dialogue (1829) 27 U.S. 2 Pet. 1 19.)
[87] ibid
[88] [1917] 243 U.S. 502, 511. Article I, Section 8, Clause 8, of the United States Constitution in securing the limited exclusive rights of inventors to their inventions, directs that the aim is to 'promote the progress of science and useful arts.'

The requirement to work a patent further strengthens the social policy aspect of patent system. In some Countries, Patent Law requires that the patented invention is worked or exploited, although the consequence of not working or exploiting the Patent varies from Country to Country. In some instances, non-working of a patent may lead to a revocation of the patent licence and justify the grant of a non-voluntary licence to a third party wishing to exploit the invention or government non-commercial use in the public interest.[89] In many instances, public interest (e.g health, environment, economic/technological and scientific development, defense and national security, development of vital sectors, misuse of patent monopoly rights and dependent patents) is given paramount importance and primacy with regards to Patent Law and Rights.

In the case of compulsory licenses, for example, society's interest is taken into account to limit the exclusive rights of patent owners, even without the patentee's permission, where it is expedient to do so. What this indicates is that the patent system does not exist solely in the interest of patent holders, in fact, where a patent is not serving its public purpose, the law can intervene to redirect it to ensure it does so. Therefore, public welfare is a necessary element of the patent system. As reiterated by the US Supreme Court in the anti-competition related case of *United States v Masonite Corp.*[90]

> [w]hilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these.[91]

The argument made here is not whether the patent system actually leads to technological, pharmaceutical or scientific progress, but to emphasize that the patent system is not intended to leave the public out of its consideration.[92] Consequently, since the material and objective nature

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[89] Sheetal Thakur, *Patenting in India* (Lulu.com) 116

[90] [1942] 316 U.S. 265, 278.

[91] ibid (quoting from Mr. Justice Deniel in *Kendall v Winsor* (1858) 21 How. 322, 329.

[92] In making this argument, this study is not oblivious to the criticism of the disclosure/enablement criterion. As pointed out by critics, despite the disclosure and enablement requirements, the actual disclosure in the patent claim may be incomplete, too

of a patent indicates that the system exists within a certain public policy purpose, it is important for policymakers and the courts to take into account the public-driven aspect of the patent system in the design and interpretation of patent law and rights. From an access to medicines perspective, it should include the human and social development objectives of the system to users of the intellectual results and products.

In sum, there is a need to redirect the focus of patents to the benefits that society stands to gain from them. In this study, the point is made that the public benefit of having a patent system would be better enhanced if people actually had access to the patented technology and medicines and that the protection does not stifle incremental innovations which would benefit the public.

With this public perspective in mind, the next section examines the international system for the protection of patents, particularly, the TRIPS Agreement. This exposition also assesses the public nature of the system and its limitations. The introduction of the TRIPS Agreement and minimum IP standard in the Agreement has raised concerns with regards to patent rights and their effect on access to medicines; hence, the Agreement is significant to the analysis in this study.

V. The TRIPS Agreement from a Public Health and Access to Medicines Perspective

States generally sign up to treaties and international agreements to increase the social and economic welfare of their citizens. Equally, these international treaties and agreements serve the overall goal of integrating global interests and interdependence for better technological, social, economic and human development. In the context of enhancing the public's socio-economic and technological development, the International Trade-related TRIPS Agreement also underlies a public objective. All IPRs, including patents, in the TRIPS Agreement can promote socio-economic development by encouraging innovative R&D of medicines, technology transfer, FDI and economic growth, which could also enhance the

technical and inadequate to enable others to utilise the disclosed knowledge. Luigi Alberto Franzoni (n 28) 112. Nonetheless, the arguments made here proceed on the assumption that, in a perfect world, the disclosed information in the patent application alone should be sufficient to facilitate the improvement and follow-on design as anticipated by patent law. Yu (n.36) 115.

availability of and access to the products of this increased development within an international trade context.[93]

On the other hand, however, the provisions of the Agreement have been the subject of criticism and debate, on the grounds that they could restrict access to important life-saving health treatments, particularly for the poor in developing Countries,[94] or limit the obligations of governments to fulfil their national duty to safeguard public health, as was the case in South Africa,[95] Thailand[96] and Brazil.[97] To increase understanding of the TRIPS Agreement and the debate on the role of its patent system in underpinning the problems of access to medicines, it is necessary to consider, briefly, the scope and negotiating history of the Agreement.

5.1 Goals of the TRIPS Agreement from a Public Interest Standpoint

There are two ways of thinking about the goals and function of the TRIPS Agreement. First, a legal institution provides rules for the protection and regulation of private proprietary rights of an innovation or invention. For this purpose, the Preamble recognizes the need for 'the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights,' and reiterates that IP rights are private

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[93] The International Chamber of Commerce (ICC), 'Intellectual Property: Powerhouse for Innovation and Economic Growth' (2011) 26. Available at <http://www.iccwbo.org/advocacy-codes-and-rules/bascap/value-of-ip/ip-and-economic-growth/> accessed 6 August 2016; Ha-Joon Chang, *Rethinking Development Economics* (London: Anthem Press 2003) 269-272.

[94] International Center for Research on Women, *Trade Liberalization Women's Reproductive Health: Linkages and Pathways* (International Center for Research on Women 2009). Also available at http://www.icrw.org/files/publications/Trade-Liberalization-and-Reproductive-Health.pdf; Jayashree Watal 'Access to Essential Medicines in Developing Countries: Does the WTO TRIPS Agreement Hinder It?' (2000) *Science, Technology and Innovation Discussion Paper No. 8, Center for International Development, Harvard University,* 2.

[95] For more information, see Brazil — Measures Affecting Patent Protection (WT/DS199/1 G/L/385 IP/D/23 8 June 2000 (00-2254); *Treatment Action Campaign and others v Minister of Health and others* (2001) High Court of South Africa, Transvaal Provincial Div., 12 December 2001 CASE NO: 21182/2001.

[96] In this case, the United States challenged the decision by the Thai Government to issue compulsory licence for patented HIV/AIDS drugs. 't Hoen (n.49) 23.

[97] In 2001, the United States instituted an action at the WTO Dispute Settlement Body (DSB) against the compulsory licensing provisions of Article 68 of the Brazilian Intellectual property law. ibid 24.

rights.[98] The provisions in the Agreement generally provide exclusive and time-specific IP-related rights and privileges. These IP rules and rights are, however, not devoid of public interest and welfare objectives.

A second approach is to view the TRIPS as an instrument for promoting trade, scientific and technological advancement, as well as human, social and economic development through the instrumentality of IP protection. For example, the Preamble to the Agreement highlights this objective by explicitly referring to the need to protect IPRs and promote international trade relations by reducing

> […] distortions and impediments to international trade […] taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.[99]

The TRIPS Agreement also aims to promote a developmental objective for IP to contribute to technological innovation, knowledge-based economic growth and technological diffusion. This intention is expressed in the Preamble to the Agreement, which recognizes 'the underlying public policy objectives of national systems for the protection of intellectual property including development and technological objectives.'[100] In the context of public health, it suggests that WTO members can take into consideration, the developmental needs of their citizens to have access to medicines under their national systems.[101] It also means that members can implement the Agreement in a manner that promotes their national technological and R&D priorities, public interest and health objectives.

This public welfare development goal of the TRIPS Agreement is consistent and can be read together with the WTO goals, which state that:

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[98] See the Preamble to the TRIPS Agreement. As private rights, matters relating to IP are issues for determination by civil law and procedures.

[99] Preamble to the TRIPS Agreement.

[100] Preamble to the TRIPS Agreement. For a comprehensive history of the negotiation see Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (3nd edn, Sweet & Maxwell 2003); Peter Yu 'The Objectives and Principles of the TRIPS Agreement' (2009) 46 Houston Law Review 978, 984.

[101] This argument is consistent with Article 1(1) of the TRIPS Agreement which states that '[m]embers shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.' Sisule F Musungu, 'The TRIPS Agreement and Public Health' in Carlos María Correa and Abdulqawi Yusuf (eds), *Intellectual Property and International Trade: The TRIPs Agreement* (Stockholm: Kluwer Law International 2008) 427.

> […] relations in the field of trade and economic endeavour should be conducted *with a view to raising standards of living,* ensure full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, […] and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[102]

In this manner, while the WTO's IP system has been framed as an instrumental institution for the creation and protection of IP, which includes patented pharmaceutical products and processes, its underlying objective lies in a broader development mandate.

5.2 The Public Interest Objectives and Principles of the TRIPS Agreement in Articles 7 and 8

Article 7 has been described as the balancing and 'interpretive provision' of the TRIPS Agreement.[103] It sets out the principal objective of the Agreement and plays a central role in the interpretation and enforcement of TRIPS.[104] The provision states that IP protection and implementation should promote technological innovation and dissemination, and also links this protection to the promotion of social and economic development as follows:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation

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[102] (Emphasis added). First recital, Preamble to the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, the Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1867 U.N.T.S. 154, 33 I.L.M. 1144 1994) (Hereinafter the WTO Agreement). Also Available at <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 15 January 2015.

[103] Gervais (n. 100) 203; Yu (n.100) 981.
The interpretative and balancing importance of Article 7 was reflected in the Canada-Patent Protection for Pharmaceutical Products dispute before the WTO Dispute Settlement Body (DBS). See *Canada - Patent Protection of Pharmaceutical Products - Complaint by the European Communities and their Member States: Report of the Panel* (WT/DS114IR, March 17 2000).

[104] Yu (n.100) 981.

> and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Significantly, this provision delineates the core public interest objectives of the TRIPS Agreement.

The first objective envisages that the protection and recognition of IPRs should result in improvements in technology, knowledge and innovation. This supports the argument made earlier that a patent, a form of IP, is not an end in itself. It can be said that this provision not only describes the technological purposes of the IP provisions in the TRIPS Agreement, it encapsulates the public agenda behind the Agreement and defines IP protection as a means to an end.[105] Thus, IP is an instrument for the advancement of technological dissemination, knowledge and innovation, which should also promote socio-economic development and public welfare. This point was made further by the submission of developing countries, including Nigeria, to the TRIPS Council before the Doha Ministerial Conference that, 'Article 7 […] clearly establishes that the protection and enforcement of intellectual property rights do not exist in a vacuum. They are supposed to benefit society as a whole and do not aim at the mere protection of private rights.'[106]

The second objective seeks to protect and promote both the interests and contributions of authors/innovators as IP producers, at the same time as the interests of users of IP who, according to Correa, are 'interpreted as encompassing final consumers as well as producers of goods and services that utilize technological knowledge.'[107] Thus not only does IP in TRIPS grant rights to and impose obligations on innovators, it also acknowledges the 'equal' rights and obligations of public users to

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[105] Yu, 'The Objectives and Principles of the TRIPS Agreement' (n 100) 1004-1005.

[106] Council for Trade-Related Aspects of Intellectual Property Rights 'Submission by the African Group, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela' (IP/C/W/296, 2001) Paragraph 18. Available at <https://www.wto.org/english/tratop_e/trips_e/paper_develop_w296_e.htm > accessed 17 July 2016. See also Yu(n.100) 1004-1004.

[107] Carlos María Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford: Oxford University Press 2007) 19.

access and use intellectual products and technological knowledge.[108] This objective can be invoked as a support for public health and access to medicines. From a public health perspective, it can be argued that it envisages that patients, as users, should gain some advantage from medicines which are products of intellectual creation. To gain this benefit, however, it is obvious that patients will need access to the drugs.

This second objective also reflects the need to find a balance between encouraging incremental creativity innovation and promoting users' and society's interests.[109] The balance, according to Gervais, should be assessed using well-established IP legal principles and identified that the balance entails:[110]

a) rewarding or compensating creators and inventors for innovation and;
b) promoting the interest of businesses and the public at large in securing access to science, technology and culture.

Gervais concludes that '[i]n order to stimulate innovation, this balance must be maintained.'[111]

While it is argued that maintaining this balance is essential to stimulate incremental innovation,[112] the question remains, how can this balance be achieved? Gervais provides insight into the outline of this 'balance.' At the policy level, it requires granting inventor's rights in a manner that allows them to recoup investment costs without hindering competition or future innovation.[113] In other words, inventors' right must be weighed against the need for the public and users to access the products and information about the innovation.[114] While this is ideal, in practice, finding a balance between protecting the short-term interests of IP owners whilst simultaneously promoting long-term investment in innovation and creativity and benefits to users is hard to achieve. Sometimes, the interests of IP producers and users might conflict. This is often the case where

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[108] Yu (n 100) 12.
[109] Hannu Wager and Jayashree Watal, 'Introduction to the TRIPS Agreement' in Antony Taubman, Hannu Wager and Jayashree Watal (eds), *A Handbook On The WTO TRIPS Agreement* (Cambridge: Cambridge University Press 2012) 13.
[110] Gervais (n 100) 204.
[111] ibid 204.
[112] ibid
[113] ibid
[114] ibid

tension arises between the need to provide incentives for pharmaceuticals R&D and the need to access essential drugs.

The third objective reflects the need to take into account 'social and economic welfare,' development and the advancement of both IP producers and the public in the protection, interpretation and enforcement of IP. In this manner, TRIPS seeks to strike a balance between the objectives of promoting IP as an incentive to encourage invention, and requiring the protection to contribute to social-economic, welfare and technological development goals. The emphasis is important because it positions the TRIPS Agreement as not only an instrument for the protection of IP rights but also as a means for promoting societal welfare and development as argued in the preceding section. The provisions of Article 7 can be read together with Paragraph 19 of the Doha Ministerial Declaration which states that '[i]n undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.'[115] The *Resource Book on TRIPS and Development* also makes the point that Article 7 clearly indicates that the negotiators of TRIPS did not intend to 'abandon a balanced perspective on the role of intellectual property in society.'[116] Thus, the Agreement intends that patent rules should play a significant role in promoting, not hindering the public welfare and interests.

Article 8 is another 'interpretative or normative principle' of the TRIPS Agreement that further state the public policy objective of patents and other IPRs in the Agreement.[117] Its importance has been acknowledged by Professor Peter K Yu as a framework to limit the exclusive rights granted to IP holders in the interests of the public.[118] Provided it is consistent with the general standard in TRIPS, the provision of Article 8 permits members to promote the public interest in sectors of vital

[115] Doha WTO Ministerial 2001: Ministerial Declaration (WT/MIN(01)/DEC/1, 2001) Paragraph 19.
[116] United Nations Conference on Trade and Development (UNCTAD) and International Centre for Trade and Sustainable Development, *Resource Book on TRIPS and Development* (Cambridge: Cambridge University Press 2005) 126.
[117] ibid
[118] Yu (n.100) 1008-1009.

importance to their socio-economic development, with particular stress on nutrition and health. Article 8(1) provides that:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Thus, WTO members are allowed some flexibility to pursue their public policy objectives by incorporating and implementing measures, including policies, to safeguard the national public interest, health, nutrition and socio-development priorities in their domestic laws.[119] According to Professor Correa:

> Article 8.1 broadly recognizes Members' rights 'in formulating or amending their laws and regulations'[…] [I]t does not only refer to laws and regulations on IPRs but to measures adopted in other fields, for instance, those that restrict the manufacture or commercialization of IPR-protected goods. Issues concerning the application of Article 8.1 may, hence, arise in two contexts, one fully within the IPR realm, and another one outside it, but with implications on the protection of IPRs.[120]

Importantly, Article 8(2) adds support to the Article 8(1) by recognizing the need to adopt appropriate measures to prevent the abuse of patent

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[119] In *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* the Panel in interpreting Article 8 stated that
These principles reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.
European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs: Report of the Panel (WT/DS174/R, 15 March 2005) 7.210.

[120] Correa (n.107) 104.

rights by patentees, including practices that unduly restrain trade, or hamper technology transfer, in a TRIPS-consistent manner.[121]
In summary, from a public health point of view, the Preamble, Articles 7 and 8 of the TRIPS Agreement outline the importance of the Agreement in the interests of society and importantly, the promotion and safeguarding of public health. It is imperative therefore, to approach this international IP system from this perspective.

5.3 Patent Right and Access to Medicines from a Public Welfare Perspective in Nigeria: The Way Forward

In Nigeria, addressing the conundrum of access to medicines requires manifold intensive intervention from within the country. In proposing ways to address the challenges of access to medicines in Nigeria in light of patent rights, two central recommendations run throughout this study. First, is a proposal for the reform of the substantive and procedural provisions of the patents law and system; second is the general improvement of human welfare, social, economic conditions and other national support systems.[122] While the second aspect is important for promoting and enhancing access to medicines, this article essentially focuses on the first aspect.

5.3.1 Reforming the Patent System in Nigeria to Promote Access to Essential Medicines

First, this study recommends a reform of the legislative and regulatory framework of the patent system in Nigeria to better facilitate the availability of, and access to affordable medicines in the interests of the citizens' public welfare, human rights to health and human development. While there are many ways of doing this, this article specifically recommends that the obviously obsolete Patent Law be amended to bring it

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[121] The Article provides that
Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.
See more at Yu, (n.100) 1010-1013, 1016.

[122] Note that the general improvement of the socio-economic welfare and other necessary structures in this regard is out of the scope of this study. However, it is worth mentioning in light of its importance in enhancing access to essential medicines in Nigeria.

into compliance with its obligations under the TRIPS Agreement and the flexibilities in this regard. In line with the human rights duties of the Nigerian State, this amendment should be approached with the pro-development objective of encouraging important and innovative pharmaceutical R&D, at the same time as promoting the production of generic medicines for domestic consumption to enhance the availability of, and access to, cheaper essential medicines. In conforming to Nigeria's TRIPS obligations, the patent law should be designed in a way that grants patent rights to promote important R&D, while minimising any interference with access to high quality, and affordable new pharmaceuticals, incremental R&D and generic manufacturing or re-entry after the expiration of a patent term.

It is particularly identified that the flexibilities can play an important role in this respect. The fundamental element is the language of the law in prescribing the protection and the exceptions to the right, including the derogation for public use. As Article 8 of the TRIPS Agreement, supported by Paragraph 4 of the Doha Declaration allows members the discretion to 'adopt necessary measures' consistent with the general provisions of the Agreement in cases where it is expedient to protect public health and promote the interests of the public, this study highly recommends the full incorporation of all TRIPS flexibilities provisions, as well as tailoring the rules to ensure that Nigerians can adequately have access to affordable, safe and accessible essential medicines. This would enable the government and citizens to take advantage of the health safeguards and exceptions to actively promote the availability of, and accessibility of affordable life-saving medicinal treatments. Where the flexibilities already exist under the national law, they should be suitably adjusted to safeguard public health and improve access to affordable medicines without unnecessary delays. Significantly, this incorporation of the flexibilities and amendment of the patent law in the public interest would take into cognizance the public welfare objective and aim of the patent system.

5.3.2. Approaching the Patent System from a Public Health or User Perspective to Promote Better Access to Essential Medicines

Another possibility open to the Nigerian government and the national courts is to strike a balance between the interest of inventors on the one hand and promoting society's welfare to access the fruits of pharmaceuticals R&D, including the generics, on the other. The need to strike a balance between the rights of the creators and access the products of technological innovation such as medicines also mirrors the debate about the balance of patent holders' rights and public's rights in IP systems. The challenge for national and international lawmakers is to find the optimal balance between the various competing interests with a view to maximizing the benefit of the invention to the public, whilst also meeting the private interests of inventors.

One way in which this can be done is by properly delineating the nature and scope of public and private rights. For patents, the patentable subject matter, scope, limitations and term of protection, can be clearly defined and balanced against the public interests, particularly, with regards to their rights to health and human development. Also, a way of finding this balance might be to clearly map out the purpose of patents, which is the promotion of technological and social development, and state that where private rights interfere with this goal, the fundamental human rights to health should prevail in the public interest. By way of example, the case of *Smith Kline and French Laboratories Ltd v Netherlands* buttressed the point that public interest is given paramount importance where there is a conflict of interests.[123] The European Commission on Human Rights (ECHR) stated that the granting of compulsory licensing for a patented drug was not an interference with the human rights entitlement under Article 1 of Protocol No 1 of the ECHR.[124] Even when the patent holder's right was recognized as a human right, the Court gave primacy to the public interest.

In that case, the Applicant, a proprietor of a patented medicine cimetidine (for the treatment of gastric and duodenal ulcer), appealed against the granting of a compulsory license to a drug company,

[123] *SmithKline and French Laboratories Ltd v Netherlands Application* 12633/87, (1990) ECHR Decision and Reports.
[124] ibid

Centrafarm Bv, to use and work those patented invention. Among other things, the Applicant claimed that the compulsory license was a violation of its right to peaceful enjoyment of its 'possession' contrary to Article 1(1) Protocol 1, and that the license interfered with the exclusive right to exploit the patented invention.[125] The ECHR in its ruling found that, although the compulsory license 'constitutes a control of the use of property,' the grant was lawful in accordance with the general interest of the public.[126] Notably, the general public interest was adopted, as a yardstick by the Courts to test whether the interference with the use and enjoyment of the proprietor's right was lawful. In the end, the ECHR concluded that, 'the grant of the compulsory license was lawful and pursued a legitimate aim of encouraging technological and economic development.'[127] Since the Applicant's invention prevented the working of a patent that was beneficial to society, the ECHR considered the long-term interest of the public to benefit from technological and scientific progress to decide in favour of the compulsory license.

The interests of the patentee, in this case, were recognized; hence, the ECHR found that the decision of the Patent Office to grant the license constituted an interference with the inventor's rights and use of its property. However, the ECHR took into account the broader development goal of the public (the dependent patent in this case) to access and use the patented invention since it was clear that the Applicant's patent limited the use and working of Centrafarm Bv's invention. The ECHR attempted to strike a balance between two competing interests (SmithKline and French Laboratories Ltd and Centrafarm Bv) by recognizing the overall public objective of encouraging technological and socio-economic development as a yardstick to measure their various interests.

In another example, the Indian Supreme Court in 2014, dismissed a petition by Bayer to set aside the compulsory license on the anti-cancer drug '*Sorafenib Tosylate'*, otherwise marketed as 'Nexavar.'[128] In that case,

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[125] ibid paragraph 2.
[126] ibid
[127] ibid
[128] Further information is available at 'Breaking News!! SC Dismisses Bayer's SLP Against India's First CL' (Spicy IP) <http://spicyip.com/2014/12/breaking-news-sc-dismisses-bayers-slp-against-indias-first-cl.html> accessed April 23, 2016; 'Supreme Court Says No to Bayer, Upholds Compulsory License on Nexavar' (Lawyerscollective.org)

Nacto Pharma Ltd., a pharmaceutical drug producer, made a request for a voluntary licence to Bayer which was denied. Natco subsequently made an application for, and was granted, a compulsory licence to manufacture and market the patented drug in 2011. On appeal by Bayer against the decision to grant the compulsory licence, Natco argued in defence that *Sorafenib Tosylate*, a crucial drug for patients living with kidney and liver cancer, was unreasonably expensive and unaffordable to patients in India. Moreover, Bayer had not worked its drug, Nexavar, in the territory of India. Bayer contended these claims, but the Controller General of Patents ruled in favour of Natco.[129] In 2013, the Intellectual Property Appellate Board (IPAB) considered whether the licence can be granted to the applicant on the grounds that the drug was not 'available to the public at a reasonable price' in accordance with Section 84(1)(b) of Indian Patents Act. The IPAB after a careful deliberation, dismissed the Appeal filed by Bayer and confirmed the compulsory licence given to Natco.[130] The IPAB based its decision on the yardstick of the public in ruling that '[s]ection 84 […] is only concerned with the price at which the drug is made to the public.'[131] Significantly, the IPAB approached the appeal from the perspective of the public interest within the context of the right to life as guaranteed under Article 21 of the Constitution of India, 1950. Accordingly,

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<http://www.lawyerscollective.org/updates/supreme-court-says-no-to-bayer-upholds-compulsory-license-on-nexavar.html> accessed 23 April 2016.

[129] See decision of the Controller at *Natco Pharma Ltd v Bayer Corporation – Application for Compulsory License under Section 84(1) of the Patents Act 1970 in respect of Patent No 215758* Controller General of Patents, Mumbai, CLA No 1 of 2011 (unreported) also available at http://www.ipindia.nic.in/iponew/compulsory_license_12032012.pdf. After a careful consideration of evidence, the Controller General came to the conclusion that the patented invention was not 'available to the public at a reasonably affordable price' not locally manufactured in India, and that the patent rights holder has 'failed to grant a voluntary license on reasonable terms to anyone,' therefore, a compulsory licence was granted to Natco Pharma Ltd. The licence effectively authorises Natco Pharma Ltd to produce the drug in its own facilities and sell it. A royalty payment of six percent is to be paid to Bayer Corporation. *Natco Pharma Ltd v Bayer Corporation* Controller General of Patents, Mumbai, CLA No 1 of 2011. 35-61 (unreported) See also Charles Lawson, 'Accessing and Affording Drugs Despite the Patent Barrier: Compulsory Licensing and Like Arrangements?' (2013) 24 AIPJ 94, 107-108; Mansi Sood, 'Natco Pharma Ltd. V. Bayer Corporation and the Compulsory Licensing Regime in India' [2013] NUJS Law Review, 104.

[130] *Bayer Corporation v Natco Pharma Ltd*., Order No. 45/2013 (Intellectual Property Appellate Board, Chennai).

[131] ibid paragraph 42.

> [t]here we are not concerned with the interest of the compulsory licence Applicant, but only the public interest. The grant of compulsory licence is not to favour the applicant, but only because the applicant has demonstrated that the invention has not reached the public in the manner envisaged under Section 84.[132]

The ruling in this case upheld the primary importance of public health over private monopoly rights and gave impetus for the Indian Government to grant more compulsory licences in the interest of access to medicines.

VI. Enhancing Access to Essential Medicines: Conclusion

The point made in this article is that the statutory requirements of the patent framework indicate that the system does not completely disregard the public. This finds support in the observation by the UK Commission on Intellectual Property Rights that IPR privileges should not be considered as an end in itself, rather, they are a means to an end, 'as instruments of public policy which confer economic privileges on individuals or institutions solely for the purposes of contributing to the greater public good'[133] This Article argues from a public perspective that the patent system and the rights conferred to inventors underlay a social welfare objective and the benefit of the system to society would be maximised if it could access and utilise patented inventions such as pharmaceuticals. Likewise, it is argued that the TRIPS Agreement was negotiated with the objective that it would stimulate local innovation, promote socio-economic welfare and facilitate technological development. These objectives are codified in the Preambles and Article 7 of the Agreement. The issue, however, remains that the patent rules contained therein can be used to cause barriers to accessing affordable essential life-saving drugs and vaccines for the poor in Nigeria and other developing countries, with significant implications for their human rights and human development potential. It is acknowledged that while several factors influence the problems of access to medicines, pharmaceutical patents

[132] ibid paragraph 43.
[133] Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property Rights and Development Policy* (n.146) 7.

rights can contribute to the problems of unavailability and also, interfere with access to essential medicines at an affordable cost.

In this regard, it is argued that since one of the aims of the patent system is to promote the development goals of society, the exclusive control right which it confers upon inventors should not stand in the way of this fundamental objective. Thus, a patent right granted to innovators should promote, not hamper, public health. The system's benefit to society's interests must be evaluated in the light of this public interest goal.[134] When the patent system is approached in the light of its public welfare objectives, it is expected that the interpretation and enforcement must take into account this basic social function and development purpose of the patent system.

With this goal in mind, this study makes a case for access to medicines within the context of their socio-economic and cultural setting. In this connection, this study argues for ways to improving access to essential health treatments within the context of patent law, especially through the use of the TRIPS-compliant flexibilities and patent rights exemptions, where patent right threatens this access. The flexibilities include among others: government use and compulsory licenses to allow government authorities or third parties to use an invention without the consent of the owner; The exhaustion of rights flexibility and parallel imports to allow the importation and resale of a patented product; patentability standards and limitations on the grant of 'new or second uses' of old patents; public policy, order and morality exclusions; research/experimental use and early-working exemptions to facilitate the research and production of medicines and other limited exceptions.

The Doha Declaration has confirmed these flexibilities in 2001. Significantly, the Declaration affirmed that members could interpret and implement the TRIPS Agreement in a way that supports the right to public health and facilitates access to medicines for all.

Consequently, this study argues for a reform of the Nigerian 1970 Patent and Designs Act and the broad-based incorporation and adaptation of the flexibilities into the Patent Law and other relevant policies of Nigeria.

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[134] John C Stedman, 'Invention and Public Policy' 12 (1947) *Law and Contemporary Problems* 649.

In the same vein, the implementation and interpretation thereof in the interests of Public health.

In closing, a Patent, as an instrument for promoting better health, would require that people can actually derive the benefits, through access to the patented invention or medicine, it is therefore imperative that the patent system is designed to ensure this benefit.

EXEMPTIONS TO THE RIGHT OF ACCESS TO INFORMATION UNDER THE FREEDOM OF INFORMATION ACT: A PROTECTIVE FIREWALL OR AN UNNECESSARY BARRIER?

Victor O. Ayeni*

Abstract

This article analyses the developing approach to the construction of exemptions under the Freedom of Information Act (FOIA) 2011. It draws from document analysis and review of case law on the subject. The article questions whether the use of exemptions under the FOIA has shut the door on the unfettered right of members of the public to access information thereby providing public institutions some leeway to deny applications for information. The article argues that as a general rule, exemptions under the FOIA should be construed strictly and narrowly, and that any form of exemption may be invoked only where the public interest in withholding the information outweighs the gains of disclosure to the public. The article discusses the various types of exemption under the FOIA, reviews judicial authorities on exemptions under the FOIA and discusses at least three tests that need to be carried out before applying an exemption under the FOIA. It concludes that the door is open to continued evolution, if not revolution, in the practice as it relates to exemptions under the FOIA and that abuse of exemption provisions by public institutions portends a grave danger to the right of access to information.

Keywords: Exemptions, Rights, Access to information, Freedom of Information Act

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1. Introduction

Constitutional rights and freedoms are not absolute.[1] This implies that every right and freedom has some kind of limitation attached to them. These limitations are boundaries set or necessitated by the need to protect the rights of others or the interests of the public as a whole. Absolute freedom therefore is neither attainable nor desirable. A society in which men recognize no check on their freedom sooner or later becomes a society where freedom is the possession of only a savage few. Limitation ensures a proper balance between protected rights and other equally important public concerns such as public order, security, and democratic values. The mechanism by which this balance is maintained in the Freedom of Information Act (FOIA) is called 'exemptions'.

When the Freedom of Information Act (FOIA) came into force on 28 May 2011, following its passage into law by members of the National Assembly on 26 May 2011, the FOIA was hailed as a landmark piece of legislation.[2] As stated in the Explanatory Memorandum to the FOIA, the primary objective of the Act is to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.[3] The Act comprises 32 sections covering right of access to information and proactive disclosure,[4] processing of requests,[5] maintenance of public records,[6] exemptions,[7] judicial review,[8] monitoring,[9] and miscellaneous provisions.[10]

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[1] I Currie and J Waal, *The Bill of Rights Handbook* (Cape Town, JUTA, 2005) p 163.
[2] The FOIA was passed into law by the National Assembly on May 26th, 2011 and assented by the President of the Federal Republic of Nigeria on May 28th, 2011.
[3] Explanatory Memorandum to the Freedom of Information Act, 2011 as FOIA in force since 2011.
[4] FOIA, sections 1-2.
[5] FOIA, sections 3-8.
[6] FOIA, sections 9-10.
[7] FOIA, sections 11-19.
[8] FOIA sections 20-25.

The Act provides for the right of 'any person' to access or request any public record or information which is in custody of any public agency or institution.[11] This right is guaranteed by employing two mechanisms. First, the Act obliges public institutions to ensure that they keep records of their activities and ensure proper organization and maintenance of all information in their custody in a manner that facilitates easy public access.[12] In this wise, public institutions shall regularly publish and make available to the public without prior request basic information relating to such organization. These pieces of information are required to be widely disseminated, updated and reviewed periodically and whenever changes occur. Secondly, the Act guarantees the right of access to information by empowering any person who is interested in any public record or information to apply for it from the public institution which has custody of it.[13]

As a general rule, all FOI requests are required to be processed, granted or refused within seven days.[14] However, where a public institution which receives an FOI request is of the view that another public institution is more suitable to disclose the information, the institution to which the application is made shall within 7days the application is received transfer same to the other public institution.[15] The receiving institution has seven days within which to make the information available to the applicant. However, where large number of records is requested and producing such volume of records would unreasonably interfere with the operations of the institution, or consultations are necessary before the document can be produced, the original time limit of seven (7) days may be extended by another seven (7) days. Altogether, a public institution may have up to 21 days within which to grant or refuse FOI request, if transfer and consultations are involved.[16]

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[9] FOIA, section 29.
[10] FOIA, sections 26-28 & 30-32.
[11] FOIA, section 1.
[12] FOIA, sections 2(2), 8 & 9.
[13] FOIA, section 1.
[14] FOIA, sections 4.
[15] Notice of the Transfer must be given to the Applicant.
[16] First 7 days is the original time limit; another 7 days in case of transfer; yet another 7 days in case the records requested are large and consultation necessary before the records can be generated.

Not every official information is liable to disclosure under the FOIA. The Act provides for two general exemptions: absolute and qualified exemptions. An exemption is a form of limitation or a preferential treatment approved by law. It is an official permission not to do something which otherwise you would have been legally bound to do. An exemption may relate to persons or things. Where it relates to persons, it means a legal obligation which ordinarily should attach to everyone does not attach to the exempted persons. In the case of things, it means the exempted things may not be treated the way other things or items are treated. Although the FOIA does not define exemption, an exemption under the FOIA is a right of refusal to disclose information or simply a valid reason for refusing to disclose information.

Information or records which enjoy the status of exemption under the FOIA are contained in sections 11, 12, 14, 15, 16, 17, 19 and 26 of the Act. These provisions exempt from disclosure certain information relating to international affairs and defense,[17] law enforcement and investigation,[18] personal information,[19] third party information,[20] professional privileges,[21] course or research material,[22] published material or material available for purchase by the public, library or museum material and material placed in the National Library, National Museum or the non-public section of the National Archives of the Federal Republic of Nigeria.[23] It should be noted that unless a piece of information is specifically exempted from disclosure, there is no legitimate reason under the FOIA to withhold such information from the public. Thus, documents marked as 'Confidential', 'Secret', 'Top Secret' or 'Classified' may still be disclosed to the public proactively or on request unless it is shown that such document falls under one exemption or the other under the FOIA.

Exemption is a very important tool in the FOIA. The introduction of exemptions into the FOIA is based on the recognition of the fact that it is impracticable for any government, no matter how liberal, to allow access

[17] FOIA, section 11.
[18] FOIA, section 12.
[19] FOIA, section 14.
[20] FOIA, section 15.
[21] FOIA, section 16.
[22] FOIA, section 17.
[23] FOIA, section 26.

to all kinds of information and records in its custody without some private or state interests being jeopardized. Exemptions therefore strikes a balance between the right of access to information and other protected rights by ensuring that the exercise of the right of access to information does not interfere with state security, privacy rights, business proprietary interests, fair trial and intellectual property rights. Exemption also serves the purpose of ensuring that right of access to information is not exercised to the detriment of the common good in the areas of national security and international relations.

The FOIA contains eight issue-based exemptions.[24] These exemptions set boundaries to the right of access to information contained in the FOIA or any other legislation relating to right of access to information. If a piece of information is exempt, it means two things. For members of the public, it means that they do not have a right of access to that information. For public institutions, it means they do not have an obligation to disclose such information. It should be noted that not having a right does not mean a privilege of access cannot be granted, and not having an obligation to disclose does not mean discretion to disclose cannot be exercised.

Thus the particular effect of an exemption under the FOIA depends on whether the exemption is discretionary or non-discretionary Exemption. If an exemption is discretionary, a public institution may still disclose the information even after the exemption has been engaged and the public interest in the disclosure has been shown not to outweigh the injury the disclosure may cause. On the other hand, a public institution is under an absolute duty to deny an application for a piece of information which enjoys non-discretionary Exemption. Where an application is made to a public institution for information part of which is exempted from disclosure, the institution shall disclose that part of the information that is not subject to the exemption. It must be noted that exemptions do not apply to request for information by a court of law in the course of judicial

[24] Guidelines on the Implementation of the Freedom of Information Act 2011, Revised Edition 2013, published under the authority of The Honourable Attorney General of the Federation and Minister of Justice, p 12. The document is referred to subsequently as the Revised Guidelines on the implementation of the FOIA, 2013.

proceedings. No information in the custody of any public institution in Nigeria can legally be withheld from a court of law on any ground.[25]

2. Types of Exemption under the FOIA

The FOIA does not clearly classify exemptions. It simply provides for information which may or must be exempted from disclosure and information which may be exempted only upon fulfillment of certain conditions. By looking closely at the various provisions relating to exemption under the FOIA, the following types of exemptions are identifiable: qualified exemption, unqualified exemption, injury-based exemption, discretionary exemption and non-discretionary exemption.

(i) Qualified Exemption

Qualified exemption applies to the class of information which may be denied by a public institution only after considering and satisfying the requirements of the Public Interest Test.[26] In other words, information enjoying qualified exemption may be disclosed by public institutions on the ground of overriding public interest. For instance, a public institution may legitimately deny an application for information if the disclosure of such information will be injurious to Nigeria's defense and conduct of her international affairs.[27] Request for information may also be denied if the information requested pertains to records of any public institution in respect of administrative enforcement proceedings and the disclosure of such information would:[28] (a) interfere with pending law or administrative enforcement proceedings, (b) deprive a person of fair trial, (c) breach confidentiality between parties, (d) violate personal privacy, (e) obstruct ongoing criminal investigations, or (f) facilitate the commission of a crime. Every public institution is also under an obligation to deny an application for information that contains personal information of a third party except where the third party consents or the information is already publicly available.[29] Section 15 of the FOIA obliges public institutions to deny application for information which contains trade secrets (except the person or business to which such trade secret relates consents);

[25] FOIA, section 22.
[26] Revised Guidelines on the implementation of the FOIA, p 12.
[27] FOIA, section 11.
[28] FOIA, section 12.
[29] FOIA, section 14.

information the disclosure of which could reasonably be expected to interfere with the contractual or other obligations of a third party; and proposals and bid for a contract or grant including information which if disclosed would frustrate procurement or give an advantage to any person.[30]

Finally, requests for information may also be denied under this genre if the information pertains to test question, scoring keys, examination data, architects and engineers' plan for private buildings and library circulation and other records identifying library users with specific material.[31] All the exemptions cited above are qualified exemptions.[32] The uniqueness of qualified exemptions is that they are not automatic. Before a public institution can rely on any one of the qualified exemptions above to deny a request for information, the public institution must have carried out the public interest test. In appropriate cases, if it is shown that the public interest in the disclosure of the exempted information outweighs the injury their disclosure may cause, the public institution concerned may disclose the information.

(ii) Unqualified Exemption

This is also referred to as absolute exemption. An unqualified exemption under the FOIA is an exemption which may be applied by a public institution without carrying out the public interest test.[33] This class of exemptions may be relied upon by a public institution to deny FOI requests, regardless of whether the public interest in the disclosure of the information outweighs the injury the disclosure may cause. Even in cases where the public interest in the information is very strong and supports disclosure, a public institution may legally deny disclosure if the information is one that is exempted without qualifications. The class of information exempted from disclosure without qualification is contained in sections 15(2), 16, and 17 of the FOIA.[34]

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[30] FOIA, section 15.
[31] FOIA, section 19.
[32] See FOIA, sections 11(2), 12(2), 14(3), 15(4), & 19(2).
[33] Revised Guidelines on the implementation of the FOIA, p. 12.
[34] *Ibid.*

For instance, public institutions may deny application for any information that is subject to legal practitioner-client privilege, health worker-client privilege, journalism confidentiality privileges and any other professional privilege recognized by an Act. Similarly, information which contains course or research materials prepared by Faculty members is also exempted from disclosure. Information containing product of environmental testing carried out by or on behalf of a public institution may also not be disclosed. The FOIA does not apply to the following set of information: published materials or material available for purchase by the public; library or museum material made or acquired and preserved solely for public reference or exhibition purposes; and materials placed in the National Library, National Museum and non-public section of the National Archive on behalf of any person or private organization. A public institution may deny all the set of information listed above. In doing the public institution concerned need not public interest or the injury disclosure may cause.

(iii) Injury-based Exemption

This is a special form of qualified exemption. Injury-based exemptions are exemptions in which disclosure of information 'may', 'would', or "could reasonably be expected" to cause injury or harm, or an interference, or a deprivation of the specified purpose of the exemption. Unlike other qualified exemptions, it does not specifically exempt any particular information, and where it does, the exemption relates to only such information the disclosure of which would be injurious to the purpose or subject matter of the exemption. In such cases, it is not enough to state that a particular piece of information relates to the purpose or subject matter of the exemption. It must further be established by the public institution that the information if disclosed is likely to be injurious to the purpose or subject matter of the exemption. It is only after this that the public interest test is then applied. This type of exemption is contained in sections 11 and 12 of the FOIA.

Before a public institution can rely on an injury based exemption, the institution must satisfy three pre-conditions. Firstly, it must ascertain that the information requested is of the type covered by the exemption. Secondly, the public institution must show that the disclosure of information may, would or could reasonably be expected to cause the harm

identified in the exemption. It is only at this point that the exemption is engaged. Only after then will the public institution apply the public interest test.

(vi) Discretionary Exemption

A discretionary exemption is one that gives a public institution discretion as to whether or not to disclose a piece of information which is the subject matter of an exemption. This type of exemption is introduced with the phrase 'A public institution may deny'. This type of exemption is contained in sections 11, 12, 16, 17 and 19 of the FOIA. The provisions of these sections are introduced with the modal auxiliary verb 'may'. In *Auchi Polytechnic v. Okuoghae*,[35] the court held, with regard to the use of the word "may" in a statute, as follows: "In the ordinary rule of construction of statutes containing the word "may", the use of the word *prima facie* conveys that the authority which has power to do an act has an option either to do it or not to do it." In all such cases, a public institution has discretion to disclose or deny access to the information sought for under those sections. A discretionary exemption provides a public institution with discretion to still disclose the record or information despite the fact that the public interest in disclosure does not outweigh the injury or harm stated in the exemption.[36] In other words, there is no obligation to refuse the application and withhold the record.

(v) Non-discretionary Exemption

This is also referred to as mandatory exemption. Unlike discretionary exemption, a non-discretionary exemption is one that prohibits disclosure and imposes an absolute obligation on a public institution to withhold the information requested once the requirements of the exemption have been satisfied. This type of exemption is introduced with phrases such as a public institution 'must deny' or 'shall deny'. In *Ogwuche v. Mba*,[37] the Court, while stating the meaning or the use of the word "must" in a statute held, as follows: *"…'Must' is a word of absolute obligation…It is not merely directory. It is naturally prima facie imperative*

[35] (2005) 10 (Pt. 933) 279 at 293.
[36] Revised Guidelines on the implementation of the FOIA, p 13.
[37] (1994) 4 NWLR (Pt. 336) 75.

and admits of no discretion. Similarly, in *Achineku v. Ishagba,*[38] the Court of Appeal explained the meaning of the word 'shall' as follows: *"The word 'shall' in its ordinary meaning is a word of command and one which has always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning, and it is generally imperative and mandatory. It has the invaluable significance of excluding the idea of discretion and the significance of operating to impose a duty may be enforced. Thus, if a statute provides that a thing 'shall' be done, the natural and proper meaning is that the peremptory mandate is enjoined."*

This type of exemption is contained in sections 14 and 15 of the FOIA. The effect of such exemption is that the public institution is under an absolute obligation to deny access to the information sought under those sections unless the public interest in disclosure clearly outweighs the harm identified. It is a breach of the FOIA for any public institution to disclose any information duly subject to non-discretionary exemption.[39]

3. Information exempted from disclosure under the FOIA

There are basically eight (8) classes of information exempted from disclosure under the FOIA. As earlier noted, each of the exempted information may be identified as qualified exemption, unqualified exemption, injury-based exemption, discretionary exemption or non-discretionary exemption. However, in order to avoid repetition, subsequent analysis will be limited to qualified and non-qualified exemptions. This is so because injury-based exemption, discretionary exemption and non-discretionary exemption are either qualified or non-qualified exemption.

(i). Conduct of international affairs and defense

This exemption is contained in section 11 of the FOIA. The section actually contains two sub-exemptions: a sub-exemption for information whose disclosure may be injurious to the conduct of international affairs; and another sub-exemption for information whose disclosure may be injurious to the defense of the Federal Republic of Nigeria(FRN).

[38] *Achineku v. Ishagba* (1988) 4 NWLR (PT.89) 411 at 420.
[39] Revised Guidelines on the implementation of the FOIA, p 13.

Information whose disclosure may injure or harm the conduct of the international affairs is exempted under the FOIA. International affairs include relations between Nigeria and any other country; relations between Nigeria and any international organisation, and the protection of Nigeria's interests and citizens abroad.[40] The injury contemplated under this exemption must be to the interests of Nigeria as a collective, rather than simply to the public institution which holds the information or that of any federating state constituting Nigeria.[41] It must be noted that the information exempted under this sub-exemption may be in the custody of any public institution.[42] All that needs to be established is that the disclosure of the information may, would or could reasonably be expected to cause the harm to the conduct of Nigeria's International Affairs Exemption. In order for this sub-exemption to apply, the information requested must relate to the conduct of international affairs and the public institution must demonstrate how the disclosure of the information may, could or would reasonably be expected to harm the conduct of the international affairs of Nigeria. Thereafter, the public institution should proceed to apply the public interest test. If the public interest in the disclosure outweighs the injury the disclosure may cause, the public institution has a duty to disclose the information.

Information may also be exempted if its disclosure could injure or harm the defence of Nigeria. A piece of information may be injurious to the defence of Nigeria if its disclosure could assist an enemy or a potential enemy of Nigeria.[43] This sub-exemption is not only about defence information such as information about weaponry, troop deployments, reliability of a piece of military equipment, state of alert of the Armed Forces but any information whose disclosure could be injurious to Nigeria's defence.[44] This sub-exemption is subject to the public interest test.[45] This means that even where a piece of information might assist an enemy, public institutions are still obligated to consider whether there is a stronger public interest favouring its disclosure.

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[40] *Ibid* at p 26.
[41] *Ibid* at p. 27.
[42] *Ibid*.
[43] *Ibid* at p 28.
[44] *Ibid.*
[45] See FOIA, section 11(2).

(ii). Law Enforcement and Investigation Exemption

The activities and events covered by this exemption are:[46] pending or actual and reasonably contemplated law enforcement proceedings by any law enforcement or correctional agency; pending administrative enforcement proceeding conducted by any public institution; fair and impartial trial of any person; maintaining the secret identity of a confidential source; the personal privacy of any person except it is in the greater public interest to do so; ongoing criminal investigations; and security of penal institutions, such as the various prisons and detention centres.

Before a public institution can rely on any of the foregoing activities as grounds for denying information, the information requested must first of all relate to any of the activities and events above. Secondly, the public institution must further show that the disclosure of the information will be detrimental to any of these activities. Only after demonstrating the detrimental effect of the disclosure to the activities above may the public institution proceed to the public interest test. Public institutions may also deny application for information which the disclosure of which could reasonably be expected to be injurious to the security of penal institutions or which could facilitate the commission of an offence.[47]

(iii). Personal Information

Public institutions are required by virtue of section 14 of the FOIA to deny application for information which contains any personal information. What is personal information? Personal information includes the following:[48] files and personal information maintained with respect to individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public

[46] FOIA, section 12.
[47] FOIA, section 12(1)(b)&(3).
[48] FOIA, section 14(1)(a)-(e).

institutions; personnel files and personal information maintained in relation to employees, appointees or elected officials of public institutions or applicants for such positions; files and personal information held by any public institution dealing with professional or occupational registration, licensure or discipline; tax information required from an individual unless disclosure is authorized by another statute; and information revealing the identity of 'whistleblowers' and other persons who file complaints to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

The purpose of this exemption is to address the tension between right of access to information by members of the public and the right to privacy of individuals. In applying this exemption, it is not necessary for the public institution to show that the disclosure of the information may, could or would reasonably be expected to cause harm to the privacy rights of the individuals concerned. The only task before the public institution is to show that the information requested falls under any of the fore-going list of personal information. However, there are three circumstances in which a piece of personal information may be disclosed by a public institution: (a) if the individual to whom the information relates consents to its disclosure; (b) if the information is already publicly available; or (c) if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates.[49]

(iv). Third Party Information

A public institution is under an obligation to deny an application for information that contains:[50] trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure; information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party; and proposal and bids for any contract,

[49] See FOIA, section 14(2)&(3).
[50] FOIA, section 15(1).

grants, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person.

A trade secret is a secret formulae or recipes.[51] It may also include the names of customers and the goods they buy as well as a company's pricing structure (if these are not generally known and are the source of a trading advantage). Commercial information on the other hand covers a broad range of information such as bank statements and advertising budgets.[52]

This is typically a non-discretionary exemption and partly an injury based exemption. In order to engage with the first leg of the exemption, the public institution need to show either that the trade test or commercial information is proprietary, privileged or confidential or that the disclosure of such trade secrets or information may cause harm to the interests of the third party. The other legs of the exemption required an Injury Test. The public institution needs to show that harm will occur to the purposes / activities specified before proceeding to deal with the public interest test. Once the information requested falls under any of the listed third party information, the harm has been established, and it is determined that the public interest in disclosure does not clearly outweigh the injury that the disclosure will cause, the public institution must deny the application.

(v). Test questions, plans for building and library circulation

Requests for information may also be denied under this genre if the information pertains to test questions, scoring keys, examination data, architects and engineers' plan for private buildings and library circulation and other records identifying library users with specific material.[53] However, where the public interest in the disclosure outweighs the disclosure would cause, the information may nonetheless be disclosed.[54]

(vi). Result or product of environmental testing

A public institution have discretion to deny disclosure of a part of a record if that part contains the result or product of environmental testing

[51] Revised Guidelines on the implementation of the FOIA, p 38.
[52] *Ibid.*
[53] FOIA, section 19(1).
[54] FOIA, section 19(2).

carried out by or on behalf of a public institution.[55] Where however the public institution chooses to disclose such information, or a part thereof, that contains the results of a product or environmental testing, the institution shall at the same time as the information or part thereof is disclosed provide the applicant with a written explanation of the methods used in conducting the test.[56] As an unqualified exemption, there is no need for the public institution to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it.

(vii). Professional Privileges

Public institutions may deny application for any information that is subject to any of the following privileges: legal practitioner-client privilege, health worker-client privilege, journalism confidentiality privileges and any other professional privilege recognized by an Act.[57] Legal practitioner-client privilege covers all communications between lawyers and their clients for the purpose of obtaining legal advice, and other documents created on behalf of such clients.[58] Health Workers – Client Privilege on the other hand covers all communication between health worker and their patients or clients.[59] Health workers in this case include doctors, nurses, and dentists.[60] Journalism Confidentiality Privilege is the right to refuse to divulge sources of information or disclose the actual or entire content of the information provided by these confidential sources. The purpose of these privileges is to encourage full and frank openness between professionals and their clients. As an unqualified exemption, there is no need to consider whether there would be any injury caused by disclosing the requested information; or whether there might be a stronger public interest in disclosing the information than in not disclosing it. Once a piece of information falls under any of the privileges, such information is exempted from disclosure. However, the public institution may nonetheless disclose the information since this exemption is a discretionary one.

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[55] FOIA, section 15(2).
[56] FOIA, section 15(3).
[57] FOIA, section 16.
[58] Revised Guidelines on the implementation of the FOIA, p 41.
[59] *Ibid*.
[60] *Ibid*.

(viii). Course or Research Material

Public institutions may deny application for information which contains course or research materials prepared by faculty members.[61] Course Material includes any academic material prepared in furtherance of a curriculum offered by an institution of higher learning.[62] Research material on the other hand connotes records produced from a systematic investigation undertaken by an academic member of a faculty of a tertiary institution to establish facts, solve new or existing problems, prove new ideas or develop new theories.[63] The purpose of this exemption is to protect academic integrity and professional excellence among lecturers. As an unqualified exemption, there is no need to consider whether there would be any injury caused by disclosing the requested information; or, whether there might be a stronger public interest in disclosing the information than in not disclosing it. Once a piece of information is shown to be a course or research material, such information is exempted from disclosure. However, the public institution may nonetheless disclose the information since this exemption is a discretionary one.

4. Attitude of Courts to Exemptions under the FOIA

The Courts in many cases have made pronouncements on several provisions relating to exemptions under the FOIA. In *Okazie v Attorney General of the Federation & Anor,*[64] for instance, one Mr. Okazie wrote a letter to the Attorney General of the Federation and the Economic and Financial Crimes Commission (EFCC) requesting information on the list of criminal prosecutions being carried out by the Ministry of Justice through private lawyers, the total amount paid for the said prosecution, the source of fund, and the reason for abandoning its own Legal Officers in favor of private lawyers in the prosecution of offenders. The AGF and EFCC refused to provide the information requested. On application to the court for a

[61] FOIA, section 17.
[62] Revised Guidelines on the Implementation of the FOIA, p 43.
[63] *Ibid*.
[64] *Boniface Okazie v Attorney General of the Federation & Anor* Suit No FHC/L/CS/514/2012.

judicial review, the court granted all the reliefs sought by the applicant as prayed except the information relating to the total sum paid to the firm of Olaniwun Ajayi LP in respect of the prosecution of Cecelia Ibru. The Court held that section 15(1)(b) of the FOIA imposes an obligation on all public institution to deny an application for information whose disclosure could reasonably be expected to interfere with the contractual or other negotiation of the third party. 'A third party' includes a legal practitioner in the context of his professional relationship with his client.

In ***LEPAD v Clerk of the National Assembly,***[65] LEDAD, an NGO registered in Nigeria, wrote to the Clerk of the National Assembly requesting amongst others information on the details of the salaries, emoluments and allowances paid to federal legislators that is, Honorable Members and Distinguished Senators of the 6th Assembly, from June 2007 to May 2011. This request was denied by a Notice of Denial written to the applicant by the Clerk of the National Assembly. According to the Notice, the request was denied on two grounds, namely; (i) that the requested information was subject to litigation in court; and (ii) that the information formed part of the information exempted by section 14 of the FOIA. On the second ground, the court held that the applicant's request does not relate to personal information exempted under section 14 of the FOIA but was information relating to what was paid out from public fund while the legislators were in service. The Respondent was thus ordered to disclose to the applicant within 14 days from the date of the order detailed information on the salaries and emoluments of the legislators.

In another case, ***PPDC v Power Holding Company of Nigeria,***[66] the power of public institutions to deny application for information was again tested. In this case, Power Holding Company of Nigeria (PHCN), awarded a contract for the supply and installation of 300 units of 11KV, 500A On-Load Sectionalizers for installation at the High Voltage Distribution System (HVDS) networks at Karu (in Abuja); the Lagos University Teaching Hospital (LUTH), Ogba and Agege (all in Lagos); and Challenge (Ibadan). By a letter dated 30th August 2012, the applicant requested for the following information or documents in respect of Bid No. NGP-D2 for the

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[65] *Legal Defence and Assistance Project (Gte) Ltd v Clerk of the National Assembly* Suit No FHC/ABJ/CS/805/2011.

[66] *Public and Private Development Centre (PPDC) Ltd & Nigeria Contract Monitoring Coalition v Power Holding Company of Nigeria* Suit No FHC/ABJ/582/2012.

contract: the Procurement Plan, Needs Assessment Document, documentation on design and specification requirement which are not contained in the standard bidding documents and other documents relating to the awards. The Respondent Company refused to furnish the applicant with the documents requested. The applicant in this suit brought pursuant to sections 1, 2(6) & 20 of the FOIA prayed the court for a declaration that the failure of the respondent to furnish the documents requested violated the right of the applicant under the FOIA.

The respondent company anchored its refusal to disclose the information on section 15(1)(b) of the FOIA. The section provides as follows: "A public institution shall deny an application for information that contains…information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of the third party."[67] The respondent's counsel submitted that one of the documents requested is a copy of the Bid Evaluation Report of the Technical Sub-Committee of the Tenders' Board for the procurement and it involved a third party, the winner of the bid, namely Crown Resources Development Co Ltd. The respondent's counsel also argued that section 15(1)(b) has its origin in the doctrine of *Privity of Contract*, and that the disclosure of the requested information would certainly affect the contractual relationship between parties to the contract.

The Court, per Ademola J, held that before a public institution can hide under the exemption clause of section 15(1)(b) to withhold information, the following conditions must exist concurrently: the transaction alleged must still be at the negotiation stage; a third party must be involved; and the disclosure of the information should reasonably be expected to interfere with the contractual or other negotiations of a third party. In the present case, negotiation had been concluded before the FOI request was made and the disclosure of the information sought by the applicant cannot by any stretch of the imagination reasonably be expected to interfere with any contractual or other negotiations of Crown resources Development Co. Ltd which is the third party in the case. The court also noted that the pleadings and written argument of the Respondent lacked substance, were frivolous, time-wasting and an abuse of court process.

[67] FOIA, section 15(1)(b).

Accordingly, the court award costs of ₦20, 000 jointly and severally against the Respondents.

Also in the case of *Citizens Assistance Centre v Ikuforiji*,[68] the applicant by a letter dated 14th July, 2011 wrote the Speaker of the Lagos State House of Assembly requesting for information on overhead costs of the legislative house from 1999 to September 2011. This request was denied on the ground that the information requested is exempted under the FOIA, such being personal information maintained with respect to the Respondent's employees, appointees and support staff. The applicant thus brought this suit asking the court for *mandamus* compelling the Respondent to release to the applicant the information requested. The court held that the FOIA does not apply retrospectively and that the overhead expenses of the Lagos State House of Assembly falls under the category of information precluded from public knowledge by virtue of section 14(1)(b) of the FOIA.

This decision is questionable on many grounds but most importantly, the court has made it clear in the earlier case of *LEPAD v Clerk of the National Assembly* (supra) that emoluments of legislators was liable to disclosure under the FOIA. It can only be safely concluded that the practice of courts with respect to exemptions under the FOIA is just evolving. As more of the cases reach higher courts and possibly the Supreme Court, most of the issues pertaining to the use of exemptions under the FOIA will be clarified. At the moment, it can safely be asserted that exemptions under the FOIA, if properly used, does not shut the door to the public's right to access information; rather it is aimed at creating a balance between the public's right to know and the risk of abuse of some critical public information which may put the security and safety of members of the public in danger. However, before any exemption is relied upon under the FOIA, some tests need to be carried out. The goal of these tests is to ensure that the exemption provisions are not abused by public institutions.

[68] *Incorporated Trustees of the Citizens Assistance Centre v Hon. Adeyemi Ikuforiji* Suit No ID/211/2009.

5. Tests to be carried out before applying an exemption under the FOIA

Before applying an exemption, the exemption must be engaged. An exemption is engaged when the information requested relates to any of the items mentioned in the FOIA and in the manner mentioned by the Act. In the case of non-injury based exemption such as professional privileges, course or research material, test questions, plans for building and library circulation, excluded records, personal information exemptions; this is very simple and straightforward. Once the information requested relates to any of the listed professional privileges, course or research material, test questions, plans for building and library circulation, excluded records or personal information, the exemption is said to be engaged. However, in the case of injury-based exemption such as conduct of international affairs and defence, law enforcement and investigation, results or products of environmental testing, and third party information exemptions; the test of engagement is a bit more complicated. The exemption is not engaged simply because the information requested relates to the conduct of international affairs and defence, law enforcement and investigation, results or products of environmental testing, or third party information. In addition to that, it must be shown or demonstrated by the public institution that the information requested may, would or could reasonably be expected to harm, injure, interfere with or prejudice the conduct of international affairs and defence, law enforcement and investigation, results or products of environmental testing, or any third party information. Only then is the exemption engaged. This additional test is called the Injury Test.

Once an Unqualified Exemption has been engaged, such exemption can be applied. However, for Qualified Exemptions, it must be noted that the mere fact that an exemption is engaged does not mean that the exemption should be applied. The Public Interest Test must also be carried out be carried out before applying a qualified exemption.

The second test to be carried out before applying an exemption is the injury test. As stated above, the Injury test is not a stand-alone test; it is part and parcel of the Test of Engagement for all Injury-based Exemptions such as the exemptions relating to conduct of international affairs and

defence, law enforcement and investigation, results or products of environmental testing, and third party information. One interesting thing about the fore-going list of injury-based exemptions is that it comprises both qualified and unqualified exemptions. In all the examples of exemptions cited above, public institution cannot withhold information unless the disclosure, 'may', 'could' or 'would reasonably be expected to' injure, harm or prejudice any of the purposes mentioned. The injury test is applied only after it has been determined that the information requested falls under any of the subjects listed above. In all the relevant sections of the FOIA providing for injury-based exemptions such as sections 11, 12, 14, 15(1) and 19, there are three alternative parts to the injury test. These are: (i) whether the disclosure of the information 'may' cause harm to the purposes mentioned or listed, (ii) whether the disclosure 'could reasonably be expected to' cause harm to any of the purposes mentioned or listed; and (iii) whether the disclosure 'would' cause harm to any of the purposes mentioned or listed.

'May cause harm' implies only a simple possibility or fair chance of injury or harm if the information is disclosed. 'Could reasonably be expected to cause harm' implies a reasonable expectation or likelihood of harm if the information is disclosed. 'Would cause harm' implies a significant, actual and real conviction or certainty that harm will occur should the information be disclosed. Public institutions are required under the FOIA to explain the harm or injury that 'may', 'would' or 'could reasonably be expected' to be caused by the disclosure. Although the institution is not expected to prove exactly what would happen on disclosure, it must be able to provide some evidence which it can then use in reaching a well-informed conclusion about the nature of harm resulting from disclosure. It is not sufficient for an institution to put forward unsupported speculation or opinion.

The third test to be carried out before applying an exemption is the public interest test. The FOIA does not define exactly how public institutions should carry out this test. The Act only mandates public institutions in the cases of Qualified Exemptions to disclose the information requested if the public interest in the disclosure of the information outweighs the harm that its disclosure would cause. Perhaps, the best way to appreciate the public interest test is to understand 'public interest'. The phrase 'public interest' is also not defined in the FOIA.

However, the Black's Law Dictionary,[69] defines 'Public Interest' as: "Something in which the public, the community at large, has some interest by which their legal rights or liabilities are affected; Interest shared by citizens generally in affairs of local, state or national government." It also important to differentiate between 'what interests the public' on the one hand, and 'what is in the public interest' on the other hand. Information is in the public interest if it serves the interest of the public at large.

In applying the Public Interest Test, public institutions are required to make only two decisions: whether it is in the interest of the public to disclose a particular piece of information, and whether the public interest in the disclosure outweighs the harm that the disclosure of the information may cause. Factors that may influence public interest in the disclosure of any information include: the extent to which the information is already in the public domain, the need for furthering the understanding and participation in the public debate of issues of the day, promoting accountability and transparency by public authorities for decisions taken by them, promoting accountability and transparency in the spending of public funds, allowing individuals, companies and other bodies to understand decisions made by public institutions affecting their lives, and bringing to light information affecting public health and safety.

It must be noted that section 26 of the FOIA excludes the following records from application of the FOIA: published material or material available for purchase by the public; library or museum material made or acquired and preserved solely for public reference or exhibition purposes; and material placed in the National Library, National Museum or non-public section of the National Archives of the Federal Republic of Nigeria on behalf of any person or organization other than a government or public institution. With respect to documents covered under section 26 of the FOIA, there is no need to consider whether there would be any injury caused by disclosing the requested information; or, whether there might be a stronger public interest in disclosing the information than in not disclosing it. Once a piece of information is shown to fall under any of the listed items above, such information is excluded from the operations of the FOIA. In other words, public institutions have no discretion to disclose the information to members of the public on request.

[69] Black's Law Dictionary, 9th ed. (St. Paul, MN West Publishing Co. 2009)

6. Conclusion

This article examined the meaning, nature, effect, purpose and types of exemptions under the FOIA. The article also discussed the various classes of information exempted from disclosure to the public under the FOIA as well as the tests to be carried out before applying the exemptions. It is important to note the eight exemptions contained in the FOIA are to be construed strictly and narrowly. The presumption should be in favour of disclosure, always. Whenever the public interest in disclosure is equal to the harm the disclosure would cause, the public interest in disclosure ought to prevail. It is noteworthy that some records may contain both disclosable and exempt information. Just because an exemption applies to some information within a record does not mean that the entire document should be withheld. Section 18 of the FOIA permits the extraction of disclosable information from other information in a record that is either exempt or not relevant. This is known as redaction. Redaction can be made by deleting or blocking words, sentences, paragraphs and whole sections of record. If well used, redaction will reduce the number of occasions public institutions invoke one exemption or the other under the FOIA.

While exemptions are necessary for the protection of third party rights and information vital to national security, its abuse by public institutions portends a grave danger to the right of access to information. In order to ensure the grounds of exemptions provided in the FOIA are not abused, courts must rise to the occasion by construing exemptions narrowly and putting in place mechanisms to ensure public institutions adhere to court rulings on the FOIA. In addition, public institutions that withhold public information without reasonable justifications should be held liable through the use of punitive damages. In conclusion, whether or not the exemption provisions under the FOIA will be a protective firewall for national security and third party rights or an unnecessary barrier to the right of access to information will depend on two factors; first, the ease with which applicants are able to access courts if a public institution turns down their FOI request and secondly, the way and manner the grounds of exemptions are construed by the courts.

OFFSHORE JURISDICTION DICHOTOMY IN NIGERIA VIS-À-VIS A COMPARATIVE ANALYSIS OF OTHER FEDERAL STATES

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ABSTRACT

It is trite that the sovereignty and jurisdiction over natural resources is vested in the Federal Government, nevertheless there is still a clamour for ownership and control of these resources by the component states where these resources are deposited. This quest for hegemony over natural resources by component/littoral states have extended beyond the natural resources found within their land territory as there have been agitations as to who owns the offshore natural resources within the seaward boundary of those component states/littoral states. This research aims at examining the offshore jurisdiction dichotomy of Nigeria, analyzing the case of Attorney General of the Federation v Attorney General of Abia State and 35 Ors. (2002) viz-a-viz the offshore jurisdiction of other Federal States. The doctrinal method was used in carrying out this research and it concluded by advocating for reforms of the laws regulating Nigeria's offshore jurisdiction. The paper recommends the adoption of what is obtainable in other jurisdictions like U.S.A., Canada and Australia.

Keywords: sovereignty, jurisdiction, dichotomy, off-shore, ownership

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I. Introduction

Natural resources worldwide are a gift of nature and an endowment of comfort that makes the existence of mankind complete. As nature's priceless gift to man and because nature's endowment of these resources is without reference to people or nation, the subject of ownership and control is one that has generated a great deal of passion and controversy amongst people and nations. Unfortunately, these resources have been identified as playing key roles in triggering conflicts, and, all through history, the struggle for possession and control of natural resources has been the remote, if not the immediate, cause of great wars and human tragedies.[1]

In Nigeria, a lot of mineral and material resources abound. God Almighty in His characteristic generosity has endowed different parts of Nigeria with diverse types of resources. But the resource which attracts the attention of Nigerians more than any other is crude oil. Since it was discovered in large and commercial quantity in Oloibiri in Bayelsa State in 1956, it has been the main natural resource, which generates the bulk of the revenue in the Federation Account. Nigeria is ranked the sixth largest crude oil producer in the world.[2]

Admittedly, crude oil is not found in all parts of Nigeria. It is commonly found in the Niger Delta Region or mainly in the South-South flank of Nigeria. This is principally because of the peculiar terrain of the region which is coastal in nature and which is richly endowed with oil and oil-related resources. While a greater percentage of the oil is explored on the land, the remainder is drilled from the offshore belts mostly the Continental Shelf which is blessed with extensive oil and gas fields.[3] Nigeria however operates a federal system of government hence the offshore fields are presently being explored and exploited through contractual arrangements between the Nigerian government through, the

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1 Lanre Aladeitan "Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy." 38 (2013) Thurgood Marshall Law Review 159

2 Oil is the mainstay of Nigeria's economy and Nigeria's ranking is courtesy of Organization of Petroleum Exporting Countries (OPEC), located in Vienna, Austria

3 P.C. Underwood, ''Ocean Boundaries and Resource Development in West Africa'' in D.M. Johnson & P.M. Saunders (eds.), *Ocean Boundary Making: Regional Issues and Development* (London: Croom Helm, 1988), 229–267.

Nigerian National Petroleum Corporation (NNPC) and various multinational oil and gas companies.

The 1999 Constitution confers ownership of these natural resources found in any State in Nigeria on the Federal government[4] and the federal government[5] provides a revenue formula whereby states, with natural resources being exploited within their territory, are entitled to a certain percentage of the revenue accruing directly to the federation account from such exploitation. The proviso of this section, which incorporated what is popularly known in Nigeria as the ''derivation formula'', has in fact generated a lot of controversies amongst the people of these littoral states as the agitations for resource control brought to the fore the need to determine (especially as regards revenue derived from the oil and gas resources) whether the offshore bed of the territorial sea, exclusive economic zone and continental shelf of Nigeria should be regarded as part of the littoral states or not?[6]

It is against this backdrop that this paper discusses the jurisdictional issues associated with offshore natural resources in Nigeria vis-a-vis a comparative analysis of other federal states. This paper is divided into six parts. Part I is the introduction and Part II examines the concept of sovereignty, jurisdiction, territorial sea, contiguous zone, exclusive economic zone, continental shelf. Part III discusses the offshore jurisdiction of Nigeria using the case of *Attorney General of the Federation v Attorney General of Abia State and 35 ors.,* arguments for and against offshore jurisdiction by some learned authors was also looked at as well as the national laws regulating offshore jurisdiction in Nigeria. Part IV considers offshore jurisdiction in other states like USA, Canada and Australia. Part V of this paper maked recommendations and Part VI is the conclusion.

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4 Lanre Aladeitan (n. 1)

5 Constitution of the Federal Republic of Nigeria,1999 (As Amended), Section 162(2) (CFRN)

6 Edwin Egede "Who owns the Nigerian Offshore Seabed: Federal or State? An Examination of the Attorney General of the Federation v. Attorney General of Abia State & 35 Ors Case" 49(1) (2005) *Journal of African Law* 73 doi:10.1017/S0021855305000069

II. Conceptual Clarification

2.1 Sovereignty

The term "sovereign" is derived from the French word *"souverain"* which in its own is derived from the Latin word "superanus" which originated from another classical Latin word "*superus"* "superior" or "overness" - an authority which has no other authority over itself.[7]

In international law, the concept of sovereignty is the essence of the State and it pertains to a government possessing full control or dominium over its own affairs within a territorial or geographical area or limit, and in certain context to various organs (such as courts of law) possessing legal jurisdiction in their own chief, rather than by mandate or under supervision. In essence, sovereignty is the legitimate exercise of power by a state.[8]

In all, the key element of sovereignty in the legalistic sense is that of exclusivity of jurisdiction: the power to govern. Specifically when a decision is made by a sovereign entity, it cannot generally be overruled by a higher authority. The term sovereignty has however been identified to be "an element of or characteristics of state along with population, territory and government."[9]

Going by the provisions of the 1962 United Nations General Assembly Resolution 1803, every state has permanent sovereignty over the natural resources within its territory. It has the right to dispose of its natural wealth and resources in accordance with its national interest.

Notwithstanding the above, sovereign states enter into treaties with other states for their mutual benefit and common interest.

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[7] S.R. Myeneni, *Jurispudence (Legal Theory)* 2nd Ed. (Kothi, India: S.P. Gogia, HUF C/o Asia Law House, 2004) 101

[8] Ian Brownlie, *Principles of Public International Law*, (Oxford: Clarendon Press, 1990) 107.

[9] S.R. Myeneni, (n. 7)

2.2 Jurisdiction

Jurisdiction refers to the capacity of a State to exercise certain powers. It is the State's right to regulate or affect by legislature, executive or judicial measures the rights of persons, properly acts or events within its territory although such actions are not always entirely and exclusively of domestic concern.[10]

For the purpose of this paper, jurisdiction is described as the power and or competence to exercise legislative, executive and or judicial power in relation to a particular territory and or subject matter. Jurisdiction within the context of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 is defined as the control which the littoral State has regarding the establishment and use of artificial islands, installations and structure, marine scientific research, the protection and preservation of marine environment as a common heritage of mankind.[11] The issue of jurisdiction is germane in determining ownership of offshore resources particularly in the context of a federal state like Nigeria.

2.3 Territorial Sea

The Territorial sea is an extension of the sovereignty of the coastal State over its land territories and internal waters. Every State has the right to establish the breadth of its territorial sea which is fixed at 12 nautical miles from the baseline of the low water marks.[12]

2.4 Contiguous Zone

A Contiguous zone is a zone contiguous to a coastal states" territorial sea and the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; punish infringement of the above laws and regulations committed within its territory or territorial sea over such area describe as contiguous zone.[13] The

[10] C. I. Anthony, *The Concept of the State Jurisdiction in International Space Law: A Study in the Development of Space Law in the United Nations* (Hague: Martinus Nijthoff, 1971) 49.
[11] Ian Brownlie, (n. 8)
[12] UNCLOS 1982 Article 3
[13] UNCLOS 1982 Article 33(1)

Contiguous zone may not extend beyond twenty-four nautical miles from the baseline from which the territorial sea is measured.[14] UNCLOS gives to a coastal State limited authority in the contiguous zone for the purpose of enforcing its customs, fiscal, immigration, and sanitary laws and regulations.

2.5 Exclusive Economic Zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the LOS Convention.[15] The coastal State has jurisdiction over marine scientific research within the exclusive economic zone, as well as sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and over other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds. Jurisdiction is also provided over establishment and use of artificial islands, installations, and structures and over the protection and preservation of the marine environment. The exclusive economic zone extends to a maximum breadth of 200 nautical miles from the baseline from which the territorial sea is measured.

2.6 Continental Shelf.

The Continental Shelf is a geological expression referring to the ledges that project from the continental landmass into the seas and which are covered with only a relatively shallow layer of water (some 150-200 metres) and which eventually fall away into the ocean depth.
Article 1 of the 1958 Continental Shelf Convention defined continental shelf:

> as being the seabed and subsoil of the maritime areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limit, to where the depth of

[14] Article 33(2)
[15] Article 55

> the superjacent waters admits of the exploitation of the natural resources of the said seas.[16]

The UN Convention on the Law of the Sea provides that-

> the Continental Shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[17]

The 1982 Convention gives the coastal State the sovereign right to explore and exploit the natural wealth, both mineral and non-living resources, of the sea-bed and subsoil and any sedentary species of the shelf, with no other state being able to exploit the resources without the consent of the coastal State.[18]

In the same vein, the continental shelf is the prolongation of the land territory seawards beyond the territorial sea:

(a) But not exceeding 200 nautical miles from the baseline of the territorial sea;
(b) Beyond the 200 nautical miles it must not exceed 350 nautical miles and
(c) 100 miles from the 2,500 metres *isobath*,

Provided this does not apply to submarine elevations that are natural components of the continental margin such as its *plateaux*, rises, caps, banks and spurs.[19]

The Coastal States exercises exclusive sovereign rights over the area for the purposes of exploration of the natural resources.[20]

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[16] Convention on the Continental Shelf 1958, Article 1
[17] UNCLOS 1982 Article 76(1)
[18] UNCLOS 1982 Article 77
[19] U. O. Umozurike, *Introduction to International Law,* (Ibadan: Spectrum Books Limited, 2005) 108.
[20] *Ibid*

It should be noted that most of the natural resources offshore are found within the territorial sea, exclusive economic zone and the continental shelf.

III. RIGHTS, JURISDICTION AND FREEDOMS OF COASTAL STATES OVER THEIR NATURAL RESOURCES

It is not in doubt by the Law of the Sea Convention and various municipal legislations that every coastal state has exclusive sovereignty over the natural resources within its territorial waters and specific sovereign rights over the living and non-living resources lie in the seabed, subsoil and superjacent water columns of its exclusive economic zone and the continental shelf. For these rights and jurisdiction are exclusively resided with the coastal states however they may with permission allow other coastal states to carry out some sea activities in all their maritime zones. And those activities must be in accordance with what the principles and tenets of international law permits or as it may otherwise agree. Those freedoms exercisable by other coastal states on the maritime waters of a coastal state may include freedom of navigation, over flight, to lay submarine cables and pipelines, to construct artificial islands and other installations, freedom of fishing and freedom of scientific research.[21] That notwithstanding these freedoms, there are times when a coastal state is allowed to prevent those freedoms of other coastal states in its maritime waters. And in such moment, the law preserves the interest of that coastal state and all its maritime entitlements against any form of prejudicial acts or omissions by other coastal states.

In all, it is very important to note therefore that these rights, jurisdictions and or freedoms of coastal states are exercisable only by nation states (federal States) and not their component units (littoral states) as the case may be.

3.1 Offshore Jurisdiction of Nigeria*: The case of Attorney-General (Federation) v. Attorney-General, Abia & 35 Ors*[22]

Nigeria operates a Federal system of government and the 1999 Constitution as well as other plethora of laws regulating the oil industry

[21]Amos Enabulele and Bright Bazuanye, *Principle of Public International Law*, 330 to 420
[22] [2002] 6 NWLR (Pt. 764) 542

vests ownership and control of these mineral resources in the federal government and not the component states/littoral states. Over the years there has been a quest for component/littoral states hegemony over vast mineral/oil deposits within their territories and this has generated a lot of issues within such territories. The 1999 Constitution[23] provides that such states are entitled to 13% of the revenue accruing directly to the federation account from such exploitation. This ''derivation formula'', necessitated the need to determine (especially as regards revenue derived from the oil and gas resources) whether the offshore bed of the territorial sea, exclusive economic zone and continental shelf of Nigeria should be regarded as part of the littoral states or not.[24]

As a result of this dispute which arose between the federal government and the littoral states as to whether mineral resources derived from the continental shelf and exclusive economic zone form part of the mineral resources found in the territory of the state for the purpose of being entitled to the 13% of the revenue stipulated by the Constitution, the Attorney-General of the Federation, on behalf of the federal government, sought the Supreme Court judicial determination of the seaward boundary of the littoral states for the purpose of computing the revenue payable under the provisions of Section 162(2) of the 1999 Constitution. By extension, the Attorney General of the Federation sought to have the Federal Government declared as having jurisdiction to own and manage the vast mineral resources located in the oceans and sea beds with the rights and powers to manage the submerged lands outside the low-water mark of the land surface.

It was contended on behalf of the Federal Government that the seaward boundary of each of the littoral states is the low-water mark of the land surface of such state, or seaward limit of inland waters within the state. It further maintained that natural resources located within the Continental Shelf of Nigeria are not derivable from any state of the federation.

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[23] Constitution of the Federal Republic of Nigeria, 1999 (As Amended), s.162(2)
[24] Edwin Egede (n. 6) 73

The littoral states, relying on historical facts, titles, customs and treaties with colonial authorities, claimed that their territories extends beyond the low-water mark onto the territorial water and even unto the continental shelf and the exclusive economic zone. Hence, natural resources derived from both onshore and offshore are derivable from their respective territories. The littoral states further counter-claimed for the arrears due to them under Section 162(2). In the resolution of this case, the Court considered the provisions of both municipal legislation, common law decisions from other jurisdictions and several public international agreements on ocean boundary limitation to determine the seaward limit, sovereignty and jurisdictional power of the federal government over vast mineral oil and gas resources deposits within the Continental shelf, exclusive economic zone and oceans located within the territory of the littoral states.[25] The Supreme Court rejected in entirety the littoral states ownership claim over vast oil and gas resources in the oceans and seabeds and reiterated the federal government paramount "governmental authority and power in and over the Exclusive Economic Zone measured from the low water mark or the seaward limits of the inland waters into the open sea within the prescribed nautical miles prescribed by law"[26] and full dominion over the resources of the subsoil, including oil. The Supreme Court held thus:

1. 'Coastal States' under the United Nations Convention on the Law of the Sea 1982 means nation-state and not the internal state of a country like the littoral states in Nigeria. In a federation, it applies to the federating states that comprised the federation. This is necessarily so because international law applies to countries that are members of the Comity of Nation and so the provisions of international law in a convention do not directly apply to them but to the federation.[27]
2. On this point, Ogwuegbu J.S.C said,[28] " It is Nigeria as a Sovereign State which can exercise jurisdiction and rights as a Coastal State over her territorial waters, contiguous Zone, other zone in which

[25] UNCLOS 1982
[26] *A.G. Federation v A.G. Abia State and 35 Ors*.(n.22) *Per* Iguh J.S.C, at p. 892.
[27] Lawrence Atsegbua, *The Oil and Gas Law in Nigeria: Theory and Practice* (Benin: Fifers Lane Publishers,2012) 14-15
[28][2002] 6 NWLR (Pt. 764) 828-829

she has special interest and the high seas and will answer the claims of other members of the International Community, for, any breach of her obligations and responsibilities under international conventions such as the United Nation Convention on the Law of the Sea 1982 and not her littoral states who have no international personality.

3. The sea boundary of a littoral state within the Federal republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that state pursuant to section 162(2) of the Constitution is the low- water mark limit of the surface of the seaward inland waters.

This is because "none of the littoral states is sovereign despite the historical narration by some of them. They are all part and parcel of the sovereign independent State of Nigeria. None of them can exercise any control beyond the landmass of their respective States. They cannot claim that revenue accruing from mineral resources offshore belongs to any of them. Whatever revenue accrues from drilling off-shore belongs to the whole Federation of Nigeria based on section 162 of the 1999 Constitution, their claims that they are entitled to not less than 13% of the total revenue accruing from off-shore drilling must therefore fail and same is hereby refused and dismissed". [29]

3.2 Argument For and Against Offshore Jurisdiction over Natural Resources

As cautiously observed, that some communities with mineral endowment, regardless of the legal position on ownership of mineral resources lay claim to such mineral resources located within their domain as legitimately belonging to them, became a basis for divergent views on federal State offshore jurisdiction/ control over mineral resources in the country[30].

[29] *A.G. Federation v A.G. Abia State and 35 Ors*.(n.22) *per* Wali J.S.C. at p.772
[30]Lanre Aladeitan, (n.1) 159.

One of the prominent proponents of federal offshore ownership, especially as it relates to the oil and gas industry, is Professor Ajomo[31].His positions are that the vesting of mineral resources in the federal government by adducing that ownership and control of petroleum is an important political symbol in most developing countries. Additionally, he asserted that the question of the government or authority to whom revenues should be paid, and the power and resources derivable from it, was an issue in the crises that led to the Nigeria Civil War, therefore, necessitating the federal government to claim that right exclusively[32].He contended further that, since oil has a vital influence on the life of the people because of the benefit of petroleum to the economy, exclusive federal control permits the promulgation of uniform regulations in the oil industry. Still, on the justification for federal offshore jurisdiction, Professor Ajomo noted that the federal government, being a federal subject under the Constitution, is the only authority that can successfully pursue, in collaboration with oil companies, a policy that will not adversely affect Nigeria's foreign exchange position.

It was also the contention of the learned Professor that only the federal government has capacity to operate in the petroleum industry given the huge capital outlay and the high degree of technical expertise required. Similarly, he asserted that only the federal government has the capacity to compel the multinationals operating in the industry to share the necessary technical knowledge with Nigerians. He therefore expressed the view that, contrary to private ownership, Federal Government ownership and control of petroleum resources will enhance national unity.

Professor Sagay[33] contends that some arguments could not stand up to a rigorous examination or analysis, based on Nigeria's national experience. Starting from the very first argument, Professor Sagay posits that, instead of promoting unity, the federal government's exclusive

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[31] M.A. Ajomo, "The Legal Framework of the Petroleum Industry", *(Paper presented at the centre of petroleum environment and development studies workshop on essentials of oil and Gas Law*), Lagos October 17-18, 2001

[32] M.A. Ajomo, "The 1969 Petroleum Decree: A Consolidation Legislation, Resolution in Nigeria's Oil Industry in 57 (1979) *Nigerian Annual International Law* 42

[33] Itse Sagay, "Ownership and Control of Nigerian Petroleum Resources: A Legal Perspective" In Victor Eromosele ed. *Nigerian Petroleum Business: A Handbook* (Lagos: Advent Comme'ns Ltd, 1997) 178

ownership and control of our oil resources has caused deep bitterness, resentment, and a sense of majority oppression of the minority producers of oil. He went on to say that the country has witnessed rebellions, revolts and cries brought about by the exclusive ownership and control of mineral resources in the federal government by the oil producing areas. He further argued that, as a result of the federal offshore ownership and control policy, the people of all the oil producing areas naturally feel "cheated and exploited" by a policy under which the wealth under their land is carted away, leaving them with a polluted and devastated environment.

Based on the these issues, which cannot be answered positively, it is humbly submitted that the points as canvassed by the learned Professor Ajomo, while not illogical, are not justifiable reasons in the Nigerian experience[34].

In a true Federalism, the component states constitutionally control the resources, which are found within their geographical spread, and they pay a certain percentage of revenue derived from such resources to the Federal Government. Practically, therefore, resource control rests in the component states of the Federation. In Nigeria, the constitution of the Federal Republic of Nigeria 1999 and various other enactments vest the control of mineral resources in the Federal Government of Nigeria.

3.3 Statutory (Municipal) Laws/Regulations Governing Offshore Jurisdiction over Natural Resources in Nigeria

The most compelling factor in determining whether the ''ownership'' or "offshore jurisdiction" of the Territorial Sea, Continental Shelf and EEZ of Nigeria is vested in the Federal government or the littoral states is the municipal laws of Nigeria. Unfortunately the municipal laws failed to expressly deal with this issue.[35] The laws are as follows:

3.3.1 The Constitution of the Federal Republic of Nigeria, 1999 (As Amended)

The 1999 Constitution is the Supreme Law of Nigeria; any law that is inconsistent with its provisions is to the extent of such inconsistency null

[34]*Ibid.*
[35]Edwin Egede, (n.6) 85

and void[36]. There are no express provisions on the ownership of the offshore seabed as between the federal government and the littoral states under the Constitution. However, we can say that the ownership is not explicit in the Constitution although by virtue of section 44(3), it conferred on the Government of the Federation only the control of the entire property in mineral resources both on land and in or under sea areas as mentioned by the aforesaid section. By implication, this gives the federal government the right of ownership over all the offshore natural resources. The Constitution declares Nigeria to be a federation consisting of states and a federal capital territory (FCT). The FCT is the only territory vested in the federal government under the Constitution[37]. While the FCT is clearly defined by the Constitution in terms of precise co-ordinates[38], the extent of the various states are merely defined by mentioning the local governments' areas in each state in the federation without any exact delimitation of such.

3.3.2 The Petroleum Act

The Act[39] provides for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all onshore and offshore revenue from petroleum resources derivable there from in the Federal Government and for all other matters incidental thereto. And by virtue of section 1 (1), (2) and (3) of the Act, all petroleum resources are vested solely on the Nigeria Government that is the Federal Government *simpliciter*.

3.3.3 The Offshore Oil Revenues (Registration of Grants) Act

This Act[40] states that:

> ''All registrable instruments relating to any lease, license, permit or right issued or granted to any person in respect of the territorial waters and the continental shelf of Nigeria shall, notwithstanding anything to the contrary in any enactment continue to be registrable in the States of the

[36] CFRN 1999, s.1
[37] s.2(2), ibid
[38] s.3(4), 297 and Part II of the First Schedule, ibid
[39] Petroleum Act, 1969 Cap P.10 Law of the Federation of Nigeria, 2004
[40] Offshore Oil Revenues (Registration of Grants Act)

Federation, respectively, which are contiguous to the said territorial waters and the continental shelf.[41]''

The legal implication of the above is that every registrable instrument pertaining to permit or license over oil operations and production are granted by the Governor of a state of the federation within that territory except in cases where there are disputes as to whether or not any instrument is registrable in any state, such dispute is required to be determined by the head of the federal government whose decision shall be final and binding[42].

3.3.4 The Territorial Waters Act (TWA), Exclusive Economic Zone Act (EEZA) and Sea Fisheries Act (SFA)

The TWA[43] (stating the breadth of the territorial sea and making provision in respect of the exercise by the Nigerian courts of criminal jurisdiction over the Nigerian territorial sea), the EEZA[44] (regulating the Nigerian EEZ) and the SFA[45] (regulating fishing within Nigerian waters), while not making express provision for ownership of the offshore zones but it can be implied that offshore zones lie with the federal government. More than this implication, it is also obvious that the constitution gives the power to the federal government to implement policies relating with these offshore zones and hence, subject matters relating to these offshore zones to be exclusively listed for federal government to handle.

[41]section 1(1), ibid

[42]Edwin Egede, "The Nigerian Territorial Waters Legislation and The Law of The Sea Convention (LOSC) 1982 " (2004) *The International Journal of Marine and Coastal Law*, 147-172

[43]Territorial Waters Act, Cap T428 Law of the Federation of Nigeria, 1990,Territorial Waters (Amendment) Act No.1 of 1998

[44] Exclusive Economic Zone Act, Cap E 17, Law of the Federation of Nigeria, 2004

[45]Sea Fisheries Act, Cap S404 Law of the Federation of Nigeria, 1990

3.3.5 Deep Offshore and Inland Basin Production Sharing Contracts Act

This Act[46] gives effect to certain fiscal incentives given to the oil and gas companies operating in the deep offshore and inland Basin areas under production sharing contracts between Nigerian National Petroleum Corporation or other companies holding oil licenses or leases and various petroleum exploration and production companies.

3.3.6 Allocation of Revenue (Abolition of Dichotomy in the application of the Principle of Derivation) Act, 2004

This is the most recent enactment by the Nigeria Parliament on offshore jurisdiction controversy and the purpose of the Act[47] is to give effect that two hundred metre (200m) water depth Isobath contiguous to a state of the federation shall be deemed to be part of that state for the purpose of computing the revenue accruing to the Federation Account from the state pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 or any oilier enactment.

Additionally, the municipal laws regulating offshore jurisdictions in Nigeria and the legal effects and application of these laws have favoured the Federal government when it comes to who controls the offshore jurisdiction of all the territorial waters, contiguous zone, exclusive economic zone and continental shelf within the territorial limit of the federation.[48]

IV. Comparative Analysis of Offshore Jurisdictions over Natural Resources in Other Federal States or Sovereign Nations with Nigeria

Following the importance of natural resources as essential commodities, which are at the heart and soul of a nation's economic

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[46]Deep Offshore and Inland Basin Production Sharing Contract Act No. 9, 1999.This is the first piece of Nigerian Legislation recognizing the dichotomy between the onshore and offshore exploration regimes.

[47]Allocation of Revenue (Abolition of Dichotomy in the application of the Principle of Derivation) Act, Cap A. 15 LFN, 2004

[48] M. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Clarendon Press, 1989) 44- 62.

survival and the definition of natural resource ownership as a bundle of rights, different nations of the world have different approaches to the offshore jurisdiction, ownership and control of natural resources based on the different nations' political, social, and economic considerations have evolved differently across the world[49].

4.1 Ownership and Jurisdiction of Offshore Oil and Gas in United States of America

This provides a large portion of the nation's oil and gas supply. Large oil and gas reservoirs are found under the sea offshore from Louisiana, Texas, California, and Alaska[50].The issue of state versus federal ownership has a long contentious history. The US Supreme Court ruled in 1947 that the Federal Government owned the entire seabed off the California coast[51]; the court applied the same doctrine against Louisiana[52] and Texas in 1950[53]. The court ruling invalidated existing states leases over producing offshore oil fields in the three states.

However, the US Congress passed the Submerged Land Act[54] in 1953 which recognized state ownership of the seabed within 3 nautical miles (6km) of the shore[55].That same year Congress also passed the Outer Continental Shelf Lands Act[56], which gave the federal government control over minerals on and under the sea bed farther offshore from state waters. Each littoral state owns the territory extending 3 nautical miles (6km) from the shore at mean low tide, and has jurisdiction to decide whether or not, and under what terms to lease the territory for oil and gas.

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[49]John L. Taylor, "The Settlement of Dispute Between Federal and State Governments Concerning Offshore Petroleum Resources: Accommodation or Adjudication" (1970) *Harvard International Law Journal* II 358

[50]*Ibid*

[51]*United States v. California*, 332 U.S 19 (1947), 381 U.S 139 (1965); 436 U.S 32 (1978)

[52]*United States v. Texas*, 339 U.S 699 (1950)

[53]*United States v. Louisiana*, 339 U.S 699 (1950); 363 U.S 1 (1960); 389 U.S 155 (1967)

[54]Submerged Lands Act, 43 U.S.C 1301- 1315 (1982 $ Supp. Iv. 1986)

[55]It is notable that from the historical cases in U.S, it was only Texas and Florida who were able to establish the necessary historic claims to obtain jurisdiction beyond three nautical miles.

[56]Outer Continental Shelf Lands Act, 43 U.S.C 1331- 1356 (1982 $ Supp. Iv 1986); Christopher, The Outer Continental Shelf Lands Act: Key to a New Frontier 6 STAN L. REV. 23 (1953)

It is important to know that there are variations in defining the breath of the water of each littoral state. For instance, Texas and the west coast of Florida for historical reasons own the sea bed up to 9 nautical miles (17km), while other states use the international nautical mile adopted by the United States in 1954[57]. For the Federal ownership, President Harry Truman proclamation extending the US jurisdiction over mineral resources to the edge of the continental shelf was codified by the Outer Continental Shelf Land Act of 1953.

As a result of the joint ownership over the offshore natural resources by the Federal and state government, the offshore operations and production across the states of the U.S have been boosted and greeted with economic growth and development of those states. For instance state offshore seabed in California produced 37, 400 barrels (5, 950m^3) of oil per day[58], and federal offshore tracts produced 66, 400 barrels (10, 560m^3) of oil per day in November 2008. State and Federal offshore tracts together made up 16% of the state's oil production.

4.2 Offshore Jurisdiction over Oil and Gas in Canada

Canada, like all Coastal States, enjoys sovereign rights over the continental shelf for the purposes of the exploration for and exploitation of submarine mineral resources[59].And, as in some other federal states, these rights have been in dispute between central and provincial or state governments. Although all coastal provinces presently maintain claims to offshore mineral jurisdiction, three in particular have been in the vanguard of the dispute: British Columbia[60], Newfoundland[61] and Nova Scotia[62]. It is

[57]Edgar Wesley Owen "Trek of the oil Finders" (1975) *American Association of Petroleum Geologists II* 13.
[58]*Ibid.*
[59]Rowland J. Harrison, "Jurisdiction over the Canadian Offshore: A Sea of Confusion" *17 (3)* (1979) *Osgoode Hall Law Journal* 12 http: // digitalcommons.Osgoode yorku.Ca/ohlj/ vol.17/iss. 3 /1
[60]Re: Offshore mineral rights of British Columbia,62 W.W.R. 21 (1967), wherein the province of British Columbia claimed absolute jurisdiction over oil resources in its offshore land and challenged the federal government competence to issue permits to oil operator. In its decision, the Supreme Court of Canada ruled against British Columbia, finding no provincial offshore jurisdiction in the territorial sea and continental shelf of Canada.

salient to observe that the issue of jurisdiction over the territorial sea remains unresolved.

There was a battle between the Federal and provincial government of Newfoundland regarding jurisdiction over offshore lands located beneath the territorial sea and the continental shelf. Both government deployed means to resolve the conflict but all negotiations and other amicable mode of settlement employed all failed and hence litigation ensued. The Newfoundland Court of Appeal determined that Newfoundland hold jurisdiction over the land beneath its territorial sea, but not over the continental shelf. The Supreme Court of Canada said 'no' and held that Newfoundland lacked jurisdiction over both the territorial sea and the continental shelf.

Notwithstanding the controversial decisions of the Apex Court of Canada and for the Canadian Government to forestall breakdown from the end of aggrieved persons of Newfoundland, political intervention was necessary to rectify the erroneous decisions of the Canadian and the US Supreme Courts.

In Canada, the federal and provincial government of Newfoundland negotiated the Atlantic Accord Agreement which provided for joint management and revenue sharing regarding offshore natural resources.

Through these political settlements the province of Newfoundland and other states were able to achieve partial victories in their battles against the federal government over the control and ownership of offshore natural resources notwithstanding that the agreement ignores the jurisdictional question and, indeed, is intended to survive a judicial determination of that issue one way or the other[63].

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[61]The Newfoundland claim is set out and discussed in a number of articles. See. in particular, Manin,"Newfoundland's Case on Offshore Minerals" 7(1975) *Ottawa L. Rev.* 34.
[62]Canada / Nova Scotia Agreement on Offshore Management and Revenue Sharing, March, 1982. See Doucet, "Canada• Nova Scotia Offshore Agreement: One Year Later". XXII *Alta. L.*Rev. 132 or on the Nova Scotia claim to exclusive offshore resource jurisdiction, see Foley, Nova Scotia's Case for Coastal and Offshore Resources" (1981) 13 Ottawa *L. R,:v.* 281.
[63] Atsegbua (n.27) 23-27

4.3 Offshore Jurisdiction over Oil and Gas in Australia

Uncertainty over offshore jurisdiction within the Australian Federation provided a spur to inter-governmental cooperation when offshore petroleum exploration commenced in the 1960s[64]. On 16 October, 1967[65], the Commonwealth and the states concluded the "agreement relating to the exploration for, and the exploitation of, the petroleum resources, and certain other resources, of the Continental Shelf of Australia and of certain territories of the commonwealth and of certain other submerged land."

The object of the Agreement was to set aside the competing jurisdictional claims of the Commonwealth and the States, without derogating from them. The agreement was that offshore petroleum as far as possible be subject to a common legal code[66]. The Petroleum (Submerged Lands) Act 1967 was enacted by the Federal Parliament and each state enacted its own statute in virtually identical terms. The significance of this Act was that the Federal statutes covered all adjacent areas while each state statute applied only to its adjacent area.

However, subsequent experience revealed that where there were conflicts between the exercise of offshore jurisdiction as provided by the two existing statutes or powers to be exercised by the ministers who were vested with such powers within the respective statutes, the federal government or the federal minister lacked the competence or capacity to

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[64]The ensuing case of *New South Wales v. Commonwealth* (1975) 135 C.L.R. 377 (H.C.A.) provided no relief to the State in their quest to recover lost territory. In fact, the judgment was actually a regressive step in their efforts to reassert an offshore personality. Not only was SSLA upheld in its entirety but the Court determined that the Commonwealth possessed legislative capabilities it had not even contemplated when enacting the law.

[65]Petroleum (Submerged Lands) Act 1967 (Cth.,)

[66]Clause 9 of the Settlement stated that Common Mining Code – the P(SL)A – would be administered by the Designated Authority in respect of each State, a role defined by the Petroleum Submerged Lands Act, 1967 to be the responsible state minister. This arrangement raised a question of Constitutional Law that is still yet to be answered – whether the Constitution permits the power to administer a Commonwealth statute to be conferred upon a state minister. The Designated Authority device was created to avoid the judicial review that such a fundamental legal issue would invite. The Commonwealth's P(SL)A refers to the Designated Authority instead of to the state minister directly, to further raising concerns over the Constitutional legitimacy of the Designated Authority.

enforce the policies. Owing to the erratic nature of the government in power as at then and the inception of another government headed by a different political party, the Petroleum (Submerged Lands) Act 1967 was abolished and another law- the Seas and Submerged Lands Act 1973 was enacted which gave the federal government the sovereign power and jurisdictions over Australia's territorial sea and right to explore the continental shelf and to exploit its natural resources. The Constitutional validity of these claims was challenged by all six states, but to no avail. The High Court of Australia held that the Federal Parliament, by virtue of its power to make laws with respect to 'external affairs' had jurisdiction over all offshore areas beyond the territorial boundaries of the states as they were at the time of federation (usually represented by the ordinary low water mark)[67].

By 1979, the Federal and State governments reached a new accord on offshore jurisdiction, the "Offshore Constitutional Settlement"[68] which recognized the joint ownership and management of offshore natural resources in both the territorial seas and the continental shelf. The remarkable thing about this new Accord, besides the decision of the High Court of Australia in respect of the Seas and Submerged Lands Act case and the sustained antipathy of the Federal Labour Party to the 1967 Agreement, is the extent of the responsibility over offshore petroleum operations retained by the states. The Agreement therefore allows the littoral states to obtain jurisdiction over coastal waters along with ownership of sea bed resources within its territoriality.

Although there are doubts as to the commercial viability of offshore jurisdiction over natural resources from some offshore areas, the corresponding constitutional uncertainties surrounding offshore activities are now being resolved as a result of national legislations enacted as seen in case of United States or political interventions as seen in the cases of Canadian and Australian Governments. Importantly therefore, the nature of the jurisdiction exercisable by a littoral state over a particular marine

[67]The 1980 OCS for the first time divvied the offshore by creating a 3-mile territorial sea and assigning this to the states. Title to the continental shelf beyond reverted to the Commonwealth. More important than the narrow territorial sea issue was the development of sectoral models within the OCS framework which enables the states to share decision-making beyond the three-mile limit.

[68]*Ibid.*

area adjacent to it depends on the juridical category, established by international law, into which that area falls. For the present purposes, four categories may be identified: inland waters, internal waters, territorial sea and the continental shelf.

From the above comparative analysis of the three Federal States of U.S, Canada and Australia, it is crystal clear that offshore jurisdictions over natural resources just like in the case of Nigeria had never been seen as child's play at any time; both the federal and its component units have taken it to be a do or die affair because of the economic prosperity laid with it. For United States, it was until recently that Congress promulgated enabling laws allowing Federating units to be beneficiaries of offshore control and ownership over their oil resources within a territorial limit. Nigeria too had followed suit with the recent extant enabling statute[69] as discussed above which allows the littoral states to benefit from the revenue accruing or derivable from exploitation of mineral resources drills from the seaward boundary of their sea areas other than states ownership and control of those offshore resources.

For Canada and Australia, after repeated constitutional ill-lucks by provincial states, their Federal Government(s) came up with a CONCORD or ACCORD (call it a political leeway) to assuage the aggrieved provincial states. Thus if Nigeria should adopt this system, it would have an inconsequential and inconsistent effect with the Constitutional provisions which support the Federal government more on offshore jurisdiction or resource control[70] as well as recognize the Supremacy of the Nigerian Constitution over all other laws including political/ economic agreements.

V. Recommendation

True Federalism has not been practiced in Nigeria since time immemorial and this explains the onerous challenges over ownership

[69]Allocation of Revenue (Abolition of Dichotomy in the application of the Principle of Derivation) Act, Cap A.15 LFN, 2004

[70]Aniedi J. Ikpang, "The Legal Chasm Between Resource Control and the Determination of the Seaward Boundaries of the Littoral States in Nigeria", *12(2011) UULJ 12*

tussle of natural resources by the federal and state governments till date[71]. The socio-economic development of most component units especially the oil producing states have been retrogressive and at best, they have been at the economic disadvantaged position with no beams of hope on the generation yet to come. It is on this basis that this paper has hereunder proffered the recommendations that will solve these problems associated with offshore jurisdiction of natural resources under/in the Nigerian federation.

5.1. Fiscal Federalism/ Resource Control:

It is suggested that state ownership and control of natural resources to be constitutionally adopted. Taxes over these resources shall however be made by the state to the federal government. Such constitutional amendment will be in line with fiscal federalism and at the same time put an end to the constant agitation of the oil communities[72]. This will further conform to the common law principle in maxim: *quid quid plantatuer solo solo cedit*. As earlier seen, this is what is obtainable in states like Texas, California etc.in the United States.

With the adoption of the above, this will to some reasonable extent resolve the controversy surrounding the control of offshore jurisdiction or the offshore resources between the federal State and its component units.

VI. Conclusion

From the totality of the above consideration on offshore jurisdiction regime in Nigeria, it is clear that the littoral states have been robbed of their natural resources by the federal governments and hence, the cause for litigation ensued between the littoral states and the federal governments. This was seen in the over-celebrated case of *A. G of the Federation v. A.G of Abia States & 35 Ors*[73] . As a result of this decision of the Apex court on who controlled the offshore natural resources within the national jurisdiction of Nigeria (even though the judgment favoured the federal government than the littoral states), yet the federal government

[71]Amah Emmanuel Ibiam, "An Examination of the Contradictions in the Ownership of Land and Natural Resources in Nigeria Federation", *8(2009)EBSULJ 230*
[72]Ibid., p. 235
[73] *A.G. Federation v A.G. Abia State and 35 Ors*.(n.22)

pacified the littoral states by enacting a law which allows the littoral states to benefit from the revenue accrued from the natural resources within their sea boundary to the rate of 1.5% but later increased to 13 % derivation principles as contained in the Constitution. But what may come to mind is have these derivation principles resolved the age long crisis of offshore jurisdiction regime in Nigeria? If the answer is in the negative then we may further ask: why are there still more dissatisfactions?

To answer these questions, this research compared the offshore jurisdiction regime in other federal states like United States, Canada and Australia with that of Nigeria to see whether we faced the same issues and how it was resolved regarding offshore jurisdiction controversy over there.

To say the least from the comparison, this research was able to gather that offshore jurisdiction controversy is not peculiar to Nigeria alone as the United States, Canada and Australia faced the same issues. These federal states, having realized what were before them, took the bull by the horn which was commendable by deploring either legislative means as seen in the case of United States or political intervention as seen in the cases of Canada and Australia. Nigeria too, deplored legislative means to resolve this offshore jurisdiction controversy but this was not enough as the tussle still lingers. And hence, the need to restructure the offshore jurisdiction regime in Nigeria through a viable constitutional means is a necessity in order to make our offshore jurisdiction regime to be at par with other federal states like United States, Canada and Australia

THE RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN THE PROTECTION OF LIVES DURING ARMED CONFLICTS: AN APPRAISAL

Chukwudumebi Okoye-Asoh*

Abstract

This paper discusses the relationship between international humanitarian law (IHL) and international human rights law (IHRL). There has been a lot of debate on the concurrent applicability of these bodies of law in times of armed conflict particularly non-international armed conflict. This is against the backdrop that many think that in situations of internal armed conflict, IHL will not apply since IHL is international law that regulates the conduct of States while human rights law regulates the relationship between citizens and their government. This paper has shown that IHL as *lex specialis* applies in times of armed conflict although human rights law continues to apply because it applies at all times. The paper examines the relationship between the two bodies of law and their points of derogation. It also looks at the origin of the laws and note that IHL developed out of charity while human rights law is a Constitutional issue. The paper further discusses the protections afforded by these laws and concludes that both laws are complementary and both applies in times of non-international armed conflict.

Keywords: Humanitarian, Human Rights, Law, Derogation, Complimentary, Model

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I. Introduction

This paper discusses the relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in the protection of victims of conflict of a non-international character. In so doing it highlights the two major models of such relationship: complementary and *lex specialis*. However it brings to the fore major issues that challenges the adequacy of these bodies of law in their bid to afford adequate protection during conflicts of a non-international character. To this end, part I introduces the paper and discusses the origin of both bodies of law. Part II evaluates the two major modes of relationship between these laws highlighted their similarities and differences. Part III discusses the derogation regime of the laws. Part IV the major protections afforded by the law during armed conflict. Part V examines the pitfalls of these laws and part VI concludes with certain recommendations that will strengthen the protection afforded to individuals during armed conflict.

There is an on-going debate concerning the actual relationship between human rights law and international humanitarian law, in regulating armed hostilities. This debate is heightened by the theory of the separate development of both regimes of law and the circumstances they were meant to apply. There are two major models that reflect the exact nature of this relationship. Complimentarity[1] and the principle of *lex specialis/lex generalis* as propounded by ICJ in legality of the threat or use of Nuclear Weapons, ((Advisory opinion, 8 July 1996, para 106)).

This complexity is most notable in conflicts of a non-international character. This is so because firstly, few instruments exist in the field of IHL regulating internal armed conflict than international armed conflicts. Secondly, there is a controversy as to the nature of threshold a conflict or tension must attain before it can be termed non-international armed

[1] Micheal, B., 'The Historical Evolution of International Humanitarian law, International Human Rights Law, Refugee Law and International Criminal Law, International Humanitarian Law and Other Legal Regimes. Interplay in situations of violence-proceeding of the 27th Round table, San Remo, 4-6 September 2003, 47; Ivitit Muntabhorg, 'Legal Qualification and International Humanitarian law as "lex specialis": 10 Basic Questions concerning international armed conflicts and answers. International Humanitarian law and other Legal Regimes. Interplay in situations of violence – proceedings of the 27th Round table San Remo. 4-6 September, 2003, 36

conflict and thirdly, the controversy as to whether or not non-state actors are bound by the rules of IHL.

Classical theories on International law posit that these two branches of Public International law developed separately fuelled by separate circumstance but bound by a common philosophy, the protection of human dignity. Both International humanitarian law and international human rights law are subsets of international law. Classical international law recognises the separation between the law of peace and the law of war. Depending on the situation, either the *corpu juris* of the law of peace or that of the law of war was applied. This position however charged with the adoption of the United Nations Charter of 1945[2] and of subsequent human rights instruments. This new innovation was not readily accepted by all because traditionally, both regimes of law developed separately.[3]

Firstly, the rules of IHL was designed to apply to armed conflicts.[4] Its origin dates back to the 18th century treaties between states in a bid to regulate issues of War. It was primarily based on the reciprocal expectations of two parties at war[5] based on the principle of charity. As opposed to human rights law, the underlying principle of IHL was humanity not of rights and its legal development was made possible by the notion of reciprocity between states in the treatment of states troops[6]. On the other hand, human rights law is traceable to visionaries of the Enlightenment who sought a more just relationship between the state and its citizens.[7] Then, it was a matter of constitutional law, an internal affair

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[2] Hans – Janchim Heinse, "On the Relationship Between Human Rights Law Protection and International Humanitarian Law" (2004) *R I C R* (vol. 86 N. 856) 789/

[3] Noelle Q., 'The History of the Relationship Between International Humanitarian law and Human Rights Law in Roberta Arnold and Noelle Quenivetc (eds.) *International Humanitarian law and Human Rights law, (*Martnus Nihoff Publishers, 200*8) 4.*

[4] See also the definition of armed conflict by Cande in Conde. H., *A Handbook of International human rights terminology (*2nd Ed. University of Nebraska Press, 2004) 18.

[5] For example the Lieber code: U.S. War Department, instructions for the Government of Armies of the United States in the field, General Orders MO 100, 24 April 1863

[6] Cordula D., 'The Interplay Between International Humanitarian law and International Human Rights law in situations of Armed Conflict (2007) (Vol. 40 No. 2) *Israel Law Review,* 313.

[7] Doswald – Beck and Spvia Vite "International Humanitarian Law and Human Rights Law" (1993) (293) *International Rev. Red cross*, 94 – 119.

between the government and its citizens[8] until the atrocities of the Second World War. After the Second World War, human rights became part of International law, starting with the addition of the Universal Declaration of Human Rights in 1948. Subsequently, human rights was more entrenched in international law by the adoption of several specialised international and regional human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) of 1966 and other Regional Treaties.[9]

The developmental differences notwithstanding, both laws have become relevant in the protection of individual dignities even during armed conflicts. But how do they play out. This section will now address this pertinent question.

II. RELATIONSHIP BETWEEN IHL AND IHRL: COMPLIMENTARITY MODEL

For years, the relationship between IHL and IHRL had been understood that the former was applied only in a situation of war and the latter in peace time.[10] However, because of the in adequacies of IHL with respect to protection of individuals during armed conflict, the separatist approach began to change.[11] From the drafting histories of both laws, it is evidenced that both laws were not mutually inspired.[12] However, according to Cordular Droege, there is a clear reminiscence of war in the debates on the Universal Declaration. It therefore means that "for each right, the delegates went back to the experience of the war as the epistemic

[8] The development in the American and French Revolutions affected many states and ideas which were submitted throughout these events were imported into the constitutions of state.

[9] Europe has the European Convention on Human Rights (ECHR) of 1950, European Social Charter of 1961, America has the American Convention on Human Rights of 1969 and Africa has the African Charter on Human and Peoples Rights.

[10] The United Nation Human Rights office of the High Commissioner, International legal protection of Human Right in Armed Conflict, (2011) http://www.ohchr.org/Document/Publications/HR in armed conflict pdf.> accessed 20th February, 2019

[11] Flona, N., 'The Relationship between International Humanitarian Law and International Human Rights Law: Parallel Application or Norm conflict? (2012)https://www.papers. ssn.com/5013/Delta - Integrity.notice.cfma.abid= 202 1839 accessed 20th February 2019.

[12] Cordular Droege (n.6).

foundation of the particular right in question" [13] the Geneva Conventions on the other hand, was filled with gaps, thereby needing improvement especially with respect to non-international armed conflict.[14] In this case recourse is now had to human rights law bringing IHL closer to human rights law. This is so especially with regard to civilians in detention and the treatment of state's own national during non-international armed conflicts.

Strikingly, the application of human rights law in armed conflict was not readily accepted by states from the onset, the words of the United Nation Organs, established the continued application of human rights laws during armed conflict. For example in the Koran conflict, human rights law was invoked by the General Assembly Resolution[15] on the treatment of captured soldiers and civilian in Korea by North Korean and Chinese forces. Similarly after the invasion of Hungary by Soviet troops in 1956, the Security Council called upon the Soviet Union and the authorities of Hungary "to respect (...) the Hungarian people's enjoyment of fundamental human rights and freedom."[16] Furthermore, in 1967, the United Nations Security Council resolved with respect to the occupied territory of Palestine that the essential and inalienable human rights should be respected even during vicissitudes of war.[17] Israel was called upon to apply both the Universal Declaration of Human Rights and the Geneva Conventions, in the occupied Palestinian territories.[18] This was followed by the resolution titled "Respect for Human Rights in Armed Conflict", this latter resolution prompted a call to the Secretary General to draft a report on measures to be adopted for the protection of all individuals in times or armed conflict.[19]

Two reports were concluded stating that human rights instruments particularly the International Covenant on Civil and Political Right afforded a more comprehensive protection to persons in times of

[13] Johannes Morsink, 'World War Two and the Universal Declaration' (1993) (Vol. 15) *Human Rights Quarterly* 357 – 358.
[14] Cordular (n.6).
[15] GA Res. 804 (VIII). UN Doc.A 804/VIII (Dec. 3 1953)
[16] GA Res. 1312 (XIII) UN Doc. A 38/49 (Dec. 1958)
[17] GA Res. 237/2, preamonlar/ 2 UN Doc. A 237/ 1967, (June 14 1967)
[18] Final Act of the International Conference on Human Rights, UN Doc. A/Conf. 32/41 (Apr.22 – May 13, 1968
[19] Cordula Droege(n.6).

armed conflict than the Geneva Convention only.[20] Pursuant to these two reports, the UN General Assembly affirmed in its resolution on the basic principles for the protection of civilian population in armed conflict that Fundamental Human right continued to apply fully in situations of armed conflict.[21] By these resolutions, as noted by Cordular Droege, the two bodies of law have met, are fusing together at some speed and ... in a number of practical instances the regime of human rights is setting the general direction and doctrine for the reunion of the law of War.[22]

Indeed, current international treaties draw from both human rights and international humanitarian law provisions. Examples abound, such as the Convention on the Rights of the Child, 1989[23], The Rome Statute of the International Criminal Court, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000, and the Convention on the Rights of Persons with Disabilities.[24] IHL and IHRL share one common quality; both of them aspire to protect the life, humanity and dignity of human beings from arbitrariness and abuse. The synergy of both rules is therefore important because of the complication associated with modern wars. [25] Both laws are interdependent and are parallel. The interdependence of these branches international law is confirmed in the jurisprudence of international court of justice.[26]

Because of the resemblance of the two bodies of law, in terms of goals, values and terminology, the recourse to human rights laws is generally a welcomed and needed assistance to determine the content of customary international law in the field of humanitarian law. With regards to certain of its aspects, IHL can be said to have fused with human rights

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[20] Report on respect for Human Rights in Armed Conflict UN Doc. A/7729 (Nov. 20th 1969)
[21] G.A. Res 2675 (XXV). Principle for the Protection of Civilian Population in Armed Conflict (UN Doc A/8028) Basic (Dec. 9th , 1970)
[22] Draper, G., 'The Relationship Between the Human Right Regime and the Laws of Armed Conflict (1971) (1) *Israel Year Book on Human Rights*. 191
[23] Article 38 of the Convention on the Right of the Child
[24] See Art II of the Convention of the Right of persons with disabilities 2006
[25] Kellenberger, J., 'Protection through Complementarity of the law', International Humanitarian Law and other regime. Interplay in situation of violence-proceedings of the 27th Round Tables Sanrenmo 4-6 September 2003, 10
[26] Legal Consequences of Construction of the Wall in the occupied Palestinian Territory Advisory Opinion of 9 July 2004. *DRC v. Uganda Moperat* of 19 Dec. 2005

law.[27] At the same time, the tribunal noted that notions developed in the field of human rights can be transposed in IHL only if they take into consideration the specificities of the latter body of law.[28] To described the relationship between IHL and IHRL as complementary means that both body of laws do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually.[29] For example, Human Rights can be interpreted in the light of International Humanitarian Law and vice versa.[30]

Both IHL and IHRL aspire to protect the life, humanity and dignity of human beings from arbitrariness and abuse. The significance of this purpose is revealed in the complexity attributed to contemporary armed conflict Non international armed conflicts. But before we delve into that lets examine briefly their points of difference.

a. Differences between IHL and IHRL

Firstly, humanitarian law only applies in times of armed conflict, whereas human rights law applies at all times. Secondly, human rights law and humanitarian law traditionally bind different entities. By the provision of Common Article 3, IHL binds state and non – state actors this question is controversial in human right law.[31] Furthermore while most international human rights are derogable, with few exceptions humanitarian law is non – derogable (with the only exception of Article 5 of the Fourth Geneva Convention). A major distinguishing feature of IHL is that it regulates the conduct of hostilities and considers the balance between humanity and military necessity in armed conflicts On the other hand, IHRL, is based on the considerations of humanity and contains restriction clauses such as "required by law" and "requirements of a democratic society." Thus the issue of military necessity are not addressed by IHRL.[32] Furthermore, whereas the distinction between combatant and

[27] Kunarac, IT – 96 – 23 – T. The agreement of 22 Feb 2001 at para 467
[28] Ibid at Para 471
[29] Cordular Droege 'The interplay between International Human Right Law and International Humanitarian Law (2007) (Vol. 140 No 2) *Israel Law Review*, 337
[30] Cordula (n.19)
[31] Art 2 ICCPR, AAIECHR Art 1 ACHR. Provides that "States" arts subjects of IHRL
[32] Kocar, Y., 'The Relationship Between International Human Rights Law and International Humanitarian Law in situations of Armed Conflict (2015) (ISS 10, Years) *Human Right Review,* 17

civilian and between military objectives and civilian objectives are a basis of IHL protection in armed conflict this principle is not known to IHRL.

b. Lex Specialis/ Les generalis Model of IHL/IHRL Relationship

Earlier writings of scholars reflect the meaning of *lex specialis* thus:

> What rules consent to be observed in such cases (i.e. where parts of a document are in conflict). Among agreement which are equal... that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.[33]

This principle has generated lot of criticisms. Firstly, it is said or argued that international law as opposed national law, has no clear hierarchy of norms and no centralized legislature but a "variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal orders"[34] Furthermore it's also argued that nothing indicates which of the two norms is the *lex speciallies* or the *lex generalis,* particularly between human rights law and humanitarian law.[35] Most importantly, it has been criticised on the ground that the principle allows manipulation of the law in a manner that support and diametrically opposed arguments from supporters that are both for and against compartmentalization of IHL and IHRL.[36]

As a result of the above criticism, several approaches have been suggested as an alternative to the *Lex Specialis*. They are called 'pragmatic theory of harmonization', "Cross-Pollination" or "Cross – Fertilization" and "Mixed Model" all of which have one thing in common. Emphasis on the harmonization between the two bodies of law. However, in reality there could be genuine conflict between norms in which one of the norms

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[33] Hugo Grotius, De mic Prcilla Ac Pacis bk11, sect xxix
[34] Lindroos, A., "Adressing the Norm Conflicts in a fragmented system: the doctrine of Lex Specialis". (2005) (74) *Nordic journa l of International Law,* 24.
[35] Homme, P. Lex Specialis: oversimplyfying a more complex and multifaceted Relationship?(2007) (Vol.40) *Isreal Law Review* 365
[36] Ibid at 117

must prevail. In this context the narrower meaning of *Lex-specialis* rules of displacement becomes handy as indeed there are some norms in IHRL and IHL that are contradictory. In such situation, a complementary approach cannot solve the conflict.[37]

According to Kocar, the principle of *Lex Specialis* states that when two separate branches of Law collide, the more specific rule displaces more general rule.[38] It is also called the 'displacement method' being that it is said that IHL displaces IHRL in armed conflict because it is a specific law developed to regulate the conduct of hostilities.[39] This theory is one of the main theories explaining the relationship between IHRL and IHL and are advocated in jurisprudence of the ICJ. In the advisory opinion in relation to the legality of the threat or use of nuclear weapon (1990), the court stated that in principle, the right not to arbitrarily deprive one's life (codified in Article 6 of the ICCPR) applies also in hostilities. The test of what is arbitrary deprivation of life however, then falls to be determined by the applicable *Lex Specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities[40] this opinion has been subjected to debate as to its purport. Some scholars argue that rather than attempt to extend human rights norms to an armed conflict scenario, the appropriate approach is to apply *lex specialis* of humanitarian law[41] others argue that the rule of *lex specialis* is a harmonization of both norms- IHL and IHRL However the most comfortable approach to the mind of this writer is that posited by Kaskemimic. According to this learned authors the *lex specialis /*general rule is akin to the relationship between general rule and particular rule.[42] The particular rule being an exception to the general rule. The general rule either explicitly authorizes or prohibits while *the lex specialis* (the particular rule) serve as an exemption to the general rule.

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[37] Cordula Droege (n.19).
[38] Ibid
[39] Schabas W., 'Lex specialis? Belt and suppadera? The parallel operation of Human Rights Law and Law of Armed Conflict and the conudrun Actus Ad Bellium' (2007) (40) *Isreal Law Review,* 17.
[40] ICJ, legality of the threat it use of Nuclear Weapons, Advisory opinion, 8 July 1996 Par 24-25
[41] Watkn K., 'Controlling the Use of Force; A Role for Human Rights Norms in Contemporary Armed Conflict (2004) (98 (1)) *The American journal of International Law*, 22.
[42] Koller D., 'The Moral Imperative; Toward a Human Rights- Based on Law of War' (2003) *Harvard International Law Journal , P.*261

This diverse approach to the *lex specialis* principle is fuelled by the Nuclear Weapon Cases. The ICJ's opinion created some uncertainties concerning how the principles is applied to conflict between IHL and IHRL in an armed conflict and doubt arise whether the principles apply in all situation or is it just related to the right to life. However it is clear that when it comes to the meaning or determination of certain acts within the context of an armed conflict, IHL provides the relevant meaning as the exception to the generalized meaning in this case IHL displaces IHRL. The separation wall case[43] also emphasised the principle in generalised terms showing that IHL displaces IHRL but that IHRL continues to apply in times of armed conflict. The reason for this displacement rule is that IHRL has a number of inadequacies namely, the derogation regime, responsibilities of non-state armed groups and specificity of IHRL standards.

III. DEROGATION REGIME

According to the provision of human right treaties most human rights can be derogated from in times of public emergency, which includes situation of armed conflict.[44] However, derogation is not an elimination of right but a suspension of right within a time limit. Furthermore, derogations are only permissible to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with states other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[45]

For derogation to be lawful they must be officially proclaimed and other states parties to the treaties must be duly notified of them. The question that remains open is whether these procedural rules apply in situation of armed conflict in practice, especially with respect to non-

[43] ICJ, Legal Consequence of the Construction of a Wall in the Occupied Territory, Advisory Opinion 2004, para 136 <http//www.icj-cij.org/docket/files/131/167/pdf>

[44] Article 15 of the European Convention on Human Right, Art 27 of American convention on Human Rights, and Art 2 of CAT expressly mention war although the International Convention on Civil and Political Right did not mention situation of war explicitly in its derogation clause.

[45] International Covenant on Civil and Political Right Art 4, March 23 1976, 99 U.W.T.S. 17 I, European Convention for the protections, of Human Right and Fundamental Freedom , Art 15, Sept 3 1953, 21, U.N.T.S. 222 and American Convention on Human Rights Art 27, Nov 22 1969, 1144 U.M.T.S 123

international armed conflict, is mixed. For instance Turkey derogated from the European Convention on Human Rights with respect to the conflict into the South Western part of the Country. That, notwithstanding, derogation clauses, where they exist, not only permit the suspension of rights, but also limit this suspension and prohibit the suspension of other rights – known as *erga Omnes*.[46] They ensure that in terms of armed conflict Human Rights continue to apply and be respected, albeit in a modified manner. Reaffirming this position the ICJ posited in Advisory Opinion on the legality of the Threat of use of Nuclear Weapons of 1996 with respect to the ICCPR.

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduce from the terms of the covenant itself.[47]

IV. CONFLICT BETWEEN IHRL AND IHL IN NON-INTERNATIONAL ARMED CONFLICT

In non-international armed conflict, conflict may arise between the two norms. Where this happens, the restrictive means of the *lex specialis* rule which is meant to solve conflict of norms may apply. Examples abide thus:

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[46] Non derogable rights include the right to life, freedom from discrimination, judicial guarantees etc.

[47] Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, 1996 ICJ. 226-593 (July 8) at para 25

1. **The protection of the Right to Life:** According to Cordula Droege, IHL accepts the use of lethal force and tolerates the incidental killings and wounding of civilians not directly participating in hostilities, subject to the proportionality requirements. On the contrary, in human rights law lethal force can only be resorted to if there is an "imminent danger of serious violence that can only be averted by such use of force.[48] It is therefore unlawful to plan operations with the purpose of killing as envisaged under IHL except when it is strictly unavoidable to protect life. Also, the principle of proportionality in humanitarian law is different from proportionality in human rights law. While the latter requires that the use of force be proportionate to the aim to protect life, the former requires that the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination there of caused by an armed attack must not be excessive in relation to the concrete and direct military advantage anticipated.[49] Both principles according to a learned author can lead to different results. It is therefore necessary to decide whether a conflict situation is one of armed conflict within the meaning of IHL or a mere situation of violence in which case human rights is applicable. This distinction is necessary because certain killings that are justified under humanitarian law are not justified under human rights law. The difficulty to decide which body of law applies and the nature of the conflict (i.e. whether it has attained the threshold of an armed conflict) whether it is the law enforcement or conduct of hostilities is a factual one and not a legal one. While the situation seems clear with respect to international armed conflict especially in cases of occupation.[50] It does not seem clear with respect to non-international armed conflicts because not all criminal activity, even if extremely violent can be treated like an armed attack.

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[48] Article 9 and 10 of the UN Basic Principles on the use of Force and Firearms by law Enforcement officials, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990, Report prepared by the Secretarial (United Nations Publication, sales No. E. 91. IV. 21 Chap. 1, Sect 13 2. Annex.

[49] Art 51(5)(b) of Additional protocol 1

[50] See A 1- Skeinni's case *Ai-Skeinni V. Sec. of State for Defence* (2005) EWCA (CIV) 1609, Para 48.

In resolving conflicts of this nature the European Court of Human Rights have clearly relied on the principles close to humanitarian law but outwardly applying human rights law. In *Ozkan v. Turkey*,[51] the European Court of human rights held that the right to life would be violated in security operations involving the use of force if the state agents omitted "to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and in any event to minimizing incidental loss of civilian life.[52] This position corresponds with the provision of Article 57 (2)(a)(ii) of API which although is applicable duly to international armed conflict but also deemed applicable to non-international conflict as a customary law. The court further, applying humanitarian prohibition of indiscriminate weapons against a concept of humanitarian law. The major reason why the Court did not openly apply humanitarian law in these cases is that the countries in question did not acknowledge the existence of an armed conflict on their territory. This leads us to the second situation of conduct of hostilities as opposed to that securing law enforcement.

2. **Law Enforcement/Conduct of Hostilities:** A major distinguishing factor required in the classification of conflicts whether as merely situation of violence or armed conflict is whether or not state authorities have enough control over the situation. Humanitarian law is the law most appropriate for the conduct of hostilities because its norms on the use of force are based on the assumption that military operations are ongoing and that the armed forces have no definite control over the situation. [53] If the reverse is the case, i.e. the authorities have enough control over the situation, as to enable them carry out law enforcement operations, human rights law provides the most appropriate framework.[54]
3. **Procedural Safeguards:** IHRL and IHL differ significantly in the procedural aspect of protecting individual rights. This is born out of the fact that the *reason de tart* of the development of both regime of

[51] European Court of Human Rights judgement April 6, 2004 at Para 297
[52] Ibid see also, *Ergi v. Turkey* 1998 – IV European Court of human Right at Para 79; *Isayeva v. Russia* European Court of Haman Right Judgement of Feb. 24 2005 of Para 176
[53] Cordula (n.19)
[54] Ibid

law differ. While human rights law developed as a result of a struggle for individual rights, humanitarian law focuses on "the parties to a conflict". As a result, human rights laws are entirely built around the individual and have entitlement. This has led to the procedural development of this regime, giving individuals standing before the courts both at national and international level. Thus, the enforcement of human rights have evolved on the basis of an understanding of individual entitlements and of private standing both in national courts and before international bodies.[55] Although the ICJ and hybrid criminal tribunal have enforced IHL, these courts give no possibility of individual complaint. There is therefore a need to re-enforce IHL by putting in place, a body or tribunal whose function would be to receive complaints against government that flaunt the provision of IHL.[56]

Another procedural aspect of protection afforded individuals is with respect to the obligations to investigate, prosecute and punish violation of rights. IHRL and its jurisprudence in this regard is far more advanced than in IHL.[57] In Human Rights Law for instance, all serious human rights violation must be subject to prompt, impartial, thorough and independent official investigations. The investigation must be capable of leading to a determination of the facts and lawfulness of the acts. Such investigations must include securing evidence concerning the incident, including eyewitness testimony, forensic evidence etc. Finally, the result of the investigation must be subject to public scrutiny and finally made public.

[55] Cordula (n.19)

[56] Mac Bride S., 'Human Rights in Armed Conflict, the Interrelationship Between the Humanitarian Law and that of Human Rights' (1970) (IX) *Revue de droit penal militare et de droit des la guewe*, 373, 388.

[57] See the UN Principles on the Effective Prevention and Investigation of Extra – legal, Arbitrary and Summary Executions, recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or punishment ; among the vast body of Jurisprudence see Human Rights Committee: Concluding Observations on *Serbia and Montenegro*, 9, UN Doc. CCPR/Co/81/SEMO, (Aug. 12, 2004)

These requirements on investigation have been applied by human rights bodies even in situations of armed conflicts.[58]

Furthermore while for all violation of civil and political rights the individual has a right to an effective procedural remedy before an independent body, no such individual right exist in international humanitarian law.[59] Similarly, while every violation of a human right entails a right to reparation, the equivalent norms on reparation in IHL accrues duly to the state.[60] However, the law on non-international armed conflict is silent on reparation. However, there is a clamour for a Change, that states should afford reparation for violations of humanitarian law as well.

The reason behind this according to Cordula, is that in times of armed conflict, violations can be so massive and widespread, and the damage done, so overwhelming that it defies the capacity of states both financial and logistical, to ensure adequate reparation to all victims. There is also the problem of implementation. However, there is a clamour for a change in this regard, that states should afford reparation for violations of humanitarian law. Article 75 of the Rome Statute provides for such reparation.[61] However there remains many uncertainties as to the way in which widespread reparations resulting from armed conflicts can be adequately ensured.

V. IHL, IHRL AND THE PROTECTION AFFORDED DURING NON INTERNATIONAL ARMED CONFLICT

As noted earlier, the principle of complementarity and the *lex specialis* principle majorly define the relationship between IHRL and IHL. Although IHL is the *lex* specifics of armed conflicts, it suffers from detailed rules about the protection of individuals.

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[58] *Isayava, Yusupova and Bazayeva* v. *Russia* Eur. Court. H.R Judgement of Feb. 24, 2005 para 208 – 213; *Myrna Mac-Chang v. Guatemala* 2003 Inter. Am. Ct. H.R., Human Rights Committee: Concluding Observations on Colombia. 32, UN jDoc. CCPR/C/79/May 5, 1997.
[59] Zegveld, L., 'Remedies for victims of violation of International Humanitarian Law'(2003) (851) *Int. Rev. Red Cross,* 497 – 528.
[60] Art. 81, Additional Protocol 1, Art 3, Hague Regulation of 1907. Gillard, E., 'Reparation for regulators of International Humanitarian law '(2003) (851) *Int. Rev. Red Cross*, 529 – 554
[61] See also the Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Human Rights law G A Res 60/147 of 16 December, 2005.

Furthermore, the determination of the legal threshold for the applicability of IHL is highly controversial. According to Act 1(2) of AP II, the regime of IHL does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. The question is, at what point will a conflict reach, to be termed armed conflict and not merely, internal disturbances and tensions? Recall that while this question is being resolved human atrocities is being committed thereby stifling the main purpose of the law: to protect Humanity. IHRL on the other hand continues to apply even in such situations. But for this nature of IHRL, gross human atrocities will continue unabated. Thus, IHRL re-enforces IHL.

It is very important to note that it flows from the very nature of human rights that if they are inherent to the human beings they cannot be dependent on a situation. Indeed, the nature of human rights is universal, and their object and purpose is the protection of the individual from the abuse of state. The applicability of human rights law together with IHL is so important because states are often reluctant to admit that there is an armed conflict that has met the threshold of AP II. So they usually recourse to their domestic laws in dealing with any uprising. Shutting down the light of IHL. In this case human rights law becomes very useful as it deals with the rights of individuals irrespective of the situation. This confirms the relevance of both regimes of laws especially human rights laws.

The concurrent application of both bodies of law has the potential of offering greater protection to the individual. However, there may be problems of overlapping contradictory and complementary. In resolving this difficulty, the ICJ has posited that "Some rights may be exclusively matters of IHL, others may be exclusively matters of human rights law; yet others may be matters of both these branches of International law.[62] Indeed, rights that are exclusively matters of humanitarian law, for instance, are those of prisoners of war. Rights which are typically a matter of human rights law are such rights are freedom of expression or the right to Assembly. Rights that are matters of both bodies of law are such rights as freedom from torture and other cruel, inhuman or degrading treatment or punishment, the right to life, a number of economic and social rights, and rights of Persons deprived of liberty.

[62] Construction of Wall in occupied Palestinian Case

Both laws seek to protect people from abusive behaviour by those in whose power they are –state authorities in the case of human rights law, a party to the conflict in the case of humanitarian law. Both laws are more relevant during non-international armed conflict because in this type of conflict, there is the state power which wields control of the armed forces of the state and more often than not deny the reality of the existence of an armed conflict, thereby acting irrespective of the rules of war and the belligerent armed group.

i. Pitfalls of IHRL and IHL in the protection Afforded during conflict Situations:

Both IHL and IHRL provides for certain guarantees. According to IHRL certain rules or rights are guaranteed to individuals whether or not caught up in armed conflicts. These rules are non-degrogable even where a state of emergency is declared. They include the right to life, the prohibition of slavery, the prohibition of inhuman, cruel or degrading treatment especially torture and the non –retroactive nature of penal laws.[63] IHL is not left out in these protections as Article 4 AP II provides for certain fundamental guarantees for persons who do not take a direct part or who have ceased to take part in hostilities. These guarantees include prohibition of on violence to life, health, physical or mental well-being of persons etc. They are accorded to those who do not take part in hostilities

These *erga omnes* obligations are so entrenched in international law that the ICJ[64] classifies it as the "elementary considerations of humanity" whose importance for the international community is such that all states may be viewed as having a legal interest in their being protected in all circumstances. However, these rules today appear to be insufficient, not covering all situations arising from non-international armed conflict examples are mass arrests and the suspension of judicial safe guards. Because countries are reluctant to classify a violence situation within their borders as non-international armed conflict they tend to invoke security considerations as grounds for arresting selected individuals from political

[63] Meron, T., *Human Rights in Internal strife: Their International Protection,*(Cambridge, Grotius Publications, 1987) .P. 52

[64] The Corfu Channel's case (*United Kingdom v. Albania*) I.C.J. Repo As 1949 P. 22 and the Barcelona Tracton, Light and Power Company Limited (*Belguim v. Spain*) I.C. J. Reports 1970 P. 32

circles, periods of detention are unduly extended and detainees sometimes ill-treated, even with the new rules such as the "standard minimum rules for the treatment of prisoners" adopted on 30 August 1955 by the first United Nations Congress on the prevention of crime and the treatment of offenders.[65]

Furthermore, irregularities in penal procedures are common in periods of internal strife. The right of detainees to receive public hearing before an independent and impartial court is often ignored. Restrictions abound on the rights of the defense. The detainee is not accorded the opportunity to learn the reasons for his arrest and the accusations levelled against him and a host of others in the cloak of "state of emergency". In the scenario painted above, IHRL seem insufficient not because there are no rules catering for such scenarios, but because these instruments embodying these rules gives states party the freedom to exercise the right of derogation and to suspend the application of those rights when an exceptional public danger exists.

VI. CONCLUSION

International humanitarian law and international human rights law continues to re- enforce each other in their bid to protect victims of armed conflict their divergent histories notwithstanding. As revealed in this article, there remains some pit holes in her protection bid foremost of all, is the continued subjection of judicial powers to executive whims and caprice. However, this ugly situation can be curbed with the entrenchment of international justice system. Thus States do not have exclusive jurisdiction over grave breaches of human rights and humanitarian law such as crimes against humanity, genocide and war crimes. Hopefully, where such extremities, reaches the threshold for such crimes, persons responsible for it would be held individually responsible and where such persons are not tried by their domestic Court as would be the case, the international criminal court can take them up. The world has indeed become a single community with states having universal jurisdiction to try culprits of human rights and international humanitarian law.

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[65] Stephen P., 'The Principles and Norms of Human Rights Applicable in Emergency Situations' in Karel VasaK (ed.), *The International dimensions of human rights* UNESCO, Pans 1978 P. 218.

THE BURDEN AND STANDARD OF PROOF IN ELECTORAL CASES IN NIGERIA: NEED FOR A PARADIGM SHIFT

Samuel I. Akpan*

Abstract

In a society such as Nigeria where representative government and the entrenchment of universal adult suffrage have taken root, regular free and fair elections are conducted into key public offices. To complete the democratic process, these societies tend to have special umpires to ensure that elections conducted are not a sham, and that the results thereof are the genuine outcome of the exercise. To this end, stakeholders have continued to work, not only to midwife a process that guarantee free and fair elections, but also to ensure that existing election dispute resolution mechanism work for the benefit of all by ensuring justice always. Although election cases are *sui generis "of its kind"* the law provides procedures, or conditions as laid down by statute within which a petition can be initiated. In election cases, the burden lays squarely upon the petitioner by adducing some cogent evidence in proof of his/her assertions therein. The problem this paper seeks to resolve is whether a petitioner, who is not a prosecutor or law enforcement officer with investigative skills and powers, can successfully attain this high standard of proof when an allegation of crime is in issue? The paper recommends a shift in the burden of proof in election fraud cases from the petitioner to the electoral umpire because they have access to and custody of election materials and other vital documents necessary to prove or discharge this burden.

Keywords: Election, umpires, substantial compliance, balance of probabilities, Over-voting, ballot stuffing.

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I. Introduction

Historically, from 1959 till date, at the end of each election in Nigeria, the governments sets up Electoral and Political Reforms Committee to look into some of the noticeable loopholes in the management of elections with the view of recommending appropriate solutions to these problems. Recently, Nigeria has witnessed the following committees: Dr Samuel Cookey Political Bureau of 1986, the Abacha Vision 2020 documents, Justice Niki Tobi (2005) Justice Muhammed Uwais (2007), Justice Legbo Kutigi/Prof. Bolaji Akinyemi (2014) and Senator Ken Nnamani(2016).[1] Each of these reports proffered laudable options for sustainable growth and development of democracy in Nigeria, through credible elections yet their suggestions remain unseen or are not often implemented, thereby creating rooms for more malpractices, which commonly create violence leading to destruction of lives and property, and in some cases military intervention.[2] Most at times, Nigeria leads or continues to record the highest number of election petitions in the world. The election petitions rose to about 1,500 in 2007 and only started declining from 2011 probably due to the realization of the need for continued reforms in the electoral process.

Simon Lalong[3] opined that, political reforms are expected to right noticeable wrongs in order to build public confidence in elections. There is this growing desire for people to aspire to high political offices in the country or probably due to the lust for power and its material prerequisite. They do these not necessarily for the good of the people they seek to represent but at times greed becomes a driving force. These and many more have culminated into elections being marred by violence, ballot snatching and ballot stuffing by political thugs. The impunity which characterized each election has been confirmed in many election petitions in the country. It is not uncommon to hear the government in power challenging the opposition to go to court if not satisfied with the election result probably knowing the heavy burden the petitioner will face in proving their case at the Election Tribunals.

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1 Simon Lalong, " Lalong to Panel: Protect INEC from Executive, Legislature" The Nation Tuesday, March 14, 2017 p.28

2 *Ibid.*

3 *Ibid.*

Whatever political theorist may say about its propriety, Nigerian Courts have held that the primary purpose of an election is to determine the wishes of the majority of the electorates.[4] To this end and in a plethora of cases, the appellate Court have declared the overriding importance of the actual and perceived independence of electoral umpires.[5] Thus, in *INEC v Oshiomole*[6], the Court of Appeal frowned at a separate Appeal filed by the Independent National Electoral Commission against the ruling of the Tribunal. The court went on to say "*to that end, INEC is expected to and must be seen as an impartial umpire, but INEC and its officials appear to have derailed from their role in this case".*

The official impunity which characterized the 2007 general election was confirmed in many election petitions. In the case of *Buhari v Yar'Adua,* [7] the Supreme Court established that the ballot papers distributed and used for the Presidential election were not marked and serialized as required by law. By a narrow margin of 4-3, the apex Court upheld the result of the controversial election on the ground that there was *substantial compliance* with the Electoral Act 2006 by INEC. Gleaned from the judgment above, from 2012-2014, the Independent National Electoral Commission (INEC) conducted three gubernatorial elections in Edo, Ondo and Delta States of Nigeria with questionable outcomes. In Ondo State governorship election for example, of October 20, 2012, the INEC was accused of manipulating the voters register in favour of the Labour Party. But unfortunately, due to the heavy burden of proof, the Supreme Court held that the Appellant had failed to prove how the alleged injection of names in the voters register with 100.000 voters used for the election affected the credibility of the election. The apex Court further held that most of the complaints were criminal in nature which ought to have been referred to the security agencies for action.

II. Prosecution of Election Petitions

Election petition proceedings are peculiar and special provisions are made to regulate them. It is not *stricto sensu* a civil proceeding and

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[4] *Gwadabawa v Kwangi* (1998) LRECN 219 at 222

[5] A. Babalola, "Independence of Electoral Umpires in Nigeria", The Nation Tue,23,2013 p.34

[6] (2008) 3 LRECN 649

[7] (2005) 50 WRN 1

cannot be described as such. It is appropriately described as proceeding *sui generis,* meaning "of its kind"[8]

By the provisions of section 246(1)(b)(i) and (3) of the 1999 Constitution of the Federal Republic of Nigeria, an appeal to the Court of Appeal shall lie as of right from the decisions of the National Assembly Election Petition Tribunals and Governorship and Legislative Houses Tribunals on any question as to whether any person has been validly elected as member of the National Assembly or of State Assembly under the Constitution. The amendment to the section which allows appeals to get to the Supreme Court only affected the election of the Governor or the Deputy Governor. Where the election being questioned is an election to the National Assembly, the Supreme Court lacks jurisdiction to entertain such an appeal.[9]

III. Grounds for Questioning an Election

By virtue of section 138(1) of the Electoral Act 2010 (as amended) an election may be questioned on any of the following grounds;

(a) That a person whose election is questioned was, at the time of election not qualified to contest the election,
(b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act;
(c) That the respondent was not dully elected by majority of lawful votes at the election, or
(d) That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

A careful reading of section 138(1) would reveal that a petition under subsection (1) (a) (b) and (c) presuppose that the petitioner did in fact participate in the election as a contestant. Whereas, a petition under subsection (1)(d) presuppose that the petitioner was excluded from participating in the election as a contestant. A petitioner who did not contest the election would not be heard to complain that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act or that the respondent was not dully elected

[8] See *Egeonu v INEC & Ors* (2014) LPELR-22868*, Ubeh v Etuk* (2011) LPELR-4428 CA
[9] *See Salik v Idris & ors* (2014) 15 NWLR (pt. 1429) 41 SC

by majority votes cast at the election.[10] A party who institutes his petition on the ground of substantial non-compliance with the provisions of the Electoral Act must not only plead and prove substantial non-compliance but must also plead and prove that the non-compliance substantially affected the result of the election. Non-compliance with the provisions of the Act without more is not sufficient to invalidate an election. In *Ojukwu v Yaradua*[11] , the petitioner failed to plead facts that established the substantiality of the effect of the alleged non-compliance with the provisions of the Electoral Act on the result of the election.

IV. Burden and Standard of Proof

In election cases, the burden of proving a petition lies squarely upon the petitioner by adducing some cogent evidence in proof of his assertion therein[12]. But where an allegation of crime is alleged against a candidate; it is trite and settled that only the trial and conviction by a competent court is constitutionally permitted to prove the guilt of a person alleged or charged with any criminal offence. For the accusation of a criminal offence to be successfully levied against a person, such an offence ordinarily must be established before an impartial court of law. In *Enechukwu v Chimaroke Nnamani*[13], the court held that, there was no evidence that he had been tried and found guilty of any criminal offence by a court of law to have disqualified him from contesting the said Enugu East Senatorial District election of April, 21st 2007.

The burden of proof required in criminal matters or civil matters in which claims are founded on conduct bordering on crime differ from the burden which a claimant discharges on the balance of probabilities. In criminal matters or claim founded on criminal conduct, the allegation has to be proved beyond reasonable doubt. In civil matters, the burden does shift. In *Chime v Ezea*[14]; the appeal was premised on the conduct of officials of the Independent National Electoral Commission that bordered on criminality. It was held that, the respondents have to prove their allegations beyond reasonable doubt. The burden did not shift. It remained

[10] *Buhari v INEC* (2009) EPR VOL.4 p623 SC
[11] (2007) LRECN 401 CA, (2009) LPELR-2403, SC
[12] See *Iyagba v Sekibo & ors* (2008) LPELR-4346 CA
[13] (2008) LPELR-CA/E/EPT/6/08 CA
[14] (2009) 2 NWLR (pt.1125) p.263

on them until it had been fully discharged. Civil suits are decided on preponderance of evidence. It is settled that it is he who assert the existence of a fact or set of facts which are to his knowledge that must prove those facts through evidence led by him or his witnesses.[15] Thus, in election petition matters, the onus of proof of the grounds for the petition is on the petitioner who commenced the process. Thereafter, the burden of proof shifts as the evidence preponderates.[16]

Where the petitioner is required to prove an allegation of ballot stuffing, the Court in *ANPP v Usman & Anor.*,[17] held that in order to prove the allegation of ballot stuffing in an election petition, the ballot boxes in which the ballot papers were allegedly stuffed must be tendered and opened before the tribunal for the contents to be seen by all present. Also where the petitioner alleges corrupt practices during the election, to succeed, the petitioner must prove beyond reasonable doubt that the respondent was the person who actually committed the alleged corrupt practice and undue influence; secondly, that where the act was alleged to have been committed by an agent, he was authorized by the respondent; thirdly, that the act was committed with express consent or knowledge of a person who was acting under the general or special authority of the respondent; and finally, that the alleged corrupt practices has substantially affected the outcome of the election.[18] The combined effect of these cases shows that the petitioner has an uphill task in proving allegation of crime in an election petition. Due to this overbearing problem, a group known as the Human Rights Law Service (HURILAWS) identified six key issues and suggested ways of addressing them. The issues were; access to vital materials by election petitioners, relevance and admissibility of card reader evidence, time frame for conducting election petitions in the face of the provisions of Section 285(6) of the Constitution, the burden and standard of proof in election petition, the category of people who can file election petition and the cost of election tribunal services.[19]

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[15] Section 134 of the Evidence Act 2011, see *E. Oyinloye v B. Esinkin* (1996) 5 SCJE 842
[16] A. Adekunle, NIALS Digest of Electoral Judgments, Vol.2. (Lagos: NIALS,2015) p.160
[17] (2008) 2 LRECN 155
[18] *Abdulkarim & Ors v Shinkafi & Ors* (2008) 2 LRECN 536
[19] Eric Ikhilae, Jurist Mull Fair Election Litigation, Nation Tuesday, June 20,2017 p.27

Deducing from the case of *Abdulkarim & ors v Shinkafi & ors*[20]*;* in proving the case of allegation of corrupt practices such as falsification of result, ballot stuffing and other criminal malpractices requires active assistance of the electoral umpires. Because the electoral umpire is always in custody of materials used for the conduct of the elections in dispute, a petitioner requires its permission to access these materials for the purpose of obtaining evidence to support his petition. In most cases however, access to these vital materials are often frustrated by the INEC and its officials, who in most cases, rather than being neutral, work in support of the party it returned as winner in an election. Contrary to section 151 of the Electoral Amendment Bill 2017, which requires the INEC to grant access to election materials to litigant, the INEC is in the habit of frustrating the inspection of voting materials by petitioners. In the process, petitioners are forced to apply to Election Tribunals to compel INEC to comply with the law which in effect is time consuming. Even where orders are granted for inspection, they are treated with disdain by INEC in a bid to cover up electoral malpractice. Gladly enough, applications filed in court for inspection of election materials are no longer necessary as it has become a criminal offence under the Electoral Act and Freedom of Information Act to deny access to official records.[21] It is further suggested by scholars that[22], election materials being a public document should be made accessible to all citizens upon an application under the Freedom of Information Act. Failing which, INEC should be penalized as provided by the Act. Furthermore, an amendment is required to compel INEC to deposit such election materials at the National Library in every state where petitioners and other interested members of the public could easily access them.[23]

It is also suggested that the deployment of Information Communication Technology (ICT) to elections centers is very essential. That INEC should be made to upload such election materials on its website, easy access by the public would eliminate bottlenecks, and incidents of

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[20] (2008) 2 LRECN 536

[21] F. Falana "Election petitions: Tools for timely dispensation of justice" The Nation Tue,Feb.4,2014 p.27.

[22] F. Monye, "Jurist Mull Fair Election Litigation", Nation Tuesday, June20,2017 p.27

[23] *Ibid*

manipulations such as the card reader innovations.[24] Despite the above arguments, the main laws that are of great relevance to the conduct of elections are the Electoral Act (2010) as amended and the Evidence Act (2011). While section 52(2) of the Electoral Act expressly prohibits the use of electronic voting or such electronic appliances, section 84 of the Evidence Act was specifically introduced to allow for computer generated evidence during the cause of trial. For there to be any meaningful advancement in our electoral process, section 52(2) of the Electoral Act must be expunged.[25] However, Obienu[26] expressed doubt about the success of ICT and the deposit of election materials in the library where poor power supply still persist and the National Library is non-existent in many States of the Federation.

The legitimacy of the hurdles erected by the courts for petitioners in election matters as a criterion for the discharge of the onus of proof is highly queried. Mr. Festus Okoye[27] noted that in election cases, it is always difficult to prove allegations of crimes like rigging, electoral violence, and falsification of result sheets, undue influence and other forms of electoral malpractices because of the standard of proof set by the judges. He further noted that the kind of evidence to be led to prove a case where election results/scores/ votes is being challenged requires that such evidence should come from the officers present where the votes were counted. Where a petitioner fails to call such polling officers/agents as witnesses, the petition will be dismissed. Where a petitioner challenges an election on grounds of non-compliance with the electoral Act, he/she is required to call witnesses polling unit by polling unit and ward by ward to establish his claim of non-compliance. That is not all; the petitioner is also required to establish that, the non-compliance was substantial and that it affected the outcome of the election.

Where the petition is anchored on over-voting or ballot stuffing, a petitioner is required to produce the voters register, the ballot boxes containing the stuffed ballot papers and statements of result from the

[24] F. Falana, "Election Petitions: Tools for Timely Dispensation of Justice" The Nation Tuesday, Feb. 4, 2014 p.27.
[25] B. Ozobia, " E-Voting will reduce electoral fraud" The Nation Tuesday, Jan.29,2013 p.32
[26] *Ibid*
[27] F. Okoye "Quest for perfection in Nigeria's electoral process", The Nation, Tuesday,July25,2017 p.24

affected polling unit complained of. A petitioner who alleges that an election did not hold is required to produce unmarked voters register. He is not to merely say so through witnesses' testimonies. He noted with respect that, though election tribunals and courts have always insisted on these manners of proof in election petitions, there is no single provision in the Electoral Act that provides for such proof or a particular kind of witness in proof of any allegation. It follows therefore that the laws were made by judges, which with all respect contradict the provisions of the Electoral Act.[28] We beg to differ and submit most respectfully on this point that, "the prophecies of the court are nothing more pretentious", therefore the judgments of the courts is also the law, and the court is guided by the Evidence Act which regulates the procedures in both civil and criminal litigations.

Akintayo Iwilade[29] highlights thoughts on a fundamental statutory misconception that has underlined the treatment of criminal allegations made in election petition proceedings. He maintained that the concept of "severance of pleadings" created by the court has failed to cure the illogicality of this concept. He said the concept of severance still retains the requirement of proving criminal allegations in civil proceedings beyond reasonable doubt because the severed pleadings with criminal imputations must still be proved beyond reasonable doubt else the claim founded on them will inevitably fail. He further maintained that, there is absolutely no basis to require that the standard of proof for conviction- seeking proceedings, be introduced into proceedings seeking different outcomes such as compensatory damages, injunctive/restorative relief, declarations etc, such as are often sought in civil and election petition proceedings respectively.[30]

To demand that a private entity prove the commission of a crime (and the personages actually responsible) beyond reasonable doubt is tantamount to making the law operate in denial of the limitations imposed on lawful private entities, against the possession and deployment of the sophisticated infrastructure needed for arrest, investigation, confiscation etc; in quest to unravel the thorough details of so called crimes. This is a

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[28] *Ibid*.
[29] A. Iwilade, "Required proof for criminal allegations in Election Petitions" a Critique" The Nation Tuesday, July 23, 2013 p.33
[30] *Ibid.*

domain exclusive to the state and it is such exclusivity that makes it easier for the state to unravel and prove the commission of crimes beyond reasonable doubt. The law should accordingly stop the treacherous assumptions of equality between the state and its subjects.[31] Such treacherous assumptions are amplified through the incongruous insistence that private entities prove crime with the same dexterity expected from the state when it is obvious there is unequal power between the state and the private entities competing for claims within it.[32] Given the dire need for true democracy in Nigeria, it is difficult to contemplate how election petitions often get bugged by such statutory incoherence and illogicality.

He submitted that the legislature and the courts may be persuaded to reverse the decade's old trend of requiring proof beyond reasonable doubt to establish allegations of crime made in civil proceedings, especially election petitions at the earliest opportunity. He proposed that another standard of proof be creatively invented to deal with criminal allegations made in civil proceedings especially election petitions, and urged the legislature to consider enacting another phrase such as *"highly probable"* to become statutorily sufficient to determine the proof or otherwise of so called criminal allegations made in election petitions.[33]

Therefore, in examining such standards as enunciated by the Supreme Court in the cases afore-mentioned[34], Moneke[35] argued that the requirement of "*proof beyond reasonable doubt*" in relation to crime was impossible in election matters and we tend to agree with him.

V. Conclusion

Since election petition cases are said to be *sui generis,* it is submitted that, there is no basis for equating them with criminal cases where the prosecution is required to prove the case against the defendant

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[31] *Ibid.*
[32] *Ibid.*
[33] A. Iwilade, "Required Proof for Criminal Allegations in Election Petitions" a Critique" The Nation Tuesday, July 23, 2013 p.33
[34] *Buhari v Obasanjo* (2005) 13 NWLR (pt.941) p.1, *Omisore v Aregbosola* (2015) 15 NWLR (pt. 1482) p.205, *Ngige v INEC* (2015) 1 NWLR (pt. 1440 p.281, *Shinkafi v Abubakar Ya*ri (2016) 65 NSCQR 1
[35] F. Moneke, (p.13 above)

beyond reasonable doubt. As electoral justice is aimed at confirming the candidates elected by the people, the proof of election petitions should be based on the balance of probabilities so that the onus can shift. In other words, once a petitioner shows that elections were marred by irregularities, violence, inadequacies of election materials, the burden lays squarely on the electoral umpire to discharge it. *In Buhari v Obasanjo,*[36] Tabai, JCA (as he then was) held "*in this situation, someone has to do more to show the veracity of his position". "*Falana, submitted and I agree with him totally, that the party to do more to show the veracity of his position should be the one who tried to show that election was held in accordance with the laws.[37]

It is indisputable that electoral malfeasance is on the increase because of the culture of impunity in the land. Our judicial system and judicial process is anchored on the principle of precedent. The moment the Supreme Court laid down the law, it becomes the precedent and all other inferior courts must follow it. The moment Courts begin to pick and choose which decision to follow, it becomes very problematic for our electoral process and undermines the judicial process. From the foregoing, it is undoubtedly clear that if credible elections are conducted by INEC, there will be no basis for setting up election petition tribunals. The recent announcement by INEC that the result of forthcoming elections will be transmitted electronically deserved commendation. Commitment and sincerity of purpose in the execution of this intention is another thing altogether. The world class DNA and Forensic Centre provided by the Lagos State government which eliminates the question of proving criminal cases beyond reasonable doubt is highly recommended. This implores using a more scientific led investigation technique in prosecuting criminal cases.[38] Prof. N. Udombana[39]noted the need for the courts to stand up to their responsibilities in curbing electoral crimes. He urged the Tribunals to refer established cases of crimes committed during elections to the appropriate authorities as enshrined in section 149 of the Electoral Act

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[36] (2005) 19 WRN 1 at 166

[37] F. Falana, "Election Petitions: Tools for Timely Dispensation of Justice" The Nation Tuesday, Feb. 4, 2014 p.27.

[38] A. Onanuga, " We've raised the bar of proving criminal cases beyond reasonable doubt" The Nation Tue.Nov.28,2017 p.26

[39] N. Udombana, "Right Commission seeks end to Electoral Crimes" The Nation Tue. April 3, 2018 p.28

2010. In the majority of cases reviewed, the election petition tribunals failed to exercise the powers given to them in the Electoral Act, which is to direct the appropriate authorities to investigate and prosecute alleged electoral infractions.

More-over, Judges manning election tribunals and appellate courts should not allow litigants and counsel to engage in dilatory tactics and the judicial system must not permit all kinds of interlocutory appeals, most of which are designed to frustrate the hearing of election petitions. Thus, the skewed interpretation of section 285 of the 1999 Constitution by the Supreme Court that any petition not heard within 180 days on account of interlocutory appeals has lapsed should be reviewed to accommodate these lapses. In other words, a petition alleging serious electoral malfeasance is not likely to be heard and determined if INEC and other respondents (who may have rigged the election) decide to exercise their right of filing preliminary objections and interlocutory appeals. Furthermore, the tribunals and the courts should not apply undue technicalities in the resolution of election disputes.

In most instances, petitions alleging grave electoral malpractices, the need to prove beyond reasonable doubt is strictly interpreted by the Courts to favour the respondent. Moneke, [40] suggests the reduction of the standard of proof to a balance of probabilities or preponderance of evidence to the effect that where a petitioner successfully proves allegation of non-compliance or corrupt practices by preponderance of evidence, the onus should shift to the respondent to prove that the alleged malpractices did not affect the outcome of the election. This idea tally with some of the recommendations of the Justice Muhammed Uwais led Electoral Reform Committee that the burden of proof should be on the electoral managers to make them more diligent[41], and also for the establishment of Electoral Offences Tribunal to prosecute electoral offenders should be implemented without further delay.[42]

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[40] Moneke, Kingsley Nnajaka, "Jurist Mull fair election litigation" The Nation Tuesday, June 20,2017 p.27

[41] Igini, " Lessons from April Elections" The Nation Tue, June 28,2011 p.17

[42] INEC has been invested with the prosecution of electoral offenders by virtue of section 157 of the Electoral Act, but it is not equipped with the sophistication to carry out such duty effectively.

The recently passed Electoral Amendment Bill 2017 by the National Assembly which effectively put to rest the concern over the status of a card reader in the country's electoral process, despite the position of the Supreme Court that it was not a replacement for manual accreditation should be assented to by the President without delay as we approach the next general election. In addition, the recent overhauling of the Evidence Act to incorporate electronic evidence is a step in the right direction. Thus, the electoral process should be directed to strengthen the wishes of the electorate and the decisions of Courts should not be a substitute for the mandate of the electorate.

Ancillary to these, are a review of the time frame for the determination of election petitions especially when a retrial is ordered by the apex court in the interest of fair trial be considered in the next amendment to the Constitution. The incorporation into the Constitution and the Electoral Act, dates for election, order of sequence for election, hearing of cases and appeals, burden of proof in election matters, timely determination of pre-election matters, constitutional enactment of the laws recommending stringent punishment for persons found to have compromised their sacred position on electoral matters and any other person found to contravene electoral laws. Finally, the call that election matters should be concluded before an elected officer takes the oath of office should not be left at the discretion of the court, but a Constitutional enactment is necessary.

WIDENING THE FRONTIERS OF THE DEFINITION OF RAPE IN NIGERIA: A COMPARATIVE ANALYSIS OF SELECTED JURISDICTIONS

Oniha, Osato Mabel*

Abstract

The severity of the offence of rape cannot be over emphasized as many people, particularly women and children are sexually abused on a daily basis in Nigeria. The Nigeria Criminal and Penal Codes defines the offence of rape. Many accused persons are not convicted due to the narrow definitions of the offence of rape. This paper examines the current legal meaning of rape in Nigeria viz-a-viz the positionin other countries. It notes that the definitions are too narrow compared to what obtains in other more advanced jurisdictions. Consequently, an offender could be left off the hook because of the narrow definitions of rape in Nigerian statutes. The paper, therefore, recommends an amendment of sections 6, 357 and 358 of the Nigerian Criminal Code and section 282 of the Nigerian Penal Code to accord with current global trend. This would assist in taking offenders safely off the streets of Nigeria and reduce the crime of rape to its barest minimum.

Keywords: Rape, marital or spousal rape, child rape, consent, crime, sexual assault.

I. Introduction

The offence of rape has turned a big global issue that eats into the fabric of many nations. This is because of the nature of the frequency of its occurrence and the pains the victims of rape are made to undergo.

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They suffer unquantifiable anguish, ranging from post-traumatic stress disorder, dissociation from reality, physical violence, social disorder, sexually transmitted diseases, memory loss, forced motherhood/unwanted pregnancy amongst others. Nigeria, like many other Countries, has her laws defining and regulating the offence of rape and other forms of sexual assaults. These laws, like those of the United States and India have their roots in the common law of England.[1] One cannot help but wonder why the Laws in Nigeria still remains ancient/static while these countries and other countries of the world have moved on in their legal regimes. This inability to go beyond ancient position unfortunately has its attendant inadequacies as many accused persons cannot be trapped in the web of the offence of rape due to its narrow nature. This can be seen from the non-comprehensive definition proffered. In the Nigerian context, rape is simply defined as the non-consensual sexual intercourse between a man and a woman who is not his wife. This is clearly not comprehensive enough to include every act that constitutes rape in current global trend.[2]

Another aspect of rape is the marital rape (or spousal rape) which is the act of sexual intercourse with one's spouse without the spouse's consent. The issues of sexual and domestic violence within marriage and the family unit, and more specifically, the issue of violence against spouses, have come to growing international attention from the second half of the 20th century.[3] Still, in Nigeria, marital rape still remains outside the Criminal Law. A lot of people go through emotional and psychological trauma on a daily basis simply because they are unfortunately trapped with spouses who engage in rape; spousal rape.[4] Sadly, in Nigeria, this is not considered as rape as the general belief that a woman is the property of the husband and therefore should be available

[1] Incorporated in Nigeria statute as relics of colonialism.
[2] As it encourages increase in crime by letting criminals go scot free
[3] Vivian C. Fox, Historical Perspectives on Violence Against Women, Journal of International Women's Studies vol. 4, 2002 <www.vc.bridgew.edu/cgi/viewcontent.cgi> accessed 12 December 2018
[4] *Ibid*

for sex at all times over shadows the issue, in case of rape of a wife.[5] Upon entering into the marriage contract under statutory or customary law, there is immediately a legal presumption that the wife gives implied general consent to sexual relations with her husband. The women on their part don't cry out for fear of been judged by the society as bad spouses to avoid societal dent on their images. Other troubling aspects of rape are child rape, fraudulent rape and legal gender bias as to which sex can commit the offence of rape.[6]

In these kinds of ugly situations, one would consider the enabling laws for succour. Unfortunately, the statutory provisions that are to be relied on as bailout from this menace have not helped much. Generally, the definition of rape allows most wrongdoers to go scot free while in the case of marital rape, it is not criminalized at all. This paper examines the relevant statutory provisions; the Criminal code (applicable to the southern States) and the Penal Code Act (applicable to the Northern states and the FCT, Abuja) and judicial authorities for solutions to this menace.

II. Meaning of Rape

Rape has been defined by various statutes, such as the Criminal and the Penal Codes. Under the Criminal Code, the offence of Rape is defined as follows:

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband is guilty of an offence which is called rape.[7] Any person who commits the offence of rape is liable to imprisonment for life, with or without caning.[8]

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[5] Since in the Nigerian laws, only men can rape women. See Criminal Code Act Cap C38 Laws of Federation of Nigeria 2004, s 357 and Penal Code Act, Cap. P3 Laws of Federation of Nigeria 2004, s 282.

[6] Gurvinder Kalra and Dinesh Bhugra, 'Sexual violence against women: Understanding cross-cultural intersections' Indian Journal of Psychiatry <https://www.ncbi.nih.gov/pmc/articles/> accessed 12 December 2018

[7] Criminal Code Act Cap C38 Laws of Federation of Nigeria 2004, s 357

[8] *Ibid* s 358

The Act[9] defines carnal knowledge as an offence which is complete upon penetration. While unlawful carnal knowledge means carnal connection which takes place otherwise than between husband and wife. In the Northern part of Nigeria, it is defined under section 282 of the Penal Code[10] as follows:

> (1) A man is said to commit rape who ... has sexual intercourse with a woman in any of the following circumstances:-
>
> (a) Against her will;
> (b) without her consent;
> (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;
> (d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is the man to whom she is or believes herself to be lawfully married;
> (e) with or without her consent when she is under fourteen years of age or of unsound mind.
>
> (2) Sexual intercourse by a man with his own wife is not rape, if she has attained puberty.

In the case of *Adonike v State*,[11] the Nigerian Supreme Court held that in a charge of rape or unlawful carnal knowledge of a female without her consent, the prosecution has a burden to prove the following ingredients:

(a) That the accused person has sexual intercourse with the prosecutrix;
(b) That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;
(c) <u>That the prosecutrix was not the wife of the accused;</u>
(d) That the accused had the *mens rea*, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly, not caring whether the prosecutrix consented or not. (emphasis mine)
(e) That there was penetration.

[9] *Ibid* s 6
[10] Penal Code Act, Cap. P3 Laws of Federation of Nigeria 2004
[11] 2015 All FWLR (Pt 772) 1631

Similarly, in the case of *Natsaha v State*[12], the Nigerian Supreme Court once again upheld the above ingredients to prove the offence of rape or unlawful carnal knowledge. The Court underscored the principle that the prosecution must prove that the prosecutrix was not the wife of the accused person.

III. Spousal or Marital Rape

Spousal or marital rape occurs when a spouse forces the other spouse to undertake sexual intercourse without consent. The lack of consent is the essential element and need not involve violence. Marital rape is considered a form of domestic violence and sexual abuse. Although, historically, sexual intercourse within marriage was regarded as a right of spouses, engaging in the act without the spouse's consent is now widely recognized by law and society as a wrong and as a crime.[13] It is recognized as rape by many societies around the world, repudiated by international conventions, and increasingly criminalized. Under the Nigerian criminal codes, as we have seen, the offence of rape is committed where one has unlawful carnal knowledge of a woman without her consent or with her consent which is however vitiated by fraud, threats, force, intimidation, fear of harm, fraudulent misrepresentation or impersonation. Under the Code,[14] the term unlawful carnal knowledge earlier defined as, "carnal connection which takes place otherwise than between husband and wife simply connotes that sexual intercourse between a husband and wife cannot constitute the offence of rape since unlawful carnal knowledge is an element of the offence of rape. This position was also made clear in the cases of *Adonike v State*[15] and *Natsaha v State*[16] where the courts held that one of the ingredients to prove the offence of rape is that the prosecution must prove that the prosecutrix was not the wife of the accused person.

The spousal or marital rape exemption gives legal immunity to a man who forcibly and sexually assaults his wife, an act which would be

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[12] 2017 All FWLR (Pt 898) 127

[13] Daily Mirror, 'Marital Rape to be a Punishable Offence' December 15, 2017, <www.dailymirror.ik/aticle/marital-rape-to-be-a-punishable-offence> accessed 14 December 2018

[14] Criminal Code (n.7)

[15] Penal Code (n.10)

[16] (2015) All FWLR (pt. 722) 1631.

rape if committed against a woman not his wife. The justification for this exemption rests on the belief that when a woman enters into a marriage contract, she thereby gives her consent to all future acts of intercourse which she cannot subsequently revoke unless she terminates the marriage.[17] At common law however, a woman, including her sexuality, was considered the property of her husband, and the law did not recognize any crime in a husband violating the woman who legally belonged to him.[18] In the book titled '*History of the Pleas of the Crown'* authored by Sir Matthew Hale wrote, "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."[19]

Under Customary Law, similar views hold sway in the customs of most communities in Nigeria. The incidence of spousal rape of a wife by her husband is unknown in customary law as the wife is the property of the husband.[20] She must therefore be available at all times. The wife is not expected to complain. Upon entering into the marriage contract under statutory or customary law there is immediately a legal presumption that the wife gives implied general consent to sexual relations with her husband. This implied consent is revocable either by an order of a court or a separation agreement. One major reason given to justify this form of violence is that it is based on payment of bride price and once that is paid, husbands now own their wives and therefore could discipline them; this gives the impression that consent perpetuates the idea that a woman is a piece of property owned by the husband.[21]

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[17] Daily Mirror, (n.13)

[18] M. Pracher, 'The Marital Rape Exemption: A Violation of a Woman's Right of Privacy https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article> accessed 15 December 2018

[19] Wendy Larcombe and Mary Heath 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia' <https://www.austlii.edu.au.au.journals/SydLRev/2012/35.pdf> accessed 12 December, 2018

[20] O. C. Emmanuel and A. E. Obidimma, 'Spousal Rape in Nigeria: An Aberration' <https://iiste.org/journals/index.php/JAAS/articles> accessed 17 December 2018

[21] *Ibid*

IV. **Child Rape**

There have been incessant reports of child rape incidents[22] which wasn't the case in the past. While these terrible cases of child rape can be very traumatic to the children, it causes their parents unbearable pains and anguish. Research has shown that minors are mainly attacked by people known to them such as teachers and close family members.[23] These unbearable pains caused by child rape to both the children and their parents have made some countries categorize it specially in their various statutes. These children deserve protection from the evil minded people. The rape of a child under 13years of age in the United Kingdom, was made a special class of crime.[24] This was reiterated in the UK case of *R v Corran and ors.,*[25] when the Court said that "... the purpose of the legislation is to protect children under 13 from themselves, as well as from others minded to prey on them." The Law in UK regarding the issue of child rape covers the following scenarios:

a. Offender ejaculated or caused victim to ejaculate
b. Background of intimidation or coercion
c. Use of drugs, alcohol or other substance to facilitate the offence
d. Threats to prevent victim reporting the incident
e. Abduction or detention
f. Offender aware that he is suffering from a sexually transmitted infection
g. Pregnancy or infection results
h. Victim engaged in consensual sexual activity with the offender on the same occasion and immediately before the offence
i. Sexual activity between two children (one of whom is the offender) was mutually agreed and experimental.

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[22] Bukola Adebayo, The Punch Newspapers of Tuesday, (Nigeria, 23April 2013) 4-5 and Thursday, (Nigeria, 25 April 2013) 26 – 27

[23] Carol Ronken and Hetty Johnston, 'Child Sexual Assault: Facts and Statistics' <https://bravehearts.org.au/wp-cotent/uploads/2016/06/Facts-and-Stats> accessed 10 December 2018

[24] Sexual Offences Act 2003, s 5.

[25] (2005 2 Cr. App. R. (S) 73.

Special sentences were also given to rapists depending on the age of the child and the frequency of the act.[26] This position recognizes that the child is very vulnerable, and there is the need to make a special legislation which will take care of their special situation. India for example, enacted the Protection of Children from Sexual Offences Act 2012, in recognition of this crime and the menace that goes with it.

This is a giant stride on the development of the previous systems where the only laws that remotely addressed the problems of child assault in the India were sections 376, 377 of Indian Penal Code and some sections of the Information Technology Act, 2000. There was no specific law that can punish paedophiles or can compensate the victims of such occurrence. This has clearly bridged the gap earlier created. These laws are applicable in India as against Nigeria.

V. Issues on Nigerian Law on Rape

Under Nigerian law on rape therefore, at least two principal issues confront the legal sense of fairness, these are non-discrimination and respect for human rights of women. The definition raises some issues which are mostly sexist in nature:

a. rape is penile penetration of the vagina and other part of the female physiology
b. a man cannot be guilty of rape on the wife
c. only a man can commit the offence of rape and committed on a female and
d. fraudulent representation is only as to the nature of the act

a. Rape is Penile

Rape is limited to penile penetration of the vagina in Nigeria statutes.[27] Anal or oral sex or penetration using objects or other parts of the body such as the tongue or finger, do not constitute sexual intercourse for the offence of rape. The unduly restrictive or conservative definition of the

[26]Oludotun Sotonade, 'A Comparative Analysis of the Nigerian Criminal Law on Rape' <www.journals.oouagoiwoye.edu.ng/v2/index.php/AJH/article/view/105/105> accessed 20 September 2018

[27] See Criminal Code Act Cap C38 Laws of Federation of Nigeria 2004, s 357 and Penal Code Act, Cap. P3 Laws of Federation of Nigeria 2004, s 282.

offence of rape under the Nigerian Penal laws to "carnal knowledge or connection" has been interpreted by the Supreme Court in the case of *Adonike v State*[28] to mean unlawful penetration by the offender into the vault of the vagina of the woman (victim). What this simply means is that penetration by the offender's genital or any other object into any other opening of a woman's body such as the anus or mouth cannot constitute the offence of rape. It is submitted that the violation of these other part of a woman's body with the genitals of the offender or any other object is no less heinous in contemporary times as the vault of her vagina and as such be penalized.

b. **A Man cannot be guilty of Rape of his Wife**

Both codes provide (with little exceptions) that sexual intercourse between a husband and wife cannot constitute the offence of rape. For now, under Nigerian criminal law, a man may only be charged with assault, depending on the circumstances under which he has sexual intercourse with his wife, but he cannot be charged with raping his wife.[29] This position of the law on rape in Nigeria protects a husband from criminal prosecution for the offence of rape, while it imposes harsh physical emotional and legal abuse on the woman, who is the victim of her husband's forcible sexual assaults. This is even more worrying in cases where the parties are separated but not yet properly or formally divorced. The marital rape exemption not only robs a married woman of the right to control her body vis-a-vis her husband; but also disregards the serious harm suffered by the victim and denies a married woman, the right, which a single woman has, to legal recourse against her attacker.

c. **A Male cannot be raped/A Woman Cannot Commit the Offence of Rape**

The first point to be noted from the above provisions[30] is that in Nigeria, a woman cannot commit the offence of rape upon a man. In *R v. Cogan and Leak*[31] however, and pursuant to section of 7 of the Nigeria Criminal Code, a woman is incapable of committing rape, she can only be

[28] (2015) All FWLR (pt. 722) p.1659, Paras. C- E
[29] The Punch, 'Marital Rape Under Nigerian law' September 3 2017, <https://punchng.com/marital-rape-under-nigerian-law/> accessed 6 December 2018
[30] Criminal Code (n. 27)
[31] (1975) Crim. L.R. 584

found guilty of the same offence for aiding, counselling or procuring the commission of the offence.[32] This is so because the statutes[33] provide that the offence can only be committed upon a woman or girl.[34] In other words, only a woman can be a victim of rape. This is the result achieved if the principle of interpretation of statutes; *expressio unius est exclusio alterius* is applied.[35] This aspect of the offence in Nigeria is not in consonance with the trend in other jurisdictions as sexual offences can be committed by both men and women and upon men and women respectively. Recent legislations on this across the world shows that it is possible for a woman to be guilty of rape under the definition of the offence of rape.[36]

d. **Fraud Amidst Consent**

The Nigerian definition of rape restricts the element of fraud only to the nature of the act of rape itself without more. It states "...or by means of false and fraudulent representation as to the nature of the act..." The world has long departed from this colonial, narrow and restricted definition as it relates to fraud in rape. Failure to use condom as agreed for example after consenting to sex can vitiate consent.[37] So the issue of fraud has clearly gone beyond just the act.

VI. Meaning of Rape in Other Jurisdictions

In most other jurisdictions, the definition of rape has long gone beyond Nigeria's ancient and conservative statutory definitions having couched their definitions to suit the modern times.

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[32] O. C Obidimma and Q. C Umeobika, 'Time for a new Definition of Rape in Nigeria' <https://www.iiste.org/Journals/index.php/RHSS/article/viewFile/26090/26764 > accessed 3 December 2018

[33] The Nigeria Criminal Code and Penal Code Acts.

[34] C. O. Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria*, (2nd edn; Ibadan: Spectrum Books, 1980) 271.

[35] Macolm, "Rape Under Nigerian Law: Time for a Review" <http://saymalcolm.wordpress.com/2012/07/25/rape-undernigerian-law-time-for-a-review/> accessed 23 September 2018

[36] Obidimma and Umeobika, (n.32).

[37] This is known as stealthing (a form of rape by fraud) and Women commit this form of rape when they lie to a man about being on contraceptives in order to induce the man to have sexual intercourse.

The salient points of departure from the Nigerian definition are:

a. Rape is beyond Penile Penetration of the Vagina

The definitions of rape have been expanded to include Anal or oral sex or penetration using objects or other parts of the body such as the tongue or finger. That is, it has expanded merely beyond the woman's vagina to include other parts of a woman's body. For instance, the US Department of Justice defines rape as "Penetration of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[38] Also in the UK, the offence of rape is defined as:

(1) A person (A) commits an offence if -

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents...

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.[39]

In South Africa, the new legislation on rape, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007[40] repealed the common law offence of rape and replaced it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender.[41] The new law expanded the definition of rape which was previously limited only to vaginal sex to now include all non-consensual penetration of the vagina, mouth or anus of the victim. In the Act, sexual offences can be committed by both men and women and upon men and women respectively.[42]

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[38] Susan Garbon, "An Updated Definition Of Rape," <http://www.justice.gov/opa/blog/> accessed 3 April 2018

[39] Sexual Offences Act 2003, s 1.

[40] Act No. 32 of 2007

[41] Obidimma and Umeobika,(n.32)

[42] *Ibid*

The Statute defines rape as follows:

> Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.[43]

Sexual Penetration is defined as:[44]

> Any act which causes penetration to any extent whatsoever by –
>
> (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
>
> (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
>
> (c) the genital organs of an animal, into or beyond the mouth of another person.

6.2. A Spouse can be Guilty of Rape

The trend has also changed in other jurisdictions as many advanced countries have criminalized spousal rape. In Bhutan [45] for example, the statute went directly without any form of ambiguity to criminalize the offence of marital rape. According to the provisions of Penal Code of Bhutan, 2004,[46] marital rape was criminalized in the following words; "A defendant shall be guilty of marital rape, if the defendant engages in sexual intercourse with one's own spouse without consent or against the will of the other spouse." Marital rape in United States Law is non-consensual sex in which the perpetrator is the victim's spouse. It is a form of partner rape, of domestic violence, and of sexual abuse. Today, marital rape is illegal in all 50 US states. Connecticut[47] for example has a specific crime dealing with forced sex with a spouse and this doesn't apply only to spouses but also to unmarried cohabitants. It is called 'Sexual assault in spousal or cohabiting relationship' and it reads:[48]

> No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such

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[43] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act N0. 32 of 2007), s 3.

[44] *Ibid*

[45] *Bhutan* is a Landlocked country in South Asia, located in the Eastern Himalayas

[46] Article 199

[47] Connecticut is a Northeastern State in the United States

[48] Penal Code, Chapter 952, s 53a-70b.

other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.

6.3. Both Men and Women can Commit the Offence of Rape

There is certainly no doubt that the majority of rape cases are committed by men, but women can rape and do rape men or fellow women. Many Countries have long realized this fact and have since incorporated same into their laws. Nigeria is yet to wake up from slumber to delve into this area at all, she still prides herself in the ancient ideas. In Nigeria laws as it stands, a woman is not capable of committing the offence of rape since she is not capable of 'penetration' as stipulated by the provisions of the codes. At best, she may be convicted of Sexual Assault upon been proven guilty.[49] The Canadian Statute brilliantly made clear provision in this regard to cure gender bias on rape as it states that; a man, a woman (or a child) can be raped by another woman or man.[50]

6.4. Fraudulent Representation is beyond the Nature of the Act

Although this may on the surface of it not constitute rape, but it still amounts to rape in the sense that the consent to the sexual intercourse itself was obtained fraudulently. On the issue of fraud, Canada for example has long expanded its scope of fraud in rape cases, not just tying it to the act alone. In the Canadian case of *R. v. Hutchinson*,[51] the complainant agreed to sexual activity with her partner, H, insisting that he uses a condom in order to prevent conception. Unknown to her, H had poked holes in the condom and the complainant became pregnant. H was charged with aggravated sexual assault. The issue was whether evidence establishing that there was no voluntary agreement of the complainant to engage in the sexual activity in question or whether complainant's apparent consent was vitiated by fraud. The trial judge found that the

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[49] Dominic A.S., "Towards a Precautionary Approach to the Reform of the Law of Rape in Nigeria," (University of Jos, Jos, 2010) 17

[50] Aneschka Von Meck, "Rape-the New Legal Definition" <http://www.knysnattherald:com/news/News/General/14052/Rape-t> accessed 6 September 2018

[51] 2014 SCC 19, (2014 1 S.C.R.) 346

complainant had not consented to unprotected sex and convicted H of sexual assault. On appeal, the majority upheld the conviction on the basis that condom protection was an "essential feature" of the sexual activity, and therefore the complainant did not consent to the "sexual activity in question". The appeal was thereafter dismissed.

VII. **Conclusion**

Four salient legal positions can be gleaned from the above statutory and judicial definitions of rape. The first is that under the Nigerian laws, rape is penile penetration of the vagina and no other part of the female physiology. Secondly, a man cannot be guilty of rape upon his wife and thirdly, only a man can commit the offence of rape on a female. Finally, fraudulent representation is only as to the nature of the act. From the foregoing, it can be seen that concerted efforts have been made in Nigeria to enact laws which are to deter acts of rape, they are unfortunately grossly outdated and inadequate/insufficient, of interest here been the definition of rape.

It can be seen from the law in other jurisdictions that for an act to amount to sexual penetration (rape) it does not have to be vaginal penetration only. It suffices to be rape if the penetration is of the mouth and any other part of the body including the anus. Sexual intercourse between a husband and wife can constitute the offence of rape in more advanced countries same having been criminalized. This is tantamount to a wakeup call on Nigeria to protect married persons from being sexually assaulted by their spouses.[52] Child rape should also be emphasized since it has now become a very common phenomenon just as the United Kingdom classified it as special crime of rape.[53] In the same vein, sexual offences can be committed by both men and women and upon men and women respectively. The issue of fraud has also advanced beyond been tied to the act of rape alone, but to other ancillary matters bordering on rape itself.

It is submitted that the Nigeria definitions are outdated and out of tune with modern times as recent legislations in most advanced countries all over the world on the definitions of rape demonstrates a continued

[52] As both women and men do suffer marital rape; though men in exceptional cases
[53] Sexual Offences Act, 2003

departure from the ancient common law definition. The undue restrictive definition of the offence of rape under the laws and judicial interpretations thereof, constitute a grave violation and discrimination against victims.

There is urgent need to amend the various definitions of rape. The definition should be broadened to be more encompassing as to include other forms of rape as the current ones are archaic and has many limitations. It is also advocated that there should be a provision making marital or spousal rape a crime as contained in the Penal Code of Bhutan and the United States of America. It should be clearly stated in the laws that both men and women can be guilty of the offence of rape as can be seen, for example in the Canadian laws cited above.[54] Finally, the proposed definition should be made to expand the scope of fraud beyond its current restrictive nature in line with the Canadian case of *R. v. Hutchinson*,[55] and child rape should be classified as special rape as done in the United kingdom.[56] It is therefore recommended that an urgent amendment of sections 6, 357 and 358 of the Nigerian Criminal Code and section 282 of the Nigerian Penal Code be done, to accord with current global trend towards the criminalization of rape on a wider scale rather than the current restrictive one. This will in no time reduce the number of rape cases to its barest minimum as more accused persons will be brought to justice by way of convictions to deter others.

[54] Dominic(n.48)
[55] (2014) SCC 19; (2014) 1 SCR 346
[56] Sexual Offences Act, 2003, Sec. 1.

AN EXAMINATION OF DOMESTIC VIOLENCE AND LEGAL REMEDIES IN NIGERIA

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Abstract

Domestic violence is a global phenomenon and not unique to Nigeria. It's an evil that has spared no country, has not stopped and my never ceased to exist. This is because, studies have shown that globally, domestic violence accounts for nearly one quarter of all recorded crimes. Historically, some cultures have accepted domestic violence as an aspect of life while some others see it as an evil or crime that needs to be fought in order to protect the human rights of citizens. The degree of domestic violence differs from society to society. It has profound and destructive consequences on the victims such as: psychological, physical, emotional and social disorders. Despite the spirited efforts made by International Organizations, Nigerian Constitution and International Treaties /Conventions, to eliminate discrimination and domestic violence, and to enthrone the idea of freedom, equity and justice, women are still being violated without apology. Obtaining justice for anybody who is abused at the family level is very difficult and leave the victims dejected, rejected and dehumanized. This paper discusses domestic violence in Nigeria, the various forms of abuse which may occur in a family or intimate relationships and the devastating consequences on the individuals involved and the society at large. Some of the predisposing factors and the effects of domestic violence are also discussed and remedies proffered as a panacea for the ugly phenomenon.

Keywords: Domestic Violence, Remedies, Nigeria, Human Rights

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I. Introduction

Domestic violence is an issue of global concern. Historically, in many cultures it has been accepted as a fact of life. However, in recent years it has begun to be viewed as a criminal problem and efforts are being put in place to ensure that the problem is controlled or curbed if possible. Notwithstanding, in many societies, Nigeria for instance, it is still culturally acceptable.[57] This paper discusses the reported incidence of domestic violence in Nigeria, the causes of domestic violence and its devastating consequences on the victims and the society at large, the preventive and remedial measures are proffered as a panacea for the ugly phenomenon. This paper is divided into five parts. Part I is the general introduction. Part II examines incidences of domestic violence, whereas Part III accesses the effects of domestic violence on the victims. Part IV considers the international and domestic legal frameworks against domestic violence and the remedies they proffer. Part V deals with conclusion and recommendation.

II. Incidence of Domestic Violence:

Domestic violence is 'the intentional and persistent abuse of anyone in the home in a way that causes pain, distress or injury'.[58] It refers to "any abusive treatment of one family member by another, thus violating the law of basic human rights."[59] It includes beating of close spouses and others, harmful cultural practices on women, martial sexual abuse and rape, child sexual abuse. Another form of domestic violence is female genital mutilation. Domestic violence is a shameful act that occurs globally.[60] Families from all social, racial, economic, educational and religious backgrounds experience domestic violence in different ways. Dahlberg and Krug, report that in the United States of America, each year, women experience about 4.8 million intimate partner-related physical assaults and rapes and men victims of about 2.9 million intimate partner related

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[57] Half of Nigerian's Women experience domestic violence. Afro/News: http://www.afro.com/awrticles /16471 , 2007 (visited 28 July, 2018).

[58] O. N. Aihie, 'Prevalence of Domestic Violence in Nigeria Implications for Counseling' *Edo Journal of Counselling*, Vol 2. (May 2009) page 1-8 at p 1.

[59]Ibid

[60]L. L. Dahlberg and E. G Krug (2002*)" Violence-a Global Public Health Problem*. In King E, Dahlberg, Mcray J. A. and A.B Zni, Lozano R (eds.) *World Report on Violence and Health* Geneva. Switzerland WHO, 1-56.

physical assaults.[61] In parts of the developing countries generally and in West Africa, in particular, domestic violence is prevalent and reportedly justifies and condoned in some cultures. For instance 56% of Indian women surveyed by an agency justified wife beating on grounds like; bad cook, disrespectful to in-laws, producing more girls, leaving home without informing her partner, among others[62].

Reports from Integrated Regional Information Networks (IRIN) show that 25% of women in Dakar and Koalack in Senegal are subjected to physical violence from their partners and that very few admit that they are beaten.[63] While 60% of domestic violence victims turn to a family member, in three quarter of the cases, they are told to keep quiet and endure the beatings. The report also revealed that a law passed in the Senegalese penal code punishing domestic violence with prison sentences and fines is poorly enforced due to religious and cultural resistance. In Ghana, spousal assaults top the list of domestic violence.[64]

In Nigeria, reports uncover "Amazingly high" dimension of brutality against women.[65] Amnesty International reports that about 66% of women are accepted to have been exposed to physical, sexual and mental viciousness completed principally by spouses, accomplices and fathers while young ladies are regularly constrained into early marriage and are in danger of discipline in the event that they endeavor to escape from their husbands. Increasingly woeful is the disclosure of gross under announcing and non-documentation of abusive behavior at home because of social components.[66]

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[61]Dahlberg, L. L. and E. G Krug (2002) Violence – a global public health problem. In King E, Dahlbergl, Meray J. A and A. B Zwi, Lozano R (eds.) World Report on violence and health. Geneva. Switzerland: WHO, 1-56.

[62] Aihie (n.2); Ibid.

[63] International Research and Training Institute for the Advancement of Women, 'Ending men's violence': http://www/un-instraw.org/inindex.php2option+content&task-view&id+909&itemid+182 (visited 2018, June 10)

[64] Ibid, pg 2.

[65] Half of Nigerian's Women experience domestic violence. Afro/News: http://www.afro.com/awrticles /16471 , 2007 (accessed 28 July, 2018).

[66]Obi, S. N. and B.C. Ozumba (2007) Factors associated with domestic violence in South-East Nigeria. Journal of obstetrics and gynaecology. 27. (1) 75 – 78.

2.1 Incidence of domestic Violence: the case in Nigeria

Customarily, in Nigeria, as in numerous other African nations, the beating of spouses and children is accepted generally as a type of control. In this manner, in beating their children, guardians trust they are ingraining discipline in them. Similarly husbands beat their wives to discipline and control them. This is particularly so when the women are financially dependent on the men. The society is essentially dominated by men and the women's place inside the plan is positively subordinate.

Violence against women in the home is generally regarded as belonging to the private sphere in Nigeria and is therefore shielded from outside scrutiny. A culture of silence reinforces the perpetuation of such crimes.[67]

III. Effects of Domestic Violence

Domestic violence has adverse effects on the victims, and most times these are long-term effects that may lead to or cause the death of the victim. Initially, the intention of the abuser is to exert control through intimidation, fear, verbal abuse or threats of violence and in doing this, the victim is abused. Such abuse can physically, psychologically and socially affect the woman.

3.1 Physical Effects

Domestic violence has a considerable impact on the victim's health and well-being. The direct and immediate physical effects of domestic violence include injuries such as bruises, cuts, broken bones, lost teeth and hair, miscarriage, still birth and other complications of pregnancy, pelvic pain, headaches, back pain, Gynecological injuries, sexually transmitted diseases (STD), Heart problems, deaths, etc.

[67] M.A. Umar et al 2017 'An Appraisal of Wife Battery as Human Rights Violation and Criminal Offence in Nigeria', *Ebonyi State University Law Journal* vol. 8 No. 2, 115.

3.2 Psychological Effect

Physical violence is typically accompanied by emotional or Psychological abuse.[68] Intimate partner violence can lead to various psychological consequences for victims, such as anxiety, depression, post-traumatic stress disorder (PTSD), antisocial behaviour, suicidal behaviour, low self-esteem, inability to trust others, especially in intimate relationships, fear of intimacy, emotional detachment, sleep disturbances, insomnia, replaying assault in the mind, loss of hope in the future, inability to concentrate, etc.

3.3 Social Effects

The negative social effect may restrict the victims' ability to escape domestic violence. Victims of domestic abuse sometimes face the following social consequences[69], controlled access to services meant to help the victim, strained relationships with authority such as health care providers and employer, isolation from family, friends and other supportive individuals, isolation from social networks, homelessness (domestic violence is seen as the major cause of homelessness)[70]. Survivors of domestic violence are often isolated from support networks and financial resources by their abusers, hence putting them at the risk of becoming homeless. They tend to lack steady income, employment opportunities; access to credit cards. With these treatments, a victim may not be able to get an accommodation for herself. Lack of employment is also a social effect of domestic violence, since the victim is almost totally disconnected from interactions of any kind with the outside world. Even where the victim is already employed, she tends to lose her job because, she'll not be very efficient at work due to the psychological effect, the domestic violence has on her.

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[68]Jean Paul,Inter-partner violence:
http://www.cdc.cov/violenceprevation/intimatepartnervioence/consequences.html (accessed 6 July, 2018)

[69]Grace Adelan. Abusive relationships:
http://divorcesupport.about.com/od/abusiverelationships/p/effects_abuse.htm (visited 6 July 2018).

[70] Joan Zorza, Women Battering; A major cause of Homelessness:
http://heinonline.org/HOL/Landingpage?Collection=Journals&handle=hein.Journals/clears25 &div=56&id=&page= (visited 6 July 2013). See also
Http://www.endhomelessness.org/pages/domesti-violence (accessed 6 July, 2018).

3.4 Health Effects

Aside the health problems mentioned under the physical effects of domestic violence, women with a history of domestic abuse are more likely to display behaviours that present further health risks, (for instance, substance abuse, alcoholism, suicide attempts) than women without a history of domestic abuse. Studies have shown that the more severe the violence, the stronger its relationship to negative health behaviour by victims. Examples of these behaviours are; engaging in high-risk sexual behaviour (These include, unprotected sex, Decreased condom use, early sexual initiation, choosing unhealthy sexual partners, multiple sex partners, trading sex for food, money, or other items. Using harmful substances (These include smoking cigarettes, drinking alcohol, drinking while driving, and illicit drug use). Unhealthy diet-related behaviours (These include Fasting, Vomiting, Abusing diet pills, overreacting), and drug abuse.

Having stated the effects of domestic violence, on the victim, it is also worthy of note that domestic violence also has significant consequences for children, family friends, co-workers, and the community[71]. Family and friends may themselves be targeted by the abuser for helping a woman leave violent relationship or find assistance. Children in homes where domestic violence occurs may be witnesses to abuse, they may themselves be abused, and may suffer harm "incidental" to the domestic abuse. They often times become abusive themselves when they grow up.

Domestic violence also contributes to women's vulnerability to other forms of violence against women[72]. Research conducted by the advocates for Human Rights in Moldova and Ukraine revealed that domestic violence may increase women's vulnerability to trafficking;[73] women who experienced violence at home were more willing to look for and accept an uncertain and potentially risky job abroad.

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[71]Mike Dean, "Effects of Domestic Violence" http://www.stopvav.org/effects-of-Domestic-Violence.html (accessed 6 July, 2018).
[72] Ibid.
[73] Ibid.

IV. LEGAL REMEDIES FOR DOMESTIC VIOLENCE IN NIGERIA

Many African countries do not have specific laws prohibiting domestic violence and punishing perpetrators of domestic violence,[74] current laws do not adequately protect victims of domestic violence. In fact some existing laws encourage and condone domestic violence[75]. This is further evidenced by the rules of procedures in courts which are not friendly to victims of domestic violence, especially when it is in the form of sexual assault. Judicial officers and law enforcement officers, as well as officials of other governmental institutions, are not sensitized on issues of domestic violence or trained on how to respond to this issue[76]. Many of them also operate from the prejudices and stereotypes of the male dominated society. The combined factors of economic vulnerability and financial dependence of the woman on the man, social and cultural practices that condone domestic violence, and lack of prosecution or punishment of perpetrators discourage victims from speaking out and seeking redress[77]. The widespread poverty and the political, cultural and religious marginalization of women in Africa make the African woman more vulnerable to domestic violence[78].

In recent years, there have been increased efforts to enhance the protection and promotion of women's rights through the international,

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[74] Berta Esperanza Hernandez Truyol, Conceptualizing *Violence; Present and Future Developments in International Laws"*, 60 ALB.L.REV.607, 623 (1997).

[75] Section 55 of the Penal Code Northern Nigeria: Correction of child, pupil, servant, or wife.

[76] Legal Defence and Assistance Project, Background Paper and Domestic violence Bill 13 (2003) Note 4 at 12 (reporting that " police officers, prosecutors and judges lack sensitization and training on issues of violence against women in general at violence in the family in particular").

[77] Nigeria's combined 4th and 5th Country Report (CEDAW/C/NGA/405) submitted to CEDAW committee and deliberated upon in January 2004 reputed that numerous customary laws and practices such as widowhood rites, women's inheritance, and succession to property impede the promotion of women's rights. See press Relax to tripartite Legal System Hinders Progress towards Gender Equality in Nigeria, say Experts on women's Anti-discrimination Committee, U.N.Doc. WOM/1427 (Jan 20, 2004), available at http://www.un.org/News/Press/docs/2004/Wom1427.doc.htm. (accessed 6 July, 2018)

[78] United Nations, Economic Commission for Africa, Synthesis Report, Sub-Regional Meeting On the Decade Review Of The Impementation Of Beijing Platform of Action: West Africa. Available at http://www.unica.org/beijingphusio/Report%20Ade%201Ovest-Beijing+10.pdf (accessed 6 July, 2018) (participants observed that deposit the multiplicity of poverty eradication policies and strategies to date, women still represent the highest proportion of the poor).

regional, and national enactment of laws and policies. Such efforts have resulted in standard setting documents like the Convention on Elimination of All forms of Discrimination Against women (CEDAW) and the Beijing platforms for Action at the International level. Some countries have passed laws and policies incorporating such international standards into their domestic laws[79]. For example, Nigeria has incorporated the United Nations Protocol to Prevent, Suppress and Punish, Trafficking in Persons, especially, Women and Children and the United Nations Convention against Transactional Organized Crime, and the Convention on the Rights of the Child into domestic Law[80]. The African Charter on Human and People's' Rights has also been incorporated.[81]

In many other countries, however, women are faced with obstacles to the enforcement of international human rights and therefore, suffer from a lack of protective laws that would meet recent international standards. Such obstacles include lack of political will by the government to integrate ratified international instruments as required by their Constitutions, discriminatory cultural and traditional practices, religion and poverty[82]. Others include lack of participation in politics and decision making processes, denial of access to education and inheritance, high cost of legal services, and prejudices against women in all the communities.

Nigeria is one of the countries where international human rights instruments are yet to be incorporated into domestic laws. The long standing military regime in Nigeria resulted in gender- insensitive laws and policies passed by military leadership. Despite increased awareness of democracy and the need to sustain democratic rule in the country, women's rights issues are still not properly articulated in terms of policies

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[79] This is the dualist system under which ratified treaties are not enforceable or justiciable until the parliament enacts a law to incorporate them into domestic laws.

[80] United Nations Office on Drugs and Crime, Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially women and Children, supplementing the United Nations Convention Against Transactional organized Crime, http://www.unodc.org/unodc/en/treaties/CTOC/countrylisttraffickingprotocol.html (accessed 19 August, 2018)

[81] University of Minnesota, Human Rights Library, Ratification of International Human Rights Treaties-Nigeria, http://www.un.edu/humanists/research/ratification-nigeria.html (accessed 19 August, 2018).

[82] Ada Agina, Gender and Elections in Nigeria, GENDER ISSUE: This is a publication of Legal Defence and Assistance Project; a Non-Governmental Organization in Lagos, Nigeria

and have yet to be given their proper priority by the government. An example is the declaration of May 29 of every year as "Democracy Day" by the government of Olusegun Obasanjo[83].

However, there have been initiatives to integrate international instruments and protect victims and survivors of domestic violence. Current initiatives include an advocacy campaign for the passage of a law on violence against women, which would provide rehabilitation services including shelters and skills acquisition programs for victims and survivors[84].Other initiatives include the Domestic Violence Bill Advocacy project, a Campaign that involves raising awareness about domestic violence, and campaigning for the enactment of domestic violence laws in twelve states in Nigeria[85]. These initiatives have been met with various obstacles and challenges at different stages of the law reform process.

4.1 NIGERIA'S OBLIGATION UNDER DOMESTIC, REGIONAL AND INTERNATIONAL LEGAL INSTRUMENTS

a. **Regional instruments**:

- **The African charter On Human and People's Rights** (The African Charter) entered into force on October 21, 1986.[86] It has been domesticated by Nigeria[87], and is now a part of the domestic law[88].

[83] Synthesis Report (n.22). Participants agreed that gender issues are not systematically addressed in government or parliamentary discussions on political or institutional reform. It is also difficult for gender issues be included in national budgets because the requisite technical expertise is lacking and disaggregated gender-based data is unavailable.
[84] This is the advocacy campaign for a national law on violence women by a coalition of over one hundred non- governmental organizations working on women's rights in Nigeria.
[85] The Domestic Violence Bill Advocacy project is an advocacy project of the Legal Defence and Assistance Project (LEDAP) a non-governmental organization of lawyers and law related professionals engaged in law reform advocacy for the protection and promotion of human rights and the rule of law in Nigeria. Cited from Itoro Eze-Anaba, "Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges", Cardozo Journal of Law & Gender vol. 14:21 2007 at page 24.
[86] African Charter On Human and People's Rights, Organization of African Unity, Jun 27,1981, available at http://www.hrer.org/docs/Banjul/afrhr.html, (accessed 27 July, 2018).
[87] Section 12 of the Constitution provides that 'no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".

The African Charter recognizes Women's rights in three clear provisions.Article 18 (3) ensures the elimination of every discrimination against women and ensures protection of women[89]. Article 1 contains a non-discrimination clause, providing that the rights enshrined in the Charter shall be enjoyed by all irrespective of race, ethnic group, colour, sex, language, political or any other opinion, national or social origin, fortune, birth or other status[90]. The equal protection clause in Article 3 provide for equality before the law and equal protection before the law[91].

This Charter, however was inadequate in protecting the rights of women in Africa. It did not take into consideration critical issues such as custom and marriage. Within the marital relationship, there was no provision on the age of marriage and equality of spouses. More importantly, the charter promoted African traditional values on women[92]. Because of these and other issues, there was a heightened agitation by women's rights advocates for a regional instrument on women's human rights that resulted in the African Women Protocol.

- **The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa**

This protocol was ratified by the required fifteen member states, including Nigeria, and came into force on November 26, 2005. The Protocol

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[88] Network Against Human Trafficking in West Africa, Country Reports-Nigeria, available at http://nautiwa.victualactivism.net/Country reports.html Nigeria (accessed 23 August 2018) (stating that Nigeria has recently domesticated the United Nations Convention Against Transactional Organized Crimes and it's Supplementary Protocol and the Convention on the Rights of the Child)

[89] African Charter (n.30), Art 18 (3) provides "the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in the international Declarations and Conventions"

[90] Ibid, Article 2 states that "Every individual shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status".

[91] Ibid, Article 3.

[92] Ibid, Article 17 (3) states "The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state."

places an obligation on state parties to take measures to address not only violence against women but also other aspects of women's rights[93]. Article 1 of the African Charter as earlier stated defines violence against women[94] and its definition widens the scope of sexual violence to include marital rape. Prohibition of marital rape is further emphasized in Article 4 which requires states parties to prohibit, prevent and punish "all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public[95]". Other key provisions of the protocol include Article 1(4) which guarantees the enjoyment of women's rights regardless of marital status in all spheres of life. This provision implies that national laws and constitutions that discriminate against married women are in conflict with the protocol and violate its non-discrimination principles[96] .

Article 1 (g) defines harmful practices as practices that "negatively affect the fundamental rights of women and girls such as their rights to life, health, dignity, education, and physical integrity. Article 3 imposes an obligation on all state parties to the charter to combat all forms of discrimination against women through appropriate, legislative, institutional, and other measures. States should, among other things, include in their constitutions and other legislative instruments the principle of equality between men and women and ensure its effective implementation.[97]Article 3 reaffirms woman's rights to dignity inherent in

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[93] African Commission on Human and People's Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African, available at: http://www.achpr.org/english/_info/women_cn.html . (Accessed 14 July 2018).

[94] African Charter (n.30), Art. 4a.

[95] Ibid Art 4 (2) States that " states parties shall take appropriate and effective measures against women including unwanted or forced sex whether the violence takes place in private or public".

[96] Section 26 of 1999 Constitution which enables Nigerian men to confer citizenship by registration to their foreign wives but does not extend the same rights to foreign men married to Nigerian women.

[97] African Charter (n.30), Art 3(1) which states: "that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights; (2) Every woman shall have the right to respect as a person and to the free development of her personality (3) states parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women: (4) States parties shall adopt and implement appropriate measured to ensure the protection every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

a human being and the recognition and protection of her human and legal rights. It obligates state parties to adopt and implement appropriate measures to ensure the protection of every woman's right and protection from all forms of violence, particularly sexual and verbal violence. Having already defined harmful traditional practices, Article 5 focuses on measures to be taken by the government to eliminate them such as public awareness, legislative measures, provision of necessary support to victims, etc.

Importantly, Article 6 established the minimum age for marriage as 18, thereby abolishing child marriages[98]. It also gives women the right to acquire, own and freely manage their property. In the case of divorce, Article 7 provides the right to an equitable sharing of the joint property deriving from the marriage[99]**.** Under Article 8**,** state parties have an obligation to reform existing discriminatory laws and practices in order to promote and protect the rights of women.[100]Article 20 provides for widows' rights and state parties are urged to take appropriate legal measures to ensure that widows are not subjected to inhuman, humiliating, or degrading treatment[101]. A widow automatically becomes the guardian and custodian of her children unless this is contrary to the best interest and welfare of the children. A widow also has the right to equitable share in the inheritance of the property of her husband and shall have the right to continue to reside in the matrimonial house. Nigeria has signed and ratified this instrument and is therefore bound to implement its provisions once it is domesticated.

b. International Instruments

As a member of the United Nations, Nigeria has signed and ratified several of the human rights instruments. Some are general human rights instrument that specifically recognize the right to non-discrimination. Such general instruments that provide protection against non-discrimination which Nigeria has signed and ratified include the International Covenant on Economic, Social and Cultural Rights (in force in 1976), the International Convention on Civil and Political Rights (in force in 1976)

[98] African Charter, (n.30) Art 6 (b).
[99] Ibid Art. 7
[100] Ibid Art.8
[101] Ibid Art. 20

and the Convention on the Rights of the Child. There are also other instruments, which focus specifically on women such as Declaration on the Elimination of Discrimination against Women[102], and the Convention on the Elimination of all forms of Discrimination Against women (CEDAW)[103].

Nigeria signed and ratified CEDAW on June 13, 1985 without any reservations. It also ratified the Optional Protocol to CEDAW on November 22, 2004. CEDAW provides the basis for ensuring equality between men and women[104]. It urges state parties to condemn discrimination against women in all its forms and pursue without delay a policy of eliminating discrimination against women by embodying the principles of equality of men and women in the constitutions[105].

Article 4 encourages the principle of Affirmative Action as a temporary special measure to ensure women's advancement[106]. Sexual exploitation of women, especially for prostitution and trafficking are addressed in Article 6 and state parties are obliged to take all appropriate measures to ensure trafficking and other forms of sexual exploitation are eliminated[107].Article 15 grants women equality before the law[108], while Article 16 obliges states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to family relations[109].

By ratifying CEDAW and its optional protocol, Nigeria promises to incorporate the principles of equality in the Nigerian legal system, abolish all discriminatory laws, and adopt appropriate legislative and other measures to eliminate discrimination against women. By ratifying CEDAW

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[102] Declaration on the Elimination of Discrimination Against women, G.A. Res 2263 (xxii) (Nov, 7 196).
[103] CEDAW, G.A Res. 34/180,U.N Doc. A/Res/34/180 (Sept 3, 1981).
[104] Ibid.
[105] CEDAW, Article 2.
[106] Ibid, Article 4.
[107] Ibid, Article 6 states that "state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."
[108] Ibid, Art 15 which provides, "states parties shall accord to women equality with men before the law.
[109] Ibid, Article 16 states parties shall all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women.

and its optional protocol without reservation, Nigeria is promising the international community that it would be bound by those provisions and would repeal laws that impede the success of women. However, the Nigerian government is yet to domesticate CEDAW in line with section 12 of the Constitution[110]**.** This means that at best, the principles of CEDAW can only have persuasive influence on the domestic legal system.

c. Domestic Legislature, Policies, and Guidelines:

The civilian administration, which began in 1999, has provided the opportunity for advocacy on women's rights in Nigeria. Laws and policies have been formulated to eliminate gender-based discrimination and bridge the gap between men and women. Some of these include 1999 Constitution of the Federal Republic of Nigeria[111], the National Policy on Women[112], the Infringement of a Widow's and Widows Fundamental Rights Law No.3 of Enugu State[113], the Prohibition of Female Genital Mutilation Law- Cross River State[114], the Prohibition of Early Marriages Act, Kebbi State[115], the Retention in School and Against Withdrawal of Girls from School Act, Kano State[116], the Trafficking in Persons Prohibition, Enforcement and

[110] Section 12 of 1999 constitution which provides that international treaties can only be enforced upon the enactment of a domestic law to that effect by the parliament.
[111] Section 42 of 1999 constitution which provides for equality of all citizens of Nigeria irrespective of ethnic group place of origin, sex, religion or political opinion, section 34 which provides for the right to dignity of human person (this include that of women) .
[112] Women Consortium of Ngeria, Report of The Decade of Review of The Implementation of Beijing Platform for Action (BEIJING + 10) (2004) at 18 available at http://www.wildaf-ao.org.fr.IMG/doc/nigeria ENG-2.doc. (Visited 3 September 2018). This policy guideline is based on the principles of CEDAW. However, it is just a guideline without any legal force, it is not binding on any government, organization or individual.
[113] Ibid, at 12. This law aims at eradicating harmful rites and practices that accompany the death of one's spouse, especially inflicted on the women on the death of her husband.
[114] Ibid, the goal is to abolish female genital mutilation.
[115] Ibid, the law focuses on early marriage which is very common in Northern Nigeria.
[116] Ibid,. This is intended to prevent early marriage as most girls are withdrawn from school and given out in marriage in some parts of the country.

Administration Act of 2003[117], the Child Rights Act[118]. Most recent is the Domestic Violence Law in Lagos State[119].

In Nigeria, a number of bills have been proposed by individuals and groups to various States House of Assembly and the National Assembly which addresses specific forms of violence against women, some of these bills have been passed into law. The most notable is the Violence Against Person Prohibition Act (VAPP) Act 2015. The VAPP defined violence against person as the intentional and unlawful use of force or violence upon a person, including the unlawful touching, beating or striking against his or her will with the intention of causing bodily harm to that person.[120] Domestic violence is serious offence under VAPP Act, 2015; under the Act, whoever beats his or her spouse commit an offence and is culpable on conviction to a term of imprisonment not exceeding three years or to fine of N200,000.00 only or both.[121]The VAPP Act 2015 is limited in jurisdiction as it only applies in Abuja.[122] This means that the Act does not have a national application, being that violence does not fall under the exclusive list of the National Assembly.[123]

In Ebonyi State there is the "Ebonyi State Protection Against Domestic Violence and Related Matters Law 2005"[124]Section 3 of the law in its interpretation section defined Domestic Violence thus; 'Domestic violence means physical attack or abuse and includes verbal attack capable of causing emotional and psychological pain'. Section 4(1) makes it an offence for any person to met out domestic violence on any person with whom he is or was in a domestic relationship and Sub (2) empowers such

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[117] Ibid, at 22. This is a comprehensive law to combat trafficking in persons and provide rehabilitation and reintegration services to victims.
[118] Ibid, This Act domesticates the Convention on the Rights of the Child and echoes the requirement of free compulsory education and punishment for the marriage of a girl child.
[119] Laws of Northern Nigeria, cap 89.
[120]See section 46 VAPP Act 2015
[121][121] See section 19 VAPP Act 2015. See also M.A. Umar et al (2017) 'An Appraisal of Wife Battery as Human Rights Violation and Criminal Offence in Nigeria', *Ebonyi State University Law Journal* vol. 8 No. 2, 115.
[122] Section 47 of VAPP Act 2015.
[123] Second schedule Part I & II Exclusive and Concurrent Legislative List pursuant to section 4 of the 1999 Constitution of the Federal Republic of Nigeria (As Amended). It is therefore expected that States will domesticate VAPP Act in order to grant the civil liberty women in their respective states.
[124] [Cap. 74] Law No. 3, 2005

person to whom domestic violence has been meted to apply to court for a protection order. Section 5 imposes on any policemen or social worker duty to assist victims, if they're at the scene of the domestic violence, or learns of any incident. Section 6 provides for formal complaint. Sub (1) A victim of domestic violence of a magnitude amounting to crime under the criminal code shall lodge a complaint to the police for the arrest, investigation and prosecution of his/her attackers.

In order to protect the interest of the victim, who summons coverage to report a domestic violence case, Section 13 makes it an offence for any person to publish or broadcast by any means, reports of proceedings or disseminate information which may reveal testimonies and identity of parties thereto. Penalty for such act is imprisonment for a term not exceeding 6 months or fine of not less than five thousand naira or both. Section 14 gives any policeman or social worker, who is in the course of effecting arrest under Section 5 they have power to seize arms or weapons of violence. By virtue of Section 16 a court may upon application for or after hearing parties refer the complaint to a marriage counselor or social worker for counseling. The court with the jurisdiction to try domestic violence cases is the Magistrate Court. The purpose of this law is to provide for protection against domestic violence and matters incidental there to and deemed to have come into effect or Wednesday the 22nd day of June, 2005.

In Ebonyi State, also, is the Law on Abolition of Harmful Traditional Practices against Women and Children[125]. This law defined "Harmful Traditional practices" as any traditional or customary practices[126]:

i. Of a Scandalous or disgraceful nature which amounts to a failure to observe the fundamental human rights of a woman or any child;
ii. Which allows for a female genital mutilation or circumcision
iii. That is harmful to widows including any practice which requires the confiscation of her husband's properly;
iv. Child labour, Child abuse/ neglect;
v. Forced and early marriage of girls before the age of 18

[125] [Cap 2] Law No 10, 2001
[126] Section 2 of the law No. 10 of 2001 Ebonyi State

This law also went further to abolish the traditional practices in Section 3, where it stated this,

> Notwithstanding any custom or tradition of any community or people, each and every harmful traditional practices which on the date of the commencement of this law is practiced, shall from after such date cease to be practiced and any liability arising from such harmful traditional practices shall be free and discharged from any consequences thereof and harmful traditional practices applicable in any community or among any group of people is hereby utterly and forever abolished and declared unlawful.

Section 4 and 5 of the law, stipulates the offences arising from harmful traditional practices where it provided that where a person is guilty of an offence under this law that upon conciliation shall be liable to a fine not exceeding one hundred thousand naira to imprisonment for a term not exceeding five years. This law came into force on the 14th November 2001 with the aim to put an end to traditional practices that are harmful to women and children.

The law also assigned roles to the police officers, social workers and lawyers to help facilitate the aim and success of this law, in Sections 4, 2(3), 8(4)-(6), 15(a), The penalty for any disobedience by a party of the order made by the Court shall impose a fine of ₦100, 000.00 or an imprisonment of not more than five years or both.

4.7.2 FAILURE OF EXISTING CRIMINAL JUSTICE SYSTEM

Some provisions of law, rather than protecting women from domestic violence, encourage incidents of domestic violence and give the accused person wide room to escape punishment. For instance, under section 55 (1) (d) of the Penal Code a man is empowered to correct an erring child, pupil, servant or wife[127]. The section provides that "nothing is an offence which does not amount to infliction of grievous hurt upon any

[127] Ibid.

person which is done…by a husband for the purpose of correcting his wife, such husband and wife being subject to any native law and custom under which such correction is lawful[128]".

> The penal code designates the following as grievous hurt; emasculation, permanent deprivation of sight in an eye, of the hearing of an ear, or of the power of special, deprivation of any member or joint, destruction or permanent impairing of the head or face, fracture or dislocation of bone or tooth, any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily or unable to follow his ordinary pursuits.[129]

Another provision states, "Nothing is an offence by reason that it causes or that it is intended to cause or that it is likely to cause any injury if that injury is so slight that no person of ordinary sense and temper would complain of such injury.[130]"

Since there is no law against domestic violence in Nigeria, at best a victim who seeks protection under the law will rely on the provisions of the Criminal Code on common assault[131]. The criminal code considers assault on a woman as a misdemeanor while assault on a man is a felony[132]. This lower sentence of two years means that an assault on a woman is not as serious as assault on a man. Victims of domestic violence are reluctant to use the justice system as it is not victim friendly. In same cases, the judges openly blame the victims for the violations of their rights[133]. Women are asked demeaning questions during investigation and trial, and the fear

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[128] Ibid at section 216.
[129] Ibid at section 58.
[130] Laws of Northern Nigeria, Criminal Code Act (1990), cap.77.
[131] Section 353 of the criminal code prescribes 3 years punishment for an incident assault on a man, calling it felony while section 360 prescribes 2 years for same punishment for the same offence on a woman calling it misdemeanor.
[132] Amnesty International, *Nigeria- Unheard Voices Violence Against Women in the Family, (2005) at https://www.refworld.org/docid/439463b24.html accessed 28/05/2019*.
[133] Ibid.

of these intrusive questions about their private lives prevents victims from reporting rape and using the legal system[134].

Under the Criminal Code, sexual abuse of children between the ages of thirteen to sixteen is known as defilement and is not as serious as rape[135]. In some states, sexual abuse of a girl child between the ages of eleven to thirteen is merely a misdemeanor or indecent treatment with a punishment of two years imprisonment[136]. In many cases of sexual assault, the law requires corroboration in addition to the victim's testimony[137]. In particular, section 221 of the Criminal Code requires corroboration before conviction for defilement of a girl under the age of sixteen can be sustained. Since sexual assault is hardly carried out in the open, the requirement of corroboration cannot be met[138]. As a result, many accused persons are set free; this further traumatizes the victim and prevents other victims from speaking out and seeking redress. Moreover, the burden of proof for lack of consent in rape allegations is with the prosecutor[139]. In other words, the victim has to prove that she did not consent to the act. This is often difficult to do, especially as these offences take place where there are no witnesses.

The offence of rape is defined as:

> Unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by impersonating her husband[140].

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[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] See *Upaha v the State*[2003]6 NWLR pt 816(Where the court held that medical evidence did not satisfy the requirement for corroboration).
[138]YemiAkinseye- George,*TheDilemma of Legal Aid in the protection of Human Rights*,3 J, Hum. RTS.L. &PRACTICE 102 (1993).
[139] Section 357 Criminal Code Act (1990) cap 77, Laws of Northern Nigeria.
[140] Ibid at Section 358.

The punishment for rape is life imprisonment "with or without caning[141]. A man cannot be guilty of raping his wife because under common law, which gave rise to criminal code, there is mutual consent and contract between a man and his wife. Thus, the wife had given up herself unto her husband, which she cannot retract.[142] Sharia law is said to forbid marital rape generally.[143] However, the husband may withdraw maintenance to his wife if she refuses him sexual intercourse.[144] In establishing the offence of rape, the state must prove that the victim did not give her consent.[145] At the same time, the accused in defending himself is allowed to give evidence of prior sexual history of the victim, the partner notwithstanding.[146]

Under the present legal framework, it is mostly likely that a victim of domestic violence who lays complaint and pursues legal remedy against the perpetrators will break up her home or generate insecurity in herself and her children. It is likely that she will lose the economic support of the male perpetrator. She may be forced out of her marital home and if she returns to her father's house might be driven back to her husband's house of horror. As she cannot support herself and the children, they end up on the streets or become victims of other forms of abuse if she return to the violent home to face a more aggressive and more arrogant husband. This vulnerability of women discourages them from reporting cases of domestic violence or abuse against them at home or to seek legal redress. There are no provisions for shelter or other rehabilitative services.

The Nigerian legal system is more adversarial than reconciliatory. The indirect outcome of most judicial proceedings is usually the termination or straining of the relationship of the litigants, and this is true of a domestic violence victim who takes the perpetrator to the police station or the court for redress under the present law. Many victims of domestic violence, who lay complaint at police stations, usually get taunted, and humiliated, or their complaints are trivialized. In this way, the victim suffers more emotional and psychological violence because law

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[141]Ihal.P.C. 629.
[142] Baobab For Women's Human Rights: Women's access to Justice and Personal Security in Nigeria:: A Synthesis Report (2003) at www.baobabwomen,org accessed 28/05/2019
[143] Amnesty International (n.76).
[144]Ibid
[145]Ibid
[146] Baobab (n.86)

enforcement officials, like officials of other male dominated institutions, are not sensitized on the issue of domestic violence or trained on how to respond to such complaints. The police also operate from the prejudices and stereotypes of the male dominated customs and traditions in the society. Without any effective remedy to protect a victim and her children while still allowing them to remain in their home, she remains silent and sometimes die from the continued violence. Again, relative, neighbours and the community who witness the violence in the home may be willing to help, but cannot directly do so under the present legal system, because the victim needs to initiate the complaint as there is no provisions for third party complaint[147].

Due to the open court system prevalent in our country, except in some states where family court have been established, domestic violence cases especially of sexual abuse become a public affair and the victims are further traumatized by the disclosure of private matters. The legal system does not take into consideration the specific needs of a domestic violence victim; neither does it offer any specific protection.

The current laws do not make adequate provisions for the protection of victims of domestic violence[148]. The victims are usually women and children, and the combination of inadequate laws and male dominated customary and religious practices make the victims more vulnerable, without legal or social remedy[149]. There is a need for complete overhaul of the Criminal Justice System in Nigeria using a victim friendly human rights approach.

4.6 PREVENTIVE MEASURES AND SOLUTIONS FOR DOMESTIC VIOLENCE

There is no easy solution to the problem of domestic violence as its elimination requires changes in the very nature of the society. Until people develop a sense of respect for others and recognition of the worth of each individual. Violence will continue and the weaker members of the

[147] Amnesty International, "Nigeria: Level of Violence against Women in the Home. Shockingly High", http://news.amnesty.org/index/ENG-AFR 440 122005 (accessed 19 August, 2013).
[148] Ibid.
[149] Ibid.

community will largely be the victims. The following are measures that can be taken to avert or control domestic violence.[150]

i. Education:

The family is principally responsible for building the character of individuals, and it is in functioning families that feelings of self-worth, respect for others and conflict resolution skills are developed. It is therefore important that support is given to families by way of educating them, an enlightening them on child development, so as to enable them nurture these qualities which if not developed in the early, formation years are hard to instill later.

ii. **Counseling:**

At the same time, it is important to break the cycle of violence in those families where it occurs, since it has been established that children reared in this environment are more likely to become either victims or perpetrators themselves. For this reason counseling (including techniques of conflict management, negotiation, anger control, etc. where appropriate) is vital for all family members and individuals affected by domestic violence. Community funding should be available for counseling in order to ensure accessibility to all who require it.

iii. **Sanction:**

Violent behaviour injures its victims and demeans its perpetrators. Where an abuser seeks help to alter/control his behaviour, help should be available. However, this should be provided in association with, and not replace, appropriate punishment for the crime. Society must recognize the criminal nature of domestic violence and accord appropriate punitive sanctions to it. The general community must be encouraged to stop "minding its own business" and report/interfere/offer support. Let their non-acceptance be known in local neighbourhoods.

[150]Joy Greenwood, "Domestic Violence", available at http://www.womensactionallience.com.au/domesticviolence.html (accessed 12 July, 2013).

iv. **Intervention Orders:**

Intervention orders have become an important instrument in the management of domestic violence. When an order is issued it should be accompanied by information about the availability of counseling. If an order is breached attendance at counseling should be compulsory, in addition to any punitive sanctions. Law enforcement officers should also be instructed to help enforce and implement these orders and they should report any breach as well. Consideration should be given to broadening the application of orders so that they protect from all abusers. Uniform legislation and co-operation in all states allows an order issued in one state to be valid and enforceable in others regardless of the jurisdiction under which it is issued. Laws should also be made in the various states and Nigerian as a whole to protect women from domestic violence.

i. The Media:

The media irresponsibly over-represents violence in news coverage and entertainment. Children who have been desensitized by exposure to this have been shown to demonstrate increased level of violence in their play. This effect is more marked in children from high risk backgrounds. It is not reasonable to expect children, who have been exposed to violence over a period of many years by adults and /or via television and videos, not to eventually reproduce that behavior. For this reason strict controls must apply in children's viewing times. On the other hand, the media should be used as an avenue to enlighten and educate the general public on the ills of violence, how to prevent domestic violence and agencies that reports can be made to in the event or any threat of domestic violence. The media should develop programs that say "No" to domestic violence.

It is sometimes suggested that the solution to domestic violence lies in equality for women and particularly, in ensuring that all women are economically independent, and therefore, able to support themselves and their families. While in no way denying the importance of equality, women's Action Alliance does not believe that economic independence is a universal panacea for domestic violence for the following reasons:

a. Whether a woman remains in a violent relationship has much to do with her own self esteem as with her economic independence. To the extent that economic independence confers self-esteem thus reflects poorly on the society's view of the value of women, especially those who do not perform paid work. When the community values their role, the women at home will no longer feel like second class citizens.
b. While society's lack of respect for women remains, there will always be victims, because there will always be those in society who are weaker, more vulnerable and less powerful.

In conclusion, domestic violence will never be eliminated until; society ceases to tolerate violence in its many forms, and society recognizes and promotes the intrinsic worth of all individuals and respects the value of their contribution to the community whatever that may be.

V. RECOMMENDATIONS AND CONCLUSION

There is need for States to domesticate the VAPP Act to regulate the actions of perpetrators of domestic violence in local areas. Most of the international instruments on the protection of women's rights (e.g. CEDAW) which has been ratified, should be domesticated to make the required impact on the liberation of women from discriminatory practices on Nigeria.

It is evident that domestic violence against any person is a human rights violation of global proportion, and therefore, deserves the global attention that it has received even though in some parts of the world, it is treated with less seriousness. The devastating cases of domestic violence against women discussed in this work cannot be over emphasized. Hence, the need for serious national actions aimed at protecting women from domestic violence and prohibition of domestic violence against individual in national constitution.

It is germane for Nigeria to realize women's rights are human rights and as such, deserve to be protected. Nigeria is a signatory to International and Regional Legal Frameworks on women protection, with their attendant obligations. Nigeria must live up to her expectation by fulfilling her obligations under these international frameworks. However, the most effective means of combating this menace of domestic violence is by empowering women all round. Women are the golden seed that rock

the cradle hence, they deserve a special place in the society that the heavily contribute to.

OWNERSHIP CLAIMS IN OUTER SPACE

Olatinwo Khafayat Yetunde •

ABSTRACT

Ever since a man walked into a notary public office in Pittsburgh in 1936, declaring all the property known as planet, islands-of-space and other matter, supposedly known as A.D Lindsay archapellago, to belong to him, the rate at which individuals, organisations and even States are laying claim of ownership to all or part of outer space have been on the increase. This is despite the provision of Article II of the Outer Space Treaty 1967 which tries to make the environment of the outer space property of all mankind. It is the intention of this paper to assess the relevant international law on the outer space in respect of ownership of outer space in order to ascertain the claimant's authority in its ownership claim and how such claims have been dealt with.

Space Law, Outer Space, Ownership, Right, Individual, Claims

I. Introduction

In January 2015, the Cable Network News reported a case of threat to the Russian Space Station in the Outer Space wherein the Russian was said to have moved from its *portion* to the United States of America's *portion* until it was found out that it was just a mere scare. These two States started what is now known as space race in 1957 and since then they must have lost count on the number of Satellites launched into outer space. As these exploration and exploitation continue, Nations from different part of the world came to realize that some legal regimes have to be put in place to regulate human activities in this pristine environment especially at the end of the Second World War. The first attempt at developing Space regimes

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resulted in the *Partial Test Ban Treaty of 1963*[1] which was adopted mainly to ban the use and test of Nuclear weapons in the environment. These legal regimes on the environment of space have grown and so far, there basically six major Laws on Outer space. That is;

1. "Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water often called the Partial Test Ban Treaty or Nuclear Test Ban Treaty of 1963"[2]
2. "Outer Space Treaty of 1967"[3]
3. "Convention on International Liability for Damage Caused by Space Objects 1972"[4]
4. "Convention on Registration of objects launched into outer space (1975)"[5]
5. "Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968"[6]
6. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1979[7]

These laws regulates several aspect of man's explorative and exploitative nature in Outer Space which include the registration of object launched in Space, the rescue of Astronauts, compensation in the event of

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[1] Entered into force on 10th Oct, 1963. often called "Partial Test Ban Treaty (PTBT), Limited Test Ban Treaty (LTBT) OR Nuclear Test Ban Treaty (NTBT)"

[2] Entered into force on 10 October,1963

[3] "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty", adopted by the General Assembly in its resolution 2222 (XXI)), opened for signature on 27 January 1967, entered into force on 10 October 1967

[4] "The Convention on International Liability For Damage Caused By Space Objects (the Liability Convention" adopted by the General Assembly In Its Resolution 2777 (XXVI)) Opened For Signature On 29 March 1972, entered Into force On 1 September 1972

[5] "The Convention On Registration Of Objects Launched Into Outer Space (The Registration Convention)" adopted by the General Assembly in its Resolution 3235 (Xxix)), opened for signature on 14 January 1975 and entered into force on 15 September 1976

[6] "The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the "Rescue Agreement)", adopted by the General Assembly in its Resolution 2345 (XXII)), opened for signature on 22 April 1968, entered into force on 3 December 1968.

[7] The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the "Moon Agreement", adopted by the General Assembly in its resolution 34/68), opened for signature on 18 December 1979, entered into force on 11 July 1984.

damage caused as a result of space activities and the freedom given to man to explore the utility of space for the benefit of mankind. This paper will streamline itself and focus on the particular space regime on the ownership (to a portion or whole) of space.

II. The boundary of Outer Space

Before delving into the ownership right in space, it is pertinent to define or rather ascertain the boundary of this environment. Outer space can be defined as any region of Space beyond limits determined with reference to the boundaries of a celestial body or system, especially (a) the region of space immediately beyond Earth's atmosphere (b) Interplanetary or interstellar Space.[8] According to Fraser, space is defined by the point at which the Earth's atmosphere ends and the vacuum of space takes over. The first official definition of Space came from the National Advisory Committee for Aeronautics[9] who decided on the point where atmospheric pressure was less than one pond per square foot which was the altitude that Airplane control surfaces could no longer be used and corresponded roughly 50miles or 81 Kilometres[10] followed by the calculation by an aerospace Engineer Theodore Von Karman that above an altitude of 100 Km, the atmosphere would be so that an Aircraft would need to be traveling at orbital velocity to derive any lift which is later known and adopted as the Karman Line[11] This environment immediately precedes the Air space and the two areas are governed by different regimes. Airspace is under sovereign jurisdiction of the state beneath it while outer space is free for all.

Abound are controversies as to the actual delimitation of outer space and airspace[12] i.e where does Outer Space begin? According to Scott,[13] defining exactly where Airspace ends and Outer Space begins has

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[8] American Heritage Dictionary of English Language, 5th Edition 2013. www.freedictionary.com/outer>accessed on 12 Sept 2018

[9] The predecessor to the National Aeronautics and Space Administration

[10] Fraser C. "*How High is Space*?" July 25, 2013 www.howhighisspace >accessed on 16 September 2018

[11] By the world Airsports Federation

[12] Glenn Reynolds & Roberts Merges, Outer Space: Problems of Law and Policy (1997) Second Edition. Pp.11-24 & 77-83. West view press ISBN 00-8133-1802-5

[13] Virgiliu P. "*Unreal Estate*- The Men Who Sold the Moon." (2006) Cornwal,UK: Exposure ISBN 1- 84685- 095-9< http://www.virgiliupop.com> accessed 23 May 2018

proven problematic and proposals have ranged from 80km to 100km.[14] In fact, the controversies that linger on the issue of the definition and delimitation of Outer Space have found its way into how Outer Space is being defined in the National Laws of Some States. For example, the United States of America's National Aeronautics and Space Act[15] defines Outer Space as the areas *outside the Earth's atmosphere,* while the South Africa's National Space Law[16] defines Space as *the space above the surface of the Earth from a height at which it is in practice possible to operate an object in an orbit around the Earth.* This definition seem to read the mind of the Soviet Union in proposing the establishment of a legal boundary at an altitude of 100km based on the theory that an Aircraft, as the main subject matter of most International and Local Air Law, would never be able to reach such altitude in view of their dependency, for purposes of lift, upon a density of air not available in those regions. Also, space objects orbiting the earth would not descend below such an altitude, as the atmosphere would be dense for staying up in their orbit, the attendant atmospheric drag no longer being compensated by the centrifugal forces resulting from their velocity. This proposal seem to be unaware of the provision of Article 2 of the Jordan Civil Aviation Act which defines an aircraft as *any machine whose continuous flight in aerospace is derived from air and other reactions above the surface of the Earth*[17]

Pertinent to point out a recurring issue that kept resonating in the above definitions i.e. '*at the point where the atmosphere ends*' Now where does the atmosphere end that we can safely agree that the outer space begins at a particular borderline? The issue of spatial delimitation has become a burning issue at the International level and Space law scholars. Frans G. Von Der Dunk[18] in his work, *The Sky Is The Limit- But Where Does It End,* also pointed out the fact that many experts have discussed where outer space begins (often as part of the broader issue of the definition of

[14] Ibid.
[15] National Aeronautics and Space Act 1958 (As amended)
[16] Space affairs Act 1993
[17] Civil Aviation Act No.1 of 2007
[18] Frans G.V. *The Sky is the Limit- But Where Does it End* (2005) Space and Telecommunications Law Program Faculty Publication. Paper 34. Proceedings of the Forty-First Colloquium on the Law of Outer Space 84-94(2005) & the 56th International Astronautical Congress of the International Astronautical Federation the International Academy of Astronautics and the International Institute of Space Law, 2005.

outer space) ever since the first unmanned artificial satellite[19] orbit into space which has posed the vexing question as to whether individual states could exercise their well-established sovereignty over the airspace above their territories to prohibit man-made space objects to be present above such territories. The quick formalisation of one of the fundamental rules of International space law, that outer space itself remained outside any sovereignty as a *terra/res communis,*[20] seemed to reinforce the need to establish a clear boundary between the two areas subject to regimes with such fundamental differences. Precedents could be derived from the discussion on the law of the sea. The 1958 Treaties negotiated in Geneva dealt with the demarcation of territorial seas (where the sovereignty of the coastal states applied comprehensively, with the exception of the framed 'right of innocent passage') versus high seas which were basically open to all states and regulated only at the international level.[21]

III. Ownership claim

Ownership is part of human nature and as well part of life. It is in the human nature to want to own even irrelevant things. However claiming does not mean owning, its just to certify that a claim is being made. To legally own something, mere expression of intention to own (*animus*) is not enough, what is key is the actual possession (corpus).[22] It is pertinent to start with the analysis of some Claims of ownership to the whole or part of outer space before identifying the attitude of the International legal regimes on space towards ownership claim to the environment of Space.

James Thomas Mangan is one of the many[23] that has laid claim of ownership to the whole of Outer Space. He is the founder of Nation of Celestial Space[24] nicknamed *Celestia,* with this, he laid claim to everything

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[19] *Sputnik 1* by the Soviet Union

[20] Outer Space Treaty, Article I& II establishes the cardinal principle of Common Heritage whereby Outer Space is not subject to National appropriation.

[21] Convention on the Territorial Sea and Contaguous zone 1958, Article 1,2,14,15,16 & 17 (came into force Sept 10, 1964). Also Convention on the High Seas 1958 Article 1&2 (came into force Sept 30, 1962)

[22] Virgiliu P. Unreal Real Estate- The men who sold the moon. (2006) Cornwal,UK: Exposure ISBN 1- 84685-095-9

[23] Glenn Reynolds & Roberts Merges, Outer Space: Problems of Law and Policy (1997) Second Edition. Pp.173-177

[24] Created in Evergreen Park,Illinois in 1949

in Space. He even invited many States to give him official recognition and applied for membership of the United Nations in 1948, which was rejected. In 1957, he fought with the USSR and the United States for the launch of Sputnik[25] and that such a lunch amounted to trespassing especially that the United States did not obtain his permission before sending surveyor cameras to the moon in 1966. Upon his death he willed the control of this Country to his children.

Also in 1980, an American named Denis Hope made a "Declaration of Ownership" to the moon, registered a company known as Lunar embassy and started selling off acres in the moon. According to Denis he wanted to be known as the "*Omnipitant ruler of the lighted surface*" He once sent $55,000 storage and littering bill to the United States, USSR and the United Nations. So far the numbers of moon-buyers have risen to 3.6 millions in 181 countries including members of the royal families in six countries and two former presidents.[26]

Again in 1997, Adam Ismail, Mustafa Khalil, and Abdullah Al-Umari sued the National Aeronautics and Space Agency (NASA) for 'the act' of landing its pathfinder on the Mars as trespass.[27] These Claimants filed a law suit with the Yemeni Prosecutor general linking their authority to the claim as inheritance from their ancestors 3,000 years ago according to mythologies of the ancient Sabaean and Himyaritic civilizations. This suit was dismissed

Also in 2004, an American named Gregory Nemitz registered a claim to a part of the outer space called the Asteroid Eros, this spurred NASA[28] to go and investigate the asteroid. Thereafter, Gregory sent a letter to NASA instructing it to pay a parking fee of $20 for landing the satellite on his property.[29]

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[25] The first artificial Satellite launched in space on the 4th of October 1957
[26] Virgiliu P. "*Unreal Estate*- The Men Who Sold the Moon." (2006) Cornwal,UK: Exposure ISBN 1- 84685- 095-9< http://www.virgiliupop.com> accessed 23 May 2018
[27] CNN Online NEWS "3 Yemenis sue NASA for trespassing on Mars: They say they inherited it 3000 year ago" Online news < http://edition.cnn.com/TECH/9707/24/yemen.mars > accessed 26 September 2018
[28] United States National Aeronautics and Space Administration.
[29] Nemitz V. NASA (2005) Appellate case No.04-16223

In 2012, some International Business tycoon including Larry Page and Eric Schmitz[30] registered their intention to send a robotic spacecraft to Outer space in order to mine precious metals from asteroid and bring them back to earth for business purpose. According to them such business will add Trillion to the global Gross Domestic Product.[31]

IV. International Space Law and Ownership claim: Resolving the Dispute.

As noted earlier, Outer Space is purely regulated by International law even though some States have deemed it fit to put in place National laws to complement the available International space law in respect of their respective space activities[32]. The framework on ownership of outer space is mainly the outer space Treaty of 1967 and the Moon Treaty 1979. The Outer Space Treaty headed off territorial dispute by barring outer space and celestial bodies from all national appropriation. The provision goes thus:

> *"Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means"*[33]

From the above provision no State or individual is allowed to lay claim of ownership to outer space, whether as a whole or any part thereof. Rather, what is encouraged is the peaceful use of the resources of this environment for the benefit of all mankind and not even for selfish use.
Hence, the exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, And shall be the province of all mankind. The environment is free for exploration and use by all States without

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[30] Adam M; Space Cases: The Weirdest Legal Claims in Outer Space.< http://www.wired.com/2012/06/space-cases/ >accessed 15 February 2018

[31] Natelie W, 'Does Asteroid Minning Violate Space Law?' April 2012 <http:// m.livesscience.com/33864- asteroid-mining-space-law.html>accessed 26 September. 2018

[32] For example the South Africa's Space Affairs Act 1993 [No. 84 of 1993] G 14917, Jordan's Civil Aviation Act No.1 of 2007 and the United States of America's National Aeronautics and Space Act

[33] Outer Space Treaty 1967, Article II of the

discrimination of any kind, on a basis of equality and in accordance with international law with free access to all areas of celestial bodies. Also there is freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation. While barring ownership claim, the only access to the use of Space is encouraged to be for the benefit of all.[34]

It is therefore a concern where investors derive the rights to form the intention of mining precious minerals in space for business purposes and the excitement to add trillion to the Global GDP (who would this investment favour in the actual sense).

In 1979, the United Nations Passed the Moon Treaty which is regarded to have closed all the loophole in the subtle provision of the Outer Space Treaty. The Moon Treaty, by it provisions bans private property claims altogether which is still frowned at by many States. The provision is regarded as steps taken too far and responsible for its unpopular assent as many States refused to ratify the Treaty. According to the provision of Article 11 (3)

> *"Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof. The foregoing provisions are without prejudice to the international regime referred to in paragraph 5 of this article."*

This provision, in trying to cover basic, specifically mentioned actors of space and its celestial bodies who would ordinarily want to own or claim portions of this area. While the outer space leaves room for speculation on individual rignt to claim ownership of portions of space, the

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[34] Article I & II Outer Space Treaty 1967

moon treaty specifically names these actors i.e State, Individual, international intergovernmental or non-governmental organization, national organization or non-governmental entity. It further provides that the mere fact that a space station or any other property is placed on the surface of the environment does not attribute or confer ownership of the portion of such part or surface on the launcher.

However, the provision of these two Treaties on the banning of ownership claim in respect of any part of Outer Space and its Celestial bodies does not affect ownership of man-made-properties launched or placed in Space and Celestial bodies' i.e space stations, spacecrafts and Satellites. Ownership of such property still remains in the owner despite the fact that it is in an *unowned* environment. Therefore a private space hotel remains a private property even while in orbit and subject to the applicable national law to which the owner belongs. Also each module of International Space Station is the territory of the State to which it belongs to, hence, the Laws of the country to which the module belongs to is applicable to all the activities that are carried out there whether such activities are inventions or acts of crimes.[35] Laws of the responsible country govern the issues of property rights over privately owned and launched space object.[36] A typical example can be drawn from the presence the United States of American's Embassy on the Nigerian soil.

Furthermore, the non-appropriation of any part of Outer Space and its celestial bodies is applicable to all the resources it possessed.[37] These resources already contribute billions to the terrestrial economy.[38] For example, the geostationary orbit is the point in outer space directly above the equator where a satellite orbits at the same rate as the earth turns therefore allows a fixed antenna to maintain a link with a satellite.[39] Also natural resources like asteroids known to be rich in valuable elements

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[35] This rule is based on the principle of extra-territorial jurisdiction applicable to ships and other vessels in high seas and individual satellites launched into outer space.

[36] Catherine D; who owns Outer Space? Engineering and Technology (2010) Magazine Vol.5 Issue 11<http://eandt.theiet.org/magazine/2010/who-owns-outer-space.cfm> accessed 19 September 2018

[37] This has definitely did not stopped the equatorial nations to claim ownership of the geostationary part of the orbit, this manifested in the 1976 Bogota declaration. Though this claim has received international criticism and is being ignored.

[38] Lewis J.S, Mining the sky: Untold Riches from the Asteroids, Comets, and Planets. (1997) Perseus Publishing ISBN 0-201-328194-4

[39] Access to this portion of outer space is regulated by the International Telecommunications Union (ITU)

such as neodymium,[40] scandium,[41] yttrium,[42] iridium,[43] platinum[44] and palladium[45] which are regarded as limited and rare resources on earth are present in Outer Space. The Moon is also blessed with concentration of precious metals including aluminium, titanium and rare elements. These resources has been held to be capable of *sustaining trillions of people until the sun dies*[46]

Undoubted, with the combined provisions of Article II of the Outer Space Treaty and Article 11 of the Moon Treaty, issue of ownership is as regards claims on portions or whole of the environment of space. This ownership does not affect the carrying out of space activities such as launching of Satellite or scientific investigation. This can be extended to the mining of the available natural resources. The only question would then be "who owns the mined resources" as in practice, activities involving appropriation like mining may violate the principle of non-appropriation.

This question can be put to rest by the provision of the Moon Treaty that specifically included *resources* in barring acts of claims of ownership. The outer space Treaty is silent regarding the ownership of space resources but since the provision of the Moon Treaty is also

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[40] "A bright , silvery, reactive element of the lanthanide series, found in the mineral monazite and bastnaessite and use for colouring glass, for doping laser and crystals and in materials with strong, permanent magneticproperties that make them useful for computer and audio equipmet"< American Heritage Dictionary of English Language fifth Edition, 2016 >http://www.yourdictionary.com>accessed 13 June 2018

[41] "A rare light silvery-white-metallic element occurring in minute quantities in numerous minerals." Collins Dictionary 2012 Digital Edition <http://www.dictionary.com/browse/scandium >accessed 13 June 2018

[42] An element used to boost the strength of magnesium and aluminum alloys. American Heritage Dictionary of English Language fifth Edition, 2016<http://www.thefreeedictionary.com/yttrim> accessed 13 June 2018

[43] An element used to boost the strength of magnesium and aluminum alloys. American Heritage Dictionary of English Language fifth Edition, 2016<http://www.thefreeedictionary.com/yttrim> accessed 13 June 2018

[44] "A heavy precious metallic element; grey-white and resistant to corroding; occurs in some nickel and copper ores and is also found native in some deposit" Vocabulary.com Dictionary <http://www.vocabulary.com/dictionary/platinum> accessed 13 June 2018

[45] "A rare metallic element of the platinum group, silver-white, ductile and malleable, harder and fusing more readily than Platinum: Used chiefly as a catalyst and in dental and other alloys" Dictionary.com <http://www.dictionary.com/browse/palladium> accessed 13 June 2018

[46] Lewis J.S, mining the sky: Untold Riches from the Asteroids, Comets, and Planets. (1997) P-12

applicable to Outer space, then such lacuna may be said to have been filled up by Article 11 of the Moon Treaty.

These two regimes have declared the outer space "the common heritage of mankind" which goes to suggest equal access to outer space. Hence, where one is allowed to use a portion of space for mining of resources, it may hinder the other from the use of such portion and invariable whittle down the principle of common access to the use of space as enshrined in the space regimes.

From the provisions of the Outer space Treaty and The moon Treaty on the ownership of outer space, it can be safely deduced that any claim of ownership to any piece of outer state cannot stand. One would then wonder why the there has been series of cases on claims of ownership despite the provisions of this Laws. In fact many claimant have gone ahead to sell portions of outer space which has been declared property of commons. What then is the faith of buyers whose sellers have no title to the parcel of space sold? Evidently, there is no way to sustain or be vested title where one acquires from an untitled seller.

V. Conclusion/Recommendation

Outer space and its celestial bodies is not subject to appropriation by any means by a State, individual international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person, rather, it is a common property. But one cannot help wonder that despite this well-established rules, individual are still seen walking back and forth court houses to assert their own right to either a portion or the whole of the outer space environment. With this incessant mockery of the administration of justice, where in spite of the knowledge that one cannot have but still want to try and see, even haven seen other tried and fail, then there must be a problem somewhere.

It maybe reasoned that this law just like any other international law without effective sanctions or enforcement mechanism has failed to compel its adherence, or that the general public it not aware of this provisions. It hereby recommended that;

a) The provisions of Outer Space Treaty and Moon Treaty be amended to the effect that claims of ownership of outer space be treated as a criminal act with necessary and effective sanctions on the violators.

b) This Provision on prevention of ownership claim should be brought to the awareness of the public with the attendant consequences in the event of any violations
c) A special court be created solely for the purpose of resolving space dispute particular dispute relating to ownership claim as arbitration cannot be deemed to be an effective means of settling ownership Dispute or
d) In the alternative. Ownership dispute should not even be entertained as subject of litigation in the law court. That is, no right of audience.

RULES GOVERNING EVIDENCE OF OFFICIAL AND PRIVILEGED COMMUNICATIONS UNDER THE NIGERIA'S EVIDENCE ACT, 2011 (AS AMENDED): A CATHEDRAL VIEW

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Kyrian Etiang Omang**

Abstract

The dynamism of law stems from the fact that it must always be proactive and be ready to allow itself passes through a change in order to meet the purpose for which it is enacted. This paper, therefore, gives a cathedral view of the rules governing evidence of official and privileged communications under the Nigeria Evidence Act, 2011 (as amended). The paper discusses the various heads of official and privileged communications under the amended Act, and tries to appraise each of the heads with a view to determining whether they are sufficient for accomplishing the desired objectives which necessitated their enactment. The paper concludes that there are still loopholes in some of the provisions of the amended Act governing this special area of law of evidence in Nigeria. It recommends that the Nigeria's Evidence Act, 2011 should be further amended to meet its set objectives for best International Practices in advocacy, legal education and training.

Keywords: evidence, official communications, privileged communications, public interest, private interest.

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1. Introduction

The basic principle governing admissibility in our Law of Evidence is that a piece of evidence is admissible if it is relevant but it is inadmissible if it is not relevant.[1] However, the fact that admissibility is predicated on relevancy does not mean that all relevant facts are admissible. The court may not admit a relevant fact if, for instance, it is privileged facts or facts which a party is not entitled in Law to prove.[2]

Matters that are privileged under the Act may be grouped into two classes, namely: Official communications and records of state matters on the one hand; and privileged communications between private persons and privileged documents of private persons on the other hand. The two classes respectively correspond with what in English Common Law described as "state privilege" or privilege on ground of public policy and private privilege. For convenience, we shall discuss the various heads of official and privileged communications under the Amended Act under the following heads:

1. State privilege; and
2. Private privilege

State Privilege

The rule in respect of state privilege allows relevant evidence to be excluded if its reception would be contrary to state interest or public interest.[3] In such a situation, it is widely, if not universally recognized that the public interest that harm, shall not be done to the state by disclosure of

[1] See S. 17 of the Evidence Act, 2011 (as amended)
[2] See S. 1(B) of the Act
[3] Afe Babalola, *Law & Practice of Evidence in Nigeria* (Ibadan: Sibon Books Ltd., 2001).p.176

certain relevant evidence is of grave importance that no other interest, public or private, can be allowed to prevail over it[4].

a Judicial Officers' Privilege

According to section 188 of the Act,

> *'no justice, judge, Grand Khadi or president of a customary court of Appeal and, except upon the special order of the High Court of the State, or of the Federal Capital Territory, Abuja or the Federal High Court, no magistrate, or other persons before whom a proceeding is being held, shall be compelled to answer any questions as to his own conduct in court in any of the capacities specified in this section, or as to anything which came to his knowledge in court in such capacity but he may be examined as to other matters which occurred in his presence whilst he was so acting'.*

By virtue of the above provision, any of the judicial officers mentioned in section 188 cannot be compelled to answer any question as to his own conduct in court or as to anything which came to his knowledge in court in his capacity as such judicial officer. However, the fact that a judicial officer cannot be compelled does not mean that he cannot voluntarily submit himself to be questioned and answer accordingly.

The scope of the privilege is limited to anything which came to his knowledge or his conduct in court in his capacity as a judge. In other words, a judge who is in court either as a witness, accused or as a mere observer of a particular proceeding can be compelled to answer any question as to anything which came to his knowledge or as to his own conduct in court in his capacity as a witness, accused or mere observer. While the same principles as to voluntary submission and change of capacity apply to a Magistrate, a magistrate's claim of the privilege is further subject to the special Order of the High Court of a State, or of the

[4] State priviledge is provided for in Sections 188, 189, 190, 191 and 243 of the Evidence Act, 2011.

Federal Capital Territory, Abuja or the Federal High Court. The justification of this limitation, as regards Magistrates, in case of a State High Court, lies in the doctrine of 'Supervisory jurisdiction of the High Court'. Hence, the High Court, in its supervisory jurisdiction, could curtail the privilege provided for Magistrates under the section, whenever there is a real need for it. However, it has been warned[5] that such power of review should be exercised sparingly. Nonetheless, it can be said that generally, the privilege does not extend to any questions as to other matters which occurred in his presence whilst he was so acting.[6]

Apart from mentioning some judicial officers, such as Justices, Judges, Grand Khadis or Presidents of a Customary Court of Appeal and Magistrates, the section also stipulates 'other persons before whom a proceeding is being held'. This is a welcome attempt of the section to broaden the list of judicial officers in Nigeria as section 188 does not present a comprehensive list of judicial officers. A comprehensive list of judicial officers in Nigeria is presented by section 318(1) of the 1999 Constitution and we take the liberty to reproduce that particular section without further explanation of the section:

> *'A reference to a judicial officer is a reference to the holder of any of the following offices: office of Chief Justice of Nigeria or a justice of the Supreme Court, the president or justice of the court of Appeal, the office of the Chief Judge or Judge of the Federal High Court, the office of the Judge of the High Court of the Federal Capital Territory, Abuja, the office of the chief judge of a state and judge of the High Court of a State, a Grand Khadi or Khadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, a president or judge of the customary Court of Appeal or judge of the Customary Court of Appeal of the Federal Capital Territory, Abuja, a Grand Khadi or Khadi of the Sharia Court of Appeal of a State, or president or a Judge of the Customary Court of Appeal of a State'.*

[5] Babalola (n.3) p.166
[6] See last 2 lines of section 188

Except a Judge, Justice, Grand Khadi or President of a Customary Court of Appeal the privilege as to all other judicial officers should be subject to the special order of the Federal or State High Court including the High Court of the Federal Capital Territory Abuja.[7] The purpose of this head of privileges is to protect all judicial officers in the country from being compelled to answer any questions as to their own conducts in court in their capacities as judges or as to anything which come to their knowledge in court in such capacity.

The rule governing the application of the privilege was originally laid down in section 165 of the Evidence Act, 2004 but was highly criticised on the ground that it was discriminatory because of the fact that it did not present a comprehensive list of all judges in the country and as such, it was contrary to its purpose. Hence, the provision was amended in the 2011 Amended Act to cover all judicial officers in the country. It is our view, therefore, that section 188 is now a perfect piece of legislation that warrant no criticism here.

b. Privilege against Disclosure of Source of Information as to the Commission of Offences

Generally, according to Section 189 of the Evidence Act, citizens have a right to report commission of crime to the police especially, where good grounds exist for reporting. In *Fajemirokun v. Commercial Bank Nig. Ltd & Anor*,[8] the Respondents reported to the police that the Appellant Company issued series of dud cheques that bounced were issued (acts which were criminal in nature). Aloma Mukhtar, JSC (as she then was) in her concurring judgment held *inter alia* that, 'as citizens of Nigeria, we have the choice to exercise our legal rights of reporting commission of offence to the police, being custodians of law and order and no one can deprive any citizens of that right more so when there was a good ground for reporting and not as a result of suspicion. Informers are shy whether they are undercover agents of the police or merely citizens stepping forward with information about violations of Law and if their names were subject to be readily revealed, this enormously important aid to law enforcement would be almost cut off. Hence, the above provision is meant

[7] This conclusion is, in our view, appropriate.
[8] (2009) 2-3 SC (pt.1) 26

to preserve the anonymity of informers so as to prevent the source of information from drying up. From the close reading of the provision of section 189, we think it is necessary to examine a couple of points. The first is that section 189 does not forbid voluntary disclosure of source of information leading to the commission of an offence by the police, magistrate or any authorized investigating officer. It merely prohibits the compellation of such disclosure. Although, this conclusion stands correct by the literal interpretation of that section; such an exercise of discretion may defeat the purpose of the section.

Another point is that the section seems to be confined to disclosure of identity and does not extend to the contents of the information. This view is supported by the expression '… source of information' as used in the section. Both in English Language[9] and in Law,[10] the word 'source' is construed to mean a person, (or book, document), or originator, or primary agent consulted for information and does not include contents. In view of the foregoing, one may imagine a situation where revealing the contents will probably reveal the identity of the informer and may ask, 'should the privilege attach in such a circumstance?' The privilege should prevent the revelation of the contents in such a circumstance in order not to defeat its purpose. Conversely, the privilege should not apply if revealing the contents will, in the circumstance, not reveal the identity of the informer.

An interesting point to consider again is whether the privilege, in case of a police officer, extends to the identification of premises used for surveillance operations and to the owners or occupiers of those premises. It is our view that the privilege should be extended to protect such premises and the owners or occupiers of those premises. The reason for this conclusion is in two-fold. First, the word 'source' in section 189 when construed, does not only mean a person who revealed the information but also the place[11] from which such information is got. The same principle applies to a writer of a book or document revealing the identity of the informer. In other words, the privilege is available not only to the person who gives the information orally but also in writing. The important thing is

[9] The New Webster's Dictionary of the English Language, p.949
[10] Bryan, Garner, *Black's Dictionary*, 7th Ed. (Minnesota: West group, 1999) p. 1401
[11] New Webster's Dictionary (n.9)

that such information was given. Second, the owners or occupiers of those premises should be protected from disclosure as they may be seen as those who aided the police officer to arrest the accused and consequently, become object of probable attack. This second reason is based squarely on the public policy which justifies this head of privilege.

The section refers to offences under any 'written Law'. The rationale for this expression is not far- fetched since a person cannot be prosecuted or convicted for an offence which is not known to Law.[12] In *Jacob Amadi v. Federal Republic of Nigeria*,[13] the appellant was accused of being in possession of various drugs, packaging materials, labels and drugs packets which were allegedly meant to aid or abet the sale of fake drugs contrary to the provisions of section 1(a) of Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act. The trial court convicted and sentenced him accordingly. Aggrieved, the appellant appealed against the judgment and the Court of Appeal unanimously allowing the appeal, ruled *inter alia*, that by the provisions of section 36 (7) of the 1999 Constitution, he could not be convicted as he was charged for committing an offence which was not known to Law. This was because printing of or being found with possession of label or packages without more, could not constitute an offence under section 1(a) of the Drug and Unwholesome Processed Foods Act.

The section made mentioned of 'Public Officers, police officer and magistrate'. Section 258 of Evidence Act provides that the term "public officer" shall be construed with reference to Public Service of the Federation or of a State. Suffice it to say that any member of the Public Service of the Federation or of a State appointed for this purpose is a Public Officer. The Act did not, however, define who a Police Officer or a Magistrate is. We assumed the Act took it for granted that their meanings would not cause difficulty. For the purpose of completeness, it should be noted that Section 18(1) of the Interpretation Act[14] defines a 'police officer' as any member of the police force.

[12] See Section S. 36 (7) of the 1999 Constitution
[13] (2010) 5 NWLR (pt 1186) 87
[14] Cap. 192 Laws of the Federation 1990; See the Section for the meaning of a Magistrate

This privilege is to preserve the anonymity of informants so as to prevent the source of information from drying up. It is considered to be in the public interest to protect those who volunteer information or the channel of information as many people could not volunteer information unless they are assured of absolute secrecy.[15] Under Section 189, the only exception to this head of privilege is when the magistrate, police officer or the authorised investigating public officer voluntarily disclose the identity of the informant or place of information. This exception is, in our view, not sufficient in two senses.

The first one is that the Section failed to take into cognisance the effect of non-disclosure of identity of an informer in cases, where for instance, it is needed to establish the innocence of the accused. In such cases, the balance is between the public interest in withholding the identities of informants, so as not to put the informant at risk, or to jeopardise the future flow of information and the public interest in ensuring that justice is done and, in particular, no miscarriage of justice occurs. It is our view that where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion of life, the weight to be attached to the interests of justice should be very great. Thus, if the disputed material or information is such that may reveal the identity of the informant but may prove the defendant's innocence or avoid a miscarriage of justice, the balance should come down resoundingly in favour of disclosing it. But if the defence is manifestly frivolous and doomed to failure the trial judge may conclude, in view of section 189, that disclosure must be sacrificed to the general public interests in the protection of informers.

Second, when the identity has already become known to those who would have cause to resent the information, the privilege ought to cease and disclosure allowed for the interest of justice. Whether disclosure should be necessary under one of the above areas of criticisms should be a question of fact, not discretion. There is nothing to suggest that privilege against the disclosure of the identity of an informer despite its towering importance, is so massive that its protection or enforcement must inevitably and always be more important than other things in all cases.

[15] See chapter two of the Act for Provision

From the foregoing, in subsequent amendment, a magistrate, police officer or any investigating authorized public officer should not be permitted to disclose the source of any information contrary to such officers not being compelled as provided in section 189. However, if the court pleases, any of the aforementioned officers may disclose the identity of the informant; the identity of the informer should be disclosed in cases where it is needed to establish the innocence of the accused, particularly, in criminal cases touching and concerning liberty or conceivably on occasion of life.

c. Evidence as to Affairs of State

In discussing section 190 of the Act which is based on evidentiary privilege, it is well to define at the outset the expression 'records relating to affairs of state' used in the section. In this context, 'records relating to affairs of state' must mean the records of matters the publication of which would be injurious to national defence, security or interest or to good diplomatic relations. Such records must be kept secret if their full military and diplomatic advantage is to be exploited in the national interests. In *Aregbesola v. Oyinlola*, [16] it was held that 'a document marked secret usually concerns affairs of state'.

The point must, however, be made that the emphasis of this evidentiary privilege is on the word 'unpublished'. It has been submitted that where the person against whom the privilege is claimed has been allowed to see the records in question there has been no publication of the records.[17] Thus, document relating to affairs of the state may be regarded as unpublished even when it is given restricted publication. On the contrary, where the records have been published to the gaze of the public or made known to the public, they could no longer be regarded as unpublished.

Under section 190, no person, whether such a person is a public officer or not shall neither be permitted to produce any unpublished official records relating to the affairs of state nor give any evidence derived

[16] (2009) 14 NWLR (pt. 1162) 429 at 445
[17] Babalola (n.3) p. 178.

from such records and this is so even if, such a person has improperly or properly obtained a copy of such document unless the president or the Governor (as the case may be) directs that such unpublished records be produced or the heads of the department, ministry or agency concerned gives his or her permission for the production of such records. To achieve this, the Head of Department (*et al*) concerned could raise objection to the production of such official records subject to the direction of the president or the Governor (as the case may be), in a proceeding where a person tries to produce such records. Presumably, the objection, if taken before trial, shall be by affidavit and if taken at the trial, shall be by the issuance of certificate to that effect.

Although the Head of department (*et al*) has discretion whether to grant or withhold his permission, the discretion of the head of Department could be overruled by the directive of the President or the Governor (as the case may be). The question that may follow is whether the court can overrule the directive of the president by its order? The answer is an emphatic 'yes' in the light of the proviso to section 190. This, no doubt, leaves us with the impression that, underlying this evidentiary privilege is the constitutional doctrine of 'checks and balances' in its loose sense. The discretion of the head of Ministry (*et al*) concerned is subject to any direction of the president in the case of federal Government records and the Governors in the case of state government records and the direction of the president or the Governor (as the case may be) is subject to the order of the court in that regards.

Generally, the determination of what is 'unpublished official records relating to affairs of State' falls within the power of the Court. Hence, section 190 further empowers the Judge to order the Head of the Ministry (*et al*) concerned to produce to him the official record in question or permit evidence from it to be given to him alone in chambers in order to determine not only that the discretion of the head of the ministry (*et al*) concerned has been exercised properly and *bona-fide* but also to inspect such records relating to affairs of state to determine if such records are to be regarded as 'unpublished official records relating to affairs of state'. It is, therefore, our view that the court has a discretion to determine whether or not such records relating to affairs of state are 'unpublished' and which records can be validly regarded as 'records relating to affairs of state'.

However, the purpose of this head of state privilege is to exclude the disclosure of certain documents known as 'unpublished official records' with a view to protecting the country's public interest.

In recognition of the fact that too much judicial inquiry into the claim of this privilege may force disclosure of the thing the privilege was meant to protect and, a complete abandonment of judicial control would lead to intolerable abuses, the legislature in an intelligent and admirable way amended the provision of section 167 (now S.190) to take into consideration these two extremes and deprived neither from prevailing. Owing to this amendment, the court may not automatically require a complete disclosure to the gaze of the judge before accepting the claim of privilege in any case. It may be possible to satisfy the court from all the circumstances of the case that there is a reasonable danger that compulsion of the evidence will expose for example, military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate and the court may not jeopardise the security which the privilege is meant to protect by insisting upon an examination of the evidence even by the judge alone in chambers. On the contrary, judicial control over the evidence in the case cannot be abdicated to the caprice of the executive officers concerned.

Be that as it may, section 190 is not free from criticisms. The Act and the section failed, to define the word 'unpublished' and, to state definitively which records relates to affairs of state. This omission is fundamental because the emphasis of the provision of S.190 is on the expression 'unpublished records relating to affairs of state'. It is, therefore, suggested here that in subsequent amendment, section 190 should state the kinds of records that may be regarded as 'unpublished official records relating to affairs of state' or the law to refer to in determining such records. Unlike section 243 which states the procedure to be followed by the Minister or the Governor when raising objection to the production of documents or giving of oral evidence, section 190 failed to stipulate the procedure to be followed by the officer at the head of the Ministry, Department or Agency concerned to stop a person who seek to produce such records in cases where they are in his possession. This may be included in any future amendment of this section.

d. Official Communications

The ground for exclusion under section 191of the Act is 'public interest' and the Act or section did not define the words 'public interest'. Suffice it to say that the determination of what is public interest falls within the power of the court.[18]

Under State privilege, the holder of the privilege is a 'public officer' as distinguished from 'any person'. Unfortunately, instead of the Act to define public office, the Act, in section 258(1) merely provides that 'public service of the Federation or of a state' has the meaning assigned thereto in the Constitution; public officer shall be construed accordingly. This provision cannot be said to constitute a definition of the words 'public officer' but at least, it gives us an insight as to what it means.

In order to understand section 258 (1) of the amended Evidence Act with regard to the meaning of 'public officer', it should be read together with Sections 18 (1) of the Interpretation Act and 318(1) of the 1999 Constitution (as amended). Under the Interpretation Act, a public officeris defined as a member of the public service of the Federation or of the public service of a State within the meaning of the Constitution. The Constitution defines public service of the Federation and Public service of the State as the service of the Federation or State in any capacity in respect of the Government of the Federation or Government of the State respectively and specifically list these services. Therefore, persons who come within the list under the constitution are all public officers.[19] Once a person becomes a public officer, he becomes entitled to this head of privilege, but the privilege terminate the moment he stops being a public officer.

[18] This is because it is near impossible to proffer any comprehensive definition of "public interest' as it changes with time.
[19] See *Okomu Oil Palm Ltd v. Okpame* (2007) 3 NWLR (pt. 1020)

The communication must have been made to the public officer in 'official confidence'. A communication is made in official confidence if it is not intended to be disclosed to third persons. Moreover, the communication may be verbal or non-verbal. Since the section did not qualify the maker of such communication, the implication is that, from whom the communication proceed from to the public officer is not important. Meaning, an ordinary citizen can discuss anything with a public officer in official confidence and such communication will be privileged if the public officer considers that the public interests would suffer by the disclosure of the substance of such communication unless the court rule otherwise. As stated earlier, the fact that the public officer cannot be compelled does not mean that he cannot, on his own accord or voluntarily disclose the communication in question even if he is of the view that the public interest might suffer by such disclosure.

In spite of the fact that the view of the public officer that public interest will suffer is not sacrosanct, of greater importance is that he held such a view and his view here is subjective. It is subject to the order of the court and such order must only require the public officer to disclose to the judge alone in chambers and not in open court, the substance of the communication in question. The same applies to section 190. If the judge is satisfied that the communication should be received in evidence this shall be done in private in accordance with section 36(4)b of the constitution which provides that 'If in any proceedings before a court or such a tribunal, a minister of the government of the federation or a commissioner of the government of a state satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangement for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter'. But, if the court is not satisfied, it may make such matter public. The purpose of Section 191 is to exclude disclosure of oral communications made to a public officer in official confidence in order to protect the public interest. The section speaks of 'public interest' but failed to define such an ambiguous expression or give us a clue as to its meaning. Also, by section 191 once a person assumes the status of a 'public officer', he become entitled to claim this head of privilege. It is open to doubt whether he ceased to be entitled to claim the privilege for communications made to him as a public officer

after he has ceased from occupying that public officer's possession by virtue of retirement or removal. Besides, the Act and the Section failed to definitively define the terms 'public officer'. An attempt to define these terms in Section 258(1) of the Act is unclear and confusing.

e. Exclusion of Evidence on Grounds of Public Interest

Section 243(1) provides that a Minister, or in respect of matters to which the executive authority of a state extends, the Governor or any person nominated by him may in any proceedings object to the production of documents or request the exclusion of oral evidence when after consideration he is satisfied that the production of such document or the giving of such oral evidence is against public interest.[20] However, (2) any such objection shall, if taken: Before trial, be by affidavit; or at the hearing, be by certificate produced by a public officer.[21] (3) The court shall have a discretion whether or not to uphold any such objection, and may in determining how to exercise its discretion, inspect such documents or be informed as to the nature of the oral evidence to which the objection relates.

The Act did not define the term 'Minister' or 'Governor' presumably, it took it for granted that their meaning will not cause difficulty, but the interpretation Act,[22] in Section 18(1), defined a 'minister', where no particular ministry is specified in the context, to mean the minister of the government of the Federation charged in pursuance of the constitution of the Federal Republic of Nigeria with responsibility for the matter to which the context relates. In other words, the Minister that may object to the production of documents or request the exclusion of oral evidence thereto in section 243(1) is one with respect of matters to which his/her authority extends or in pursuance of the constitution of Nigeria charged with the responsibility of the documents he is raising objection to their production or requesting exclusion of oral evidence thereto.[23]

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[20] See section 318 of the Constitution of the Federal Republic of Nigeria, 1999
[21] Ibid.
[22] Interpretation Act, Chapter 192, Laws of the Federation of Nigeria, 1990.
[23] The same holds true of a Governor of a State

The purpose of the objection is to exclude the production of 'documents' or oral evidence thereto. By Section 258(1) of the Act, document includes. Books, Maps, plans, graphs, drawings, photographs, and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter, any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it, and any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; any device by means of which information is recorded, stored or retrievable including computer output. The foregoing provision is no doubt, a response to modern day's practices as mankind is marching to the computer age.

The procedure to be followed by the Minister or the Governor when raising objection to the production of documents or giving oral evidence under section 243 of the Act has been clearly stated in sub-section (2) of the section and should be followed strictly. By the sub-section if the objection is taken before trial, it shall be by affidavit. In *Josien Holdings Limited v. Lornamead Limited*[24] the Supreme Court defined an 'affidavit' as 'a statement of fact which the maker or deponent swears to be true to the best of his knowledge, information or belief'.[25] Also, the subsection provides that if the objection is taken at the trial, it shall be by issuance of certificate by the Minister (or the Governor) to that effect.[26] If such certificate was not issued by the appropriate minister or Governor, it would be declared invalid. In *Attorney-General*, *Western State v. Dr. Olunloyo,*[27] a *subpoena duces tecum* was served on the secretary to the Military Governor of Western State at the Instance of the plaintiff. In answer to the subpoena, a principal secretary in the office of the Military Governor of Western state was present in Court and he was requested to produce the Executive Council decisions with regards to the Ibadan Polytechnic. He claimed privilege based on a certificate issued by the

[24] (1995) 1 NWLR (pt. 371) 254 at 265
[25] See sections 107-120 of the Evidence Act, 2011 (as amended) for Affidavit
[26] *Johnson v. Sarkis* (1969) 2 All NLR 27
[27] (1975) 5 WSCA 122

commissioner for Education which was tendered by him. The trial judge held that the Commissioner for Education was not the relevant Minister of Government to claim privilege for the documents in custody of the Executive Council. On appeal, the Western State Court of Appeal affirmed the decision and further held that it was only the Federal Executive Council or the Military Governor of a State that could issue such certificate. The claim of state privilege failed.

Therefore, the affidavit or certificate of the Minister must show clearly the identity and the nature of the documents he is objecting to, the grounds of the objection and that the Minister has personally examined the documents in question before reaching the conclusion that they should be withheld in the public interest[28].

Notwithstanding the fact that the Minister or the Governor or person nominated by him has to satisfy the court that production of such documents or the giving of such oral evidence is against public interest, the court, by subsection(3) of section 243 has a discretion to uphold or not to uphold such objection. The subsection states further that in determining how to exercise its discretion, the court may inspect such documents or be informed as the nature of evidence to which the objection relates. Such inspection or reception of evidence as to the nature of the document should be done in private, by the judge alone in chambers. The power of review of the document would enable the court to know whether or not disclosure would be against public interest. The purpose of this section is to protect from disclosure 'documents' or request the exclusion of it oral evidence in order to safeguard the public interests. The short and simple distinction of this section from section 190 is that, the documents protected here is wider in scope than the one classified as 'unpublished official records relating to affairs of state'. Moreover, the use of the word 'document' here extends the privilege to maps, plans, graphs drawing, disc, tape, sound track, film, negative, and so on.[29] However, it is open to doubt whether records in section 190 amount to document for this wide interpretation to be applied and in any case, the Act did not define the term 'record'.

[28] Babalola (n.3) p. 187
[29] See S. 258(1) for definition of document

Section 243 may also be distinguished from Section 191 in that, section 191 relates to communication, verbal or non-verbal while the document in section 243 needs not necessarily be in form of communication. Their aim is the same, namely protection of public interest. Moreover, the views of the officers mentioned in section 243, similar to officers in sections 190 and 191, are that public interest may suffer by disclosure and in the three sections, the Court has a final say as to the disclosure of the privileged matter. In spite of the fact that Sections 190, and 243 are aimed at preventing the disclosure of document or oral evidence thereto, if such disclosure would be injurious to public interest, the peculiar advantage of section 243 over section 190 which provides for the procedure to be followed by the Minister or the Governor when raising objection makes the section stands correct and comprehensive enough to implement its purpose. However, the expression, 'public interest' used in sections 191 and 243 should be construed to mean anything not injurious to the public welfare, or against the public good.

1. **Private Privilege**

Private privilege protects from disclosure matters which affect a person in his private capacity. It directly affects the interest of the individual rather than that of a state or public. There are six sections governing Private Privilege under the Evidence Act. These are as follows:

a. **The Privilege against Self-Incrimination**

By the provision of Section 183, a person cannot refuse to go to the witness box to give evidence merely because he thinks that he might be asked incriminating questions, rather, one must submit to judicial inquiry (including being sworn, if the inquiry is conducted under oath), and may invoke the privilege only after the potentially incriminating question has been put. Moreover, invoking the privilege does not end the inquiry and the witness may be required to invoke it as to any or all of an extended line of questions. The Judge or Magistrate may tell a witness that he need not answer the question or more usually his counsel on his behalf, craves the indulgence of the court not to answer the question on the ground that it will incriminate him. The trial judge has an unquestionable duty to accommodate carefully both the witness interest in avoiding compelled

self-incrimination and the defendant's interest in having all relevant evidence.

Determining whether a specifically demanded response would be incriminating and thus within the protection of the privilege is the obligation of the court by section 183. It follows that once-self incriminating answers are given voluntarily, the privilege provides no protection against the use of such answers as they constitute free and voluntary waiver of the privilege. In fact, the privilege is a privilege to be free from legal coercion imposed to compel an incriminating response to questions which may be put to the individual.[30]

By the section, the answer must not only, in the opinion of the court, have a tendency to expose the witness to any criminal charge, penalty or forfeiture, the judge must also regard such answer as reasonably likely to be preferred or sued for that is, to be the basis of a subsequent suit. The Judge will regard incriminating answers as 'not' reasonably likely to be sued for if no conviction is possible because of prior conviction or acquittal, passage of the period of limitations or executive pardon. The same holds true if the one from whom testimony is sought is effectively granted legal immunity from any action arising from his testimony which is within the protection of the privilege. In case of conviction, where appeal as of right is pending or is still available, the privilege still exists. In such situations, the mere fact of conviction does not remove the danger of incrimination. In fact, as the object of this privilege is protection from exposure to certain liabilities, it follows that where the particular liability ceases, the privilege related to it also cease.

Whether or not a witness in either State or Federal court may claim danger of incrimination under the Laws of a foreign country; or a witness in a state court may claim danger of incrimination under the laws of another state; or a witness in a state court may claim danger of incrimination under the Federal Laws, or a witness in a federal court may claim danger of incrimination under state laws, depends on what the judge regards as reasonably likely to be preferred or sued for. If the privilege of a witness has been violated, the only available remedy appears to be the

[30] Using a witness' incriminating answers to convict him may violate the sense that government should be required to prove guilt without the assistance of the defendant.

exclusion of the testimony elicited and any other evidence derived from it when and if that evidence is offered in subsequent charge or, charge for penalty or forfeiture and not to have any resulting indictment dismissed.

However, section 183 did not state the means by which the incriminating answers or questions may be given or asked. It is noteworthy that answers must not only be testimonial before it may incriminate a person. Written answers may also incriminate a person and this is also true of answers by gestures. Thus, according to section 176(1), 'a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court'. By analogy, a dumb witness cannot be questioned orally and as such, he is not expected to answer orally: The privilege therefore, extends to his written or sign answers. The privilege is the right of a person in any legal proceedings to refuse to answer any question if to do so would, in the opinion of the Court, tend to expose that person, or his spouse to proceedings for any criminal charge, forfeiture or penalty.

In *Nwaigwe v. F.R.N*,[31] the following was said about forfeitures:

> "Forfeiture is a divesture of specific property without compensation. It imposes a loss by the taking away of some pre-existing valid right without compensation. A deprivation or destruction of a right in consequence of the non-performance of some obligation or condition. Loss of some right or property as a penalty for some illegal act. Loss of property or money because of breach of a legal obligation. Forfeiture is punitive". In this section, penalty is apparently restricted to fine or imprisonment.

A witness may not claim the privilege for the benefit of any other person save his 'spouse' that is, wife or husband. Section 258(1) of the Act defines wife and husband to mean respectively the wife and husband of a marriage validly contracted under the Marriage Act, or under Islamic Law or a Customary Law applicable in Nigeria, and includes any marriage

[31] (2009) 16 NWLR (pt. 1166) 169 at 177

recognised as valid under the Marriage Act. Presumably, the rationale, for this, lies in the fact that incriminating one spouse invariably means incriminating the other as they are regarded as one.

However, since the privilege is against self-incrimination, office holders, employees or agents of a company can claim the privilege themselves, but cannot refuse to answer questions which would tend to incriminate the company or render it liable to a penalty or forfeiture. Equally, the company cannot refuse to answer questions which would tend to incriminate the office holders.[32]In cases where section 183 has expressly removed the privilege, the Courts lack the power to impose the privilege of their own. The application of the privilege is excluded by section 183 in certain well-defined situations. The general rule that the privilege may be claimed when self-incrimination is threatened is inapplicable in cases where paragraphs A-C of section 183 apply. In paragraph A, the privilege does not apply to an accused who is called as a witness on his own behalf under section 180. He may be asked and he is bound to answer any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged. Paragraph B is self-explanatory. The rationale for paragraph B is, presumably, that in civil litigation, the parties are on equal footing. Consequently, there is no need to protect the party from oppression by the state exercising its awesome powers of incrimination.

Paragraph C and consequently, the third exception is that a witness shall not be excused from answering any questions required to be answered under the provisions of Section 458 of the Criminal Procedure Act at any inquiry directed by the Attorney – General of the Federation or of a State. Under the said section 458, any confession or answer by such witness to a question put at such inquiry shall not be admissible in evidence against him in any proceeding except in a criminal proceeding for perjury committed at or after the holding of such inquiry. The privilege rests upon the need to avoid depreciating and intrusive pressures to engage in conduct inconsistent with one's dignity as a human being. Thus, the privilege as stated earlier, is a privilege to be free from legal coercion imposed to compel an incriminating answer to questions which may be put

[32] Lord Diplock in Rio Tinto Zinz Corp v. Westinghouse Electric Corp (1978) AC. 547, (1978), All ER.434

to the individual. By section 183, once it is in the opinion of the court that an answer have a tendency to expose the witness to any criminal charge or penalty or forfeiture which is reasonably likely to be preferred or sued for and the answer is not one that falls within the scope of any of the exceptions stipulated in paragraphs A-C of Section 183, the Court will allow a claim of privilege against self-incrimination irrespective of other factors.

Therefore, if as a result of a person availing himself of this privilege, certain non-incriminating consequences which are relevant to the other party for the just determination of his case results alongside incriminating answers, the short and simple conclusion would be that the privilege holder may successfully claim the privilege. It is however, our humble view that if in the opinion of the court, the answer have a tendency to expose the witness to any criminal charge, penalty or forfeiture reasonably likely to be sued for and at the same time, the answer discloses other relevant facts to the just determination of the case, then, the witness should answer for the sake of the towering importance of justice and should be protected from subsequent suits predicated on his answer. Whether the privilege protects a witness from prosecution, penalty or forfeiture under a foreign law is subject to the view of the judge as to whether the judge regards the witness' answers to be reasonably likely to be the source of subsequent suit against the witness.

A corporation is not protected against self-incrimination even though it is now clear that corporation and sometimes, even unincorporated entities can be criminally liable by virtue of acts performed by an agent of the organization. This conclusion is predicated upon the perceived personal nature of the privilege and the inability of any person, even an officer or agent of the corporation, to invoke any such privilege the organization may have. But more substantively, a corporation, as a creature of the state of country has only those rights and privileges conferred by Law. The rights of a corporation, virtually by definition do not include the right to avoid compulsory self-incrimination.[33] Consequently, if answers would incriminate the corporation but not its agent or officer, it

[33] Cleary Edward W, (ed.), *McCormick on Evidence*, 3rd ed. (Minnesota: West Publishing Co., 1984) p. 176

will not be privileged. It is only when it may incriminate the individual in question that it may be regarded as privileged.

The privilege *stricto sensu* covers only answers to incriminating questions and does not extend to request for the production of incriminating items. This omission in S.183 is fatal to the purpose for which this head of privilege was created. This is because; by producing certain items the witness communicates at least the following information:

i. The items produced, exist;

ii. The items were within the possession or control of the witness; and,

iii. The witness believes or has some reason to believe that the items produced were stolen.

This information may be incriminating in any of several ways. It may be admissible evidence concerning an element of an offence; if the item produced is contraband, for e.g., the witness production of it may constitute an acknowledgement of illegal possession: or, the information may be of value in an ongoing investigation into possible criminal activity. From the foregoing, we are therefore of the view that restricting incrimination under section 183 to only answers to incriminating question is not appropriate much less sufficient mechanism of formulating legal rule for accomplishing the desired objectives which necessitated the creation of this head of privilege.

b. Production of Title Deeds or Other Documents of Witness Not a Party

In section 184, any witness who is not a party to a suit shall not be compelled to produce his title-deeds to any property or any document[34] by virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to incriminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims. A title

[34] On documents, see Sections 258 of the Evidence Act, 2011

deed is a legal document (instrument) executed and acknowledged under the seal and in the presence of a notary, evidencing the right of ownership to a property described therein. By virtue of the section, the title deed may relates to 'any' kind of property. Generally, property consists of any external thing over which the rights of possession, use, and enjoyment are exercised.[35]

This privilege also stipulate that a witness not a party to a suit shall not be compelled to produce any document by virtue of which he holds any property as pledgee or mortgagee. A pledgee or mortgagee holds property in pledge and mortgage, respectively and the chief distinction between a mortgage and a pledge is that, by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition; while, by a pledge the pledgor retains the general title in himself and parts with the possession for a special purpose. Leonard Jones put it this way, 'by a mortgage, the title is transferred, by a pledge, the possession'.[36] For purposes of completeness, the point must be made that whereas a mortgage is a conveyance of title to property that is given as security for the payment of a debt or the performance according to the stipulated terms, a pledge is a bailment or other deposit of personal property to a creditor as security, for a debt or obligation.

The privilege also extends to document, the production of which might tend to incriminate him. Incrimination in section 184 differs extensively from incrimination under section 183 of the Act. While in section 183, the scope of incrimination is confined to responses in form of answers to any incriminating question, section 184 merely prohibits compelled production of incriminating documents. Further, the incrimination in section 183 which the privilege expressly protects is defined to include criminal charge; penalty or forfeiture, the provision of section 184 only used the word incrimination. Suffice it to say here that incrimination is used here in its ordinary sense to mean exposition to an accusation or a charge of crime.

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[35]Black's Law Dictionary (n.10)

[36] Leonard Jones, *A Treatise on the Law of Mortgage* (Boston; Houghton Osgood and Company, 1878) pp. 5-6

Similar to section 183, section 184 speaks of compulsion. It does not preclude a witness not a party to a suit from voluntarily producing his title deeds to any property or any document by virtue of which he holds property as pledgee or mortgage or any document the production of which might tend to incriminate him. If he voluntarily produces any of such documents, such production will constitute an implied waiver as a waiver needs not only be by express agreement. Section 184 further provides that such a witness may waive the privilege by agreeing in writing to produce such deeds with the person seeking the production of the deeds or the person through whom he claims. This will constitute express waiver of the witness right to claim this head of privilege. The implication here is that a witness under this section may either waive his privilege expressly or impliedly. However, in the light of modern life, we find it difficult to justify the idea that the agreement must only be in writing such a requirement is not necessary. Thus, it is our view that the agreement needs not be in writing

It is our view that the court should exercise discretion to determine whether or not to uphold the objection to produce a document under this section for danger of incrimination and in exercising this discretion, inspect such documents or be informed as to the nature and contents of the document in question.

c. Production of Privileged Documents by another Person

Here, section 185 is a restatement of elementary rule of private privilege that even where a witness is competent and compellable, he may, by virtue of his legal right be able to claim privilege from, *inter alia*, tendering certain documents or by virtue of the legal right of another, refused to tender such privileged document unless that last mentioned person consents to their production. When privilege relates to a document, this will extend to secondary evidence of the document.[37] This rule does not, however, prevent the other party from tendering the privileged document or, giving secondary evidence of it, except where the document relates to affairs of state.[38]

[37] Akinola Aguda, *The Law of Evidence*, 4th ed. (Ibadan: Spectrum Books Ltd, 1999) p.315
[38] Ibid, p. 315

Similarly to sections 183 and 184 is section 185 which speaks of compulsion when it says 'no one shall be compelled'. The implication is that the section does not preclude voluntary production of privileged documents even where the privileged holder has not consented. Unlike section 183 which such requirement may be justified on the ground that the criminal process requires the defendants to make choices in section 184. It may be justified partly on the afore-mentioned reason and partly on the ground that in civil litigation, the parties are on equal footing; such requirement in section 185 is unfortunate as it is subversive to the general rule governing private privilege which states that where the privilege is that of another person whom he is representing, he will not be 'allowed to give evidence or tender the document in question unless the person whose privilege it is waives the privilege'.

Hence, McCormick[39] is of the view that since private privilege directly affect the interest of the individual, such interest will not be deemed to have been sufficiently protected if his representative is allowed to divulge such privileged matter as he wishes'. Moreover, it has been submitted that the court has no power to order the production of privileged documents in the absence of agreement between the parties, or a waiver of privilege, which would be implied by the party giving his consent to their production.[40] This rule does not, however, prevent the opposite party who has obtained the privileged document or secondary evidence of it from tendering it.[41] In *Rumpling V. D. P.P.*[42] a husband who was charged with murder wrote a letter to his wife in which he confessed the crime to her. The letter however happened to be, intercepted and got to the hands of the prosecution and consequently tendered in evidence. The House of Lords held that the letter could be received in evidence as part of the prosecution's case though the letter was privileged as communications between spouse. This rule also applies to incriminating document in section 184.

The opening wording of the provision of section 185 of the Act which shows that though a person may not be compelled to produce

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[39] McCormick (n.33) p. 193
[40] Babalola,(n.3) p. 172. See also *Causton v. Mann Egerton Johnson Ltd*. (1974) 1 All E.R
[41] *Calcraft v. Guest* (1989) 19.B. 759
[42] (1962) 3 All E.R. 256

privileged documents in his possession, he or she may voluntarily produce such documents if he or she so desires is dangerous. The danger with such wording is that such a person may voluntarily produce such privileged documents in his possession even if the required consent for production under section 185 has not been obtained. And, if he produced the document without the requisite consent, the interest of the person which the privileged is meant to protect will be radically jeopardize and the disclosing party will not be liable in Law since the provision of the section allows him the choice of voluntarily producing the privileged document.[43]

In the light of the foregoing, it is the opinion of the authors of this paper that, since it is the interest of the holder of the privilege that the privilege protect, the power to waive it should only be that of the holder of the privilege and as such, the person in possession of the privileged documents should not be permitted to produce such documents without the relevant consent of the privileged holder.[44] This conclusion is strengthening by the reasoning that if the person in possession of the privileged document fraudulently obtained possession of such documents, he should not be permitted to disclose same. Whether a document under section 185 is one which a person would be entitled to refuse to produce on the ground that it is privileged should fall within the determination of the court and the Law.

d. The Privilege for Marital Communications

This Privilege is provided for in section 187 of the Evidence Act, 2011.The words 'husband' and 'wife' have been defined in section 258(1) of the Act to mean respectively the wife and husband of a marriage validly contracted under the marriage Act, or under Islamic Law or a Customary Law applicable in Nigeria, and includes any marriage recognized as valid under the Marriage Act. While marriage under the Act[45] otherwise known as statutory marriage[46] is monogamous in nature, customary or Islamic law marriage is polygamous. In *Usman v. Usman*,[47] Islamic Law was held as

[43] The section is in our view not properly formulated
[44] The word 'permitted' should replace the word 'compulsion' in this section
[45] Popularly referred to by Laymen as either court marriage or church marriage
[46] Se S. 35 and 1191) D of the Marriage Act and 3(1)d of the Matrimonial Causes Act
[47] (2003) 11 NWLR (pt. 1230) 109 at 120

a reasonable and rational Law and in *Ajagungbade III v. Ogunsesan,*[48] Obaseki, JSC(as he then was), described customary law as the organic or living law of an indigenous people of Nigeria regulating their lives and transactions. While it is convenient to speak of customary Law and Islamic Law, this usage should not mislead us to think that Islamic Law is not Customary Law.[49] It is also Customary Law. But their point of difference is that whereas Islamic Law is religiously orientated and there is an appreciable level of homogeneity in the applicable Islamic Law because of the deliberate acceptance of a Maliki Law school as the predominant rite, Customary Law is the body of customs[50] and traditions and since there are many independent traditional communities in Nigeria, there are many customary laws.

By virtue of Section 187, 'Communications' between husband and wife of a monogamous or polygamous marriage made during the marriage are privileged. The word 'communication' in the section should be construed in its broad sense to include both verbal and non-verbal communication in order not to render this head of privilege absurd. It is only when this is done that the privilege will cover all forms of expressions (oral, written, sign language or expressive acts) intended by one spouse to convey a meaning or message to the other.[51] Moreover, the protection of the privilege should shield against indirect disclosure of the communication as where, a husband is asked for his wife's whereabouts which he learned only from her secret communication. The United States case of *Blau v. United States*[52] affords an illustration here, though the case has no binding force in Nigeria. In that case, witness' wife was hiding out to avoid service of subpoena in connection with communist investigation. It was held that since witness got his knowledge of his wife's whereabouts

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[48] (1990) 3. NWLR 182

[49] S. 2 of the Old Native Courts Law of the Northern Region No. 6 of 1956 used the Expression with reference to Moslem Law, 'Native Law and Custom (Customary Law)'

[50] See SS. 16 and 17 of the Evidence Act for Customs that are admissible

[51] In State v. Smith, 3884 A 3d 684 (Me. 1978), a husband display of items to wife was, under circumstances, said by court to be equivalent to assertion, "I have stolen a gun and a camera". However, in the United State of America Case of Chamberlin v. Chamberlin, 230 S. W. 2d 184 (M.O.App. 1950) a wife's testimony that her husband made "unnatural sexual demand" of her was held not privileged because such demands were not shown to have been made verbally

[52] See Oxford Advanced Learner's Dictionary, 7th Edition. See also Black's Law Dictionary (n.10)

from what she 'secretly told' him, he could refuse to disclose .The Act speaks of 'any communication between the spouses'. Two points are to be examined here.

First, if a third person (other than a child of the family) is present to the knowledge of the communicating spouse, this stretches the web of confidence beyond the marital pair, and the communication is unprivileged. If children of the family are present, this should likewise deprive the conversation of protection unless the children or the third person are too young to understand what is said. In that case, it should be assumed that the communication is between the marital pair since the third parties lack understanding. 'Such communication is privileged even if made in the presence of another person provided that person lacks the requisite mental capacity to understand the conversation'. This conclusion should also apply m*utatis mutandis* in the case of marriage under the Act, as well as customary or Islamic marriage.

Second, the subject matter of the communication is not important provided the communication was between the spouses to the exclusion of third parties. However, the fact that the pre-statutory descriptions of the privilege had clearly based it upon the policy of protecting confidences should include into it the requirement of confidentiality. Communications in private between husband and wife are assumed to be confidential, though of course assumption will be strengthen if confidentiality is expressly affirmed, or if the subject is such that the communicating spouse would be embarrassed or for some other reason. However, a variety of factors, including subject matter of the communication or the circumstances under which it was made or both may serve to rebut a claim that confidentiality was intended. For purpose of completeness, it must be noted that the privilege is created to encourage marital confidences and as such, it should not only be limited to them but should also extend to only confidences.

From the wordings of section 187, only communications made 'during' the marriage are privileged. In other words, communications between husband and wife before they were married, for instance, agreement establishing the marriage are not privilege. Moreover, it appears that the privilege attaching to communications made during the

marriage survives the marriage. Thus, even after the dissolution of the marriage, the parties thereto, can neither be compelled nor any of them be permitted to disclose communications between them during the subsistence of the marriage. In fact, the section used the words 'is' or 'has been' married. While 'is' is used to show a state of being, 'has been' implies 'no longer'.[53] So long as the marriage subsists, the privilege applies, whether or not the spouse making the communication is actively hostile to the other. This is because of the difficulty involved in determining when hostility between the spouses has become implacable.

The privilege does not protect against the testimony of third persons who have overheard (either accidentally or by eavesdropping) in oral communication between husband and wife or who have secured possession or learned the contents of a letter from one spouse to another by interception or through loss or misdelivery by the custodian in the case of a written communication.[54]

This view is supported by the fact that section 187 is phrased in term of incompetency of the spouses to testify to the communication, and should not be extended to disqualify third persons. The opening statement of the section states: 'No husband or wife', it did not say 'nobody'. However, it is our humble view that the privilege should not be lost if the eavesdropping, or the mis-delivery or disclosure of the letter be due to the betrayal or connivance of the spouse to whom the message is directed. Just as that spouse would not be permitted, against the will of the communicating spouse, to betray the confidence by testifying in court to the message, so he or she should not be allowed to effectively destroy the privilege by out-of-court betrayal.[55] Thus, unlike sections 183 and 184 which speak only of compulsion, section 185 speaks of compulsion and permission.

Be that as it may, since the privilege has as its only effect the suppression of relevant evidence, its scope should be confined as narrowly as is consistent with reasonable protection of marital communications. Thus, the communicating spouse should take ordinary precautions against

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[53] See Oxford Advanced Learners Dictionary; See also Black's Law Dictionary (n.10)
[54] *Rumpling v. D. P.P.* (n.42)
[55] The section speaks of compulsion and permission

overhearing or interception otherwise; he should bear the risk of a failure to take such precautions.

Under the section, if the spouse to whom the letter is addressed dies and, the letter is found among the effects of the deceased, the personal representative can render it in evidence; because, legally, he or she is not a spouse to the communicating spouse and equitably there is no connivance or betrayal by the deceased spouse and it is not a disclosure against which the sender could effectively guard against. Only the holder of the privilege or his representative in interest can consent to their disclosure and the provisions of the section points to the communicating spouse as the holder.[56] However, if the other spouse not the communicating spouse adopts the communication and act upon it, he/she should be allowed to object to their disclosure. Similarly, if a conversation between them is offered to show the collective expression of both of them, either of them should claim the privilege as to the entire conversation.

A failure by the holder to assert the privilege by objection, or a voluntary revelation by the holder of the communication, is a waiver. In other words, by the provision of section 187, though a spouse may not be compelled or permitted to disclose the communication in question, the spouse may voluntarily divulge the communication in question provided he/she is the communicating spouse. In case of objection, the judge is not to permit disclosure in view of section 187. The privilege against marital communications admits exceptions and the exceptions to which it is subject to are derived from the express provision of section 187. The privilege will not be allowed in proceedings in which one married person is prosecuted for an offence specified in section 182(1) of the Evidence Act apart from the exceptions of overhearing or interception by a third party, voluntary disclosure by the communicating spouse and disclosure as a result of the communicating spouse's consent. By virtue of section 182(1), a married person may be charged with an offence under sections 217, 218, 219, 221, 222, 223, 224, 225, 226, 231, 300, 301, 340, 341, 357 to 362, 369, 370, or 371 of the Criminal Code.[57] These include: indecent practices between males, defilement of girls under thirteen years or sixteen years of age, defilement of girls under sixteen years but above thirteen years and of

[56] See lines 5 and 6 of S. 187
[57] Cap C 38 Laws of the Federation, 2004

idiots, indecent treatment of girls under sixteen years, causing or encouraging the seduction or prostitution of a girl under sixteen years, among others. However, if a married person is charged with an offence under any of the above sections, the privilege will not apply.

The justification, presumably, for the exception in suits between the spouses is that, while husband and wife would desire that their confidence be shielded from the outside world, they would ordinarily anticipate that if a controversy between them should arise in which their mutual conversations would shed light on the merits, the interests of both would be served by full disclosure. Nonetheless,one of the auxiliary reasons which had been historically given to justify this privilege was that of preserving marital confidences.[58]

Nonetheless, we feel that the provision of section 187 is at some points too broad. The over-breadth of the section is reflected in the use of the words 'any communication' and the necessity of excepting from its operation like communications relating to obviously non-intimate subjects such as business and property or facts are intended later to become publicly known. Examples are: statements about business agreements between the spouses or about business matters transacted by one spouse as agent for the other, or about property or conveyances.[59] Therefore, to cloak them with privilege merely because they amount to communication, when the transactions come into litigation would be productive of special inconvenience and injustice. Again, a particularly anomalous feature of the present privilege, if protection of marital privacy is to be accepted as its justification, is its extension to testimony sought after the termination of the marriage by death or divorce.[60]

e. Legal Professional Privilege[61]

This head of privilege is governed by four separate sections namely: 192, 193, 194 and 195 of the Evidence act, 2011. Section 192(1) suggests that the privilege operates in two-ways. First, it operates to

[58] McCormick (n.33) 188
[59] Ibid., p. 188
[60] We said the privilege survived the termination of the marriage
[61] The privilege is that of the client

protect communications or contents or conditions of the client or his agent to the legal practitioner or his clerk. Second, it is the advice given by the legal practitioner to the client or conditions of documents of the client.

The word 'Communication' in section 192 consists of both verbal and non-verbal communications. Thus, the privilege also applies to written communications. A professional communication in writing, as a letter from a client to his legal practitioner, for example, will of course be privileged. These written privileged communications are steadily to be distinguished from pre-existing documents or writings, such as deeds, wills, and warehouse receipts, not in themselves consisting communications between a client and his legal practitioner. This pre-existing document is what Section 192 had in contemplation when it precludes the legal practitioner from stating their contents or conditions. The client may make communications about such pre-existing document by words or by acts, such as sending the document to the lawyer for perusal or handling it to him and calling his attention to its terms.

The client's communication to the legal practitioner may and usually take the form of instructions. Consequently the legal practitioner is under an obligation not to disclose the instructions he has received except with the express or implied consent of his client or former client. *In Queen v. Eguabor*[62]*,* the accused was tried for murder. During the trial a statement allegedly made by him was tendered in evidence and read in court. The counsel to the accused, who did not object to the statement being admitted, said that his original instructions were that the accused went to tap palm-wine on the day in question and the statement was thereafter admitted. On appeal, it was held that the counsel's statement as to the original instructions he had received was one which he ought not to have made and that the conduct of the counsel had occasioned a miscarriage of justice.

Although not stated in the section, it appears that communications in the course of preliminary discussion with a view to employing the lawyer are privileged even if the employment is in the upshot not accepted. In *Akintoye v. Omole,*[63] it was held, by Ogundare, JSC. (as he then was) that the communication to the managing clerk was privileged. However, where

[62] (1962) 1 All NLR 289
[63] Suit No. HAD/10/75 of 6th June, 1978

one consults a lawyer as a friend or not in his capacity as a lawyer, the consultation is not professional nor the communication privileged. The communication must be made by or on behalf of the client. Thus, the rule does not bar divulgence by the legal practitioner of information communicated to him or his agents by third persons, even if it concerns the client. But information so obtained becomes privileged if it is being related by the legal practitioner to the client in form of advice. The privilege is that of the client's and his alone.

In *Oshunrinde v. Akande,*[64] Ogwuegbu, JSC commenting on a similar provision, S.170 (now S.192) said that 'this provision of the Law is enacted for the protection of the client and not of counsel. Consequently, since the privilege is that of the client, he may assert the privilege even though he is not a party to the cause wherein the privileged testimony is sought to be elicited. If he is present at the hearing whether as a party, witness or by-stander, he must assert the privilege personally or by his legal practitioner or it will be waived. Moreover, the client being the holder of the privilege has the sole power to waive it. His lawyer or agent acting with his consent may exercise this power of waiver on his behalf by section 192(1).

Waiver includes, as McCormick[65] points out, not merely words expressing an intention to relinquish his known right, but conduct such as a partial disclosure, which would make it unfair for the client to insist on the privilege thereafter. The mere voluntary taking of stand by the client as a witness in a suit to which he is a party and testifying to facts in the case which were the subject of consultation with his counsel is no waiver of the privilege for secrecy of the communications to his counsel. It is the communication which is privileged not the facts. Thus, section 194 provides that 'if any party to a suit or proceeding gives evidence in such suit or proceeding whether at his own instance or otherwise, he shall not be deemed to have by this reason consented to such disclosure as is mentioned in s.192 and if any party to a suit or proceedings calls any such legal practitioner as a witness, he shall be deemed to have consented to such disclosure only if he questions such legal practitioner on matters

[64] (1996) 6 NWLR (pt. 455) 383 at 392
[65] McCormick (n.33) 248

which, but for such question, he would not be at liberty to disclose'.[66] The privilege or obligation provided in S.192 continues after the employment has ceased.[67]

The privilege in section 192(1) is not applicable to communication, verbal or non-verbal, made in furtherance of any illegal purpose.[68] Here, the court may look at the substance of the communications, if necessary to determine whether they came into existence to further an illegal purpose.[69] Further, the privilege will not apply to fact observed by any legal practitioner in the course of his employment as a legal practitioner, showing that any crime or fraud has been committed since the commencement of his employment.[70] It is immaterial whether the attention of such legal practitioner was or was not directed to such 'fact' by or on behalf of his client. According to section 258(1) a fact includes anything, state of things, or relation of things capable of being perceived by the senses.

The justification of the exceptions in section 192(1) (a) and (b) is that, since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme. Advice given for those purposes would not be a professional service but participation in conspiracy that is, agreement to commit the illegal act; and by virtue of section 7(d) of the Criminal Code, such a legal practitioner is a party to the illegal act if committed and may be charged as such. The word 'client' in section 192 means a person, natural or artificial, who consults a lawyer with a view to obtaining professional legal services from him and a legal practitioner, is a person authorized to engage in the practice of Law in any state or the country authorizing him to practice law. In other words, an alien legal practitioner will not come under this section. A communication by a client made to his legal practitioner in the course and for the purpose of his employment is

[66] See *Nea Karteria Marine Co. v. Atlantic & Great Lakes Steamship Corp. & Anor*. (1981) Com LR. 138 or Babalola (n.3) p. 170
[67] Evidence Act, 2011; section 192(3)
[68] Ibid section192(1) (a)
[69] Ibid, section 192(1) (b)
[70] Ibid, section 192(2)

privilege whether or not litigation was contemplated at the time. The provision of section 192 applies to interprets and the clerks of legal practitioner.[71]

Section 195 provides that 'no one shall be compelled to disclose to the court any confidential communication which has taken place between him and a legal practitioner consulted by him, unless he offers himself as witness in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known, in order to explain any evidence which he has given, but no others'.

It is important to contrast this section with section 192(1) to enhance our understanding of the provision of section 195. While section 192(1) speaks of permission, section 195 speaks only of compulsion. This is because the privilege is that of the client and as such, it is important not to permit the legal practitioner to disclose the substance of such communication without the holder consent. On the contrary, the client as the holder of the privilege is given the discretion to disclose or not to disclose but cannot be compelled to disclose. The choice of words here is preferable to the ones used in sections 185 and 184 where a non-holder of the privilege is given the same discretion to disclose the privilege matter but not to be compelled.

However, in S.192(1), the communication proceeds from the client to the legal practitioner and that is why we said that the communication may and usually take the form of instructions, here, the communications takes place between the client and the legal practitioner. S.195 only provides that the client must consult the lawyer but did not say the communication must be made in the course and for the purpose of the employment as legal practitioner. The implication is that, while there must be employment in S.192(1), in Section 195, a mere consultation of a legal practitioner as such is sufficient even though not employed.

However, the issue of waiver in section 195 only arises after the individual offers himself as a witness. In *Dawaki Gen. Ent. Ltd. v Amafco Ent.*

[71] Ibid, section 193

Ltd.[72] At the conclusion of the trial, the trial court gave judgment for the respondent. The appellant aggrieved by the decision of the trial court, appealed to the Court of Appeal where he contended *inter alia*, that the evidence of P.W.I., a counsel contradicts the provisions of section 173 of the evidence Act (now section 195 of the Evidence Act, 2011). The Court of Appeal in deciding the appeal therefore considered the provisions of sections 170 to 173 of the Evidence Act (now sections 192 to 195 of the Evidence Act, 2011). Muhammed, JCA (as he then was) held that 'the general rule governing the fiduciary relationship of a legal practitioner and his client as stipulated by sections 170 to 173 of the Evidence Act (now sections 192 to 195 of the same Act, 2011 as amended), is that no disclosure of any communication made to the legal practitioner in the course and for the purposes of his employment as a legal practitioner by or on behalf of his client is allowed. This kind of communication is the one regarded as privileged communications, meaning those statements made by certain persons, for instance, attorney-clients, husband-wife, within a protected relationship.

Finally, it should be noted that the basis for the legal professional privilege as stated by Holden, J. in *Horn v. Richard*[73] is to enable every client to feel safe when making disclosures to his solicitor or counsel. The purpose of this privilege is to guard against half-truths of the reticent client. Thus, the privilege encourages full disclosure by the client for the furtherance of administration of justice.[74] Thus, the non-use of the above expression in sections 192 and 195 is a deliberate attempt to limit the scope of the privilege for the interest of justice which takes primacy over other interests. This is in recognition of the inhibitive nature of privilege itself.[75] Moreover, the use of the expression in that paragraph is, presumably, to enable the Government prosecute crimes for the interest of the society which outweighs that of the individual. In our view therefore, such provision finds justification in modern day practices.

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[72] (1999) 3 NWLR (pt. 594) 225 CA

[73] (1963) NNLR 67 at 68; (1963) All NLR 40 at 41

[74] Ibid.

[75] Rules of privilege are not designed or intended to facilitative the fact finding process of safeguard integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out light. (See Lynch, J. in *State v. Acres of Land in New Castle Country*, 193A. 2D 799 (Del super: 1963).

From the foregoing, it is certain that communications prior to the establishment of legal practitioner and client relationship are not privileged. This, in our view is preposterous, as a lawyer may opt to hear a client's story before accepting the employment.[76] Communications in the course of preliminary discussion with a view to employing the legal practitioner should be privileged though the employment may not be accepted in the upshot.

f. Statements in Documents Marked 'Without Prejudice'

According to Section 196 of the Act, a statement in any document[77] marked 'without prejudice' made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceeding in proof of the matters. The privilege under this heading, from the wording of S.196 arises only in civil cases. The word 'without prejudice' means without prejudice to the maker of the statement. In *A. C. B. Plc. v. Evolocha*[78], per Fabiyi, JSC in interpreting the phrase 'without prejudice' and its effect in a contract held that where an offer is marked 'without prejudice', it is meant as a declaration that no rights or privileges of a party concerned are to be considered as thereby waived or lost; and such a document has no place in legal proof of an assertion. Generally, it is inadmissible in evidence and not worthy of consideration even if put in through the back door'.

Therefore, negotiations by parties and letters sent to each other labelled 'without prejudice' are privileged, inadmissible as evidence and should not be considered by the judge in deciding the factual issues. In *Haruna Bakokolo v. F.B.N. Plc.*[79] the Court of Appeal held that statement in a letter marked without prejudice or evidence of facts emanating from offers of compromise or attempt at or negotiation for out of court settlement of disputes are not admissible in evidence. Also, in *Fawehinmi v. N. B. A.*[80] , it was held that 'offers of compromise' made expressly or

[76] See *Queen v.Equabor* (1962) 1 All NLR 289.
[77] See S. 258(1) for definition of document
[78] (2001) FWLR. (pt. 60). 1611 at 1614
[79] (2003) 3 NWLR. (pt. 806) 216 at 222; see also *Akanbi v. Alatede* (2000) I NWLR (pt. 639) 123 at 236
[80] (1989) 2 NWLR (pt 105) 448 SC.

impliedly 'without prejudice' cannot be given in evidence against a party as admissions, for the law has its policy, the protection of negotiations bona fide entered into for the settlement of disputes. The words 'without prejudice' protect subsequent and even previous letters on the same correspondence; and all admissions made during a *bona fide* attempt to settle a dispute would be excluded even when not expressly made without prejudice as the law regards it to be unfair that advantage should be taken of the willingness of one party to negotiate.

By virtue of the section, the statement in the document marked 'without prejudice' must have been made in the course of negotiation for a settlement of a dispute out of court. The implication of this is that statement in document marked without prejudice at a time when no dispute has arisen and no proceedings are contemplated will not be entitled to the privilege attaching to document properly so marked. Thus, in *Nwadike & Ors. v. Ibekwe & Ors,*[81] the Supreme Court held *inter alia* that 'letters and other communications are only protected when there was a dispute or negotiation pending between the parties, and the letters written with a view to compromise'.

It appears that for a document marked 'without prejudice' to be excluded, the statement in the document must constitute an admission. In *Jadesimi v. Egbe,*[82] the Court of Appeal while considering the rule under the repealed Evidence Act, held that the 'piece of evidence concerned must relate to admission by the person against whom the evidence is to be given, the admission must have been made upon an express condition that evidence of it is not to be given; or the admission must have been made in the circumstances from which the court can infer that the parties agreed together that evidence of it should not be given'.

The practice has been that the application of the rule does not depend on the use of the expression 'without prejudice'. Thus, in practice, the words 'without prejudice do not, in themselves, offer any protection per se. Likewise, the omission or absence of those words do not automatically convert truly 'without prejudice' correspondence into an 'open' letters. As everything else in life, it is substance, not label that

[81] (1987) 2 NCC 219 at 279
[82] (2003) 10 NWLR (pt 827) 1 at 9, See also *Nwadike v Ibekwe* (1987) 2 NCC 219

matters. In *Societe Commerciale Del' Quest Africans v. Michael Ayodele A. Olusegun & Anor,*[83] the court held that the document was a complete and binding contract; that the phrase 'without prejudice' could have no meaning at all when attach to such a contract; that the phrase must therefore be ignored and that the document was admissible in evidence'. The case of *U.B.A. Ltd v. I.A.S. & Co. Ltd,*[84] is quite illustrative here. On the question of admissibility of the documents marked without prejudice, the court held that a letter not written in the course of negotiation like exhibit 13 in that case, cannot be excluded from evidence on the ground that it was marked 'without prejudice'.

In *UBA Ltd v. IAS & CO. Ltd*[85], the Court of Appeal held that 'the main purpose of this privilege under the former Act was to enable parties 'negotiate fully and sincerely without being hindered by the notion that the admissions made in the course of negotiations may be used later against them'. Moreover, Aguda[86] is of the view that 'the rationale of this privilege lies in the fact that it is in the best interest of the public that parties should be able to settle their dispute amicably without recourse to the Courts, if possible'. Consequently it is our view here that this head of privilege is founded on the public policy of encouraging litigants to settle their differences amicably rather than pursuing them to the bitter end. The statutory authority for its application in Nigeria is section 196 of the Act and our submission is that it is this section that the Nigerian Courts must use as a guide and not the principle of Common Law. Therefore, we hold the view that the provision of section 196 is short from being sufficient as it only contemplates statement reduced into writing and marked 'without prejudice'.[87]

Conclusion

In spite of the fact that the need for the ascertainment of truth in a trial for the ends of justice is considered more important than any other consideration, the earmarks of evidentiary privileges are clearly inhibitive. Evidentiary privileges cannot be asserted by the adverse party as such, but

[83] (1936) 13 NLR 104
[84] (2001) FWLR (pt. 75) 578
[85] Ibid
[86] Aguda (n.37) 326
[87] It does not provide for oral statement not reduced into writing

only by the person whose interest the particular rule of privilege is intended to safeguard. Thus, rules of evidentiary privileges are not designed or intended to protect or facilitate the fact finding process but to protect some 'outside' interest other than the ascertainment of truth in a trial.

The sections of the Act governing this aspect of our Law of Evidence were critically analysed and appraised in this work and the analysis and appraisal revealed that there are still loopholes in some of the provisions of the amended Act governing this aspect of our law of evidence. Based on the findings arising from this study, we recommend that the Act should be further amended in the light of modern day practices to meet with Best International Practice.

ADOLESCENTS' SEXUAL HEALTH IN NIGERIA: THE CASE FOR SEXUALITY EDUCATION FOR ADOLESCENT GIRL CHILD.

Folake Tafita*

Abstract

Sexual activity and risky sexual behaviour among some adolescents in Nigeria is very high and rising. This accounts for the high incidence of unwanted pregnancies, sexually transmitted diseases, unsafe abortions and deaths due to complications. Despite the advancement in the recognition of adolescents' rights and evolving capacities around the globe, adolescents' access to formal reproductive and sexual health education in schools in Nigeria remains restricted. Many studies have been carried out on adolescent sexuality and sex education in Nigeria but very few have addressed the need for specific intervention on the right to sexuality education for adolescents in Nigeria. This article examines the right of the adolescents' particularly the girl child to sexuality education in Nigeria with a view to drawing attention of government, parents and other role actors to the need for a national school curriculum on sexuality education. This article posits that the denial of access to sexuality education is contributory to the poor state of adolescent girls' reproductive and sexual health in Nigeria. The right to sexuality education is a child's right that must be viewed through the lens of the 'Best interest principle.' Securing the reproductive and sexual health rights of adolescents through to sexuality education will afford the adolescent girl child the necessary knowledge for survival, well-being and all round development.

Keywords: Sexual health, Sexuality education, Adolescent reproductive health, best interest principle, Sexuality education in Nigeria

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Introduction

Sexual activity and risky sexual behaviour among some adolescents in Nigeria is very high and rising. This accounts for the high incidence of unwanted pregnancies and unsafe abortions resulting in deaths due to complications. Nigeria's birth rate for adolescents is one of the highest in the world, and the prevalence among female adolescents in Nigeria of sexually transmitted infections, including HIV, is climbing rapidly.[1] Adolescents have unique reproductive health needs that constitute a problem in many countries.[2] Adolescents, particularly the adolescent girl child have been the focus of international discourse on women empowerment, issues of gender and development. Adolescents' rights to sexual health education are very crucial in advancing population health and development.[3] The International Conference on Population and Development (ICPD) 1994 held in Cairo marked a watershed in the history of reproductive and sexual health. The Conference noting that the reproductive health needs of adolescents have been largely ignored, recommended that reproductive health education, information, and care be accessible to adolescents. The right to education, particularly sexual health education for the adolescent girl child has also been identified as one of the keys to women's empowerment towards achieving Sustainable Development Goals (SDG's).

The conception of childhood as a period of 'innocence' seems to be a major hindrance to sexuality health education.[4] In recent years, many developing countries have begun to show more concern for adolescent reproductive health due to the increase in sexual activity, pre-marital sex and rapid spread of HIV/ AIDs. The phobia for adolescent sexual

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[1] G. Slap et al. "Sexual behaviour of adolescents in Nigeria: cross sectional survey of secondary school students" *BMJ* 2003;326:15 https://doi.org/10.1136/bmj.326.7379.15 5th September 2018

[2] J. Paxman & R. Zukerman, *Laws and Policies Affecting Adolescent Health* (Geneva: World Health Organization, 1987) at 35.

[3] International Conference on Population, Mexico, August 1984

[4] R. Cox, *Shaping Childhood* (London: Routledge, 1996) at 203. See generally, F. Olaleye, 2005 "Discrimination and Adolescent Girls' Reproductive and Sexual Health in Nigeria" *LLM Thesis*, Faculty of Law, University of Toronto, Canada.

awareness remains universal,[5] however in sub-Saharan African societies like Nigeria, the fear of children getting to know about sex before adulthood is still very entrenched and is expressed in the various norms and traditional practices aimed at controlling the sexuality of children in order to maintain the child / adult distinction or dichotomy.[6] In one of the most troubling manifestations of such control, for example, girls' 'innocence' is protected and extended as long as possible through female genital cutting and other traditional practices.[7]

Even absent these more draconian attempts to control childhood sexuality, the general view in sub-Saharan African societies is that childhood innocence is a state that can be corrupted by sexual knowledge. Recent developments have, however, challenged these traditional notions and attitudes. For instance, a number of developmental models have suggested that sexuality is innate to all people, manifested in various ways, a part of our physiological makeup.[8] While this point is widely accepted with respect to the world of adult sexuality, it remains a point of controversy where children are concerned, which reflects the ongoing deep social and cultural unease about child sexuality and the right of the child to sexual health education or information.[9]

This unease causes a number of problems in the context of parental obligations to protect their children from real or perceived harm. For instance, the 1998 Convention on the Rights of the Child (CRC)[10]

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[5] M. Ogunlayi, "An assessment of the awareness of sexual and reproductive rights among adolescents in south western Nigeria", *African Journal of Reproductive Health / La Revue Africaine de la Santé Reproductive*
Vol. 9, No. 1 (Apr., 2005), pp. 99-112

[6] Ibid
[7]Ibid
[8] S. Jackson, *Childhood and Sexuality* (Oxford : Blackwell, 1982).
[9] W. Rogers & R. Rogers, "What is good and bad sex for children?" in M. King ed., *Moral Agenda's for Children's Welfare* (London: Routledge, 1998) 179.
[10] Convention on the Rights of the Child, 20 November 1989, GA Res.44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49 (entered into force 2 September 1990) [" The Convention, CRC "]. The Convention is the international instrument for the protection of children's human rights. The Convention was adopted on the 20th November 1989. This Convention is also the most largely accepted international human rights instrument, being ratified by almost every country in the world except for United States and Somalia.

recognizes the rights of parents,[11] but purports to give ultimate weight and consideration to the child's 'best interest' and evolving capacities.[12] However, while many parents understand and acknowledge the importance of sexual health and education in protecting children's health, the idea of adolescents having free, uncontrolled and unmonitored access to sexual health information, the unease with regard to childhood sexuality leads most parents to resist providing their children with the required access and information. The denial of access to sexual health education or information is more precarious for the adolescent girl child than the boy child, a kind of 'favoritism' bothering on discrimination.

This article is based on a proposed research on reproductive and sexual health awareness among undergraduate law students. The interest of the researcher stems from the teaching of the course, reproductive and sexual health rights law to second year undergraduate law students. The researcher observed during interaction and contact hours with the students that many of them were not taught sexual education in the secondary school. The few that claimed to have been taught sex education in secondary school explained that it was no different from what they were taught in biology and home economics classes. This establishes the fact that adolescent awareness sex education is very poor.

This, then, raises a series of questions:

(a) Why should there be continued denial and restriction of adolescents particularly girls in access to sexual health education and information?
(b) Should the rights of parents with regards to protection and upbringing of the child be without limits?
(c) At what point should a parent be ceased of parental rights where adolescent sexuality and access to reproductive and sexual health education are concerned?
(d) What is the implication of the denial of access to sexuality education for the adolescent girl child?
(e) Is the right to sexual health education a child's right, a State's obligation and obligation of schools or a parent's choice?

[11] Ibid. arts. 5, 14 (2) &18 (1). The Convention recognizes parental rights and responsibilities with regards to upbringing
[12] Ibid.

The aim of this article is to establish that the denial of access to sexuality education or information is contributes to the poor state of adolescent girls' reproductive and sexual health in Nigeria, a situation that will most likely hinder women empowerment and ultimately the realization of SDG's. It identifies Nigerian laws and national health policies relating to adolescents' reproductive and sexual health and the right to sexual health education, examines and critically analyses those laws and policies in the light of adolescents' 'evolving capacities' and the child's 'best interest' principle as set out in the Child's Rights Act 2003.[13] This article will engage in a comparative analysis. More specifically, it will compare Nigeria's national statutory instruments and policies on children, especially the 2003 Child's Rights Act, with the Convention on the Rights of the Child and laws relating to these issues as provided in other jurisdictions. The aim of the comparative analysis is to reveal the existing gaps and inadequacies in the laws and policies on the right of adolescents to sexual health education. Finally, it argues that there is a general obligation on government, parents, educational institutions, particularly schools and other appropriate agencies to ensure adolescent girls' right to reproductive and sexual health education and information in Nigeria.[14]

Who is the Adolescent girl child?

In most countries, there is no precise definition of adolescence, what exists in most national laws are stipulated ages of majority for particular purposes.[15] The term "adolescent", according to the Oxford Dictionary,[16] means someone in the process of developing from a child into an adult. It comes from the Latin word "*adolescere*" which means "to grow up."

According to the Child Rights Convention,[17]

[13] *Child's Rights Act 2003, An Act to Provide for the Rights and Responsibilities of the Child and a System of Child Justice Administration and other related Matters.* ["the Act"].
[14]*Gillick v West Norfolk and Wisbech Area Health Authority*, [1986] 1 A.C. 112 [H.L. (E)]
[15] In Nigeria for example, 18 is the majority age for voting.
[16] *The Concise Oxford Dictionary,* 11th ed., *s.v.* "adolescent".
[17] The Convention, CRC(n.10)

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.[18]

The Convention did not specifically define adolescence it however gave a definition of a child which extends to cover the adolescent. The word "children" comprises any human being below the age of eighteen years, unless domestic laws applicable to the child's majority age establish distinctions. So even when there is no distinction between a child and an adolescent, the Convention leaves open the possibility for States to determine an earlier age to distinguish between a child and an adolescent. The difficulty in framing a universal definition of adolescence stems from the existence of diverse traditions and customs. The period of adolescence varies from one setting to another. The existence of cultural and regional pluralism has therefore made a universal definition of adolescence difficult. United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Population Fund (UNFPA) however provide a guide to the definition of adolescence, stating that the commencement of puberty is usually associated with the beginning of adolescence. The end of adolescence on the other hand varies from culture to culture[19] and also according to the capacities of the adolescent.

While some definitions have emphasized the biological characteristics of the adolescent such as attaining the age of puberty, others have noted the deficiency of the biological definition by trying to define adolescence from a social and legal perspective.[20] There is however one unvarying view that adolescence is a transitional period of life from childhood, dependency, immaturity, non-reproductive and non-responsible sexuality into productive sexuality and adulthood.[21]

What is most significant in this developmental phase are the biological and the psychological development evidenced by the

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[18] Ibid, art.1.

[19] See generally, UNESCO & UNFPA, *Handbook for Education on Adolescent Reproductive and Sexual Health: Understanding the Adolescents and their Reproductive and Sexual Health: Guide to Better Educational Strategies, Book 1,* loose leaf (Bangkok: UNESCO, 1988).

[20]*African Charter on the Rights and Welfare of the Child*, July 1990, O.A.U Doc . CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999).

[21] P. Adams, et al., *Children's Rights toward the liberation of the child* (London *:* Elek 1971) at 99.

development of secondary sex characteristics to sexual maturity; the development of cognitive and emotional patterns from those of a child to those of an adult and the transition from a state of socio-economic dependence to one of relative independence.[22] Many people have however expressed the view that this transitional period of adolescence is a period of limbo when the adolescent is no longer a child but is not regarded as an adult and neither is he or she accorded the status or protection of an adult by the society.[23]

The period between adolescence and the entrance into adulthood is also culturally determined. In some societies young people or adolescents are considered adult upon marriage whereas in other societies their contemporaries who are still in school are considered dependent adolescents.[24] For example in Nigeria under the Child's Rights Act 2003, a child is a person less than 18 years.[25] The Act did not define "adolescence" in express terms but states in s.172 that,... "Child" means, in this law, unless otherwise provided, a person who has not attained the age of 18 years ... "age of majority" means the age at which a person attains the age of fourteen years. The most recent and widely used definition of adolescence however is the one by the World Health Organization which defines 'adolescence' as the period spanning 10 to 19 years of age.[26]

Adolescents and sexuality education in Nigeria

Adolescent sexual health in Nigeria according to statistics and recent research is poor.[27] The poor state of adolescent sexual health has

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[22] R. Cook, B. Dickens & M. Fathalla, *Reproductive Health and Human Rights* (Oxford: Clarendon Press, 2003) at 277.
[23] *Kent v. United States*, 383 U.S. 541 (1966) at 546, Fortas J.
[24] International Planned Parenthood Federation, *Understanding Adolescents: An IPPF Report on Young People's Sexual and Reproductive Health Needs* (London: International Planned Parenthood Federation, 1994).
[25] The Act (n.13) s. 277.
[26] World Health Organization, *The health of Young People: A Challenge and a Promise* (Geneva: World Health Organization, 1993) at 1 ["WHO, *Health*"]. 'Youth' are those aged 15-25, thus there is a considerable overlap between adolescence and young people. The two terms are usually used interchangeably.
[27] J. Ajuwon et al; "Sexual behavior and experience of sexual coercion among secondary school students in three states in North Eastern Nigeria" *BMC Public Health* 2006 6:310https://doi.org/10.1186/1471-2458-6-310 Accessed 5th October 2018

been attributed to several factors; one of which is lack of awareness.[28] Awareness of rights in relation to reproductive and sexual health can only be achieved through sexual health or sexuality education. Sexuality education is the process of acquiring information and forming attitudes and beliefs about sex, sexual identity, relationships and intimacy. It aims at reducing the risks of potentially negative outcomes from sexual behavior, like unwanted or unplanned pregnancies and infection with sexually transmitted diseases, and to enhance the quality of relationships. Sexuality education includes but is not limited to the following topics: the human sexual anatomy, sexual reproduction, reproductive health, reproductive rights and responsibilities, emotional relations, contraception and other aspects of human sexual and non-sexual behaviour.[29]

Several studies have been carried out on adolescent sexual health in Nigeria. According to a study carried out by Ogunlayi [30] in Ikeja and Ikorodu Local Government Areas of Lagos State, Nigeria on the awareness of sexual and reproductive rights among adolescents in south-western Nigeria revealed that although majority of the adolescents were aware of sexual and reproductive health rights but are not aware of sexual and reproductive health programmes being implemented for adolescents. The research also revealed that even when adolescents are aware of these intervention programmes, sociocultural barriers impede access or use of the services. While this article agrees with the findings of Ogunlayi, it is submitted the study ought to have investigated the source of awareness to ascertain whether the adolescents were appropriately exposed to reproductive and sexual health education. This article disagrees with the position of Ogunlayi that knowledge is not sufficient to prevent unwanted reproductive outcomes. It is submitted that Knowledge is what informs awareness; sexual health rights and access to reproductive health services can only be improved through exposure to appropriate reproductive and sexual health education. Being adequately informed through exposure to appropriate sexual health education curricula beyond mere knowledge of reproductive biology and health, adolescents are able to make informed

[28] M. Ogunlayi "An assessment of the awareness of sexual and reproductive rights among adolescents in south western Nigeria" (n.5)
[29] V. Kumar V and P. Kumar , "Right to sexuality education as a human right", *The Journal of Family Welfare* Vol. 57, No.2, December – 2011, p.23
[30] M. Ogunlayi (n.5)

decision, behave responsibly and develop a healthy culture as far as their sexual and reproductive health is concerned.

According to Cook R et al, the right of adolescent girls to access education and literacy and the capacity to protect and improve their reproductive and sexual health are closely related. The authors identified the combined effect of education, empowerment strategies for girls and access to necessary health services as key factors in the reduction of maternal deaths in countries like Sri Lanka, Kerela State in India, Cuba and China.[31] The authors emphasized on the right to school education, reiterating that states are obligated to provide free primary education to girls. The right to education includes the right to access education in other to attain literacy, which basically means knowing to read and write. While literacy is very foundational in the right to education, this article argues that knowing to read and write is not the ultimate in the right to education. The right to sexual health education and the empowerment of girls in taking control of their reproductive and sexual health lives towards attaining the highest attainable standard of reproductive and sexual health goes beyond being able to access primary education. Given that the age of entry and exit from primary schools in Nigeria is age 4-12 years, and the child is too young to notice or understand the changes taking place in her sexual and reproductive processes, the appropriate level for sexual health education is the secondary school. It is the position of this article that right to education for girls in secondary schools should include a specially developed content on sexual and reproductive health education that goes beyond teaching reproduction as a topic under biology as a subject.

The introduction of sexual and reproductive health education is also referred to as sex education. This nomenclature has made the introduction and teaching of sexual and reproductive health education difficult. Many parents often challenge the introduction of sex education into schools because these parents have the misconception that it is indoctrination into moral depravity.

[31] R. Cook et al, (n.22)

Sexual Health Status of Adolescents in Nigeria and the Best Interest Principle

Sexual health, with the positive definition of health by World Health Organization, may be defined as a state of physical, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health therefore implies a positive and respectful approach to sexuality, fulfilling sexual relationships, safe and satisfying sexual experiences, free of coercion and sexual abuse, discrimination and violence, sexually transmitted diseases, ability to prevent and achieve pregnancy by choice.[32]

Sexual health and reproductive health are therefore closely intertwined and interrelated. Generally, 'the reproductive health status of the Nigerian adolescent is poor'.[33] Adolescents aged between 10 and 19 years constitute about 22.8 % to 30% of the total population in Nigeria.[34] The present high rate of maternal mortality in Nigeria is an indication of the general poor status of women's health in Nigeria. Adolescent girls or teenagers with high- risk pregnancy contribute to the high maternal mortality rates in the country.[35] Adolescent girl's morbidity and mortality in Nigeria is mostly due to complications arising from ill-fated illegal abortion, and child birth.

Statistics have shown that in Nigeria 60.1% of abortion seekers are adolescent girls and youths aged between 10-24 years.[36] Adolescents engage in sexual activities and often get pregnant and then resort to unsafe abortion. Abortion law in Nigeria is very restrictive. While there is no formal restriction to contraceptives and contraceptive information many

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[32] R. Cook et al, (n.22) 8, 14

[33] Federal Ministry of Health, *National Reproductive Health Policy and Strategy*, (Abuja: Federal Ministry of Health, 2001) at 7 ["Federal Ministry of Health, NRHPS"].

[34] *Ibid*. at 3.

[35] *Ibid*.

[36] B. Oye-Adeniran, "Population Studies and Social Development' in Civil Resources Development and Documentation Centre (CIRDDOC)" in *National Tribunal on Reproductive Health and Abortion in Nigeria*, Public education series no. 10 (Enugu: Fourth Dimension, 2002) at 3 - 4.

informal restrictions exist, particularly for adolescent girls and their reproductive health needs are often neglected.[37]

A cross-sectional study of 820 adolescents from 10 secondary schools in Ekiti State, Nigeria revealed that access to sexual health education is low.[38] The general neglect of adolescent's reproductive health is a reflection of societal attitude to child and sexuality. In Nigeria and generally among the countries of sub-Saharan Africa due to social and cultural norms, norms, children are shielded away from any exposure to sexual education or information. Although the attainment of puberty is usually celebrated, even after the attainment of puberty children remain generally subject to parental control and guidance. The paternalistic or 'parentalistic'[39] cultural norm of parental control and guidance is stricter on girls than boys.

The overbearing influence of culture and religion also, makes any involvement in sexual activity or any exposure to information on sex outside the context of marriage a taboo. There is a general denial of adolescent sexuality and a 'conspiracy of silence' on sexuality especially for the girl child who is shielded from information about her body, sexuality and reproduction necessary to ensure that she can act on that knowledge.[40] Despite the conspiracy of cultural, religious and parental control over adolescent sexuality and access to reproductive and sexual health information, the reality is that adolescents in Nigeria are sexually active. Statistics reveal that 56% of Nigeria's population is below 20years of age, the median age at first intercourse for girls is 16 and teenagers account for 80% of unsafe abortion complications.[41]

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[37] The Center for Reproductive Law and Policy (CRLP), *Women of the World: Laws and Policies Affecting Their Reproductive Lives - AngloAfrica* (New York: CLRP, 1997) at 81 & 85.
[38] T.Ola, 2009, Centre for Population Health Research, Ekiti State, Nigeria. http://paa2009.Princeton.edu/download(accessed 5th October 2018)
[39] Ogunlayi, (n.5)
[40] G. Vincent-Osaghae, "Improving Adolescent Reproductive Health: the role of sexuality education" (1997) 2:2 *Women's Health Forum* 5.
[41] Action Health Incorporated, *Guidelines for Comprehensive Sexuality Education in Nigeria: School Age to Adulthood* (Lagos: Fine Print Limited, 1996) at 1.

Supporting the report on the high rate of sexual activity among adolescents, Nigeria's late former health minister, Professor Olikoye Ransome –Kuti said,[42]

> Although we deny information to young people about sexuality, boys and girls inevitably mix freely at school and play at a stage of development when the sexual drive is intense. It should therefore be surprise that 2 out of every 5 secondary school girls have had at least one previous pregnancy,150 out of every 1000 women who give birth are 19 years and under, over 60% of patients presenting at Nigerian hospitals with abortion complications are adolescent girls, abortion complications account for 72% of all deaths among young girls under the age of 19years and 50% of the deaths in Nigeria's high maternal mortality rate are adolescents girls, due to illegal abortion…Social structures that permit such extensive destruction of young lives when there are safe and humane alternatives should be questioned.
>
> I will end this with quotes from what a group of young people said at a meeting convened by UNICEF and WHO in 1993…
>
> "there is a 'global' lack of information about sexuality; government and churches fail to convey the right messages to young people; there is a lack of communication with parents, especially about sex,... when I took condoms home from an AIDS education meeting to my brothers whom I knew were sexually active, my mother shouted at me that I was trying to teach them what they did not know…we would like to see communication between parents and their children improve; teachers and health workers trained to have warm and welcoming attitudes and religious leaders mobilized to discuss issues of sexuality…with young people"

In Nigeria generally; there is still a low level of access to quality reproductive health information and services at all levels of health care delivery, [43] however married women still have better access to reproductive and sexual health information on safe sex practices, family planning and contraception than minor or unmarried adolescent girls.

[42] Ibid. at v- vi.
[43] Federal Ministry of Health, NRHPS (n.37) 10

Minor and unmarried adolescent girls are restricted from accessing sexual health information on safe sex practices, family planning or contraceptives; significant is the general opposition to a comprehensive sexuality education or information especially for minor and unmarried adolescent girls. Given the socio-cultural and religious context in Nigeria, information on sexuality to children is deemed immoral, indecent and harmful.

Laws protecting children in Nigeria are scattered in different laws.[44] There are various statutory definitions of a child. The National Adolescent Health Policy recognizes adolescence as 'an important transition from childhood ' and sets the age range of 10- 24 years as persons to whom the policy shall apply.[45] There are a number of programmes and strategies aimed at addressing youth and adolescents' reproductive health, for example, National Youth Sexual and Reproductive Health Strategy with a 2011 to 2015 timeframe. While the current status of this strategy is unknown, it is embedded within the National Health Policy 1995 which provides;

> In view of the increasing problems associated with adolescent sexuality and teenage pregnancies in Nigeria, it is considered appropriate that sexually active adolescents who seek contraceptive services shall be counselled and served where appropriate.

It is however doubtful whether adolescents who are sexually active are able to freely seek information or services as envisioned under the National Health Policy.

There are various formal and informal restrictions on publications containing pictures, stories or instructions which are considered to be harmful, immoral, indecent representatives.[46]With these restrictions it is doubtful whether adolescents particularly girls can freely access or seek

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[44] R. Akpan, Minister of Women Affairs for Nigeria, Statement made to the United Nations Committee on the Rights of the Child during the presentation of Nigeria's second periodic report to the Committee in 2005 (online: http://www.unhchr.ch/huricane/huricane.nsf/0/B39C5D8F929E7C98C1256F96002C537A?opendocument accessed:13th October 12, 2018)

[45] Federal Ministry of Health, *The National Adolescent Health Policy* (Abuja: Federal Ministry of Health, 1995) at 3 ["Federal Ministry of Health, NAHP"].

[46] The Act (n.13), ss. 30, 31 & 36

sexual education or information. Lack of or restricted access to sexual health education is not in the best interest of the child. On the other hand, while it may seem that adolescents have restricted access to formal sexual health education guided by school curriculum, the unrestricted access to informal and unhealthy indoctrination via other means such as the internet, social media and other platforms have further endangered adolescent sexual and reproductive health.

In a class group discussion with undergraduate students on reproductive and sexual health, some of the students attest to the fact that during their secondary school days, some of their classmates back then engaged in indiscriminate sexual relationships and practiced unhealthy sexual behaviour learnt via pornography websites, You Tube, films and obscene pictures on social media. The formal restrictions and denial of adolescents' sexuality and access to formal sexual health education or information has unduly exposed adolescents to unhealthy medium of information, and this has further complicated and compromised the sexual and reproductive health status of adolescents in Nigeria. Many adolescent girls and boys fall prey to misinformation and uncontrolled distortions about sexuality from their peers, exposing them to the risks of sexually transmitted diseases such as HIV/AIDS, unwanted pregnancy and the resort to unsafe abortion out of fear and shame of being discovered.[47]

According to Eva S. Goldfarb and Norman A. Constantine:

> Sexuality education comprises the lifelong intentional processes by which people learn about themselves and others as sexual, gendered beings from biological, psychological and socio-cultural perspectives. It takes place through a potentially wide range of programs and activities in schools, community settings, religious centres, as well as informally within families, among peers, and through electronic and other media.[48]

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[47] H. Friedman & K. Edstrom, *Adolescent Reproductive Health: An Approach to Planning Health Service Research* (Geneva: World Health Organization, 1983) at 17.

[48] *Sexuality Education* in B.Brown & M. Prinstein (Eds.). (2011). Encyclopedia of adolescence. NY:Academic Press.
http://phi.org/uploads/application/files/ivt4kzchq4s71zqg875wo4kjjamss0tufifflgmhi Accessed 5th October 2018

In early childhood education, researchers have agreed that the home is the child's first contact with learning.[49] One major hindrance to adolescents' access to sexual health education in schools is the negative notion and views that parents and teachers hold on sex education. This is mostly due to a parent or teacher's moral stance or religious inclination. A parent or school can thus insist on the type of educational health information or religious instruction to be given to children in schools.

Oshi, D et al[50] in an exploratory study to examine the social and cultural determinants of the teaching of HIV/AIDS sex education among secondary school teachers in Eastern Nigeria, examined how 60 secondary school teachers in Eastern Nigeria perceive passing their knowledge of HIV/AIDS prevention measures to their students in the context of their cultural and social norms, which restrict open discussion of sex. The study reveals that despite teachers' high level knowledge of HIV/AIDS preventive measures, these teachers are not passing on this knowledge because of cultural and social inhibitions. In addition, teachers have not been receiving adequate training and motivation on information, education and communication for HIV/AIDS sex education.[51]

The 1999 Nigeria Constitution protects the right to private family life allowing parents to exercise their religious liberty even in upbringing. Parents have the right to bring up their own children according to their own customary and religious values. It is submitted that while parents have both moral and constitutional right to child upbringing, not all parents understand the art of parenting and upbringing. According to… parenting and child upbringing… The pertinent question is do the parents know and understand what is required at every stage of child growth and development? How informed are parents on adolescence and the processes involved in the transition to adulthood?

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[49] NICHD, "Early child care and children's development prior to school entry: results from the NICHD study of early child care" *American Educational Research Journal*, Spring 2002, vol.39 no.1, pp.133-164

[50] D. Oshi et al, "Cultural and social aspects of HIV/AIDS sex education in secondary schools in Nigeria" *Jour. Of Biosocial Science,* vol. 37:2 (2005) https://www.cambridge.org/core/journals/journal-of-biosocial-science/article/cultural-and-social-aspects-of-hivaids-sex-education-in-secondary-schools-in-nigeria/16E5B6122C9F48459337C6A2DC7E1BAC Accessed 3rd October 2018

[51] Ibid.

The sad reality is that many parents lack the requisite knowledge even about their own sexual and reproductive health, hence, may not likely understand and may be prejudiced about adolescent access to sexual health education. Where a parent is ignorant about the adolescence and the evolving process to adulthood, there is the tendency the child will also lack the requisite knowledge and may be exposed to misinformation from peers. Religious or moral instruction is not enough to ensure sexual and reproductive health. Recognition of a child's evolving capacity is important in child upbringing and parenting. When a child is in adolescence and he or she begins to recognize and acknowledge his or her sexuality, it is important that the parents understand this by granting access to formal reproductive and sexual health education in the best interest of the child.

According to Cook et al, adolescence is in three developmental phases,

> Biological development progresses from the initial appearance of secondary characteristics to that of sexual maturity; psychological processes and cognitive and emotional patterns develop from those of a child to those of an adult… Today, girls everywhere are becoming sexually mature at an earlier age than in previous generations.[52]

The Convention on the Rights of the Child, whilst requiring respect for parents' rights, also provides that parental rights must be exercised in a manner consistent with the 'evolving capacities of the child',[53] recognizing the fact that the adolescent child is in a transitory stage unto adulthood. More importantly, also recognizing the fact that the right to survival and development envisioned under the Convention can only be ensured within the context of giving due recognition and consideration to the evolving capacity of a child and ' the best interest of the child'.[54] The best interest principle, gives priority to what is in the best interest of the child, and this should be of utmost importance where a child's right to survival and development is concerned. Introduction of sexual health education is in the best interest of the adolescent, necessary for the survival and healthy development of the adolescent girl child. Child's Rights Act 2003 states that

[52]R. Cook, et al. (n.22) 277
[53] Art. 14(2)
[54] Ibid., Art. 18.

the best interest of the child must be the paramount consideration. According to s.1 of the Act[55]

> In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be primary consideration.

In addition, The Cairo Plus Five Report restated the central role of families, parents and other legal guardians to educate their children about sexual and reproductive health, consistently with the evolving capacities of the child.[56] Adolescents have a right to health information, education, reproductive and sexual health services, right to privacy and confidentiality. Governments under the Programme of Action at the United Nations International Conference on Population and Development (ICPD) have an obligation to protect and promote the rights of adolescents to reproductive health education, information and care. In conjunction with non- governmental organisations, support programmes on education, counselling of adolescents in the area of gender relations and equality, responsible sexual behaviour, responsible family planning practice, family life, reproductive health, sexually - transmitted diseases, HIV infection and AIDS prevention should be made available to adolescents.[57]

Considering the legislative capacity and responsibility of states in Nigeria, the Child's Right Act is a national legislation that is expected to be replicated by an enactment of a state law. Currently not all states in Nigeria have enacted a child's rights law. The few that have enacted a child's rights law do not contain any provision on the right to sexual health education.

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[55] The Act (n.13)

[56] R. Cook and B. Dickens , " Recognizing adolescents' "Evolving Capacities" to Exercise Choice in Reproductive Healthcare", *Int. J. Gynecol. Obstet*. 70 (2000), 13-21; R. Cook et al (n.22) 283

[57]UN, Population and Development, i. Programme of Action Adopted at the International Conference on Population and Development , Cairo, 5-13 September 1994 (New York: UN, Department for Economic and Social information and policy Analysis, 1994), ST/ESA/SER.A/149.

Global Perspectives and Comparatives on Adolescents' Rights to Sexuality Education

Health is a fundamental human right indispensable for the exercise of other human rights.[58] Adolescent reproductive health and the right to sexual health education featured prominently at the 1994 International conference on population and Development, where it was stated that;

The response of societies to the reproductive health needs of adolescents should be based on information that helps them attain a level of maturity required to make responsible decisions. In particular, information and services should be made available to adolescents to help them understand their sexuality and protect them from unwanted pregnancies, sexually transmitted diseases, and subsequent risk of infertility.[59]

The right to sexuality education and the right to sexual health information are closely linked and related to the right to the highest attainable standard of sexual and reproductive health.

> Boys and girls also talk about [sex] among ourselves. But we can only talk to each other because we usually cannot talk with adults, neither those in our families, schools, nor anywhere. I think teachers are just like parents. They are afraid that talking about sex, especially about how to prevent unwanted consequences will prompt us to have sex. In my country, people think [sex education] means 'showing the squirrel how to get in the hole'. Actually, all squirrels already know the hole, and so young people already know about sex, but we need to make sure they have the correct knowledge.[60]

[58]CESCR, General Comment 14, UN ESCOR 2000, UN Doc. E/C.12/2000/4,11 August 2000.
[59] *International Conference on Population and Development*, Cairo, Egypt, 13-15 September 1994, UN Document A/ Conf. 171/13 (online: www.unfpa.org/icpd/icpdpoa.htm Accessed 16th September 2018.
[60]A speech made by Sukrit, a Thai student who participated in a satellite session on 6 August 2008 at the 17th International AIDS Conference, Mexico City culled from Plan Asia Regional office, "Sexuality education in Asia: Are we delivering? October 2010 An assessment from a rights-based perspective"

To further buttress the global concern for adolescent rights to sexual health education, the United Nations Educational Cultural and Scientific Organization (UNESCO) in collaboration with the United Nations Population Fund (UNFPA), the United Nations Children's Fund (UNICEF), UN Women, UNAIDS, and the World Health Organization (WHO), recently produced the International Technical Guidance on Sexuality Education, where it was re-stated;

> …children and adolescents everywhere want and need information about their health and their rights, and the skills to be safe and to respect others. Parents often are unwilling to talk to their children about sexual health and rights, and frequently are poorly prepared to do so. Meanwhile, the Guidance points out that social media and the Internet, which can offer helpful resources for young people, also spread inaccuracies and promote harmful images, including gender stereotypes and violence.[61]

In a related move to address the poor state of adolescent reproductive health, the UNFPA in East and Southern Africa designed a programme called the ESA commitment which has been endorsed by ministers of health and education from 20 East and Southern African countries to deliver comprehensive sexuality education and reproductive health services to adolescents and young people.[62]

Providing adolescents with the required education and information about their reproductive processes and function will help them in making informed decisions and choices in relation to their reproductive health. Responsible behaviour in sexual relations and reproductive decision making will stem from an informed mind on the consequences of making wrong sexual health behaviour choices. The Supreme Court of India, on the right to education have stated that 'the right to education is implicit in

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https://hivhealthclearinghouse.unesco.org/sites/default/files/resources/bangkok_sexualityeducationasia.pdf Accessed 16th October 2018

[61]International Technical Guidance on Sexuality Education 2018 https://iwhc.org/2018/02/un-sexuality-education-guidelines/ Accessed 14th October 2018

[62] UNFPA, East and Southern Africa Commitment to CSE www.esaro.unfpa.org Accessed 15th October 2018

the right to life and personal liberty as contained in the Article 21 of the Indian Constitution'[63]

In a recent report, Center for Reproductive Rights noted as follows;

> Providing adolescents with information is the first step toward allowing them to make meaningful choices, to protect themselves from unwanted pregnancy and sexually transmissible infections (STIs), including the human immunodeficiency virus (HIV). …adolescents need comprehensive sexuality education. Without complete information, adolescents' rights to health and reproductive self-determination are significantly compromised.[64]

International Legal instruments and the Obligation of the Nigerian State to Adolescents Sexuality Education

Reproductive and sexual health rights relevant to adolescent sexuality, health and rights are expressed in International and regional legal instrument such;

i. The Protocol on the Rights of Women in Africa

ii. The African Charter on Human and Peoples' Rights

iii. The African Union Charter on the Rights and Welfare of the Child

iv. UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

v. The Convention on the Rights of the Child

Under international and regional instruments, governments have obligation to respect, protect, and fulfil adolescents' reproductive and sexual health rights which includes the right to comprehensive sexuality

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[63] R. Cook, et al.(22) 212

[64] https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/adolescents%20bp_FINAL.pdf Accessed 15th October 2018

education as expressed in the relevant instruments. Nigeria like other States have specific legal obligations to respect, protect and fulfil these rights according to international legal standards as expressed in human rights treaties and various conventions. These obligations include both limitations on the actions that States may take (negative obligations) and proactive measures that States must take (positive obligations). States must take steps towards fulfilling their obligations by all appropriate means, including particularly the adoption of legislative measures to address issues affecting reproductive and sexual health.

In the general comments and recommendation Committee on the Elimination of Discrimination against Women,[65] "State parties should ensure without prejudice and discrimination, the right to sexual health information, education and services for all women and girls."[66] State obligations under international and regional human rights law is premised on a range of reproductive rights such as freedom from discrimination, contraceptive information and services, safe pregnancy and childbirth, abortion and post-abortion care, freedom from violence against women, HIV/AIDS and comprehensive sexuality education for adolescents and youths.[67] The obligation to respect requires that state parties refrain from restricting access to sexual health information. This obligation also includes protecting adolescents' rights to access sexual health information from undue restriction by parents or other persons. It requires that states and their agents take action to prevent and impose sanctions for violations by private persons including parents and schools. The duty to fulfil, places on states parties an obligation to take appropriate legislative, judicial, administrative, budgetary, economic and other resources to ensure that adolescents realize their rights to sexual health education.[68]

Adolescents' access to sexual health education varies from one jurisdiction to other jurisdictions. Recognizing the importance of adolescent health to population health and development, many countries are now giving attention to adolescents as a special group, particularly in

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[65] General Recommendation 24: Women and Health, CEDAW UN GAOR1999, UN Doc. .A/54/38/ Rev.1,pp.3-7

[66] Ibid. 18

[67] Center for Reproductive Rights and UNFPA, Reproductive Rights ; A Tool for Monitoring State Obligations www.reproductiverights.org Accessed 15th October 2018

[68] See generally, General Recommendation 24: Women and Health (n.65).

the relation to their reproductive and sexual health. For instance, in Canada, formal sexuality education is a mandatory component of the high school curriculum in most of the provinces.[69] According to the findings of a study conducted by Kumar et al, education in Canada "is under provincial jurisdiction and almost every province's high school curriculum contains formal sexual education. Within the province of Ontario, sexual education is a subcomponent of health and physical education courses; each course is comprised of approximately 110 h of instruction."[70] The course is termed "Healthy Growth and Sexuality Course" with six outlined expectations based on a drawn curriculum of Ontario's Ministry of Education. At the end of the course is expected that students will be able to:

a. Identify the developmental stages of sexuality throughout life
b. Describe the factors that lead to responsible sexual relationships
c. Describe the relative effectiveness of methods of preventing pregnancies and sexually transmitted diseases (e.g., abstinence, condoms, oral contraceptives)
d. Demonstrate understanding of how to use decision-making and assertiveness skills effectively to promote healthy sexuality (e.g., healthy human relationships, avoiding unwanted pregnancies and sexually transmitted infections such as HIV/AIDS)
e. Demonstrate understanding of the pressures on teens to be sexually active
f. Identify community support services related to sexual health concerns.[71]

As laudable as the Canadian schools sexual education programme is, it was reported that there is no form of assessment or evaluation, and this places a doubt on the knowledge of young Canadians about sexuality.[72]

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[69] M. Kumar, "Sexual knowledge of Canadian adolescents after completion of high school sexual education requirements", *Peadiatr Child Health* 2013 Feb; 18(2): 74–80. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3567900/ Accessed 16th October 2018

[70] Ibid.

[71] Ibid.

[72] Ibid.

Comprehensive sexuality education curriculum must include a form of assessment or evaluation for effective and impactful learning outcomes.

In South American countries such as Columbia and Northern European countries with the exception of Sweden, sexuality education has been made compulsory since 1995.[73] In many Asian countries like Sri Lanka, Kerela State in India, Cuba and China, governments have begun to give attention to adolescent sexuality education; Thailand however, is the only country that has given access to sexuality education for adolescents.[74]

Conclusion and the Way Forward

Adolescence is a transition period from childhood to adulthood. Sexuality in children is a reality that must be accepted. While children may be sexually immature, they cannot be regarded as nonsexual beings. The disturbing figures of teenage pregnancy, deaths from unsafe abortion, prevalence of HIV/AIDS and other sexually transmitted diseases around the world have demonstrated the necessity for access to sexual health education or information.[75] Responsible sexual behaviour and positive attitude to sexuality is only achievable when adolescents have access to comprehensive sexuality education, information and services. Adolescent sexuality is denied and restricted by national legislation, social, religious and cultural factors. These restrictions contribute to the present poor state of adolescents' reproductive and sexual health in Nigeria. Lack of formal comprehensive sexuality education for adolescent girls and children in Nigeria violates the rights of the child and the 'best interest principle' under the CRA, the national constitution and other international and regional instruments.

Unlike the CRC, the Child's Rights Act is not as elaborate in the protection of specific rights such as the right to sexual health education including family life education, therefore a review is suggested. Nonetheless pending the suggested review, the best interest principle can

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[73] Plan Asia Regional Office "Sexuality education in Asia: Are we delivering? October 2010 An Assessment from a Rights-based Perspective" (n.60).

[74] UNICEF, "Review of Implementation of Comprehensive Sexuality Education , Thailand 2017" http://unesdoc.unesco.org/images/0024/002475/247510e.pdf Accessed 15th October 2018

[75] C. Packer, "Preventing Adolescent Pegnancy: The Protection Offered by International Human Rights Law" (1997) 5 Int'l J. Children's Rts. 47 at 47 ["Packer, PAP"].

be useful in improving adolescent girl's right to sexual health education or information. The principle should be explored by child's rights advocates and other Non-governmental organizations involved in reproductive health or child's rights advocacy to demand and ensure State, parental and institutional obligation to ensure children's right to sexual health education.

Sexuality education must be made mandatory for adolescents. Reproductive and sexual health education should be incorporated into the curricula of secondary schools and tertiary institutions. Government through the Federal and State Ministries of health and Ministries of education must ensure that health care providing centres are well placed to provide information and education on sexual health to adolescents without discrimination The 1995 Adolescent Health Policy must translate to action.

While parents have the right to upbringing under the Constitution, the Act and the Convention; parental rights cannot and should not be allowed to trump children's rights,[76] particularly the adolescent girl's right to sexuality education. The right to sexuality education is a right necessary for the survival and development of the adolescent girl child. Parental rights must be exercised with care, giving appropriate guidance to the child on sexual health and education in a manner consistent with the best interest principle and the evolving capacities of the child.[77] According to the United Nations new Guidance, 'comprehensive sexuality education programs must be grounded in human rights principles and in scientific evidence.' Sexuality education programmes in Schools must be 'age appropriate' 'start at a young age (the Guidance provides recommendations on learning objectives for ages 5-8, 9-12, 12-15 and 15-18), curriculum-based, and learner-focused'.

Finally, Sexuality education must reach all adolescents irrespective of whether they are in school or not, sexuality education should not just be a school-based, it must be a national sexuality education program. Government must initiate programs to reach the large number of young people outside the school system. Parents, community organizations,

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[76] Committee on the Rights of the Child, General Comment No. 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child ["CRC, General Comment No 4"] , CRC/GC/2003/4(2003) para 28

[77] Ibid, para 7

religious groups, reproductive rights advocates and healthcare providers must combine efforts to promote adolescent reproductive and sexual health through sexuality education.[78] Comprehensive sexuality education will enable adolescent girls in Nigeria adopt positive sexual behaviours, such as delay sexual debut; reduce frequency of sex and habit of engaging multiple sexual partners.

[78] Sexuality Education http://www.advocatesforyouth.org/publications/publications-a-z/2390-sexuality-education

THE ROLE OF TRADE UNIONS IN THE CAPITALIZATION AND STABILIZATION OF WORKERS IN NIGERIA

Anthony Ekpoudo*

ABSTRACT

This article reviews the roles of trade unions in Nigeria as significant stakeholders in the labour sector and national development project. It notes that industrial relations in Nigeria is not quite harmonious as there are many negative developments in the system which has caused tension in the employer-employee relationship and make the workers weak and apprehensive about their future. The paper discusses the nature and development of trade unions in Nigeria and posits that trade unions have played a key role in uplifting the status of workers. The focus of trade union activities and some of the strategies adopted by trade unions have also been highlighted. It is the position of this paper that the trade unions can still do more to uplift the workers if it can overcome some problems. In light of this, the article makes a case for the entrenchment of industrial democracy in the unions and the need for partnership between organized labour and other civil organization and institutions in order to stabilize the system and achieve the desired end of regulating the terms and conditions of employment.

Keywords: Capitalization, Employee, Employer, Stabilization, Strikes, Trade Unions.

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I. Introduction

The labour sector in Nigeria is clearly at a crossroad. This is largely occasioned by the torrents of policies and practices introduced into the system by directors and managers in the formal employment establishment. These range from under payment of agreed wages, delay in payment of salary, absence/delay in promotions, downsizing, influx of expatriates, retrenchment, outsourcing, casualization of labour etc. These negatives are quite evident in the public as well as in the private sectors of the economyand make the workers generally apprehensive about the security of their employment and their general future wellbeing.[1]Presently, the crisis in the labour sector has reached a tipping point with nearly all the labour combinations having issues with their employers and the government.

Some years ago, Uwaifo, JCA (as he then was) had anticipated this development when he declared in *Udemah v. Nigeria Coal Corporation*[2] thus:

> Some employers may literally knock some of their employees about, they may treat them inhumanly without paying due regard to their contribution toward making a success of their businesses. They forget about the value and virtue of *espirit de corps* between employers and employees. They think strictly of master and servant relationship with an accent on the servantship factor instead of the service rendered. There could be callousness involved.[3]

It is apt to state at this point that in many industries and institutions, operations are based on the market forces of demand and supply.[4] In this arrangement, management reserves for itself the right to manage the

[1]J. A. Dada, "Promoting Security of Employment: The Role of Trade Union," Vol. 1, No. 1 (2002) *Unical Private Law Journal,* 128
[2](1991) 3 NWLR (pt.180) 477 at 492
[3]Ibid
[4]D. Otobo, *Industrial Relations: Theory and Controversies,* (Ikeja, Malthouse Press, 2000), 267

enterprise, a claim which arises from the fact of ownership or as representatives of the owners and proprietors. Besides, as a dynamic developing state, Nigeria is heading towards the entrenchment of full blown capitalist ethos in order to accommodate active investors and workers from the domestic and foreign establishments.[5] The route which this development has taken creates some tensions within the domestic labour sector.

In order to address their problems jointly and strengthen their capacity the workers decided to unionize and this was accommodated by the government.[6] The emergence of industrial unions, contributed significantly to the changes in most areas of industrial relations in Nigeria[7] particularly in terms of welfare of workers. However, of recent, it appears that the gains of labour and its 'perceived' understanding, with the government and other employers have been lost. Employers of labour in Nigeria have undermined the interests of organized labour so much so that there is a huge disequilibrium in the system which has left some of the union gasping for breath while the individual worker is left nearly destitute by the sultry, suffocating and repressive activities and polices of the employer.

The inevitably raises the issue of the causes of the degeneration of industrial relations in the country and secondly whether the trade unions are really playing their expected role in promoting and protecting workers interest and maintaining industrial harmony. In this paper, we shall examine these and related issues and also highlight the role of the trade unions in the stabilization of employment relationship and the capitalization of workers in the country.

II. Conceptual Clarifications

The two main terms considered in this work, capitalization and stabilization are clarified hereunder.

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[5]A. Lucky, Peculiar Problems of the Nigerian Labour Market, *http://www.nigeriansinan.*Accessed 20/05/2017.

[6]Government support was in terms of enactment of legislations to regulate labour relations and also accepting to negotiate only with duly elected leaders of workers unions.

[7]F. C. Anyim, J. O. Ekwoaba and A. O, Shonuga "Industrial Unionism and its Bargaining Correlates in Nigeria Industrial Relations System," Vol. 4, No. 3 (2013) *Journal of Management and Strategy,* 56-57 www.sciedu.ca/jms.Accessed 20/05/2017.

2.1 Capitalization

> The term capitalization is often used in the economic sense in relation to capital in form of money, or assets available for investment.[8] It means the act or process of capitalizing or converting something into capital[9] or to use a thing to one's advantage.[10] In the work establishment, employees of different categories are engaged by the employer (for their knowledge, skill or labour) to perform some work or services as stipulated in the contract of employment and for this they are paid wages. The wages received gives the worker some measure of power and capability to meet their needs. But this has waned significantly over time.

Some decades ago, Adeogun wrote that "the presumption of equality between the parties … tends to ignore other social and economic considerations and is fictitious and hollow. The so-called bargaining power of the individual workers is of little importance … in a country like Nigeria where there are more workmen than the jobs available and where the employer can choose freely whom to employ and under what conditions they are to be employed."[11] Thus many employees are working under stressful conditions and are paid wages which cannot meet their most pressing needs.

Capitalization of labour within the purview of this work therefore refer to the means and stratagems that may be adopted by organized labour to enrich, strengthen and empower the employees in their respective work places.

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[8]Bryan A. Garner (ed.), *Black's Law Dictionary,* 8th edition, (St. Paul, MN, Thomson West, 2004), 221

[9]*Ibid,* 223

[10] See *Webster's Universal Dictionary & Thesaurus*, (New Lanark, Scotland, Geddes &Grosset, 2007), 87

[11]A. A. Adeogun, "The Legal Framework of Industrial Relations in Nigeria," Vol. 3, (1969) *Nigeria Law Journal,* 13.

2.2 Stabilization:

This relates to the idea of making something stable or steady.[12] In the work place, it involves the security of the employment. In the past, the idea of doing a steady and wage earning work with one establishment was alien to most Nigerians particularly skilled persons.[13] Many skilled workmen preferred self-employment while the others that engaged in wage earning work adopted a migratory employment habit in their quest for greener employments.

The concept of job security and stability of employment came about with the emergence of the civil service, institutional establishments and public corporations which employed a large number of workers. In statutory establishments, job security creates little problems as there are laid down rules and procedures for the disengagement and compensation of staff. The problem though, still persists in the private sector organizations where the rule of the master or director is supreme.

It is important to stress that employers will always seek ways to shortchange the workers, the terms of the contract of employment and status of the later notwithstanding. In Nigeria the most commonly adopted methods includes; restructuring, re-organization, rationalization, retrenchment, downsizing, casualization, outsourcing, overloading, underpayments, delayed payment of wages etc. Without conscious planning and effort by the trade unions of workers, the workers will continue to groan and be overburdened by the weight, schemes and devices of their employers and some may not have a stable and fulfilled career. In this work the term stabilization therefore relates to the means and efforts of trade unions to ensure that the workers position in the establishment is secure and beneficial to the parties.

III. THE STATE OF LABOUR RELATIONS IN NIGERIA

Basically, there are two parties in a labour or employment contract. These are the employer and the employee.[14]The terms of the agreement

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[12]*Webster's Universal Dictionary & Thesaurus,* (New Lanark, Scotland, Geddes &Grosset, 2007),456

[13]A. Emiola, *Nigerian Labour Law, 3rd ed.* (*O*gbomoso,Emiola Publishers, 2008),3-4.

[14]Classically, the parties were called master and servant.

usually involves the subjection by the employee of his or her service to the employer for wages. By implications, the employer expects that the labour of the employee will be available at a price which permits a reasonable margin of profit or dividends for his investments; while the employee expects that he will be paid reasonable wages for his services and that this shall be steadily increased in line with societal and occupational dynamics.[15]

In the past, the relationship between the two parties in labour relation was very close and personal. According to Drake,[16] "the master often worked alongside his journey-man and apprentice, the latter not infrequently residing with his master to whose *donminiapotestas* he was subject …."[17] By this arrangement, the employee worked at the mercy of the employer and could be dealt with as the employer wishes. Thus the right of the employer to terminate the employment and dispense with the services of the employee was unfettered.[18]

The right of the employer to hire and fire is a cardinal common law doctrine.[19] In *Vince v. National Dock Labour Board,*[20] Viscount Kilmur stated that the principle of law is that the court will not impose a willing servant on an unwilling master even where the master's conduct and tactics are wrong. The position has also been adopted in Nigeria for ordinary contracts of employment without statutory flavour. Thus, in *Odinkenmere v. Impresit Bakolori (Nig.) Ltd*[21] Opene stated that:

> It is settled that an employee cannot compel the employer to retain him no matter how desirable that may be on humanitarian or other grounds. In as much the same way an employer cannot compel an

[15]See A. A. Ekpoudo, "Pacific Settlement of Labour Disputes in Nigeria," unpublished LL.M Thesis, Faculty of Law, University of Calabar, (2010), 2.
[16]C. D. Drake, *Labour Law,(* London, Sweet and Maxwell, 1973), 4
[17]*Ibid*
[18]See *Oki v. Taylor Wall Tanjon (Nig.) Ltd.* (1965) 2 All N.L.R 45; *Bankole v. Nigerian Broadcasting Corporation* (1986) 2 All N.L.R. 3
[19]See *Elderton v. Emmens,* (1848) 6 CB 160
[20](1956) 1 All E.R. 1
[21](1995) 8 NWLR (Pt.11) 52

> employee to remain in his service no matter how indispensable his service may be to the employer.[22]

The implication of the above is that even where the termination is deemed unjust and declared unlawful, the best that the worker may get is an award of damages because any order for re-instatement may be difficult to effect. This position is justified by the fact that labour in the traditional view is considered as just one of the factors of production which can be combined freely with others and manipulated by management in any way to achieve the set objectives.[23]

Over time, agitations by workers and the rise in the educational and professional status of some employees challenged the system successfully and the old order of master and servant lost its appeal. Thus excepting employments of a domestic or apprenticeship nature, the personal nexus between the employer and his employee no longer exists. In its place there has emerged official contracts of employment[24] whereby the nature of the relationship between the parties are clearly articulated.[25] To a large extent the terms and conditions of work specified in the contract of employment of workers in different institutions are results of trade union activism. No country can successfully execute its socio economic objectives and attain some measure of development without a satisfied work force primed by well-organized trade unions.

In Nigeria, the trade unions have contributed immensely to the attainment of many labour and developmental feats. Yet, as the 'mother' of workers, the unions must remain alert and work vigorously to boost the worker's welfare by checking the recklessness of the employers and addressing the multifarious challenges which weaken the workers. Thus, trade unions in Nigeria being the main pivot of labour relations have a

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[22]*Ibid,* 66. See also *Oki v. Taylor Wall Tanjon (Nig.) Ltd.* (1965) 2 All NLR 45; *Nitel v. Ikaro*(1994) 1 NWLR (pt. 320) 350; (pt.678)

[23]I. N. E. Worugji, "Challenges of the Nigerian Trade Unions in the 21st Century." A paper presented at a workshop held on 22-24 September, 1999 at the Unical Hotel Conference Centre, Calabar.

[24]By section 91 of the Labour Act (Cap.L1 LFN 2004), a contract of employment means any agreement, whether oral or written, expressed or implied, whereby one person agrees to employ another as worker and the other person agrees to serve the employer as a worker.

[25]J. A. Dada, "Promoting Security of Employment: The Role of Trade Union," Vol. 1, No. 1 (2002) *Unical Private Law Journal,* 132

great role to play in stabilizing labour relations in the country and empowering workers in this period of change.

IV. NATURE OF A TRADE UNION

According to the Trade Unions Act,[26] a trade union means

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

The above statutory definition of a trade union gives two important criteria for determining whether an association is a trade union or not. Firstly, the combination must be of workers or employers; and secondly, it must be formed for the purpose of regulating the terms and conditions of employment of workers. The first criteria concern those that may form or belong to a trade union. Basically, a trade union may be a combination of workers or that or employers. This clearly deviates from the traditional notion of a trade union as a union of workmen or workers.[27]The position of the law is that a trade union is not an exclusive association of workers as employers of workers can also form or belong to one. But, the membership of a trade union cannot be mixed. It must remain exclusive for workers or the employers. In *Writers Guild of Great Britain v. British Broadcasting Corporation,*[28] an organization was held not to be a trade union because it did not consist wholly or mainly of workers. A worker in the legal context refer to any member of the public service of the federation or state and any other person who has entered into or works under a contract with an

[26] Section 1, Trade Unions Act, Cap. T.14, LFN, 2004
[27] A trade union was conceived as "a continuous association of wage earners for the purpose of maintaining their lives." See S. and B. Webb, *The History of Trade Unionism*, (London, Longman, 1920), 23.
[28] (1974) ICR 120

employer, whether the contract is for manual labour, clerical work or otherwise ...."[29]

Workers generally include those in the public and private sectors and "embrace the entire wage earning or salaried employment."[30] Gratuitous and retired workers of an establishment are also included as well as those employed through intermediaries.[31] A combination of employers such as an employer's federation (association of employers) may also form a trade union. An employer is "any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the service of any other person ...."[32] Also persons carrying on industrial or commercial undertakings including corporations and their successors are considered to be employers of labour.

The second criteria for the determination of a trade union relates to its purpose. Every combination of workers or employers as the case may be shall aim "to regulate the terms and conditions of employment of workers.[33] This is the basic and primary purpose of a trade union. A trade union may have other purposes, objectives and target including the provision of welfare benefits for the members. These are merely ancillary or complementary to the primary purpose.[34]In *Duo v. O.H.M.B, [35]*the Court of Appeal reiterated this position when it held *inter alia* that primarily, the basis for the existence of a trade union is to regulate the terms and conditions of employment of workers. According to the court, trade unions exist to ensure that the workers have suitable terms and conditions of employment and thereby enjoy a reasonable security of tenure.[36] Such

[29] Section 54 Trade Unions Act, Cap. T14, LFN 2004.
[30] Per Lord Wright, *National Association of Local Government Officers v. Bolton Corporation,* (1943) AC 166 at 186
[31] S. C. Srivastava, *Industrial Relations and Labour Laws, (*New Delhi, Vikas Publishing, 2007), 60
[32] Section 91, Labour Act, Cap L.1 LFN 2004
[33] See Section 1 (1) Trade Unions Act
[34] O.V.C Okene, *Labour Law in Nigeria: The Law of Work, (*Port Harcourt, Claxton and Derrick, 2012), 160
[35] (1990) 4 NWLR (Pt. 142) 53
[36]J. A. Dada, "Promoting Security of Employment: The Role of Trade Union," Vol. 1, No. 1 (2002) *Unical Private Law Journal,* 143

employment is one which can only be validly terminated by due process[37] or in conformity with the terms agreed by the parties.[38]

Generally, trade unions endeavour to regulate and standardize the terms and conditions of employment of their members through the mechanism of collective bargaining. In this process the unions engage the authorities and management in direct benefit-negotiations, and grievance handling. They are also involved in community service, and in certain trades, job search and referral.[39] Their functions to a large extent span across economic, political, social, welfare and psychological benefits and the opportunity to get involve in managerial functions in the industry.[40]

Whatever the other purposes and interests of a trade union may be, it must be seen to be focused on its primary objective otherwise the union may not be registered or may even be de-registered if it is found to have deviated from or compromised its purpose. Section 7 (1) (d) of the Trade Unions Act empowers the Registrar of Trade Unions to cancel the registration of a trade union if it is proved that the principal purpose for which the union is in practice being carried on is a purpose other than that of regulating the terms and conditions of employment of workers. Thus in *Re Union of Ifelodun Timber Dealer and Allied Workers,*[41]the application by a group of persons with the appellation "Union of Ifelodum Timber Dealers and Allied Workmen" was denied registration because it was *a combination of traders and not registrable as a trade union under the law.*[42]In dismissing the appeal of the body against the denial of registration, the Court held that by law, whether a combination is a trade union or not does not depend on its constituents but on its main purposes and since that association purposes which was the protection and expansion of timber trade and welfare of workers was outside the purview of the law, the Registrar of Trade Unions decision was correct.

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[37]*Federal Civil Service Commission v. Laoye*(1989) 2 NWLR (Pt.106) 657; *Raji v. University of Ilorin* (2007) All FWLR (Pt. 345) 325

[38]*WAEC v. Felix Oshionebo* (2007) All FWLR (pt. 370) 1501; *United Calabar Co. v. Elder Dempster Lines Ltd.* (1972) 1 All NLR (Pt. 2) 244

[39]D. Otobo, *Industrial Relations: Theory and Controversies, (*Ikeja, Malthouse Press, 2000), 101

[40] See generally S. Fajana, *Industrial Relations in Nigeria: Theory and Features, (*Lagos, Labofin Publishing, 2000).

[41] (1964) 2 All NLR 63

[42]Emphasis mine.

A trade union operates in the place of employment of workers. This is usually within a trade or industry. An industry has been comprehensively defined as "any business, trade, undertaking, manufacture or calling of services, employment, handicraft or industrial occupation or a vocation of workmen."[43] From this definition, it is clear that an industry[44] is composed of two main categories of persons,viz, the owners (including managers) who are the employers and the workers.[45] A trade union of workers is exclusive to the concerned workers and that of employers is exclusive to the employers. Workers and employers cannot come together in one union.[46]

The registration of a trade union with the Registrar of Trade Unions is compulsory. Accordingly, no trade union shall perform any act in furtherance of the purposes for which it has been formed unless it has been duly registered.[47] Once registered and issued with a certificate the trade union becomes a legal or corporate entity enjoying all the inherent attributes and powers.[48]

Before concluding this part of the discourse, it is important to point out that the membership of trade union is open to all eligible members. Infact, the 1999 constitution of Nigeria positively guarantees the right of individuals to form or join any association of one's choice.[49] In the labour sector, this guarantee is captured in Convention No. 87 of the International Labour Organization (ILO) which confers on employees and employers the right to establish and join organizations of their choice.[50] In any case, the

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[43] Section 2 (j) Industrial Disputes Act, 1947, India

[44] The Labour Act defines an industry to include a trade. See S.91, Labour Act, Cap. L.1, LFN, 2004

[45] S. C. Srivastava, *Industrial Relations and Labour Laws, (*New Delhi, Vikas Publishing, 2007), 65

[46] E. E. Uvieghara, *Labour Law in Nigeria* (Ikeja, Malthouse Press, 2001),315

[47] Section 2 (1) Trade Unions Act

[48] See *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (1901) AC 426; *Bonsu v. Musicians Union* (1956) AC 104; *Fawehinmi v. Nigeria Bar Association (No. 2)* (1989) 2 NWLR (Pt.105) 558

[49] Section 40 of the *1999 Constitution* provides, "every person shall be entitled to assemble freely and in particular, he may form or belong to any political party, trade union or any other organization for the protection of his interest. "See also section 12 (1) Trade Unions Act.

[50]Convention concerning Freedom of Association and Protection of the Right to Organize, 1948. It came into force in July 1950 and Nigeria has acceded to it.

trade unions are no free for all associations. By its internal constitution and bye-laws, a trade union can regulate its membership by stipulating the criteria for membership. A person intending to join a trade union must have some relationship with the union or show how the union would protect his interest.[51] In *Sea Trucks (Nig.) Ltd v. Pyne,*[52] the respondent and his colleagues who were staff of the appellants which is not in oil related business but were involved in water transportation insisted on belonging to the National Union of Petroleum and Natural Gas Workers (NUPENG) instead of the Nigeria Union of Seamen and Transport Workers (NUSTW). In holding for the appellant, Salami, JCA stated that to give approval for workers of the appellant to be registered in the NUPENG would contradict the provisions of section 37 of the 1979 constitution (now section 40 of the 1999 constitution) and would defeat the purpose and intendment of the constitutional provision. According to the erudite jurist, the constitution should be interpreted in a manner that would "… avoid lending support to unrestricted access to associations that please their fancy and not one that protect their interest."[53]

Certainly, the law would deny the move and right of persons to form or belong to a trade union when it is in the public or general interest so to do. Also in *Osawe & Ors v. Registrar of Trade Unions,*[54] the appellants applied to the respondent for the registration of their union called "the Nigerian Unified Teaching Services Workers Union. The respondent refused to register the union on the grounds that an already existing trade union, the "Non Academic Staff Union of Educational and Associated Institutions" was sufficiently representing the interest of the class of persons whose interest the proposed union was intended to represent. In disallowing the contention of the appellants that decision of the Registrar was a violation of their fundamental right of association the Supreme Court held that the right to freedom of associations is subject to its being in consonance with

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[51] G. G. Otuturu, *Legal Aspects of Industrial Relations in Nigeria, (*Port Harcourt, Pearl Publishers, 2007), 48

[52] (1999) 6 NWLR (Pt. 607) 514

[53] *Ibid* 536-537. Contrast with *Anigboro v. Sea Trucks (Nigeria) Ltd* (1995) 6 NWLR (Pt. 399) 399 where the court rejected and decided against the move by the appellants to cause their employers to belong to the NUSTW instead of NUPENG which they opted for. According to court, the act of the appellants constituted a violation of the right of association of the workers, as it is not the place of an employer to choose a trade union for his employees.

[54] (2004) 1 NLLR (Pt. 1) 34

any law that is reasonably justifiable in a democratic society and that it was in the interest of public order that the proposed union was not registered. According to Aniagolu, JSC, "the proliferation of trade unions clearly tends itself to chaos in labour circles…."[55]

V. Evolution of Trade Unions in Nigeria

The origin of trade unions in Nigeria cannot be stated with exactitude. Some scholars considered guilds, mutual aid societies and occupational unions as trade unions.[56] Amongst them is the eminent Nigerian Jurist, Elias.[57] According to him;

> Craftsmen such as iron mongers, bronze workers, blacksmith, wood carvers, leather workers, cotton weavers and tailors have been associating together from early times in order to regulate admission and expulsions from their respective associations under which persons were allowed to practice their professions.[58]

Clearly, these old pre-colonial trade organizations protected their members, provided them some welfare and social benefit and generally regulated their professions. Indeed, their existence exirpates the assertion by some scholars that trade unionism in Nigeria is a colonial legacy. [59]Though these early organization exhibited the traits of professional associations, they cannot be regarded as trade unions in the real and current contraption of the entity. Their members were not engaged in wage paying employment neither could their primary purpose be tied to the regulation of the terms and conditions of employment. Also their

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[55]*Ibid* p.53.Before imposing any order of restriction, the court will meticulously consider the justice of the case as it is also conscious of the fact that in trade union matters, the strength and capability of a particular union is significantly determined by its size.

[56] H. D. Siebel, "Systems of Allocation and Receptivity to Modernization," in U.G. Damachi and H.D. Siebel (eds.) *Social Change and Economic Development in Nigeria, (*New York, Praeger, 1973)

[57] T. O. Elias, *Nigeria Legal System, (*London, Routledge and Kegan Paul, 1952); See also S. F. Nadel, *The kingdom of the Nupe in Nigeria, (*London, OUP, 1965), 25

[58]*Ibid,* 321-322

[59] E. M. Hyde and H. Davidson, "The Organization of Employers and Trade Unions: Collective Bargaining," in J. E. Genders (ed.) *Personal Management in Developing Countries,(*London, Institute of Personnel Management, 1964) 12

structural formations were extensively destroyed by the disorganization of Nigerian communities during the early period of colonialism.[60]

The first evidence of the emergence of modern trade unions in Nigeria can be traced to 1912 when the Southern Nigeria Civil Service Union was formed. The union later changed its nomenclature to the Nigerian Civil Service Union in 1914 upon the amalgamation of the protectorates of Northern and Southern Nigeria.[61] Between 1916-1932 many other unions were formed.[62] The Nigerian Union of Teachers (NUT) was the first union to embrace workers from the public and private establishment.[63]It is important to stress that the early trade unions revered the colonial employers and ascribed a paternal status to the establishment. This mentality tended to slow down the tempo of trade union activities.[64] In 1930, the British government advised all her dependencies to enact legislation to regulate trade union operations in line with the English Trade Unions Act, 1871. For Nigeria, the Trade Union Ordinance was enacted in 1938. A major highlight of this law was that it required the registration of a union before that union could negotiate with an employer or take industrial action.[65] The aim of the law was to prepare Nigeria for the inevitable trade disputes which would accompany industrialization[66]and also latently, as a way of keeping the unions away from the nationalist struggle of the period.[67]

The Trade Union Ordinance formally legalized trade union activities in the country and made provisions for their internal

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[60] D. Otobo, *The Role of Trade Unions in Nigerian Industrial Relations, (*London, Malthouse (Overseas Monograph) 1987), 12

[61]W. Ananaba, *The Trade Union Movement in Nigeria, (*Benin, Ethiope Publishing ,1969) 10

[62] These include Nigerian Railway Native Staff Union (1919), Railway Workers Union and the Nigerian Union of Teachers (NUT), both founded in 1931.

[63] See G. G, Otuturu, *Legal Aspects of Industrial Relations in Nigeria,* (Port Harcourt, Pearl Publishers, 2007), 20

[64] S. Fajana, *Industrial Relations in Nigeria: Theory and Features*, (Lagos, Labofin Publishing, 2000), 144

[65] A. K. Ubeku, *Personnel Management in Nigeria, (*Benin, Ethiope Publishing, 1975), 149

[66] See T. Fashoyin, *Industrial Relations in Nigeria: Development and Practice, (*Ikeja, Longman, 1992) 34

[67] D A Offiong, *Organized Labour and Political Development in Nigeria*, (Calabar, ,Centaur Press, 1983) 80

administration and external regulations.[68] That Act stimulated interest of workers in trade union activities as the pattern of growth of unions and their membership soon changed.[69]One of the notable problems of the trade unions in this early period was factionalization due largely to the interplay of some internal and external factors.[70] To arrest this issue, the leaders formed trade union centers[71] to serve as umbrella organizations for a number of unions but they too soon became enmeshed in leadership tussle.

In 1975, government decided to check the proliferation of trade unions in the Country by restructuring the existing arrangement. The Trade Unions Central Labour Organizations Act 1976 dissolved the existing four labour centres[72] and made provision for the appointment of an Administrator of Trade Unions. Following extensive consultations, reorganization and reconstitution [73] of the trade unions by the Administrator, the Nigerian Labour Congress (NLC) was inaugurated in 1978 as the only central labour organization in the country to which the trade unions must be affiliated. The new structure of trade unions was given statutory recognition by the Trade Unions (Amendment) Act, 1978 and by the Trade unions (miscellaneous provisions) Act 1980 which recognized two categories of trade unions – those of workers and those of employers and senior staff associations.[74] More changes were introduced by the Trade union (Amendment) Act 1996 to further strengthen the capacity of the unions, eradicate intra union disputes and promote internal

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[68]T. Fashoyin, *Industrial Relations in Nigeria: Development and Practice, (*Ikeja, Longman, 1992),64

[69]*Ibid,* 34

[70]D. Otobo, *Industrial Relations: Theory and Controversies, (*Ikeja, Malthouse Press, 2000), 80

[71] The first of these centres was called the African Civil Servants Technical Workers Union (ACSTWU) with 12 affiliate unions. It later teamed up with the Civil Service Union and the Nigerian Union of Railwaymen to form the Federated Trade Unions of Nigeria in 1942. In 1943 it changed its name to the Trade Union Congress (TUC) and was accorded official recognition.

[72] These were: United Labour Congress of Nigeria (ULCN), Nigerian Workers Council (NWC), Labour Unity Front (LUF) and Nigerian Trade Union Congress (NTUC).

[73] The Administrator recognized about 70 trade unions

[74] It is important to note that upon the completion of the restructuring exercise in 1978, some 700 odd and mushroom unions faded away and were replaced with 70 registered and recognized trade unions. See F.C Anyim, J. O. Onyinyechi and A. O. Shonuga, "Industrial Unionism and its Bargaining Correlates in Nigeria Industrial Relations System,"Vol. 4 No. 3, (2013),*Journal of Management and Strategy,* 56-64 available at www.sciedu.ca/jms. Accessed 20/4/2017.

cohesion.[75] Following this law, the number of trade unions in the Country further reduced.[76]

The status quo was maintained until 2005 when the government decided to liberalize and democratize the labour movement much more. The trade Unions (Amendment) Act 2005 was enacted. A direct consequences of this legislation was expansion of opportunities for the emergence and registration of new trade union centres or federations.[77] Accordingly, the Nigeria Labour Congress (NLC) ceased to be the only central labour organization in the country as another labour centre called the Trade Union Congress (TUC) emerged and was accorded recognition. It has been asserted that, government opted for the amendment in order to "clip the wings" of the NLC which voraciously opposed many unpopular policies of government especially the incessant increase in petroleum product prices during the period.[78] Thus the amendment was governments revenge against the NLC.[79]Although the Act was widely criticized by labour activists and opponents of the government at that time, being perceived majorly as a ploy by government to censor the opposition, it has overtime boosted the trade unions push for democratization and provided viable alternative voice to organized labour in the country.

VI. The Concern and Undertaking of Trade Unions

The main task and focus of trade unions in Nigeria is stipulated by law. According to the Trade Unions Act, trade unions are meant to regulate the terms and conditions of employment of workers.[80] This goal is generic and can be amplified to generate many specific roles and issues which the trade unions must contend with in its bid to strengthen the capacity of workers. An important element in the goal of trade unions as presently conceptualized is connected to the phrase "terms and conditions of

[75] See the Preamble to the Trade Unions (Amendment Decree 1996)
[76] Industrial/workers unions reduced from 42 to 29
[77] Section 7 (2) of the Trade Unions(Amendment) Act 2005 substituted the phrase "Central Labour Organization" in the Principal Act wherever it appears, with the phrase "Federation of Trade Unions."
[78] O. O. Animashaun, "Residing state violence against Trade Unions in Nigeria."Vol. 1 No. 2 (April, 2007)*Labour Law Review,*139-147 at 145
[79] R. A. Danesi, "The Trade Union (Amendment) Act 2005 and Labour Reform in Nigeria: Legal Implications and Challenges,"Vol. 1 No. 1 (2007),*Labour Law Review,* 105
[80] Section 1 (1) Trade Unions Act, Cap T.14 LFN 2004

employment of workers." This phrase encompasses many other issues and features of the working environment of the employee: economic, (wages), physical environment (health, safety and cleanliness), nature of work (workload, job assignment) and control at work (supervision, discipline, promotion).[81] The unions are also concerned about the future of their members in the work place as well as with general developments in the country. It is apposite at this point to consider the roles of trade unions under specific headings.

6.1. Promoting the conditions of workers employment

Every trade union strives for favourable terms of employment for its members. This role is tied to the statutory duty of a trade union and according to Dada[82] is borne out of the fact that if workers have favourable terms of employment, they will have a reasonable security of tenure. This is why trade unions are involved in the collective bargaining process. This process according to the International Labour Office[83]involves negotiation about working conditions and terms of employment between an employer, a group of employers or one or more employers' organization, on the one hand, and one or more representatives of workers organizations on the other, with a view to reaching agreement. Trade unions provide the platform for workers to negotiate matters concerning the terms and conditions of employment of their members with their employers. Through such negotiations, new terms and conditions are established and old ones are modified, varied or even rescinded. Collective bargaining in this respect can be divided into contract negotiation to determine the terms of an agreement and contract administration to interpret the terms.[84]

Generally, every aspect of the terms and conditions of work can be negotiated by the parties and resolved. The product of the negotiation is called collective agreement. Thus while collective bargaining is a business deal for the determination of the price of labour services and the terms and

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[81]D. Otobo, *Industrial Relations: Theory and Controversies, (*Ikeja, Malthouse Press, 2000), 101

[82]J. A. Dada, "Promoting Security of Employment: The Role of Trade Union," Vol. 1, No. 1 (2002) *Unical Private Law Journal,*143

[83]International Labour Office, *Collective Bargaining: A Workers Education Manual, (*Geneva,ILO, 1960), 3.

[84] James J. Healy (ed) *Creative Collective Bargaining, (*New Jersey, Prentice-Hall, 1965), 9

conditions of employment of labour, collective agreement is concerned with the mode of execution and implementation of the agreed terms.

On its own, a collective agreement does not have a legally binding character.[85] Thus trade unions must ensure that terms of collective agreements are embodied in the individual's workers contract of employment. It should also ensure that there is put in place a machinery for the periodic review of agreed terms and conditions in line with changing realities of conditions of living. In this regard, it is important to note that the non-unionized workers look on secured collective agreements as leads and precedents with which to make their own demand in their respective employments.[86]

In order to be effective in bargaining, union leaders and negotiation team members need to be independent, well-fortified and alert on current issues and facts particularly since the management will engage experienced, ingenious and smart experts to deal with labour groups. A situation where a union owes its survival to their employers will not augur well for the union during negotiation.

6.2. Workers welfare

The welfare of workers is of paramount concern to the union he/she belong. Trade unions regard the socio economic welfare of their members as their primary concern and always demand 'more' from the government and employers. Many of the wage increases and allowances and bonuses which workers get in Nigeria are products of trade union efforts. Other trade union welfare services include award of scholarships to members or children of departed members, operation of cooperatives, thrift and credit schemes and provision of employment (even temporary employment) to distress members.[87]

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[85]I. N. E. Worugji, "Challenges of the Nigerian Trade Unions in the 21st Century." A paper presented at a workshop held on 22-24 September, 1999 at the Unical Hotel Conference Centre, Calabar.

[86]S. Fajana, *Industrial Relations in Nigeria: Theory and Features, (*Lagos, Labofin Publishing, 2000), 139

[87] A.A. Ekpoudo, *Pacific Settlement of Labour Disputes in Nigeria,* unpublished LL.M Thesis, Faculty of Law, University of Calabar, (2010), 42.

6.3. Organizing members

Trade unions are involved in the formal grouping and coordination of its membership. It is important to note that the existence of trade unions in Nigeria predates the legislations which regulate it. The unions therefore have the burden of organizing existing members and work opportunities, retaining them and sourcing new members to replace retired, dead or relocated members. Where it fails in this regard, it may stagnate or fade off.[88]

Organizing within the union also involve education of members to equip and inform then on necessary knowledge and skills for the tasks ahead. This is accomplished though seminars, conferences and workshops. Another aspect of organizing it leadership recruitment and development. Trade unions are fertile grounds for the recruitment and training of future leaders at the micro and macro societal levels. The unions provide a platform for some members to launch themselves on a political trajectory and public service.[89] This it does through the exposure of members to various leadership responsibilities.

6.4. Grievance Handling and Intervention

In the work place a trade union is an interventionist institution particularly in times of a labour dispute. The grievance handling mechanism of a union becomes activated when a problem arises between a worker or group of workers and the management and the continued employment of the former becomes an issue. The union usually intervenes on behalf of the worker(s) to bring about amicable settlement of the problem and even reinstatement/recall where some worker(s) might have been unfairly terminated. According to Dada,[90] this role is important in

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[88]D. Otobo, *Industrial Relations: Theory and Controversies, (*Ikeja, Malthouse Press, 2000), 102

[89] In Nigeria, a former NLC President was elected a state governor while another was a one time presidential running mate. Other former union leaders and members have served in government as legislators or members of the executive arm and in many other levels and capacities.

[90]J. A. Dada, "Promoting Security of Employment: The Role of Trade Union," Vol. 1, No. 1 (2002) *Unical Private Law Journal,*145

view of the fact that where there is tension between a worker or workers and management, the union is likely to be given audience by the authorities than the estranged or sanctioned employee(s) who may even be intimidated, coerced and subdued. Trade unions also assist the distress worker(s) to seek appropriate redress and justice where they are unfairly treated.[91] They also take steps to defend workers in the employment of some mushroom foreign companies who may be treated inhumanly under conditions that may be described as modern day slavery.[92]

6.5. Promotion of industrial peace

Trade unions are agents of industrial peace. Of recent, there has been an increase in the spate of strikes and cessation of work in the country.[93] However, while trade unions could not be absolved completely from responsibility, and the strike option cannot be completely avoided, the fact is that the unions often engage the government and other employers in dialogue to resolve outstanding and developing issues and avoid open confrontation in form of a strike. Trade unions do their utmost best to interpret the environment to the stakeholders. A strike action is often resorted to as a last resort.

Trade unions in Nigeria are concerned about industrial peace for increase productivity and benefits to the workers and generally to attract attention and investment in the relevant sectors. It plays this role with an awareness that industrial peace results from the genuine efforts of all industrial partners and a favourable work climate facilitated principally by the government.[94]

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[91] When some academic staff of the University of Ilorin where unfairly dismissed by the university management for their participation in a national strike declared by the Academic Staff Union of Universities (ASUU) in Nigeria, the ASUU supported the staff to seek legal redress till the matter was resolved in their favour by the Supreme Court and the university was ordered to reinstate them and pay salary arrears.

[92] P. A. K. Adewusi, "The Role of Trade Unions in the Enhancement of Civil Liberties in Nigeria,"Vol. 1 No. 3, (2007), *Labour Law Review,* 87-103, at 95

[93] Strikes are most rampant in unions in the health, educational sectors and petroleum sectors.

[94] H. H. Wellington, *Labour and the Legal Process,* (New Haven, Yale University Press, 1968), 215

6.6. Involvement in civil rights and the political process

The trade unions in Nigeria, being founded on the fundamental principles of freedom of association, take active interest in the expounding and enforcement of civil liberties in the country.[95] It does this through a number of instruments and mediums including seminars, workshops picketing, mass protests and strikes. Such actions are taken based on the peculiarities of the socio political environment at any particular time.[96] The unions also play active role in the political process in the country.They usually align with political parties during campaigns and elections. Their interests are spread across conservative and progressive platforms in line with the liberal disposition of the polity.[97] Essentially, trade unions in Nigeria are among the largest and most influential special interest groups advocating for the entrenchment of democratic ethos.[98] Universally, trade unions are noted for their role in guiding and upholding democracy and as pillars of social justice and particularly, they mobilize women, minorities, consumer groups, the unemployed and the rising cadre of working poor for some positive action.[99]

6.7. Socio economic developmental activities

Trade unions are involved in broad socio economic issues and programmes which are beneficial to their members and the larger society. This is particularly outstanding in Nigeria where trade union contribution to the independence struggle in the 1940s and 50s was widely acclaimed. Their involvement in issues which are traditionally outside the scope of labour is rooted in the realization that social problems transcends industrial boundaries and that development should not be left to government alone. Accordingly, trade unions in Nigeria as in other

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[95]P. A. K. Adewusi, "The Role of Trade Unions in the Enhancement of Civil Liberties in Nigeria," Vol. 1 No. 3, (2007), *Labour Law Review,*91

[96]O. Sonubi, "Role of Unions in Industrial Relations," in D. Otobo and M. Omole, *Readings in Industrial Relations in Nigeria,* (Lagos, Malthouse Press, 1987),36

[97] In the 2015 general elections the interest of the trade unions were divided across the main political parties, APC and PDP.

[98]T.Adefolaju, "Trade Unions in Nigeria and the Challenge of Internal Democracy,"Vol. 4 No. 6, (July 2013), *Mediterranean Journal of Social Sciences,* 97-104 at 98

[99] International Labour Organization, *World Labour Report (1997-1998),* Geneva, ILO, 1998; see also T. Adefolaju, *Ibid.*

countries, seek to be involved in the making and implementation of social and economic policies at state and national levels.[100]

Trade unions give direct economic assistance to their members through soft loans aids and grants. The unions also rally around their members and their relatives in difficult times.[101]Unions membership to a large extent caters for the safety and esteem needs of some persons. A relatively few workers have also used the platform of a trade union to realize their quest for status and self-fulfillment.[102] For the employee with high goals, but with educational and other deficiencies that would otherwise condemn him to an unchallenging life of mediocrity, opportunities for further need satisfaction are thereby provided.[103]

6.8. Strikes

Ultimately, in its drive to regulate the terms and conditions of employment of workers, a strike action is the most effective strategy that trade unions adopt when all consultations fail to yield the desired result. To a large extent, it is a last resort mechanism.
According to Lord Denning, strike means:

> A concerted stoppage of work by men done … with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or other or supporting or sympathizing with other workmen in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger.[104]

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[100] The unions in Nigeria were actively involved in the process of privatization and commercialization of some state enterprise e.g. NITEL, NEPA (now PHCN). Some trade unions are involved in some commercial ventures and housing development through their cooperatives.
[101]For, instance, "tragedy or disaster e.g. kidnapping, fire disaster or even death.
[102] Se generally, A. H. Maslow, *Motivation and Personality, (*New York, Harper & Row, 1954); and "A Theory of Human Motivation,"L. (1943), *Psychological Review,* 370-396
[103] J. M. Bret, "Why Employees want Unions," in K. M. Rowland, G. R. Ferris and J. L. Sherman, *Current Issues in Personnel Management, (*Boston, Allyn and Bacon, 1983).
[104]*Tramp Shipping Corporation v. Greenwich Marine Inc.* (1975) 2 All ER 989. See also Section 47 (1) Trade Disputes Act, Cap. T8, LFN 2004

During strikes, workers temporary stop work without any intention to determine the contract of employment.[105]A strike action can only be effective when it is organized and coordinated by a body of persons employed acting in combination or by persons having a common understanding.[106]Trade unions in Nigeria also use the strike device to make the employers and the government to redress the plight of workers and Nigerians in general. This is why trade unions in the past has had cause to embark on general and political strikes.[107]This kind of strike which is quite different from the industry specific or localized strike, cuts across all segments and is embarked upon to induce government or parliament to take certain actions(s).[108]

A strike action is quite lawful in Nigeria[109] but it is expected that it should be tied or related to a labour disputes, though this is not always the case.[110] The issue for labour becomes one of distinguishing between an issue concerning the employee and employer; and one concerning the masses and indirectly a matter of concern for organized labour. This is why some conservative judges will always grant an injunctive relieve against the trade union.[111] Lord Scarman stated in *Express Newspapers Ltd v. McShane*[112]

> In a case where action alleged to be in contemplation or furtherance of a trade dispute endangers the nation …, it could well be a proper exercise of the courts discretion to restrain the industrial action pending trial of the action.

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[105] R. W. Rideout and Jacqueline Dyson, *Rideout's Principles of Labour Law,* (London, Sweet and Maxwell, 1983), 242

[106]E. Etteh, "Strike as a Labour and masses tool in the context of the new Trade Unions (Amendment) Act, 2005." A paper delivered at the Senior Staff Association of Nigeria (SSANU) Workshop held from 30/6/2005 – 1/7/2005 at the University of Nigeria, Nsukka.

[107]P. A. K. Adewusi, "The Role of Trade Unions in the Enhancement of Civil Liberties in Nigeria," Vol. 1 No. 3, (2007), *Labour Law Review,*97

[108] J. M. Audi "Strike as Labour and Masses Tool in the Context of Trade Unions (Amendment) Act, 2005" in P.A. K Adewusi, *Ibid,*91

[109] See section 43(1) Trade Unions Act; Section 48 91) Trade Disputes Act, Section 40 of the 1999 Constitution; Article 10 (1) & 15 of the African Charter on Human and Peoples Right;

[110] See *FGN v. Oshiomhole* (2004) NLLR (pt.2) 326; *FGN v. Oshiomhole* (2004) NLLR (Pt.3) 541

[111]*Obeya v. A.G of the Federation* (1987) NWLR (Pt. 60) 325

[112] (1980) ICR 42

Therefore, it is imperative for trade union leaders to be objective by carefully weighing the issues and options and follow due process before embarking on any strike action. The goal should be to ensure that the workers and by implication the masses are better off at the end of the strike action.

VII. Prospects and Conclusions

Trade unions will continue to be relevant in work places. By focusing on the development and activities of unions, this paper has espoused the role of trade unions in employment stabilization and capitalization of workers. The unions have evolved to their present status after some protracted and tedious effort and have also continuously remained in the vanguard for the protection and enhancement of workers' rights and welfare. Indeed the present status of Nigerian workers can largely be attributed to the efforts of trade unions.

Despite the capabilities and successes of the trade union movement in Nigeria, there are still some hiccups and inhibitors in the system. It is important to highlight some of them in order to appreciate the matter. Some of the core issues plaguing the unions include leadership tussle and disunity of members, intra and inter union squabbles, government interference and undue politicization, financial constraints, indiscipline and disloyalty of members. These issues have serious implications for trade union effectiveness and should be addressed.

Most trade unions in Nigeria are still facing leadership challenges.[113] Both at the national and branch levels, the labour movement recurrently have these problems which sometimes led to the split of some unions. This is caused largely by the inordinate ambition of some members for power, ethnicity and external influences. When a union is perplexed and distracted by intra and inter union crises, it will lost focus and fail in its efforts to promote the interest and welfare of the members. Though government intervention intrade union affairs through legislation has significantly tamed this anomaly, it is imperative for the trade unions to adopt the tenets of industrial democracy in its entire operations. According

[113] As recent as 2015 the NLC faced a major crises during the election of its national leadership. This resulted in the congress breaking into two factions according to the loyalties of the members and branches.

to Godard,[114] any organization which seeks to provide workers some democratic rights and protection in the work place should itself be internally organized to provide such rights and protection.

However, work place participatory democracy in Nigeria has been limited by many factors. These include centralization of the decision making process in some unions, employee's limited perception of their role in decision making, corruption, fear of management, external influence of some corporations and the overwhelming influence of government in public sector organization.[115] The regular sensitization of trade union members through seminars, conferences and workshops can help in surmounting some of these issues. The unions should also devise ways of adequately asserting their independence by becoming more self-reliant and self-financing and limit the acceptance of donations and gifts from their employers and the government.[116] This will embolden them well during the negotiation process with the employers.

Casualization of labour services is increasing in Nigeria both the private and public sectors (but more in the former). Casual staffs are exposed to a lot of risk and are generally unfairly treated even when they are assigned the same tasks and targets as the regular/permanent staff.[117] Part of the cause of the vulnerability of casual work is the fact that the employers use the general condition of paucity of jobs in the country to prevent them from becoming unionized. Trade unions in the different work places can assist and empower this category of workers by ensuring that they are allowed to join the respective unions that will cater for them. This they can achieve by working towards the inclusion of a clause on this

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[114] J. Godard, *industrial Relations, the Economy and Society,* (2003) in T. Adefolaju, "Trade Unions in Nigeria and the Challenge of Internal Democracy,"Vol. 4 No. 6 (2013),*Mediterranean Journal of Social Sciences,* 99

[115] See T. Fashoyin, "Democracy in Industry: A Desirable Management Practice," in T. Adefolaju, *Ibid.*

[116] It is important for union to embark on some income generating ventures. E.g. cooperatives, housing projects, purchase of shares in blue clip companies, transportation etc.

[117]B. Daniels, "Concerns over casualization of labour in Banks," *This Day,* August 21, 2016, p.21

in the collective agreement. This will in future bring most of the workers in the country into a trade union.[118]

Trade unions in their bid to protect the interests and rights of workers and indeed those of the masses, usually adopt different tactics, the most potent of which is a strike weapon. However, this strategy may become controversial and be denominated as a political action. It may also become subjected to some mazy legalism and thereby cause division within the union and polity.[119]Trade unions should be wary of this and try to bring all their actions within the context of the 'terms and conditions" of employment to make the issue a labour dispute within the confines of law. Thus for instance, a case of a hike in petroleum product prices may be protested as a demand for an increase in transport or utility allowance on ground that the policy will adversely affect the interest of workers by reducing the value of the current wage.[120]

Lastly, it is important to stress that the unstable labour conditions in the country is directly connected to low productivity and indirectly to the economic meltdown. It is important for all workers to be mobilized to change the direction of the economy. The trade unions are significant stake holders in this regard as highlighted in this paper, hence, it is important for their leaders and members to continually partner with other institutions to build up and stabilize the system. This will require some measure of courage, transparency and a high sense of commitment from the unions without which the issues addressed herein will still persist and the workers will continue to grouse and whine under unfair and exploitative schemes of employers .

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[118] Section 40 of the 1999 Constitution provides inter alia that: "Every person shall be entitled to… form or belong to any … trade union or any other association for the protection of his interests."

[119] See *FGN &Anor v. Adams Oshiomole&Anor,* (2004_ 1 NLLR (pt.3) 541

[120]P. A. K. Adewusi, "The Role of Trade Unions in the Enhancement of Civil Liberties in Nigeria," Vol. 1 No. 3, (2007), *Labour Law Review,*103

POLLUTERS' LIABILITY AND VICTIMS REMEDY: ASSESSING THE QUANTUM OF COMPENSATION FOR ENVIRONMENTAL POLLUTION IN NIGERIA.

Okani, J. O*

Abstract

Damage to the environment is mostly perpetrated by oil spills resulting from exploration and transportation activities of Multi-national Oil firms who take undue advantage of the weak enforcement standards in Nigeria. This article examines the effects of pollution on man and the ecosystem in relation to sustainable development. It compares the economic and judicial considerations for granting remedy to victims of pollution in Nigeria and United States of America, bearing in mind that in granting mandatory orders, the Court is mindful of the need to balance the benefits which the order will confer on the plaintiff and the detriment which it will cause the defendant. The article recommends a re-appraisal of the situation in Nigeria with a view to achieving a combination of not-too legalistic and a good corporate citizenship approach in granting remedy to victims of environmental pollution.

Keywords: Compensation, Environment, Ecosystem, Pollution, Spillage.

1. Introduction

The geographical entity called "The Niger-Delta-Region" in Nigeria is endowed with God given wealth: Land-enriched with Petroleum (Black Gold); luxurious vegetation; large area of water with species of fish and abundant sea foods, which if properly enhanced would today be a tourist attraction of beaches ranking with Hawaii, Miami and Mexico on one hand and on the other, provide ocean vessels water ways to boost the nation's economy, create viable employment as well as foster export and import trade.

According to North[1]"if the resources enjoyed the consequences of employing the natural endowment well, the Niger-Deltans by today would

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[1]Thornton,J., and Bechwith, S.,*Environmental Law* (London: Sweet & Maxwell, 2004)2

think themselves very rich". But with the wealth of the region gone down the drains through pollution, all the wealth in the world will indeed not purchase another blessed land, water, vegetation and cannot replace all the great men which the region has lost due to gruesome assassination of the likes of Ken Saro Wiwa and others. Where oil spillage or pollution has occurred, judicial relief must be mandatory, requiring the defendant to remove or clean up contamination, or at least to keep them within his own boundary. The Court in Nigeria is often loath in granting mandatory injunction having regard to the irreversibility of the order. It is of utmost interest to consider the discretionary nature of the order and the duty to be fair to the parties. Being fair is to consider the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. In good faith, a plaintiff should not be deprived of relief to which he is justly entitled for the mere reason that it would be disadvantageous to the Oil Company. In equity, the plaintiff should not be permitted to insist on a form of relief which will confer no appreciable benefit on him and also materially detrimental to the defendant.

The environment has been a product of colonial/modern legislations[2] vis-à-vis local[3] and international conferences/summits[4]. The subject matter of the conferences was to ensure the survival of the Earth in relation to man so as to leave it "*Urbem et orbem*"[5]. The concept of Environmental Law is a dynamic one. The effects and problems of Oil pollution are obvious and well known. The awareness of Oil pollution is largely the result of the publicity generated by the incident of the Torrey Canyon Disaster in 1967[6].This caused the wreck of a ship considered the largest vessel (at that time). The disaster was the result of supertanker carrying120,000 tons off the Western Coast of Cornwall, England in March

[2] The Criminal Code Act, Cap 77 Laws of the Federation of Nigeria, 1990. This statute primarily is a Colonial Act enacted in 1958. It stipulates sanctions for: Fouling of water in springs, streams, wells, tanks, reservoirs, burial of corpses within 100 yards of a dwelling house. For provisions on modern legislations, references are made to the Federal Environmental Protection Agency Act, 1990 and the NESEREA Act, 2007, The Petroleum Refining Regulation 1974. (The Oil Pipelines Act 1956)

[3] Local conferences: - e.g. the "Earth Day" held in Lagos on 24/04/12.

[4] Numerous International Conference and Summits has been the forum for environmental issues. Amongst them are: the "Stockholm Conference 1972, the "Rio de Janeiro Conference 1992 and the recent Earth Summit of June, 2012 held in Rio de Janeiro.

[5] Meaning to "leave it in a better state than it was when we took it from our fathers".

[6] Malcom, R., *A Guidebook to Environmental Law*,(London: Sweet & Maxwell),192

1967[7], causing environmental disaster which was termed "the World's worst manmade environmental smoke pouring at 2,000 feet high" Closely following the Torrey Canyon, was Santa Barbara Blowout in 1969.[8]Nigeria has had its fair share of oil spills and devastating gas flaring. The Oil Companies engaged in processing of Oil prefer litigation to settlement or payment of compensation to the victims. Litigation provides the avenue for the Oil multinationals to evade payment to the affected communities. The period of litigation affords a polluter a good time to get off lightly and they take advantage to continue operations undisturbed based on the notion that the matter is in court and therefore subjudice.

This paper examines the global problems of environmental pollution with special regards to Nigeria, the amount of compensation paid to victims of pollution, legislations regulating pollution and control, the liability of those responsible for the pollution, Polluter pays principle, the extent of compliance with Principles 21, and 22 of the Stockholm Conference which charged states to develop further, the international laws with regards to liability and compensation. It also discusses sustainable development in the light of institutional frame work as embodied in the Brundtland Report, Kyoto Protocols and the United Nations Declarations on the environment. In addition, the dumping of harmful toxic waste at Koko, a town in Delta State stampeded the Nigerian government into passing a series and crucial legislations[9].

2. Nature and Effect of Environmental Pollution on Man and the Ecosystem

Pollution has been defined as a man-made or man aided alteration of chemical, physical or biological quality of the environment to the extent that is detrimental to that environment or beyond acceptable limits.[10]Environmental pollution is the addition to the natural environment of any substance or energy (heat, sound…) at a rate that is higher than natural concentrations of that substance and therefore, has an adverse

[7]Ibid

[8]The Santa Barbara spill occurred in the Pacific Ocean channels, February, 1969. It was at that time the largest Oil
Spill on the United States waters.

[9]Harmful Waste (Special Criminal Provisions) Act, Cap.165 Laws of the Federation of Nigeria 2000, in Atsegbua, L., *Environmental Law in Nigeria* (Lagos: Ababa, 2003) p. Also in The Guardian Newspaper,Thursday June 9,1988, p9,

[10]Petroleum Act, Cap.P10 Laws of the Federation of Nigeria 2004 S.8(1)

effect on it.[11] The Niger Delta environment has been impaired by placement of High Pressure pipelines carrying crude oil and petroleum products in different forms across villages. Spills from the pipes are the result of wear and tear due to old age, or alleged sabotage by unscrupulous business men who reap where they have never sowed or by the restive youths.[12]

According to Professor Ambrose Alli[13], vast tracts of agricultural land have been destroyed and become unproductive. Surface water and river courses are polluted and contaminated rendering the water undrinkable. This has caused great hardship for the inhabitants who eventually become impoverished and deprived. The result is that some are compelled to migrate to other towns in search of decent life. Apart from the large quantity of oil that gushed from the pipes, the terrain of the Niger Delta, allows the quick spread of oil on water and there is no limit to the extent this can go.[14] The awareness of oil spills and the resultant pollution did not get early recognition both in Nigeria and internationally. Crude oil pollution has for some time been, for many countries of the world, Nigeria inclusive, a major source of national income[15]. The hazard it poses often times comes up against the interest in the income it provides. It is noted that government has not set its priorities right. The laws and focus on environmental issues are inadequate and ineffective in the control and prevention of Oil pollution. In the Niger Delta, there was the Texaco Funiwa No.5 Oil blow out in which about 200,000 barrels of oil were lost and four villages suffered from the pollution. The Nigerian National Petroleum Company only provided interim relief despite the quantifiable monetary loss of ₦1,395,817.76.[16]

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[11] Omorogbe, Y., "Regulation of Oil Industry Pollution in Nigeria" *New Frontiers in Law*, Azinge, E. ed., (Benin: Oliz Publisher), p.147

[12]Odiase- Alegimenlen, O.A., & Ezekiel, M.P., *The Impact of State Ownership of Petroleum Oil on Nigeria: A*
Socio –Legal Perspective, Atsegbua, L.A., (ed.) (Benin City: Headmark Publishers, 2001) p.71

[13]Alli, A. F., during the "Ceremony/ Opening Address" in the Petroleum Industries and the Nigerian Environment
Proceeding of 1981, International Seminar in Port- Harcourt, Nigeria. p.12

[14]Odiase, (n.12)

[15] Omotola, J.A., *Environmental Law in Nigeria including Compensation* , (Lagos:Faculty of Law,1990) p.173

[16] Ibid p.174

In a similar incident, Shell was reported to have accepted liability for two oil spills in Nigeria and that the oil giants now face a bill of hundreds of millions of Dollars, following a class action suit brought on behalf of the communities in Bodo-Ogoni Land. The multinational company accepted full responsibility for the massive oil spills which devastated the community with a spill of about 69,000 barrels of oil. It is estimated that it may take about 20 years to clean up the effect of that spill. Experts who studied the video footage at Bodo, say they could together be as large as the Exxon Valdez disaster in Alaska, where 10 million gallons of oil destroyed the remote coastline. The "double rupture" culminated to a class action suit taken on behalf of the community by a London based law firm named Leighday & Co. The incident caused rupture of the Bonda/Bonny Trans Niger pipeline pumping over 20,000 barrels of oil per day.[17]

In 1994, the Ogonis, evicted Shell Oil Company for the unchecked pollution which affected the creeks and inlets on which Bodo and as many as 30 other settlements depended for food, water etc. Shell made no attempt at cleaning the oil which collected and had seeped into water table and farmlands. "Shell after two years offered the sum of £3,500, 50 bags of Rice, Beans, few cartons of Sugar, Tomatoes, Groundnut oil. The offer was rejected by the community which considered it "insulting, provocative and beggarly".[18] Most communities in the Niger-Delta sued Shell for damages occurring from pollution of their land in the British Courts.[19] The Coordinator, Centre for Environment and Human Rights in Port Harcourt, Patrick Neagbortenm, reported that "Shell is heavily implicated for the spills, disaster and is highly responsible for over 7,000 oil spills since 1989. The role of case law in this respect is best appreciated where there is judicial activism.[20]Judicial proceedings against Shell and Shell Petroleum Development Company are numerous in various Courts in Nigeria. The Company accepted responsibility for equipment failure under the Oil Pipelines Act 1956, and agreed to pay compensation to those entitled to receive it. Despite the commitment to pay, they have reneged on their obligation. This has forced the community to seek redress in Court.

It is obvious that Shell treats the victims and communities, the judiciary and environmental matters with levity by further subjecting

[17]The Vanguard Newspaper, Thursday June17, 2010 p1,5
[18] Ibid
[19]Odiase (n.14)
[20] Atsegbua, L., et.al., *Environmental Law In Nigeria,* (Lagos: Ababa Press Ltd. 2005)p34

without reasonable course an already concluded agreement to further negotiations.[21]Petroleum as a natural resource is a blessing to: Canada-Ontario, Baku-Capital City of Azerbaijan, Gulf of Mexico et cetera, in Nigeria, it seem to be a blessing in disguise.[22]The Niger Delta has substantial oil and gas reserves which accounts for about 95% of the Country's foreign exchange earnings and about 25% of the nation's gross domestic product. Despite its great mineral wealth, the region which is well endowed with fertile agricultural land, forest, rivers, creeks and coastal waters, have suffered perpetual neglect by past civilian/military government. The area remains one of the poorest and most underdeveloped. The inhabitants, 70% of whom still live in a rural, subsistent existence characterized by a near total absence of basic facilities as electricity, pipe borne-water, hospitals, proper housing and motorable roads are further weighed down by poverty, malnutrition and disease.[23]The New York Times in an editorial captured the Niger Delta situation thus:

> Traveling through the delta region, it is difficult to comprehend that this is actually an area wealthy in natural resources…generating hundreds of billions of dollars in revenue since oil was discovered, the Niger Delta is one of the poorest and least developed part of the country.[24]

2.1 Environment for Sustainable Development

The ultimate reason for environmental law is to ensure a sustainable development. The concept supports the realization that the world's economies and the ways in which its human and animal inhabitants are treated are interlinked. It is trite that environment is the "totality of physical economic, cultural aesthetic, social circumstances and factors which surrounds and affect the desirability and value of property and which also affect the quality of lives."[25] Considering the fact that it is

[21] Ibid
[22] Ibid
[23] Ibid
[24] Odiase (n.14)
[25] Atsegbua, L.A., *Environmental Law in Nigeria: Theory and Practices* (Lagos: Ababa Press Ltd; 2005) p5

based upon the milieu of man in his natural habitat, sustainability derives from the fact that environment has a unique impact and influence on the wellbeing of man, man's activities and dispositions for survival depending on whether it impacts positively or negatively.

The environment in its natural state is harmonious, decent and absolutely adaptable for man's healthy existence. It is Man's exploitation of it, for the purposes of survival and his quest for industrialization and scientific advancement that brings about the obnoxious result of degradation, damage and adulterated quality. Man's life no doubt depends on resources in his environment for sustenance. It is now being realized that environment for all intent and purposes extends beyond a peoples immediate surroundings and sometimes assume international dimensions.[26]

The Brundtland Report[27]was the first to give prominence to the concept of sustainable development in view of the competing demands made on man's natural resources. The competition is usually between the forces of deterioration whose dominant objective is to consume or deteriorate and the conservationists whose primary concern is how to preserve the society's natural resources.[28]

The Stockholm Conference of 1972 was the first international attempt to deal with the environment as a whole. The Conference issued a declaration that a "point has been reached in history when we must shape our actions throughout the world with a more prudent care for our environment".[29] It reiterated the *"Sic utere tuo et alienum non laedas*" rule in principle 21 which states that:

> States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to explore their own resources pursuant to their

[26] Ogunsanwo, B, *Environmental Law and Sustainable Development in Nigeria*, M.A. Ajomo (ed.) (N.I.A.L. Lagos:
1994) p.18

[27]Ibid

[28] Osipitan, T., "Problems of Proof in Environmental litigations" in *Environmental laws in Nigeria*. Omotola, J.A.,
(ed). (Lagos: University Press, 1990) p.112

[29] United Nations Doc. A/conf.48/14/ev. 1 Stockholm conf 1972
http://www.cjwalshi.e./tag/1972-stockholm-dec accessed 15/15/2019 ("Stockholm Conference")

> environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of area beyond the limits of national jurisdiction.

To maintain sustainable development we must act in line with the popular saying "break eggs if we must make omellette". We therefore must make waste become wealth, engage in employment, attain better health and guaranteed life expectancy improved. Principle 21[30] also affirms the sovereign rights of states to exploit their own resources pursuant to their environmental policies. Principle 22[31] of the conference forms the bedrock of this article and considered to be the cornerstone of modern international environmental law. The above principles were later reaffirmed at the Rio de Janeiro Declaration in 1992.[32] The Declaration which emerged from customary international law featured prominently in the Trail Smelter Arbitration between Canada and the United States of America,[33]where the principle of neighbourly life was greatly emphasized. The issues for determination in this case was that "Zinc" and "Lead" smelter on Canadian soil was released in large quantity of Sulphur dioxide coupled with residues from clouds of smoke contaminated the air and fell as toxic precipitation on numerous farms in the United States. The Court summed its decision in the following terms:

> No state has the right to use or permit the use of its territory in such a way as to cause injury by fumes in or to the territory of another or the property or persons there in when the case is of serious consequence and injury is established with clear and convincing evidence…

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[30] UN. Doc. A/conf.48/14rev.1, in Amokaye, O.O., *Environmental Law& Practice in Nigeria*, (Lagos: ULP, 2004)
p. 47.
[31] Ibid
[32] Ibid
[33] Trailsmelter Case (*US v Canada*) 1938/3UNRIA 1905

In the *Confu Channel case*,[34] a decision of the International Court of Justice followed the same judicial reasoning: "that no state may knowingly allow its territory to be used in a manner that would cause serious physical injury to the environment of another". As a safeguard to the Principles of Stockholm Conference, a number of concepts have been applied to combat the situation. One of such concept is that of '*Utere tuo ut alienum non laedas'*[35] the other is the principle of "good neighbourliness" (*bon voisinage*)[36]. It is regrettable that in Nigeria, the legal status of the principles have not been secured.[37] Notwithstanding, they are not only part of customary international law that ensures state responsibility to prevent, mitigate, repair or compensate for the harm caused to others, they have been signed and incorporated into our legislation. For this reason, individuals and communities have the right to demand or sue for payment of compensation in the event of any harm/damage caused to land, farms, livestock and property. Denying an injured victim access to justice is to say in the words of Ogbuigwe, "they have been robbed of their resources and to rob them of their right of access to justice is worse than apartheid."[38]

Since 1972, the protection of the environment has become one of the central objectives of the international legal system. Several bilateral and multinational agreements namely the Bamako Convention, 1991[39]; the Basel Convention,1989[40]; the Montreal Protocol, 1992[41], the Kyoto

[34] I.C.J Report (1949) 244
[35] Amokaye (n.32)
[36] Malanezuk, P. Akehust's Modern *Introduction to International Law*, 7th ed. (London: Routledge, 1997) p. 241.
[37] Ibid 26
[38] Ogbuigwe, A.E., "Law and Environment: The Niger Delta Challenge" (1991)1 Port Harcourt Law Journal p. 98
[39] Bamako Convention, 1991. Cited in Atsegbua, et al. *Environmental Law in Nigeria* (Benin: Ambik Press,2010)
p.405
[40]Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, adopted in 1989. Entered into force on May 5, 1992 at https://www.basel.int/The Convention/overview/Textofthe convention/tabid/1275/Default.aspx accessed 30/05/2019 ("Basel Convention")
[41] Montreal Protocol on Substances that Deplete the Ozone Layer adopted in Montreal on Sept. 16, 1987 at https://www.britannica.com/event/Montreal-Protocol accessed 31/05/2019 ("Montreal Protocol")

Protocol, 1997[42] have evolved and adopted by some member nations. These Conventions/Protocols were put in place to address the minimum acceptable standards on the environment and sustainable development. While South Africa played host to the United Nations Climate Conference on the Environment, a significant and remarkable achievement of the Conference is the "agreement to extend the Kyoto protocol for another five (5) years.[43] Consequent upon the agreement for extension of time, Canada withdrew from the Kyoto protocol,[44] for the following reasons:

(1) that it does not go far enough to curb greenhouse emissions and avoid dangerous climate changes;
(2) its cost outweighs the benefits;
(3) the standard set is considered too optimistic, highly inequitable, and inefficient agreement which will do little to succeed,
(4) Canada called the agreement "a false".[45]

III. The Liability Principle

Liability for an offence may arise in one of the following ways:

(i) By imposition: In this sense, liability may be imposed as a legal consequence upon a person's act or omission in breach of a Law where he is under a duty/obligation to so act.
(ii) By the fault principle: Where liability is based on "fault principle," a person becomes liable for the injury he has caused to another. More often, the negligence of a *tortfeasor* is a sufficient ground to establish liability. Fault can occur by intentional act or negligent act. Intention signifies that a person voluntarily undertook a course of conduct knowing that it is more likely to result to harm. Here, the actor's motive or malice is largely irrelevant. In many civil law

[42] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997 at https://www.britannica.com/event/kyoto-Protocol accessed 30/05/2019 ("Kyoto Protocol")
[43] Nigerian Television Authority (N.T.A) Network News – 11/12/2011 (21.00hrs)
[44] Basel Convention (n.40)
[45]Ibid

jurisdiction, acting in certain ways with knowledge is considered "*dolus eventualis*"[46].

However, some tort requires that damage must have been done to the claimant in person or to his property or his right. Trespass, for example do not require proof of actual damage.[47] Liability arising from a breach of duty is fixed by law[48]. This duty is generally towards all persons and a victim of the breach may seek redress by an action. This imposed duty is the basis of principle 21[49]. Liability may be strict or vicarious. Blackburn, J., in *Rylands v. Fletcher* demonstrated the utility of strict liability principle thus; "any person who for his own purpose bring on (his) land, collects or keep there anything likely to do mischief, if it escapes, must keep it at his peril".[50] This principle has been a matter for the International Convention on Civil Liability for oil pollution[51]. A body acting with uniform international rules and procedures for determining what constitutes liabilities as well as accessing the measures for payment of adequate compensation-Art 111.[52]

A polluter may be charged under the strict liability rules for harm resulting from dangerous activities of Oil exploration. Across jurisdictions, a company may be held legally responsible when an abnormally dangerous activity it undertook caused harm regardless of whether or not it was at fault and to what extent it took measure to prevent the harm. Harm resulting from dangerous activities of a polluter, is viewed as an absolute liability. The trend in most part of the world is that "a conviction should be sustained without a showing that the defendant has a *mensrea* because the offences are against public welfare[53]

An International agreement amongst some governments brought about the London Convention on Civil Liability for Oil Pollution Damage

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[46]*UK. Bradford Corporation v Pickles*, (1895) A.C. 587, or *Lloyd's of London v. Scalera* (2000) I.S.C.R 551

[47]*Winifield, & Jolowicz on Tort*, 16th ed. (London: Sweet & Maxwell, 2002) p.206

[48] Turner, C. & Hodge, S., "Unlocking Torts (Gt. Britain: Hodder & Stoughton (ed.) 2008) p.3

[49] Stockholm Conference (n.29)

[50] (1865) L.R.3Hl

[51] Smith, I.O., "Corporate Social Responsibility Towards a Healthier Environment" (2001) Modern Practice Journal
of Finance & Investment Law, Vol.4,p.124

[52] Ibid

[53] Omotola (n.15) p.243

from offshore operations. This Convention affirmed the concept of strict liability "for any pollution, damage resulting from offshore operations, except caused by war, insurrection, force majeure (Act of God) or natural catastrophe." In 1985, Oleum gas leaked from a manufacturing plant in India causing injury to the health of many individuals. Those injured filed a civil claim against the Company in the Indian Court[54]. In the course of litigation, the Indian Supreme Court developed a theory of absolute liability. The Court held that:

> An enterprise which is engaged in a hazardous or inherently dangerous industry… owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of… the activity which it has undertaken… for private profit can be tolerated only on condition that the enterprises… indemnifies all those who suffer on the account of carrying on such… inherently dangerous activity regardless of whether it is liable to compensate all those…affected by the accident…[55]

Oil companies in Nigeria come under this legal responsibility when an abnormal/dangerous activity which they undertake caused harm, regardless of whether or not it was at fault. Kelson, posits that a constitutional right of a person involves a corresponding constitutional duty on others. The correlative rights clearly imply that the rights of the Niger Deltans must be given adequate remedy with compensation for a breach of care.[56] Public law confined constitutional rights exclusively to the determination of the legality of actions which caused transgression rather than trace liability to transgressors. The Supreme Court in *Meskell v C.I.E*[57] held that public law liability under the constitution and tortuous liability under general law are wholly distinct causes of action. The Court posits

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[54] Report of the International Commission of Jurists, Civil Remedies: Geneva: Vol. 3, 2008 p.42

[55] *Mehta, M.C. v. Union of India*, WP 12739/1985 (Oleum Gas Leak case)

[56] Ukhuegbe, S., "Enforcement Process in Fundamental Human Right Cases in Nigeria," New *Frontiers in*
Law, Azinge, E. (ed.) (Benin: Oliz Publishers; 1993) p.206

[57] (1973) I.R. 121

that liability under the Bill of Rights need not fit the recognized compartment of tort. Ukhuegbe,[58] referred to the Ireland example thus: "in line with other common law jurisdictions, special public law liability is developing. It is expected that the same will be made applicable to Nigeria." In determining corporate liability, the key officers of the company are deemed to be guilty of the offence unless they can otherwise prove that they had no knowledge of the offence or that due diligence was exercised to prevent the spill. No flimsy excuses should be allowed for them to escape liability.

IV. Polluter's Vicarious Liability for the Act of a Subsidiary Company

In many instances, it may not be necessary to establish that the company acted negligently or intentionally because companies can be held accountable for the actions of persons with who they are in a partnership. A court will consider whether the company's conduct contributed to the infliction of harm. If a parent company know or ought to know the risk of its subsidiary causing harm to third parties, then it is required to take sufficient precautionary measures against the act.

The level of precaution depends on the formal and de facto control the parent Company has over its subsidiary. In a matter titled Chevron and Nigeria, 1998, Military police was reported to have killed protester and environmental activists in the Niger Delta. These persons where campaigning against Chevron's subsidiary's oil drilling in the area. 2004, a civil tort claim was initiated in the United States against Chevron Corporation and subsidiaries. In *Boweta et al v Chevron Co*.[59], deciding whether the civil complaint against a parent company Chevron-Texaco involving its Nigerian Subsidiary, could go to trial, a United States court held that "the fact that defendants were making abnormally frequent attempts to contact Nigeria on the third day is an indication of responsibility.[60]

4.1 Compensation and the Polluter's Pay Principle

The European idea of liability for breach of a duty of care by the polluter is designed to satisfy the principle that the "polluter" must pay for

[58] Ukhuegbe (n.56)
[59] *Boweto et al v. Chevron Co. et al*., (2007), 3:99 - cv – 02506 - 51
[60] Ukhuegbe (n.56)

the harm caused by him or that which is attributed to him. He is statutorily bound to keep the product within the pipelines and properly direct them.[61] Polluters are responsible for any sipping, leakages and spills of oil on land or water. Hitherto, The Environmental Protection Agency[62] thereinafter referred to as FEPA, provided a wide discretion on when and how to take action against a polluter. While imprisonment is considered draconian, the level of fines are insufficient to deter further occurrence as it does not adversely affect the polluter's business, profit or goodwill. Apart from the common law remedies of damages and injunction, there exists a special statutory compensatory regime for the victims of environmental pollution, particularly in respect of oil pollution.

Generally, compensation means to recompense for loss suffered by aggrieved persons. It ensures that the injured victim is not worse off after the injury complained of or if his property is destroyed, a fair market value is paid for the loss or deprivation of his property. Compensation could be relevant in two circumstances in oil pollution cases. First, where the land is acquired for oil exploitative and exploratory activities. Second, when there is oil pollution arising from pipeline leakages or other exploratory activities. Here, compensation in environmental matters is not restricted to personal or proprietary damages, it could be in form of restitution where an award is made to restore the damaged environment to its original position or restore the victim to the *status quo ante* insofar as it is possible so to do through payment of monetary compensation.

The category of damage in environmental cases is broad to accommodate damage/destruction of natural resources including: real or personal property, loss of subsistence use of resources, loss of profit or impairment of earning capacity. Government can also recover damages for net cost of providing additional public services during or after removal activities.[63] Where monetary compensation is paid for damaged properties in pollution-related cases, what the law gives to the victims is the right to be put so far as money can do it, in the same position as if his land or property has not been destroyed.

[61] Section 11(5) (c) Oil Pipelines Act, Cap 145 (1956)
[62] FEPA Act Cap 131 LFN 1990 (now repealed)
[63] Ukhuegbe (n.60)

The right to receive just compensation for expropriation of private rights is a constitutionally guaranteed right under our Constitution. The Constitution requires the payment of prompt compensation to persons whose property has been compulsorily acquired.[64]The Constitutional arrangement is itself inconclusive because it failed to provide the mode of assessing compensation and time of payment. The payment of compensation is also not automatic, a person who claims compensation must be able to establish some degree of damage either to his person or property bearing in mind that compensation is determined by the extent of damage. However, the degree of proof is less rigorous than the proof of claim in common law remedies of nuisance, negligence or trespass. It is sufficient if it can be shown that damage exists and the question of remoteness of damage is unnecessary.

Other legal compensatory regimes are contained in the Land Use Act.[65], Federal Environmental Protection Agency Act[66], Petroleum Act[67], Petroleum (Drilling and Production) Regulation [68] , Environmental Guidelines and Standards for the Petroleum Industry in Nigeria, 2002 (EGASPIN)[69], Oil Pipeline Act,[70] also in Oil and Pipeline Regulation Act[71], National Environmental Standards and Regulations Enforcement Agency Act (NESREA) 2007.[72] Unlike the U.S. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[73] and Oil Pollution Act[74]which comprehensively provide adequate response guidelines for environmental cleanup and remediation, creates liability scheme for those responsible for environmental pollution and establishes trust fund to underwrite clean up, Nigeria's legislation on compensation fails in all material respects to address some of these environmental concerns. First,

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[64] Constitution of the Federal Republic of Nigeria (as amended) S. 44 (1) (a)
[65] (1978) Decree No 6, Supplement to Official Extraordinary Gazette No 14, vol. 65
[66] Ibid
[67] (1969) S.8 (1) (b) (iii) Specified the Rules for proper Operation Exploration, Transportation Activities.
[68] Cap 350 LFN, 1990 as amended by section 1 No. 3 1996.
[69] Environmental Guidelines and Standards for Petroleum Industry in Nigeria, 2002 (EGASPIN).
[70]Oil Pipelines Act, Cap. 338. 2004, see also Oil Pipelines Act, 1995 section 1, No 14, p. 75
[71] Ibid
[72] NESREA – 2007, Cap 131 LFN, 1990.
[73] 42 U.S.C. Section 9659.
[74] 33U.S.C.A.SS2701-2761 (1990)

the local statutes are advisory in nature, non-committal, the language is rather lose as they merely direct polluters to pay compensation. Second, the statutes merely create a liability regime for polluters and in some cases require polluters to pay compensation without adequately providing criteria for computing the compensation payable.

The agitation for just and equitable compensation for loss of economic and social livelihood by the host communities has also accentuated the clamor for resource control and fiscal independence by many states of the oil producing areas. Amount claimed as damages by communities and individuals has been criticized to be very high and unrealistic. The court reiterated in *Shell Petroleum Development Co. v. Farah,*[75]that compensation paid by the defendant was not commensurate with the degradation of the environment. While it is accepted that personal and proprietary injuries arising from environmental pollution could be adequately compensated financially, opinion is divided as to whether the natural environment could be adequately compensated, rehabilitated or restored and at what cost and for how long? Consequently, various theories have been posited by scholars as to the best way to value the environment in cases of environmental pollution and the cost to impose on the polluter to restore. Although, an essential step in determining what should be done about environmental damage is to value it and compare it with the costs of preventing the damage, the major hindrance to a fair and just compensatory regime is the problem of valuation of environmental damage. A judicial view expressed in *Amoco Productions Co. v. Village of Cambell Alaska,*[76] is that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least, of long duration, that is irreparable."

First, the traditional private law measure of damages discussed above for injury to private property is the diminution in the property's market value, unless the injury can be repaired at lower cost. In case of injury to the environment, market value is not adequate or appropriate measure of damages because many environmental resources and amenities are not traded in the market. Again, there are no market prices for many public or common natural resources and environmental amenities. Even where the market prices exist, they generally do not

[75] (1995)3 NWLR (Pt. 382) 148
[76]*Amoco Productions Co. v. Village of Cambell Alaska*, 480 U.S. 545 (1987).

capture the full range that the public place on the liability.[77] In the determination of a compensatory injury or damage to the environment, it would not be reasonable or appropriate to impose liability for any act and every physical or chemical change in the natural environment resulting from the discharge of pollution. Rather it would be appropriate to balance economic and social utility of an activity with environmental security. Strongly connected with this concept is the aspect of how to determine the scope and quantum of compensation payable for diminution in the value of injured resources. Assessing liability for damage, require some means of placing economic value on the environment.

The need to place such value cannot be overestimated. For effective valuation of resources the courts should be allowed to assess damages for environmental harm, set standards to deter further pollution, help ensure protection for natural ecosystem, and to fix remediation, restoration cost or compensation payable to the victim.[78] Natural resources valuation is also critical to analyzing the costs and benefits of protecting the environment. There appears to be a consensus both in national and international law that damages, for environmental injury should be based primarily on the reasonable costs of measures taken to remove debris caused by pollution, restoration and reinstatement of the injured resources and persons. The award of a paltry sum of ₦20,000.00 for individual offender/polluter and ₦500,000 for a corporate body is in adequate.[79]

The Act states that the owner of business or the polluter must bear the full responsibility for the cost of removal or restoration of the natural resources as well as fulfill third party cost/obligation in terms of reparation, restoration, restitution or compensation.[80] Agomo, on this matter when said, "the best remedy in the circumstance is not a discretionary remedy. There ought to be a definite right to compensation as determined by the courts outside the framework of the law of torts."[81]

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[77] Sands, P. & Stewart, R. B., "Valuation of Environmental Damage": U.S and International Law Approaches, cited
in Amokaye, O.O., *Environmental Law and Practice in Nigeria* (Lagos: ULP, 2004) p. 664.
[78] Ibid
[79] FEPA Act Cap 131 LFN 1990. S.21(1) (a)
[80] Ibid
[81] Agomo, C.K. "Labour Legislation Regulating Industrial Pollution, An appraisal", in Omotola, J.A., (ed)

The challenge can be met with developing valuation principles that will provide adequate and fair compensation for loss and provide incentives for avoiding environmental harm. Ibidapo[82] suggests that government must not fold its hand, where pollution has occurred. Statutorily, NESREA provided that a "combined rescue/action team/machinery be put in place in times of emergency or spillage.[83] A contemporary approach to the issues of oil pollution and the gains of corporate social responsibility ought to assuage the effect of environmental degradation. This however, is not the case.The expected economic satisfaction derivable, from developmental projects cannot sustain the action plan package provided in "Agenda 21 of the Rio De Janeiro declaration".

4.2 Duty of Care

Affirming the Polluters Pays Principle, Kachikwu notes that, "It is more cost effective for oil companies to pay the penalty of pollution than put the re-injection scheme in place[84]. Justifying the polluter pays Principle, Fogam declared thus: "almost all over the world, pollution involves more than just a failure to comply with administrative regulation. Pollution is a threat to societies' welfare as much as acts which are traditionally labeled as violent crimes. Part of what is required of a company is to adopt all practical precautions which include: provision of "up to date" equipment; take prompt steps to control and if possible end pollution as soon as it occurs[85]

The polluter is further required to maintain installations, keep them in good repairs and condition in order to prevent the escape or avoid waste of petroleum, and to cause as little damage as possible to the surface of the area, the trees, crops, buildings, and structures. Oil facilities are hazardous to nature. Flow stations, machine/equipment are inadequately fenced. Breach of care resulted in the incident which led to the drowning of five children in East Eket in Akwa Ibom State. Equipment failure is said to

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Environmental Laws including Compensation, (Faculty of Law, University of Lagos, (1990) p.7

[82] Omotola (n.15) p. 247

[83] NESREA (n.72)

[84] Kachikwu, E.I., "Legal Issues on the Oil and Gas Industry"(1989) 2 Gravitas Review of Business and Property Law, p.35

[85] Omotola, (n.81)

be responsible for over 92% of the net volume of crude spills. A Polluter is required by statute, to keep the product within the pipelines and properly directs wastes into receptacles.[86] In most pollution cases, it is difficult to apportion to the plaintiff the precise amount of compensation and calculate same because no formula has been developed in this regard.

V. Regulatory Laws and the Enforcement Principles

The concept of enforcement is to ensure obedience to minimum environmental standards. Regulatory laws are both specific and general. Presently, some of the laws are inconsistent with the developmental aspirations of the host communities.

1. The Constitution of the Federal Republic of Nigeria 1999, hardly pays attention to questions of autonomy or reorganization of political power. It however, provides for the protection of the environment from oil exploration. In section 20, the Constitution provides that, "the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife". By its supremacy clause in section 1, this provision must serve as a guide to all statutes on environmental laws.
2. Federal Environmental Protection Act (FEPA): The powers include to monitor pollution, provide prevention and control measures in the exploration industry. Thus "the operator" should mitigate the damage by giving notice to the agency and other relevant agencies, begin cleanup operations immediately using the best available clean up practice and removal methods.[87] Section 22 provides for specific removal methods, national spill contingency plans, financial responsibility levels for onshore or offshore facilities, notice and reporting requirements, penalties and compensation "Removal" under the Act means: removal of hazardous substance from waters of Nigeria, including shore lines. Section 23 provides that the President by a fiat may require the provision of the section of FEPA Act to take effect. A number of subsidiary legislation exists under FEPA: they include: -
3. National Environmental Protection (Effluent limitation) Regulations ;

[86] Oil Pipelines Act Cap.145, 1956, S. 11(5)(c)
[87] Ibid

4. National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations;
5. National Environment Protection (management of solid and hazardous waste) Regulations.

Penalties imposed by the Act are clearly stated in Sections 36 and 37. These include: in the case of individual or non-corporate persons fines ranging from ₦20, 000 or imprisonment for a term not exceeding 2years or both. For a body corporate, the liability for a breach is a fine not exceeding ₦500, 000.00 plus the payment of compensation for any damages resulting from or restore the polluted environment to an acceptable level as approved by the Agency. The utility of the Act was demonstrated in the decision of the Supreme Court in *Shell Petroleum Development Company v. Chief G.B.A., Tiebo VII & 4 ors*.[88] The polluter was held liable for the resultant damage to the environment. In a related and earlier Supreme Court decision in *Mobil Producing (Nig.) Unlimited v. Lagos State Environmental Protection Agency & ors*,[89] the Court compelled the Agency to ask the company to pay compensation to those affected by the spill. The Supreme Court made a definitive pronouncement on the issue but remitted the matter back to the Federal High Court for retrial. The statutes are good and standard but the fault lies in enforcement. Section 51(1) of NESREA Act provides that:

> Any person who violates any of the provisions of the regulations commits an offence and shall on conviction, be liable to a fine not exceeding ₦200, 000.00 or imprisonment for a term not exceeding two years or both such fine and imprisonment and an additional fine of ₦5,000.00: for every day the offence subsists.

2. "Where an offence is committed by any facility, it shall on conviction, be liable to a fine not exceeding ₦1,000,000.00 and an

[88] (2005) NWLR (Pt. 265) 990
[89] (2001) 8 NWLR (Pt. 715) 489

additional fine of ₦50,000.00 for every day that the offence subsists".[90]

This Statute reflects that there has been a remarkable increase in fines as against the sanctions in the FEPA Act. The increase in sanctions is in no way comparable to what a polluter is compelled to pay for polluting the environment in the United States of America. Environmental Impact Assessment Act (EIA).[91] The law is meant to study the potential physical, biological, economic and social effects of a proposed development projects on the immediate and distant environment. The impact, whether good or unfavourable, is duly assessed and taken into account while planning, design or implementation of all major types of development projects.

The law requires that an impact assessment be done before the establishment of any industry. Oil production required fully integrated industry and each component should carry out an EIA at each stage.[92]Where EIA is not complied with, the host community suffers the effect of unseen pollution. A Canadian authority did question the effectiveness of an administrative body like NESREA in the control of oil pollution.

The Ninth Circuit Court of Appeals in San Francisco sat over the case of *Larry Boweto v Chevron* -1998.[93] The Company was charged with complicity in the brutal attacks against non-violent demonstrators who protested against the company for "environmental destruction and economic disruption." Regardless of the outcome of the appeal, the plaintiff has achieved victory. This is because Nigerian villagers who were treated as worthless could force the world's fourth largest Corporation in the Oil industry to stand trial in its own home soil. This is a demonstration of a remarkable progress for corporate accountability. The bottom line question is, "if the U.S. Courts are willing to do so much to ensure justice, why the reluctance and apathy in the Nigerian Courts? Following the 2010 BP Oil spill in the Gulf of Mexico, in which millions of barrels of crude oil was spilled into the ocean, the Obama Administration was recognized for introducing widespread energy reforms, targeted at engendering safer and

[90] Ibid p. 1338
[91] EIA Cap E12 LFN 2007
[92] Ugwu, F., "The Law and Marine Pollution" The Guardian (Lagos: Dec. 27th 2005) p. 55
[93] Ibid

more sustainable drilling in deep water operations[94]. Shell Petroleum Development Company (SPDC), in a reaction to an allegation on oil pollution, insisted that the claim around the spill was exaggerated.

The excuse that spills recorded by BP in the United States of America or the Exxon Mobil Valdez spill are on the same parallel, is a direct admittance of being liable or accepting liability for polluting the area, with oil. Trying to justify their action by comparing spills in Nigeria with spills in America is criminal and unacceptable. While oil companies in America would readily pay compensation as directed by the courts, Shell and other oil companies in Nigeria resort to litigations knowing that the victims of the spill and pollution can hardly sustain their legal actions. The constraints obviously are low finances, lack of knowledge and means of retaining a retinue of legal luminaries. The oil multinationals can afford to hire the best lawyers and even remain in court for as much as 10 years during which the victims languish in pains of destruction of their livelihood. We must continue to lend our voices to the clarion call for judges to be judicially and radically active in matters concerning environmental pollution in Nigeria.[95]

VI. Conclusion/Recommendations

Compensation may not necessarily mean indemnity but necessarily involves the payment of something good to balance or reduce the effect of damage. Of all forms of environmental damage only oil pollution or blowout has received appreciable attention. The Nigerian legislation on environmental pollution is a mandatory provision accompanied by its sanction for polluters. Breach of the statutory duties is actionable in court. Compensation is all about making amends for the loss suffered by victims of environmental damage. It is the process of recompensing losses/injury suffered. One cardinal principle of compensation is that it must be fair and adequate to assuage losses/pains. Corporate Social Responsibility cannot be equated with charity. Whereas, charity is what you choose to give out of your own volition, Corporate Social Responsibility must be seen as a

[94] Dana, Bash., "Obama oil spill response…" CNN Politics report June, 2010. http://edition.cnn.com/2010/POLITICS/06/15/obama.speech/index.html at 22/ 05/2019 8.50pm

[95] Omotola, J.A., *Environmental Laws*(Lagos: Faculty of Law, 1990) p.116

commitment expected of the institution to perform as a plowback to the society or host community. This can be done in any of the following ways:

1. Investment in education;

2. Embark on the use of local content materials;

3. Application of Tax Reduction Scheme to the Corporation. *Afortiori*, specific provisions should without delay, be included in Chapter 4, Constitution of the Federal Republic of Nigeria as part of Fundamental Rights of Individuals and Communities.

Nigeria should evolve a regime which can provide for experts to be appointed by environmental agencies to assist victim of pollutions. Environment has been described as a state of affairs of nature viewed holistically and based upon the milieu of man in his natural habitat. This article has examined the fact that many communities face the risk of irreversible damage to the environment which is now a great threat to the basis for human progress. It has also examined local and international effect of oil pollution on the environment. It extensively discussed the problem of assessment, valuation and payment of monetary compensation to victims of pollution. There are grounds for hope that people and corporate business can cooperate to build a future that is more prosperous, more just and secure. A new era of economic growth can be attained if we adhere to national policies meant to sustain and expand the earth's resources. It is expected that the progress made by some oil producing nations over the years, will soon benefit our local communities.