



BIU LAW JOURNAL

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EDITORS NOTE

We are glad to publish the 2019 edition of Benson Idahosa University, Faculty of Law Journal (BIULJ). As we know, the objective of the Law Journal is to publish current, high quality and original research papers. The journal also contains case and statute reviews of contemporary legal and academic importance in Nigeria. The journal is again an effort geared towards sustaining invaluable scholarly contributions to topical and contemporary issues of relevance to the legal profession and the society at large.

The Law Journal in pursuit of academic excellence appreciates and recognizes the importance of different areas of law to legal knowledge. Consequently, we present an array of authors who have written on different and related perspectives on topical legal issues. The authors in their articles have presented their perspectives on issues such as: Herdsmen and Farmers Conflict in Nigeria: A Quest for Paradigm Shift; Admissibility of Electronic Evidence in Nigeria: Some Contending Issue; State Police: A Progressive Approach to Tackling Insecurity in Nigeria; The Implications of Legal Technicality on Rule of Law and Administration of Justice; Rethinking the Laws on Death Penalty, Suicide and Attempted Suicide in Nigeria; Crossing the Border: The Complementarity Notion of Protection of Rights of Victims of Armed Conflict Under International Humanitarian Law, International Human Rights Law And International Criminal Law; Delineating and Addressing the Impacts of Section 171 of the Nigerian 1999 Constitution on the Security of Office of head of Anti-Corruption Agencies in Nigeria; Guardianship and The Child's Right Act: A Review of Statutory Guardianship in Nigeria; Marital Rape: Evolving Trends and the Way forward; A Critique of the Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018 of Nigeria; Saving the Fluidity of Customary International Law through the Role of International Judges in Custom-Making; Promoting Local Content and Adherence to World Trade Organization (WTO) Trade Liberalization Policies: Striking the Right Balance for Nigeria; The End Fails to Justify The Means: Judicial Intervention in Arbitration and Conciliation in Nigeria; The Menace of Kidnapping in Nigeria: An examination of the Constitutional Implications; The Scope of the Investigatory Powers of the National Assembly: Need for Safeguards against Abuses; The Effects of Excluding Men from International and Regional Instruments of Protection on Sexual Violence; Legal and Institutional Frame Work for Gambling/Online Gambling in Nigeria; Legal Framework for Copyright Protection in Nigeria

This edition is therefore an invaluable compilation of intellectual research the readers will find very useful. It is our utmost wish that you enjoy this edition and we encourage you to submit your articles for future publications in our Faculty Journal.

Authors can access their articles via: www.biu.edu.ng/oer/journal

Professor Theresa Uzoamaka Akpoghome, PhD
Editor-in-Chief

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1. The Benson Idahosa University Law Journal (BIULJ) is a journal devoted to contemporary issues of relevance to the legal, academic and commercial community. It is published once a year and circulates within and outside Nigeria.
2. The Editorial Board welcomes the submission of articles which examines current legal problems and issues by setting them within their general legal, economic or political context. Contributors will focus their research into larger issues of law, economics and politics as well as illuminate the actual experience of lawyers resolving practical problems of developing legal devices or techniques.
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Professor (Mrs.) T. U. Akpoghome, Ph.D (Jos)
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Benson Idahosa University,
Benin City.

All correspondence to:
The Editor-in-Chief,
Benson Idahosa University (BIU) Law Journal,
Faculty of Law,
Benson Idahosa University,
PMB 1100, Benin City.
Tel: +2348065436545, +2348056317472

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HERDSMEN AND FARMERS CONFLICT IN NIGERIA: A QUEST FOR PARADIGM SHIFT

*Theresa U. Akpoghome and Ekene Adikaibe***

Abstract

The constant conflict and killings in Nigeria by herdsmen has reached a frightening dimension that no day passes without the news of massacres by this group. This paper addresses the herdsmen and farmers conflict in Nigeria and seeks a paradigm shift from the status quo. The paper traces the history of herders' farmers' conflict in Nigeria and notes that this has been on for about seventy years without any sustainable solution. The paper also examines the causes of these conflicts and the legal and policy framework to check the conflicts. The paper discovers that so many issues such as climate change, ignorance and existing squabbles are some of the causes of these conflicts. The paper also notes that there is no extant law to check this menace. The paper concludes by making far reaching recommendations such as the need for the enactment and harmonization of laws to help end the crises.

KEY WORDS: Herdsmen, Farmers, Conflict, Climate, Population, Fulani

I. Introduction

The conflict between herdsmen and farmers in Nigeria has become a recurrent decimal with its attendant consequences on lives and property. History has it that the Fulani herdsmen respect the fact that they are strangers in an area where they find suitable grazing field for their flock and they always made efforts to be at peace with farmers.¹ The question that bothers every well-meaning Nigerian is “what has changed”? Could it be that this is the other face of the Boko Haram insurgents? The Fulani herdsmen attack, kill and displace villagers without provocation? On 1st January 2018, Nigerians woke up to the news of the massacre in Benue State that led to the loss of over seventy lives and massive destruction of property while thousands fled the village.² Other villages and locations in Plateau, Nasarawa, Kaduna and Adamawa States have also been attacked.³ In Edo state, there has been news of attacks by herdsmen and some farmers in Edo State have lost their lives in the process.⁴ Those not killed were abducted/kidnapped⁵ and tortured and this has

*Akpoghome, T. U., PhD, LL.M, LL.B, BL. Professor and Dean, Faculty of Law, Benson Idahosa University, Benin City. E-Mail: teremajor@gmail.com, takpoghome@biu.edu.ng. Ph: 08056317472, 08065436545.

**Adikaibe, M. E., LL.B, Research Assistant, Faculty of Law, Benson Idahosa University, Benin City. Ph: 09035282122.

¹ D Agbese, “Fulani Herdsmen? Here are the Grim Statistics,” <<http://guardian.ng-deliver>> accessed 20 August 2018.

² John Charles, “Benue January Killings: We are still in a state of shock”, <<http://punchonline@punchng.com>> accessed 28 November 2019.

³ *Ibid.*

⁴ Oluwatosin Omojuigbe and Peter Adekunle, “Youths Block Benin-Ore Road over Woman’s killing by Suspected Herdsmen”, <http://punchng.com> accessed 5th September, 2019.

affected food production in the State. The herdsmen have also attacked non farmers in the state. On the 7 July 2019, a naval officer returning from an official assignment on the NNS Burutu, a Nigerian Navy Vessel was attacked.⁶ Reports have it that he was attacked by nine suspected armed herdsmen along the Benin by-pass by Ahor Community in Edo state.

Reports show that 676 persons lost their lives in January, 526 in February and 146 in March, 2018. North East was top on the list with 591 deaths while the South East recorded 30 deaths.⁷ These killings have gone on unabated with little or no meaningful arrest by the security agencies and it is based on the above facts that this paper seeks a paradigm shift in the Nigerian security architecture.

For effective discussion of the issue under review, the paper is divided into seven parts including the introduction. Part II considers the history of Fulani herdsmen and farmers conflict in Nigeria with a view to tracing the remote and or immediate causes of the conflict. Part III discusses the causes of the conflict, Part IV examines the responses of the Buhari led administration in addressing the menace. Part V examines the legal and policy framework put in place to address the conflict. Part VI makes recommendations based on the findings in parts three, four and five while Part VII concludes the paper.

II. History of Herdsmen/Farmers Conflict in Nigeria

Herdsmen/Farmers conflict in Nigeria always involves the destruction of farmland by herdsmen which pitched the farmers and herdsmen against each other. The most affected states are Benue, Taraba and Plateau. The first recorded conflict between herdsmen and farmers in Nigeria occurred in 1948.⁸ The next conflict occurred in 1951 and this was responsible for the migration of Fulani Bororo to Sudan.⁹ The clash in 1955 was considered to be genocide and the Sudanese Government issued quit notices to all Fulani Bororo mandating them to relocate to

⁵ Peter Adekunle, “Suspected Herdsmen Kill one, abduct seven in Edo State”, <<http://punchng.com>> accessed 5 September 2019.

⁶ Sahara Reporters, “Herdsmen Attack Nigerian Naval Officer in Benin”, <<http://saharareporters.com>> accessed 4 September, 2019.

⁷ C Ndijihe, and C Udochukwu, “Violent Death: 1, 351 killed in 10 weeks”<<https://vanguardng.com>> accessed 20th August 2019.

⁸ IS Birma, “Fulani Herdsmen/Farmers Conflict: A Holistic Perspective”, <<http://dailytrust.com.ng/fulani-herdsmen-farmers-conflict-a-holistic-perspective-251257.html>> accessed 19th August, 2019.

⁹ *Ibid.*

their native lands.¹⁰ The Fulani Bororo were from Borno, Sokoto and Kano States of Nigeria.¹¹ In 1956, the Fulani Bororo's returned to Nigeria. Eventually, urbanization and developmental projects dislocated the herdsmen from the ranches.¹² These evictions led the Fulani herdsmen to forcefully design their own grazing routes and to acquire temporary sites which ultimately turned out to be farm lands.

Documentary evidence shows that the Nigerian government by 1964 had gathered about 6.4 million hectares of land which were in 144 locations in the Savannah region of Northern Nigeria and about 3 of such lands in Oyo and Ogun States.¹³ These lands were not fully utilized and eventually abandoned. Again the cattle routes such as the Burtali/Labi have also been abandoned or have been utilized for urbanization purposes thereby creating a source of conflict as the livestock route overseers were no longer needed to maintain the routes.¹⁴

Indeed, the seeds of inter-religious and inter-ethnic confrontation predate Nigeria's independence in 1960.¹⁵ With the colonial government establishing tin mines in the mainly Christian Jos plateau, indigenes, as well as people from other parts of present-day Nigeria, were encouraged to come and work in the mines.¹⁶ Some of the so-called non-indigenes were mainly Muslim pastoralist Fulani having settled in the communities. The original inhabitants of the land objected to Fulanis grazing their cattle in the area, especially at the expense of local crops. Such allegations of crop damage have led to reprisal (and perhaps pre-emptive) herd slaughter, which have sparked off brutal confrontations between Fulani herdsmen and the indigenous farming communities.¹⁷

Due to the peculiarity of the activities of the herdsmen, they move from one place to another in search of pasture. In the process, the herdsmen have reportedly encountered cattle rustlers and made complaints to the relevant authorities who fail to investigate the issue, hence their purported reason for carrying arms about. During their journey, they frequently trespass farmlands owned by locals in their host

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Such projects or urbanization as in the FCT or dams and power projects as in Manibila and Mokwa led to the dislocation of herdsmen.

¹³ Birma (n6) 2.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

communities, destroying crops and valuables. Attempts by farmers to prevent them from causing havoc are met with stiff and violent resistance.¹⁸ Most times, the farmers are overpowered, injured and killed, while others are evicted from their homes. Sometimes, the herdsmen are accused of taking these opportunities to steal, rape, raze houses and kill innocent members of the communities they pass through.¹⁹

Before now, the herdsmen have been known to wreak havoc in certain communities in Nigeria. However, the rate at which they commit these crimes has increased exponentially. According to statistics provided by the Institute for Economic and Peace 1,229 people were killed in 2014, whereas in 2013, about 63 people were reportedly attacked and killed by herdsmen. Today, Benue State seems to be the hardest hit in recent times.²⁰ Barely five days to the end of Governor Gabriel Suswam's administration in May 2015, over 100 farmers and their family members were reportedly massacred in villages and refugee camps located in the Ukura, Per, Gafa and Tse-Gusa local government areas of the State. According to reports, in July 2015, suspected herdsmen attacked Adeke, a community on the outskirts of the state capital, Makurdi.²¹ In December 2015, six persons were killed at Idele village in the Oju local government area. A reprisal attack by youths in the community saw three Fulani herdsmen killed and beheaded.²²

In February 2018, as a result of a clash between herdsmen and farmers in Benue State, 40 more people were killed, about 2,000 displaced and not less than 100 were seriously injured.²³ Most recently, more than 92 Nigerians were massacred by suspected Fulani Herdsmen in Benue and Niger States²⁴. Also, there have been reported attacks by the Fulani Herdsmen in southern states of the country, including

¹⁸ G Yusuf, "Grazing Bill: A Law that can Destroy Nigeria" *Pointer*.

<<http://www.thepointernewsonline.com/?p=46655>> Accessed 7 August, 2019.

¹⁹ *Ibid*

²⁰ I Iro, *Nomadic Education and Education for Nomadic Fulanis*. (Mandara Press 2004) 2-10

²¹ Idoma Voice, "Special Report: Inside Agatu Killing Field: Blood on the Streets, Charred Bodies Everywhere", Premium Times, (2016 March) <<https://premiumtimesng.com/news/headlines/200369-special-report-inside-agatu-killing-field-blood-on-the-street-charred-bodies-everywhere.html>> accessed 23 August, 2019.

²² Christopher I Ndubuisi, "A Critical Analysis of Conflicts between Herdsmen and Farmers in Nigeria: Causes and Socioreligious and Political Effects on National Development, (2018) *Herv. Teol. Stud.*, Vol. 74, No. 1, <<http://dx.doi.org/10.4102/hts.v74i1.5056>> accessed 23 November 2019.

²³ MK Aliyu et al, "Assessment of the Effect of Farmers- Herdsmen Conflict on National Integration in Nigeria, *International Journal of Humanities and Social Science* (2018), Vol.8, No. 10, <http://ijhssnet.com>> assessed 29 November 2019.

²⁴ Ndubuisi (n22).

Enugu, Ekiti and Ondo States.²⁵ As the clashes have become more deadly, elements within Nigeria's national security establishment have pointed to alleged links between 'Fulani herdsmen' and the Boko Haram insurgency. The allegation is that Boko Haram fighters fleeing the war in the northeast have moved south to the north central region where they are carrying out attacks on civilian communities under the guise of herdsmen. Newspaper headlines are fuelling public anger.²⁶ The classification of 'Fulani militants' by the Global Terrorism Index 2015 as the world's fourth-deadliest terror group also stoked the flames, increasing fear and anxiety in a region regularly terrorised by jihadist sects. This was the first time this activity had been described as terrorism, with the index unhelpfully listing pastoralist-linked clashes alongside established terrorist groups such as ISIS and al Shabaab.

Concerns have been raised as to the true identity of those behind the attacks. Many with dissenting views believe they may be members of the Boko Haram sect, masquerading as Fulani Herdsmen.²⁷ A few others, including the Nigerian military, have said they are herdsmen from other parts in West Africa and not Fulani. While the latter may be admissible due to porous Nigerian borders and poor immigration surveillance, especially in northern parts of the country, it is very difficult to correlate the activities of Boko Haram terrorists to those of the Fulani Herdsmen. Boko Haram has utilised explosives carried by suicide bombers or hidden in a target, but accounts by victims of the herdsmen crisis have shown that the Fulani Herdsmen are mainly concerned with gaining greater access to grazing lands for livestock.²⁸ In fact, following the February 2018 attacks in Benue, the leadership of the Fulani group openly admitted that the attacks were carried out by its members.²⁹

From 1948 to 2018, seventy years down the line, Nigeria is yet to find a durable solution to this menace. It has even become worse presently. Nigeria is currently going through a very challenging phase in its history. Economically,

²⁵ CG Ameh, "Anti-grazing Bill: No Right to Chase Us", Daily Post,<<http://dailypost.ng/2017/10/30/anti-grazing-bill-ortom-no-right-chase-us-benue-fulani-herdsmen/>> accessed 28 July, 2019.

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ A Mahdi, *The Role of Fulani and Tuareg Pastoralists in the Central Sudan*, (Manchester University Press 1996) 16-32

²⁹ E Mayah, and others "Exclusive: Why we Struck in Agatu- Fulani Herdsmen",<<https://premiumtimesng.com/news/headlines/200426-exclusive-struck-agatu-fulani-herdsmen.htm>> accessed 24 August, 2019.

challenges like acute unemployment, an exchange rate crisis and the attendant runaway inflation confront the country. Official corruption adversely affects the workings of government, too, while corrupt elements and judicial bureaucracy, reportedly, impede the administration's much vaunted war on corruption.³⁰ However, insecurity appears to have been the most formidable challenge faced by the current administration.

An accurate account of the death toll resulting from herdsmen-farmer violence in Nigeria is difficult to come by due to the lack of a dedicated database.³¹ Therefore, most of the evidence comes from newspaper reports of various incidents involving the herdsmen and farmers in settled communities. Some sources claim that the conflicts have resulted in the loss of over 16,000 lives. Of these deaths, women and children accounted for almost 12,000. Some accounts even trace the violent confrontations to as far back as 2001.³²

III. Cause of the Herdsmen/ Farmers Conflict

There are many reasons that have been adduced as possible causes of the conflicts between herdsmen and farmers in Nigeria. This part makes an attempt to discuss a few of these causes. Some of them include but not limited to:

1. Climate Change

The changes in the environment have in no mean measure contributed to the herdsmen farmers' crises. Global warming has led to the decimation of vegetation's and water bodies making it imperative for the pastoralist to move from his habitual abode to other places in search of pastures for his animals. In addition to climate change, the effects of urbanization, encroachment and population explosion of both human and livestock have also contributed to the conflict. Where resources are lean, it creates an opportunity for people to struggle in order to gather and protect what they believe rightfully belongs to them. Climate change has led to lower rainfall pushing

³⁰ C Nwosu, "Between Fulani Herdsmen and Farmers" <http://republic.com.ng/aprilmay-2017/fulani-herdsmen-farmers/> accessed 23 July 2018.

³¹ F Joseph, "Managing Farmer-Herder Conflicts in Nigeria" *Ibadan Journal of Social Science*, (2006) Vol.4, No.1, 33-45

³² R Blench, *Natural Resource Conflicts in North-Central Nigeria*. (London: Mandaras Press: 2004) p.20

the herdsmen southward.

2. Increase in Population

In 1950, the population of Nigeria was about 33 million but today the population is over 192 million.³³ As at August 24th 2018, the population of Nigeria has risen to 196,626,777. This is based on the latest United Nations estimates. Nigeria population is equivalent to 2.57% of the total world population.³⁴ The United Nations has projected that Nigeria population would hit 364 million in 2030 and 480 million by 2050.³⁵ The increase in the population as noted earlier has put a lot of pressures on land and water resources used by the key actors in the conflict.³⁶ This increase demographically has led to an expansion in agricultural fields and a reduction in grazing areas for herdsmen and this reduction in resources ultimately leads to competitions that are not healthy. The southward movement of the herdsmen has resulted in conflicts in the Middle Belt region of Nigeria particularly in Plateau, Kaduna, Niger, Nasarawa, Benue, Taraba and Adamawa States and these conflicts have led to the death of so many Nigerians especially the farmers and the displacement of so many villagers whose villages have been attacked by herdsmen.

3. Neglect for the Agricultural Sector

The neglect of the agricultural sector especially in the rural areas is a huge problem. With the dominance of the oil sector in the economy, there have been little or no improvements in agricultural and livestock production. As huge as the oil revenue may seem, it has not been reinvested by the government in productive economic activities.³⁷ Aside the problem of not reinvesting in the agricultural sector, when problem relating to this sector arises, the responses from state in the face of these conflicts have been *ad hoc* and reactive with no apparent sustainable strategies for conflict management and peace building.³⁸ The states need to be proactive and put in place sustainable institutional mechanisms which go beyond the deployment of security operatives and setting up of Commission of inquiry whose reports are never

³³ “How to Resolve Herdsmen Crises Nigerian Working Group”<<https://premivativesng.com/news/top-news/255364-resolve-herdsmen-crises-nigeria-working-group.html>> accessed 20 August 2019.

³⁴ “Nigeria Population (2018)-Worldometers”<<https://www.worldometers.info>> accessed 24 August, 2019.

³⁵ Blench (n24).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

implemented.

4. Grazing on or Damaging of Crops

The intentional grazing on crops or damaging of such crops by cattle has been noted as one of the reasons for conflict.³⁹ Adeoye posits in his study that the deliberate grazing of cattle on crops, farmers' encroachment on grazing reserves, water holes and cattle paths and indiscriminate bush burning by herders are notable causes of conflict between the groups in parts of Kano, Yobe and Borno State of Nigeria.⁴⁰ Adelakun et al noted in their contribution to the literature that about 34.5% of the farmers and 6.7% of the pastoralist indicated that crop damage always triggers conflict between the actors.⁴¹

5. Unsettled Communal Conflicts

Most of the recent attacks carried out by the Fulani herdsmen can be traced to some age long disputes with various communities.⁴² Mayah et al in their work reported that a Fulani leader alleged that the killings of Agatu people by the Fulanis was a reprisal attack against the killing of Fulani prominent son by the Agatu people in April 2013.⁴³ It was also discovered that the conflict in the Middle Belt region can be traced to a long history of conflict over farm lands and herding. Already existing communal clashes have sustained the violence as herdsmen turned militants in the face of urbanization, desertification and indifference of the Nigerian government to the plight of these communities.⁴⁴

6. Lack of Fresh Water

The lack of fresh water appears to be under discussed and underestimated as a potential cause of conflict. The demand for water in the World grows every year as

³⁹ OO Adebayo and DA Olaniji, "Factors Associated with Pastoral and Crop Farmers Conflict in Derived Savannah Zone of Oyo State, Nigeria", *Journal of Human Ecology*, (2008), Vol.23, No.1, 71-74.

⁴⁰ NO Adeoye, "Land Use Conflict between Farmers and Herdsmen in Parts of Kano, Yobe and Borno States of Nigeria: Nomads Viewpoint", *Ghana Journal of Geography* (2017), Vol.9, No.1, 127-151.

⁴¹ DE Adelakun and others, "Socioeconomic Effects of Farmer – Pastoralist Conflict on Agricultural Extension Services Delivery in Oyo State, Nigeria", *Journal of Agricultural Extension*, (2015), Vol.19, No.2, 59-70.

⁴² G Burton, "Background Report: The Fulani Herdsmen", *Project Cyma Publications* (2016), 1-18.

⁴³ Mayah et al., "Exclusive: Why we Struck in Agatu – Fulani Herdsmen", Premium Times (2016) <<https://www.premiumtimesng.com/news/headlines/200426.exclusive-struck-agatu-fulani-herdsmen.html>> 20 August 2018.

⁴⁴ Burton (n37).

the population increases. The increased effect of global warming and the resultant climate change has exacerbated the scarcity for fresh water and this is creating serious security concerns in some areas of Sub-Saharan Africa, particularly in the semi-arid regions.⁴⁵ Audu posits that the availability of water which is a major resource needed for agricultural activities are reducing due to changes in global climatic conditions. Herdsman and farmers who are the main practitioners of agriculture in Nigeria depend heavily on fresh water resources to sustain their livelihood. Recently, access to water and grazing land have become more competitive and has led to violent conflicts on a regular basis between herdsmen and farmers.⁴⁶

7. Negligence on the Part of Farmers and Herdsmen

It has been observed that both the farmers and herdsmen have contributed to the conflict by either being negligent with their herds or the farmers being negligent with their farm produce. Yahaya⁴⁷ has posited that the herdsmen often leave a large number of cattle in the care of young persons who do not know how to can handle the outcome in the event of destruction of farm produce by the cattle. On the other side of the divide, there are farmers who would leave their farm produce unprotected in the farms while some of them with poor/low yields leave the crops unharnessed for the cattle to graze on and they turn around to demand for unreasonable compensation.⁴⁸

The government has been indicted in this drama. Government silence and or inaction on the need for increase grazing field has also fuelled the conflict. Burton posits that the request for increased grazing field is not new as the herdsmen have constantly called on the government to make right the situation.⁴⁹ He author maintains that the government disposition towards resolving the conflict is not encouraging as some people believe that the situation is politicized to the benefit of a few.⁵⁰

These conflicts have attendant consequences that cannot be ignored and some of the consequences include but not limited to the loss of human lives in addition to the loss of livestock; there has been massive destruction of farm produce and crops;

⁴⁵ SD Audu, "Conflicts among Farmers and Pastoralists in Northern Nigeria Induced by Freshwater Scarcity", *Developing Country Studies* (2013), Vol.3, No12, 25-32.

⁴⁶ NP Oli and others, "Prevalence of Herdsmen and Farmers Conflict in Nigeria", *International Journal of Innovative Studies in Sociology and Humanities*, (2018), Vol.3, Issue 1, 34.

⁴⁷ YS Yahaya, "Perspectives on Nomads/Farmers Conflict", A paper presented at Zamfara State College of Education, Zamfara State, Nigeria, September 14th – 16th 2018.

⁴⁸ *Ibid.*

⁴⁹ Burton (n37).

⁵⁰ *Ibid.*

the failure of security agencies to control the excesses of the herdsmen has led to reprisal attacks in some communities. There is an increase in the number of internally displaced persons and there is a possibility that some of these displaced persons may cross internationally recognized boundaries and thereby become refugees. The distrust between the herders and farmers cannot be overemphasized as these groups live in mutual suspicion and anger and this makes them predisposed to violence at the slightest provocation.

IV. Responses from the Buhari Administration

Since the present administration assumed office, the most widely known security threat to Nigeria's corporate existence was the Boko Haram Insurgency. The insurgents, who once controlled vast swathes of territory in their quest to establish a caliphate, have caused the loss of about 20,000 lives and the displacement of over a million others.⁵¹ At the time of President Buhari's inauguration, less known to the international community was another source of insecurity: the attacks by so-called Fulani herdsmen. While the Buhari administration has had measurable success in its fight against Boko Haram, it appears that the menace of the herdsmen-farmer conflicts has defied the government. The brazenness with which suspected Fulani herdsmen slaughter settled communities and raze down villages is a sad reminder of the enormous security challenges still facing the Buhari administration.⁵²

Though the crises obviously predate the Buhari administration, the administration's actions and inactions in the face of continued confrontations have subjected it to much flak by Nigerians. One of the most prominent attacks allegedly perpetrated by the Fulani Herdsmen in the Buhari era was the Agatu Massacre in Benue State.⁵³ In February 2016, about 300 Agatu indigenes in four communities were massacred, while some 7,000 were displaced. Some reports suggest about 500

⁵¹ *Ibid.*

⁵² D Adetula, "Understanding the Fulani Herdsmen Crisis in Nigeria: Here is Everything you Need to Know" <<http://venturesafrica.com/slavery-in-libya-victim-blaming-and-the-failure-of-african-governments/>> accessed 12 August 2019.

⁵³ *Ibid.*

deaths in ten Agatu communities at the hands of suspected herdsmen in early 2016.⁵⁴ These killings were accompanied by the destruction of houses and other property as well as allegations of rape. According to a leader of the Fulani, the attacks were reprisals against the Agatu people for killing a prominent Fulani man and stealing his cattle in 2013.⁵⁵

It took the Presidency more than a week to issue a statement of condemnation and order an investigation, and his spokesman defended his taciturn stance on the crisis on the grounds that “the President is not a talkative.”⁵⁶ Moreover, allegations of either inaction or outright collusion with the herdsmen have been leveled against the government and security agencies. There have been accusations against the military of allowing the Fulani herdsmen to occupy the sacked communities, while their cattle, numbering over 100,000 freely grazed on their farmlands.⁵⁷ That the fact that the President is Fulani also added ammunition to his attackers, who saw his slow response as a tacit support for the killers.⁵⁸

Further south, on 25 April 2016, suspected armed Fulani invaders attacked Ukpabi Nimbo, a town in Enugu State, killing about 40 indigenes.⁵⁹ This drew wide-ranging condemnation, and highlighted the potential threat of the conflict feeding other security flash points.⁶⁰ The Movement for the Actualization of the Sovereign State of Biafra, a group agitating for a restoration of the separatist Republic of Biafra, warned of dire consequences should the killings continue⁶¹. The group is viewed as treasonous by the government. Some communities in the South-East zone

⁵⁴ G Gololo, “Ortom’s aides using anti-open grazing law to send Fulani away from Benue – Herdsmen” <<http://punchng.com/ortoms-aides-using-anti-open-grazing-law-to-send-fulani-away-from-benue-herdsmen/>> accessed 15 August 2019.

⁵⁵ *Ibid.*

⁵⁶ SD Musa and MI Shaibu, “Resource Use Conflict Between Farmers and Fulani Herdsmen in Guma Local Government Area of Benue State, Nigeria. *International Journal of Sciences, Basic and Applied Sciences*, (2014) Vol., 9, 11-21.

⁵⁷ Musa, S.D. and Shaibu, M.I. (2014) “Resource Use Conflict between Farmers and Fulani Herdsmen in Guma Local Government Area of Benue State, Nigeria. *International Journal of Sciences, Basic and Applied Sciences*, Vol., 9, 30-41

⁵⁸ *Ibid.*

⁵⁹ E Akintayo, “Bloodbath in Enugu as Fulani Herdmen Kill 40”, <<https://vanguardngr.com/2016/04/bloodbath-enugu-fulani-herdsmen-kill-40/>> accessed 22nd August, 2019.

⁶⁰ P Fredrick, “Buhari breaks silence, orders “herdsmen” brought to justice”, *Premium Times*, 27 April 2016, 15

⁶¹ H Umoru, “Fulani Herdsmen: Attack threaten Nigeria’s Existence”, <<http://vanguardngr.com/2016/04/fulani-herdsmen-attack-threaten-nigerias-existence-nass/>> accessed 22 August 2018.

have threatened reprisals to alleged attacks.⁶² Similar cases of herder-farmer conflicts have been reported in Zamfara and Katsina States in the North,⁶³ as well as Abia⁶⁴ and Osun States in the South-East and South-West respectively.⁶⁵

It is baffling that virtually no successful prosecution or conviction has been secured on any of these incidents of killing and wanton destruction of property by the herdsmen. To aggravate the people's sense of betrayal, the governor of Kaduna State and a powerful ally of the President, Nasir el-Rufai, admitted to paying foreign transhumant Fulani's to stop killing the mainly Christian southern Kaduna people.⁶⁶ Kaduna was embroiled in a crisis involving Fulani herdsmen and southern Kaduna residents in December 2016. The most worrying aspect of the attacks is that, reportedly, they were carried out during a 24 hour curfew.⁶⁷

As in the case of the Agatu Crisis, the Southern Kaduna Killings were said to be reprisal attacks by Fulani herdsmen for previous murders. Even if the compensation was made in good faith, that the governor, a Muslim Fulani, paid fellow Muslim Fulani's rather than bring them to justice, has been seen by many as emboldening the herdsmen.⁶⁸ Even a United Nation press briefing on herdsmen-perpetrated attacks in Nigeria noted "the complete impunity enjoyed so far by the perpetrators".⁶⁹ Reports also suggest that only about five arrests have been made over the Nimbo Massacre even though the Massacre was allegedly perpetrated by up

⁶²Nigerian Eye, "Abia Community Threatens Reprisals over Fulani Herdsmen's Attack", <<http://nigeriane.com/2016/11/abia-community-threatens-reprisals-over-fulani-herdsmen-attack/>> accessed 22 August 2019.

⁶³ W Odunsi, "How Southern Kaduna Crisis Started- MACBAN Scribe", <<https://www.dailypost.ng/2017/02/06/southern-kaduna-crisis-started-macban-scribe/>> accessed 22 August, 2019

⁶⁴ Nigerian Eye, (n57).

⁶⁵ Channels TV, "Osun Civil Defence Arrests Suspected Marauding Herdsmen", <<https://www.channeltv.com/2017/01/13/osun-civil-defence-arrests-suspected-marauding-herdsmen/>> accessed 21 August 2019.

⁶⁶ O Yusuf, "The Solution to Fulani Herdsmen Attack is Unity" <<https://naija.ng/820395-fulani-herdsmen-attack-foolishness-playing-ethnicity.html#820395>> accessed 8 August 2019.

⁶⁷ *Ibid.*

⁶⁸ E Agyemang, "Fulani Herdsmen Conflict" <<http://tribuneonlineng.com/editorial>> accessed 28 July 2019.

⁶⁹ R Colville, "UN Press Briefing Notes ON Mozambique and Nigeria", <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19905&LangID=E>, (Accessed 28th July 2019)

to 500 armed men.⁷⁰ One thing is certain: it is worrying when attacks and reprisals can be carried out in a country, with little or no consequences for the perpetrators.⁷¹

Perhaps the most perplexing question surrounding the conflicts is how cattle herdsmen end up with sophisticated weapons like the AK-47 (semi-)automatic gun. As has been noted by some concerned Nigerians, the specter of a fully-armed Fulani herdsman is new. A number of factors, such as the Libyan Crisis and the resulting free flow of firearms in the wake of Ghaddafi's death, gun running, and local politics, have been blamed for the relatively easy access of Fulani herdsmen to dangerous and sophisticated weapons.⁷²

A related problem is Nigeria's porous borders. The recent spate of herdsmen-perpetrated violence has been blamed on foreign transhumant Fulani's.⁷³ If this is true, the fact that foreigners can travel as far south as Enugu and Osun State to wreak havoc points to an even deeper problem that has plagued successive administrations in Nigeria, and persists under the present Buhari administration: the lack of effective border security.⁷⁴ Even the ECOWAS (Economic Community of West African States) Regulations on Transhumance between Member States does not endorse unregulated and/or armed grazing, and calls for an evolution to ranching.⁷⁵

To be fair to the Buhari administration, there seems to be some desire to prevent future attacks. Currently, the National Grazing Reserve (Establishment Bill) was laid before the National Assembly.⁷⁶ The bill seeks to establish a grazing reserve in each state so as to not only improve livestock production, but also prevent herdsmen-farmer conflicts. However, given the charged nature of the problem, it

⁷⁰ Akintayo (n54). See also Premium Times on Nimbo Massacre, <<http://premiumtimesng.com/news/headlines/204072-nigeria-police-arrest-nimbo-attackers-recover-video-attack-spokesperson.htm>> accessed 28 July 2019.

⁷¹ *Ibid.*

⁷² T Sola, "Nigeria's Government Must Ensure a Balanced Response to the Pastoralist" <<https://chathamhouse.org/expert/comment/nigeria-s-government-must-ensure-balanced-response-pastoralist-settler-crisis>> accessed 4 August, 2019.

⁷³ "FG Explains Why Foreigners can't be Stopped from Grazing in Nigeria" <<http://dailypost.ng/2016/06/10/fg-explains-why-foreigners-can-t-be-stopped-from-grazing-in-nigeria/>> accessed 20 July 2019.

⁷⁴ A Olaniyan, "The Fulani-Konkomba Conflict and Management Strategy in Nigeria", *Journal of Applied Security Research*, (2015) Vol.10, No.3, 330-340.

⁷⁵ Article 3, Regulation C/REG.3/01/03 Relating to the Implementation of the Regulations on Transhumance between ECOWAS Member States, 2003

⁷⁶ SI Nchi, *Religion and Politics in Nigeria: The Constitutional Issues*. (Green world; 2013) 2

appears the bill hardly enjoys any support from most southern states. Many see the bill as unjust, alleging that their lands will be expropriated to serve Fulani commercial interests.⁷⁷ Others see it as affording the Fulani a potential leeway to dominate the south. Even more worrying is the fact that some Fulanis disapprove of the bill, insisting that it is an infringement on their rights to movement. The bill was subsequently withdrawn from the National Assembly as the Deputy Senate President Ike Ekweremadu contended that the National Assembly lacked the capacity to legislate on matters relating to livestock since the subject was neither in the exclusive nor the concurrent list but in the residual list and falls squarely within the legislative competence of the states.⁷⁸

So far, it appears that the federal government has neither embarked on any systematic enlightenment campaign to douse these concerns, real or imagined, nor proposed an alternative feasible solution.⁷⁹ The lack of a broad-based and coordinated national policy on grazing has the potential to lead to anarchy, where different states take their destiny into their own hands. A case in point is Ekiti State, where an Anti-Grazing Law has been enacted.⁸⁰ The law, which prohibits grazing outside designated places and times, as well as with firearms, has been condemned by the Miyetti Allah Cattle Breeders Association (the umbrella body representing the herdsmen).⁸¹

A careful analysis of the conflicts indicates that allegations of cattle rustling are at the heart of some of the clashes. Herdsmen accused settled communities of stealing their cattle and murdering their colleagues and children, necessitating their bearing of arms. According to Mohammed Abdullahi, the Chairman of the Miyetti Allah Cattle Breeders Association in Plateau State, “The Fulani use the AK47 for defence since the government has failed to protect them.” While not an acceptable solution, such self-defence is an indictment of the security apparatus in Nigeria.

⁷⁷ *Ibid.*

⁷⁸ O Ogunmade, “Senate Rejects Grazing Bill, says Its Unconstitutional”< <https://thisdaylive.com>> accessed 24 August 2019.

⁷⁹ A Olaniyan and M Francis and U Okeke-Uzodike, The Cattle are Nigerians but the Herders are Strangers: Farmer: Herders Conflicts, Expulsion Policy and Pastoralist Question”, *African Studies Quarterly*, (2015) Vol.15, No.2, .41-53.

⁸⁰ Prohibition of Cattle and Other Ruminants Grazing in Ekiti, 2016..

⁸¹ Olaniyan (n79) 48.

A Nigerian lawmaker, Zainab Kure, has sponsored a bill in the country's Senate. The bill popularly regarded as the 'Land Grazing Bill,' is aimed at securing areas for Fulani Herdsmen across the federation and for the mapping out of grazing routes. Beyond that, the bill seeks to establish a National Grazing Reserves Establishment and Development Commission.⁸² The successful signing of this bill into law means there will be a limited area reserved for the Fulani Herdsmen and their cattle. On the land required for the grazing routes, Nigeria's Minister of Agriculture, Audu Ogbeh, has said that many northern states have donated several pieces of land for the project. However, states in the southern part of the country have kicked against the idea, noting that they cannot be forced to give out their land for this purpose. Despite the controversy that comes with the proposal, the bill has scaled the first reading in the Senate.⁸³

However, a security-related question is what the police and other relevant security agencies are doing to either forestall or promptly respond to attacks by Fulani herdsmen. That large-scale massacres and pillage can be carried out during a 24-hour curfew as in the Southern Kaduna Killings is reprehensible and speaks to either an ineffectual security apparatus or worse still, active collusion by security agencies. And the general failure of the government to successfully prosecute most of the perpetrators of the violence on both sides not only fails to deter future attacks, but encourages a dangerous arms race on both sides of the conflict.⁸⁴

The Fulani Herdsmen have unabatedly continued to wreak havoc, mostly in the middle belt area of the country. The inability of the Nigerian Police to contain them may spell greater doom for lives in susceptible areas. Some days ago, Ventures Africa reflected on what the silence of President Muhammadu Buhari on the herdsmen crisis could mean. Nigeria needs to take the bull by its horn, else, the Fulani Herdsmen – who are deemed only less deadly than Boko Haram, the Islamic State of

⁸² AU Ofuoku and BL Isife "Causes, Effects and Resolution of Farmers-Nomadic Cattle Herders Conflict in Delta State, Nigeria" *International Journal of Sociology and Anthropology*, (2016) Vol.1, No.2, 44-57.

⁸³ *Ibid.*

⁸⁴ S Tonah, "State Policies, Local Prejudice and Cattle Rustling along the Nigerian Border", *Africa*, (2015), Vol.70, No.4, 551-567.

Iraq and the Levant (ISIS or ISIL), and al-Shabaab in the entire world – may be Nigeria's worst nightmare.⁸⁵

As public support grows for a government intervention, lawmakers will need to be mindful of avoiding a one-sided approach to resolving this conflict. The Fulani ethnic group has on many occasions called for the Nigerian government to intervene in the conflict – but as an impartial mediator between all sides rather than an antagonist, to provide security and protection for both herdsmen and settled farmer settlements and clamp down on the criminal gangs and opportunists. A security policy seen to be against a single party in this crisis effectively dismisses the grievances of the Fulani.⁸⁶

In a country with a history of sectarian violence, the crisis is gradually being seen through an ethno-religious prism. There is a historical trust deficit between the Muslim and Christian communities, and an approach that is seen to be one-sided risks perpetuating the development of a siege mentality within the wider Muslim communities. Should the government resort to a military response against the Fulani pastoralist community, there is a risk the conflict could spread further – drawing in other Fulani communities from across the region and causing widespread instability.⁸⁷

V. Legal and Policy Framework to Address the Conflict

The primary legislation to be examined here is the constitution of the Federal Republic of Nigeria.⁸⁸

The constitution provides for right to freedom of movement.

It states thus:

Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exist there from.⁸⁹

The above provision of the Constitution is to ensure that Nigerians are free to

⁸⁵ K Hussein and J Sumberg and D Seddon, "Increasing Violent Conflict between Herders and Farmers in Africa: Claims and Evidence" *Development Policy Review*, (2012) Vol.17, No.4, 397-418.

⁸⁶ *Ibid.*

⁸⁷ HW Wabnitz, "The Code of Pastoral Farming in Nigeria: Revival of Traditional Nomads Rights to Common Property Resources" <<http://nomadic.com>> accessed 19August, 2019.

⁸⁸ Hereinafter CFRN 1999 (as amended 2011).

⁸⁹ Section 41(1) CFRN 1999 (as amended 2011).

reside in any part of the country of their choice without being expelled. Good provision but how practicable is it? Today in Nigeria, the citizens prefer to live or reside in areas where they feel safe. Quit notices were issued to certain groups of Nigerians in 2017 and hate speeches became the order of the day. The government could not muster enough strength to arrest the perpetrators of these crimes that led to the death of some others. Nigeria has been polarized along ethnic and religious lines that we do not see ourselves as belonging to one nation because some tribes and religion appears to be more superior and preferred.

A major difficulty in resolving the issue around the conflict is the politicization of legal regimes and the blocking of the enactment of or the implementation of legislation that will be able to address the problems or the causes of these conflicts as already discussed. A bill was proposed in 2016 titled “A Bill for an Act to Establish Grazing Reserves in each of the States of the Federation Nigeria to improve agriculture yield from livestock farming and curb incessant conflicts between cattle farmers and crop farmers in Nigeria”.

This Bill was thrown out by the National Assembly because they perceived that the bill was seeking to favour one particular profession practiced mainly by one ethnic group – the Fulani’s. One may be forced to argue that if we do not have grazing reserves and it is impossible for herdsmen to move, how they are expected to take care of their pasture and ensure the constitutional provisions earlier cited are not violated.

This paper is quick to note that even though the creation of grazing reserves or ranches may appear attractive and a simple way out of the herders and farmers conflict, the constraints of land and land ownership in our communities is a huge challenge.⁹⁰ All the states in the South East and South South of Nigeria have kicked against the compulsory acquisition of land by the government for ranching by the herdsmen. The Rural Grazing Area (RUGA) settlement introduced by the federal governments in July 2019 was openly rejected by Nigerians because of the attendant controversies surrounding the initiative.⁹¹ Consequently it has been suspended in the

⁹⁰ R Akinkuolie, “Herdsmen/Farmers Clashes: Problems and Solutions” the Guardian, <https://guardian.ng/opinion/herdsmen-farmers-clashes-problems-and-solutions>. (Accessed 19th August 2018)

⁹¹ Samson Toromade, “7 things you should know about Buhari’s Controversial RUGA Settlements”, <http://pulse.ng/news/local/ruga-7-things-to-know-about-buharis-controversial-settlements/tcjmr7m>> accessed 5 September 2019. See also “RUGA Settlement Plans Stirs Reactions” <https://placng.org/situation_room/sr/ruga-settlement-plans-stirs-reactions/> accessed 5 September 2019.

interest of peace and security in the nation even in the face of what the federal government considers as the accruing benefits if accepted.

Nigerians have also suggested to the federal government what it should do with the billions of Naira budgeted for the RUGA settlement. There is dearth of infrastructure in Nigeria but the federal government plans to provide infrastructure such as schools, electricity, water which most Nigerians do not enjoy to the RUGA settlements and this most Nigerians have described as the ‘height of nepotism and clannishness’. There is hunger in the land, Internally Displaced Persons (IDPs) are wallowing in pains and agony in the various camps all over the country especially in the north east and north central and most of the IDPs in Benue state were displaced by herdsmen.⁹² Some others have queried Buhari’s regime rejection of ranching in favour of RUGA. Prior to this period, some states have enacted laws or are processing bills that will prevent open grazing on their land and such states include Ekiti State that has enacted the Prohibition of Cattle and other Ruminants Grazing in Ekiti, 2016; Benue State Law: A Law to Prohibit Open Rearing and Grazing of Livestock and Provide for the Establishment of Ranches and Livestock Administration, Regulation and Control and other Matters Connected therewith, 2017.

Taraba State: Anti-Open Grazing Prohibition and Ranches Establishment Bill 2017. A Bill for a Law to prohibit open rearing and grazing of livestock and provide for the establishment of ranches and the Taraba State Livestock and Ranches Administration and Control Committee and for others connected thereto 2017; and the Edo State Bill: A Bill for a Law to Establish the Edo State Control of Nomadic Cattle Rearing/Grazing Law and for other Purposes. Some of these laws have already been passed and one cannot deny the fact that some of these states particularly Benue and Taraba have been on the receiving end of the brutality and massacre perpetrated by herdsmen and the argument of free movement cannot stand in the face of stark reality of lives being lost in order to protect cattle.

As it is today, Nigeria does not have a comprehensive legal or policy framework for the development and regulation of livestock production. The National Assembly has also noted that only states can legislate on matters relating to livestock as it is contained in the residual list.

The Northern Grazing Reserve Law and the Land Use Act of 1978 should be

⁹² Emma Amaize, “Nigerians Rule on what FG should do with RUGA Money”

<https://vanguardngr.com/2019/07/nigerians-rule-on-what-fg-should-do-with-ruga-money>> accessed 5 September 2019.

updated. The anti-grazing reserve laws from states and the ECOWAS Transhumance Protocol and other related international instruments have to be updated and be in line with current realities. While we await an acceptable legal framework in this regard, Nigeria should note that the grazing of cattle on trails in the 21st century has become antiquated. There are modern ways of cattle rearing with the aim of maximizing benefits which includes job creation, food security, and ultimately the elimination of the conflicts between the herders and the farmers.

VI. Recommendations

Flowing from the above discussions the paper therefore makes the following recommendations on the belief that if implemented Nigeria will avoid unnecessary conflicts between the herders and farmers thereby protecting lives and property which is the key role of government.

1. There is need for the herdsmen to be properly educated on the modern ways of rearing livestock. The existing nomadic education should be expanded to include agricultural and technical skills.
2. The federal government should adopt cattle rearing mechanisms in Europe and India. These countries largely depend on dairy products. India has an annual production of 163 million metric tonnes of milk which represents 10% of the world's milk output, yet their cattle's are reared within the confines of village communities, and farmer's cooperatives. The European model for dairy farm is also within confined paddocks which in most places are not as big as football pitches. The average milk yield per cow in Europe is between 40-50 litres a day. A sharp contrast to the 1 – 2 litres a day from the Nigeria cow. This is because the cattle's in Nigeria do not feed well and are worn out by the stress of the grazing trails.
3. The government should introduce the technology that would assist herders to grow their fodder in their locations or in other farms which specialize in growing hays, grains and other animal feeds.
4. If grazing fields must be established in any part of Nigeria, it has to be done through due consultation, dialogue and appeal and regions that do not welcome the idea should be left out of the project. There should be no

- imposition of grazing reserves on any part of the nation as that would engender more strife
5. Prosecution and punishment of those involved in slaughtering other Nigerians would serve as a deterrence to others but the current attitude of government of not arresting and prosecuting anyone makes government complicit in the matter and appears to give credence to the speculations that the government wants to Islamize Nigeria by using the Fulani herdsmen to subdue oppositions.
 6. The Agricultural sector needs to receive a boost from the federal and state governments' budgets. Agriculture was the mainstay of the Nigerian Economy before the discovery of oil. Over dependence on oil revenue has its disadvantages. There is need for a diversification of the economy. A mono economy for a nation like Nigeria is poor.
 7. The problem of climate change can be addressed if the Federal Ministry of Water Resources rises to the challenge. Climate change has led to shortage in fresh water resources and this has led to the migration of the herdsmen to the south. This should be addressed by the Ministry of Water Resources by making sure that there is adequate water and also educating people on how to manage water.
 8. Aggressions should be discouraged and effective dispute resolution mechanisms should be established at grass root levels.
 9. Our leaders should desist from politicizing or giving religious connotations to the herders/farmers conflict and come up with laws and policies that will put an end to these conflicts.
 10. Alternative low water and drought resistant grasses should be produced, in response to the impact of desertification on fodder production. This will help meet the needs of herds.
 11. In countries like Chad, Ethiopia and Niger, there is the existence of institutionalized and functional mechanisms for pre-empting and resolving conflicts between farmers and herdsmen and this has enabled them to live in peace. Nigeria should make efforts to copy these practices.
 12. There should be a review of existing laws on grazing and bring them in line with current realities especially in the northern states of Nigeria. Regional laws and instruments should be domesticated.

13. The Nigerian government should address the issue of the Nigerian borders. The President, Muhammadu Buhari in United Kingdom blamed the crisis in Libya as the cause of the conflict. He noted that illegal arms from Libya found their ways into Nigeria. This issue must be addressed as the Libyan crises ended six years ago with the death of Muammar Ghaddafi. Nigeria cannot leave her borders unsecured and turn around to blame Libya while Nigerian citizens lose their lives
14. The Government must have the will to end the herders/farmers crises by implementing the law. The Law enforcement agencies must live up to their duty and the courts must be ready to prosecute offenders.

VII. Conclusion

The ongoing conflicts between farmers and herdsmen in Nigeria can no longer be ignored. These conflicts have led to the loss of lives of thousands of Nigerians while some others have fled their habitual places of residence and have become internally displaced due to well-founded fears for their lives. The economic and social impact of these crises cannot be over emphasized and in line with these, the paper has made far reaching recommendations that would help resolve the conflicts if the relevant authorities and agencies implements them. Most importantly, the paper is of the opinion that the Indian and European model of cattle rearing should be adopted as the idea of having grazing reserves in the 36 states of the federation will not be a solution rather it would engender strife and fear in the nation. Again there is the need for the root causes of these conflicts as articulated in this paper to be addressed if the government is interested in the security of lives and property of Nigerians.

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN NIGERIA: SOME CONTENDING ISSUES

*Sam Erugo**

Abstract

The admissibility of electronic evidence has always been technical, contentious and controversial in Nigeria. Before the enactment of the Evidence Act of 2011, a party wishing to rely on electronic evidence, including emails, computer generated documents, etc., faced an uphill legal task in tendering same before the court. A lot of energy was wasted in objections to the documents being admitted in evidence. The latest Act would appear to have addressed several issues of admissibility of electronic evidence, essentially by an elaborate definition of document to include electronic evidence. The Act also consciously addressed several other issues of admissibility so much so that today most decided cases under the defunct statute have become out-dated and redundant. So far, and correspondingly, the courts have been progressive in interpretation of relevant provisions. Consequently, most age-long preliminary objections to the admissibility of electronic evidence became innocuous. However, the matter is not that simple in practice. This paper emphasizes the real basis of admissibility of electronic evidence and the importance of such in trial, assesses the current legal framework and provisions for the admission of such evidence under the Evidence Act 2011 *vis a vis* the defunct Act, and concludes that there are still contending issues and challenges in the application of extant provisions. In addition, there are the related issues of weight to be attached to admitted electronic evidence as well as the exceptions that call for ingenuity.

I. Introduction

Evidence includes any piece or chunk of information submitted in proof or disproof of a fact in issue. The essence is to clarify the fact in issue, and essentially assist in establishing the truth or justice of a case. So, it could be oral, real or documentary information related to a fact in issue that can be determined either by admission or evidence [unless there is admission]. Accordingly, proof of fact in issue is by evidence, and the basic rule of evidence is encapsulated in various rules of pleading, relevance and admissibility in law. Thus, for any piece of evidence to be useful to the court, it must be both pleaded, relevant and admissible under the extant rules of evidence. From time immemorial, documents or documentary evidence have been accepted as admissible in court as evidence -usually the best as it eliminates much of the challenges of oral evidence. However, the question is usually what form of document is admissible, and the requirements or conditions for such admissibility under the rules of evidence? Admissibility of electronic evidence, a later and dynamic technological development, has always been contentious! The Evidence Act of 2011 would appear to have expanded the repertoires of

* Sam Erugo, Professor of Law, PhD, LL.M, LL.B, BL., Faculty of Law, Abia State University, Umuahia sam.erugo@yahoo.com

documents to specifically include electronic evidence and streamlined its admission, but the legal framework still raises several contending issues in the legal process. This paper attempts to highlight the new position of the law on admissibility of electronic evidence, the potentials, contending issues and challenges in practical application. The article is divided into six sections, the abstract, introduction, conceptual clarification, legal framework, contending issues, and conclusion.

II. Conceptual clarification

There is need to clarify some concepts commonly used in this work. These include:

a Admissibility

‘Admissibility’ is the rule of evidence that determines whether evidence can be received in court: *Faramoye v The State*.¹ A piece of evidence is said to be admissible if it is allowed in court. Admissibility is ‘the concept in the law of evidence that determines whether or not evidence can be received by the court. The evidence must first be relevant, but even relevant evidence will be tested for its admissibility.’²

b Document

The Evidence Act 2011 s258 defines a ‘document’ as:

- (a) 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 those means, intended to be used or which may be used for the purpose of recording that matter.
- (b) Any disc, tape, soundtrack 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 of the equipment) of being reproduced from it; and

¹ (2017) LPELR – 42031(SC)

² Collins Dictionary of Law<<https://legal-dictionary.thefreedictionary.com/admissibility>>accessed 14 November 2019

- (c) 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; and
- (d) Any device by means of which information, is recorded, stored or retrievable including computer output.

Under same s258, "copy of a document" includes:

- (a) in the case of a document falling within paragraph (b) but not (c) of the definition of "document" in this subsection, a transcript of the sounds or other data embodied in it;
- (b) in the case of a document falling within paragraph (b) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied in it whether enlarged or not;
- (c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and
- (d) in the case of a document not falling within the said paragraph (c) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not, and any reference to a copy of the material part of a document shall be construed accordingly.

c Computer

"Computer" means

Any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process.³

d Electronic evidence

'Electronic evidence', sometimes also referred to as 'digital evidence' or 'computer evidence' is

³ EA 2011, s258

curiously not defined by the Evidence Act 2011.⁴ Omolaye-Ajileye⁵ has adopted the definition by Schafer and Mason:

Data(comprising the output of analogue devices or data in digital format) that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a communication system that has potentials to make the factual account of either party more probable or less probable than it would be without evidence.⁶

Omolaye-Ajileye rightly posits that the definition consists of three elements:

first, all forms of data created, manipulated or stored in a computer. Second, it encompasses the various forms of devices by which data can be stored or transmitted...; third ...attempts to take care of the meaning of the word evidence' as information that has the potentials to make the factual account of either party more probable or less probable than it would be without evidence.⁷

Thus, electronic evidence covers a wide range of electronic materials in various devices, and not restricted to those stored or generated from computers.

III. Legal framework

The legal framework remains largely under same subject heads as under the defunct Evidence Act 2004 but modified to permit the benefits of technological development. The Evidence Act 2011 simply modified ‘the general rules to permit the ‘admission of electronically generated documents under certain conditions which are enumerated’⁸ thereunder. Before the advent of the current legislation, ‘technologically generated evidence was argued to offend some of the following general rules of evidence’:

⁴ Evidence Act 2011 recognises a “statement contained in a document produced by a computer”: EA 2011, s84(1). The phrase covers all the categorizations: electronic evidence, computer evidence, or digital evidence.

⁵ Alaba Omolaye-Ajileye, *Electronic Evidence* (Jurist Publications Series, Lokoja, 2019) 74

⁶ *Ibid*, see also Burkhard Schafer and Stephen Mason ‘The Characteristics of Electronic Evidence’. In Stephen Mason and Daniel Seng (eds.) *Electronic Evidence* (University of London, 2017) 19

⁷ *Ibid* 75

⁸ Legal Alert – May 2012 – ‘Admissibility of Electronic Evidence’<www.oseroghoassociates.com/articles/30-admissibility-of-electronic-evidence?print=1&download=0> accessed 14 November 2019

- (i) The issue of the custody and the reliability of the evidence tendered if it is not the original document.
- (ii) The best evidence rule which requires that a party must produce the original document during a trial or where the original document is not available, secondary evidence of it in the form of a copy, with other corroborating notes, etc, must be produced.
- (iii) The rule against the admission of hearsay evidence which forbids witnesses giving evidence on facts that they do not directly or personally witness or know about.⁹

One of the earliest popular cases on the admissibility of electronic evidence in Nigeria is the Supreme Court case of *Esso West Africa v Oyegbola*¹⁰ where the court held that computer printouts were admissible. Thereafter, there was uncertainty as to when such documents would be admissible. In that case, the court was called to decide the fate of one of documents signed in quadruplicate with carbon copies through one single process as the original copy. The court relying on the repealed Evidence Act s93, held that where several documents have been made by one single act of the use of carbon paper, each of such document so reproduced is primary evidence of the other quadruplicate copies. The court further held, *albeit obiter* that ‘the law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.’ Again, in the latter case of *Oguma Associated Companies (Nig.) Ltd v I.B.W.A Limited*¹¹ the same Supreme Court advised, *obiter*, that ‘Nigerian Courts need to become circumspect in interpreting Section 96 of the ... Evidence Act in the light of modern day banking procedures and gadgets such as computers which are now increasingly used by businesses.’¹²

Similarly, in the case of *Yesufu v A.C.B.*¹³ the document in issue was a bank statement prepared from the Ledger Card of a Bank by a Machinist. The Machinist reportedly obtained the entries from the Bank’s day-to-day Vouchers. Incidentally, the bank officer who tendered the bank statement admitted he neither personally prepared the statement nor did he verify that the

⁹ *Ibid*

¹⁰ (1969) 1 NMLR 194

¹¹ (1988) 1 NSCC 395, 413

¹² Legal Alert – May 2012 (n8)

¹³ (1976) 4SC 1 @ 9-14; cf. *Anyaebosi v R. T. Briscoe* [1987] 3 NWLR (Pt 59) 84

statements were correct. The Supreme Court upturned the lower court's admission of the bank statement as offending the provisions of Section 96(1)(h) of the repealed Evidence Act. The court observed that though entries were derived from the day-to-day vouchers of the bank, it did not qualify, without other supporting oral evidence, as a bankers' book and therefore inadmissible. The Court in referring to the *obiter* in *Esso West Africa v Oyegbola*¹⁴ stated that '... it would have been much better, particularly with respect to a statement of account contained in a book produced by a computer, if the position is clarified beyond doubt by legislation as has been done in the English Civil Evidence Act, 1968.' This prediction has come to pass in the Evidence Act 2011 which adopted the suggested approach of the English Civil Evidence Act, 1968.

'The cardinal codifications in the Evidence Act 2011' have been observed¹⁵ to constitute the provisions regarding the concept of document and the admissibility of electronic evidence in sections 84, 258 and 34(1)(b). These provisions received judicial *imprimatur* in the case of *Kubor v Dickson*.¹⁶

Thus, the change was predicted, and the extant legal framework for the admission of electronic evidence encompasses:

- i. Rules of evidence on pleading, relevance¹⁷ and admissibility¹⁸ which constitute preconditions for admissibility of documents generally.
- ii. The expansive definition of documents: Evidence Act 2011 s258
- iii. Admissibility of electronically generated evidence: Evidence Act 2011 s84 specifying the conditions for the admissibility of such evidence
- iv. Rules of evidence providing exceptions and weight to be attached to documents

a. Pre-conditions for admission

General rules of evidence on pleading, relevance and admissibility impose pre-conditions.

Section 2 of the extant Evidence Act provides *inter alia*, that:

¹⁴ *Esso West Africa v Oyegbola* (n10)

¹⁵ Olushola Abiloye, 'Impact of Supreme Court's decision on development of e-commerce in Nigeria: Issues and prospects', The Guardian, 05 May 2015<<https://guardian.ng/features/impact-of-supreme-courts-decision-on-development-of-e-commerce-in-nigeria-issues-and-prospects>> accessed 14 November 2019

¹⁶ [2013] All FWLR (Pt 676) 39

¹⁷ EA 2011, s1

¹⁸ *Ibid*

all evidence given in accordance with section 1 shall, unless excluded in accordance with this or any other Act, or any other legislation validly in force in Nigeria, be admissible in judicial proceedings to which this Act applies:

Provided that admissibility of such evidence shall be subject to all such conditions as may be specified in each case by or under this Act.

Generally, there are three basic criteria governing admissibility of documents, including electronic evidence: These are:

1. Pleadings: it must be pleaded in civil cases. The rule of exclusion of evidence of facts not pleaded by a party is sacrosanct. The trite position of the law remains that evidence of any facts not pleaded, goes to no issue: *Emegokwe v Okadigbo*.¹⁹
2. Relevance to the facts in issue: See *Kubor & Anor v Dickson*.²⁰
"Fact in issue" includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows.²¹
3. It must be admissible in law [cf hearsay evidence²², opinion evidence²³, character evidence²⁴, etc.] whether relevant or not.

In the case of electronic evidence, there are additional conditions prescribed under the new provisions which must be satisfied. This has been illustrated in quite several cases: *Kubor & Anor v Dickson*²⁵, *UBN Plc v Agbontaen & Anor*²⁶, *Omisore v Aregbesola*²⁷ and *Dickson v Sylva*.²⁸

¹⁹ (1973) 4 S.C. 113; *Ajukwara v Izuoji* (2002) 100 LRCN 1699

²⁰ *Kubor v Dickson* (*n16*); see also EA 2011, ss 4-13 on relevancy

²¹ EA 2011, s258

²² *Ibid* s162. Cf. s 258 defines "real evidence" as meaning 'anything other than testimony admissible hearsay...'

²³ *Ibid* s67

²⁴ *Ibid* ss78-87

²⁵ (2012) LPELR 15364 (CA), [2013] 4 NWLR (Pt 1345) 534

²⁶ (2018) LPELR-44160(CA)

²⁷ (2015) LPELR 24803 (Sc)

²⁸ (2016) LPELR 41257 (SC)

The facts of the case of *Kubor & Anor v Dickson*²⁹ are apt here:

This was an election petition matter. The Appellants challenged the election and return of the 1st Respondent as a Governor in the February 11, 2012 governorship election. They tendered from the Bar a printout of the online version of the Punch Newspaper and another document from the website of the Independent National Electoral Commission (INEC), the 3rd Respondent in the appeal. While the electronic version of The Punch Newspaper was admitted and marked Exhibit “D”, the document from INEC’s website was admitted and marked Exhibit “L”. Sadly, the Appellants did not satisfy the conditions laid down in section 84(2) of the Evidence Act with respect to the admissibility of electronic evidence. As expected, the matter went on appeal and one of the contentions was that since Exhibits “D” and “L” were public documents, only certified copies thereof were admissible in evidence; and that in any case, the documents having been tendered from the Bar without the foundational conditions set out in section 84(2) of the evidence Act being satisfied, both documents were inadmissible in evidence.

The Supreme Court agreed with the above submissions. In the lead judgment the court stated that:

There is no evidence on record to show that the appellants in tendering exhibits “D” and “L” satisfied any of the above conditions. In fact, they did not as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admission as e-documents under section 84 of the Evidence Act, 2011. No wonder therefore that the lower court held at page 838 of the record thus:

“A party that seeks to tender in evidence computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84(2) of the Evidence Act 2011.”

²⁹ *Kubor v Dickson*(n16), facts culled from Olushola Abiloye (n15)

The same conclusion was reached in *UBN Plc v Agbontaen & Anor*³⁰ where the Court adopted the reasoning of *Kubor & Anor v Dickson*³¹ in the following words:

..., I am inclined to accept the fact that the case of *Kubor v Dickson* ... is applicable. Therein this Court while analysing the requirements for the admissibility of documents produced by a computer as provided for under the Section 84 (1) and (2) of the Evidence Act 2011 held *inter alia* ... as follows: "Section 84(2) provides for the conditions to be satisfied in relation to the statement and computer from which the documents sought to be tendered and admitted were produced. A party who seeks to tender in evidence a computer-generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of computer must be called to establish the conditions set out under section 84(2) of the Evidence Act."³²

The Evidence Act 2011 s84 must be distinguished from the requirements under the Evidence Act 2011 ss51, 89(1) (h) and 90(1)(e). The contending issue and confusion in the two regimes are illustrated by the recent case of *UBN Plc v Agbontaen & Anor*.³³ In this case the issue concerned the conditions for admissibility of computer-generated documents, specifically Bank Statements of Account, and the Court of Appeal observed thus:

The issue in contention between the parties is whether the 2nd Respondent's statement of account sought to be tendered in evidence by the Appellant but rejected by the trial Court for being inadmissible complied with the relevant provisions of the Evidence Act, 2011. For the Appellant, the relevant provisions of the Evidence Act governing the admissibility of the said document is sections 51, 89(1)(h) and 90(1)(e). But the Respondents are of a contrary stance by insisting that the governing provision is Section 84 of the Act which the learned trial Judge relied on rejecting the admissibility of the said statement of account.

³⁰ (2018) LPELR-44160(CA), Per Oseji, J.C.A. at 11-22, paras E-B

³¹ *Kubor v Dickson*(n16), facts culled from Olushola Abiloye (n15)

³²See further cited Supreme Court cases of *Omisore v Aregbesola* (2015) LPELR 24803 (SC), per Nweze, JSC, and *Dickson v Sylva* (2016) LPELR 41257 (SC) that such electronic generated evidence must be certified and must comply with the pre-conditions laid down in Section 84(2) ... whether tendered as original or secondary evidence

³³ (2018) LPELR-44160(CA), Per Oseji, JCA at 11-22, paras E-B

The Court of Appeal in analysing the relevant provisions of the Evidence Act 2011, ss 51, 84(1), 89(1)³⁴ and 90(1)³⁵, stated as follows:

It is however worthy of note that while the learned counsel for the Appellant insists that the provisions of section 84 of the Evidence Act, 2011 is of general application and sections 89(1) (h) and 90 (1) (e) of specific application in which case they take priority over the former. I do not however see it that way. It is .., the other way round(sic). What is more, while section 84 prescribed the conditions for the admissibility of statements in documents produced by computers, sections 89(1) (h) and (90) (1) (e) deal with admissibility of secondary evidence generally, and the conditions for their admissibility... It thus emphasises the imperative nature of the provisions of section 84 of the Act with regard to admissibility of document produced by computer whether being tendered in evidence as a primary (original) or secondary evidence...on the other hand, sections 89 (1) (h) and 90(1)(e) deal with the admissibility of secondary evidence generally, including banker's books and not limited to electronic or computer derived documents. In the instant case, I believe that there is no disputing the fact that the statement of account sought to be tendered had its origin from a computer whether or not it is asserted to be extracted from an electronic ledger which to all intents and purposes the information therein was imputed through a computer and the print out also derived therefrom. The point that I am trying to make here is that, whether the statement of account or electronic ledger is to be tendered either in its original form or as a secondary evidence it is required that it must satisfy the conditions prescribed by Section 84 of the Act.

Thus, the pre-conditions are settled.

b. The expansive definition of documents

The definition under the Evidence Act s258 is wide enough to include electronic evidence, though the expression is not used. By this definition, document:

³⁴‘Secondary evidence may be given of the existence, condition or contents of a document in the following cases:.. (h) when the document is an entry in a banker's book.’

³⁵‘The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of Section 89 is as follows: ...’

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 for the purpose of recording that matter.

The definition expands the meaning of the word ‘document’ beyond paper-based materials, and more extensive than the definition under the defunct Evidence Act. Section 258 is widely interpreted, unlike the repealed Act where the word was restrictively interpreted, and that had posed serious challenge to admissibility of electronic documents. For instance, in *Nuba Commercial Ltd v NAL Merchant Bank*³⁶ bank’s record of transactions between the parties stored in the bank’s computer and reproduced was held inadmissible. Again, in *Udoro & Ors v Governor Akwa Ibom State*³⁷ the definition of ‘document’ under the repealed Act did not include a video cassette. Under the previous regime it was not predictable.

c. Admissibility of electronically generated evidence

Section 84 of the Evidence Act, 2011 specifically provides for admission and the conditions for admissibility of electronically generated evidence. The section has five subsections streamlining the admissibility of electronic evidence while stipulating processes and conditions.³⁸ Section 84(1) provides that:

In any proceeding, a statement contained in a document produced by computer shall be admissible, if it is shown that the conditions in subsection (2) of this Section and satisfied in relation to the statement and computer in question (Emphasis supplied)

So, while section 84 (1) renders electronic evidence admissible, section 84(2) prescribes four conditions to be fulfilled:

- a) the statement sought to be tendered was produced by the computer during a period when it was in regular use, to store or process information for the purpose of any activity regularly carried on over that period;
- b) during that period of regular use, information of the kind contained in the document or statement was supplied to the computer;

³⁶ [2003] FWLR (Pt 145) 661

³⁷ [2010] 1 NWLR (Pt 1205) 322

³⁸ See Omolaye-Ajileye (n5) 74

- c) the computer was operating properly during that period of regular use or if not, the improper working of the computer at any time did not affect the production of the document or the accuracy of its contents; and
- d) that the information contained in the statement was supplied to the computer in the ordinary course of its normal use.

The real essence of the conditions stipulated under section 84(2) is the requirement of the witness to lay proper foundation for admissibility of electronically generated evidence: See *Kubor v Dickson*³⁹, on the need to lay ‘necessary foundations for admissibility of e-documents.’ The rejection of the Internet Printouts, Exhibit “D” and “L” in *Kubor & Anor v Dickson & Ors* was on the basis that there was insufficient foundational evidence to render the document admissible. There was no fact in the deposition of the affected witness to fulfil the conditions in Section 84 (2)-facts required by section 84[2] must be contained in the Statement of Witness on Oath. In criminal cases facts must be stated.⁴⁰

Fulfilment of section 84(2) is mandatory:⁴¹ This point is clear and evident from the cases of *Kubor v Dickson & Ors*⁴²; *Akeredolu & Anor v Mimiko & Ors*;⁴³ *Omisore & Anor v Aregbesola & Ors*;⁴⁴ and *Dickson v Silva & Ors*.⁴⁵

The next question is who should prove the conditions under Section 84(2)? This need not be an expert: *R v Shephard*.⁴⁶

Section 84(3) provides that where the function of storage or processing is performed by combination of computers or different computers, all the computers used for that purpose shall be treated as constituting a single computer.

³⁹ [2013] 4 NWLR (Pt 1345)534

⁴⁰ Omolaye-Ajileye (n5) 74

⁴¹ Omolaye-Ajileye, (n5) 75

⁴² *Kubor v Dickson* (n29)

⁴³ (2013) LPELR-20532

⁴⁴ [2015] 15 NWLR (Pt 1482)205

⁴⁵ (2016) LPELR-41257(SC)

⁴⁶ (1993) 1 All ER 225

Section 84(4) requires the production of a certificate of authentication. This means that the party offering electronic evidence must adduce enough evidence to support a finding that the document in question is what it purports to be.⁴⁷ It must be genuine!

Why does electronic evidence require authentication? Vulnerable to manipulation - can easily be altered or manipulated-can be copied, forwarded, updated, intercepted or even deleted; changes to photographs and videos can easily be made by using Photoshop and graphic design programs. See *Araka v Egbue*⁴⁸:

in this age of sophisticated technology, photo-tricks are the order of the day
...Phototricks could be applied in the process of copying the original document with
the result that the copy which is secondary does not completely or totally reflect the
original... Courts have no eagle eye to detect such tricks.

The question is how do you satisfy this requirement of certificate of authentication? No form is prescribed in the Act. In India, affidavit is required.⁴⁹

Exceptions to Section 84(4) include where it becomes impossible to tender a certificate; and where the opponent is in control of the computer that produced the electronic document.

IV. Contending issues:

Contending issues include

- i. Wider ambit of definition of document

There is no argument that the legislature intended wide scope, and the courts appear to give the section expansive interpretation in a seeming change of attitude: Tape recordings were tendered and accepted as documents in *Federal Polytechnic, Ede & Ors v Oyebanji*.⁵⁰ Video tape was admitted in *Obatuga & Anor v Oyebokun & Ors*⁵¹ and held to qualify as a document; and hand-held devices like smartphones are documents as well.

⁴⁷ See Omolaye-Ajileye, (n5) 75; Mason & Stanfied(n6) 19

⁴⁸ (2003)7 SCNJ 114, Tobi, JSC at 126

⁴⁹ Omolaye-Ajileye (n5) 241

⁵⁰ (2012) LPELR – 19696(CA)

⁵¹ (2014) LPELR – 22344 (CA)

- ii. There is still need to lay foundation in view of listed conditions -as demonstrated by *Kubor v Dickson & Ors.*⁵²
- iii. There is clear recognition of the vulnerability of such documents- hence certificate of authentication is required
- iv. There is presumption as to electronic messages: Section 153 of the Evidence Act presumes the accuracy of electronic mails, etc. The court may presume the accuracy of an electronic mail message but shall not make any presumption as to the person to whom the message is sent.

v. Weight

Section 34(1)(b) guides the court weight to be ascribed to electronically generated evidence already admitted. See *Jibril v FRN*⁵³ - it may be admitted but will not pass the accuracy test under section 34(1) - need to lead evidence to create doubt. Evidence Act, 2011 s34 recognises the possibility of reproduction of electronic documents and therefore prescribes it as one of the factors to be considered by the court in ascribing weight to such evidence.

- vi. Some objections to admissibility of electronic evidence under the repealed Act would not stand under the Evidence Act, 2011. For example:
 - a) Section 84(1) now recognises “a statement contained in document produced by a computer” as a document
 - b) As against argument that electronic evidence is hearsay and inadmissible - Section 41 now provides as an exception to hearsay rule where it “consists of any entry or memorandum made... in electronic device kept in the ordinary course of business...”
 - c) In any event, the fact that a document is produced by computer does not necessarily make it a hearsay.

⁵² *Kubor v Dickson*(n29)

⁵³ (2018) LPELR – 439931(CA)

- d) As against objection to electronic evidence as not original but secondary evidence requiring foundation being laid “Section 84 does not recognise the existence of any dichotomy in the nature and character of electronically generated as to qualify it as primary, original or secondary evidence. It only recognises a statement contained in a document produced by computer.”⁵⁴ Again, the facts required to be proved as conditions under section 84(2) constitute foundational evidence: *Kubor & Anor v Dickson & Ors*⁵⁵ on “necessary foundation.” Thirdly, the very nature and process of generating electronic document make it look like and it should be treated as original.⁵⁶

- e) As against objection on the ground that the maker of an electronic document has not been called as a witness. Section 84 does not focus on the maker of a document but its producer, that is, the computer: *Brila Energy Ltd v FRN*⁵⁷ held that section 83 is inapplicable to electronically generated document –‘when it comes to computer generated documents, the provision of section 83 has been excluded.’⁵⁸

- f) There is need for extra caution as the admissibility of electronic evidence remains technical despite the improvement on the regime. It has been rightly observed that:

Electronic evidence is becoming more and more prevalent in lawsuits. Therefore, significant time should be devoted to identifying and analysing the authentication and admissibility issues relative to the electronic data involved in the litigation. Addressing these issues at the earliest possible phase is critical to a successful evidentiary presentation on summary judgement, at a hearing or at trial. The groundwork for establishing the

⁵⁴ Omolaye-Ajileye, (n5)182

⁵⁵ *Kubor v Dickson*(n16)

⁵⁶ Omolaye-Ajileye (n5) 290. Contrast, *Anyaebosi v R.T. Briscoe* (1987) NSCC (Pt 11) 805, the Supreme Court recognised a computer printout as secondary evidence decided under the repealed Act.

⁵⁷(2018) LPELR-43926(CA)

⁵⁸*Ibid*, Jummai Hannatu Sankey, JCA

authenticity and admissibility should begin as soon as the information is gathered and reviewed as additional discovery may be required to ensure that the electronic evidence can be used in Court.⁵⁹

V. Conclusion

By the copious provisions of the Evidence Act 2011, the admissibility of electronic evidence has become firmly established in Nigeria. Essentially, the provisions accord due recognition to human development, specifically in the area of information or computer technology. This has seen an extensive repertoire of admissible documents including, electronic, digital or computer evidence, though without precise statutory definition of any of those terms. Consequently, the admissibility of electronic evidence is streamlined in a regime that incorporates general rules of admissibility of documentary evidence, in processes and under conditions that take into consideration current realities. The courts have risen to the occasion in proactively wide interpretation. However, despite the prospects of the new provisions for admissibility of such electronic evidence, there are several contending issues and challenges in the practical application of the law. The most critical issues include the failure of legislature to define electronic evidence and prescribe the form of certification required to make such evidence admissible. Accordingly, there is possibility of admission of every electronically generated document that satisfies the requirements of the Evidence Act 2011, s84. This is so because the issues of custody, reliability and best evidence rule would appear to have given way without adequate assurance of authenticity. There is need for urgent statutory intervention to assuage the contentions of practitioners and stakeholders.

⁵⁹ Zachary G. **Newman** and Anthony **Ellis**, ‘The Reliability, Admissibility and Power of Electronic Evidence’ January 25, 2011, Litigation Section of the American Bar Association Journal; see also, Legal Alert – May 2012, (n8)

STATE POLICE: A PROGRESSIVE APPROACH TO TACKLING INSECURITY IN NIGERIA

*Ebele Gloria Ogwuda**

Abstract

Nigeria has undoubtedly in recent times been confronted with a myriad of security challenges. These challenges have persisted and thus become a source of concern and worry to both the government and the citizenry. The security of lives and property of all nations including Nigeria should be of paramount importance to any government, the sustenance of which may be daunting without the role of the police in a given polity. The Police is one institution of the state that plays a pivotal role in any given society. Given the upsurge in security challenges and its abysmal management in Nigeria, it may be apt to state that the centralised system of policing and its attendant problems has failed. Also, the usurpation of the powers of state governors as chief security officers of their respective states has further intensified the call for state police. It is in view of the foregoing that the paper examines the need for state police which in the opinion of the paper will mitigate the current realities of insecurity in the country. It further argues that in order to achieve some semblance of security in Nigeria, there is need to decentralise the police force and empower State governments to have control over their security affairs which should however be done within the parameters of checks at the center to prevent abuse of power. Using the doctrinal approach of research, the paper discusses the meaning of state police, establishment and functions of the police, controversies trailing the creation of state police as well as the imperative of creating state police which is the core argument of the paper. The paper thereafter concludes with recommendations to ensure effective management of state police in Nigeria upon creation.

Key Words: State police, Decentralization, Centralization, Policing, Power

I. INTRODUCTION

Security is the state of being safe from harm or danger, the defence, protection, preservation of values and the absence of threats to acquired values.¹ Also, security can be seen as freedom from danger, threats and the ability of a State to defend and develop itself, promote as well as improve the well-being of its people. All these can be attained through an internal security system. Internal security system in any society is very vital because it is utilised to prevent violence and criminal activities in different societies. It similarly guarantees freedom of people from criminal acts and reduces occurrence of crimes which are detrimental to internal cohesion and development.²

Where there is an absence of these indices, there is said to be insecurity. Nigeria has in recent times been confronted with a myriad of security challenges³

* Ebele Gloria Ogwuda, Research Fellow, Nigerian Institute of Advanced Legal Studies, Supreme Court Complex, Abuja. LL.B, BL, LL.M (University of Abuja) Email: ebeleogwuda@yahoo.com.

¹ Idoko Cletus Usman, Dasuma Arida Mathew, ‘Security Challenges in Nigeria and National Transformation’ <<https://www.arcjournals.org/pdfs/ijmsr/v2-i8/2.pdf>> accessed 15 February 2018.

² ibid.

³ The year 2018 for instance, started on a bloody and sad note for Nigeria. 73 persons were killed in Benue State by persons alleged to be herdsmen with repeated incidents in Taraba, Adamawa, Kogi, Plateau etc. In southern Kaduna, Kaduna State, a traditional ruler and his pregnant wife were murdered in cold blood in their home. In Rivers State, over 20 innocent persons lost their lives to suspected

ranging from armed robbery, human trafficking, cultist killings, militancy in the south east and south south, political/electoral violence, unlawful proliferation of arms, kidnapping/abduction,⁴ cattle rustling, terrorism,⁵ farmers/herders clash⁶ (which has resulted in the death and internal displacement of several people as well as wanton destruction of properties), etc. These challenges have persisted and thus become a source of concern and worry to both the government and the citizenry. Even more worrisome is the fact that even where such security threats are reported to the appropriate authorities to forestall or prevent their occurrence, next to nothing is done to avert them.⁷

The security of lives and property of all nations including Nigeria should be of paramount importance to any government.⁸ What this means is that the security of lives and property of the people should not at any time be treated with levity; the sustenance of which may be daunting without the role of the police⁹ in a given polity. The Police is one institution of the state that plays a pivotal role in any given society.

cultists while returning from a church vigil on the 31st December, 2017. 14 worshippers were murdered in January at a mosque in Gamboru, Borno State while a suicide bombing attack in Maiduguri claimed 10 lives. For further reading, see ‘Speech: VP Osinbajo’s Address at the National Security Summit in Abuja’ <<http://statehouse.gov.ng/news/speech-vp-osinbajos-address-at-the-national-security-summit-in-abuja/>> accessed 9 March 2017.

⁴This nefarious act of kidnapping has even cascaded to medical personnel in hospitals.

⁵ The operations of the terrorist group known as the Boko Haram Sect (*Jama ’atu, Ahlis sunna Lidda’ awati wal-Jihad*) which literally means ‘western education is forbidden’ has in the last six years been both a serious challenge and lingering threat to Nigerian’s security, existence and development. Their activities have led to the death and internal displacement of thousands of Nigerians, bombing of schools, office buildings, newspaper houses, churches, mosques, abduction of school children (the most recent being the abduction of one hundred and ten girls from Government Girls Science and Technical College, Dapchi in Yobe State some of whom have fortunately regained their freedom), etc. For further reading see, Adagba Okpaga and Ugwu Sam Chijioke and Okechukwu Innocent, ‘Activities of Boko Haram and Insecurity Question in Nigeria’

<<http://www.researchgate.net/publication/264849674> Activities of Boko Haram and Insecurity Question in Nigeria> accessed 5 March 2018.

⁶ The violent clashes between herdsmen from the North and farming communities in the central and southern region have taken a different dimension (almost as deadly as the Boko haram insurgency in the Northeast). These conflicts led to the death of approximately 2,500 in 2016. Till date, government’s response at both federal and state level has been nothing short of satisfactory, thus intensifying the activities of these herdsmen without any decisive action on the part of Government. For further reading see, ‘Herders Against Farmers: Nigeria’s Expanding Deadly Conflict’ <<http://www.crisisgroup.org/africa/west-africa/nigeria/252-herders-against-farmers-nigerians-expanding-deadly-conflict>> accessed 5 March 2018.

⁷ In the case of Benue State for instance, Governor Samuel Ortom claimed that Security report of the planned attack by the leaders of Miyetti Allah Kautal Hore (an Association of Cattle Breeders) was received and communicated to the appropriate authority but nothing was done to avert it. For further reading, see, Samuel Ogundipe, ‘Benue Killings: Why we’re not going after Killer Herdsmen now-Police’ <<https://www.premiumtimesng.com>> accessed 20 April 2018.

⁸ See section 14(2) of the 1999 Constitution which provides that the security and welfare of the people shall be the primary responsibility of government.

⁹ The word, police is derived from the greek word ‘*polis*’ which means that part of non-ecclesiastical administration concerned with the safety, health and order of the State. For further reading see, ‘Nigeria Police Force Portal’ <<http://police.gov.ng>> accessed 17 April 2018.

It represents the civil power of government in contrast to military power and basically refers to a body of people structured to maintain civil order and public safety, enforce the law, and investigate commission of crimes.¹⁰

The Nigeria Police Force¹¹ is mandated by law to prevent and detect crimes, apprehend wrongdoers and generally maintain law and order in the country.¹² One may want to ask at this juncture whether the Nigerian Police (the only police force established for the entire Federation) have successfully and effectively carried out these duties or is clearly overwhelmed given the upsurge in security challenges highlighted above? Has it successfully policed the entire nation (with a population of over 190 million people)¹³ from the centre? It may not be out of place to answer in the negative. Given the state of insecurity and its abysmal management, it can be said that the Nigeria Police has performed below expectations.¹⁴ What can therefore be done? Is there a need to rehabilitate the institution or alternatively decentralize the central police force?

For some time now, decentralization of the police force or the creation of state police has become one of the most contentious issues dominating political discussions on restructuring and Federalism. This is so much so the position that even the Vice President, Professor Yemi Osinbajo at a recent security summit¹⁵ held in February 2018 alluded to the fact that the entire country can no longer be policed from the center.

¹⁰ Eme Okechukwu Innocent, Ogbochie, Andrew N, 'Limitations of State Police in Nigeria' *MJSS* 5 (15) (2014) <<http://www.mcser.org>> accessed 25 March 2018.

¹¹ In *Asheik v Borno State Government* (2012)9 NWLR (PT. 1304)1, the court described the Nigerian police as an organ of the Federal Government which is complete and comprehensive, with national institutions of its own.

¹² See section 4 of the Police Act CAP P19 LFN 2004. See also, J O Akande, *The Constitution of the Federal Republic of Nigeria 1999 with Annotations* (MJ Publishers 2000) 326. See also section 4 of the Police Act.

¹³ According to United Nations estimates, Nigeria's current population as at 16 April 2018 is 194,785,847. For further reading see, 'Nigeria Population (2018)-Worldometers' <<http://www.worldometers.info>> accessed 17 April 2018.

¹⁴ A case in point for instance will be the recent admission by the President that he was not aware that the Inspector General of Police did not relocate to Benue State as instructed following the farmers/herders clash that took place in January without any obvious consequence. For further reading, see 'Benue: Buhari 'Queries' IGP, Idris for Flouting his Order' <<https://www.vanguardngr.com>> accessed 10 April 2018. Also another example of the poor handling of a crisis situation will be the remarks made on national television (Channels TV) by the Police PRO (Jimoh Moshood) regarding the Benue State's Governor's stance on open grazing. He specifically described him as 'a drowning man'. The said comment was seen as unwarranted and insensitive in the face of the ongoing herders' crisis. For further reading see, Ameh Comrade Godwin, 'Benue Killings: Force PRO, Jimoh Moshood under Fire for Calling Ortom 'Drowning Man'' <<http://dailypost.ng>> accessed 10 April 2018.

¹⁵ The Security Summit was organised by the Senate of the National Assembly to address the ongoing security challenges Nigeria is grappling with.

The foundation of the foregoing controversy on state police is undoubtedly linked to the provisions of section 214 of the 1999 Constitution of the Federal Republic of Nigeria.¹⁶ The provision imposes the duty of policing the whole country on the federal government. It has been argued that this provision contradicts Nigeria's practice of federalism,¹⁷ has escalated the security crises in most parts of the country and has more or less usurped the powers of state governor(s) as chief executive(s) of their respective state(s) as guaranteed under section 176 (2) of the same Constitution.¹⁸ This is because ordinarily, the onerous task of maintaining law and order should be the sole responsibility of the state governor as the chief security officer of the state. This has nevertheless not been the case for Governors who are reduced to ceremonial chief security officers.¹⁹

It is against this backdrop that the paper analyses the need for state police which in the opinion of the researcher will go a long way in mitigating the current realities of insecurity in the country. The paper posits that in order to achieve some semblance of security in this country, there is need to decentralize the police force and empower State governments to have control over their security affairs. This should however be done within the parameters of checks at the center to prevent abuse of power. The paper is divided into six sections for ease of understanding and clarity. The second section after the introduction examines the meaning of state police. The third section looks at the establishment of the Police under the 1999 Constitution and its duties in Nigeria. The fourth section weighs in on the controversies trailing the creation of state police and also looks at the other side of the coin i.e. the imperative of creating state police which is the core argument of the paper. The fifth section of the paper makes recommendations to ensure effective management of state police in Nigeria upon creation while the last section features concluding remarks on the subject.

II. Meaning of State Police

State police refers to a police system maintained or controlled by a state as

¹⁶ Angela E Obidimma, Emmanuel O C Obidimma 'State Police an Imperative for True Federalism in Nigeria' <<http://www.ijird.com/index.php/ijird/article/viewFile/80338/62082>> accessed 12 February 2018. The section provides that "there shall be a Police Force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section, no other police force shall be established for the federation or any part thereof".

¹⁷ ibid.

¹⁸ Eme Okechukwu Innocent, Nkechi O Anyadike, 'Security Challenges and the Imperatives of State Police' <<https://www.arabianbmr.com>> accessed 19 May 2018.

¹⁹ ibid.

distinguished from those of a lower state sub-division (as a city or county) of the State Government.²⁰ In relation to Nigeria, state police could be seen as some sort of sub-national police formation which is established, organised, maintained and under the direct control and jurisdiction of a particular state government.²¹ According to Mr. Sunday Ehindero,²² state police means an absence of a national police force.²³ This means a locally controlled police force in the state which will not be under the supervision or control of the Inspector General of Police. It will rather become the responsibility of the Governors of states to maintain law and order without any intrusion from the Inspector General of Police or the President.

Furthermore, state police connotes a specially organised and highly trained body, acting under state rather than local authority, and constantly involved in the prevention of crime, apprehension of criminals, and the protection of life and property generally throughout the state and especially in the rural and sparsely settled districts. In most states, the state police force is organised on a military basis and dispersed in split groups all over the entire state for patrol duty, but quickly mobilised in larger units in an emergency.²⁴

From the foregoing, it may be apt to conclude that state police is simply a police force arrangement in which the powers of control and management are vested in an individual or particular State government. This means that in the event of an impending danger or crisis situation which requires swift action of the police, the state government will not be constrained in acting or the Commissioner of police will not await directives from the centre or Inspector General of police which is usually the case in a centralised police force.²⁵

III. The Police

²⁰ A A Egunjobi, ‘The Nigerian Federal Practice and the Call for State Police’ *IJAARSMS* Vol. 2(7) (2016) <<http://www.ijaar.org>> accessed 29 March 2018.

²¹ *ibid*.

²² ‘Wither Nigeria: National or State Police?’ <<https://www.vanguardngr.com>> accessed 16 April 2018.

²³ This definition in the opinion of the researcher is flawed because the creation of State Police does not in any way vitiate the existence or operation of a National or central Police force.

²⁴ Margaret Mary Corcoran, State Police in the United States

A Bibliography’ *JCLC* 14(4) (1924) <<https://www.scholarlycommons.law.northwestern.edu/jclc>> accessed 20 April 2018.

²⁵ For instance, the apparent helplessness of Governor Uguawnyi in ‘commanding’ the Police and other security personnel to tackle head on the plans of herdsmen to attack Nimbo in Uzo-Uwani Local government area in Enugu State is one of such situations where centralised policing has failed and led to the death of so many Nigerians. For further reading see, Gregory Austin Nwakunor, Odita Sunday, Sam Oluwalana and Iyabo Lawal, ‘State Police will solve Problem of Violence, but...’ <<https://www.guardian.ng/saturday-magazine/cover/state-police-will-solve-problem-of-violence-but/>> accessed 18 April 2018. See also section 215(2) of the 1999 Constitution

In laying the foundation for our discussion, it is important to examine the establishment, structure and duties of the Police given the crucial role they play in any society. In so doing, we shall make reference to the 1999 Constitution-the extant grundnorm as well as the Police Act.

1. Establishment and Structure of the Nigerian Police Force

The 1999 Constitution establishes the Nigeria Police force in section 214(1).²⁶ It provides thus:

there shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police force shall be established for the Federation or any part thereof.²⁷

From the foregoing provision, it becomes obvious that the drafters of the Constitution intended the creation of a centralised police to be known as the Nigerian Police Force. The section forbids the establishment of any other police force for Nigeria or any part thereof. The 1999 Constitution by expressly prohibiting the establishment of any other police force followed the 1979 Constitution. The said provision is indeed a clear departure from the 1963 Constitution²⁸ which sanctioned the establishment of local police forces on regional basis.²⁹ Each Region at that time through its Legislature was empowered to make provisions for the purposes of maintaining a police force established by any authority or local government authority within that province.³⁰

Furthermore, section 214(1)(a) provides that the Nigerian Police Force shall

²⁶The Nigeria Police was first established in 1820 with over one thousand members drawn from the armed paramilitary Hausa Constabulary in 1879. The Lagos Police was set up in 1896 while a similar force- the Niger Coast Constabulary was established in Calabar in 1894 under then newly created Niger Coast Protectorate. In the North, the Royal Niger Company Constabulary consequently became the Northern Nigeria Police while a component part of the Niger Coast Constabulary became the Southern Nigeria Police. Most of the police set ups were associated with local governments (Native Authorities) during the colonial period. Nevertheless, under the first Republic in the 1960s, these forces were first regionalised and then nationalised. The Nigeria Police (NP) was consequently designated under Section 194 of the 1979 Constitution as the national police of Nigeria and given exclusive jurisdiction to police the entire country. For further reading, see, Egunjobi, (n 20).

²⁷ The section further provides under paragraphs (a), (b) and (c) that the Nigeria Police Force shall be organized and administered in accordance with such provisions as may be prescribed by Act of the National Assembly, the members of the force shall have such powers and duties as may be conferred upon them by law and lastly the national Assembly is empowered to make provisions for branches of the Nigeria Police Force forming part of the armed Forces of the Federation or for the protection of harbours, waterways, railways and airfields. See also section 3 of the Police Act which contains similar provision on the establishment of the Nigerian Police Force.

²⁸ See section 105(7) of the 1963 Constitution.

²⁹ Obidimma, (n 16). See also section 194(1) of the 1979 Constitution which is *in pari materia* with section 214(1) of the 1999 Constitution.

³⁰Akande, (n 12) 327. See also section 105(7) of the 1963 Constitution.

be organised and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly.³¹ This provision is a clear indication of the intent of the Constitution which is to make National Assembly the sole body empowered to make laws regarding the police. What this means is that the State Houses of Assembly of the various States are excluded or cannot competently legislate on such matters because they fall under the exclusive legislative list which is the exclusive preserve of the National Assembly.³² Herein also lies the problem for states who are more or less handicapped when it comes to the subject of establishing a state police or legislating on police related matters.

The Nigeria Police Force is an institution of the federal government with a centralised command structure which is headed by the Inspector General of police (IGP).³³ Section 6 of the Police Act which is *in pari materia* with section 215(2) of the Constitution provides that “the Force shall be commanded by the Inspector-General of Police”. This connotes that orders, directives and instructions to perform police duties flows from the Inspector-General of Police-issued through a chain of Command to any officer in the position to carry out such order. Disobedience or failure to carry out such instruction, directive or order, attract punitive sanctions³⁴ which could be disciplinary action, outright dismissal, suspension, etc. Subsection (2) of section 215 also provides that any contingents of the Nigeria Police force stationed in a state shall, subject to the authority of the Inspector General of the police, be under the command of the Commissioner of police³⁵ appointed for that state by the Police Service Commission.³⁶ This means that a Commissioner of police cannot take any

³¹ ‘Nigeria Police Force’ <http://www.npf.gov.ng/Force_Structure.php> accessed 23 April 2018.

³² See item 45 of Part I to the Second Schedule of the Constitution.

³³ ‘About the Nigeria Police’ <<http://www.nigeriapolicewatch.com/resources/about-the-nigeria-police/>> accessed 27 April 2018. The Inspector General of Police is appointed from among serving members of the Nigeria Police force by the president on whose authority he acts. It is important to note that such appointment or removal as that case maybe is usually on the advice of the Nigeria Police Council. See Akande, (n 12) 329. Sections 153 of the 1999 Constitution and 9 of the Police Act provides for the establishment of Nigeria Police Council (NPC) to amongst other things be responsible for the organisation and administration of the Nigeria Police Force, general supervision of the Nigeria Police Force, to advise the President on appointment of the Inspector General of Police, etc. The NPC consists of the President who shall be chairman, the Governor of each State of the Federation, the chairman of the Police Service Commission and the Inspector-General of Police. See also item 27, Part I of the third Schedule of the Constitution.

³⁴ ‘Nigeria Police Force’ (n 31).

³⁵ Pursuant to the provisions of section 215 (2) of the 1999 Constitution, section 5 of the Police Act provides for the office and rank of a Commissioner of Police.

³⁶ See section 215(1)(b). Section 153 of the 1999 Constitution establishes the Police Service Commission (PSC) to be an independent body saddled with the responsibility of appointing, promoting, and disciplining all members of the police force except the IGP. Item 29, Part I of the third Schedule of the Constitution provides for its composition which shall be a Chairman and such number

decisions regarding the security of a state under his command without the consent of the Inspector General first had and obtained.

With respect to maintaining and securing public safety and public order, section 215(3) provides that the President or the Minister of the Government of the Federation authorised for that purpose, may give lawful directions to the Inspector General of police who must comply with them or cause them to be complied with. Subsection (4) contains similar provisions with respect to the Governor of a state or Commissioner of the Government of the state giving such lawful directions to the Commissioner of police for the purpose of maintaining and securing public safety and public order. This however has a *proviso*, the effect of which is that the Commissioner of police may before carrying out the directions, request that the matter be referred to the President or relevant Minister of the Government of the Federation.

This ensures that the absolute control of the police remains with the Federal Government which has however been a cause of displeasure amongst most Governors. The reason being that by virtue of their positions, they are responsible for the maintenance of peace and security within their province and there are occasions where crisis situations could be curtailed as result of prompt and decisive action.³⁷ The reverse is nevertheless the case where the Commissioner of police has to get clearance from the Inspector General of police (acting under the authority of the President or Minister) before carrying out the instructions of the Governor.

By virtue of the provisions of section 7 (1) of the Police Act, the next in line to the Inspector General of Police is the Deputy Inspector General of Police. Even though this position is not specifically mentioned in the Constitution, it has statutory backing. This is because the Police Act is a law made by the National Assembly in accordance with the Constitution.³⁸ Accordingly, the Deputy Inspector General of Police (DIG) is the second in command of the Force who acts in the Inspector-General's absence. Section 5 of the Police Act makes provision for the appointment of as many DIGs as the Nigeria Police Council considers appropriate. Every other rank³⁹ below the IGP, takes order of command from him in the performance of their lawful duties.⁴⁰

of other persons, not less than seven but not more than nine, as may be prescribed by an Act of the National Assembly. For further reading, see, 'About the Nigeria Police', (n 33).

³⁷ Akande, (n 12) 329.

³⁸ See section 214(1)(a).

³⁹ Every other rank in the Force is legally provided for by section 5 of the Police Act.

⁴⁰ 'Nigeria Police Force' (n 31).

The structure of the Nigeria police is such that each State including the Federal Capital Territory is served by an administrative unit known as a state command. The state commands are grouped into 12 zonal commands with two to four states in each zone. Each zone is supervised by an Assistant Inspector General of police (AIG)⁴¹ while each state command is headed by a commissioner of police (CP) who is directly accountable to the AIG in the respective zone. State commands are further split into smaller area commands, police divisions (headed by a divisional police officer, or DPO), police stations, police posts, and village police posts.⁴²

2. Duties of the Police

The Government of every nation has the responsibility of protecting lives, liberties and properties of its citizens. Through its law, the society gives its government wide powers for the purpose of efficient and effective maintenance of law and order, and protection of citizens from crime and violent conflicts. The police as an agent of the state is the most visible symbol of any government's power and authority primarily established to enforce laws.⁴³

Section 4 of the Police Act clearly defines the duties as well as powers of the police. This has consequently received judicial pronouncement in the cases of *Olatinwo v State*⁴⁴ and *IGP & Anor v Ubah & Ors.*⁴⁵ In fact, the court of Appeal in *Chukwuma v Commissioner of Police*⁴⁶ reiterated the provisions of section 4 thus:

By virtue of section 4 of the Police Act, Cap 359, laws of the Federation of Nigeria, 1990, the duties of the police include amongst others the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and they shall perform such military duties within or without Nigeria as may be required of them by, or under the authority of the Police Act or any other Act. In the instant

⁴¹ The office of the AIG of Police is provided for by sections 5 and 8 of the Police Act. He acts for the Inspector-General of Police in the absence of the IGP and DIG of Police.

⁴² 'About the Nigeria Police' (n 33).

⁴³ Ogaga Ayemo Obaro, 'The Nigeria Police Force and the Crisis of Legitimacy: Re-defining the Structure and Function of the Nigeria Police' *European Scientific Journal* 10 (8) (2014). For further reading see, Ogadimma Chukwubueze Arisukwu, 'Policing Trends in Nigeria since Independence (1960–2012)' <<http://journals.sagepub.com/doi/pdf/10.1350/pojo.2012.85.2.582>> accessed 5 May 2018.

⁴⁴ [2013] LPELR-19979 (SC).

⁴⁵ [2014] LPELR-23968(CA).

⁴⁶ [2005] 8 LWLR (Pt – 927) 278.

case, the action of the Police in frustrating the meeting of the association was to maintain law and order and their action was justifiable.

These duties will now be discussed under subheads.

a. Prevention and Detection of Crimes

This is one of the most important statutory functions of the Nigerian Police Force. The police in carrying out this duty are expected to do everything within their power to combat crime and rid the society of violence and every threat to life or property.⁴⁷ Because of insecurity of lives and property of people within Nigeria and the surge in criminal activities, the Nigerian Police Force has to always be alert and alive to its statutory responsibility of ensuring that necessary steps (such as formulation of policies and strategies as well as technological mechanisms) are taken to suppress crime. The Nigerian Police Force patrol teams, sting operations are for instance, empowered to uncover attempts to commit crime.⁴⁸

b. Apprehension of Offenders

In line with the provisions of the Police Act, the police can with or without warrant, arrest any person alleged to have committed an offence or in the course of committing an offence. Such arrest is deemed lawful as long as the alleged offence committed is against the provisions of the Constitution or any other law of the land.⁴⁹

c. Protection of lives and property

This is another function of the Nigerian Police Force which is considered crucial to the existence of any nation. The Nigerian Police as the law enforcement agency is saddled with the responsibility of ensuring that the lives and properties of the citizenry are protected.⁵⁰

d. Maintenance of law and order

The Nigerian Police is mandated to ensure that citizens obey law and order. In so doing, they consequently maintain peace. In fact, all other duties are subsumed in this specific duty of the Nigerian police which entails maintaining law and order in the

⁴⁷ Joseph Athanasius, ‘5 Major functions of the Nigerian Police Force’ <<https://www.infoguidenigeria.com/functions-nigerian-police/>> accessed 12 May 2018.

⁴⁸ ibid.

⁴⁹ Jide Webmaster, ‘Duties of the Nigerian Police Force (Constitutional Duties)’ <<https://www.nigerianinfopedia.com/duties-nigerian-police-force/>> accessed 5 May 2018. In *Sadiq v State* (1982) 2 N.C.R.142, it was held that there must be actual touching or confinement of the body of the person to be arrested.

⁵⁰ Joseph Athanasius, (n 47).

society.⁵¹

e. Due Enforcement of Laws and Regulations

It suffices to say that the police are not obliged to enforce every law except where it is directly charged to act under such a law. For instance, the police are not expected to ordinarily interfere or enforce laws bothering on civil matters or laws that define contracts between individuals or agreement between or among individuals. The police is however duty bound to enforce any crime related law.⁵²

f. Performance of Military Duties

Apart from enforcing laws, the Nigerian Police is furthermore under the Act expected to undertake some military duties which in most situations occur where there is a state of emergency. More so, on several occasions police officers have in the past been ordered to serve in different peacekeeping missions in different countries.⁵³

IV. Creation of State Police in Nigeria

Recall that we mentioned in the introduction section of this paper that the issue of state police has overtime dominated discussions on restructuring, federalism and has for a long time been subjected to a lot of debate as to whether it should be adopted or not. This section of the paper will now look at some of the arguments advanced against the establishment of state police and also make a case for its creation which is the core argument of the paper.

a. Examining the Controversies against State Police in Nigeria

The most common conceived argument against state police is the likelihood of abuse by the state governors.⁵⁴ The opinion on this is that it could impact not only politicians but also affect public security when utilised as an instrument of

⁵¹ Jide Webmaster, (n 49).

⁵² Jide Webmaster, (n 49).

⁵³ ibid

⁵⁴ Obidimma, (n 16).

intimidation to oppress political opponents by the government in power.⁵⁵ Also, this is hinged on the fact that the defunct native authority and local government police forces were abused by local politicians of Nigeria's First Republic, and that nothing has changed in the country in the conditions leading up to the demise of local police forces in that Republic.⁵⁶ It is therefore believed that history will repeat itself if state governors are allowed to have operational control of their police affairs.

While not disputing the fact that issues of abuse may possibly arise, the paper however posits that the trend of political intimidations/assassinations which has overtime dominated Nigeria's power play still prevails in the absence of state police. It should consequently not be utilised as an excuse to discourage the creation of state police in Nigeria which when put in place with the right strategy may prove to be a useful tool for maintenance of law and order especially during emergencies. That notwithstanding, the paper is of the opinion that such cases of abuse could be reduced to the barest minimum where there are clear guidelines at the centre to check such abuses.

The Control mechanism in the United Kingdom for instance, ensures that there is a substantial degree of uniformity of police practice and condition of service throughout Britain.⁵⁷ By way of modification, Nigeria can adopt a system which ensures that each state police force submits quarterly reports of its activities to the central Police force and also establish a secured hotline or emergency line where such cases of abuse can be reported as has been done regarding certain offences such as gender based violence or whistleblowing with regard to corruption cases. Such acts of abuse should be treated with utmost seriousness and penalties imposed for such violations.

While this may not totally eradicate incidents of abuse, it is believed that proactive implementation will reduce such incidents. Also at the state level, to curb such cases of abuse when operational control of the police is given to state governors, Commissioners of police should be able to distill which order from the governor is legal or not for the good of the society as opposed to the whims of the state governors. Constant training and re-orientation of police officers (to reform their mindset and

⁵⁵ Valentine B Ashi, *Fundamental Constitutional Doctrines and Concepts*, 2nd ed (Legalpoint Publishers Ltd 2013) 226.

⁵⁶ These local police forces of Nigeria's First Republic emptomised absolute powers by the local authorities and this power was utilised with reckless abandon by politicians for selfish motives. See n 54 above.

⁵⁷ Egunjobi, (n 20).

operations) is also key to prevent abuse of state police.

Another argument advanced by opponents of state police has to do with the problem of conflict of interest or the possibility of fallout of multiple security agents. Even though the police as is currently structured maybe guilty of most or all the allegations leveled against the defunct local police, the nagging issue is whether or not Nigeria should squarely face the challenge of a single police force rather than resolving the squabbles that could emanate from operating a decentralised police system.

The capability of Nigerian politicians to handle the jurisdictional problems that are likely to arise from operation of multiple police forces is also in doubt.⁵⁸ The problem here is whether there will be interference or a clash of duties in operation of the police forces and what happens in the event of such clashes. The paper recommends that an under study of other jurisdictions where state police is successfully operational be done to find out how these issues of conflict are resolved. Countries such as America, Canada, Britain, Australia or even Ethiopia could become case studies, findings of which should however be modified to suit our local circumstances.

Furthermore, the establishment of state police in Nigeria may not be a practical option given the problem of funding. This is because most of the states depend on allocation from federation account to run the affairs of their respective states and such allocations are hardly enough to meet their expenditure.⁵⁹ The burden and cost of maintaining state police force even with the security votes allocated to them may thus be too enormous for the State Governments in Nigeria to bear. Given the difficulty the Federal Government is facing in funding and running the Nigeria Police Force today, the situation may be more precarious if states are left to fund their own police forces.

For instance, many states today are unable to pay the salaries of their workers⁶⁰ and consequently have to rely on bailouts from the federal government. It will therefore be an onerous burden on the part of state governors to add police responsibility to the affairs of states, most of who are still grappling with issues of

⁵⁸ Okemuyiwa Akeem Adedeji, ‘State Police in Nigeria: {Issues and Challenges}’ <<https://www.researchgate.net/publication/292965357>> accessed 17 May 2017.

⁵⁹ ibid.

⁶⁰ Obidimma, (n 16).

payment of salaries, minimum wage, etc.⁶¹

On the foregoing note, the paper suggests that States which are financially self-sufficient i.e. oil producing states such as Akwa Ibom, Delta, Edo and other non-oil producing states e.g. Anambra, Abia, etc. and don't really depend on funds from federation accounts should take the giant stride of creating and funding their own State police. This may serve as a 'test run' period for the entire nation to ascertain whether state police is the way to go. It is interesting to point out here that this recommendation is in consonance with one of the resolutions of the National Conference (CONFAB), 2014 which recommended the establishment of state police for any state that requires it; to be funded and controlled by the said state.⁶²

V. State Police as an Imperative to Security in Nigeria

One of the strongest arguments in support of the establishment of a state police is that it is in line with the principle of Federalism upon which Nigeria's Constitution is fashioned. As a Federal State, the power of the Federal Republic of Nigeria is shared between the central government which is known as the federal government and the 36 states of the federation (federating units).⁶³ The power of Law making at the centre is vested on the National Assembly⁶⁴ while the State Houses of Assembly also make laws subject to the limits imposed by the legislative list contained in the second Schedule to the Constitution.⁶⁵ There is an extension of the principle of federalism to the Federal and state courts in which their powers and jurisdiction are clearly spelt out by the Constitution.⁶⁶

The same goes for Executive powers of the Federation which pursuant to section 5(1) are vested in the President while that of the States are vested in the

⁶¹ ibid. Even Lagos state which has been supportive in the funding of policemen deployed to the state has been doing so through a trust fund specifically set up for that purpose. For further reading, see Obidinma, (n 16).

⁶² See specifically Resolution 5.11.2 of the Report. The conference which was inaugurated by the former President Goodluck Jonathan as part of the efforts to strengthen national unity and consolidate democratic governance in Nigeria as part of the efforts to strengthen national unity and consolidate democratic governance in Nigeria made far reaching recommendations on restructuring, resource control, power sharing/rotation, creation of more states, etc. For further reading see, 'Key National Conference Recommendations You Need to Know' <<https://www.premiumtimesng.com/national-conference/key-national-conference-recommendations-need-know/>> accessed 18 March 2019.

⁶³ Adedeji, (n 58).

⁶⁴ See section 4 of the 1999 Constitution.

⁶⁵ See section 4(6) & (7) of the Constitution.

⁶⁶ See section 6 for judicial powers of the courts.

Governors.⁶⁷ The argument here is that from these provisions, it will be clearly revealed that each of the States that make up Nigeria ought to be a complete government on its own with requisite powers to make laws, administer them and punish offenders through the Judiciary. The reverse is however the case as the only agency responsible for enforcing laws is the Nigeria police force-a federal agency.⁶⁸ It has therefore been opined that a State without coercive power is just like any other organised society regardless of its status. It may consequently be able to bark but can certainly not bite.⁶⁹

Given the deplorable state of security, some proponents of state police are convinced that it is only a decentralised police force which is practiced in most developed countries that can rescue Nigeria from this quagmire. They have stressed that the adoption of state police will afford the central police the opportunity of focusing on issues of recruitment and training of highly professional police officers at the centre who may from time to time be deployed as the need arises.⁷⁰ As at 2016, the total number of police personnel in the country was estimated to be 370,000 which approximately places the ratio thus; 1 policeman to 459 Nigerians.⁷¹ This is quite disheartening when compared with Nigeria's population of over 190 million and is grossly insufficient by the United Nations Standard which is 400 to 1 ratio. If a state police structure is put in place, the states would be able to ascertain their security needs, recruit and train enough manpower to meet them.⁷²

Also, the federal government's role towards effective policing is greatly undermined by politicking. The Constitution categorically imposes controlling powers of the Nigeria police force on the President and the IGP.⁷³ For instance, pursuant to the provisions of section 215 (4) of 1999 Constitution, a State Commissioner of police is obliged to refer a directive given by a State Governor to the President or Minister so authorised before acting on them. It will therefore be typical for a Governor's directive to the State Commissioner of police to be subjected to constant veto in

⁶⁷ Adedeji, (n 58) The exercise of these executive powers in both situations extend to the execution and maintenance of the Constitution and all laws made either by the national or state houses of assembly, as may be appropriate.

⁶⁸ ibid.

⁶⁹ ibid.

⁷⁰ Innocent, (n 10).

⁷¹ M U Ndagi, 'Nigeria's Under-staffed Police Force' <

[>](https://www.dailystreet.com.ng/news/philosofaith/nigeria-s-under-staffed-police-force/139543.html)

accessed 1 June 2018.

⁷² ibid.

⁷³ See section 215.

Nigeria where several government decisions are politically influenced.⁷⁴

In addition, it is erroneous to assign the sole management of a sensitive institution as the police force to a particular tier of government in Nigeria. It has thus become expedient to revisit the issue of state police. The decision to completely cede policing to the federal government in Nigeria was predicated on the erroneous assumption that the federating states in Nigeria lack the means to maintain and sustain a force given the experience of the first republic as discussed earlier. Experience has however shown that federal police are not immune to the allegations of abuse against the local police.⁷⁵ All the factors that led to the demise of the local police such as corruption, indiscipline, oppression, etc. still impede federal police from effectively discharging their constitutional duties.⁷⁶

Furthermore is the issue of funding of the police by the states. Notwithstanding that the police as a federal agency ought to primarily be the responsibility of the federal government, there have been cases where several states make and still make huge financial investments to maintain the police within their jurisdiction. These they have done by providing vehicles and logistic support, building or rehabilitating police stations within their states.⁷⁷ As Chief Security Officers/Chief Executives of the states, it would be deemed irresponsible of them not to release funds which could possibly avert a crisis situation in their states. This is because it could send the wrong signals to their citizens who would in turn only lose confidence in them without knowledge of the logistics involved.

It has therefore been argued that funding by the states is inequitable without

⁷⁴ Michael B Aleyomi, 'Is State Police a Panacea to Security Threat in Nigeria?' AAJSS 4 (4.2) (2013) <https://www.researchgate.net.../256429569_Is_State_Police_a_Panacea_to_Security...> accessed 30 April 2018. An example of where presidential power was utilised to undermine the state would be the murder trial of Nigeria former senate majority leader, Teslim Folarin in 2011. Without waiting for legal advice to be issued on the murder charge against him, the police, believed to be acting the script of the federal government of Nigeria, unilaterally withdrew the charge against the accused person. Another clear example was the abduction of Governor Chris Ngige in Anambra State in 2003. The act was carried out by some policemen (led by the late Assistant Inspector-General of police, Raphael Ige) in collaboration with the Federal government and some thugs. It was intended to intimidate and unseat a democratically elected governor. Here, through the federal might, the State Commissioner of police was prevented from taking lawful directives from the embattled Governor. What this means is that State Governors are constitutionally handicapped when it comes to maintenance of security and protection of lives in their territory and this definitely makes a caricature of the principle of true federalism. For further reading see, I T Akomoledo, 'Good Governance, Rule of Law and Constitutionalism in Nigeria' EJBSS 1 (2012) <<http://www.ejbss.com/recent.aspx>> accessed 1 June 2018.

⁷⁵ Adedeji, (n 58).

⁷⁶ ibid.

⁷⁷ Olong Matthew Adefi, Josephine Aladi Achor Agbonika, Re-awakening the State Police Controversy in Nigeria: Need for Rethink' IJASS 3(11) (2013) <http://www.aessweb.com/journal-detail.php?id=5007> accessed 23 May 2018.

any corresponding control over the police. With the creation of state police, states can constitutionally appropriate funds for the police force under their respective jurisdictions and the citizens would know how these funds are expended.⁷⁸ While allegations of police inefficiency at the Federal level cannot be ignored and complaints by some State Governors about the low standards of policing in the states may be proven, on the whole, what every Nigerian wants is an efficient, professional and an apolitical force. This could be attained through reconciliation of conflicting interests, striking a balance which would ensure the maintenance of the status quo of the police as a national outfit while allowing State Governors some degree of control over police affairs within their respective States.⁷⁹ It has become quite glaring that the Federal Government alone cannot solve the problems associated with policing due to their urgency, quantum and nature. In resolving these challenges, community partnership is required especially with respect to manpower shortage, inadequate and obsolete equipment, poor and inadequate accommodation, poor public image, sagging morale, poor and inadequate communication facilities.⁸⁰

Yet another contention in support of state police is hinged on the fact that Nigeria is too enormous a country and also heterogeneous for its security matters to be over centralised. In situations of emergencies where swift and decisive action is required to quell violence by deploying troops, time is often wasted on issues of administrative bottlenecks and needless bureaucracies.⁸¹ The effectiveness and efficiency of local militias like the *Oodua* People's Congress (OPC), *Bakassi* boys, *Egbesu* boys, Vigilante Groups etc. have lent credence to the conviction by many that security is a local problem which can only be effectively managed by those who understand the terrain.⁸²

The last issue to be discussed in this paper which buttresses the foregoing point is that the establishment of state police is predicated on the need to reduce crime to the barest minimum. Crime occurs in every “community” and is often carried out by persons who come from that community or locality. In order to deal with crime, it has become expedient to ensure that locals are absorbed and posted to their various localities to apprehend the criminals. This is because according to them, a place

⁷⁸ ibid.

⁷⁹ Adefi, (n 77).

⁸⁰ ibid.

⁸¹ ibid.

⁸² ibid.

would be better policed by people from that area who speak the language.⁸³ Also, the paper believes that state police will enhance intelligence gathering at both state and local level.

VI. Recommendations

In order to achieve successful enthronement of state police in Nigeria, the paper thus recommends the following:

- a. The provisions of section 215(2) of the 1999 Constitution and section 6 of the Police Act which vests control of the police force on the IGP should be amended and open to devolution of powers.
- b. With respect to section 215(4) which provides that directions given by a State Governor to the Commissioner of police must be referred to the President or relevant Minister of the federal government should be reviewed by making it more flexible and empowering State Governors to control their security affairs especially in crisis situations.
- c. Section 214(1)(a) of the 1999 Constitution which provides that the Nigeria Police force is to be organised and administered in accordance with an Act of the National Assembly should be reviewed. Item 45 of Part I of the Second Schedule to the Constitution (found in the exclusive legislative list) which is on police matters should be moved to the concurrent legislative list. This will give both the National Assembly and state Houses of Assembly powers to legislate on it.
- d. In order to reduce incidents of abuse of state police by State Governors, it is recommended that clear guidelines should be put in place at the centre. This will include submission of quarterly reports of the activities of the various state police forces to the central police force and also the establishment of a

⁸³ Destiny Eze Agwanwo, ‘State Policing and Police Efficiency in Nigeria’ *RHSS* 4(25) (2014) <<http://www.iiste.org>> accessed 20 May 2018. For instance in America, the following factors informed the decision to establish state police as early as 1865 and 1870: 1.the movement responded primarily to the increasing consciousness on the part of dwellers in rural and suburban districts of a need for a greater degree of police protection. The invention of the automobile and improved road networks widened the range of crime and rendered its control more difficult, 2. Local sheriffs and constables were not adequate nor especially fitted for the work, 3.state militia was a clumsy and extremely expensive agency and was not trained for police duty. Rather it was designed to primarily supplement the standing army for national defence, 4.state police was therefore perceived as a movement toward centralisation of government for the purpose of economy and efficiency. For further reading see, Corcoran, (n 24).

secured hotline or emergency line where such cases of abuse can be reported as has been done with respect to gender based violence offences or whistleblowing in corruption cases.

- e. There should also be constant training and re-orientation of police officers to prevent or check incidents of abuse.

VII. Conclusion

The paper examined the notion of state police which it argues will go a long way in mitigating Nigeria's current security challenges with the proper control mechanisms put in place. It established that Nigeria operates a centralised police system in which operational control is vested in the IGP, who in turn is answerable to the president of the federal republic of Nigeria or Minister acting in that behalf. The paper in aligning its argument with the proponents of state police, posited that the said system not only contradicts the practice of federalism but also greatly undermines the authority of State Governors to effectively handle their security affairs and should thus be decentralised. Nigeria should explore state policing as the next available option, given the apparent failure of the central police force to effectively manage the security challenges.

THE IMPLICATIONS OF LEGAL TECHNICALITY ON RULE OF LAW AND ADMINISTRATION OF JUSTICE

Olusegun Femi Akeredolu *

Abstract

This article is a deconstruction of functions of legal technicality and the implications of technical elements on the rule of law and administration of justice in Nigeria. The dispositions of court to depart from the provisions of its rules create a problem of uncertainty in the administration of justice and seemingly violate the principle of rule of law. It is discovered that the main purposes of technicality embedded in adjectival laws are designed to ensure justice is done in a certain, predictable and stable manner when the court or persons acting in judicial capacities are called upon to apply the substantive law within a given legal system. This article expounds judicial pronouncements and reviews some literatures; it was discovered that without legal technicalities, there cannot be justice because adjectival rules are part of the rules that are made to be obeyed to achieve rule of law. Thus, it is argued that legal technicality is made to regulate the dispensation of justice by the self-regulated legal system. In this article, it is recommended that in the administration of justice, justice should be prefigured by the application of the applicable adjectival laws unless any provision of law dictates otherwise. This concludes by advocating that the courts should always insist that litigants must comply with all the provisions of relevant laws in pursuit of justice.

Keywords: Technicality, adjectival law, substantive law, legal system, court, justice, Litigants

I. Introduction

The words ‘legal technicality’ is generally taken to represent, ordinarily, a strict adherence to the words of statutes to determine the spirit of justice. This is because, ‘law is not a broadening omnipresence in the sky, but the prophecy of what the Court will do’. In giving life to the abstract concept known as legal technicality, His Lord Justice Niki Tobi JSC (as he then was) notes¹ that:

A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case. A technicality arises if a party quickly takes an immediately available opportunity, however infinitesimal it may be, to work against the merits of the opponent’s case. In other words, he holds and relies tenaciously unto the rules of Court with little or no regard to the justice of the matter. As far as he is concerned, the rules must be followed to the last sentences, the last words and the last letters without much ado, and with little or no regard to the injustice that will be caused the opponent

* Olusegun Femi AKEREDOLU, B.A (2000), LLB (2008), BL (2009), LLM (2014), Department of Public Prosecutions, Ondo State Ministry of Justice, Ondo State New Secretariat Complex, Alagbaka, Akure, Ondo State.akeredolukaikai@gmail.com, akeredolusegun@yahoo.co.uk.

¹ In *Adedeji v The State* (1992) 4 NWLR (Pt. 234) 248, at page 265

While this article is not advocating that justice should be sacrificed on the altar of mere regularities, it encourages the courts to insist that the laws should be obeyed and complied with by all litigants before the Court. It is argued that it is only when the laws are followed that we have the rule of law and justice will be seen to be done. This article focuses on the provisions of law that unlined the doctrine of legal technicality and pronouncement of the superior courts in Nigeria on legal technicality related provisions of law. This article is divided into eight subsections. The first subsection highlights the concept known as legal technicality in Nigeria. The second subsection discusses the Nigerian Legal System and underscores the differences between adjectival laws and administrative law. Third subsection distinguishes between mere irregularities in procedures and legal technicality that are mandatory. The fourth subsection explains how the court treats mere irregularities and substantial irregularities. In the same manner, subsection five deals with the concepts of fair hearing, rule of courts and administration of justice in Nigeria.

The focus of subsection six is the effects of legal technicalities in administration of criminal justice. The seventh subsection examines the general legal implications of legal technicality on rule of law and administration of justice. are considered as well as the effects of same on rule of law and administration of justice in Nigeria. The last subsection summaries the article and makes some recommendations on in respect of litigants' failure to hold fast to the provisions of laws.

II. Dialectics of Legal Technicality

The general principle of moral ethos that underlines the negation of strict adherence of application of law during the administration of justice is factored by the fact that laws are made for man and not the other way round. Thus, where the letters of law² will occasion injustice to any other party in a judicial litigation or adjudication, the spirit of the law should be applied notwithstanding the direct, explicit and implicit letter of the law. Otherwise, the party who succeeds by invoking the letters of the law will '*leave the Court with a shield of victory obtained on mere technicalities*'.³ Technicality becomes an issue in a matter and it is said to be a 'mere technicality' where a party places absolute reliance on inordinate legalism to becloud or drown the merits of a case and escape from his legal liability,

² Especially rule of Courts

³ *Akeredolu v Abraham & Ors* (Supra).

responsibility or detriment. In other words, it arises when a party relies on or holds tenaciously unto the rules of Court with little or no regard to the justice of the matter.⁴ Technicalities represent the law as contained in the law books: blind, abstract, inactive and brutish, and it stands on one side during the administration of justice.

On the other side of administration of justice is the principle known as rule of law which requires absolute application of the related law without fear, favour, partiality and or any other extraneous consideration. The administration of justice must be ruled by the dictates of the law- as the law is. Rule of law requires that citizens should be governed by accepted rules, rather than by the arbitrary decisions of rulers⁵ and administrators of the judiciary. ‘Where the law is subject to some other authority’, the saying as imputed to Plato, ‘and has none of its own, the collapse of the State is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a State’.⁶

The whole purpose of law and rules of Court is to ensure that the affairs of the Court during the administration of justice are carried out in an orderly fashion with reasonable degree of certainty that prescribed acts have been duly complied with by the parties in the interest of justice.⁷ Thus, where the law prescribes a way of carrying out an act, such is the only way to be followed, when a date is specified for the doing of an act, that date becomes sacrosanct. This is because the rules of Courts and practice direction are made to be obeyed and no favour should be shown for not obeying same.⁸ However, it has also been judicially noted that strict and unreasonable adherence to technicality in the administration of justice shuts out justice.⁹

However, where there is a need to approach the Court to enforce a right, duty, responsibility, obligation or redress, guaranteed by the law, the spirit of justice will have to look at the legal procedures and processes to see whether the provisions of the law that established the Court, the rules, regulations and practice directions of the Court is followed. This is the focal point of this study, an attempt to deconstruct the need for litigants to strictly adhere to the fundamental provisions of adjectival laws in

⁴ *Osarereren v FRN* (2018)10 NWLR (PT.1627) 221 at page 226.

⁵ Alok Kumar Yadav, ‘Rule of Law’ 2017, 4:3, International Journal of Law and Legal Jurisprudence Studies, 205-220,

⁶ *Ibid*,

⁷ *F.S.B.Int. Bank Ltd Vs. Imano (Nig.) Ltd* (2000) 11 NWLR (Pt.679) 620 at 634

⁸ *Williams v Hope Rising Funds Society* (1982), 2 Sc 145 quoted with approval in *Jimoh O. Ojugbele v Mr. Musefiu O. Lamiidi* (1999) LPELR-CCN/1/99, Ratio 2.

⁹ *Akeredolu v Abraham & Ors* (2018) LPELR- 44067 (SC).

order to enforce the provisions of substantive laws. This is because a legal system is a system of general rules, which are created and applied consistently with procedural justice and fairness.¹⁰

III. Nigerian Legal System, Adjectival Law and Administration of Justice

A legal system is the interaction between the law and the people in a society in order to maintain the peace, State social order (founded on ideals of freedom, equality and justice)¹¹ and good government. Simply put, a legal system is a set of laws of a country and ways in which they are interpreted and enforced.¹² The legal system is regulated, mostly by procedural or adjectival law.¹³ Accordingly, it is imperative that a healthy legal system must meet the eight fundamental conditions internationally recognised for the safeguard of impartiality in the application of the law, that is: (1) a system of rules; (2) promulgation and publication of the rules; (3) avoidance of retroactive application; (4) clear and intelligible rules; (5) avoidance of contradictory rules; (6) practicable rules; (7) consistency of rules over time and (8) congruence between official actions and declared rules.¹⁴ These essentialities represent the fact that every legal system must have three necessary attributes: ‘the laws must be general; equal and certain, to ensure justice and adherence to the rule of law.¹⁵

The laws that enable Courts and the rules made for the Courts are the pivotal controls put in place to ensure that the substantive law¹⁶ of a given country are interpreted and enforced with certainty, predictability and stability. Thus, the rule of law requires that normativity and law application reach a degree of development sufficient to provide for certainty, predictability and stability¹⁷ to prevent arbitrariness and sentiments in the application of the substantive law. It could be argued that the procedural laws are the fuel through which the administration of justice is ran. In fact, it is the adjectival law that gives both meaning and life to the substantive law. Therefore, just like the substantive law, the principle of rule of law dictates that the provisions of the adjectival law must be enforced by the Courts during the

¹⁰ Stéphane Beaulac, ‘The Rule of Law in International Law Today’, in Dans G. Polambella & N. Walker (Dir.) *Relocating the Rule of Law*, (Hart Publishing 2009), 197-223.

¹¹ Section 17 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

¹² Collins Online English Dictionary <<https://www.collinsdictionary.com/dictionary/English/legal-system>> Accessed 17 October, 2019.

¹³ Body of law that sets forth the methods, rules, and procedures for Court cases.

¹⁴ Stéphane Beaulac (n10), 203.

¹⁵ F. A Hayek, *The Political Idea of the Rule of Law* (National Bank of Egypt 1955), 34.

¹⁶ The part of law that establishes, defines, and regulates rights, including law of contracts, tort, wills, marriage, criminal responsibility etc.

¹⁷ Stéphane Beaulac (n10), 206.

administration of justice strictly to the letter without favour, fear or sentiment. The judiciary has the duty to act in accordance with the dictates of the law as it stands and not as critics would like it to be. In this sense, naïve idealism is but a pale imitation of legal certainty.¹⁸ Thus, legal justice implies the application of the law as it is. This ordinarily implied that all the laws of the land, including procedural laws and rules of courts must be adhered to by all the litigants seeking justice before the court.

However, in approaching the Court, there are high chances of making mistakes which in turn may lead to defect, failure, or mistake in a legal proceeding or lawsuit.¹⁹ These possible mistakes are normally described as irregularities: departures from a prescribed rule or regulation prescribed by the adjectival law that is not punishable.

IV. Treatment of Irregularities (technicalities) in the Process of Justice Administration

The provisions of the Rules of Court are intended for the orderly conduct of cases before the Court and are therefore required to be complied with by all litigants and prospective litigants.²⁰ There are broadly speaking two types of irregularities in Law: substantial irregularities and non-substantial irregularities. The treatment the Court will accord a given irregularity depends on its nature and effect in law. When a non-substantial irregularity is discovered and proved to exist during a judicial procedure, if curable, the Court will grant leave to the party in error to correct the irregularity subject to the conditions specified by the trial Court. Most of the adjectival laws provide succor for parties who failed or show lack of in-depth knowledge of the technicalities involved in preparation and filing of processes before a given Court. For example, the National Industrial Court Rules, 2007,²¹ provides that failure to comply with any of the rules may be treated as an irregularity and the Court may give any direction it deems fit in the circumstances.

The implication of this provision is simply that a non-compliance (failure to exhibit maximum standard of technical know-how) with the provisions of the rules is not intrinsically fatal to the proceedings, and the Court has the discretion under the

¹⁸ Ahuraka Isah, ‘Supreme Court’s Judgements follow Law, Not Sentiments’, 16 February, 2016, @ m.guardian.ng/features/law/supreme-Court’s-judgements-follow-law-not-sentiments/. Accessed 04/09/19.

¹⁹ <https://legal-dictionary.thefreedictionary.com/irregularities>. Accessed 04/09/2019.

²⁰ Offornze D. Amucheazi & Paul U. Abba, *The National Industrial Court of Nigeria: Law, Practice and Procedure*. (Wildlife Publishing House, 2013) 124.

²¹ See Order 5, Rule 1, the National Industrial Court Rules, 2007 (NIC Rule, 2007).

rules to waive such non-compliance. Generally, a Court may bend forward or backward and direct a departure from the provisions of its rule where the interest of justice so requires²² to accommodate technical defects in a given proceeding.

Therefore, where a procedural irregularity can be cured without causing any injustice to the adverse party, an amendment would be readily granted to rectify the anomaly and restore normalcy. Such discretionary power may be granted to correct the name of a party even if doing so will have the effect of substituting a new party, provided the Court is satisfied that the mistake in question, being sought to be corrected, is honest, genuine and not one which will overreach and unduly encumber the adverse party. Indeed, the Court in deserving cases, can also allow a plaintiff to amend his writ even after final judgment in the proceedings has been entered, for the purpose of substituting a party's correct name for the incorrect one.²³ The Court may enlarge the time provided by the rules for the doing of anything to which the rules apply, or may direct a departure from the provisions of the rules in any other way where departure is required in the interest of justice.²⁴

On the other hand, once an irregularity is found to be substantial, the process becomes incompetent because same is ineffectual in conferring jurisdiction on the Court. It is the law that an incompetent process cannot be amended.²⁵ The Supreme Court in *Dickson Ogunseinde Virya Farms Ltd v Societe Generale Bank Ltd & Ors*²⁶ reiterates that:

A litigant cannot be heard to complain about fair hearing when the applications (s)he placed before the Court were incompetent. ‘That is the exception to the fair hearing principle as it only applies where the party has the right to be heard and when that right does not exist on account of a process that is incompetent or dead on arrival, then the party has no leg on which to stand to cry out about fair hearing.

Substantial irregularity is any irregularity that goes to the root of the proceedings or process. For instance, the failure to commence proceedings with a valid writ of summons goes to the root of the case and any order emanating from such proceedings is liable to be set-aside as incompetent and nullity because, ‘it clearly borders on the issue of jurisdiction and the competence of the Court to adjudicate on the matter’.²⁷

²² Order 21, Rule 2, Court of Appeal Rules, 2016.

²³ Hon. Justice Mossud Abdurrahman Oredola, J.C.A. in *Njoku & Ors v Onwunelega*, (2017) LPELR-43384(CA) (Pp. 41-42).

²⁴ Order 2, Rule 31, Rules of Supreme Court of Nigeria

²⁵ *Nigeria Army v Samuel* (2013) 14 NWLR (Pt. 1375) 466 at 483.

²⁶ (2018) LPELR-43710(SC)

²⁷ *Kida v Ogunmola* (2006) All FWLR (Pt. 327) 402 at 412-413, (2006) 13 NWLR (Pt.997) 377 at 394

It is trite law that an originating process which is not signed by the litigant himself or a legal practitioner known to law is a substantial irregularity, and will be deemed as an irredeemable failure to comply with the appropriate rules and same will be treated as incompetent process.²⁸ Another instance of substantial irregularity that is incurable is when a process i.e., election petition is not filed within the time specified²⁹ or the fees statutorily prescribed³⁰ are not paid. Generally, other forms of substantial irregularities include where a matter is filed before a Court that lacks jurisdiction to entertain the matter, non-service of relevant processes (including hearing notices) and in all these situations the procedure will amount to nullity.³¹

V. Difference between Mere Technicality and Substantial Technicality

It is now settled law that Courts should not decide cases or resolve issues on mere legal technicalities.³² One good example is when a litigant inadvertently approaches a Court for the redress by a wrong procedure. A person whose rights have been violated must be free to seek redress for such wrongs in the Courts. It will amount to mere technicalities or irregularities to base a defence to such action on the fact that the action was instituted by wrong procedure.³³ Also, a contention that a particular document was not tendered at particular stage of the trial will go to no issue, at best, it will be considered as a mere technicality which cannot vitiate or influence the outcome of the procedure.³⁴

An irregularity is substantial when it touches on the legality of the whole proceedings or process and in such situation, the technical failure is not a mere technicality but an irregularity that is transcendent to the *rem* of validity. A substantial irregularity is the one which causes a proceeding to have a smell of judicial sacrilege and to allow that kind of trial which is hostile to the law to stand is in itself, denial of fair of hearing.³⁵ A breach of a mandatory constitutional provision is more than a mere technicality, it is fundamental. The breach vitiates the entire proceedings before

²⁸ *Kaka v Daniel* (2009) 14 NWLR (Pt. 1161) 416; *Oshiomole v Airhiavbere* (2013) 7 NWLR (Pt. 135) 376

²⁹ Electoral Petitions must be filed within 21 of the announcement of the elections results. See section 285 (5), Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010.

³⁰ Paragraph 3 (4), First Schedule to the Electoral Act, 2010 (as amended).

³¹ *Okafor v A. G. Anambra State* (1991) 6 6 NWLR (Pt. 200), 659.

³² *Egolum v Obasanjo* (1999) 7NWLR (Pt. 511) 255, 413

³³ See General Sani Abacha & Ors v *Chief Gani Fawahinmi* (2000) 6 NWLR (Pt. 660) 228.

³⁴ *Madumere v Ole Okafor & Ors.* Unreported Supreme Court of Nigeria Judgement delivered on the Tuesday, April 2, 1996.

³⁵ *Ojasanmi v FGN:* (2018) LPELR-44331(CA)

the Court.³⁶ Commenting on this position of law, the Supreme Court rules that:

To suggest that because the hearing was in open Court, the delivery of judgment in chambers is a technicality as no miscarriage of justice was occasioned thereby, is to beg the issue. The delivery of judgment is, in my respectful view, part of the hearing of a cause or matter. A breach of a mandatory constitutional provision is more than a mere technicality; it is fundamental. And it is no argument that there has been no miscarriage of justice.³⁷

Again, no matter the degree of grievous harm done to the victim of a crime, it will be idle and a complete misconception, to suggest that failure of taking the plea of the defendant as established by the law is a mere technicality because no miscarriage of justice was occasioned thereby to the defendant. Such an argument or contention will, with the greatest respect and humility, amounts to begging the issue.³⁸ So also, a litigant must adhere strictly to his pleading, hence a litigant who ignores his pleadings and made a different case at the hearing will not be allowed to claim that such inconsistency is a mere technicality.³⁹ It is the law that parties must be consistent in presenting their cases to the Court. This means that the pleadings and the oral evidence should tell the same story because this goes to the root of the case and the rule of pleadings.

It is loud law that parties are bound by their pleadings not to tell stories while giving oral evidence in contradiction from their pleadings. ‘The case of a party is first made in the pleadings and because the pleadings have no mouth and not the intelligence to talk, the human being who is possessed of the two, narrates the content of the pleadings to the Court’.⁴⁰ In effect, a party cannot move out of his pleadings and give evidence of facts not duly pleaded therein, such departure is not in the eye of law a mere technicality but a substantial irregularity that goes to the root of the departing party’s case since same has the potentiality to overreach and do injustice to the other party.⁴¹

It is an irredeemable irregularity for judicial officer(s) who did not sit through

³⁶ *Alhaii Nuhu v Alhaji Ogele* (2003) 18 NWLR (Pt. 852) 251

³⁷ *Ifezue v Mbadugha* (1984) 1 SCNL 427; (1984) All NLR 256.

³⁸ See *Ogbonna Okeke v The State* (2018) LPELR-45053 (CA).

³⁹ *Kode v Yussuf* (2001) 4 NWLR (Pt. 703) 392

⁴⁰ *Mojeed Suara Yusuf v Madam Idiatu Adegoke & Ors*, Supreme Court of Nigeria Judgment delivered on Friday, the 20th day of April 2007 S.C. 15/2002

⁴¹ *Kode v Yussuf* (Spr).

a trial to deliver judgment in the case. The main function of the trial Court is to see and observe the witnesses. ‘He watches their demeanor, candour or partisanship, their integrity, manner etc. He can therefore decide on their credibility and this affects a substantial part of his findings of fact’.⁴² The opportunity of a Court or Tribunal to observe the demeanour of a witness is an indispensable aspect of procedural jurisprudence, which is rooted in fair hearing.⁴³ Consequently, the Supreme Court in *Adeleke v Oyetola*⁴⁴ held that the decision of the Electoral Tribunal was a nullity because Justice Obiora who read and pronounced the majority judgment at the Tribunal was evidently absent from the proceedings, at least, one of the days of the trial and the failure of the absent panelist to be present on that day meant that the tribunal lacked the authorities to have given any judgment in the entirety of the matter.

The Supreme Court’s majority decision in *Adeleke v. Oyetola* follows the West African Court of Appeal authority in the case of *Nana Tawiah v. Kwesi Ewudzi*,⁴⁵ where it was discovered that at least two of the Tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence. Thus, the Court (WACA) came to the conclusion that the absence of the judges “vitiates the whole trial, and in my opinion this Court has no option but to declare the whole proceedings before the Tribunal and the Provincial Commissioner’s Court a nullity”.⁴⁶ Based on this long tradition and trite law, ascribing the decision on *Adeleke v. Oyetola* to technicality as suggested by Senator Enyinnaya Abaribe⁴⁷ in a veiled reference to the Supreme Court judgements on Osun and Ondo States Election had sought to know the views of the CJN on technicalities’ in judgements, definitely overstretching the mystical concept of technicality in our judicial process.

VI. Fair hearing, Rule of Courts and Administration of Justice

The concepts of fair hearing, rule of law and justice presuppose a society where the interests, rights and justice outlooks of individual may clash and unless and until persons interact with each other, such ideas or practices are inapplicable.⁴⁸ It is apposite to note that the right to a fair trial is generally construed in light of the rule of

⁴² *Okereke v The State* (2016) 1 SCM 99 at p. 113

⁴³ *Woluchem v Gudi* (2004) 3 WRN, 20

⁴⁴ SC/553/2019

⁴⁵ 3 WACA 52

⁴⁶ *Ibid.*

⁴⁷ While the Senate was screening the would be Chief Judge of Nigeria on the 17th of July, 2019.

⁴⁸ Randy E. Barnett, ‘Can Justice and the Rule of Law Be Reconciled? Foreword to the “Symposium on Law and Philosophy”, 1988, 11, *Harvard Journal of Law & Public Policy*, 597-624, 599.

law, as its cardinal requirement.⁴⁹ However, while the reality of fair hearing connotes that parties to a matter are afforded equal opportunity, rule of law implies that everything done during the process of litigation is done as specified by the applicable laws without favour, fear and sentiment but that every action by the judicial officers are taken strictly according to the letters of the law. Conceived substantively, justice presupposes the correctness of the outcome of individual cases.

Conceived procedurally, the rule of law speaks to the form of a "fair" legal process. Conflict between these two values arises when the outcome of a "fair" legal system is deemed to be unjust; or when the effort by the legal system to be "just" is deemed by critics to be unfair. The resultant conflict is the manifestation of the divergence between procedural correctness and substantive fairness. When applied to particular cases or controversies, concepts that are different must sometime point in different directions.⁵⁰ Thus, at the end of every keenly contested legal dispute, there is tendency for the judgment to be considered as unfair in one hand (by the losing side) and the justice by the winning party. In the actuality of administration of justice every legal effort aiming at resolving or reducing social conflict and promoting social harmony⁵¹ will have to pass through the conflicts of fair hearing, rule of law to arrive at the justice or injustice to the party depending on the outcome and effect of the justice on the litigants.

It seems the law is now tending towards doing substantive justice on the ground that strict adherence to the letters of law (legalism) may amount to injustice to defeat the course of justice on the altar of mere technicalities.⁵² This principle of law is based on the provisions of law which the Court is meant to apply because the rules of Courts which form part of the law empowers the Court to depart from the rules of the Court where the justice of the matter before the Court so demand.⁵³ The High Court of Ondo State (Civil Procedure) Rules makes balance for provisions for fair hearing and rule of law in justice under Order 5⁵⁴ of the Rules. In respect of effect of irregularities, Rule 1 (1) of Order 5 provides thus:

⁴⁹ Ana Koprivica, 'Right to a Fair Trial in Civil Law Cases' in Rainer Grote *et.al* (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (Max Planck Foundation for International Peace and Rule of Law 2018), 598

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, 600

⁵² *Ogundalu v Macjob* (2006) 7 NWLR (Pt. 978) 148.

⁵³ See Order 1, Rule 9 (3), National Industrial Court of Nigeria (Civil Procedure) Rules, 2017.

⁵⁴ Order 2, High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2007 is imperia material with Order 5 of High Court of Ondo State (Civil Procedure) Rules, 2012.

Where in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and if so treated will not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

These provisions were seemingly designed to cure whatever irregularity the lack of technical know-how or mistakes on the part of a litigant, may occasion to the parties before the Court. Since these provisions appear to be for the benefit of both parties, it could be argued to be a provisional instrument to ensure institutional fair hearing to both parties in the case. It is in line with the new era in the law that lay credence to substantive justice rather than sacrifice merit on the temple of mere technicality. However, the applicability of the provisions of Order 5, Rule 1 (1) is curtailed by the provisions of sub rule 2 therein which provides that:

The Court may, on the ground that there has been such a failure as mentioned in sub rule (1), and on such terms as to cost or otherwise as it thinks just, set aside either wholly or in part, the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein, or it may exercise its powers under these rules to allow such amendments (if any) dealing with the proceedings generally as it thinks fit.

These provisions, in our humble opinion are to impress it on the litigants that failure to comply with the provisions of the Rules is a failure to apply the law with the possibility of heavy sanctioning by the Court. Thus, Rule 1 of Order 5 of High Court of Ondo State (Civil Procedure) Rules makes provisions to ensure that the civil litigation in the Court is conducted in line with the concept of rule of law and may allow correction of defects in deserving situations.

But the provisions of Rule 2 under the same Order is made to ensure fair hearing to the party when it provides that ‘an application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order made therein shall not be allowed unless it is made within a reasonable time and therefore the party applying has not taken any fresh step after becoming aware of the

irregularity.'

Hence, the law has provided a system of fair hearing mechanism for the just determination of nature and effect of technicality in an administration of justice. Thus, determining whether an irregularity is a ‘mere technicality’ or ‘substantial technicality’ has been made a matter that must pass through a legal test within a reasonable time and before the party alleging an irregularity has taken any further or fresh step after becoming aware of the irregularity. The provisions of Order 5, Rule 2 (1) is establishment of trial within trial in Civil Matters just like the trial within trial in criminal cases.

VII. Fair Hearing and Technicality in Criminal Justice

Crimes and offences created by statutes are conduct against the community (State) at large not just one individual, as a result, enforcement is not left to the victim but the State to handle. Therefore, whenever a crime is not prosecuted by the State government except for the fact that the offender is not ascertained and apprehended, the victim is denied fair hearing and the injustice (double jeopardy) is fostered against the victim of the crime. Under the international law and in the interests of justice, the criminal law and judicial system of each State must allow for the prosecution and trial of persons accused of committing these crimes. All persons accused and/or brought to trial must, however, benefit from a series of procedural safeguards and fundamental guarantees designed to ensure that individuals receive a fair trial and are protected from being unlawfully or arbitrarily deprived of their fundamental human rights and freedoms.⁵⁵

In criminal matters, the burden of proof is always on the prosecution. The basic standard of proof in any criminal litigation or in any trial where commission of an offence is in issue is the proof beyond reasonable doubt. That is, the burden of proof required to discharge the burden of proof of specific elements in criminal trial is proof beyond reasonable doubt.⁵⁶ Because of the nature of proof required in criminal matters, the issue of fair hearing is mostly one sided: fair hearing always leans in favour of the defendant who is ordinarily presumed innocent by the law. Hence, once

⁵⁵ ICRC Study on Customary International Humanitarian Law (CIHL): Advisory Service on International Humanitarian Law, ‘Judicial Guarantees and Safeguards’, 2014, <http://www.icrc.org/customaryihl/eng/docs/homeihl/eng/docs/home>. Accessed 09/08/19.

⁵⁶ See *Maune v Abdul* (2001) 4 N.W.L.R. (PT.702) 95 at 105, *Wankey v State* (1993) 5 N.W.L.R. (Part 295) 542 at 551 – 552.

there is any doubt, a doubt which any impartial view of the evidence is induced,⁵⁷ it is the duty of the trial Court to give the benefits of that doubt to the defendant⁵⁸ and declare him not guilty for the offence(s) for which he is charged.

The effects of technicalities and rule of law in administration of criminal justice is heavy and deeper than in civil cases. In criminal law, the investigators of the allegations of crimes are expected to be tactically and technically sound in order to ensure justice to the society as represented by the victim of the offence. Before a trial of crime in Court, the investigator must have observed and complied, strictly with the provisions of the related criminal adjectival laws.⁵⁹ For instance, where the only available evidence against the defendant is the confessional statement but it is proved that the defendant was not afforded the opportunity to consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest in line with sections 15 and 17 of ACJL, the trial Court will definitely throw the case to the judiciary's dustbin for the investigator's failure to observe the rule of law in carrying out the investigation.⁶⁰

Since 2015,⁶¹ the rule of law in respect of criminal investigation and administration of criminal justice must be adhered to strictly. 'Certain provisions of Administration of Criminal Justice Act, 2015 (ACJA) are in the pattern of the Judges' Rules and are aimed at providing a guide for the law enforcement officers and ensuring the protection of the innocent as well as the rights of the suspect. However, unlike the case with the Judges' Rules which were cautionary, the provisions of ACJA have the force of law. *'Non-compliance with these provisions would automatically throw a purported confessional statement out of the window. I therefore share the view that the provisions of Sections 15(7) and 17(2), as well as Section 9(3) thereof, which are for the benefit of a suspect, are mandatory'*.⁶²

The overall position of the Court in administration of criminal justice is that failure to comply with the provisions of criminal adjectival laws by stakeholders in the enforcement of law against the defendant are not mere failure but violation of the

⁵⁷ *COP v Hector Awambor* (2014), Charge NO. B/8CA/2014, unreported case of the High Court of Edo State, delivered on Wednesday the 13th Day of April, 2016.

⁵⁸ See *Ikemson v State* (1998) 1 ACLR 80 and *Bozin v State* (1998) 1 ACLR 1.

⁵⁹ Administration of Criminal Justice Act, (ACJA), 2015, the equivalent at the State levels or the Criminal Procedure Law(s) in the States where ACJL is yet to be passed.

⁶⁰ *Zhiya v People of Lagos State* (2016) LPELR-40562(CA)

⁶¹ Section 15(4) of the ACJA.

⁶² *Nnajiofor v FRN* (2018) LPELR-43925(CA)

rule of law.⁶³ This is so because every of the provisions of the criminal justice adjectival legal instruments are imperative and mandatory provisions of law except where there are otherwise provisos clearly stated in the law. Therefore, failure to comply with any of the imperative provisions of the criminal adjectival laws will not amount to mere technicality but fundamental violation of fair hearing and rule of law. In the same manner, the Supreme Court has established the law that failure to conduct criminal trials in line with any of the constitutional provisions regulating criminal litigation (i.e. section 36 of the Constitution), cannot be deemed as technicality but constitutional breach⁶⁴ with its attendant consequences and effects in law.

VIII. Legal Implications of Legal Technicality on Rule of Law and Administration of Justice

The knowledge of workings and applications of law enhances the rule of law in the societies by making the outcomes of both judicial and administrative enterprises predictable, ascertainable and stabilized system of social and legal justice. Legal practitioners are trained in the rem of the technicality of law and applications of both substantive and adjectival laws in practice of their profession to ensure justice in the society. Though the Court will not ordinarily allow the letter of the law to defeat the spirit and substance of the law, it must be stated that fair hearing cannot be achieved without compliance with the provisions of the adjectival laws in civil and criminal procedures. The purposes of adjectival law are to, in criminal cases, ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim.⁶⁵ In the same vein, the objectives and intent of most of the civil procedure rules are to establish an enduring, equitable, just, fair, speedy and efficient fast-track case management system for all civil matters that are adjudicated upon by the Courts.⁶⁶

As rightly observed by the Supreme Court in *Dickson Ogunseinde Virya Farms Ltd v Societe Generale Bank Ltd & Ors*,⁶⁷ ‘the principles of fair hearing can apply only in a case where a party has the right to be heard on a Court process but was

⁶³ *Okegbu v State* (1979) 12 NSCC 157, 174

⁶⁴ *Ifezue v Mbadugha* (1984)

⁶⁵ Section 1 (1) ACJA

⁶⁶ N.I.C (Civil Procedure) Rules, 2017.

⁶⁷ (2018) LPELR-43710(SC)

denied. To the contrary, if a party has no right to be heard in respect of a process because he did not comply with the Rules of Court, the party cannot be heard to invoke the principles of fair hearing.⁶⁸ This is because laws are not made to be flaunted but to be obeyed by all and sundry. A litigant should not be allowed disregard the provisions of law without consequences that is the core of the doctrine of rule of law. Once the courts begin to overlook the failure of litigants to abide with the dictates of procedural laws, an average reasonable person will not come out of court to say that justice is seen to be done.

IX. Conclusion

The article has shown that laws are made to be obeyed and laws must be obeyed. In operation, substantive law of a society has no life until given by the Courts within the legal system which must apply the adjectival law in giving life to substantive law. Therefore, one can safely conclude that the implications of technicality on rule of law and administration of justice are to deepen rule of law and maintain certainty, predictability and stability in the administration of justice. In reality, the Courts will not allow disobedience to the rule of law without repercussions, tolerate irregularities without backlashes or encourage a party to bankrupt the rule of law without consequences. This is because, laws are made to be obeyed, and whoever wishes to benefit from the law must know the technicalities of the law or hires legal practitioners trained in the technicalities of the law to handle his case for him. This is what lawyers are trained to do: to follow the law to the letter.

It is admitted that mere regularities should not be allowed to defeat the justice of a suit before the court. However, where the rules of court or other procedural laws specify certain steps litigants must take in pursuit of his case, courts should insist that such steps are taken. Thus, it is herein suggested, firstly, that once there are written provisions of procedural law, the court must always insist that such written provisions should be complied with and should not be treated as mere irregularities. This is to ensure that the outcome of a litigation is ascertainable. Secondly, the court discretions to consider legal technicalities as mere technicalities should be subjected to the approval of the opposing litigants. Thus, where any of the opposing parties refused to tolerate or waive a discovered failure to comply with the dictate of law, the court must insist that such an abnormalities be corrected immediately. Finally, the court should explain in its judgements, rulings and orders, where legal technicality is in issue, the

⁶⁸ See *Sosanya v Onadeko* (2005) 2 SC (Part 11) 13.

reason(s) for considering such technicalities as mere or substantial technicalities. It is humbly submitted that if these suggestions are followed, the problems associated with where to place legal technicalities: mere or substantial, and the public complainants associated with courts using legal technicality to defeat justice will be reduced drastically. This will also encourage filing of quality processes before the court upon which quality and sound judicial justice will be produce by the court. It will make the outcome of judicial actions predictable, ascertainable and satisfying.

RETHINKING THE LAWS ON DEATH PENALTY, SUICIDE AND ATTEMPTED SUICIDE IN NIGERIA

*Enobong Mbang Akpambang **

*Omolade Adeyemi Oniyinde **

Abstract

The article critically examines the position of Nigerian laws on death penalty, suicide and attempted suicide. While there has been a robust increase in the number of laws sanctioning death penalty in the country, it is yet to be seen how they have effectively accomplished the primary objective of addressing or reversing the respective crimes for which they were intended. For instance, the crime of kidnapping now attracts a death penalty in some States of the federation, but kidnapping rate still continues unabated on daily basis from newspaper reports. Irrefutably, the Nigerian courts have affirmed the legality of death penalty. However, it is argued that since deterrence, which is one of the likely reasons for retaining the verdict under our statute books, is not serving any useful purpose, there is need for reforms regarding the imposition of death penalty in Nigeria. The article went further to define suicide as an intentional killing of oneself. Suicide is not only a public health issue but is also a personal tragedy that prematurely terminates the life of an individual and leaves consequential effects on the family, friends and the society generally. While suicide does not constitute an offence under Nigerian laws, it was discovered that an attempted suicide is criminalized. The article argues that this is rather faulty and lacks foundation in the principles of criminal law. Studies have associated suicide and attempted suicide with mental disorder. Thus, a person who attempts suicide should be entitled to a defence of insanity to escape from criminal liability. The article concluded that imposition of death penalty is not only a threat to the enjoyment of the right to life but also infringes on the right to dignity and freedom from torture, inhuman and degrading punishment. Thus, the article recommended, inter alia, that the Nigerian government and other relevant stakeholders should have a re-think on imposition of death penalty and the criminalization of attempted suicide in Nigeria. Rather than punishing a person who attempts suicide, the article further suggested that the government should provide care, treatment and rehabilitation that will transform the individual into a better person.

Keywords: Right to Life, Death Penalty, Suicide, Attempted Suicide, Defence of Insanity, the M'Naghten Rules

I. Introduction

A death penalty is a supreme sentence or penalty imposed as a form of punishment for the crime of murder and other capital offences. Capital punishment or death penalty has been a recognised form of punishment for certain crimes from time immemorial. Methods of its execution vary from one jurisdiction to other. They include firing squad, guillotine, beheading, hanging, lethal injection, stoning,

*Dr. Enobong Mbang Akpambang, LL.B (Hons.), LL.M., Ph.D., B.L. Senior Lecturer and Acting Head, Department of Public Law, Ekiti State University, Ado-Ekiti, Nigeria (**Corresponding Author**). He is a Barrister and Solicitor of the Supreme Court of Nigeria. E-mail Address: barristereno@yahoo.com or enobong.akpambang@eksu.edu.ng

**Dr. (Mrs.) Omolade Adeyemi Oniyinde, LL.B (Hons.), LL. M., Ph.D., B.L. Senior Lecturer and Acting Head, Department of Jurisprudence and International Law, Faculty of Law, Ekiti State University, Ado-Ekiti, Nigeria. She is also a Barrister and Solicitor of the Supreme Court of Nigeria. She can be contacted through her E-mail Address: omoladeoniyinde@gmail.com

crucifixion, etc.¹ The Roman Empire, for instance, imposed death punishment on a variety of crimes. Jesus Christ was crucified on the cross by the Roman government in active connivance with the Jewish leaders for what was allegedly believed to be a crime of blasphemy.² Stephen was to follow suit a couple of years later.³

Followers of Christianity have equally laid claim to the validation of death sentence as a form of punishment in the biblical injunction that “whoso sheddeth man’s blood, by man shall his blood be shed.”⁴ Other biblical crimes which attracted the imposition of death penalty included idolatry,⁵ kidnapping,⁶ insolence to one’s parents⁷ and sexual offences.⁸ In some instances, the quality of evidence to be adduced before a death penalty could be secured in some offences was stipulated.⁹

The codification of death penalty in Nigeria is recognised under the 1999 Constitution (as amended)¹⁰ and in a number of other statutes. For instance, the Robbery and Firearms (Special Provisions) Act¹¹ stipulates death penalty for being in possession of a firearm or offensive weapon¹² during robbery.¹³ The Terrorism (Prevention) Act (as amended)¹⁴ also prescribes death sentence for acts of terrorism. The Administration of Criminal Justice Act, 2015 equally recognises death penalty by hanging the convict by the neck till he is dead or by lethal injection as a form of punishment for capital offenders.¹⁵ Some controversial bills aimed at regulating social

¹ Adeniyi Olatunbosun, *Death Penalty Jurisprudence in Nigeria* (Hiras Publications Ltd., 2019), 18-31.

² *The Holy Bible*, Mark, Chapter 14: 63-64; John 10:33.

³ *Ibid*, Acts of the Apostles, Chapter 8: 9-14 and 54-58.

⁴ *Ibid*, Genesis, Chapter 9:6, King James Version.

⁵ *Ibid*, 1 Samuel, Chapter 28: 9.

⁶ *Ibid*, Exodus, Chapter 21: 16.

⁷ *Ibid*, Exodus, Chapter 21: 17.

⁸ *Ibid*, Leviticus, Chapters 18: 7-28 and 20:10.

⁹ *Ibid*, Numbers, Chapter 35: 30-31, King James Version, states: “[w]hoseth any person, the murderer shall be put to death by the mouth of witnesses: but one witness shall not testify against any person to cause him to die. Moreover ye shall take no satisfaction (ransom or compensation) for the life of a murderer, which is guilty of death: but he shall be surely put to death.” (Words in bracket supplied).

¹⁰ See for example sections 33(1), 233(2)(d) and 241(1)(e) of the 1999 Constitution, which in no mistakable terms recognise the imposition of death penalty as a form of sentence or punishment by a court of law. It is therefore, submitted that if death penalty was not recognised by the Constitution, it would not have made provisions for appeals to the Supreme Court and Court of Appeal when the death sentence is imposed by the courts.

¹¹ Cap. R11, Vol. 14, Laws of the Federation of Nigeria, 2004.

¹² The Act defines “offensive weapon” to mean “any article (apart from a firearm) made or adapted for use for causing injury to the person or intended by the person having it for such use by him and it includes an air gun, air pistol, bow and arrow, spear, cutlass, machet, dagger, cudgel, or any piece of wood, metal, glass or stone capable of being used as an offensive weapon,” *ibid*, section 11. In *Umoh Ekpo v. The State* (2018) LPELR-43843(SC) decided by the Supreme Court of Nigeria on 23rd February 2018, the offensive weapon used for the robbery operation was a pair of pliers.

¹³ The death sentence may be executed by hanging the convict by the neck till he dies or by causing him to suffer death by firing squad as may be determined by the Governor, *ibid*, section 1(2) and (3). As a matter of fact, it is immaterial whether or not such robbery attack resulted in the death of the victim- see *Francis Odili v. The State* (1977) All NLR 49; *Anthony Isibor v. The State* (2002) 2 SC (Pt. 2) 110.

¹⁴ Act No. 10 of 2011. See also Terrorism (Prevention) (Amendment) Act 2013 which amended section 1 of the principal Act to introduce a death penalty- section 2 thereof.

¹⁵ However, where the sentence of death was imposed upon a pregnant woman, the execution of the sentence shall be suspended until the baby is delivered and weaned. On the other hand, sentencing in the case of a child offender (i.e. a person who has not attained the age of eighteen years at the time the

media and hate speech in Nigeria are also proposing the penalty of death for the offenders.¹⁶ Similarly, some States recently have added kidnapping to the lists of offences that are punishable with death.¹⁷ In the northern States, which operates under the Sharia criminal legal jurisprudence, sexual offences attract death sentence.¹⁸

Various arguments have been advocated for the retention or abolition of death penalty in Nigeria, as shall be seen in the article. However, it shall be argued in this article that the continued retention of the punishment in our statute books does not merely offend the right to dignity of a person as it is inherently cruel, inhuman, gruesome and a degrading form of punishment but also violates some global human rights instruments.

On the other hand, suicide is a self-afflicted death. It is a deliberate act of terminating one's life either as a result of mental disorder, severe stress, or as a result of various motivations or other associated suicidal behavioural risk factors which could be social, cultural, religious, psychological, biological, or medical. According to a World Health Organisation report, an estimated 804,000 suicide deaths occurred globally in year 2012, accounting for a yearly global age-standardised suicide rate of 11.4 per 100,000 population (i.e. 15 for males and 8 for females).¹⁹ In Nigeria, suicide or suicidal attempts have been prevalence. The said WHO report stated that the number of suicides in Nigeria for all ages in that year stood at 7238,²⁰ ranking

offence was committed) shall neither be recorded nor pronounced by the court, rather the court shall sentence the child-offender to a life imprisonment or any other suitable term as the court considers expedient. See sections 402, 404 and 405 of the Act.

¹⁶ Aside from the Bill for an Act to Provide for the Prohibition of Hate Speeches and for other Related Matters (a.k.a. the hate speech bill), the other bill is the Protection from Internet Falsehood and manipulation Bill 2019, which seeks to control messages that are posted on the internet. As at the time of writing this article, the controversial bills were facing stiff oppositions from some lawmakers, members of the civil society and the general public. See generally Sunday Aborisade, 'No going back on hate speech, social media bills-APC Senators.' *The Punch* (Lagos, 16 November, 2019). Available at <<https://punchng.com/no-going-back-on-hate-speech-social-media-bills-apc-senators>> accessed on 17 November 2019. Section 4(1) of the Bill defines what constitutes a "hate speech," while subsection (2) thereof provides that "[a]ny person who commits an offence under this section shall be liable to life imprisonment and where the act causes any loss of life, the person shall be punished with death by hanging."

¹⁷ The States that have imposed death penalty regarding kidnapping-related crimes include, Akwa Ibom, Abia, Anambra, Bayelsa, Bauchi, Cross River, Enugu, Imo, Kogi, Lagos, Ogun, Ondo, Oyo and Rivers. See Robert Egbe, 'Kidnapping: Is Death Penalty the Answer?' *The Nations* (Lagos, 28 March 2017). Available at <<https://thenationonlineng.net/kidnapping-death-penalty-answer>> accessed on 23 September 2019. Zamfara State has also indicated interest in making banditry and kidnapping capital offences. There is a bill to this effect currently pending before the Zamfara State House of Assembly at the time of writing this article. See News Agency of Nigeria, 'Zamfara Assembly to make banditry, kidnapping capital offences.' *The Punch*. Available at <<https://punchng.com/zamfara-assembly-to-make-banditry-kidnapping-capital-offence>> accessed on 23 October 2019.

¹⁸ See generally, Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database: Nigeria.' Available at <<http://deathpenaltyworldwide.org/country-search-post.cfm?country=Nigeria>> accessed on 23 September 2019. See also Oluwatoyin Badejogbin, "Onuoha Kalu v. The State and Flaws in Nigeria's Death Penalty Jurisprudence." (2018) 18 *African Human Rights Law Journal*, p. 554.

¹⁹ See World Health Organisation, *Preventing Suicide: A Global Imperative* (Luxembourg: World Health Organisation, 2014), p.7.

²⁰ *Ibid*, p. 85.

Nigeria the 10th position in Africa and the 67th position in the world.²¹ However, this figure may be under reported due to the sensitivity of the issue and the accompanying stigmatisation. Stigmatisation against suicide may have its foundation primarily in religious and cultural sentiments.

For every suicide, there are many more people who attempt suicide yearly. Though Nigerian laws do not punish suicide, yet they criminalise attempted suicide. For instance, in 2017, one Ifeanyi Ugokwe who had made fruitless attempts to secure a gainful employment jumped into the lagoon but was rescued by some fishermen who handed him over to the police. He was detained in a police cell and subsequently arraigned before a Magistrate's Court on a charge of attempted suicide. While in prison custody pending the perfection of his bail, his defence lawyer later provided a guarantor who undertook to care for his welfare and the case was struck out.²²

Similarly, in July 2018, a 27 year old unemployed man was allegedly charged before Igbosere Magistrate's court in Lagos on a two counts charge of attempting to commit suicide with a rope tied to his neck on two respective occasions. He pleaded guilty to the charge.²³ Normally, attempted suicide carries a penalty of up to one year in jail. Though convictions are rare and there is dearth of reported cases on the subject in Nigeria as most Magistrates' courts have shown little appetite for conviction of attempted suicide survivors, it shall be argued, nonetheless in this article, that it is time that attempted suicide is decriminalised in Nigeria.

II. Jurisprudence on the Constitutionality of Death Penalty in Nigeria

This discussion would be started from the position of the 1999 Constitution of the Federal Republic of Nigeria (as amended), which has been reputed as the "Nigerian Grundnorm."²⁴ Admittedly, section 33(1) of the 1999 Constitution provides for the right to life in qualified terms. It declares that every person has a right to life and that no person shall be deprived deliberately of this inalienable right unless such is done in the execution of a verdict pronounced by the court of law regarding a criminal offence of which the person had been found guilty in Nigeria. The qualified nature of the constitutionally guaranteed right to life under the Nigerian Constitution became a central issue before the Nigerian Supreme Court in *Onuoha Kalu v. State*,²⁵ a case which itself also engenders the debate regarding the retention or abolition of death sentence in Nigeria.

²¹ Chioma Obinna and Gabriel Olawale, 'More Nigerians to die by suicide if...' *Vanguard* (Lagos, 21 May 2019). Available at <<https://vanguardngr.com/2019/05/more-nigerians-to-die-by-suicide-if/>> accessed on 29 July 2019.

²² Stephanie Busari, 'Locked Up For Trying to Take His Own Life, in a Country Where It's a Crime to Attempt Suicide.' *CNN* (30 December 2018). Available at <<https://cnn.com/2018/12/30/health/imprisoned-suicide-illegal-nigeria-intl/index.html>> accessed on 22 September 2019.

²³ Paul Iyoghojie, 'Man Sent to Prison over Attempt to Commit Suicide.' *PM News* (Lagos, 4 July 2018). Available at <<https://www.pmnnewsnigeria.com/2018/07/04/man-sent-to-prison-over-attempt-to-commit-suicide/>>. Accessed on 22 September 2019.

²⁴ For a general discussion on the subject of Nigerian grundnorm, see Kayode Eso, *Nigerian Grundnorm* (Idigbe Memorial Lecture Series, Lagos: Nigerian Law Publications Ltd., 1986).

²⁵ (1998) 12 SCNJ 1 at 30, 37.

Briefly, the facts of the case were that the appellant on or about 24 August 1981 unlawfully stabbed the deceased, one Agbai Ezikpe, to death with the broken end of a star larger bottle in the neck in the presence of witnesses who also testified. The deceased was rushed to the hospital where he died a few minutes later from the stab injuries. The appellant however denied the charge. His defence was that he returned from a tour the previous day to learn that the deceased had raped the appellant's sister in his room and that he, the appellant, reported the incident to the deceased's brother. According to the appellant, on the said 24 August 1981 while he and his comrades were discussing how to handle the alleged criminal conduct of the deceased, they heard some shouting outside. On rushing out to see what was happening, they saw the deceased lying down in a pool of blood. At the end of the trial, the appellant was found guilty, convicted and a mandatory penalty of death was imposed on him. His appeal to the Court of Appeal was dismissed.

On a subsequent appeal to the Nigerian Supreme Court, the vital question before the court, was whether the statutory provision which prescribed a death penalty for the offence of murder²⁶ was not inconsistent with section 31(1)(a) of the erstwhile 1979 Constitution²⁷ and therefore, unconstitutional, invalid, null and void and of no legal effect. In answering this sensitive question, the Nigerian apex court admitted that though the Nigerian Constitution guarantees and protects the right to life yet the sentence of death penalty in criminal cases by a competent court of law was constitutionally permissible having regard to the qualified nature of the right as enshrined in our Constitution.²⁸

Unfortunately, the hard judicial stance of the Nigerian courts on the legality of the imposition of death sentence as a form of punishment for the offence of murder has not really changed several years after the decision in the *Onuoha Kalu* case as was revealed in a later case of *Yusuf v. State*.²⁹ In his contribution to the judgment in the *Yusuf* case, Agube, JCA bluntly stated thus:

It is disheartening that in this 21st Century, persons of the appellant's ilk can still be engaged in such nefarious and primitive acts of mindless and dastardly termination of an innocent girl's life just for filthy lucre, in this case, money. This is a classic case for those religiously and feverishly advocating for the abolition of death penalty in this country; which for some of us, is not only untimely and uncalled for in our present level of civilization, social condition and development. Can any person in his right senses and possessed of the milk of humaneness, under the guise of human rights advocacy, condone this wanton killing of this innocent girl...?

²⁶ Section 319 (1) of the Criminal Code, Cap. 31, Laws of Lagos State of Nigeria 1973, which is also *impari materia* with section 319 (1) of the Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria, 2004.

²⁷ The said section is identical in wordings with the extant provisions of section 33 of the 1999 Constitution.

²⁸ *Onuoha Kalu v. State*, *op. cit.*, p. 30. See also *Okoro v. State* (1998) 12 SCNJ 84 *Joseph Amoshima v. The State* (2011) 14 NWLR (Pt. 1268) 530; *Aminu Tanko v. The State* (2009) 1-2 SC (Pt. 1) 198.

²⁹(2012) All FWLR (Pt. 641) 1478.

I think not. Surely the spirit of this unfortunate and harmless angel whose life has been prematurely terminated...will not rest until her blood and gruesome murder which are now crying to high heavens have been avenged by the instrumentality of law....The appellant who has connived with his other confederate...must not only incur the wrath of God, but must pay the supreme price of death under the laws of the land for his impunity and heartless act.³⁰

The posture of the learned Justice of the Court of Appeal, Honourable Justice Agube, in the *Yusuf* case is a vivid reminder of the discussion between God and Cain in the outskirt of the Garden of Eden after the latter had murdered his brother Abel. In the biblical account, God told Cain that “the voice of thy brother’s blood crieth unto me from the ground. And now art thou cursed from the earth, which hath opened her mouth to receive thy brother’s blood from thy hand.” Though God’s judgment upon Cain was a mere “deportation” order and not an express death penalty, yet in a subsequent Noahic covenant,³¹ God recommended death penalty for capital offences.³² This divine injunction was later recognised and incorporated into the Mosaic Law for both human and animal offenders.³³

a. Arguments for and Against the Retention of Death Penalty in Nigeria

Olatunbosun³⁴ has traced the origin of public debate on imposition of death penalty in Nigeria to the successful diplomatic exploit Nigeria made when the country’s plea with Libya that the death sentence imposed on a Nigerian citizen, Nathaniel Jackson Ikpato Notibo, and three Ghanaians for the murder of a Libyan be substituted for prison terms yielded a positive result from the Libyan authorities.³⁵ This diplomatic exploit later provoked a public debate in January 2003 among Human Rights groups over the continued retention of death penalty in our statute books.³⁶ There have been various arguments and opinions for and against imposition of death penalty. Some have argued that death penalty can serve as deterrence to other intended criminals from venturing into committing crimes worthy of death penalty.

The advocates of death penalty have further canvassed the argument that imposition of death penalty would not only seek justice for the victim of the crime of murder but would also help in minimising crime rates in the society. Extending the frontiers of the contention further, the proponents of death penalty have submitted that

³⁰*Ibid*, at pp. 1511-1512.

³¹ *The Holy Bible*, Genesis, Chapter 4: 10-11.

³² *Ibid*, Genesis, Chapter 9:6.

³³ *Ibid*, Exodus, Chapter 21:14, 29; Chapter 22: 18-20; Chapter 35: 2; Leviticus Chapter 20:10; Leviticus 24:17; Deuteronomy Chapter 13:6-9; Chapter 17:12; Chapter 21:18-22.

³⁴ Adeniyi Olatunbosun, *Death Penalty Jurisprudence in Nigeria*, *op. cit.*

³⁵ *Ibid*, p. 183.

³⁶ *Ibid*. See also Francis Ogunbowale, ‘Nigeria: Agenda for the Coalition of Death Penalty,’ *All Africa* (11 March 2003). Available at <<https://allafrica.com/stories/200303110072.html>> accessed on 31 July 2019.

the punishment is not necessarily a revenge or “an eye for an eye,”³⁷ rather it amounts to terminating a life that “has no value for other human lives, so that if one cannot value the life of another human being, then one’s own life has no value.”³⁸ The necessary import one could derive from such arguments is that imposing a death penalty on a murderer is indeed a “favour to the society,” justice to the victim of crime, his family and a fulfilment of divine injunction.³⁹

On the other hand, opponents of death penalty have doubted the extent to which the imposition of death sentence has served as deterrence to the members of the society who may wish to commit similar crimes as canvassed by advocates of death penalty. In this regard, Aguda, using the case of armed robbery which is one of the criminal offences that attracts a death penalty reasoned thus:

Now under extreme caution it may be said that it is difficult for anyone to say conclusively whether public executions have had any marked influence on incidents of armed robbery. One thing, however, which is clear, is that, in spite of the public executions of armed robbers which have been going on for some time now; the crime still continues.⁴⁰

Another argument against death penalty is that it is cruel, barbaric and amounts to a grave violation of the constitutionally guaranteed right of dignity of human person, which *inter alia*, frowns against subjecting a person to torture or to inhuman and degrading treatment.⁴¹ This position was strongly canvassed by the appellant’s learned counsel in *Onuoha Kalu v. The State*,⁴² where the Nigerian Supreme Court unfortunately established that death penalty did not breach the rights to life and human dignity.⁴³ On the contrary, in the Tanzanian case of *Republic v. Mbushuu*,⁴⁴ the Tanzanian High Court did not hesitate to maintain that death penalty was intrinsically cruel, inhuman and amounted to a degrading punishment as the process of execution by hanging was on the whole horrific, sordid, debasing and generally brutalising. The court accordingly held that death penalty was an affront to the provisions of Article 13(6)(e) of the Constitution of the United Republic of Tanzania.⁴⁵

A third argument against death penalty is that it is irreversible once executed

³⁷ *The Holy Bible*, Leviticus 24:20; Revelation 13: 10.

³⁸ Adeniyi Olatunbosun, *Death Penalty Jurisprudence in Nigeria*, 202-203. A learned author has also expressed the view that the “purpose of capital punishment, though it may be partly deterrent, contains also the idea that he who kills must be killed.” See Cyprian Okonkwo, *Criminal Law in Nigeria* (Sweet & Maxwell, Second Edition, 1980), p. 28.

³⁹ Adeniyi Olatunbosun, 203.

⁴⁰ Akinola Aguda, ‘Law as a Means of Social Hygiene’ in *Judiciary in the Government of Nigeria* (New Horn Press, 1983), p. 165, quoted in Akin Ibidapo-Obe, *Essays on Human Rights Law in Nigeria* (Concept Publications Limited, 2005), 32-33.

⁴¹ See generally the 1999 Constitution, section 34(1)(a).

⁴² (1998) 12 SCNJ 1.

⁴³ *Ibid*, p. 32.

⁴⁴ (1994) TLR 146.

⁴⁵ Article 13 (6) (e) of the Tanzania Constitution is similar, though of different wordings, to section 34(1)(a) of the 1999 Nigerian Constitution. The former states: “It is prohibited to torture a person, to subject a person to inhuman punishment or to degrading punishment.”

and that if the sentence is wrongly carried out on an innocent convict it would do more harm than good to the individual, the family and the society. This is, conceivably anchored on the trite principle of law that it is better to allow nine guilty accused persons to go scot free than to subject an innocent person to punishment. The Nigerian case of *Aliyu Bello & 13 others v. Attorney-General of Oyo State*⁴⁶ readily comes to mind. In that case, an accused person who was found guilty of the offence of armed robbery lodged an appeal before the Nigerian Supreme Court. However, before his appeal was heard and determined by the apex court, he was hastily hanged while in prison. The apex court, in a subsequent action instituted by the deceased's family, strongly castigated the State Government and awarded monetary compensation to the family. In the opinion of the court, the hurried execution of the deceased was a "reckless disregard for the life and liberty of the subject and the principle of the rule of law"⁴⁷ and therefore was "unconstitutional and unlawful."⁴⁸ But painfully, with all the judicial rhetoric, the life of the convict could not be restored.

This third argument for the abolition of death penalty also finds support in the recent release of an 86 years old death row inmate, Azubuije Ehirio, and his two other family members from the Enugu Maximum Prison by the Presidential Committee on Prisons Reform and Decongestion. The convicts were sentenced to death by hanging by an Abia State High Court in 2005. Due to financial constraints, they could not appeal against the judgment. According to Ehirio, he had a land dispute with the complainant and around the same time, the complainant's son was killed by armed robbers. Based on the circumstances, the convicts were arrested and charged to the court on trumped murder charge. The Presidential Committee after listening to the circumstances that resulted in the arraignment, incarceration and subsequent conviction of the inmates was convinced that there was need to set them free. It accordingly released them unconditionally.⁴⁹ The question is, had the inmates been executed fourteen years earlier when their sentence was passed, would the committee have had the opportunity of reviewing their case?

b. Balancing the Arguments on Death Penalty in Nigeria

Balancing the arguments for and against the imposition of death penalty *vis a vis* the above cited cases of Aliyu Bello and Azubuije Ehirio, would make one readily tilt in favour of the abolition of death penalty in Nigeria. It is the view of the present authors that death penalty is not only a limitation to the enjoyment of the right to life, but it also terminates the enjoyment of other constitutionally guaranteed rights, including the right to human dignity and protection against cruel, inhuman and degrading treatment. It is a known fact that death penalty has some inherent ingredients of torture. From the time a sentence of death is passed on a criminal till

⁴⁶(1986) 5 NWLR (Pt. 45) 828.

⁴⁷*Ibid*, at 860.

⁴⁸*Ibid*, at 851.

⁴⁹ See NAN, '86-Year-Old Death Row Inmate, Son, Cousin Regain Freedom.' *The Punch* (Lagos, 3 July 2019). Available at <<https://punchng.com/86-year-old-death-row-inmate-son-cousin-regain-freedom/>>. Accessed on 4 July 2019.

when the execution is carried out, the convict would be subjected to severe mental pain, agony and suffering.⁵⁰

The historic decision of the Constitutional Court of South Africa in *State v. Makwanyane & Anor*⁵¹ is very instructive in this area. The case involved two accused who were convicted for murder and sentenced to death. Their appeal to the Appellate Division of the Supreme Court was unsuccessful as the court expressed the view that the circumstances of the murder warranted that the accused should be punished with the sentence of death. On a further appeal to the Constitutional Court of South Africa, it was ruled that capital punishment was a violation of the guaranteed right against cruel, inhuman and degrading treatment contemplated of under the South African Constitution. According to the court,

Death is the most extreme form to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution. It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs. In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it involves, by its very nature, a denial of the executed person's humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.⁵²

Indubitably, the need for abolition of death penalty in Nigeria is long overdue. However, notwithstanding how laudable the advocacy for the elimination of death penalty may appear, it is the candid view of the present authors that such may not bring about the much needed change except both the legislature and the executive arms of the government exercise a bold political will and determination to amend the 1999 Constitution and other relevant laws which still harbour death penalty as a form

⁵⁰ See the United Nations General Assembly (UNGA) Resolution 3542 (XXX) on the Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 9 December, 1975, which recognises both mental and physical pain or suffering as a form of torture.

⁵¹ Case No. CCT/3/94 decided on 6 June 1995; (1995) ZACC 3; (1995) (6) BSCLR 665; (1996) 2 CHRLD 164. Judgment in the case is available at <<http://www.saflii.org/za/cases/ZACC/1995/3.html>> accessed on 1 August 2019.

⁵² *Ibid.*

of punishment in relation to capital offences. The judiciary must also be bold enough to engage in judicial activism in their interpretation of the laws as seen in other climes.

III. Suicide Debate: Historical Background and Contributory Factors

Suicide is a global occurrence and has been reported by the World Health Organisation to be the second leading cause of death among 15-29 year olds worldwide. Essentially, the report stated that 79% of suicide took place in low and middle income countries in 2016 and that the phenomenon accounted for 1.4% of all deaths globally, making it the 18th leading cause of death in 2016. Putting it in more concrete terms, it is estimated that over 800,000 people die as a result of suicide annually⁵³ and Nigeria is among the leading countries that are prone to suicide.⁵⁴ Over the years, it was commonly thought that cases of suicide was prevalent among the older people, but as recent occurrences have shown, this trend has moved significantly towards the younger generations.⁵⁵ Studies have estimated that 9.5% of all unnatural deaths in persons younger than 45 years of age were attributed to suicide.⁵⁶ Almost on daily basis, cases of either suicide or attempted suicide are reported in our local and national newspapers.⁵⁷

The term “suicide” originated from the Greek word, *suicidium*, meaning “deliberate killing of oneself.”⁵⁸ It has also been defined as “the human act of self-inflicted, self-intentioned death.”⁵⁹ In the view of Markson, suicide is “the intentional, voluntary, unaccidental act of a sane man” which culminates in his own demise.⁶⁰ The term has been judicially defined as “an act of self-killing or self-destruction, an act of terminating one’s own life by one’s own act and without the aid or assistance of any other human agency.”⁶¹ Lubaale, relying on Schebusch, has also described suicide to

⁵³World Health Organisation, “Suicide Data across the World-2016.” Available at https://www.who.int/mental_health/prevention/suicide/suicideprevent/en/. Accessed on 29 July 2019.

⁵⁴ Chioma Obinna and Gabriel Olawale, ‘More Nigerians to die by suicide if...’ *Vanguard* (Lagos, 21 May 2019). Available at <<https://www.vanguardngr.com/2019/05/more-nigerians-to-die-by-suicide-if/>>. Accessed on 29 July 2019.

⁵⁵ See for instance, Chukwuma Muanya and Stanley Akpunou and Adaku Onyenucheya, ‘Nigeria: Addressing Rising Cases of Suicide Among Teenagers,’ *All Africa* (21 May 2019). Available at <<https://allafrika.com/stories/201905210071.html>> accessed on 29 July 2019.

⁵⁶ Soornarain S. Naidoo and others, ‘Unmasking Depression in Persons Attempting Suicide,’(2015) 57(2) *South African Family Practice*, 83-87. Available at <<https://doi.org/10.1080/20786190.2014.1002219>> accessed on 23 September 2019.

⁵⁷ See for example, Muneer Yaqub, ‘Suicide by ‘Sniper’: Insecticide Turns Popular Choice for Suicidal Nigerians,’ *Sahara Reporters*. Available at <<http://saharareporters.com/2019/03/21/suicide-sniper-insecticide-turns-popular-choice-suicidal-nigerians>> accessed on 24 September 2019.

⁵⁸ See, ‘Origin and Meaning of Suicide.’ Available at <<https://www.etymonline.com/word/suicide>> accessed on 19 September 2019.

⁵⁹ Antoon A. Leenaars, ‘Suicide and Human Rights: A Suicidologist’s Perspective,’ (2003) 6(2) *Health and Human Rights*, 129.

⁶⁰ See David S. Markson, ‘The Punishment of Suicide-A Need for Change,’ (1969) 14(3) *Villanova Law Review*, p. 464. Available <<http://digitalcommons.law.villanova.edu/vlr/vol14/iss3/5>> accessed on 23 September 2019.

⁶¹ See *Maruti Shripati Dubal v. State of Maharashtra* 1987 (1) BomCR 499, para, 16, (1986) 88 BOMLR 589, decided by the Bombay High Court on 25 September 1986. Available at <<http://indiankanoon.org/doc/490515/>> accessed on 21 July 2019

include “a wide range of self-destructive or self-damaging acts in which people engage, owing to varying degrees of level of distress, psychopathology” with the consciousness or expectations of the harmful results of such suicidal behaviour.⁶² The implication of the Lubaale’s definition is that suicide is not only an act of knowingly terminating one’s life but it also accentuates the correlation between suicide and mental disorder. This makes suicidal behaviour a complex problem that cannot completely be tackled through criminalisation and penalisation.⁶³

As a matter of fact, the attitude of ending one’s life through suicide is not a strange phenomenon or a process unknown to human history. It cuts across myriad of religions, culture, race and societal strata. The Christian Bible does not explicitly forbid suicide, though the idea is objectively considered by Christians as a grave violation of the Sixth Commandment, “thou shalt not kill.”⁶⁴ Cases of people who committed suicide are however recorded both under the Old Testament and the New Testament of the Bible. Such Bible characters include Abimelech,⁶⁵ Sampson,⁶⁶ Saul and his armourbearer,⁶⁷ Ahithophel,⁶⁸ Zimri,⁶⁹ and Judas Iscariot.⁷⁰ The Bible also recorded an attempted suicide case by a jailer.⁷¹ On the contrary, the Muslim Quran expressly prohibits suicide. In this regard, a passage in the Quran admonishes, “[a]nd do not kill yourselves, surely God is most merciful to you.”⁷² The condemnation of suicide is also recorded in statements of Hadith such as the one narrated by Abu Huraira, “[t]he Prophet said, he who commits suicide by throttling shall keep on throttling himself in the hell fire (forever) and he who commits suicide by stabbing himself shall keep on stabbing himself in the hell fire.”⁷³

Cases of suicide can also be found in some literature books. Achebe gives an account of how his main protagonist, Okonkwo, killed a messenger and resorted to hang himself on a tree after his failed attempts to rouse his clansmen to act in unity in the face of betrayal and brazen disregards of the Umuofia’s communal traditions and taboos by the colonial government and the new religion (Christian church).⁷⁴ Though such unfortunate incident may be regarded as a personal tragedy of Okonkwo, but it also reflected the attitude of the communal people regarding the concept of “self-killing.” Obierika, a close friend of the deceased, summed it up in his communication with the District Commissioner:

⁶² Emma Charlene Lubaale, ‘The Crime of Attempted Suicide in Uganda: The Need for Reforms to the Law,’ [2017] (4) (1) *Journal of Law, Society and Development*, 3.

See also L. Schlebusch, *Suicidal Behaviour in South Africa*, (Pietermaritzburg: University of KwaZulu-Natal Press.2005), 179.

⁶³ Emma Charlene Lubaale, ‘The Crime of Attempted Suicide in Uganda: The Need for Reforms to the Law,’ *ibid*, at 7.

⁶⁴ *The Holy Bible*, Exodus 20: 13, KJV.

⁶⁵ *Ibid*, Judges 9:53-54.

⁶⁶ *Ibid*, Judges 16:26-31.

⁶⁷ *Ibid*, 1 Samuel 31: 4-5.

⁶⁸ *Ibid*, 2 Samuel 17: 23.

⁶⁹ *Ibid*, 1 Kings 16: 18.

⁷⁰ *Ibid*, Matthew 27: 3-5.

⁷¹ *Ibid*, Acts of the Apostles 16: 27-28.

⁷² *The Holy Quran*, Sura 4:29.

⁷³ Sahih al-Bukhari, 2:23:446.

⁷⁴ Chinua Achebe, *Things Fall Apart* (Heinemann Educational Books, 1981, Reprinted), 140-145.

It is against our custom....It is an abomination for a man to take his own life. It is an offence against the Earth, and a man who commits it will not be buried by his clansmen. His body is evil, and only strangers may touch it. That is why we ask your people to bring him down, because you are strangers....We shall pay your men to do it. When he has been buried we will then do our duty by him. We shall make sacrifices to cleanse the desecrated land....That man was one of the greatest men in Umuofia. You drove him to kill himself; and now he will be buried like a dog....⁷⁵

Shakespearean plays also illustrated some instances of “self-murder.” Such plays could be found in *Romeo and Juliet*, where the duo used their suicidal deaths in unifying their feuding families.⁷⁶ Similarly, in *Anthony and Cleopatra*, after being misinformed of the demise of his lover, Cleopatra, Mark Anthony stabbed himself to death with his sword.⁷⁷ Cleopatra subsequently committed suicide rather than be subjected to humiliation by the triumphant Octavian’s forces. Their deaths ultimately brought peace to the Roman Empire.⁷⁸

Muanya *et. al*, have admitted that while there exist a connection between suicide and mental disorder or depression in developed countries of the world, many suicides cases also occur due to inability to cope with stresses of life such as financial challenges, chronic ailment, and relationship issues.⁷⁹ In addition, other factors that contribute to suicide cases include socio-economic factor, situational factor, religious factor, environmental factor, self-induced or drug-related factor, the need to avoid humiliating and undignified situations, or the need to justify or achieve a cause whether social, religious or political, to mention but a few.

Psychoanalytic theories and studies have also explained the possible reasons why people resort to suicidal behaviours. One of the first proponents of this concept was Sigmund Freud. He posited that suicide was propelled by an inherent death instinct in man “as the goal of all life is death.” His further proposition that “suicide was based on harboured guilt feelings and inwardly directed violence in an emotionally arrested or immature individual has been” replicated by many contemporary psychiatrists.⁸⁰

From the psychological perspective, Durkheim has contended that the more socially integrated and connected to the society a person is, the less likelihood it is for the individual to commit suicide and that where such social assimilation diminishes, there is a possibility for the individual to commit suicide. He consequently classified

⁷⁵ *Ibid*, at 147.

⁷⁶ See William Shakespeare, *Romeo and Juliet*, Act 5 scene 3, lines 111-112, 171 and 309.

⁷⁷ See generally, William Shakespeare, *Anthony and Cleopatra*, Act 4, scene 15-Act 5, scene 1.

⁷⁸ *Ibid*, Act 5, scene 2.

⁷⁹ See Chukwuma Muanya and Stanley Akpunou and Adaku Onyenucheya, ‘Nigeria: Addressing Rising Cases of Suicide Among Teenagers,’ *All Africa* (21 May 2019). Available at <<https://allafrica.com/stories/201905210071.html>> accessed on 29 July 2019.

⁸⁰ See David S. Markson, ‘The Punishment of Suicide-A Need for Change,’ *op. cit.* at 469.

suicide into four groups based on the connection existing between the society and the individual. First, egoistic suicide or suicide of a self-centred individual, which occurs when an individual feels completely disconnected from the society. Thus, when a person's bond or ties with the society is undermined, the individual may be vulnerable to this type of suicide as he focuses more on himself and lacks the necessary concern for the community.⁸¹ The second type is altruistic suicide that occurs when an individual feels an undue sense of commitment or strong obligation to the community or a cause. In such a situation, the person may be compelled by such feelings or force to kill himself for the benefit or cause of the society.⁸²

Durkheim also identified fatalistic suicide as another type of suicide. This occurs where a person chooses to die rather than continue to suffer in a tyrannical or suppressive condition.⁸³ The fourth category is anomic suicide. This type of suicide is triggered off by the failure of the society to manage and control the behaviour of individuals. This may happen during periods of severe socio-economic and political disorder which may lead to serious changes in the society. In such circumstances, an individual may feel confused, withdrawn and unable to acclimatise when the society changes and thereby resorting to committing suicide.⁸⁴ Although Durkheim's categorisations may not necessarily be exhaustive regarding reasons why people commit suicide, they nonetheless provide some additional guides on the factors that encourage it.

a. Nigerian Laws on Suicide and Attempted Suicide

Notwithstanding the factors that may prompt a person to commit suicide or attempt a suicide, the fact still remains that in Nigeria, under the Criminal Code Act⁸⁵ and the Penal Code, the crime of suicide is neither defined nor penalised though these laws criminalise attempted suicide, abetment or aiding of the commission of suicide. According to the Criminal Code, any person who procures another to kill himself and consequently induces him to do so is guilty of a felony and liable upon conviction to a life imprisonment.⁸⁶ An attempt to commit suicide is considered as a misdemeanour and attracts an imprisonment for one year under the Criminal Code.⁸⁷

On the other hand, the Penal Code also makes provisions for various categories of abetment of suicide and attempted suicide. The Penal Code makes it an offence punishable with death for any person to abet the commission of suicide by a child, an

⁸¹See George Ritzer, 'Theory of Suicide by Emile Durkheim.' Available at <<http://socialscience.blogspot.com/2015/03/theory-of-suicide-by-emile-durkheim.html?m=1>> accessed on 3 September 2019.

⁸² *Ibid.*

⁸³ *Ibid.* It may be recalled that the popular Jasmine revolution in Tunisian in 2010 during the Arab spring was triggered off when one Mohammed Bouazizi, an unemployed street trader set himself ablaze to complain against the arbitrary seizure of his vegetable stand by the police for failure to obtain a permit- See The Editors, Encyclopaedia Britannica, 'Jasmine Revolution: Tunisian History.' Available at <<https://www.britannica.com/event/Jasmine-Revolution>> accessed on 7 December 2019.

⁸⁴ George Ritzer, 'Theory of Suicide by Emile Durkheim,' *ibid.*

⁸⁵ Cap. C38, Laws of the Federation of Nigeria 2004.

⁸⁶ *Ibid*, section 326.

⁸⁷ *Ibid*, section 327.

insane person, an idiot or a person under the influence of intoxication.⁸⁸ Where the person assisted to commit suicide was neither a child nor an insane person, the person who assisted in the commission of such suicide shall be liable to an imprisonment which may extend to ten years as well as become liable to payment of a fine.⁸⁹ With regard to attempted suicide, the Penal Code prescribes an imprisonment term of more than one year with a fine.⁹⁰

The Penal Code and the Criminal Code have defined what constitute an attempt to commit an offence. According to the Penal Code,

whoever attempts to commit an offence punishable with imprisonment or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence shall, where no express provision is made ...for the time being in force for the punishment of such attempt, be punished with imprisonment for a term which may extend to one half of the longest term provided for that offence or with such fine as is provided for the offence....⁹¹

The Criminal Code is more forthright as it attempted to codify some of the Common Law principles of crime.⁹² According to the Code, an attempt to commit offences occur

when a person intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment manifests his intension by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence.⁹³

From the wordings of the two penal laws, it is obvious that for a person to be liable for a criminal attempt, the offence for which he is alleged to have attempted to commit must be punishable under the law. Thus, the rationality for rendering attempted suicide as an offence under our criminal legal jurisprudence is seriously questioned.⁹⁴ It is contended that since suicide itself has not been criminalised in our statute books, for the possible reason that the perpetrator or victim of the crime is dead and cannot be reached for criminal prosecution, it stands to reason therefore, that a person should not be held criminally liable for an attempt if the “conduct they attempt to engage in does not constitute a crime.” On the basis of this statutory ambiguity, it follows that an attempt to commit suicide under the Nigerian law is

⁸⁸ See Penal Code, section 227.

⁸⁹ *Ibid*, section 228.

⁹⁰ *Ibid*, section 231.

⁹¹ *Ibid*, section 95.

⁹² Peter Ocheme, *The Nigerian Criminal Law*, (Second Edition, Liberty Publications Ltd., 2008), 66.

⁹³ Criminal Code, *op. cit.*, section 4.

⁹⁴ Cyprian Okonkwo, *Criminal Law in Nigeria*, (Second Edition (Reprint), Spectrum Books Limited, 2005), 184.

faulty and lacks proper basis in the principles of criminal law.⁹⁵

b. Attempted Suicide and the Defence of Insanity

This section of the work focuses on discovering the effect of mental illness or mental defect on criminal accountability of a defendant who is charged with the offence of an attempted suicide. In a defence of insanity, the defendant admits the action, but asserts a lack of blame for the action or omission by reason of a mental infirmity.

Empirical study⁹⁶ and a report by the World Health Organisation⁹⁷ have buttressed the fact that suicidal behaviours are strongly connected with the presence of depression and other common mental disorders. WHO reports that an estimated total number of over 300 million people, equivalent to 4.4% of the world's population, suffered from depression globally in 2015.⁹⁸ Depression is also reputed as the major contributor to suicide deaths.⁹⁹ The report also acknowledged that the "risk of becoming depressed is increased by poverty, unemployment, life events such as the death of a loved one or a relationship break-up, physical illness and problems caused by alcohol and drug use."¹⁰⁰

The test for establishing the extent of mental disorder necessary for excusing criminal liability was first recognised in the celebrated English case of *R. Daniel M'Naghten*.¹⁰¹ The M'Naghten Rules were developed on the notion that accountability is the essence of the criminal law and that the ability to make a decision between right

⁹⁵ See Emma Charlene Lubaale, 'The Crime of Attempted Suicide in Uganda: The Need for Reforms to the Law,' *op. cit* at 9-10; C. R. Snymans, *Criminal Law*, (Durban, Johannesburg and Cape Town: LexisNexis, 2014), 283, 285; J. Burchell, *Principles of Criminal Law*, (Cape Town: Juta, 2013), 535-553.

⁹⁶ Omolabake Alabi and others, 'Suicide and Suicidal Behaviour in Nigeria: A Review,' *Journal of University of Ibadan Medical Students Association*. Available at <https://www.researchgate.net/publication/271748010_Suicide_and_Suicidal_Behavior_in_Nigeria_A_review>. Accessed on 30 August 2019.

⁹⁷ World Health Organisation, *Depression and other Common mental Disorders: Global Health Estimates* (Geneva: World Health Organisation, 2017), p. 5.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ (1843) 10 Cl. & F. 200; (1843) 8 E. R. 718. The case involves one Daniel M'Naghten who shot the deceased with a pistol believing that the deceased was the then British Prime Minister Robert Peel. On a subsequent charge with the offence of murder, the suspect pleaded not guilty to the charge on grounds of insanity. Witnesses were called on his behalf to attest that he was suffering from morbid delusion and was not in a sound mind at the time of committing the offence. The question Lord Chief Justice Tindal stated to the jurors for determination in relation to the charge against Daniel M'Naghten was, "whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of the opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him." Daniel M'Naghten was eventually found not guilty. Following this decision, a panel of Judges attended the House of Laws and raise a series of hypocritical questions on the topic of insanity. The response to the questions resulted in the formulation of the famous M'Naghten Rules (1843) 4 St. Tr. (N. S.) 847. See generally "R. v. McNaughten Case Summary." Available at <<https://www.lawteacher.net/cases/r-v-m-naughten.php>> accessed on 20 September 2019.

and wrong is the kernel of liability.¹⁰² The Rules created a presumption of sanity except the defendant could establish that at the time he committed the alleged criminal act, he was labouring under a defect of reason arising from a disease of the mind as not to know the nature and quality of his act or that if he did know it, that he did not know that he was doing wrong. The M'Naghten test thus has two-pronged components, each of which is independently adequate to prove an insanity defence.

First, a defendant is considered insane if he is unable to know what he is doing at the time he committed the alleged offence. This is in agreement with criminal law principle or conception of culpability. The second element of the test seeks to determine if the defendant knew that his action was wrong. Thus, even where the defendant knew what he was doing, he would still be deemed insane if he was incapable of recognising the wrongfulness of the action committed.

However, over the years with the advancement in medical knowledge, considerable criticisms have trailed the Rules, particularly from psychiatrists who have argued that “there were many mentally ill people who, though able to appreciate intellectually that an action might be wrong, nevertheless were under intolerable emotional pressure to commit it (e.g. paranoid).” That to consider such people as being criminally liable was “a fiction of undesirable kind.”¹⁰³ Others have also criticised the Rules on the ground that “[b]y focusing exclusively on cognitive incapacity, the M'Naghten test is not well suited for treating more nuanced forms of psychological disorders, particularly those involving volitional impairment” though normally, the test has been connected with schizophrenia and psychotic disorders.¹⁰⁴

Defence of insanity is recognised both under the Nigerian Criminal Code¹⁰⁵ and the Penal Code.¹⁰⁶ Though the law presumes everyone to have a sound mental capacity until the contrary is established,¹⁰⁷ yet it admits that a person cannot be criminally held accountable if he is insane by reason of a state of mental disease or natural mental infirmity which robbed him of the ability to understand what he is doing or control his action or the capacity to know that he should not to do the act or

¹⁰² Cyprian Okonkwo, (n94) 130.

¹⁰³In the United States of America, though the M'Naghten Rules was applied in many States, but in the District of Columbia, the criticism of the Rules resulted in the 1954 formulation of the Durham Rule (the “Product” Test), which was more favourable to the psychiatric view. The case was in relation to a 23-year-old Monte Durham who had been in and out of prison and mental institutions since he was 17 years old. He was convicted for housebreaking by a district court Judge. The decision was overturned on appeal on grounds “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” The Durham case, in an attempt to reform the M'Naghten Rules departed from “legal formalisms and emphasised scientific psychological evaluations and evidence.” See “Insanity Defense.” Available at <https://www.law.cornell.edu/wex/insanity_defense> accessed on 21 September 2019. See also Cyprian Okonkwo, *ibid*, 130-131.

¹⁰⁴ “Insanity Defense,” *ibid*.

¹⁰⁵ Criminal Code, section 28.

¹⁰⁶ See section 51 thereof, which provides that “[n]othing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law.”

¹⁰⁷ Criminal Code Act, section 27; *Guobadia v. State* (2004) All FWLR (Pt. 205) 191 at p. 201; *Onakpoya v. Queen* (1959) NSCC 130. See also Criminal Procedure Act No. 51 of 1977 of South Africa, section 78(1A) which raises a similar presumption of law but requires that the proof shall be “on a balance of probabilities.”

make the omission.¹⁰⁸ It would appear that the Nigerian law on insanity under the Criminal Code is significantly wider in scope than the law of insanity formulated in the M'Naghten Rules.¹⁰⁹

For instance, the language of the Criminal Code talks not only of “mental disease” but also of “natural mental infirmity,” a phrase which was obviously intended by the framers of the law to go beyond the scope of mere “mental disease” and more than the M'Naghten Rules.¹¹⁰ In *R. v. Omoni*¹¹¹ and *R. v. Tabigen*,¹¹² the phrase “natural mental infirmity” was defined by the respective appellate courts to mean, “a defect in mental power neither produced by his own default nor the result of disease of the mind.”¹¹³ The fact that a defendant was “in a grip of a strong passion” may therefore be material in considering if he had been deprived of the capacity to control his action.¹¹⁴

Definitely, a person who attempts suicide may possibly be under a control of “strong passion” which may cause him to lose the capacity to understand what he is doing or the capacity to either control his action or know that he should not do the act. Where such is proved on the balance of probability or preponderance of evidence coupled with supportive medical evidence, the defendant ought to be relieved from criminal liability.¹¹⁵ However, it is necessary to point out that a defendant's display of abnormal behaviour is not evidence of insanity and evidence tendered by the defendant himself is suspect and is usually not taken seriously by the court.¹¹⁶

In contrast to the Nigerian position and the M'Naghten Rules which stress the defendant's cognitive ability, other jurisdictions like South Africa have recognised the “irresistible impulse test (IIT)” under their law. The IIT focuses on the volitional ingredients of insanity. According to the IIT, a defendant is legally insane and consequently not criminally accountable for his action if a mental illness made it impracticable for him to control his behaviour and shun the commission of the alleged criminal act. Lubaale offers some useful information on IIT as an insanity defence. According to the author, “a person can fall within the ambit of the insanity definition if by reason of their mental illness they lack ‘self-control’ and they cannot ‘resist’ committing or ‘refrain’ from committing an offence.”¹¹⁷

For the avoidance of doubt, section 78(1) of the South African Criminal Procedure Act¹¹⁸ provides for mental illness or mental defect and criminal responsibility. It states *inter alia*:

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or

¹⁰⁸ *Ibid.*, section 28.

¹⁰⁹ Cyprian Okonkwo, (n94), at 144.

¹¹⁰ *Ibid.*, 134.

¹¹¹ (1949) 12 WACA 511.

¹¹² (1960) 5 FSC 8.

¹¹³ Cyprian Okonkwo, (n94), at 134.

¹¹⁴ *Ibid.*

¹¹⁵ *Guobadia v. State*, (n107) at. 204-205.

¹¹⁶ *Onyekwe v. The State* (1988) 1 NWLR (Pt. 72) 565.

¹¹⁷ See Emma Charlene Lubaale, (n95) at 13.

¹¹⁸ No. 51 of 1977.

omission suffers from a mental illness or mental defect which makes him or her incapable –

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

The position under the South African law, which recognises the element of self control, would make it easier for a court not to hold a defendant guilty by reason of insanity where the defendant was labouring under a mental disorder or defect that controlled him to commit an alleged offence. Had similar provisions been made under the Nigerian law, it is submitted that those charged with an attempted suicide would have benefitted more. This is because of their inability to control their suicidal propensities. As earlier noted in the work, the mental condition of a person who attempts suicide often make them incapable of acting in accordance with the appreciation of the wrongfulness of their suicidal behaviour.¹¹⁹

IV. Conclusion and Recommendations

The article examined the position of Nigerian penal laws in relation to death penalty, suicide and attempted suicide. The primary objective was to find out if the Nigerian laws on the subjects under investigation were satisfactory and if not, whether there was need for reforms in our laws.

With respect to death penalty, it was discovered in the study that death penalty is not only a threat to the enjoyment of the right to life but also violates the right to dignity and freedom from torture, inhuman and degrading punishment. It is therefore, recommended that the 1999 Nigerian Constitution and statutes still retaining death sentences as forms of punishments for capital offences should be amended accordingly to reflect current realities across the world where imposition of life imprisonment is applied for capital offences. This will bring our laws in accordance with such international and regional instruments like the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) Concerning the Abolition of Death Penalty, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) Concerning the Abolition of Death Penalty in all Circumstances, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

It was also discovered in the study that though suicide has not been criminalised under any known Nigerian laws, attempted suicide as well as aiding and

¹¹⁹ See Emma Charlene Lubaa, ‘The Crime of Attempted Suicide in Uganda: The Need for Reforms to the Law,’ (n95) at 14.

abetting are offences for which various sanctions are prescribed under Nigerian criminal statutes. One of the likely reasons for prescribing penalty for a criminal offence is to serve as deterrent to others contemplating similar crime. But whether the theory of deterrence would serve any useful purpose, for instance, where a person attempted suicide because of a mental disorder which requires proper psychiatric treatment or where another attempted suicide because of an incurable physical disease is very doubtful. What positive effect would criminal sanction serve in the case of a person who attempted suicide because of unemployment, poverty and inability to feed himself or his family? A criminal sanction for an attempted suicide by a person who has been on death row for years will equally serve no useful purpose, except to continue subjecting the person to psychological trauma and mental agony which may further cause him to think suicidal thoughts. In all these instances, it is apparent that criminal sanctions for attempted suicide would be self-defeating and counter-productive.

It is therefore, recommended that the Nigerian government should decriminalise sanctions for attempted suicide, which is a mere colonial relic decorating our statute books. On the contrary, it serves a useful purpose for the culprit, the family and the society at large where the root cause(s) that compel people to commit suicide or attempt suicide can be identified and addressed where possible. Most times, the person who attempted the suicide may not even know that his action is a criminal offence. All that is uppermost in his heart is to end his life rather than continue to live a meaningless life. Thus, survivors of suicidal attempts should not be punished but be presumed to suffer from mental stress and should be offered opportunities for rehabilitation by the government and relevant non-governmental organisations. Meaningful social welfare package should also be made available by the Nigerian government to the unemployed as it is obtainable in other developed countries. This will go a long way to reducing the rate of suicide by unemployed youths in the country.

The Indian example is the pathway Nigeria should adopt towards mental healthcare. Recently India, a former British colony like Nigeria, enacted the Mental Healthcare Act 2017 which effectively decriminalises attempted suicide which was punishable under section 309 of the Indian Penal Code. The 2017 Act also imposes a duty on the Indian government to provide care, treatment and rehabilitation to a person who is suffering from severe stress and who attempted to commit suicide with a view to reducing the risk of reoccurrence of an attempt to commit suicide. Unfortunately, Nigeria does not have any effective mental health legislation or policy. A Mental Health bill first introduced in 2003 on the floor of the National Assembly is yet to translate into law years after it was re-introduced in 2013, despite calls for its enactment into law.

Flowing from what the authors have stated above, it is suggested therefore, that the Nigerian government and other relevant stakeholders should have a re-think on death penalty, suicide and attempted suicide with a view to repealing our laws sanctioning death penalty and criminalising attempted suicide. If the challenges identified in the article and the recommendations made are addressed by the Nigerian government,

they will go a long way to settling the raging debates discussed in the article.

CROSSING THE BORDER: THE COMPLEMENTARITY NOTION OF PROTECTION OF RIGHTS OF VICTIMS OF ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW

*Shaba Sampson**

Abstract

The intersection between International Humanitarian Law (IHL), International Human Rights Law (IHRL) and International Criminal Law (ICL) norms is becoming more pronounced in the geared move towards the preservation of the rights and the human dignity of victims of armed conflict. Not until about a decade and half ago, this relationship was considered pseudo. But with the increased wave of conflicts situations across the globe, the synergy between these regimes of protection has not only been evident but normal and natural against the backdrop of their increasing relevance in both standard setting and penalties' prescription for violations. It is against this background that this paper considered the nature of rights *cum* protective valves encapsulated in these bodies of laws and their efficacies in times of war. It was found by this paper that the *milieux* within which they apply vary a great deal. While IHRL apply mostly in peace time and minimally during armed conflicts, the opposite is the case with IHL whose specialty always manifest in conflict situations. On the other hand, ICL is almost always evoked only after an armed conflict to bring grave violators to justice. The paper concludes that the rights of victims of armed conflict are better protected by the synergized application of these regimes and therefore recommends the strengthening of the interplay that exists between them.

Key words: Humanity, Rights, complementarity, Regimes, Criminal, Humanitarian.

I. Introduction

Protection of the rights of victims of armed conflict has become a global norm geared towards improving and safeguarding the sanctity of human dignity, not only in content and context but in practical terms. Humane treatment of victims of armed conflicts began when the principle of humanity assumed dominance during armed conflict.¹ This principle has well developed over the years through frameworks in the field of human rights law and international humanitarian law. Consequently, restraint on the part of belligerents is primarily based on the need for the respect of the innate nature of the sanctity of human life and human dignity but not for economic gain in favour of the party exercising restraint.²

Contemporary regimes of both international humanitarian law and human rights law therefore provide the bases for the respect and protection of the principle of humanity even during armed conflicts with International Criminal Law prescribing

* Shaba Sampson, PhD, Department of Public International Law, College of Law, Afe Babalola University, Ado-Ekiti, Ekiti State. E-mail-sampsonshaba@gmail.com. Ph: 08035048499, 08052891160.

¹ . GIAD Draper, 'The Development of International Humanitarian Law,' in H Dunant (ed), *International Dimensions of Humanitarian Law*, (Martins Nijhoff Publishers, 1998) 67.

². *Ibid.*

sanctions against individuals who violate these norms.³ Respect for rules of war is an imperative on the part of belligerents irrespective of the justness or otherwise of the conflict. Humanitarian concerns and the passion for respect for humanity over and above military considerations led to the signing of instruments to formally regulate the conduct of war. This began way back in the second half of the 1890s while human rights norms in its present form became a matter on the front burner of the international community at the turn of the 19th century with the adoption of the United Nations Charter in 1945.⁴ Up until then the individuals enjoyed human rights via bills of rights and later through constitutional law and in some exceptional cases international treaties providing protection to minorities.⁵

Rights and protection in both regimes of norms are best companions. Protection is not possible over what is non-existent, in this case right. Neither is right a worthy right without protective mechanisms by way of frame works. As a specialized aspect of international law, humanitarian law has, arguably been able to protect human dignity during and after war times through a number of frameworks on war generally.⁶

Humanitarian concerns led to the codification of the law of armed conflict in the first and second halves of the 19th century⁷ which existed as customary international law at the time.⁸ It is however, believed that the ‘modern humanitarian movement creating law’⁹ began after the horrors of the battle of *Solfeno*¹⁰ in 1859.¹¹ An eye witness, Henry Dunant, a Swiss National published the horrific memories of the war in 1862 and 1863. The memories about this war and the Declaration of St. Petersburg of 1868¹² impelled humanitarian ideals culminating in the Hague

³ E Ama Oji, *Responsibility for Crimes under International Law*, (Odade Publishers, 2013) 15-16.

⁴. HO Agarwal, *International Law and Human Rights*, (17th edition Central Law Publications, 2010) 729.

⁵ N Quenivet, ‘The History of the Relationship Between International Humanitarian Law and Human Rights Law’, in R Arnold and N Quenivet (eds) *International Humanitarian Law and Human Rights Law, Towards a New Merger in International Law* (Martinus Nijhoff Publishers, 2008) pp 1-3.

⁶ B Bowing, ‘Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights’, (2009) *Journal of Conflict and Security Law*, 6.

⁷. Draper, (n1), p 69.

⁸. WA Qureshi, ‘Untangling the Complicated Relationship between International Humanitarian Law and Human Rights Law in Armed Conflict’, (2018) vol. 6 issue 1, *Penn State Journal of Law and International Affairs*, 208.

⁹. Ibid.

¹⁰. Between Austria and France.

¹¹. Draper, (n1) p 70.

¹². Ibid 69.

Convention of 1899¹³ which was closely followed by the 1907 Hague Regulations. Earlier, in 1864, the very first Geneva Convention was enacted, and in 1929 the second Geneva Convention¹⁴ came into place. It revised and improved on the first Convention and the 1907 Hague Regulations. These Conventions marked the unequivocal ‘acceptance of secular compassion’ which resulted in the avowed ‘desire to reduce suffering in war,’ and further, ‘to protect and respect those who are, by definition, defenceless in the hands of the enemy as prisoner of war or sick, or as civilians.’¹⁵ This forms the fulcrum and crux of our modern and present day humanitarian law. The Geneva Conventions of 12th August, 1949¹⁶ revised and enhanced the provisions of the 1929 Convention. These Conventions with their two Additional Protocols of 8 June, 1977¹⁷ fully express the humanitarian law or law of war of our time.¹⁸ Extensive provisions for the protection of all categories of war victims are to be found in these conventions.¹⁹

To effectively reduce the negative impacts of armed conflict on the dignity of the human person, a convergence and synergy between international humanitarian law, human rights law and international criminal law is thus an imperative. A conflation of these norms is not only a blessing to humanity but an answer to the question of how dignified is human dignity in unusual situation of armed conflict in a civilized world of ours.

Consideration of the humanity of man because he belongs to mankind forms the core of modern humanitarian law with human right law as a veritable and indispensable ally. The recognition of the principle of humanity brought about restraint on, and limited the excesses of belligerents during armed conflicts.²⁰ To achieve this objective, the Hague Law fashioned out rules on the conduct of hostilities, means and methods of warfare, the Geneva Law²¹ on its part went several

¹³. Ibid.

¹⁴. Ibid.

¹⁵. Ibid 71.

¹⁶. While the first two Conventions determine general circumstances of casualties and distress situations, the last two provide for statuses and rights of the victims.

¹⁷. While the Protocol I expounds the provisions of the Geneva Conventions on International Armed Conflicts, Protocol II amplifies provisions of the Conventions on Non-International Armed Conflicts.

¹⁸. Draper, (n1), p 81.

¹⁹. Ibid.

²⁰. M Maclaren and F Schwendimann, ‘An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law’, (2005) Vol. 06 No. 09, *German Law Journal* 1218.

²¹. That is, the four Geneva Conventions and their Additional Protocols.

steps further to provide for the protection of individuals in distress situations arising from armed conflicts.

The Geneva Conventions

Drawing from the fundamental standard of humanity generally, the nature of rights and protection provided in the Conventions differ. Each of the four Geneva Conventions of 12 August, 1949 provides specifically for particular category of victims of armed conflict. Geneva Convention I for instance make provision for the protection of victims of armed conflict in the fields. It provides for the ‘Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field’²² that are in the hands of the enemy. It is worth mentioning that the origin of this Convention dates back to the Geneva Convention of August 22, 1864. Thereafter, a range of treaties, each of them pointing to the need to upholding the dignity of the human person even in situations of armed conflicts were enacted.²³ In part two of this convention, detailed provision for the protection of victims, in this case, the wounded and sick is to be found.²⁴ These provisions are predicated on the consideration of fundamental standards of humanity.²⁵

Man is conferred with natural rights for the reason of his membership of the human family. Core among these rights is the right to life, dignity of the human person and of fair hearing.²⁶ All (human) rights documents either at the international, regional or municipal levels hallow these basic rights because they are considered inseparable from man. Part IX contains provisions for repression of abuses and infractions. Article 49 for instance enjoins State parties to enact legislations for penal sanctions against persons committing or ordering to be committed grave breaches of the conventions.

Similarly, Convention II provides for intervention in the case of the wounded, sick and shipwrecked members of the armed forces of a belligerent in the hands of the enemy. Just like the first Convention, the second Convention in part two provides for

²². Geneva Convention I

²³ Quenivet, (n5), p 2.

²⁴ This is contained in G.C.I, Articles 12-18.

²⁵ K Casla, ‘Interactions Between International Humanitarian Law and International Human Rights Law for the Protection of Economic, Social and Cultural Rights’, (2012) Vol. 23 *Revista Electronica De Estudios Internationales*, p 2.

²⁶. These forms the cardinal pillars of modern human rights and fundamental freedoms as can be found in International, Regional and National human rights instruments.

the rights and protection of victims of armed conflict at sea. At the core of this provision is the passionate consideration for the fundamental standards of humanity predicated on the sacredness of certain rights of man considered inalienable.²⁷

Geneva Conventions III and IV on the other hand categorize and gave statuses to the identified victims in the first²⁸ and second²⁹ Conventions. Fighting members of a party to an armed conflict are categorized by Geneva Convention III as combatants with prisoners of war status upon capture by the enemy. They are entitled to humane treatment by their captors.³⁰ Internment of captured combatants is purely to break up links with those still in the battle field against any advantage the link might provide. They are to be released at the end of hostilities unconditionally. They are not criminals if their engagement and conduct is in tandem with the laws of war, otherwise they could be prosecuted for picking up arms illegally and for crimes resulting from such unlawful engagement.

The framework for the protection of the rights of the non-fighting members of a party to an armed conflict is Geneva Convention IV. Convention IV is relative to the ‘Protection of Civilian Persons in time of War’ and is particularly dedicated to the protection of civilians in time of war. Like the first three conventions, it continues to apply even after the cessation of hostilities. Application of the convention after armed conflict ensures and guarantees respect for the human dignity of civilians that have fallen victims of the conflict. They are entitled to certain safeguards against violation of their rights and freedoms under international humanitarian law.³¹ These rights include respect for their persons, their honour, their family rights, their religious convictions and practices and their manners and customs.³² Umozurike³³ identified two categories of civilians. One of them according to him is designated ‘protected persons’ and this consists of: *persons who find themselves, in the event of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they*

²⁷. See for instance the provisions of Common Article 3(1) (a-d).

²⁸. The first Geneva Convention provides for the ‘Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.’

²⁹. The second Geneva Convention provides for the “Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

³⁰. They are prisoners of war once captured and a detailed provision on their treatment is contained in the third Convention known as the ‘Prisoner of War Convention.’

³¹. CC Wigwe, International Humanitarian Law, (Readwide Publishers, 2010) p 134.

³². *Ibid.*

³³. O Umozurike, ‘Protection of the Victims of Armed Conflict: Civilian Population,’ in H. Dunant (ed), *International Dimensions of Humanitarian Law*, (Martinus Nijhoff Publishers, 1998) p 188.

*are not nationals.*³⁴

Part III of Geneva Convention IV lay down special safeguards for the protection of this category of civilians in its articles 27-34. The second ‘comprise the entire population of a country in conflict regardless of nationality, race, religion or political opinion.’³⁵ Part II of the convention comprising of articles 13-26 provide for their protection. In terms of coverage, the later covers wider ground, in fact, the entire population in the territory of a party to the conflict without any form of discrimination. However, the obligation to protect and ensure respect for the rights of civilian victims is stronger in the former, reason being that, the administering authority styled occupying power is under strict obligation to protect the rights and freedom of victims in its hands.

The focus of Geneva Convention IV is on all civilians, the entire non-fighting population in the territory of a party to the conflict. Once their normal course of life and business is altered or affected by armed conflict situation, they become victims, and as such deserve special care and attention in order not to feel less human by reason of circumstances of war.

II. The Nature of Rights of Victims of Armed Conflict

a. Under International Humanitarian Law

International Humanitarian Law is a specialized branch of Public International Law. This aspect of the law of nations which grew via, and applied as customary law³⁶ from the middle ages up till the 18th century is now clearly and comprehensively expressed in the four Geneva Conventions of 1949 and the two Additional Protocols to the Conventions. Codification of the international humanitarian norm was first achieved when the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted in 1864.³⁷ Situations of armed conflicts as they affect life and human dignity spurred the development of international humanitarian law to the present level. Protection and preservation of human dignity is core to this principle. It does not permit of treatment capable of engendering a feeling of less humanity even in worst situations of armed conflicts. Dehumanizing

³⁴. Ibid.

³⁵. Ibid.

³⁶ Quenivet, (n5) p.2.

³⁷ Ibid.

treatments are prohibited and criminalized as war crimes.³⁸

Rights of victims of armed conflict under international humanitarian law are by nature, not to be derogated under any circumstances otherwise preservation of human dignity, the very essence of humanitarian law will be illusory. Thus, international humanitarian law arguably, derogates from human rights law regime.³⁹ Application of humanitarian law begins as soon as there is an outbreak of armed hostilities. It is largely dormant in peace time but will continue to apply even in peacetime after hostilities until normal situation is completely restored. For example, humanitarian law will continue to apply in situations where victims are held by their adversary or in situation of occupation by the enemy and even when they are in neutral environment.⁴⁰ The implication is that the law of Geneva (humanitarian law) will continue to apply until every victim in enemy custody is repatriated or the situation of occupation is determined.⁴¹

By nature, the rights secured or guaranteed by humanitarian law are not only inalienable but non-derogable. Even where the victim is being tried for criminal offences, his/her rights still subsist. He or she will still be entitled to decent and humane treatment even in prison if sentenced. As long as humanitarian law continues to apply, so long the rights and privileges (if any) of victims of armed conflict inure with the protection of the law. Basically, victims' rights under international humanitarian law are individuals' rights as they address the individual of the human person as opposed to group. It creates obligations that are binding on both state and non-state actors and the consequences of violation of any aspect of the law of war amounts to grave violation which attaches individual criminal liabilities even at the international plane, especially now that individuals are subjects of international law.⁴²

b. Under International Human Rights Law.

In scope and sphere of application, human rights law covers wider ground than

³⁸. See *Prosecutor v. Bralo*, IT-95-17-S, Sentencing judgment, 7 December 2005. The accused was convicted for, among others, outrages upon personal dignity of torture and inhuman treatment as a war crime. See also *Prosecutor v. Brdanin*, IT-99-36-T, Judgment, 1 September 2004.

³⁹ Quenivet, (n5), p 5. Human rights law regime allows derogation of some of its provisions once such derogation does not go contrary to the Constitution and other relevant enactments. See C Droege 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', (2007) Vol. 40 No. 2, *Israel Law Review*, p 318.

⁴⁰ AP I, Articles 19 and 31.

⁴¹. G.C.III Article 118 and G.C IV, Article 133.

⁴². Oji, (n3), pp 105-7.

international humanitarian law. Human rights law has developed to the extent that it touches on almost all kinds of situation relating to both individual and collective or group rights.⁴³ It is not in doubt that human rights law provides a set of standard rules applicable to both international and national laws⁴⁴ and, international humanitarian law is not impervious to human rights' tenets.

Human rights law invasion into the domain of international and municipal laws actually began with the adoption of the United Nations Charter in 1945 after the Second World War, and has since then greatly influenced these bodies of norms. In 1948 the Universal Declaration of Human Rights was adopted with nebulous human rights provisions. However, the document prides as the first in the advancement of human rights tenets globally. Drawn from the fluid provisions on human rights and freedoms by the UN Charter,⁴⁵ it did in fact set the pace for further developments in this field. In 1966 a major feat was achieved in the field of human rights development with the codification of the Universal Declaration when two separate covenants were enacted.⁴⁶ The first was the International Covenant on Civil and Political Rights⁴⁷ while the second is styled International Covenant on Social, Economic and Cultural Rights⁴⁸ both of 1966. With these enactments, a separation of civil and political rights from social economic rights was achieved thereby providing the means for their implementation as peculiar to each of them.

Since then, human rights law influence on international humanitarian law has quite been obvious, thereby justifying it as a 'lawyer of standard rules for all.' For example, fundamental standards of humanity and human dignity, the core of international humanitarian law, are basic human rights law concepts. The observance of these basic standards usually, is the result of fundamental guarantees for human dignity in any civilized society in all climes.

However, some of the rights found in a number of human rights instruments

⁴³. M Odello, 'Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law,' in R Arnold and N Quenivet (eds) *International Humanitarian Law and Human Rights Law*, (Martinus Nijhoff, 2008) 24.

⁴⁴. *Ibid.*

⁴⁵ Generally, provisions on human rights and fundamental freedoms can be found in paragraph two of the preamble of the Charter of the UN and articles 55 (c) and 62 (2) of the UN Charter.

⁴⁶ J O Oraa, 'The Universal Declaration of Human Rights' in F G Isa and K de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges*, (University of Deusto, 2006)19-47.

⁴⁷. Herein ICCPR.

⁴⁸. Herein ICSECR.

are such that could be derogated whenever the situation warrants with the exception of just a few.⁴⁹ The irresistible impulse therefore is to think that some human rights stipulations are superior or more important than others. The test of every human rights provision is its enforceability and the ability to protect the entire gamut of the humanity and dignity of man even in worst of situations.

One of the leading international human rights instruments, the International Convention on Civil and Political Rights (herein ICCPR) expressly allows for derogation in situation of public emergency threatening the life of the nation.⁵⁰ This must however, be strictly in compliance with relevant laws in order to prevent abuse and arbitrariness by the government.⁵¹ The justification for derogation arguably appears to consider national interest to be of paramount importance than the rights and civil liberties of the citizens. Since both are constituents of every modern state, whatever therefore may be the threat to the life of a nation, it should not be considered enough justification to derogate on the rights of its citizens. This is because the life of a nation cannot be separated from the general wellbeing and decent treatment of its citizens. A very high standard requirement was therefore set by the UN Human Rights Committee in its General Comment on Article 4 of the ICCPR before derogating on any of its provisions. It is stated in the comment that:

... in addition to the provisions in article 4 and 5, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if, and to the extent that, the situation constitutes a threat to the life of the nation.⁵²

Compared with international humanitarian law, human rights law appears less preferred in situations of armed conflicts. It does not however mean that it is completely irrelevant. To the extent that it resists derogation, it perfectly complements humanitarian law. In spite of this shortcoming, human rights practice by nations of the world forms the bench mark by which the civility of any nation is assessed.

⁴⁹. Oraa, (n46) 25.

⁵⁰. Article 4(1) of the ICCPR. (The Covenant was Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49). See also Article 27 of the African Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

⁵¹ Droege, (n39)318.

⁵². UN Human Rights Comment, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights), 24 July 2001.

Development in this field of law has been positively rapid since 1945 following the adoption of the United Nations Charter and subsequently, the Universal Declaration of Human Rights in 1948 among others.

Initially, obligations under human rights law basically foist on States and not individuals⁵³ even though individuals are the right bearers. This to a larger extent accounts for the vagueness and shrewdness in the application and realization of human rights' norms notwithstanding the fact of their clarity in instruments.⁵⁴ The limitation of human rights norms is more glaring in non-international armed conflicts where non-State elements are actively involved. It was believed that non-state parties would not be bound by international human rights treaties since they are not state entities to which treaty obligations under human rights attach. This however, has since changed with the recognition of individuals and insurgent groups as legal entities with rights and obligations under international law.⁵⁵ Consequently, violation of the human rights of individuals during armed conflicts attaches individual criminal responsibilities on the individual violator(s) under international humanitarian law and human rights law norms.

Human rights law is, unarguably, an imperative in all civil societies of our time. Even though it is not necessary to recognize new set of rights or a re-definition of the existing rights in favour of victims of armed conflict, the one thing that is however, urgently desirable, is, "specific rules and clear guidelines to apply existing rights."⁵⁶ This is an imperative if these rights must have meaning and positively improve the dignity of man at all times and in all situations.

c. Under International Criminal Law.

Grave breaches of international humanitarian law and international human rights law constitute crime under international law. To ensure that the rights of victims of armed conflict are not bare and more particularly to end impunity on the parts of perpetrators, the criminalization of certain breaches of international law became necessary thereby establishing direct and individual criminal responsibility.

Serious violations against international humanitarian law and international

⁵³. Odello, (n43) 28.

⁵⁴. Ibid.

⁵⁵. M N Shaw, *International Law*, (6th edition Cambridge University Press, 2008) 245 and 257. See also Oji, *op cit*, p 105.

⁵⁶. Odello, (n43) 29.

human rights law are regulated by international criminal law. Individual criminal accountability has been recognised by international criminal law as a norm.⁵⁷ International criminal law is a body of international rules which proscribe certain categories of conduct and make those who engage in them personally liable.⁵⁸ In this category are breaches that are considered war crimes⁵⁹ and crimes against humanity,⁶⁰ notwithstanding the conflict paradigm.⁶¹ Even before the establishment of the International Criminal Court (herein ICC), the *ad hoc* tribunals in Yugoslavia⁶² and Rwanda⁶³ provided for direct criminal responsibility,⁶⁴ and later the Special Court for Sierra-Leone (herein SCSL).⁶⁵ The ICTY, ICTR and the SCSL⁶⁶ were neither established to try non-criminal conducts nor ordinary violations of international law

⁵⁷. International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights Office to the High Commissioner, New York and Geneva, 2011, 74. Available at: <http://Ohchr.org/.../HR_armed_conflict...> accessed on 24/4/2019.

⁵⁸. A Cassese, *International Criminal Law*, (2nd edn Oxford University Press, 2008) 3.

⁵⁹. Rome Statute of the International Criminal Court, Article 8.

⁶⁰. Ibid, Article 7.

⁶¹. In the case of *Prosecutor v. Tadic*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October, 1995, paras 74-75. The Appeals Chamber held inter alia: “The Prosecutor makes much of the Security Council’s repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to “other violations of International Humanitarian Law,” as expression which covers the law applicable in internal armed conflicts as well.” The Extraordinary African Chambers: Hybrid Court to that tried former dictator *Hissène Habré* of Chad charged for the under-listed offences which, beyond any shadow of doubt are grave breaches of the Geneva Conventions and human rights law provisions:

- The practice of murder, summary executions, and kidnapping followed by enforced disappearance and torture, amounting to crimes against humanity, against the Hadjerai and Zaghawa ethnic groups, the people of southern Chad and political opponents;
- Torture; and
- The war crimes of murder, torture, unlawful transfer and unlawful confinement, and violence to life and physical well-being.

⁶². Established for the prosecution of persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia since 1991, via Security Council res. 827 of 25 May 1993.

⁶³. Established for the prosecution of persons responsible for genocide and other serious violations of IHL committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January and 31 December 1994, via Security Council res. 955 of 8 November 1994.

⁶⁴. See ICTY Statute, Article 7 (1) and ICTR Statute, Article 6 (1). Both Articles similarly provide that: ‘A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in article ... of the present Statute, shall be individually responsible for the crime.’

⁶⁵ Special/Extraordinary African Chambers in Senegal which tried *Hissene Habré* of Chad is one excellent example. See the Rome Statute of the ICC, Article 4 paragraph 2 which provides that, ‘The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.’

⁶⁶. The Special Court for Sierra-Leone was established by an Agreement between the United Nations and the Government of Sierra-Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000. According to article 1(1) of the Statute of the Court, the Court is to “... prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”

below the threshold of grave breaches. They were established as a response to the brazen barbarity and savagery brutality resulting in the desecration of the dignity of the human person in the internal armed conflicts which took place in these countries.

Jurisdiction over these crimes is exercised primarily by domestic courts⁶⁷ under normal circumstances, that is, where the criminal justice system of the country concerned, is well developed and the political will of the leader demonstrate the resolve to punish violations. This municipal jurisdiction is complemented by the International Criminal Court (the World's Criminal Court)⁶⁸ which is specially designed and equipped to try perpetrators of heinous crimes that offend the sensitivity of the international community.⁶⁹ Usually, the ICC exercises jurisdiction based on referrals by States who are unable or unwilling to prosecute.⁷⁰ It may also receive referrals from the Security Council, the prosecutor may also issue same *suo moto*.⁷¹

Articles 7 and 8 of the Rome Statute of the International Criminal Court provides for the subject matter jurisdiction of the ICC. Article 8 of the Statute define war crimes to mean,

- a. Grave breaches of the Geneva Conventions of 12 August 1949;
- b. Other serious violations of the laws and customs applicable in international armed conflict; and
- c. In the case of an armed conflict not of an international character, serious violations of the laws and customs applicable in such conflict.⁷²

Article 7 on the other hand define crimes against humanity for the purpose of the Rome Statute to mean “any act committed as part of the wide spread or systematic attacks directed against any civilian population, with knowledge of the attack.” Some of the crimes under this category of breaches are ‘murder; extermination;

⁶⁷. This is provided in the Statute of the ICC, Article 1 and paragraph 10 of the Preamble to the ICC Statute. See O Soler, ‘Complementary jurisdiction and international criminal justice,’ (March 2002) Vol. 84 No 845, *International Review of the Red Cross* 148. See also M Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity,’ (2003) Vol.3, *Max Plank UNYB* 592.

⁶⁸. Ibid.

⁶⁹. In principle, the ICC is seen as the successor of the ICTR and ICTY.

⁷⁰. Statute of the ICC Article 1 provides *inter alia*: ‘An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.’

⁷¹

⁷². Crimes in these categories include: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful confinement, taking of hostages, declaring that no quarter will be given, using civilians as shield, etc.

enslavement; deportation or forceful transfer of population....⁷³ It is important to note that under international customary law, crimes against humanity do not require a connection to an armed conflict.⁷⁴

Direct individual criminal liability ‘does not necessarily equate with physical perpetration. In some instances, the perpetrator may not have physical contact’ with the victim.⁷⁵ Article 25 (3) (a)-(f) of the Rome Statute makes elaborate provisions on direct criminal liabilities that would confer jurisdiction on the Court to include situations where that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempt to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.’

Beyond the criminalization of grave breaches against international

⁷³. See the Statute of the ICC, Article 7 (1) (a)-(k).

⁷⁴. See International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights Office to the High Commissioner, New York and Geneva, 2011, 76. Available at: <http://Ohchr.org/.../HR_armed_conflict...> Accessed on 24/4/2019. See also *Prosecutor v. Dusko Tadic* IT-94-I-T, Judgment (7 May 1997) Para 141.

⁷⁵. P V Sellers, ‘The Protection of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation’ 14. Available at: <www2.ohchr.org/.../Paper_Prosecution_o...> accessed on 24/4/2017.

humanitarian law and international human rights law under international law, the international criminal court is, for the international community, a permanent world's penal adjudicatory body against violators of these norms resulting in heinous crimes. Criminal prosecution has punishment as its end. In this case the victim of crime is only satisfied that the offender has been punished by the law⁷⁶ and almost always without more, thereby leaving the victim with nothing to alleviate the harm suffered. Jurisprudentially, a conduct becomes a crime where, apart from being contrary to prohibited conducts,⁷⁷ it inflicts injury on its victim one way or the other. It would therefore not be adequate justice if the culprit is only punished for his criminal acts without more.⁷⁸ Balancing the dictates of penal laws with addressing the injury inflicted on the victim is not only restorative in outcome but implants genuine confidence and trust in victims of breaches that the penal system would meet the true ends of justice.

Emerging trends in both international and domestic criminal justice systems point to the need to achieve a balance between the punishment of the offender and the rehabilitation of the victim. This is an imperative for any society that is determined to respond to the demands of social security and cohesion using the criminal justice approach.⁷⁹ There should be a shift from dependence on the sentencing policy which places heavy reliance on the machinery of punishment to the neglect of the victim's remedy.⁸⁰ In Nigeria for instance, the two major procedural laws before now support this position.⁸¹ Legislative mechanisms and institutional structures that support this are lacking in a majority of the third world countries. In 2014, Kenya took the bold step and enacted the Victim Protection Act.⁸² According to Oji,⁸³ this vacuum in statutory provisions 'diminishes public interest and confidence in the administration of criminal justice,' thereby discouraging victims from approaching the courts and the perpetrators of crimes move freely instead of being made to account for their dastard acts. The reluctance and apathy by victims to invoke the criminal process against

⁷⁶. E A Oji, 'Compensation for Victims of Crimes in the Nigerian Criminal Justice System: the Need to Follow International Trends,' (2015) vol. 18 No. 1, *The Nigerian Law Journal* 120.

⁷⁷. *Ibid* 121.

⁷⁸. A Olatubosun, 'Compensation to Victims of Crime in Nigeria: A Critical Assessment of Criminal-Victim Relationship,' (2002) volume 44 No. 2, *Journal of the Indian Law Institute* 208.

⁷⁹. Oji, (n76) 121.

⁸⁰. Olatubosun, (n78) 205.

⁸¹. See the CPA section 255, the CPC sections 356-357, the ACJA 2015 sections 319(a) and 321(a).

⁸². No. 143 (Acts No. 17) of 2014.

⁸³. Oji, (n3)p121.

offenders may make the victims and the community to engage in self-help.⁸⁴

This, however, is not the case with the international criminal justice system, especially with the Rome Statute that established the ICC. Even before the creation of the Court, the United Nations had in 1985 issued a declaration titled, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁸⁵ It proposed four basic principles *inter alia*: of access to justice; restitution; compensation; and assistance.⁸⁶ These translate to what one may refer to as indices of a complete criminal justice, that is, punitive on the offender and restorative on the victim.

Compensation and restitution are compatible concepts that aim at the restoration of the liberty and family life of the victim of crime among others.⁸⁷ The jurisprudence of the ICC in relation to the welfare of victims of crime revolves around the foregoing, and it is a matter of law with the establishment of the Trust Fund for Victims in Article 79 of the Rome Statute.⁸⁸

Full restoration of the victim back to his position prior to the commission of the crime where possible, is one of the targets of the international criminal justice system and this should be emulated by domestic criminal justice systems. Where however, full restoration is not achievable, compensation may be awarded in favour of the victim or his surviving relatives if the victim is no more.⁸⁹ Funds for this purpose are paid into the Trust Fund for Victims.

In the Nigerian criminal justice system, award of compensation⁹⁰ and the quantum has been a subject for judicial pronouncements thereby establishing the fact that our courts are enjoined to award compensation.⁹¹ Arguing for a complete and

⁸⁴. Olatubosun, (n78) 208.

⁸⁵. Otherwise known as Victims Declaration. UN Doc. AREs/40/34/ (1985). Available at: <www.justice.gov.za/.../2006_compendium> accessed on 24/4/2019.

⁸⁶. See Oji, (n3) 143-4.

⁸⁷. *Ibid* 128.

⁸⁸. In Germany, after the Nazi slavery, German Companies that committed crimes against their former Nazi's slaves developed a Fund to pay compensation for their former Nazi's slaves than being confronted with many law suits. The agreement to establish a Fund was called 'Princez Agreement' after the case of *Princz v. Federal Republic of Germany*, 26 F. 3d 1166, 1176-85 (D.D. Cir. 1994).

⁸⁹. Oji, (n3) 127.

⁹⁰. See the case of *Tsofoli v. Commissioner of Police*, (1971) NSCC 330 at 333, where the said that: '...in every case, the matter of compensation is governed by statute, and there is no inherent power in any court to award compensation,' cited by Oji, *ibid* 143.

⁹¹. See the case of *Ngwu Kalu v. The State* (1988) 4 NWLR 503 at 513 where the court remarked that 'it has to be emphasized that in these cases of murder, justice must also be done to the victim whose life has been cruelly cut short. Indeed, this Court has said it on several occasions.' Lamenting the

balanced criminal justice for victims in Nigeria, Oji,⁹² stressed that:

The judiciary should be proactive and use all available legislation to award victims of crime adequate compensation so that the victim gets something out of the criminal justice system and not just the ‘satisfaction’ of seeing the offender punished.

The Kenyan approach using specific legislation to take care of the interest of victims of crime is commendable. Section 15 of the Kenyan Victim Protection Act expressly provides that a victim has a right to restorative justice. Award of reparation is no longer strange to the African criminal justice system following the conviction of *Hissene Habre* of Chad by the Extraordinary African Chambers on the 30 May 2016. On the 29 July 2016, barely two months afterwards, substantial reparation was awarded to victims by the court against *Hissene*.⁹³

In addition the rights of victims of crime to participate in the trial and to protection of their lives together with their witnesses are enshrined in the Rome Statute in Article 68. The article further provides for the mechanisms for the realisation of these rights. Paragraph one provides that the victim shall be entitled to protection generally. It states that the Court shall take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses. Usually the court takes into consideration relevant factors such as the age, gender, health, nature of the crime among others in ensuring the safety and wellbeing of victims.⁹⁴

III. The Interplay between the Norms

Principles of territorial sovereignty in the application of human rights found its support in the traditional view that human rights law can only be applied by a state within its territorial limits. Most human rights provisions do not only protect citizens of a particular state but everyone who qualifies as a right bearer irrespective of

imperativeness of compensation to victims of crimes, Justice Aniagolu JSC in the case of *Nwafor Okegbu v. The State*, (1979)1 SC 1, stated that, ‘where else would this be more appropriate than a tragic case like this in which a young body with a promising future was unceremoniously sent to the grave by hoodlums.’

⁹². Oji, (n76) 143.

⁹³. SAE Hogestol, ‘The Habre Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity’ (October 2016) Vol. 38 No.3, *Nordic Journal Of Human Right* 147.

⁹⁴ The Statute of the ICC provides for the establishment by the Registrar of the Court, the ‘Victims and Witnesses Unit’ in article 43(6) of the ICC Statute. The Unit is to advise the prosecutor and the court on appropriate protective measures, security arrangements, counselling and assistance.

citizenship. Even in such situations, reference would be made to the particular instrument the right in question is contained. For international humanitarian law, the issue of territorial limitations in its application is of no moment, the obligation and protections contained in this body of rules would apply whenever and wherever there is an outbreak of armed conflict.

The old notion that human rights law only addresses the interest of group of persons as opposed to IHL on individuals might account for its territorial proclivity. Whatever it may be, the complexities of modern armed conflicts have broken this wall of disparity in the sphere of applicability thus down playing on their territorial nuances.⁹⁵ Thus, its sphere of application is now extra-territorial just as international humanitarian law. International Criminal Law on its part criminalizes violations of the above two streams of rules that are considered gross in magnitude and effect in relation to human dignity and general human sensibility. Such violations are either punished by municipal courts or by the ICC through its complementary jurisdiction of local courts to punish heinous crimes; or by a specially arranged court or tribunal properly constituted by the appropriate constitutive instrument. For example, the Extraordinary African Chambers, a hybrid Court established to try the former Chadian dictator, *Hissène Habré*⁹⁶ who was charged for grave breaches of the Geneva Conventions and human rights law provisions.⁹⁷

His offences ranged from the practice of murder, summary executions, and kidnapping followed by enforced disappearance and torture, amounting to crimes against humanity, against the Hadjerai and Zaghawa ethnic groups, the people of southern Chad and political opponents; to torture; and to war crimes of murder, torture, unlawful transfer and unlawful confinement, and violence to life and physical well-being.⁹⁸ Interestingly, the Extraordinary African Chamber trial of Hissene was conducted ‘unbehalf of Africa.’ He is the first African leader to be convicted before a domestic court of another country.⁹⁹

⁹⁵ C Droege, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) Vol. 40 No. 2, *Israel Law Review* 327.

⁹⁶ *Prosecutor v Hessein Habre* Chambre Africaine Extraordinaire D’Assises. Available at <<https://ihl-data-bases.icrc.org/applic/ihl/ihl-nat.nsf/caselaw>>. Accessed on 9/12/2019.

⁹⁷ The summary of the charges against Hissene were: crime against humanity; war crimes; and torture, committed during his eight years rule (1982-90).

⁹⁸. All these were considered grave breaches of international humanitarian law.

⁹⁹. Hogestol, (n93) 147.

Earlier, the Special Court for Sierra-Leone was established by an Agreement between the United Nations and the Government of Sierra-Leone.¹⁰⁰ According to article 1(1) of the Statute of the Court, the Court is to:

... prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

For an effective protection measures for victims of armed conflicts, the interplay or complementarity of these legal regimes is not only desirable but imperative. There is no human rights provision considered fundamental that cannot be found in IHL provisions and the statute of the ICC.

Overlap between International Human Rights Law and IHL can be seen in their basic provisions. For example, the taking of human life by extra-judicial means is prohibited by both regimes and the statutes of the ICC and where this happens those responsible are individually held accountable. The right to life has attained a peremptory status of customary international law prohibiting the taking of human life under circumstances that are not justifiable in law.¹⁰¹ As the lawyers' law, IHRL has positively influenced almost every field of law with its basic protective norms.¹⁰² For their basic nature and relevance to human existence, derogation is not allowed on some of them at all. Where allowable, it must meet two conditions. Firstly, it must strictly comply with relevant laws under which it may be justified and secondly it must be shown to be in the best interest of the right bearer.¹⁰³ For example, the Committee against Torture, places obligation on the State parties to '...recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict....' Events and circumstances are not to constitute impediments to the enjoyment of the right to freedom from torture or degrading treatment.¹⁰⁴ Other rights

¹⁰⁰. The Court was established pursuant to Security Council resolution 1315 (2000) of 14 August 2000.

¹⁰¹. J M Henckaerts, 'Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (March 2005) Vol. 87 No.857, *International Review of the Red Cross* 195.

¹⁰². Ibid.

¹⁰³. H J Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) Vol.86 No.856 *International Review of the Red Cross*, 791.

¹⁰⁴See ICCPR, Art 7 and ACHPR Art. 5

in this category include the right to life,¹⁰⁵ arbitrary arrest and imprisonment¹⁰⁶ right to dignity¹⁰⁷, right to family¹⁰⁸ *etcetera*.

This right has its origin in the United Nations Universal Declaration of Human Rights of 1948 wherein article 5 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The International Covenant on Civil and Political Rights, believed to be a codification¹⁰⁹ of the civil and political rights contained in the Universal Declaration, simply reproduced the definition of torture by the 1948 Declaration and added a prohibition against scientific or medical experimentation without the consent of the victim.¹¹⁰ The two definitions are fluid and lacking in clarity for failing to state what constitute torture. However, the Convention against Torture,¹¹¹ for short, a human rights instrument contains a more detailed definition¹¹² which was adopted in part by the International Tribunal in *Prosecutor v Kunarac, et al.*¹¹³ The Tribunal in attempting a distinction on the meaning of torture under the two norms held the following to constitute torture under international humanitarian law:

The infliction, by act or omission, of severe pain or suffering whether physical or mental; the act or omission must be intentional; the act or omission must aim at obtaining information or a confession, or at punishing, intimidating or accepting the victim or a third person, or at discriminating on any ground against the victim or a third person.

Both norms aim at guaranteeing the dignity of the human person at all time. Armed conflict situation is not an excuse for a State or a party to the conflict to subject any one to torture in whatever form because the obligation to respect the dignity of the human person inures at all time. The ICC which is established to try crimes against international law predominantly committed during armed conflicts similarly define

¹⁰⁵ Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by the General Assembly Resolution 39/46 of 10 December 1984. The Convention entered into force on 26 June 1987, in accordance with article 27 (1).

¹⁰⁶ The CAT, Article 1 contains the definition of torture

¹⁰⁷ IT-96-23 and 23/1-A-T (22 February 2001)

¹⁰⁸ Statute of the ICC, ARTICLE 7 (2) (e)

¹⁰⁹. Oraa, (n46) 25.

¹¹⁰ See ICCPR, Art. 7 and ACHPR Art. 5.

¹¹¹. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. The Convention entered into force on 26 June 1987, in accordance with Article 27 (1).

¹¹². The CAT, Article 1 contains the definition of torture.

¹¹³ IT-96-23 and 23/1-A-T (22 February 2001).

torture to mean “...the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.¹¹⁴

Far back in 1863 torture was declared a non-military necessity. Article 16 of the *Lieber* Code of 1863 in addressing the issue of torture provided that “Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge ... nor of torture to extort confessions....” A violation of this ambivalent norm carries criminal consequences as same is considered to be a grave breach against international humanitarian law.¹¹⁵ Education of the relevant agencies and authorities on the contents and tenets of IHL is usually undertaken in peace time in order to ensure effective application and maximum benefits by all concerned in the event of an outbreak of armed conflict. Once there is an outbreak of armed hostilities that meets the threshold of articles 2 and 3 of the four Geneva Conventions, the rules of IHL would apply and continue to apply even after actual armed hostilities until every single victim of the situation have been restored to the *status quo* where possible and practicable.¹¹⁶ However, because the United Nations Charter abhors the use of force and conducts that are inconsistent with the letters and spirit of the Charter touching on world peace and security, Common Article 2 armed conflicts are now very rare.¹¹⁷

Vulnerable groups, especially children and women, both humanitarian law and human rights law regimes make adequate provisions for their protections and welfare. Article 4(3) paragraphs a-e of AP II provide for safeguards of their rights. Paragraph ‘c’ which is considered a direct replica of article 38 of the Convention on the Rights of the Child¹¹⁸ and articles 1 and 2 of the Optional Protocol¹¹⁹ to the Convention particularly prohibits the recruitment of children by parties to an armed conflict.

¹¹⁴ Statute of the ICC, article 7(2)(e).

¹¹⁵ See Statute of the ICC, Article 8(2) (a)(ii).

¹¹⁶ GC III, Articles 118 and 119.

¹¹⁷ United Nations Charter, Article 2(4).

¹¹⁸ Convention on the Rights of the Child. The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, in accordance with article 49.

¹¹⁹ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts. The Protocol was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, and entered into force on 12 February 2002.

Recruitment of under aged children, taken into account the age benchmarks in the above instruments and the Statutes of the ICC including deportation of civilian population are prohibited and therefore criminalized under articles 7(1)(d) and 8(b) (xxvi) & (e) (vii) of the ICC Statutes.

Sexual exploitation of women is deprecated by both humanitarian law and human rights law and is termed a grave breach of these norms and thereby punishable under articles 7(1)(g) and 8 (2)(a)-(f) of the Rome Statutes as crime against humanity and war crime respectively. This cannot be considered mere repetition of rights by these instruments especially when viewed against the backdrop of their fundamental nature. A cursory look at the provisions of articles 7 and 8 of the Rome Statute show that the acts criminalized therein are grave violations of basic and fundamental rights that are contained in human rights instruments. A numeration of some of these basic rights has been achieved by humanitarian law instruments.

The implications of these mix and interplay are threefold. In the first place, mankind is distinguishable from other lives because they possess certain rights that are by their origin and nature innate or inborn and therefore should not be separated from him. Secondly, these rights must not be denied under any circumstances except in circumstances strictly allowed by law if man must retain his dignity of humanity. Allowable exceptions or limitations must conform with the law, for example in time of public emergency it must amount to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed, and same must be relaxed as soon as the situation eases¹²⁰ off; and thirdly no legal rule gives rights, they only recognize and guarantee God given rights and freedoms, therefore just as you cannot give what you do not have, it will be criminal for anyone to take away what he has no power to give. This perspective of the natural law theory forms the prop for the universalization and internationalization of human rights. Relativism as a concept does not negate the natural law theory, it emphasizes that the cultural and religious variations of the States should be factored into the human rights movement. Respect, protection and promotion of human rights by all nations of the world have been acknowledged to be one sure way of consolidating on world peace and security just before the end of the WW II by Truman when he said:

¹²⁰. GC III, Article 118.

The Charter of the UN is dedicated to the achievement and observance of human rights and fundamental freedoms, unless we can attain these objectives for all men and women everywhere without regard to race, language or religion one cannot have permanent peace and security in the world.¹²¹

However, the exceptions to this prohibition are contained in relevant national and international penal instruments. For example, a detailed guide to a generally allowable circumstance for derogation is contained in the General Comment of the UN on article 4 of the ICCPR which brings to the fore the imperative synergy between the rules of IHL and that of HRL in the protection of the rights of any-one caught in the web of an armed conflict thus:

During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and 5, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if, and to the extent that, the situation constitutes a threat to the life of the nation.

IV Conclusion

The right to the dignity of the human person has become a marker with which the civility of the nations of the world is assessed. From the Divine law dogmas to Natural law tenets and to the era of legal positivism, the basic rights of individuals stood tall and sacrosanct. In the first two periods, man was considered a being, born with certain rights that their violation, even by the sovereign was forbidden. In legal positivism, enactment of legislation by bodies duly constituted for the purpose becomes the in thing. It separated legal rules from moralities, with the postulation that the two streams flow in distinct parallel courses without meeting. But because there is actually no piece of legislation that is completely devoid of a modicum of morality, the sensitivity and human consciousness in the protection and preservation of the dignity of the human person even in the worst of situations are not only heightened but firmly entrenched in civilized consciences.

Armed conflict is as old as man himself. Through the ages, the notion of protection of the rights of victims of armed conflict was viewed in different light at

¹²¹ H S Truman was the 33rd US President in an address at the San Francisco Conference in 1944?

different times of human civilization. What solely began with the protection of combatants turned prisoners of war witnessed a robust and broadened consideration of all possible victims, whether actively involved in armed hostilities or not in the 1949 four Geneva Conventions and their 1977 Additional Protocols. These treaties considered a perfect reflection of international humanitarian law as of today, represents a combination of two notions, one of a legal nature and the other moral thereby opening an era in which man and the principles of humanity come first.

In 1945 the United Nations Charter was signed. It gave human rights its current name. Though nebulous in its provisions on human rights and fundamental freedoms, it was nevertheless seminal as subsequent developments showed. Consequently, the Universal Declaration of Human Rights was enacted in 1948 which was codified in 1966. In evolution and development, the establishment of the Nuremberg and Tokyo Military Tribunals, the ICTY (1993) and ICTR (1994) provided the necessary impetus toward putting in place a world criminal court and criminal justice system for the international community. This climaxed in the signing of the Rome Statute in 1998. Today, and for the benefit of man and humanity in both peace and armed conflict times, a conflation of these regimes is significantly advancing the avowed dignity of man and the principles of humanity in a depraved world.

DELINERATING AND ADDRESSING THE IMPACTS OF SECTION 171 OF THE NIGERIAN 1999 CONSTITUTION ON THE SECURITY OF OFFICE OF HEAD OF ANTI-CORRUPTION AGENCIES IN NIGERIA

*Ernest Ogwashi Ugbejeh **

Abstract

The paper delineates and addresses the impact of section 171 of the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN) as amended on the security of office of the heads of anti-corruption agencies (ACAs) and the fight against corruption in Nigeria. One of the key pillars for securing the independence of ACA is securing the tenure of office of the ACAs through appointment and removal procedures. Such protection enables the head to effectively discharge his function without fear or undue influence. To guarantee this, the anti-corruption law usually provides for the procedures for appointment and removal of head of ACA. Where the appointing authority of the head of ACA is the President, a confirmation of the appointment by the Senate is required. The appointment of Mr. Ibrahim Magu under section 171 CFRN after two rejections of confirmation of his appointment by the Senate of the Federal Republic of Nigeria upon recommendations by the President calls for assessment of section 171CFRN in order to delineate and address the impacts of this section on the security of office of the heads of ACAs in particular and the ACAs in general in Nigeria. Therefore, this paper using content analysis and case study approaches examines the provisions of section 171 of the Constitution, the impact of the section on appointment of heads of ACAs. The paper finds that section 171 is an erosion of the security of office of the ACA and independence of the ACA in Nigeria. In offering the ways forward, the paper recommends among others things, the amendment of section 171 to include the head of ACA among appointments that require the confirmation of the Senate and a clear provision stating that appointment in an acting capacity made by the President should be for a maximum of one year and not renewable. Also, the removal of head of ACA at all times should be subjected to the confirmation of the Senate.

I. Introduction

Corruption is a global challenge and there is no State that is exempted from its scourge. The fight against corruption is of international concern because of its trans-boundary and far reaching effects. Thus, one of the main anti-corruption strategies accepted globally is the establishment of independent and specialized anti-corruption agency (ACA). Nigeria has two specialised anti-corruption agencies: Independent Corrupt Practices and Other Related Offences Commission and Economic and Financial Crimes Commission (EFCC). These ACAs were created by an Act of the National Assembly and established in 2000 and 2004 respectively. In spite of their existence, there is a general belief that their efforts have not succeeded in reducing the high level of corruption in Nigeria. This belief is affirmed by the Transparency International and other rating agencies' reports classifying Nigeria consistently as one of the most corrupt nations in the world.

The effectiveness of any ACA is dependent on the level of dependence and

* Ernest Ogwashi Ugbejeh, LL.B (AAU), LL.M (UNIBEN), PhD Law (UK) is a Lecturer and Head of Commercial Law Department of Faculty of Law, National Open University of Nigeria. A Partner of Lex. Point Solicitors and an Independent Anti-Corruption Consultant.

autonomy the agency enjoys. Thus, it is a major requirements of United Nations Convention Against Corruption (UNCAC) that a State Party should grant to the ACA or ACAs, ‘the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies (ACA or ACAs) to carry out its or their functions effectively and free from any undue influence’.¹ This is a fundamental requirement for the effective operation of any ACA because of the true nature of the phenomenon of corruption, which in many respects equals abuse of power.² In other words, a State such as Nigeria experiencing grand and systemic corruption with deficits in good governance and weak law enforcement³ can only make headway in the anti-corruption battle if there are strong and independent ACAs.

The independence of the ACA entails de-politicization of, and ensuring adequate levels of, structural and operational autonomy of the ACAs,⁴ which can be guaranteed where there exist certain fundamental building blocks.⁵ Securing the tenure of office of the head of ACA is one of the key building blocks towards securing the independence of ACA. The appointment and reappointments of the Chairman of EFCC, Magu by the President Buhari after rejections of Magu’s confirmation by the Nigerian Senate calls for the interrogation of section 171 of the 1999 CFRN (as amended) to determine its impact on the security of office of head of ACAs in Nigeria.

It is against the above background that this paper seeks to delineate and address the impact of section 171 of the 1999 CFRN on the security of office of head of anti-corruption agencies in Nigeria. In this endeavour, the paper addresses the following key areas: Anti-Corruption Agency, Appointment and removal of head of ACA, Magu’s confirmation rejections, examination of section 171 of 1999 CFRN, the impacts of section 171 CFRN in the fight against corruption in Nigeria and how to address the impacts.

II. Anti-Corruption Agencies (ACAs)

¹ Article 6(2) of UNCAC.

² OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 24.

³ This is one of the major factors why corruption remains unabated in Nigeria. It makes engaging in corruption rewarding with little risk: there is little or no risk of being apprehended, prosecuted and sentenced.

⁴ Ibid, (n 1).

⁵ Such as financial autonomy, firm legal basis, adequate investigative power, etc.

An ACA relates to a separate, permanent government agency whose primary function is to provide centralized leadership in core areas of anti-corruption activity. The core functions of the agency globally include receiving and responding to complaints; intelligence gathering, monitoring, and investigation, prosecutions and administrative orders; research, analysis, and technical assistance; ethics policy guidance, compliance review, and scrutiny of asset declarations; and public information, education and outreach.⁶ ACAs are government agencies set up primarily to combat corruption using the relevant anti-corruption legislations. There is a requirement of both legal and institutional strategies to effectively combat the menace of corruption. The enactment of anti-corruption law and formulation of policies requires ACAs for their implementations. An ACA ‘is a separate, permanent government agency whose primary function is to provide centralized leadership in core areas of anti-corruption activity’.⁷ Therefore States are required to establish an ACA or ACAs.

There are international and regional legislations that provide for the establishment of anti-corruption institution. UNCAC in Article 6 provides that:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate that prevent corruption by such means as:
 - (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
 - (b) Increasing and disseminating knowledge about the prevention of corruption.⁸

Similarly, African Union Convention on Preventing and Combating Corruption (AUCPCC), in Article 5(3) requires States to adopt legislative and other measures to ‘establish, maintain and strengthen independent national anti-corruption authorities or agencies’ and Article 20(5) provides that States Parties are required to ‘ensure that national authorities or agencies are specialized in combating corruption and related

⁶ See (n3) 4

⁷ Office of Democracy and Governance, *Anticorruption Agencies (ACAs): Anti-corruption Program Brief* (UNSAID, 2006) 5.

⁸ Article 6(1) (a) and (b) of the UNCAC.

offences by, among others, ensuring that the staff are trained and motivated to effectively carry out their duties.'

Also the Southern African Development Community (SADC) Protocol against Corruption provides that amongst other preventive measures "an obligation to create, maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption."⁹ Inter-American Convention against Corruption made a call for "oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts."¹⁰ These conventions underscore the international obligation of States to ensure institutional specialisation in the area of corruption. Most of these conventions have either been domesticated or reenacted with little or no variation by State Parties. These conventions require a State Party to establish an ACA where none exists and such a State Party has the option of establishing one or more ACAs and where there is in existence an ACA, to maintain and strengthen the same.

Using the UNCAC requirements as a basis, ACAs are grouped into one of three categories: Preventive anti-corruption agency model under Article 6; Law Enforcement anti-corruption agency model under Article 36; or Prevention and Law Enforcement anti-corruption agency or combined anti-corruption agency model where both Articles 6 and 36 are fused into one agency.¹¹ The research examines them in turn.

- (i) Prevention model: Article 6 provides for the establishment of an institution that prevents corruption.
- (ii) Law enforcement model. Article 36 provides for the establishment of an institution that combats corruption through law enforcement. In States that adopt this model, the ACA has the powers to prosecute corruption cases and act as the lead agency in combating corruption.
- (iii) The combined agency model which is a combination of Articles 6 and 36 (prevention and law enforcement models). Under the combined agency model, the ACA has the power and duty to prevent corruption and combat corruption

⁹ Article 4, SADC, adopted: 14 August 2001; entered into force: 6 July 2005.

¹⁰ Paragraph 9 of Article III, adopted: 29 March 1996; entered into force: 6 March 1997

¹¹ It can also be called a combined anti-corruption agency. OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 31.

through law enforcement simultaneously. It is always the lead anti-corruption agency in such States regardless of the national strategy.¹²

UNCAC and the AUCPCC lay down international standards and basic benchmarks for creating specialised ACAs in a State.¹³ The main benchmarks include: independence and autonomy, specialised and trained staff, adequate resources and powers.¹⁴ However, these conventions failed to offer a blueprint for setting up and administering a specialised anti-corruption institution. There no single best model or a universal type of an ACA recommended, unlike the provisions relating to the elements of corruption offences that are considerably more precise.¹⁵ Consequently, the issue arising from this provision is whether a separate ACA under UNCAC requires the preventive, investigative and prosecuting functions to be housed in one agency.¹⁶ Thus, many ACA models have evolved over the years but there is no universally accepted ACA model.¹⁷ In some States, a separate ACA is created; some States give the anti-corruption mandate to an office or commission;¹⁸ others create a specialised unit within an established law enforcement agency that deals with corruption related matters.¹⁹

To attain the goals of establishing anti-corruption body or bodies in each State Party, the conventions further requires each State Party to grant the established ‘body or bodies the necessary independence, ... to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. This includes securing the tenure of office of the head of the ACA.

¹² Ugbejeh, E. O., ‘The Dilemma of Anti-Corruption Agencies in Nigeria’ 1 NOUN Journal of Legal Studies, (2014) pp 33.

¹³ OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 20.

¹⁴ *ibid.*

¹⁵ *ibid.* 24.

¹⁶ Nicholls C, *et al*, *Corruption and Misuse of Public Office* (2nd edn, Oxford University Press 2011) Pg 393. This issue is germane, given the provision of Article 36 of UNCAC that places the same obligation on States Parties as regards law enforcement.

¹⁷ See Heilbrunn, J. R. *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption* (World Bank Institute 2004) and OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 21.

¹⁸ In Ghana, it is the Commission for Human Rights and Administrative Justice; in Namibia, Papua New Guinea, Vanuatu and the Philippines it is the Office of the Ombudsman; in Uganda, it is the Inspector General of Government; and in South Africa it is the Public Protector.

¹⁹ Example is the Serious Fraud office in England and in Spain it is the *Fiscalía Anticorrupción*

a. The Anti-Corruption Agencies in Nigeria

The two main ACAs in Nigeria are the ICPC and the EFCC. The ACAs were established using the combined model.²⁰ The ICPC was established by the ICPC Act.²¹ One of the duties of the ICPC is to prevent corruption.²² The EFCC Act created the EFCC and empowers the commission, among other duties, to prevent economic and financial crimes established under the Act and any other law or regulation relating to economic and financial crimes.²³ The primary function and duty of ICPC is to prevent corruption and misuse of office especially in the public sector through preventive measures. The aim of EFCC is to prevent all forms of financial crime including corrupt practices through preventive measures. Other relevant agencies in Nigeria that contribute to the prevention of corruption include Bureau of Public Procurement (BPP),²⁴ Code of Conduct Bureau,²⁵ the Fiscal Responsibility Commission (FRC) which is responsible, among other things, for developing and publishing financial reporting standards to be observed in the preparation of financial statements of public entities in Nigeria,²⁶ and Nigeria Extractive Industries Transparency Initiative (NEITI).²⁷ Their mandates include preventing and combating corruption in their different areas of operation.

III. Securing the Office of the Head of ACA via Appointment and Removal Procedures

²⁰ This model allows the combination of two or more anti-corruption pillars in one agency. These pillars are prevention, investigation, prosecution, asset recovery and international cooperation.

²¹ Section 2 of Corrupt Practices and Other Related Offences Act Cap C31, Laws of the Federation of Nigeria 2004.

²² Section 6(a-f) provides for these duties. The investigative duty entails receiving and investigating reports of corrupt offences as created by the Act. Enforcement duty requires the commission in appropriate cases to prosecute the offender(s). The preventive duty is to examine, review and enforce the correction of corruption-prone systems and procedures of public bodies, with a view to eliminating or minimizing corruption in public life. Preventive duty also extends to education and enlightenment of the public on and against corruption with a view to enlisting and fostering public support for the fight against it.

²³ Sections 6 and 42 of the EFCC Act. These other laws include the Banks and Financial Institutions Act 1991, Miscellaneous Offences Act, the Money Laundering Act 1995, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994, the Advance Fee Fraud and Other Fraud Related Offences Act 1995, and the Money Laundering and (Prohibition) Act 2011 (as amended).

²⁴ This commission is created by PPA 2007. The core objectives of BPP include economic efficiency, providing fair competition for all, in other words, a level playing field for all bidders, ensuring that government receives value for money and maintains transparency in public procurement: Section 4 of the Act.

²⁵ The Code of Conduct Bureau and Tribunal Act, formerly Cap 56, LFN 1990, now Cap. C15 LFN 2004.

²⁶ Financial Reporting Council Act.

²⁷ Established by NEITI Act 2007 to implement the provisions of the Act. The main objectives of the NEITI include ensuring due process, transparency and accountability and eliminating all forms of corrupt practices in the extractive industry.

The two areas necessary for securing the office of the head of ACA are appointment and removal requirements and procedures. These are examined below.

a. Appointment of Head of Anti-Corruption Agency

The United Nations Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC) do not provide for and no consensus exists as to the qualifications needed for appointment of the head of an ACA. Some Jurisdictions require legal qualifications or public service experience while others provide for minimum educational qualifications without restricting appointment to any professional qualifications or public service experience.²⁸ In Nigeria, the ICPC Act requires a retired judge or any person qualified to be a judge of any superior court in Nigeria to be Chairman²⁹ while the EFCC Act requires a retired or serving law enforcement officer with 15 years minimum experience to be Chairman.³⁰

The Chairman of the ACA plays a symbolic role as the head of an anti-corruption institution.³¹ In many ways, the director or Chairman represents a pillar of the national integrity system and the selection process for the head of ACA demands transparency to facilitate the appointment of a person of integrity.³² The appointment of the Chairman by a single political figure, e.g. the President, is not considered a good practice.³³ In Nigeria, the respective Acts place the power of appointment of the Chairman of the ACAs on the President subject to the confirmation by the Senate.³⁴ Whilst these provisions are in principle satisfactory, the effect of section 171(1) of the CFRN undermines their effective application. Section 171(1) of the

²⁸ For instance, in *South African Association of Personal Injury Lawyers v Heath and Ors* (2001) 4 LRC 99, the South African court appointment of a serving judge to head the ACA was held to be a contravention of the principle of separation of power and invalid. However, under similar circumstances, the High Court in Kenya declared the ACA unconstitutional in *Gachiengo and Kahura v Republic* (2000) eKLR; Transparency International, ‘Transparency International 1993-2003: Ten Years Fighting Corruption’ in John Hatchard (ed.) *Cases and Materials Relating to Corruption* (Issue 4 2003) 3.

²⁹ Section 3(4) of the ICPC Act. It provides that the Chairman of ICPC ‘shall be a person who has held or is qualified to hold office as a judge of a superior court of record in Nigeria’.

³⁰ Section 2(1) of the EFCC Act. It provides that the qualification is ‘(ii) ... a serving or retired member of any government security or law enforcement agency not below the rank of Assistant Commissioner of Police or equivalent; and (iii) Possess not less than 15 years cognate experience’.

³¹ Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008).

³² Ibid.

³³ Ibid.

³⁴ Section 3(6) of the ICPC Act and Section 2(3) of the EFCC Act.

Constitution empowers the President to appoint the head of an ACA in an acting capacity, without the requirement of Senate confirmation and without limiting the number of such appointments for an appointee. This has eroded the requirement of confirmation of heads of ACAs and in practice gives the President absolute control over the heads of the ACAs in Nigeria.

b. Removal of Head of Anti-Corruption Agency

It is trite that the fight against grand corruption is a fight against powerful elite, who are organised, powerful and desperate persons in both public and private sectors, determined to kill to retain their ill-gotten wealth and to further their evil acts,³⁵ the access of the ACA to politically and commercially sensitive information about these persons can place the ACA in conflict with their political and economic interests.³⁶ Thus, it is imperative that the head of ACA enjoys security of office by making his or her removal not subject to the whims and caprices of the President, political power or any group but rooted in constitutional procedure. In Nigeria, the EFCC Act offers the President the leverage of sacking the head of the commission and other board members as if they were his temporary servants under probation. The Act provides that:

A member of the Commission may at any time be removed by the President for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct or if the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office.³⁷

The provision gives the President unbridled discretion to remove any member of the commission including the Chairman. Assuming the phrase ‘any other cause’ is to be read *ejusdem generis*, what constitutes ‘misconduct’ is not provided by the Act and what follows: ‘...if the President is satisfied...’ clearly indicates that the draftsmen intended to place the fate of the members and Chairman of the Commission

³⁵ Lumumba, P., ‘Key Note Speech at the Third Corruption Convention’ held at Hotel Africana Ltd, Uganda <<https://www.youtube.co/watch?v=4cbEuwqKKqE>> accessed 9 November 2018.

³⁶ Colin Nicholls C. et al, *Corruption and Misuse of Public Office* (2nd edn, Oxford University Press 2011) 396.

³⁷ Section 3(2) EFCC Act. The removal of the Nuhu Ribadu, former Chairman of the EFCC shortly after the exit of the former President Olusegun Obasanjo from office in 2007. His reappointment after the death of Umaru Yar’Adua in May 2010 when President Goodluck Jonathan assumed office and Ribadu was thereafter replaced by Waziri Farida in May 2008 shows the weakness of this provision.

in the hands of the President. The weak security of office of the head of EFCC has led to the removal of three heads of EFCC under unexplained circumstances before the expiration of their tenure of office.

The first was Nuhu Ribadu who was removed immediately after President Olusegun Obasanjo left office. The next was Mrs. Farida Waziri and the most recent was Ibrahim Lamorde, who on 9th November 2015 was forced to proceed on terminal leave ahead of the formal expiration of his tenure in 2016. Although, Ibrahim Lamorde's removal seems justified as there was a petition against him by George Uboh³⁸ to the Senate of the Federal Republic of Nigeria alleging Lamorde's diversion of N1 trillion worth of recovered assets. The Senate through its Committee on Ethics, Privileges and Public Petition commenced investigation and had invited the petitioner before it suspended its investigation. President Muhammadu Buhari wrote through the Ministry of Justice calling for the investigation of the petition. Thereafter, on 2nd November 2015 the Chairman of the Committee, Senator Samuel Anyanwu, announced that the Committee was to resume the investigation on 10th November 2015.³⁹ Surprisingly, on the 9th November 2015 the Committee announced an indefinite suspension of the investigation.⁴⁰ This petition is still pending before the Senate with little or no progress made in the investigation and public hearing.

In another development, a legal practitioner, Leo Ekpenyong, petitioned the President Muhammadu Buhari alleging an unhealthy relationship between the former EFCC Chairman (Lamorde) and the Minority Leader of the Senate, a former Governor of Akwa Ibom State, (Godswill Akpabio). Leo Ekpenyong expressed lack of confidence in Lamorde in investigating his petition against Godswill Akpabio on allegations of monumental graft when Godswill Akpabio was governor of Akwa Ibom State in Nigeria from 2007 to 2015.⁴¹ Lamorde's removal by mere pronouncement of

³⁸ George Uboh is the Chief Executive Officer of Panic Alert Security Systems (PASS), a Non-Governmental Organisation.

³⁹ Jeremiah A., 'Senate to Resume Probe of EFCC Chairman' <<https://www.naij.com/625420-senate-resumes-investigation-lamorde-alleged-corruption.html>> accessed 10 June 2019.

⁴⁰ Jeremiah, A., 'Senate Postpone Indefinitely Lamorde's Probe' <<https://www.naij.com/632339-senate-stops-probe-sacked-efcc-boss.html>> accessed 10 November 2018.

⁴¹ Ibeh N., 'There is a Romance Between EFCC and Akpabio-Lawyer' <<https://www.naij.com/621454-petitioner-speaks-on-sen-akpabios-case-with-efcc.html>> accessed 10 July 2019.

the President also reveals the level of insecurity of tenure of office of members and the Chairman of EFCC.

The provision of the ICPC Act is quite encouraging and provides that:

Notwithstanding the provisions of the section 3(7) of this Act, the Chairman or any member of the Commission may at any time be removed from the office by the President acting on an address supported by two-thirds majority of the Senate praying that he be removed for inability to discharge the functions of the office (whether arising from the infirmity of mind or body or any other cause) or for misconduct.⁴²

Therefore, there are gaps under the EFCC Act and the Nigerian Constitution that need to be amended to guarantee the security of the tenure of the Chairman and members of the Commission. This will enhance the independence of the Commission.

IV. Section 171 of the 1999 Constitution of Federal Republic of Nigeria

Section 171 of the Constitution empowers the President of the Federal Republic of Nigeria to appoint the head of ACAs in an acting capacity, without the requirement of confirmation by the Senate or any other body, for one year renewable for unlimited times. Section 171 of the CFRN provide that:

- ‘(1) Power to appoint persons to hold or act in the offices to which this section applies and to remove persons so appointed from any such office shall vest in the President.
- (2) The offices to which this section applies are, namely -
 - (a) Secretary to the Government of the Federation;
 - (b) Head of the Civil Service of the Federation;
 - (c) Ambassador, High Commissioner or other Principal Representative of Nigeria abroad;

⁴² Section 3(8) of the ICPC Act. Section 3(7) provides that ‘The Chairman shall hold office for a period of five (5) years and may be reappointed for another five (5) years but shall not be eligible for reappointment thereafter; and the other members of the Commission shall hold office for a period of four (4) years and may be reappointed for another term of four (4) years but shall not be eligible for re-appointment thereafter.

- (d) Permanent Secretary in any Ministry or Head of any Extra-Ministerial Department of the Government of the Federation howsoever designated; and
- (e) any office on the personal staff of the President.
- (3) An appointment to the office of the Head of the Civil Service of the Federation shall not be made except from among Permanent Secretaries or equivalent rank in the civil service of the Federation or of a State.
- (4) An appointment to the office of Ambassador, High Commissioner or other Principal Representative of Nigeria abroad shall not have effect unless the appointment is confirmed by the Senate.
- (5) In exercising his powers of appointment under this section, the President shall have regard to the federal character of Nigeria and the need to promote national unity.
- (6) Any appointment made pursuant to paragraphs (a) and (e) of subsection (2) of this section shall be at the pleasure of the President and shall cease when the President ceases to hold office;

Provided that where a person has been appointed from a public service of the Federation or a State, he shall be entitled to return to the public service of the Federation or of the State when the President ceases to hold office’.

From the above provisions, the head of ACA falls within Head of any Extra-Ministerial Department of the Government of the Federation.⁴³ Subsection 6 of section 171 clearly states that the appointment is at the pleasure of the President. This renders the requirement of confirmation by the Senate under the anti-corruption laws (ACLs) aimed at guaranteeing the independence of the ACAs of no effect. Section 171 of the Constitution erodes the independence of the ACAs.

This provision of section 171 was intended as a stop gap measure before the appointment of a substantive head, but it has no express provision on the number of times such appointment in an acting capacity should be made on one person or whether such person can be reappointed or continue in an acting capacity after

⁴³ Section 171(2) (e).

rejection of confirmation as substantive head by the Senate in line with the requirement of section 3(2) of the EFCC Act and section 3(4) of the ICPC Act. This provision of section 171 in effect empowers the President to appoint head of ACA in Nigeria without confirmation by the Senate and even after refusal of confirmation as has been the case of Magu, Chairman of EFCC.

V. Ibrahim Magu's Confirmation Rejection

President Buhari, in line with previous practice and in compliance with section 2(3) of the EFCC Act, which requires confirmation by the Senate of a candidate nominated by the President to be the substantive Chairman of EFCC, forwarded the name of the acting Chairman of the EFCC, Ibrahim Magu for confirmation as the substantive head. The Senate Rule and Procedure requires that every nominee for confirmation must pass through an integrity check by the DSS. The DSS reported that Magu, who had been acting as the Chairman of EFCC, failed this test. The Senate wrote to the President informing him of the report, expecting a replacement. Instead, the President constituted a panel headed by the A-G to consider the allegations. After the panel's inquiries, which report was not made public, Magu was cleared of all allegations. The President resubmitted Magu for the second time, stating that the allegations were unfounded. The Senate, for the second time wrote to the DSS for a security check on Magu. Interestingly, the DSS responded to the Senate that it stands by the earlier report that Magu failed the integrity test. Based on the report and performance of Magu during the confirmation hearing, the request for Magu's confirmation by the President was refused. This case has raised several issues in the fight against corruption in Nigeria.⁴⁴

In one of such instances, the Nigerian Senate summoned the Chairman of the Presidential Advisory Committee against Corruption (PACAC) for expressing a legal opinion on the rejection of Magu as the substantive Chairman of EFCC. Sagay had said that the President does not require Senatorial confirmation under section 171 of the CFRN 1999 (as amended) for Magu to continue as Acting Chairman of EFCC.

⁴⁴ As discussed below it raises the issues of independence of EFCC, the synergy between and among the arms of government and the government agencies, how the constitution undermines the anti-corruption efforts and the issue of political interference in the anti-corruption fight.

Section 171 empowers the President to appoint heads of governmental agencies in an acting capacity, without the confirmation of Senate.

There are many theories surrounding Magu's rejection by the Nigerian Senate. The first is on the grounds of his failure of the integrity test carried out by the DSS superintended by the President. The second is on the grounds of incompetence, as found by the Senate; and the last is that the confirmation is sought from those Magu is either investigating or prosecuting for corruption. The last raises the issue of a fair hearing.

The identifiable factors that account for institutional weakness in Nigeria include lack of independence arising from the power of the executive to remove heads of ACAs, the power of the executive to appoint heads of ACAs whether as substantive or in an acting capacity, as demonstrated in Magu's case; lack of financial autonomy of the ACAs; lack or shortage of funds, inadequate human and material resources;⁴⁵ power of the executive to determine financial allocations of ACA in the fiscal year and when such allocations are to be released to ACAs, and the weak recruitment procedure of staff manipulated by political exposed persons (PEPs).⁴⁶ EFCC Act provides for the removal of the Chairman of the EFCC by the President, without the requirement of Senate's confirmation.⁴⁷

VI. Impacts of Section 171 of the Constitution of Federal Republic of Nigeria on the Security of Office of Head of Anti-Corruption Agencies in Nigeria

One of the issues that arose from Magu's case is whether Magu continuation as Acting Chairman of EFCC after his rejection as substantive Chairman by the Senate is legal. The law has no provision barring Magu or any other person from being appointed as Acting Chairman after Senate's rejection of confirmation. This scenario was not anticipated and captured at the time of enacting the Constitution. However, the moral implication and perception of the public in retaining Magu after the Senate's rejection has negative effects on the independence of the EFCC. The combined effect of section 2(3) of the EFCC Act and section 171 of the CFRN 1999 is that the Chairman of the EFCC is subject to the wish of the President who can

⁴⁵ For instance the CCB is unable to carry out its verification of declared assets mandate due to lack of human and material resources.

⁴⁶ These are building blocks for assessing the independence of ACAs in Nigeria.

⁴⁷ Section 3(2) of EFCC Act.

appoint and dismiss the Chairman without recourse to any authority or body, including the Senate. Giving the sensitive nature of the fight against corruption in Nigeria, the following are the impacts of Magu's appointment under section 171 of the CFRN on the security of office of the head of ACA, the independence of ACAs and the fight against corruption in Nigeria.

The first is that it erodes the independence of the ACAs in Nigeria. This will lead to the case of he who pays the piper details the tune. In the absence of security of office of the head of ACA, the appointing officer or person will have undue influence on him.

Secondly, it conveys to the public that the ACAs are under the control of the President. The general belief in the public domain is that the EFCC and its Chairman is under the President's control given the way he was appointed. Thirdly, it erodes public confidence of the impartiality of ACAs in Nigeria. The general belief that the Chairman of ACA is under the control of the President weakens the public confidence on the impartiality and independence of the ACA in discharge of its duties. Another impact of is that it subjects the head of ACA to the authority and control of the President. This ridicules the anti-corruption effort at the international level and questions the government political will and sincerity in fighting corruption. The last but not the least is that it hinders the fight against corruption as many persons, bodies, organisation and States will be discouraged from cooperating with the ACA whose head is appointed under section 171 of the 1999 CFRN.

VII. The Way Forward

To address the impacts of section 171 of the CFRN, the following steps should be taken.

Firstly, the provision of section 171(1), (2) and (6) of 1999 CFRN, which empowers the President to appoint heads of governmental agencies in an acting capacity without the confirmation of Senate for one year should be amended to include the head of ACAs among appointments that require the confirmation of the Senate and a clear provision stating that appointment in an acting capacity made by the President should be for a maximum of one year and not renewable.

Secondly, the weak security of office of the head of EFCC that had led to the removal of three heads of EFCC under unexplained circumstances before the expiration of their tenure of office should be addressed by amending section 3(2) EFCC Act by removing the phrase ‘...if the President is satisfied...’ and the term ‘misconduct’ should be clearly defined. Thirdly, the removal of head of ACA should at all times be subjected to the confirmation of the Senate, not merely by the President alone.

VIII. Conclusion

The paper examined the impact of section 171 of the 1999 CFRN as it relates to the independence of ACAs in Nigeria and the security of office of the heads of ACAs in Nigeria. The meaning and forms of ACA was unravelled using international anti-corruption laws -UNCAC. The appointment and removal of head of ACA and section 171 of CFRN was critically examined *vis a vis* the primary anti-corruption laws in Nigeria – EFFC and ICPC Acts. The paper found gaps in section 171 of the CFRN and the fact that the section erodes the independence of ACA and the security of tenure of office of the head of ACA in Nigeria. On the basis of the findings, the paper recommends amendment of the section 171 of CFRN 1999, to include the heads of ACAs among appointments that require the confirmation of the Senate, a clear provision stating that appointment in an acting capacity made by the President should be for a maximum of one year and not renewable, the removal of head of ACA should be subject to confirmation of the Senate and the term ‘misconduct’ should be clearly defined under the EFCC Act.

GUARDIANSHIP AND THE CHILD'S RIGHT ACT: A REVIEW OF STATUTORY GUARDIANSHIP IN NIGERIA

*Samuel E. Ojogbo **
*Josephine O. Obasohan **

Abstract

This paper reviews the legislative framework on statutory guardianship in Nigerian. The Child Rights Act regulates statutory guardianship and other matters that concern the protection and rights of children in Nigeria. Guardianship is a process that grants legal authority to a person with capacity to care for another's person or property especially because of their infancy, incapacity or disability. This review focuses on how the appointment of a guardian for those children who may be in need of parental care is regulated under the Act. The review identifies the death or incapacitation of a child's parents as the circumstance under which a guardian may be appointed to provide parental care for the child. This review questions the procedure for appointing a guardian under the Act, especially for a child who has no parents, and for whom the last surviving parent may not have by deed appointed a guardian. The Act provides for a person (who the Court may in fact by order be appointed the child's guardian) to make an application for a child in this category but the Act did not provide for the person(s) who have the power to make the application. Secondly, the Act did not provide for the qualification of those who may be appointed guardian(s) in this regard. The review argues that this gap in the Act puts the children in this category at risk, and suggests a review of the Act to address the gap.

Key Words: Child, Right, Nigeria, Statutory, Guardianship, Infancy

I. Introduction

The Child's Right Act (CRA)¹ in Nigeria is 'an Act to provide and protect the rights of a Nigerian child'.² This explains why in the Act, the best interest of a child is considered paramount in every action concerning a Nigerian child.³ It is in furtherance of this objective that Part IX of the Act is dedicated to guardianship of a Nigerian child.

The Act did not define a guardian. However, according to Edwin Nwogugu, '[a] guardian is one who has authority and duty to care for another's person or property especially because of the other's infancy, incapacity or disability'.⁴ The parents of a child are the natural guardians.⁵ The CRA provides that in the event of the death of a parent, the surviving parent shall be the guardian of the child.⁶ Thus, appointment of a guardian becomes necessary only where the parents of a child are unfit to be guardian of the child jointly or severally.⁷

*S. E. Ojogbo, PhD (Nottingham), Senior Lecturer, Benson Idahosa University, GRA, Benin City.

*J O Obasohan, LLM (DELSU), Lecturer, Benson Idahosa University, GRA, Benin City.

¹ Child's Right Act 2003, Act No. 26.

² *Ibid.*

³ *Ibid* s1.

⁴ E. I. Nwogugu, Family Law in Nigeria (3rd edn, HEBN Publishers 2014) 320.

⁵ CRA 2003 s83.

⁶ CRA 2003 s83.

⁷ *Ibid* s 83(2).

Death of the parents of the child is another factor that would necessitate the appointment of a guardian for the child. It is probably why the CRA provides that ‘[a] surviving parent who has guardianship of a child may, by deed, appoint a guardian for the child in the event of the death of that parent’.⁸ Thus, the Act provides for the appointment of a guardian where the parents are unfit on application of a member of the family, it also provides for appointment of a guardian by deed, but it did not provide for the appointment of a guardian for an orphan where there is no deed appointing one. This is the main concern that necessitated this review because the appointment of a guardian is a requirement under the Act for a child who is unavoidably missing parental care. The fact that the parents or a surviving or a single parent may not always execute a deed makes it imperative to provide for such cases under the Act. The absence of provisions in the Act that address the cases of orphans where there is no deed appointing a guardian is a major challenge for statutory guardianship in Nigeria. This is because the failure to adequately address issues concerning orphans has major implications given the powers of the guardian over the child and his estate.⁹

It is in view of the above that this review interrogates the institution of guardianship as provided in the CRA. It will also make references to the institution of guardianship under customary and Islamic law by way of comparison. This is with a view to highlighting the weaknesses that necessitated this review and thus, provide a basis to suggest amendments. This review is undertaken in four Parts including this introduction. The next Part discusses the legislative framework for guardianship under Part IX of the CRA. Part III presents a critical and comparative analysis of statutory guardianship and guardianship under customary law and Islamic law while the concluding Part suggests the changes necessary to provide effective statutory guardianship for a Nigerian child.

II. The Legislative Framework for Guardianship in Nigeria

The Child’s Right Act 2003 (CRA) is the principal legislation that provides for and protects the rights of the Nigerian child. The Act provides that the best interest of the child shall be the primary consideration in every action concerning a Nigerian Child.¹⁰ In furtherance of this consideration, the Act provides in Part IX for the guardianship

⁸ *Ibid* sub-s (3).

⁹ *Ibid* CRA 2003 s87.

¹⁰ CRA 2003, s1.

of a child who may lack parental care due to death or incapacity of the parents.¹¹

The CRA did not define who a guardian is but it recognizes the parents of a child as the natural guardians.¹² The Act recognizes two types of guardians – a guardian who shall have parental responsibility (general guardian)¹³ and a guardian (*guardian ad litem*) appointed only for the purpose of representing the child and his interest in certain proceedings.¹⁴ The responsibility of a general guardian under section 82 (1) reflects on parental responsibility of a guardian and thus underscores the recognition of the parents as the natural guardians.

The CRA provides in section 83 for three ways by which a guardian may be appointed. First is that where the parents of a child are not fit to be guardians of the child jointly or severally, ‘the Court shall, on application of a member of the family or an appropriate authority, appoint a person to be a joint guardian with the parent or parents of the child’.¹⁵ Secondly, ‘[a] surviving parent who has the guardianship of a child may, by deed, appoint a guardian for the child in the event of the death of that parent’.¹⁶ Finally, a single parent may, by deed, appoint a person to be the guardian of the child upon the death of that single parent.¹⁷

The three processes of appointing a guardian discussed above appears to confer exclusive rights on the parents and family members. However, the Act provides for the order for guardianship of a child in section 84. This section introduces a new process for appointing a guardian, especially for a child who has no parent with parental responsibility for him.¹⁸ It provides that ‘where an application for the guardianship of a child is made to the Court by a person, the Court may, appoint that person to be the guardian of the child’.¹⁹ This is especially in the case of a child who has no parent with parental responsibility for him. A child in this category or even a child for whom a single or surviving parent has not appointed a guardian by deed (in accordance with s 83(3)) is left in the hands of possibly a stranger to appoint a guardian for him. The problem with this is that the Act did not provide for any specification as to who this person might be or what qualifies him to be a guardian.

¹¹ *Ibid* s 83(2).

¹² *Ibid* sub-s (1).

¹³ *Ibid* s 82(1).

¹⁴ *Ibid* sub-s (2).

¹⁵ *Ibid* 83(2).

¹⁶ *Ibid* sub-s (3).

¹⁷ *Ibid* sub-s (4).

¹⁸ CRA 2003 para (a).

¹⁹ *Ibid* s (84) (1).

This is unlike the case of a guardian *ad litem* appointed under section 89 where the Act provides for the conditions as well as the procedure for their appointment.²⁰ It is to address this gap that a critical and comparative review of statutory guardianship is undertaken below to assess the adequacy of the CRA to protect the interest of a Nigerian child who has no parents, and who may require a guardian.

III. A Critical and Comparative Analysis of Guardianship Laws in Nigeria

The institution of guardianship in Nigeria is recognized both under the statute as well as under customary and Islamic laws. The purpose is to create a way to look after the interests of children who are unavoidably missing parental care at their tender age. Thus, whether we speak of guardianship under the Act or under customary or Islamic law, the focus is always on how to serve the best interest of a child in need of parental care, especially those whose parents are unable to provide such care for because of incapacity or those whose parents have died.

The CRA recognizes the parents of a child as the natural guardians.²¹ This is also the case under the various customary law systems, and Islamic law in Nigeria.²² Islamic Law explains the basis for the primacy of a child's parents with respect to guardianship. The terminology of guardianship in Islamic law is *Hadahah*. This is an Arabic 'word which means the side or part of the body that lies below the armpit'.²³ This word is used to express the action of mother-bird using its wings to protect its chick, thus symbolizing the protection and shielding of the young ones from the hazards of life at a tender age.²⁴ According to Ambali, while this protection involves personal care such as providing food and shelter, '[i]t does not leave out looking after the child at a tender age spiritually and intellectually so that when he or she overcomes the weakness of infancy and childhood, he will be able to stand on his own and face the challenges of life'.²⁵ This underscores the general concept and essence of guardianship, which makes a critical review of the CRA imperative to assess how the best interest of a child (outside the personal care of food and shelter) could be achieved under the Act.

²⁰ *Ibid.*

²¹ CRA 2003 s 83(1).

²² Nwogugu (n4) 323.

²³ M. A. Ambali, *The Practice of Muslim Family Law in Nigeria* (3rd edn., Princeton & Associates Publishing Co. Ltd 2014) 325.

²⁴ *Ibid.*

²⁵ *Ibid.*

The CRA recognises the guardianship responsibility of a child's parents, and the guardianship responsibility of a surviving parent in the event of the death of a parent.²⁶ It is only in the event of death or incapacity of the parents that the Act permits appointment of a guardian.²⁷ This review focuses on children who are unavoidably without care for reasons of death of their parents (orphans). In consideration of the best interest of children in this category it would be expected that the Act clearly answers the question about who may be appointed a guardian, and who has the authority to appoint such a guardian. This is not the case. It is true that the Act provides that 'the Court shall, on application of a member of the family or an appropriate authority, appoint a person to be a joint guardian with the parent or parents of the child'.²⁸ This is applicable only where the parents of a child are not fit to be guardians of the child jointly or severally.

Arguably, the appointment of a guardian in the case of an orphan could be inferred from s 84(1) which provides that 'where an application for guardianship of a child is made to the court by a person, the Court may, by order, appoint that person to be the guardian of a child'²⁹ in a case where a child has no parent with parental responsibility for him.³⁰ The problem with this is that the Act did not state who this person who may present this application might be.

Having identified this weakness in the CRA, it is perhaps necessary to look at the way the issue of guardianship for orphans is addressed under customary law, and under Islamic law to show the person(s) with responsibility and authority for the appointment of a guardian for orphans in the two systems. Under both systems the family of a child who is the subject of guardianship play major roles. For example, under customary law, the head of the family of the child is the proper person to appoint a guardian for the child.³¹ The same is applicable under Islamic law where guardianship devolves amongst the family members in the order of their succession hierarchy.³² The CRA on the other hand, provides for application for guardianship being made by a person, who may be appointed by the court to be the guardian of the child. It would appear based on this provision that the application for guardianship of

²⁶ CRA 2003 s 283(1).

²⁷ *Ibid* 83(2).

²⁸ *Ibid*

²⁹ *Ibid*, s 84(1).

³⁰ *Ibid*, s (1) (a).

³¹ Nwogugu (n4) 323.

³² Ambali (n23) 330, citing the Qur'an 2:233.

an orphan may be made by a person who is not a member of the child's family.

It is probably because of this gap in the Act that there is no provision regarding who is qualified to be appointed a guardian despite the wide powers a guardian enjoys under the Act over the child and his estate. This is arguably a major gap considering that the same Act provides copiously for the conditions under which a guardian *ad litem* may be appointed and the procedure for such appointment.³³

Appointment of a potential guardian for orphans is addressed under Islamic law where blood relationship is the major qualification for such appointments. The mother is the natural guardian of a child under Islamic law subject only to capacity.³⁴ After the mother, the other members of the child's family rank in the order of their succession hierarchy. The issue of qualification for who may be a guardian of an orphan is clearly addressed both under customary law too. Customary law recognises and gives effect to close family ties which exists in a traditional society. As a result, a conscious effort is made to restrict the choice of guardians to members of the extended family of the child concerned.³⁵

In view of the weaknesses highlighted above, it is argued that the failure to provide for the appointment of a guardian for orphans (for whom no appointment has been made by deed) has grave implications because it has created a gap as to who is qualified to be a guardian for orphans in this category. Apart from the fact that a guardian as trustee of the estate of the child may abuse the trust, there are also issues of the child's personal life, especially with regard to the religious and moral upbringing of the child. This aspect of a child's life is taken very seriously under Islamic law. The view under this system is that it is desirable for a child to grow and have a good opportunity to develop under a normal home as a sure and positive way to remove the psychological agony of the child growing up among strangers under different religious and moral background.³⁶ In the case of a guardian appointed by deed, this aspect of the child's life is likely to be addressed by the parent who has made the appointment.

The need to address a child's personal life have implications for both statutory guardianship and the CRA as an Act. The Act was enacted in 2003. Its major goal is the protection of the Nigerian child. The Act has a universal application in Nigeria. However, the problem is that the Act has not been adopted by all the states in Nigeria.

³³ CRA 2003 s89.

³⁴ Ambali (n23) 334.

³⁵ Nwogugu (n4) 323.

³⁶ Ambali (n23) 331.

In fact, out of the 11 core Muslim states of the North East and North West of Nigeria, only Kaduna state has adopted the Act.³⁷ This raises concerns about how the issues addressed in the Act, such as statutory guardianship are viewed across the country. Perhaps there is the need to bring the Act in line with the way of life in Nigeria, especially when it is not repugnant to good conscience.

In view of the above, it is argued that it is imperative to provide specifically for the person(s) who are qualified to be guardian(s) of orphans. First, it will help to address issues of safety of the child's estate as well as his personal life. In this regard, the Act should prioritise the immediate family of the child as the first in line to be considered in matters of guardianship. It is only where there is no person capable of taking-up the responsibility in the immediate family that the extended family may be considered. Non-members of the child's family or other groups that look after orphans, such as non-governmental organisations (NGOs) can only be considered when there is no person in the immediate or extended family of the child.

IV. Conclusion

One of the major fallout from the growing security challenges in Nigeria is the large number of orphans that it has generated across the country. This has exacerbated the problem of children in need of parental care in Nigeria thereby making it imperative to address the issue of guardianship. The Child's Rights Act regulates guardianship in Nigeria. Guardianship is a concept that is also recognized under the customary, and the Islamic law. However, since the CRA has a universal application in the country, it is important to ensure that its provisions fulfill the main objective of the Act – to serve the best interest of the child.

Thus, a review of the provisions of CRA concerning guardianship is proposed to address the differences that currently exist between the statutory regulation of guardianship and Islamic law, and customary law regulation of the subject. This will serve the best interest of a child and thereby fulfill the main object of the CRA.

³⁷ Nike Adebawale, '11 States in Northern Nigerian yet to Pass Child's Right Law' *Premium Times* (Abuja May 11 2019)

MARITAL RAPE: EVOLVING TRENDS AND THE WAY FORWARD

*L. M. Bulus **

*V. P. Wuyep ***

Abstract

Marital rape is a term used to describe sexual acts committed without consent, or against the will of a party, where the perpetrator is the victim's spouse. This may include, the use of physical force, threats of force or implied harm based on prior assaults, causing the victim to fear that physical force will be used if he/she resists. Though males may also be victims of marital rape, this work focuses on women as victims because the rape definitions found in statutes identifies them as such. It is also argued that a woman's physical, economic and social position places her at a disadvantage. Most times, the marriage rapist is not necessarily a crazed sex fiend, but one who seeks to use sex as a means of asserting or validating his masculine identity. The victims of marital rape suffer both short and long term consequences, ranging from humiliation, fear, guilt, depression, injuries and broken bones. This work argues for the expunging of marital rape exemption from Nigeria's laws. This is premised on the fact that the law does not contain a comprehensive position for the protection of married women. It is somewhat general and inadvertently encourages the perpetration of domestic violence against women. This exemption violates the woman's right to her reproductive system, abuses her psychological, emotional and physical health, and also fundamentally infringes on her right to non-discrimination and dignity of her person.

I. Introduction

Marriage is an institution created and protected by law. The duties and obligations of the parties involved are regulated by the law applicable to the marriage in question. In Nigeria, marriage is conducted and regulated by the tripartite legal system which exists simultaneously, i.e customary laws¹, Islamic law² and statutes laws³. Under these laws, sexual intercourse is regarded as an obligation for both parties⁴. Conversely, it is a right which spouses can lawfully demand from each other. However, a denial of the fulfilment of this obligation does not confer on the aggrieved party the right to forcefully take it. Thus, based on marital laws ordinarily, it will be

* L. M. Bulus LLB, LLM, is a lecturer with the Department of Commercial Law, Faculty of Law, University of Jos, Nigeria Email: daudal@unijos.edu.ng, Department of Commercial Law, Faculty of Law, University of Jos, Jos, Plateau State. P.M.B 2084

** V. P. Wuyep, LLB, LLM, is a lecturer with the Department of Public Law, Faculty of Law, University of Jos, Nigeria. Email: wuyepv@unijos.edu.ng, Postal Add.: Department of Public Law, Faculty of Law, University of Jos, Jos, Plateau State. P.M.B 2084

¹ Nigeria has about 300 indigenous groups and cultures see Lize Okoh "A Guide to the Indigenous People in Nigeria- Culture Trip available at <<https://culturetrip.com/africa/nigeria/articles/a-guide-to-the-indigenous-people-of-nigeria/>> accessed 7/12/19. Each of these cultures have their laws regulating marriage (which are largely unwritten).

² The Nigerian Muslim community subscribe to the Maliki Islamic School of thought.

³ The Marriage Act, 1914 and the Marriage Act, Cap. 218 LFN 1990, the Marriage Validation Act, Cap 219, LFN 1990 and the Matrimonial Causes Act Cap 220, LFN 1990.

⁴ S 368 of the Plateau State Penal Code Law (Gazette 24th October, 2018) provides for the punishment of adultery, by a married person, with another, not the spouse of the marriage. It further states that the person shall be guilty of rape, if the sexual act was forceful. The provision carefully states that the punishment applies outside of marriage, meaning it is legal when sex is forced within the ambit of a legal subsisting marriage.

unlawful for a spouse to force himself or herself on the unwilling and non-consenting partner⁵. This, we argue, is within the contemplation of the marital law. Even though it has not found express stipulation in the law, it can be inferred from the remedy available to a person whose spouse wilfully and consistently refuses to consummate the marriage. The law provides explicitly for a remedy in a suit for an order of restitution of conjugal rights⁶ (which may be inclusive of other marital duties e.g. cohabitation, etc) and/or the failure of which an aggrieved party can sue for an order of dissolution of the marriage.⁷

From the above, it is obvious that the law already contemplates a situation in which a party to a marriage may deny the other party the right to sexual intercourse. As it is with every right, a denial does not confer on the aggrieved party the right to arbitrarily take it. The aggrieved party is expected and obligated by law to seek redress within the mechanism provided by law itself. In this case, the options available to him/her are as discussed earlier. This appears to be the reasonable and legal course of action to take. However, when a spouse chooses to act otherwise, by taking matters into his/her hand, and forcefully having sexual intercourse with an unwilling and non-consenting wife, he is protected by law and exempted from prosecution.

The rational for this comes from a common law principle propounded in the most seminal book, *Historia Placitorum Coronae*⁸ authored by Lord Matthew Hale who reasoned that "...a man 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 up herself in this kind unto her husband, which she cannot retract".⁹ This position has been retained since 18th century and has found a place into the Nigerian laws.¹⁰ The cumulative laws criminalising rape in Nigeria, the Penal Code, the Criminal Code and recently the Prohibition of Violence against Persons Act, do carry the exception that rape, when perpetrated by the victim's husband is not an offence.

⁵ Ibid

⁶ S. 47 of the Matrimonial Causes Act, 1970

⁷ Ibid, Section 15(2) (a). Although section 21 of the same Act provides that the court shall not find that a respondent has wilfully and persistently refused to consummate the marriage unless the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated. If this is the case, there are other legitimate options open to the aggrieved party as may be found under s. 15(2)

⁸ Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (Sollom Emlyn 1736)

⁹ ibid. 628

¹⁰ See (n 4)

In expounding this position, this paper will consider the aforementioned position through a careful perusal of the concept of marriage, rape, what amounts to marital or spousal rape. Then further delve into the crux of the paper by considering issues surrounding marital exemption, and the provisions of some of our laws. We believe that this will set the theme for better appreciation of the position of the authors.

II. CONCEPTUAL FOUNDATION

a. Marriage

In the landmark case of *Hyde v Hyde Woodmansee*¹¹ Lord Penzance defined marriage as the “voluntary union between one man and one woman for life, to the exclusion of all others”¹². While this definition is still valid for statutory marriages as well as Christian Marriages¹³, it is not so for Nigerian Customary marriages which are polygamous in nature and Islamic Law which has a restrictive Polygamy of not more than 4 wives with a stipulation to treat them fairly¹⁴. Globally, the trends concerning marriages have changed. The struggle for inclusion by the Lesbian, Gay, Bisexual, Transgender, Queer, Intersexual and Asexual (LGBTQLA) group has changed the narrative involving the parties to a marriage. Most countries have removed the restriction against same sex marriages. Marriages are now conducted between same sex partners.¹⁵ Nigeria however, remains among the increasingly decreasing number of States that have refused to adopt same-sex marriage. It has in fact criminalized such relationship since 2013.¹⁶

The interpretation section of the Same Sex Prohibition Act defines “marriage as a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law in Nigeria”. The silence to same-sex

¹¹ [1866] [L.R] 1 P. &D. 139.

¹² ibid

¹³ Although this form of marriage does not legally recognise and it is, at best recognise as a form of customary law marriage, being that its solemnization is preceded by customary rites of marriage. It is strongly submitted by the authors that because of its prevalence in Nigeria, it should be, in least, recognized as a type of marriage practiced in Nigeria, after all, the law is made for man and not vice versa.

¹⁴ The Holy Quaran 4:3

¹⁵ History of Same Sex Marriage in the United States.

¹⁶ Section 5, Same Sex Prohibition Act, 2015

marriages in this definition is deafening and is arguably the whole purpose of the law. Thus, while polygamy is accepted as a form of marriage in Nigeria, same-sex marriage is not.

The contrast provided in the definition by the Black's Law Dictionary¹⁷ cannot be missed. It defines marriage as "a legal union of a couple as spouse in a contract". Here, the use of gender insensitive terms such as "couple" and "spouse" are very well intended to be inclusive of same sex marriages. This without being mentioned, does not fit in the Nigerian context of legalised marital unions.

Marriage confers on parties certain rights and obligations, the most common of which is referred to as consortium, which relates to a bundle of rights enjoyed by the parties. This includes the duty to cohabit, have sexual intercourse, maintenance etc. The breach of any of these duties by a party to the marriage, entitles the aggrieved party to sue for redress in the form of an order for the restitution of conjugal rights¹⁸ or for dissolution of the marriage¹⁹.

Generally, even though the marriages under Customary Law, Islamic and Statute Law vary in form and requirements, their effects are similar in Nigeria. Most of these marriages come with special privileges and, arguably, certain protection is accorded to parties who have contracted statutory law marriage in Nigeria.²⁰

b. Rape

Rape is defined by the Criminal Code Act²¹, the Penal Code Act and the Violence Against Persons Prohibition Act.

Section 357 of the Criminal Code Act provides that:

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

¹⁷ Bryan A Garner (ed) *Black's Law Dictionary*(10th edn, West Publishing Co. 2014) 1117

¹⁸ See (n6)

¹⁹ See (n7)

²⁰ For instance, the right to inherit one's spouse. While both parties under statutory law marriages are entitled to inherit each other in the event of an intestate succession, wives of Islamic Law marriage are entitled to inherit only ½ of what would ordinarily be inherited by the male spouse; and in most customs under the Nigerian customary law, women are generally not entitled to inherit whether as wives or daughters of the deceased. However, the narrative for this is quickly changing since the decision of the court in Ukeje v Ukeje [2004] 11 NWLR (Pt 1418) 384 – 414 blazed the trail in changing perspective in the Nigerian Judiciary about upholding rights of women to inherit, whether as daughters or wives. Whether this is obtainable in practice, especially for the underprivileged who cannot afford to pursue such rights in the courts of law is a matter for another discourse.

²¹ LFN 1990, Cap. C38

force or by means of threat 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.

Section 282 of the Penal Code Act provides a man is said to commit rape:

who, except in the case referred to in subsection (2) of this section, 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 was obtained by putting her in fear of death or 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 another 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.

These provisions have unfortunately laid a platform for others to continually view rape as an offence against the woman in Nigeria. Alubo²² defines rape as “an act committed by a man against a woman by way of sexual intercourse, by force or without her consent or against her will”²³. He however, observed with great foresight, that with the legalization of same sex marriages in different States of the world today, it is probable that the definition of rape will concomitantly change as it may become possible to rape a man by another man, or a woman by another woman²⁴. While this may be true, the learned author seems to be convinced that rape is a gender-based crime against a female by a man and does not even allude to the possibility that it could also be a crime, by the woman against the man.

These provisions and gender-based definitions of rape have faced many criticisms by people who feel that the gender-sensitive definition of rape encourages the perpetration of the crime against women. According to Oyajobi, “by continuing to define rape in a sex specific language, the law provides fertile ground for the

²² Alubo AO, ‘Rape Under Nigerian Criminal Law: Review of and Prescriptions for 21st Century Nigeria’ Jos Bar Journal (2005) 1(4)

²³ Ibid. 79

²⁴ Ibid.

persistence of the various myths about women and rape”²⁵ this criticism captures the bane of the Nigerian Feminist who launched campaigns against the gender sensitivity of the law, which they claim engenders its perpetration.²⁶ This campaign cumulated into the conspicuously different wordings of the section 1 of the Violence against Persons Prohibition Act²⁷, which not only removes the gender-sensitivity attached to the various definitions of rape in the two legal instruments discussed above. This also revolutionised the definition of rape from its most restrictive sense of “vaginal penetration” to a more wholesome definition, which somewhat brings it in line with what is obtainable in most jurisdictions around the world²⁸. The law provides a definition of rape as:

A person commits the offence of rape if:

- a. He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;
- b. The other person does not consent to the penetration; or
- c. The consent is obtained by force or means of threat 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 the use of any substance or additive capable of taking away the will of such person, or in the case of a married person by impersonating his or her spouse²⁹

Another laudable innovation by this law is the inclusion of the use of any substance or additive capable of eroding the will of the rape victim. This is significant so much so that male victims who have been induced by such substance could also find remedy under this law, as incidences of the overpowering of a man by

²⁵ Oyajobi A, ‘Better Protection for Women and Children Under the Law’ in Women and Children Under Nigerian Law, Federal Ministry of Justice, Lagos, p. 23 in Effah et al, *Unequal Rights: Discriminatory Practices against Women in Nigeria* (CRP, 1995)

²⁶ see ibid, Ilfemeje Sylvia Chika, ‘Legalization of Marital Rape in Nigeria: a Gross Violation of Women’s Health and Reproductive Rights’ Journal of Social Welfare and Family Law (2011)

Available at <<http://dx.doi.org/10.1080/09649069.2011.571469>> accessed on 21 June, 2011 and Nasir J N and Alemika E, *Women and Law in Nigeria* (Jos University Press Ltd., 2001)

²⁷ 2015

²⁸ The definition is similarly worded and arguably influenced by that given by the Trial Chamber of the International Criminal Tribunal for Yugoslavia in the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (2001) IT-96-23 and 23/1. The tribunal came to that conclusion after it has considered the definition of rape in various national jurisdictions of Germany, Austria, Korea, Brazil, Spain, China, India, Australia, Norway and some states in the USA amongst others. For further details see <<http://un.org/icty/cases/indictindex-e.htm>>

²⁹ S. 1, Violence Against Persons Act, 2015

a woman through physical force, threat or intimidation, fear of harm may seem far-fetched though not impossible.

While this is applauded as a victory for the prosecution of rape cases, a lot is still left to be desired, because, as well intended as the laws is, it has retained the marital rape exemption which forms the fulcrum of our discourse. Furthermore, this law is presently only applicable to the Federal Capital Territory, Abuja, as other states are yet to domesticate same.

c. Marital/Spousal Rape

Marital rape, also referred to as spousal rape, has found expression in our laws by way of exemption only. It is, as the name implies, a rape carried out within a marriage or where the perpetrator is the spouse of the victim. It is also defined as “any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent”³⁰. The three main laws which define rape in Nigeria as discussed above all carry a stipulation which isolates marital rape from other forms of rape and as one which does not embody illegality³¹.

III. Origin of Marital Rape Exemption

This exemption originates as far back as the 18th Century, where Hale made a notorious statement, which seems to be grounded in common law and even though his statement was not supported by any citation,³² it was accepted and adopted by the courts to exempt men from liability in the rape of their wives.³³ This acceptance which the exemption garnered consolidates on the common law doctrine of coverture which states that:

³⁰ Raquel Kennedy Bergen, ‘Marital Rape: New Research and Directions’(2006) The National Online Resource Center on Violence Against Women’<https://vawnet.org/sites/default/files/materials/2016-09/AR_MaritalRapeRevised.pdf> accessed 16 August 2019. It should be noted that the gender-sensitive definition of this author is not intended by the present authors; however, it is not surprising as most rape definitions and marital rape exemptions are couched in gender-sensitive terms, implying that the woman is the usual or expected victim.

³¹Section 357 read together with Section 6 of the Criminal Code, Section 282 (2) of the Penal Code and Section 1(c) of the Violence Against persons Prohibition Act.

³² Jill Elaine Hasday, ‘Contest and Consent: A Legal History of Marital Rape’ California Law Review (2000) 88 (5) 1398.

³³ The only situation that may warrant a conviction in rape of a wife is as a principal, if he prostitutes his wife to another:See Mathew Hale, *ibid*. Other judicially provided exceptions may exist where a decree of divorce has been ordered see *R v O'Brien* (1974) 3 All E. R. 665; where the parties are living separately under a separation order of the court, see *R v Clarke* (1949) 1 All E. R. 448; Where a husband has undertaken to the court not to return to his wife see *R v Steele* (1974) 65 Crim. App. Rep. 22 and Where there is a separation agreement se *R v. Miller* (1954) 2 Q.B. 282

By marriage, the husband and wife are one person in law:(i) that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and influence of her husband, her baron or lord; and her condition during her marriage is called *coverture*.³⁴

Under the doctrine of *coverture*,³⁵ the woman is not allowed to own land or any real property; If she does before marriage, such is subsumed into that of her husband. The woman's position is such that her husband might give his wife moderate correction, since he is responsible for her behaviour, and that such correction should in the same moderation as he would his apprentice or children.³⁶ It is obvious that the position of the married woman was so unfortunate that it was better for her to remain single, as she would still be in possession of her property.

Lanbam³⁷ opines, however, that while it seems that the legal regime of common law already supports the marital exemption, before Hale's treatises, the theoretical basis of the immunity seem to be a creation of Hale.³⁸ Hasday notes that the earliest roots of the marital rape exemption are murky, and that it may be linked to the medieval Moral Theology and the Law of the Church.³⁹ Though the implication of the biblical passage is that both spouses are expected to give themselves to each other, Zoe noted that in a patriarchal society, the real effect given to it was to give the husband sexual autonomy but not the wife.⁴⁰

A wave of feminist agitation and activism against the status of women during the 18th Century, led to the enactment of Married Women's Property Law 1882. Under this Law, a woman was allowed to have a legal personality that is independent of her husband's. As such is able to own and manage her personal property. However, while the feminist fought and won a battle against the woman's sovereign powers

³⁴ William Blackstone, *Commentaries on the Laws of England* (Callaghan & Co., 1872) 442

³⁵ ibid

³⁶ Ibid. 446

³⁷ David Lanbam, 'Hale-Misogyny and Rape' 7 CRIM L.J. (1983) 148 (155) cited by Hasday 1379

³⁸ Ibid

³⁹ See I Corinthians 7:3-5, *The Holy Bible* NLT (Tyndale House Publishers Inc. 1996) 883

⁴⁰ Zoe I, 'Marital Rape' <www.rapeinfo.wordpress.com/2008/5/25/maritalrape> cited by Josephine AA Agbonika, 'Marital Rape in Nigeria: Myth or Reality?' in Dakas CJ Dakas , Akkarren Samuel Shaakaa and Alphonsus O Alubo (eds), *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (Innovative Communications 2015) 402. It is further argued here that there is nothing biblical in support of marital rape, if anything the bible negates the principle of marital rape when it states in 1 Corinthians 13:5 that "love ...does not demand its own way..." and such should not be used to justify what society has twisted or perverted in support of an already patriarchal and misogynistic society.

over her property, they then neglected the battle over (or lost the battle over) her personal sovereignty. We submit that the battle over the woman's personal sovereignty is imperative, the lack of which is antithetical to any property that she may own. Thus, a woman's right to self-ownership is violated by the retention of the exemption of marital rape in our laws. The question that begs for an answer is of what significance is her property if she does not own herself?

IV. Challenges to Marital Rape Exemption

The origin of the challenge to marital rape exemption is traceable to 1970⁴¹. Hasday noted that the 19th century feminists waged a campaign that was both vociferous and systematic against the exemption and argued that the economic and political equality would prove hollow, if women did not win the right to set the terms of marital intercourse⁴². This agitation was aimed at offsetting the age long and deeply rooted common law prerogative. However, as radical as this campaign was, it was not very successful initially. Presently, there are 127 countries that still retain the exemption of marital rape in their laws⁴³. Commenting on irrationality of the retention of the exemption, the New York Court of Appeal held that:

...rape is not simply a sexual act to which one party does not consent.

Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd... A married woman has the same right to control her body as does an unmarried woman⁴⁴

Generally, the agitation against marital rape is seemingly championed by feminists alone and in a bid to favour the woman's position and eliminate all forms of unequal and discriminatory practices against the woman. While it is true that the woman is, in most cases, at a disadvantage because of her anatomy (physical strength), economic and political position which makes her more vulnerable to violence generally and rape specifically, the idea of men being raped in a heterosexual

⁴¹ See Hasday (n5) and Bergen (n2).

⁴² Hasday 5

⁴³ See UN Women Justice Report: get the data <<https://www.theguardian.com/global-development/poverty-matters/2011/jul/06/un-women-legal-rights-data>>

⁴⁴ *People v Liberta* 474 NE 2d 567, 572-73 (NY 1984) cited in Barbara Stark, 'Does International Law Really Require the Criminalization of Marital Rape? <<http://doi.org/10.1017/S2398772300001690>> accessed 26 August 2019

marriage is not unheard of. However, even though it is true that the incidences are higher in relation to women victims, there are a plethora of cases of women raping men. Agbonika discussed some of these incidences in her work.⁴⁵ She referred to an incident that occurred within the context of marriage where a man in Benue State was allegedly raped to death by his six wives. It was reported that his six wives insisted that he must have sexual intercourse with all of them at the same time, when he declined, they overpowered him and each took turns raping him until he died.⁴⁶ Had the exemption of marital rape been removed in our statutes, this could have also been prosecuted as rape and those women charged also rape perpetrators.⁴⁷ But since, unfortunately, that is not the case, they could only be charged for murder or manslaughter as the case may be.

Furthermore, the definition of consent in the Violence Against Person's Act, states that consent could be vitiated by force, threat, intimidation, fear of harm, false and fraudulent misrepresentation, use of any substance or additive capable of taking away the will of a person. The sum of these qualifications to consent is not beyond use by a woman, assuming she cannot physically overpower the man. We argue that the marital rape exemption is as much a shield for the man as it is for the woman. However, it cannot be disputed that the woman is more likely to experience rape in marriage than the man, and the fact that the marital rape exemptions are gender specific. Be that as it may, this work focuses more on the woman as a victim of marital rape.

The continuous retention of the exemption of marital rape in our statutes is a perpetuation of the advantage that the then *feme sole* (a woman without a husband) enjoyed by virtue of remaining single, since an unmarried woman could sue any person who rapes hers. It would appear that marriage opens a woman to the possibility of being violated sexually without the protection of the law. This argument is more succinctly captured by West when he states that "On marriage, it means... that a wife is by virtue of her status available to her husband for forced sex whenever and however imposed, regardless of the presence or absence of either her consent to, or

⁴⁵ Agbonika 420-422

⁴⁶ ibid.

⁴⁷ This is significant as it would have given a judicial debunking of the myth that women are the only victims of rape.

desire for sex itself.”⁴⁸ He further states that “being married, then, in countries with the marital rape exemption, means that one’s body is essentially boundary-less, or porous, and one’s own will is irrelevant with respect to sexual penetration by one’s husband...”⁴⁹ It cannot be said in clearer terms than this, that women in countries which retain marital rape exemption like Nigeria, are not viewed as having equal rights to men. Furthermore, such acts of discrimination and violations of their rights are sanctioned by the very laws which are meant to protect them.

Nigeria may present a peculiar circumstance different from that of other countries where dowries or bride prices are not paid. In Nigeria, customary marriages are only valid on the condition that the dowry or the bride price of the woman is paid. Without the payment of bride price, the marriage is never accorded any social or cultural recognition. Suffice it to mention that bride price payment is not restricted to marriages conducted under the customary and Islamic laws. Before marriage under the Act or statutory law marriages are conducted, the practice is that the cultural rites and the bride price payment are made first. Although this is not a requirement of statutory law, this practice only goes to show how much significance Nigerians defer to their culture and religion. Because men pay dowry in Nigeria, most men feel that they are making payment for the bride and consequently have a right over her and her body hence the rhetoric “I have paid for it,” which is common with Nigerian men when referring to the sexual duties that a woman is obligated by law to perform in marriage. While it is true that submitting to reasonable sexual demand is a requirement between couples, it is demeaning to the woman if such expectation arises from the perception that she has to submit because dowry has been paid on her.

While arguing that the payment of bride price has further increased the marginalization and subjugation of women in the home, Ifemeje⁵⁰ opines “that the man who has paid bride price feels that the woman is his property and denies her a voice at home⁵¹. ” But if this is the case, then how different is the position of the married woman to that of the prostitute? If the husband feels he has irrevocable right to sexual intercourse with his wife, because of the payment of some token, does that

⁴⁸ Robin West ‘Marital Rape, ‘Consent, and Human Rights: Comments on “Criminalizing Sexual Violence Against Women in Intimate Relationships”’ AJIL Unbound (2017) 109 (197) 5. <<http://doi.org/10.1017/S2398772300001434>> accessed on 16 August 2019.

⁴⁹ Ibid

⁵⁰ Ifemeje Sylvia Chika, “Gender Based Domestic Violence in Nigeria: A Socio-Legal Perspective Indian Journal of Gender Studies (2012) 19(1)(137-148)

⁵¹ ibid. 142. This includes, of course, the right to refuse his sexual advances. Any objection may earn her beating, rape or even divorce.

not put the position of woman even lower than that of the prostitute who is paid at every point of sexual intercourse? Another question that begs for answer is how much dowry or bride price could be paid to justify perpetual sexual duties by a wife? Especially given that, in contemporary times, dowry or bride price are just a token given to the woman's family as a symbol of cultural compliance.

States in the Southern and Eastern Nigeria have enacted laws to regulate the payment of exorbitant sums as bride price of prospective wives.⁵² In India, one of the countries with the highest rates of marital rape, dowry is being paid by the woman and entails a significant transfer of wealth from the family of the bride, to the bridegroom, or groom's family.⁵³ Dowry is often represented as the cause of serious social problems, including harassment, abuse and even murders of brides in India. Legislative attempts to deal with the situation yielded virtually no diminutive effect of either dowry or violence⁵⁴. In the West, where dowry is usually not paid, only recently has the removal of the statutory exemption to marital rape been completely successful. Although authors have argued that some of the pieces of legislations contain lesser punishment for marital rape. Some require a couple to be separated at the time of injury, others only recognise marital rape if it involves physical force and/or serious physical harm. While some vastly reduced the penalties, some others create special procedural requirements for marital rape prosecutions⁵⁵ or even a withdrawal of the suit at the instance of the victim. Thus, marital rape is not a product of dowry payment, but it is based on a deep rooted cultural and archaic social norm and entrenched ideal fuelled by patriarchy and misogyny.

V. Effects of Marital Rape Exemption

Proponents of the abolishment of the marital rape exemption have often times tried to justify such activism by citing a plethora of reasons. Ifemeje⁵⁶ argues that the legalization of marital rape is a gross violation of Women's Health and Reproductive Rights. Reproductive right is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity in all matters

⁵² Limitation of Dowry Laws, 1956 (Laws of Eastern Nigeria, Cap. 76)

⁵³ Mary K Shenk, Dowry and Public Policy in Contemporary India, the Behavioural Ecology of a "Social Evil" Human Nat. (2007) 18(242-263) 243

⁵⁴ ibid

⁵⁵Ibid. Hasday 1484

⁵⁶ Ifemeje (n 28)

relating to the reproductive system and its functions and process.”⁵⁷ Ifemeje further argues that institutionalized barriers have seriously impeded the full realization and protection of women’s reproductive rights and this has resulted in eroding their bargaining power when it comes to negotiating safe sexual behaviours with their partners in order to avoid life threatening sexually transmitted diseases or unwanted pregnancy.

We agree absolutely with her position and further state that the patriarchal entrenched subjugation of women has made some women rather timid and turned them into mutes for fear of being labelled un-submissive or being beaten or disenfranchised from economic advantages in the home-front. They do not dare raise their voices in objection to their husbands’ sexual advances, such that even when express consent is given, such consent is influenced by the above factors and cannot be real consent. Some women have to seek their husband’s permission before they can submit themselves to any contraceptives to avoid pregnancy⁵⁸, even if such pregnancy may be detrimental to her health. These women are forced to submit to sexual intercourse with their husbands even if they are doubtful of his fidelity, thereby making them vulnerable to sexually transmitted diseases.

The factors that work against the married woman are overwhelming and this is further compounded by the law legalizing marital rape; hence, making her situation helpless in a so called democratic society. Suffice it to state here that the instances of marital rape, stemming from total dependence on men folk is not very common with urban-class women, who work and are somewhat self-reliant.

Bergen⁵⁹ notes that despite the myth that rape by one’s partner is a relatively insignificant event causing little trauma, research has shown that marital rape often has severe and long lasting consequences for women⁶⁰. Physical effects ranging from vaginal injuries, lacerations, soreness, bruising, torn muscles, etc., while gynecological consequences may include vaginal stretching, anal tearing, pelvic pain, urinary tract infections, miscarriages, still births, bladder infections, infertility and sexually transmitted diseases, and inability to use contraceptives.⁶¹ We may add that

⁵⁷ Nwosu-Jiraba N, Ojo O, Musa R, and Ighorodje M, *Reproductive Health and Rights* (Liberty 2007) 3 cited in Ibid.

⁵⁸This different from an invitation to have a discussion about it, and if he declines such permission, she is prohibited from having such protection.

⁵⁹ Ifemeje 5-6, (n 28)

⁶⁰ Ibid

⁶¹ ibid

the failure of contraceptives may lead to unwanted pregnancies. Psychological consequences result from the shock of being raped by someone they once presumably love and trusted or, whom they most certainly expect protection from. Research has also shown that women who experience marital rape are more likely to experience multiple rapes by the same person. Psychological effects include anxiety, shock, intense fear, depression, suicidal ideation, sleeping disorder, post-traumatic stress disorder, etc. These effects are overwhelming, to say the least. If all of these do not erode the woman's right to self-dignity and invariably her enjoyment of the right to life, we cannot say what else could.

VI. Nigeria's International Obligation to Criminalize Marital Rape

The non-criminalization of marital rape in Nigeria is a violation of a host of international conventions, treaties and documents to which Nigeria is a signatory or party to. A 2006 report on violence against women by the Secretary General of the United Nations (UN) reiterates the due diligence obligation of states under the Beijing Platform “to treat all forms of violence against women and girls as criminal offences⁶² Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates State Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular, to ensure on a basis of equality of men and women, the same rights and responsibilities during marriage and at its dissolution⁶³. Also, the rights to decide freely and responsibly on the number and spacing of their children and have access to information, education and means to exercise these rights⁶⁴. There are several ways in which Nigeria's retention of the marital rape exemption is in violation of this international obligation.⁶⁵ The combined effect of the domestic and sexual violence provisions, the reproductive health rights provision of the International Covenant on Economic, Social and Cultural Rights(ICESCR), International Covenant on Civil and Political Rights(ICCP),

⁶² Secretary General, Indepth Study on all forms of Violence against Women, paras 112-113 UN Doc. A/61/122/Add.1 p. 12 cited in Melanie Randall and Vasanthi Venkatesh, ‘Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligation Under Human Rights Law’ (2016) ASIL Vol. 109, p. 192

⁶³ Article 16 Para. (c) Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) adopted by the UN General Assembly in 1979

⁶⁴Ibid Para (e) of Article 16

⁶⁵ Since Nigeria has both signed and ratified the Convention

Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment⁶⁶, the African Charter on Human and Peoples' Rights(ACHPR), the Protocol on the Rights of Women in Africa are to the effect that Nigeria has an international obligation to criminalize marital rape which is a form of violence against the woman. It can do this by the abolition of the marital rape exemption clause in its statutes.

VII. Conclusion

To continue to retain the exemption of marital rape in our legislation is to continue, by legal means or machinery of the law, to deprive the woman of the right to herself. If the woman cannot control what happens to her body, how can she enjoy any of the constitutionally guaranteed rights? A woman's self-sovereignty should be without any qualification, cannot be subjected to anything if at all the law requires her to be free and equal to her male counterpart. This should be guaranteed without having to cite any reason relating to her health: physical, emotional or psychological. It should be because she is – a human, and exists the same way the man does. Unless and until such a right is guaranteed, and the exemption is expunged from our laws without any qualification, the woman can never truly be equal to the man.

Based on the forgoing, we recommend the amendment of Nigeria's rape Statutes (the Penal Code, the Criminal Code and the Violence against Persons' Prohibition Act) to eliminate the exemption of marital rape stipulations in the laws. Furthermore, it is imperative that the Penal and Criminal Code Acts definitions of rape be amended to eliminate the gender sensitivity of the laws, so as to remove the double standard it creates against the male folk as it is no longer a myth that men can also be victims of rape. The rape definitions need also to be broadened and not restricted to only vaginal penetration.

We further recommend that in the absence of a marital rape criminalizing law, marital rape victims can approach the courts on a fundamental human rights enforcement claim, since the law as it is, is inconsistent with the non-discriminatory provision of the constitution, also as argued in this work, a violation of the woman's right to dignity of the human person and her right to life generally. However, we are

⁶⁶ 1984, ratified by Nigeria in 2001

not unmindful of the conservative nature of Nigeria's judiciary, and that it may be difficult and somewhat near impossible for one to succeed. Even if that is possible, the judgment shall be in form of damages and not a conviction.

We recommend that there is a need for sensitization by women groups e.g. the Federation of Women international (FIDA) to women as to their right to the control of their person, which is analogous to the above mentioned constitutional provision, women need to know that they are not owned by their husbands and their bodies belong to them, that they have the right to refuse sexual intercourse with their husband if they have health concerns, are not emotionally or psychologically ready or they just do not have a desire to at the particular time. The perpetual silence in this area is fuelled by lack of knowledge and enlightenment. They need to know that their refusal does not amount to an assault on their marriage, rather it is a call for men to generally have self-control and respect for their wives. For men to see their wives as partners in the marriage whose opinions and voices matter, rather than a piece of furniture which can be used at his whim. Women need to know that their values exceed any dowry paid on them, and that their position as wives is not equivalent to that of a prostitute who must render the services she was paid for, the marriage institution is much more honourable than that.

We further recommend that communities should express support in strong terms for the enforcement of current laws and for new legislation to combat domestic and sexual violence. This can be achieved by support for educational and prevention programs at the local, state and national levels.

Finally, the victims of marital rape may choose to remain in a marriage for various reasons such as fear of more violence, financial insecurity, a sense of low self-worth and a false hope that their partners will change. Support group can be a source of strength and encouragement where victims are able to discuss freely with other victims of spousal abuse. Legal aid service at no or low cost should offer legal information and assistance.

A CRITIQUE OF THE TRAFFICKING IN PERSONS (PROHIBITION) ENFORCEMENT AND ADMINISTRATION ACT (AMENDMENT) BILL, 2018 OF NIGERIA

*Oladele Grace Abosede **

Abstract

This paper examines the provisions of the Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018. The Bill seeks to amend the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015 of Nigeria amongst other things. This paper shows that the Bill does not address pertinent issues necessary for the elimination of trafficking in persons in Nigeria such as criminalization of corrupt practices of law enforcement agents, civil legal aid for victims and enforcement of mandatory reports from corporate bodies on steps taken to prevent the use of trafficked persons in their business chains. It concludes that until these issues amongst others are addressed, the Trafficking in Persons (Prohibition) Enforcement and Administration Act along with its amendment will remain defective and unable to significantly curb the menace of trafficking in persons in Nigeria.

Key Words: Trafficking, Enforcement, Corrupt Practices, Corporate Bodies.

1. Introduction

The Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018 was sponsored by three members of the House of Representatives namely - Hon. Samuel Ikon, Hon. Isiaka Ibrahim and Hon. Alabi Mojeed. The Bill seeks to amend the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015, establish a Specialised Human Trafficking Court, mandate an annual training on the subjects of human trafficking, modern-day slavery and protection of victims, expand the composition of the governing board of the National Agency for the Prohibition of Trafficking in Persons (NATIP), by including members from the Economic and Financial Crimes Commission (EFCC) and increase penalties under the Act.¹

Although, it is still a Bill, yet to be passed into law, it is important to examine its provisions to ascertain if the proposed amendments are adequate to stem the tide of trafficking in persons in Nigeria. This paper therefore, examines the amendments in the Bill with a view to identifying the drawbacks in it. It also makes recommendations on further amendments to be included in the Bill to make it comprehensive and

*Oladele Grace Abosede, Department of Private Law, Faculty of Law, Olabisi Onabanjo University, Ago-Iwoye, Ogun State, Nigeria, abosedeladele@yahoo.com.

¹ Preamble to the Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018.

effective in curbing the menace of trafficking in persons in Nigeria.

Meaning of Trafficking in Persons

The internationally recognized definition of trafficking in persons (also known as human trafficking) is stated in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the Convention Against Transnational Organized Crime.² Article 3 of the Protocol defines trafficking in persons as - (a) the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered as trafficking in persons even if this does not involve any of the means set forth in subparagraph (a) of the article; (d) child shall mean any person under eighteen years of age.

A similar definition exists under section 82 of the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015 of Nigeria which defines trafficking in persons as the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person, having control over another person or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in forced or bonded labour, or in slavery-like conditions, removal of organs or generally for exploitative purposes.³ Where any of the means set forth in the definition is used,

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention Against Transnational Organized Crime was adopted on 15 November 2000 and entered into force on 25 December 2003, available at <<http://www.unhcr.org/refworld/docid/4720706c0.html>> (accessed 21 October 2019).

³ Section 82 of the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015 provides that exploitation includes at a minimum the exploitation of the prostitution of others or other

consent of the victim to the exploitation set forth in the definition of trafficking in persons in the Act, is irrelevant. In Nigeria, the common forms of exploitation are – labour exploitation, sexual exploitation, domestic servitude, begging for arms, organ removal/harvesting, sale of babies and involvement in armed conflict (by terrorist groups).⁴

Trafficking in persons takes place within Nigeria (domestic trafficking) and across her borders (international trafficking). Nigeria is on tier 2 Watch List of the United States Department of State Trafficking Report 2018.⁵ This means that the Government of Nigeria has not fully met the minimum standards for the elimination of trafficking in persons, but is making significant efforts to do so.⁶

Within Nigeria, people, in particular, children are trafficked from rural areas to cities such as Lagos, Abeokuta, Ibadan, Kano, Kaduna, Abuja and Port Harcourt.⁷ Trafficking in persons also takes place in internally displaced persons camps.⁸ This is due largely to the deplorable condition of the camps and lack of adequate food and care. As a result, displaced persons become desperate to leave.⁹ This situation makes them vulnerable to traffickers who pretend to offer solution to their problems by making false promises of better prospects elsewhere.

With respect to international trafficking, Nigeria is a source, transit and destination country.¹⁰ As a source country, Nigerians are trafficked to various countries in Europe, America, Asia and even Africa. Nigeria is a destination country for people trafficked from West African countries and it is a transit country for victims trafficked to Europe.¹¹ Victims are enslaved and subjected to various forms of exploitations which leave them traumatized and affected by various health challenges.

forms of sexual exploitation, derivation of the offspring of any person, forced labour or services or practices similar to slavery, servitude or the removal of organs.

⁴ G.U. Osimen, *et al*, “The Socio-Economic Effects of Human Trafficking in Nigeria” *Journal of Social Sciences and Human Research*, Vol. 3, Issue 8, (2018), p.122

⁵ United States Department of State “[2018 Trafficking in Persons Report: Nigeria](https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282722.htm)” available at <<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282722.htm>> (accessed 14 October 2019).

⁶ *Ibid.*

⁷ E.E. Okodudu and O. Akpoghomei, “Effects of Socio-Economic Status of Trafficking in Persons on Incidence of Human Trafficking in Southern Nigeria” *Journal of Humanities and Social Sciences*, Vol.22, Issue 7, (2017), p. 72.

⁸ F. Abugah, “Infographic Reveals How Children are Trafficked in IDP Camps Across Nigeria” available at <<http://venturesafrica.com/this-infographic-reveals-how-children-are-trafficked-in-idp-camps-across-nigeria/>> (accessed 2 October 2019).

⁹ “In north-eastern Nigeria, traffickers are preying on vulnerable children in IDP camps” available at <<https://www.equaltimes.org/in-north-eastern-nigeria?lang=en#.W6Cs6LgnbIU>> (accessed 13 September 2019).

¹⁰ G.U. Osimen, *et al*, “The Socio-Economic Effects of Human Trafficking in Nigeria” p. 123, *op cit*, note 4.

¹¹ United States Department of State “[2018 Trafficking in Persons Report: Nigeria](https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282722.htm)” *op cit*, note 5.

Analysis of the Provisions of the Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018

The Bill contains twenty amendments to the Principal Act - Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015. The proposed amendments were made in respect of the following sections of the Principal Act - sections 2, 3, 5, 11, 13, 14, 23, 29, 30, 32, 34, 35, 44, 47, 61, 62, 65, 67, 70 and 79. These amendments are examined below -

The Bill amends section 2 of the Principal Act by inserting a new subsection (3) which established a Specialised Human Trafficking Court (SHTC) saddled with the responsibility of determining cases on trafficking in persons involving - (i) case identification and assessment by officers of the Agency; (ii) trauma informed courtroom protocols that protect victims; (iii) linking victims to protective services; (iv) judges, prosecutors and courtroom staff who are trained in human trafficking and trauma informed care for victims; (v) single presiding judges and regularly assigned prosecutors per case; (vi) expedited cases that are concluded within one year; (vii) collaboration and capacity building via joint task forces and working groups; (viii) the creation of a publicised (electronic and print media) Human Trafficking database of convicted traffickers in English and varying domesticated languages; and (viii) evaluation and performance indicators to monitor the success of the SHTC.”¹² This amendment is laudable because it would ensure speedy trials of trafficking cases, since the court will only focus on trafficking offences. However, the creation of a Specialised Human Trafficking Court should be under a separate section and not a sub-section under the establishment of the National Agency for the Prohibition of Trafficking in Persons in section 2. The court should be independent of the Agency and as such should not be a subsection under the establishment of the Agency.

The Bill includes the Federal Ministry of Foreign Affairs and the Economic and Financial Crimes Commission (EFCC) as members of the Governing Board of the National Agency for the Prohibition of Trafficking in Persons by inserting new paragraphs (iv),¹³ and paragraph (viii) under section 3(2)(c) of the Principal Act.¹⁴ This will help reduce laundering of money by traffickers in order to finance the illegal

¹² Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018, section 2.

¹³ *Ibid*, section 3(a).

¹⁴ *Ibid*, section 3(b). The National Agency for the Prohibition of Trafficking in Persons is the body established for the eradication of trafficking in persons and protection of victims in Nigeria under section 5 of the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015.

business. Also, traffickers will be prevented from benefitting from the proceeds of the crime.

The Bill amends some provisions of the Principal Act by inserting phrases to expand the scope of work of the National Agency for the Prohibition of Trafficking in Persons and increase penalties. For example, the functions of the Agency were extended through an amendment to section 5(r) of the Principal Act by inserting the words "including establishing a physical presence at all national borders". There appears to be a grammatical error in that phrase. The letter 'a' ought not to be in the phrase since the "national borders" is in plural form. The amendment should read as follows - "including establishing physical presence at all national borders". With the correction made to the amendment, section 5(r) of the Principal Act would read as follows – "establish and maintain a system for monitoring trans-border activities relating to trafficking in persons including establishing physical presence at all national borders immediately in order to identify suspicious movements and persons involved".¹⁵ This provision is very essential if effectively implemented. The Nigerian border is very wide and there are many entry and exit points which are illegal routes. Officers of the Agency and other law enforcement agents should be at all entry and exit points and routes to prevent trafficking of persons across the borders.

The Bill expands the scope of trafficking in persons under section 13(1) of the Principal Act by inserting the phrase "including virtual trafficking online via the internet, slavery, involuntary servitude and forced or compulsory labour".¹⁶ With this amendment, the provision reads as follows – "all acts of human trafficking including virtual trafficking online via the Internet, slavery, involuntary servitude and forced or compulsory labour are prohibited". This is a laudable provision for the purpose of prosecuting traffickers. This is because trafficked persons are now recruited via the internet.

Also, Bill amends paragraph (a) of section 13(4) of the Principal Act by inserting the words - " including but not limited to actions, ceremonies, rituals, etc. performed by traditional (native) doctors, pastors, imams or any other persons which require the taking or swearing of an oath to enforce an act of trafficking". The amended version thus, reads – "a person who in or outside Nigeria, directly or indirectly – (a) does or threatens any act preparatory to or in furtherance of an act of

¹⁵ *Ibid*, section 4.

¹⁶ *Ibid*, section 6(a).

trafficking in persons including but not limited to actions, ceremonies, rituals, etc. performed by traditional (native) doctors, pastors, imams or any other persons which require the taking or swearing of an oath to enforce an act of trafficking". This amendment is indeed necessary in a country like Nigeria where spiritual powers are used to hypnotize and instil fear in victims to prevent them from escaping or reporting to law enforcement agents.

Before the word "participates" in Paragraph (e) of section 13(4) of the Principal Act, the Bill inserts the phrase - "knowingly purchases a sexual act from a victim of trafficking or otherwise", and after the word 'accomplice', it inserts - the words "aider and/or abettor". The amended version of section 13(4)(e) of the Principal Act would read as follows – “ a person who in or outside Nigeria directly or indirectly, knowingly purchases a sexual act from a victim of trafficking or otherwise participate as an accomplice, aider and/or abettor in the commission of an offence under this Act”. This amendment will broaden the scope of trafficking activities, aid prosecution and help prosecutors secure the conviction of traffickers.

In addition, the Bill contains an upward review of the penalty under section 13(4) of the Principal Act from an imprisonment term of not less than 5 years and a fine of not less than one million naira (N1,000,000) to – “a minimum of five (5) years up to and including life imprisonment and a fine of not less than one million naira (N1,000,000).¹⁷ However, the Bill erroneously stated that this new penalty was to be placed in the proviso, immediately after paragraph "(o)" of section 13(4) of the Principal Act. It is erroneous because section 13(4) does not have a paragraph "(o)", the paragraphing stops at paragraph (f). Thus, the amendment should have stated that the new penalty should be put in the proviso immediately after paragraph "(f)" of section 13(4).

Similarly, the Bill extends the term of imprisonment under section 14(b) of the Principal Act to from an imprisonment term of not less than 5 years and a fine of not less than one million naira (N1,000,000) to – “a minimum of five (5) years, up to and including life imprisonment and a fine of not less than one million naira (N1,000,000).¹⁸ This upward review of the imprisonment term under section 13(4) and 14(b) of the Principal Act from a minimum of five (5) years to “a minimum of five (5) years up to and including life imprisonment” is laudable because it would act

¹⁷ *Ibid*, section 6(e)(iii).

¹⁸ *Ibid*, section 7.

as deterrence to potential traffickers, thereby preventing trafficking in persons in Nigeria.

The Bill increases the age at which a child can be used as a domestic servant from 12 years to 18 years under section 23(1) of the Principal Act.¹⁹ It increased the penalty for an attempt to commit a trafficking offence under section 29 of the Principal Act from “half” of the punishment to “full” of the punishment for committing the offence.²⁰ Similarly, there is an increase in the penalty under section 30(1) of the Principal Act from “half” of the punishment to “full” in a case where evidence establishes attempt to commit a trafficking offence.²¹ This upward review of the punishment makes it severe and act as deterrence.

Also, the Bill amends the punishment under section 32(1)(b) of the Principal Act for unlawfully obstructing the Agency or any authorized officer of the Agency in the exercise of any of the powers conferred on the Agency by the Act from “an imprisonment term not exceeding five years and a fine of two hundred and fifty thousand naira (N250,000) or to both”, - to “an imprisonment term not exceeding five years without an option of fine”.²² In addition, the penalty under section 34(b) of the Principal Act which is an imprisonment term not exceeding five years and a fine of two hundred and fifty thousand naira (N250,000) or to both was amended to “an imprisonment term not exceeding five years without an option of fine”.²³ The removal of an option of fine is commendable because it makes the punishments more severe.

To further protect witnesses, the Bill includes new paragraphs (d) and (e) under section 47(3) of the Principal Act as follows - “paragraph (d) issuing of restraining orders which place a wide range of restrictions on the behaviour and activities of a person who poses a risk of harm to the trafficking victim and/or his or her family, to the public, to particular members of the public so as to prevent them from committing additional slavery or trafficking offences; and paragraph (e) issuing of an order directing - (i) the victim or any members of his or her family, (ii) a witness or any members of his or her family; or (iii) any other person, including whistleblowers, requiring protection as deemed necessary by the Court, into protective custody by the Agency or any other government ministry or agency via a

¹⁹ *Ibid*, section 8.

²⁰ *Ibid*, section 9.

²¹ *Ibid*, section 10.

²² *Ibid*, section 11.

²³ *Ibid*, section 12.

witness protection programme which can include security, immunity from criminal prosecution, housing, livelihood and travel expenses, medical benefits, education, and vocational placement".²⁴ These proposed amendments were done with the aim of increasing the measures a court can take to further protect a witness or other persons in any proceeding before it.

There is an upward review of the penalty for contravening an order or direction of court on protection of witnesses under section 47(6) of the Principal Act from an imprisonment term of not less than 5 years, to - "an imprisonment term of not less than 5 years without the option of a fine".²⁵ Although, the Principal Act did not give an option of fine, the inclusion of the phrase "without an option of fine" makes the punishment more specific.

The Bill extends the provision on protection of the identity of a trafficked person under section 61(g) of the Principal Act, to include "victim's family, or any relevant witness or person, if and when necessary".²⁶ This amendment will go a long way in ensuring cooperation from witnesses during trial and reduce stigmatization.

With respect to treatment of trafficked persons and training of officers of the Agency, the Bill inserts new paragraphs (k), (l) and (m) under section 61 of the Principal Act as follows - "(k) the Agency shall ensure that at all times, at least one staff member at all Embassies or High Commissions is trained and is receiving annual training on human trafficking on Nigeria's legal framework on trafficking and on the protection of trafficking victims, as defined in the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, so as to ensure adequate treatment of and services to trafficking victims; (l) the Agency shall ensure that - at all times, a person who is a victim of trafficking who is temporarily sheltered in one of the Agency's shelters is not held against his or her will and is not forced to participate in the prosecution of a case against his or her trafficker, should he or she not choose to; and (m) the Agency shall ensure that - at all times, a person who is a victim of trafficking shall receive, at no cost to the victim, holistic, victim centered, human rights based and trauma informed rehabilitation and care, with the rights and best interests of the victim being paramount".²⁷ These provisions are laudable because they will help protect, rehabilitate and assist

²⁴ *Ibid*, section 15(b).

²⁵ *Ibid*, section 15(c).

²⁶ *Ibid*, section 16(b).

²⁷ *Ibid*, section 16(c).

trafficked victims who have nowhere to go and no one to protect their interests.

Under section 62 of the Principal Act with regards to non –detention and non-prosecution of trafficked victims for criminal activities, the Bill includes ‘prostitution’ as an absolute statutory defence to any criminal charge brought against a trafficked person committed as a result of being trafficked.²⁸ This proposed amendment is commendable because the most common form of exploitation is prostitution and with this defence, victims will not be prosecuted for engaging in it and other similar criminal acts.

On the issue compensation of victims, the Bill opens up other sources of compensation by inserting a new sub-section (5) under section 67 of the Principal Act which states that "should the Court fail to issue a compensation order in favour of the victim of trafficking at the time of sentencing of the convicted offender, a victim may apply for humanitarian, legal, financial aid or compensation from the Trust Fund, without the legal burden of establishing the criminal case against the offender".²⁹ This provision will greatly assist and provide relief for trafficked persons even where the court fails to grant compensation in their favour and with this money they can go for vocational training, education or set up a business.

Furthermore, the Bill amends section 70(1) of the Principal Act by inserting a new paragraph (c) to the effect that “the Minister may, on the recommendation of the Agency, make a request to any foreign State for extra-territorial jurisdiction so as to allow Nigeria to investigate any of her citizens within the said jurisdiction who is suspected of involvement in human trafficking abroad”.³⁰ This is a laudable provision, but for it to be effective, there must be international cooperation and cordial relationship between Nigeria and other foreign States.

The Bill places a duty on relevant public authorities and ministries notify the Agency where it has reasonable grounds to believe that a person may be a victim of human trafficking. It does this by inserting new sub-section (3) under section 70 of the Principal Act as follows - "(3) A legal duty is imposed for any and all relevant public authorities and ministries within Nigeria's National Referral System, to immediately notify the Agency where it has reasonable grounds to believe that a person may be a victim of human trafficking, pursuant to the Guidelines on National

²⁸ *Ibid*, section 17.

²⁹ *Ibid*, section 19.

³⁰ *Ibid*, section 20.

Referral Mechanism for Protection and Assistance to Trafficked Persons in Nigeria (NRM) (2015)". This is a good provision that will enhance the rescue of trafficked persons in Nigeria. This is however, subject to the condition that the identity of the informant will be kept secret so that such persons are not exposed to attacks from traffickers and their agents. It is suggested that this suggestion should be included in the Amendment Bill.

There is also an amendment to section 70 of the Principal Act prescribing mandatory annual training for relevant officers of Embassies, High Commissions and other governmental Agencies through a new sub-section (4) which provides that – “(4) There is established a mandatory annual codified training on the subjects of human trafficking, modern-day slavery and protection of victims, the members include (a) representative of all Embassies and High Commissions with offices in Nigeria (b) two (2) senior representatives of – (i) Ministries responsible for Education, Information and Culture, Justice, Youth and Sports, and Foreign Affairs, (ii) all relevant law enforcement Agencies, (iii) National Orientation Agency, (iv) Joint Border Task Force, border control, (v) National Commission for Refugees, Migrants and Internally Displaced Persons, (vi) Small and Medium Enterprises Development Agency, (vii) National Emergency Management Agency, (viii) Office of the National Security Adviser, and (ix) Economic and Financial Crimes Commission, and all the institutions involved in Nigeria's National Referral Mechanism;³¹ (c) the Mandatory annual codified training on human trafficking and modern day slavery shall be responsible for training for all staff and sensitization of the general public on trafficking in person”.³² The proposed annual training is expedient in combating human trafficking, identification, rescue and protection of victims. This is because traffickers keep developing new ways of carrying out their activities in order to hold their victims captive, circumvent the law and avoid being caught.

Finally, the Bill extends the conditions under which an officer of the Agency would be indemnified under section 79 of the Principal Act. The amendment included the phrase "is not in violation of the Act, cannot be said to amount to official complicity and where the act or omission complained of is not an act of sabotage,

³¹ *Ibid*, section 20(b).

³² *Ibid*.

complicity or other unlawful abuse of the privileges of official position".³³ In its amended form, section 79 reads as follows – “a member of the board, Director-General, officer or employee of the Agency shall be indemnified out of the assets of the Agency against any proceedings brought against him in his capacity as a member of the board, Director-General, officer or employee of the Agency where the act complained is not *ultra vires* his powers, is not in violation of the Act, cannot be said to amount to official complicity and where the act or omission complained of is not an act of sabotage, complicity or other unlawful abuse of the privileges of official position”. This provision was well couched and would help protect officers of the Agency against unnecessary prosecutions.

The Bill prescribes the punishment for contravening the provisions on indemnity of officers of the Agency, by including a new sub-section (2) under section 79 of the Principal Act. It reads thus - “a person who contravene the provision of the section shall be liable on conviction to imprisonment for a term not exceeding two years or a fine not exceeding one million naira (N1,000,000) or both”.³⁴

Defects in the Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018

The Bill does not contain certain provisions which ought to have been included to improve upon and fill the lacuna in the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015. This has thus, made this Bill defective. The defects are enumerated below.

(1) Specialised Human Trafficking Court

The Bill establishes Specialised Human Trafficking Court under section 2(3) of the Principal Act, which is the same section that established the National Agency for the Prohibition of Trafficking in Persons. The Specialised Human Trafficking Court should be established under a separate section. The court should be independent of the Agency and as such should not be a subsection under the establishment of the Agency.

(2) Review of Penalty

The Bill contains an upward review of the penalty under section 13(4) of the

³³ *Ibid*, section 21(a).

³⁴ *Ibid*, section 21(b).

Principal Act from a term of not less than 5 years and a fine of not less than one million naira (N1,000,000) to – “a minimum of five (5) years up to and including life imprisonment and a fine of not less than one million naira (N1,000,000)”.³⁵ However, the Bill erroneously stated that this new penalty was to be placed immediately after paragraph "(o)" of section 13(4). Section 13(4) does not have a paragraph "(o)", the paragraphing stops at paragraph (f), therefore the amendment should have stated that the new penalty should be put immediately after paragraph "(f)" of section 13(4).

(3) Legal Guardians for Child Victims

The Bill does not provide for a legal guardian that would represent and act in the best interest of child victims. This provision is important because children are vulnerable and need more protection and attention. Also, bearing in mind that article 3(1) of the Convention on the Rights of the Child³⁶ provides that the best interests of a child must always be a primary consideration. In some developed jurisdictions such as the United Kingdom, there are legal provisions for independent child trafficking advocates. Section 48 of the Modern Slavery Act 2015³⁷ established the office of independent child trafficking advocates to represent the interest of child victims and give them necessary support and assistance.

In addition, article 4 of the UNICEF Guidelines on the Protection of Child Victims of Trafficking 2006 provides that a guardian should be appointed for unaccompanied children or situations in which the parents or guardians cannot act in the best interest of the child. Paragraph 4(2) of the UNICEF Guidelines highlights the responsibilities of a guardian as follows – (a) to ensure that all decisions taken are in the best interest of the child; (b) to ensure that the child has appropriate care, accommodation, health care provisions, psycho-social support, education and language support; (c) to ensure that the child has access to legal and other representation where necessary; (d) to consult with, advise and keep the child victim informed of his or her rights; (e) to contribute to the identification of a durable solution in the child’s best interests; (f) to keep the child informed of all the proceedings; (g) to establish and maintain a link between the child and the various

³⁵ *Ibid*, section 6(e)(iii).

³⁶ Convention on the Rights of the Child was adopted by the United Nations on 20 November, 1989 and entered into force 2 September 1990, available at <<http://www1.umn.edu/humanrts/instre/k2crc.htm>> (accessed 19 October 2019).

³⁷ Modern Slavery Act 2015 (Chapter 30), available at <http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf> (accessed 20 October 2019).

organizations which may provide services to the child; (h) to assist the child in family tracing; (i) to ensure that if repatriation or family reunification is possible, it is done in the best interests of the child; (j) to ensure that relevant paperwork is completed.

This law should serve as model for Nigeria. Appointment of legal guardian is important considering the vulnerability of children and the fact that they need special care and protection which exceeds the general need of adult victims. The National Assembly of Nigeria should take a cue from these legal instruments by including the establishment of independent child trafficking advocates in the amendment Bill.

(4) Punishment for Corrupt Law Enforcement Agents

Neither the Amendment Bill nor the Principal Act (Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015) criminalizes corrupt activities of officials of government agencies and security services in aiding and abetting trafficking in persons. The illegal business of trafficking in persons thrives in Nigeria because of the endemic corruption of some law enforcement agents, especially those that assist traffickers to cross national borders and those in the Internally Displaced Persons Camp. Such actions by law enforcement agents in Nigeria should be criminalized with severe penalties under the Bill.

(5) Civil Legal Aid for Victims of Trafficking in Persons

The Bill and the Principal Act do not provide for civil legal aid for victims of trafficking in persons to enable them bring civil actions against traffickers and other persons that have violated their rights in the course of being trafficked. This is necessary because victims cannot afford legal representation for civil actions and the wrong they have suffered should not be without a remedy.

(6) Law Mandating Corporate Entities to Report on Steps Taken to Prevent the Use of Trafficked Persons in Their Businesses

The amendment Bill and the Principal Act do not mandate corporate entities to ensure that trafficked persons are not used in their business and supply chains and to submit annual report on the measures taken by them in preventing trafficking in persons. This is now best corporate practice and should be introduced in Nigeria through the amendment Bill. This provision exists under the Modern Slavery Act 2015 of the United Kingdom. Section 54 of the Modern Slavery Act provides that -

(1) a commercial organisation³⁸ within subsection (2) must prepare a slavery and

³⁸ *Ibid*, section 54(12) defines a commercial organization as - (a) a body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, or

human trafficking statement for each financial year of the organisation. Section 54(2) of the Act provides that commercial organisation is within this subsection if it - (a) supplies goods or services, and (b) has a total turnover of not less than an amount prescribed by regulations made by the Secretary of State. An organisation's total turnover is to be determined in accordance with regulations made by the Secretary of State.³⁹

A slavery and human trafficking statement for a financial year is - (a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place - (i) in any of its supply chains, and (ii) in any part of its own business, or (b) a statement that the organisation has taken no such steps.⁴⁰ An organisation's slavery and human trafficking statement may include information about - (a) the organisation's structure, its business and its supply chains; (b) its policies in relation to slavery and human trafficking; (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains; (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; (f) the training about slavery and human trafficking available to its staff.⁴¹

Section 54(6) of the Modern Slavery Act provides that a slavery and human trafficking statement - (a) if the organisation is a body corporate other than a limited liability partnership, must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent); (b) if the organisation is a limited liability partnership, must be approved by the members and signed by a designated member; (c) if the organisation is a limited partnership registered under the Limited Partnerships Act 1907, must be signed by a general partner; (d) if the organisation is any other kind of partnership, must be signed by a partner.

If the organisation has a website, it must - (a) publish the slavery and human trafficking statement on that website, and (b) include a link to the slavery and human

(b) a partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

³⁹ *Ibid*, section 54(3).

⁴⁰ *Ibid*, section 54(4).

⁴¹ *Ibid*, section 54(5).

trafficking statement in a prominent place on that website's homepage.⁴² If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.⁴³ The duties imposed on commercial organisations by section 54 are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.⁴⁴

This elaborate provision should be included in the amendment Bill, with severe punishment for non-compliance.

(7) Law on Removal of Human Organ

Removal of human organ is one of the exploitations trafficked persons are subjected to in Nigeria. However, the Bill does not contain any provision criminalizing the offence of removal of organ of trafficked persons. Also, the Principal Act does not contain elaborate provisions criminalizing removal of organ (also known as organ harvesting). In the United Kingdom for example, there is a whole Act (Human Tissue Act 2004) which criminalizes illegal removal of human organ. The Human Tissue Act 2004 prohibits the removal of the organ of a human being for any purpose without the consent of the owner and consent must not be obtained by force, threat or deception.⁴⁵ This law should serve as a model to Nigeria.

Conclusion

Trafficking in persons is a prevalent problem in Nigeria and its elimination has posed a great challenge to the Government. The Trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill, 2018 is fraught with defects which will create drawbacks in the effectiveness of the legal frameworks in eliminating trafficking in persons in Nigeria. It is therefore pertinent for the National Assembly of Nigeria to take a second look at the amendment Bill and include all necessary provisions in order to stem the tide of trafficking in persons in Nigeria and adequately protect and assist trafficked victims in order to prevent re-trafficking.

Recommendations

⁴² *Ibid*, section 54(7).

⁴³ *Ibid*, section 54(8).

⁴⁴ *Ibid*, section 54(11).

⁴⁵ Section 32 of the Human Tissue Act 2004 of the United Kingdom, available at <http://www.legislation.gov.uk/ukpga/2004/30/pdfs/ukpga_20040030_en.pdf> (accessed 18 October 2019).

The Specialised Human Trafficking Court should be established under a separate section and not under section 2(3) of the Principal Act which established the National Agency for the Prohibition of Trafficking in Persons. The court should be independent of the Agency and as such should not be a subsection under the establishment of the Agency.

The grammatical error in the amendment to section 5(r) of the Principal Act should be corrected. The amendment inserts the words "including establishing a physical presence at all national borders". The letter 'a' ought not to be in the phrase since "national borders" is in plural form. The amendment ought to read as follows - "including establishing physical presence at all national borders". The legislature should be concerned not only with making laws, but also with the grammatical construction of the laws. They should ensure that the provisions of the laws are grammatically correct.

The error in the amendment made to section 13(4) of the Principal Act should be corrected. The Bill erroneously stated that a new penalty should be placed in the proviso, immediately after paragraph '(o)' of section 13(4). Section 13(4) does not have a paragraph '(o)' the paragraphing stops at paragraph (f), therefore the amendment should have stated that the new penalty should be put immediately after paragraph '(f)' of section 13(4).

The Bill should provide for a legal guardian that would represent and act in the best interest of child victims and give them all necessary support and assistance. This provision is important because children are vulnerable and need more protection and attention.

The Bill should criminalize corrupt practices of law enforcement agents which facilitate trafficking in persons with severe penalties.

The Bill should provide for civil legal aid for trafficked victims to enable them bring civil actions against traffickers and other persons that have violated their rights in the course of being trafficked. This is necessary because victims cannot afford legal representation for civil actions against traffickers and other people who have violated their rights.

The Bill should mandate corporate entities to submit annual report on the measures taken to prevent trafficking in persons and the use of trafficked persons in their business chains. This provision exists under section 54(6) of the Modern Slavery Act 2015 and should serve as a model for Nigeria.

The Bill should be amended to comprehensively criminalize the offence of illegal removal of human organ also known as organ harvesting. On the other hand, a separate Bill may be brought before the legislature criminalizing illegal removal of human organ. The Human Tissue Act 2004 of the United Kingdom contains elaborate provisions criminalizing illegal removal of organ which can serve as a model for Nigeria.

SAVING THE FLUIDITY OF CUSTOMARY INTERNATIONAL LAW THROUGH THE ROLE OF INTERNATIONAL JUDGES IN CUSTOM- MAKING

*Joycelin Chinwe Okubuiro **

Abstract

Although Article 38 (1) (b) of the Statute of the International Court of Justice (ICJ) provides for customary international law as a source of international law and defines it as ‘evidence of a general practice accepted as law’, the clarity of the text and the entire statute have remained questionable. Attempts have been made to box international custom into state practice and *opinio juris*, yet it is argued that ascertainment of these elements is paradoxical. There is no clear idea on what constitutes customary international law, no authoritative text, and its unwritten nature renders it insecure, elusive, scattered, unstable, unsystematic as well as hegemonic. These obstacles are no excuses for international judges to fail in their adjudicative duties when questions of customary international law are before them. In response to these challenges by the international courts, this paper investigates whether international judges go beyond its primary interpretative role to custom-making. Following the examination of cases before the ICJ and ad hoc tribunals, this paper argues that through judicial creativity, international judges are contributing to the making and development of customary international law. Therefore, making international custom a continually relevant primary source of international law despite its challenges.

Key Words: Customary, International, Law, Fluidity, Court, Tribunals

I. Introduction

Custom is one of the primary sources of international law. The statute of the International Court of Justice provides that in the application of the court’s decision, custom may be employed as one of its sources. Article 38(1) (b) Statute of the International Court of Justice refers to ‘international custom as evidence of a general practice as law’.¹ Huge court decisions and literature abound in the interpretation and definition of customary international law.² For instance, ‘International customary law is that law which has evolved from the practice or customs of states. It is the foundation of the modern law of nations.’³ There are similarities and prominent

* Joycelin Chinwe Okubuiro, Lecturer, Department of International and Comparative Law, Faculty of Law, University of Nigeria. LLB- RSUST, LLM- University of Hull, United Kingdom, PhD-University of Liverpool, United Kingdom, BL- Nigeria, Email: joycelinokubuiro@gmail.com; joycelin.okubuiro@unn.edu.ng.

¹ Article 38 of the Statute of International court of Justice.

² *North Sea Continental Shelf* ICJ Reports (1969) p. 3, *Military and Parliamentary Activities in and Against Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 97(para. 183,110 (para. 211); *Asylum case*, ICJ Reports (1950) pp. 226, 276-277; *Right of Passage over India Territory*, ICJ Reports (1960) pp.6, 40; *Legality of the Threat or Use of Force*, ICJ Reports (1966) pp. 226, 253-255 (paras 65-73); Anthony D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971); Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999).

³ Martin Dixon, *Textbook on International Law* (sixth edition, Oxford University Press, 2007).

elements in diverse definitions of custom⁴ and these are state practice (consistence of such practice;⁵ generality of such practice;⁶ duration of such practice) and *opinio juris et necessitates*.⁷ While state practice is regarded as the objective element, *opinio juris* is regarded as the subjective (psychological) element of customary international law.

In spite of the common factors in the above definitions, custom has remained a controversial source of international law.⁸ Determination of evidence of practice is far from self-evident as contested.⁹ The difficulty in ascertaining the above two elements as constituting custom if deduced from article 38 (1) (b) of the ICJ is doubted as authoritative.¹⁰ Again the insistence on state practice and *opinio juris* as the sole determinant has been viewed as hegemonic based on the argument that there is a huge concentration of Western state practice and *opinio juris* which renders such international custom Western biased.¹¹ Therefore rendering Africa disadvantaged in the making and application of customary international law and unattractive to the world public.¹²

In view of the above, the president of the ICJ addressed the court's approach to customary international law by stating that: '*authors are correct in drawing attention to the prevalent use of general statements of rules in the Court's modern practice, although they take the point too far by insisting on theorizing this development*'.¹³ The

⁴ Ian Brownlie (1993) *Principles of Public International Law* (sixth edition, Oxford, Oxford University Press, 1993) 6; P Malanczuk, *Akehurst's Modern Introduction to International Law* (seventh edition, Routledge, 1997); R Shabtai, *The Hague Academy of International Law, The Perplexities of Modern International Law* (Martinus Nijhoff Publishers, 2004); J Duggard, *International Law, A South African Perspective* (Juta & Co Ltd, 1994); Patrick Dumberry, 'The Last Citadel! Can a State Claim the status of persistent objector to prevent the Application of customary international law in investor-state Arbitration? [2010] (23) (2) *Leiden Journal of International Law* 381; Michael Byers, *Custom, Power and Power of Rules, International Relations and Customary International Law* (Cambridge University Press, 1999).

⁵ *Lotus case* (1927) PCIJ Series A, No. 10, p. 18.

⁶ *North Sea Continental Shelf case*, (1969) ICJ Reports 43.

⁷ *Fisheries case* (1951) ICJ Reports 116.

⁸ Robert Kolb, 'Selected Problems in the Theory of Customary International Law' [2003] (50) (2) *Netherlands International Law Review* 119.

⁹ Andrea Pellet, 'Article 38' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) 750.

¹⁰ *Ibid.*

¹⁰ Jörg Kammerhofer, 'Uncertainties in the Formal Sources of International Law: Customary International Law and some of its Problems' [2004] (15) (3) *EJIL* 523.

¹¹ Joycelin Chinwe Okubuiro, 'Application of Hegemony to Customary International Law: An African Perspective' [2018] (7) (2) *Global Journal of Comparative Law* 232.

¹² Isabelle R Gunning, 'Expanding the International Definition of Refugee: A Multicultural view' [1989-90] (13) *Fordham International Law Journal* 156 at 158.

¹³ Michael Wood, Special Rapporteur, First report on formation and evidence of customary international law, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-

president also highlighted that, in practice, the court does not take into consideration such inquiry in every case and that it would be sufficient to also consider the views of bodies such as the International Law Commission.

This paper explores the role of international judges in custom-making as a necessity in the development and continual relevance of custom as primary source of international law. Such ‘extension of duty’ has been seen as undue influence of the ICJ in the identification of custom.¹⁴ Although caution is solicited while carrying out such judicial creativity, the ability of international judges to do so takes away ‘stagnancy of the law’ and contributes to the development of customary international law. Arguably, it is a step in the fulfilment of its subsidiary role for the determination of international law in Article 38 (1)(d) of the ICJ Statute.

In carrying out the task of this paper, it first explores the necessity of customary international law in the international system. Thereafter, it examines the competence of international judges in custom-making. It considers the attitude of the international judges in custom-making and the legal effect of such custom-making is examined. The final part considers if there could be a custom without a judge.

II. Is It Necessary To Make Custom?

Despite the weaknesses of customary international law as enumerated above, it is regarded as an important source of international law that binds states unless a state has established persistent objector as argued by some scholars.¹⁵ The importance of custom may be considered indispensable as it affects different spheres of states interactions. For instance, it provides the foundation for the whole of international law and it is at stake in every fundamental question of international law.¹⁶ Custom also play relevant roles in the development of treaties and they complement each other, although some times, there are conflicts between them.¹⁷ Custom plays an important role in the international system as it has no legislative or compulsory judicial system.¹⁸ Consequently, custom provides a source of international legal regulation.

¹⁴ August 2013, <<http://legal.un.org/docs/?symbol=A/CN.4/663>> accessed on 23 June 2016.

¹⁵ Loretta Chan, ‘The Dominance of the International Court of Justice in the Creation of Customary International Law’ [2016] (6) *Southampton Student Law Review* 44.

¹⁶ Patrick Dumberry, (n 4).

¹⁷ Herman Meijers ‘On International Customary Law in the Netherland’ in Ige F Dekker and Harry HG Post (eds), *On the Foundations and Sources of International Law* (The Hague, T.M.C.Asser Press, 2003).

¹⁸ M Dixon, (n 3).

¹⁹ J Duggard, n 4.

On humanitarian international law, the wide application of custom over treaties has been pointed out.¹⁹

It is contended that treaties apply only to states that have ratified them, but customary international law applies to all parties to a conflict irrespective of whether or not they have ratified the treaties containing the same or similar rules.²⁰ In this regard, treaties are of a limited usage. It cannot be a source for resolution of conflicts between parties who are not parties to the said treaties, but custom can serve as a source for resolution.

Investment, trade and business in international sphere have also emphasised the significance of custom stating that:

Custom is the residual applicable legal regime between a foreign investor and the host State in the absence of any BIT [Bilateral Investment Treaties]. Thus, numerous BITs may be, but they certainly do not cover the whole spectrum of possible bilateral treaty relationships between States. It has been argued that, BITs in fact, cover only some thirteen percent of the total bilateral relationship between states in the world. Since a BIT is only binding on parties to the treaty and not on third parties, the limited worldwide geographical scope of BITs necessarily results in the legal protection of foreign investments. Customary rules of international investment law are important as a supplement to an existing BIT.²¹

Again, any foreign investor can invoke rules of customary international law notwithstanding whether its state of origin has entered into a BIT with the country of investments to claim his or her rights.²²

Furthermore, custom has been termed very useful in the filling of lacuna in treaties to ascertain the meaning of undefined terms in the text or to help the interpretation and implementation of its provision.²³ Custom most often serves as the last resort of international legal protection against unlawful conduct by States.²⁴ Based on such huge significant roles of custom in international law, arguably, its making is

¹⁹ J Henckaerts, ‘Study on customary international humanitarian law, A Contribution to Understanding and respect for the Rule of law’ in L Maybee and B Chakka (eds), *Armed Conflicts in Custom as a source of International Humanitarian law* (New Delhi, ICRC, 2006).

²⁰ Ibid.

²¹ Patrick Dumberry, n 4 at 379.

²² Ibid.

²³ Ibid.

²⁴ Ibid; See also, *Iran-US Claims Tribunal in Amoco Int'l Fin. Corp. v. Government of the Islamic Republic of Iran*, 15 Iran-USCTR189, 14 July, 83 ILR 500(1990).

imperative for the progression of the international system. As such, limitations towards such achievements requires the active participation of the international judges to see to the continuous significance of international custom

III. Does An International Judge Have The Competence To Make Custom?

It is trite that the function/competence of the court is the settlement of disputes by the interpretation of laws. The ICJ, the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for former Yugoslavia (ICTY) are examples of international court and tribunals created for settlement of disputes and maintenance of international peace and security. It has been stated that:

it is clear that the court cannot legislate...Rather its task is to engage in its judicial function of ascertaining the existence or otherwise of legal principles and rules...The contention that the giving of an answer to the question posed would require the court to legislate is based on a supposition that the rules in the present corpus juris is devoid of relevant rules in this matter. The court could not accede to this argument; it states the existing law and does not legislate. This is even so if, in stating and applying the law, the court necessarily has to specify its scope and sometimes note its general trend.²⁵

Despite the obvious function of the international judge to interpret laws, he/she is said to play important role in custom-making to resolve the peculiar challenges associated with the nature of custom which is uncertain and unwritten. Though the judge is sometimes criticised to manipulate the meaning of what custom is. The court in ascertaining what is custom has always adopted three different procedures:

1. Pronouncing or declaring the existing law;
2. Crystallising a rule of customary international law by articulating an evolving rule and transforming it into an existing law; and
3. Generating or constituting a rule whereby the court's pronouncement becomes states practice that forms into a rule of customary international law.²⁶

Looking at the above proposition, the ability of an international judge to employ

²⁵Alan Boyle and Christine Chinkin, *The Making of International Law; Foundations of Public International Law* (New York, Oxford University Press, 2007) 268; Ige F Dekker and Wouter G Werner, 'The Completeness of International law and Hamlet's Dilemma: Non liquet, the Nuclear Weapons case and legal theory' in Ige F Dekker and Harry HG Post (eds), *On the Foundations and Sources of International law* (Netherlands: T.M.C. Asser Press, 2003)12.

²⁶Alan Boyle and Christine Chinkin, (n 25) 268.

any of these propositions would definitely have to pull the judge out of the positivist theory of conservatism of seeing law as what it is. It takes away the burden and possible negative effects of restriction on the judge as just a *mere interpreter of existing rules, even when there is none to guide*. However, for the judge to perform his/her role effectively bold step must be taken or better still a cloak of judicial activism must be worn to make some pronouncements which could later develop into custom. Yet, it takes a bold judge to certify that the former pronouncement had given birth to custom which could be invoked in subsequent decisions of international courts and tribunals.

Following this trend of argument, judges in international criminal courts and tribunals could be said to play some significant roles in custom-making and these are examined below.

Article 21 of the Rome statute provides for the sources of law applicable to the International Criminal Court (ICC), but did not mention customary international law. However, in section 1 (b) of this article, there has been inference of custom in the following words: ‘the principles and rules of international law, including the international law of armed conflict.’ Although the rulings of the ICC attach little or no importance to customary international law,²⁷ numerous references to customary law have been made in ICTY, ICTR and SCLR (Special Court for Sierra Leone) by the judges.²⁸

In the *Tadic Interlocutory Appeal Decision*²⁹ of ICTY which has been described as ground breaking decision approached custom-making from a different angle. The court stressed that not every piece of evidence reflects state practice and *opinio juris*. That military practice, for instance, poses more of operational tactics than the considerations which supported the establishment of legal rule. Arguably, this contributed to emergence of a new rule. Looking at this decision, it showed that there were fundamental rules that were applicable to international and internal armed conflicts. This position was also supported by some findings of the International

²⁷Ibid

²⁸W Schabas, ‘customary law or “judge-made” law: Judicial creativity at the UN Criminal Tribunals’ in J Doria, H Gasser and MC Bassiouni (eds.), *The Legal Regime of the International criminal court, Essays in Honour of Professor Igor Blishchenko* (ed.) (Martinus Nijhoff, 2009).

²⁹*Tadic, Decision on Defence motion for interlocutory Appeal*, 02. 10. 1995, B. Schulutter, Constitutionalisation at its best or at its worst? Lessons from the development of customary International Criminal Law < <http://esil-sedi.eu/wp-content/uploads/2018/04/Schleutter.pdf>> accessed 9 September 2019

Committee of Red Cross.³⁰ The Chamber boldly declared the customary nature of individual criminal responsibility flowing from a violation of these rights through the following words:

We have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international conflicts. Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognised as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, or the interest of the international community in their prohibition.³¹

Again, the international judge played significant role in the ascertainment of custom in the case of *Prosecutor v. Tadic*.³² Here, the court gave an innovative and explicit meaning to terms that are not defined by a given statute. In this case, the issue of what constitutes ‘serious violation’ in terms of customary international law was raised. Neither did the statute provide for explicit authority as to the meaning of the term nor did the tribunals provide for explicit authority for general application of customary international law. However, an exception in article 3 of the statute of ICTY to the ‘laws or customs of war’ was employed. The interpretation incorporated within the tribunal’s jurisdiction viewed all crimes recognised as ‘serious violations of international humanitarian law’ to the extent that they are part of customary international law. Though corresponding article 3 of the Geneva Conventions of 12 August 1949 for the protection of war victims and its Additional Protocol 11 stipulates the issue of 2 ‘serious violation’ without any guidance as to what constitutes serious violation. Despite the silence, tribunals have acted as if there is a provision inviting them to apply, as residual law, the recognised sources of public international law, especially customary international law.³³

International judges have further expanded what constitutes crime, hence showing their competence necessity to make custom. In this regard, the statutes of the international tribunals were quite limiting as to the definition of certain crimes such as what constitutes rape, genocide and other crimes against humanity. In the definition

³⁰Ibid. See also Titus K. Githiora ‘Implications for General Military Operations in custom as a source of international humanitarian law’ in L Maybee and CB Benarji (eds.), *Custom as a Source of International Humanitarian Law* (ICRC, 2005) 117.

³¹B Schleutter, (n 29).

³² Tadic, (n 29).

³³W Schabas, (n 28).

against humanity, though there was a division on whether a state or organisational plan or policy was an element of crimes against humanity, the ICTY Appeals chamber in *Kunarac's case* held that the policy component was not an element of crimes against humanity at all 'at the time of the alleged acts'.³⁴ There was the controversy on the requirements of customary international law and the text of the Rome Statute which the ad hoc tribunals have sometimes regarded as an authoritative codification of customary international law.³⁵ However, in the same *Kunrac's case*, it has been noted that the traditional concept of slavery was expanded as defined in the slavery convention and referred to as 'chattel slavery; has developed into various contemporary forms of slavery which are based on the exercise of any or all of the powers attaching to the right of ownership'.³⁶

In *Prosecutor v. Naletilic*,³⁷ the international judge exhibited the ability of expanding definitions through the determination of intents. The court stated that persecution refers to 'a discriminatory act or omission' that 'denies or infringes upon a fundamental right laid down in international customary law or treaty and that it penetrated with intent to discriminate on racial, religious or political grounds'.³⁸

The *judgement of Kupreskic* displays more roles of the international judge in custom-making as it buttresses the 'elementary considerations of humanity' contained in the Martens clause for the interpretation of rules of international humanitarian law. The tribunal examined the customary nature of article 51(2) and 52 (6) of the Additional Protocol 1 to the Geneva Convention (API). Although some states such as India and United States have ratified the Protocol, the Chamber held that the demands of humanity or dictates of public conscience could foster the emergence of a new rule of customary international law.³⁹ The tribunal went further to hold that this constituted a 'new approach to customary international law which resulted from a general transformation of humanitarian law, that is, from the humanisation of armed conflict', a trend which had been confirmed by the International Law Commission (ILC) work on state responsibility.⁴⁰

In the face of the limitation of state practice which is a traditional element of

³⁴ *Kunarac et al.* (IT-96-23 & 23/1)

³⁵ W Schabas, (n 28).

³⁶ *Ibid* at 78.

³⁷ *Prosecutor v. Naletilic et al* (case no. IT-98-34-T) Judgement, 31 march 2003.

³⁸ *Ibid*. See also, W Schabas, (n 28) 99.

³⁹ B Schleutter, 29.

⁴⁰ *Ibid*.

custom as held by the ICJ, the tribunal in the *Hadzihasanovic Interlocutory Appeal Decision*,⁴¹ boldly examined the applicability of command responsibility in international and internal armed conflicts. The tribunal made a deduction from customary application to the internal armed conflicts from the principle of responsible command in article 3 of the Geneva Conventions and in article 3 of its statute without reference to article 38(1) (b) ICJ statute.⁴² All the above functions exhibit the contributions of the international judge in custom-making.

IV. Attitude of International Judges in Custom-Making.

It is a general knowledge that the evidence of customary law is scattered, elusive and unsystematic.⁴³ This uncertain nature of custom has led to different theoretical postulations,⁴⁴ which are also with deficiencies. International judges in the face of all these odds is expected to perform his/her judicial functions. Following these, some questions have arisen to determine the attitude of international judges in the role of custom-making. These are:

1. How did the judges act in performing this role?
2. Did they respect the already made laws?
3. Did they go beyond the plain interpretation?
4. Did they exhibit judicial activism?
5. Did they follow a consistent procedure in their role of custom-making?

From the above cases discussed under the section of the competence of judges to make custom in the international tribunals, the mere fact that the judges did not shy away from their judicial responsibilities proved a point of enthusiasm and courage to dispense justice and fill some gaps where and when necessary with the aid of custom, unlike in the *Nuclear Weapons Advisory opinion*⁴⁵ where the ICJ eschewed any law-making function. In the absence of any relevant treaty or rule of customary international law, the ICJ declined to conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstance of self-defence in which the survival of a state would be at stake. The court's failure to reach

⁴¹ Ibid.

⁴² Ibid.

⁴³ R Shabtai, (n 4).

⁴⁴ Michael Byers, (n 4); A Cartt, *The Decay of International Law? A Reappraisal of the limits of legal imagination in international affairs* (Manchester, Manchester University Press, 1986).

⁴⁵ *Legality of the Use of by a State of nuclear weapons in armed conflict, Advisory Opinion*, (1996) ICJ Reports 66.

a definite conclusion was greatly regretted by Judge Higgins in her dissenting opinion.⁴⁶

The judges in international criminal tribunals respected already made laws. This is proven from the fact that they tried to recognise custom as a source of law to base their decisions. However, where the statute did not expressly provide for custom, there were incidents the courts went on voyage of discoveries as shown in the United Nations international criminal tribunals such as ICTY, ICTR and SCSL. There were no explicit provisions in these statutes for the application of customary international law. Though there was the exception of reference in article 3 of ICTY to the ‘laws or customs of war’, these tribunals applied customary international law⁴⁷ without fear or favour in the cases stated earlier. However, could these be viewed that the judges went beyond their jurisdiction? Of course not, as the implied or inherent powers of the court gave them the authorisation to do so.⁴⁸

Whether the judges went beyond plain interpretation of the statute is another important attitude to consider. It was discovered that when the judges were faced with limited definitions, they went beyond the plain meaning of a given provision. In fact, the court expanded the meaning of the provisions to arrive at their decisions. These might be termed a revolution against the traditional conservatism to judicial creativity and activism. For instance, on the question of what constitutes ‘serious violations’,⁴⁹ there was an expansion as illustrated above. Again, showed dissatisfaction on the lack of provisions and limitations on what constitutes the crime of rape and genocide. Furthermore, the court went ahead in the *Kunrac case* earlier mentioned to ignore the limitation before it and gave a definition of slavery by interpreting that slavery has developed into various contemporary forms of slavery which are based on the exercise of any or all of the powers attaching to the right of ownership.⁵⁰

The *Tadic’s case* received a loud ovation from legal minds for the tribunal’s judicial activism and some writers called it a ground breaking decision.⁵¹ The tribunal scrutinised and affirmed that article 3 of its statute penalised violations common to article 3 to the Geneva Conventions to internal as well as to international conflicts.

⁴⁶ The expression of Judge Higgins, *Legality of the Threat or use of Nuclear Weapons* (1996) ICI Reports (Adv. Op) diss op Judge Higgins; Alan Boyle and Christine Chinkin, (n 25) at 289.

⁴⁷ W Schabas, (n 28).

⁴⁸ Jan Klabbers, *An Introduction to International Law* (second edition, Cambridge University Press, 2009).

⁴⁹ W Schabas, (n 28).

⁵⁰ *Kunrac, Trial chamber judgement*, 22.06.2002, case No. IT-96-23-T

⁵¹ B Schleutter, (n 29).

The court held that this resulted from the development of customary international law in this field. The court further employed that there existed principles and rules of humanitarian law reflecting ‘elementary considerations of humanity requiring minimum conduct, and that no one can doubt the gravity of the acts at issue or the interest of the international community in their prohibition’.⁵²

On the question of procedural attitude of the judges in the determination of custom, it could be said that there were some levels of flexibility and inconsistency, though in some cases the court tried to adopt a consistent approach. The court invoked ‘elementary considerations of humanity’ to evidence the customary character of certain norms of international criminal law which were adopted in several subsequent judgements of the court. For example, *the Celebici Appeals chamber judgement* as well as the recent *Halilovic Trial chamber decision* re-emphasised these findings.⁵³

The international criminal tribunal manifested a sign of inconsistence in *Hadzihasanovic’s case*. Here, the court examined and deduced the principle of responsible command reflected in common article 3 of the Geneva conventions and in article 3 of its statute without reference to traditional approach of custom as stated in article 38(1) (b) ICJ Statute viewed as evidence of state practice and *opinio juris*. Yet in answering the question of internal conflicts, it applied traditional elements of article 38(1) (b) ICJ Statute.⁵⁴

Though it looks as if the certainty or the presumption of what the court will make out of a matter before it cannot be one hundred per cent (100%) predicted, the attitude of the international criminal judges in filling a lacuna, expansion of definitions, judicial creativity and judicial activism portrays the intangible and uncertain nature of custom that the court tries to preserve or create. This judicial behaviour in giving decision might be criticized to bring in some manipulations by some judges. However, it gives room for the development of custom and other aspects of international law as well as save the statute from absurdity, limitations, vagueness, and ambiguities that plain meaning might give should a question of law arise in such statute. However, the caution and moderations are prescribed while making these decisions.⁵⁵

⁵²Ibid.

⁵³Ibid.

⁵⁴Ibid

⁵⁵ R Shabtai, (n 4).

V. The Legal Effects of Judge-Made Customs

It has been stated that the ‘Making of orders and delivering of opinions in legal matters is the proper function and judicial responsibility of the court and when the court properly discharges its obligations in this regard, the court’s determination will naturally have its repercussions in many spheres including the political...Again, the process by which the court achieves this resolution makes it clear that judicial decision-making is a deliberative process giving rise to collegiate responsibility for the outcome’.⁵⁶ Based on the foregoing, the legal effects of the roles international judges play in custom-making create responsibilities as well as repercussions and so on. The legal effects are most times advantageous as discussed below, though; there could be possible negative effects.

The identification and ascertainment of what actually constitutes custom by the international judge especially in customary international human rights is binding. This is because customary international human rights are *erga omnes* in that they are applicable against the entire world.⁵⁷ It is also the responsibility of the court to actually make the pronouncements/interpretations on what constitutes customary international law. Even if there are some statutes to this effect, the court still has to interpret and these pronouncements or interpretations are binding especially as it concerns customary international human rights.

Though, the doctrine of precedence is not recognised in international law, the general principle is that a decision only binds the parties to a dispute.⁵⁸ However, the effect of such decisions sometimes assumes the role of authoritative interpretation and substantive international law. In fact, as observed by Shabtai Rosenne, ‘there is a general desire for consistency and stability in the court’s case law when the court is dealing with the legal issues which have been before it in previous cases’.⁵⁹ Therefore, previous judgments can aid the later case in getting to a decision.

Custom-making or creation by the international judges arguably leads to the fulfilment or actualisation of the intention and provisions of statutes. Firstly, as shown above, where there is a limitation as to the meaning of some provisions of the statute,

⁵⁶ Alan Boyle and Christine Chinkin, (n 25) 268-269

⁵⁷ Tzevelekos P Vassilis, ‘In Search of Alternative Resolutions: Can the state of origin be held International Responsible for Investors’ Human Rights Abuses which are not Attributable to it?’ [2010] (35) *Brooklyn JILaw*, 155

⁵⁸ Statute of the ICJ

⁵⁹ Alan Boyle and Christine Chinkin, (n 25) 298

the court has tried to employ some extra device to expand such meaning to give their ruling, thereby saving the statute from non-intended limitations. Secondly, it satisfies the provision that judicial decisions form part of the sources of law in the international law. For instance, article 38(1) (d) of the ICJ provides that judicial decisions form part of the sources of law. If this was the case, then, it means that there is anticipation for judicial decisions which could arise in the form of law-making. When the judge makes a decision, example, custom-making, then it can be deduced that the anticipation of the statute or the intention of the draftsman has been fulfilled as such decision form part of sources of law.

Custom-making could also have the legal effect of gap filling especially where the statutes/treaties did not make express provisions on some legal issues. Though, in filling this gap, some writers have argued that sometimes, the judge makes a change and the authority of this change has been sometimes questioned. For, it has been put forward "...that state practice which contributes to the development, maintenance and change of customary rules is usually engaged in only after consideration of the customary international law.⁶⁰ However, the problem with this view is that who or what institution have the power to consider the effect or the process of customary international law before there is a change. Also, from whose eyes are the effects seen from? This could suggest a question of what is right and wrong which could be controversial in determination.

Another very important legal effect of custom made by international judges is that it could serve as a binding source of municipal law.⁶¹ However, this has to be incorporated first into national legislations. It has been argued that irrespective of the existence of a contrary rule to national law, the relevance of the judgments of international courts has always propelled its application in Netherlands, for instance.⁶² In *R. v. Hape*,⁶³ it was considered by the Canadian Supreme Court that customary international law may be incorporated in her domestic law where there is no conflict.⁶⁴ National courts may also employ the methodology of the international courts when determining the existence and content of a rule of customary

⁶⁰ Michael Byers, (n 4) 139.

⁶¹ MJ Cedric Ryngaert and Duco W. Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' [2018] (65) (1) *Netherlands International Law Review*, 1.

⁶² Herman Meijers, (n 16) 111.

⁶³ (2007) SCC 26

⁶⁴ J Currie, 'Hape Tangles Rules Governing the Domestic Reception of International Law' 12 October 2009 <<http://www.thecourt.ca/hape-tangles-rules/>> accessed on 9 September 2019.

international law.⁶⁵

VI. Can There Be A Custom Without The Judge?

It is difficult to specifically say yes or no to this question. The question on what constitutes custom is a very difficult one looking at the unwritten and uncertain nature of custom. There is also a contention that states most times do a different thing and say a different thing which makes it difficult sometime to ascertain what is a state practice. Diverse international lawyers and the ICJ have acknowledged state practice but what constitutes state practice and many more questions can only be determined by the court especially in contentious matters. The court in some of its decisions has also held that not all repetition can amount to custom. Therefore, what is custom? Can there be a custom without the judge? Well, it could be argued that where there is a conflict, when other means of peaceful resolutions such as negotiation, mediation and so on have failed, it is only the judge that can determine its existence or creation. Though, a state that is pleading custom may have to prove its existence.

VII. Conclusion

The major goal of the international community is peaceful co-existence in order to carry out their economic, social, political, and religious activities.⁶⁶ However, in the course of these activities, some legal questions sometimes arise and the need for resolutions become eminent. The role of the international judge in custom-making should be encouraged by whatever form for the clarity of what the law is. This helps in the development of the law. In this regard, the courts may refuse to make its interpretation of decision on just textually plain meaning where this could lead to absurdities, ambiguities and so on.

It is observed that there were some inconsistence and deviation from the customs which were identified or made by the judges. Though it is trite law that in the international community, the decisions only bind the said parties but it would be more beneficial and less controversial (not forgetting the unwritten and uncertain nature of custom) if same methodologies are followed in the determination of custom. This will help safe the time of the court. It is also important that judges in their decision expose

⁶⁵ Alan Boyle and Christine Chinkin (n 25).

⁶⁶Ige F Dekkar and Wouter G. Werner, (n 25) 12.

why and how they arrive at every decision. Though these are generally done, but in some occasions, these features were lacking.⁶⁷

There is the temptation to conclude that the International legal environment is likely to be unthinkable without custom. The modern international society has continued to develop and expand in the areas such as industries, science, technology, international relations and other institutions⁶⁸. When all the statutes, norms and other written laws have been exhausted in the face of a conflict, history of court decisions have shown that custom comes in to rescue the situation by filling the gap. The ability of the international judge to make customs to meet the requirement or needs of the changing international community becomes compelling.

In conclusion, despite the imprecise nature of custom, international judges have always resort to it as a basic source of international law. The international courts have been portrayed to be a significant vehicle for the integration of international law into international affairs. It is observed that the international judge while making custom have some things in mind, and this is to preserve peace, humanity and adhere to public policies. These are important roles for the safety and peace of the international society.

Finally, there is no doubt that though the primary function of the judge is the interpretation of law. However, this paper has exhibited the competence and the role of the international judge in custom-making. The judges in the face of limitations expanded the meaning of terms given to them by the statutes. The judges went beyond plain meaning of words to avoid absurdity, vagueness, ambiguity and hardships the definitions of some words might to their decisions. This boldness is applauded and the acts of these judges are for the benefit of the international society and the development of law.

⁶⁷ B Schleutter, (n 29).

⁶⁸ O Schachter, *International Law in Theory and Practice* (volume 13, Martinus Nijhoff Publishers, 1991).

PROMOTING LOCAL CONTENT AND ADHERENCE TO WORLD TRADE ORGANIZATION (WTO) TRADE LIBERALIZATION POLICIES: STRIKING THE RIGHT BALANCE FOR NIGERIA

*Rebecca Adedayo Ebokpo**

Abstract

This article explores the need to balance the contending forces of protection and promotion of Nigeria's local content and adherence to the World Trade Organization (WTO) trade liberalization policies in the areas of trade and commerce, labour and employment, manufacturing, technology exchange, monetary and expatriate policies. It argues that in modern times, no nation is self-sufficient, hence the need to intermingle especially on the plane of trade and investment amongst nations, Nigeria inclusive. It discusses the concepts of local content and trade liberalization and takes an excursion into the history and objectives of the WTO. It argues that since the era of Structural Adjustment Program (SAP) coupled with the drive to attract Foreign Direct Investment (FDI) as well as the International Monetary Fund (IMF) and World Bank (WB) loans conditions, Nigeria's economy has been liberalized with a concomitant devaluation of the Naira, paralysis of local industries, and increased unemployment. It examines the anatomy of local content, the various local content protection and promotion efforts of the government. The article further argues that liberalization is only beneficial to a manufacturing and exporting economy; therefore, it recommends the revamping and diversification of Nigeria's economy beyond oil, improvement on Small and Medium Scale Enterprises (SME), strengthening of the Naira as a legal tender, and introduction of viable fiscal policies. These measures would engender a balance between adherence to WTO trade liberalization policies and promotion of Nigeria's local content.

Keywords: Economy, Nigeria, Naira, Trade, World Bank.

I. Introduction

From time immemorial, no single nation has been self-sufficient; in fact, human wants are numerous and insatiable.¹ This has made interrelationship between individuals and nations indispensable.² One of the platforms people and nations of the world interact and comingle is international or cross border trade and commerce.³ Thus, international trade has become a veritable tool for the satisfaction of human needs.

International trade revolves around various interests ranging from individuals, national to international, thereby making the need for regulation imperative. Regulation in this regard deals with the issues of tariffs, dispute resolution,

*Rebecca Adedayo Ebokpo, LL.B (Hons) UNIABUJA, BL, MBA (in view) Barrister and Solicitor of the Supreme Court of Nigeria. Telephone: +2347068470752, Email: r.ebokpo@gmail.com

¹Sarnobat, S., 'Adam Smith and His Theory of Human Wants' <www.indiastudychannel.com> accessed 12 May 2019.

²Alisigwe, H. C., 'Regionalism as a Tool for International Economic Development: The ECOWAS Paradigm' in Nnabue, U. S. F., *Thematic on the Law of Development* (Ed) (Owerri, Applause Multi-Sectors Ltd., 2017) 465-466.

³Shen, S., 'Trade and Sustainable Development: Friend or Foe?' available online at <<https://www.ciel.org/trade-sustainable-development-friends-foes/>> accessed 13 May, 2019 conditions, Nigeria's economy has been liberalized with a concomitant devaluation of

the Naira, paralysis of local industries, and increased unemployment. It examines the anatomy of local content, the various local content protection and promotion efforts of the government. The article further argues that liberalization is only beneficial to a manufacturing and exporting economy; therefore, it recommends the revamping and diversification of Nigeria's economy beyond oil, improvement on Small and Medium Scale Enterprises (SME), strengthening of the Naira as a legal tender, and introduction of viable fiscal policies. These measures would engender a balance between adherence to WTO trade liberalization policies and promotion of Nigeria's local content.

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International trade revolves around various interests ranging from individuals, national to international, thereby making the need for regulation imperative. Regulation in this regard deals with the issues of tariffs, dispute resolution, negotiation, policy formulation and implementation. Thus, in 1995, the World Trade Organisation (WTO) was formed in advancement of the General Agreement on Tariffs and Trade (GATT).⁴ Since its formation, the WTO agreement and its annexes have strengthened existing international trade discipline, extended international trade law rules into new economic sectors, and provided a unified common institutional framework for the conduct of trade relations among its members.⁵

*Rebecca Adedayo Ebokpo, LL.B (Hons) UNIABUJA, BL, MBA (in view) Barrister and Solicitor of the Supreme Court of Nigeria. Telephone: +2347068470752, Email: r.ebokpo@gmail.com

¹Sarnobat, S., 'Adam Smith and His Theory of Human Wants' <www.indiastudychannel.com> accessed 12 May 2019.

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³Shen, S., 'Trade and Sustainable Development: Friend or Foe?' available online at <<https://www.ciel.org/trade-sustainable-development-friends-foes/>> accessed 13 May, 2019

⁴History of the Multilateral Trading System" Available Online at <https://www.wto.org/english/thewto_e/history_e/history_e.htm> accessed 10th May, 2019.

⁵Hoekman, B., "The WTO: Functions and Basic Principles" available online at <http://www.profesores.ucv.cl/mberthelon/hoekman%202002.pdf>> accessed 16 March, 2019.

Nigeria is a member of the WTO and prior to its formation Nigeria has, particularly since independence experimented various economic policies towards liberalisation of its economy, aimed at attracting Foreign Direct Invest (FDI).⁶ Before the discovery of oil, in commercial quantity and its exploitation, Nigeria had an agrarian economy; dominated by the groundnut pyramids of Kano, the cocoa of the South West, palm oil and other farm produce in the South East. However, the discovery of oil led to a substantial abandonment of agriculture, for an oil-driven economy with its attendant consequences on the environment, as exemplified in the Niger Delta Region (NDR).⁷

The WTO and other international bodies have aggressively engaged in promotion of trade liberalisation policies amongst nations of the world. The WTO trade liberalisation policy involves the elimination of non-tariff barriers to imports, the rationalization and reduction of tariffs, the institution of market-determined exchange rate, and removal of fiscal disincentives and regulatory deterrents to exports.⁸ The motive is to create competitive atmosphere between local and foreign industries.⁹

However, it is apposite to note that trade liberalisation as an economic policy, is well intentioned but its benefits or otherwise is dependent on individual nation's economic structure and policies. Given the fact that Nigeria is a mono-economy, heavily dependent on oil, with an almost non-performing agriculture, manufacturing, and export sectors, how beneficial would be the liberalisation of her economy? Presently in Nigeria, there is an astronomic level of unemployment and underemployment,¹⁰ insecurity,¹¹ obsolete and lopsided commercial disputes' resolution framework,¹² increase in casualization of labour,¹³ lack of adequate support

⁶ Eze, U. Z., Eze, T. C. and Okonkwo, T., "An Appraisal of the Legal Framework for Foreign Direct Investments in Nigeria and Implications for National Security and Development" Proceedings of the 50th Annual Conference of the Nigerian Association of Law Teachers (NALT) (2017) 581-587.

⁷ Ezike, E. O., "Resource Control, True Federalism and the Niger Delta Question" 14 *The Nigeria Juridical Review* (2016) 233-235.

⁸ Bakare, A.S., "The consequences of Trade Liberalisation for Economic Growth in Nigeria: A Stochastic Investigation" 1 (14) *Contemporary Marketing Review*, (2011) 1423.

⁹ Ajayi, S.I., "What Africa Needs to do to Benefit from Globalisation" 38(4) *Finance and Development* (2001) 24.

¹⁰ Odejimi, D. O. "The Impact of Trade Liberalisation on the Nigerian Labour Market" 3(4) *International Journal of Economics, Commerce and Management*, (2015) 5.

¹¹ Ekwoma, O. J. H., "Nexus Between Poverty and Kidnapping in Nigeria: A Case Study of Kogi State Axis" 8(1) *The Journal of Jurisprudence and Contemporary Issues* (2016) 259-263.

¹² Adebisi, A. L., "An Appraisal of the Grounds for Setting Aside an Arbitral Award under the Arbitration and Conciliation Act" 5 *Nnamdi Azikiwe University Journal of Public and Private Law* (2013) 243.

for Small and Medium Scale Enterprises (SMEs), devaluation of the Naira, corruption¹⁴ and infrastructural deficits; as a result, liberalizing trade in Nigeria cannot be beneficial to her. Thus, there is a need to ensure that liberalizing the economy will be beneficial to Nigeria and Nigerians as well as foreign investors.

This article strikes a balance between WTO trade liberalisation policies and the need to protect and promote Nigeria's local content in terms of growing SMEs, job creation, diversification of economy, and increase in exports while minimizing imports. It vehemently argues that unless Nigeria tackles the problem of infrastructure deficits exemplified by erratic electricity supply, insecurity, diversification of the economy from mono to multi economy, curbing of casualization of labour, strengthening of the Naira, revamping of manufacturing and processing industries, restricting importation of goods that can be cheaply produced locally, etc., trade liberalisation will be a parasitic experiment instead of a symbiotic cohabitation.

For the purpose of presentation, this essay is divided into six sections. Section one is the general introduction. Section two discusses the meaning, evolution and objectives of WTO, with regards to its trade liberalisation policy. Section three discusses the various liberalisation policies embarked upon by Nigeria in a bid to improve her economy, highlighting their impacts on her economy. Section four examines the effects of trade liberalisation on Nigeria's local content, focusing on the economy, labour, employment, manufacturing, export, and banking sectors. Section five is a synthesis of trade liberalisation and local content balance through recommendations. Section six contains the conclusion and recommendations.

II. Evolution and Objectives of The WTO, and Nigeria's Local Content

The World Trade Organisation (WTO) as an inter-governmental organisation was established in 1995 as the legal and institutional foundation of a multilateral trading system.¹⁵ The establishment of WTO is a product of the lengthy (1986-1994) Uruguay Round of negotiations by some nations with a view to harnessing global trade collaborations.¹⁶ The WTO oversees the various trade agreements negotiated by its members, including the Trade Related Aspects of Intellectual Property Rights

¹³ Kalejaiye, P. O., "The Rise and of Casual Work in Nigeria: Who Loses, Who Benefits?" 8 (1) *African Research Review* (2014) 160-162.

¹⁴ Akintola, N., "Corruption and Rule of Law: Wither Nigeria" in Onigbinde, A. and Ajayi, S., *Contemporary Issues in the Nigerian Legal Landscape*, (2010)175-180.

¹⁵ The Encyclopedia of the Nations "The World trade Organisation (WTO) Structure" available online at <www.nationsencyclopedia.com/united-nations-related-agencies/index.htm> accessed 1 may 2019.

¹⁶ Pollock, R., "Basic Facts about the WTO" Available online at <www.rufuspollock.org/wto/wto_index.htm> accessed 20 April 2019.

(TRIPS), the main objective of TRIPS is to promote the effective and adequate protection of the intellectual property rights on a global scale, General Agreement on Trade in Service (GATS) (the GATS has two main objectives, to ensure that all signatories are treated equally when accessing foreign markets; and to promote progressive liberalisation of trade in services, overtime, eliminating trade barriers to enable further participation in one another's markets),¹⁷ and General Agreement on Tariffs and Trade (GATT).¹⁸

By reducing tariff barriers and eliminating discrimination in international trade, the GATT aims at expansion of international trade, increase of world production by ensuring full employment in the participating nations, development and full utilisation of world resources and raising standard of living of the world community as a whole. The inability of some nations after the 2nd World War (WW2) in seeking world peace and economic prosperity, led to the attempted creation of the International Trade Organisation (ITO), thus, GATT was created in 1947. The belief was that had there been international institution to respond to the socio-economic crisis of the 1930s, the 2nd World War would not have occurred. The Treaty of Versailles that ended the 1st World War was perceived to have inflicted a dent of the pride of Germany coupled with the great depression that ensued after a result of prosecuting the World.

The Nazis hegemony capitalised on this to instil a national supremacy consciousness in the Germans. In 1928 the Pact of Paris was signed by post 1st WW Countries to the end that war would not be used as a means of settling disputes.¹⁹ In 1929, there was a severe economic crisis (Wall Street) with catastrophic impact. This led desperate American lenders to recall their money at home and abroad which led to a wave of bankruptcies and widespread unemployment and world trade had a spiral slump. In Germany, over 30% of the workforce was rendered unemployed by 1932 and industrial output was halted this made it difficult for it to honour its debt abroad.²⁰ As a result of this global economic crisis with its concomitant effects, international collaboration to avert economic disaster evaporated as each nation sought ways to protect itself even at the detriment of others.

¹⁷ See <<https://www.wto.org>> accessed 2 December 2019.

¹⁸ Adeoye, R. O., "A Survey of the Institutional Framework and Operation of the world trade Organisation" 3 *Law and Policy Review*, (2012)124.

¹⁹ Eisenhower, J. S., "Europe after World War 1: November 1918-August 1931" available online at <<https://www.howstuffworks.com>> accessed 2 December 2019.

²⁰ *Ibid* 3.

This economic set back pitched Germany against the West and led Hitler to prosecute Germany superiority agenda which culminated to the 2nd WW.²¹ The period preceding the WW2 was characterized by harsh socio-economic conditions that compelled nations to adopt arbitrary and discriminatory trade barriers in tariffs to cushion the effect of subsisting economic depression as well as maintain local industries and job security. This protectionist posture of nations towards their local industries, at the expense of import and global economic welfare, led to global socio-economic difficulties.²²

At Havana, in 1948, negotiations on the ITO charter were successfully concluded but the ITO could not be implemented because of the failure of the US Congress to ratify the agreement. GATT was aimed at achieving predictability, non-discrimination and stability in international trade and investment by sharing economic benefits from one nation to another. The success of GATT led WTO to incorporate it as one of its focal points. Adeoye has argued that:

The WTO is a forum for international cooperation on trade-related policies and the creation of codes of conduct for member states. These codes emerged from the exchange of policy commitments in periodic negotiations. The WTO can be seen as a market forum in the sense that countries come together to negotiate market access commitments on a reciprocal basis, it is in fact, a barter market.

The objectives of the WTO are contained in the preamble of its instrument, which is that:

international economic relations should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, expanding the production of trade in goods and services; and allowing for the optimal use of the world's resources in accordance with the objectives of sustainable development, seeking both to preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development.²³

²¹ *Ibid.*

²² Adeoye, R. O., (n18) 122.

²³ Adeoye, R. O., (n18) 122.

Article 3 of the WTO Agreement spells out its functions to include administering of WTO trade agreements, provision of forum for trade negotiations, handling trade disputes, monitoring national trade policies, cooperation with other international organisation such as the International Monetary Fund (IMF), International Bank for Reconstruction and Development (IBRD), Africa Development Bank (AfDB) and World Bank (WB), provision of technical assistance and training for developing countries. The WTO as an international-intergovernmental organisation thrives on five ingrained principles to wit, non-discrimination, reciprocity, binding and enforceable commitments, transparency and safety valves.

The principle of non-discrimination has two components, viz.: “most favoured nation” and “national treatment policy.”²⁴ It requires that a WTO member must apply the same conditions on trade with other WTO members, and both imported and locally manufactured goods and services should be treated equally, once the foreign goods enter the local market.²⁵ The principle of binding and enforceable commitments of WTO agreement seeks to achieve predictability in international trade relations amongst member states.

At this juncture, it is pertinent to examine what local content connotes. Section 106 of the Nigerian Oil and Gas Industry Content Development Act²⁶ defined local content as “the quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry.”

The Nigerian Content Development in Information and Communication Technology Guidelines²⁷ defines local content as:

the amount of incremental value added or created in Nigeria through the utilization of Nigerian human and material resources for the provision of goods and services in the ICT industry within acceptable quality and standard in order to stimulate the development of indigenous capabilities.²⁸

²⁴*Ibid.*

²⁵*Ibid.*

²⁶ Section 106, Nigerian Oil and Gas Industry Content Development Act, 2010.

²⁷ The Nigerian Content Development in Information and Communication Technology Guidelines, 2010.

²⁸*Ibid.* Guideline No. 9.0.

Bello²⁹ in stating the factor necessitating local content enforcement in Nigeria posits as follows:

local content policy came up upon the realization that the international or multinational companies had taken over the exploration, exploitation and production and refining of crude oil and other resources in Nigeria and carried on business in Nigeria using foreigners in every department of the company without the consideration of Nigeria not even for engineering or technical positions.

The above quotation indicates that the idea of local content deals with the degree of involvement of local labour and resources in the economic affairs of a nation, it seeks to ensure that citizens of a nation are actively involved in the wealth creation, resource exploration and exploitation of their nation. It is the amount of value created in Nigeria through the utilization of Nigerian human and material resources for the provision of goods and delivery of services. In fact, it extends to the benefits foreign and indigenous business concerns bring to the locality they are situated in through corporate social responsibility, towards the betterment of their host.

The idea of local content does not seek to discourage foreign participation but to ensure that local participation and resources are not sacrificed; it is geared towards ensuring that a symbiotic relationship ensues and continues between all businesses concerned in an atmosphere of profitable competition. Through local content emphasis, Nigeria can categorize certain undertakings and prescribe a percentage of local participants against foreign by identifying areas of local competence, giving of “preferential” treatment to local/indigenously owned businesses while giving incentives to foreign participants too.³⁰

III. Nigeria’s Liberalisation Policies in Retrospect

This part of the article examines the various liberalisation policies the government of Nigeria has adopted in a bid to boost Nigeria’s economy and their concomitant effects. However, it is apposite to discuss, howbeit passively, the

²⁹ Bello, A. T., “Local Content in the Nigerian Oil and Gas Sector: A Classical Model for Indigenization” Available Online at <<http://papers.ssrn.com>> accessed 18th April 2019.

³⁰ Chigozie, H. N., “Enhancing Local Content in the Upstream Oil and Gas Industry in Nigeria: An Appraisal of Current Policy” 2(1) *OGEL*, 2004, P. 24.

nuances of trade liberalisation. It is a move towards freer trade between two or more countries and entails removal of import quotas and other quantitative restrictions. It also involves the abolition or reduction of import tariff rates, removal of export taxes, removal of protection for infant industries, elimination of non-tariff barriers and devaluation of the local currency.³¹ Trade Liberalisation usually implies tariff rationalization, discontinuation of import licensing and the elimination of marketing boards. It is the removal of obstacles on trade. The motive is to create competitive atmosphere between local and foreign industries.³²

Starting with the structural adjustment programme (SAP) in the mid-1980s,³³ and moving to the current home-grown National Economic Empowerment Development Strategies (NEEDS),³⁴ different reforms in trade and investment components point to the liberalisation stance of the government. The reforms encompass changes in policy directions as well as policy instruments. Investment policy, for instance, witnessed a radical reform as the indigenization policy of the government was abandoned in favour of a liberalized (foreign and domestic) investment regime. In most cases institutional reforms constituted a major component of the package.

Again, in investment policy, the Nigerian Investment Promotion Commission (NIPC)³⁵ was invigorated to discharge its redefined statutory functions. The SAP was a watershed in the history of trade and investment policy reforms in the country. The Programme was able to achieve substantial reduction in average tariffs and saw to the minimal application of quantitative import restrictions. As a comprehensive approach

³¹Odejimi, D. O. “The Impact of Trade Liberalisation on the Nigerian Labour Market” 3 (4) *International Journal of Economics, Commerce and Management* (2015) 2.

³²Oluwaleye, J. M., “Public Policy and Trade Liberalisation in Nigerian Economic Development” 4 (15) *Research on Humanities and Social Sciences*, 2014, P. 92. Available online at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.875.8428&rep=rep1&type=pdf>> accessed 26 March, 2019.

³³ Obansa, S. A., “Impact of Structural Adjustment Programme on the Nigerian Economy” 12 (2) *African Update Newsletter*, 2005) 12-20; Ogbona, B., “Structural Adjustment Program (SAP) in Nigeria: An Empirical Assessment” 6 (1) *Journal of Banking* (2012) 19-40.

³⁴ Ugoani, J. N. N., “Examination of the Impact of National Economic Empowerment and Development Strategy on Poverty Reduction in Nigeria” 3 (5) *International Journal of Economics and Financial Research* (2017) 65-75; Olusoji, M. O. and Oloba, O. O., “Impact of National Economic Empowerment and Development Strategy (NEEDS) on the Private Sector: A Case Study of Power Sector” 4 (3) *Journal of Public Administration and Governance* (2014) 15-29.

³⁵ Zakari, A. Aliero, H.M., and Abdul-Quadir, A. B., “The Role of the Nigerian Investment Promotion Commission (NIPC) in Attracting Foreign Direct Investment in Nigeria” 8 (7) *European Scientific Journal* (2012) 14-28.

to restructure the Nigerian economy, the Programme contained policies that were complementary to trade and investment especially foreign exchange reform.³⁶

Major objectives of SAP included the restructuring and diversification of the productive base of the economy in order to lessen dependence on the oil sector and on import; the achievement of fiscal and balance of payment visibility; laying the basis for a sustainable non-inflationary or minimal inflationary growth; and reducing the dominance of unproductive investments in the public sector, improving the sector's efficiency and intensifying the growth potential of the private sector.³⁷ Trade liberalisation policy was a major component of the IMF-World Bank structural adjustment programme (SAP).³⁸ Liberalisation of restrictive trade policy regime culminated in the deregulation of foreign exchange market and it was expected this would create jobs, reduce poverty and enhance economic growth performance.³⁹ Given the present situation of things in Nigeria, the outcome of the SAP can easily be identified.

Aside this, in furtherance of its liberalisation stance, successive Nigeria governments have engaged in privatization of national assets. During the Muritala/Obasanjo military junta,⁴⁰ the policy of indigenization was aggressively pursued whereby Nigerians were made to be in control of their economy through transference of ownership of business concerns owned by foreigners to Nigerians.⁴¹ However, this policy was not supported by the West and they pushed for its reversal, which came in through privatization.⁴² As a result, government equity in companies,

³⁶Ogunkola, E. O. and T.A Oyejide "Market Access for Nigeria's Exports in the European Union: An Assessment of the Impact of the Lome Convention and the Uruguay Round 43(1) *Nigerian Journal of Economic and Social Studies* (2001) 1.

³⁷ Nwadugo, N.E., "The Story of Structural Adjustment Programme in Nigeria from the Perspective of the Organised Labour" 1 (7) *Australian Journal of Business and Management Research* (2011) 30-41.

³⁸ Anyanwu, J. C., "President Babaginda's Structural Adjustment Programme and Inflation in Nigeria" 7 (1) *Journal of Social Development in Africa* (1992) 5-9.

³⁹Balogun, E.D., and Dauda, R. O. S, "Poverty and Employment Impact of Trade Liberalisation in Nigeria: Empirical Evidence and Policy Implications" Available online at <https://mpra.ub.uni-muenchen.de/41006/1/POVERTY_AND_EMPLOYMENT_IMPACT_OF_TRADE_LIBERALISATION_IN_NIGERIA_DraftfinalDaudaBalogun.pdf> accessed 11th May, 2019.

⁴⁰ Gen. Murtala Mohammed and Tunde Idiagbon were the Head of the Federal Military Government (FMG) from the 30th day of July 1975 – 13th February 1976 when the former was murdered in a *Coup 'd' etat* and was succeed by Gen. Olusegun Obasanjo from 13th February 1976 - 1st October 1979. He later contested election in 1999 which ushered in the fourth Republic and won and became the first democratically elected President of Nigeria from 1999-2007 under the 4th Republic.

⁴¹ Ike, D. N. "The Structural Adjustment Programme as it Relates to Development/Adaptation of Technology in Nigeria" Being a Paper Presented at the Workshop on SAP, NIPSS, KUR, Jos 20 September 1988)1-28.

⁴² Ogbuagu, C. S. A., "The Nigerian Indigenisation Policy: Nationalism or Pragmatism" 82 (327) *African Affairs* (1983) 241-266; Yakubu, A. O., "Indigenisation of Foreign Businesses in Nigeria: A Select Bibliography" 23 (1) *A Current Bibliography of African Affairs* (1991) 1-17.

corporations, agencies and parastatals were sold to private individuals and companies, including foreigners.

The same foreigners from whom the equity shares were bought when the indigenisation Decree was promulgated were now being considered for the transfer, control and management of the commanding heights of the Nigerian economy in place of Nigerians.⁴³ Beside its liberalisation efforts, Nigeria has adopted certain measures to protect her local content through statutory control. Section 27 of the Petroleum Act⁴⁴ provides that the holder of a mining lease shall ensure that within ten years from the grant of his lease the number of Nigerian citizens employed in connection with the lease in the managerial, professional and supervisory grades or any corresponding grade shall reach at least 75% of the total number of person employed in those grades.

In addition, the number of Nigerian citizens in any of those grades shall not be less than 60% of the total; and all the skilled, semi-skilled and unskilled workers are citizens of Nigeria. The Executive Order No. 005 of 2018⁴⁵ is another local content promotion framework; it directed the National Office for Technology Acquisition and Promotion (NOTAP) to collate the data of professionals in Nigeria for the purpose of ensuring that for all government contracts, Nigerian companies and firms are given preference in accordance with the Public Procurement Act.⁴⁶ This will ensure that Nigerian professionals and enterprises are given preference in the award of contracts bearing in mind the need to encourage their growth.⁴⁷

The Oil and Gas Industry Content Development Act⁴⁸ protects Nigeria's local content in the industry. Section 2 thereof provides that all regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, activities, operations give priority to Nigerian content.⁴⁹ The Nigerian Industrial Revolution Plan (NIRP)⁵⁰ also protects Nigeria's local content in the solid

⁴³ *Ibid.*

⁴⁴ Petroleum Act, Cap. P10, LFN 2004.

⁴⁵ Executive Order No. 005 of 2018 signed on 2nd February 2018 by President Mohammadu Buhari.

⁴⁶ Public Procurement Act, 2007.

⁴⁷ Ladan, M. T., "The Force of Law and Limits of Presidential Executive Orders in Nigeria: Lessons from the USA" 3(3)M *Miyetti Quarterly Law Review* (2018) 32.

⁴⁸ Oil and Gas Industry Content Development Act, 2010.

⁴⁹ *Ibid.*

⁵⁰ The NIRP was launched by the Goodluck Ebele Jonathan Administration in 2014 to promote local content in the iron ore, cement, aluminium and basic steel processing. Available online at <<https://nipc.gov.ng>> accessed 21 November 2019.

mineral processing sector. The Nigerian Automotive Development Plan (NADP)⁵¹ seeks to convert Nigeria from an automotive assemblage destination to production. The Guidelines for Nigerian Content Development in Information and Communications Technology⁵² seek to protect and promote Nigeria's local content in the sphere of ICT by ensuring that locally produced ICT products and services are patronized.⁵³

The Executive Order No. 003⁵⁴ by the Federal Government mandated government ministries and agencies to give preference to locally manufactured goods and services in their procurements particularly section 2 and 3 thereof.⁵⁵ Thus, the Nigerian government has not left its local content, as far as legal action is concerned to chance, but enforcement is another thing.

The African Continental Free Trade Agreement (ACFTA),⁵⁶ though not a WTO agreement *per se*, is in its similitude, an African Union (AU) policy document which has redefined trade policies amongst AU members by engendering free movement of goods and services within AU Member States. It is no doubt, a trade liberalisation agreement, which Nigeria must exercise caution before signing, bearing in mind its competitive potentials which can impedes the growth of local industries. While the agreement can foster Nigeria's economic growth and development, it must ensure that her local content is well protected so as to prevent herself from becoming a continental dumping ground for goods whether produced in other AU nations or imported into them from none AU members. If this is not done, the influx of foreign goods will stiffen her local market and negatively affect her local goods and services resulting to avoidable economic malaise.

IV. Effects of Trade Liberalisation on Nigeria's Economic Life

⁵¹Nigerian Automotive Development Plan, 2013.

⁵² Available at <https://nitda.gov.ng> > accessed 19 November 2019.

⁵³ Guidelines 9.0 and 10.0 of Nigerian Content Development in Information and Communications Technology 2019.

⁵⁴Editorial, "List of Executive Orders Issued by the Buhari Administration" NaijaParrot.com, 20th June 2018 available online at <http://www.najaparrot.com/list-of-executive-order-issued-by-buhari-administration> accessed 20 November 2019.

⁵⁵Budget Office of the Federation, "Executive Order on Budget- May 2017" available online at <<http://www.budgetoffice.gov.ng/index.php/resorces/internal-resorces/executive-order?task=document.viewdoc&id=567>> accessed 20 May 2019.

⁵⁶ The agreement was signed by 44 AU members in Kigali on 21st March 2018. Give details of the source of the document.

This section of the essay evaluates the effect of trade liberalisation championed by WTO on Nigeria. It focuses on the economy, labour, employment and industrialisation of Nigeria. According to Boeut,⁵⁷ the world community that made poverty alleviation the main goal of MDGs called for current global trade negotiations conducted by the World Trade Organisation (WTO), the Doha Development Agenda. The expectation is that trade liberalisation will have positive effect on development and poverty reduction especially among less developed countries characterized by surplus labour as factor endowments. However, it has been observed that open trade policy, backed by exchange rate reforms, which led to improvement in exports of many countries, especially the Asian Tigers, have had adverse consequences on employment and poverty in most Less Developed Countries (LDCs).⁵⁸

Odejemi⁵⁹ has graphically captured the effect of trade liberalisation in Nigeria in the following manner:

The liberalisation policy has had a devastating effect on local production and employment and has discouraged further investment in Nigeria. Indeed, trade liberalisation has been accompanied by de-industrialisation in Nigeria. Both the Manufacturing Association of Nigeria (MAN) and the Nigerian Labour Congress (NLC) have drawn attention to a number of industries and firms that have gone under as a result of trade liberalisation. In the Guardian Newspaper of April 27, 2008, the Group Managing Director of Chanrai Group of Companies spoke on how the importation of finished textile products to Nigeria led to the closure of his textile company in Nigeria named Afprint which started operation in 1966. This led to over 3000 employees being thrown into the labour market. In the same vein, several companies like Eleganza, Doyin Groups, Toyo glass, Arewa Textile, Calcemco, NIFOR just to mention a few closed down, sending thousands of workers home. Poor countries, Nigeria inclusive, do not have the wherewithal to compete internationally whether as it concerns trade or labour conditions. The vital thing lacking in Nigeria is a conducive environment, security and infrastructural support to boost production in the private real sector.

⁵⁷Bouët, A. 2006. What can the poor expect from trade liberalisation? Opening the black box. MTID Discussion Paper No. 93. IFPRI, Washington, DC. Where can it be found? Supply the URL or any useful link or source.

⁵⁸Balogun, E.D., and Dauda, R. O. S, "Poverty and Employment Impact of Trade Liberalisation in Nigeria: Empirical Evidence and Policy Implications" available at <https://mpra.ub.uni-muenchen.de/41006/1/POVERTY_AND_EMPLOYMENT_IMPACT_OF_TRADE_LIBERALISATION_IN_NIGERIA_DraftfinalDaudaBalogun.pdf> accessed 11th May, 2019.

⁵⁹ Odejimi, D. O. (n28) 6.

Balogun and Dauda⁶⁰ identified internal and external factors constraining the competitiveness of the Nigerian economy in her quest of liberalisation. These include excessive devaluation of the Naira, inadequacy of economic infrastructure, high inflation and interest rates, foreign borrowing, political instability and lack of genuine social engineering among others. The near full throttle liberalisation of trade embarked upon by Nigeria has given rise to massive inflows of all manner of finished products from industrialized countries of the West and Asia, including fairly used products like textile, footwear, automobiles, motor cycles, refrigerators, air conditioners, televisions, radios, blenders; substandard and fake products like pharmaceuticals, cosmetics, toiletries, electrical materials, foods, wines, etc. Some of the goods apparently dumped on the Nigerian market are goods that can be produced or are being produced in Nigeria.⁶¹

A critical observation of the consistent and prevailing socio-economic situations in Nigeria lay bare the effects of the various liberalisation programmes engaged in by Nigeria. In the 70, 80s and early 90s, before graduating from school, a prospective graduate is sure of gainful employment, in fact, the problem such a person would have is to choose amongst the available employment options. Today, the reverse is the case. Youth unemployment and underemployment is rampant in Nigeria, which has led to increment in crime rate.⁶² According to National Bureau of Statistics, the unemployment rates for Nigeria between 2000 and 2011 showed that the number of unemployed persons constituted 31.1% (percent) in 2000 and it reduced to 11.9% (percent) in 2005 but again increased to 23.9% (percent) in 2011.⁶³ Nigeria has a youth population of 80 (eighty) million, representing 60% (percent) of the total population with a growth rate at 2.6% (percent) per year, and the national demography suggest that the youth population remains vibrant with an average annual entrant to the labour force of 1.8 million between 2006 and 2016. As at 2016⁶⁴, the National Bureau of Statistics reported that youth unemployment rate in Nigeria rose to

⁶⁰ Balogun, E.D., and Dauda, R. O. S, (n49) 14.

⁶¹ *Ibid.*

⁶² Ajaegbu, O. O., "Rising Youth Unemployment and Violent Crime in Nigeria" 5 (2) *American Journal of Social Issues and Humanities* (2012) 315.

⁶³ *Ibid.* The expected reference is the National Bureau of Statistics, which '*Ibid*' cannot satisfy; more so, author has not furnished any nexus between note 36 and the data from NBS. Author should supply the appropriate reference.

⁶⁴ Alagbe, J., "Youth Unemployment, a Time Bomb" *Punch* Newspaper of 28th January 2018) 10.

42% (Forty-Two) percent.⁶⁵

Moreover, Nigeria's Naira in the 70s used to be more valuable than the pound sterling. In those days, foreigners from all parts of the world, come to work in Nigeria. Today, through trade liberalisation, the Naira has been grossly devalued. It is not recognized as a currency for trans-border transactions. Devaluation of the Naira was one of the unspoken conditions for IMF loans. Most local industries have died a natural death because they are unable to favourably compete with imported goods due to the open market policy of liberalisation. The cost of production is higher than that of importation. Nigeria is littered with imported goods of various varieties including those that can be locally manufactured. Odejimi puts it thus:

One of the major limitation or disadvantage of this situation is that, infant industries and small scale struggling businesses find it difficult and to say the least, impossible to compete in the world market with these products. For example, the unit cost of producing a stick of candle in Nigeria is about 150% the price of an imported candle stick from China. Now, how can the candle factories in Nigeria compete for market or even strive to export? How would the millions of skilled and unskilled labourers be employed if factories are closing down for inability to compete with foreign products? These are few of the questions begging for answers.⁶⁶

The concomitant effect of the above is a snail pace growth economy which is not capable to cater for the needs of Nigerians. Nigeria's labour sector has experienced recurrent unrest as workers keep agitating for better and improved conditions of work amidst dwindling economic growth. In fact, this unrest is felt beyond the contemplated limits of various workers groups in different sectors in Nigeria. The off shoot of this is the resort to casualization of labour, which is a term used in Nigeria to describe work arrangements that are characterized by bad work conditions like job insecurity, low wages, and lack of employment benefits that accrue to regular employees as well as the right to organize and collective bargaining.⁶⁷ “Casual work is often temporary, with uncertain wages, long hours, and no job

⁶⁵Ibid.

⁶⁶Odejimi, D. O. (n28) 10.

⁶⁷Danesi, A. R., “*Labour Standards and the Flexible Workforce: Casualization of Labour under the Nigerian Labour Laws*” Available at <www.ajol.info/indexphd/eajphr/cart/view//39344/7848>, Accessed 25th March, 2019.

security.”⁶⁸ This practice in itself is inimical to decent work and international minimum best practice, but has become an acceptable norm due to socio-economic factors.

The situation above points to the conclusion that, Nigeria’s embrace of WTO trade liberalisation policy has not been to her benefits due to certain prevailing factors.

V. Closure of Nigeria Borders and Protection of Local Content

Recently, the Federal Government directed the closure of all land borders between Nigeria and her neighbouring countries as a result of continuous undermining of her economic policies concomitant with its adverse economic effects.⁶⁹ These borders, particularly the Seme-Badagry Border has become the hub for brazen smuggling activities despite talks between Nigeria and Benin Republic to discourage same. The ECOWAS Treaty regulates the free movement of person and goods within ECOWAS States to the extent that goods produced in one State can be moved to another where the market is available after payment of requisite duties.⁷⁰ However, goods imported from a non-ECOWAS State by an ECOWAS State, cannot be moved to another member State without payment of requisite taxes and duties.

The borders particularly between Nigeria-Benin and Nigeria-Niger has become a route for smuggling of contraband goods and even goods that are locally manufactured in Nigeria into Nigeria. This situation is capable of injuring Nigeria’s local content. Nigeria’s Minister of Finance, Budget and National Planning, Mrs Zainab Ahmed, said the borders were closed to curb illegal trading activities by Nigeria’s neighbours. Ahmed said the closure would remain in force until the country secured the commitment of its neighbours to trade agreements and treaties signed with them.⁷¹ This action of the Federal Government is boost towards striking a balance between trade liberalisation in the face of the African Free Trade Continental

⁶⁸Fapohunda, T. M., “Employment Casualization and Degradation of Work in Nigeria” *International Journal of Business and Social Sciences*, (3)9 (2012) 258. Available online at <http://ijbssnet.com/journals/Vol_3_No_9_May_2012/31.pdf> Accessed on 28 April 2019.

⁶⁹Royal, D. O., Why Federal Government Closed Nigeria’s Borders available at <<https://www.vanguardngr.com/2019/09/why-fg-closed-nigerias-borders-cg-customs/>> accessed 22 November 2019.

⁷⁰Article 3 of the Revised ECOWAS Treaty 1993.

⁷¹Urowayino, J., “Border closure: IMF backs Nigeria” <<https://www.vanguardngr.com/2019/10/border-closure-imf-backs-nigeria/>> accessed 25 November 2019.

Agreement and Nigeria's ECOWAS membership. Tons of rice are smuggled into Nigeria despite availability of local rice, the effect is the inhibition of the local rice market growth.

The above notwithstanding, closing borders with a neighbouring country sharing a common external tariff and a soon-to-be implemented common currency might not be the right signal to send about the seriousness of the West African integration agenda of which Nigeria has become a prominent advocate. It is clearly not in Nigeria's interest to pursue policies of relying on import protection to boost inefficient domestic industries and subsidizing gasoline use. Instead, the solution to the overarching enigma of its weak industrial and agricultural bases might be in the predominance of the oil sector over the rest of the economy (oil makes up 90 percent of Nigeria's exports), as well as counterproductive economic policies and rampant corruption and favouritism.⁷²

VI. W TO Trade Liberalisation and Local Content: The Synthesis

In the preceding section, the effects of trade liberalisation on Nigeria's local content have been graphically captured. It is obvious that while the idea of trade liberalisation is laudable, Nigeria's experience has been largely unrewarding, at least to its local content. This section of the article proposes a template that will ensure a synthesis between trade liberalisation and Nigeria's local content. It is trite that since the inception of the Fourth Republic,⁷³ the rate of unemployment/underemployment, increment in importation against near zero export, closure of local non-oil businesses, devaluation of the Naira, precarious labour practices (casualization), increment in financial crimes, etc. have engulfed Nigeria in an unprecedented proportion.

The issue here is, what must Nigeria do to create the much-needed balance so that she does not continue to liberalize her economy to her own detriment as it is presently the case? Firstly, there is a need to diversify Nigeria's economy from a predominantly oil driven economy to a multifaceted one. Presently, 90 percent of Nigeria's earning is from the oil sector. Her non-oil sectors particularly agriculture is

⁷² Golud, S., Golubski, C., Mbaye, A. A., "Consequences of Nigeria-Benin border closure" Available online at <<https://guardian.ng/opinion/consequences-of-nigeria-benin-border-closure/>> 22 November 2019.

⁷³ The fourth Republic began from 1999 till date when Nigerian returned to Democratic Rule with Olusegun Obasanjo as the President.

comatose. Prior to the discovery and exploitation of oil in commercial quantity in Nigeria, her foreign earning had been from agricultural produce such as cocoa, coffee, palm produce, rubber, groundnuts, etc. Several years ago, the groundnut pyramids of Kano were being used as reminders of the ancient Egyptian pyramids, cocoa house in Dugbe, Ibadan, South West Nigeria, reputed as the first skyscraper in Africa, Western Nigeria Television (now NTA), Liberty Stadium (the first stadium in Africa), are all national legacies, built with money from agriculture and not oil.

Yet, while these legacies still subsist, commercial agriculture has become moribund in Nigeria. Diversification will ensure that the foreign earning potentials of Nigeria and Nigerians are more than one, which will engender multiple earnings and increase in GDP.

Furthermore, a corollary to diversification is the need to revamp the production and manufacturing sector of Nigeria's economy. An economy like Nigeria's that is basically a consuming one is not able to maximize the benefits of economic liberalisation as it should and has become a dumping ground for imported goods encouraged by low tariffs.

Regrettably, even Nigeria's crude oil is not refined in Nigeria presently; her refineries, like many other industries, are mere relics of bygone eras. The economic implications of a liberalized non-manufacturing economy like Nigeria, *inter alia*, is the purchase of raw products at a cheaper rate by other nations to exchange with finished goods as import at a higher rate on a low tariff. It is shameful to note that as common as toothpick is still being imported by Nigeria, despite the abundance of raw materials in Nigeria. Nigeria is still a major importer of electronics, consumable goods like rice, cereals, beans, building materials, cars, etc.; while exporting mainly crude oil. The issue is where are the locally manufactured goods to favourably compete with foreign goods imported into Nigeria?

Moreover, to synthesize the WTO trade liberalisation policies and Nigeria's local content, there is the need to improve on the business infrastructure in Nigeria. The importance of electricity and good road network to the exploitation of the business potentials of any nation cannot be overemphasized. A lot of local businesses which could have favourably competed with foreign ones in Nigeria are struggling because of lack of adequate infrastructures. Electricity is the live wire of manufacturing; however, the electricity generation and supply in Nigeria is not only erratic but

epileptic. This makes the cost of doing business in Nigeria for local industries extremely cumbersome and unprofitable.

Incidental to this is the lack of good roads for most produced goods to be moved to the available markets, particularly perishable goods, from rural settings to the cities where they are needed. Thus, most of these goods get spoilt before getting to the limited available markets, causing local businesses to run at a loss. This reduces the capability of local goods favourably competing with foreign ones.

Furthermore, there is a need for re-orientation for the need to consume locally manufactured goods by Nigerians. In the area of automobile, Innoson Motors,⁷⁴ an indigenous automobile company is reputed for manufacturing durable and stylish luxurious cars like their foreign counterparts. However, Nigerians, especially government functionaries, would rather buy foreign manufactured cars (even fairly used ones whether *UK or US used*) than a brand new Innoson cars.⁷⁵ The same attitudes go for other products especially electronics and clothing. This unjustifiable preference for foreign goods over locally produced goods, which may even be of superior quality, is a negative omen on Nigeria's local content protection and promotion.

Made in Nigeria goods are looked at with suspicion, especially by the elite class. The outcome of this is the uncontrollable influx of Nigeria's market by foreign goods at the expense of local ones. Where local manufacturers are unable to sell their goods, local business will suffer, and the economy will be negatively affected. To overcome this unjustified preference for foreign goods over local goods, most local manufacturers have resorted to labelling locally produced goods as "made in China, Taiwan, Belgium, etc., even when they are actually made in Aba, Onitsha, or Lagos.

Furthermore, it is a truism that unemployment and underemployment keep increasing in geometric progression in Nigeria.⁷⁶ A Nation whose teeming youths and

⁷⁴Innoson Motors is a Nigerian Automobile company based in Nnewi, Anambra State, Nigeria

⁷⁵ The preference for foreign goods is not to be viewed as an act of lack of patriotism. The guarantee of quality of locally produced goods is uncommon when compared to foreign goods, this is a precipitant for the preference. The standard of goods produced locally especially electronics, clothing, pharmaceuticals, and others, cannot be compared to foreign goods. Thus, to discourage consumption of foreign goods, the quality of the local goods must be improved upon, the Standard Organisation of Nigeria and other quality assurance agencies must regulate quality of locally produced goods.

⁷⁶Kamaldeen, I. M., "Challenges of Sustainable Development in Nigeria: Legal Perspectives" in Egbewole, W. O., Etudaiye, M. A., and Olatunji, O. A., (eds.) *Law and Sustainable Development in Africa*, (Ilorin, Al-Fattah Publications Ltd., 2012) 98.

young graduates roam the street helplessly and hopelessly is heading for economic crisis and dependence on foreign assistance, which has been the lot of Nigeria since the commencement of the Fourth Republic.⁷⁷ Nigeria remains a major recipient of Foreign Aids (FA) from European Nations (EN) and international organisations such as IMF, WB, UNICEF, USAID, UNESCO, US, UK, and China. It becomes very difficult, if not impossible, for Nigeria to courageously adopt economic policies that would protect her local market from the dominance of foreign goods. Recently, the MTN Nigeria (a South African company) was heavily fined by the Nigerian government for illegal repatriation of funds, the fine has become a matter of circuitous negotiations between Nigeria and South Africa with Nigeria refraining from using the big stick, being aware of the loss of employment Nigerians stand to risk in the event of the exit of the telecommunication company from Nigeria, like many other companies.⁷⁸

Unemployment will continue to weaken the resolve of successive Nigerian government to adopt a Nigerian beneficial economic policy as foreign interest would continue to pressure her to opening of her market at her own detriment. Recently, the Minister of Labour, Employment and Productivity, Chris Ngige was quoted expressing serious concerns over the increasing unemployment rate in Nigeria. He said:

The high unemployment rate of 23.1 percent and underemployment of 16.6 percent by the National Bureau of Statistic (NBS) of 2019 report was worrisome amidst growing level of insecurity challenge in the North East and the increasing menace of the Fulani herdsmen.⁷⁹

Moreover, another issue that must be frontally confronted and conquered, for there to be a balance between trade liberalisation and promotion of Nigeria's local content, is the hydra headed monster of corruption.⁸⁰ Corruption has become a major bane of all developmental efforts towards commercialization and industrialisation of

⁷⁷The fourth Republic is the period from the return to democratic rule in Nigeria which is from 1999 with the election of President Olusegun Obasanjo till date.

⁷⁸Ogunfuwa, I., "MTN Pays N55bn Balance of Sim Infraction Fine" Punch Online 1 June 2019. Available online at <https://www.google.com/amp/s/punchng.com.mtn-pays-n55bn-balance-of-sim-infraction-fine> accessed 19 November 2019. See also <<https://www.ncc.gov.ng>> accessed 19 November 2019.

⁷⁹Akinwale, A., "FG: Nigeria's Unemployment Rate Reaches 33.5% by 2020" Available Online at <https://www.thisdaylive.com/index.php/2019/05/03/fg-nigerias-unemployment-rate-reaches-33-5-by-2020/> accessed 13th May 2019.

⁸⁰Oyebode, A." Law and Nation-Building in Nigeria" Lagos, Centre for Political and Administrative Research, (2005) 175-185.

Nigeria. Year in, year out, contracts are awarded, and monies paid, yet, there are no completed projects, the completed ones are mainly substandard.⁸¹ In fact, certain items have become perpetually reoccurring items on the budgets of successive governments. For example, the Lagos-Ibadan and Benin-Ore expressways have had federal allocations severally, but the roads remain death traps, despite their strategic posture to conveyance of goods from and to various parts of Nigeria. Due to institutional corruption, regulatory bodies have become condonation and connivance bodies, allowing substandard goods and services to thrive in Nigeria.⁸² There is no sector in Nigeria that is not been confronted by one shade of corruption or the other.⁸³ The negative impact corruption has on trade liberalisation vis-a-vis Nigeria's local content is that it is undermining the growth of domestic industries and products to favourably compete with foreign goods/services.

Moreover, to strike the right balance between adherence to WTO trade liberalisation policies and Nigeria's local content, there is the urgent need to overhaul the existing labour and employment legal and regulatory regimes. Liberalisation was hoped to engender employment amidst deregulation of labour. However, liberalisation in the labour sector, as discussed above, has led to the infamous, precarious and inhumane practice of casualization of labour in Nigeria, particularly in the inadequately regulated informal sector.⁸⁴ Several reasons have been advanced as the precipitants of casualization in Nigeria.⁸⁵

Aside the employer shylock desire for profit maximization, the obsolete status of Nigeria's labour legal regime has been a major propellant.⁸⁶ Under the current legal

⁸¹ Otoghile, A., "Economic Policy and Development: 1985-Date" in Igbinovia, P. E., Okonofua, B. A., and Osunde, O. O., (eds) *Law and Social Policy Legislation and Administration in Nigeria*, Lagos, Ababa Press Ltd., (2004) 115.

⁸² Akintola, A., "Corruption and Rule of Law, Whither Nigeria?" in Onigbinde, A. and Ajayi, S. (Eds) *Contemporary Issues in the Nigerian Legal Landscape: A Compendium in Honour of Prince Lateef Fagbemi SAN*, (Ibadan, Crown Goldmine Communications Ltd., 2010) 190.

⁸³ Aligba, A., "An Assessment of the Performance of the Courts in the Fight Against Corruption in Nigeria" 2 *Ebonyi State University Journal of International Law and Juridical Review*, (2013) 140.

⁸⁴ Bamidele, R, *Casualization and Labour Utilization in Nigeria*. Available online at <<http://www.ilo.org/public/english/iira/documents/congress/regional/lagos2011/1stparallel/session1b/casualization.pdf>> accessed 13 March 2019.

⁸⁵ Anyim, F. C., Ufodiamma, N. M., and Ideh, D. A., "From Flexible Labour Market to Precarious Labour: Unhealthy Fate of Nigerian Workers" available online at <https://www.academia.edu/9234066/FROM_FLEXIBLE_LABOUR_MARKET_TO_PRECARIOUS_LABOUR_UNHEALTHY_FATE_OF_NIGERIAN_WORKERS> accessed 15 March 2019.

⁸⁶ Kalejaiye, P. O., "The Rise of Casual Work in Nigeria: Who Loses, Who Benefits?" Vol. 8, No. 1, *An International Multidisciplinary Journal, Ethiopia*, 2014, P. 157. Available online at <<https://www.google.com.ng/search?q=Theories+on+Casualization+of+Labour&oq=Theories+on+Cas>

regime, the status and rights of casual workers are shady and undefined.⁸⁷ These has made employers, particularly foreign domesticated employers in the oil and gas, construction and manufacturing industries to resort to precarious casualization of employment with its attendant negative consequences on domestic labour.⁸⁸ When the plight of casual workers in Nigeria is compared with their contemporaries in Ghana, Ghana through legislative pro-activeness has amended its laws wherein the meaning, duration, rights, privileges, of casual workers and the obligations of their employers are clearly spelt out and not left to judicial conjecture and activism.⁸⁹

The overhauling of the existing obsolete labour legal regime would provide legal enthusiasm to trade unions to agitate against casualization of labour which has cheapened labour in Nigeria within foreign own businesses operating in Nigeria as well as embolden the Court to make appropriate declaratory and protective pronouncements.⁹⁰ The effect of this overhaul as a catalyst for protecting and promoting Nigeria's local content is that Nigerian workers would enjoy the benefits of legal protections whether they are permanent or casual workers, they will be remunerated at least, better than what is presently obtained. This will lead to worker's prosperity convoluting to general societal wellbeing as the incessant agitations by trade unions against employers of casual workers with its attendant acrimonious and economic deflating outcomes, if not eradicated, would be minimized to the barest minimum.⁹¹

Furthermore, since trade entails the interaction of various interests, dispute is an inevitable occurrence. However, the occurrence of dispute, particularly within commercial sphere should not be the end of such relationship. It is common knowledge that prudent commercial disputants are reluctant to submit their disputes to litigation especially to a forum different from theirs, due to several drawbacks of

<https://www.google.com/search?q=Casualization+of+Labour&aqs=chrome..69i57.13873j0j7&sourceid=chrome&ie=UTF-8> accessed 17 March, 2019.

⁸⁷Ajayi, M. O., and Eyongndi, D. T., "Legal Status of Casual Employees under Nigerian Labour Law: The Imperative for Legal Reforms" Vol. 19, No. 1, *University of Benin Law Journal*, 2019, P. 165.

⁸⁸Adewusi, A. O., "Remuneration of Casual Workers in Selected Foreign-Owned Manufacturing Industries in Southwest, Nigeria" Vol. 7, No. 22, *European Journal of Business and Management*, 2015, P. 186. Available online at

<<https://iste.org/Journals/index.php/EJBM/article/viewFile/25048/25981>> accessed 17 March 2019.

⁸⁹ Amechi, P. E. and Eyongndi, D. T., "Casualization of Labour in Nigeria and Ghana: What Lessons are there for Nigeria?" 2017-2018, *Nigerian Current Law Review*, 2018, Pp. 136-138.

⁹⁰ Animashaun, A. O. "Casualization and Casual Employment in Nigeria: Beyond Contract" Vol. 1, No. 4, *Labour Law Review*, 2007, Pp. 25-28.

⁹¹ Aladekomo, F. O. "Casual Labour in a Nigeria Urban Centre" Vol. 9, *Journal of Social Science*, 2004, Pp. 211-213.

litigation as a dispute settlement mechanism.⁹² Presently in Nigeria, an alternative to litigation, such as arbitration, faces several challenges in Nigeria which has made settlement of commercial disputes more cumbersome and even suspicious.⁹³ Most Nigerian lawyers have a litigious attitude and see arbitration as a foe, some sort of “hole making device in their pockets”, robbing them of appearance fee and therefore are hostile towards it. Some judges are ill-equipped with regards to the practice and procedure of arbitration.⁹⁴ The existing legal framework encapsulated in the Arbitration and Conciliation Act (ACA)⁹⁵ is obsolete when compared to some other jurisdictions⁹⁶ and does not instil confidence in foreigners to select same as the *lex arbitri* of an arbitral proceeding nor can they choose Nigeria as the seat of an arbitration.⁹⁷

The effect of this is that disputes that arise during international commercial transactions in Nigeria or with a Nigerian investor are taken to other jurisdictions with more predictable settlement outcome and less cumbersome procedure such as US, UK, Singapore, and Canada for settlement. This robs Nigeria of income which could have been earned through the settlement of the dispute in Nigeria.⁹⁸ There is a need to make the Nigerian dispute settlement mechanism *in tandem* with the WTO structure.⁹⁹

Moreover, there is the need for the government to explore and implement policies that would help strengthen the Naira as a legal tender. The devaluation of the Naira has led to economic downturn. Further devaluation attempts by bourgeoisie foreign organisation particularly the IMF and WB should be resisted. If this is done, it will positively impact on the exchange rate and earn Nigeria and Nigerians more income. Nigeria is regarded as the giant of Africa, in her trade relations with other

⁹² David T. Eyongndi and Akin O. Oluwadayisi, “An Appraisal of Section 34 of Arbitration and Conciliation Act and the Role of the Court in Arbitral Proceedings in Nigeria” *5 Rivers State University Journal of Jurisprudence and International Law* (2018) 102-118.

⁹³ Eyongndi, D. T., “An Appraisal of Perennial Hurdles in the Enforcement of Arbitral Awards in Nigeria and India” *10 Ram Manohar Lohiya National Law University Journal*, (2018) 107-112.

⁹⁴ Ajogwu, F., *Commercial Arbitration in Nigeria: Law and Practice*, 2nd ed., (Lagos, Commercial Law Development Services, 2007) 59.

⁹⁵ Arbitration and Conciliation Act 1988, Cap. A18 LFN 2004.

⁹⁶ The UNCITRAL Model Law from which the ACA was drawn has been reviewed four times since 1988 with the latest being the 2010 UNCITRAL Rules but the ACA has remained despite changes necessitating its review. See also the English Arbitration Act 1996.

⁹⁷ Eyongndi, D. T., “The Arbitration and Conciliation Act, 1988 and International Commercial Arbitration in Jet Age: The Imperative for Urgent Review” *1 LASU Law Journal* (2018) 119.

⁹⁸ Oke, O., “Alternative Dispute Resolution in Nigerian Legal System: Past, Present and Future” in Olanrewaju, D., (Ed.) *Law and Its Leeway: Essays in Honour of Emeritus Professor Isaac Oluwole Agbede*, (Lagos, Gem Communications Resources, 2013) 213-222.

⁹⁹ Otor, E. I., “An Overview of the World Trade Organisation (WTO) Dispute Settlement System” 8(2) *The Journal of Jurisprudence and Contemporary Issues* (2016) 136-202.

African countries, Naira as against any other western currency should be the medium of exchange. The inflation rate should be controlled, as this will aid the strengthening of the Naira as well.

Over the years, under the guise of reciprocity which is one of the tenets of the WTO trade liberalisation policy, industrialized nations such as China, USA, UK, and Japan have converted Nigeria to a dumping ground for all kinds of goods. This is possible because Nigeria's compliance with the WTO liberalisation policy has been unregulated. To turn this negative tide around, the government should adopt a regulated liberalisation policy. Certain goods should not be allowed to be imported into Nigeria, particularly those that can be and are being locally manufactured. To be able to achieve this, the government must aggressively support local industries through various incentives to be able to produce the quality and quantity that is needed of these categories of goods. The enabling environment must be created alongside funding through minimal interest loans and grants.

Also, the government should ensure that the various laws and policies geared towards promotion of Nigeria's local content are rigorously enforced dispassionately. The various regional and Continental trade agreements to which Nigeria is a signatory should be observed with the interest of Nigeria as paramount; any act or omission by any member State that is capable of undermining Nigeria's economic wellbeing should not be tolerated. If all the above is done, it is hoped that a balance will be struck between Nigeria's adherence to WTO trade liberalisation policies and protection as well as promotion of Nigeria's local content.

VII. Conclusion

Extrapolating from the analysis above, it is obvious that the WTO trade liberalisation policy is a well-intentioned initiative aimed at encouraging international trade and investment amongst nations of the world. It is geared towards removing barriers from international trade and investment amongst nations of the world. Its benefits cannot be overemphasized as it seeks to engender a near borderless trade environment on an international scale ensuring that there is competition between local and international goods and services affording the consumers the opportunity to select only the best.

Thus, this will culminate into the creation of an egalitarian capitalist world of course with its attendant consequences. Despite Nigeria's quest for inducing FDI by creating an enabling trade and investment environment through trade liberalisation as exemplified by her successive liberalized trade policies, the benefits can only be harnessed if and only if, certain indispensable factors such as increment in the quantity and improvement in the quality of locally manufactured goods, creation of gainful employment opportunities, encouragement and growth of SMEs, strengthening of the Naira , diversification of the economy from mainly oil production to agriculture, manufacturing, entertainment, tourism, improvement in basic manufacturing and trade infrastructure such as electricity supply, good road network, creation and expansion of market for locally produced goods and services, strengthening of legal and regulatory institution for optimal performance, provision and improvement in commercial dispute settlement mechanisms and enforcement of settlement outcomes, continuous implementation of the WTO championed trade liberalisation policies, would remain a bane to Nigeria's local content.

Given Nigeria's human and natural resources, she stands to benefit a great deal from liberal trade policies however, her failure to put into place the necessary infrastructural catalysts, have led to her having an unpalatable experience as the rate of poverty, unemployment and underemployment, over dependence on imported goods, closure of local industries, migration of foreign business concern have increased astronomically. Nigeria is regarded as the giant of Africa and her economy as vacillated within the perimeters of fasted growing economy and growing economy in Africa. Her population keeps increasing necessitating an urgent need for all stakeholders to have all hands-on deck to ensure that local content is not sacrificed sheepishly and hopelessly on the altar of international solidarity.

We contend that now, more than ever, there is a dire need to strike a balance between the WTO trade liberalisation policies and Nigeria's local content and the preceding sections in this paper, have graphically provided a timely and pragmatic roadmap towards achieving this compulsory synthesis.

THE END FAILS TO JUSTIFY THE MEANS: JUDICIAL INTERVENTION IN ARBITRATION AND CONCILIATION IN NIGERIA

*Ahmed Rabiu **

Abstract

For a cheap, speedy and effective dispute resolution mechanism which is a factor and a fundamental requirement for a Foreign Direct Investment (FDI) to flow and flourish, Arbitration and Conciliation Act was enacted to facilitate the settlement of investment and other contractual disputes within Nigeria through arbitration rather than courts. Arbitration has continued to maintain the lead as the preferred mechanism for the resolution of domestic and international business disputes in the Nigerian legal system, the major attraction being the flexibility of the process and the freedom exercised by contracting parties in choosing their own tribunal. The result of such disputes mechanism is an award which incidentally would have to be taken to the regular court for recognition and enforcement. The research recommends the establishment of special courts tasked with the registration and enforcement of foreign and domestic arbitral awards or judgments, or alternatively: administrative recognition of all litigation involving arbitration as *sui generis* and worthy of being fast tracked through the judicial process. Otherwise the end, in the quest for an effective, cheap and speedy alternative dispute resolution mechanism, would not justify the means, in the arbitration process.

Key Words: Judicial, Arbitration, Conciliation, Investment, Foreign, Nigeria

I. Introduction

The starting point to discuss judicial intervention in arbitration and conciliation in Nigeria is the Arbitration and Conciliation Act¹ itself. In accordance with the reforms carried out on an effective mechanism for a speedy resolution of commercial dispute, Nigerian authorities have tried to examine the legislative and regulatory central mechanisms of foreign investment in Nigeria. The institutional and various municipal legislations relating to these have been institutionalized in trying to attract investment via various reforms. These reforms included the deregulation of the economy, the new industrial policy of 1989, the establishment of the Nigeria Investment Promotion Commission (NIPC) in early 1990s, and the signing of Bilateral Investment Treaties (BITs) in the late 1990s. Others were the establishment of the Economic and Financial Crime Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC).

The Nigerian Investment Promotion Commission (NIPC) Act of 1995, in particular, aims to remove most of the legal disincentives to foreign investment; one of the most significant of these is the Settlement of Investment Dispute.² The

* AHMED RABIU, PhD, Associate Professor, Department of Private and Commercial Law, Faculty of Law, Bayero University, Kano-Nigeria. +2348037045126, rabiu1970@gmail.com

¹ Cap.19 Laws of the Federation of Nigeria 2004

² See Section 26 (3) NIPC Act 1995

relevance and desirability of a reliable framework for the settlement of investment disputes cannot be overemphasized, and the Act sets out the mode of settlement of **investment** dispute, which is by arbitration, where mutual discussion has failed in resolving the dispute.

Arbitration and Conciliation Act³ is the main Nigerian statute dealing with Arbitration. The purpose of the law was clearly spelt out from its long title, that is, to “provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.”

Since the Arbitration Ordinance of 1914, arbitration in Nigeria has metamorphosed from almost a state of non-existence to that of irresistible dominance. The major international arbitration instruments namely the United Nations Commission on International Trade Law (UNCITRAL Model Law)⁴ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) have been domesticated⁵ as required by the country’s constitution for their application. This was achieved in the basic law to wit the Arbitration and Conciliation Act⁶ (referred to herein as ACA). This law applies throughout the federation.⁷ It however recognizes the applicability of the provisions of other laws in respect of which disputes might be submitted to arbitration or settled in any manner provided under that law concerning certain transactions. Parties are free to choose the law applicable to the arbitration proceedings but where they have not

³ Cap 18, Laws of the Federation of Nigeria 2004

⁴ United Nations Commission on International Trade Law, UN Doc, A/40/17 (Annex. 1) Adopted on 21st June 1985

⁵ See **Section 53** ACA which allows the application of Arbitration Rules set out in the First Schedule, and allows parties to a commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the first schedule to the Act or the UNCITRAL, Arbitration Rule or any other International Arbitration Rules acceptable to the parties.

And **Section 54** ACA which provides for the application of Convention on the Recognition and Enforcement of Foreign Arbitral award where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the convention set out in the second schedule to the Act shall apply to any award made in Nigeria or any contracting state. Where the state has reciprocal legislation recognizing the enforcement of arbitral award made in Nigeria under the Convention, and that the Convention is applicable only to differences arising out of legal relationship which is contractual.

⁶ Cap A18, LFN, 2004

⁷ See C.G.D.E Geophysique v Etuk (2004) 1 NWLR 853 at 20

predetermined the law, the arbitral proceedings shall be governed by the ACA⁸.

However, it could be observed for this purpose that problem of dispute settlement remained intact notwithstanding the NIPC Act 1995 and the ACA. This is because after the arbitration the arbitral award shall be recognised as binding and subject to section 31⁹ and section 32¹⁰ shall, **upon application in writing to the court, be enforced by the court.**

This paper examines the judicial intervention in the recognition and the enforcement through the courts and analyse the impact of such intervention to the realisation of a cheap and speedy settlement of investment dispute in Nigeria.

II. Arbitration Process in Nigeria

Although this law¹¹ purports to domesticate the operation of the New York Convention, it introduced some modifications to its application. It seems to apply only to disputes arising from contractual legal relationship and not otherwise.¹² Thus, some writers have submitted that the Arbitration and Conciliation Act ACA is a breach of treaty obligation since it derogated from the provision of the Convention to which Nigeria is a party,¹³ which is supposed to apply to disputes arising in any legal relationship “*whether contractual or not.*”

Similarly, in its Interpretation section¹⁴ the Act defines ‘arbitration’ to mean “a commercial arbitration whether or not administered by a permanent arbitral institution “. However, more elaborate is the definition in *Stroud’s Judicial Dictionary*¹⁵ relying on Romilly M.R¹⁶ states that: “Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between parties”

Furthermore, *Halsbury Laws of England*¹⁷ defines arbitration as: “An

⁸ Section 15(1) and (2) ACA 2004

⁹ section 31 (1) ACA 2004

¹⁰ ibid

¹¹ ACA LFN 2004

¹² See Convention on the Recognition and Enforcement of Foreign Arbitral Award, New York, 10th June, 1958, 330 U.N.T.S. 38 No. 4739 (entered into force on 7th June, 1959) Art. II(1) which provides for „whether contractual or not“; see also Art 7(1), UNCITRAL Model Law

¹³ Idornigie, P. (2004) The Principle of Arbitrability in Nigeria Revisited, Journal of International Arbitration. 21-3 279-288

¹⁴ Section 57(1) ibid

¹⁵ Third Edition, Vol.1 at P.180

¹⁶ See Collins v Collins 28 LJ Ch. 186

¹⁷ Third Edition Vol. 2

arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than in court of competent jurisdiction.”¹⁸ Another reputable author¹⁹ on the subject explains arbitration from the point of view of agreement. According to him: “When two or more persons agree that a dispute or potential dispute between them shall be decided in legally binding way by one or more impartial persons in a judicial manner, that is upon evidence before him or them, the agreement or a submission to arbitration. When, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called arbitration and the decision when made is called award”

It would seem, if the term "arbitration" is used merely as descriptive of a simple and speedy determination of a cause, without reference to a formal procedure but in accord with the customs of a trade, the designation arbitration is proper.

Learned Authors, Redfern and Hunter posit that in its origins, the concept of arbitration as a method of resolving disputes was simple:

“The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to the courts.”²⁰

Arbitration is a dispute resolution mechanism between two or more persons by seeking and accepting a decision by a third party of their choice. An essential component of arbitration is an agreement to arbitrate, which implies a submission to arbitration. Generally, the import is that the submission is voluntary²¹ even though there are cases where arbitration is imposed by statute.²²

The use of arbitration as a dispute resolution mechanism is quickly gaining

¹⁸ ibid at P.2 para.2 see also Russell on arbitration seventeenth Edition at P.3 where the author states that – “The essence of sort of arbitration to which this book is concerned is that some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of to a court”

¹⁹ Ronald Bernstein (ed) the Hand Book of arbitration, Sweet and Maxwell quoted by C. Obi Introduction to Arbitration Clauses, Continuing Legal Education Association (Nigeria) Lecture Notes-Nos.3a and 3b at P.14 See also Kano Urban Development Board V. Fanz Construction Company Ltd (1990) 4 NWLR (Pt. 142 at P.32

²⁰ Redfern & Hunter, “Law and Practice of International Commercial Arbitration, 2nd Ed. (1991), p.22

²¹ See Commerce Assurance Limited V. AlhajiBuraimohAlli (1992) 3 NWLR (Pt 232) 70

²² Like the industrial arbitration under the Trade Dispute Act cap 432 Laws of the Federation of Nigeria 2004. See also C. Obi op cit. P.14.

ground in Nigeria. The principal advantages of arbitration are the opportunity to be able to appoint a person with relevant knowledge to resolve the dispute as well as the relatively shorter time taken to resolve the dispute as compared to litigation, which takes much longer. Disputes arising out of basic commercial contracts are common, it has become a real alternative to court proceedings, particularly for disputes arising from commercial transactions²³.

For the first time in Nigeria, Arbitration and other forms of Alternative Dispute Resolution(ADR) is given constitutional backing as a means of settlement of disputes. Specifically, Section 19 (d) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, provides for the settlement of disputes by Arbitration, Mediation, Conciliation, Negotiation and Adjudication.

This is in recognition of the crucial role Arbitration and other forms of ADR now play in the resolution of various types of disputes. The constitutional status accorded Arbitration and other forms of ADR for the settlement of disputes⁸ is a complementary role to the judicial powers conferred on the courts by the Constitution.²⁴ The growing success of arbitration as a mechanism for settling commercial disputes lies in the fact that, one would, today, rarely find any contract between domestic or international parties without an arbitration clause or agreement of some sort, whether ad hoc or institutional, to be conducted under the auspices of the world's leading arbitration institutions.²⁵

Arbitration as a dispute resolution mechanism has several advantages and attractions over and above Litigation. It is, for instance, convenient and expeditious.²⁶ It is cost effective, and generally helps in maintaining business relationship of the parties. Again, informal nature of arbitration proceedings saves the parties from the rancorous tendencies and consequences often associated with litigation.²⁷ Arbitration is a form of extrajudicial dispute resolution that parties can use to achieve speedy and high-quality results in settling disputes. Arbitration constitutes a much broader and more efficient dispute resolution system than the public courts system.

²³Adekoya o. and Emagun D, (2012) Arbitration Guide IBA Arbitration Committee, Nigeria P.20

²⁴ Paul Mitchard, *A Summary of Dispute Resolution Options*, in martindale- hubbell international arbitration and dispute resolution directory 3–24 (1999).

²⁵ Ibid.

²⁶ Peters, D. Arbitration and Conciliation Act Companion, (2006) Lagos Dee-Sage Nigeria Limited, Lagos. P18

²⁷ Ibid.

Arbitration is not part of the State system of courts. As already noted, it is a consensual procedure based on the agreement of the parties. Nevertheless, it fulfills the same function as litigation in the State court system. The end result is an award that is enforceable by the courts, usually following the same or similar procedure as the enforcement of a court judgment.

With regard to the courts' support for arbitration, Nigerian courts are today generally believed to be arbitration-friendly, as they would readily enforce arbitration agreements and awards. In the case of *Kano State Urban Development Board v Fanz Construction Co Ltd*²⁸ where the Supreme Court held that the courts strive to uphold arbitration agreements so that even loose and brief expression such as "arbitration to be settled in a ["named place"] or "suitable arbitration clause" will often be given sufficiently precise meaning to ensure arbitration.²⁹ A further review of the decided cases shows a general recognition by Nigerian Courts of arbitrations as a good and valid alternative dispute resolution mechanism. In *C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd*,³⁰ the Court held that arbitral proceedings are a recognized means of resolving disputes and should not be taken lightly by both counsel and parties. However, there must be an agreement to arbitrate, which is a voluntary submission to arbitration.

Where there is an arbitration clause in a contract that is the subject matter of Court proceedings and a party to the Court proceedings promptly raises the issue of an arbitration clause, the Court will order a stay of proceedings and refer the parties to arbitration.³¹

However, in *Afribank Nigeria Plc v Haco*³² the Court granted interim relief and directed the parties to arbitrate under the provisions of ACA. Upon the publication of the award the parties returned to the Court for its enforcement as judgment of the Court.

²⁸(1990) 4 NWLR (part 142) 1 and 33,

²⁹See also the Supreme Court's decision in *M V Lupex v Nigeria Overseas Chattering & Shipping Ltd* (2003) 15 NWLR (part 844) 469.

³⁰(2005) 1 NWLR Part 940 577

³¹See sections 4 and 5 of the ACA. See sections 6(3) and 21 of the Lagos Law, which empowers the Court to grant interim orders or reliefs to preserve the *res* or rights of parties pending arbitration. Although the ACA in section 13 gives the arbitral tribunal power to make interim orders of preservation before or during arbitral proceedings, it does not expressly confer the power of preservative orders on the Court and section 34 of the ACA limits the Courts' power of intervention in arbitration to the express provisions of the ACA.

³²(Unreported FHC/L/CS/476/2008)

The Courts in Nigeria are often inclined to uphold the provisions of sections 4 and 5 of the ACA provided the necessary conditions are met. A live case in point is the case of *Minaj Systems Ltd. v Global Plus Communication Systems Ltd. & 5 Ors.*³³ In this case, the Claimant instituted a Court action in breach of the arbitration agreement in the main contract and on the Defendant's application, the Court granted an order staying proceedings in the interim for 30 days pending arbitration. In *Niger Progress Ltd. v N.E.I. Corp.*³⁴ the Supreme Court followed section 5 of the ACA, which gives the Court the jurisdiction to stay proceedings where there is an arbitration agreement. In *M.V. Lupex v. N.O.C*³⁵ the Supreme Court held that it was an abuse of the Court process for the respondent to institute a fresh suit in Nigeria against the appellant for the same dispute during the pendency of the arbitration proceedings in London. In *Akpaji v Udemba*³⁶ the Court held that where a defendant fails to raise the issue of an arbitration clause and rely on same at the early stage of the proceeding but takes positive steps in the action, he would be deemed to have waived his right under the arbitration clause.

The only formal requirement is that the arbitration agreement should be in writing, either executed by the parties, or evidenced in an exchange of letters, telex, telegrams or other means of communication, which provide a record of the agreement. An exchange of points of claim and of defense in which the existence of an arbitration agreement is alleged by one party and not denied by the other party will also fulfill the legal requirement.³⁷

The award in arbitration is further regulated by the ACA, Section 26 of the Act and Article 32 of the Rules provide for formal requirements of an award. These requirements include: the award must be in writing; it must be signed by all the arbitrators or a majority of them; it must detail the reasons for the decision must be given, except where otherwise agreed by the parties; the date and place of the award must be stated. The Act does not specify the relief and remedies, which the arbitrator can give in his award. However, in practice, the arbitrator can make awards for payment of money, of specific performance, of an injunction (where a third-party will

³³Unreported Suit No. LD/275/2008

³⁴(1989) 3 NWLR (Part 107) 68

³⁵(2003) 15 NWLR (Part 844) 469

³⁶(2003) 6 NWLR (Part 815) 169

³⁷ See, section 1(1) c ACA

not be affected), or of a declaration for the rights of one or both of the parties.

It is not clear whether arbitrators can award punitive or exemplary damages but they can award interest on the sum of money awarded. With regard to the rate of interest, the arbitrators are guided by what is fair and just in the absence of any specific provision of the law or agreement of the parties. The arbitrators may award compound interest if it is fair or agreed to by the parties or provided by the law governing the issue or by the custom of the trade in dispute³⁸.

By the provision of section 31 ACA an arbitral award shall be recognized as binding and subject to the section and section 32 of the Act, shall, upon application in writing to the court, be enforced by the court. The party seeking to enforce the award will apply to the High Court within the jurisdiction where it wishes to enforce for recognition and enforcement of the award. The application must exhibit the original or a certified true copy of the arbitration agreement and the award. The other party must be put on notice and may then request the court to refuse recognition or enforcement of the award. In practice, the Courts in Nigeria will recognise and enforce an arbitral award in the absence of any valid and convincing ground for setting aside or for refusal of recognition and enforcement. A party applying for the recognition and enforcement of an arbitral award shall furnish the Court with:

- (i) The duly authenticated original award or a duly certified copy thereof;³⁹
- (ii) The original arbitration agreement or a duly certified copy thereof; and⁴⁰
- (iii) Where the award or arbitration agreement is not made in English Language, a duly certified translation thereof in to English Language⁴¹

Grounds for refusal include that there is incapacity of a party, there was an invalid arbitration agreement, there was lack of notice of the proceedings, there was lack of jurisdiction by the arbitral tribunal, there was improper composition of the arbitral tribunal, the subject matter was not proper for arbitration, that the award is not binding, was set aside or was suspended at origin, or dictates of public policy⁴². Where an application for the refusal to recognize an award is before the court, the court may

³⁸,Adekoya O. and Emagun D. (2012) Arbitration Guid eI BA Arbitration Committee, Nigeria P.22

³⁹section 31 (2) (a) ACA

⁴⁰ Section 31 (2) (b) ACA

⁴¹ See also Section 51(1) a,b,c ACA , See also *Adwork Limited v Nigeria Airways Limited* (2000) 2 NWLR (Pt.645) 415

⁴² See Section 52 ACA

upon application stay execution of the award pending the determination of the application.⁴³

Once the local court grants recognition and enforcement of an award, the award is treated as a judgment of the registering court and enforced in a similar manner.⁴⁴ A writ of execution or garnishee order can be issued to compel payment of a money award. The rules of civil procedure will apply, and a party can apply to court in respect of the award, usually to seek payment on favorable terms.

There are two alternative methods of enforcement of an award⁴⁵ open to an applicant, namely;

1. “By application directly to enforce the award... or
2. By application to enter judgment in terms of the award and so to enforce the judgment by one or more of the usual forms of execution...”

Thus the two alternative methods are fundamentally different. The summary method treat the award as an existing judgment and only seeks to enforce it. The enforcement by action seeks to get judgment in terms of the award. There can, therefore, be no question of a proceedings by way of summary procedure to enforce the award being pleaded as *estoppel per rem judicatam*, as in that case the court itself decides nothing. It simply enforces the award as if it were a judgment.⁴⁶

The duration of enforcement proceedings depends on whether the other party contests the award or not. There is no expedited procedure for the enforcement of an award. Awards like court judgment must be enforced within 12 years from the date they become enforceable.⁴⁷ A party to arbitration may be deemed to have waived his right to object to any non-compliance from the award that any requirement under the arbitration agreement, has not been complied with and yet precedes with the arbitration without stating his objection to such non-compliance.⁴⁸

There are no special rules that apply to the enforcement of an award against a State or State entity. However, it should be noted that awards may be enforced against a State or State entity where there is a waiver of diplomatic immunity.⁴⁹ Awards may also be

⁴³ Section 52 (3) ACA See *Baker Marine Nig. Ltd v Chevron Nig. Ltd* (2000) 12 NWLR (Pt.681) 393

⁴⁴ Section 31 (3) ACA

⁴⁵ See Supreme Court Practice, 1979, paragraph 3787 Vol. 2

⁴⁶ at PP.723-724 *ibid*.

⁴⁷ Adekoya O. and Emagun D. (n38).

⁴⁸ Section 33 ACA

⁴⁹ Under Section 2, 5(2), 7, 8 10 and 16 of the Diplomatic Immunity and Privileges Act, Cap D9, Laws of the Federation of Nigeria, 2004.

enforced where the State engages in commercial transactions, which are subject of arbitration. In these situations, the State's entry into an arbitration agreement is treated as a waiver of immunity.⁵⁰

An award disposes of all disputes between parties that were submitted to arbitration. Thus if a party brings a Court action on the same subject matter that has been disposed of by arbitration and on the same cause of action, the Court will dismiss the action on the ground that the issues are *res judicata* on the basis of issue estoppel⁵¹. Issue of estoppel arises where an issue had earlier on been adjudicated by a Court of competent jurisdiction between the same parties. The law is that either party to the proceedings is estopped from raising that same issue in any subsequent suit between the same parties and the same subject matter. In the case of *Oyerogba v. Olaopa*.⁵² Issue of estoppel also arises in respect of issues which ought to have been raised in the former suit but which were not raised. It applies to issues raised but not expressly decided; such issues are deemed to have been decided by implication and thus *res judicata*.⁵³

Issue estoppel has been held to extend to arbitration.⁵⁴ The question of whether an arbitral award will operate, as *res judicata* has not been fully tested in Nigeria but the provision of section 31 of the ACA implies that an arbitral award has the same effect as the judgment of Court.⁵⁵ It has also been found that as a panacea to the regular courts and adjudication process, generally, many commercial agreements now contain an arbitration clause and a wide range of disputes are increasingly being referred to arbitration especially in the construction, capital markets, oil and gas, maritime, and banking industries. Within these industry sectors, disputes involving breach of contract terms and shareholder disputes are common.

Arbitration has continued to maintain the lead as the preferred mechanism for the resolution of domestic and international business disputes in the Nigerian legal system, the major attraction being the flexibility of the process and the freedom exercised by contracting parties in choosing their own tribunal, particularly for complex and technical cases requiring specialized knowledge in the subject matter of

⁵⁰PUNUKA Attorneys & Solicitors Nigeria 2010 <<http://www.iclg.co.ukiclg>> to: international arbitration visited on 26/6/2019

⁵¹ibid

⁵²(1998) 13NWLR pt. 583 p .512.

⁵³ PUNUKA (n50).

⁵⁴ See *Middlemiss v. Hartlepool Corporation* (1973) 1 A.E.R. 172

⁵⁵See sections 31(1) & (3) which provide that an arbitral award shall be recognised as binding and may be enforced in the same manner as a Court judgment or order to the same effect.

the dispute. But it should be noted here that arbitration process regulate faster “trial” of commercial disputes. In the end all awards by the arbitration tribunal would have to be presented to our conventional courts for execution and enforcement. Therefore all the legal problems so far identified in this research constitutes impediments to the enforcement of contractual judgments in our courts.

III. Enforceability of Awards in Nigeria.

The enforcement of the decision of any dispute resolution process is the most crucial part of the exercise. This is because without the possibility of enjoying the fruit of the judgment or award, the entire dispute resolution process amounts to an exercise in futility. Unlike court judgments, arbitration awards themselves are not directly enforceable; a party seeking to enforce an arbitration award must resort to judicial remedies. In the case of arbitration, enforcement ordinarily ought to be a non-issue, as the arbitral process is initiated based on the express consent of the parties, with the intention that the final award of the tribunal is binding on the unsuccessful party. Where the unsuccessful party fulfils this intention and voluntarily complies with the terms of the award, the matter concludes on a seamless note. However, in practice, especially in international arbitration, it is not often the case that the unsuccessful party adopts this seamless approach. The successful party is therefore left with no alternative but to seek enforcement of the award.

In Nigeria, there are generally three ways to enforce foreign arbitral awards:

1. Enforcement through an action upon the award under common law.
2. Enforcement through the Foreign Judgment Registration and Enforcement Statutes: Reciprocal Enforcement of Judgments Ordinance 1922⁵⁶, or the Foreign Judgments (Reciprocal Enforcement) Act⁵⁷
3. Enforcement through the Arbitration and Conciliation Act.⁵⁸

IV. Challenges of Judicial Intervention in the Enforcement of Arbitral Award

Recognition and enforcement are vital parts of arbitration. Without the

⁵⁶ Cap. 175, Laws of the Federation of Nigeria (LFN) 1958

⁵⁷ Cap. F35, Laws of the Federation of Nigeria 2004.

⁵⁸ Cap. A18, Laws of the Federation of Nigeria 2004.

likelihood for the winning party to enforce the arbitral award in its desired country, the entire arbitration process becomes pointless. Of course, if an unsuccessful party instantly carries out the terms of an arbitral award, the question of recognition or enforcement of the award doesn't arise. Yet this is often largely not the case, largely in regard to foreign arbitral awards, the unsuccessful party may be unwilling to go with the terms of the award or could even apply to challenge it. Lamentably, the arbitral process cannot by itself enforce its own award because a *reward simplicia* doesn't have the force of a judgment of court. As such, it usually implies that the victorious party could have won the battle but is yet to win the war. The disposition of Nigerian courts to enforce foreign arbitral awards and also the ease or difficulty of doing so are issues of huge concern to any foreign person who desire to enforce an arbitral award in Nigeria.

The party against whom an arbitral award is made may voluntarily obey the order and comply since the award is binding between the parties. Every arbitral award duly made is to be recognized as binding and is expected to be complied with. It is when it is not complied with that the question of enforcement by the winning party arises. The reality in Nigeria is that almost the enforcement of most awards are subjected to excruciating obstacles and resistance.⁵⁹ In Domestic Arbitral Award in Nigeria, Section 31 (1) ACA provides that an arbitral award shall be recognized as binding and shall upon application in writing to the court be enforced by the court. Recognition and Enforcement are not one and the same thing. An award may be recognized without being enforced. But an award enforced is an award recognized. For example, when an award is pleaded for the purpose of the defence of *res judicata*.

Two alternative methods of enforcement of domestic arbitral award are available to a successful party, thus:

1. By an application directly to enforce the award; or
2. By application to enter judgment in terms of the award and so to enforce the judgment by one or more of the usual forms of execution.

The procedure for obtaining enforcement of an award is set out in Section 31 (2) and (3) of the ACA. Thus the party wishing to enforce an award shall bring an application before the High Court, annexing:

1. The duly authenticated original award or duly certified copy thereof;

⁵⁹ Akpata E, "The Nigerian Arbitration Law in Focus" (1997), Lagos, West African Book Publishers p.92

2. The original arbitration agreement or a duly certified copy thereof thereafter the party shall apply to the court for leave to enforce the award.

An award recognized by a court shall for all intent and purposes be treated as a judgment of that court. The court will give judgment in the terms of the award. And as stated in subsection (3) “an award may, by leave of court or a judge, be enforced in the same manner as a judgment or order to the same effect”⁶⁰

International arbitral awards in Nigeria like domestic award are binding on the parties. The procedure for recognition and enforcement is the same except that where the award or arbitration agreement is not made in English language; a duly certified translation in to the English language must accompany the applicant for leave. Section 54 of the Arbitration and Conciliation Act, 1988 also makes the New York Convention on the recognition and Enforcement of Foreign Arbitral Awards applicable to Nigerian courts; it stipulates instances where the convention will be applicable in Nigeria.

As simple as the procedure for enforcement of arbitral award may seem, it is not always an easy ride! Most often than not, an unsuccessful party at arbitration dissatisfied with the award in a domestic or international arbitration may do either of the following: commence legal proceedings challenging the award, or prepare to oppose any action that may be brought to enforce the award.⁶¹ While Section 52 of Arbitration and Conciliation Act provides for refusal of recognition or enforcement of a foreign award and grounds for such refusal, Section 32 which provides for recognition or enforcement of a foreign award does not specify grounds for such refusal. However, in practice unsuccessful parties in domestic arbitrations have often appropriated the grounds mentioned in Section 52 to challenge the award. The grounds include incapacity of any of the parties, invalid arbitration agreement, improper notice of appointment of arbitrators or proceedings, jurisdiction of arbitrators, award going beyond scope of submission and composition of tribunal and procedure adopted by arbitrators.

It should be observed that enforcement by action on the award is a comparatively cumbersome procedure. It enables the party opposing the award to reopen the points which had been canvassed in the arbitral proceedings and thereby

⁶⁰ ibid

⁶¹ Ezejiofor, *The Law of Arbitration in Nigeria*, (Longman Nigeria Plc.; 1997) p. 115

set up a new case for litigation.⁶² More often than not, these hearings are long drawn out there by defeating one of the cardinal advantages modern day arbitration set out to exploit. Now it is imperative to note that, the end does not justify the means. One of the major advantages parties factor into their selection of arbitration, as their preferred dispute resolution mechanism is that it is relatively less cumbersome than litigation. This advantage is significantly pronounced in Nigeria, given the laborious process of litigation within the jurisdiction. It is therefore an unfortunate irony that parties who deliberately avoid litigation and its associated stresses, have to resort to litigation in order to enforce the award of their chosen alternative to litigation.⁶³

Essentially, enforcement could be a cumbersome process where the unsuccessful party mounts a spirited challenge, as the legal system's inadequacies such as lengthy delays, and undue weight on technicalities, could be manipulated to their advantage. Using an example of a case handled by our law firm, a consent judgment entered in the High Court of England was registered in Nigeria in 2003 for enforcement, however the opposing party challenged the registration based on a technicality. Although the challenge was dismissed at the High Court and the Court of the Appeal (in 2013), the appellant further appealed to the Supreme Court. The matter is still yet to be heard by the Supreme Court, and we are in the year 2019, several years after the judgment was obtained. The point being made here is that the unsuccessful parties readily rely on loopholes, ambiguities and technicalities as a springboard to frustrate the hearing of applications seeking to enforce foreign arbitral awards and judgments.⁶⁴ These and many more other challenges make the arbitration process to push the contracting party from bad to worse in the quest for an effective and speedy commercial dispute resolution mechanism.

V. Conclusion

The most efficient means of tackling these challenges would be the establishment of special courts tasked with the registration and enforcement of foreign and domestic arbitral awards or judgments, or alternatively: administrative recognition of all litigation involving arbitration as *sui generis* and worthy of being fast tracked through

⁶² ibid P.121

⁶³ Rotimi Adeniyi, A. (2018) "Enforcement of Foreign Arbitral Awards in Nigeria" accessed at https://medium.com/ enforcement-of-foreign-arbitral-awards-in-nigeria-fc2...visited 25th August 2019

⁶⁴ ibid

the judicial process. Although these courses of action have long been recommended, we still await their implementation. In the meantime, the best advice to concerned parties is to conduct their international or domestic arbitration as efficiently as possible, to avoid availing the unsuccessful party an opportunity to frustrate the recognition and enforcement of the award in Nigeria. Ideally, Nigerian counsel should be consulted before, during and after conclusion of the arbitration proceedings to ensure the smooth enforcement of the award when obtained.⁶⁵ Otherwise the end, in the quest for an effective, cheap and speedy alternative dispute resolution mechanism, would not justify the means, in the arbitration process. Although grounds for attacking an arbitration award in court are limited, efforts to enforce the award can be fiercely fought, thus necessitating legal costs that negate the perceived economic incentive to arbitrate the dispute in the first place.

⁶⁵ ibid

THE MENACE OF KIDNAPPING IN NIGERIA: AN EXAMINATION OF THE CONSTITUTIONAL IMPLICATIONS

*A.O Adeniyi**

Abstract

This work examined the menace of kidnapping in Nigeria been a violation of Section 33,34 and 41 of the constitution of the Federal Republic of Nigeria (as amended).Kidnapping is a global problem that affects countries all over the world and emphasis been laid on Nigeria, which is the focus of this paper. Kidnapping is not new in Nigeria, and has become the biggest challenges facing Nigeria from 2017 up till now. The recent evolution of Fulani herdsmen kidnapping citizens for ransom, which, has led to the loss of lives of many citizens no doubts, needs the prompt attention of our government to profound lasting solution to the menace of this daredevil. The activities of these armed bandits have become a threat to national security. The aim of this work is to have a conceptual understanding of the act of kidnapping and its injurious effect on the fundamental rights of victims. The objective of this work is to determine the implications of kidnapping to Nigeria's national security and also examine the causes, consequences and challenges faced by security agencies in curbing the activities of these bandits and to also investigate the measures being taken by the government to combat kidnapping in Nigeria. Finally, the paper suggests that for the menace of kidnapping to be eradicated in Nigeria, bribery and corruption ongoing amidst security outfits in Nigeria be reduced to the barest minimum. In addition, stricter penalties like imposition of death penalties in cases resulting to death of any person in their custody.

KEYWORDS: Kidnapping, Insecurity, Human Rights, Banditry, Nigeria

I. Introduction

Nigeria from South to West, North to East is plagued by the activities of kidnappers. As of today, “the fear of kidnappers is the beginning of wisdom” for an average citizen of Nigerian. Kidnapping is a national problem that has eaten deep into the nation. It has become a disease diagnosed but with no cure. There is no week in Nigeria as of today that we do not read on newspapers or watch on television the cases of kidnapping in one part of the country. The activity of this beastly creature is an infringement of the fundamental human rights of citizens as entrenched in the 1999 Constitution of the Federal Republic of Nigeria (as amended). It is also a threat to national security. National security is the security of a nation state, including its citizens, economy, and institutions, which is regarded as a duty of government.¹ Section 17 (1)² states that; the state social order is founded on ideals of freedom, equality and justice. Subsection 2 (b) provides that; the sanctity of the human person shall be recognized and human dignity shall be

* A.O Adeniyi, Lecturer II, Faculty of Law, Ekiti State University, Ado-Ekiti. barrylummie@gmail.com
09034003300

¹ National security available at <www.sciencedaily.com>, accessed 16 September 2019

² 1999 Constitution of the Federal Republic of Nigeria (as amended)

maintained and enhanced. Nigeria's experience in the past years of democracy has witnessed a lot of mayhem and several losses of lives, for instance, the kidnapping of members of the public by the Fulani herdsmen amount to infringement of their right as, entrenched in the constitution. Chapter four of the Constitution focuses on the right of a citizen from section 33-43 as follows:

- a. Right to life
- b. Right to dignity of human person
- c. Right to personal liberty
- d. Right to fair hearing
- e. Right to private and family life
- f. Right to freedom of thought, conscience and religion
- g. Right to freedom of expression and the press
- h. Right to peaceful assembly and association
- i. Right to freedom of movement
- j. Right to freedom from discrimination
- k. Right to acquire and own immovable property in Nigeria

The rate of kidnapping in the country has failed to level down due to back up they received from members of the Police Force and even our Armed Forces. Political activities have helped in raising many of our youth to venture into kidnapping. Many youths who have served as a political thug in times of election are neglected after election and since they do not have anything meaningful to do, they engage in kidnapping or armed robbery and they make use of weapons given to them by politicians during elections to carry out their operations. In view of the above, this paper did not only focus on kidnapping as an infringement of Section 33, 34, 35 and 41 of the constitution but also examine the nexus between kidnapping and our political leaders and the security agencies in Nigeria. The fundamental obligation of the Nigerian government is to provide adequate security in the country.

The constitution provides that "the security and welfare of the people shall be the primary purpose of government".³ Insecurity is one of the greatest challenges to economic development in any nation. These menace impinge on the security of lives and property of Nigerians at home and ones in Diaspora who wants to visit their home in other to start a business, which may likely boost

³ S.14(2)(b)1999 Constitution of the Federal Republic of Nigeria (as amended)

our economy. It is also a threat to foreigners who may likely want to invest in the country.

II. Conceptual Review

a. Kidnapping

Kidnapping is derived from “kid”= “child” and “nap”= “snatch”, and was first recorded in 1673.⁴ It was originally used as a term for the practice of stealing children for use as servants or laborers in the American colonies. Kidnapping is the crime of taking away of a person by force, deceit, or threat and detaining that person against their will.⁵ Kidnapping is a crime where the victim is transported a substantial distance or held in a place of isolation with force.⁶ Kidnapping is the taking away of a person by force or fraud, commonly to obtain ransom for his or her release.⁷ In addition, kidnapping is the unlawful seizing and carrying away a person by force or fraud, or seizing and detaining a person against his or her will with an intent to carry that person away at a later time.⁸ Kidnapping is also said to occur when a person, without lawful authority, physically **asports** another person without that other person’s consent, with the intent to use the abduction in connection with some other nefarious objective.⁹

Kidnapping according to Cambridge Dictionary is to take a person away illegally by force, usually in order to demand money in exchange for releasing them.¹⁰ According to Find Law’s team of legal writers and editors, kidnapping is commonly defined as the taking of a person from one place to another against their will, or the confinement of a person to a controlled space.¹¹ Kidnapping is generally defined as the abduction of another person with intent to:-¹²

1. Hold him for ransom or reward
2. Use him as a shield or hostage
3. Accomplish or aid the commission of any felony or flight therefrom

⁴ New World Encyclopaedia, kidnapping available at <www.newworldencyclopedia.org> accessed 16 September 2019.

⁶ What is kidnapping? Available at <www.criminal-law.freeadvice.com> accessed 16 September 2019.

⁷ Kidnapping available at <www.businessdictionary.com> accessed 16 September 2019.

⁸ Kidnapping available at <www.legal-dictionary.thefreedictionary.com> accessed 16 September 2019.

⁹ Ibid.

¹⁰ Kidnapping available at <www.dictionary.cambridge.org> accessed 16 September 2019.

¹¹ Kidnapping available at <www.criminal.findlaw.com> accessed 16 September 2019.

¹² Kidnapping available at <www.definitions.uslegal.com> accessed 16 September 2019.

4. Inflict physical injury upon him, or to violate or abuse him sexually
5. Terrorize him or a third person
6. Interfere with the performance of any governmental or political function

Furthermore, kidnapping is defined as the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another.¹³

The Black's Law Dictionary¹⁴ defines kidnapping as; the crime of seizing and taking away a person by force or fraud. To me, kidnapping is the act of taking another person (man or woman) by force and with the use of intimidation (weapons) for financial gains or as a means of sacrificing for ritual purposes. As of today, Nigeria cannot boast of any form of security as the main objectives of the government. The protection of lives and property of the citizens cannot be met because of the activities of the kidnappers.

i. Ingredients of Kidnapping

Section 360, Indian Penal Code provides that “whoever conveys any person beyond the limits of india without the consent of that person, or of some person legally authorized to consent on behalf of the person, is said to kidnap that person from India.”¹⁵ The Criminal Code¹⁶ (Southern part) and Penal Code¹⁷ (Northern part) in Nigeria also criminalize the act of kidnapping. Section 364 of the Criminal Code provides that:

Any person who-

1. Unlawfully imprisons any person , and takes him out of Nigeria without his consent; or
2. Unlawfully imprisons any person within Nigeria in such a manner as to prevent him from applying to court for his release or from discovering to any other person the place where he is imprisoned, or in such a manner as to prevent any person entitled to have access to him from discovering the place

¹³ What is kidnapping? available at <www.thelawdictionary.org> accessed 16 September 2019

¹⁴ Black's Law Dictionary, (8th Edition Thompson publishing 2004) 886.

¹⁵ What are the ingredients of the offence of kidnapping? available at <www.shareyouressays.com> accessed 25 September 2019.

¹⁶ Cap C38 Laws of the Federation of Nigeria 2004.

¹⁷ Cap P14b Laws of the Federation of Nigeria 2004.

where he is imprisoned; is guilty of a felony, and is liable for imprisonment for ten years.

Section 271 of the Penal Code also provides that:

Whoever takes or entices any person, under fourteen years of age if a male or under sixteen years of age if a female, or any person of unsound mind out of the keeping of the lawful guardian of such person without the consent of such guardian or conveys any such person beyond the limit of the state without the consent of someone legally authorized to consent to such removal, is said to kidnap such person.

From the aforementioned, the ingredients of kidnapping include:

- A. There must be a taking or carrying away of another person
- B. The taking or carrying must be by force or with threat
- C. It must be without the consent of the person been carried away
- D. It must be without lawful excuse¹⁸

b. Human rights

Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death.¹⁹ According to the United Nations, human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion or any other status.²⁰ Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. M.A Ajomo describing the nature of human right stated that human rights are those rights which human beings enjoy by virtue of their humanity, whether black, white, and yellow or red, the deprivation of which would constitute a grave affront to one's natural sense of justice.²¹

¹⁸ Section 35 (1) of the Constitution of the Federal Republic of Nigeria (as amended) provides that “every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law”.

¹⁹ What are human rights? Available at <www.equalityhumanrights.com> accessed 21 August 2019.

²⁰ What are human rights? Available at <www.un.org> accessed 21 August 2019.

²¹ M A Ajomo, *The Development of Individual Rights in Nigeria's Constitutional History: Individual Rights under the 1989 Constitution* (Nigeria Institute of Advanced Legal Studies 1993) 59.

Men are born with these rights. That is, God gives them to man. These rights are not given by government but by God. The only duty of the government is to serve as a bulwark against its infringement through its judicial arm. Human rights are also fundamental. They are crucial to a peaceful co-existence of members of a community. The supreme sacredness of human rights was emphasized by Justice Kayode Eso, JSC in the case of *Saude v. Abdullahi*²² that those rights are not just mere rights, they are fundamental. In *Ogba v. The State*, the Supreme Court extra-judicially declared that “a fundamental human right is one that cannot be waived by the government or any form of legislation”.²³ Human rights are commonly understood as being those rights which are inherent in the mere fact of being human.²⁴

The concept of human being rights is based on the belief that every human being is entitled to enjoy her/his rights without discrimination.²⁵ Human rights are held by all persons equally, universally and forever.²⁶ Human rights are inalienable as these rights cannot be lost, it is also indivisible; that is, human cannot be denied a right because it is less important or non-essential.²⁷ Human rights in the Virginia declaration of rights in 1776 proclaim that “all men are by nature equally free and independent and have certain inherent rights, of which, when they enter a state or society, they cannot, by any compact, deprive or divest their posterity.”²⁸

III. Categories of Kidnapping

Kidnapping is a crime that is very violent in nature. Kidnapping has become a lucrative venture for some of Nigerians jobless youths. In view of the foregoing, it is imperative to discuss the forms of kidnapping witnessed in Nigeria.

- a) **Basic Kidnapping:** It is the most common form of kidnapping and can be accomplished in any part of the world with minimal preparation, with a relatively low risk of failure. Kidnappers would generally target local businessmen or their

²² [1985] 2 SCNJ 75

²³ [1992] 22 NWLR 1642

²⁴ Definitions and Classifications available at <www.humanrights.is> accessed 22 August 2019

²⁵ Ibid.

²⁶ Human Rights Fundamentals available at <www.hrlibrary.umn.edu> accessed 26 August 2019

²⁷ ibid

²⁸ Human Rights available at <www.businessdictionary.com> accessed 26 August 2019

families. The kidnappers' goal is a fast easy pay off. Generally, the ransoms requested are relatively easy for the victim's family or company to obtain.²⁹

- b) **Express Kidnapping:** It is one of the hottest forms of kidnapping in Ondo and Ekiti State in Nigeria and is on the rise. This is because the roads leading to and from Ekiti and Ondo States are lonely, untarred, in a serious state of utter disrepair and altogether unsafe for commuters. The kidnappers thus lay ambush to abduct unwary passengers along the route. A victim is typically an unsuspecting volunteer who gets into a taxi. It need be say that many of the victims of this form of kidnapping are covetous human beings. The driver picks them up with few other passengers and after a short distance, the driver begins to act strange and start questioning one of the passenger and accusing him/her of moving around with a huge amount of money.

The passenger in return seeks for spiritual assistance of other passengers in the taxi as the money has been charmed. The perpetrator then takes the victim to an unknown destination. The victims in this category are rob of their valuables (money, phones and jewelries). Some of the victims are taken to Automated Teller Machine (ATM) locations and made to withdraw maximum limits.³⁰ The victims are instructed not to speak to anyone and that if they do, they will vomit blood and die. It is pertinent to point out that, many of the victims are held overnight and this is an outright violation of Section 41 of the Constitution. It is also important to note that the kidnappers rape female victims and amounts to infringement of their right to dignity of human person.³¹

c. **High net worth individual kidnapping:**

Experienced or professional gangs execute these types of kidnapping. It is strategically planned and requires surveillance and information gathering. The target is tailed for a while to know his movement schedule and if he has any form of security attachment.³² This period is a period of waiting to determine the best for the kidnappers to shoot their shot. After the victim has been taken, the kidnappers interrogate him to know his/her source of income and how much he/she

²⁹ O.Danwi-Osaro, Basic kidnapping available at <www.academia.edu> accessed 17 September 2019

³⁰ Types of kidnapping available at www.usssinc.com accessed 16 September 2019

³¹ Section 34, 1999 Constitution of the Federal Republic of Nigeria (as amended)

³² Types of kidnapping available at www.threatrate.com accessed 16 September 2019

has in his/her bank account. Following this, his/her family or employer is contacted and the ransom demanded made known to the family or employer. After the demand, a negotiating process occurs in order to beat down the amount demanded to what the family can afford. Generally, after the payment of ransom, victims are released. However, some victims are killed even after the payment of ransom.

d. Political/terrorist kidnapping:

This type of kidnapping is to make negotiations with the government. Terrorist organizations use this form of kidnapping to make political statements, negotiate the release of their members in government detention and to also fund their organizations.³³ Political kidnapping gained prominence with the political strides of militants of the Niger-Delta region of the South-South Nigeria. The aim of this group was to make their grievances known to the Federal Government on the dilapidated state of their region. The people against the government and oil companies initially used kidnapping in the region as a weapon of protest by kidnapping expatriates and government officials or their families for the degradation of their environment and the neglect of the region by the Federal Government.

In addition, terrorist group also kidnap school pupils, aid workers, government officials and expatriates to make negotiations with government or make political statements. The kidnapping of Chibok schoolchildren was a ploy by the terrorist group to register their discomfiture against western education in the Northern part of Nigeria. On a hot night in April of 2014, hundreds of fighters with the jihadist group Boko Haram descended on the town of Chibok, rounded up 276 Students at the Government Girls' Secondary School, and drove the girls into the Sambisa Forest.³⁴ In addition, on February 19, 2018 at 5:30pm, the Boko Haram terrorist group invaded the Government Girls' Science and Technical College in Dapchi, Yunusari Local Government Area of Yobe State, kidnapped 110 Schoolgirls.³⁵

IV. Incidences of Kidnapping in Nigeria that amounts to Outright Violation of Right to

³³ Types of kidnapping available at <www.uussinc.com> accessed 16 September 2019.

³⁴ F Diep, The True Story of the Nigerian Schoolgirls who Survived Boko Haram available at <www.psmag.com> accessed 23 September 2019.

³⁵ Dapchi schoolgirls kidnapping available at www.economist.com> accessed 23 September 2019.

Life

Kidnapping has led to the loss of lives in recent time. Many of the victims of the crime have been killed in the course of abduction and some after payment of ransom. A few instances of kidnapping that has amounted to violation of Section 33 of the Constitution of the Federal Republic of Nigeria (as amended) will substantiate the acts perpetrated by these dreaded criminals in Nigeria. On 2 January 2019, two council staff, pastor A Onaade, an Administrative Officer and O Fashina, a Primary Health Care Official were kidnapped along Ikere-Ise-Emure road while returning to Akure. However, an accountant with the local government, Mr Abayomi Ajayi was unlucky as the gunmen shot him dead on the spot.³⁶

Again, a kidnapped incident in Osun State left one dead. The incident that occurred on 4 December 2018 left one dead on the spot. The gunmen was reported to have blocked the Esa-Oke road leading to the campus at about 4 p.m which happens to be the closing time of the institution on the said day and stopped several vehicles before abducting some of the occupants.³⁷

In another incident, a lecturer at the Rufus Giwa Polytechnic, Owo has been found in the bush days after been kidnapped. The deceased was kidnapped alongside with three victims who were members of staff of the Federal Medical Centre, Owo. The deceased identified as Taiwo Akinyemi was reportedly found dead in the kidnappers' den tied to a tree. The deceased was allegedly killed for failure on the part of his family to pay the ransom demanded on time.³⁸ Professor Gideon Okedayo, a senior lecturer at the Ondo State University of Science and Technology (OSUCTECH), was kidnapped on Igara Road in Akoko Edo Area of Edo State while travelling to his hometown. The dead body of the professor was later found inside a bush. The kidnappers' was reported not to have contacted the deceased family till his dead body was found.³⁹

What is more worrisome is that these kidnappings happen during the light of the day and even more worrisome is the presence of security outfits arrayed on these routes and criminals like the abductors of the aforementioned still carry out their operation successfully. Every life is worth

³⁶ A Nejo, Kidnapped Ekiti Council Officials Regain Freedom available at <www.punchng.com> accessed 23 September 2019

³⁷ Gunmen kill one, kidnap four Osun college workers available at <www.channelstv.com> accessed 24 September 2019

³⁸ P Dada, Ondo Poly Lecturer dies in kidnappers' den available at <www.punchng.com> accessed 24 September 2019

³⁹ Breaking: Kidnapped Ondo University Professor Found Dead available at <www.saharareporters.com> accessed 24 September 2019

the cost as no human being is useless. It must be noted that the victims of these violations are citizens of the country, that is, everyone has a right to life, and no one shall be deprive intentionally of his life.⁴⁰ It is important to note at this point that Governments must through the institution of the law enforcement and security agencies discharge their duties of providing adequate security, protecting lives and properties of the people which they govern.

V. Incidences of Kidnapping that Impinge Right to Dignity of Human Person and Right to Personal Liberty

The right to dignity of human person and the right to life as entrenched in section 34 and 35⁴¹ is daily infringed upon by the activities of the kidnappers on our major roads in Nigeria. The incidence of kidnapping has been taking place in Nigeria over the years and is on the rise from the last two years due to the activities of the insurgents (Boko Haram, Fulani Herdsmen). A Nigerian in Diaspora has given her account of horror she went through in the kidnappers' den. The woman alongside with her husband and a nine-year-old daughter were kidnapped shortly after the Ijare junction. The woman gave an account of how the kidnappers shot at their car and marched them into the bush. According to her, she was hit at the chest and her daughter was hit on the head.

She also said one of the men tore her dress with his gun and she was left with her underwear. The kidnappers' was reported to have given them option of who should be raped amidst the three of them. What can be more degrading than this inhumane act of this beast? The woman made herself the sacrificial lamb and became the relic and a sexual museum for the armed men in other to save her nine-year-old daughter.⁴² What can be more traumatic than this horrible event? For a husband to witness the rape of her legally wedded wife and not able to do anything to rescue her. What can be more anguishing than this event?

Section 34 (1) of the Constitution provides that; "every individual is entitled to respect for the dignity of his person, and accordingly-

- a) No person shall be subjected to torture or to inhuman or degrading treatment;

⁴⁰ Section 33(1) of the Constitution of the Federal Republic of Nigeria (as amended) provides that; "every person has a right to life, and no one shall be deprive intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria".

⁴¹ 1999 Constitution of the Federal Republic of Nigeria (as amended)

⁴² Horror in Kidnapper's Den (A Must Read) available at <www.thenigerianvoice.com> accessed 25 September 2019

- b) No person shall be held in slavery or servitude; and
- c) No person shall be required to perform forced or compulsory labour.

In another story, tears gush out of a twenty-year-old victim named Joy while recounting her ordeal in the hands of kidnappers. She was abducted for five (5) hours along Benin-Ore road on her way to Enugu, the Eastern part of Nigerian from Lagos. According to her, while in the bush, the kidnappers' brutally assaulted her and she sustained terrible degrees of injuries. In addition, a Female Senior Lecturer in one of the Tertiary Institutions in Rivers State, also gave an account of her ordeals in the hands of kidnappers. She recounted how she was raped in the forest of Emohua Local Government Area of Rivers. The victim who was reported to have been kidnapped from her home on 30 April 2019 around 8pm. Her home was looted and cash was transferred to them.⁴³ The inhumane act meted on this people amounts to violation of their right as entrenched in the Constitution.

VI. Causes of Kidnapping

In Nigeria today, anybody can be kidnapped. Kidnapping has no regard for gender, age, religion, economic status, colour or nationality. Politicians, civil servants, lecturers, royal fathers, clergymen, traders, peasants, schoolchildren etc. can be kidnapped at any time. Kidnapping has continued to thrive in Nigeria because of poor security arrangements and poor democratic process. There are many causes of kidnapping in Nigeria today and some of the causes will be discussed. Nigeria has the label of having one of the world's highest levels of corruption. A society where corruption is on the high side is likely to experience a high level of kidnapping. For instance, if a government is corrupt or not satisfying members of a region, the government official or family members can be kidnapped in other to make their grievances known to the government.

As earlier noted in this work, the activities of kidnapping in the Niger-Delta region of Nigeria was used as a weapon of protests by the people of the Niger Delta area against the government and the Oil Producing companies for the degradation of their environment and the neglect of the region by the Federal Government. The initial target and victim were the expatriate workers and high profile government officials. The criminals and particularly those that have

⁴³ A Anagor-Ewuzie Chilling Tales by Kidnap Victims: who will end the misery? available at www.businessday.ng accessed 25 September 2019

taken kidnapping as a profession are alleged to be former employees of politicians. They were trained as political thugs and after election; they were abandoned to exist with the weapons given to them. The politicians are culpable for every act of terrorism in Nigeria. For instance, the kidnap kingpin (Alhaji Hamisu Bala Wadume) whose arrest brought about the loss of three police officers attached to the Intelligence Response Unit of the Inspector General of Police of Nigeria while interview disclosed that he is not a kidnapper but a political thug and supplier of weapons for kidnappers.⁴⁴

In addition, poverty is another cause of kidnapping in Nigeria. According to United Nations on poverty, poverty is a denial of choices and opportunities, a violation of human dignity. It means lack of basic capacity to participate effectively in society.⁴⁵ Anyone who lives below US\$1.90 a day is living below the poverty line. An average Nigerian is living below the United Nations poverty line (as of today, the Nigerian minimum wage is ₦18,500 monthly, that is, ₦18500 divided by 30 =₦616 per day whereas US\$1.90 in Nigerian currency is ₦684.95). The main intention of kidnappers is to obtain ransom (money). Many Nigerians who ventured into crime do it in other to cater for their family and also to feed, clothe and provide shelter for themselves.

Moreover, unemployment is another cause of kidnapping in Nigeria. A proverb says, “an idle hand is the devils workshop”. A person who does not have any job tends to result to crime. Kidnapping is either for financial or political benefit. Prior to this time, victims of kidnap are always oil expatriates or government officials but in recent times, locals who are financially incapable of fending for their families are kidnapped and turn to beggars in other to pay for ransom required. People like this can also result to kidnap to save their own in the kidnappers den. In addition, kidnapping has become quite a lucrative and many youths see it as a business model. A cash-strapped unemployed person may believe that when he kidnaps someone who is rich, he may be able to become rich himself.⁴⁶

Furthermore, greed and desperation is another cause of kidnapping in Nigeria. My friend is riding 2019 Toyota Highlander car and I want to ride the same model has led many Nigerian to involve themselves in criminal activities. However, the question to be asked here is why would a

⁴⁴ I supply weapons, I am not a kidnapper: Hamisu Bala Wadume Story available at <www.pmnewsigeria.com> accessed 26 September 2019

⁴⁵ United nations definition of poverty available at <www.tolerance.org> accessed 26 September 2019

⁴⁶ O Uzochukwu, Kidnappings: Overview, Causes, Effects, and Solutions available at <www.owlcation.com> accessed 24 September 2019

mother kidnap her daughter? Why would a father kidnap or participate in the kidnap of his wife? Biblically, the love of money is the root of all evil: which while some coveted after, they have erred from the faith, and pierced themselves through with many sorrows.⁴⁷ If not for greed, why would a pastor kidnap himself and demands ransom from member of his church. Adewuyi Adegoke, a Pastor at Methodist Church, Ado-Ekiti, Ekiti State has been arrested for organizing his own kidnap.

It was gathered that Adegoke had arranged with one Oluwadare Sunday to fake his kidnap and demand ₦3million ransom from his congregation.⁴⁸ In a related development, a 21-year-old man was recently arrested in Delta State, for faking his kidnap in a bid to collect money from his rich uncle in order to complete his father's house in the village and to celebrate Christmas and New Year in a big way.⁴⁹

Illiteracy is another cause of kidnapping in our country Nigeria. According to Cambridge dictionary, illiteracy is a lack of the ability to read and write. It is also lack of knowledge about a particular subject.⁵⁰ Illiteracy limits ability of an individual to have knowledgeable facts of things happening around. Illiteracy largely limits the reasoning ability of illiterates. Although, many illiterates have native intelligence, but research suggests that some illiterates are not enlightened and as such unable to realize many of the consequences of their actions and inactions. For instance, Boko Haram uses people who are poorly educated as suicide bombers. They can be abducted from their houses and trained to be suicide bombers.⁵¹ These set of people are allegedly manipulated by their abductors and influenced by money. They are made to understand that killing according to their religion is right thing to do. Thus, since they can neither read nor write they believe everything completely.

Conclusively, kidnappings can be motivated by politics or religion. People in politics can use the tactics of kidnapping to silence their opponent and put them in disarray to drop their political ambition in order to save their children or spouse. In this case, ransom can be demanded from the family of a kidnapped victim so as to raise fund for their political activities. It is also

⁴⁷ 1 Timothy 6 v 10

⁴⁸ T Yakubu, Extra: Ekiti pastor ‘kidnaps self’, demands ₦3m from congregation available at <www.thecable.ng> accessed 26 September 2019

⁴⁹ D Joseph, Self-abduction: Another Face of Kidnapping? available at <www.leadership.ng> accessed 26 September 2019

⁵⁰⁵⁰ Illiteracy available at <www.dictionary.cambridge.org> accessed 26 September 2019

⁵¹ G Ibenegbu, 5 causes of kidnapping in Nigeria and possible solutions available at <www legit.ng> accessed 26 September 2019

conducted to obtain political concessions from security forces or governments, rivalry political parties and the kidnappers own political party.⁵² Kidnapping can be religious in nature because of the groups' fundamentalist Islamic beliefs. Their purpose is to institute Sharia, or Islamic law in Nigeria. The meaning of their name is "western education is forbidden".⁵³ This explains why they continually target schoolchildren. For instance, the kidnap of 276 children from Chibok in Borno State in 2014 and 110 children from Government Girls Science and Technical College , Dapchi in Yobe State in 2018.

VII. Effects of Kidnapping

Kidnapping survivors face a lot of effect after enduring physical, emotional and mental abuse. The effects of trauma can vary widely from person to person due to individuals' responses to stress, age and severity of abuse. Victims of kidnapping suffer from an array of psychosomatic illnesses, eating disorders, insomnia, chronic pain and mental health problems like posttraumatic stress disorder. The major effect of kidnapping is the financial debt incurred by members of the victims' family while in captivity in other to pay ransom demanded by the kidnappers. Money is borrowed from family, friends and loans obtained from the banks and cooperative societies to secure his release. The community may be forced to spend money in hiring guard or private security to protect the environment from further occurrence of such incidents.⁵⁴ The Government of the State may be forced to spend more on security rather than increasing spending on physical development of the State.⁵⁵ For instance, spending on providing basic amenities that will enhance boost in the economy of the State.

Many victims of kidnapping suffer from post- traumatic stress disorder (PTSD). Post-traumatic stress disorder is a mental health condition that is triggered by a terrifying event-either experiencing it or witnessing it.⁵⁶ It causes the victim to have recurrent memories or thoughts of the trauma, recurrent dreams depicting various aspects of the trauma and dissociative symptoms

⁵² Political kidnapping available at <www.theguardian.com> accessed 26 September 2019

⁵³ Boko Haram Fast Facts available at <www.cnn.com> accessed 26 September 2019

⁵⁴ J.D Inyang and U.E Abraham, 'The Social Problem of Kidnapping and its Implications on the Socio-Economic Development of Nigeria: A Study of Uyo Metropolis' (2013) 4 (6) Mediterranean Journal of Social Sciences available on <www.researchgate.net> accessed 26 September 2019

⁵⁵ ibid

⁵⁶ Post-Traumatic Stress Disorder (PTSD) available on <www.mayoclinic.org> accessed 27 September 2019

such as flashbacks of the severe beatings or a feeling that they are outside of their body. In addition, victims suffer from anxiety because of violence meted to them while in the kidnappers' den. Some members of family of a victim who lost his/her life in the den of kidnappers depends solely on alcohol, many are feel with suicidal thoughts and unable to function properly while some even collapse and died on the spot on hearing the news of death of the victim.

Conclusively, victims that are raped by the kidnappers can contract sexually transmitted disease. For instance, life-threatening diseases like; Human Papillomavirus (HPV), Herpes, Human immunodeficiency Virus (HIV), Chlamydia, Syphilis, Gonorrhea, Trichomoniasis. The first three aforementioned cannot be cured while the last ones can be curable with early detection and treatment.

VIII. Recommendations

Having discussed the causes and effect of kidnapping in Nigeria, it is imperative to recommend the following:

1. Job Creation

Unemployment is one of the causes of kidnapping in our dear Nation. It is paramount that the Government creates more jobs targeting our youth in order to shield them away from crime. Section 17 (3) (a) of the Constitution of the Federal Republic of Nigeria as amended provides that; "the state shall direct its policy towards ensuring that- all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment." It is important that our government live up to this responsibility.

2. Adequate Funding of Security Agencies

The Government has a lot of work to do in other to redeem the image of Nigeria security agencies. The most important is the provision of necessary equipment's to work well and efficiently (sophisticated weapons and ammunitions). The era of police officers buying uniforms, boots should end. The agency needs to be well kitted and retooled with superior weapons and ammunitions with which they can fight this daredevil. Their salaries and allowances should be enhanced and paid as and when due in order to avoid corrupt practices practiced by them especially in the areas of being kidnappers' informant. Many of our security are on the payroll of this kidnap

kingpin. For instance, an Army Captain, Musa Balarabe who ordered the shooting of the police officers in Taraba is reported to be on the payroll of the notorious kidnap kingpin, Alhaji Hamisu Wadume.

3. Deployment of Technology

There is a need for Nigeria to copy technological advancement of developed countries of the world in the installation of closed-circuit television cameras in all the nooks and crannies of our country. It is essential for the detection of crime. For instance, if not for the installation of closed-circuit television cameras in the hotel in Rivers State where the serial killer was operating; his arrest would not have been possible.

4. Creating Efficient Database

There is a need for the creation of database for people living in the country in a central location and not depend on database of some agencies (Federal Road Safety Corps, Internal Revenue of States) to harness information. Rather, there is the need for the National Security Agency (NSA) to develop a fingerprint and visual recognition database for all citizens. This would allow for easy detection of criminals and eventually reduce crime to the barest minimum.

5. Public Sensitization on Kidnapping

Non-Governmental organizations should embark on awareness campaign to sensitize people on how to avoid been kidnapped and offer serious counseling or therapy for victims of kidnapping and family members who has lost a son, daughter, father or mother to the menace of kidnapping. This is ongoing in many States in Nigeria but there is a need for this awareness campaign to be intensified across the States of the country.

6. Imposition of Stricter Penalties

IT is suggested that stricter penalties should be imposed on kidnappers. Kidnappers should be sentenced to life imprisonment and death sentence should be imposed if a victim dies in the kidnappers' den. For instance, Oyo State Kidnapping Prohibition Bill 2016 prescribes life imprisonment for any person who engages in kidnapping and death sentence for any kidnapper whose victim(s) dies while in captivity. A convicted offender whose victim is released or rescued unhurt upon the payment of a ransom, will be liable to life imprisonment and be compelled to pay

back the ransom.

Kidnapping (Prohibition) Law of Lagos State 2017 provides that “any person who instill’s fear in another for the purpose of kidnapping through coercion or by any other means against that person’s will with intent to demand ransom; commits an offence, and is liable on conviction to life imprisonment”. On the other hand, section 2(2) provides that where death occurs as a result of the commission of the offence of kidnapping, the offender(s) shall be liable on conviction to death sentence. Furthermore, apart from the above listed States, many other States in Nigeria have made kidnapping a capital offence.

7. Confiscation of Illicit Properties

The properties of these kidnappers’ should be confiscated. This will serve as deterrence to other members of the public whose intention is to venture into this business. The Nigeria Police Force has confiscated properties of a late-suspected kidnapper Collins Ezenwa known as E-Money in Enugu State. Items confiscated by the law enforcement agency include 10 cars, 13 houses, 3 AK-47 rifles, 2 tippers, a truck and other things.

8. Anti-Corruption War

There is a need for declaration of war against corruption in Nigeria. The fight against corruption should be intensified most especially amidst our security agencies. This war has been declared and the trial of some senior military or officers in the security agencies are ongoing. Examples of this officers include but not limited to Dasuki, Badeh.

IX. Conclusion

Kidnapping is an outright violation of the fundamental rights of citizens in Nigeria. The issue of kidnapping has spread across all States in Nigeria. This act of kidnapping in the South-West has however been on the high side since 2018. This paper has conceptualized kidnapping, discussed the causes and the effects on the victim and even the family members of the victim. The activity of kidnapping has brought to the fore the inefficiency of our government and security outfits in Nigeria as a result of their inability to curb the activities of the kidnappers which obviously has led to the loss of lives of many citizens.

THE SCOPE OF THE INVESTIGATORY POWERS OF THE NATIONAL ASSEMBLY: NEED FOR SAFEGUARDS AGAINST ABUSES

*Akobella Tommy Joshua **

Abstract

The Nigerian National Assembly is the highest legislative body in Nigeria. The National Assembly comprises the Senate and the House of Representatives. There are three fundamental functions of the National Assembly. These are legislation, appropriation and oversight. The three core mandates of the National Assembly require the National Assembly to carry out investigatory exercises like public hearings in order to achieve its aims. In recent times especially during the 7th National Assembly (i.e. from 2011 to 2015), the National Assembly was subjected to criticisms from some members of the public over what was perceived as the overzealous and excessive interference in the activities of other agencies and officials of the Federal Government under the guise of oversight. Indeed some learned minds have expressed doubts on the constitutionality of some of the summonses that the National Assembly had extended to government officials requiring their attendance at one investigatory hearing or another. This paper examines the scope of the investigatory powers of the National Assembly within the purview of the Constitution of the Federal Republic of Nigeria 1999 (as amended), including its power to compel the appearance of witnesses before it as well as the limitations to the exercise of such powers. The paper finds that in the exercise of its investigatory powers, the National Assembly sometimes acts ultra vires. The paper examines instances of such ultra vires actions and contends that it constitute an abuse of the investigatory powers of the National Assembly. The paper concludes with recommendations advocating the confinement of the investigatory powers of the National Assembly to their constitutional limits in order to maximise the potential benefits of the exercise of such powers.

Keywords: National, Assembly, Constitution, Investigatory, Powers. Appropriation

I. Introduction

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides for a presidential system of government based on the principle of separation of powers among the legislature, the executive and the judiciary.¹ The major distinguishing feature of presidential democracy is the division of powers among the three arms of governments which sets it apart from other systems of governance.

Nigeria is a federation² that runs a presidential system of government with a bi-cameral legislature at the national or federal level and unicameral legislatures at the sub-national or state

* Akobella Tommy Joshua (Ms), LL.B, BL, LL.M, A Research Fellow with the Nigerian Institute of Advanced Legal Studies, Supreme Court Complex, Three Arms Zone, Abuja- Nigeria. Joshua_bella@yahoo.com, Phone no: 08092873787

¹ See generally the provisions of Chapters v, vi and vii of the Constitution of the Federal Republic of Nigeria, 1999; see also Yakubu, J.A, Constitutional Law in Nigeria, Demyaxs Law Books, 2003, P. 92. Cited in Grace Ayodele Arowolo, “Oversight Functions Of The Legislature: An Instrument For Nation Building”

<<https://www.ajol.info/index.php/naujili/article/viewFile/138178/127909>> accessed 5/12/2019

² Section 2(2) of the 1999 Constitution of the Federal Republic of Nigeria.

level.³

The federal legislature is called the National Assembly⁴ which comprises the Senate and the House of Representatives. The second arm of government in order of creation is the executive arm which is made up of the President of the federation, the Vice-President, ministers and officers of the public service of the federation.⁵ The third arm of the Nigerian government is the judiciary consists of the Supreme Court and other courts of record.⁶ The government of the Nigerian Federation is structured in such a way that each of the three arms of the government acts as a check on the powers and activities of the others. This is achieved through the doctrine of separation of powers. hence while the legislature is charged with the responsibility of law making, the judiciary is charged with the responsibility of interpreting the laws made by the legislature and the executive is charged with the responsibility of enforcing the law either as made by the legislature or as interpreted by the judiciary⁷. It is on these three arms of government that the general public eventually put their hopes on.⁸

These arms of government discharge their functions in various ways. The legislature for example in order to ensure that the business of government is conducted in accordance with the law made by it, or that its laws respond to the needs of the country engages in oversight functions. This serves sundry purposes including but not limited to; keeping the executive establishment responsible and accountable, to promote rationality and efficiency in the formulation and administration of public policy, to reap party advantage and to advance the causes of individual legislators interest groups and other stakeholders in the polity.⁹

Oversight simply means the act or job of directing work that is being done or regulatory supervision of state expenditure towards transparency and accountability of public resources¹⁰.

³ See section 4 of the Constitution of the Federal Republic of Nigeria, 1999 for the legislative powers of the Nigerian state

⁴ ibid

⁵ Section 5 of the Constitution of the Federal Republic of Nigeria, 1999

⁶ See section 6 of the Constitution of the Federal Republic of Nigeria, 1999

⁷ See sections 4, 5 and 6 of the 1999 Constitution respectively.

⁸ D. A. Guobadia “The Legislature and Good Governance under the 1999 Constitution” Nigeria: Issues In The 1999 Constitution, (Ed) Nigerian Institute of Advanced Legal Studies, 2000. pg 43

⁹ Oyewo, O. “Constitutionalism and the Oversight Functions of the Legislature in Nigeria”. being a paper presented at the African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, in April 2007 at Nairobi, Kenya. Cited in “Oversight Functions of the Legislature: An Instrument for Nation Building”

<<https://www.ajol.info/index.php/naujilj/article/viewFile/138178/127909>> accessed 5/12/2019

¹⁰ Temitope A. Salami, ‘Performance of Oversight Functions by the National Assembly: An Assessment of the 7th

Pelizzo and Stapenhurst define legislative oversight as the legislative supervision of the policies and the programmes enacted by the government¹¹. They also explain that oversight is the supervision of what the executive branch of government has done as well as policies and legislative proposals.¹² Legislative oversight is therefore a tool with which the legislative arm of government exercises its powers of checks and balances of the other arms of government.¹³ The oversight thus becomes an integral part of legislative functions and even constituency responsibilities that is, its representative role¹⁴

A less technical definition is provided by former US President Woodrow Wilson¹⁵ who is credited with the development of the concept. He defined legislative oversight as “the duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice and to embody the will and wisdom of its constituents.”¹⁶ This paper would adopt as a working definition, the definition provided by Senator Victor Ndoma-Egba who defined legislative oversight as the “power of the legislature to review, monitor and supervise government agencies, programmes, activities and policy implementation strategies of the executive arm of government.”¹⁷

The senator’s definition would seem to limit the scope of legislative oversight to the executive branch of government. In view of the provisions of section 88 of the Constitution of the Federal Republic of Nigeria, the oversight function of the National Assembly extends to all statutory bodies and authorities that are charged with the execution or implementation of an Act of the National Assembly or that draw its funds from the Appropriation Act of the National Assembly. Obviously, this would include the judiciary and independent public bodies. However,

House of Representatives (2011-2015) – NIGERIA”

<https://www.academia.edu/33233683/Paper_on_Legislative_Oversight_-_Nigeria.pdf> accessed 5th November, 2019.

¹¹ Pelizzo, R. and Stapenhurst, F. (2011). “Parliamentary Oversight Tools: A Comparative Analysis” (Routledge Research in Comparative Politics). London: Routledge. Cited in Temitope A. Salami, “Performance of Oversight Functions by the National Assembly: An Assessment of the 7th House of Representatives (2011-2015) – NIGERIA” <https://www.academia.edu/33233683/Paper_on_Legislative_Oversight_-_Nigeria.pdf> accessed 5th November, 2019.

¹² ibid

¹³ PLAC: Guide to Legislative Oversight in the National Assembly <<https://placng.org/2016/12/>> accessed on 18/8/2019

¹⁴ Goubadia, D.A, “The Legislature and Good Governance under the 1999 Constitution in Nigeria: Issues in the 1999 Constitution” (NIALS Publication.) 43 at 45

¹⁵ (1856-1924) in office (1913-1921)

¹⁶ Ibid

¹⁷ Quoted in Dr. Ejikeme Jombo Nwagwu: “*Legislative Oversight in Nigeria: a Watchdog or a Hunting Dog?*” Journal of Law, Policy and Globalization Vol. 22, 2014 <<https://www.iiste.org>> accessed on 18/8/2019

the senator's definition would serve for the purpose of this paper.

In Nigeria, there are certain constitutional provisions that allow for legislative investigation of other arms of government and administration of sanctions.¹⁸ Sometimes the targets of legislative investigation resist the oversight of the National Assembly thereby resulting in conflict between the parties. To avoid or reduce such tensions generated by legislative oversight, this paper examines the investigatory powers of the National Assembly and delineates the limits of those powers and concludes by calling for self-censorship on the part of all concerned, especially the National Assembly, in order to maximize the benefits inherent in the exercise of the investigatory powers of the National Assembly.

The paper seeks to achieve its aim in six parts. Part 1 is the introduction and it reviews the concept of separation of powers in Nigeria and the power of the legislature under the 1999 Constitution of the Federal Republic of Nigeria. Part II discusses the scope of the powers of the National Assembly. Part III examines the investigatory powers of the National Assembly under the 1999 Constitution and highlights the scope and limitation of the investigatory powers of the National Assembly. Part IV gives instances of abuse of the investigatory powers of the National Assembly. Part V provides recommendations and Part VI concludes the paper with the affirmation that although the investigatory powers of the National Assembly are very useful tools for legislative affairs, it is hoped that if such powers are exercised responsibly and within their well-defined parameters, the productivity and utility of the National Assembly would be greatly improved.

II. The Scope of the Powers of the National Assembly

Section 4 (1) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) vests the legislative powers of the Federation on the National Assembly. The National Assembly in section 4 (2) of the Constitution of the Federal Republic of Nigeria 1999 is authorised to exercise exclusive powers of legislation on the items contained in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the 1999 Constitution. With respect to the items in the Concurrent List set out in the Second Schedule to the 1999 Constitution, both the National

¹⁸ See section 88 of the 1999 Constitution for example

Assembly and the Houses of Assembly of the states are both competent to legislate on them.¹⁹

However, where there is a conflict between an Act of the National Assembly and a Law of a State House of Assembly, the Act of the National Assembly prevails and the other law becomes null and void to the extent of its inconsistency with the Act of the National Assembly.²⁰ Another pointer to the primacy of the powers of the National Assembly vis-a-vis those of a state House of Assembly is that by the doctrine of covering the field, where the National Assembly has enacted an Act expressed to have nationwide application, any law of a House of Assembly of a state on the same subject is considered superfluous and unnecessary.²¹

In *AG Abia State & ors v. AG Federation*,²² the Supreme Court relying on its earlier decision in *Attorney-General Ogun State & ors. v. Attorney-General of the Federation & ors*²³ explained the doctrine in these words:

However I take the view that when one considers this doctrine, the phrase ‘covering the field’ means precisely what it says. Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State Government is inconsistent with the legislation of the Federal Government it is indeed void and of no effect for inconsistency. Where however, the legislation enacted by the State is the same as the one enacted by the Federal Government, where the two legislations are in pari materia, I respectfully take the view that the State Legislation is in abeyance and becomes inoperative for the period the Federal Legislation is in force. I will not say it is void. If for any reason the Federal Legislation is repealed, it is my humble view that the State legislation, which is in abeyance, is revived and becomes operative until there is another Federal legislation that covers the filed.

By the provisions of section 80 of the 1999 Constitution, the National Assembly is also vested with the power of appropriation of the funds or revenue of the Federal Government. The

¹⁹ See section 4 (4) (a) of the 1999 Constitution

²⁰ See section 4 (5) of the Constitution

²¹ See *AG Ondo State v. AG Federation* (2002) 9 NWLR (PT. 772) 222

²² (2002) LPELR-611(SC)

²³ (1982) 1-2 SC 13

executive has the responsibility of preparing the budget or appropriation bill and laying it before the legislature while the legislature has the duty of passing it into law.²⁴

The Constitution has also given the power of oversight of the executive and the judiciary to the National Assembly. For example by the provisions of its sections 143 and 292, the Constitution spells out the procedure to be adopted by the National Assembly in removing before the end of their tenures, the heads of the executive and judicial branches of government, respectively who the National Assembly adjudges to be guilty of gross misconduct and thus liable to removal from office.²⁵ Thus, it is apparent that constitutionally, the National Assembly has and enjoys three primary powers or functions namely, legislation, appropriation and oversight. The oversight power can sometimes be exercised in the form of investigation into the affairs of a public office or official.

III. The Investigatory Powers of the National Assembly

Nigeria at independence adopted the Westminster parliamentary system of government from the British but later changed to the present presidential system modelled after the U.S system in 1979.²⁶ Both systems of government recognize and emphasize the power of the legislature to oversee the functions of the executive through, *inter alia*, investigations of the activities of the executive. For example, in the UK which practices a parliamentary system of government with its attendant fusion of power,²⁷ the parliament has an array of tools and means of checking the executive through the exercise of parliamentary oversight. These include question time, confidence votes, statutory bodies subject to parliamentary control, etc.²⁸

From its early days, the British House of Commons had developed a tradition of investigating and where necessary punishing erring members of the executive.²⁹ An America

²⁴ See section 81 of the 1999 Constitution

²⁵ This power, if exercised in compliance with the constitutional procedure may not be subject to judicial review. See section 143 (10) CFRN

²⁶ Yahaya Baba: "Executive Dominance and Hyper-Presidentialism in Nigeria" Oxford Handbooks Online <www.oxfordhandbooks.com> accessed on 19/8/2019

²⁷ This means that members of the executive arm are also members of parliament. See F. David Levenbach "Fusion of Legislative and Executive Power, the Second Majoritarian Feature" <https://www.clt.astate.edu/fidel/classes/politics/fusion_ofpower.html> accessed on 19/8/2019

²⁸ Clare Feikert-Aholt "Parliamentary Oversight of the Executive Branch: United Kingdom"

<<https://www.loc.gov/law/parliamentary-oversight/unitedkingdom.php>> accessed on 19/8/2019

²⁹ Ibid

politician and jurist, James Wilson writing in 1774, described members of the British House of Commons as the “grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censures; and have appeared at the bar of the house, to give account of their conduct, and ask pardon for their fault.”³⁰

In the United States, although there is no express constitutional provision for congressional oversight, there is an implied authority invested in the US congress to conduct investigations and other checks on the executive.³¹ However the congressional oversight power is not unlimited.³² Congress has always arrogated to itself the powers to demand information from members of the executive branch for purposes of law-making and checking of waste and corruption.³³ The power of the congress to demand such information was upheld by the U.S Supreme Court in *Watkins v. United States*³⁴ where it was held that:

We start with several basic premises on which there is general agreement. The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Perhaps it is this historical affiliation to the two systems of government that informs the constitutional provisions on National Assembly oversight in Nigeria. The National Assembly, since 1999 has exercised the powers of investigation on numerous occasions. Some of the most

³⁰ Quoted in “Executive Privilege, Secrecy in Government Freedom of Information: Hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations and the Subcommittees on Separation of Powers and Administrative practice and Procedure of the Committee on the Judiciary United States Senate”. 93rd Congress, 1st Session, Vol. 1. 1973 p.245 <<https://www.books.google.com.ng>> accessed on 6/12/2019

³¹ Steven A. Engel “Scope of Congressional Oversight and Investigative Power With Respect to the Executive Branch” Office of Legal Counsel the United States Department of Justice.

<<https://www.justice.gov/olc/opinion/scope-congressional-oversight-and-investigative-power-respect-executive-branch>> accessed on 20/8/2019

³² See James McCauley Landis: “Constitutional Limitations on the Congressional Power of Investigation”, 40 Harvard Law Review 153 (1926) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S 579, where it was held that legislation purporting to render inoperative the President’s powers as commander-in-chief would be ultra vires the congress.

³³ Ibid

³⁴ 354 U.S. 178, 187 (1957)

sensational scandals under the current democratic dispensation in Nigeria were either products of parliamentary investigations or were later investigated by the National Assembly. For example, the scandal of the alleged \$16 billion spent on electricity by a previous administration without the corresponding result was attributed to the Ndudi Elumelu-committee in the House of Representatives that investigated the National Integrated Power Project (NIPP).³⁵ The means through which the National Assembly exercises its oversight powers include visitation to government agencies, public hearings, investigations, passing of resolutions and on rare occasions, demanding the sack or resignation of a public official.³⁶

The growing tendency of the National Assembly to conduct investigations into the activities of government agencies has been met with increasing resentment and even resistance on the part of the targets or subjects of those investigations. On a few occasions it has been met with open rebellion and refusal to co-operate by the targets. For example in 2013, then Minister of Petroleum Resources, Mrs. Diezani Alison-Madueke refused to appear before the House of Representatives Committee on Petroleum Resources to assist the committee in the investigation of an alleged scandal involving the spending of ₦ 10 billion on aircraft leasing.³⁷

It was the view of the government at that time that by frequently and incessantly summoning ministers and other functionaries of the executive branch to appear before it, the National Assembly was distracting such functionaries from focusing on their work. Former President Goodluck Jonathan in what appears as support for the Petroleum Minister lamented that the NASS had summoned some of his minister more than 200 (two hundred) times to appear before them on the pretext of one investigation or the other thereby depriving the affected ministers of the time and concentration required for their jobs.³⁸

The scope and limits of the investigative powers of the National Assembly is the subject

³⁵ Samuel Adesanya “:\$16b NIPP funds: The fact-Sheet”, The Nation newspaper of 23/5/2018 <<https://www.thenationonlineng.net/16b-nipp-funds-the-fact-sheet/>> accessed on 20/8/2019

³⁶ For example the House of Representatives in the purported exercise of its oversight function over the capital marketing demanded the sack of the then Director General of the Securities and Exchange Commission. See Ini Ekott, “Reps insists that Jonathan Fires SEC boss, Arunma Oteh” <https://www.premiumtimesng.com/news/126216-reps-insist-jonathan-fires-sec-boss-arunma-oteh.html>> accessed on 20/8/2019

³⁷ Ikechukwu Nnochiri: “N10bn jet scam: Court orders Reps to stop probe of Alison-Madueke, NNPC” Vanguard News 19/6/14 <<https://www.vanguardngr.com/2014/06/n10bn-jet-scam-court-orders-reps-stop-probe-alison-madueke-nnpc/>> accessed on 20/8/2019

³⁸ See “Transcript of Presidential Media Chats with Dr. Goodluck Ebele Jonathan” <<https://nigeriancurrent.com2015/06>> accessed on 21/8/2019

of the provisions of section 88 of the 1999 Constitution which is reproduced below for ease of reference:

88 (1) Subject to the provisions of this constitution, each House of the National Assembly shall have power by resolution published in its journal or in the official Gazette of the Government of the Federation to direct or cause to be directed investigation into-

- (a) any matter or thing with respect to which it has power to make laws, and
 - (b) the conduct of affairs of any person, authority, ministry or government department charged or intended to be charged with the duty of or responsibility for-
 - (i) executing or administering laws enacted by the National Assembly, and
 - (ii) disbursing or administering moneys appropriated or to be appropriated by the National Assembly
- (2) The powers conferred on the National Assembly under the provisions of this section are exercisable only for the purpose of enabling it to-
- a) make laws with respect to any matter within its legislative competence and correct any defects in existing laws; and
 - b) expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.

Section 89 of the 1999 Constitution empowers the National Assembly in the exercise of its powers under section 88 of the Constitution to issue warrants of arrest to compel the attendance of witnesses and other persons before it. Some pundits and stakeholders have urged strict compliance with the conditions for the exercise of the investigatory powers of the National Assembly as deduced from the plain words of the provisions.

On the face of the words of the section of the 1999 Constitution, it is apparent that one of the conditions for embarking on an investigation by any of the Houses of the National Assembly is the passage and publication in the journal of that House or the Federal Government Gazette of a resolution of that house to investigate any matter.³⁹ This was part of the argument of Diezani Alison-Madueke when she disobeyed the summons of the House of Representatives' Committee

³⁹ See Section 88(1) of the Constitution

on Petroleum Resources in relation to alleged N10 billion jet lease scandal.⁴⁰ She successfully argued at the hearing of her ex parte application for an interim injunction that the summons extended to her to appear before the committee was unconstitutional as there was no evidence of the publication of the House of Representatives' resolution to investigate the matter in the journal of the House of Representatives or the Federal Government Gazette.⁴¹

The second condition worthy of note is that the National Assembly is constitutionally empowered to investigate only matters within its legislative competence⁴². As earlier stated, the National Assembly is competent to legislate on matters set out in the Exclusive and Concurrent lists in the Second Schedule to the 1999 Constitution. Thus, the National Assembly would be incompetent to carry out investigation into any matter not listed in those two lists. This position finds support in the Latin maxim *expressio unius est exclusio alterius* which means the "express mention of one thing is the exclusion of another".⁴³ This implies that in the construction of a statute, when one or more things of a class are expressly mentioned others of the same class are excluded. See *Ehuwa v. Ondo State Independent Electoral Commission & ors*⁴⁴ where the Supreme Court per Ogbuagu JSC expounded on the maxim thus:

It is now firmly established that in the construction of a Statutory provision, where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included. The latin maxim is "Expressio unius est exclusio alterius" - i.e. the expression of one thing is the exclusion of another. It is also termed 'inclusion unius est exclusio alterius' or "enumeratio unius exclusion alterius" - See Legal Maxims in Black's Law Dictionary Seventh (7th) Edition page 1635. ... In other words, the express mention of one thing in a statutory provision automatically excludes any other which otherwise would have applied by implication with regard to the same issue.

By expressly listing the items within the legislative competence of the National

⁴⁰ Ibid (n 36)

⁴¹ Tony Soniyi, "Nigeria: Jet Charter- Court Sets Aside House's Invitation to Alison-Madueke, NNPC" This Day (Lagos) <<https://allafrica.com/stories>> accessed 4/12/2019

⁴² See Section 88 (2) (a) of the 1999 Constitution

⁴³ See B. A. Garner, Black's Law Dictionary, (10th ed. Thomson Reuters; 2014) p 1913

⁴⁴ (2006) LPELR-1056(SC)

Assembly, the 1999 Constitution has excluded all other items not included in the Exclusive and Concurrent Lists. In *A.G Abia v. A.G Federation*,⁴⁵ the National Assembly had enacted the Electoral Act, 2001 and the President had signed it into law. One of the contentious provisions of the Act was on the tenure of Local Government Councils in the country and conduct of elections into the Local Government Councils. The plaintiffs who were the thirty-six (36) state governments challenged the constitutionality of these provisions among others at the Supreme Court. It was held that since Local Governments were not in either the Exclusive or Concurrent Lists, it was outside the area of legislative competence of the National Assembly.

Those offensive provisions were declared null and void. From the above, it is clear that the investigatory powers of the National Assembly do not extend to Local Governments and all other matters not contained in either the Exclusive or Concurrent Lists. Similarly, in the case of *Oil Palm Company Limited v. A. G. Bendel State*,⁴⁶ the court frowns at state government attempt to legislate on matters on the Exclusive Legislative List of the Constitution. Flowing from the above therefore is the conclusion that the legislatures can only oversight bodies covered by its legislative competence.

The third condition is that the subject of National Assembly investigation must be a person, authority; ministry or government department charged or intended to be charged with the duty of or responsibility for administering a law passed by the National Assembly or disbursing government revenue⁴⁷. In addition to these, the purpose for National Assembly investigation is not open ended⁴⁸. It must be for the reasons provided for by the 1999 Constitution namely to aid the National Assembly in law making or correcting defects in existing legislation, exposing corruption in a government department, inefficiency or waste in the administration of laws within its legislative competence or in the disbursement of funds appropriated by the National Assembly.⁴⁹

The courts are firm that the provisions on the investigatory powers of the National Assembly do not vest the functions of the police on the National Assembly and the investigatory powers of the National Assembly are exercisable only for the purposes and within the limits of

⁴⁵ (2002) LPELR-611 (SC)

⁴⁶ (1985) 6 NCLR 344

⁴⁷ See Section 88 (1) (b)(I) and (ii) of the 1999 Constitution

⁴⁸ N. A. Inegbedion, “Scope of Legislative Oversight Under the 1999 Constitution” vol.1 2013 NIALS Journal of Constitutional Law.

⁴⁹ See Section 88 (2) (a) and (b) of the 1999 Constitution

the constitutional provisions and not for the aggrandizement of the ego or power of the House.⁵⁰ In more recent times, a senior lawyer, Femi Falana SAN had cause to express the view that the Nigerian Senate lacked the power to summon the Comptroller-General of Customs to appear before it and explain the Customs Service’s policy of compelling all vehicle importers/owners in Nigeria to pay the appropriate customs duties on their cars. In the view of the learned senior counsel, the Senate was not conducting any investigation into the Customs Service; rather it was challenging the policy of the Service and as such could not invoke its investigatory powers under section 88.⁵¹ That being the case, the National Assembly lacked the vires to summon anyone to appear before it under section 88 of the 1999 Constitution under such circumstances.

In another instance, the Senate had summoned the Chairman of the Presidential Advisory Committee against Corruption, Itse Sagay to appear before the Senate and answer questions in relation to his criticism of the Senate’s refusal to confirm the nomination of 27 Resident Electoral Commissioners. In his reaction to the summons, a Senior Advocate of Nigeria, Chief Sebastian Hon, said that the summons was unconstitutional.⁵² The Senior Advocate placed reliance on the case of *Tony Momoh v. Senate*,⁵³ and stated that the investigatory powers of the National Assembly did not give the National Assembly the powers of “a ‘universal ombudsman’ with power to invite and scrutinise the conduct of every member of the public.” He concluded that the scope of the powers of investigation of the National Assembly is limited to the persons and for the purposes provided for in section 88 of the 1999 Constitution.

Finally, the National Assembly by the Standing Orders of the two houses prohibits investigation of any matter that is the subject of pending litigation in a court of law.⁵⁴ Therefore, when a matter is pending in court, the National Assembly may not embark on its investigation to avoid prejudicing the interest of the parties even the court.

⁵⁰ See *Tony Momoh v Senate* (1982) FNLR 307 and *El-rufai v. House of Reps* 3plr/2003/63

⁵¹ Ramon Oladimeji, “Senate invitation to Customs boss, Ali unlawful, Says Falana” The Punch of 19/3/2017
<https://punchng.com/senate-invitation-to-customs-boss-ali-unlawful-says-falana/> accessed on 20/8/2019

⁵² Ade Adesomoju: “Senate’s Summons on Sagay Unconstitutional-SAN” The Punch of 30/5/2017
<https://www.punchng.com/senates-summons-on-sagay-unconstitutional-san/amp/> accessed on 21/8/2019

⁵³ (1982) FNLR 307

⁵⁴ See for example Order 55 (5) of the Senate Standing Orders 2015 which provides as follows: “Reference shall not be made to any matter on which a judicial decision is pending in such a way as might in the opinion of the president prejudice the interest of the parties thereto”

IV. Instances of Abuse of the Investigatory Powers of the National Assembly

The exercise of the investigatory powers of the National Assembly, if not properly managed, could lead to dire consequences for those involved. In the case of *El-Rufai v. House of Representatives*,⁵⁵ the plaintiff was invited to appear before the Ethics and Privileges Committee of the Defendant (the House of Representatives) to explain certain comments he made during an earlier appearance before the House of Representatives which the later considered to be defamatory of it. The plaintiff went to court to set aside the invitation extended to him. The court of Appeal held that although the suit was premature, the House of Representatives' invitation was unconstitutional.

The court quoted with approval the decision in *Watkins v. United States*⁵⁶ that:

No inquiry is an end in itself; it must be related to, and in furtherance of a legitimate task of Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to “punish” those investigated are indefensible.” The court finally held that: “From the authorities referred to above in this judgment, it seems settled that the legislature has no general authority to invite citizens to appear before it saves as provided under section 88 (2) of the Constitution.

Again in 2012, the House of Representatives in reaction to its findings on the management of the Securities and Exchange Commission,⁵⁷ recommended the sack of the then Director General of the commission, Arunmah Oteh.⁵⁸ The Director-General refused to resign and the President did not execute the resolution of the House of Representatives calling for her sack. Perhaps, the former Presidents’ refusal may be predicated on the wide held view that the resolutions of the National Assembly are merely persuasive and devoid of any force of law⁵⁹; in retaliation, the National Assembly made zero allocation to the Commission in the 2013 budget.⁶⁰ This vindictive or rash decision by the National Assembly impacted adversely on the operations and functions of the commission which is a critical player in the Nigerian economy.

Apart from hiding under the guise of investigation to further a selfish interest or cause as happened in *Tony Momoh v. Senate*⁶¹ and *El-Rufai v. House of Representatives*,⁶² the improper exercise of the investigatory powers of the NASS is also susceptible to corruption. In 2008, the Elumelu-Committee that investigated the alleged squandering of N16 billion on power soon found itself mired in a corruption scandal of its own. There were allegations of demanding and collection of bribes from National Integrated Power Project contractors who appeared before the

⁵⁵ El-rufai v. House of Reps 3plr/2003/63

⁵⁶ 354 U.S. 178, 187 (1957)

⁵⁷ Turaki A. Hassan and Abbas Jimoh “Nigeria: House of Reps Insist Oteh Must Go” <<https://allafrica.com/stories/>> accessed 7/12/2019

⁵⁸ ibid

⁵⁹ Oscar Chukwumah Okoro, “Resolutions of the National Assembly- Effect Thereof” Aro News Online, November 14,2016< www.aronewsonline.com > accessed 5/12/2019

⁶⁰ See Rilwan “Zero allocation for SEC” <<https://www.thenationonline.net/zero-allocation-for-sec-amp/>> accessed on 22/8/2019

⁶¹ (1982) FNLR 307

⁶² 3plr/2003/63

committee.⁶³ This scandal whittled down the credibility and acceptance of the eventual report of the committee among Nigerians.

In 2012, another investigation carried out by the House of Representatives also ended in scandal as the chairman of the committee that was set up to investigate alleged profiteering and corruption in fuel subsidy payment, Hon. Farouk Lawan was seen on video allegedly receiving bribes in hard currency from Mr. Femi Otedola, Chairman of Forte Oil which was one of the companies investigated by the Committee.⁶⁴ Needless to say, the bribery scandal overshadowed the subsidy probe.

V. Recommendations

From the foregoing, it is apparent that the powers of the National Assembly to indulge in investigatory activities are vulnerable to abuses unless kept within the constitutional limits. Since investigation in itself (especially when it is done to “expose corruption” in government department”) is quasi-criminal in nature in that it tends to expose its subjects legal liability, it is suggested that a balance should be struck between promoting transparency in government business and safeguarding the rights to privacy and fair hearing of the subject of National Assembly investigation.

A safe approach should be to enforce the constitutional restriction of the investigatory powers of the National Assembly to matters, persons and for the reasons mentioned in section 88 of the 1999 Constitution.

The second approach is that where the issues involved are within the jurisdiction and area of competence of the police and other law enforcement agencies, the National Assembly should refrain from conducting its own investigation in order to avoid making findings at variance with those of the court or acting in contempt of court. Also, the National Assembly should exercise self-censorship in matters that demeans its own dignity like the Sagay’s case. For the National Assembly to purport to investigate allegations of insult or disrespect to it would amount to being a judge in its own case which would be a violation of the rule of natural justice.

Further to the above, the subject of unlawful investigation by the National Assembly should not hesitate to challenge the legality of such investigations in court in order to create room for judicial activism and ultimately curb abuses of the powers of investigation of the National Assembly. Where the National Assembly, fail to censor itself, the courts should be afforded the opportunity to whip it into line.

It is further suggested that the National Assembly management should organize regular training programmes on legislative procedure and make it mandatory for its members to attend.

⁶³ See Abiodun Adelaja and Erasmus Alaneme and Patience Akpuru “Nigeria: \$ 16 Billion Probe-Panel Members in N100 Million Bribe Scandal ” *Daily Champion (Lagos)* July 2008 <<https://allafrica.com/stories/>> accessed on 22/8/2019

⁶⁴ See Ade Adesomoju “Farouk Lawan demanded \$3m, got \$500,000 bribe from me-Otedola” <<https://www.punchng.com/farouk-lawan-demand-3m-got-500000-bribe-from-me-otedola/amp/>> accessed on 22/8/2019

Alternatively, they National Assembly should avail its members the opportunity of attending such courses or training programmes from third party establishments like the Institute of Legislative Studies, the National Republican Institute, the Nigerian Institute of Advanced Legal Studies, relevant University faculties and departments, etc.

VI. Conclusion

From the decisions of the courts and the view of the learned senior counsel, it can be seen that the investigatory powers of the National Assembly can only be validly invoked in respect of a matter within its legislative competence and the conduct of a government department or functionaries. Secondly the aim of such investigation must be to aid correcting defects in existing laws; aid in enacting new laws or exposing corruption in a government department, etc. It follows that the investigatory powers of the National Assembly is not at large and is not for purposes of massaging the ego of the members of the National Assembly as happened in *El-Rufai v. House of Representatives* or the Sagay's case. Rather it is restricted to within very narrow limits by the 1999 Constitution itself. While the investigatory powers of the National Assembly are very useful tools for legislative business, it is hoped that if such powers are exercised responsibly and within their well-defined limits, the productivity and utility of the National Assembly would be greatly enhanced.

THE EFFECTS OF EXCLUDING MEN FROM INTERNATIONAL AND REGIONAL INSTRUMENTS OF PROTECTION ON SEXUAL VIOLENCE

*Dandy Chidiebere Nwaogu **

Abstract

This paper examines International and regional instrument available for the protection and prohibition of Sexual and gender-based violence within the International community. The paper argues that though there are a lot of conventions and resolutions adopted by the International community through operations of the United Nations on issues of sexual and gender crimes, but that the adopted legal instruments ranging from the Geneva Convention to the latter resolutions by the United Nations General Assembly all tends to pay concentrated attention to violence against women and girls. The paper stresses that of all the instruments of protection available both at the international and regional levels none of them specifically paid attention to men or boys as likely victims of sexual and gender based violence especially during armed conflicts. The paper further captures some major negative effects of excluding men as entities that requires protection by available instruments both regional and international. The paper therefore concluded by calling on the International Community particularly the United Nations to deliberately use gender specific language in including men and boy into legal instruments of protection as potential victims of sexual and gender violence.

Key Words: Sexual, International, Regional, Violence, Geneva, Conventions

I. Introduction

There are so many international and regional instruments that deals with the prohibition of sexual violence both in armed conflict and non- conflict situations. Most of the extant and available instruments on the subject matter, either focuses attention on sexual violence on a general term, employing gender neutral language or on the other hand strictly focusing on female sexual violence projecting women as the likely victims of sexual and gender-based crimes without any form of recourse to the plights and sufferings of men. Based on this age long traditional perspective and lack of the acknowledgment that men can be raped or become victims of sexual violation. It must be established that male sexual violence are largely unreported and unprosecuted. Owing to the belief that men ought to be protectors of women and not to be protected from violence. They are therefore either not included in protection instruments at all or included but not with a specific mention with clarity of language. Only a few recent instruments and conventions make reference to male directed sexual violence.

This paper argues that rape and other forms of sexual violence has developed over the years, starting from the mid-nineteenth century stressing that little nothing has been done in terms of implementation and enforcement of the extant laws both at the

* Dandy Chidiebere Nwaogu, PhD, Lecturer, Faculty of Law, University of Benin, Benin City, Nigeria.
Ph: 08035657681. ,dandy.nwaogu@uniben.edu.

international and regional levels in prohibiting sexual violence against men and women.¹

II. A Review of International and Regional Instruments on Sexual and Gender-Based Violence

1. The Geneva Conventions of 1949

The Geneva Conventions historically as it were is about the very first international legal instrument to recognize and make provision for the protection of women against sexual and gender based violence in armed conflict. The Geneva Convention was established with the help of the International Committee of the Red Cross, which was birthed as a result of the widespread abuse and violation of human rights during the Second World War. Out of the four Geneva Conventions adopted as a result of World War II, it is only the fourth Geneva Convention as it were that contains an explicit prohibition of rape in its Article 27, which provides that: ‘Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault’.²

The scope and wordings of Article 27 is expressly and strictly limited to women as victims of sexual and gender based violence and this has a tendency to bring back harmful stereotypes, including that a raped woman is ‘disgraced’ and that rape is a crime against honor.³ A look at Article 147 of the same Fourth Convention gives an understanding of what constitutes grave breaches of the convention, but expressly failed to include rape and sexual assault as part of it. This may not be far from the fact that in Geneva Convention IV, rape is included in the list of sexual violence not as a category of rights protecting a person’s integrity but to the provision offering protection for family rights. Although rape could be explained as falling within Article 147 relating to the prohibition on grave breach of inhuman treatment, it must be stated that explicit recognition of rape as a grave breach is absent from the convention.

However, Article 14 of the Third Convention engaged the use of sex neutral

¹ Dustin A. Lewis, ‘Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law’ (2009) vol. 27 *Conflict and Sexual Violence against Men* No.1 p.17.

² Laetitia Ruiz, ‘Gender Jurisprudence for Gender Crimes?’ (June 2016) International Crimes Database available at www.internationalcrimesdatabase.org accessed 13 August 2019.

³ Dustin A. Lewis, Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law (2009) vol. 27, *Wisconsin International Law Journal*, p. 23.

language and does not expressly prohibit rape as a crime, it provides that prisoners of war are in all circumstances entitled to ‘respect for their persons and their honor’.⁴ It must however be noted that both the 3rd and fourth Geneva Conventions, none made reference in any way to men as entities requires protection whatsoever.

It must also be stated that Common Article 3 to the Geneva Conventions provides protection from rape to civilians in times of armed conflict – but this fact was not so provided explicitly, it only mentions rape with women in view as the object of protection. Another point worthy of attention is the clause on non-discrimination based on sex, contained in the same article which implies that the obligation to treat persons not taking an active part in hostilities must be done humanely without any distinction based on, among others, sex, and the assumption should be that it encompasses both men and women.⁵

The 1977 Additional Protocols to the 1949 Geneva Convention in addition further enhanced protection against sexual violence in conflict settings, it failed however, to explicitly mention men as targets for rape and other forms of sexual abuses but it does not focus on the men folk in any way as potential victims of sexual violence and does not make them visible members of the group in need of protection.⁶ Article 7 of Protocol I employs sex-neutral language in prohibiting ‘outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault’.⁷ Article 76 of the same protocol on the other hand, out rightly prohibits rape against women in very clear terms.⁸

The second Additional Protocol to the Geneva Conventions (AP II) uses a different language in its provision on the prohibition of rape. Rather than targeting specifically women, AP II refers to the prohibition of rape against ‘persons’.⁹ This as it were may indicate a possible existence of male rape victims but it remains unclear the extent of its applicability. It should be noted that these protocols are still yet to be

⁴ The Third Geneva Convention, Article 14, first paragraph, 1949.

⁵ Latitia (n2)

⁶ Ibid.

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, 1125 UNTS 3 (entry into force 7 December 1978) Article 7.

⁸ Dustin (n3)

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, 1125 UNTS 609 (entry into force 7 December 1978), Article 4(2)(e).

ratified universally for the purpose of application.¹⁰

2. The Lieber Code of 1863

Another useful instrument enacted for the prohibition, protection and punishment of the crime of gender violence is the Lieber Code, which was the first codification of customary international laws of land warfare, it provided explicitly for the protection against sexual violence.¹¹ During that time, rape during conflict was conceived as an inevitable and natural consequence of war. The Lieber Code prohibits rape in two major provisions. As can be clearly seen in Articles 37 and 44. While Article 37 gives women special protection by linking them to family honour relationship, It however provides that '[t]he United States acknowledges and protect women in hostile countries, offences to the contrary shall be rigorously punished'.¹² Article 44 on the other hand classifies rape and other forms of sexual violence as a crime of troop discipline, yet at the same time appears to recognize the violent character of rape. It further provides that:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking place by the main force, all rape, wounding, maiming, or killing such inhabitants, are prohibited under the penalty of death, or such other severe punishments as may seem adequate for the gravity of the offense committed.¹³

It is instructive to note that at the time of the Lieber Code, rape existed in a world much different from the world of today. According to a Scholar, David S. Mitchell, in 1863, rape was 'closely associated with crimes of property rather than crimes against the person ... hence the phrase 'rape and pillage''. David Mitchell further asserts that 'at this stage (in 1863) rape remains a property crime perpetuated against a man's honor and ... it was rare to find rape reported as a crime against the person'.¹⁴ The Lieber Code nonetheless, used sex-neutral terminology, which may as

¹⁰ Catherine N Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia* (1995) 17 *Human Rights Quarterly* 649 at 676.

¹¹ Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field' (April 24, 1863) reprinted in Francis Lieber's Code and the Law of War 45 (1983) [herein after Lieber Code].

¹² Ibid, art. 37.

¹³ Ibid, art. 44.

¹⁴ Dustin (n1) 21.

it were suggest that the prohibition of rape could be not only against women but also against men.¹⁵

3. The Convention on the Elimination of Discrimination against Women (CEDAW) of 1979.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was rightly adopted in 1979 is yet another important extant instrument for the protection of victims of sexual and gender-based violence and also its serves as the most extensive international instrument dealing with the rights of women.¹⁶ With the adoption of General Recommendation 19 by the CEDAW Committee in 1992, the definition of discrimination against women set out in Article 1 of the Convention includes ‘gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.

The Convention makes provision for acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.¹⁷ The Convention further provides for remedies for violence against women, including sexual violence;¹⁸ the vulnerability of men as victims is out rightly ignored by the convention. The convention calls on states to issue reports which ‘include all available data on the incidence of each form of violence and on the effects of such violence on the women, who are victims’.¹⁹

However, the CEDAW’s Committee through its General Recommendation No. 24, makes brief reference to adolescent males on states obligation to provide sex education. It provides that ‘... In particular, states parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly training personnel in specially designed programmes that respect their right to privacy and confidentiality’.²⁰ In terms of sexual violence against men and boys in armed conflict, they are completely excluded from the provisions and recommendations of the Committee on the Elimination of Discrimination against Women (CEDAW). It provides mainly for the protection of women and girls from violence, and little or no

¹⁵ Ibid.

¹⁶ Convention on the Elimination of All Forms of Discrimination against Women art.17. December 18, 1979, 1249 U.N.T.S. 13.

¹⁷ UN Committee on the Elimination of Discrimination against Women, General Recommendation 19: *Violence Against Women*, 6 UN Doc. A/47/38 (Jan 29, 1992).

¹⁸ Ibid 24.

¹⁹ Ibid 24(u).

²⁰ Committee on the Elimination of Discrimination against Women, General Recommendation 24: *Women and Health*, art 12(1) 18 UN Doc A/54/38/Rev. 1 ch. 1 (Feb 5, 1999).

recourse is made to men and boys as potential victims of sexual violence, thereby making their recognition and visibility much difficult.

4. The African Charter on Human and Peoples' Rights (ACHPR) of 1981.

The African charter is also a useful instrument in the protection of the rights of victims of gender violence. African member States of the organization for African Unity (OAU) now the AU adopted the African Charter on Human and People's Rights (African Charter) in Nairobi in 1981. The Charter sets out not only rights, but also duties of African people as it affects the rights of other person and their respective countries. The Charter established the African Commission on Human and People's Rights, an institution mandated to promote and protect human rights on the continent. It recognizes and gives equal importance to the observance of civic and political rights as well as economic, social and cultural rights.²¹

As it relates to sexual violence and its prohibition, the African Charter has some provisions which prohibits discrimination and sexual violence, but what seems to be its major consideration, is that of crimes committed against women and girls. Any recognition given to men or boys is done in passing and no real recognition is accorded to the sufferings of the male gender in peace time or in conflict situations. *Article 5 of the African Charter* provides that:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.²²

The above provision seems to have a general coverage, in the sense that it uses sex neutral language such as “every individual” and “man”, when referring to the prohibition of all forms of exploitation and degradation persons suffer. Article 18(3) in the same light provides that:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of

²¹ National Human Rights Commission, “The African Charter on Human and People’s Right” (2018) available at <<https://www.nigeriarights.gov.ng>> accessed August 19, 2019.

²² Article 5, African Charter on Human and People’s Rights (1981), p.2.

the women and the child as stipulated in international declarations and conventions.²³

This provision only deals with the protection of women. There is no mention of men or their vulnerability as victims of sexual and gender crimes. In 2003, a Protocol to the African Charter on People's and Human Rights on the Rights of women in Africa was adopted by State parties. *Article 1(j)* defines what violence against women means and it defines it to mean ... all acts perpetrated against women which cause or could cause physical, sexual, psychological and economic harm...”²⁴ Another provision of the same protocol provides that ‘state parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures’.²⁵ *Article 4(2) (a)* of the Protocol also states that:

State parties shall take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.²⁶

Article 11(2) also provides for protection of women thus: ‘state parties shall ... protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict’.²⁷

In 2006, countries of the African Great Lakes Region agreed on a Protocol on the Prevention and Suppression of sexual violence against women and children, obliging them to prevent, criminalize and punish such acts.²⁸ In all of these provisions of the Charter, what seems clear is that, its major concern is on the protection of women and girls. It accords little or no recognition to the plights of men and boys, particularly as it relates to sexual violence committed against them in armed conflict. They are in fact not seen as victims but are seen as perpetrators of violence.

5. The UN Declaration on the Elimination of Violence against Women

²³ Article 18(3) African Charter on Human and People’s Right (1981) p. 3.

²⁴ Article 1(j) Protocol to the African Charter on People’s and Human Rights on the Rights of Women in Africa (2003)

²⁵ Article 2(1) Ibid.

²⁶ Ibid, Article 4(2) (a).

²⁷ Ibid, Article 11(2).

²⁸ Tom Hennessey and Felicity Gerry “International Human Rights Law and Sexual Violence Against Men in Conflict Zones” (2012) Halsbury’s Law Exchange available at http://www.halsburylawexchange.co.uk/wpcontent/uploads/sites/25/2012/policy_paper_sexual_violence_main.pdf

The Declaration on the Elimination of Violence against Women in the same vein provides for the protection of victims in respect to sexual and gender violence. This Declaration was adopted due to the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings.²⁹ The provision of this declaration recognizes women in conflict settings as an especially vulnerable group, and it encompasses Gender-based violence in its definition of violence against women. *Article 1* provides that:

... the term ‘violence against women’ means any act of gender-based violence that results in or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.³⁰

Article 2 further provides an understanding of violence against women and it provides that it may include ‘physical, sexual and psychological violence occurring in the family’³¹ and also, it may include ‘psychical, sexual and psychological violence occurring within the general community, including rape, sexual abuse in educational institutions and elsewhere, trafficking in women and forced prostitution’.³² *Article 2(c)* explains it to mean ‘physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.’³³

This Declaration on the Elimination of Violence against Women adopted by the UNGA is majorly focused on the violence both sexual and otherwise suffered by women. It has just six articles and none of these articles mentions men as likely victims of gender crimes. This makes the recognition of men as victims of sexual violence in peace time or in conflict situations more difficult. With regard to violence, the U.N’s belated response was to frame sexual violence as women’s issue. The female-specific approach used by the UN can therefore be treated to its neglect of women’s issues.³⁴

²⁹ Declaration on the Elimination of Violence against Women, (Dec. 20, 1993) General Assembly Resolution 48/104, Preamble U. N. Doc. A/48/49.

³⁰ Ibid, Article 1.

³¹ Ibid, Article 2(a)

³² Ibid, Article 2(b)

³³ Ibid, Article 2(c)

³⁴ Lara Stemple, “Male Rape and Human Rights” (Feb, 2009), p.627.

6. Resolutions of the UN Security Council on Sexual Violence

Aside from the above discussed international and regional instruments there are also several resolutions of the United Nations adopted with the aim of protecting victims of sexual and gender based violence. The Security Council is the UN's primary body for promoting International peace and security. The legal status of the Council's resolutions has not been conclusively agreed on, but they bring substantial international attention to an issue and provide a political framework that compels action by governments and International Organizations.³⁵ The sustained attention to violence against women in armed conflict has resulted in noteworthy resolutions by the United Nations Security Council and an examination of a series of such resolutions can tell us a great deal about the development of International discourse on a specific topic. Again in this resolution and other subsequent adopted examined in this paper only made reference to states putting measures in place in stopping and preventing sexual violence against women.³⁶

7. United Nations Security Council Resolution 1325

In 2000, the UN Security Council Resolution 1325 on Women, Peace and Security reaffirmed the Beijing Report's Commitments and specified that Women rights law to be extended to women during armed conflict and in the immediate aftermath of armed conflict. Resolution 1325 recognized 'the need to implement fully international humanitarian and women rights law that protects the rights of women and girls during and after conflicts.³⁷ It further calls on "all the parties to an armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse,³⁸ and emphasized the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes including those relating to sexual and other violence against women and girls...'.³⁹ The Resolution also called for increased representation of women at all decision making levels in national, regional and international institutions; mechanisms for the prevention,

³⁵ Note 8, *supra*.

³⁶ *Ibid.*

³⁷ Security Council Resolution 1325 (Oct. 31, 2000) Preamble. UN Doc S/RES/1325

³⁸ *Ibid.*, 10.

³⁹ *Ibid.*, 11.

management and resolution of conflict, and expansion of the roles and contributions of women in United Nations field operations.⁴⁰

The Resolution however, begins by ‘expressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict,⁴¹ appearing therefore to include in its focus, the plight of boys. However, once sexual is addressed, more specifically, the language shifts by calling on all parties to armed conflict to take special measures to protect women and girls from gender-based violence....’ It is therefore difficult to discern whether it is a statement about the degree of impact on women and children or on all civilians, including men.⁴²

8. United Nations Security Council Resolution 1820

In June 2008, the Security Council unanimously passed the ground-breaking Resolution 1820, which gave specific recognition to the fact that sexual violence represents a threat to security, especially the security of the international community as a whole⁴³ The Resolution does not however provide a comprehensive understanding of sexual violence during armed conflict because it focuses on women and girls. No specific and explicit mention of men and boys is made at any point in the resolution, which is puzzling when taking into account that their experiences would undoubtedly contribute to better understanding the problem of sexual violence.⁴⁴

The Resolution noted that ‘women and girls are particularly targeted in that sexual violence is mainly used as a tool, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group,⁴⁵ and stressed that such violence can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security...’⁴⁶ The Council demanded that:

All parties to armed conflict immediately take appropriate measures to

⁴⁰ Ibid 1-2, 4

⁴¹ Ibid, 15.

⁴² Lieber Code (n12)

⁴³ Rashida Manjoo & Calleighn McCaith, ‘Gender-Based Violence and Justice in Conflict and Post Conflict Areas’ (2011) 44 *Cornea International Law Journal*.

⁴⁴ Laetitia Ruiz, ‘Gender Jurisprudence for Gender Crime’ (June 2016) 1 C D p.6.

⁴⁵ Security Council Resolution 1820 (June 19, 2008) Preamble, UN Doc. S/RES/1820.

⁴⁶ Ibid, 1.

protect civilians, including women and girls, from all forms of sexual violence, which could include, *inter alia*, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence and evacuation of women and children under imminent threat of sexual violence to safety...⁴⁷

Noteworthy here, is the Council's statement that 'rape and other forms of sexual violence can constitute a war crime, a crime against humanity or a constitutive act with respect to genocide yet again there was no specific reference on men and boy as likely victims of gender violence needing any form of special attention or protection'.⁴⁸

1. United Nations Security Council Resolution 1888

In September 2009, the Security Council adopted Resolution 1888⁴⁹ which calls for the following:

- a. The appointment of a special Representative to provide leadership, strengthen existing UN coordination mechanisms, and advocate ending sexual violence against women with government including military and judicial representatives and with parties to armed conflicts.⁵⁰
- b. The creation of a team of experts, including specialists in areas such as the rule of law, judicial systems, criminal investigation and security sector reform to assist governments and peacemaking forces in coping with sexual violence in armed conflict, enhancing national capacity and strengthening rule of law and state authority to prevent impunity.⁵¹
- c. The appointment of women's protection advisers in peacekeeping missions.⁵²
- d. The provision of data and information about the prevalence of sexual violence in reports made by peacekeeping missions to the Security Council,⁵³ and

⁴⁷ Ibid, 3.

⁴⁸ Ibid, 4.

⁴⁹ Security Council adopted Resolution 1888 (Sept. 30, 2009) UN Doc. 8/RES/1888).

⁵⁰ Ibid, 4.

⁵¹ Ibid, 8.

⁵² Ibid, 12.

- e. An annual reporting on the progress made on implementing Resolution 1820 and this new Resolution.⁵⁴

The focus of this resolution is still clearly on any victim as long as they are not men, but the resolution ‘Requests that the United Nations Secretary General appoint a special Representative in order to address, at both headquarters and country level, sexual violence in armed conflict.’ The first of such special Representative is Margot Wallstrom who was appointed in February 2010. Her title, however, may be a little misleading, as the Secretary-General made clear when he stated that she been appoint to end ‘sexual violence against women and children in conflict areas’. In her first presentation to the UN, Wallstrom included 39 uses of the ‘women’ but none of ‘men’.⁵⁵

10. Nations Security Council Resolution 1960

In December 2010, noting that sexual violence during armed conflict remains systematic, rampant and widespread; the Security Council unanimously adopted a new resolution, Resolution 1960.⁵⁶ This resolution creates institutional tools and teeth to combat impunity and outlines specific steps needed for both the prevention of and protection from sexual violence in conflict. The new ‘naming and shaming’, listing mechanism mandated in the Resolution is a step forward in bringing justice for victims and a recognition that sexual violence is a serious violation of human rights and international law.⁵⁷ The list comprises of those who are ‘credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflicts’. This resolution does not deal with victims of sexual violence but the perpetrators and so does not use a specific gender language. There is no recourse to either females or males as being victims of sexual violence and this could be a calculated efforts at excluding men as likely victims.

⁵³ Ibid, 24

⁵⁴ Ibid, 24.

⁵⁵ Note 8, *supra*.

⁵⁶ Security Council Resolution 1960 (Dec 16, 2010) UN Doc S/RES/1960

⁵⁷ Peace Women, Security Council Resolution 1960 (2010) Women International League for Peace & Freedom <<https://www.peacewomens.org>> accessed 10 August 2019

III. The Effects of Excluding Men from Instruments of Protection

The exclusion of men from both international and regional instruments of protection has with it a whole lot of negative impact on the men folk. Firstly, it has resulted to the continued sufferings of men from acts of sexual violence perpetrated against them this is because there is no known or identifiable laws that tends to serve as a check to perpetrators of sexual violence against men especially during armed conflicts. Secondly, male victims of sexual and gender crimes find it very difficult to speak out or report acts of violence perpetrated against them because of lack of available law and existing legal instruments under which they could stand to fight for justice. Law is an instrument of justice, where there is no law it difficult to talk of justice, the law aids justice.

Thirdly, because there are no laws in place that out rightly prohibits and criminalizes such acts of violence, there can be no adequate reparations for the male victim,

Similarly, if there is no substantial recognition of male-directed sexual violence, the need for victims to speak out about their plights will be further diminished. The more legal instruments are oblivious to sexual violence against men, the more the victims of such crimes will be reluctant to speak out about its occurrence. According to the arguments of the UN Secretary-General, he says that ‘it is my strong belief that when it comes to sexual violence, we cannot expect peace without justice, reparation without recognition, and sustainable development without the full empowerment of those who have suffered sexual violence or are at risk’.⁵⁸

Men should be provided with enhanced protection against sexual violence in armed conflict by treaty drafters, prosecutors and jurists. This is because international law may reinforce certain stereotypes and norms that may fuel such violence in the first place and lead to its underreporting. These stereotypes includes femininity and masculinity and stereotypes from pernicious cultural norms regarding sexuality, especially same-sex sexual behavior.⁵⁹ Also, to delegitimize the harmful stereotypes and norms that fuel such violence, treaty drafters should use the definition of sexual violence laid out earlier, in which sexual violence includes attacks directed at an

⁵⁸ Note 28, supra.

⁵⁹ Dustin A. Lewis, *Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law* (2009) vol. 27 Conflict and Sexual Violence against Men No.1 p. 48.

individual's perceived, imputed or actual sexuality.

Criminalizing attacks targeting an individual's sexuality would work toward delegitimizing the destructive stereotypes attending heterosexuality and homosexuality in wartime,⁶⁰ stereotypes that provide some of the motivation for men (and women) to commit sexual violence against men. Such explicit recognition in international instruments would also put potential perpetrators on notice that sexual violence against men is just as serious a crime as it is against women. Moreover, such recognition would provide male victims with a vocabulary to articulate their experiences.⁶¹ If men continue to be ignored as victims of sexual violence, doctors and humanitarian-aid workers will find it difficult to identify and better treat such violence.

However in terms of investigation and prosecution male related sexual violence International criminal tribunals for Rwanda and Yugoslavia had clearly recorded and documented cases of rap and other forms of sexual violence against men. For instance the international criminal tribunal for the former Yugoslavia gave a conviction in the case of *Prosecutor v. Delalic*, in this case, the three defendants involved were convicted of placing fuse cords around the genitals of some male detainees and forcing them to perform oral sex on each other.

Also in *Prosecutor v. Dukotadi*, the defendants in this case were convicted of several sexual violence offences against detainees including biting off of the testicles of male victims. It is a surprise to note that none of the decisions of the International Criminal Court for the former Yuogslavia in specific recognized the acts for which the perpetrators were charged to be crimes of rape or sexual violence against the identified victims. It is the view of some feminists scholars like Sandesh that in situations where acts of sexual violence especially rape against men have been acknowledged by the International criminal court and the ad hoc tribunals, sexualized violence against men have not been categorized as gender based violence, rather such crimes as referred to as torture, or an abuse .

IV Conclusion

Men are usually in the fore front as fighters for the purpose of defense of the territorial sovereignty of any identified region in the event of conflicts both armed and

⁶⁰ Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential for International Criminal Law* (2007) 43 STAN. J. INT'L. L. 39.

⁶¹ Note 59, supra at 49.

non-armed conflicts. As a result of this, men are also the most vulnerable set of people to attacks and violations. Traditionally, men acts as reliable defense to both their community and immediate family and hence society believe that men cannot be sexually abused in any form, this particular traditional view has informed the reason why men find it difficult to talk about sexual violence perpetrated against them, or report sexual abuses against them to law enforcement agents. No doubt, there are a plethora of instruments both International and regional on protection against sexual violence, while some of these instruments have been operational for the past decades, others are relatively recent most especially the resolutions adopted by the United Nations.

The important fact to note here about these available instrument on gender violence is that they are all tailored, prepared and drafted with a gender specific language, and the language of them all is the “Language of Women”, thus, all the instruments reviewed have elaborate provisions on prohibition and protection of women against sexual and gender violence. There seem to be total silence and absence of recognition of men as possible victims of sexual and gender violence. There has always been reports of men being raped and sexually abused during armed conflicts. For instance, the Rwandan and Yugoslavian conflicts revealed shocking reports of the rape of men as well as the genital mutilation of several male victims.

It is important to note that the lack of inclusion of men in instruments of protection against sexual and gender violence results in lack of prompt prosecution of perpetrators of the crime and as well makes it difficult for male victims of sexual violence to speak out and report acts of sexual violation committed against them.

LEGAL AND INSTITUTIONAL FRAME WORK FOR GAMBLING/ONLINE GAMBLING IN NIGERIA

*Onuche Samson Ojodomo **

Abstract

Gambling activities in our society can be said to be as old as man itself. Evolving from being a recreational activity to a means for generation of income with the skills of players becoming of almost importance. While Gambling has an age long history, the means through which gambling is taking place has also witness a great deal of changes. The emanation of Information Communications Technology and the Internet, came a change of medium, therefore legislation must keep up with the paste. This article assesses the Legal and Institutional Framework for Gambling/Online Gambling in Nigeria, it exposes the nature of Gambling/Online Gambling, historical regulations in Nigeria, legal forms in which gambling exist in Nigeria, current legislation, making recommendation for possible reforms. It also enlightens the Gambling/Gaming Sector, Stakers/Bettors, the government and all stakeholders of the Gambling industry in Nigeria and the laws regulating the industry. And it is limited to the Lagos State Lottery Board Law 2008, in its examinations of states regulations relating to gambling.

Keywords: Gambling, Online, Internet, E-Commerce, Information, Communications

I. Introduction

Gambling has over the years been part and parcel of the society, it can be traced from the ancient and primitive time to modern day society. Gambling as an activity, is as old as the human society itself as people from time immemorial have often place wagers on certain outcomes of future events of life. For the vast majority of players, Gambling is an enjoyable form of leisure, pursued for a range of reasons – to relax, to socialize, to experience some excitement, and perhaps to win money. To these categories of individuals, losses incurred on Gambling are simply the price one has to pay for the entertainment, in much the same way as cinema or football tickets are the cost of a good time.¹

Gambling activities has over the years evolve into various forms and kinds. And is currently referred to as Betting and Lottery by a wide range of the population.

However, there are arguments that Betting is not the same as Gambling.² In that, in Gambling, there is an inherent feeling of excitement from the participant, in

* Onuche Samson Ojodomo, LL.B, BL, LL.M, PNM, E.I. ONUCHE & CO, Abuja, Nigeria,
Onuchesamson48@gmail.com +2348173928587, +2347062476178

¹ Agbala E.S., ‘Mapping the Nigeria Gaming Industry: Legal & Socio-Cultural Factors.’ (2016)’ *American Gaming Lawyer*.Autumn <<https://www.imgl.org/sites/>> Accessed 19 August 2018

² Fatimah Waziri –Azi “Regulatory & Legal Framework for Online Sports Betting in Nigeria: A Viable Alternative for Money Laundering” *International Journal of Law and Legal Jurisprudence Studies*: Volume 2 Issue

anticipation of preferred outcome turning up in their favour.³ And most importantly, in Gambling, the historical performance and antecedence of the object of the said gamble does not affect the outcome even though people try to use statistics to predict the outcome. Therefore, it is said that Gambling, typically involved game of chance that is based upon probability or luck and has nothing to do with the skills of a person.⁴

Betting on the other hand is an agreement between two persons, usually the Bettor and the Betting Company. Where the Betting Company provides the bookies and the other person makes prediction on the outcome of an event using the bookies. The individual either forfeits the amount wagered in case of incorrect prediction or the Betting Company pays a higher amount as per the agreed terms if the prediction turns out to be correct. Here, historical performance and statistics are factors used to predict results.⁵

However, the word “Betting” and “Gambling” in this research will be used interchangeably, being that in the clear sense of the concept of these words, they stand to mean one and the same. Even though a distinction is made, this article views the distinction as being capable to be made as a result of the modern realities which brought about the use of antecedence for predictions.

With the advent of modern Information and Communications Technological (ICT) and the Internet, Gambling activities transcended from the old trend of Physical/Landed Gambling to Cyberspace, with Internet creating a new trend of Gambling commonly referred to as Online Gambling. Online Gambling has now form part and parcel of Electronic Commerce (E-Commerce) falling under the subject area of Information Communications Technology Law dealing with Finance such as E-Money, E-payment and M- Payment. Therefore, ascertaining the Legal and Institutional framework regulating Gambling/Online Gambling is very vital.

II. Gambling

According to the *Britannica Online Encyclopedia*, Gambling is defined as the betting or staking of something of value, with consciousness of risk and hope of gain,

³ Ibid

⁴ Ibid

⁵ Ibid

on the outcome of a game, a contest, or an uncertain event whose result may be determined by chance or accident, or it may have an unexpected result by reason of the bettor's miscalculation.⁶ The term 'Gambling' involves a wide-ranged concept that includes a different variety of activities, such as Gambling in Bingo halls, Gambling though the use of machines, betting on races, Casinos and amusement arcades, as well as playing the Lottery either on Land base or through the Internet Cyberspace.⁷

a. Online Gambling

According to *Casinopedia Online*, Online Gambling is any form of gambling game which is played using a computer or mobile device and the internet connection, this can be referred to as Online Gambling.⁸ In the same vein, the European Union (EU) defines Online Gambling services as any service that involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means and at the individual request of a recipient service.⁹ Online gambling employs the boarder less medium of the internet to deliver its services¹⁰

b. E-Commerce

Electronic Commerce, consists of the buying and selling of products or services over electronic systems such as the Internet and other Computer Networks.¹¹ It has also been defined as the exchange of information across electronic networks at any stage in the supply chain, which could be either within an organization, businesses, businesses and consumers or between the public and private sectors

⁶Britannica Online Encyclopaedia "Gambling" <<http://www.britannica.com.oasis.unisa.ac.za/EBchecked/topic/2248636/gambling>>. Accessed 19/09/2018.

⁷ Omachi, S.A, Okpamen K. O "The changing patterns of Gambling in Benue State the case of emerging roles of ICT(Information and Communication Technology) in Contemporary Markurdi Metropolis.' 27th April, 2018 *American Association for Science and Technology AASCIT* Vol 5, Issue 2

⁸ Online Casinopedia <<https://www.casinopedia.org/terms/online-gambling>> Accessed 20/09/2018.

⁹ Salvatore Casabona" *The EU's Online gaming regulatory approach and crises of legal modernity.* Working Paper No.17 January,2014.

¹⁰ John Mikler 'Sharing Sovereignty for Global Regulation: The Cases of Fuel Economy and Online Regulation & Governance' 2008 Volume 2, Journal Compilation (Blackwell Publishing Asia Pty Ltd: 2008) 383–404

<[doi:10.1111/j.1748-5991.2008.00048.x](https://doi.org/10.1111/j.1748-5991.2008.00048.x)> Accessed 1st September, 2019

¹¹ Akintola K.G, Akinyede R.O.& Agbonifo C.O, 'Appraising Nigeria Readiness For Ecommerce Towards: Achieving Vision 2020' November 2011, Vol 9 Issue 2, IJRRAS <www.arpapress.com/Volumes/Vol9Issue2/IJRRAS_9_2_18.pdf> Accessed 30th August 2019

whether paid or unpaid.¹² E-Commerce involves wide range of transactions such as, Electronic Data Interchange (EDI), Supply Chain Management, Automated Data Collection systems, Internet Marketing, Electronic Funds Transfer (EFT), Online Transaction processing and Inventory Management Systems¹³

Some States of the Federation have Laws on Gambling or Lotteries, However, focus will be streamline to Lagos State Lottery Board Law 2008 while discussing regulations pertaining the States of the Federation primarily because under the said Law, Eighteen(18) Online Betting operators have been Licensed, while 12 have Temporary Licence and 14 have got their licence suspended,¹⁴and these Companies carryout Online Gambling/Betting activities all over the federation. The National Lotteries Commissions together with the Lagos State Lotteries Board have issued a combine total of more than Eighty (80) Licences prompting need to access its Legal framework and its institutional regulations.

III. Historical Regulations of Gambling in Nigeria

As a result of the receptive provisions of Nigeria Legislation, which received and made English Legislation applicable to our jurisdiction,¹⁵ the first Gambling Legislation applicable to Nigeria, was the Unlawful Games Act of 1541.¹⁶ The Act was enacted by the Parliament of England to prohibit several other games that have cause the decay of the sport of Archery.¹⁷ As a build up to the said Act, the House of Lords Select Committee made recommendations in 1844 which resulted in the enactment of the Gaming Act of 1845 in England.¹⁸ The said Act did not try to make Gambling illegal, however, it was aimed at discouraging Gambling by making

¹² Anthony Idigbe Nnamdi Oragwu & Okorie Kalu ‘Legal And Institutional Framework For E-Commerce In Nigeria, Being A Paper Delivered At Bankers House Seminal Held 9th June 2010 Lagos, Nigeria

¹³ Ibid

¹⁴ Online sport betting, Lagos State Lottery Board. <<https://lslb.ig.gov.ng/osb/>>. Accessed on 29th April 29, 2018

¹⁵ **Section 45 of the Interpretations Act No.1 January 1964, Section 14 of the Supreme Court Ordinance of 1914.**

¹⁶ The Unlawful Games Act of 1541 (33 Henry 8 Chapter 9).

¹⁷ Archery is the art, sport, practice, or skill of using a bow to shoot arrows. Historically, archery has been used for hunting and combat. In modern times, it is mainly a competitive sport and recreational activity.

¹⁸ The Gaming Act 1845, (8 & 9 Victorian Chapter 109) was assented on the 8th of August 1845. The said Act was repealed In England on 1st September 2007.

contracts emanating from every Gambling activities unenforceable as a Legal Contract.

In 1853, the Betting Act of 1853 was enacted making it illegal to use or keep any private property for the purpose of Gambling thereby outlawing any off-track Gambling. The Act help to restrict betting to only Horse Racing and Track Race event at the time. Over the past 40 years, Gambling laws have been enacted in Nigeria to protect its citizens and to define punishments for illegal gambling activities. These laws, provides penalties and punishments for playing illegal games, operating illegal gaming houses, operating an illegal gaming machine and more.

The Laws regulating Gambling in Nigeria at present are numerous and cutting across several legislations, which can be out-lined as follows:

1. The National Lottery Regulatory Commissions Act 2007.¹⁹
2. The Lagos State Lottery Board Law 2008²⁰
3. The Casino Taxation Act 1965.²¹
4. The Gaming Machines Prohibitions Act 1977²²
5. Criminal Code Act (1990)²³
6. The Penal Code Act.
7. The Economic and Financial Crimes Commissions Act 2004.
8. Money Laundering Act 2004.²⁴
9. The Advance Fee Fraud Act.²⁵
10. The Cybercrimes Act 2015.
11. The Constitution of the Federal Republic of Nigeria 1999.
12. Companies and Allied Matters Act.²⁶

¹⁹ No. 7.2005

²⁰ Lagos State Lotteries Board Laws Cap. L89 2004 (Now Lagos State Lotteries Board (Amendment) Law 2008.

²¹ Cap. C3 LFN 2004

²² Cap. G1 LFN 2004

²³ Cap. C38 LFN 2004

²⁴ Cap.M18 LFN 2004

²⁵ Cap. A6 LFN 2004

²⁶ Cap. C20, LFN, 2004

IV. Legislative Jurisdiction on Gambling/Online Gambling in Nigeria

In Nigeria, it is doubtful to assert that an activity not expressly prohibited or legislate upon is illegal.²⁷ The provisions of Section 36(8) and also Section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999, supports this position of the Law. Therefore, all forms of gambling not expressly prohibited or legislated upon is a legal form of gambling, inclusive of Online Gambling under the National Lottery Commissions Act. However, there has been a lot of legislative dichotomy and the issue of dispute on who can legislate on issues relating to Gambling/Gaming. This is a subject of controversy in the case of *Attorney General of Lagos State v. Attorney General of Federation*²⁸ pending before the Supreme Court.

Judicial decisions before now has not help to resolve these controversies as seen in the case of *National Lottery Regulatory Commission v. Attorney General Lagos*²⁹ where the Federal High Court held that Lottery and Gaming falls within the meaning of an Inter State Commerce and it is the exclusive competence of the National Assembly to legislate on interstate Trade and Commerce.³⁰ Therefore, a holder of a licence can carry on business without any interference from the State as held in the case of *National Sports Lotteries Limited v. Attorney-General of Lagos State*.³¹

In the recent decision in the case of *Edet v. Chagoon*,³² the Court of Appeal held that Pools Betting and Casino Gaming (Prohibition) Act is not within the legislative competence of the National Assembly as same is not listed on the Exclusive and Concurrent list and therefore falls within the residual competence of states. The Constitution of the Federal Republic of Nigeria 1999 provides in Section 4(7) that the state shall have Residual Powers to legislate on items not contained in

²⁷ Araromi, Marcus, ‘Regulation of Gambling in Nigeria: A Need to Review the Status Quo’ (March 18, 2018 Accessed from <<https://ssrn.com/abstract=3286593>> Accessed 10th September 2019

²⁸ Suit No. 01/2008

²⁹ Suit No. FHC/L/CS/1258/2012

³⁰ Paragraph 62(a) Second Scheduled of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

³¹ (2009) All FWLR PT 474

³² (2008) 2 NWLR (PT.1070)85

the Exclusive List and the Concurrent List.³³ Gambling not been provided for falls under the residual list for the state to exercise legislative jurisdiction on. Therefore, the provisions of Section 34(3) of the National Lottery Act 2007, in line with its inconsistency with provisions of the Constitution is seen to be null and void and of no effect as such provision cannot amend the clear provisions of the Constitution.

V. Legislative Framework

Gambling, regardless of its long existence and increasing familiarity, has never been regarded as merely another business, free to off its wares or services to the public.³⁴ Instead it has always been a target of special scrutiny by governments in every jurisdiction where it exists, even among gambling friendly states.³⁵ The primary assumptions, whether empirically based or not is that, Gambling Industry, when left unregulated and subject only to market forces, would produce a number of adverse impacts on society and the government is the most appropriate remedy to turn to for Legislation regulating this Industry.³⁶ Thus, the objective of regulation is to ensure the integrity of the games offered. This function is often valued most by the proprietors of gambling establishments, being that regulations is the most effective means of ensuring that Legal Gambling exist and is operated in a fair and honest manner.³⁷

Secondly, government concern in regulations is aimed at prevention of crime such as an Organized Crime, and the volume of cash in the gambling sector could easily bring about a situation of Money Laundering when not adequately monitored.³⁸ Thus, the rationale behind statutory regulation is its command status. There is usually a higher level of compliance with statutory regulations of the State than Non-Statutory regulations produce by the Industry itself. Therefore, the Legislative and Institutional framework for the regulation of Gambling and Online Gambling Industry in Nigerian Gambling industry can be examine as follows: -

1. The National Lottery Commissions Act 2005

³³ Section 4 of the CFRN 1999, Second Schedule Part 1 and 2 of the Constitution.

³⁴ Micheal Belletire, ‘Regulating Casinos Gaming: A view from State Regulators, Administrators Board of Illinois Board, Report Written for the NGISC at the request of the subcommittee on Regulation, Enforcement, and the Internet.’ A Report to the National Gambling Impact Study Commission (January1998)

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

The National Lottery Regulatory Commission Act was passed by the senate on 22nd March 2005 and also the House of Representative on same date. The Act was signed into Law by President Olusegun Obasanjo on the 30th March 2005.³⁹ Gambling sector in Nigeria, was grossly unregulated before the enactment of the Act and the Act still represent the legislative measures for regulating the Gambling Industry nationally. The Act is applicable to all Licenses operating immediately before the commencement of the Act and such a License is deem to have been granted under the Act.⁴⁰

The Act is divided into 58 Sections, and it establishes the National Lotteries Regulatory Commissions,⁴¹ which is a body a corporate with a perpetual succession and a common seal.⁴² The Act established the National Lottery Regulatory Commission Governing Board⁴³ which consist of a Chairman and Ten (10) other members, of which 6 must come from each of the six geopolitical zones⁴⁴ and the Federal Ministry of Commerce, the Federal Ministry of Finance, the Federal Ministry of Sports⁴⁵ and also the Director-General of the Commission⁴⁶ the chairman and the members of the Board shall be appointed by the president on a part time basis.⁴⁷

The rationale for the spread of membership across the six geo political zones, is in line with the Federal Character Principle under the Nigerian Constitution.⁴⁸ However, this provision of our Legislation has been criticised for its tendency to replace loyalty with national tribal loyalty⁴⁹and incompetency where such qualified persons are not within a particular geo political zones. Section 4 of the Act provides that notwithstanding the provisions of section 3, a member shall cease to be a member where he resigns, becomes of unsound mind, bankrupt, convicted of a felony or offence related to dishonesty or corruption, incapacitation of the body or mind, or upon satisfaction by the President that it is not in the interest of the Public or the commission for such a person to hold such office.

³⁹ The National Lotteries Commissions Act 2005 N0. 7 2005, became effective on that day.

⁴⁰ Section 32 of the NLC Act 2005

⁴¹ Section 1(1) NLC Act 2005

⁴² Section 1(2) NLC Act 2005

⁴³ Section 2(1) NLC Act 2005

⁴⁴ Section 2(2) (c) NLC Act 2005

⁴⁵ Section 2(2) (a) NLC Act 2005

⁴⁶ Section 2(2) (d) NLC Act 2005

⁴⁷ Section 2(3) NLC Act 2005

⁴⁸ Section 14(3) of the Constitution of the Federal Republic of Nigeria 1999.

⁴⁹ Akande J.O., Introduction to the 1999 Nigerian Constitution. (Lagos: MIJ Publishers), P. 55

a. Powers of The Board

Section 6 of the Act, vest the power on the Board to make general policy guideline, manage and superintend the policies of the Commission, determine the terms and conditions of service of the employees of the Commission, fix remunerations and benefit for staff and employee of the Commission in consultations with the National Salaries, Income and Wages Commission and to do all that is necessary within its opinion to ensure the efficient performance of the functions of the Commissions.⁵⁰

b. Functions of The Commission

Section 7 of the Act places an enormous duty on the Commission boarding on monitoring and regulating, administrative, Evaluative, and a duty of Trust to the Players, Stakeholders and the Public.

Theses duties includes:

- A. To regulate the operation and business of the National Lottery in Nigeria;⁵¹
- B. To collaborate with Licensee of the Gambling Industry, to set standards, guidelines and rules for the operation of National Lottery in Nigeria;⁵²
- C. To promote transparency, propriety and integrity in the operation of National Lottery in Nigeria;⁵³
- D. To ensure the protection of the interests of Players, Stakeholders and the Public in the National Lottery;⁵⁴
- E. To carryout periodic assessment of the operation of National Lottery in Nigeria and submit Report to the President and the National Assembly;⁵⁵ and
- F. To perform such other duties as may be directed by the President, from time to time, and as are necessary or expedient to ensure the efficient performance of the functions of the Commission under this Act.⁵⁶

c. Lottery Licence

Sections 17 of the Act provides:

⁵⁰ Section 6 of the Act.

⁵¹ Section 7(a) of the Act.

⁵² Section 7 (b) of the Act.

⁵³ Section 7 (c) of the Act.

⁵⁴ Section 7 (d) of the Act.

⁵⁵ Section 7 (e) of the Act.

⁵⁶ Section 7 (f) of the Act.

As from the commencement of this Act, the operation of the business of a National Lottery or any lottery, by whatever name called, shall be subject to a licence granted by the President upon recommendation by the Commission and compliance with the provisions of this Act or any regulations made pursuant thereto.⁵⁷

Section 17 of the Act clearly places all issues concerning the grant of permit and or licence to operate a National Lottery within the jurisdiction of the Act. The Act provides that licence may be granted to an individual or a Corporate Personality upon application to the President through the Commission⁵⁸ and such grant or licence issued upon the fulfilment of all the conditions as prescribe by the Act.⁵⁹ Licensee with approval of the Commission may contract, appoint and or engage any person or corporate body as an operator or agent to manage, promote, contract or operate, on behalf of the licensee.⁶⁰

d. Duration and Revocation of License

Licences issued under the Act is valid for a period of 10 years minimum and 15 years maximum, renewable upon application, by the President for a period not exceeding 10years.⁶¹ Such a License may be revoke in line with Section 21 of the Act, where the licences is no longer fit and proper to carry on the business of a National Lottery whether arising from Insolvency, Liquidation or any other valid reason, breach of any stated conditions of the licence, where such Licensee is not fit to benefit from such licence as a result of Insolvency, Liquidation, confinement in Correctional Services⁶² or any other institution or where he fails to take adequate steps to prevent the commission of fraud by his employees after being alerted or becoming aware of such act of fraud or dishonesty, unlawful prevention by the licensee or employee of the President or the Commissions from carrying on its duties under the Act, where

⁵⁷ Section 17 of the Act.

⁵⁸ Section 18 of the Act.

⁵⁹ Section 19 of the Act Prescribed conditions to be fulfilled before the grant of the licence and that also to be fulfil after the said grant has been issued in other to maintain the said licence Section 22 of the Act dealing with miscellaneous provisions relating to a licensee, prohibits any political office holder with the meaning of the Constitution of the Federal Republic of Nigeria, from having any financial interest in a National Licence or licence

⁶⁰ Section 23 of the Act.

⁶¹ Section 20 (1) (2) of the Act.

⁶² The Nigeria Correctional Services Act 2019, Repeal The Nigeria Prisons Act Cap. P. 29 Laws of the Federation of Nigeria and same provides for the change of name from the Nigeria Prisons to Nigerian Correctional Services.

licensee fails to abate or prevent the violations of the provisions of the Act, where the licensee or any of its employees repeatedly and knowingly sell tickets or awards or pays prizes to any person contrary to the provisions of the Act.⁶³ Compensation may be paid to the licensee after due valuation of all physical assets of the licensee that are related or use in the conducting of the business of the National Lottery.⁶⁴

e. Offences and Penalties Under the Act

Sections 30 and 34 of the Act contain a wide range of offences and their penalties. These includes the offences of obtaining or attempt to obtain by forming or conducting a syndicate for the purchase of a ticket or electronic entry,⁶⁵ any form of promotion of a syndicate for the purchase of an electronic ticket,⁶⁶ Forgery of Lottery ticket,⁶⁷ sales or attempt to sell a forged ticket,⁶⁸ Alteration of Lottery ticket with intent to defraud,⁶⁹ taking or conversions of proceed of a Lottery operated by a Licensee,⁷⁰ Sells of ticket to persons under Eighteen years,⁷¹ Fraudulent Representation as agent or licensee,⁷² giving of guarantee as incentive inducing a player as to winning a prize or share from a prize in a Lottery,⁷³ conducts or promotes a scheme which gives guarantee that a player or bettor will win a prize or share out of a prize in a lottery.⁷⁴

The National Lottery Commissions Act also prescribes various penalties for different offences. These are usually in form of terms of imprisonment or options of fine, or both imprisonment and fine.⁷⁵ The Act is of the effect that where no specific penalty is prescribe for a specific offence, such offender upon conviction will be liable to fine not less than Twenty Thousand Naira or imprisonment for a term no less than one year or both such fine and imprisonment.⁷⁶ Where such offence is committed by a Corporate body, such corporate body shall be liable to fine of not less than One Hundred Thousand Naira in addition to a fine of Twenty Thousand Naira for each of

⁶³ Section 21 (A-G)

⁶⁴ Section 21 (4)

⁶⁵ Section 30 (1)

⁶⁶ Section 30 (2)

⁶⁷ Section 34 (1) (A)

⁶⁸ Section 34 (1)(B)

⁶⁹ Section 34(1) (C)

⁷⁰ Section 34(1) (D)

⁷¹ Section 34 (1) (E)

⁷² Section 34 (1) (F)

⁷³ Section 34 (1) (G)

⁷⁴ Section 34 (1) (H)

⁷⁵ Section 30 (3)

⁷⁶ Section 34 (1) (I)

the Director, Managers and Officers of the Company or an imprisonment for a term of not less than one year or both.⁷⁷

The Act empowers the National Lotteries Commission to properly carry out its objectives as stated in the Act and to change the negative perception on lottery as revenue generated therefrom is applied to good cause under the management of the National Lotteries Trust Fund established under the Act to manage income generated from Lotteries.⁷⁸

2 The Lagos State Lottery Boards Law 2008

The LSLB Law was passed into Law on the 21st July, 2008.⁷⁹ The Law is the most comprehensively drafted legislation currently to provide for Gambling in Lagos State. Before the enactment of the Law, the Lagos State Lotteries Board adopted a single operator model, where a single licensee has the sole right to conduct lotteries within the state. And this approach brought about illegal operation of Lottery Houses therefore leading to the enactment of the Lagos States Lotteries (Amendment) Law 2008.⁸⁰ The amendment of the Law in 2008 brought about multi-operators ‘model in the Gambling Industry in Lagos State. The amended Law brought about a removal in the exclusivity clause on the operation of Lottery within the State, Introduction of Public Online Lottery Licence to Licence multiple Licensee, the Act also reduced the duration of Lottery License, outlawing or prohibiting of Coupon /Paper Lottery, Introduction of Online Lottery operation and also the enlargement of the jurisdiction of the Board to regulate all aspects and types of Lotteries and Gaming.⁸¹

The Law is divided into 63 Sections, the Lagos State Lotteries Board (amendment) Law, establishes the Lagos State Lottery Board,⁸² Which is a body corporate with perpetual succession and a common seal.⁸³ The membership of the Board cut across the various Stake holders of the industry, it includes a Chairman with a knowledge and experience in the functions of the Board,⁸⁴ a Permanent

⁷⁷ Section 34 (2)

⁷⁸ Section 35 National Lotteries Commissions Act 2005

⁷⁹ Section 63 Lagos state Lotteries (amendment) Law 2008

⁸⁰ Online sport betting, Lagos State Lottery Board. <<https://lslb.ig.gov.ng/osb/>>. Accessed on 29th April 29, 2018

⁸¹ Ibid

⁸² Section 1 (1) Lagos State Lotteries Board Law 2008

⁸³ Section 1 (2) LSLB Laws

⁸⁴ Section 2(1)(A)

Secretary from the Ministry of Finance or his representatives,⁸⁵ Permanent Secretary from the Ministry of Homes Affairs and Culture or his representative,⁸⁶ a Legal Practitioner of not less than 10 Years post-call experience,⁸⁷ an Accountant of not less than 10 years post registration experience,⁸⁸ and four members of the public with proven business experience in the functions of the Board.⁸⁹

Members of the Board are appointed by the Governor on the recommendations of the Commissioner,⁹⁰ while the Legal Practitioner shall be appointed by the governor on the recommendation of the Attorney-General for the State,⁹¹ the members of the Board shall hold office for a duration of 5 years subject to a reappointment by the Governor for another term.⁹²

Section 2(5) of the Law states the conditions for the removal and or suspension of members of the Board on the ground of misconduct or prolonged inability to perform the functions as members of the board,⁹³ shall suspend where a member of the board is facing a criminal proceeding on ground of fraud, forgery, uttering a document, perjury or any offence involving dishonesty and shall be terminated where found guilty on these.⁹⁴

The Law provides that where a person or his immediate family or business associates has any financial interest directly or indirectly, he shall not be appointed as a member and no business of his shall be in conflict with his duties as member of the Board.⁹⁵ Political Office Holder, Insolvent Persons, person removed from any office on account of misconduct or persons who has been convicted for fraud, forgery, or uttering of a document, perjury, or any offence involving dishonesty shall not be appointed to the Board.⁹⁶

⁸⁵ Section 2(1)(B)

⁸⁶ Section 2 (1) (a)

⁸⁷ Section 2 (1)(d)

⁸⁸ Section 2 (1)(e)

⁸⁹ Section 2(1) (f)

⁹⁰ Section 2 (2)

⁹¹ Section 2(3)

⁹² Section 2 (4)

⁹³ Section 2 (5)(a)

⁹⁴ Section 2 (5) (b) (c)

⁹⁵ Section 7 (a) (b)

⁹⁶ Section 7 (c)

i. Duties of the Board

Section 9 of the Law the Lagos States Lottery Board is charged with enormous functions of;

- a. Advising the Governor on the issuing of License to conduct to conduct Lottery in Lagos State.⁹⁷
- b. Ensure that Lottery within the State is conducted with all due propriety and strictly in accordance with the Constitution, this Law, all other laws that are applicable and the License for the Lottery and with any agreement pertaining to the License.⁹⁸
- c. Ensure that the interest of every participant in the Lagos State Lottery is adequately protected and the net proceeds are as large as possible.⁹⁹
- d. The board administers the fund and holds in trust and administer same in accordance with the Law.¹⁰⁰
- e. Advice the Commissioner on the efficacy of a legislation as it relates to Lottery.¹⁰¹
- f. Make such arrangement within the Law to protect prize monies and the distributions of the monies.¹⁰²
- g. Advice the Commissioner on all aspect relating to Lagos State Lottery and on other matters as the Commissioner may requires.¹⁰³
- h. Ensuring that the promotion of Good Cause as envisage in the Law is promoted with the incomes generated from Lottery.¹⁰⁴
- i. Inspect and audit the Licensee's records of account whenever it appears necessary in the opinion of the Board.¹⁰⁵

⁹⁷ Section 9 (a)

⁹⁸ Section 9 (b)

⁹⁹ Section 9 (B)(ii)(iii)

¹⁰⁰ Section 9(c)(e)

¹⁰¹ Section 9 (d)

¹⁰² Section 9 (g)

¹⁰³ Section 9(h)

¹⁰⁴ Section 9 (i)

¹⁰⁵ Section 9 (j)

- j. Grant License for Public On-line Lotteries and other Lotteries within the States.¹⁰⁶
- k. Regulates and control every aspect of Lotteries operation in the State.¹⁰⁷
- l. Monitor retail ticket sale by using information technology, standard based solutions, comprehensive and automated processing.¹⁰⁸
- m. Impose fee on all Lottery's operations within the State.¹⁰⁹
- n. To enter into contract with any agent, supplier or platform operator for the exercise of its monitoring, retail management and regulatory functions of the Board.¹¹⁰

ii. Lottery Licence

The Governor issues License to conduct Lottery's within the State after consultations with the Commissioner or the Board.¹¹¹ Such applications must be in writing and must meet all conditions stipulated by the Law before such applications can be considered.¹¹² Such as sufficient and appropriate knowledge or experience to conduct such Lottery,¹¹³ possession of the necessary financial resources.¹¹⁴ Absence of any political connections of such applicant,¹¹⁵ such applicant must show a clear and continuous commitment to Lottery operations within the State.¹¹⁶ The Law abolished the use of Coupon or any means of Lottery unless such means is conducted online by a Licensed Operator or their retailers.¹¹⁷

Under the Lagos State Lotteries Law, the Board regulates the following categories of Lotteries within the State. These Lotteries License are namely:

1. Public Online Lottery,
2. Online Sport Betting,
3. Promotional Competitions,

¹⁰⁶ section 9(k)

¹⁰⁷ Sections 9 (L)

¹⁰⁸ Section 9 (m)

¹⁰⁹ Section 9 (n)

¹¹⁰ Section 9 (o)

¹¹¹ Section 12 (1)

¹¹² Section 12 (2)

¹¹³ Section 14(1)(i)

¹¹⁴ Section 14 (1) (ii)

¹¹⁵ Section 14 (1)(iii)

¹¹⁶ Section 14 (1)(iv)

¹¹⁷ Section 13 of the Law

4. Private Lotteries,
5. Charitable Lotteries,
6. Society Competition,
7. Scratch Cards, and
8. Interactive Game.
9. Emerging Online Games (Web-Based, SMS-Based)

The Lagos State Lotteries Board Law prohibits all forms of conduct of Lotteries unless through Online Channels, therefore online distributions channels such as Internet, POS terminals and mobile technology are adopted. The use of these Online Channels is aimed at achieving accountability in the Gaming industry, promoting transparency as information is made accessible and verifiable at all time and also for the purposes of assurance of Revenue for both the Players/Bettors and also for the government to perform ‘Good Cause’¹¹⁸ within the State. Licence to conduct Public Online Lottery in Lagos State, is obtained from the Lagos State Lotteries Board as stipulated by the Law.

3 Money Laundering (Prohibition) Act 2011

The Money Laundering (Prohibition) Act 2011¹¹⁹ was passed in a bid to prevent or stall money laundering in all sectors of the economy. The Gambling Sector is not exempted as this sector could be a veritable means to Launder and legitimize money back to the economy.

Money Laundering is a term used to describe the various methods or processes by which funds derived from illegal or illegitimate sources, are brought into formal economy through lawful financial channels with a view to legitimizing and

¹¹⁸ Section 48 of the Law defines ‘Good Cause’ to mean any cause as provided by the law, to which the net proceeds generated are payable. These good causes are to meet the need of infrastructural Objectives, Educational Objectives, Environmental Objectives, and all social and health related objectives and other expenditure as may be approved by the Governor of the state. See section 33, 34, 35, 36, 37, 38 and 48 of the Lagos State Lotteries (Amendment) Law 2008.

These objectives are as contained in chapter 2 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) dealing with fundamental objectives and directives principles of State Policy. Section 16 deals with Economic Objectives, Section 17 Social Objectives, Section 18 deals with Educational Objectives, while section 20 deals with Environmental Objectives.

¹¹⁹ The Money Laundering Act 2011 repeal the Money Laundering Act, Cap M18 Laws of the Federation 2004

concealing or disguising the sources of such fund.¹²⁰ The Money Laundering (Prohibition) Act 2004 brings Casinos within the meaning of a Financial Institution,¹²¹ whereas the Money Laundering Act 2011, defines a Casino as Designated Non-Financial Institution.¹²²

Section 4 of the Act,¹²³ places a duty to verify the identity of any Gambler who buys, brings into exchanges chips or tokens, by requiring the gambler to present an authentic document bearing his name and address.¹²⁴ A record of the chronological order of all transactions shall be kept stating the nature of the transaction, amount involved together with the gamblers' identity stating the surname, forenames and address in a register to be issued by the Ministry of Commerce.¹²⁵ Such a record shall be kept at least Five (5) after the record of the Last transaction recorded.¹²⁶ The Act provides that compliance officer must be provided for at the management level of such financial institution, regular training programmes for personnel and employees, centralisation of information collected and establishment of an internal Audit unit to ensure compliance with the provisions of the Act.¹²⁷

The Act also provides for a written disclosure to the Commission that is Economic and Financial Crimes Commissions by a financial institution or designated Non-Financial institution of any single transaction, lodgment or transfer of fund in excess of Five million Naira for an individual and Ten Million Naira for a body corporate.¹²⁸ Failure to comply with these provisions is an offence and upon conviction is liable to a fine of not less than Two Hundred and Fifty Thousand Naira and not less than One Million Naira for each day of continuous contravention of the Act.¹²⁹

¹²⁰ M.L. Yusufari, Mohammed Isah, A.M. Bello, 'Money Laundering in Nigeria: Implications on National Development' Being a conference paper presented at the 46th Annual Conference of the Nigeria Law Teachers Association, held at University of Ilorin, 22nd -26th April,2013. P. 73 -105See also Section 14 Money Laundering (Prohibition) Act, 2011.

¹²¹ Section 25 of the Money Laundering(prohibition) 2004

¹²² Section 25 of the Money Laundering(prohibition) 2011

¹²³ Section 4 MLA 2011

¹²⁴ Section 4 (1) (a)

¹²⁵ Section 4(1)(B) MLA 2011

¹²⁶ Section 4 (2) MLA 2011

¹²⁷ Section 9 MLA 2011

¹²⁸ Section 10 (1) MLA 2011

¹²⁹ Section 10 (3) MLA 2011

4 Advance Fee Fraud and Other Fraud Related Offences Act 2006

The Act was passed into Law on the 5th June, 2006 to provide for fraud related offences. The Act also regulates the Gambling Industry as its frame work to check mate fraud related offences within the Industry. The Act in a bid to check these kinds of fraud provides for the registration of all Internet Service Providers and Internet Cafe with the Commission (Economic and Financial Crimes Commissions).¹³⁰ A register of all fixed and non-fixed line customers such as Global system of Mobile Communication (GSM).¹³¹

The Act places a duty of care on the owners of the premises to ensure that her premises are not use for the commission of any illegal purposes¹³²any person who ought to be registered, or furnish the Commission on demand on the use of his services and facilities or facilitate access to data and information by employee or staff of the Commission and fails do so with the intent to conceal or disguise the nature of his activities or the use of his service or facilities commits an offence and upon conviction to a term of imprisonment of three years without an option of fine and in the case of a continuing offence, a fine of 50,000,00 each day such offence persist, and where a person or entity is convicted under this act more than once shall have his operational licence revoke or cancelled.¹³³

With the advent of the Internet and subsequent emanation of online Gambling/Lotteries, the importance of the Advance Fee Fraud Act cannot be over emphasized to the Gambling industry.

5 Cybercrimes (Prohibition, Prevention Etc.) Act 2015

The Cybercrimes (Prohibition, Prevention, etc.) Act, 2015 is a very important enactment regulating the Online Gaming, in Nigeria. The Act is enacted in Nigeria to regulate the conduct of persons and activities in the Cyberspace in Nigeria. The Act was passed into Law by the Nigerian National Assembly on the 5th of May, 2015. The Act contains 59 sections, 8 Parts and Two Schedules. The Act criminalizes

¹³⁰ Section 13 Advance Fee Fraud Act 2006

¹³¹ Section 13 (2) Advance Fee Fraud Act 2006

¹³² Section 13 (3) Advance Fee Fraud Act 2006

¹³³ Section 13(5)(6) Advance Fee Fraud Act 2006

Unlawful Access to a Computer,¹³⁴and this protection relates to both private and individual interest within and outside Nigeria,¹³⁵ the Act provides for registration of cybercafé. And also, directed under Section 7(1) to maintain a register of users through a sign-in register. The Register shall be available to Law Enforcement Personnel whenever needed.¹³⁶

Section 7(2) provides that any person who perpetuates Electronic Fraud or Online Fraud using a cybercafé shall be guilty of an offence and shall be sentenced to three years imprisonment or a fine of One Million Naira or both. Subsection 3 provides that if such person connives with the owners of the cybercafé, the owners would be guilty of an offence and sentenced to three years imprisonment or fine of One Million Naira. Section 8 criminalizes the use of any Computer System by any person without lawful authority. Section 9 criminalizes the Act of destroying or aborting electronic mails or processes which money or valuable information is being conveyed. Section 12(1) criminalizes the Act of unlawful interception of non-public transmissions of data.

Section 13 criminalizes the Act of computer related forgery which includes knowingly accessing any computer or network with the intention that such inauthentic data would be considered. The Act provides for computer related fraud. Section 14(4)(a) of the Act provides that any person employed by or under the authority of any bank or other financial institutions who with intent to defraud, directly or indirectly, diverts electronic mails commits an offence and shall be liable on conviction to imprisonment. Where such occurs, the Act provides for forfeiture of whatever benefit derives from such act.

Section 16 of the Act criminalizes the act of unauthorized modification of Computer Systems, network data and system interference. Section 21 imposes a duty on any one operating a computer system to notify the National Computer Emergency Response Team (CERT) of any attacks on intrusion on its computer. This is one of the enforcement bodies created by the Act to enforce its provisions. Any person who fails to report such incident shall be liable to pay a mandatory fine of N2, 000,000 (Two Million Naira) to the National Cyber Security Fund.

Section 22 of the Act criminalizes identity theft and impersonation of any person who is engaged in the services of any financial institution.

¹³⁴ Section 6

¹³⁵ Section 6(4)

¹³⁶ Section 7

Section 28 of the Act criminalizes importation and fabrication of E-Tools such tools include any device, including computer program or component designed or adapted for the purpose of committing an offence under the Act. Section 29 criminalizes the Act of breach of confidence by service providers, where the computer-based service provider with intent to defraud, illegally uses its customers security code with the intent to gain any financial or material gain. Section 32 of the Act criminalizes the offence of Phishing and spamming and also spread of computer virus. Phishing is defined under the Act as the criminal and fraudulent process of attempting to acquire sensitive information such as usernames and password.

VI. Other Legislations Dealing With Gambling/Online Gambling in Nigeria

The Criminal Code and Penal Codes are both Legislations that criminalises Gambling when done outside the ambit of the Law.¹³⁷ Such a Lottery must be conducted by a Race Club in Nigeria and licence must be given by the Minister.¹³⁸ Where Betting or Lottery is done to raise funds in aid of any Institution of a public character after obtaining permission in writing from the Minister such exercise will not be regarded as illegal.¹³⁹ The Casino Taxation Act 1965¹⁴⁰ the Act provides for the payment of all net gaming revenue to the Federal Board of Inland Revenue. The Act also empowers the Board to enter in the premises of such Gambling Company to review the Statement of Account and also the income.

The Gaming Machines Act 1977, declares the owning and operating of any Gaming Machines outside the provisions of the Law and without the necessary permit as being illegal. The Act punish the act with a term of one (1) year of imprisonment and the forfeiture of such machines to the Federal Government.

To obtain a Gambling Licence in Nigeria, the prospective gambling operator must first incorporate a Company in Nigeria for that purpose, and such purpose of the business must be approved by the Nigeria Investment Promotion Commission (NIPC), Special Control Unit Against Money Laundering (SCUML), and the National

¹³⁷ Section 239, Criminal Code Act Cap.C38, Laws of the federation of Nigeria 2004

¹³⁸ Section 240, Criminal Code Act

¹³⁹ Section 240D (2) Criminal Code Act

¹⁴⁰ The Casino taxation Act 1965

Office for Technological Acquisition and Promotion (NOTAP), a Capital Importation licence where a foreign company, registration for a Valued Added Tax (VAT), and a Tax Identification number as some of the requirements.¹⁴¹

VII. Observation and Findings

1. That the National Lottery Commissions Act did not make mention of Online Gambling, the only mentioned was for the sales of ticket through Electronic Channels which is permissible by the Act. The only comprehensive laws that specifically made all provisions for Online Gambling is the Lagos State Lotteries Board Law.
2. The various Laws, in its enactment uses and defined the word Lottery to mean Gambling, however, the definitions provided by these Legislation covers all aspect of Gambling and Lottery is a form of Gambling.
3. There is no Legislation prohibiting the operation of Gambling through the use of the Internet and or Electronic Channels of both Local and Foreign based sites and there are several Legislations protecting Online Transactions and E-Commerce in Nigeria which encompasses all Gambling Transactions.
4. Nigeria is a permissible territory where Licensee who are carrying on a Land-Based Gaming such as Casinos and other forms of Betting can expand its operations Online, for the purposes of convenience, the only conditions precedent is compliances with the provisions of the relevant Law and guidelines regulating Gambling and other Online transactions in Nigeria.

VIII. Recommendations

Therefore, this work recommends the following:

1. The Legislatures must take on a holistic approach to the enactment or amendment of the current legislative framework on Gambling to include Online Gambling and all other forms in which gambling may occur in the society.
2. The Acts provides for prohibitions for person under the age of 18 years from gambling, but fails to exclude some certain person from Gambling, in South

¹⁴¹ ‘‘Nigerian Gambling’’ Gambling Africa. Accessed „, from <http://www.gamblingafrica.com/Nigeria/>

Africa the law provides for application by an individual for exclusion from gambling and this is referred to as self-exclusion such as over aged, mentally derelict, and bankrupt individuals from gambling. Also, any person may apply to the court requesting for the registration of a dependent, mentally ill person, family members or any person under the care of the applicant whose behavior manifest addictive or compulsive gambling and the court may grant such order and the excluded person can also apply to the court to vacate such order where it is no longer reasonable for such order to subsist. This approach is highly recommended.

3. A trust fund or the scope of the current trust fund be expanded to administer unlawful winning from illegal operators, prohibited persons or excluded persons or proceeds of crime emanating from the sector be paid into, to promote the pursuit of Good Cause.
4. The Issues of compliance and enforcement of the provisions of the law requiring registration by cybercafé owner has proved difficult to actualized as the Act need to provide for a specified enforcement authority.
5. A gambling specific Act such as the Unlawful Internet Gambling Enforcement Act in the United States of America which places a duty on Internet Services Provider to identify and prohibits restricted transactions pertaining to Online Gambling, should be enacted separate from the Cybercrimes Act of 2015.
6. The various Legislations on Gambling should be amended to include problems associated with gambling such as domestic violence, drugs abuse, unmanageable debt or bankruptcy and other crimes should be incorporated in the legal framework of Gambling in Nigeria to reduce the negative impact of Gambling on the society.
7. The Licenses issued under the various legislation should be polarize to several categories of licenses such as management and control of Gambling/Online Gambling License, Gambling Equipment and Supply License, Internet, Server or software License etc. this is to enable proper management and supervision, ensure a level of standard and competence.
8. To prevent underage Gambling, the Licensee must ensure that gambles furnish all necessary document such as identity document and the Licensee has a sole responsibility to confirm same document and verify the age. This could be

achieved with collaborative efforts from the National Identity Card Management or any other authority where such information could be accessed.

IX. Conclusions

The rapid growth of the gaming industry is as a result of the influence and or impact of technological advancement and such growth is difficult to halt, therefore, regulations must be up to date at all times since prohibition will not guarantee the cessation of Gambling/Online Gambling but rather promoting illegal operators. Therefore, regulations provide an opportunity to manage the societal differences on the right and wrong as it relates to this industry, bringing this industry and all its competition and persons affected under the confines of the Law with the state deriving socio-economic benefits. To achieve these, the current Legal frame work must be critically looked into as they are grossly inadequate and in need of an overhaul in other to properly position the Gambling sector in Nigeria.

LEGAL FRAMEWORK FOR COPYRIGHT PROTECTION IN NIGERIA

Kolawole Olatoun A.
Onu Kingsley Osinachi**

Abstract

Copyright protection provides benefits in the form of economic rights which entitle the creators to control use of their literary and artistic material in a number of ways such as making copies, performing in public, broadcasting, use on-line, etc. and to obtain an appropriate economic reward. Creators can therefore be rewarded for their creativity and investment. Effective copyright protection will afford the growth of the copyright-based industries, encourage creativity and contribute to economic growth. It is premised on this fact that in every jurisdiction, there is a legal regime for copyright protection. However, the existence of a legal right which the populace is ignorant of amounts to no right, hence this paper. This paper uses a doctrinal research methodology to critically examine the legal regime for copyright protection in Nigeria. It also traces the rationale for copyright protection, policy objectives of copyright protection, and discusses in details the sources of copyright laws in Nigeria which are Statute, case law, common law, international law and regulations. It further examines what constitutes infringement and available criminal and civil remedies. This paper finds that the legal framework of copyright in Nigeria is defective because the statute did make provisions that can tackle present digital technology challenges and the penalty clause in the statute is also obsolete. This paper therefore recommends *inter alia* that the Copyright Act be amended to make provision for stiffer penalties for copyright infringement and provision to tackle the present day technological challenges. It further recommends that Nigeria adopt a formal registration of copyright works like developed nations.

Key Words: Copyright, Technology, Legal, Protection, Nigeria, Creativity, Investment

I. Introduction

Over the past decade, the understanding of intellectual property and its economic benefits to the society has increased significantly. This is largely due to the expansion of research conducted across all disciplines.¹ The greatest source and foundation of every civilization is its creativity, innovation and invention which will invariably boost the economy of a nation.² Copyright is one of the fields of intellectual property dealing with creations of human intellect. Copyright protection exists from the moment a work is created in a fixed and tangible form of expression and it is original.³ It relates to literary and artistic works. The aim of such protection is ensuring that no one reaps the fruits of another man's labour without authorization.

* Kolawole Olatoun A. LL.B (HONS) (Abuja), BL, LL.M (Ife), M. Phil (Ife). E-mail: tounkolawole@yahoo.co.uk. Lecturer, Faculty of Law, Adeleke University, Ede, Osun State, Nigeria.

**Onu Kingsley Osinachi LL.B (HONS) (EBSU), BL (Yenagoa), LL.M (Ibadan), PNM, NIM. E-mail: kingsleyonu2020@gmail.com; kingsley.onu@adelekeuniversity.edu.ng.. Lecturer, Faculty of Law, Adeleke University, Ede, Osun State, Nigeria; and PhD Candidate at the University of Ibadan, Nigeria.

¹Xuan L, (*et al*) *Intellectual Property Enforcement: International Perspectives*, (Edward Elgar Publishing 1999), Pp3-4

²Nwogu I.O 'The Challenges of the NCC in the Fight against Copyright Piracy in Nigeria' *Global Journal of Politics and Law Research*, Vol.2 No 5,2014 Pp 22-34

³ Copyright Act Cap C28, Laws of Federation 2004.

Copyright protection encourages individual effort and invariably enriches the society.⁴ As the world experiences greater advancement in technology, more emphasis is now placed on innovative and knowledge based products. Nigeria, as a nation with huge creative capacity, has witnessed the gradual growth of her movie and music industries, which is beneficial to the country's economy.⁵ This paper examines the legal framework for copyright protection in Nigeria. It examines terms for copyright protection, it traces the rationale for copyright protection, policy objectives of copyright protection, and it also discusses in details the sources of copyright laws which are Statute, case law, common law, international law and regulations. It also examines what constitutes infringement and availability of criminal and civil remedies.

II. Conceptual Analysis and Definition of Terms

a. What is Copyright?

Cornish⁶, described copyright as: "The right of a person to protect his ideas and information from commercial exploitation". Copinger and Skone⁷ say that: "Copyright law is concerned with the negative right of preventing copying of physical materials existing in the field of literature and the arts".

Black's Law Dictionary offers the following meaning:

The right of literary property as recognized and sanctioned by positive law. An intangible incorporeal right granted by statute to the Author or Originator of certain literary or artistic productions, whereby he is invested for a limited period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

Copyright can be defined as a set of exclusive rights granted by government for a limited time to protect the particular form, way or manner in which an idea or information is expressed. Copyright may subsist in a wide range of creative or artistic form or "works"; including literary works, movies, musical works, sound recordings,

⁴Adewopo A. *Nigerian Copyright System: Principles and Perspectives* (Odade Publishers, 2012) Pp.120-123.

⁵Folarin, S. *Intellectual property Law, Studies in Industrial Design, Copyright and Trademark*, (Maxmunich Publication, 2003) Pp.42.

⁶Cornish W.R, *Intellectual Property*, (Sweet & Maxwell) (1981). Pp.1-7.

⁷Copinger (et al) *On Copyright*, (12th ed., Sweet & Maxwell, 1980) Pp.123-125.

paintings, photographs, software and industrial designs. Copyright laws simply explain the legal protection given to authors against unauthorized copying of their work. Copyright is the exclusive right given under the law to the owner to control the reproduction of the work which is the subject of copyright.⁸ Copyright is a branch of Intellectual property which is the product of the mind and has been described as man's only genuine property worthy of protection.⁹

The property rights created as a result of legal recognition of ownership of Intellectual Property is known as Intellectual Property Rights¹⁰. There are Intellectual property law in place to protect all intangible products of human intellect or creativity. In the case of Copyright, there is the Copyright Act¹¹ in place in Nigeria and other applicable laws. Legal protection is undoubtedly the reason anyone will dissipate energy into creating intellectual property for public consumption. Intellectual property is a product of human creations; it can be created by an individual or an individual can pay someone else to create it for them. The tentacle of intellectual property spread across every aspects of human life, that is, the right of an author of a book, the right of the creator of a new invention, the right of the designer of a pen casing etc.¹²

Basically, intellectual property is a product of human ingenuity, most of the new medicines and other high technology are product of inventions and innovations, creators will then be given the right to prevent others from using their inventions or authorize its use. Generally, intellectual property law deals with the law relating to literary works and more.¹³ Copyright law did not exist before the invention of the printing press in Europe in the 15th century. To reduce the risk of adversaries printing politically dangerous books, the royal government of England granted a publishing monopoly to a group of book publishers, who all belonged to a guild called the

⁸Uvieighara, E.E “*Essays on copyright Law and Administration in Nigeria*” (Ibadan) (1992) Pp.102-104. Copyright has been defined as “right to literary property as recognized and sanction by positive law, an intangible, incorporeal right granted by statute to the author or original of certain literary or artistic productions, whereby he is invested, for a limited period with the sole and exclusive privilege of multiplying copies of the same published work and selling them”.

⁹Ameh I ‘An Appraisal of the Role of the Nigerian Copyright Commission in the Enforcement of Copyright Laws in Nigeria’ *Ahmadu Bello University, Journal of Commercial Law(ABUJCL)*, vol5, no 1, (2010-2012) Pp 140-150.

¹⁰Adedeji A.A ‘*Conceptual and Legal Framework for the Protection of Intellectual Property Right being a paper presented at the Nigerian Institute of Advanced Legal Studies, (July 18, 2016)*. p.4

¹¹ Onatola, A. (et al): “Nigerian Libraries and the Protection of Author’s Rights”, in Nigerian Libraries, *Journal of the Nigerian Library Association*, Vol. 39) (2005/2006) Pp. 49-64.

¹²International Bureau of WIPO “*The New Communication Technologies Copyright*”, WIPO/PO/ACAD/E/98/28.

¹³ Garner, B.A., Black’s Law Dictionary (8th ed., Thompson West Publishing Co, 2004) p.45

Stationers' Company¹⁴.

In Nigeria, a body known as the Nigeria Copyright Council (NCC) was established to cater for the Administration of Copyright system in Nigeria. The Commission is entrusted with all matters affecting copyright in Nigeria as provided for in Copyright Act¹⁵. To monitor and supervise Nigeria's position in relation to international conventions and regulate conditions for the conclusion of bilateral and multilateral agreements between Nigeria and any other country; enlighten the public on matters relating to copyright, maintain an effective data bank on authors and their works; and responsible for such other matters as relate to copyright in Nigeria as the Minister may, from time to time¹⁶.

Nigeria Copyright Act¹⁷ defined "copyright" as involving the sole right to produce or reproduce a work or any substantial part thereof in any material form, whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public, if the work is unpublished, to publish the work or a substantial part thereof. Copyright apply to creative works such as books, journal articles, research reports, novels, poems, piece of music, computer software, proceedings of a conference, artwork and so on. Section 51 of the Act¹⁸ states that "copyright" means copyright under this Act. This is not a sufficient definition, but, however it suggests that copyright protection in Nigeria can only derive its force from the provisions of the Act. That is, no copyright claim exists outside the statute. However, there are other sections of the Act, discussed infra, that provide for the nature and scope of the specific rights conferred on different kinds of work which copyright deals with.

III. Rationale for Copyright Protection

The main purpose of copyright protection is to ensure due fairness to authors and owners of work. *Article 27 of Universal Declaration of Human Rights*¹⁹ states that: (2) Everyone has the right to the protection of the moral and material interests

¹⁴ Cornish (n6) 12-17

¹⁵ Copyright Act Cap C28, LFN, 2004

¹⁶ P. Gleason: International Copyright in Publishing and Development: (Book of Readings) (1998). p12.

¹⁷ Section 1(2) (d) of Copyright Act Cap 28. Laws of the Federation, 2004.

¹⁸ Section 57 of the Copyright Act Cap C28, LFN, 2004

¹⁹ Article 24 of Universal Declaration of Human Right Charter, 1948.

resulting from scientific, literary or artistic production of which he is an author. History has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works.²⁰ Copyright protection, for the creator of works, makes sense only if the creator actually derives benefits from such works. The essential role of Copyright protection is that of promoting and enriching the national cultural heritage.²¹

Different opinions have emerge on the necessity of copyright protection,²² One of the arguments in support of copyright protection is that since a man has a natural right to the product of his hand, he should have the same rights to the product of his brain. A school of thought against this believes that the author does not deserve the monopoly granted to him by law because no single idea is unique or truly original.²³ Anyone else can use the idea as long as it is in another form of expression. So there is no monopoly of idea. Another argument in support is that it is only reasonable for a man to reap from his labour after spending time, money and energy to create a work to the advantage of the society having done these the author deserve an incentive by way of limited monopoly to promote more creativity.²⁴ Thus, basically the rationale for copyright protection is to encourage societal growth and creativity. However, this monopoly is a bit limited when it conflicts with a paramount public interest or the necessity for some members of the public to make a single copy of a work for non-profit, educational purposes.²⁵

²⁰ Marisella O. ‘The Role of Copyright in Economic Development’ *NIALS Journal of Intellectual Property (NJIP)* (2012) Pp 66-70.

²¹ *ibid*

²² Agbai, C, ‘Trademarks Reform: Treaty Obligations and the Registry’, (2012) *Nigerian Law Reform Journal NLRJ*, P.89.

²³ *ibid*

²⁴ Adeloye, A.; ‘The Information Market in Nigeria’ (2002). *Journal of Science* 26 (4): Pp282-285.

²⁵ Johnson, D.F. *Copyright Handbook*, (2nd ed.: E.R Bowker Company; 1983), Pp34-36.

IV. Policy Objective of Copyright Protection

The main purpose of copyright protection is to protect the creator of a work against infringement, to guarantee commercial exploitation and to stimulate new ideas. The modern concept of copyright law postulates that the primary purpose of copyright is to promote the public welfare by the advancement of knowledge, with the specific intent to encourage the production and distribution of new works for the public; it provides incentive for creators by granting them exclusive rights to reproduce and distribute their works.²⁶

Copyright protection is not intended to inhibit the free flow of information and ideas.

The goal of copyright protection is to encourage dissemination of ideas by protecting the embodiment or expression of an idea in a creative work and reserving the right in it to the creator of the work. What is being advanced here is the optimization of economic benefit of copyright without prejudicing the owners' proprietary interest in his work. In the words of Olueze,²⁷ copyright, apart from being a proprietary right, is a means of employment and economic sustenance of the owner. He states further, that a creator of copyright work expends some labour and skill in his creation. This is worthy of protection from undue appropriation by those who would like to reap from where they did not sow. The function of copyright law is to protect from annexation by other people the fruits of another's work, labour, skill or taste.²⁸

There are two policy objective of copyright protection. The first is that Copyright protection is a means of economic compensation of owners of IP for their invaluable contribution to the advancement of man's quality of life.²⁹ Another crucial reason is to balance the public use and reuse of a copyright work with the need to provide protection and incentive.³⁰ The justification for copyright protection exists under International Human Rights Standards such as the Universal Declaration of Human Rights (UDHR) of 1948 as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. Both bodies provides for the right of

²⁶ Nwogu M.I.O Copyright Law and the Menace of Piracy in Nigeria, *Journal of Law, Policy and Globalization*, Vol.34, 2015.

²⁷ I.M Olueze: *Nigerian Copyright Law*, (Maghlink Publishing; 1998) pP.1-5

²⁸ Nwogu. M.I.O, "The Challenges of the Nigerian Copyright Commission in the fight against copyright piracy in Nigeria". *Global Journal of Politics and Law Research vol2*, No 5, (2010) Pp 22-34.

²⁹ 'Purpose of Copyright; Protecting the creator against infringement' <<http://www.novagraaf.com/copyright>> accessed 4th August, 2016.

³⁰ 'Philosophy of Copyright' available at <<http://www.academia.edu>>introduction-to-copyright>

owners to have moral and material interest resulting from any scientific, literary or artistic production of which he is the author.^{31³²}

The second lies in the perception that social value of copyright protection lies in their use by the public to promote public interest by providing access to variety of works and inventions. There by encouraging creativity and inventions, consequently, the monopolistic right of control accorded copyright protection rights owners must be tempered to avoid any undue restrictions on their use³³

On the surface this two ostensibly contradictory objectives has been the foundation of unending debates on enforcement.³⁴ Protection automatically means exclusion of public access, however it is not usually so. This is because creations are not always safe from the exploitations of free riders who will replicate such works.³⁵ Thus, lack adequate of legal provisions as well as poor enforcement mechanism will continue to make copying a profitable and lucrative option to the detriment and discouragement of right owner's thereby discouraging creativity.

V. Sources of Copyright Law

1 Statutes

Generally, intellectual property law deals with the law relating to literary works. Here in Nigeria like many countries of the world, apart from international laws regulating intellectual property relations amongst civilized nations, there are local laws, which regulate relationships amongst individuals in relation with intellectual property. Statute is one of the sources of copyright legal framework. Copyright is a legal recognition granting the authors the exclusive right to produce, publish, distribute, perform, broadcast or display their creative works³⁶. The goal of copyright law is to encourage authors to invest effort in creating new works of art and literature.

Law ensures copyright and sanctions for the breach of any of the provisions

³¹ Oyewunmi A.O, Nigerian Law of Intellectual Property: (University of Lagos Press) (2015), Pp.6-7.

³² Article 27 of the Universal Declaration of Human Rights, United Nations, 1948, and Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966.

³³ Adedeji A.A, *Conceptual and Legal Framework for the Protection of Intellectual Property Right' being a paper presented at the Nigerian Institute of Advanced Legal Studies, (July 18, 2016)*. Pp.10.

³⁴ Ibid Pp.10.

³⁵ Oyewunmi,(n31) 7

³⁶ Ezekude, A. 'Nigerian Copyright Commission Report of Activities of the year under Review';(2012) Pp23-34.

relating to the right. However, these rights are subject to many exceptions, which are detailed in the copyright act. For instance, certain non-profit organizations can perform certain copyrighted works without the permission of the copyright owner, and libraries can make copies of damaged books without violating the copyright statute. The statute also permits owners of copies of computer software to make one copy as a backup.³⁷ Copyright notice informs the public that a given work is copyrighted. The notice is placed in each published copy of the protected work and consists of either the word copyright, or the symbol ©, accompanied by the name of the copyright owner and the date of first publication. For sound recordings, the symbol ® is used instead of the symbol ©.³⁸ Under the 1909 act, publication of a work without a proper copyright notice resulted in a complete loss of copyright protection.³⁹

In Nigeria, the Act in place to tackle the issues in copyright and copyright enforcement is the Copyright Act.⁴⁰ A writing need not be words on paper. Section 1(1) of the Copyright Act⁴¹ states the works that are eligible for Copyright protection. These works are literary, musical and artistic works, cinematograph films, sound recordings and broadcasts. The Act further clarifies these works in its Section 51⁴² and states that no work will attract the term ‘copyright’ unless it falls within the listed category. In copyright law, it could be a painting, sculpture, or other work of art. The writing element merely requires that a work of art, before receiving copyright protection, must be reduced to some tangible form.⁴³

This may be on paper, on film, on audiotape, or on any other tangible medium that can be reproduced (i.e., copied).⁴⁴ The writing requirement ensures that copyrighted material is capable of being reproduced. Without this requirement, artists could not be expected to know whether they were infringing on the original work of another. The writing requirement also enforces the copyright rule that ideas cannot be copyrighted: Only the individualized expression of ideas can be protected.

³⁷ The Copyright Act, 1909.

³⁸ S.18 Copyright Act, 1909.

³⁹ Fabunmi, A.B, ‘The Roles of Librarians in Copyright Protection in Nigeria’ *International Journal of African & African American Studies Vol. VI, No. 1, (Jan 2007) Pp80-87*

⁴⁰ Cap C28 LFN 2004

⁴¹ ibid

⁴² S.51 ibid

⁴³ S.6(1)(b)(i) ibid

⁴⁴ ‘Understanding copyright and related rights’ <<http://www.wipo.net/publication>> Retrieved December 27th ,2017

Copyrighted material must be original.⁴⁵ This means that there must be something sufficiently new about the work that distinguishes it from previous similar works. If the disparity is more than trifling, the work will merit copyright protection. Functionality can be a factor in copyright law. The copyrights to architectural design, for example, are generally reserved for architectural works that are not functional.⁴⁶

If the only purpose or function of a particular design is utilitarian, the work cannot be copyrighted. The scope of protection is generally limited to the original work that is in the writing. For example, assume that an artist has created a sculpture of the moon. The sculptor may not prevent others from making sculptures of the moon. However, the sculptor may prevent others from making sculptures of the moon that are exact replicas of his own sculpture. Copyright protection gives the copyright holder the exclusive right to (1) Reproduce the copyrighted work; (2) Create derivative works from the work; (3) Distribute copies of the work; (4) Perform the work publicly; and (5) Display the work for a period of time.⁴⁷

The first two rights are infringed whether they are violated in public or in private. The last three rights are infringed only if they are violated in public. Infringement of copyright occurs whenever someone exercises the exclusive rights of the copyright owner without the owner's permission. The infringement need not be intentional. There are two types of infringements we have the primary and the second type of infringement. Copyright owners usually prove infringement in court by showing that copying occurred and that the copying was not authorized⁴⁸. These require analysis and comparison of the copyrighted work and the disputed work. The most important exception to the exclusive rights of the copyright holder is the "fair use" doctrine.⁴⁹

This doctrine allows the general public to use copyrighted material without permission in certain situations. Which includes some educational activities, literary and social criticism, some Parody and news reporting. Whether a particular use is fair, depends on a number of factors, including whether the use is for profit; what proportion of the copyrighted material is used; whether the work is fictional in nature;

⁴⁵ S. 1(2) (a) Copyright Act, Cap C28, LFN, 2004.

⁴⁶ S.6 (3) Copyright Act, Cap C28, LFN, 2004.

⁴⁷ Fabunmi, A.B, 'The Roles of Librarians in Copyright Protection in Nigeria' *International Journal of African & African American Studies Vol. VI, No. 1, (Jan 2007) Pp80-87.*

⁴⁸ Cambridge University 'Intellectual Property and Copyright in the Digital Environment'. *Information Current* (12 September, 2005). Pp.24-34

⁴⁹ Second schedule to S. 6 (1) Copyright Act, Cap C28, LFN, 2004.

and what economic effect the use has on the copyright owner. See *John Stone v. Bernard Publication Limited*.⁵⁰ Lord Denning M.R. in *Hubbard v. Vosper*⁵¹ stated:

It is impossible to define what is ‘fair dealing,’ it must be a question of degree; you must consider first the number and the extent of the quotations and extracts. Are they altogether too many and too long to be fair? The more you consider the use made of them, if they are used as a basis for comment, criticism or review that may be fair dealing. If they are used to convey same information as the author, for a rival purpose, that may be unfair.

However there are many loopholes in this Act which hinder effective enforcement, for example, section 20(2)(a)-(d) of the Copyright Act⁵² provides that any person who ; sells or let for hire or for the purposes of trade or business, exposes or offers for sale or hires any infringing copy of any in which copyright subsists, or (b) distributes for the purposes of trade or business any infringing copy of any such work or (c) has in his possession, other than for his private or domestic use, any infringing copy of any such work, or (d) has in his possession, sells, lets for hire or distribution for the purposes of trade or business or exposes or offers for sale or hire any copy of work which if it had been made in Nigeria, would be an infringing copy unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, is guilty of an offence under this Act and liable

From the above provisions an infringer is exempted from criminal liability if he can show that he did not know and had no reason to believe that the materials in his possession are infringing copies. This test makes the proof of infringement against the accused difficult and encourages most infringers to evade punishment. The test should have been that of reasonable man who engaged in the business of such circumstances who should know the difference between pirated copies and legitimate ones and the credibility of his sources of materials so as to establish the guilty. Also section 44(1)⁵³ of the Copyright Act, provides:

⁵⁰ (1938) 1 CH 603.

⁵¹ (1972) 2 QB p.98.

⁵² Copyright Act, Cap C28, LFN 2004

⁵³ ibid

the owner of the copyright in any published literary, artistic or musical work or sound recording may give notice in writing to the Nigerian Customs Service (a) that he is the owner of the copyright in the work, and (b) that he requests the Nigerian Customs Service during the period specified in the notice, to treat as prohibited goods, copies of the work to which this section applies...

This restricts the importation of printed copies of literary, artistic, musical works or sound recordings, made outside Nigeria which, if it had been made in Nigeria, would be an infringing copy of the work.⁵⁴ This is probably the reason why infringing materials are exported to other countries from Nigeria with ease. Under Berne and Universal Copyright Conventions, Nigeria has an obligation to accord national treatment to foreign authors and their works⁵⁵. The conventions provide that each contracting state shall provide for the adequate and effective protection of the rights of authors and other copyright proprietors in various copyrighted works.⁵⁶

2 Judicial Decisions

Case law is another source of the legal framework for copyright protection in Nigeria. Case law is the body of principles and rules of law formulated through pronouncement of courts which are subsequently adhered to and followed in similar situations. Thus decisions of Nigerian courts on copyright, serve as precedent cases on the same subject matter. The laws on copyright infringements are geared towards protecting the right owner. The rights of an owner of copyright are infringed when one of the acts requiring authorization of the owner is done by someone else without his consent. The unauthorized copying of copyright materials for commercial purposes. The act provides punitive measures against infringement by way of

⁵⁴ S. 44 (2) Copyright Act, 2004.

⁵⁵ Article 2(1) of the Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.; Article 1 of the Universal Copyright Convention as revised at Paris on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971.

⁵⁶ Ibid.

inspection and seizure order.⁵⁷

An essential part of piracy is that the unauthorized activity is carried on for commercial gain. This element of commercial gain implies that piracy will often be carried out on an organized basis, since not only is the unauthorized reproduction of a work involved, but also the subsequent sale or distribution of the illegally reproduced work, which will require some form of organized distribution network or contact with potential purchasers. To the consumer, often only the end of the chain of such a distribution network will be visible in the form of one sales outlet selling a pirated product. It is important to bear in mind, however, particularly when addressing the question of the means of dealing effectively with piracy that behind one such outlet will often lie a systematically organized illicit enterprise, which illegally reproduces a copyrighted work and distributes it to the consumers.

A copyright owner whose right has been infringed through any of the acts state above can enforce such right through civil proceedings. infringing copy of any such work, or has in his possession, sells, lets for hire or distribution for the purposes of trade or business, or exposes or offers for sale or hire any copy of a work which, if it had been made in Nigeria, would be an infringing copy, unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was licensed and thus requires authorization.

Under Section15 of the Copyright Act,⁵⁸ copyright is infringed by any person who, without the license or authorization of the copyright owner, undertakes any of the acts provided under s. 15(1)(a-g) of the Copyright Act.⁵⁹ When infringement occurs, an action for infringement will be brought against the infringer. An action for infringement of copyright is provided for under Section 16 of the Copyright Act.⁶⁰Copyright infringement is actionable at the initiation of the owner, assignee or an exclusive licensee of the copyright in the Federal High Court which has jurisdiction in the place where the infringement occurred. Remedies for infringement of copyright or for violation of related rights consist of civil redress.

Some laws also provide for penal remedies in the form of fines and/or imprisonment. Infringing copies, receipts resulting from infringement and any

⁵⁷Known as Anton pillar Order which permits an alleged injured parties to visit and search the premises of the defendant where the alleged infringement is taking place and keep the infringing copies in his custody as prove in the court of law

⁵⁸ S.15 of the Copyright Act Cap c28, LFN 2004.

⁵⁹ S. 15(1) (a-g) *ibid*.

⁶⁰ Copyright Act cap C28 LFN 2004.

implement used for the same are usually subject to seizure.⁶¹ Main remedies which are available to a copyright owner in respect of infringement in common-law jurisdictions are an injunction to restrain the continuation of the infringement, and damages to compensate the copyright owner for the depreciation caused by the infringement to the value of his copyright. In the context of piracy, because it is often carried out as an organized activity, the effectiveness of these remedies may be jeopardized for a number of reasons.⁶²

Thus in May 2016 a telecommunication giant in Nigeria, MTN⁶³ was charged with copyright Infringement in an action brought by the Nigerian Copyright Commission (NCC) against them by Copyright Society of Nigeria (COSON).⁶⁴ A restraining order was sought by COSON at Federal High Court, restraining MTN, its agent's privies or servants from the continued unauthorized copying, communication to the public, streaming, selling, broadcasting, making available for downloading and permitting the unauthorized performance and infringement of the copyright in the musical works and sound recordings belonging to the members, affiliates and assignors of COSON.⁶⁵

The copyright owner may be confronted with a situation in which it is possible to locate only a small proportion of these outlets, without being able to prove any link between the outlets, or any common source of supply for the outlets. Furthermore, the service of a writ commencing an action for infringement, by giving notice to the pirate or to those distributing the works which he has illegally reproduced, may hasten the destruction of vital evidence required to indicate the source of supply and the extent of sales which have taken place. In addition, since piracy often involves an international dimension, there is a risk that the financial resources and other assets of a pirate may be removed from the jurisdiction in which legal proceedings are commenced against him, thereby depriving the copyright owner of the possibility of recovering damages.⁶⁶

⁶¹ Obianuju N, *Global Journal of Politics and Law Research* Vol.2, No.5, 2011 Pp.22-34, (Published by European Centre for Research Training and Development UK).

⁶²J.O Asein (*et al*) 'A Decade of Copyright Law in Nigeria(ed.) published by NCC, (2002) p.34

⁶³FHC/L/CS/619/2016

⁶⁴Action against MTN, for non-payment of requisite royalties for the musical works and sound recordings deployed by the company

⁶⁵'COSON slams MTN with 16 billion infringement law suit' Nigerian Law Intellectual Property Watch, available at <http://nlipw.com/copyright-infringement-cosom.com> accessed 5th August,2017.

⁶⁶ WIPO Intellectual Property Handbook, WIPO PUBLICATION, ISBN 978-92-805-1291-5, 2004, P.53.

These difficulties have accentuated the need for preliminary remedies which may be obtained speedily, which will assist in the collection of evidence against a pirate, and which will prevent the destruction of evidence and the removal of financial resources against which damages may be claimed. In many common-law jurisdictions a number of developments have occurred in recent years in response to this need.⁶⁷

3 Common Law

Common law of England is also a source of law in Nigeria. It dates back to its introduction to the colony of Lagos in 1863 via Ordinance No. 3, Through S.45 (1) Interpretation Act the Common law and doctrines of Equity are recognized sources of Nigeria Law. In Nigeria, protection of copyright was governed until 1970 by the English Copyright Act of 1911.⁶⁸

The Nigerian Copyright Act 1970 has since its enactment into law undergone series of amendments in 1988, 1992 and 1999. For instance, the Copyright Act 1988, provided for the establishment of the Nigerian Copyright Commission, the establishment of a Governing Board for the Commission and a Copyright Licensing Panel. Also the 1988 Act unlike the 1970 Act allowed both a civil suit and a criminal suit against the infringer.

Right to the institute the civil suit was vested in the owner while the right to bring a criminal action was vested in the Nigerian Copyright Commission; and both suits can run simultaneously.⁶⁹ Likewise, the sanctions available under the 1988 Act are heavier than what was obtainable under the 1970 Act. The 1992 Act and the 1999 Act allowed the appointment of Copyright Inspectors with the same powers as the Police.⁷⁰ At present, the Copyright Act Cap C28 Laws of the Federation of Nigeria, 2004 is a prototype of the 1999 Act.⁷¹ However the decisions of English Courts are not

⁶⁷ Ibid.

⁶⁸ ibid p.27

⁶⁹ S.21 Copyright Act, 1988.

⁷⁰ S.38 (5) Copyright Act, 1999.

⁷¹<www.ngex.com/news/public/article> accessed October 23,2017

binding on Nigerian courts but would only operate as a guide.⁷²

Nigeria is also signatory to a number of treaties and conventions, including the Berne Convention for the Protection of literary and Artistic Works 1886, the Rome Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations etc. There is therefore need for a new order to integrate these developments, and to avoid the misconception that Nigerian law does not protect foreign works. There is also the recent Copyright (Levy on Materials) Order, 2012 which prescribes levies to be paid on materials used or capable of being used for the infringement of copyright, Part of the funds from the collection of such levies is to be distributed equally among all approved collecting societies, to compensate for the infringement of copyright through the use of such materials, while the remaining funds are to be deployed for administrative and other purposes.

4 Regulations

The source of copyright law also includes regulations. Such as Copyright Optical Disc Regulations 2006 made by the Nigerian Copyright Commission to regulate Optical Disc Plants in Nigeria, and Copyright (Collective Management Organisations) Regulations 2007 to regulate collective management of Copyright and *Video Rental) Regulations 1999.*

5 International Law

International law is another source of copyright legal framework which provides the legal platform for cross-border protection. Nigeria is a signatory to the following conventions and treaties on Copyright. They include; Universal Copyright Convention, Berne Convention, Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement, the Rome Convention, WIPO Copyright Treaty, the Madrid Agreement, the Patent Cooperation Treaty (PCT), the Paris Convention, *inter alia.*⁷³⁷⁴

⁷²Adedeji (n33) 67

⁷³ Universal Copyright Convention as revised at Paris on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971; the Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.; Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1896 U.N.T.S, 299, 33 I.L.M. 1197 (1994).; the Convention of Rome of June 19, 1980 on the Law Applicable to Contractual Obligations.; WIPO Copyright Treaty, adopted December 20, 1996, WIPO Doc. CRNR/DC/94.; the Madrid

There are some solid arguments that could be stated in favour of international protection of works: if protection were to be limited only to national works, foreign works would be allowed into the local market without any copyright cost. They would be sold at cut prices. Of course, consumers may benefit from such low prices. But this practice could detrimentally affect the sale of locally made products, which would have to compete with works of foreign origin distributed at a more attractive price. The dangerous result is that consumers might reject nationally made products and buy foreign ones. National culture, whether it is the music, or book or other industry may, therefore, suffer.

At international level an important step towards a strengthened international copyright protection was the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). It was signed in Marrakesh in 1994. The TRIPS Agreement covers areas such as copyright and related rights, trademarks, geographical indications, industrial designs, and patents, among others. In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the agreement sets out the minimum standards of protection to be provided by each member. The Agreement sets out these standards by requiring first, that the substantive agreements of the main conventions of WIPO, the Paris Convention and the Berne convention, in their most recent versions, must be complied with. With the exception of Article 6b of the Berne Convention⁷⁵ which concerns moral rights, and added provisions on computer programs, databases, rental rights and so on.⁷⁶ The TRIPS Agreement is a trade-related agreement since it was adopted as part of the outcome of the Uruguay GATT round of trade negotiations and it is administered by the World Trade Organization (WTO).⁷⁷

Agreement Concerning the International Registration of Marks and the Protocol Relating to the Madrid Agreement, April 14, 1891, as last revised, Stockholm, July 14, 1967, 828 U.N.T.S 389; the Patent Cooperation Treaty, June 19, 1970; the Paris Convention for the Protection of Industrial Property, March 20, 1883.

⁷⁴ WIPO Intellectual Property Handbook: Policy, Law and use, 2nd (Geneva: WIPO, 2004) at 262.

⁷⁵ Article 6 of the Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.

⁷⁶ See Article 2.1 and 9.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1896 U.N.T.S, 299, 33 I.L.M. 1197 (1994).

⁷⁷WIPO Intellectual Property Handbook, (WIPO Publication, 2004).

VI. Eligibility Requirements for Copyright Protection in Nigeria

The preconditions for legal protection are the requirement of originality and fixation;

1 Originality

The Act⁷⁸ provides that for a literary, artistic or musical work to be eligible for protection such work must pass the originality test. It provides that such work shall not be eligible for copyright unless, sufficient effort has been expended on making the work to give it an original character. *Pearce L.J in Ladroke (Football) Ltd v. Williams Hill (Football Ltd)*,⁷⁹ explained that the question as to whether the plaintiffs are entitled to copyright in their coupon depends on whether it is an original literary work. The word ‘original’ does not demand original or inventive thought, but only that the work should not be copied and should originate from the author. Originality means the work must be the author’s intellectual creation.⁸⁰

In *Express Newspapers Plc. v News (UK) Ltd*⁸¹ a work comprising selections of quotations from an interview was held to be an original copyright work involving the exercise of judgment and discretion in the selection and arrangement of the quotations.

2 Fixation

The second criteria for protection is in S.2(b) of the Act⁸² which states that; “The work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of machine or device”. The court in *Donoghue v. Allied Newspaper Ltd*⁸³ further reiterates the principle that a work must be fixed in a material form if it is to enjoy copyright, and stated:

There is no copyright in an idea or ideas. A person may have a brilliant idea for a story or for a picture or for a play and one which appears to him original, but he if he communicates that idea to an author or an artist or playwright, the production which is the result of the

⁷⁸ Section 1(2)(a) of the Act

⁷⁹(1964) 1WLR 273

⁸⁰Oyewunmi A. O *Nigerian Law of Intellectual Property*, (University of Lagos Press; 2015). Pp.32-33.

⁸¹Ibid, Pp.34-42

⁸² Copyright Act cap C28, LFN 2004.

⁸³(1938) CH 106 at 109

communication of the idea....⁸⁴

Nigeria is also a signatory to some international Conventions and Treaties that provide protection for works of Copyright owners. The main purpose of copyright protection is to ensure due fairness to authors and owners of work. Article 27 of Universal Declaration of Human Rights ⁸⁵states that: (2) everyone has the right to the protection of the moral and material interests resulting from scientific, literary or artistic production of which he is an author.

Therefore, copyright owners have a right to the protection of their interest in their work.

VII. Nature of Copyright

As with all fields of intellectual property copyright is concerned with protecting the work of the human intellect which are literary and artistic works. These include writings, music, and works of the fine arts, such as paintings and sculptures, and technology-based works such as computer programs and electronic databases.⁸⁶ Copyright protects the expression of thoughts, and not ideas. So an imaginary work is not protected.⁸⁷ Copyright in works comes into existence automatically upon the fulfilment of two basic conditions; (a) Sufficient effort has been expended on the work to give it an original character, (b) the work must be in a tangible medium of expression from where it can be perceived, reproduced, or otherwise communicated.⁸⁸

All works under copyright protection usually enjoy a wide range of economic and moral rights.⁸⁹ These are the two types of rights under copyright, “economic rights”, which allow the owner of rights to derive financial reward from the use of his works by others, and “moral rights,” which allow the author to take certain actions to

⁸⁴ *Donoghue v. Allied Newspaper ltd.* (supra).

⁸⁵ Article 24 Of Universal declaration of Human Right Charter.

⁸⁶ S.1 of the Copyright Act, Cap C28, LFN, 2004.

⁸⁷Chapter 2 - Fields of Intellectual Property Protection, WIPO Publication P.43.

⁸⁸ Section 1(2) (a)(b) of the Copyright Act, Cap C28, LFN, 2004.

⁸⁹Oyewunmi, A.O: Nigerian Law of Intellectual Property;(1st Ed) (Lagos: University of Lagos Press) (2015) Pp 51-54

preserve the personal link between him and the work. Moral right is in two folds: The first is referred to as the Paternity Right – the right to claim authorship over the work which effectively stamps the author's personality to his work. This right still remains in the author even after transferring copyright to another person, thereby ensuring that an author is always acknowledged even after the sale of his economic right in the published work.⁹⁰

The second leg of this right is to object and seek relief with any distortion, mutilation, or other modification of and any other derogatory action in relation to his work, where such action would be or is prejudicial to his honour or reputation. This is referred to as the Integrity Right. A clear example of the violation of an author's moral right to claim authorship is the case of *Maurice Ukaoha V. Broad-Based Mortgage Finance Limited & Anor.*⁹¹ The plaintiff, who was an architect, entered into a contract with the defendants to make a model of a bungalow building to be displayed in the defendant's premises. Before the model was ready, the plaintiff loaned the defendant another model of a 17-storey building created by him while he was a student at the department of Architecture, University of Lagos.

To the plaintiff's chagrin, the model was advertised by the defendants in some national newspapers as its proposed headquarters in Abuja, while the authorship of the model was also being ascribed to a certain Gori & Associates, instead of the plaintiff. The plaintiff's action against the defendants for infringements of copyright in the model succeeded, as the court held that the acts of the defendants in publicly exhibiting and publishing the model, while also ascribing authorship to a third party, without the consent, authorisation or licence of the plaintiff constituted a violent infringement of the plaintiff's honour and reputation as the author and owner of the model.

In order for a work to be eligible for protection it must fall within these categories:

- (a)Literary works (b) Musical works (c) Artistic works (d) cinematograph films (e) Sounding recording (f) Broadcasts.

⁹⁰Intellectual Property and Copyright in the Digital Environment. *Cambridge University Information Current* (12 September) (2005) Pp.45-47

⁹¹(1997-2003) 4 I.P.L.R 48.

1 **Literary Works⁹²**

For literary works, the Act⁹³ provides that copyright in a work shall be the exclusive right to do or authorize the doing of any of the acts provided under Section 6(1) (a) of the Copyright Act.⁹⁴ It must be original and fixed(It can be in form of): (I) Novel, stories and Poetic works (II) Plays, stage directions, film scenarios and broadcasting scripts (III) Choreographic works (VI) Encyclopedias, dictionaries, directories and anthologies (VII) Letters, reports and memoranda (VIII) Letters, Address and Sermons (IX) Law reports, excluding decisions of courts (X) written tables or compilations.

For a work to be eligible for protection it must be original however, originality does not mean inventiveness or novelty. It means not copying verbatim, so any compilation of another person's work will suffice as original work. Because the person has put in his own skill, judgment, effort and labour in the creation of the compilation. In Nigeria, the Copyright Act provides that copyright in literary or musical works is the exclusive right to do and authorise the doing in Nigeria of any of the following acts ;Reproduction of the work in any material form; Publication of the work; Performance of the work in public; Production, reproduction, performance or publication any translation of the work; Making any cinematograph film or a record in respect of the work; Distribution to the public, for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement; Broadcasting or communication of the work to the public by a loudspeaker or any other similar device; Making any adaptation of the work⁹⁵

2 **Musical Works⁹⁶**

Any musical work, irrespective of musical quality and includes works composed for musical accompaniment will be eligible for protection. The requirement of originality and fixation is also applicable to musical works, so if the musical work is in writing, it will contain the musical notes to differentiate it from an ordinary literary works.⁹⁷

⁹² Section 1(a) Copyright Act Cap C28, LFN 2004.

⁹³ Section 6(1) (a) Copyright Act, 2004.

⁹⁴ Adedeji A.A ‘*Conceptual and Legal Framework for the Protection of Intellectual Property Right’* being a paper presented at the Nigerian Institute of Advanced Legal Studies, (July 18, 2016).p.7.

⁹⁵ S.6 (1)(a) Copyright Act, 2004.

⁹⁶ Section 1(b) Copyright Act, Cap C28, LFN, 2004.

⁹⁷ Philips, J., The Economic Importance of Copyright: *Common Law Institute of Intellectual property* (1st Ed) ;(London)1985 p.67

3 Artistic Works⁹⁸

Artistic works includes (I) Paintings, drawings, sketching, lithographs, woodcuts, engravings and prints; (II) Maps, plans and diagrams; (III) Works of sculpture (IV) Photographs not comprised in a cinematograph films; (V) works; and (VI) Works of artistic craftsmanship.⁹⁹ The right owner has the exclusive right to reproduce the work in any material form of choice. Thus in *Peter Obe v Grapevine Communications Ltd*,¹⁰⁰ the plaintiff, a professional photographer, successfully sued the defendant who had reproduced and published in its magazine, the plaintiff's photographic work without authorization.

4 Cinematograph Film¹⁰¹

This is the first fixation of a sequence of visual image's capable of being shown is a moving picture and of being the subject of reproduction and with the recording of a sound track associated with the Cinematograph film.¹⁰² The owner of this right has exclusive rights to produce or make a copy of the film in any form he deems fit. Based on the era of digitalization and internet technology, uploading the film online is within the exclusive right of the owner.¹⁰³

5 Sound Recording¹⁰⁴

Copyright in sound recording means the right to reproduction, broadcasting or communication to the public of the recording, as well as the distribution to the public for commercial purposes of copies of the work by way of rental, lease, hire, loan or

⁹⁸ Section 1(c) Copyright Act Cap C28, LFN 2004

⁹⁹ S.51 (1) of the Copyright Act, 2004.

¹⁰⁰ *Peter Obe v. Grapevine Communications Ltd (2003-2007)5 I.P.L.R 354*

¹⁰¹ Section 1(d) Copyright Act Cap C28, LFN, 2004.

¹⁰² Section 51(1) Copyright Act, 2004.

¹⁰³ Adedeji A.A (n94) 35

¹⁰⁴ Section 1(e) Copyright Act Cap C28, LFN, 2004

similar arrangement. Thus any form of unauthorized copying will constitute infringement.¹⁰⁵

6 Broadcast¹⁰⁶

Copyright in a broadcast is the exclusive right to manage the recording and re-broadcasting, as well as the communication to the general public by any of the following means: wireless telegraph, wire or both, satellite, cable programs and rebroadcast. The broadcast may be of visual Images, sounds or a combination of the two. The right owner also has the exclusive right to distribute to the public for commercial purposes or similar arrangement. where there is an infringement the court will decide on the appropriate fair compensation.¹⁰⁷

VIII. Infringement of Copyright

The protection of copyright is backed by some legal safe guards aimed at protecting the rights of copyright owners in cases of infringement with appropriate legal remedies in place. To succeed in an infringement action, the plaintiff must satisfy certain requirements as follows: That copyright subsists in the work allegedly infringed; that the plaintiff is the true owner of the said work; that the defendant has done an act without authorization. Under section 15,¹⁰⁸ copyright is infringed by any person who, without the license or authorization of the copyright owner; carries out, or causes any other person to carry out, an act that is controlled by copyright; imports or causes to be imported into Nigeria any copy of a work that, if it had been made in Nigeria, would be an infringing copy under this section of the copyright Act; exhibits in public any article in respect of which copyright is infringed; distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the copyright owner any article in respect of which copyright is infringed; makes or has in its

¹⁰⁵Oyewunmi A.O (n89) 51-55

¹⁰⁶ Section 1(f) Copyright Act Cap C28, LFN, 2004

¹⁰⁷ Section 9(3)

¹⁰⁸ Section 15 of the Copyright Act, LFN, 2004

possession plates, master tapes, machines, equipment or contrivances used for the purpose of making infringing copies of the work.¹⁰⁹

Anyone who exercises any of the exclusive rights held by a copyright holder, without permission or authorization by the rights holder, is an infringer, that is, unless he or she is excused by legal defense or exemption. Such infringement may be primary or secondary.¹¹⁰ The issue of intent (or lack thereof) is often a misunderstood and confused aspect of matters involving copyright infringement. What constitutes copyright infringement? Copyright infringement occurs when an individual other than the right owner. Subject to certain defences, it is copyright infringement for someone other than the author to do the following without the author's permission:¹¹¹ copy or reproduce the work; create a new work derived from the original work (for example, by translating the work into a new language, by copying and distorting the image, or by transferring the work into a new medium of expression); sell or give away the work, or a copy of the work, for the first time (but once the author has done so, the right to sell or give away the item is transferred to the new owner).

This is known as the "first sale" doctrine: once a copyright owner has sold or given away the work or a copy of it, the recipient or purchaser may do as she pleases with what she possesses; perform or display the work in public without permission from the copyright owner.¹¹² To make it perfectly clear, intent is not required to bring a claim (or have a claim brought against an infringer) for copyright infringement. To plead a case of direct copyright infringement, a plaintiff need only show (1) that the plaintiff has a valid copyright in the work, and (2) that the defendant copied protectable expression from the plaintiff's copyrighted work. So, simply making or distributing even one unauthorized copy of a copyrighted work may constitute as infringement whether or not someone intended to infringe, or knew that they were

¹⁰⁹Olowu B. Nigeria: Protecting and Enforcing Trademarks and Copyrights available at <http://www.building.pvalue.com/06mena/296_299.htm> pp.23-34 accessed December 27th, 2017.

¹¹⁰ Primary infringement is a direct infringement by a person or organization of an exclusive right. It is the duty of the copyright owner to prove that his work was copied without permission. The final requirement is to prove the defendant took enough of the copyright holder's material as to warrant a finding of infringement. And Secondary infringement may occur when an organization or individual facilitates another person or group to infringe upon a copyright. Generally, in copyright infringement cases, to be found liable for contributory infringement, the person/organization accused of contributory infringement must have benefited from the infringing act.

¹¹¹Section 15 of the Copyright Act Cap C28, Laws of Federation,2004

¹¹²<www.cyber.law.harvard.edu/property/library/copyprimer.html> accessed January 14th ,2018

otherwise violating copyright law.¹¹³

1. Civil action for infringement

An action for infringement of copyright is provided for under Section 16 of the Copyright Act. The Act provides for both civil and criminal actions for infringement of copyright and both actions can be taken simultaneously in respect of same infringement. Copyright infringement is actionable at the initiation of the owner when it is a civil action, such action will be instituted at the Federal High Court which has jurisdiction in the place where the infringement occurred. The Act provides for three categories of persons who may institute action for copyright infringement-the right owner, an assignee, as well as exclusive licensee of the copyright.¹¹⁴

In the case of *Compact Disc Technologies Ltd and 2 Ors. v Musical Copyright Society of Nigeria Ltd/Gte (MCSN)*,¹¹⁵ the appellant prayed for dismissal of the action brought against it for infringement of copyright in respect of the unauthorized importation ,recording, reproduction ,distribution, offering for sale, communication to the public and public performance of some copyright works. The ground for the prayer for dismissal was that the plaintiff respondent as alleged owner, assignee and exclusive licensee lacked *locus standi*, to commence action under the Copyright Act (as amended).¹¹⁶The trial judge dismissed the motion, holding that the plaintiff had no *locus standi*. The learned trial judge relied on the Court of Appeal decision in the Ade-Okin case¹¹⁷. On appeal however, the learned justices of the Court of Appeal distinguished the case from the earlier decision in Ade-Okin, primarily on the basis that the applicable law in the former was the Copyright Act of 1988, while in the latter, it was the Copyright Act 2004.¹¹⁸

2 Criminal Action for Infringement of Copyright

The law also provides for criminal action in respect of certain offences which are considered as public concerns, due to its socio-economic wellbeing in the society. Acts which may be subject to criminal action are provided for in the Act.¹¹⁹The proof

¹¹³'Copyright Infringement and Strict Liability: What's Intent Have to Do with It' <<http://sparkmanfoote.com/copyrightinfringementintent/>>

¹¹⁴ Section 16(1)

¹¹⁵ (2008-2011)6 I.P.L.R 198

¹¹⁶Onyido J.C, 'Intellectual Property Protection for Software Rights in Nigeria: Need for law reform' *Modus International Law and business quarterly June Vol5, No.2 (2000) Pp13-19*

¹¹⁷ *Musical Copyright Society of Nigerian Ltd. v. Adeokin Records* 47 NIPJD (CA. 2004) 498/1997.

¹¹⁸Oyewunmi A.O: Nigerian Law of Intellectual Property; (University of Lagos Press; 2015) 51-54

¹¹⁹ Section 20-21 of the Copyright Act

of criminal liability goes beyond evidence of physical act or intention. The defence of not being aware that an infringing act is committed is acceptable. In the case of *Nigerian Copyright Commission v Edolo*,¹²⁰ the accused, an engineer, was charged with offences bordering on the rebroadcasting of the signals of the Multi-Choice Company programmes, without the consent of the company. The major issue before the court was whether or not the prosecution had proved its case beyond reasonable doubt. It was held by the court that it was the duty of the prosecution to show that the items were indeed contrivances within the meaning of section 18(1) (a) and (c) of the Act.¹²¹ The failure of the prosecution to prove that the accused caused the smart card to be made for sale, hire or for the purpose of trade and business, other than for private use as alleged by him. The case was dismissed for lack of proof.

3 Remedies for Infringement

The Copyright Act as a legislation for the regulation of copyright provides an ample range of remedies for copyright infringement. The remedies available to a copyright owner in this regard are mostly civil in nature and they are mostly post trial remedies like damages, injunction account of profits and delivery up. The primary remedy granted under the Act for infringement of copyright is a right of action vested in the owner of the copyright. S.16 (1) of the Act¹²² provides thus:

subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of the copyright, as the case maybe, in the Federal High Court exercising jurisdiction in the place where the infringement occurred; and in any action for such an infringement, all such relief by way of damages, injunction, account or otherwise shall be available to the plaintiff in any corresponding proceedings in respect of infringement of other proprietary rights.

Thus, the remedies are given to the owner of the copyright that is to say the original owner or a person deriving title under him by assignment or exclusive license. Furthermore, it is only federal high court that has jurisdiction on matters arising from

¹²⁰ (2008-2011) 6 I.P.L.R 1

¹²¹ Section 18(1)(c) of the Copyright Act renders criminally liable any person who makes or causes to be made or has in his possession, any plates, master tapes machines, equipment or contrivances for the purpose of making any infringing copy a such work

¹²² Copyright Act Cap C28, Laws of Federation, 2004.

infringement of copyright.¹²³ It is only the original owner, assignee or exclusive licensee that can sue for infringing copyright. The remedies available to the owner of copyright under the Act include civil and criminal remedies.¹²⁴

4 Civil Remedy

Injunction

Injunction is an order of court which compels a party to do or refrain from doing an act.¹²⁵ The operation of injunction illustrate the equitable maxim, equity act in personam¹²⁶ and such orders are most commonly couched in a negative, ordering the person not to do something. But, in certain circumstances, the court will make a positive order known as mandatory injunction which may order a stated order to be done. The general principles governing the granting of injunction are enunciated in the case of *Obeya Memorial Specialist Hospital v. A.G. Federation*¹²⁷ and *Kotoye v. CBN*¹²⁸.

There are various forms of injunction which includes the following:

Final or perpetual injunction- this is an injunction granted after the infringers have been finally found liable by the court for infringement of copyright.

- a) **An interlocutory injunction-** This is granted upon evidence by affidavit only. However, a plaintiff must show that the case is of urgency and the granting of injunction will not cause an irreparable damage to the defendant if it should turn out at the trial that the defendant was right.¹²⁹
- b) **Interim injunction-** This type of injunction is based on ex parte motion. The term “ex parte” means that the application is made without the defendant having the chance to prepare or present evidence. Generally, such application is made without any notice to the party against which the order is sought. This type of injunction can only be applied for by the plaintiff and granted when the plaintiff can show real urgency. It is only granted for a sufficient time for both sides to prepare evidence for a full interlocutory injunction.

However, S. 15(5) of the Act¹³⁰ provides that no injunction shall be issued in proceeding for infringement which requires a completed or a partly completed

¹²³ S.16 (1) Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹²⁴ S.24 Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹²⁵ Wolverhampton and Clifford Miller, Commercial exploitation of Intellectual Property, 1st Ed. P. 224.

¹²⁶ Nassar V. Moses (1960) LLR 170.

¹²⁷ (1987) 3 NWLR (pt 60) 325.

¹²⁸ (1987) 1 NWLR (pt 98) 419 at 441.

¹²⁹ Spottis Wood v. Clarks (1846) FSR.

¹³⁰ Copyright Act Cap 68 Laws of Federation of Nigeria 1990.

building to be demolished or prevents the completion of a partly completed building.

- c) **Mareva injunction-** A mareva injunction is an order designed to prevent a defendant from spiriting his asset abroad or otherwise dissipating them or concealing them during the pendency of an action so as to deprive the plaintiff of any monetary compensation should he eventually succeed at trial. This order will only be granted where the plaintiff can show likelihood that he defendant would be held liable to pay damages or some other monetary award to the plaintiff at the end of the litigation. And that the defendant will transfer asset out of the country or dissipate them to avoid paying. A Mareva injunction is obtained without notice to the defendant.

Damages

S.16 (1)¹³¹ provides that relief may be granted by way of damages for infringement of copyright. Damages for infringement of copyright had as early as 1914, in the case of *Fenning Films Services v. Wolvehampton Cinemas*¹³² been said to be “at large”. Consequently, in *Plateau Publishing Co. v. Chief Chucks Adophy*¹³³ an arbitrary award which had no direct relevance to any ascertainable economic indices was made. A successful plaintiff will be entitled to recover damages for the infringement of his copyright. However, the principal head of damages to be considered is the loss of profit caused the plaintiff by the diversion of trade from him and in this regard. The profit made by the infringers is not a very relevant consideration. Damages for copyright would be the actual monetary loss resulting from the infringement. As the court have said,¹³³ “the measure of damages is the depreciation caused by the infringement to the value of copyright as a chose in action.”

Additional Damages

¹³¹ Copyright Act Cap C28, Laws of Federation 2004.

¹³² (1914) 2 KB 1171.

¹³³ Per Lord Wright in *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd* (1936) all ER 117.

By virtue of S.16(4)¹³⁴ the court is empowered to award additional damages where it is satisfied having regard to the flagrancy of the infringement and any benefit shown to have accrued to infringer by reason of the infringement, that effective relief will not otherwise be available to the copyright owner. However, it is not clear whether this subsection contemplate the award of aggravated exemplary damages. The English court of appeal in *William v. Settle*¹³⁵ approved award of substantial and heavy damages of a punitive nature which are exemplary damages. But the House of Lord rejected award of such damages. In *Rookes v. Barnard*¹³⁶ the House of Lord further held that such award can only be justified as aggravated damages.

Also, in *Cassell & Co. Ltd. v. Broome*¹³⁷ the House Of Lord affirmed its decision in the above case and Lord Kilbradon said that S.12 (3) of English Copyright Act of 1956 which impari material with S.16 (4) of Nigeria Act does not authorize the award of exemplary damages. In *Ezeani v. Njidike*¹³⁸ Supreme Court of Nigeria warned against the award of excessive damages. In the case of *Bellot v. Pressdram Ltd.*¹³⁹ Thomas J was clearly of the view that this section,¹⁴⁰ did not contemplate the award of either aggravated or exemplary damages.

From the above cases, it is submitted that the better view is that the court cannot award exemplary or punitive damages in copyright cases the reason is that the imposition of punitive damages amounts to the introduction of the criminal law element of punishment. The principle of civil law is compensatory rather than punishment. Thus, additional damages may be awarded only on the basis of compensation.

Innocent Infringer

S.16 (3)¹⁴¹ provides a limited form of defence for infringer. This subsection like the criminal law and copyright make allowance for innocent infringement of copyright, where although an infringement has been committed, but at the time of the infringement, the infringer was not aware and had no reasonable ground for

¹³⁴ Copyright Act Cap C28, Laws of Federation, 2004.

¹³⁵ (1960) 2 ALL ER 806.

¹³⁶ (1964) A.C. 1129.

¹³⁷ (1972) A.C 1129.

¹³⁸ (1965) NMLR 95.

¹³⁹ (1973) 1 ALL ER 241.

¹⁴⁰ S.12 (3) English Copyright Act (1956).

¹⁴¹ Copyright Act Cap C28, Laws of Federation, 2004.

suspecting that copyright subsist in the work. The copyright owner is entitled not to any damages but only to an account profit, however, the innocent infringer is not allowed to profit from his conduct. Thus, other relief such as injunction other than damages will be appropriate. In *Plateau Publishing Co. V. Chief Chuck Adophy*¹⁴² the Supreme Court held that account of profit rather than damages will be appropriate only where innocent is established.

5 Anton Pillar Order

An Anton Pillar order is an order which will enable the claimant, accompanied by his solicitors and law enforcement agents and court bailiff, to enter the premises where the offending materials and articles are kept and remove them, or have copies made, so they can be produced at the trial. It is an order, which is obtained without notice to the other party, so as to remove evidence which ought to otherwise be destroyed. The order originated in Lord Denning's judgment in the case of *Anton Piller KG v. Manufacturing Processes Ltd.*¹⁴³

The object of a search order in this context is the preservation of evidence. In this instance, the claimant has to give an undertaking as to damages in case he is wrong and the defendant suffers damages as a result of then granting and execution of the order. The purpose of the order is to fulfil a legitimate purpose, that is, protecting the claimant's copyright. see *Columbia Pictures v. Robinson*.¹⁴⁴

It is imperative to note that search orders have been abused in their exercise in the past. For this reason, they are granted sparingly and with strict compliance with guidelines set down in *Universal Thermosensors Ltd v. Hibben*.¹⁴⁵ Anton pillar order is an order which may be given ex parte for inspection, photographing and the delivery up of infringing material in the possession or control of an infringer. The decision in the case of Anton pillar has been enacted into the copyright Act of Nigeria by virtue of S.25.¹⁴⁶

Application for this order is based on urgency and secrecy. Lord Denning MR has stated the basis for granting of an Anton pillar order has follows;

¹⁴² Supra.

¹⁴³ 193 (1976) 1 Ch. 55.

¹⁴⁴ 194 (1987) 1 Ch.

¹⁴⁵(1992) 3 ALL ER 257.

¹⁴⁶ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

It seem to me that such an order can be made by a judge ex parte but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties; and when or if the defendant were fore warned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or loss or hidden, or taken beyond the jurisdiction, and so that the end of justice be defeated; and when the inspection would do no real harm to the defendant or his case.

Before the coming of the Nigerian Copyright Act, this type of order was sought under the civil procedure rule¹⁴⁷ of the Federal High Court and its inherent jurisdiction by which the court may have recourse to common law. This was because the then Nigerian Copyright Decree¹⁴⁸ had no provision on inspection and seizure. There were two important decisions of Federal High Court prior to the current Act which illustrated the principle for and against the granting of Anton Pillar Order. The order was granted in the case of *Ferodo Ltd. v. Unibros Stores*¹⁴⁹ according to Anyaegbunam .J as he then was “this application is novel. So far, I have no seen where such an application is reported in our law reports”.¹⁵⁰ He traced it to Lord Denning’s book¹⁵¹ where it was reported that the procedure was invented by an ingenious member of the English Chancery Bar, Hugh Laddie.

In a subsequent Nigerian case also decided prior to the current Copyright Act this type of order was refused by Justice M.B Belgore, who was also then of Federal High Court, Lagos. The case was *Sony Kabushiki Kaisha v. Shahani and Co Ltd.*¹⁵² which was an action for infringement of registered trademarks. The plaintiff sought for an order to restrain the defendant from selling or disposing cassette tapes bearing the world “Sony” which infringed their trademark, and for inspection and seizure of such material or document relating to the alleged infringement either from the defendant directly or from their agents.

Thus, Anton Pillar Order are intended to provide a quick and efficient means of recovering infringing articles and of discovering the source from which they are

¹⁴⁷ Order XX Rules 3, 4 and 5 of Order 33 Rules of the Federal High Court (Civil Procedure Rules).

¹⁴⁸ Decree no 61 of 1970.

¹⁴⁹ Unreported suit no; FHC/L/21/80 before the Lagos Judicial Division of Federal High Court. (Ruling Delivered on 29th May 1980).

¹⁵⁰ Ibid at p.1.

¹⁵¹ The Due Process of Law p.123.

¹⁵² Unreported suit no: FHC/LL/35/81 Before the Lagos Division of Federal High Court with ruling delivered on 26th May 1981.

being supplied and the person to whom they are being supplied and the person to whom they are distributed before those concerned have time to destroy or conceal them.

In *Ferodo Limited v. Unibros Stores*¹⁵³ the plaintiff Ferodo Limited, were the sole distributor in Nigeria of Ferodo Products, certain products said to be Ferodo Brake lining which are Ferodo products were being sold by the defendants who were not consumer of the plaintiffs. The plaintiffs brought an action and filed a motion the same day asking the federal High Court to make a number of orders. The following order asked for were granted:

1. The defendants to permit up to six persons (including a police officer) to enter upon the premises of the defendants at No 168 F, Nnamdi Azikwe Street, Lagos for the detention, preservation and inspection of any moveable property or thing that will constitute a breach of injunction prayed in this suit.

2. The defendants to allow the plaintiff's solicitor to inspect all or any document in the custody or under the control of the defendants to this suit.

The order does not authorize the plaintiff to enter the premises of the defendant against his will. The plaintiff can only enter if permitted by the defendant, however, the defendant, runs the risk of being charged for contempt of court if he refuses to permit entry. The original form of the order as formulated by the English courts can however not be applied in a Nigerian situation. The order entails a requirement on the defendants to disclose the names and addresses of person he has had dealing with in the pursuit of the illegal trade, and also the trade. This aspect of the Anton Pillar Order runs counter to the provisions of S.176 of the Evidence Act¹⁵⁴ which provides:

No one is bound to answer any question if the answer thereto would in the opinion of the court have a tendency to expose the witness or the

¹⁵³ Supra.

¹⁵⁴ Cap 112 Laws of Federation of Nigeria (1990).

wife or husband of the witness to any criminal charge or to any penalty or forfeiture which the judge regards as reasonable likely to be sued for

Thus under the Nigerian Law court cannot and will not order a defendant suspected of infringing the plaintiff copyright to disclose any information regarding the sources or outlets of the infringing copies which he deals in.

6 Rendering of Account

One of the remedies provided in S. 16 (1) of the Act¹⁵⁵ is the rendering of account by the infringers. Rendering of account of profits is an equitable remedy incidental to the right of injunction. However, a plaintiff cannot obtain both account of profit and damages at the same time since a claim for an account condones the infringement.¹⁵⁶ The principle upon which such an account is granted was stated by Wilgram V.C in *Calburn v. Simmons*¹⁵⁷

It is impossible to know how many copies of the dealer books are excluded from sale by the inter position of the cheaper one. The court by the account, as the nearest approximation which it can make to justice, takes from wrong doer all the profits he has made by his piracy and gives them to the party who has wronged.

On the other hand, an account of profit will be refused if it is clear that there are no profits.²⁰⁹ But the plaintiff has the right to claim the damages.

7 Criminal Remedy

The Act provides various criminal liability to infringers of the copyright, S.20 of the Act¹⁵⁸ provides various punishment for the infringement. For instance S.20(2)(a)¹⁵⁹ provides that “any person who sells or lets for hire or for the purpose of trade or business, expose or offer for sale or hire any infringing copy of any work in which copyright subsist unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was infringement of any such work be guilty of offence under the Act and shall be liable on conviction of this

¹⁵⁵ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹⁵⁶ Cap 112 Laws of Federation of Nigeria (1990).

¹⁵⁷ Supra.

¹⁵⁸ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹⁵⁹ Ibid.

section or to a term of imprisonment not exceeding two years.” S.28 (1)¹⁶⁰ also provides criminal liability in respect of infringement of performance right.

In addition, S.491 of the Criminal Code¹⁶¹ provides that “any person who knowingly infringes copyright for a commercial purpose, let for hire or by way of trade, expose or offer for sale or distributes either for the purpose of sale or to such an extent as to affect prejudicially the owner of the copyright or by way of trade, exhibit in public any infringing copy of any work is guilty of a simple offence and liable to a fine not exceeding N4 for each copy dealt with or a maximum of N100”.

8 Delivery Up

Apart from injunction, the only non-monetary civil remedy available for the infringement of copyright is delivery up.¹⁶² This is an order made by the court directing the infringers to deliver up to the plaintiff, all the infringing articles of the copyright. The owner of copyright is regarded as if he is the owner of the infringing article(s). Therefore, he can exercise the option to ask for delivery up as well as claim consequential damages for conversion.

The court has an inherent jurisdiction to order the delivery up to the plaintiff for destruction of items which came into existence through a breach of the plaintiff property right and this is an equitable remedy. However, it appears that this order can only be made for destruction and not for any other purpose. The purpose of this order is to prevent infringing goods from getting on to market and to prevent the defendant from profiting from his infringement by stock piling goods made during the period of infringement. The remedy is limited to articles in the possession or control of the defendant so it cannot be used to remove infringing goods from innocent third parties such as independent distributors.

9 Inspection and Seizure

¹⁶⁰ Ibid.

¹⁶¹ Criminal Code, Cap C38, LFN, 2004.

¹⁶² S.20 (4) Copyright Act, 2004.

By virtue of S.25 (1)¹⁶³ any interested party may bring an ex parte application supported by an affidavit showing reasonable cause for suspecting the presence in any premises, of an infringing copy, plate, film, or capable of being used or intended to be used for making infringing copies or capable of being used for the purpose of making copies or any other articles, book or document associated with an infringement. The court, after hearing the application may authorize the application to enter the premises at any reasonable time accompanied by a police officer not below the rank of Assistance Superintendent of Police. In pursuance of that order, the application is allowed to seize, detain and preserve any infringing copy or contrivance relating to the action found in the premises and to inspect any document in the custody or under the contract of the defendant relating to the information pursuant to the execution of this order.

IX. Defences to Infringement Action¹⁶⁴

The first exception is the fair dealing exception, which may apply to uses in relation to the exercise of any of the rights of the copyright owner, where it is used for the purpose of research, private use, criticism or review. Thus the reproduction, translation, performance or other act in respect of a work would not constitute infringement. The second exception is for educational purpose, however; such work must include an acknowledgment of the title and authorship of the work.¹⁶⁵ The act provides that “the inclusion in a collection of literary or musical work which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgement of the title and authorship of the work.¹⁶⁶ Other exceptions include; public interest use by Government, public libraries and institutions for the disabled.¹⁶⁷

X. Legal Framework for Copyright (Digital) Protection in Nigeria.

The law of copyright accords protection to computer software and this is to be

¹⁶³ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹⁶⁴ Onyido, J.C, ‘Intellectual Property Protection for Software Rights in Nigeria: Need for law reform’ *Modus International Law and business quarterly June Vol 5, No.2(2000) pp19-23*

¹⁶⁵ Para(f) of the 2nd schedule of the copyright Act

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

found expressly in section 51(1)¹⁶⁸ of the Act, which defines computer software or programs as; a set of statements or instructions to be used directly or indirectly to bring about a certain result. Furthermore, the section defines computer software as an aspect of literary works. Hence, any provision of the copyright Act applicable to literary works is applicable to computer software. Section 1(a)¹⁶⁹ of the Act lists works eligible for protection and two requirements are needed for their eligibility to be accorded, which includes (1) that sufficient effort must have been expended to give it originality of character and (2) it must be fixed in a definite medium of expression.

Section 10(1)¹⁷⁰ of the Act stipulates that ownership of a computer software is vested on the author first, more so, this is subject to cases of computer software created as part of an employment duty in cases of contract employment, as held in *Joseph Ikhudiora v campaign service ltd and Anor*¹⁷¹, where the plaintiff's claim to entitlement to copyright in a work he created in the course of working for the defendant was dismissed by the court and the defendant was held to be entitled to the copyright work.

The Nigerian copyright Act¹⁷² confers the under listed scope of right in relation to digital works on copyright owners:

- i. The right of production and related rights.
- ii. The right to control the distribution of copyrighted work and issuing of copies¹⁷³ to the public.
- iii. The rights to control the making of adaptations which have been defined as the modification of pre-existing works from one genre to another and consist in altering works within the same genre to make it suitable for different conditions of exploitation.

After considering the legal framework already in place in Nigeria and relating it to our digital age today, it will still be right to say that Nigeria still have a long way to go with respect to the protection of digital broadcast by cable and satellite and also the area of adequate protection for computer software. The greatest concern is the impact produced by the skeletal nature of our copyright Act with regards to copyright

¹⁶⁸ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ (1986) F.H.R (federal high court report), 308.

¹⁷² s.6 (1) of copyright Act, Supra.

¹⁷³ s. 6(1)(a) vii, ibid.

regulation in this subject.¹⁷⁴

Another worrisome challenge is that, before a computer program becomes eligible for protection, it must be subjected to the test of originality and expression in a definite form. In consideration of this, some new innovations may not fit into the requirement, for instance, most computer programs in their technical nature may involve computer language made by different authors which differs from the interface that might be created by another author. It is worthy of note that, as far as our jurisdiction is concerned the creator of a computer language is not entitled to a distinct copyright on the creation of language only under the copyright Act; whereas this is not obtainable in the united states. The implication of the whole consideration is that new technological advancement have really exposed the lacunas of copyright protection in Nigeria.

XI. Recommendation and Conclusion

In the appraisal of the legal and institutional frameworks of copyright protection in Nigeria, findings showed that the legal framework of copyright in Nigeria is defective because the statute did make provisions that can tackle present digital technology. This paper therefore recommends inter alia that the Copyright Act be amended to make provisions to tackle the present day technological challenges. It further recommends that Nigeria adopt a formal registration of copyright works like developed nations.

¹⁷⁴ s.1 (2) of copyright Act, ibid.

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