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Editorial Comments

In yet another tasking and most challenging collective efforts, we have been able to produce another edition of this journal. We must admit that concerted efforts have been exerted to ensure that the quality, standard and reputation built by the journal for over a decade have been maintained.

We must say that this edition is unique because it contains interesting, current and well-researched scholarly articles covering such areas as sports law, medical law, international humanitarian law, legal regime of online data protection for children, privacy and data protection of telecommunication service subscribers, the law relating to protection of expectation rights of students in the Nigerian university system, administration of criminal justice system, national security legal issues, constitutional arguments surrounding *nolle prosequi* in criminal trials and the law concerning street begging in Kano State as well as exploring the jurisprudence of case review in the area of public law.

While appreciating the urgency exhibited by authors in seeing that this edition comes out as scheduled, we must admit that there was a publication delay occasioned by high cost of production materials, lack of sufficient funds, and the desire to maintain quality and standard. We, therefore, seek for the authors' understanding and hope that the delay has not in any way affected your wishes and aspirations. We believe you will keep the faith in us and we pledge that by the grace of Almighty Allah, we will continue to deliver academically in ensuring that we produce subsequent editions in good time.

On this note, I must personally acknowledge with deep sense of gratitude all those who sacrificed time, energy and resources to see to the realization of this edition including but not limited to members of the editorial board/ advisory committee, authors, reviewers, all members of different committees of this journal as well as the supporting staff of the department. We thank you all. Together, we remain committed to contributing to knowledge and scholarship particularly with the current legal developments and challenges on ground.

We hope the recommendations proffered by authors in this edition will be looked into, addressed and implemented by the government and other relevant stakeholders. We look forward to receiving your articles for our next edition coming up in few months to come.

Accept my best of regards.

Muhammad Nuruddeen, PhD
Editor-in-Chief

Implied Repeal of Statute and Judicial Flip-Flop in Nigeria

Fredrick Ikenna Awkadigwe* and Sylvester Ndubuisi Anya**

Abstract

There are times, when, within the same legal system, two sets of laws incompatible with each other purport to govern the same subject matter. The objective of this paper is to ascertain which of such discordant laws prevails. The Supreme Court evaluates this issue with regards to the Legal Practitioners Act 2004 and established that the most recent of a set of conflicting laws prevails over the old. However, a trial court aiming to appraise the same issue with regards to the Institute of Medical Laboratory Technology Act 2004, Medical and Dental Practitioners Act (MDPA) of Nigeria and the Medical Laboratory Science Council of Nigeria Act (MLSCNA), 2003 took a different view. This paper analyses the relevant law on implied repeal vis-à-vis these seemingly conflicting laws and finds that the later judgment of court was given in error. The paper recommends that MDPA laboratories should just go as 'medical laboratories' while MLSCNA laboratories should go as 'medical technology laboratories'.

Keywords: Implied repeal, Statute, Judicial flip-flop, Medical Laboratory, Technologists.

1.1 Introduction

The paper begins with a review of *Akintokun v Legal Practitioners Disciplinary Committee (LPDC),*[1] which shall later be used as a criteria to evaluate the rightness or wrongness of the pathologists' case that follow. The main subject matter in *Akintokun v Legal Practitioners Disciplinary Committee (LPDC)*[2] was the issue of the pathway to be adopted by an aggrieved legal practitioner while initiating an appeal from the direction of the Legal Practitioners Disciplinary Committee of the Body of Benchers (LPDC). Initially, the Legal Practitioners Act (LPA) 1990[3] provided that such an appeal shall lie to the Appeal Committee of the Body of Benchers. In 1994, the provisions of the LPA Amendment Decree No 21 of 1994, modified the provisions of the original Act (LPA 1990) and conferred right of appeal on any person to whom such a direction relates, directly to the Supreme Court Decree No. 21, 1994 thus became the extant law on the issue of the procedure

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[1] (2014) LPELR 33941 (SC).

[2] Ibid (2014).

[3] Cap 207, Laws of the Federation of Nigeria, (LFN) 1990.

for discipline in the legal profession from 1994. Subsequently, section 12 of the new Legal Practitioners Act (LPA) in the Laws of the Federation (LFN) 2004[4] returned the Appeal Committee of the Body of Benchers, thereby conflicting with the provision in Decree No 21 of 1994, which provided that an appeal against the direction of the LPDC should lie directly to the Supreme Court.

The question before the Supreme Court in *Akintokun's* case[5] was, between the Supreme Court and the Appeal Committee of the Body of Benchers, to which will the appeal from the direction of the LPDC lie, given that the provisions of the LPA Amendment Decree No.21 of 1994, modified the provisions of the original Act i.e. LPA 1990,[6] and conferred right of appeal on any person to whom such a direction relates, directly to the Supreme Court; while the more recent LPA, which is an exact copy of the LPA prior to the 1994 amendment, still retained the Appeal Committee of Body of Benchers in its provisions. The question placed before the Supreme Court was in view of the inadvertent omission of the LPA Amendment Decree No 21 of 1994 in the Revised Edition of the *LFN* 2004 at that time. This inadvertent omission was later corrected by the publication of the Legal Practitioners (Amendment) Decree No. 21 of 1994 as Supplementary to the Laws of the Federation of Nigeria 2004. Thus, any direction given by the Disciplinary Committee against a legal practitioner invariably is challenged at the Supreme Court after the publication.[7]

The litigants and the two impartial advisers to the Court on that particular case (*amiscus curiae*) in *Akintokun* appeared to be in consensus *ad idem* that even though the LPA, *LFN* 2004 contained the Appeal Committee of the Body of Benchers as the pathway for an aggrieved legal practitioner, that the LPA Amendment Decree No 21 of 1994 omitted in the Revised Edition of the *LFN* 2004 still operated to amend section 12 of the LPA, *LFN* 2004 which was a mere reproduction of the pre-amendment Act, such that all appeal from the direction of the LPDC shall still lie directly to the Supreme Court as contained in the 1994 amendment. To them, the omission of Decree No 21 of 1994 does not invalidate the Decree as they contended that *LFN* 2004 was only a version of what is already in existence and not something new. In other words, the litigants appeared to contend that the numerous different

[4]Cap L11, LFN 2004.
[5] Supra.
[6]Cap 207, LFN, 1990.
[7]See *Nwalutu v Nigerian Bar Association* (2019) LPELR-46916(SC).

Acts of the National Assembly contained in the *LFN* 2004 exist on the authority of their initial enacted versions, and that the approval of the *LFN* 2004 by the National Assembly using the instruments of the Revised Edition of the Laws of the Federation of Nigeria Act, No.30 of 2007, did not translate to a fresh enactment of the composite Acts in the *LFN* 2004.

According to the Supreme Court in *Akintokun*,[8] the Revised Edition of the Laws of the Federation of Nigeria Act, No. 30 of 2007 referred to by the Attorney General of the Federation is enacted by the National Assembly to enable effect to be given to the Revised Edition to the Laws of the Federation of Nigeria, 2004. The enabling law, Laws of the Federation Act No. 30 of 2007 provides in section 1 that 'the Laws of the Federation of Nigeria compiled and published in 2004 under the authority of the Attorney General of the Federation and Minister of Justice are hereby approved by the National Assembly'.[9] Even though the word "approval" or "approved" is not typically used in legal or legislative writing to convey assent, it does so in section 1 of the above-quoted law because that section's intent is to imply that the National Assembly has approved the collection of all the laws in the 2004 edition of the Laws of the Federation.[10]

The import is that the LPA 2004,[11] which is a copy of the LPA enacted in 1975, came later in time than the amendment done on that Act in 1994, just because the Act found its way into the *LFN* 2004. On the authority of the Supreme Court in *Akintokun's* case,[12] all the Acts in the *LFN* approved with a Revised Edition (Laws of the Federation of Nigeria) Act, are brand new enactments of the National Assembly on the day the *LFN* is approved by the National Assembly by way of the Revised Edition (Laws of the Federation of Nigeria) Act. Thus, the Revised Edition (Laws of the Federation of Nigeria) Act is not just a mere approval of an edition of the compilation of the Attorney-General of the Federation, but a breath of newness into all the Laws contained in the edition. It is on this foundation that the Supreme Court upheld the LPA, *LFN* 2004. If a later Act cannot stand with an earlier one, parliament is generally taken to intend an amendment of the earlier. This is a logical necessity, since two inconsistent texts cannot both be valid. The Latin maxim puts it that *leges posteriores priores contrarias abrogant* (later laws abrogate prior

[8] Supra.
[9] The collection of the LFN 2004 was released by the Federal Ministry of Justice in 2004
[10] The LFN 2004 is the current collection of laws in Nigeria.
[11] Cap L11 LFN 2004.
[12] Supra.

contrary laws). In the matter at hand, the 2004 Acts and in particular, the LPA[13] are valid and existing laws of the Federal Republic of Nigeria. Equally, the 1994 Decree No 21, may not have been textually repealed. On matters of initiating appeal from the direction of the LPDC, Decree No. 21 of 1994 conferred right of appeal on any person to whom such a direction relates, direct to the Supreme Court. Section 12 of Cap L11 2004 LFN establishes or re-enacts an Appeal Committee of the Body of Benchers. No two laws or provisions of an enactment or enactments on same subject which are in conflict shall be allowed to co-exist. The provisions in the 2004 Laws of the Federation relating to the disciplining of erring Legal Practitioners as contained in the LPA 2004[14] are the ones that will regulate appeals from the directions of the Legal Practitioners' Disciplinary Committee of the Body of Benchers. In a situation where there is in existence two conflicting laws on the same subject matter, the current law prevails over the old. This position is further buttressed by the Revised Edition of the LFN Act No. 30 of 2007, described as an Act to enable effect to be given to the Revised Edition to the Laws of the Federation of Nigeria. In other words, when a law is re-enacted in the LFN, the Law is taken to have been born on the commencement day the Revised Edition (Laws of the Federation of Nigeria) Act of the particular *LFN*, for the purposes of ascertaining which Law came first in time, for proper application of *Akintokun v LPDC.*[15]

1.2 From the LPDC to the Pathologists' Case

The decision in *Akintokun* has become monumental in recent cases[16] essentially between the Medical Laboratory Scientists and the Pathologists in Nigeria. On Monday 27 July 2020, the National Industrial Court of Nigeria (NICN) sitting in Enugu delivered its final Judgment in *The Incorporated Trustees of the Association of Medical Laboratory Scientists of Nigeria & Ors v The Attorney-General and Commissioner for Justice of Enugu State & Ors*[17] (the Pathologists case). The College of Nigerian Pathologists subsequently sought and was joined in the suit. The Medical Laboratory Scientists presented the following questions for determination namely:

1. Whether having regards to the combined operation of the Medical Laboratory Science Council of Nigeria Act No. 11 of 2003 and the Scheme of Service for Medical Laboratory Scientists in Nigeria of 22 February 2001 with Ref. No.

[13]Cap L11 LFN 2004.
[14]Ibid.
[15](2014) LPELR 33941 (SC).
[16]NICN/EN/53/2017, NICN/ABJ/182/2016, & NICN/ABJ/284/2014).
[17]Suit No NICN/EN/53/2017.

8.63279/T/35, a person who is not qualified and duly registered as medical laboratory scientist can practice the profession of medical laboratory science and/or head the Department(s) of Medical Laboratory Service in Enugu State University Teaching Hospital, Parklane or any hospital in Nigeria?

2. Whether the respondents/defendants are not bound by the Scheme of Service for Medical Laboratory Scientists in Nigeria approved by the Federal Government of Nigeria on 22 February 2001 with Ref. No 8.63279/T/35?
3. Whether having regards to the effect and clear provisions of the Medical Laboratory Science Council of Nigeria Act No. 11 of 2003, the provision of the Medical and Dental Practitioners Act No 23 of 1988 could still be construed to empower a pathologist or a medical doctor of whatever nomenclature or grade who is not a medical laboratory scientist to practice the profession and/or head the Department of Medical Laboratory Service in Enugu State University Teaching Hospital or any hospital in Nigeria.

Now, apart from this suit, the Incorporated Trustees of the Association of Medical Laboratory Scientists in Nigeria have some other suits against the Attorneys-General of the Federation and of some states on the same issues. Some of those suits had been concluded while some had not, at the time of the judgment in the instant suit.

The Medical Laboratory Science Council of Nigeria Act (MLSCNA) of 2003 created a regulatory Board. The powers of the Board were provided for in section 7 while the functions of the same Board were provided for in section 4. The Board had the power to make rules in respect of any matter contained in the Act.[18] The Board is also saddled with the function of regulating the practice of Medical Laboratory Science in Nigeria.[19] On the side of the Medical and Dental Practitioners Act (MDPA) of 1988, a Council called the Medical and Dental Council of Nigeria (MDCN) was created for it, with functions provided in section 1 and powers provided in section 3 of the Act. The Council has the power to do anything under the Act. One of the functions of the Council in section 1 (2)(e) is: establishing guidelines for clinical laboratory practice in the field of pathology, which includes histopathology, forensic pathology, autopsy, and cytology, clinical cytogenetics, haematology, medical microbiology, medical parasitology, chemical pathology, clinical chemistry, immunology, and medical virology.

[18]S 7(a). of MLS CNA.
[19] Ibid., S 4(b).

Then, section 29 of the MLSCNA 2003 provides as the definition of Medical Laboratory Science (for which its Board shall make Regulations) as:

> Medical Laboratory Science'- (a) Means the practice involving the analysis of human or animal tissues, body fluids, excretions, production of biologicals, design and fabrication of equipment for the purpose of medical laboratory diagnosis, treatment and research; and (b) includes medical microbiology, clinical chemistry, chemical pathology, haematology, blood transfusion science, virology, histopathology, histochemistry, immunology, cytogenetic, exfoliative cytology parasitology, forensic science, molecular biology, laboratory management; or any other related subject as may be approved by the Council.

At the end of the day, the trial Court revealed that it had found an irreconcilable conflict between section 1 (2)(e) of the MDPA of 1988 and section 29 of the MLSCNA of 2003. The Court vehemently applied *Akintokun v LPDC*[20] to the two identified Acts of the National Assembly in the provisions contained in section 29 of the MLSCNA 2003 and section 1(2)(e) of the MDPA 1988. The Court also referred with approval to *Nigerian Union of Pharmacists, Medical Technologists and Professionals Allied to Medicine v Obafemi Awolowo University Teaching Hospitals Complex Management Board,*[21] which it considered the *locus classicus* on this issue. The Learned Justice had this to say:

> I therefore harbour no further qualms that the two statutes cannot stand side by side: they are very unaccommodative of each other. The MLSCNA 2003 being later in time than the MDPA 1988 has demonstrated a clear intention to amend the contrary provisions of the MDPA. In line with *Akintokun v Legal Practitioners Disciplinary Committee* (supra), I therefore have no discretion other than to declare that the inconsistent provisions of the MDPA are impliedly repealed by the inconsistent provisions of the MLSCNA, 2003.

[20] Supra.
[21] Suit No NICN/ABJ/284/2014.

No reference was made to Medical and Dental Practitioners Act 2004[22] and Institute of Medical Laboratory Technology Act 2004,[23] both of which were enacted in the current and authentic compilation of the laws of the Federation at the time the suit was commenced and up to the time that the suit was disposed of. Having begun on a wrong citation of the Law, as occasioned by the citations supplied by the plaintiffs in their originating summons, the Court held that the MDPA of 1988 [8] was older than the MLSCNA 2003. It is true, that the version of the Medical and Dental Practitioners Act found in Cap M8 LFN 2004 was the version enacted into Law in 1988 by the National Assembly of Nigeria. It is also noteworthy that the Medical Laboratory Science Council of Nigeria Act 2003, which was enacted into Law in 2003 by the National Assembly of Nigeria, sought to repeal and replace the Institute of Medical Laboratory Technology Act 2004.[24] The Court, presumed without any attempt at requisite construction, that the fields of the medical laboratory science contained in section 29 of the MLSCNA 2003 are the same fields of pathology contained in section 1(2)(e) of the MDPA 1988 by virtue of the similarities of nomenclatures. To the Court, 'forensic pathology' mentioned in MDPA 1988 was comprehensively the same thing as 'forensic science' mentioned in MLSCNA 2003, that 'clinical cytogenetics' mentioned in MDPA 1988 was comprehensively the same thing as 'cytogenetics' mentioned in MLSCNA 2003, that 'medical parasitology' mentioned in MDPA 1988 was comprehensively the same thing as the 'parasitology' mentioned in MLSCNA 2003 and that 'medical virology' mentioned in MDPA 1988 was comprehensively the same thing as 'virology' mentioned in MLSCNA 2003. The truth remains that those pairs are obviously not the same. One is at best an incomprehensive subset of the other.

The Court even noted in its judgment that 'exfoliative cytology' is only a subset of 'cytology' and that both are not exactly the same thing. Upon this finding and decision, the principle of *generalitus specialibus derogant* (special things derogate from general things) ought to have been invoked by the Court to resolve the 'perceived' conflict; ie that the specific legislation on 'exfoliative cytology' overrides the general legislation on 'cytology'. This is because, 'cytology' being a general term used in one legislation, cannot override its specific part (the exfoliative

[22]Cap M8 LFN 2004.
[23] Ibid., Cap I14.
[24]Ibid.

cytology, part of cytology) made in another legislation.[25] This simply means that the principle of law that will guide the above pairs is not *leges posteriores priores contrarias abrogant* that is time-frame sensitive, but *generalia specialibus non derogant* (general things do not derogate from special) which operates across time frame. Therefore, even if the human laboratories mentioned in all the laws in Nigeria are the same as held by the Court, then forensic pathology, clinical cytogenetics, medical parasitology, and medical virology were eminently preserved under the pathologists by both MDPA 1988 and MLSCNA 2003 irrespective of which Act was prior or latter. Incidentally, and as shall be seen later on in this paper, the issue of *leges posteriores priores contrarias abrogant* does not even apply to the two enactments. The subject matter of the two enactments is clearly not in the same field.

The finding of the Court that all the laboratories mentioned in the written addresses of the parties were the same was not based on any evidence before the trial court as there was no evidence led at the trial either from the Court's *amici curiae* or from the litigants on the nature and workings of each of the laboratories. Thus, the above analysis on the proper principle of Law to apply for the determination of the 'perceived' irreconcilable conflict between the MDPA 1988 and MLSCNA 2003 are just academic.

The position of this paper is not in line with the ominous progenitor in the *Akintokun's case*; but *Akintokun* being the extant law on implied repeal in Nigeria, few points are obviously in vociferous existence to severely interrogate the foundation of the decision in the stated *Pathologists cases* to the extent of global subversion of whatever ratio there to be.

1.3 Contextualising Implied Repeal

First, the Institute of Medical Laboratory Technology Act 2004,[26] on the obvious authority of *Akintokun*, is the extant law regulating medical laboratory science practice in Nigeria today; and not the Medical Laboratory Science Council of Nigeria Act 2003. This is because the Act,[27] having been 'enacted' in 2004, is deemed a newer Act than the Medical Laboratory Science Council of Nigeria Act

[25]See *Madumere v Okwara* (2013) LPELR 1 @ 15-17; *Attorney General of Ogun v Attorney General of the Federation* (2003) FWLR (Pt 143) 206 @ 246; *Edet Akpan v State*(1986) 3 NWLR (Pt 27) 25.
[26]Cap I14 LFN 2004.
[27] Ibid.

2003 enacted in 2003. Thus the Institute of Medical Laboratory Technology Act 2004[28] impliedly repealed the Medical Laboratory Science Council of Nigeria Act 2003, being that it was made in 2004 which is later in time, on the authority of *Akintokun*. The fluid nature of the birth-death-and-rebirth of legislation in Nigeria, as is inherent in enactment of Acts in the editions of the *LFN* can be found in the alacrity with which the Legal Practitioners' (Amendment) Decree No. 21, 1994 got deemed re-enacted in a 2019 judgment in *Nwalutu v NBA.*[29] The amendment to the Decree which was deemed to have been impliedly repealed by the Legal Practitioners Act 2004[30] in *Akintokun's* case *of 2014*, by virtue of the omission of the Decree from the first publication of the 2004 Edition of the *LFN*, quickly sprung to life on its subsequent inclusion in the *LFN* 2004 through a Supplementary to the first Edition. The Court of Appeal, in 2016, decided a case of *Chief Andrew Oru v. Nigerian Bar Association*[31] without adverting itself to the new Supplementary publication of the amendment Decree done after 2014 when *Akintokun* was determined. The Supreme Court in *Nwalutu v NBA*[32] held:

> The extant law which is in operation is the Legal Practitioners Act 2004 (incorporating the provisions of the Legal Practitioners) (Amendment) Decree No 21, 1994) published as Supplementary to the Laws of the Federation of Nigeria, 2004. The Court of Appeal in *Chief Andrew Oru v Nigerian Bar Association*[33] reached its decision per incuriam. The Honourable Committee was properly constituted and had the requisite jurisdiction when it sat and heard the complaint of professional misconduct against the appellant.' Per AKA'AHS, JSC (pp 16-21, Paras. C-E) in *Nwalutu v NBA* (2019) LPELR-46916(SC).

Second, assuming without conceding that the Institute of Medical Laboratory TechnologyAct 2004[34] did not impliedly repeal the Medical Laboratory Science Council of Nigeria Act 2003, and that the Medical Laboratory Science Council of Nigeria Act 2003 is in fact the extant law on medical laboratory science practice in Nigeria, yet, the Medical Laboratory Science Council of Nigeria Act 2003, which is not contained in the *LFN* 2004 is deemed older in time than Medical and Dental

[28] Ibid.
[29](2019) LPELR-46916(SC).
[30]Cap L11 LFN 2004.
[31][2016] All FWLR (Pt. 816) 543.
[32][2019] LPELR-46916(SC).
[33](2016) All FWLR (Pt 816) 543,
[34]Cap I14 LFN 2004.

Practitioners Act of Nigeria.[35] Thus, in a situation of incompatibility or inconsistency necessitating the application of *Akintokun* between the two Acts, the Medical and Dental Practitioners Act of Nigeria[36] will definitely, impliedly repeal the older Medical Laboratory Science Council of Nigeria Act 2003, and not the other way around.

Third, even if the Medical Laboratory Science Council of Nigeria Act 2003 was contained in the *LFN* 2004, it cannot be said that it came later in time than Medical and Dental Practitioners Act of Nigeria 2004[37] as both of them would have been deemed to have been enacted the same year 2004.

1.4 Exclusion of Implied Repeal

The application of *Akintokun's* case to the *Pathologists* case, in the first place, was uncalled for, unwarranted and inapposite, the two considered Acts being in totally different fields and professions. The reasons for the inapplicability of *Akintokun* to the two considered Acts are legion. First, implied repeal does not apply to the Acts of Parliament in un-identical areas or fields. The doctrine of implied repeal is based on the principle that if the subject matter of the subsequent legislation is identical to the earlier legislation to such an extent that it becomes impossible for them to stand together, then the earlier law shall be impliedly repealed by the subsequent legislation.[38] It is a cardinal principle of the law that statutes are not repealed by inference or implication but by direct provision of law.[39] Implied repeal is only entertained where the subject matter is not only similar, but holistically identical. In the *Pathologists Cases*, the subject matter of the area in purported conflict was not identical. A cursory look at the subject matter will reveal numerous variations in nomenclature of terms with incongruous and asynchronous specifications and subsumption of characters. If anything, the subject matter only exhibited some hoax similarities of names that were not analyzed and considered at the trial court by expert witnesses to ascertain their significance from the professional meanings of the terms listed in the Acts.

[35]Ibid.
[36]Ibid.
[37] Ibid.
[38]See *Pt. Rishikesh & Anor v Salma Begum (Smt)* Civil Appeal No. 1266 of 1979 (an Indian case).
[39]See *Raleigh Industries Ltd v Nwaisu* (1994) 4 NWLR (Pt 341) 760-771); *Joseph Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Pt 498) 124 at 163, paras E-F.

Second, it was the decision of the court in *Akintokun v LPDC*[40] that the LPA 2004[41] was in conflict with its amendment and therefore the latter Act[42] was deemed to have repealed the conflicting provisions found in the 1994 amendment (not contained in LFN 2004) by implication. The principle of implied repeal was applied in *Akintokun's case* because the subject matter in both Acts was identical. The application of the doctrine of *leges posteriors priores contrarias abrogant* enunciated in *Akintokun's* case, cannot hold true when confronted with two different laws regulating two different professional bodies with two different regulating agencies as obtains in the *Pathologists* case.

In other words, a recent enactment can impliedly repeal an older enactment if, and only if, the recent enactment can repeal and replace the older enactment because they are so identical and incompatible that they cannot exist side by side. Only express repeal can be invoked where subject matters of the two enactments are divergent as seen in the *Pathologists* case. In reality, however, the Medical Laboratory Science Council of Nigeria Act 2003 can only repeal the Institute of Medical Laboratory Technology Act,[43] or vice versa, as both are enactments in the same professional field.

In fact, the Medical Laboratory Science Council of Nigeria Act 2003 expressly and clearly stated in its section 1 that the Institute of Medical Laboratory Technology Act has been repealed. The legal maxim is captured in expression *uniusest exclusion alterius* - meaning that the express use of a word or words is an implied exclusion of another or others.[44] This clearly showed that the legislature did not intend to repeal any other Act of the National Assembly using the instrumentality of the Medical Laboratory Science Council of Nigeria Act 2003, either expressly or impliedly.

Thus, having expressly mentioned the Act it wanted repealed in its section 1, the National Assembly cannot be imputed to have impliedly repealed any other Act in the medical laboratory science field or in any other field remote to medical laboratory science. The Medical Laboratory Science Council of Nigeria Act 2003

[40](2014) LPELR 33941 (SC).
[41]Cap L11 LFN 2004.
[42]Ibid.
[43]Ibid.
[44] See *Attorney-General of Lagos State v Attorney-General of the Federation* (2014) 9 NWLR (Pt 1412) 217-322; *Azubuike v Government of Enugu State* (2014) 5 NWLR (Pt 1400) 364-411).

cannot impliedly abrogate any enactment in the Medical and Dental Practitioners Act 2004,[45] a professional enactment in a totally different field of human endeavor, and which incidentally, was re-enacted into law *posteriores*.

Third, in order to determine the application of implied repeal, the following three issues need to be addressed:

1. There must be a direct conflict between the two provisions in question. In the instant suit under discussion, there is no evidence that the two provisions are in conflict in any way whatsoever. For two provisions to be said to be in conflict, on the authority of *Akintokun's* case, they must be on the same subject matter. The only vital and relevant issue, which was skillfully obliterated, omitted or glossed over by the Court in its reliance on *Akintokun's* case was the issue of subject matter which statutory provisions were alleged to be in an irreconcilable conflict. What then is the meaning of 'the same subject matter'? The same subject matter simply means that the subject matters of the two enactments must be the same. A cursory look at the two enactments will show that the subject matter in section 29 of the Medical Laboratory Science Council of Nigeria Act (MLSCNA) 2003 is the practice of the different components of medical laboratory science by a medical laboratory scientist, while the subject matter of section 1(2)(e) of the Medical and Dental Practitioners Act (MDPA) 2004 is the practice of the different components of pathology (some, and not even all, of which have similar nomenclatures, only, as some, and not even all, of those of the medical laboratory scientists) by the pathologist medical practitioner. How on earth did the subject of practice of medicine by a medical doctor the same as the subject of practice of medical laboratory science by a scientist, two totally different professions?

In *Akintokun's* case, the subject matter was about appeals relating to directions from the Legal Practitioners Disciplinary Committee on Legal Practitioners found liable for misconduct. The subject matter was not just about Appeals from directions meted for liability for misconduct, but appeals from directions meted for liability for misconduct on a legal practitioner. The subject matter would not be the 'same' if the subject matter under review in the two enactments were on appeals from directions meted for liability for misconduct of a legal practitioner (in one enactment) and on appeals from directions meted for liability for misconduct of a pharmacist (in the other enactment). It is because the subject matters covered in the

[45]Cap M8 LFN 2004.

two enactments were on same legal practitioners that implied repeal was applied. The subject matter must be on the same professional before it can be said to be 'the same subject matter'. In the *Pathologists* case, the subject matters of practice were not the same, as they touch on two totally different groups of practitioners regulated by two totally different bodies. If anything, the closest the two Acts came (assuming without conceding that the similar nomenclatures used in the two Acts meant one and the same thing, and which no evidence was laid at the trial court to determine the scopes of the corresponding areas in the two Acts) is that the two Acts duplicated duties, and not that they were in conflict of duties. The law is trite that in such situations of statutory duplication of duties to two bodies and practitioners, the battle must shift to the legislature and not to the Court. According to the apex Court in *Akintokun's* case, Courts do not make laws. Courts do not amend or repeal Laws/Acts of National or State Assemblies.

These are undoubtedly legislative functions. Any provision passed by the legislature cannot be changed by the courts. As administrators of the courts, judges are only required to interpret and apply the law as it is, in accordance with their understanding. Judges in that process are, of course, not perfect. They are subject to human error. The only person who is infallible is God. Oputa, JSC, once said it in *Adegoke Motors Ltd v Adesanya:*

> We are final not because we are infallible, rather we are infallible because we are final. The justices of this court are fallible human beings. It will be a sign of short-sighted hubris to deny this simple truth. It is also true that this Court's intelligent judgments have the potential to accomplish immeasurable good. Similar to this, the Court's errors have the potential to do immeasurable harm. Therefore, such counsel should have the audacity and fortitude to request that such a decision be overruled when it appears to learned counsel that any decision of this Court has been made *per incuriam*. This Court has the authority to overrule itself (and has done so in the past), as it readily admits that it is preferable to acknowledge a mistake than to persist in it.

The battle ground must shift from the Court rooms to the legislature. It is not in the powers of any Court in Nigeria to assign statutory duties to any profession or take away the statutory duty of one profession and give same to another profession under the guise that the functions of one profession have been impliedly repealed because

of what may at the best be described as duplication where there is evidence of identical subject matter, but which is perceived as an irreconcilable conflict.

2. The legislature must have evinced an intention to lay down an exhaustive code in respect of the subject matter replacing the earlier statute. For this purpose, it would be essential for the later enactment to incorporate the entire subject matter that the former law was dealing with. There is nothing in the two different subjects in the MLSCNA 2003 to suggest an intention of legislature to lay down an exhaustive code in respect of the subject matter replacing the MDPA 2004. The corresponding component fields in the two Acts are either entirely different in nature (see forensic pathology and forensic science), or some are specific subsets of a general field (see for example exfoliative cytology and cytology, medical parasitology and parasitology), or some have only similarity of nomenclature (chemical pathology and clinical chemistry). If anything, the only intention known from the MLSCNA 2003 is the intention to repeal the antecedent Institute of Medical Laboratory Technology Act 2004[46] which regulated the Medical Laboratory Technologists, and to replace their name with Medical Laboratory Scientists. There was no intention of the legislature whatsoever to dabble into the provisions of the MDPA 1988 or its re-enactment in Cap M8 LFN 2004.

3. For there to be implied repeal, the two legislations must fall within the same field.[47] In *State of MP v Kedia Leather & Liquor Ltd*,[48] the Supreme Court observed that there is a presumption against repeal by implication even in the same field. This is based on the view that while enacting laws on a particular subject, the legislature has a thorough knowledge of the laws that are already in force on that subject. Therefore, the absence of a repealing provision in the subsequent law would imply the intention of the legislature that the existing provision should not be repealed. Moreover, the legislature would never intend to create confusion by retaining conflicting provisions. This presumption can only be rebuttable to bring about repeal by necessary implication. This rebuttal is completely absent in the submissions of the laboratory scientists at the trial court.

[46]Cap I14 LFN 2004.
[47] See Criminal Appeals Nos. 151-58 of 1996 (Indian case); *Akintokun v LPDC* (2014) LPELR 33941 (SC) 66.
[48]Criminal Appeals Nos. 151-58 of 1996 (India).

4. A look at the functions of the regulatory body of the medical laboratory scientists and the definition of laboratory in the extant and extinct laws of the medical laboratory scientist[49] shows that the laboratory provided for the medical laboratory scientists/technologists is the medical technology laboratory as contained in the founding Act, and not hospital laboratory as stated in the Court judgments in the *Pathologists'* case. This laboratory did not change with the enactment of the newest Act. In fact, the newest extant Act did not evince any intention to change the scope, configuration or ramifications of the 'medical laboratory'. It only removed 'technology' from the name of the laboratory, having replaced it with 'scientist' in the 'repealing' Act. In other words, it was purely a change in nomenclature and not functions and scope.

Section 15(1) (c) of the Institute of Medical Laboratory Technology Act 2004[50] referred to the staff members of the medical laboratory technology as 'medical laboratory personnel', just the same way that section 19(1)(c) of the Medical Laboratory Science Council of Nigeria Act 2003 referred to the staff members of the medical laboratory science as the same 'medical laboratory personnel'. If both personnel groups belong to medical technology laboratories, how did the NICN arrive at the decision that their laboratory belongs to the hospital laboratories. Section 64 of the National Health Act defines health technology, to which the medical laboratory science belongs, in terms of machinery or equipment used in the provision of health services. The Act clearly excluded them from health workers. Their functions and duties lie in the health technology laboratories (where the equipment for the analysis of human and animal samples are manufactured) and not hospital laboratory. Where they are conscripted into the hospital or veterinary laboratories, it is simply to assist the pathologists and veterinary surgeons (who are in short supply in hospital or veterinary laboratories) in human and animal sample analyses and the preservation of equipment, both of which functions that the scientists and technologists have acquired some knowledge in the course of their training as technologists and scientists.

Paragraph 1(2) of the 3rd Schedule to the Medical Laboratory Science Council of Nigeria Act 2003 state that: 'All persons previously registered as medical laboratory technologists by the Institute of Medical Laboratory Technology shall at

[49] See also S19 of the Institute of Medical Laboratory Technology Act Cap I14 LFN 2004 and s 29 of the Medical Laboratory Science Council of Nigeria Act, 2003 on the definition of Laboratory.
[50]Cap I14 LFN.

the commencement of this Act be referred to as medical laboratory scientists and be considered registered by the Council accordingly'. This paragraph literally changed the names of the practitioners from medical laboratory technologists contained in the Institute of Medical Laboratory Technology Act 2004,[51] to medical laboratory scientists as contained in Medical Laboratory Science Council of Nigeria Act 2003, without doing any violence to their hitherto known rights, functions and duties that they presently claim to have acquired under the 'repealing' Act. The Medical Laboratory Science Council of Nigeria Act 2003 did not, in fact, successfully repeal the Institute of Medical Laboratory Technology Act 2004[52] as it sought to repeal an Act that postdated it. The issue of repeal of an Act, much less implied repeal, cannot be adjudicated at the trial court in the absence of necessary and proper parties properly sought out and joined.

The National Assembly of Nigeria enacted the National Medical College Act 2004[53] (NMC Act), and Medical Residency Training Act 2017 (MRT Act). The National Medical College Act 2004[54] is newer than the Medical Laboratory Science Council of Nigeria Act 2003 on the authority of *Akintokun*. In both Acts, the National Assembly created and mandated a statutory body known as the National (Postgraduate) Medical College to train medical practitioners in specifically-enacted postgraduate medical fields. Pathology, which is the subject matter of the *Pathologists* case, was clearly created and mandated in the National Medical College Act 2004,[55] the Medical Residency Training Act 2017 and the Medical and Dental Council of Nigeria Act 2004[56] i.e. three Acts of the National Assembly specifically made for medical practitioners in Nigeria.

It is therefore unfathomable how paragraph 1(2) of the 3rd Schedule to the Medical Laboratory Science Council of Nigeria Act 2003, which merely renamed medical laboratory technologists to medical laboratory scientists without altering their statutory functions, can be presumed or assumed by the trial court to abrogate pathologists that are under another profession managed under three autonomous

[51]Ibid.
[52]Ibid.
[53]Ibid Cap N59.
[54] Ibid.
[55] Ibid.
[56]Ibid.

Acts, *viz* National Medical College Act 2004,[57] the Medical Residency Training Act 2017 and the Medical and Dental Practitioners Act of Nigeria 2004.[58]

It is also unfathomable how an Act in another field of study (Medical Laboratory Science Council of Nigeria Act 2003) could be assumed or presumed by the trial court, to have impliedly scrapped subsisting enactments in the three subsisting and active medical Acts. What is more, neither the Medical and Dental Council of Nigeria (saddled with the function of training undergraduate pathologists) nor the National (Postgraduate) Medical College of Nigeria (saddled with the function of training postgraduate pathologists) was joined in the suit at the trial Court before scrapping them in their functions in a matter that directly touched on them.

A cursory look at the whole length and breadth of the Institute of Medical Laboratory Technology Act 2004, and the Medical Laboratory Science Council of Nigeria Act 2003 will clearly show that the legislature did not evince any intention of expanding the functions of the Medical Laboratory Scientists in the Medical Laboratory Science Council of Nigeria Act 2003 more than what their functions used to be under the Institute of Medical Laboratory Technology Act 2004[59] when they were called medical laboratory technologists. There is no such intendment. The two Acts are almost the same enactments except in change of names and nomenclatures. If medical laboratory technologists did not repeal and replace pathologists under the Institute of Medical Laboratory Technology Act 2004,[60] how then can the present medical laboratory scientists repeal and replace pathologists under the Medical Laboratory Science Council of Nigeria Act 2003.

The Medical Laboratory Technologists, since 1968, (when the Institute of Medical Laboratory Technology Decree of 1968, which was later re-enacted as Institute of Medical Laboratory Technology Act 2004,[61] was promulgated), have never been pretentious about the scope of their functions within the hospital laboratory settings when called, from the medical technology laboratories, into the pathologists laboratories in the hospitals. The job of the medical laboratory technologists in hospital laboratories has always been the intermediate job of human sample analysis and upkeep of laboratory equipment. Sample collection, interpretation of

[57]Ibid Cap N59.
[58]Ibid Cap M8.
[59]Ibid Cap I14.
[60]Ibid.
[61]Ibid.

results and issuing of laboratory reports are the exclusive preserves of the pathologists in fact and in the laws of Nigeria. The same thing is true for veterinary medicine. See the relevant sections of the National Health Act, the 1969 Veterinary Surgeons Act re-enacted as Veterinary Surgeons Act Cap V3 LFN 2004, the MLSCNA, the NMC Act, the MRT Act and the MDPA, particularly their interpretation sections.

1.5 Conclusion

There is nothing in the Medical Laboratory Science Council of Nigeria Act 2003 whatsoever to suggest that the functions of the medical laboratory scientists have been expanded in scope in the, now contentious, Medical Laboratory Science Council of Nigeria Act 2003 so much as to abrogate the subsisting scope of functions of the pathologists who are in a totally different profession. The pathologists have always manned the hospital laboratories in peace with the medical laboratory technologists assisting them in bench sample analysis since the promulgation of the Institute of the Medical Laboratory Technology Decree of 1968. The recent hue and cry that the Medical Laboratory Science Council of Nigeria Act 2003 has created a new profession to abrogate pathology is thus unfounded. The opinion of the NICN on the functional status of the Medical Laboratory Scientist was obviously formed *per incuriam* without regard to the provisions of the 'repealed' Institute of Medical Laboratory Technology Act 2004.[62]

There is a higgledy-piggledy mix in the nomenclatures used in the laboratory practice in the Medical field and the laboratory practice in the Medical Laboratory field in Nigeria. MLSCNA 2003 and Cap I14 2004 appear to refer to the medical laboratory scientists and technologists as medical laboratory personnel, while at the same time identifying the laboratory they were created for as the Medical Technology Laboratory. A technology laboratory where animal samples are analysed, and equipment are fabricated, as provided in Section 29 of the MLSCNA 2003, cannot be a hospital laboratory. To make matters worse, the medical practitioners also refer to pathology laboratory as medical laboratory because of the 'medical' in 'Medical Practitioners' that signifies human hospital practice. Different Laws in Nigeria have taken their turns to refer to pathology and

[62]Ibid. See also the opinion of one of the authors of this article in https://awkadigwemedicolegals.blogspot.com/2022/10/implied-repeal-of-statute-and-national.html?m=1.

technology laboratories as medical laboratories, thereby blurting the dissimilarity between the two laboratories. It appears the Laws are tilted towards identifying pathologists' hospital laboratories as clinical laboratories while identifying medical technology laboratories as medical laboratories.

There is a dire need for the different sets of practitioners and the Legislature to identify the proper terminologies for the different laboratories, and stick to them for clarity of reference, descriptions, purpose and functions. All laboratories where human beings are investigated ought to be labelled ‘Pathology Laboratory’ or ‘Clinical Laboratory’ or ‘Hospital Laboratory’ for the Pathologists under the regulations of the MDPA; while all laboratory where human and animal samples are used for the manufacture of medical and veterinary laboratory equipment should be labeled ‘Medical Laboratory’ for the Medical Laboratory Scientists under the regulation of the MLSCNA. Where a practitioner of one laboratory discipline is employed in a department of the other laboratory discipline for any purpose whatsoever, there should be no doubt as to the headship of that other department being the preserve of members of that other discipline. Alternatively, MDPA laboratories should just go as 'medical laboratories' while MLSCNA laboratories should go as 'medical technology laboratories'. The laboratories under the Veterinary Surgeons Act 2004 should neither be a medical laboratory, a medical technology laboratory, nor a hospital laboratory; it should just be what it is: a veterinary surgeon's laboratory.

An Examination of the South African National Soccer League Dispute Resolution Mechanism: A Model for Nigeria

Clementina Chika Okeke* and Lateefat Adeola Bello**

Abstract

For a professional football player, time is always of the essence, whether it is playing time or the time it takes to resolve his dispute with his club. Thus, the ability to have a dispute speedily resolved between a football player and his club may be the difference between him spending his time on the pitch or in the court. Thus, without a competent means of internal dispute resolution, more and more cases would have to be referred to the courts and the tendency of court rulings to have an abrupt and profound impact on sporting rules portends a relegation of the concept of self-regulation that sports governing bodies thrive on. The objective of article is to examine the South African dispute resolution chamber for football and to make a case for Nigeria borrow a leaf therefrom. The article adopt a doctrinal research method to achieve this targeted objective. The article reveals that the Federation of International Football Association (FIFA) has taken steps to develop a comprehensive football dispute resolution mechanism in order to stem the problems associated with the taking of football disputes to the courts and to promote a specialised dispute resolution mechanism operational in football across the globe. The article further discovers that the FIFA's basis for dispute resolution is premised on the principle of member associations ousting the jurisdiction of their own national courts. In addition, all football associations are obligated to establish a national dispute resolution chamber to settle all football disputes. Consequently, In South Africa there is a national soccer league dispute resolution chamber that deals with football disputes. While in Nigeria, the article posits that there is none, although the Nigerian Football Federation (NFF) Statutes provide for it. Therefore, this article recommends the establishment of a National Dispute Resolution Chamber in Nigeria, thereby borrowing a leaf from the South African Soccer dispute resolution mechanism.

Keywords: Soccer, Dispute Resolution Mechanism, South Africa, Nigeria, Football, Model

1.1 Introduction

Football has grown over the years in terms of commercial value, thus resulting in a corresponding growth in football – related disputes.

[1] It is a well-known fact that the traditional form of dispute resolution has been litigation. However, litigation in many jurisdictions is fraught with numerous

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drawbacks, ranging from prolonged trials, numerous adjournments, and huge costs amongst others. Therefore, alternative dispute resolution (ADR) mechanisms have been embraced for speedy resolution of football disputes. The football world has likewise developed its own sport-specific dispute resolution mechanism, based largely on arbitration which is aimed at curtailing recourse to ordinary courts for the settlement of football-related disputes.[2]

There is no gainsaying the advantages of alternative dispute resolution over litigation. The benefits of speed, amicable resolution of disputes and reduced costs make ADR a preferred option. While these benefits are also apt in relation to sports disputes, that of speed appears to hold very high practical significance.[3] For a professional football player, time is always of the essence, whether it is playing time or the time it takes to resolve his dispute with his club. Thus, the ability to have a dispute speedily resolved between a football player and his club may be the difference between him spending his time on the pitch or in the court.[4]

Thus, without a competent means of internal dispute resolution, more and more cases would have to be referred to the courts and the tendency of court rulings to have abrupt and profound impact on sporting rules portends a relegation of the concept of self-regulation that sports governing bodies thrive on.

It is to avert more of such that Federation of International Football Association (FIFA) has taken steps to develop a comprehensive football dispute resolution mechanism[5] in order to stem the problems associated with the taking of football disputes to the courts and to promote the specialised dispute resolution mechanism operational in football.

All football associations are enjoined by FIFA[6] to establish a national dispute resolution chamber to settle all football disputes. Consequently, In South Africa there is a national soccer league dispute resolution chamber that deals with football disputes. While in Nigeria there is none, although the NFF Statutes provide for it.

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[1] Omojine, K.C.; Dispute Resolution In Nigerian Football: The Need For A National Dispute Resolution Chamber; African Sports Law And Business Bulletin (2014) , p.20, accessed from http://www.africansportslawjournal.com>... on 1/2/2018

[2]Ibid.

[3]Ibid.

[4]Ibid.

[5]Ibid.

[6]Art, 58 Federation of International Football Association Statutes 2022 Edition.

This paper examines the South African dispute resolution chamber for football as a model for Nigeria.

1.2 The Fundamental Principles of Dispute Resolution in Football

The fundamental principles of dispute resolution in football are captured in Article 58 of the FIFA Statutes 2022. It provides as follows:

1. The confederation, member associations and leagues shall agree to recognise Court of Arbitration for sport (CAS) as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.
2. Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.
3. The Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take dispute in the association affecting leagues, members of league, clubs, members of club, players, officials and other associational officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for a stipulated recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provisions shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation or to CAS.
4. The associations shall also ensure that this stipulation is implemented in the association, if necessary by imposing a binding obligation on its members. The associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration and not to ordinary courts of law. The confederations, member associations and leagues shall agree to comply fully with any decisions passed by the relevant FIFA bodies which, according to these statutes are final and not subject to appeal. They shall take every precaution necessary to ensure that their own members, players and officials comply with these decisions.[7]

From the provisions of the FIFA Statutes above, the following are established:

[7] Art.58 FIFA Statutes 2022 Edition.

1.2.1 Ousting of the jurisdiction of National Courts

The FIFA Statutes obliges national associations to exclude the jurisdiction of its own national courts.[8] Member association of FIFA must take cognizance of this provision in the contemplation dispute resolution, given that FIFA will likely refuse to recognise and, where appropriate, challenge any decision rendered by a national court in a football-related dispute. In addition, FIFA has the right to impose sanctions on any member that violates this provision. There are two notable exceptions to the prohibition on having recourse to ordinary courts, namely:[9]

a. Where a club is required to enter into insolvency proceedings, here FIFA accepts that such proceedings are conducted by the relevant national courts; and
b. The right is reserved for players and clubs to enforce statutory employment rights in the applicable national courts (rather than via FIFA or any national dispute resolution body) in appropriate cases.[10] This can be of assistance to clubs where they have contractual or statutory rights in respect of a player which are recognized at domestic level, but perhaps not by FIFA.

For instance, Nigeria was suspended from international football in 2014 because of government interference. FIFA sent a letter to the NFF expressing its concern after the NFF was served with court proceedings preventing its president from running the country's soccer affairs. FIFA said the court compelled the Nigerian Minister of Sports to appoint a senior member of the civil service to manage the NFF until the matter was heard in court. Nigeria was banned by FIFA until the court case was withdrawn.[11]

1.2.2 Mandatory Jurisdiction of FIFA

FIFA's Dispute Resolution Chambers (DRC) is the exclusive forum for the resolution of disputes which arise under the provisions of the FIFA regulations on the Status and Transfer of Players ('RSTP') in relation to the payment of Training Compensation and the Solidarity Mechanism.[12]

Certain disputes can only be referred to FIFA in the first instance (but it is open to the parties to challenge any subsequent decision before the Court of Arbitration for

[8] Ibid., Art.58(2).
[9]Benett, M. (2016) CHOOSING The Right Path In International Football Dispute Resolution, European Professional Football Leagues Legal Newsletter, p.3.
[10] Art.22 Regulations on the Status and Transfer of Players march edition, 2022.
[11] https://www.reuters.com>article>... Accessed on 16/04/2023.
[12]Art. 21 Regulations on the Status and Transfer of Players march edition, 2022.

Sports (CAS). FIFA judicial bodies are divided into three[13] namely: the Disciplinary Committee; the Ethics Committee and the Appeal Committee.

The Confederations, member associations and leagues shall agree to comply fully with any decisions passed by the relevant FIFA bodies which, according to these statutes, are final and not subject to appear.[14]

1.2.3 Jurisdiction of Court of Arbitration for Sports

FIFA recognises the Independent Court of Arbitration for Sports (CAS) to resolve disputes between FIFA, member Associations, Confederations, Leagues, Clubs, Players, Officials, Intermediaries and Licensed match agents[15]. In this regard, the provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings.[16] The jurisdiction of CAS as contained in the FIFA Statutes is as follows:[17]

1. Recourse may only be made to CAS after all other internal channels have been exhausted.
2. Appeals against final decisions passed by FIFA's Legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.
3. CAS, however, does not deal with appeals arising from:
    a. Violation of the Laws of the Game;
    b. Suspension of up to four matches or up to three months (with the exception of doping decisions);
    c. Decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an association or confederation may be made.
4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect.
5. FIFA is entitled to appeal to CAS against any internally final and binding doping related decision passed in particular by the confederations, member associations or leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations.
6. The world Anti-Doping Agency is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by

[13] Art. 52.
[14] Ibid., Art.60 (1).
[15] Ibid., Art. 57(1).
[16] Ibid., Art. 57(2).
[17] Ibid., Art. 58 FIFA.

> FIFA, the confederations, member associations or leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations.

The CAS is composed of three divisions namely:[18] The Ordinary Arbitration Division whose responsibility is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its president or his/her deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules; the Anti-doping Division constitutes Panels, whose responsibility is to resolve disputes related to anti-doping matters as a first instance authority or as a sole instance; and the Appeals Arbitration Division which constitutes Panels, whose responsibility is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement provide.

1.2.4 Mandatory Jurisdiction of National Dispute Resolution Chambers

The National Dispute Resolution Chamber (NDRC) Standard Regulations were created by FIFA in order to shift responsibilities from FIFA to its member associations in connection with the resolution of disputes. The NDRC regulations includes certain minimum requirements which must be fulfilled for a body to be recognized by FIFA as an NDRC including in particular, the need for the body to be equivalent to the DRC by being composed of members who provide equal representation of clubs and players. The NDRC Regulations provide that the NDRC: "is competent to handle disputes between clubs and players regarding employment and contractual stability, as well as those concerning training compensation and solidarity contributions between clubs belonging to the same association."[19]

However, there are limitations on the powers of NDRC, compared to FIFA's bodies in the context of an international dispute, as a NDRC will have no jurisdiction to impose a sanction on any club[20] which belongs to another association for its role in any breach of contract by the player registered with its member club. The ousting of the jurisdiction of National Courts invariably meant that by provisions of FIFA Statute, each member association is to establish its own National Dispute

[18] Art.20 Code of Sports-Related Arbitration 1 July, 2019.
[19]http://resources.fifa.com/mmdocument/affederation/admiistration/67/18/19/national dispute resolution efsd 47338.pdf.
[20]Art 17(2)(4) Regulation on Status and Transfer of Players 2022.

Resolution. In compliance with the FIFA Statutes, the Confederation of African Football (CAF) Statute 2017 provides the means for dispute resolution thus:

1. National associations, leagues, clubs or members of clubs shall not be permitted to bring before a court of law disputes with CAF or other Associations, Clubs or members of clubs. They shall submit any such disputes to an arbitrator appointed by mutual agreement and fully comply with this decision.[21]
2. Should the laws of a country entitle the concerned national association and its clubs and their members to appeal to a court of Law, the national association shall insert a clause in its statutes, by which it, along with its clubs and their members, freely renounces that right, and undertakes to accept the decisions of the arbitrators selected.
3. National associations must strictly adhere to the decisions taken by CAF or CAF-designated arbitrators, and where these decisions concern a club, a zonal union or a league, the later must take the necessary steps to observe such decisions.
4. Associations who violate any of the clauses of this Article shall be expelled from the confederation.

1.3 Dispute Resolution in South African Soccer

Professional football worldwide is arranged in a pyramid structure. In the South African context the descending hierarchy is as follows; at the apex is FIFA, followed by the Confederation of African Football (CAF), the South African Football Association (SAFA) and the National Soccer League (NSL) at the base. SAFA – as the National Sports Federation (NSF) – regulates all football in South Africa, amateur and professional. The NSL on the other hand is the only professional football body and a special member of SAFA. It regulates all professional football in South Africa.[22] The NSL's activities are mainly regulated by the NSL Constitution and the NSL Rules. The NSL comprises two tiers of 16 teams each; the Premier Division, popularly known as the PSL and the National First Division (the NFD).[23] Anyone wishing to pursue professional football, be it as a footballer, club or official can only do so under the auspices of the NSL.

[21] Art. 46 Confederation of African Football Statutes 2017.

[22] Razano, F Keeping Sport Out of the Courts: The National Soccer League Dispute Resolution Chamber-A Model for Sports Dispute Resolution in South Africa And Africa, Sports Law and Policy Centre Africa, Sports Law and Business Bulletin.,(2014) 2, available at www.africansportslawjournal.com; accessed on 1/3/19.

[23] Rule 3 of the NSL Rules.

1.3.1 The Establishment of the Dispute Resolution Chamber

In terms of the Constitution of South Africa,[24] everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[25] Consequently, a party to a dispute can approach the court or elect to have the dispute resolved through ADR as it is their constitutional right. Participants in sport also have such a choice. But there are limitations to the choice as shall become apparent below. In most instances the rules or regulations of their NSFs enjoin them to refer disputes to ADR. In some instances, there are contractual undertakings by the parties to refer disputes to ADR. In any event, rules or regulations of NSFs are regarded as a contract amongst the members of the NSFs and if they contain an arbitral clause, parties to such contract are required to refer disputes to ADR instead of the courts.

The turning point for dispute resolution in professional football in South Africa was the judgment of the High Court in the matter of *Coetzee v Comitis and Others.*[26] There can be no doubt that the Coetzee matter is South African football's Bosman case.[27] Briefly, Coetzee was a professional footballer who battled to get his clearance certificate from his previous club after his contract with the club had come to an end. Coetzee brought a challenge before the court arguing among other things, that the NSL Constitution and Rules relating to the transfer of footballers were inconsistent with the Constitution and therefore invalid. The court found in Coetzee's favour and declared part of the NSL Constitution and Rules inconsistent with the South African Constitution and invalid. Although the court's finding, arguably, related to specific provisions of the NSL Constitution and Rules, the Coetzee matter marked the turning point for the NSL's Constitution and Rules in general. The NSL went on to effect significant changes, if not a complete overhaul of its Constitution and Rules. Most notable of these changes are the changes to the rules relating to dispute resolution. Prior to these changes, the NSL Constitution

[24] The Constitution of the Republic of South Africa, 1992.
[25] Ibid., Section 34.
[26] 2001 (1) SA 1254 (C).
[27] Case C-415/93, *Union Royale Belge des Sociétés de Football Association v. Jean-Marc Bosman, Royal Club Lidgeois v. Jean-Marc Bosman and others, and UEFA v. Jean-Marc Bosman*, December 15, 1995, 1995 E.C.R. 1-4921. This case revolutionised the rules relating to the transfer and free movement of footballers in Europe. It confirmed that once a footballer's contract had come to an end, such footballer is free to move to any club and no transfer fee can be demanded for the footballer. It also confirmed that European clubs cannot restrict the number of footballers from EU countries.

and Rules had provisions for the resolution of disputes internally, but there was no dispute resolution chamber.[28]

Arbitrations in terms of the NSL Constitution and Rules were ad hoc, held in terms of the Arbitration Act[29] and only convened after the dispute had been referred to the Chief Executive Officer (CEO) of the NSL for determination or where the parties had opted for arbitration directly. Following the Coetzee ruling, as mentioned above, the NSL amended its Constitution and Rules to provide for internal dispute resolution among those involved in professional football through standing committees of the NSL. Article 16 of the NSL Constitution provides for the establishment of two standing committees under the NSL, namely the Disciplinary Committee and the NSL DRC. The Disciplinary Committee deals with all matters of a disciplinary nature. Disputes of a disciplinary nature include disciplinary charges that are instituted by the NSL on its own accord and disciplinary disputes instituted pursuant to protests or complaints by members of the NSL against one another. The Disciplinary Committee has powers to impose sanctions ranging from warnings, suspensions or bans, and monetary fines.[30]

A party that is dissatisfied with the finding or sanction of the Disciplinary Committee can refer an appeal to SAFA in terms of the SAFA Constitution. If any of the parties is not satisfied with the SAFA Appeals Board's decision the matter can be referred to arbitration in terms of the SAFA Constitution. The arbitration is final and binding. An appeal against the arbitrator's decision can be lodged to CAS.[31] The NSL DRC, on the other hand, deals with any other disputes that are not of a disciplinary nature. Article 18.1 of the NSL Constitution provides that:

> … all participants in professional football are required, and undertake as a condition of membership and/or registration with the NSL, to refer all and any disputes and differences, other than those of a disciplinary nature, as between them to the Dispute Resolution Chamber rather than to courts or administrative tribunals.

[28] Razano, opcit.
[29] No, 42 of 1965.
[30] Rule 55.6 of the NSL Rules.
[31] Good examples of such appeals to CAS are the appeals at the time of writing by Thanda Royal Zulu Football Club and Chippa United Football Club relating to the sanctions imposed by the Disciplinary Committee following a boycott of matches by the NFD clubs during the NSL 2012 2013 season. The sanctions affected promotion of clubs from the NFD to the Premier Division of the NSL.

Article 24 of the NSL Constitution makes it clear that disputes should be resolved primarily through ADR and the courts should be the last resort. It provides that:

> A club, official, player, coach, agent or any person subject to the provisions of this constitution, may not seek recourse in a court of law or administrative tribunal on any issue that may be determined in terms of this constitution or rules of the League or SAFA or the statutes of FIFA unless all procedures prescribed in these prescripts have been exhausted.

Articles 18 and 24 of the NSL Constitution are a compromise between FIFA Statutes and the Constitution. They give effect to the FIFA Statutes while at the same time ensuring that the constitutional right set out in section 34 of the Constitution is not infringed. Article 68.2 of the FIFA Statutes is couched in absolute terms i.e. 'recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.' Section 34 of the South African Constitution on the other hand puts the courts at the forefront. It prescribes that the Constitution '…is the supreme law of the Republic [of South Africa]; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'[32] As a result of this potential conflict and to ensure that the NSL Constitution and Rules are valid in terms of South African law, the NSL compromised between the two by providing for dispute resolution in terms of the football rules as the first instance and then the courts if the dispute remains unresolved. Therefore, a participant in professional football will face difficulties in persuading the courts to exercise their discretion and deal with a matter if the 'internal remedies' (ADR in terms of football rules or agreements) have not been exhausted first. The NSL has to be commended on this as very often, in South Africa, the argument against ADR is that access to court is a constitutional right and an arbitral clause or rule does not oust the jurisdiction of the courts.[33]

The standard NSL fixed-term contract of employment for professional footballers also prescribes that any disputes arising from the contract must be referred to the NSL DRC.[34] In addition various NSL clubs have incorporated an arbitration clause

[32] Section 2 – Supremacy of the Constitution.

[33] Razano, opcit.

[34] Clause 19(1) of the NLS provides that 'All disputes arising out of or relating to this contract, including disputes such as to the meaning or interpretation of any provision of this contract or as to the carrying into effect of any such provision or as to the termination or consequences of termination shall be referred to the Dispute Resolution in accordance with the NSL rules from time to time.'

in their contracts and employee handbooks stipulating that all disputes arising between the parties should be referred to the NSL DRC. The NSL DRC is an independent tribunal whose members are appointed by the NSL Executive Committee and footballers or their representatives.[35] Article 18 of the NSL Constitution provides for the establishment of the NSL DRC; demarcates its jurisdiction; prescribes the formalities that dispute referrals to the NSL DRC must comply with and the principles that the NSL DRC has to observe in dealing with any disputes brought before it. The NSL DRC is required to follow the principles of fairness and equity, 'just cause' and it's developing jurisprudence in making its decisions.[36] The Chairman of the NSL DRC is a senior advocate (barrister) and all the other members are attorneys (solicitors). Every dispute is adjudicated by a panel of three i.e. a permanent Chairman sitting with two other members that rotate from time to time.

1.3.2. Procedure

The NSL DRC has jurisdiction over disputes relating to, among other things, the determination of the status of footballers, disputed transfers of footballers, unfair dismissal and breach of contract.[37] The NSL DRC also plays an advisory role by advising the NSL at the request of the NSL on the interpretation of FIFA Statutes and regulations governing the status and registration of footballers.[38] The NSL DRC has jurisdiction over all participants in professional football i.e. the NSL itself, clubs, clubs' officials, footballers, coaches and agents.[39] There have been debates about the NSL DRC's jurisdiction over agents as they are not members of the NSL. A number of disputes have been referred to the NSL DRC by agents who have argued that the NSL DRC has jurisdiction over agents. Notwithstanding the clear listing of agents in the NSL Rules, the NSL DRC has held that it does not have jurisdiction over agents, unless of course the agent in question is a member of the NSL.

Rule 41 of the NSL Rules sets out the procedure that the NSL DRC has to follow when dealing with disputes. It also sets out the competent sanctions that the NSL DRC may impose. The NSL DRC has the power to make awards, or impose certain sanctions, that are enforced in terms of football rules and South African laws. The NSL DRC can make an order for payment of damages or compensation, payment

[35]Article 18.1 NSL Constitution.
[36] Ibid., Article 18.10.
[37] Ibid., Article 18.3.
[38] Ibid., Article 18.3.2.
[39] Ibid., Article 18.2.

of a transfer fee, an order for specific performance, a declaratory order or a costs award. The effect of the awards that can be made by the NSL DRC is similar to the effect of awards that are made by other independent dispute resolution tribunals and the courts in relation to sport related disputes. The NSL DRC has made a plethora of awards since its establishment. These can be and have been enforced by the successful parties in terms of the relevant football rules and South African laws. In addition, Rule 58 of the NSL Rules provides for an expeditious way of enforcing the awards, orders or sanctions of the NSL DRC. It empowers the Chief Executive Officer of the NSL to deduct money from any amount due to the defaulting party by the NSL and pay it over to the party in whose favour the award was made.

Although the NSL DRC deals with other types of disputes, including commercial sporting disputes, employment disputes between footballers and football club comprise the majority of disputes this body deals with. Article 18.4 of the NSL Constitution stipulates that any dispute relating to unfair dismissal has to be referred to the DRC within 30 days of the alleged dismissal or breach of contract.[40] This article has been the subject of a number of interpretation problems. Some parties have contended that the article prescribes that all disputes, of any nature, be referred to the NSL DRC within 30 days from the date that the cause of action arises. This is a significantly shorter period, for non-employment disputes, than the common law prescription period of 3 years. The NSL DRC clarified the position in the matter of *Mofokeng & Others and African Warriors Football Club*[41] when it held that Article 18.4 of the NSL Constitution does not apply to breach of contract disputes. Any dispute (other than dismissal disputes) can be referred to the NSL DRC within the common law prescription period of three years or any other statutory prescription period or any shorter prescription period as agreed by the parties. This was clearly explained by the NSL DRC in the Mofokeng case when it held that 'to stipulate, unilaterally, that a player must refer a contractual dispute within 30 days will be constitutionally unsound. The drafter could therefore not have intended to constrict a common law right of referring a contractual dispute to 30 days.[42] The 30-day period was introduced to align the procedure of the NSL DRC to that of the Commission for Conciliation Mediation

[40] The article provides as follows 'Disputes that arise from allegations of unfair dismissal or breach of contract must be referred to the Dispute Resolution Chamber within a period of thirty days from the date of dismissal. The Dispute Resolution Chamber is entitled to condone the failure of a party to timeously refer such dispute on application and may do so in the event that the delay is not excessive, there is an adequate explanation for the delay, and there are good prospects of success.
[41] (2012) 33 ILJ 2008 (ARB).
[42] P.2011 D-E.

and Arbitration (CCMA) a specialist statutory dispute resolution body that deals with employment-related disputes – and give effect to South African labour laws. It was also a measure to ensure that disputes are resolved within a reasonable period as there was a growing tendency of former employees – especially footballers to resurface after a very long time (more than 2 years in some instances) and refer disputes to the NSL DRC.

A party referring a dispute to the NSL DRC is required to pay an administrative referral fee.[43] All disputes referred to the NSL DRC must be in writing; set out all material facts upon which the claim is based; the relief that is sought; and the referrer is required to attach a list of all the documents that the referrer believes are relevant and will be utilised before the DRC. Any documents that are in the possession of the referrer must be attached to the dispute referral document.[44] The referral document has to be served on the respondent(s) and proof of service must be provided to the NSL.[45] In the event of a party not fully complying with these Rules, the NSL DRC has discretion - upon application by such party to condone noncompliance with the Rules.[46] Once the referral has been received by the NSL, the matter is scheduled for the voluntary process of conciliation. It will then be set down for arbitration on at least 14 days' notice to the parties.[47]

Parties to the arbitration before the NSL DRC are entitled to a representative of their choice and are guaranteed a fair hearing. Every party has a right to speak on the facts, prove its case or disprove the case of a counter-party, is allowed to file any arguments and documents it seeks to rely on to prove its case, and has a right to call experts where expert evidence is required. All this is done with limited formalities. The formalities before the NSL DRC do not come anywhere close to the rigid rules of the courts or statutory tribunals, making the DRC procedure more attractive than the traditional litigation route. Any party to the proceedings before the NSL DRC that is not satisfied with the award made by the NSL DRC can refer the matter to appeal to the SAFA Appeals Board in terms of the SAFA Constitution.[48] If any of the parties is not satisfied with the outcome of the appeal before the SAFA Appeals Board, that party can refer the matter to further

[43] Rule 41.1.NSL Rules.
[44] Article 18.5 NSL Constitution.
[45] Ibid., Article 18.6.
[46] Ibid., Article 18.4.
[47] Ibid., Article 18.8.
[48] Ibid., Article 21.

arbitration in terms of the SAFA Constitution. The arbitration in terms of the SAFA Constitution is final and binding on the parties.[49]

However, should a party wish to pursue the matter further, that party can refer an appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.[50] If there are any grounds of review, a review application could be made before the court in terms of the Arbitration Act as the courts have inherent jurisdiction and the football rules do not oust the jurisdiction of the court.[51] The grounds of review are very limited and a review application can only be brought if the arbitrator has misconducted him/herself in relation to his/her duties as an arbitrator; the arbitrator has committed a gross irregularity or has exceeded his powers or the award has been obtained improperly. Review applications to court are, however, not encouraged as all disputes should be dealt with through the dispute resolution processes outlined in the football rules.

1.4 Football Dispute Resolution in Nigerian

As noted above, the FIFA and CAF Statute oblige member associations to establish their own arbitration tribunals for the resolution of football disputes. Nigeria in complying with the provisions of FIFA and Confederation of African Football (CAF) statutes provides in the Nigerian Football Federation (NFF) Statutes as follows:

1. NFF shall create an Arbitration Tribunal which shall deal with all internal national disputes between NFF, and its members, players, officials, match and players agent that do not fall under jurisdiction of its judicial bodies[52].
2. NFF, its members, players, officials and match and player's agents will not take any dispute to Ordinary Courts unless specifically provided for in these statutes and FIFA regulations. Any disagreement shall be submitted to the jurisdiction of FIFA, CAF, West African Football Union (WAFU) or NFF[53].
3. NFF shall have jurisdiction on internal national disputes, i.e. disputes between parties belonging to NFF. FIFA shall have jurisdiction on

[49] Razano, opcit.
[50] Ibid.
[51] Louw, A. *Sports Law in South Africa*. Kluwer Law International BV, The Netherlands,(2010) p. 179; cited in Razano opcit.
[52] Art. 68 NFF Statutes 2010.
[53] Ibid.,Art.69(1) .

international disputes, i.e. disputes between parties belonging to different associations and/or Confederations.[54]

4. In accordance with relevant articles of the FIFA statutes, any appeal against a final and binding FIFA decision shall be heard by the CAS.[55]
5. NFF shall ensure its full compliance and that of its members, players, officials and match and player's agents with any final decision passed by FIFA, CAF, WAFU body or CAS.[56]

Despite these provisions in the NFF Statute, the National Dispute Resolution Chamber for football has not been established in Nigeria. Thus, football disputes are taken to regular courts which are against the principles of Art.58 FIFA Statute 2022, and Art. 46 CAF Statute. In 2007, FIFA issued a circular to its member associations decrying the fact that only a few member associations had established a judicial body to adjudicate over employment disputes between players and clubs and advocating the establishment of National Dispute Resolution Chambers (NDRCs) to lighten the burden on the FIFA DRC and ease the process of adjudication.[57]

The absence of the NDRC in Nigeria has resulted in many football disputes either going unresolved or being referred to the ordinary courts of law.[58] In the case of Jalla *& 3ors. v. NFA &2ors. Suit No. FHC/ABJ/CS/1376/2022(Unreported),* a Federal High Court sitting in Abuja ordered the NFF to temporarily stop its upcoming election that was scheduled to take place on September 30, 2022. In the case of *Nnaji v. NFA & anor.(2010)LPELR-4629(CA),* the Court of Appeal held that the CAF Statute is a foreign statute and thus must be domesticated before its application. This decision implies that even FIFA Statutes will be questioned for its non-domestication in Nigeria.

The absence of a NDRC in Nigeria has equally affected the development of the legal jurisprudence on football since there is no single repository for football cases. This has in turn led to the absence of any known law reports on football law and

[54] Ibid.,Art.69 (2).
[55]Ibid.,Art.70 (1).
[56] Ibid.,Art.70(2).
[57]FIFA Circular no.1129, cited in Omuojine, K. opcit.
[58] see the cases of *Nnaji v. NFA &Anor.(2010)LPELR-4629(CA); Sam Jaja V. NFF&Ors. Suit no.* FHC/ABJ/CS/179/10; *Akpotor Power & 8 Ors. V. Warri Wolves FC &4 Ors. Suit no.* NICN/EN/29/2012*; Osiwa Ibuya v. Delta State Football Association suit no. NIC/EN/32/2011;* Harrisson Jalla &3 Ors. v. NFA &2 ors. suit no.FHC/ABJ/CS/1376/2022; Harrisson Jlla & ors. v. F.R.N., Amaju Pinnic & ors. suit no. FHC/ABJ/CR/93/2019.

insignificant interests of lawyers in football law. It has equally led to the absence of lawyers, or judges who are experts in football law. Thus the need for the NFF to fulfill its statutory obligation of establishing the NDRC cannot be overemphasized as the absence of NDRC has hampered the development of the legal jurisprudence of football in Nigeria. Meanwhile, since the establishment of the South Africa National Soccer League Dispute Resolution Chamber. Football jurisprudence and law in South Africa is gradually developing. Football disputes are no longer taken to ordinary courts at first instance.

Furthermore, the absence of a NDRC has led to Nigeria receiving various sanctions from FIFA. Nigeria was suspended from international football in 2014 because of court case and government interference. FIFA sent a letter to the NFF expressing its concern after the NFF was served with court proceedings preventing its president from running the country's soccer affairs. FIFA said the court order compelled the Nigerian minister of sports to appoint a senior member of the civil service to manage the NFF until the matter was heard in court. Nigeria was banned by FIFA until the court case was withdrawn.[59]

In addition, the constitutional conflict between the NFF Statute on the principle of non-recourse to ordinary courts will continue to be a tussle in Nigeria in the absence of a NDRC in football because the provision contravenes section 36(1) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) which provides as follows 'in the determination of civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to fair hearing within reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.'

Also, by the provisions of section 1(3) of the CFRN 1999 any law that is inconsistent with the provisions of the constitution shall to the extent of its inconsistency be declared null and void. In therefore implies that in the face of the provisions of the constitution and FIFA Statues conflicting, the Constitution will prevail and football cases will be taken to regular courts. South Africa has being able to solve this constitutional conflict by establishing its own NDRC and making rules for its operation by providing for dispute resolution in terms of the football with the NDRC as the court of first instance and then the regular courts if the dispute remains unresolved. Therefore a participant in professional football will face

[59] https://www.reuters.com>article>... Accessed on 16/04/2023.

difficulties in persuading the courts to exercise their discretion and deal with a matter if the 'internal remedies' have not been exhausted first.

Nigeria can adopt the model of South Africa which is in consonance with section 1(c) Arbitration and Conciliation Act 2022 but first NFF must put in place a system for this by establishing the NDRC and its guiding rules as was done in South Africa.

1.5 Conclusion

The fundamental principles of dispute resolution in football as captured in Article 58 of the FIFA Statute 2022 provide the basis of dispute resolution in football. The article is premised on the principles that recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations and member associations are to establish their own national dispute resolution chamber. This paper finds that:

1. The absence of the National Dispute Resolution Chamber in Nigeria has resulted in many football disputes either going unresolved or being referred to the ordinary courts of law.
2. The absence of the NDRC in Nigeria has equally affected the development of the legal jurisprudence on football since there is no single repository for football cases.
3. Recourse to ordinary courts of law in Nigeria football has led to FIFA sanctions.

Based on the above findings, this paper recommends the establishment of a national dispute resolution chamber in Nigeria with South Africa as learning point.

Analysing the Institutional Framework for the Protection and Assistance of Internally Displaced Persons in Nigeria

M. S. Sheka[*] and Sani Abdulkadir **

Abstract

Nigerian Internally Displaced Persons (IDPs) are still vulnerable. To protect them, National Commission for Refugees, Migrants and Internally Displaced Persons (NCRMI) was established with mandate among others to protect IDPs and promote their livelihoods. In addition, other institutions are providing protection and assistance to IDPs. To this end, the objective of the paper is to examine the institutional framework for the protection of internally displaced persons in Nigeria with a view to finding their capacity, strength and weaknesses. To achieve that, a doctrinal method was employed. Having analysed same, it was found among other things that NCRMI is limited in capacity to effectively address the overwhelming magnitude of IDPs in the country mostly because some States and Local Governments have not seen the need to legislate and establish complementary functional IDPs protection agencies to address the humanitarian challenges of citizens in their constituencies. Furthermore, NCRMI and other agencies lacks adequate resources to protect and assist people displaced for a longer period of time or to assist returnees and finally concluded by recommending among other things that the government needs to address capacity building, adequate funding of NCRMI and other institutions participating in protecting IDPs. This way, NCRMI would not only have the capacity to effectively address the overwhelming magnitude of IDPs in the country, but also have adequate resources at its disposal to protect and assist displaced persons for a longer period of time or to assist returnees. In addition, there is need for all the 36 States of the Federation and all the 774 Local Governments in the country to establish their States and Local Governments agencies respectively to address the humanitarian challenges of IDPs in their constituencies.

Keywords: Institutional, Protection, Assistance, Internally Displaced Persons, Nigeria

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1.1 Introduction

Displacement is likely to become more common in Nigeria due to the challenges of communal conflicts, insecurity, flood and negligence on the part of the government in developing measures to mitigate and prevent their occurrences. Their impacts can be severe in terms of human casualties, direct damage and indirect effects. However, this can be minimised by adequately utilising available resources through coordination and integration between different entities that are involved in the protection, operation and by developing measures that promote effective protection and assistance to enhance overall implementation of the legal framework for the protection of internally displaced persons (IDPs) in Nigeria generally. However, the expansion of the National Commission for Refugees, Migrants and Internally Displaced Persons (NCRMI) by Federal Government to cover issues relating to IDPs and the coordination of migration and development in 2002 and 2009 respectively set up a platform which shows that Nigeria is gradually moving away from response and relief to a more proactive mitigation and preparedness approach in its displacement management process.

So, to identify existing gaps and weaknesses, and to improve rapid response and better preparation for the protection of IDPs in Nigeria, it is important need to take into account the current situation by evaluating the capacity and capability of government and its agencies as well as other organisations and individuals that take part in the protection of IDPs activities. Doing so would enable identification of areas of improvement and promote development of measures that would strengthen the protection activities and build the capacity of those involved. It is therefore important to develop adequate awareness of the situation and understand the level of resources available for the protection of IDPs as well as the capacity of those involved. Such resources may include facilities, staffing and training, as well as activities and programmes designed to improve staff skills and knowledge of people in building their capacity on issues about IDPs in Nigeria.

Undoubtedly, effective protection operation requires adequate allocation of resources to meet the needs of IDPs and this can be achieved through the coordination, cooperation and integration of efforts of different stakeholders involved. Hence, this paper aims to give an overview of the institutional framework for the protection of IDPs in Nigeria, taking in to account the current situation and the protection institutions involve in protecting IDPs in Nigeria and the relationships between them. The paper further outlines the channels of communication used in disseminating IDPs information and the information

sharing pattern among the various IDPs protection entities in the country. It concludes by outlining the factors affecting the protection of IDPs in Nigeria.

1.2 Conceptual Clarification of Key Terms

This section brings to light certain key terms worthy of clarification as follows:

1.2.1 Displacement

Displacement simply means a situation in which people are forced to leave the place where they normally live. Article 1(1) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)[1] defines internal displacement as the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internally recognized state borders. To Ajigboye,[2] internal displacement refers to the forced movement of people within the country they live in, to flee their homes or places of habitual residence, in the context of conflict, violence, development projects, disasters and climate change, and remain displaced within their countries of residence.

1.2.2 Internally Displaced Persons (IDPs)

IDPs are defined by Guiding Principles on Internal Displacement as persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situation of generalized violence, violations of human rights or natural or human-made disasters, and also who have not crossed an internationally recognized state border.[3] While according to Hamzat, internally displaced persons are mostly victims of the inhumanity of man against man. They are victims of various kind of injustices or violence, confrontations, perpetrated by either their own government against them or by others, such as communal clashes, terrorism, riots, religious conflicts, natural disasters and so on.[4]

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[1] African Union Convention for Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009.

[2] Ajigboye, O. (2018), International Law and the Responsibility to Protect: Legal and Theoretical Basis for International Intervention in Nigeria, *Journal of Sustainable Development, Law and Policy, Vol. 3*, Afe Babalola University, Ado Ekiti, Ekiti State, 3, p.87.

[3] Article 1(2) of the United Nation Guiding Principles on Internal Displacement, 1998.

[4] Hamzat, A.O. (2016), *Challenges of the Internally Displaced Persons and the Role of the Society*. https://www.thenigerianvoice.com/news/113484/challenges-of-the-internally-displaced-persons-and-the-role.html, Accessed on 8th October, 2020 @16:50hrs

However, it is to be noted that even though IDPs and refugees have been forced to flee from their homes, as individuals or groups and the experiences of refugees and IDPs are similar in many regards, there are also a significant differences. Refugees have cross international borders and are entitled to protection and assistance from the States into which they have move and from international community through the United Nations (UN) and its specialist agencies. IDPs on the other hand, are displaces within their own country, although international law generally provides them with protection, there is no international law or standard specifically covering IDPs and no UN agency is specifically mandated to ensure their welfare.[5]

1.2.3 Meaning of Protection of Internally Displaced Persons

Protection is defined as all activities aimed at obtaining full respect for the right of the individual in accordance with the letter and spirit of the right of the relevant bodies of law, namely Human Rights Law, International Humanitarian Law and Refugee Law.[6] Protection is an objective which requires full equal respect for the right of all individuals, without discrimination, as provided for in national and international law. Protection is not limited to survival and physical security but covers the full range of rights, including civil and political rights, such as the right to freedom of movement, right to political participation, and economic, social and cultural rights, including the right to education and health. Protection is a legal responsibility.

1.3 Main Causes of Internal Displacement of Persons in Nigeria

The main causes of internal displacement and forced migration in Nigeria, given the historical trends, are multifaceted with a number of drivers that are responsible for their complexity. It is imperative to discuss them below under separate headings:-

1.3.1 Flood

Flood is generally perceived as a very large amount of water that has overflowed from source such as a river onto a previously dry area due to the massive geographical distribution of river plains and low-lying coastal areas. This includes the simple notion that a flood involves surplus water as compared with average

[5] Ryan, J., and Childs, D. Refugees and Internally Displaced Persons. In: Ryan, J., Mahuney, P. F., *et. al.*, (Eds) Conflict and Catastrophe Medicine, Springer, London, (2002), p.7.

[6] Protection of Internally Displaced Persons, Policy Paper Series, No. 2, 2000 and ICRC, Strengthening Protection in War. A Search for Professional Standards, 2001, p.1.

water levels.[7] The effects of a flood can be local to a neighborhood or community. It can cast a larger impact; the whole river basin and multiple states could get affected. Every state is at its risk due to this hazard. There are many reasons why floods occur but these can be divided into categories which include flash floods, storm surge, and dam failures.

In Nigeria, flooding is the most frequent and most widespread of natural disasters which adversely affect and displaced many people[8] According to International Organization for Migration, flooding affected most of the country in 2019 and triggered most of the 157,000 new displacements recorded.[9] Also about 15,519 individuals were displaced due to flooding in Kaduna, Katsina, Kano and Zamfara States between August-September, 2020.[10] Further, National Emergency Management Agency (NEMA) has recorded 91 deaths from flooding this year 2022, in Jigawa State, hundreds of households have been displaced to 11 temporary camps, as floods have destroyed many houses, infrastructure, farmlands, livestock and properties more than any state in the country.[11]

1.3.2 Ethnic Conflict

Ethnic conflict is a conflict between non-state groups that are organized along a shared communal identity. It involves threat or action of one party directed at a community's rights, interests or privileges or of another party, because of differences over economic issues, power or authority, cultural values and beliefs.[12] Ethnic conflicts in Nigeria can be divided into two broad categories.[13] Herder-Farmer conflicts and Religious conflicts.

Herder-Farmer Conflict: is a protracted inter-communal conflicts fuelled by regional or ethnic divisions regularly lead to death and displacement

[7]Adebayo, A. A., and Oruonye, E. D. (2019), An Assessment of the Effects of the 2018 Floods in Taraba State, Nigeria. A Paper Presented at the Annual National Conference of Hydrological Scientist, Organized by the Association of Hydrological Science, held at University of Agriculture. Abeokuta, Ogun, State, from August 14 -16, 2019, p. 15.
[8]Ibid, p.18.
[9] IOM Nigeria Flash Report: Population Displacement, Northwest/North central; https//www.iom.int; Accessed on 14th January 2021@ 1500 hours.
[10] Ibid.
[11] Nigeria-Flood Update (NEMET, NEMA, Media) ECHO Daily Flash of August, 2022; https://reliefweb.int/report/nigeria/nigeria-floods-update-nemet-nema-madia-echo-daily-flash-23-august-2022, Accessed on 9th November, 2022, at 8:14am.
[12] Merriam-Webster Dictionary (1995), 5th Edition, Oxford University Press, Oxford, p.242.
[13] Nigeria Social Violence Project Summary, 29th June, 2015.

throughout the country.[14] It is also fueled by wide spread poverty and disputes over resources have blotted stability and instigated economic and social dislocation in Nigeria. Inter-ethnic violence such as the Tiv – Jukun in Taraba State and Zangon-Kataf conflict in Kaduna State among others, had land factor as one of the central issues stimulating the clashes.[15]

Religious Conflict: This is a conflict occurring between members of two or more religions. Religion plays a critical role in Nigerian society and has expressed itself as a potent force in the geopolitical development of Nigeria.[16] Nigeria has been engulfed in numerous religious crises, an example is the religious conflict engulfed the city of Kaduna in February 2000 and Jos, Plateau State between Christians and Muslims over the implementation of Sharia Law, thousands of lives and property worth millions of naira were destroyed.[17]

1.3.3 Insurgency: - Insurgency refers to a violent move by a person or group of persons to resist or oppose the enforcement of law and running of government or revolt against constituted authority of the state or of taking part in insurrection.[18] Therefore, insurgency denotes an internal uprising often outside the confines of nations and law and it is usually described by military actions/tactics. It is a systematic struggle carefully and logically carried out to achieve certain objectives with an eventual aim of replacing the existing government structure. To demonstrate their anger on the state, insurgents usually target civilians and infrastructures. A good example is the insurgency uprising some parts of northeast Nigeria perpetrated by Boko Haram insurgents and northwest carried out by bandits, which include about 58 people killed on 22/4/2021 in Magami, Yar Doka, Ruwan Dawa, kangon Fari mana, Madaba villages, ets all of Zamfara State.[19] Similarly on same date, more than 100 people including the DPO and 17 other personnel were killed in Makuku along Sakaba village of Zuru emirate in Kebbi

[14] Moses, T. A. 'The Tiv - Jukun Ethnic Conflict and the Citizenship Questions in Nigeria; https://www.internal-displacement.org, Accessed On 14th July 2022.

[15]Ekpa, S. and Dalhan, N. H. (2015), Toward the Evolution of Right to Reparation for Loss of Housing and Property of Internally Displaced Persons (IDPs) in Nigeria, *Mediterranean Journal of Law and Policy, Vol.6, No.*3, p.380.

[16]Haldum,O. (2019), Ethnic and Religious Crisis in Nigeria. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol.10(2),* Awka, p.77.

[17]Jegede, P. (2009), Implication of Religious Conflicts on Peace, National Security and Development in Nigeria, *Ilorin Journal of Religious Studies 9(1),* p.59.

[18]Powell, C.H and Abraham, G. (2006), *Terrorism and International Humanitarian Law.* 1st African Yearbook of International Humanitarian Law, p.119.

[19]www.bbc.hausa.com, 26th April, 2021, @6:30am.

State by bandits and many people were displaced to other communities in order to save their lives.

1.3.4 Political Violence: - The pervasiveness of electoral violence has contributed to increase in the number of IDPs in Nigeria. For instance, it was reported that about 65,000 persons were displaced internally due to post election violence spread across seven northwestern States including Kano, Katsina and Sokoto in the 2011 general election in Nigeria.[20] Kano and Sokoto States were particularly affected by violence during the March 2019 gubernatorial elections in Nigeria leading to mass displacement.[21] Indeed, political violence which occurred before, during and after elections had impacted negatively on the socio-economic and political well-being of IDPs.

1.3.5 Kidnapping: - Kidnapping involve violent movement of a victim from one place to another, seizure or detention of his person, in fact, it is a restriction of victim's liberty which violates the freedom of movement as enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (as amended) on one part and on the other part, it involved financial gain or political demand. According to Fage and Alabi[22] economic reasons is the most common predisposing factor of the phenomena. The researcher agrees with the learned authors, as the profitability gain by the criminals has encouraged them to carry on with the act although there is a law prohibiting same.

Kidnapping in northwest Nigeria become rampant and have been predominantly carried out by criminal gangs popularly referred as 'bandits' in the region.[23] Travelers are often picked on high way, people from their villages. Their motive appears purely economic and their increased focus on schools can be seen as an attempt to maximize gains. This can be viewed from the kidnapping of 11th December, 2020 of over 300 students from boys Secondary School Kankara, Katsina State, more than 300 school girls kidnapped from their school in Jangabe,

[20]National Policy on Internally Displaced Persons (IDPs) in Nigeria 2012, p.10.
[21]Human Rights Watch,'Widespread Violence Ushers in President's New Term; https://www.hrw.org/news/20l9/06/l0/nigeria-widespread-violence-ushers-presidents-new-terrn, Accessed 15th July 2022, at 5:25pm.
[22]Fage, K.S. and Alabi, D.O. (2017), An Analysis of the Causes and Consequences of Kidnapping in Nigeria. *African Journal online*, www.ajol.info, Accessed 15th November, 2021, @10:12am.
[23]ISS Nigeria kidnapping Crisis Unites the North and South. Published 6th April, 2021. Accessed on 17th November, 2021 at 9:30am.

Zamfara State on 26th February, 2021.[24] The 39 Students kidnapped from a Forestry College Kaduna on 11th March, 2021, abducted students of Greenfield University, Kaduna[25]and the most recent attacked on Abuja-Kaduna train on 28th March, 2022 where not less than eight passengers were killed, while 168 others were kidnapped.[26] According to a report by the International Organization for Migration (IOM), of February 2022 banditry and kidnapping are the number two cause of displacement of peoples in northwest Nigeria.[27]

1.3.6 Government Action: - The unfavourable government policies such as the demolition of houses, streets, villages and even entire communities without providing any alternative to the teeming population has greatly contributed to internal displacement in Nigeria. It was reported that hundreds of thousand urban dwellers and other marginalized people were forcibly evicted from their homes most notably in Abuja, Lagos, Port Harcourt, Kano, Kaduna and Katsina by government in the name of security and urban renewal programmes without adequate consultations, notices, adequate compensation or offers of alternative accommodation.[28] Similarly, the mass massacre of civilians and widespread destruction of property by Nigerian military in the town of Odi, Bayelsa State and several villages in Zakibiam, Benue State in 1999 and 2001 respectively made the terrified residents to flee and abandon their homes. [29]

1.4 Institutional Framework for the Protection of IDPs in Nigeria

Nigeria's growing population of IDPs requires the establishment of dependable legal and institutional frameworks or the progressive interpretation of policy or law vis-à-vis international obligation. Although displacement has generated much concern globally, no universal convention addresses the displacement of persons within the national territory. Internationally, the United Nations has adopted the

[24] www.bbc.hausa.com, 26th February, 2021 @ 6:30am.
[25]Ibid.
[26]Kaduna Train Attack: Timeline of Events Three Weeks After Incident Without Decisive Action by Government; http://www.google.com/m?q=abuja+kaduna+train+attack&client=ms-opera-mobile&channel=new&espv=1, Accessed on 1st July, 2022, at 10:43pm.
[27] IOM Report: Communal Clashes Displaced More People in North-Central, Northwest Nigeria in 2021; https://humanglemedia.com/communal-clashes-displace-more-people-in-north-central-north-west-Nigeria-in-2021-iom-report, Accessed on 1st August, 2022, at 4:32pm.
[28]IDMC, Figures Analysis 2021 – Nigeria, p.7; https://www.Internal-displacement.org/countries/Nigeria; Accessed 1st August, 2022 at 5:58pm.
[29] Nigeria: Soldiers Massacre Civilians in Revenge Attack in Benue State; https://hrw.org/news/2001/10/25/nigeria-solidiers-massacre-civilians-revenge-attack-benue-state, Accessed 14th July 2022, at 5:50pm.

Guiding Principles on Internal Displacement in 1998 while at the regional level the African Union has adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa in 2009 and Nigeria and many member States have become a party to it. The later compels the promulgation of binding regime at the state level.[30] However, Nigeria's search for a durable solution so far has resulted only in the drafting of National Policy on Internal Displacement of Persons and National Commission for Refugees, Migrants and Internally Displaced Persons Bill.

Article 3(2) (b) of the Kampala Convention[31] places an obligation on States Parties to designate an authority or body, where needed, responsible for coordinating activities aimed at protecting and assisting IDPs and assign responsibilities to appropriate organs for protection and assistance, and for cooperating with relevant international actors and Civil Society Organisations, where no such authority or body exists. Appointment of a national focal point is a crucial step both to ensure sustained attention to internal displacement issues and to facilitate coordination, both among various branches and bodies of government and between them and other relevant actors, particularly domestic civil society groups, national human rights institutions, and international humanitarian agencies.

Nigeria has established some institutional mechanisms for the protection and assistance of IDPs in the country. This framework has made it relatively easier for the government to cater for the needs of its internally displaced population. The creation of the Federal Ministry of Humanitarian Affairs, Disaster Management and Social Development (FMHDS) was one of the ways to address some of the humanitarian challenges confronting millions of Nigerians either displaced by *Boko Haram* insurgency in the North-East, banditry or kidnapping in Northwest or those faced by natural disasters like floods in other parts of the country. As such, FMHDS came into being with the mandate to design humanitarian policies and work out quick plans to provide effective coordination of national and international interventions in emergency periods. On commencement, six agencies were brought under it for coordination and effective management in order to address urgent need of millions of Nigerians who are living in extreme poverty. The agencies under FMHDS are: National Commission for Refugees, Migrants and Internally Displaced Persons, North-East Development Commission, National Emergency

[30] Article 3(2) (a) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons, 2009.
[31] Ibid.

Management Agency, National Agency for Prohibition and Trafficking in Persons, National Senior Citizens Centre and National Commission for Persons with Disabilities. Some of these agencies particularly National Commission for Refugees, Migrants and IDPs (NCRMI) and National Emergency Management Agency (NEMA) are mandated to offer material assistance to repatriated Nigerians and IDPs irrespective of the cause of displacement and to protect the interest of refugees in Nigeria among others.

Thus, the National Commission for Refugees, Migrants and Internally Displaced Persons (NCRMI) is designated as the leading agency of government that is responsible for coordinating activities aimed at protecting IDPs,[32] but there are other similar organisations that are also involved in carrying out functions for the protection of IDPs in the country which are established by Law. The Act that established NCRMI mandated the agency with the approval of the Secretary to the Government of the Federation to "make regulations necessary for giving effect to the provisions of this Act."[33] Nevertheless, the rising severity of forced displacement of people from their homes or places of habitual residence as IDPs has necessitated the participation of many other agencies with various experts for the protection of IDPs in the country. Such agencies are established under certain specific laws that grant them powers to be engaged in protecting IDPs within the country although NCRMI is meant to oversee all activities of these other agencies in terms of protection of IDPs operations. Some examples of such Acts and regulations are discussed below.

1.4.1. National Commission for Refugees, Migrants and IDPs

The National Commission for Refugees (NCR) was established by Decree 52 of 1989. (now National Commission for Refugees Act), [34] the Act incorporated the 1951 United Nations Convention Relating to the Status of Refugees, its 1967 Protocol and the Organisation of African Unity Convention Governing Aspect of Refugees Problems in Africa to provide for safeguarding the interest and treatment of persons who are seeking to become refugees in Nigeria or persons seeking political asylum in Nigeria and other matters incidental thereto.[35] NCR is

[32] S.25 (2) (a) of the National Commission for Refugees, Migrants and Internally Displaced Persons Bill, 2019.
[33] Ibid., S. 40.
[34] Cap. N21 Laws of the Federation of Nigeria, 2004.
[35] Ladan, M.T. Protection of Displaced Persons under International Human Rights and Humanitarian Laws; A Case Study of Causes of Displacements in Nigeria. Being a Paper Presented at a 2-Days

mandated by the NCR Act to lay down general guidelines and overall policies on issues relating to Refugees and asylum seekers in Nigeria and to advise the Federal Government on policy matters relating to refugees. In 2002, President Obasanjo informally expanded NCR's mandate to cover the management of the affairs of IDPs due to their sheer volume, trend and impact of their plight on the Nigerian society.[36] This expansion has been contentious, as the bill to repeal the NCR Act 2000 to extend its mandate to returnees, stateless persons, IDPs and migrants (all these categories of persons are referred as Persons of Concern to the Commission) was never passed and therefore is yet to acquire the legal approval required. Nevertheless, since then the Federal Government changed the name of the Commission to National Commission for Refugees, Migrants and Internally Displaced Persons (NCRMI) and is working towards the appropriate legislative amendment. [37]

The Commission does not have an Act but a bill that passed the third reading of the National Assembly and awaiting presidential assent, it is currently in its final phase. Section 2 of the NCMI Bill established NCRMI, as a body corporate with perpetual succession and a common seal and may sue or be served in its corporate name. Sections of the Bill goes further to among other, mandate the commission to advise the federal government on policy matters relating to refugees, migrants and IDPs, be the designated agency to government responsible for coordinating activities aimed at protecting and assisting IDPs and shall seek the collaboration of other appropriate ministries, departments or agencies of government for such protection and assistance. In fact the functions of the Commission are provided under section 6 of the Bill.[38] The Section provides inter alia that the Commission shall be to advise the Federal Government on policy matters relating to refugees, migrant and internally displace persons; be the designated agency of government responsible for coordinating activities aimed at protecting and assisting internally displaced persons and shall seek the collaboration of other appropriate Ministries, Departments or Agencies of Government for such protection and assistance.

Workshop on International Humanitarian Law for Law Teachers in Nigerian Universities, Held at Nigeria Law School Bwari, Abuja, from August 14th – 16th, 2017, p.14.

[36] Ibid.

[37] Kyari, F.M. (2020), *The Causes and Consequences of Internal Displacement in Nigeria and Related Governance Challenges.*, SWP Press, Berlin, p.18.

[38] National Commission for Refugees, Migrants and Internally Displaced Persons Bill, 2019.

Subsection (2) of same section[39] goes further to provide that, the Commission shall also (a) develop a policy framework to encourage and promote voluntary return of internally displaced persons of habitual residence or to resettle voluntarily in another part of the country with dignity; (b) proffer long-lasting solutions to problems of internally displaced persons through reconstruction and renovation of destroyed homes and properties; (c) partner with relevant government and humanitarian agencies in the implementation of national and international legal obligations relating to it functions under this act; and (e) encourage and ensure capacity building and skill acquisition through training programmes to Nigeria who are being repatriated in order to be self-depending and gainfully engage upon their return.

Thus, it is clear that Nigeria as a state take the issue of IDPs with paramount importance, hence the requirement that the NCRMI reacts to the needs of IDPs by protecting, assisting and preferring lasting solutions to their problems towards providing durable solutions to persons of concern. Among others the Commission on 5th November, 2022 distributed food and non-food items to persons of concern in Yenagoa, Bayelsa State. Similarly, on 24th November, 2022 the Commission distributed food care package to over 500 household comprising of over 3000 individuals benefited in Jalingo, Taraba State.[40] On the other hand the Commission organized training and empowerment of persons of concerns (POC) in variable places across the country which include training and empowerment of 4th December, 2022 in Fila Local Government of Yobe State and Minna, Niger State, the training ended with lots of activities and practical by the participants on what they have to leant during the training.[41]

1.4.2 National Emergency Management Agency (NEMA)

Section 1(1) of the NEMA Act[42] established NEMA with headquarters in Abuja and with 6 Zonal offices in Enugu, Port Harcourt, Lagos, Jos, Maiduguri and Kaduna. Section of the Act goes further to among others, mandates the agency to organize, provide and coordinate emergency relief to victims of natural disasters throughout the federation and matters incidental thereto.

[39] Ibid.
[40] https://m.facebook.com/ncfrmi; Accessed on 27th December, 2022, at 1:52pm.
[41] Ibid.
[42] National Emergency Management Agency (Establishment, etc.) Act, Cap. N34, *Laws of the Federation of Nigeria*, 2004.

The Agency is empowered to provide direct material assistance to displaced persons and repatriated Nigerians irrespective of the cause of displacement.[43] The functions of the Agency are provided under section 6(1) as follows: -

> The Agency shall - (a) Formulate policy on all activities relating to disaster management in Nigeria and co-ordinate the plans and programmes for efficient and effective response to disasters at national level; (b) Co-ordinate and promote research activities relating to disaster management at the national level; (c) Monitor the state of preparedness of all organizations or agencies which may contribute to disaster management in Nigeria; (d) Collate data from relevant agencies so as to enhance forecasting, planning and field operation of disaster management; (e) Educate and inform the public on disaster prevention and control measures; (f) Co-ordinate and facilitate the provision of necessary resources for search and rescue and other types of disaster curtailment activities in response to distress call; (g) Coordinate the activities of all voluntary organizations engaged in emergency relief operations in any part of the Federation; Receive financial and technical aid from international organizations and non-governmental agencies for the purpose of disaster management in Nigeria; (h) Receive financial and technical aid from international organizations and non-governmental agencies for the purpose of disaster management in Nigeria; (i) Collect emergency relief supply from local, foreign sources and from international and nongovernmental agencies; (j) Distribute emergency relief materials to victims of natural or other disaster and assist in the rehabilitation of the victims where necessary; (k) Liaise with State Emergency Management committees established under section 8 of this Act to assess and monitor where necessary, the distribution of relief materials to disaster victims; (l) Process relief assistance to such countries as may be determined from time to time; (m) Liaise with the United Nations Disaster reduction Organization or such other international bodies for the reduction of natural and other disaster; (n) Prepare the annual budget for disaster management in Nigeria; and (o) Perform such other functions which in the opinion of

[43] Makolo, H. and Collins, M. Legal and Institutional Framework for the Protection of Internally Displaced Persons: The Nigerian Case Study, *University of Abuja Law Journal*, (2019), p.13.

> the Agency are required for the purpose of achieving its objectives under this Act.[44]

Thus, it is apparent that Nigeria as a State views the issue of repatriation and internal displacement of her citizenry with serious concern. Hence, the requirement that NEMA reacts to the occurrence of disasters in the country by sending relief materials and supplies to the affected communities and assists the victims to survive the immediate problems of displacement and dispossession.[45] NEMA is responsible for the overall disaster management in Nigeria, it coordinates emergency relief operations as well as assists in the rehabilitation of victims where necessary and can be found in most States. It has often supported IDPs in the emergency phase of a crisis such as the 2022 flood disaster.

However, despite the expectations that the agency would effectively coordinate activities relating to disaster management at the national level in particular, as it concerns proactive post disaster rehabilitation and reconstruction, the agency has had to struggle to fully perform these mandates to the optimum. Furthermore, some of the States and the Local Governments have not seen the need to legislate and establish complementary functional emergency agencies to address the humanitarian challenges of citizens in their constituencies.[46]

Though NEMA has in many instances responded to the plight of IDPs in the country, however, in most cases, its responses are only ad hoc assistance and apart from being inadequate, it is limited only to the provision of basic necessities like food, shelter and medicine, while measures that ensure respect for the physical safety and the human rights of IDPs are not often given adequate attention. Problems like this may not be unconnected to lack of strong coordination and clear institutional mandate that encompasses a comprehensive approach that integrates assistance, protection and development support for the displaced persons.[47] Furthermore, NEMA lacks the

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[44] Section 6(1), National Emergency Management Agency (Establishment, etc.) Act, Cap. N34, *Laws of the Federation of Nigeria*, 2004.

[45] Ayeni B., (2013) Challenges to Mainstreaming Disaster Risk Reduction into the Development Process in Nigeria" In Mainstreaming Disaster Risk Reduction into Sustainable Development in Nigeria. Volume 11 (Abuja: NEMA), p.98.

[46] Mashi, S. A. *et. al*. (2021), Disaster Risk and Management Policies in Nigeria: A Critical Appraisal of NEMA Act, *International Journal of Disaster Risk Reduction*, p.19; http://doi.org/10.1016/j.jdrr.2021.10.011, Accessed on 12th October, 2022, at 10:28pm.

[47] Chen, J. *et. al.,* (2013), Public-Private Partnerships for the Development of Disaster Resilient Communities and the Protection of Internally Displaced Persons under International Law. *MUNFOLLJ Law Journal, Vol.2*, (2021), Faculty of Law, Madonna University, p.133.

resources to assist people displaced for a longer period of time or to assist returnees.[48] Since IDPs are also an important part of Nigerian citizens, it is imperative that government look into how to address the long term needs of IDPs as soon as possible, in order to enable them establish their lives in safety and dignity.

1.4.3 National Human Rights Commission

The National Human Rights Commission (NHRC) was established by the National Human Rights Commission (Amendment) Act 2010 in line with the resolution of the United Nations which enjoins all member states to establish Human Rights Institutions for the promotion and protection of human rights. The Commission serves as a mechanism to enhance the enjoyment of human rights. Its establishment aims at creating an enabling environment for extra-judicial recognition, promotion and enforcement of human rights, treaty obligations and providing a forum for public enlightenment and dialogue on human rights issues thereby limiting controversy and confrontation.[49]

The Commission's Strategic Work Plan is based on above includes public education and enlightenment, training, mediation, on the spot assessment, policy oriented research and so on. It includes strategies targeted at promoting democracy and good governance, rights of vulnerable groups, conflict situation and issues relating to extra-judicial killings/torture and other violence.[50] The Commission's mandate rests squarely on two platforms: promotion and protection of human rights. Under promotions, the Commission has held workshops, seminars, conferences, and interactive sessions with relevant institutions. A lot of sensitization, education and enlightenment programmes have been carried out by the Commission. The Commission hosted the first ever Nigeria Human Rights Summit that brought together all the stakeholders in the human rights community towards drafting the National Action Plan for the promotion and protection of human rights in Nigeria,[51]

Section 5 of the Act[52] mandates NHRC to: (a) Deal with all matters relating to the promotion and protection of human rights guaranteed by the Constitution of the Federal Republic of Nigeria 1999 as (amended), the United Nations Charter and the

[48] Ibid.
[49] Preamble to the National Human Rights Commission (Amendment) Act, 2010.
[50] Makolo, H. and Collins, M. Legal and Institutional Framework for the Protection of Internally Displaced Persons: The Nigerian Case Study, *University of Abuja Law Journal*, (2019), p.15.
[51] Ibid.
[52] National Human Rights Commission (Amendment) Act, 2010.

Universal Declaration on Human Rights, the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights and other international and regional instruments on human rights to which Nigeria is a party; (b) Monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the Federal Government for the prosecution and such other actions as it may deem expedient in each circumstance among others.

Despite the 2010 amendment, the NHRC has not been able to live up to expectation, particularly in the area of protecting the rights of IDPs in the country. A major weakness of NHRC is one of enforcement. Since the enforcement of human rights largely depends on the domestic machinery of the government, the institution is not strong enough or capable of providing adequate and effective platform for meaningful human rights promotion and protection. This is especially so because it is not independent and does not have the financial and logistical capability to meaningfully function effectively.[53] The NHRC seems to be in a more precarious position, being controlled directly or indirectly by the government through funding, composition of membership, and provision of operational guidelines, and tenure of office among others, government interference or influence becomes not a mere possibility but a reality.[54]

1.4.4 The Nigerian Red Cross Society

Nigerian Red Cross Society (NRCS) was established by the Nigerian Red Cross Act[55] as a Voluntary Aid Organisation. The Nigeria Red Cross Act and the General Conventions Acts of 1960 established the NRCS as a voluntary aid society, auxiliary to the public authorities. The NRCS has become an independent national society in February, 1961 following the official recognition by the President of the International Federation of Red Cross and Red Crescent, making Nigeria the 86 member nation of the International Red Cross and Red Crescent Committee in Prague in September, 1961.[56] The purpose of the society is stated in Section 4 of the Act, that the society among other things shall in time of war, to furnish volunteer aid to the sick and wounded both of armies and among non-belligerents, and to

[53] Louise, D. B. and Sylvan, V. (2010), *International Humanitarian Law and Human Rights Law*, Texas Press, Washington DC, p.99.
[54] Ibid.
[55] S. 1(1) Nigerian Red Cross Act, Cap. N130 *Laws of the Federation of Nigeria*, 2004.
[56] http://www.redcrossnigria.org/history.html, Accessed on 12th October, 2022, at 3:14pm.

prisoners of war and civilian sufferers from the effect of war; … and in time of peace or war, to carry on and assist in work for the improvement of health, the prevention of disease and mitigation of suffering throughout the world.

In 2020 alone, the Nigeria Red Cross Society in vulnerability analysis identified about 5,000 vulnerable families that were most affected by the floods in specific parts of the country.[57] It also reported that heavy rains and strong wind, between June and October 2022, led to Nigeria's worst flooding in recent years, affecting over 2.5 million people and displaced more than 1.4 million people in 33 out of 36 states,[58] and reported 600 deaths as a result of the flooding. The NRCS has been involved in camp management and providing support, involving provision of basic health care in several IDPs camps and settlements in partnership with NEMA/SEMA and other international organisations, particularly Doctors without Borders.[59]

However, despites all these laudable functions of the NRCS, there are no official IDPs camps of a long lasting nature in most States of Nigeria. Instead, temporary shelters are often provided in army or police barracks, schools or hospitals and serve as IDPs camps only for a limited period with poor sanitary conditions. The vast majority of displaced people in northwest Nigeria reportedly seek refuge with family, friends, or host communities especially in areas where their ethnic or religious group is in the majority.[60] Many appear to return to their homes or resettle near their home areas soon after the violence or natural disaster which forced them to leave have subsided while an unknown number also resettle in other areas of the country.

Generally, though, in actual practice, Nigeria has a national coordinating institution for displacement management and other matters connected therewith. However, it is only NCRMI that was established, mandated and empowered to manage IDP affairs in all phases by a specific national legislative or policy framework on internal displacement.

[57] Ladan, M. T. National Framework for the Protection of Internally Displaced Persons (IDPs) in Nigeria. A Paper Presented at a Conference Organized by Human Rights Societies of Nigeria, Held at National Human Rights Centre, Abuja, on Thursday, April 8, 2021, p.12.
[58] Nigerian Red Cross Society 2022 Annual Report.
[59] Aloba, O. and Obaji, E. Internal Displacement in Nigeria and the Case for Human Rights Protection of Displaced Persons, *Journal of Law, Policy and Globalization, IISTE,* New York, (2020), p.26.
[60] Ibid, p.39.

1.4.5 International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) has the mandate of ensuring the application of International Humanitarian Law as it affects civilians that are in the midst of armed conflicts. Thus, they traditionally do not distinguish between civilians who are internally displaced and those who remain in their homes. In a 2006 policy statement, the ICRC stated that ...the ICRC's overall objective is to alleviate the suffering of people who are caught up in armed conflict and other situations of violence. To that end, the organization strives to provide effective and efficient assistance and protection for such persons, be they displaced or not, while taking into consideration the action of other humanitarian organizations.[61] On the basis of its long experience in different parts of the world, the ICRC has defined an operational approach towards the civilian population as a whole that is designed to meet the most urgent humanitarian needs of both displaced persons, local and host communities.[62]

However, the Director of Operations of ICRC recognized that IDPs "deprived of shelter and their habitual sources of food, water, medicine and money, they have different, and often more urgent, material needs."[63]

1.5 Correlation between Institutions Responsible for Protecting IDPs in Nigeria

Effective IDPs protection operation cannot be accomplished without incorporation of the cooperative actions of different agencies.[64] One suitable way of accomplishing such cooperation is to mandate one particular entity to, where necessary, compel different agencies to take certain actions that will ensure IDPs are effectively protected.[65] In Nigeria for instance, such powers have been delegated

[61] Claude, B. "Custom in International Humanitarian Law." *International Review of the Red Cross 285* (November-December (1991), p.580.

[62] Jean-Marie, H. "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict." *International Review of the Red Cross 857* (March 2005), p.175 .

[63] Ibid.

[64] Palttala, P. *et. al.,* (2012), Communication Gaps in Disaster Management: Perception by Experts from Governmental and Non-Governmental Organizations. *Journal of Contingencies and Crises Management, 20(1),* Pp.2-12.

[65] Chen, J. *et. al.,* (2013), Public-Private Partnerships for the Development of Disaster Resilient Communities and the Protection of Internally Displaced Persons under International Law. *MUNFOLLJ Law Journal, Vol.2,* (2021), Faculty of Law, Madonna University, p.133.

to NCRMI.[66] However, even though NCRMI is given such responsibility, and is also liable for providing resources and funding to support IDPs protection operations, other agencies also partake in protection activities at different levels of government which need to be properly integrated and well-organised to harmonise and use resources effectively. Proper coordination of the activities and resources of different institutions depends on the way the agencies interact among themselves and how they share certain vital information.[67] Accordingly, NCRMI needs to improve its accountability and ensure adequate collaboration, integration and cooperation with other stakeholders by sufficiently sharing useful information to bridge this gap.

In Nigeria, the main source of funding for the protection of IDPs and NCRMI, as provided in the Section 34 of the NCRMI Bill, is allocation of 10% by the federal government of its ecological fund, although NCRMI is granted the permission to accept gifts and donations from both local and outside supporters.[68] Also, Section 39 of the bill has empowered the Commission to borrow money as it may require on such terms and conditions for the performance of its functions under this Act. However, considering the fact that most displacement occur at the local level, and affect mostly local population, the bulk of the Commission's resources are therefore channeled towards relief and rehabilitation, especially at local level, even though state and local levels contribute nothing towards funding the Commission.[69]

Therefore, it is important for all levels of government and other organisations involved in IDPs protection to interact well with the federal level agency and coordinate among themselves in making sure that available limited resources are utilised effectively and are channeled towards promoting effective IDPs protection operation in the country. This would have persuaded judicious use of donations according to the need created by the event and the capacity of various stakeholders involved. As such, this reiterates that the difficulty of implementing activities and

[66] Section 6(1)(b) of the National Commission for Refugees, Migrants and Internally Displaced Persons Bill, 2019 .

[67] Bharosa, N. *et. al.,* (2010), Challenges and Obstacles in Sharing and Coordinating Information During Multi-Agency Disaster Response: Propositions from Field Exercises. *Information System Frontiers, 12(1),* p.54 .

[68] Section 38(1) of the National Commission for Refugees, Migrants and Internally Displaced Person Bill, 2019 .

[69] Mashi, S. A. *et. al.,* (2019), Disaster Risks and Management Policies and Practices in Nigeria: A Critical Appraisal of the National Emergency Management Agency Act. *International Journal of Disaster Risk Reduction, 33,* p.253.

utilising resources in protection operation depends on the interaction between NCRMI and other levels of government as well as other agencies involved.[70]

To curb this challenge in Nigeria, laws have been established embedded in the NCRMI Act that serve as legal policies for the protection of IDPs and provide guidance on the way NCRMI should interact with other agencies for their protection within the country.[71] Adopting this policy will therefore influence the way resources are allocated and response is coordinated. Hence, the pattern of interaction between various IDPs protection institutions in Nigeria remains highly imperative in understanding the effects of, and developing measures to reduce displacement considering the numbers of disasters that have affected the country lately even though the system of managing them has not been very effective.

Lack of interaction between stakeholders during protection and assistance operation has often placed too much burden on NCRMI and has created difficulties for the Commission in identifying the extent of the problem and the kind of relief materials that may be needed by victims.[72] This advocates for an all-inclusive, profound and intensive approach that will promote suitable interaction, embrace and accommodate all stakeholders in dealing with IDPs issues in Nigeria.

While the Bill that established NCRMI was structured in a way that includes important sections addressing different issues for IDPs protection, and also gave powers to the Governing Council of NCRMI to provide policy direction on how the Commission should go about protecting IDPs in the country and interacting with other organisations that partake in IDPs protection, the bill failed to clearly defined whether the Council can make bye-laws or issue guidelines on certain operational activities related to protecting IDPs and can oblige different stakeholders to adopt the policies and action programmes within the country. The major function of the Commission has been specified in Section 6 of the Act and can be regarded as fairly comprehensive in terms of IDPs protection because it encompass a wide range of issues including protection from displacement, protection during displacement,

[70] Okoli, A. C. Internally Displaced Persons Management and National Security in Nigeria: The Nexus and the Disconnect. *Journal of Sustainable Development, Law and Policy*, Afe Babalola University, Ado Ekiti, Ekiti State, (2021), 3, p.21-59.
[71] Okon, E. O. (2020), Natural Disasters in Nigeria: An Economic Model. *American Journal of International Law, 2(1),* p.81.
[72] Mashi, S. A. *et. al.,* (2019), Disaster Risks and Management Policies and Practices in Nigeria: A Critical Appraisal of the National Emergency Management Agency Act, *Op. Cit.,* p.255.

provision for humanitarian assistance; and provisions relating to return, resettlement and reintegration of IDPs.

Unfortunately, there is no clear definition on how NCRMI should go about stirring the support and cooperation of other stakeholders in managing such complex issues. In addition, the structures for early warning systems at all levels of government are weak and require programmes to reduce displacement risk factors. Due to absence of provision in the NCRMI bill to support specific activities and programmes that enhance protection from displacement that would have helped to improve effective response and build back better, there will continue to be haphazard misappropriation of resources, duplication of efforts and inefficiency in protecting IDPs in Nigeria.

1.6 Factors Affecting the Implementation of Institutional Framework for the Protection of IDPs in Nigeria

The first problem that affects IDPs protection operation in Nigeria is poor coordination of IDPs protection activities.[73] For IDPs protection to be efficient, it requires effective coordination and integration of all activities that are required to build, sustain, and improve the ability to prepare for, protect against, respond to, and recover from threatening natural or human-induced disasters. This is a multi-jurisdictional, multi-sectoral, multi-disciplinary and multi-service requirement.[74] Thus, it is imperative that commission who is primarily liable to coordinate other relevant stakeholders in Nigeria wake up to its duty and effectively organise its activities during emergencies. This involves pulling together the physical and human resources of an organization to attain its goals.[75] IDPs protection operation is a complex, demanding and comprehensive process, in which effective response requires well-defined vision and foresight, careful planning, staunch commitment, discipline, proper and balanced coordination and good technical know-how.[76]

[73] Olanrewaju, C. C. *et. al.,* (2019), Impacts of Flood Disasters in Nigeria: A Critical Evaluation of Health Implications and Management. *Jamba Journal of Disaster Risk Studies, 11(1),* p.6.
[74] Adefisoye, T. (2015), An Assessment of Nigeria's Institutional Capacity in Disaster Management. *Op. Cit.,* p.167.
[75] Wondolleck, J. M. and Yaffee, S. L. (2015), *Making Collaboration Work: Lessons from Innovation in Natural Resource Management*, Island Press, London, p.301.
[76] Perry, R. W. and Lindell, M. K. Preparedness for Emergency Response Guidelines for the Emergency Planning Process. *UMYUK Law Journal, Vol.2, No.2,* (2020), Faculty of Law, Umaru Musa Yar'adua University, Katsina, p.339.

Therefore, the coordinator of IDPs protection is the liaison officer among the various departments, divisions and units that are responsible for protection activities. Effective IDPs protection involve the core phases of protection from displacement, protection during displacement, provision for humanitarian assistance; and return, resettlement and reintegration of IDPs with each phase having its own approach.[77] The protection from displacement phase, is regarded as the most difficult period, requires preparing for primary, secondary and tertiary levels of response depending on the nature and gravity of the disaster.[78] To achieve this successfully, it is essential to ensure proper coordination and a holistic approach to IDPs protection by integrating well among different participants to harmonise efforts and resources.[79] Notwithstanding the function of NCRMI, coordination of IDPs protection operation activities between different levels of government and other entities in Nigeria still remain a problem.

Also, the failure of the government to provide functional IDPs protection centers, especially at the state and local government levels is a setback to effective IDPs protection in Nigeria. Very frequently, the Government makes empty promises to victims, which are never implemented. These promises are intended to be used for media purposes and gain political recognitions, whereas victims are left unaided. It was argued that decentralization of protection activities yields better results,[80] but in Nigeria, it is obvious that there is yet, no or few functional IDPs protection structure in most of the 36 states and 774 local governments of the federation. The delay in response increased impacts from this event, a situation that would have been curtailed if government were strongly committed to provide functional services.

Another important factor affecting IDPs protection activities generally, is the lack of trained personnel with inadequate skills to respond to emergencies,[81] Nigeria is

[77] Turner, B. A. and Pidgeon, N. F. (2005), *Man-Made Disasters*. 2nd Edition, Butterworth Heinemann, London, p.213.
[78] Adefisoye, T. (2015), An Assessment of Nigeria's Institutional Capacity in Disaster Management. *Op. Cit.,* p.167.
[79] Mashi, S. A. *et. al.,* (2019), Disaster Risks and Management Policies and Practices in Nigeria: A Critical Appraisal of the National Emergency Management Agency Act. *Op. Cit.,*, p.259.
[80] Rumbach, A. (2016), Decentralization and Small Cities: Toward More Effective Urban Disaster Governance? Habitat International, 52, Pp.35-42.
[81] Holguín-Veras, J. *et al*., (2007). Emergency Logistics Issues Affecting the Response to Katrina: A Synthesis and Preliminary Suggestions for Improvement. *Transportation Research Record, 2022(1),* Pp.76-82.

not free from this problem. According to Adejuwon and Aina,[82] the lack of proper management training platforms for Nigerians to acquire the necessary knowledge that would aid emergency/displacement response is a great setback to IDPs protection in Nigeria. As indicated by Perry,[83] effective protection management is not exclusively government responsibility and the IDPs protection agencies involved but extends to the general public. Therefore, it is important for responsible authorities to provide adequate training for staff and volunteers, so as to improve their knowledge and prepare them better for unforeseen circumstances. In developed countries such as the United States, government has instituted programmes to train and develop the manpower of emergency management in the public through the establishment of schools.[84] There are over 180 schools in the USA, for instance, with emergency management related programmes.[85] But this is not the case with Nigeria, and IDPs protection is thus increasingly difficult as IDPs become more serious over time.

Apart from the issues discussed above, another factor is poor funding.[86] Consistent, prompt and adequate funding is essential to the effectiveness and efficiency of an organization.[87] For IDPs protection agency to function effectively, huge financial support is required in order to build human capacity and acquire up to date equipment and new technologies.[88] However, the case is different in Nigeria. The government does not consider funding for IDPs protection activities to be a priority, this has been a huge task for NCRMI and NEMA. Many countries have experienced a paradigm shift from a government-centered approach in IDPs protection to a decentralised community participation approach example, Sweden and Canada,[89]

[82] Adejuwon and Aina, (2014) .
[83] Perry, M. (2007), Natural Disaster Management Planning: A Study of Logistics Managers Responding to the Tsunami. *International Journal of Physical Distribution and Logistics Management.* p.216 .
[84] Alexander, D. E. (2015), *Disaster and Emergency Planning for Preparedness, Response and Recovery*. Oxford Press, London, p.97.
[85] Adefisoye, T. (2015), An Assessment of Nigeria's Institutional Capacity in Disaster Management. *Op. Cit.,* p.169.
[86] Taiwo, A. (2015), An Assessment of Nigeria's Institutional Capacity in Disaster Management. *Op. Cit.,* p.
[87] Ibid.
[88] Hu, Q. and Kapucu, N. (2016), Information Communication Technology Utilization for Effective Emagency Management Networks. Public Management Review, 18(3), Pp.323
[89] Lewis, D. *et. al.,* (2020), *Non-governmental Organizations and Development*. Routledge, London, p.80.

but Nigeria is still far from this in her IDPs protection approach, thereby ignoring an opportunity to reduce the effects of natural and human-induced disasters.

The lack of strong commitment on the part of government towards developing and implementing IDPs protection policies and regulations shows the inability of the agencies to mitigate, prevent and respond rapidly to emergencies particularly those resulting from human-induced hazards which are very common in Nigeria. Notwithstanding the existence of NCRMI at the federal level, majority of the states have until date not been able to establish state agency for the protection of IDPs likewise most local governments are also yet to establish local government agency for the protection of IDPs thereby creating gaps in NCRMI's ability to coordinate and implement IDPs protection programmes.[90] Inadequate availability of trained and skilled staff and poor coordination among different IDPs protection entities means that their protection in Nigeria is not adequately prepared to reduce displacement impacts.

Displacements resulting from floods are triggered by the lack of adequate drainages and the blockage of the existing ones,[91] which can easily be monitored by responsible authorities, while insecurity can also be avoided or reduced by providing adequate control measures especially when high level technology, adequate facilities and machineries are put in place and authorities are held accountable.[92] However, this has not been achieved successfully in Nigeria as a result of lack of commitment by responsible authorities and the absence of a well-developed protection from displacement plan that incorporates adequate monitoring and supervision of activities.

1.7 Conclusion

The chapter examines the institutional frameworks for the protection of IPDs in Nigeria, this is predicated on the fact that, the plight of IDPs has increase in recent years, becoming a serious challenge of global implications. Protecting the IDPs is a responsibility that rests foremost on government, though with the help of the international community. Therefore, in an effort to discharge this responsibility, there are myriad of institutional framework both at the national and international level established for the protection of displaced persons, this in addition to the

[90] Adefisoye, T. (2015), An Assessment of Nigeria's Institutional Capacity in Disaster Management. *Op. Cit.,* p.172.
[91] Ibrahim, T. A. *et. al.,* (2019), Causes and Effects of Building Collapse in Nigeria. *KIU Journal of Social Sciences, 4(4),* Pp.81-90.
[92] Oyedepo, et al., (2015).

efforts of non-state actors and civil societies in the area of providing humanitarian assistance.

On the other hand, the level of resources availability for carrying out protection operations of the Nigerian protection institutions was discussed. It is obvious that the Nigerian effort for the protection of IDPs requires substantial improvement in provision of resources and providing facilities to support protection of IDPs operations aiming at improving coordination, cooperation and integration. In as much as they remain relevant in dealing with emerging displacement issues, the lack or absence of these elements may lead to poor protection of IDPs leaving affected communities and people with rigorous impacts. It is against the foregoing the researcher makes the following findings:

1. The National Commission for Refugees, Migrants and Internally Displaced Persons (NCRMI) as a national coordinating institution for displacement management does not have an Act to back its operation in managing IDPs affairs in all phases as the Act has not been assented by the president. Hence, in practice, the protection accorded to IDPs under NCRMI cannot be up to expectation.
2. NCRMI is limited in capacity to effectively address the overwhelming magnitude of IDPs in the country mostly because some States and Local Governments have not seen the need to legislate and establish complementary functional IDPs protection agencies to address the humanitarian challenges of citizens in their constituencies. Furthermore, NCRMI and other agencies lacks adequate resources to protect and assist people displaced for a longer period of time or to assist returnees.
3. There is a serious need for more and better collaboration, cooperation and integration across the different level of institutions to ensure efforts are geared toward effective and efficient utilization of limited resources to meet the needs of IDPs in society. As such joint efforts between government and other agencies such as NGOs and private sector organisations in Nigeria has become highly imperative in order to deal significantly with the IDPs issues in the country.

From the above findings, the followings are hereby recommended:

1. As the national assembly passed the NCRMI Bill earlier last year, 2022 the president should pass tract to sign same into law. This would help the Commission in coordinating and integrating efforts of different

institutions toward accomplishing a common goals, improving effective implementation of response and overall IDPs protection operations.

2. The government also needs to address capacity building, adequate funding of NCRMI, NEMA and NHRC. This way, NCRMI would not only have the capacity to effectively address the overwhelming magnitude of IDPs in the country, but also have adequate resources at its disposal to protect and assist displaced persons for a longer period of time or to assist returnees. In addition, there is need for all the 36 States of the Federation and all the 774 Local Governments in the country to establish their States and Local Governments agencies respectively to address the humanitarian challenges of IDPs in their constituencies.
3. There is need to improve resource sharing patterns by developing measures to harmonise each level of government and agencis/organisations in order that they can support each other and strengthen their capacities. This would in return improve the entire protection system by reducing the challenge of resource shortage. This is achievable through the establishment of a well-coordinated capacity building structure and the introduction of some training and learning programmes for all level of governments and the available resources, helping to facilitate the planning of what need to be done, where to do it and who is to do it, so as to meet the exact demands of IDPs.

An Assessment of the Legal Regimes on Child Online Data Protection in Nigeria: Rethinking the Nigerian Regulatory Framework along the United States of America Data Protection Regimes

Samson Ojodomo Onuche* and Emmanuel Isaac Onuche**

Abstract

The Nigerian child is confronted with several acts of privacy violations that transcends the physical environment into the online milieu. The sheer indispensability of a child's right to privacy cannot be overemphasized. These rights are legally protected to avoid negative consequences and their violation may cause physical, mental and psychological development of the child. Using the doctrinal research method, this article examines the online child data protection legal framework in Nigeria. The article also assesses the United States of America Children's Online Privacy Protection Act (COPPA), to draw lessons for Nigeria. The article reveals that Nigeria does not have a specific data protection law protecting the Nigerian Child. Therefore, the article recommends, among others, the enactment of a child specific online data protection law in Nigeria that must consider a unique age reduction in defining a child for the purposes of granting consent to process personal information.

Keywords: Data Protection, Privacy, Personal Data, Child Rights, Information Technology Law.

1.1 Introduction

The development of various technological devices and the unlimited accessibility or availability of the internet, has offered tremendous opportunities for children to explore online platforms for various purposes.[1] These ranges from educational, entertainment, socialization, information surfing or dissemination and many other laudable purposes that are essential to daily life.[2]

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[1] Livingstone Sonia, Lansdown Gerison, and Third Amanda, *The Case for a UNCRC General Comment on children's rights and digital media. London: Children's Commissioner for England*, (LSE Consulting: 2017) 1-63.<www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Case-for-general-comment-on-digitalmedia.pdf> accessed 21 January, 2023.

[2] Ibid.

Undeniably, while the internet offers an array of laudable daily activities to the child, it also poses an inordinate risk to the safety, wellbeing and rights of underage persons.[3] Studies have shown that an estimate of one in every three internet users globally are persons under the age of 18 (eighteen).[4] Further research, also reveals that the child's adaptability to online platforms and mobile devices, is not commensurate with the child's vulnerability and susceptibility. [5] By virtue of young age, a child is deprived from understanding, critical evaluation and self-protection from online contents that are detrimental to his physical and psychological well-being. Personal data of children are presently being subjected to various forms of abuse. This has prompted the enactment of various international and national legislation (both in Nigeria) aimed at protecting the privacy of the child from online exploitation, harassment and unwarranted exposure. But despite several efforts by the government and other stakeholders in Nigeria, online abuse of personal identifiable data of various children still persists.

For effective discussion of the issues under review, the article is divided into seven sections. After the introduction in section one, section two defines key concepts used in the article. Section three examines the nature and types of data collection methods. Section four assesses the legal framework for child data protection in Nigeria. Section five and six discusses the legal framework for child data protection in the United States of America (USA) under the Children's Online Privacy Protection Act of 1998 and the lessons for Nigeria. Section Seven concludes the article and makes some recommendations based on the findings made in other sections.

1.2 Conceptual Clarification of Terms

There is a need to clarify some terms commonly used in this article as follows:

1.2.1 Child

The Concise Oxford Dictionary, 17th Edition defines a 'Child' as a person who has not reached the age of discretion. In the same vein, the Black's Law Dictionary[6]

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[3] OECD, *The protection of Children Online: Recommendation of the OECD Council. Report on Risks Faced by Children Online and Policies to Protect them.* (Paris: OECD Council: 2012) 1–109.
[4] Livingstone Sonia, Carr John, and Byrne Jasmina, *One in three: Internet Governance and Children's Rights.* Paper series No. 22. London: CIGI and Chatham House: 2015).
[5] Livingstone, S., Tambini, D., Belakova, N., Goodman, E., *Protection of Children Online, Does Current Regulation Deliver?* Media Policy Brief 21. (London School of Economics and Political Science: Media Policy Project: 2018) 2.
[6] Henry Campbell Black, *'Black's Law dictionary 9th Edition* (St. Paul, Minn. West Group Publishing Co.1968).

defines a child as a person under the age of majority. Child Rights Act, defines a child to mean a person under the age of Eighteen (18) years.[7] Section 494 of the Administration of the Criminal Justice (ACJ) Act 2015, also defines a child to mean a person who has not attained the age of 18 years.[8] However, some laws in Nigeria, have been able to distinguish persons into four categories; namely Infants, Children, Young Persons and Adult.[9] This article acknowledges such classification, but for the intent of this research, the terms "minor", "underage", "child", "young persons" are used interchangeably to mean persons below eighteen (18) years of age, which is the statutory age of majority in Nigeria.

1.2.2 Personal Data

The National Information Technology Development Agency (NITDA), Nigerian Data Protection Regulation 2019 defines "Personal Data" to mean:

> any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; It can be anything from a name, address, a photo, an email address, bank details, posts on social networking websites, medical information, and other unique identifier such as but not limited to MAC address, IP address, IMEI number, IMSI number, SIM and others [10]

[7] Child Rights Act 2003, Cap C50, Laws of the Federal Republic of Nigeria, (LFN) 2004, Section 277.

[8] Administration of Criminal Justice Act, 2015, Federal Republic of Nigeria Official Gazette No. 86, Vol. 102 Lagos -19th May, 2015

[9] SO Onuche, "Online Gambling and Child Protection: A Case for Review of Regulatory Protection for Underage Persons in Nigeria" (2020) *Volume 2 No. 3 International Journal of Comparative Law and Legal Philosophy (IJOCLLEP)* 168. See also, Section 2 of the Young Persons Act, 1958, Section 50 Penal Code, Cap. P3 Laws of the Federation Republic of Nigeria (LFN), Section 30 Criminal Code Cap. C38 LFN 2004, Section 494 of the Administration of Criminal Justice Act, 2015 defined a 'young person' to mean a person who has attained the age of 14 and has not attained the age of 17 years.

[10] National Information Technology Development Agency (NITDA), Nigerian Data Protection Regulation 2019, Regulation 1.3. The acronyms represent: Media Access Control Address (MAC address), Internet Protocol Address (IP address), International Mobile Equipment Identity (IMEI) number, International Mobile Subscriber Identifier (IMSI) Number, Subscriber Identity Module (SIM).

The concept of Personal Data has also been described as any information that relates to a natural person that may facilitate direct or indirect identification of a natural person by reference to an identifier. [11] These identifiers may include names, identification number, telephone number, job title, and email address, data that relays the activities or interest of an individual.[12] They may also include genetic data, biometric data and other technology-based identifiers such as location data, Media Access Control (MAC) addresses, Internet Protocol (IP) address.[13] The scope of the definition also extends to websites and applications that possess the ability to track, monitor, and collect information. Instance of this are cookies that have the ability to track online activities and behaviours of users.[14] The next subhead will examine the means of accessing children's personal data.

1.3 Types and Nature of Child's Personal Data Collection

Personal identifiable data of the child can be obtained through online and offline channels. Offline data is basically data obtained from offline sources. This may include data sets bought from a third-party data base or customer information collected manually from interaction with customers.[15] This data may include name, health information, utility bills, fingerprint, telephone numbers, facial photograph, residential address, financial/credit information, email address, passenger name record, etc.[16]

Online data is obtained from online channels and activities. This is done by collecting unique identifiable data, that is then used to track online behaviour of the child. A profile of the data subject is then built, thereby enabling the controller of the data to send targeted advertisements or other activities that are consistent with the interest of the child.[17] Online tracking technologies such as cookies (that allow webservers to identify frequent visitors, their preferences, usage or surfing patterns), JavaScript (capable of accessing information stored on the browser such as history of frequently visited websites), and web- bugs are usually used for

[11] Pac Solicitors Regulatory Scan, "*Assessing the Impact of the EU General Data Protection Regulation (GDPR) on Businesses in Nigeria"* (April 2018), Volume 101, P. 2
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Combining Online and Offline data for Multichannel Marketing' 26th June 2019 <https://www.celerity-is.com/our-thoughts/online-and-offline-data >accessed 12 January, 2023.
[16] CE Izuogu, *'Personal Data Protection in Nigeria' Report submitted to the World Wide Web Foundation*, March 2018. < www.webfoundation.org> accessed 1 March, 2023.
[17] Ibid., 14.

tracking of online behaviours of the child.[18] For instance, social interactive platforms such as Facebook, harnesses information of its users to provide more targeted markets for its advertisers.[19]

Since the development of the internet in the early 1990's, it has been a major source of marketing, sales and distribution of goods and services. The interactive nature (User generated Content) and accessibility of the internet, has also enabled marketers to collect personal information from consumers (including children), during registrations on social interactive platforms. Often, marketers who obtain this personal information on the child and their family, subsequently compile these records into a file or classify them according to the marketing appeal and sell or transmit to a third party for various commercial activities. The child's personal information, in some cases, has been used to perpetrate crimes, such as child pornography or exposure of the contact of the child to a paedophile.

In Nigeria, both private and public organisations usually obtain personal data from children through offline and online channels. These organisations include the National Identity Management Commission (NIMC), the Nigerian Immigration Service (NIS), the National Population Commission (NPC), the Corporate Affairs Commission (CAC), the National Health Insurance Scheme (NHIS), the Health Management Organizations (HMO), the Nigeria Social Insurance Trust fund (NSITF), Educational Institutions, Central Criminal Registry of the Nigerian Police Force, Central Custodial Register of the Nigerian Correctional Services, Deposit Money Banks (DMBs), Other Financial Institutions (OFIs), Insurance Companies, Telecommunications services providers, Independent Registration Agents, Subscribers Registration, Internet Services providers, Airline operators and traveling agencies, Transportation services providers, Hotel and other hospitality services providers, public and private sector employers of Labour etc.[20]

The child's personal data obtained through these organisations is sometimes used for other purposes without the consent of the child or guardian. These violations of a child's right to privacy have raised legal questions about the preservation, storage and transfer of the child's personal data in Nigeria.

[18] Ibid., Web-bugs are invisible HTML object inserted in a webpage, they are designed to track a visitor's movement across the internet.
[19] CE Izuogu, opcit, at p. 14.
[20] Ibid., 12.

1.4 Legal Framework for Child Data Protection in Nigeria

Personal data and information of persons in Nigeria (inclusive of the children), are loosely protected under several Laws, Regulations, Guidelines, policies and international legal instruments.[21] These laws and other legal instruments, are appraised under the following subheads.

1.4.1 The Constitution of the Federal Republic of Nigeria 1999 (as amended)

The Constitution of the Federal Republic of Nigeria, (CFRN) 1999,[22] is the supreme and overriding law in Nigeria. It binds all persons, citizens, residents and authorities in Nigeria.[23] The provision of the Constitution guarantees the rights of all citizens, both adults and children. As the supreme law in Nigeria, the Constitution provides for some fundamental rights that are meant for the preservation and protection of citizens from government or private interference. The Constitution provides certainty and predictability for the child, for the maximum pursuit of his development and welfare.[24] The Constitution provides for a general provision that protects the privacy of all citizens. Section 37 thereof provides that:[25] "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."[26]

The provision of section 37 of CFRN is of particular benefit to the protection of the child's rights to privacy, for reasons of his vulnerability and irrationalities. The child is protected against various dictates or violations from the state, adults, parents and guardians. This protection is broad to secure the home, correspondence, telephone and all forms of communication of the Nigerian child from undue

[21] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, Resolution 44/25, 1577 UNTS 3, Article 16 (1) (2). Article 16 of the Convention provides that *"No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks.*" The African Charter on the Right and Welfare of the Child, Article 10, also provides that *"No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, . . ."*

[22] Constitution Federal Republic of Nigeria (CFRN) 1999, Chapter C-23 Laws of the Federal Republic of Nigeria (LFN) 2004.

[23] CFRN 1999, Section 1 (1). *National Assembly v. President* [2003] 9 NWLR 104.

[24] NO Osita, *Human Rights Law and Practice in Nigeria: An Introduction,* (Enugu, Nigeria: CIDJAP PRESS 1999) 86.

[25] CFRN 1999, Section 37.

[26] Ibid.

surveillance and interception.[27] However, this provision is subject to the restrictions that are provided under section 45 of the Constitution. The section provides that:

> (1) Nothing in section 37… of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons.

The above constitutional safeguard for data protection is inadequate to protect the right to children's privacy. There are no sufficient provisions for data protection in the CFRN and the restriction on the right to privacy further limits the rights of the child to adequate protection. However, some judicial authorities have clearly incorporated data protection as part of the right to privacy and confidentiality protected by the provisions of the Constitution.[28] In the case of *Emerging Markets Telecommunication Services LTD v. Barr. Godfrey Nya Eneye*[29], the Plaintiff claimed that the defendant, Etisalat, without his consent, authorised and disclosed his phone number to a third party, who in turn used the number of the plaintiff to send several unsolicited Short Message Services (SMS). The Plaintiff claimed against the defendant for the violation of his right to privacy as guaranteed in Section 37 of the CFRN. The court held in favour of the plaintiff, that "the innumerable text messages without [Plaintiff's] consent … is a violation of his fundamental right to privacy".[30]

1.4.2 The Child's Rights Act, 2003

The Child's Rights Act (CRA) 2003,[31] is a federal legislation enacted to recognize the rights of the child (persons under the age of 18 years) to survival, development, protection and participation. The Act prioritizes the best interest and welfare of children for legal protection. The Act limits access to personal information of the child except as provided by the law. As regards privacy and data protection, Section 8 of the Act provides that:

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[27] EI Onuche, SO Onuche, 'Rights of The Nigerian Child: The Law, Myths and Reality' *African Journal of Law and Human Rights (2021) 5 (1) 62* <http://journals.ezenwaohaetorc.org/index.php/AJLHR/article/view/1602 >accessed 20 January, 2023.

[28] Ezugwu Emmanuel Anene vs. Airtel Nigeria Ltd, Unreported Suit No: FCT/HC/CV/545/2015.

[29] (2018) LPELR-46193 (CA)

[30] Ibid.

[31] Child Rights Act 2003, Cap C50, Laws of the Federal Republic of Nigeria (LFN), 2004.

> (1) Every child is entitled to his privacy, family life, home, correspondence, telephone conversation and telegraphic communications, except as provided in subsection (3) of this section.
> (2) No child shall be subjected to any interference with his right in subsection (1) of this section, except as provided in subsection (3) of this section.[32]

The Provision of the CRA, offers protection to the home, correspondence, telephone and all forms of communication of the child, from interference, surveillance or interception.[33] The Act also guarantees the right of the child to family, which is the basic and foundational unit for the maintenance of its rights to survival, protection and development.[34]

The Act empowers the Chief Registrar of the court to maintain a register "fostered Children Register",[35] and prohibits the dissemination of personal data or information of a fostered child[36] and adopted child's information,[37] to the public except on the order of a competent court of law. The Minister and government authorities charged with the responsibility of matters relating to the child, may also be allowed access, for the purposes of inspecting the records of the child in the circumstances provided in the Act.[38]

The Act also provides that "no person shall publish the name, address, school, photograph, or anything likely to lead to the identification of a child whose matter is before the Court."[39] Section 205 (2) of the Act prohibits the publication of personal information of a child offender. The Act serves to protect the personal identifiable data of the child from unfair disclosure and exploitation. It criminalizes acts or omissions that constitute a violation on the rights of the Nigerian child to privacy.[40] However, while the Act guarantees the privacy and confidentiality of the child's personal information, the parent or guardian is allowed to exercise reasonable supervision and control over the child.[41] But this provision of the Act

[32] Ibid., Section 8.
[33] Ibid.
[34] Ibid.
[35] Ibid., Section 112 (1).
[36] Ibid., Section 112 (9).
[37] Ibid., Section 142 (9).
[38] Ibid., Sections 45 (4), 198 (4).
[39] Ibid., Section 157 (1).
[40] Ibid., Section 8.
[41] Ibid., Section 8 (3).

fails to define whether the term 'reasonable control' extends to disclosure of the child's personal information. It is reasoned that reasonable control ordinarily should have its scope to include the protection of children's data from abuse.

1.4.3 The National Health Act 2014

The National Health Act 2014, was passed into Law on 31st October, 2014.[42] The Act provides a framework to regulate, develop and manage the National Health care system as well as set up standards for Health Services in Nigeria.[43] The Act provides a unified standard for both the public and private health care providers in Nigeria, setting up standards, Rights and obligations of Health Care Providers, Health Workers, health establishment and its user.[44]

Under the Act, a regulatory framework is provided to protect the confidentiality of health records, prescribing person that could or should be granted access to such records. The Act provides for the maintenance, preservation and protection of Personal Data of users of health facilities in Nigeria. The Act provides that "the person in charge of a health establishment shall ensure that a health record containing such information as may be prescribed is created. . ."[45] The maintenance of the health data base of users of health services in both public and private health facilities, is made mandatory under the Act. The Act provides for the confidentiality of such information, and the circumstances in which disclosure could be made by providing that; "all information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment is confidential."[46] The Act, however, provides for exceptions where these details could be disclosed. These circumstances are:

(1) Where the express consent of the Health User (Data subject) is obtained in writing, permitting such disclosure.
(2) Where the disclosure is made pursuant to a court order or in compliance with any law which requires such disclosure.
(3) Consent of the parent or guardian, where the user (data subject) is a minor.
(4) Where a request for information from user is made by a representative or guardian of any person who cannot grant consent at the material time.

[42] National Health Act 2014, Federal Republic of Nigeria, Official Gazette No.145 Vol.101, Notice No.208, October, 2014.
[43] Preamble to the National Health Act 2014.
[44] National Health Act 2014, Section 1(1).
[45] Ibid, Section 25.
[46] National Health Act 2014, Section 26 (1).

(5) Situations where the non-disclosure of such information could constitute a serious threat to public health.

Section 27 of the Act also provides that:

> A health worker or any health care provider that has access to the health records of a user may disclose such personal information to any other person, health care provider or health establishment as is necessary for any legitimate purpose within the ordinary course and scope of his or her duties where such access or disclosure is in the interest of the user.

The Act imposes a duty on health services providers, by providing that "the person in charge of a health establishment who is in possession of a user's health records shall set up control measures to prevent unauthorised access to those records and to the storage facilities in which, or system by which, records are kept".[47] The Act also criminalize failure to comply with adequate data protection in the health sector by prohibiting several acts or omission.[48]

1.4.4 The National Information Technology Development Agency Act 2007

The National Information Technology Development Agency (NITDA) Act,[49] establishes the National Information Technology Development Agency.[50] The agency is saddled with the planning, promotion and development of the use of Information Technology in Nigeria.[51] The Act also tasked NITDA with the responsibility of developing guidelines to regulate the use and exchange of electronic data and all forms of electronic communication in all sectors of the Nigerian economy.[52]

The mandate of the agency transcends the public sector to electronic communications in the private sector of the economy.[53] The Act, in a bid to fully implement these mandates, prohibits several acts or omissions that may be

[47] Ibid., Section 29(1).
[48] Ibid., Section 29(2) (a-j).
[49] National Information Technology Development Agency (NITDA) Act 2007, Cap N156, Laws of the Federation of Nigeria (LFN) 2010, See also Act No. 28, Published in the Federal Republic of Nigeria Official Gazette No. 99 vol. 94 Lagos 5th October 2007.
[50] Ibid., Section 1(1).
[51] WM Olatokum, and BM Adebayo, 'Assessing E-government Implementation in Ekiti State, Nigeria' *Journal of Emerging Trends in Computing and Information Sciences,* (2012) 3 (4) 497.
[52] NITDA Act 2007. Section 6 (c).
[53] Ibid., Section 6 (i).

perpetrated by both individual and corporate bodies.[54] The Act contains sanctions for failure to comply with the provisions of the Act or its Guidelines.[55] But there are no specific provision in the Act that protect children's data from been abuse or misuse by the public and private sector. However, pursuant to its powers, NITDA made two key guidelines that have a tremendous effect on the protection of the Data of children in Nigeria. [56]

1.4.5 Nigeria Data Protection Regulation 2019

The Nigeria Data Protection Regulation (NDPR) 2019,[57] ("the Regulation") is made pursuant to the powers conferred on the Board by virtue of Section 6 (c) and 32 of the NITDA Act.[58] The Regulation is the first single piece of law that provides a comprehensive provision dealing with Data Protection in Nigeria. The objective of the Regulation is:

> a) To safeguard the rights of natural persons to data privacy; b) to foster safe conduct for transactions involving the exchange of Personal Data; c) To prevent manipulation of Personal Data; and d) to ensure that Nigerian businesses remain competitive in international trade through the safe-guards afforded by a just and equitable legal regulatory framework on data protection and which is in tune with best practice.[59]

The Regulation is applicable to "all transactions intended for the processing of personal data, . . . conducted or intended to be conducted in respect of natural persons in Nigeria" Notwithstanding the medium or means that such processing is been conducted.[60] It also applies to Nigerian citizens residing outside Nigeria.[61]

The Regulation mandates NITDA to oversee the administration of the Regulation,[62] licencing of Data Protection Compliance Organisations (DPCOs),[63] receiving audit information and making appropriate decisions on foreign or extra-territorial demands for transfer or mutual cooperation on the transfer of Personal Data. The Agency is also tasked with the development and management of international

[54] Ibid., Sections 17 and 18.
[55] Ibid.
[56] Ibid, Section 6.
[57] NITDA, Nigerian Data Protection Regulation (NDPR) was published on the 28th January 2019,
[58] NITDA Act 2007, Section 32.
[59] NDPR 2019, Regulation 1.1
[60] Ibid., Regulation 1.2 (a).
[61] Ibid., 2019, Regulation 1.2 (b).
[62] Ibid., See Preamble.
[63] Ibid., Regulation 4.1 (4).

cooperation, that will aid the protection of personal data, promotes fundamental Human Rights in Nigeria and its citizens in foreign jurisdiction. To prevent absurdity or restrictive interpretation, the Regulation provides that:

> Notwithstanding anything to the contrary in this Regulation, the privacy right of a Data Subject shall be interpreted for the purpose of advancing and never for the purpose of restricting the safeguards Data Subject is entitled to under any data protection instrument made in furtherance of fundamental rights and the Nigerian laws.[64]

The Regulation protects, and safeguards information derived in the cause of any dealing with a public or private body, that is stored in any retrievable format or through any other means, from been subjected to abuse or misuse by persons in custody of such information. The Regulation provides for the accuracy and adequacy of personal data, and must not be prejudicial to the dignity of the human person.[65]The Regulation provides that personal data must be collected and processed in a legitimate manner, as consented by the data subject.[66]

The NDPR further places a duty of care on persons entrusted with personal data, that such information must be protected against all foreseeable hazards such as theft, viral attack, dissemination, manipulation, cyber-attack or any damage that may be cause to such Personal Data through exposure to natural elements or hazards.[67]

Where personal data is to be obtained, the data subject must give express consent to the use of his personal identifiable data for any specific purposes. The consent under the regulation means "any freely given, specific, informed and unambiguous indication of the Data Subject's wishes by which he or she, through a statement or a clear affirmative action, signifies agreement to the processing of Personal Data relating to him or her."[68] Consent in this instance must be devoid of fraudulent representation, coercion or undue influence.[69] The Data Controller must ensure that consent has been duly obtained and such person giving consent must have the legal capacity.[70] This provision of the Regulation, bars or deprive a child below the age

[64] Ibid., Regulation 2.9.
[65] Ibid., Regulation 2.1 (b) (c).
[66] Ibid., Regulation 2.1 (a).
[67] Ibid., Regulation 2.1 (d) & (2).
[68] Ibid., Regulation 1.3.
[69] Ibid., Regulation 2.3 (2).
[70] Ibid., Regulation 2.3 (a).

of 18 years from giving any consent to the processing of his personal data. To further safeguard the child, the Regulation further provides that "no consent shall be sought, given or accepted in any circumstance that may engender direct or indirect propagation of atrocities, hate, child rights violation, criminal acts and anti-social conducts."[71] When the processing of a personal data relates to the child, the regulation provides that:

> The Controller shall take appropriate measures to provide any information relating to processing to the Data Subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, and for any information relating to a child.[72]

The NDPR guarantees the right of data subject to object to the processing of her personal data for the purpose of marketing. Data subject must be afforded with the necessary mechanism for objection to be properly made.[73] The Regulation however, did not make provision for the manner in which consent could be sought and obtained where the data subject is a child.

1.4.6 The Nigerian Communications Commission (Registration of Telephone Subscribers) Regulations 2011

The Regulation is made by the Nigeria Communications Commission (NCC) pursuant to its powers, as provided under the Nigeria Communications Commission Act 2003.[74] The Commission was established to, among other things, achieve a regulatory environment for the supply of telecommunication services and facilities in Nigeria.[75] The NCC in exercise of its powers published the NCC Registration Regulation 2011, to regulate the establishment, control, administration, and management of issues on the registration of subscribers to mobile telephone services and their data base containing personal information of subscribers in Nigeria.[76] The NCC Regulation ensure that data protection principle are strictly adhered to by licensee of the Nigeria telecommunication industry.[77]

[71] Ibid., Regulation 2.4 (a).
[72] Ibid., Regulation 3.1 (1).
[73] Ibid., Regulation 2.8.
[74] Nigerian Communications Commission Act 2003, Cap N97 Laws of the Federation of Nigeria (LFN) 2004.
[75] NCC Act 2003, Section 2 (a).
[76] NCC Registration Regulations 2011, Regulation 2.
[77] Ibid., Regulation 9(4).

The Regulation requires the provider of Mobile telephone services to collect, store and transmit "subscriber information" to the central data base.[78] The central database is the property of the Federal Government of Nigeria[79] that is domiciled with the NCC who has the responsibility for the processing of its information and storage.[80] Mobile telephone service providers are allowed to retain and use information collected on their network in accordance with the General Consumer Code of Practice for Telecommunications services and other Regulation issued by the Commission.[81] The Regulation provides that information of subscriber shall not be release to a third party unless upon written consent of subscriber.[82] The Regulation also prohibits providers of telecommunication services from transferring of subscriber information without prior written consent of the NCC.[83] The scope of the definition of a 'subscriber' in the Regulation is wide enough to cover information of persons below 18 years.[84] But there is no clear provision on the manner in which consent could be obtained from a child.

1.4.7 The Nigerian Communications Commission (Consumer Code of Practice) Regulations 2007

The Nigerian Communication Commission Consumer Code of Practice Regulations[85] made provisions guaranteeing and protecting the information of consumers of the telecommunication industry.[86] The Consumer Code of Practice Regulations, is an industry specific Regulation issued by the Nigerian Communication Commission (NCC) to protect the privacy of consumers of the telecommunication industry in Nigeria.[87] The Regulation provides that licensees of the telecommunication industry must take reasonable steps to safeguard and protect customers' information against "improper or accidental disclosure" and such information must be safely stored.[88]

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[78] Ibid., Regulation 11.
[79] Ibid., Regulation 5.
[80] Ibid., Regulation 4 (2).
[81] Ibid., Regulation 7.
[82] Ibid., Regulation (10) 3.
[83] Ibid., Regulation 10 (4).
[84] NCC Registration Regulations 2011, Regulation 1 (2).
[85] Consumer Code of Practice Regulations, 2007, Federal Republic of Nigeria, official Gazette, No. 56, Vol.94, Lagos, 10th July, 2007.
[86] See the Schedule to the NCC Consumer Code of Practice Regulations 2007. Particularly, Part VI of the Model Consumer Code of Practice.
[87] Ibid, Regulation 1 (1) (2).
[88] Ibid, Regulation 35 (1) (g) (f) "A Licensee may collect and maintain information on individual Consumers reasonably required for its business purposes. However, the collection and maintenance of information on individual Consumer shall…(g) protected against improper or accidental

The combined protection provided by the NCC Registration Regulations 2007 and the NCC Consumer Code of Practice Regulations 2007 on data protection, presents a solid backing to the protection of private data of its consumers, regardless of nationality or age limits. The Consumer Code of practice provides that information must "not be transferred to any party except as otherwise permitted or required by other applicable laws or regulations". Therefore, these Regulations provided by the telecommunication industry, further specifically solidify the provisions of the Constitution on the guarantee of the children's Right to privacy in Nigeria, regardless of the nationality of the child.

1.4.8 The Freedom of Information Act 2011

The Freedom of Information Act 2011 (the "FOI Act"),[89] is another law which made provisions for the protection of the personal information of individuals in Nigeria. The Act is enacted with the objective of making Public Records or information freely available and accessible to the public, in a manner that is consistent with public interest and personal privacy.

The Act provides that a public institution is obliged to deny an application for information that contains personal information,[90] unless, upon the consent of the individual, to disclose such information, or where such information is publicly available.[91] The FOI Act also provides that public institutions may deny any application for the disclosure of information that is subject to any form of professional privileges conferred through the instrumentality of the Law.[92] Privilege information such as Legal practitioner and client, health workers-client privilege, journalism confidentiality privilege, and other professional privilege protected by the Act.[93] The Act protects the personal information of the Child that is the custody of any public institution, from any unfair or unwarranted disclosure. But there is no special manner prescribed for obtaining consent of a child for the use of the child's personal data.

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disclosure; and (h) not transferred to any party except as permitted by any terms and conditions agreed with the Consumer, as permitted by any permission or approval of the Commission, or as otherwise permitted or required by other applicable laws or regulations".

[89] The Freedom of Information Act, No. 4, 2011 was signed into Law on the 28th day of May 2011.

[90] Section 14 (a) (b) (c) (d) (e). of the FOI ACT 2011

[91] Ibid., Section 14 (2). The Act Defines Personal information to mean "any official information held about an identifiable person but does not include information that bears on the public duties of public employees and officials".

[92] FOI Act 2011, Section 16.

[93] FOI Act 2011, Section 16 (a) (b) (c) (d).

1.4.9 The National Identity Management Commission Act 2007

The National Identity Management Commission (NIMC) Act was enacted to provide for the establishment of a National Identity Database[94] and the National Identity Management Commission,[95] responsible for the maintenance of the National Database, registration of individuals, and issuance of national identity cards.[96]

The Act makes registration compulsory for all Nigerian citizens, persons permanently resident in Nigeria and non-Nigerians resident in Nigeria for a period not less than two years.[97] Children are also eligible to be registered and their identifiable data preserved in the data base of the NIMC. Schedule 2 of the Act lists information that is kept by the Commission. This includes demographic information (names, date and place of birth, gender and address),[98] identification information (photograph, signature, finger prints and other biometric information),[99] residence status, personal reference numbers and others.

Section 17 of the Act prohibits persons and corporate bodies from unlawful access to a database that contains information of a registered data subject except on application or consent to its release with the approval of the NIMC.[100] However, the consent of the user may be dispensed with, in the public interest,[101] national security, and detection of crime and for other purposes regulated by the Commission.[102] However, the Act does not expressly provides for the manner in which consent could be obtained from the child.

1.4.10 The Cybercrime (Prohibition, Prevention Etc.) Act, 2015

The Act provides a regulatory framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria. It provides for the protection of critical national information infrastructure, promotes cyber security and protects electronic communication, data and computer programs, intellectual property and privacy rights.[103] Under the Act, service providers are required to

[94] National Identity Management Commission Act 2007, Section 14.
[95] Ibid., Section 1.
[96] Ibid.
[97] Ibid., Section 16.
[98] Ibid., Paragraph 1, Second Schedule of the Act.
[99] Ibid., Paragraph 2, Second Schedule of the Act.
[100] Ibid., Section 26(1).
[101] Ibid., Section 26 (4).
[102] Ibid., Section 26 (2) and (3).
[103] Cybercrimes (Prohibition, Prevention, Etc) Act 2015, Section 1.

preserve and retain for a period of 2 years traffic data[104] and the information of subscriber information that may be release to law enforcement agencies. However, the service provider must have due regard to the privacy rights of the individual and shall take appropriate measures to safeguard the confidentiality of the data retained, processed or retrieved for the purpose of law enforcement.[105]

The Act criminalizes and imposes punishment of imprisonment and fine for intercepting electronic messages,[106]unlawful interception,[107]computer fraud/forgery,[108]unauthorised modification of data and system interference.[109] The data of children could also be harness for purposes of child pornography. This is form of sexual abuse and exploitation, causes both physical and psychological damage to the child. Section 23 (1) of the Act states that:

> Any person who intentionally uses any computer system or network in or for- (a) producing child pornography; (b) offering or making available child pornography; (c) distributing or transmitting child pornography; (d) procuring child pornography for oneself or for another person; (e) possessing child pornography in a computer system or on a computer-data storage medium: commits an offence under this Act and shall be liable on conviction – (i) in the case of paragraphs (a), (b) and (c) to imprisonment for a term of 10 years or a fine of not more than N20,000,000.00 or to both fine and imprisonment; and (ii) in the case of paragraphs(d) and (e) of this subsection, to imprisonment fora term of not more than 5 years or a fine of not more than N10,000,000.00 or to both such fine and imprisonment.[110]

The provision of Section 23 of the Act provides for offences and punishment that are applicable to only natural persons and not artificial legal personalities like corporations. This is an omission on the protection of children under the Act. However, the Act protects the personal data of all persons in Nigeria from cybercrimes. The protection offered by the Act, is generic to cover all persons, including children. For the purposes of making a comparative study, the United States America approach to online child data protection will be examined.

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[104] Ibid., Section 38.
[105] Ibid., section 38 (5).
[106] Ibid., Section 9.
[107] Ibid., Section 12.
[108] Ibid., Sections 12 and 14.
[109] Ibid., Section 16 (1).
[110] Ibid., Section 23.

1.5 The United States Approach to Child's Data Protection

Data protection in the United States of America (USA) is regulated by different legislation enacted by both the Federal and State governments. Some of these federal legislation include the Gramm-Leach-Bliley Act (GLBA),[111] Driver's Privacy Protection Act (DPPA),[112] Health Insurance Portability and Accountability Act (HIPAA),[113] Fair Credit Reporting Act (FCRA),[114] The Communications Act, Common Carriers, Cable Operators and Satellite Carriers, Video Privacy Protection Act,[115] Family Educational Rights and Privacy Act (FERPA),[116] Federal Securities Laws, Children's Online Privacy Protection Act (COPPA),[117] Electronic Communications Privacy Act (ECPA), Computer Fraud and Abuse Act (CFAA), Federal Trade Commission Act (FTC Act),[118] Consumer Financial Protection Act (CFPA).[119] Protection of personal data is also offered by Common Law, the Constitution and states laws.[120] However, the Children's Online Privacy Protection Act (COPPA) 1998, provides a comprehensive protection for the child's Personal data in the USA.

1.5.1 Children's Online Privacy Protection Act (COPPA) 1998

The COPPA[121] is a United States Federal Law, enacted on October, 21, 1998 and became effective on April 21, 2000. The Children's Online Privacy Protection Act and the Federal Trade Commission implementing regulations,[122] regulate the online collection of personal information[123] and use of children's information under 13 years of age.[124] The Act applies to: (1) any "operator"[125] of website or online service that is "directed to children," or (2) any operator that has any "actual knowledge that it is collecting personal information from a child".[126] COPPA applies to

[111] Gramm-Leach-Bliley Act, (15 U.S. Code § 6802).
[112] Driver's Privacy Protection Act 1994, (18 U.S Code § 2721).
[113] Health Insurance Portability and Accountability Act (29 U.S. Code § 118).
[114] Fair Credit Reporting Act, (15 U.S Code 1681).
[115] VPPA, (18 U.S Code 2710).
[116] Family Educational Rights and Privacy Act (20 U.S. Code § 1232).
[117] Children's Online Privacy Protection Act 1998, (15 U.S. Code § 6501).
[118] Federal Trade Commission Act (15 U.S Code § 41).
[119] Consumer Financial Protection Act (47 U.S. Code § 227).
[120] Stephen P. Mulligan, Chris D. Linebaugh, *'Data Protection Law: An Overview'* (Congressional Research Service Report Prepared for members and committee of congress, March 25, 2019).
[121] Code of Federal Regulation 16, Part 312 COPPA 1998, § 6501–6506.
[122] ibid.
[123] COPPA, 15 United States Code. Section 6501(8). Code of Federal Regulation 16 Part 312.2.
[124] Code of Federal Regulations 16, Part 312 (COPPA 1998), § 6501–6506.
[125] ibid.
[126] United State Code 15, § 6502; Code of Federal Regulation, 16 Part 312.3.

websites that are operated from foreign jurisdiction, where such website is directed towards the children in the United States.[127]

As a Federal Legislation, COPPA is applicable to websites that are controlled and run by websites under the jurisdiction of the United States, or websites hosted on servers in the United States. The Act also regulates websites whose owners' headquarters are situated in the United States or any commercial websites that are available and accessible on the market in the United States.

The COPPA and FTC's implementing regulations were enacted in response to the growing awareness of various internet marketing strategies, targeting children to obtain personal information through online platforms, without the consent or approval of parents of the child. Under the Act, operators are prohibited from collecting and utilizing "personal Information" such as the child's name, email address, home address, phone number and other personally identifiable data of the child that is below the age of thirteen without the consent of the parent or guardian of the child.[128]

As a standard to ensure the protection of the child online, consent must be obtained before collection of the child's personal data.[129] Such consent must be "verifiable Parental consent".[130] Before consent is obtained, an operators under the Act must make available its privacy policies, data collection method, nature of data to be collected and its policies on sharing an obtained child's personal data.[131] The Act further mandates covered operators to post a "prominent and clearly labelled link" on their webpage, in such area of its site where the personal information of the child is sought to be obtained.[132] The Act also places a duty on a covered operator to establish and maintain "reasonable procedures" which guarantees the protection of the data subject's "confidentiality, security, and integrity" and in the event such

[127] GK Landy, "Chapter 18: Privacy and Use of personal Data". In Mastrobattista, A. The IT/ Digital Legal Companionship: A Comprehensive Business guide to software, IT, Internet, Media and IP Law. (Elsevier, Inc: 2008) 477.
[128] United State Code 15, § 6502(a)–(b).
[129] Ibid., § 6502(b)(1)(A)(ii); Code of Federal Regulation 16, Part 312.5(a)(1).
[130] The Term "verifiable Parental Consent" is defined by COPPA to mean any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, use and disclosure practices, and authorizes the collection, use and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from the child. See § 1302 (9).
[131] United State Code, 15, § 6502(b)(1)(A)(i); 16 Code Federal Regulation Part 312.4(a), (c).
[132] Ibid., 16 Part 312.4(d).

information is transferred or made accessible to a third party, the third party must maintain all required standards to protect the confidentiality, security and integrity of the child.[133]

COPPA has a safe harbour provision that gives latitude to an industry group or covered operator to avoid compliance with COPPA, where such covered operator opts to generate self-regulatory guidelines. [134] However, such industry guidelines must be approved by the Federal Trade Commission.[135] To qualify for the safe harbour provision, the covered operator or industry is required to submit a proposed guideline that is materially similar to the provisions of COPPA, the proposed guideline must contain a mechanism for the evaluation of the compliances of the operator. These mechanisms for compliance and evaluations include carrying on periodic reviews by operators, industry review, or independent review carried out by members of self-regulatory bodies in which such operator is a member.[136]

The Provisions of COPPA are enforced by the Federal Trade Commission, through the Attorney General of the State, where such breach affects residents within the state. [137] Action for violation are usually filed before the Federal District Court, to enforce compliance with the FTC Regulation.[138] The provisions of COPPA, does not provide for any Criminal penalties for violation, neither does it provides for a private right of action.[139] The FTC also imposes several sanctions for the violation of COPPA. The Commission ensures compliance by carrying out monitoring on internet and online platform and its website for parents compliant.

1.6 Findings and Lessons for Nigeria

An assessment of the provisions of COPPA, reveals vital regulatory measures that can be adopted in Nigeria to improve child data protection laws. These observations are ex-rayed as follows:

[133] Code Federal Regulation, 16 Part 312.8.
[134] United State Code 15 § 6503; Code Federal Regulation 16, Part 312.11.
[135] Ibid.
[136] Ibid., § 1304 (a, b (1-3) and C).
[137] Ibid., § 6504.
[138] Ibid.
[139] *Gonzaga University v. Doe*, 536 *U.S. 273, 290 (2002).*

1.6.1 The Absence of a Unique Age Threshold in Nigeria

The COPPA, unlike the various child data protection laws in Nigeria, provides for a unique age threshold (thirteen (13) years) for a child to give consent to the processing or otherwise of his/her personal data. This unique age threshold is absent under the various laws in Nigeria.

Nigeria is a state party to the United Nations Convention on the Right of the Child (UNCRC), of 1989,[140] that accounts for the various Nigerian statute definition of a general age of 18 years as majority, for the purposes of determining the status or right of the child. While 18 years as the majority, for purposes of criminal liability, may be ideal, global statistics have shown that a present-day child is born into a technological age and the child gains sufficient acclimatization to technological and online milieu at a very tender age.[141] Therefore, subjecting the child to the general age of 18 years to give consent may however, constitute an infringement on the rights of the Nigerian child.

The UNCRC provides that "child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"[142] creating flexibility for national laws to either reduce its age of majority. In the same vein, the European Union is not a state party to the UNCRC convention. Its General Data Protection Regulation (GDPR),[143] serves as a model law for most European Union member states of the UNCRC. The GDPR provides a leeway on the age threshold to give consent for processing of personal data of a child. Article 8(1) of GDPR provides that:

> In relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 16 years, or if provided for by Member State law a lower age which shall

[140] *Convention on the Rights of the Child*, 20 November 1989, Res 44/25, 1577 UNTS 3 (entered into force 2 September 1990). Article 1 of the Convention provides that "for the purposes of the present Convention, a Child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". < https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [Accessed 23 May, 2022].

[141] Livingstone, S., Carr, J. and Byrne, J. (Note 4)

[142] Ibid., UNCRC, Article 1

[143] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27April 2016 on the Protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/ec (General Data Protection regulation), *OJ L 119, 4.5.2016*, p. 1–88, <*http://ec.europa.eu/justice/dataprotection/reform/files/regulation_oj_en.pdf*, >accessed 23 January, 2023.

> not be below 13 years, shall only be lawful if and to the extent that such consent is given or authorised by the holder of parental responsibility over the child.

The absence of a unique and reduced age for consent to process personal data of children in Nigeria, accounts for the redundant provisions of our data protection laws, as most persons above the age of 13-17 already possess sufficient maturity online to consent to the use of their personal data.

1.6.2 Necessity of the Safe Harbour Provision

COPPA safe harbour provision gives freedom to an industry group or covered operator to avoid compliance with COPPA rules, through its formulation of its industry-specific standards or rules to protect a child's online data. COPPA gives the latitude for these formulated rules or self-regulatory guidelines to be approved by the Federal Trade Commission.[144] The safe harbour provisions present a unique advantage for a self -regulatory system that will be industry specific. These industry specific rules make it easily operable for the industry because of familiarity with its self-rules. While self- regulatory systems may present a myriad of regulatory systems, they are unique to each industry. Adopting the safe harbour provision in Nigeria has the potential for effective protection for the children's personal data.

1.7 Conclusion and Recommendations

The vulnerabilities of children underscore the need to ensure the protection of their data and privacy. The child is presently being exposed to online attack, monitoring technologies, corporate data collection, identity and information theft, cyberbullying, unsolicited advertisements, profiling and other forms of online risks. To effectively protect the children's personal data in Nigeria, a comprehensive child-specific data protection law must be enacted. Such a law must consider a reduced unique age for the purpose of granting consent to process personal data. Children from ages 13 -16 years should be able to give consent. Whereas, consent of parents or guardians should be mandatory for children below the age of 13 years.

Self-regulatory provisions drawn by various industries must be considered to ensure industry-specific protection that is based on the risk perceived in such industry. A multi-stakeholder approach involving the government, international organisations, corporate organisation (both public and private), mobile technology companies, internet service providers and parents, must form a synergy and play

[144] United State Code 15, § 6503; Code of Federal Regulation 16, Part 312.11.

specific roles, aimed at protecting the data and privacy of the Nigerian child. Public education and awareness programs targeted at parents, guardians, the child and the general public must be carried out continuously, to create awareness of the risk involved in exposing a child's personal data.

It is also imperative to add that building and empowering regulatory institutions to monitor and enforce online infractions will ensure better protection of children's data in Nigeria. Such institutions or agencies must have adequate modern technologies and manpower to detect and investigate these offences. Where these are properly considered, child online data privacy violations can be drastically curtailed in Nigeria.

Appraising the Role of the Nigerian Communications Commission in Ensuring Data Privacy and Protection of Nigerian Telecommunication Service Subscribers

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Abstract

There is no doubt that we are in the age of technology boom and almost every citizen's hitherto privacy, especially data privacy has been punctuated by the activities of government and telecommunication service providers. Thus, a need to ensure data privacy and protection, especially in developing Countries of which Nigeria is a part become increasingly necessary. This paper examines data privacy and protection regulations in Nigeria generally and specifically analyses the role of the Nigerian Communications Commission (NCC) in ensuring data privacy and protection in Nigeria. This paper employs a doctrinal method of research in generating information used in analysing the paper. The paper discovers that NCC plays a vital role in accomplishing this data privacy and protection task. In its bid to achieve its statutory roles, many regulations are formulated. The careful analysis of these regulations reveals that NCC's role includes, formulation of rules and regulations, monitoring compliance with the regulations, imposing sanctions and penalties and other incidental roles. It is recommended that these regulations be consolidated into a single document for ease of reference and comprehension. The NCC Act needs to be amended to make provision for the role of the NCC on data privacy and protection in Nigeria for effective legal backing.

Keywords: Role, Data, Privacy, Protection, Nigerian Communications Commission

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1.1 Introduction

Nigeria's Constitution and various legislations recognise the right to privacy. These laws require organisations to obtain consent from individuals before collecting, using, or disclosing their personal information and to take reasonable measures to ensure the protection and confidentiality of that information. This right to privacy extends to data privacy that necessitates individual data protection. The need and importance to protect individual data privacy becomes more necessary than ever before. This is because the advancement in Information and Communication Technology (ICT) has now made it possible for the data of individuals to be easily generated and stored by private and government institutions for one reason or another.[1] Individuals' data are usually supplied voluntarily to private and government institutions.[2] The data generated may often fall into the hands of scammers or other internet fraudsters.[3]

Based on the foregoing, government must do everything possible to safeguard citizen's data. This can only be successfully done through the instrumentality of the law. More often, the law establishes a regulatory body responsible for putting into effect the provisions of the said law. In Nigeria, many agencies and legislations are saddled with the responsibility of protecting and securing citizen's data. These include, but are not limited to Nigerian Communications Commission (NCC), established under the NCC Act,[4] the Nigerian Information Technology Development Agency (NITDA), established under the NITDA Act,[5] The Federal Competition and Consumer Protection Commission (FCCPC), established under the FCCP Act,[6] the Central Bank of Nigeria (CBN), established under the CBN Act,[7] the Central Bank of Nigeria Consumer Protection Framework,[8] the Economic and other Financial Crimes Commission, (EFCC), established under the EFCC Act, the 1999 Constitution of the Federal Republic of Nigeria (as amended),[9] the Child's

[1]For example, the Independent National Electoral Commission (INEC) collect and collates citizens' data for election purposes, Nigerian Immigration Service also collects and collates citizens' data during passport processing. Banks also collect and store citizens' data for banking purposes etc.

[2] Massé Etselle, 'Data Protection: why it matters and how to protect it' (Access Now, 13 January 2023) <http://www.accessnow.org/data-protection-matters-protect/accessed> accessed 10 September 2023.

[3] Chukwudiebube Opata, "Regulatory Accountability in the Nigerian Telecommunication Sector" (2013) 57(2) JAL 286.

[4] Nigeria Communication Commission Act 2003.

[5] Nigeria Information Technology Development Agency Act 2015.

[6] Federal Competition and Consumer Protection Commission Act 2018.

[7] Central Bank of Nigeria Act 2007.

[8] Consumer Protection Framework Regulation 2016 (CPFR 2016).

[9] Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN 1999) Section 37.

Rights Act,[10] Freedom of Information Act,[11] the Cybercrime (Prohibition, Prevention, etc) Act,[12] the Nigeria Communications Commission (Registration of Telephone Subscribers) Regulations, [13]and The Credit Reporting Act.[14]

It is obvious from the list of laws and regulatory agencies in charge of overseeing the regulation of data protection that there are numerous laws and legal frameworks in place. The effects of these multiple laws and regulatory bodies are serious and diverse. To this end, the NCC's role in data security and data protection in Nigeria is the hallmark of this paper. Specifically, the paper has a section on conceptual clarifications and another section on regulatory frameworks for data protection and privacy in Nigeria. There is also a specific section on the overview, powers, and functions of the NCC under the NCC Act, the Role of the NCC in Data privacy and protection in Nigeria, enforcement mechanisms, challenges facing the NCC *vis a vis* data privacy and data protection in Nigeria, conclusion and recommendations.

1.2 Clarification of Key Terms

Under this section, definitions of concepts that will aid the understanding and comprehension of the general discussions of the article are provided as follows:

Data

Data is different types of information usually formatted in a particular manner.[15] On the other hand, according to the data protection legislation, data is information which is being processed using equipment operating automatically in response to instructions given for that purpose, is recorded with the intention that it should be processed utilizing such equipment, or is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system. It need not be held on a computer.[16]

[10] Childs Rights Act 2003 (CRA 2003).
[11] Freedom of Information Act 2011 (FIOA 2011) Section 14.
[12] Cybercrime (Prohibition, Prevention, etc.) Act 2015 (CPPA 2015).
[13] Nigeria Communication Commission Regulations 2011 (NCCR 2011).
[14] Credit Reporting Act 2017 (CRpA 2017).
[15] Simplilearn, 'What is Data: Types of Data and How to Analyze Data' (Simplilearn, 23 March, 2023), <What Is Data: Types of Data, and How to Analyze Data [Updated] (simplilearn.com)> accessed 2 May, 2023.
[16] 'Collins Dictionary of Law' (Williams James Stewart, 2006) <legal-dictionary.thefreedictionary.com)>last accessed 2 May, 2023.

Privacy

Privacy is the right of an individual to be from uninvited surveillance. Privacy forms the basis of freedom. You have to have a moment of reserve, reflection and intimacy. [17]

Personal Data

Personal data means any information relating to an identified or identifiable natural person (data subject)[18]. Thus, personal data refers to information that is peculiar to a person whether natural or artificial. The protection and Security of this class of information or data is the hallmark of this paper.

Data Privacy

Data privacy is about who has access to an individual's data. Broadly, data privacy is a guideline for how data should be collected or handled based on its sensitivity and importance.[19] It concerns all sensitive information that organizations handle including that of customers, shareholders and employees.

Data privacy is a process that helps ensure that sensitive data is only accessible to approved parties. It prevents criminals from being able to maliciously use data to achieve their nefarious goals.[20] Data privacy also called information privacy is a subject of security that focuses on personal information and describes the practices which ensure that the data shared by customers is only used for its intended purpose. Privacy is the right of an individual to be left alone or free from intrusion. Data privacy therefore is the right of individuals or citizens to have control over how their personal information is collected and used.

Data Protection

In a more detailed form, data protection is defined as the implementation of appropriate administrative, technical, or physical means to guard against unauthorized, intentional or accidental disclosure, modification, or destruction of

[17] Micheal Buckbae, 'Data Privacy Guide: Definitions Explanations and Legislation' (Varonis, 28 September 2020, updated June 2023) <https://www.varonis.com/blog/data-privacy > accessed 25 September 2023.

[18] An Identifiable natural person as one who can be identified directly or indirectly in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factor, specific to the physical psychological genetic, mental, economic, cultural or social identity of that natural person. This can be anything from a name, address, a photo, an e-mail, address, bank details posts on social networking websites, medical information etc.

[19] Monika Zalnieriute, 'Data Privacy Law: An international Perspective' (2014) 5 (2) European Journal of Law and Technology.

[20] ibid.

data.[21] The foregoing definition is to the effect that data protection involves all appropriate mechanisms of law put in place to ensure that the personal data of an individual supplied voluntarily should not be compromised or corrupted. And where for any reason the data gets lost the mechanism for retrieving the lost data as quickly as possible should be put in place and when it does, the law will ensure that it is quickly retrieved.

From a human rights angle, data protection refers to an actual person's right to respect his or her private and family life, home or communications concerning the processing of personal data.[22] Data protection is about ensuring that people can trust you to use their data fairly and responsibly. Thus, data protection is the fair and proper use of information about people. It's part of the fundamental right to privacy. More respectively, it is about building trust between people and organizations.

Finally, data protection means applying technical and administrative controls to reduce or mitigate the risk of unauthorized access or unlawful processing of sensitive information and against the accidental loss or destruction of personal sensitive information.

1.3 Legal Regime of Data Privacy and Protection in Nigeria

There are many laws and regularity bodies charged with the responsibility of protecting citizen's data in Nigeria. Data privacy and protection regimes in Nigeria are sector-based. However, an attempt at providing a cross-sector regime is yet to see the light of the day.[23] It is to be noted that this practice of having multiple legal regimes for the regulation of citizens' data or information is not only peculiar to Nigeria.

In Nigeria, data privacy and protection regimes are many. Each agency has a role to play in citizen's data protection regime for the regulation of data within its custody. Hence there are many data privacy and protection regimes in Nigeria,[24] and a few of these legal regimes and agencies are considered below.

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[21] Chinenye Nwabueze "Introduction to mass Communication: Media Ecology in the Global Village" (Topshelve Pub, 2014) 14.

[22] Ibid., see also CRFN 1999 section 37.

[23] Bernard Jemilohon and Timothy Akomolede, 'Regulations or Legislation for Data Protection in Nigeria? A call for a clear legislation for Data Protection in Nigeria?' Global Journal of Politics and Law Research (2015) 3 (4) 1-16

[24] This includes NCC, FCCPC, CBN, and EFCC.

1.3.1 Constitution of Federal Republic of Nigeria 1999

The Constitution of the Federal Republic of Nigeria is the foundation upon which other legislation stands and any other legislation which is inconsistent with the Constitution is null and void to the extent of its inconsistency.[25] The Constitution is the ground norm which gives legal backing to every action of government. Therefore, the discussion on legal regimes for the protection of data privacy must commence from the Constitution**.** The constitution under section 37 protects the right of the citizens to their privacy and privacy of their homes, correspondence, telephone conversations and telegraphic communication.[26] By this provision, data privacy and protection are thus extensions of a citizen's constitutional right to privacy.

1.3.2 Freedom of Information Act, 2011 (FOIA)

Freedom of Information Act came into force in 2011 to protect public records and information held by government agencies to make this information more freely accessible by the public and also protect the data privacy of Nigerians. However, it specifically makes an exception with personal records and information and matters concerning personal privacy.[27] Though section 14 of the FOIA limits Government agencies from disclosing the personal information of citizens unless the individual's consent is obtained, or the information is publicly available, a cursory look at the provisions of this Act reveals that the Act is specifically enacted to make public documents readily available to the members of the public as at when required but did not aim at protecting the personal information of individuals. Information that is hitherto beneficial to the public but previously made sacrilege or secret is now made available to the public for the public good. Data privacy and protection therefore is not essentially within the purview of the Act.

1.3.3 Nigeria Information Technology Development Agency Act, 2007

Nigeria Information Technology Development Agency Act is the most comprehensive statutory legislation for data protection and data privacy in Nigeria.[28] The Act established the Agency (NITDA) and empowered it to issue guidelines to Carter for electronic governance and monitoring of the use of electronic data exchange.[29] Based on this, NITDA then developed and issued two

[25] CFRN 1999 S 1(3)
[26] Ibid., S. 37
[27] FOIA 2011 S 4. The only exception provided therein is where the citizen consent was freely given or publicly available.
[28] NITD Act 2007
[29] Ibid., S .6

key guidelines, that is, Nigeria Data Protection Regulation (NDPR) 2019, and the Framework and Guidelines for Public Internet Access (PIA) 2019.

The NDPR 2019 is the major law specifically aimed at addressing data privacy and protection in Nigeria. The regulation was issued by NITDA in 2019 to comprehensively regulate and control the use of data in Nigeria. The objectives of this Regulation as stated therein include-safeguarding the right of natural persons to data privacy; fostering safe conduct for transactions involving the exchange of personal data; preventing manipulation of personal data; and ensuring that Nigerian businesses remain competitive in international trade through the safeguards afforded by a just and equitable legal regulatory framework on data protection and which is in line with best practices.[30]

It is, however, unfortunate that the enforcement mechanisms provided in the regulation are grossly inadequate and ineffective in guaranteeing effective data protection in Nigeria. Similarly, the Framework and Guidelines for Public Internet Access (PIA) released by NITDA has left out a lot of issues concerning internet fraud and cybercrimes making the regulation ineffective. It is provided in this Framework that in providing public internet access, the Public Internet Access Provider (PIAP) shall adhere to all the provisions of this framework as listed in the Guidelines. However, the provider shall among other things, ensure every online communication is encrypted;[31] as well as ensure the data of users are protected and user privacy is adhered to in line with Data Protection Guidelines, 2018.[32]

To this end, one major concern surrounding the NDPR and PIA is the absence of provisions under the enabling Act authorizing NITDA to put in place regulations as relied on under section 6 of the NITDA Act, which merely empowers NITDA to create and provides guidelines but not regulations carrying or containing punishment and sanction. The guideline put in place by NITDA is therefore in order.

[30] The preamble to this regulation aptly encapsulates the significance of the regulations. It states that NITDA statutorily mandated by NITDA Act of 2007 to, inter alia; develop regulations for electronic governance and monitor the use of electronic data inter change and other forms of electronic communication transaction as an alternative to based method in government, commerce, education, the private and public sectors, labour and other field, where the use of electronic communication may improve the exchange of data and information.
[31] Public Interest Act 2019 Guidelines Rule 3.1
[32] Ibid., Rule 3.1 VII

1.3.4 Central Bank of Nigeria Customer Protection Framework (CPF) 2016

CBN is the apex bank and the controlling agency for banks and financial institutions in Nigeria. In recent time, bank transactions have been done through the Internet and the personal information of customers are usually collected, stored, processed, and used by banks. The fact that bank also uses electronic means of processing customer data made them under the regulation put in place by agencies regulating information processing and usage. Thus, CBN and other banks are subject to data regulation by the NCC as the main regulatory body for information and communication technology issues in Nigeria. It is on this basis that the CBN regulatory framework for the management of customers' data becomes important as to whether they conform to the regulations put in place by NCC.

The Central Bank of Nigeria (CBN) in furtherance of its mandate to promote a stable financial environment issued a Consumer Protection Framework (CPF) to among other objectives, build public confidence in the financial institutions.[33] The broad objective of the framework is to enhance consumer confidence in the financial services industry and promote financial stability, growth and innovation through personal data protection.[34]

In addition to the foregoing, CBN also issued guidelines on Transaction Switching Services in 2016.[35] The guidelines provide that a cardholder shall be entitled to privacy and information on his card account, and such information cannot be shared with third parties.[36]

1.3.5 Cybercrime (Prohibition, Prevention etc.) Act, 2015

The Explanatory Memorandum[37] of the Cybercrime Act[38] states that the Act seeks to provide an effective, unified and comprehensive legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrime in Nigeria; ensure the protection of critical national information infrastructure; and promote cybersecurity and the protection of computer systems and networks, electronic communication; data and computer programs, intellectual property and privacy rights. This explanation is also repeated

[33] CPF 2016 (*n.8*).
[34] Ibid.
[35] Ibid.
[36] CPF 2016 Rule 2.2.3 The Exception to this general rule is that the information can be shared with the express approval of the customers etc.
[37] This Memorandum does not form part of the above Act but is intended to explain its purpose.
[38] An Act to provide for the prohibition, prevention, detection, response, and prosecution of cybercrimes and other related matters.

verbatim in Part 1 of the Act, which sets out the objectives of the Act, wherein it is stated that – the objective of this Act is to (a) provide an effective and unified legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria: (b) ensure the protection of critical national information infrastructure; and (c) promote cybersecurity and the protection of computer systems and networks, electronic communications; data and computer programs, intellectual property and privacy rights.

The general purpose of the Act is to establish a framework for the prohibition, prevention, detection, prosecution and punishment of cybercrime in Nigeria.[39] Specifically, however, it mandates service providers in Nigeria to accord premium to an individual's right to privacy as provided under the constitution.

1.3.6 The Child's Rights Act 2003

Nigeria adopted the Child's Rights Act (CRA) in 2003 to domesticate the United Nations Convention on the Rights of the Child, which is a human rights treaty designed to guarantee the civil, economic, political, social, health and cultural rights of children.[40] The CRA is a legislation that provides for the protection of the rights of a Nigerian Child, who is defined as a person under the age of 18 years. Section 3 of Part II CRA incorporates the provisions of Chapter IV of the Constitution, which deal with the fundamental rights of citizens. Also, section 8 of the CRA which covers a child's rights to private and family life states that a child is entitled to his privacy, family life, home, correspondence, telephone conversations and telegraphic communication.[41] Thus, the Act seeks to protect the right to data protection and privacy of a child.

1.3.7 The Nigeria Communications Commission (Registration of Telephone Subscribers) Regulations 2011 (NCC Regulations)

By the provisions of section 70 of the Nigerian Communications Commission Act,[42] the Commission is empowered to make and publish regulations concerning multiple subjects including but not limited to permits, written authorisations, licenses, offences, and penalties relating to communication offences. Drawing from

[39] It is cited as an Act to provide for the prohibition, prevention, detection, response and prosecution of cybercrime and for other related matters.

[41] Uche Valentine Obi, "Nigeria: Data Privacy and Data Protection Law in Nigeria" (Mondaq, 14 April 2022) <Data Privacy and Data Protection Law in Nigeria - Privacy Protection - Nigeria (mondaq.com)> accessed 2 May 2023.

[42] NCC ACT 2003.

this authority, the NCC issued the NCC Regulations which apply to telecommunications companies. Regulation 9 of the NCC Regulations specifies that, in furtherance of the rights guaranteed by section 37 of the Constitution and subject to any guidelines issued by the NCC or a licensee, any subscriber whose personal information is stored in the Central Database is entitled to request updates;[43] to have the data kept confidential;[44] not to have subscriber information duplicated except as prescribed by the NCC Regulations or an Act of the National Assembly;[45] and to preserve the integrity of the subscriber's information.[46] Also, licensees are required to utilise the subscriber's information following the law;[47] likewise, licensees and other named parties are required not to retain the biometrics of any subscriber after transmission to the Central Database.[48] Regulation 10 of the NCC Regulations is to the effect that any release of the personal information of a subscriber must be subject to the consent of the subscriber or by the provisions of the Constitution of the Federal Republic of Nigeria or any other Act of the National Assembly or the NCC Regulations as may be amended from time to time.

1.3.8 The Credit Reporting Act 2017 (CRpA)

The CRpA was enacted to improve access to credit information and standardize risk management in credit transactions. It provides the framework for credit reporting, licensing, and credit bureaux. Section 9 of the CRpA is to the effect that Data Subjects i.e., persons whose data are maintained by credit bureaux, shall be entitled to the privacy, confidentiality and protection of their credit information subject to certain exceptions listed under section 9(2) to 9(6) of the CRpA. These exceptions are as follows:

(i) Where it has a data exchange agreement with the Credit Information User and the disclosure is for a permissible purpose, provided that a credit bureau shall be entitled to assume that consent has been obtained by the Credit Information User, unless the Credit Bureau knows, believes, or has reasons to believe that such consent has not been obtained.
(ii) Written consent of the Data Subject has been obtained by the Credit Information User under the Act and provided to the Credit Bureau (such consent to be in a form and substance satisfactory to the Credit Bureau).

[43] Nigeria Communication Commission (Registration of Telephone Subscribers) regulation 2011. reg 9(1)
[44] Ibid., Reg 9(2).
[45] Ibid., Reg 9 (3).
[46] Ibid., Reg 9(4).
[47] Ibid., Reg 9(5).
[48] Ibid., Reg 9(6).

(iii) Where the information relates to a data subject to the Bank,
(iv) Where the information relates to another person pursuant to a court order, or
(v) Where such disclosure is otherwise required under applicable law, in each case, whether or not consent has been obtained; and
(vi) The consent of a Data Subject shall not be required to disclose Credit Information on such Data Subject where the Data Subject is involved in the issuance of dishonoured cheques owing to lack of funds or involved in any other financial or credit-related malpractice and such disclosure is required to investigate or prosecute such malpractice.

1.3.9 Case Law

Though developing, this area of the law is fast complementing the array of statutory provisions. For example, the cases of *Godfrey Nya Enaya v. MTN (Nig) Communication Ltd*,[49] and that of *Barr. Ezoguru Anene v. Airtel Nigeria Ltd*[50] had the impetus to data regulation regimes in Nigeria. In the first case, the Federal High Court held that unauthorized disclosure of the claimant's phone number and subsequent unsolicited text messages received violated his fundamental right to privacy under the Constitution. The same conclusion was also reached in the second case. Other cases are also pending before the Federal High Court on the same issue of breach of data protection and security.[51]

However, in *Adeyemi Ibironke v. MTN Nigeria Communications Limited*,[52] the Appellant had alleged that the Respondent surreptitiously obtained and retained information from her SIM card on the Respondent database and that the Respondent sent messages to the Appellant's phone every ten to twenty seconds. The Appellant contended this action violated her right to privacy and amounted to nuisance which unduly interferes with her peaceful use and enjoyment of the MTN line. The Court of Appeal observed thus: '…was there any credible evidence to, again on the balance of probabilities, establish any breach of privacy by the messages and notification sent to the Appellant sim card, *even if unsolicited*…?[53] The Court answered that question in the negative and held that there was no credible and

[49] Appeal No. CA/A/089/2013 (unreported).
[50] Suit No. FCT/HC/CV/565/2015 (unreported).
[51] These are the cases of *Incorporation Trustees of Laws and Rights Awareness Initiative v Zoom Video communications Nigeria Ltd v*. Suit No. FHC/AB/C8/53/2020, for non- compliance with the provisions of NIDPR, and the case of *Digital Lawyers Initiative v. National Youth Service Corps (NYSC) Suit* No. FHC/IB/98/2020. For selling handbooks containing the detail information of the Corp member without their consent.
[52] (2019) LPELR – 47483.
[53] Ibid.

satisfactory evidence to substantiate the breach of the Appellant's privacy by the alleged messages or notifications. The Court appeared more disposed to find that the unsolicited and annoying messages amounted to a nuisance but not a breach of privacy. Even then, the Court was of the view that credible evidence had not been adduced to ground the claim of nuisance.

All these legal frameworks aforementioned portend good omen for the successful regulation of data security and protection in Nigeria. To this end, the next section discourses the importance of data privacy and protection in Nigeria and the role of the Nigerian Communication Commission (NCC) in the regulation of data privacy and protection in Nigeria.

1.4 Importance of Data Privacy and Protection

The importance of data privacy and protection in a polity especially in developing countries can never be over-emphasized. Some of the reasons why data privacy and protection become necessary are discussed below.

1. Data protection is important since it prevents the information of an organization from fraudulent activities, hacking, phishing, and identity theft. Any organization that wants to work effectively need to ensure the safety of their information by implementing a data protection plan.[54]
2. Data breaches and cyberattacks can cause devastating damage. Organizations need to proactively protect their data and regularly update their protective measures.[55]
3. With the data boom, every business accesses individuals' information to make insightful decisions and personalise their offers. Data is one of the most important assets an organisation has. Therefore, data privacy and data protection should be the top priorities for any enterprise.[56]
4. Some security agents collect citizen data for processing's sake but they may end up using the data for something else. For example, Nigeria Immigration Services collected passenger information at the time of embarkation and disembarkation at the ports for their routine jobs. This data may sometimes be

[54] Vesa Hyseni, 'Why is Data Protection Important' (PECB, 10 November 2021) <Why is Data Protection Important? | PECB> accessed 3 May 2023.
[55] Ibid.
[56] Roberta Nicora, 'The Importance of Data Privacy and Data Protection' (medium.com,30 December, 2019) <The importance of data privacy and data protection | by Roberta Nicora | Dative_io | Medium> accessed 3 May 2023.

used as a suspect index for nabbing escapee politicians or any citizen the government intends to prevent from jetting out of the country.[57]

5. Lack of Right to deal with personal information after being collected. Where information is given freely to some service providers like health workers the owner of the information hardly has the right to change or modify such information. Often, these service providers hide under the cover of official confidential information. In developed nations, this is not the case.
6. Another reason why data privacy and data protection become necessary in Nigeria is that the requisite consent required before an individual may divulge his information, especially through online transactions is lacking. This often leads to an individual releasing personal information that hitherto need not be released. This problem is due to inadequate legal and institutional frameworks, lack of implementation of existing legal frameworks for the regulation of these issues[58] and lack of awareness among the citizens.
7. Again, the lack of transparency in the processing of personal data by those agencies responsible for collecting citizen's data is another reason why data privacy and protection become necessary. Individuals more often do not know what is to be done with their data. Whereas the ideal is that anything to be done with a citizen's data must be communicated to him and should not be used unless his consent is sought and obtained.[59]
8. There is no sound legal framework protecting the vulnerability of children to privacy risks online. The reason for protecting data privacy becomes more imperative because children lack the cognitive ability to appreciate the privacy needs of their activities online.[60] Again, children may not know the nature of the information sought or the after-effect of the information or/and the intended use.[61] More so, children generally, lack the legal capacity to give valid consent.[62] Finally, the outcome of the research conducted by NCC in 2014

[57]wikiheek: (nd) Nigeria: Government, Practices Information Collection, Screening http://wikilesk.org/plood/cables/07Abuja2320-ahtml .

[58] Consent needs to be adequate and freely for it to be free and adequate, it needs to be informed, freely given and unequivocal. Requirement for free consent is usually a perquisite in developed jurisdictions. See European Union Agency for Fundamental Rights, Council of Europe 2014. P. 55

[59] MTN v. Barr. Godfrey Nya Enya Appeal No. CA/A/689/2013 (unreported) and the case of the cases are a testimony to the fact.

[60] Montgomary Kathryn, 'Generation Digital: Politics, Commerce, and Childhood in the age of the Internet' (MIT Press, 2007) p.89 < https://psycnet.apa.org/record/2007 > accessed 22 September 2023.

[61] S B Jerry "Catching Worldwide Websites, "Practising Law Institute (1998), p. 475

[62] J C Angela "Should Government Regulate Advertising to children on the world web site. Law Review, Vol. 33, No. 331 (1998). P. 320

reveals that children are more vulnerable than adults in terms of the danger posed by the use of the internet.[63]

The foregoing shows that the need to regulate data privacy and data protection in the telecommunication industry can never be overemphasized.

1.5 The Role of NCC in Ensuring Data Privacy and Data Protection in the Nigerian Telecommunication Industry

The Nigeria Communication Commission (NCC) is the regulatory body established by the NCC Act to regulate telecommunications industries in Nigeria.[64] It was established with the responsibility to regulate the provision of telecommunications services and facilities, promote competition and set performance standards for telecommunication services in Nigeria.[65] The powers of the NCC are provided under section 1 of the Act[66] while its functions are provided under section 4 of the Act.[67]

The powers and functions of the NCC as provided under Sections 3 and 4 of the Act do not specifically mention the role of NCC in the regulation or concerning data privacy or data protection in Nigeria. The provision of section 4 (i) empowers the NCC to make regulations for the successful implementation of the Act. It provides: Establish a regulatory framework for the Nigerian communication industry…[68] Similarly section 4(1)(i) provides: Making and enforcement of such regulations as may be necessary under this Act to give full force and effect to the provisions of the Act.[69]

The foregoing provisions are to the effect that NCC is empowered to provide regulatory instruments to enable it to realize or achieve its aims and objectives. The NCC makes regulations under its powers under the Act. These regulations are considered below to see the role of the NCC in data privacy and protection in Nigeria.

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[63] NCC 2014, "Parental Control Managers for Telecommunication Networks <https://www.ncc.gov.ng/domain-main/ industry-statistics/research-report1578-parental-control-measures for while-telecommunication-networks/file>

[64] First established Under Decree No. 75 of November, 24, 1992 by Federal Military Government of General Abacha. It was abrogated by the Act of National Assembly, Act No. 19 f 2003.

[65] S 1 NCC Act.

[66] Ibid.

[67] Ibid.

[68] NCC Act 2003. S 1(b).

[69] Ibid., S 4 (1)(i) and S 106.

1.5.1 NCC Consumer Code of Practice Regulation 2007

The NCC Consumer Code of Practice Regulation came into force in August 2007 to confirm and clarify the procedure to be followed by Licensees in preparing approved consumer codes of practice.[70] The code consists of 12 regulations. This code does not specifically regulate data protection or privacy. What it does instead is refer to the General Code made under the Consumer Code and Part III.[71] Regulation 8 of the Consumer Code provides; "Licenses shall be subject to the compliance provisions set out in part VIII of the General Code, or equivalent provisions of any approved individual Consumer Code."[72]

To ensure effective compliance with the provisions of the Code, regulation 9 states the consequences where any licensee fails to comply or contravene any provisions of the Code. It provides:

> Any Licensee that contravened any of the provisions of these Regulations is in breach thereof and is liable to such fines, sanctions or penalties, including any penalties determined under the Nigerian Communications (Enforcement Processes, etc.) Regulations 2005 as may be determined by the Commission from time to time.[73]

Though the foregoing provisions are laudable, failing to specify the penalties in clear terms when the provisions of the Regulation are contravened, makes the role of NCC in ensuring data privacy and protection a dicey one. This is because NCC will apply discretion when applying punishment or sanction unlike when it is expressly stated in the regulations. Again, connecting or linking the penalties fines or sanctions to be imposed on defaulters to other subsidiary legislation (Regulation) is not only cumbersome but distractive.[74] Considering the General Consumer Code made under the NCC Consumer Code of Practice Regulation is instructive.

1.5.2 General Consumer Code of Practice

This Code of Practice consists is a directive of the NCC pursuant to the provisions of the NCC ACT 2003 and the CCPR 2007. It was published under section 106 of the NCC Act of 2003. It is meant to govern the provision of service by licensed

[70] Licensees are service providers licensed by NCC to provide ICT services to consumers on members of the public. This include MTN, Airtel, Glo, e.t.c.
[71] Nigeria Communication Commission (Consumer Code of Practice Regulations) 2007.
[72] Ibid., Regulation 8.
[73] Ibid., Regulation 9.
[74]Ngozi Aderibigbe "Nigeria Has a Data Protection Regime < http://www.jacksonettianedu.com/nigeria-has-a-data-protection-regime?um_source-Mondaq&utm_medium=syndication&utm_campaign=View-Original> accessed 20 April, 2019.

telecommunication operators in Nigeria.[75] The purpose of the code is that NCC has advised all licensed telecommunications services providers in Nigeria to provide a Consumer Code of Promise. The provisions of this General Code are to be read in conjunction with the Consumer Code of Practice Regulations, 2007.[76] Specifically regulations 35, 36 and 51 of the General Code merit discussion here.

To begin with, regulation 35 provides; "A license may collect and maintain information on individual Consumer reasonably required for its business purpose. However, the collection and maintenance of information on individual consumers shall be:

a. Fairly and lawfully collected and processed;
b. Processed for limited and identified purposes;
c. Relevant and not excessive;
d. Accurate;
e. Not kept longer than necessary;
f. Proceeded by the consumer's other rights;
g. Protected against improper or accidental disclosure; and
h. Not transferred to any party except as permitted by any forms and conditions agreed with the Consumer as permitted by any permission or approval of the commission…[77]

The above is to the effect that part of the role of NCC in ensuring data privacy and protection is to see that no service provider in the telecommunication industry shall abuse a consumer's data or information that was fairly or lawfully collected.[78]

Thus, regulation 35 requires all licensees to take reasonable steps to protect the information of their customers against improper or accidental disclosures. It prescribes that licensees shall not transfer this information to a third party except as permitted by the consumer or commission or by other applicable Laws or regulations. This law extends not only to electronic or written data but also to verbal data recorded by the licensee.[79] It also provides for the notification of the consumer of the use and disclosure of data obtained from them. [80]

[75] This shows that through the contravention of these Regulation (NCC Code Regulation) may be in issue to know the punishment to be imposed further reference must be made to another law.
[76] CCPR 2007. Code 1(1).
[77] Ibid., Codes 35(a-b).
[78] Ibid., Code 36.
[79] Regulation 35(1) of General Consumer Code of Practice, 2007.
[80] Ibid., Regulation 25(3).

Similarly, the code also mandates service providers/licensees to protect the information of individuals lawfully and voluntarily collected. Further to this, the Licensee shall also ensure that any person to whom information of the consumer was lawfully given shall also protect such information. By this provision, therefore, it is part of the role of the NCC to see that consumers of telecommunication services are protected against having their information unnecessarily revealed.

Under regulation 51 of part VIII, the Commission (NCC) is empowered to monitor compliance with the applicable code provisions. The regulation states: "The Commission will monitor compliance with applicable code provisions regularly to ensure the overall effectiveness of consumer's codes in achieving their objectives which include;

a. Complaints monitoring,
b. Routine verification of code compliance by Licensees; and
c. Identification of other consumer code issues

The above provisions show that it is part of the role of the NCC to ensure data privacy and protection in Nigeria to monitor the activities of the Licensee to ensure compliance with the provisions of the codes. This monitoring role is to be done on a routine basis. Similarly, complaints made against Licensees are also to be effectively monitored for proper redress.

1.5.3 The NCC Registration of Telephone Subscribers Regulation 2011

This regulation was also made by the NCC based on its power under section 106 of the NCC Act.[81] Regulations 9 and 10 of this regulation regulate data privacy and protection of subscribers. Regulation 4 provides for the confidentiality of subscribers' personal information stored in the central or Licensee's databases.[82] It also provides that this information shall not be released to a third party or transferred outside Nigeria without the prior written consent of the subscriber and commission.[83] This regulation also regulates the information stored in the central database as the property of the Federal Government of Nigeria.[84]

From the foregoing analysis, one can safely assert that the role of the NCC in ensuring data privacy and protection in Nigeria include but is not limited to making

[81] NCC Act 2003 and Federal Republic of Nigeria Official Gazette No. 101 7 November 2011, Vol 98 .
[82] Regulation 9(2) of NCC Registration of Telephone Subscribers Regulation 2011.
[83] Ibid., Regulation 10
[84] Ibid., Regulation 5

necessary regulation for monitoring to ensure compliance with the provisions, fines, and penalties where any provision of the regulations are breached and to perform all other roles necessarily incidental to the above roles.

1.6 Findings

At the end of this research, this paper finds as follows:

1. Legal Framework and Enforcement: The Nigerian Communications Commission (NCC) has established a strong legal framework for data privacy and protection in the telecommunications sector, as well as demonstrated a commitment to enforcing data privacy laws through sanctions against telecommunications operators who violate data privacy regulations. This demonstrates the NCC's commitment to protecting subscribers' data in theory.
2. The National Data protection Regulations solely applies to all transactions intended for the processing to personal data and to natural persons residing in Nigeria or residing out Nigeria but of Nigeria descend. It excludes other form of data and organizations.
3. Subscriber Awareness: Although the NCC has implemented legislation, Nigerian telecommunications service subscribers are unaware of their data privacy rights. Many subscribers are uninformed of how to protect their data and what options they have in the event of a data breach.
4. Collaboration with Stakeholders: To guarantee the implementation of the Act, the NCC has collaborated with telecom service providers and other relevant stakeholders. This enhances the effectiveness of the data protection.
5. Challenges: The diversified and quickly changing telecommunications industry is a challenge for the NCC especially in monitoring and implementing data privacy laws. The evolving nature of technology and cybersecurity threats requires constant adaptation and resources. Robust laws without any implementation mechanism are as good as not having the laws.

1.7 Recommendations

Based on the above findings, it is recommended that:

1. Enhance Consumer Awareness: The NCC should invest in public awareness campaigns to educate Nigerian telecommunications subscribers about their data privacy rights, how to secure their data, and the procedures to follow in case of data breaches.
2. Capacity Building: Provide training and capacity-building programs for NCC staff and telecommunications operators to update and enhance their knowledge of the latest data privacy threats, technologies, and best practices. The NCC should also invest in research and development to keep pace with emerging

cybersecurity threats and technologies. And continue to foster collaboration with industry stakeholders, cybersecurity experts, and relevant government agencies to develop comprehensive strategies for data protection.

3. The NCC should create and promote a comprehensive data breach response plan that details subscribers' options in the event of a breach, as well as the penalties for negligent operators. This can be achieved by implementing international best practices to keep Nigeria's telecommunications sector globally competitive and secure.
4. Transparency and Accountability: the NCC should maintain transparency in all regulatory actions, and both the NCC and telecommunications operators should be held accountable for infractions of data privacy. Also, regular audits and inspections of telecommunications operators should be conducted to ensure compliance with data privacy regulations. This should include assessing their data security infrastructure and practices.
5. Review of Regulations: Periodic review and update of data privacy regulations is necessary to adapt to changing technologies and emerging threats, ensuring NCC remain effective and relevant.
6. Public Feedback: NCC should establish a mechanism for the public to provide feedback and report data privacy concerns, this will enable continuous improvement and responsiveness.

The Nigerian Communications Commission can strengthen its role in safeguarding the data privacy and protection of Nigerian telecommunication service subscribers, fostering trust in the telecommunications sector, and promoting digital growth in the country by implementing the above recommendations.

1.8 Conclusion

There is no doubt that the NCC has an important role to play in ensuring data privacy and protection in Nigeria. This role progresses from making regulations and monitoring compliance to imposing sanctions penalties and fines. It is however observed that there are too many laws and regulations to contend with by NCC in carrying these roles which may be counterproductive for its effective performance. Generally, the NCC Act does not provide anything concerning the role of the NCC in regulating data privacy and protection. Despite the numerous laws and regulations on data privacy and protection, the only law that specifically and comprehensively deals with this phenomenon is the NDPR by NITDA. Prior to the NDPR, most of the laws were specific. For instance, the NCC regulates and protects consumer in the telecommunication sector, the provision of the Child Rights Act protects persons under the age of 18years, and the Freedom of Information Act

protects personal data in records of public institutions. At this juncture, it can be safely concluded that the NCC's role is not significant to many subscribers as they are not aware of the existence of the commission. Aside from the numerous laws and regulations, what actual protection does the NCC provide for Nigerians? This is a question that begs for an answer, as Nigerians continue to suffer at the hands of fraudsters, who approach victims via phone numbers, emails and other social media platforms. Contacting victims on social media platforms like Facebook, Twitter (X) and Instagram can be somewhat understandable, but fraudsters contacting victims through phone or WhatsApp which also requires a phone number is a strong indication of a data breach. These fraudsters sometimes provide their target (victim) with his exact date of birth, account number and BVN. Several questions that will flood the readers' minds are; who provides them with the phone numbers and emails? How did they get this sensitive information? Answering the above questions may be subject of another article.

Assessing the Regulatory Frameworks Protecting Expectation Rights of Students in the Nigerian University System

Walter Imoedemhe*

Abstract

The Nigerian University System is an institutional unit run by laws and embedded with statutory obligations and powers, to enact rules and make regulations geared towards providing services to students. This is with a view to meeting the legitimate expectations which accrue to them from their right to freedom to study within the academic community Students expect that university authorities will not renege from these rules and the consequences of the representations that follow, more so, as the universities function within the respective statutes creating them and are also limited by their own rules. There are however frequent incidents of futility; administrative and judicial, of student's pursuit of their legitimate expectations within the university. This paper argues that embedded in the laws setting up the various university systems in Nigeria are statutory institutional frameworks, created to ensure assurances and representations by universities authorities in exercise of their discretionary powers, particularly to students are fulfilled. It observes the narrow application of their purposes, leads to a denial of their potency in the university system. The paper broadens the understanding of university authorities about students' legitimate expectations; it recommends adherence to principles inherent in the concept by universities authorities that would create the needed harmonious relationship within the university communities.

Keywords: Universities, Students, Legitimate Expectations, Public Administration, Regulatory Framework

1.1 Introduction

Higher education in Nigeria covers essentially all forms of post-secondary delivery, typically the last four years of the educational system. There are three main clusters of Higher Education in Nigeria: colleges of education, the polytechnics and universities. [1] As an institution, a university has a perpetual existence with obligations to build up a tradition of conducting all its affairs; the enforcements of

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[1] Okebukola P A, 'Private University Education in Nigeria: Case Studies in Relevance'. (2017) Okebukola Science Foundation, Sterling Publishers, Slough UK, 1.

rules and regulations and the discipline of students, the proper way.[2] Students form the core group in every university community.[3] These objectives, no doubt, cannot be effectively attained within the university without adequate machinery to safeguard students' rights and their legitimate expectations.[4]

The dynamics of administering universities and the conceptualisation of the rights of students by the judiciary, makes realising these goals doubtful; the constitutional provisions and case law in Nigeria not to provide the necessary guidance. Furthermore, the rare challenge by students of adverse academic and disciplinary decisions arising from the representations by university authorities, are generally unsuccessful. This paper argues that embedded in the statutes creating universities and their operational organs, are mechanisms for upholding student's legitimate expectations in Nigeria. The paper sets out to identify these institutional frameworks. It further examines their efficacy towards sheltering student's legitimate expectations in Nigeria's university system.

Here, the University of Benin Law and the statute creating the Ambrose Alli University, Ekpoma are used as case studies.[5] The choice of these institutions is two-fold. The first reason is that they are both public universities and the provisions of the enabling laws establishing public universities in Nigeria are analogous. Therefore, using them will suffice to substantiate the points, though it does not foreclose references to other universities in Nigeria. Furthermore, University of Benin is an example of a Federal Government owned public institution and Ambrose Alli University is a State-owned public university. Admittedly, the institutional framework of these universities does not make them rank superior to other universities in Nigeria. [6] Rather, for the reasons listed above and for space constraint, they are considered more appropriate within the perspective of this research.

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[2] *Fanoro v Abimbola*, Suit. No. HOD/5M/88 dated 26th October 1988, 2 Nigerian Public Litigation Reports, Frankad Publishers, Lagos, (2002) 594, Per Aguda, J.

[3] Imoedemhe Walter, *Sowing Seeds of Justice and Legal Development*, University Law Publishing Co, Lagos, (2019), Chapter 8, p. 170 (for discussion on students and studentship in Nigeria)

[4] These are the expectation-rights students derive from their right to freedom to study within the academic community. These rights are the consequences of the rules developed by public university authorities in exercise of their statutory powers. See Inyang E, *Education Law and Administration in Nigeria* (2010) Olade Publishers, Lagos 412-413; see, Dotan Y, 'Why Administrators should be Bound by Their Own Policies, 17, *Oxford Journal of Legal Studies,* (1977) 23, 26.

[5] University of Benin Act, Cap. U4, Vol.13, Laws of the Federation of Nigeria, 2010, and the Ambrose Alli University Law, 1999 as amended.

[6] References to universities in Nigeria may also bear necessary implications to private universities.

The paper is in four parts. Part one is the introductory section. It addresses issues relating to the meaning of universities, their development, the concept and purpose of university education. Part two enumerates and examines some of the institutional frameworks in Nigerian universities, that is, the Council, Senate, Vice Chancellor, Board of Studies and Students Affairs Division. Part three briefly examines the concept of legitimate expectations and what constitutes a student's legitimate expectations in Nigeria discussed in this paper, and the last section concludes the paper with recommendations.

1.2 Meaning of University

The term university is derived from the latin word, *'universitas',* meaning whole but which to the medieval jurists who deployed it, meant any corporation or community with an independent legal status, such as a craft guild.[7] It was rephrased *universitas scholarium*, that is, community of scholars, to differentiate it from other communities, and later as *universitas magistrorum et scholarium*, meaning, a 'community of teachers and scholars' [8] also referred to as 'a place where the truth should most be insisted upon'.[9] Inyang, posits universities are the highest academic institutions in the country'.[10] He argued their description is rather 'presumptive'.[11] The reason is that in this context, the description of the term university in Nigeria is not exhaustive.[12] For instance, the University of Benin Law simply described it as 'the University of Benin'.[13] The Ambrose Alli University Law 1999 as amended refers to it, simply as Ambrose Alli University. The consequences can be inferred from the decision in *St. David's College Lampeter v Ministry of Education*,[14] where the court held that 'the true definition of a university depends on whether an

[7] Hall D, 'What's the Point of the University' (Distilling 80years of History of Western Education) A Lecture delivered by the Registrar, University of Leicester, at Peter Williams Lecture Theatre, dated 6 August 2012, 2.

[8] *Encyclopedia Britannica*, 11th Edition 1911; Also, Oyebade E F, *Nigerian Legal System: The Role of Professional Administrators* (2011) St, Maotex Ventures, Akure 1

[9] Hyer R S and Ted A Campbell (ed), *The Purposes and ideals of a university*. (1912) Office of the President Administrative, Paper 1 at 3.

[10] Inyang, note 2, 180-182

[11] ibid 180.

[12] *Cark v University of Melbourne* (1978) VR 457 p. 467 refered to here as the 'whole body of teachers and students pursuing at a particular place, the higher branches of learning. For Crowther J, Oxford Advanced Learner's Dictionary of Current English, Oxford Press, 5th edition, 1995 P. 1304 University is the highest level of educational institution in which student's study for degrees and engage in academic research.

[13] s.2, Cap. U4, LFN, 2010; see also, s. 29, Federal Universities of Agriculture Act, Cap. F22, LFN, 2010; s.2, Obafemi Awolowo University Act, Cap. 02, LFN, 2010; s. 26, Cap. U17, LFN, 2010.

[14] (1951) All ER 559 at 560, 661.

ordinary man of good university education would consider that the institution is one'.[15]

Maiherbe[16] opined, regardless of the perspective from which the term is described, a university could be identified by its three distinct characteristics of being 'an entity, a statutory institution, and an institution of higher learning aimed at teaching and research. As an entity, it is a gathering of people comprising of staff and students with a common purpose, but with a distinct entity regarded in law as a juristic person.[17] As a statutory institution, universities are not only bound by the constitution, they are the bearer of rights by creation.[18] Any infringement of these rights by the university can only be justified in terms of the applicable provisions in the constitution.[19] It is the opinion of the writer that the better view should be that because the university is considered by a diversity of objectives, its definition should be elaborate. A university could therefore be described to mean a higher institution established for the training of students for the award of various degrees, which include post graduate and undergraduate degrees, diplomas and certificates, for research and community service.

1.3 Development of Universities in Nigeria

It is impossible to assign an exact date to the origin of universities. The simple reason is that the first of them grew into being over a considerable period of time. Scholars suggest that the earliest of 'universities simply represented societies or guilds of masters or students traceable to the academic conditions that were prevalent in some prominent ancient European cities'.[20] They metamorphosed either from the colloquium of students from all over Europe,[21] or by the appearance of great teachers who attracted students to particular cities, making them centres of

[15] Inyang note 2, 180.
[16] Malherbe R, 'A Fresh Start II: Issues and Challenges of Education in Education Law in South Africa'. *European Journal for Education Law and Policy* (2000) Vol. 4, 59-60, writing on the South African tertiary institutions.
[17] Amplified in Strategic Plan, 2002-2012, University of Benin, Benin City. pp. 27, 49, 180.
[18] Maiherbe, *Stell LR*, Vol. 3, (1999), p. 342; also, s. 1 &13, CFRN, 1999
[19] See s. 45, Constitution of the Federal Republic of Nigeria 1999 as amended (CFRN, 1999).
[20] Typified in the cities of Bologna, Paris and Oxford. See Boyd W, *The History of Western Education*, (1952) 6th edition, London, Adam & Charles, Black. p.138.
[21] Ibid.

learning for specialised instructions.[22] Boyd stated that these conglomerations were in fact, the beginnings of universities.[23]

The university has risen to be the most important institution in the higher educational system globally. The history of any 'knowledge society' cannot be divested from it as the main driver, providing the higher education that is fundamental for development and significant for its existence in a globalised world.[24] When a university builds up and establishes in a society a tradition of conducting all its affairs, particularly the enforcements of its rules, regulations and the discipline of students in the proper way, that one can call that society civilised.[25]

In Nigeria, the university is at the highest level of teaching and research. Its history is associated with the British colonial incursion into the territory then known as the Protectorate of Nigeria.[26] By the 1920s, the quest for higher education was rife. What manifested was the establishment of the Yaba Higher College, Lagos in 1934.[27] Its failure to meet set objectives to produce middle manpower led to the setting up of the Eliot Commission in 1943 to advise on Higher Education needs of British West Africa.[28] The Commission recommended the establishment of the University College, Ibadan, a college of the London University in 1948. It attained full university status in 1962.[29] The 1959 Ashby Commission on Post-Secondary Certificate and Higher Education[30] that followed established three regional universities in Nigeria between 1960 and 1962. The University of Nigeria, Nsukka

[22] Ibid.

[23] Ibid., emerged first as *school*, later, as *stadia generalia*, which unlike the schools, where generally recognised places of study open without restriction to the students of Europe.

[24] Albert I O, 'Filling Functional Gaps in University Education', Chapter 24 in Okogie J, Oloyede I and Obanya P, 50 years of University Education in Nigeria: Evolution, Achievements and Future Directions, p.489.

[25] Aguda J, opcit.

[26] It is widely noted Nigeria was colonised by the British Government, governed as a colonial extension of Britain.

[27] Nwana O.C. *University Academics in Nigeria. Memoirs of an Insider*. 2008, Peacewise, Lagos, Nigeria, p. 1. This was the nearest indigenous approach to modern day university in Nigeria, opened in 1930 and closed in 1947 after all its students were transferred to the New University College, Ibadan, Oyebade, opcit.

[28] Walter Elliot (Nigeria) Commission for Higher Education in West Africa was appointed simultaneously with the Asquith (Ghana) Commission in July 1943. See Apollos Okwuchi and Nwauwa, *Imperialism Academe and Nationalism: Britain and University Education for Africans 1860-1960* (Book craft (Bath) Ltd, Midsomer Norton, (1997) 159.

[29] The first university in Nigeria established as a College of the Metropolitan University of London. It was independent of London University and became a full-fledged University of Ibadan in 1962.

[30] Ashby Commission Report on Higher Education in Nigeria. DOC. 167/3 1960-1961.

(UNN), the first full-fledged regional University.[31] Ahmadu Bello University, Zaria (ABU),[32] and University of Lagos, (UNILAG).[33] A fourth, the University of Ife, now Obafemi Awolowo University was established simultaneously though not on the basis of the Ashby Report but on the recommendation of an all indigenous committee for the Western Region.[34] Following in this stead, the Mid-Western Regional Government of Nigeria in 1970 established the Mid-West Institute of Technology (MIT) which later became a full-fledged University, the University of Benin in 1972.[35] These six are generally now referred to as Nigeria's first generation universities.[36]

Controversies abound as to which of these Universities take pre-eminence as the first autonomous university in Nigeria. Can it be the University College, Ibadan, founded in 1948 which metamorphosed into the University of Ibadan in 1962, the first type university in Nigeria or the University of Nigeria, Nsukka, founded in 1960 with a full autonomous university status? One view is that Ibadan was established as a College of University of London and operated like a university with curriculum and teaching status, and thus have some relative seniority over Nsukka. Others argue, that since Ibadan operated the Degrees as an appendage of a London University and not its own, Nsukka should have relative seniority over her.[37] The debate is still on. According to Nwana, the eleven years of experience which Ibadan had taught students and embarked on research before Nsukka was founded in 1960 could not have been for nothing. For Akpandem, it is critical to note that in July

[31] University of Nsukka was created by the Statute of the Government of the Former Eastern Region in 1955 and it was opened in 1960.

[32] Ahmadu Bello University (ABU) Zaria was founded by the Government of the Former Northern Region in 1962.

[33] University of Lagos was established by the Federal Government in 1962.

[34] Although not recommended by the Ashby Report, University of Ife was founded by the Government of the Former Western Region in 1961 and it enrolled its first students in 1962.

[35] The Mid-West State (formerly known as the Mid-West Region, then Bendel and now Edo/Delta States) was carved out of the Western Region. It established the MT in 1970, gained a university status, University of Benin in 1972 and it was taken over by the Federal Government in 1975.

[36] Okojie summed it as follows. 1st University, the University of Ibadan, 1948; 1st generation universities, 1948 to 1970 (Regional universities, IFE, UNN and ABU); 2nd generation universities, 1975 1988 (First State Universities, RSUST, 1979); 3rd generation universities, 1991- 2007 (1st generation Private Universities, 1999); 4th generation universities, (2011-date). The number of universities in Nigeria being 142, consisting of 40 Federal, 42 States and 60 private. See Okojie J A, 'Embracing Reforms that Enhance Research Innovation and Entrepreneurship in Nigerian Universities'. Being the text of a Special Lecture Delivered at the University of Benin, Benin City, Nigeria, on Monday 04, July 2016 at the Akin Deko Auditorium, pp. 7-8: see also, National Universities Commission, Nigeria (NUC) Release, Vol. 7, No. 19 dated 7th May 2012, pp. 8-11.

[37] Nwana, note ,opcit.

1965 when UI, ABU, Lagos and IFE were to turn out their first crop of autonomous Nigerian university graduates, UNN had turned out two sets of such graduates.[38] The writer opines that what gives a university the capacity to undertake a programme of teaching is the instrumentality of having acquired the requisite accreditation of a university status. This, to all intent and purposes, the University College, Ibadan had.

The need to establish additional universities where they did not hitherto exist was considered in Nigeria's third National Development Plan. The Plan recommended the creation of seven more universities.[39] This gave birth to what was known as the Seven Sisters', or the Second Generation Universities' in 1975.[40] Between 1985 and 1999 a third generation universities, ten in number, were established following the need to address special areas of technological and agricultural demands in Nigeria.[41] Between 2011 till date, a fourth and several other universities have emerged in Nigeria.[42] Akpandem sums this up when he stated that more universities were established at random.[43] Only recently, a further category have begun to emerge. They occupy a strategic position in the development process of the Nation.[44] Eso opined that, societies all over the world look up to the universities and their intellectuals to lead the march towards civilisation and development. The more a society advances towards enlightenment and education, the greater its influence and might in the comity of nations.[45] These universities are purpose-driven, with ideals and purposes on achieving their set obligations.

[38] Akpandem J, 'Nigeria: Enhancing Employability of Nigerian Universities', *Graduates in a Competitive Global Economy* (1) in *Premium Times* 3rd November 2015, 4.
[39] See Humphrey Nwosu, Nigeria's Third National Development Plan, 1975-80.
[40] The 'Seven Sisters' or Second-Generation Universities were the University of Calabar 1973, the University of Jos 1971, the University of Maiduguri 1975, the University of Sokoto 1975, the University of Ilorin 1975, the University of Port Harcourt, 1975 and Bayero University Kano. (The name Seven Sisters is a loose association of seven liberal arts colleges in the North-eastern United States that are historically women centered colleges).
[41] Akpandem, opcit.
[42] Okojie, opcit, p8.
[43] Akpandem, opcit.
[44] Okojie, opcit, pg7.
[45] Kayode Eso, JSC, Thoughts *on Human Rights and Education*, St Paul's Publishing House (2008), in Ajayi, Goma and Johnson, (1996), p. 261.

1.4 Concept and Purpose of University Education

The word, 'concept' means 'an idea or standard that seems perfect and worth trying to achieve or obtain'.[46] It connotes a philosophy that has arisen from 'a particular set or system of beliefs resulting from the search for knowledge about life and the universe'.[47] 'Purpose' on the other hand, represents the intention, point, aim or function of a person, body, institution or organisation to achieve a set ideal.[48] Universities, by their nature are ideal-based.[49] Their creation are primarily geared towards achieving the set ideals. The extent to which this is achieved, underpins the ground for measuring their accomplishment. What constitute the concept and purposes of a university is shrouded in debates prefigured in the differing views held by commentators depending on where they stand.[50]

One view argued it may well begin with the motives for seeking right knowledge.[51] Another posit that the ethos of a given epoch determines the ideals and purposes of the university. In this regard. Hall,[52] argued that three important legacies account for this. The time and place of their establishment, the powerful agents through whose patronage they survive and flourish, and the patronages which bring about mutual dependence. According to Flexner:[53]

> a university is not outside, but inside the general social fabric of a given era ... it is not something apart, something historic, something that yields as little as possible to forces and influences that are more or less new. It is on the contrary ... the expression of the age.[54]

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[46] Hornby A S, *Oxford Advanced Learner's Dictionary*, New 8th edition, Oxford University Press, Oxford, p. 742.
[47] Ibid., 1097.
[48] Ibid., 1191.
[49] *Manual on University Management*, National Universities Commission, Abuja, Chapter One, June 1997, p. 8.
[50] For instance, Plato views education as the route to moral and intellectual excellence. For Isocrates, the purpose was to enable a practical and useful engagement with the community. Aristotle pondered whether the purpose of education was to produce learned men educated in virtue, or to satisfy materials needs of the society?
[51] See Huxley T H. (1825-1899), Address to the Faculty, University of Aberdeen in 1874 titled: 'Universities: Actual and Ideal', in Hyer note 9, A university can have no higher mission than to insist upon the truth and to discharge the obligation thus expressed. See pp.1-2.
[52] Hall, opcit, pg, 4.
[53] Flexner A, *Universities: American, English, German*. New York, NY USA, Oxford University Press, (1930) in Albert, opcit, pg.490.
[54] Ibid.

Albert, summed the two views and rightly too when he postulated that universities existed as an integral part of the larger objective of meeting societal needs with three specific mandates; to promote knowledge reproduction and develop manpower through teaching, to expand frontiers of knowledge through research, and provide public community service.[55] These three dimensional goals are universal, they have become generally the aims and philosophy that have gradually been framed into known traditions which significantly shape the character and history of universities today.

Arguably, there exists no global consensus on how universities should engage them.[56] What the real purpose of the university should be, may well account for these contentions. Some argue that it should only be teaching and research, others insist that it includes community service.[57] This again appears to be one of the reasons why expectations from universities cannot be measured in exactitude. It becomes circumspect that in order to realise the key mandates of the university, what should be considered 'is the question of preference and practical emphasis, not exclusion, so that a balance among all three objectives can be achieved.[58] This portends that every nation has to determine what it does with or expects from its university system.[59] This principle has road mapped the trajectory of universities in Nigeria.

According to Imogie, university education was a fruit of the nationalist struggle in Nigeria, hence the independent state was the key to its establishment. This content defined both the role and the function of the university as it was at that time. The State was the custodian of the development process and the university became the institution to train resources which were then called manpower training for development.[60] 'The university was a national asset; a training ground for personnel to manage development'.[61] Imogie opined that the historical factors that shaped the mission and status of university in Nigeria, premised on the notion that the university exists to produce manpower for development, not only did it shape the

[55] Ibid.
[56] Illustrative is the 'ivory tower' versus 'trade center' debate by scholars. See Albert, note 24, 490
[57] Barrett B, 'What is the function of a University, Ivory Tower vs. Trade School for plumbers?'. *Quality Assurance in Education*, Vol., 6, No.3 (1998) 45 -151 in Albert, note 24, 490.
[58] Albert, opcit, pg 491.
[59] Barrett opcit, pg 491.
[60] Imogie A I, 'Learning System as an Imperative for Adding Value to University Education in Nigeria', 4th Faculty of Education Distinguished Lecture Series, University of Benin, 30th October, 2007, p.4.
[61] Mandani M, 'Historical Notes on Academic Freedom in Africa (1985).

government policies on university education in its early days but continues to do so today.[62] 'The basic concept and purposes of university education in Nigeria were mainly the production of manpower to fill existing vacancies.[63] This narrow concept of university education has however been replaced by the expanded aims of Higher Education in Nigeria, encapsulated in the provisions of the National Policy on Education, 1981.[64]

These objectives are now pursued through the globally acceptable three-dimensional obligations of the university, teaching, research and community service mentioned earlier. How the exercise of these obligations affects student's legitimate expectations will be discussed more elaborately. But first, an examination of universities institutional frameworks is undertaken next. These comprise the administrative structures, such as the Principal Officers, Statutory Organs, Bodies and Committees that regulate students' conducts within the university community, patterned to support the ideals and purposes with which the university is meant to achieve its obligation.[65] The purpose is to ascertain if the frameworks signpost, and functions to meet its purposes.

1.5 Institutional Frameworks

Generally, the features of a university's organisation are laid down in the Law establishing it. The provisions of the Law are explained and enlarged upon in the statutes of the university. The Law and Statutes together form the administrative framework within which the university is to be governed.[66] While the Law provide guidance for exercising the provisions of the statute of the university, it empowers the administrative structures to discharge the obligations and functions of the university through the promulgation of rules, regulations and policies. The law instituted these structures with the intent that university authorities will meet the expectations of students and their statutory responsibility of teaching, research and community service. Interestingly, the outcome of the deliberative and adjudicative roles of these university organs creates legitimate expectations in the students.

[62] Imogie, opcit, pg5.
[63] Ibid.
[64] See National Policy on Education, 1981 (Objectives of the National Education Policy 2020 states UBE shall be provided for all Nigerian citizens in different ways).
[65] The obligations are teaching, research and community service. See Albert, opcit, pg 490
[66] NUC Manual, opcit, pg 2.

1.5.1 The University Governing Council

The Council [67] is the highest organ governing each University in Nigeria, subject to the provisions of the Law relating to the Visitor.[68] Its composition is as determined by the Law in force.[69] It is charged with the general control and superintendence of the policy, finance and property, as well as the public relations of the University.[70] It has autonomous powers to discharge these functions and exercise of its responsibilities for the good management, growth and development of the University.[71] These powers include the authority to make, approve policies and statutes regarding the constitution and composition of Boards and Committees in the university, and to amend or revoke them, subject to the enabling Law.[72] In this regard, the Council either delegates legislation or make subsidiary instruments, the linchpin of university's administration. It functions through Committees. Some are the Finance and General Purpose Committee, Development and Physical Planning Committee, Honorary Degrees Committee, Appointments and Promotion Board (Academic, Senior and Junior Non Academic), Board of Health, and the Senior and Junior Staff Disciplinary Committee.[73] Generally, the Council has an overall responsibility for the policies and operations of the University, including finance, staff conditions, discipline, property, building, programmes and material provisions for students.[74]

As the highest policy-making organ of the University, its role resonates clearly in ensuring the fair application of university policies and rules, particularly evident in the procedures for the discipline of students, amongst others.[75] For instance, in students' disciplinary matters, the Vice Chancellor is the only authority empowered without prejudice to any other disciplinary powers conferred on him by statute or regulation, to restrict, suspend, rusticate or expel any student, if found guilty from participating in any university activity. Nonetheless, Council has the prerogative to

[67] Refers the Governing Council established for each university. For instance, The University of Benin Governing Council under section 8 of the Law, Cap. 04, LFN, 2010. The section encompasses its composition more particularised in section 2 (i) The Universities (Miscellaneous Provisions) Amendment Act, 2003. (2007 Act No.1).

[68] S. 2(2)(i) S. 2AAA, Cap. U4, LFN, 2010, First Schedule, S. 8. See also, The Universities (Miscellaneous Provisions) (Amendment) Act, 2003.

[69] The extant provision is section 2 (i) The Universities (Miscellaneous Provisions) Amendment) Act, 2003. (2007 Act No.1).

[70] Ibid., S. 9 (i).

[71] Ibid., Section 2AAA

[72] Cap. U4, LFN, 2010, s. 10(i) a-c: See also Nigerian Evidence Act, s. 150

[73] Cap. U4 LFN. 2010, s. 9 and 23.

[74] Ibid., S.10, 11 and 18.

[75] Ibid., S. 18 ((a), (b), (c) and (d).

review the directives of the Vice Chancellor in this regard where an appeal lies to Council. Where such is the case, 'the Council, shall, after causing such inquiry to be made in the matter as the Council considers just, either confirm or set aside the direction or modify it in such a manner as the Council thinks fit'.[76] The provision does not only create an expectation in the student that the rules and regulations promulgated by the university will be fairly enforced, it affords the student a reasonable and legitimate expectation that whenever the university authorities defaults in adhering to its published provisions guiding the disciplinary conduct of proceedings, the University Governing Council should remedy such breaches.

In *Carlen (Nig) Limited v University of Jos*,[77] the Nigerian Supreme Court held a university Registrar or any university officer who makes a promise or representation to students is liable to the extent of such promise or representation.[78] This was the position of Lord Denning MR in *Schmidt v Secretary for Home Affairs*,[79] when he first introduced the concept of legitimate expectation into the English Administrative Law that well deserved expectations ought to be legally protected. The students who were refused a promised-hearing by the Home Secretary were granted the right to be heard, not because they had a legal right to it, but a promised expectation that foreign students with subsisting permits will be granted a representation. The decision brings to the fore the uniqueness of the concept of legitimate expectations, it underscores the distinctiveness of promises, practices and policies as triggers of individual legitimate expectations.[80] Notably, incidences of injustices in students' disciplinary processes in Nigerian universities revolve around failed expectations found in the deliberative and adjudicative actions of various constituent bodies and adhoc committees. [81]

1.5.2 The Senate of the University

The Senate of the university organises, control and directs the academic work of the university, both in teaching and research, and takes such measures and act in such manner as it thinks proper for the advancement of the university as a place of

[76] Cap. U4, LFN, 2010.
[77] (1994) 1 NWLR (Pt 323) 631.
[78] This was the position in *Attorney General of Hong Kong v Yuen Shiu* (1983) 2 AC 629 where it was held that the Government of Hong Kong cannot renege from a promised-procedure.
[79] (1969) 1 Ch. 149.
[80] Chianu E, 'Towards Fair Hearing for all Nigerian Employers', paper presented at a Workshop organised by Faculty of Law, University of Benin and Centre for African Legal Studies, Port Harcourt, Held at University of Benin Lecture Theatre on April 27th, 2006, p.17.
[81] Edeko E S, 'Application of the Principles of Natural Justice to Issues in University Governance'. African Journal of Education and Technology, (2011) Vol 1 No 1, 1.

education, learning and research.[82] By Law and Statute of the university, it is the supreme authority responsible for academic matters subject to the powers of Council.[83] Statutorily, the Senate is empowered to carry out the core obligations of the University to organise, control the teaching, admission and discipline of students. To this end, it wields so much power and subject to provisions relating to the Council, not only does the Senate make rules and regulations regarding academic policies, it also makes rules relating to student's admissions, welfare and discipline.[84]

As a policy, students depend on Senate rules and guidelines for their conduct. For instance, the University of Benin Academic and Teachers Code[85] is a Senate approved document encompassing the rules and regulations dealing with matters relating to pre-examination activities, conduct of examinations, post examination activities responsibilities of various agents and bodies conducting examination, evaluation of teaching, procedure for contesting and awarding rewards and so on. By the intendment of the document, it creates a legitimate expectation in the students that the university will fulfil its obligations stated therein as it relates to the conduct of examinations. How the exercise of these rules rouse legitimate expectations in students' will be discussed further. Suffice to mention that in relation to the organisation of Colleges and Faculties in the University, the Law provides that 'the academic work of the University shall be distributed in such a manner as may be prescribed by Senate, among such colleges, faculties, schools, institutes, centres, research or other teaching units as may be established by regulations or as otherwise prescribed for under the Law.[86] Thus, through its intricate network, the Senate distributes academic duties to the Boards of Studies, Faculty Boards, Committees and other organs 'to deal with any academic matters referred to it by Senate'.[87] Such other Organs include, the Committee of Deans, Academic Policy and Research and Publications Committee and Students Disciplinary Committee.[88]

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[82] Ibid.

[83] Cap. 02, LFN, 2010, s. 17(2) in carrying out these functions, it requires the concurrence of Council to provide the necessary financial and other resources.

[84] Cap. U4, LFN, 2010, s.10 and Second Schedule, s.1 for membership of the University Senate.

[85] Illustrative is the provisions in the University of Benin, Academic Regulations and Teachers Code as approved by the Senate on l5th January 2004 and Council on 4th of February 2004

[86] Ibid., Third Schedule, s.1, pp. 1- 40.

[87]Ibid., s.2 (4)(d) & 5

[88] Apart from matters that directly affect the welfare of students, students are not included in these committees.

One significant function of the Senate which appears to confront students in safeguarding their legitimate expectations is the power of Senate to deprive any student of any degree, diplomas, certificate, fellowship, scholarship, studentship, bursary, medal, prize or other academic title, distinction or award whatsoever conferred upon or granted to him by the University; if after such inquiry as the Senate may deem necessary, the Senate is satisfied that he has been guilty of scandalous or other dishonourable conduct in obtaining the same[89]. This power, the Nigerian courts have alluded to be the exclusive jurisdiction of Nigerian universities in determining academic misconduct cases involving students. In *Alechenu v University of Jos*[90] the Court of Appeal, unanimously held, that the allegations against the student appellant amounted to dishonourable and scandalous conduct, and the university was right in withdraw the certificate.[91] However, where it is proven that the civil rights and obligation of the student have been breached or denied in this process, the courts have not hesitated to rule otherwise. This was the position in *University of Ilorin v Oluwadare.*[92] Scholars have argued that the exclusivity jurisdiction of universities is rather counter-productive.[93]

1.5.3 The Vice Chancellor

The Vice Chancellor is the Chief Executive and Academic head of the University.[94] As the chief exponent of the educational mission, he ensures that the goals of the university are achieved, rules and policies are complied with, and the quality of performance that is required to attain them are developed. In this era of widening diversity, competition for relevance and reputation, greater accountability and institutional transformation, the paradigm change shift demands Vice Chancellor's ensuring effective and efficient service delivery through the utilisation of management techniques which have worked well in the private sector. By leadership example, the university must have a feel of commitment to its vision of creating knowledge through research, disseminating it through teaching and applying it through community service.[95]

[89] Cap LFN 2010, s. (1) and (2).
[90] (2015) 1 NWLR, (Pt 1440) 290-410
[91] Ibid., 343.
[92] (2006) 14 NWLR (Pt 1000) 751.
[93] Reflective is Nwauche E S, 'Rethinking the Exclusive Jurisdiction of Nigerian Universities in Academic Matters' *Nigerian Bar Journal* (2007) Vol 5 No 1 pp 1-22.
[94] Cap U4 LFN, 2010 s. 7.
[95] NUC Manual opcit, pg 4.

All officers of the University are directly responsible to him.[96] Nevertheless, the university administration is governed by the policy decision of Council and Senate and the advice emanating from the Committee system.[97] The Vice Chancellor is assisted by the Deputy Vice Chancellors, nominated by him, endorsed by Senate and confirmed by Council with specific duties as may be delegated to them by the Vice Chancellor.[98] As the Chief Executive of the University, representations made by the Vice Chancellor in addition to the published rules and regulations of the Senate of the University and the decisions of other Constituent organs all guide the conduct of students. These non-legal representations create expectations in students with the assurances that they will not be deviated from.

One distinctive function of the Vice Chancellor which creates legitimate expectations is the aspect of the discipline of students. On such matters, the Law establishing the university vests exclusive powers on the Vice Chancellor, except appeals that may go to the Council.[99] In practice, the Vice Chancellor may delegate this power under the Law and Statutes to a Students' Disciplinary Board consisting of such members of the university as he may nominate.[100] The proceedings of these body and other administrative committees as may be constituted by the Vice Chancellor are based on the rules of natural justice. The role of the Vice Chancellor in this circumstance is to ensure that the disciplinary procedure adopted by the Officers and Constituent Organs conform to the rules of fair hearing. Proven cases of deviation from these procedures have been held by Courts to be unlawful. In *Unilorin v Adesina*,[101] the Court held it was unfair for the University to deprive the student her result even after she had met the regulations published by the University.

1.5.4 The Boards of Studies and Faculties

From the level of the Senate, there is a further delegation of responsibilities to Departmental and Faculty Boards of Studies These are major organs for university's operational effectiveness. Universities can only fulfil their academic obligations to students essentially by acting administratively through the institutional framework of a Faculty/Board system. The faculty is administered by a Board which broadly controls the academic programmes subject to Senate

[96] Such University Officers include the Registrar, Deputy Vice Chancellors, the University Librarian and the Bursar, Provost, Deans and Directors.
[97] Ibid.
[98] Ibid.
[99] Cap U4 LEN, 2010.
[100] Ibid., s.17(4).
[101] (2014) 10 NWLR (Pt 1414) SC 1-206.

approval in order that Senate may not be overburdened by details, a good deal of its functions is delegated to the Faculty Board. The Chairman of the Faculty Board is usually the Dean or Provost who is elected for a specific period of time from among the Professors in the particular Faculty or College. One of the functions of the Dean and the Provost as the case maybe, is to present candidates who have passed the examinations held in the various faculties and have qualified for the award of degrees of the University at Convocation for the conferment of degrees.[102] It also deal with all academic matters, including students' discipline.[103]

The Academic Departments are the basic administrative units of the University and the main component parts of the faculties for conducting teaching, research and community service within a specified field of knowledge. [104] They constitute the first representation to students on how well the University authority adheres to published academic calendars amongst others. Most discernible is how well the faculty heads complies with the provisions of the Departmental Brochure where the rules and regulations guiding academic and other related matters are embodied.[105] It has been asserted that more than any other factor, the strength of a university lies in the headship of the departments.[106] Academic departments provide the milieu for the development, preservation and transmission of knowledge.[107] More importantly, it constitute a yardstick to measure how much a university fulfils its assurances to the students. For example, it is the responsibility of the Academic Board to ensure that the provisions of the Academic Regulations and Teachers Code are complied with.

1.5.5 Students' Affairs Division

The Students' Affairs Division is another institutional framework in the Nigeria public university system created by the Senate and saddled with the responsibility of students' welfare. The Division plays a vital role in collaborating with the university authority to actualise its statutory obligation to students, particularly in the area of welfare, thereby fulfilling students' legitimate expectations in that regard. One way this is achieved is through publication by the Division of guidelines on those provisions the university undertakes to provide for the

[102] Cap U4 LFN, 2010, s 4 (a), (b) and (c).
[103] Ibid., s.5(d).
[104] NUC Manual note 50, 7.
[105] See for example School of Postgraduate Studies, 'Guidelines for Writing Theses and Dissertations', Ambrose Alli University, Ekpoma, April 2010. See also Strategic Plan, 2002-2012, University of Benin, Benin City.
[106] Ibid.
[107]Ibid., 113.

students.[108] The mere adherence to this Code by the students and the representation that the university will fulfil same, create expectations in the students.

The Students' Affairs Division takes cognisance of the changing societal interests and needs of students in discharging its responsibilities.[109] It provides qualitative informal learning environment that contributes to the enrichment of student's experiences in the university community. Through the establishment of the Campus and Welfare Board, for example, it provides the enabling environment that is essential for the student's overall adjustments to studies and the opportunity for them to realise their potentials as enlightened and responsible members of the society.

Overall, the foregoing examined the institutional frameworks in the Nigerian university system. Whether or not these organs fulfill their objectives, particularly in meeting student's expectations is arguable. What is germane is that the assurances and representations emanating from the policies and actions of these organs while exercising their discretionary powers, create legitimate expectations in the students. When such is the case, breaches of the reliance placed on them by the students should be remedied either administratively or through judicial review. University statutes create in these frameworks a threshold for fair administrative justice system in universities in Nigeria where the authorities and their constituent organs must not neglect the promises and representations, they make to their students which constitute their legitimate expectations. What constitute student's legitimate expectations in this paper? The following section addresses this question.

1.6 Legitimate Expectation of Students: A Critical Analysis

The term legitimate expectation is conceived on a pattern of conduct, or representation, or a promise that makes it unfair for the public authority to disregard the expectation. It arises not as a result of the breach of a student's enforceable legal right but the right which becomes accruable to the student following from the breach of the assurance given, or representation made by the university authority in its various documents guiding the conduct of students.[110] It implies the breach of

[108] Such as administrative, educational and other support including (a) Meeting students' basic needs, such as, accommodation, feeding and transport; (b) Providing essential services such as financial assistance through information on bursaries, scholarships and loans; (c) Promotion of healthy environment on campus and (d) Augmenting the academic experience through the provision of productive, recreational, cultural and social services.

[109] Ibid.

[110] It does not matter whether the student is in a contractual or statutory relationship. In *Mkhize v University of Zululand* (1986) 1 SA 901(D), the decision that natural justice does not apply to

the trust that students repose in the promises made to the students in the university policies. In other words, a student legitimate expectation is the right, interest or remedy a student might reasonably be entitled to expect or hold, flowing from the representations or assurances given by a university authority about the quality of teaching, learning and living environment, and other support services of the university, the student having complied with the representations in the various university documents and other institutional guides, the breach of which will give the student a locus standi to seek review.[111]

These expectations rights derive essentially from the rights that accrue to students from both their freedom to study and as citizens of the Federal Republic of Nigeria. Students possess procedural rights, that is, right to fair administrative procedures in disciplinary matters. [112] Students also have participatory rights which derive from the provisions of the university enabling laws which guarantees their participation in university governance.[113] They are also enveloped with regulatory rights which accrues when students expect that university authorities would be reprimanded when they fail to comply with directives of regulatory bodies.[114] Students have fundamental rights[115] which affords protection in relation to their right to education, right to life, right to fair hearing, right to freedom of expression and right to freedom of association, among others. The protection afforded in these aspects can be achieved when fair procedure is followed and students should expect that their interest will be protected.[116]

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contractual relationship between students and university was adjudged as unsound. It is no longer the law. This is not to discountenance the right to the plea of exercise of discretion by public authorities in administrative decisions. See *Adejumo v Ayanntegbe* [1989] 3 NWLR (Pt 110) 417 SC. See, however, the Supreme Court decision in *Stitch v AG Federation* [1986] 5 NWLR (Pt 46) 941-1077, where it held a public authority cannot renege in the promise it made.

[111] Imoedemhe Walter, 'The Concept of Legitimate Expectation' (2022) Vol 2 *Benin Journal of Public Law*, 102. See Ekwo I E, *Education Law and Administration in Nigeria* (2010) Odade Publishers 412-413 for expectation rights of students derivable from their freedom to study.

[112] See s. 18. University of Benin Law Act, Cap. U4, LFN, 2010; s. 21, Ambrose Alli University Law, 1999, as amended.

[113] See s. 7AAA, University Miscellaneous (Provisions) Amendment) Act, 2003.

[114] See s. 4(1), National Universities Commission Act, 2010; also s.10 Education (National Minimum Standard and Establishment of Institutions) Act, 2010.

[115] See SS. 18, 33(1), 36(1), 39 and 40 of the Constitution of the Federal Republic of Nigeria, 1999 as amended, which provides for the right to education, right to life, right to fair hearing, right to freedom of expression and right to freedom of association, respectively.

[116] *Garba v University of Maiduguri* (1986) NSCC 17.

Overall, where a university Vice Chancellor or Registrar or any officer acting for the university makes a representation, such Officer should be held accountable on behalf of the university for the action. This was the position in the case of *Carlen (Nig) Limited v University of Jo*s.[117] Conversely, it is argued that where students fulfil the conditions of their studentship as prescribed by university authorities, it will not be fair to also deny them the entitled expectation-rights. In *Chima v University of Benin,*[118] the students were expelled after the university panel that investigated their alleged misconduct, had exonerated them. In their claim, the breach of their legitimate expectation; 'the dilapidated and unkempt state of the lecture theater' by the university was not specifically pleaded. It is contended if this reasoning had been applied, it may have mitigated the hardship caused the students.[119] Nwauche[120] expressed this view in *Magit v University of Agriculture, Makurdi,*[121] where the student's request to appear before the university senate and defend the allegations made against him by the university was rejected.

What resonates from the discussion in this paper is that university statutes provide necessary legal templates in the various institutional frameworks for the purposes of fulfilling their obligations, particularly in the protection of the expectation-rights of students. It is however observed, university authorities in Nigeria appear not to recognise that universities are so created. In *University of Ilorin v Adesina,*[122] the court found it 'laughable' when the senate of the university stated 'fair hearing within section 36 of the 1999 Constitution is not applicable to the student' and the student does not have any right to request to appear before it. They do not recognise fulfilling legitimate expectations as a normative constraint in administrative decision-making processes, and meeting representations and promises made to

[117] (1994) 1 NWLR (Pt 323).

[118] Suit No FHC/B/33/M2/96, Vol 2 NPILR, 454, 456 where the court held the right to be protected was not a right to education. In *Oghenekome v Federal University of Technology, Akure* Suit No FCH/B/101/M2/95 (1996) NPILR 2, 1017, the courts subsumed legitimate expectations simply as the breach of the students right to fair hearing.

[119] Constitutionally, legitimate expectations are embedded in Chapter II of the Constitution of the Federal Republic of Nigeria (1990) as amended. (CFRN) as Fundamental Objectives and Directive Principle of State Policy (FODPSP) They are generally not legal rights as compared to the rights in Chapter IV which encapsulates the Fundamental Human Rights (FHR). Applying the expended position on application of the principles of natural justice may well resolve this. In Nigeria, the application is episodic.

[120] Nwauche E S, 'Rethinking the Exclusive Jurisdiction of Nigerian Universities in Academic Matters '*Nigerian Bar Journal* (2007) 1, 14-15.

[121] (2005)19 NWLR (Pt 959) 21.

[122] (2010) 9 NWLR (Pt 1000) CA 345, (2014) 10 NWLR (Pt 414) SC 1 – 206, per Agube JCA, ratio 12, 342.

students as part of the university's plan to provide favourable environment for their learning and development.

Students are also mostly wholly excluded from active participation in university governance. Ojo argued students would be better advanced if they participate in university council, senate and other committees. [123] Jega noted 'in most countries, there is increasing recognition of this, and students are offered positions in key university decision-making committees, including the Senate. In Nigeria, this is virtually non-existent, and the current situation should be remedied'.[124] Added to the rather unpleasant outlook of Nigeria's non-recognition, slow acceptability and stuttered application of the concept in the light of prevailing conceptual advancements, is the tenacity with which the courts in Nigeria support the exclusive domestic jurisdiction of universities in handling students arising from agitation for failed expectations. It is contended, this approach is double faced and has adversely affected decisions involving students.[125] Democratisation in the university should mean bringing together all stakeholders together, reflecting a mutual inclusivity approach where students will participate as members in all organs of the university without prejudice to overriding statutory provisions.

1.7 Conclusion

This paper recommends a threshold for fair administrative justice system in universities in Nigeria where the authorities and their constituent organs must not neglect the promises and representations, they make to their students which constitute their legitimate expectations. It is proposed that irrespective of the limited application of the concept in Nigeria following its conceptualisation in the legal system, students are citizens under the constitution, and as such, all their rights, including the right to freedom of study, are protectable. It becomes germane to state that the creation of statutory institutional frameworks in universities are deliberate, to guide and put university administrators in tune with the expectations expected of them. It was shown that the main framework for protecting student's legitimate expectations include the University Governing Council, Senate, Vice

[123] Ojo J D, 'Law and University administration in Nigeria'. (1990, Lagos, Malthouse Press Limited) 156 .

[124] Jega A, Keynote Address at the Association of Registrars of Nigerian Universities, 18th Annual Conference and 68th Business meeting, October 29, 2020 at the Events Centre, Chida International Hotel, Abuja, 11.

[125] *Akintemi v Onwumechili (*1985) 1 NWLR (Pt 1) 69 the decision was mostly guided by precedents, not for want of jurisdiction but more on ground of public policy and discretion. See also *Esiaga v University of Calabar* (2004) 7 NWLR (Pt 872) 366. See Akinrele A, 'The Dosmestic Forum of a University - An Inviolable Sanctuary' The Legal Practitioners Review 1 No 1 (1986) 28.

Chancellor, Departmental and Faculty Board of Studies and Students Affairs Division. All of these work in synergy and are hierarchic in a sense thereby providing avenue for students' legitimate expectations to be protected. The extent of such protection in practice, may sometimes be a far cry from the expected standards. However, if the different structures are efficiently and effectively deployed, the expectations rights of students in Nigerian university system would have been fulfilled.

Challenges Associated with Prosecuting Politically Exposed Persons in Nigeria

Musa Usman Abubakar*

'Corruption is one of the hardest crimes to track because it is by its nature carried out in secret. Its protagonists, or the smart ones anyway, deliberately construct labyrinthine structures to conceal it, and the complexity makes it difficult and expensive to prosecute. That's why so many corruption cases never come to court and why so many of those that do are subject to failure.'

'*Very Bad People: the Inside Story of the Fight against the World's Network of Corruption*' By Patrick Alley, 2022: 210

Abstract

The conviction rate of white-collar high profile politically exposed defendants is observed to be abysmally low in Nigeria and indeed globally. This led the public to judgementally score the Anti-Corruption Agencies (ACAs) low and non-performing. However, little attention is paid to the complexity associated with prosecuting cases involving highly placed public officials. Against this backdrop, this article, using both doctrinal and empirical methodology, examined the challenges generally faced in prosecuting such categories of defendants, and found through an unstructured interviews with about 50 prosecutors and investigators, that it is a herculean task to successfully prosecute and secure convictions, as they use their power either through inducement or threat to prevent access to relevant documents and potential witnesses. It is indeed only when they volunteer to admit, or an insider who is a major player in the act of corruption chooses to open up that securing a conviction is possible. To secure more convictions the article recommended that plea bargaining is the key, but it has to be regulated in a way that the sentence consequently awarded befits the illegality. To achieve this, victims of the illegality should be allowed to make victim impact statement as that may sway the judge to award stiffer sentence. If convicts are allowed allocutus with a view to having a mitigated sentence, victims of crime of the powerful are more deserving of such concession. The article further suggests the need for attitudinal change among lawyers and judges, and recommended that the latter should consider social status as a burden rather than a shield for the politically exposed persons.

Keywords: White-colar, Defendant, Politically Exposed, Challenges and Corruption

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1.1 Introduction

As a former prosecutor, it baffles me why prosecution versus conviction ratio is the parameter used, among others, in determining achievements of prosecuting agencies. The National Assembly makes it also as one of the indices to measure budget performance of such agencies, including anti-corruption agencies, and are often castigated by the legislators and general public for returning low convictions, notwithstanding the fact that attainment of justice has always been the watchword of prosecutors and not securing conviction. Given the nature of the adversarial system that tilts more on the side of the accused, the prosecutor is always saddled with enormous burden of proving his case beyond reasonable doubts. Corruption cases involving high profile figures such as former governors, ministers, permanent secretaries and other very senior government functionaries mostly handled by anti-corruption agencies in Nigeria require the same burden of proof.

However, the number of convictions in such cases is abysmal from the available records. Yet, the public appear to be more interested in the number prosecuted and imprisoned on the assumption that corruption cases are like low-hanging fruits that are easy to pluck. Low rate of conviction in corruption cases is noted in many jurisdictions owing to the nature of defendants involved in such cases, popularly known as politically exposed persons, a sub-category of white-collar defendants. For instance, the Kenyan Ethics and Anti-Corruption Commission recorded 49 cases from July 2017 to September 2018, and in 2022, Independent Corrupt Practices and other Related Offences Corruption Commission of Nigeria only recorded 19 convictions.[1] The underlying factors responsible for this state of affairs are often not interrogated, particularly the enormous challenges faced by the prosecutors in dealing with corruption cases committed by the powerful. It is often asked whether it is worth the deal to have a corruption case on the cause list for several years. Is 'full trial' the most appropriate means of achieving conviction in such cases? Can anti-corruption agencies rely solely on traditional criminal law to rid the country of corruption?

Against this backdrop, this article examines the factors responsible for the low conviction rate in corruption cases involving politically exposed persons, and why it is difficult to secure one given the privileged status of the personalities involved. It also examines the reasons that make the conviction, even when secured, worthless in the eyes of the discerning minds, particularly the sentencing discretion

[1] JV Okoye, Tenure Appraisal: Performance Evaluation of the Strategic Action Plan 2019-2023(Successes, Failures, Challenges and Prospects) at the 2023 Board and Management Retreat held at Lokoja, Kogi State, from 17th-20th January 2023.

which gives unfettered power on the judge to award sentence. The article is divided into five sections. After the introduction, in section two, it explores the meaning of white-collar high profile crimes to demonstrate that corruption and related offences, are the most complicated crimes to investigate and prosecute as elitist crimes. Part three examines the factors responsible for the complication, and to achieve this the paper examines the pre-trial, trial and sentencing stage to demonstrate the enormity of the challenges. This is followed by part four dealing with the recommended way forward and finally section five, concludes.

1.2 Understanding White-collar High Profile Crimes

Crimes[2] are as old as humanity and can be broadly divided into four categories, viz:

(i) Ordinary conventional street crimes, which can be violent if it aims against person, like murder and rape, or non-violent usually against property like car-theft;
(ii) White-collar crimes like money laundering, fraud and embezzlement, targeted at government or businesses; `
(iii) Organised crimes, such as terrorism, drug cartels; and
(iv) Victimless crimes, like gambling, use of drug, prostitution as they are consensual.[3]

The article does not intend to deal with all these forms of criminalities but only focuses on some variants of white-collar criminality associated with public funds perpetuated by the politically exposed persons. In doing so, the paper will be making comparison between the ordinary conventional street crimes and the white-collar crimes for the reader to better appreciate what challenges prosecutors are passing through in prosecuting corruption cases.

Ordinary conventional street crimes were commonly associated with people of low socio-economic status, as initially attention of criminologists was more on ordinary conventional street crimes of violent nature, such as robbery, murder, theft, rape,

[2] See JE Conklin, *Criminology* (4th Edition, Pearson Education, Inc., New Jersey, 2013)

[3] There are scholarly debates on whether or not there are victimless crimes see Ushangi Bakhtadze 'Is Prostitution a Victimless Crime? 2013 SSRN Electronic Journal available at www.researchgate.net last visited 14th February 2023; Robin Fletcher 'White-Collar, Blue-Collar and Collarless Crime: The Complicity of Victims in 'Victimless Crime'*' ,(2015) 5 Exploring Criminal and Illegal Enterprise: New Perspectives on Research, Policy and Practice (Contemporary Issues in Entrepreneurship Research, Emerald Group Publishing Limited, Bingley,)75-95*

etc.[4] That being the case, their illegality is obvious hence the lack of difficulty in identifying and addressing them. It was not until the 20th century with the seminal work of Edwin Sutherland that a new genre of crimes was identified that does not share the characteristics of ordinary conventional street crimes. These categories of crime are non-violent, and mostly associated with the upper class referred to as white-collar crimes. Sutherland's name will remain indelible in the annals of history as the person who coined, developed and popularized the term 'white-collar crimes'.[5] For instance, the act of self-dealing, awarding contract to one's own private company, receiving kickbacks from contractors, etc., are all crimes, but the line between what is legal or illegal in white-collar crimes is often not very clear, at least to a layman. Hence, a layman may not see any illegality in such actions. Conversely, he will not have difficulty in accepting that robbery is an illegal act.

As the name implies, white collar crimes are special genre of crimes that are associated with high class citizens, even though nowadays the line is becoming blurred, as more and more people on the low social strata are becoming culprits. The Edwin Sutherland's perspective of viewing white collar crimes as offender-based, viz, 'a violation of criminal law by a person of the upper socio-economic class in the course of his occupational activities' is markedly at variance with the definition proffered by Herbert Edelhertz who gives it offence-based definition as: "… an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."[6]

There are a number of other definitions proferred by scholars, but for the purpose of this article, David Friedrichs' definition of white collar crimes is adopted, 'as a generic term for the whole range of illegal, prohibited, and demonstrably harmful activities involving a violation of a private or public trust, committed by institutions

[4] Aleksandra Jordanoska and Isabel Schoultz, 'The "Discovery" of White-Collar Crime: The Legacy of Edwin Sutherland' in Rorie, M ed *The Handbook of White-Collar Crimes'* (John Wiley & Sons, Inc, New Jeysey, 2020) 3-15 at 4.

[5] Some scholars disputed the American origin of the concept of white-collar crime arguing that it is of European origin in the 1905 works of Dutch Criminologist Willem Bonger. For details of this contestation see Christian Walburg, '*White-Collar and Corporate Crime: European Perspectives'* in Rorie, M ed n 4, 337-346 at 338, see also Diego Zysman- Quirós, 'What is 'European' about White- Collar Crime in Europe? Perspectives from the Global South' in Nicholas Lord and others, eds *European Whitecollar Crime: Exploring The Nature Of European Realities* (Bristol University Press, Bristol, 2021) 271-283 at 278.

[6] April Wall-Parker 'Measuring White Collar Crime' in Rorie, M ed, n 4, 32- 44 at 34.

and individuals occupying a legitimate, respectable status, and directed toward financial advantage or the maintenance and extension of power and privilege.[7]

To further delimit our focus for the reader to appreciate the category we are dealing with, any reference to white collar defendants in this article is in reference to the politically exposed persons as defined in the Money Laundering (Prevention and Prohibition) Act, 2022 as:

(a) Individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or Government, senior politicians, senior government, judicial or military officials, senior executives of State owned corporations and important political party officials,
(b) Individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of Government, senior politicians, senior government, judicial or military officials, senior executives of State owned corporations and important political party officials, and
(c) Persons who are or have been entrusted with a prominent function by an international organisation and includes members of senior management such as directors, deputy directors and members of the board or equivalent functions and their family members and close associates, other than middle ranking or more junior individuals in the foregoing categories.'[8]

The personalities mentioned in the section have a number of things in common, viz:
i. They hold key positions in any of the three arms of government, and cut across all levels, including junior level officers. Family members and associates of these functionaries are equally included.
ii. They are entrusted with important public functions in the government, which function cannot be executed without public funds;
iii. They are mostly in the elitist class as they are highly regarded given their socio-economic standing.

Apparently, this definition of politically exposed persons is far-reaching as no government official of whatever category is left out. Conveniently, low ranking officers involved in job racketeering, over invoicing, procurement fraud, etc. are, for the purpose of this Act, politically exposed persons, and of course, their collaborators from the private sector. However, same cannot be said of internet

[7] Friedrichs, David O 'White Collar Crime: Definitional Debates and the Case for a Typological Approach' in Rorie, M ed, n 4, 16-31 at 27.
[8] Money Laundering (Prevention and Prohibition) Act, 2022, s 30.

fraudsters, popularly known as 'yahoo boys' for they do not hold any public office nor entrusted with any public functions. One can without mincing words assert that, all politically exposed persons are white-collar defendants, but not all white-collar defendants are politically exposed persons. Indeed, Rothe and Kauzlarich appropriately describe the species of white-collar crimes being discussed here as 'crimes of the powerful.'[9]

Unlike ordinary conventional street offenders whose conducts are mostly violent and have no inkling with their occupation, the nature of illegality associated with this set of personalities are clandestine and done in the course of their occupation, aptly characterized as acts with 'combination of supposed virtue and actual vice.'[10] The illegal activities are also committed by well-off, socially well-integrated, and mentally healthy individuals with no pathological abnormality done in violation of the trusts reposed in them. These made illegalities like abuse of office, money laundering, bribery, diversion or misappropriation of funds, embezzlement, breach of procurement process, etc., fall under the categories of white-collar crimes. Importantly, all these illegalities are being done to obtain personal advantage as white-collar crimes are financially-motivated non-violent crimes committed in the comfort of one's office and the privilege of power.[11] The other motivating factors include greed, arrogance and feeling entitled.[12]

While the cost or harm of ordinary conventional street crimes may be limited to the very victim of the act, same cannot be said of the white-collar crimes. For instance, when 'A' steals from 'B' he only causes unlawful loss to 'B' and unlawful gain to himself, but certainly not to the whole community. The exact opposite is what a white-collar crime causes. When 'A' awards a road construction work to 'B', but the contract was not executed it has multiplier effect across all levels. It could cause accidents leading to loss of lives, damage to the vehicles plying the road, environmental pollution, traffic jam leading to lateness to work, etc. People may lose confidence in the government and this could result in chaos and revolt. On this note, one will agree with Rothe and Kauzlarich's observation that cost of white-

[9] See Dawn L Rothe and David Kauzlarich, *The Crime of the Powerful: White-Collar Crime and Beyond* (Routledge is an imprint of the Taylor & Francis Group, Oxon 2022).
[10] see Karin van Wingerde and Nicholas Lord 'The Elusiveness of White-Collar and Corporate Crime in a Globalized Economy' in Rorie, M ed, n 4, 469-483 at 476.
[11] Ibid., p 58.
[12] EO Onoja, *Economic Crimes in Nigeria: Issues and Punishment*, (Lawlords Publications, Abuja , 2018) 92.

collar crime cannot be quantified just in monetary terms, far from that, they also have physical and social costs:

> There are financial costs, damages to institutions and the moral climate, damages to the foundations of democracy, costs to personal health and safety, death, environmental costs, and more. Just the financial costs alone of crimes of the powerful far exceed those resulting from traditional crimes. This reflects the greater frequency with which these crimes and harms are committed and the fact that a single offense can result in losses running upward of millions of dollars or more. Yet again, we reiterate, students should disavow the notion that white- collar crime or crimes of the powerful are *only* financial.[13]

In addition to the above misconception, there is the belief in the gentility of white-collar defendants. Perhaps, as we shall discuss in due course, that is why judges tend to be lenient with them. Debunking that belief as 'misleading' and 'misguided', Frank S Ferri argues thus[14]: 'white-collar criminals are not kinder and gentler offenders that the general public and criminal justice system often believe they are. White-collar crime's monetary impact dwarfs that of street-level crimes, and the emotional and psychological effects can resemble those of victims of violent acts.'

Corruption as an umbrella term covering many illegal acts leading to the abuse of entrusted power for private gain, no doubt brings about serious setbacks in any society. As such, no society should treat it with kid-gloves but must go after the perpetrators of this heinous act with full force. However, in tackling this monster, the general public must appreciate the enormous challenges prosecutors face as shall be discussed below.

1.3 Challenges of Prosecuting White-collar High Profile Defendants

Scholars have acknowledged the difficulty of prosecuting white-collar defendants in general terms, particularly in the United States of America,[15] and demonstrated how plea bargain proved the most appropriate means of securing conviction.

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[13] Dawn L Rothe and David Kauzlarich n of cit 9,14.

[14] Qouted in EO, Onoja, opcit, 92.

[15] Ronald G. Burns and Michele Bisaccia Meitl 'Prosecution, Defense and Sentencing of White Collar Crime' in Rorie, M ed, n 4,279-296 at 279 see Karin van Wingerde and Nicholas Lord 'The Elusiveness of White-Collar and Corporate Crime in a Globalized Economy' in Rorie M ed, n 4, 469-483 at 476.

Indeed, the 2016 United States Sentencing Commission revealed that 98.1% of embezzlement cases, 98.0% of forgery/counterfeiting cases, 95.7% of money laundering cases, 95.2% of antitrust cases, and 94.5% of fraud cases were disposed of on the basis of plea bargain.[16] From the outset, it is pertinent to note that most cases of corruption in the Western world are from the private sector. This might not be unrelated to the checks and balances in their public institutions that leave little or no room for a Chief Executive Officer to aggrandize himself. Hence, the rarity of corruption cases involving politically exposed persons in such jurisdictions. The discussion will proceed by analysing these challenges at three stages, viz: Pre-trial, Trial and Sentencing Stage, even though there may be some overlaps.

1.3.1 Pre-Trial Stage

For there to be a successful prosecution the investigation must be thorough with all documents to be relied upon handy. Given the status of the defendant in the organisational hierarchy, investigators face a herculean task accessing relevant documents as they are routinely denied access to sensitive records, particularly when the Chief Executive Officer is the culprit and he still occupies his seat. Of course, no matter how good is a case if access to records is denied there will hardly be a successful prosecution. Although anti-corruption agencies may invoke their coercive power of forceful entry into the premises, upon obtaining court order, 'to search for, seize and take possession, inspect, make copies of or take extracts of any relevant document,[17] such records can, on the instruction of the CEO or his collaborators, be distorted or even destroyed, using the privilege of his powers.[18] At least, reports of vital financial documents being eaten by rodents or termites, or gutted by infernos are common occurrences in government establishments.

Complexities associated with processes of some sectors pose another major challenge. Given the varied nature of industries in the public sector, it is not in all cases that prosecutors will be conversant with the business of a given industry. For instance, when the case involves officials in the extractive industry, investigators

[16] Ronald G. Burns and Michele Bisaccia Meitl, n opcit, 286.
[17] Corrupt Practices and Other Related Offences Act, 2000, s 36 .
[18] N Ribadu, Obstacles to Effective Prosecution of Corrupt Practices and Financial Crime Cases in Nigeria at the 1st Stakeholders Summit on Corrupt Practices and Financial Crimes in Nigeria Organized by the House of Representatives Committee on Anti-Corruption, National Ethics and Values, at the International Conference Centre, Trade Fair Complex, Kaduna, 23rd – 25th November, 2004.
https://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/OBSTACLES%20TO%20EFFECTIVE%20PROSECUTION%20OF%20CORRUPT%20%20PRACTICES%20&%20FINANCIAL%20CRIMES%20IN%20NIGERIA.pdf last visited 10/3/2023.

and prosecutors must be schooled enough to be able to scrutinize and tender in evidence relevant financial records. The prosecutors must appreciate the processes and technical details as applied in that sector to be able to examine witnesses and cross-examine the defendant. Even where there are expert officers in the agency they may be unwilling or reluctant to guide the prosecutors as that would aid the latter in nailing their bosses. In some instances, the prosecutors are told the expert officer is now retired and relocated. This means the prosecutor will need considerable time and resources before filing charges against the defendant. It is worrisome that on many occasions, officers in the given agency who are conversant with the processes are shielded from interfacing with the prosecutors.

Recently, some finance officers in one of the Nigerian states are on the verge of receiving administrative sanctions for making statements when invited by an anti-corruption agency.[19] It is the requirement of the law to attach the names and statements of defendants and the potential witnesses while filing charges in order not to spring surprise to the defendants. With this threat hanging on their neck these potential witnesses may refuse to come forward on the trial day, and may even turn hostile when compelled to testify. The question is whether in cases like this it is worthwhile to proceed with full trial. Can there be any prospect of success amidst threat of losing one's job?

These instances point to the fact that successful prosecution in corruption cases is rarely achieved if the insiders are non-cooperative. Indeed, if what occurred in some concluded and ongoing cases is anything to reckon with, one will make bold to say that it is only when an insider willingly offers himself and volunteer information that there will be prospect of conviction. This strengthens the position of Patrick Alley of Global Witness as gleaned from the Malabu OPL245 case that 'if you're not actually in the room when a corrupt deal is being done, then you are not going to achieve a conviction.'[20]

Another challenge at this stage is in deciding whether to prosecute and who to prosecute. The prosecutor has the enormous burden of determining whether to prosecute or not, and who to prosecute. Is it the CEO or a lower ranking officer that is to be charged? If the prosecutor goes for the latter, how will he contend with the public backlash that he left the big fish out?

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[19] Resident Anti-Corruption Commissioner of ICPC, Sokoto state office reported this incident to the author on 3rd January 2023 while on inspection tour.

[20] Patrick Alley, *Very Bad People: The inside Story of the Fight against the World's Network of Corruption*, (Octopus Publishing Group Limited London, 2022) 226.

Given the roles played by many personalities including party stalwarts in committing an illegality, should political considerations matter in deciding whether to prosecute? Prosecutors in anti-corruption agencies are sometimes locked between the devil and the dark blue sea, especially when deciding who to prosecute. For instance, a ruling party may hesitate to prosecute a member of the opposition party who is found neck deep in corruption scandal for fear of being branded as a witch-hunt. On the other hand, in the case of the ruling party, even when an agency is brave enough to file charges, for political reasons, a *nolle prosequi* may be entered by the Attorney General thereby rubbishing its efforts. The case of Dr Julius Makanjuola remains a reference point in that regard. Dr Makanjuola was a Permanent Secretary in the Ministry of Defence, and in 2002, he was alleged to be involved in a N450 million procurement scandal and was arraigned before the Court by the ICPC, only for a *nolle prosequi* to be entered by the Attorney General of the Federation thereby stultifying the case.[21] Eventually, Dr Makanjuola was dismissed from service in 2004.

Prosecuting politically exposed persons drains significant amount of man hour and financial resources. Millions of naira and time are spent on a case that may ultimately yield no conviction but acquittal. Prosecutors may have travel many times risking their lives in the process. On many occasions anti-corruption agencies have to resort to cost/benefit analysis to decide whether to proceed with the prosecution.

[21] Uzendu Anselem C 'Political Economy of Corruption and Regulatory Agencies in Nigeria: A Focus on the Economic and Financial Crimes Commission (EFCC), 2000-2010', (An MSc Dissertation in Political Science Dissertation, Department of Political Science, University of Nigeria Nsukka, nd) 58 at www.unn.edu.ng/publications last visited 25/01/2023.

1.3.2 Trial Stage

At the trial stage it is more daunting as even when the prosecutor surmounted the pre-trial challenges they are confronted with much higher ones. The prosecution witness may be financially induced with money or money's worth only to spring surprise to the prosecutor by either not turning up to testify or by simply turning hostile. White-collar defendants, as a fact, are people with deep pockets. They can offer humongous amount to the potential witnesses to escape justice. Depending on the amount involved, some defendants may even relocate the witnesses. Prosecutors and witnesses are often threatened with death or physical assault. A team of ICPC lawyers narrowly escaped being killed or incapacitated while prosecuting an ex-Governor in the state he once ruled.[22]

Interlocutory applications are common dilatory tactics in corruption trial deployed by the defence. Given their abundant resources white-collar defendants have the ability of hiring the best lawyers in town to do their bids. Series of applications are made from the beginning of the trial to the end, such as challenging the jurisdiction of the trial court, challenging the constitutionality of the enabling legislation like the ICPC Act, 2000, seeking for restraining orders, instituting actions under the Enforcement of Fundamental Human Rights Procedure Rules, application for trial within trial, etc., and this can drag up to the Supreme Court.[23]

Interestingly, Section 396(2) of the Administration of Criminal Justice Act (ACJA), 2015 provides as follows:

> After the plea has been taken, the defendant may raise any objection to the validity of the charge or the information at any time before judgement provided that objection shall only be considered along with the substantive issues and a ruling thereon made at the time of delivery of judgement.

Although from the above, the Administration of Criminal Justice Act, 2015 has made a giant stride to ameliorate these problems, which was further strengthened by the Supreme Court in Chief Olisa Metuh v FRN and Anor,[24] delays in

[22] See MU Abubakar, 'Shielding Anti-Corruption Operatives from Vulnerabilities' in Owasanoye, Bolaji and others, eds, *ICPC and the War Against Corruption in Nigeria: Reflections for a New Vision*, (Anti-Corruption Academy of Nigeria, 2020) 420-432 at 422.

[23] *FRN v Adeniyi Francis Ademola and Ors unreported Suit No.:* FCT/HC/CR/21/2016; AG Rivers *State v EFCC and Others unreported Suit No*.: FHC/PHC/CS 178/2007*; FRN v Dariye* (2015) 10 (NWLR) (Pt 1467) 325, etc.

[24] (2017) 11 NWLR (Part 1775) 157 SC.

prosecution are still in bogue. The Court of Appeal in *Shema v FRN*[25] ironically overruled the Supreme Court when it ruled that an interlocutory application that raises the issue of jurisdiction must be heard and determined at the time it was raised. This is against section 396(2) of ACJA, 2015. In this case, the former Governor of Katsina State, Alhaji Ibrahim Shehu Shema was arraigned before the trial court on 26 count charges bordering on money laundering. On 8/4/2018, he filed a motion praying the court to quash the charges as they did not disclose a *prima facie* case. The trial court acted as per section 396 (2) of ACJA and deferred the ruling to be delivered along with the substantive issues at the judgement stage. Dissatisfied with this stance, the appellant filed an interlocutory appeal, and the Court of Appeal held that the issue raised touches on jurisdiction of the court as such it cannot be deferred until judgement. The judgement obviously made nonsense of the provisions of ACJA and is a heavy blow in prosecuting corruption cases.

Upon successful filing of charges, prosecutors also experience reluctance of some Chief Judges to assign corruption cases for trial. The case is simply left to last for several months before it is assigned. Some tactically assign such cases to judges that are sick or those about to retire, and with defense lawyers ready to facilitate the delays the case may not reach anywhere before the judge retires, necessitating assigning the case to yet another judge for the case to start *de novo*. There was an instance where a judge for no reason deliberately refused to admit vital documents in evidence to pave way for acquittal of the defendants, and thereafter proceeded to his retirement. Petitioning the National Judicial Council will not yield any result since this body only disciplines serving judicial officers. Nuhu Ribadu mentions further instances where some judges are ignorant of the law yet they proceed to handle corruption cases. Some may deliberately misdirect themselves on the facts and the law, and this situation occurs when the judge was compromised. In such a case, no amount of evidence from the prosecution will convince him.[26] Ribadu then concludes:

> Corruption and financial crimes most often involve huge sums of money. Those who are beneficiaries of the crimes, are willing to share a little percentage of the proceeds with the judges. Once the judge takes the bait, the case fails *ab initio*. No evidence presented will sway him to the side of the prosecution. The evidential burden of proof beyond reasonable doubt is stretched to read "proof beyond

[25] CA/K/432/C/2018 (unreported).
[26] N Ribadu, opcit, pg,18.

> every shadow of doubt" contrary to the long line of decided cases by the apex court, the Supreme Court.[27]

Concerned about mutual antagonism between the Bar and the Bench on who is to be blamed for this state of affairs, in 2018, the then Chief of Judge of the Federal Capital Territory, Abuja, Hon Justice Ishaq Bello had to convene a meeting of all the stakeholders to address these problems.[28] How far such interactions facilitate efficient disposal of such cases remains to be seen.

White-collar high profile defendants are specialists in feigning ill-health, as Nigerians are not new to the melodrama staged in court rooms whereby a defendant comes to court on a stretcher, a wheel chair, an ambulance or a cervical collar, intentionally to slow the wheels of justice and win public sentiment. This is not common in other regular cases involving ordinary conventional street crimes as in such cases the defendant will be happy to have his case disposed of early for fear of continued incarceration in prison custody. In the case of the politically exposed persons they deploy all arsenals at their disposal to frustrate the prosecution's case. The Nigerian Supreme Court expressed dismay at these attitudes in the following words:

> …There are cases where the accused develop some rare illness which acts up just before the date set for their trial. They jet out of the country to attend to their health and the case is adjourned. If the medical facilities are not available locally to meet their medical needs it is only because due to corruption in high places, the country cannot build proper medical facilities equipped with the state of the arts gadgets. There should be no clog in the process of determining whether or not a person accused of crime is guilty irrespective of his status in the society.[29]

Linked to the above is the challenge of unnecessary and prolonged adjournment. Defence Lawyers have been identified as notorious in seeking long adjournments, and in collaboration with some judges corruption cases may remain on the cause list for more than a decade. For instance, in 2006, the ICPC arraigned the defendant in the case of *FRN v Emmanuel Ikor (HC/53C/2006)* before the High Court of Cross River State, and in March 2020, the case had to start *de novo* before another judge

[27] Ibid.
[28] Channels Television, Justice Ishaq Bello Meets Lawyers Handling Corrupt Cases. https://www.youtube.com/watch?v=i6obJ_EuOh4 last visited 10/3/2023.
[29] *FRN* v *Dariye (2015) 10 NWLR (Pt. 1467) 325.*

owing to the retirement of the first trial High court judge. Obviously, in such a scenario there is no likelihood of successful prosecution as key witnesses may have relocated, retired, incapacitated or even died. Similarly, the documentary evidence might be lost through movement from one court registry to another.

All these antics and legal gymnastics are made possible because the defendants are at all material times on bail living freely within their comfort zones since white collar offences are bailable offences. The only possible limitation is travel restrictions which in itself is the by-product of the defendant's action not allow the case to progress. Besides, it is often lifted by court on application. This freedom afforded him the opportunity to navigate his way through the system, reach out to key officers within his office and beyond. Only few ordinary street criminals have this opportunity.

1.3.3 Sentencing Stage

Another area of challenges in prosecuting white-collar high profile defendants is at the sentencing level. Judges mainly play significant role in sentencing and have unfettered discretion in determining what sentence to award. Sentencing is meant, if appropriately deployed, to reform, rehabilitate and deter people from engaging in criminalities, and the whole thing lies squarely on the disposition of the judge. Little wonder, a case that only attracted a fine of ₦ 750,000 before one judge may fetch up to seven years imprisonment before another judge. Most judges rely on the seriousness of the offence and the criminal records of the defendant in the exercise of such power especially in ordinary crimes, but the impacts of white-collar crime in the nature of financial, physical and social costs to the immediate community or the country at large coupled with the betrayal of trust are hardly reckoned with in Nigeria. At the end of the day, even after successful prosecution, a reasonable sentence commensurate to the white-collar illegality is rarely awarded. Lamenting on this state of affairs, Esa O Onoja retorted:

> …Where sentencing practice taps into the expectations, the perception of fairness and justice of the average citizen, it reinforces the basic building blocks of society, a fundamental component of which is equality before the law. All members of society are, and must be seen to be equal before the law. *Lady Justitia* cannot afford to play peeping Tom and temper justice to the status, the depth of the pocket, or the 'tentacles' of the advocate of the offender. Where the man on the street perceives that the justice system works in the collective interest, and that offenders who loot the treasury of the country, or steal from corporate bodies, are not cuddled with lenient

> sentences but face rigorous justice, or where the status of the offender and his counsel does not facilitate unfair bargained justice, then crime will truly not pay. There is failure of justice, desert, and deterrence when the criminal justice system delivers less than it promises by permitting the purchase of justice. In such an environment, crime does pay.[30]

The above is apposite when one compares the treatment of white-collar defendant on the one hand and an ordinary conventional crime defendant, on the other, particularly given the way courts come hard on the latter stating several reasons why stiffer penalty is appropriate in a given case. The fact that all the offences associated with the politically exposed persons are bailable, it appears to suggest that in making anti-corruption legislation the legislature did not take into account the social, financial and physical damage caused by white-collar offences.

Studies suggest that white-collar defendants enjoy the sympathy of judges who tend to be compassionate to them since the judges are also in the same social class doing white-collar job. Most of the white-collar defendants have no past criminal history, their illegality is non-violent, and they have gainful employment and lead a conventional life. These give them a "status shield," hence affording them the opportunity to receive less punitive sentences than street criminals.[31] Given the status advantage and grandeurs lifestyle white-collar defendants lead before offending some judges are reluctant to award harsh punitive sentence by assuming that prolonged incarceration may plunge them in more difficulty as they will be unable to withstand the rigors of prison life.[32]

According to Galvin and Simpson, some judges treat these defendants as such as they 'worry about costs to the community when otherwise prosocial offenders are incarcerated…or that privileged offenders already receive seizable punishment in the form of informal social consequences…'[33] As noted above, laymen may find unobjectionable some conducts of the powerful people as right like awarding contract to one's own company. It is only outright looting that they may consider blameworthy. Even then, public sympathy may be swayed in his favour once it can be demonstrated that he used part of the loot to benefit a few in his community.

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[30] EO Onoja, opcit, 440.
[31] Ronald G. Burns and Michele Bisaccia Meitl, opcit, 289
[32] Miranda A. Galvin and Sally S. Simpson, 'Prosecuting and Sentencing White-Collar Crime in US Federal Courts: Revisiting the Yale Findings' Rorie, M. ed, opcit, 381.
[33] Ibid.

Notwithstanding the popular perspective highlighted above, there are yet other scholars who believe that high-profile defendants deserve to attract harsher penalties for abusing their privileges and betraying the trust reposed in them. In other words, their social status should be seen as 'burden' or 'liability' rather than a 'shield' or 'advantage'. Hence, Wahrman argues: 'If socially privileged offenders receive all of the benefits of high status, and yet still violate the law, this might be perceived as an affront to an implicit social exchange.'[34] It is then worth the while of the Nigerian judges to be conscious of this school of thought and treat social status of a high-profile defendant as liability rather than a shield. This entails considering the betrayal of trust by the defendant and the damage he caused to the community depriving them basic amenities of life: education, roads, portable water, etc. A situation where a defendant who diverted for his personal use humongous amount of money from the public treasury is awarded a very light sentence which is more like a slap on the wrist will only dampen the hope of the common man that there is no intention to rid the system of corruption.

Another challenge at this level is refusal of the trial judge to deliver judgement after final addresses by lawyers against clear provision of the Constitution of the Federal Republic of Nigeria, 1999, which provides that the judgement must be delivered within three months after final address. A certain case before the FCT High Court was adjourned for judgement but the judge refused to deliver it for over a year. The Presidency had to intervene before judge finally delivered it.

1.4 Way Forward

Much as the challenges identified are huge and heavy that does not mean they are unsurmountable. A lot got to do with attitudinal change on the part of the public, lawyers and judges. It is high time it is appreciated that crimes of the powerful, mostly non-violent though, come with huge physical, social and financial costs. The general public must not see an armed robber as more dangerous than a public servant who divert public funds. Judges must begin to perceive status of defendants as liability rather than a shield. A socially disadvantaged person should deserve the pity of the judge than the well-off. If not, why should the judge be lenient with someone whose illegality was driven by greed but hard on the one whose misconduct was as a result of deprivation?

Continuous capacity building of prosecutors in intricate and complicated processes that serve as obstacle to the appreciation of operations of some key economic

[34] Ibid., 384.

sectors like the extractive industry should be intensified. Most of the atrocities in government agencies are done behind the veil, they enjoy low detection, and are hard to investigate from outside. It takes a very meticulous officer to appreciate how they were committed and prosecute same.

Given the uncertainty and/ or difficulty of successful prosecution through full trial in cases under review it is doubtful if the traditional criminal law can be adequate enough to address concerns of anti-corruption prosecutors. Indeed, it was this lack of belief in the system that yielded it to undergo what Christian Walburg coins as 'a process of 'economization and consensualization' in the name of plea bargain.[35] In view of this, it is not out of place to consider other alternative means of securing conviction without necessarily expending huge resources. It is suggested that if the statistics of the United States Sentencing Commission is anything to go by, anti-corruption agencies should, in deserving cases, deploy plea bargaining as the surest means of securing conviction. If in the US plea bargaining had to be deployed to secure conviction in over 90% of cases of fraud, money laundering and embezzlement despite their expertise and sophistication in investigation and prosecution, there is no reason why prosecutors in Nigeria should not give plea bargaining more priority.

Furthermore, the Malabu OPL245 case has taught us a very painful lesson of how not to proceed to full trial. The case was partly settled through plea bargaining as Emeka Obi and Gianluca Di Nardo owned up and were convicted and sentenced to four years imprisonment including forfeiture of 98.4 million USD and 21.9 million USD respectively. However, Shell and Eni, including Dan Etete refused to admit and opted for full trial, and on17th March 2021 they were discharged and acquitted. Even the convictions of the duo of Emeka and Gianluca were quashed.[36]

We are not unaware of the public perception about plea bargaining which posit that it is something akin to a class struggle in justice delivery by using different standards for the rich and the poor.[37] This argument seems plausible, however, it is a matter of choosing between two necessary evils, i.e., going through the rigors of full trial amidst uncertainty or plea bargaining with 100% guarantee of success but with a ridiculous sentence. Esa Onoja appears to have refined his earlier hard-line stance against plea bargaining which he claimed has made the criminal justice

[35] Christian Walburg, 'White-Collar and Corporate Crime: European Perspectives' in Rorie, M ed, n 4, 337-346 at 341.
[36] Patrick Alley, opcit, 221-224.
[37] EO Onoja, n opcit, 249.

system 'cow-tow to rich, high-profile, or politically exposed persons', to a more subtle position of regulated plea bargaining.[38]

Much as it is suggested that plea bargaining should be prioritized, but the pertinent question begging for answer is whether by awarding light sentences the overriding purposes of punishment, viz: reformation, rehabilitation and deterrence can be said to have been achieved? Certainly, no. Udofia Abia,[39] and Idehen and Daudu posit that despite the deployment of plea bargaining to improve the conviction, it has not proved to be very effective as corruption is on the increase.[40] This necessarily means that in the absence of reasonable sentence that fits the crime, the only achievement made is that the conviction has dented the convicted politically exposed person and will be ineligible to hold political office in future. The sentence will not deter other potential culprits from criminality, after all, at the end of the day they will only receive a slap on the wrist. In view of this, it is suggested that a sentencing guideline should provide a minimum sentence that no judge shall sentence below in cases settled through plea bargain.

The anti-corruption agencies should have similar provisions in their plea bargaining manuals too. It is equally important to consider allowing people directly affected by the criminal act of the convicted politically exposed person to make victim impact statements before sentence is pronounced. That would aid the judge in making an informed decision in sentencing. Imagine if the victims of the Police Pension Board scam were in court and had been heard, will Justice Talba have sentenced Mr Yusuf John Yakubu to pay a fine of N750, 000 for embezzling N32.8 billion? It is common knowledge that many retirees have been dying in the course of pursuing their pensions. Their families are in serious state of hardship and can barely eat three squarely meal. Given their limited resources, their children may end up dropping out of school and become a nuisance to the society. It is high time our laws are amended to allow for victims to have a say before sentencing as that would ginger up the judges to reflect on the physical, social, financial costs the illegality of a convicted politically exposed person caused to his community, and award him a sentence that befits his misconduct notwithstanding the plea bargain.

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[38] Onoja, E O., 'Constitutionality of Practice of Plea Bargaining in Nigeria: Cross-National Currents of a Not So Alien Idea' (2022) 2 *Nigerian Journal of Anti-Corruption Studies,* 56-81.

[39] A Udofia, 'Plea Bargaining in Public Sector Corruption Cases in Nigeria- is Justice Really Served?' (2018) 13 *Universitat* 113-127 .

[40] SO Idehen and SO Daudu 'Combatting the Cankerworm of Corruption through Plea Bargaining in Nigeria' (2020) 8 (2) *Journal of Law and Criminal Justice,* 130-139 at 135.

It is therefore not out of place to amend the Administration of Criminal Justice Act, 2015 to allow victims not only to make representations to the prosecutor but to make statement before the court. Other Anti-Corruption legislation may have similar provision too. To avert the problem of *locus standi*, the definition of victim should be flexible enough to accommodate not only the victim directly harmed by the act of the convict but his immediate family, and in deserving cases, the state. It is our position that if a convict can be allowed to make *allocutus* with a view to mitigating his sentence, his victims too should benefit from the opportunity to address the court at the sentencing stage.

1.5 Conclusion

In the foregone, the paper examined the challenges associated with prosecuting politically exposed person, a sub-category of white-collar defendants. It analysed the challenges from pre-trial to the sentencing stage and found that the challenges are not unsurmountable as they are mostly a product of stakeholders' attitude to criminal justice. It particularly highlighted how cases that undergo full trial are stultified and frustrated by the defendants, their lawyers and the instrumentality of unpatriotic judges, at the end such cases are lost after a decade of trial. The paper recommended the need for attitudinal change particularly on the part of judges who are enjoined in exercising their discretionary power of sentencing, to consider the status of the politically exposed persons more of liability rather than a shield by awarding sentences that befits the illegality committed. The paper noted that even though the primary goal of prosecutors is not securing conviction at all cost, the prosecuting anti-corruption agency should deploy regulated plea bargaining as a quick win to securing conviction, as it would weed away unscrupulous persons from further destroying the Nigerian state we have all laboured to sustain. Victims should be allowed to make impact statement before sentencing as that may persuade the judge to award reasonable sentence that befits the crime.

The Power of the Attorney General to Enter *Nolle Prosequi* in Criminal Proceedings: Lessons for Nigeria

B M Tijjani*

Abstract

The Attorney General (AG) being the Chief Law Officer of Ministry of Justice at both Federal and State government levels plays a very significant role in the prosecution of crime. By virtue of his power as vested on him by the Constitution of the Federal Republic of Nigeria (CFRN) 1999, he reserves the right to discontinue criminal proceedings at any stage before the final judgment. This paper examines the extent to which the AG can exercise this power. The paper deems it apt to explain who the AG is, his qualification, power and mode of appointment. The paper also analyses extensively the concept of nolle prosequi in criminal proceedings, how it can be exercised and who has the power to exercise it. The paper reveals the relevance of the power of nolle prosequi in crime prevention strategies in Nigeria. The papers recommends Constitutional amendment that would feature the separation between the office of the Attorney General and the Minister/Commissioner for justice, just as it is been done in United Kingdom and many other developed democracy.

Keywords: *Nolle Prosqui*, Attorney General, Crime, Nigeria and United Kingdom

1.1 Introduction

Generally, every individual by nature is a potential criminal. It is therefore the duty of the state to ensure that a strict measure is put in place to prevent the manifestation of these criminal tendencies by individuals, in order to achieve sanity and orderliness in the society. It is trite law that crime cannot be successfully committed except there is simultaneous co-existence of *Mens Reas* and *Actus Reus* that is the criminal intention and the resultant criminal act. It is the sole responsibility of the state to preserve its law and also prosecute and punish offenders. Each jurisdiction has a nomenclature ascribed to an individual who plays a front role in the preservation of the law of such state, that is, the Chief Law Officer. In Nigeria, the AG is the person saddled with the responsibility of preservation of laws and prosecution of offenders be it at Federal or State level. Among the key powers conferred on the AG by the CFRN power of *nolle prosequi* is the one that has been criticized by many and it remains doubtful whether exercising the power has in any way been helpful in tackling the ever increasing crime rate in Nigerian society. To appreciate this paper, there is need to know who is responsible for initiating criminal proceeding in Nigeria.

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1.2 Power to Initiate and Prosecute Criminal Matters in Nigeria

In Nigerian Criminal System, there are four (4) categories of persons who are lawfully empowered to institute criminal proceedings in Nigeria, namely: The Attorney General (of Federal or State), police, private person and special prosecutors.[1]

The AG ranks high in the hierarchy of persons empowered to initiate and prosecute criminal matters in Nigeria.[2] The reason for this primacy is not farfetched, it is as a result of the enormity of power vested on the AG by the CFRN. The office of the AG exists both at the Federal and State levels. Precisely, Section 150 of the CFRN provides, thus:

1. There shall be an Attorney General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation.
2. A person shall not be qualified to hold and perform the office of the Attorney General of the Federation unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than 10 years.[3]

In the same vein, Section 194 of the CFRN provides for the office of the Attorney General of the State as follows:

1. There shall be an Attorney General for each state who shall be the Chief Law officer of the state and the Commissioner for justice of the Government for that state.
2. A person shall not be qualified to hold or perform the functions of the Attorney General of a state unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than 10 years.[4]

A careful study of the above sections reveal that the constitution permits the fusion of the office of Attorney General and the office of the Minister for Justice at the federal level and Commissioner of justice at state level.[5] These provisions have been widely criticized over the years, and several doyens within the legal profession have called for constitutional amendment that would feature a separation between

[1] Administration of Criminal Justice Act, 2015 (as Amended.)
[2] Ibid., section 106.
[3] Section 150 of the Constitution of the Federal Republic of Nigerian 1999 (as amended.).
[4] Ibid.,Section 194.
[5] Ibid.,Sections 150 (1) &195 (1).

the office of the Attorney General and the Minister/Commissioner for Justice. According to Niyi Akintola, the learned Senior Advocate of Nigerian is of the view that the office of the Minister of justice is strictly political while that of the AG is purely legal.[6] The amalgamation of these two offices poses a great threat to the dispensation of justice. He further suggested that the Minister or Commissioner of Justice may be a political appointee, but the AG be a career civil servant, who cannot be removed by the whims and caprices of the President or Governor.[7] The AG should have a secured tenure and should be insulated from the control of any arm of government.[8]

Wole Olanipekun holds a contrary opinion. In his own opinion, the fusion of the two offices both at the Federal and State levels is in order and poses no threat whatsoever to the effective dispensation of justice. He opines thus;

> The position of the Attorney General should be a political, it is a position that should be not be politicized. It is a position that the occupier should see himself as the Chief Law officer of the Nation. Once he is appointed, he does not belong to any political party. Therefore, whoever that is appointed should see himself as card-carrying member of any political party but see himself first and foremost as the foremost law officer of the nation.

He further maintains that once we key into that, the argument about separating the office of Attorney General from that of the Minister of Justice will go into oblivion.[9] Taking a critical look at the provisions of the law as contained in the CFRN and considering various argument and opinion as canvassed by different authors, it is the humble opinion of this paper that the fusion of the office of Attorney General and Minister/Commissioner for justice is *strictu sensu* not out of place. However, considering the political antecedent and realities of Nigeria, it is safer and more appropriate to create a clear separation and distinction between the two offices. Another compelling reason why this position should be accorded a positive consideration is the fact that this practice was inherited from British Colonial Government, and the position is no longer the same in the United Kingdom, as it was abolished about nine years ago.

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[6] https://gurdian.ng/features/office-of-attorney-general-and-minister-of- justice-better-together-or not/.
[7] Ibid.
[8] Ibid.
[9] Ibid.

The Attorney General simply means everything pertaining to the law, he is the justice, while the Minister of Justice is in charge of the ministry. The Minister of Justice has nothing to do with the operation of the dispensation of justice.[10] Therefore, if Britain can divide office into two, why should Nigerian not do so?

Similarly in the United States, the two offices are clearly separated. The office of the Attorney General of the United State of America and the office of the head of department of justice as the Chief law officer of the Federal Government who represents the United States in legal matters generally and gives advice and opinions to the president and the heads of the executive departments of the government when so required.[11]

1.3 Qualification and Appointment of Attorney General (AG)

As noted above, the law regulates and prescribes the minimum qualification that must be met before any individuals can be appointed to hold the office of the AG, Section 150 (2) of the CFRN provides as follows: "A person shall not be qualified to hold or perform the functions of the office of the Attorney General of the Federation (AGF) unless he is qualified to practice as a legal practitioner in Nigerian and has been so qualified for not less than ten years".[12]

The constitution did not expressly provide for the authority responsible for the appointment of the person to the office of AGF or AGS, but rather provides for the person for the appointment of the Minister at the Federal level and Commissioner at the state level. By the combined provisions of Sections 147 and 192 of the CFRN, it is the President and the Governor of a state that have exclusive right to appoint qualified individuals to become a Minister or Commissioner of Justice respectively. This appointment is however subject to approval by the Senate or a State House of Assembly as the case may be. However, since the Minister/Commissioner of justice dovetails as the AG, it suffices to say that the President/Governor having the power to appoint a Minister/Commissioner also impliedly appoints the AG.[13]

1.4 An Analysis of the Powers of AG

As stated earlier, the office of the AG commands tremendous respect and significance both at the state and the federal levels. This is unconnected with the

[10] Ibid.
[11] Larry, J.s., & Joseph, J.s. (2004), Essentials of Criminal Justice (4th ed.), Thomson Learning Inc., Canada, P. 232.
[12] See also, setion 195 2) of the constitution of the Federal Republic of Nigeria 1999(As amended)
[13] Sections 147 (2) and 192 of the Constitution of the Federal Republic of Nigeria 1999(As amended).

fact that the CFRN bestows on the office varieties of powers.[14] Some of the powers as it relates to criminal proceedings are that the AG has the absolute power to institute and undertake criminal proceedings, the power to take over and continue criminal proceedings and lastly the power to discontinue a criminal proceeding (*Nolle prosequi*).[15]

However, with the advent of the Administration of Criminal Justice Act, (ACJA) 2015, there are some modifications as to the exercise of certain powers exclusively reserved for the AG, as it relates to the prosecution of offences created by an Act of National Assembly. For example, Section 108 (1) of the ACJA provides that a prosecutor may, or on the instruction of the AG discontinue a criminal proceeding at any stage of proceedings before final judgment. This section by implication, is a pointer that a prosecutor can single handedly enter a *nolle prosequi* without any input whatsoever from the AG. A study of the criminal justice of several other countries reveals that the power accruing to the office of an AG is almost universal.[16]

It is to be noted that among the three powers of the AG, this paper is going focus on *nolle prosequi* and it is imperative to know what it is, how it evolved and its rationale. This is carefully done in the following paragraph.

1.5 The Concept of *Nolle Prosequi*: How it Evolved and it's Rationale

The expression *nolle prosequi* is derived from the Latin Legal phrase, with the meaning: unwilling to pursue. It can as well be said to mean: do no prosecute. Its origin is traceable to the common Law criminal justice system, where the prosecution is unwilling to proceed with, or voluntarily withdraws from the prosecution of a criminal charge proffered against an accused person(s).[17]

Nolle prosequi has been define by Merriam Webster Dictionary to mean entry on the record of legal action denoting that the prosecutor or plaintiff will proceed no further in an action or suit either as whole or as to some count or as to one or more of several defendants.[18]

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[14] see also Section 104 (1) of the Administration of the Criminal justice Act 2015.
[15] See sections 174 and 211 of the 1999 Constitution of the Federal Republic of Nigeria.
[16] Such as the UK and Sierra Leone. See for example section 66 of the 1991 Constitution of the Republic of Sierra Leone.
[17] *Audu V. Attorney General of the Federation* (2013) All FWLR, Part 667 at 623
[18] https://www.maeriam-webster.com/dictionary/nolle%20peosequi accessed on 24th April 30, 2017.

Nolle prosequi amounts to a formal declaration made by a prosecutor in a criminal case, or by a plaintiff in a civil lawsuit, that the case against the defendant is being dropped. In criminal cases, *nolle prosequi* may be used in situations in which there is a fatal flaw in the prosecution's case, the prosecutor realizes he cannot prove the charges, he cannot prove the charges, or even that the prosecutor no longer believes the defendant is guilty.

Nolle prosequi may be entered in a civil lawsuit for similar reasons, such as when evidence and testimony take a turn, and the plaintiff no longer have confidence that it will prove his case. In both civil and criminal cases, the entry of *nolle prosequi* has the same effect as a voluntary dismissal of the case, or certain claims, charges, or defendants of a case.

1.5.1 *Nolle Prosequi* : The Procedure for Entering and the Effect thereof

The power to discontinue a criminal proceeding otherwise referred to as *nolle prosequi* is exclusively vested in the AG without any judicial review.[19] Although Section 108 of the ACJA seems to have whittle down the power of the AGF in this regard. The constitution did not expressly provide for the mode, style or procedure for the exercise of the power of AG in entering *nolle prosequi*, save for the fact that it was provided that the power can be exercised by the AG in person or through an officer of his department.[20] There are other procedural legislation that prescribe the mode in which the power of the AG can be exercised in line with the provision of Sections 174 and 211 of the CFRN. The ACJA under Section 107 provides that the AG can exercise his power of *nolle prosequi* in person by informing the court of his intention to discontinue orally or informing the court in writing. Section 107(1) of the ACJA provide thus:

> In any criminal proceeding for an offence created by an Act of the National Assembly, and at any stage of the proceeding before judgment, the Attorney General of the Federation may discontinue the proceedings either by stating in court in writing that the Attorney General of the Federation intend that the proceeding shall not continue and based on the notice the suspect shall immediately be discharged in respect of the charge or information for which the discontinue is entered.

[19] *State V Ilori* (1982) 2 SC. 155.

[20] Section 174 (2) & 211 (2) *of the constitution of the Federal Republic of Nigeria 1999 (As amended).*

It is to be noted that in some states in United States, the mode of filing a *nolle prosequi* is through a motion in court.[21] Upon entering a *nolle prosequi* with respect to criminal matter by an AG, the defendant is still prone to prosecution on the same offence. It therefore suffices to say that the entry of *nolle prosequi* is not acquittal, and the principle of double jeopardy therefore does not apply. The implication is that defendant may later be re-indicted on the same charge.[22] It is trite that the entry of *nolle prosequi* by the AG does not serve as a permanent shield from prosecution, neither does it serves as an atonement for criminal liability. The effect of the entry of *nolle prosequi* on the accused will largely depend on the prevailing circumstance and the stage of the case as at the period of the entry of *nolle prosequi*. This is well captured under the ACJA where the effect is highlighted in different circumstances. For instance, Section 107(4) of the ACJA provides thus: "Where discontinuance is entered in accordance with the provisions of this section, the discharge of a suspect shall not operate as a bar to any subsequent proceedings against him on account of the same facts."[23]

1.5.2 The Power of *Nolle Prosequi* and ever Increasing Crime Rate

The intent of the draftsmen of the CFRN providing for the office of the AG could not have been anything short of the fact that they want it to aid the course of justice and curtail the incessant spread of crime in the society. However, the effectiveness of the exercise of the power of the AG in giving effect to the intendment of the draftsmen remain a troubling question which is yet to be answered by anyone. There is no doubt that the AG is significantly powerful and occupies a strong position in government, whether in the state or federal level. This is not just because the CFRN has clothed him with a volume of functions, but his office as a minister of or commissioner for justice is an express creation of the CFRN unlike other political appointees.[24] Looking at the enormity of power concentrated in the office of the AG, and considering the body language of the courts in interpreting the constitutional provision on the power of the AG, it will not be farfetched to refer to an AG as a law unto himself. Although the CFRN provides for the guiding principle for the exercise of his power as it relates to criminal matters, yet this has not deter the court in holding in plethora of cases that the power of the AG in entering a *nolle prosequi* is unfettered. The CFRN in these regard provides under Section 174 (3)

[18] https://legaldictionary.net/nolle-prosequi/accessed April 24, 2017.

[22] *FRN V. Osahon and Ors* (2006) Law Pavalion Electronic Law Report - 3174 (SC).

[23] It is also essential to note the provision of Section 108 of the ACJA as it relates to the effect of discontinuance of criminal proceedings against a defendant.

[24] Sections 150 (1) and 195 (1) of the Constitution of the Federal Republic of Nigeria 1999(As amended).

as follows: "in exercising his powers under this section, The Attorney General of the Federation shall have regard to public interest, the interest of justice and the need to prevent abuse of legal process.[25]

There are quite a number of reasons why the AG might have a *nolle prosequi* with respect to a criminal cases. Some of the reasons include but not limited to:

i. A key witness has been discredited, or is now refusing to co-operate;
ii. Evidence has been re-evaluated and found lacking, or found to prove the opposition's point; or
iii. New evidence, which proves the defendant's innocence, or brings doubt as to his guilt, has come to light etc.

It is to be noted that a *nolle prosequi* can as well be filed in a situation whereby the defendant is late. One June 17, 2011, U. S Attorney Preet Bharara filed a motion of *nolle prosequi* regarding terrorism charges against Osama bin Laden, which has been filed for more than 13 years obviously, for his role in blowing up two U.S Embassies in Africa. This motion of unwillingness to pursue came after the al Qaeda leader's death during a military raid on his home in Pakistan.[26]

With the advent of the mechanism of the Alternative Dispute Resolution, the concept of plea bargaining has become another necessitating factor for the exercise of the power of *nolle prosequi* by the AG. This often happens when despite the charges against the defendant, the AG may decide to discontinue the case against the defendant. The Attorney General has become politicized, as the constitution has subjected it to the whims and caprices of the Executive. Since the player of the pipe will always dictate the tune. the Executive being the almighty figure who has the constitutional power to hire and fire the AG, has in many instances used the his office to perpetrate gross injustice in several respects. One of the common ways in which the Executive usually utilize the office of the AG to promote personal interest is the inordinate prosecution, persecution and witch-hunting of their political foes. This attitude obviously does not in any way have positive effect on the reduction of crime in the society, rather, the act itself is criminal.

There has been instances where the AG was said to have derives personal benefit from the exercise of his power of *nolle prosequi*. In the case of *State v Ilori*[27] the AG was alleged to have collected bribe in exchange to the exercise of his power of

[25]Ibid, Section 211 (3).
[26] https://legaldictionary.net/nolle-prosequi/ accessed 24th April, 2017.
[27] (SC. 42/1982); (1983)NGSC 37.

nolle prosequi. Even though the court in the case refrained from concerning itself with whether or not the allegation reflect the true state of affair, but rather went ahead to hold that the mere allegation that the AG collected the bribe will not vitiate the exercise of his constitutional power to discontinue criminal proceedings. The court further held that if such allegations in real sense reflect the actual state of affairs, then it makes the AG liable to be removed either by the legislature or his appointer.[28]

1.6 Conclusion and Recommendations

In conclusion, it would be a height of deception to categorically state that the exercise of the power of *nolle prosequi* by the AG has yielded tremendously in combating and reducing crime rate in the society. The opinion is predicated upon the fact that exercise of the power has been politicized in many ways, as the Executive arm often used it as a weapon of destruction on other foes and weapon of protection for their political allies. This act on its own is criminal in nature.

Consequently, for the office of the Attorney General to effectively deliver its office mandate in line with the good intention of the draftsmen of the constitution, the following are the recommendations of this pape;

1. The Executive must desist from interfering with the exercise of the power of *nolle prosequi* by the AG.
2. There should be a Constitutional amendment that would feature the separation of the office of the AG and the Minister/Commissioner for justice, just as it has been done in United Kingdom and many other developed democracy.
3. The offices of the AGF and AGS should be made more responsible and accountable for the exercise of their power of *nolle prosequi.*

If these recommendations are given serious consideration, it is believed that crime rate will drastically reduce in the country.

[28] Ibid.

Exploring the Legal Framework of Non-Custodial Sentences in Nigeria: Problems and Prospects

Omodanisi Kemi Beatrice *

Abstract

This paper discusses international and domestic legal frameworks and the use of non-custodial sentencing/ measures such as community service, parole, probation, fine, plea bargaining, restitution, and compensation in Nigeria. It offers a rich discussion on penal provisions that provides for these measures noting innovations provided by the Administration of Criminal Justice Act, (ACJA) 2015, the Administration of Criminal Justice Laws of States, and the Nigerian Correctional Services Act, 2019. The discussion focuses on the application or use of these measures in Nigeria while discussing judicial attitude and preference in the application of these measures. The paper also discusses challenges inhibiting the robust application of these measures and proffers solutions by way of recommendations such as the need for more judicial activism in the application of non-custodial measures, adequate funding of non-custodial measures, and the need for proper enforcement of legal frameworks for non-custodial measures in Nigeria.

Keywords: Legal Frameworks, Non-Custodial Sentencing, Community Service, Probation, Nigeria

1.1 Introduction

Non-custodial sentencing developed owing to international recognition that imprisonment, though a legal sanction for offenders is not a panacea for crime prevention, rehabilitation and re-integration of offenders. This is because of the challenges facing most prison systems in many countries including Nigeria, which have adverse effect on physical and mental health of inmates, and consequently impedes the yield towards the rehabilitation and re-integration of offenders.

Non-custodial sentences are codified in international and domestic legal frameworks. At the international sphere, the use of non-custodial measures has been accorded legal backing since 1990 by the United Nations through the adoption of the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules).[1]The Tokyo Rules provided a set of basic principles to support the use of

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non-custodial measures and sanctions, as well as minimum safeguards for persons subject to alternatives to imprisonment.[2]

In Nigeria, with the aim of shifting the criminal justice administration from the retributive penal justice system to a problem solving approach and borrowing a leaf from other climes, non-custodial sentences are codified in legislations such as Administration and Criminal Justice Act (ACJA), 2015, Nigerian Correctional Services (NCS) Act, 2019, Administration of Criminal Justice Law of States, Child's Rights Act, Penal Code, Criminal Procedure Act and Criminal Code Act.

This paper discusses the legal framework (international and domestic) as well as the use of non-custodial sentencing in Nigeria. Beside Part 1 which is the introduction, Part 2 clarifies concept and discusses international and domestic legal frameworks for non-custodial measure. Part 3 discusses the use of non-custodial sentences in Nigeria and challenges bedeviling the use of these measures in Nigeria. Part 4 concludes and makes recommendations.

1.2 Conceptual Clarification of Key Terms

Black's Law Dictionary[3] defines non-custodial sentencing as a criminal sentence not requiring prison term. It also defines alternative sentence as a sentence other than incarceration. Examples include community service and victim restitution.

Similarly, Mann[4] defines non-custodial sentencing as sentences that do not include imprisonment but include discharge, fines and community service order. It is used basically for less serious offences based on considered factors such as any mitigating factor and offending history.

Having considered these definitions, this paper defines non-custodial sentences or measures as sentences other than imprisonment that is applicable at three stages of

[1] United Nations, Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), 1993 (adopted by Resolution 45/110 of 14 December 1990)< https://www.ojp.gov/pdffiles1/Digitization/147416NCJRS.pdf >accessed September 9, 2022.

[2]Penal Reform International, 'International Standards' <https://www.penalreform.org/issues/alternatives-to-imprisonment/international-standards/> accessed September 9, 2022.

[3] Garner, B. A, *Black's Law Dictionary*, (8th ed. Thomson West Publishing Co: United States of America, 2004)

[4]Mann R, 'Non-Custodial Sentencing' < https://www.researchgate.net/publication/338917500_POSTnote_613_Non-Custodial_Sentences> accessed September 8, 2022.

legal proceedings which are: pre-trial stage, trial stage and post-trial stage. These measures or alternative sentences are within the realm of rehabilitative justice, which focuses on rehabilitation of offenders for long term benefit of both offenders and the community.

1.3 International Legal Instruments

The following are the international legal instruments identified as relevant to this research:

a. **United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)**[5]- The Tokyo Rules emanated from a global discussion and exchange of experiences initiated by Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders in Tokyo, where the question of obtaining an alternative to imprisonment was raised.[6] Adopted in 1990, these Rules provided key international standard on alternative to imprisonment. They provide set of basic principles aimed at promoting the use of non-custodial measures and sanctions, and also provide safeguards for persons subject to alternatives to imprisonment.[7]

b. **United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)**[8]

   The Beijing Rules was the pioneer international statement that centres on juvenile justice administration. It aimed at developing a juvenile justice system that is fair and humane, emphasizing the well-being and rehabilitation of juvenile.[9]

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[5] United Nations Digital Library, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): Resolution/Adoption by the General Assembly, 1990 < https://digitallibrary.un.org/record/105347?ln=en#record-files-collapse-header > accessed 28th January, 2022.

[6] Ibid.

[7] Penal Reform International, 'International Standard' < https://www.penalreform.org/issues/alternatives-to-imprisonment/international-standards/> accessed 28th January, 2022.

[8] United Nations Digital Library, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"): resolution/adoption by the General Assembly, 1985 < https://digitallibrary.un.org/record/120958?ln=en> accessed 28th January, 2022.

[9] Centre for Social-Legal Studies, 'Juvenile Justice in Nigeria' (2009) < https://censolegs.org/publications/9.pdf> accessed 28th January, 2022.

c. **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**[10]
This declaration was adopted by the UN General Assembly as a benchmark for measuring State practice in relation to victim's rights. It sets out basic principles of treatment for crime victims, based on compensation and respect for human dignity. The declaration advocates access to judicial and administrative processes, restitution, compensation for victims etc.

d. **United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)**[11]
Bangkok Rules provide seventy (70) Rules that apply to women prisoners, women serving non-custodial sentences as well as juvenile females.[12] It provides clarification on certain United Nations Standard Minimum Rules (UNSMR) to ensure UNSMR effectively respect the rights of prisoners without discrimination. Basically, Bangkok Rules address issues of female prisoners from the moment of pre-trial detention as well as other challenges female prisoners face in relation to physical and mental health care.[13]

1.4 Domestic Legal Framework

The following Nigerian statutes are identified and considered relevant to and worthy of analysis by this research:

a. **Administration of Criminal Justice Act, 2015**[14]
This legal framework shifted Nigeria's administration of Criminal Justice System from a punitive approach to a restorative approach by taking cognizance of the needs of the society, victims and some vulnerable persons. Innovatively, the ACJA provides for non-custodial sentences such as suspended sentence, conditional release, payment of compensation, probation, community service, parole, deportation, plea bargaining and fines.

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[10] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted 11th November, 1985) <https://www.unodc.org/pdf/rddb/CCPCJ/1985/A-RES-40-34.pdf> accessed January 31, 2022.

[11] United Nations Human Rights Office of the High Commissioner, 'United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offender' (adopted December, 2010). <https://www.ohchr.org/EN/ProfessionalInterest/Pages/BangkokRules.aspx> accessed January 31, 2022.

[12] Ibid.

[13] Ibid.

[14] Administration of Criminal Justice Act, 2015, <https://www.policinglaw.info/assets/downloads/2015_Administration_of_Criminal_Justice_Act.pdf> accessed February 1, 2022.

b. **Nigerian Correctional Services Act, 2019:** This Act repeals the Prison Act and changes the name of the Nigerian Prisons Service to Correctional Service.[15] The Act is divided into "Custodial Service" and "Non-Custodial Service."[16] The Act in Parts II provides for non-custodial service and place the onus of administering non–custodial measures on the service. Such non-custodial measures includes: community service, parole, probation, restorative justice measures and any other non-custodial measures assigned to the Correctional Service by a court of competent jurisdiction.[17]
c. **Penal Code:** The It provides for the following non-custodial measure: caning,[18] fine,[19] and compensation[20]
d. **Criminal Procedure Act:**[21]The following are punishments that are not custodial in nature: caning,[22] fine,[23] deportation,[24] probation.[25]
e. **Criminal Code Act:**[26] This law provides for some non-custodial measures such as canning,[27] forfeiture[28] and fine.[29]
f. **Child Right Act:**[30] This law provides for some non-custodial measures as methods of dealing with child offenders such as community service,[31] fine, compensation or cost,[32] probation.[33]

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[15] Ibid.

[16]Nigerian Correctional Services Act, 2019 < https://placng.org/i/wp-content/uploads/2019/12/Nigerian-Correctional-Service-Act-2019.pdf> accessed February 1, 2022, S 1

[17] Ibid., S 37 (1).

[18] Penal Code (Northern States) Federal Provision Act, Cap. P3 LFN, 2004, s 77. It provides that the Court in addition to imprisonment can order caning.

[19] S 74 of the Penal Code CAP. P3 LFN, 2004.

[20] Ibid., S. 78.

[21] Criminal Procedure Act, CAP. C41 LFN, 2004.

[22] SS 384-387 provides for caning, method of administering this punishment and category of persons that can be caned.

[23] S 389 of the Criminal Procedure Ac.t

[24] SS 402-412 of the Criminal Procedure Act 2004.

[25] SS 435-440 of the Criminal Procedure Act 2004.

[26] Criminal Code Act, CAP. C38 LFN, 2004.

[27] S 18. Caning for male persons under seventeen

[28] S 20 of the Criminal Code Act

[29] S 17 of the Criminal Code Act provides for offences that are applicable under the Code as death, caning, imprisonment, fine, and forfeiture. Of these punishments, caning, fine and forfeiture are non-custodial.

[30] Child Rights Act, 2003 < https://placng.org/lawsofnigeria/laws/C50.pdf> accessed March 21, 2023

[31] Ibid., S 223(d)(iii).

[32] Ibid., S 223(d) (ii).

[33] Ibid., S 223(c) (i).

g. **Sharia Penal Code Act**[34]- This law provides for caning,[35] fine,[36] compensation[37] as punishments that are non-custodial in nature.

h. **Administration of Criminal Justice Laws:** As at 2022, thirty (30) states have enacted the ACJL.[38] This paper will highlight the following states ACJL representing the six geopolitical zones of Nigeria i.e. North Central, North-West, South-South, North-East, South-East, and South-West. This will enable this paper relate the perspective of these states as it relates to non-custodial measures.

   a) **Lagos State Administration of Criminal Justice Law, 2015:** To start with, Lagos State passed its Lagos State Administration of Criminal Justice Law in 2007, and this was re-enacted in 2011, 2015 and recently amended in 2021 as the Administration of Criminal Justice (Amendment) Law (ACJL) of Lagos State, 2021.[39] The Lagos State ACJL, 2015 provides for non-custodial measures such as fine,[40]deportation[41]Probation,[42] and Community Service.[43]

[34] Sharia Penal Code with Northern States Federal Provision Act Cap 345
[35] Ibid., SS 68 (1)(f) and 77.
[36] Ibid., SS 68(1)(e) and 72.
[37] Ibid., S 78.
[38] Partners West Africa Nigeria, 'ACJL Tracker,' <https://www.partnersnigeria.org/acjl-tracker/> accessed January 23, 2023 ; National Judicial Institute, 'An Overview of the Administration of Criminal Justice Act and Laws'(2021) Presentation by Prof. Adedeji Adekunle SAN at the 2021 All Nigeria Judges Conference of the Superior Courts Organised by the National Judicial Institute 15-19 November, 2021 Abuja. < https://nji.gov.ng/wp-content/uploads/2021/12/An-Overview-of-the-Administration-of-Criminal-Justice-Act-and-Laws-by-Prof.-Adedeji-Adekunle-SAN.pdf> accessed February 1st, 2022.
[39] Okeke, C, 'Reinvigorating Non-Custodial Provisions of the Lagos State Administration of Criminal Justice Law, 2015,' 2019 <https://www.linkedin.com/pulse/reinvigorating-non-custodial-provisions-lagos-state-criminal-okeke; Steve, A. 'ACJL Amendment Signed into Law by Sanwo-Olu' *This Day News Paper* (Lagos 12 October 2021). <https://www.thisdaylive.com/index.php/2021/10/12/2021-acjl-amendment-signed-into-law-by-sanwo-olu/> 1st February, 2022 ; Lagos State Ministry of Justice, ' Governor Babajide Olusola Sanwo-Olu Signs Administration of Criminal Justice Amendment) Law of Lagos State, 2021' 2021<https://lagosstatemoj.org/2021/10/05/governor-babajide-olusola-sanwo-olu-signs-administration-of-criminal-justice-amendment-law-of-lagos-state2021/ > accessed 1st February, 2022.
[40]Ibid., S 316 of Lagos State ACJL, 2015.
[41]Ibid., S 339 .
[42] Ibid., SS 341-344.
[43] Ibid., S 347.

b) **Administration of Criminal Justice Law 2016 of Edo State:**[44] Administration of Criminal Justice Law, 2016 of Edo State[45] provides for non-custodial alternatives in Part 44. It provides for probation,[46] conditional release of defendant and payment of compensation for loss or injury and of costs,[47] suspended sentence and community service order,[48] parole[49] and release of prisoner before completion of sentence.[50] Furthermore, Part 28 deals with plea bargain,[51] and fines.[52]

c) **The Administration of Criminal Justice Law, 2016 of Oyo State:** The Administration of Criminal Justice Law, 2016 of Oyo State[53] in Part 42 provides for probation and non-custodial alternatives. It provides for probation order,[54] conditional release of the Defendant, compensation for loss or injury and of costs,[55] suspended sentence and community service,[56] parole,[57] plea bargain,[58] and fine.[59]

d) **Administration of Criminal Justice and Other Related Matters Law of Ogun State, 2017:** The Administration of Criminal Justice and Other Related Matters Law of Ogun State, 2017[60] provides for fine,[61]

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[44]Administration of Criminal Justice Law <edojudiciary.gov.ng/wp-content/uploads/2018/10/ADMINISTRATION-OF-CRIMINAL-JUSTICE-ALAW.pdf> accessed 21st February, 2022.

[45] Administration of Criminal Justice Law,2016 of Edo State https://edojudiciary.gov.ng/wp-content/uploads/2018/10/ADMINISTRATION-OF-CRIMINAL-JUSTICE-LAW.pdf accessed 21st February, 2022.

[46] Ibid.,SS 453, 455-458 .

[47] Ibid.,SS 454, 459.

[48] Ibid., SS 460 -465 .

[49] Ibid.,Part 45.

[50] Ibid.,S 468 .

[51] Ibid.,SS 270-277 .

[52] Ibid.,SS 420, 422-435 .

[53] Administration of Criminal Justice Law, 2016 of Oyo State <https://oyostate.gov.ng/download/assented-law-administration-of-criminal-justice-2016/> accessed 21st February, 2022

[54] Ibid.,SS 441, 443,444,445,446, of ACJL, 2016 of Oyo State

[55] Ibid.,SS 442, 447

[56] Ibid.,SS 448-456 of ACJL

[57] Ibid.,S 456

[58] Ibid., S 269

[59] Ibid.,S 328(1)

[60] Administration of Criminal Justice Law , Ogun State, 2017. Printed and Published by the General Manager, Ogun State Printing Corporation, Abeokuta.

[61] s 340

deportation,[62] probation,[63] conditional release of defendants and payment of compensation for loss of injury and of costs,[64] suspended sentence and community service,[65] and parole[66] as non-custodial measures.

e) **The Adamawa State Administration of Criminal Justice Law, 2018:** The Adamawa State Administration of Criminal Justice Law, 2018 also made provision for non-custodial measures. It provides for the following: restitution,[67] fine,[68] probation,[69] conditional release of defendant and payment of compensation for loss or injury and of costs,[70] suspended sentence and community service,[71] plea bargain[72] deportation[73] and parole.[74]

f) **Imo State Administration of Criminal Justice Law, 2020:** The Imo State Administration of Criminal Justice Law, 2020 provides for probation and non-custodial alternatives in Chapter 34 and 35 of the Law.[75] It provides for conditional release of offenders,[76] restitution of stolen property,[77] probation order and conditions of recognizance,[78] suspended sentence and community service[79] and parole.[80]

g) **Kaduna State Administration of Criminal Justice Law, 2017:**[81] The Kaduna State Administration of Criminal Justice Law, 2017[82] also reflects

[62] Ibid., SS 454-466.
[63] Ibid., SS 468, 470-474.
[64] Ibid., S 469 of ACJL.
[65] Ibid., SS 475-483.
[66] Ibid., S 484.
[67] Ibid., SS 322, 343 of Adamawa State ACJL, 2018< https://v1.corruptioncases.ng/resources> accessed February 23rd, 2022.
[68]Ibid., S 328.
[69] Ibid., SS 454, 456-459.
[70] Ibid., SS 455, 460.
[71] Ibid., SS 461-467.
[72] Ibid., S 271.
[73] Ibid.,S 441.
[74] Ibid., S 469.
[75] Imo State Administration of Criminal Justice Law, 2020< https://barristerng.com/imo-state-administration-of-criminal-justice-law-acjl-no-2-of-2020/ > accessed February 23, 2022
[76] Ibid., S 447.
[77] Ibid., S 449.
[78] Ibid., SS 450-456.
[79] Ibid., SS 461-468.
[80] Ibid., S 469.
[81] Kaduna State Government, 'Administration of Criminal Law, 2017' < https://kdsg.gov.ng/wpfd_file/administration-of-criminal-law-2017/> accessed February 23rd, 2022.
[82] Ibid.

the following non-custodial measures thus: plea bargain[83] fine,[84] compensation,[85] restitution,[86] probation,[87] caning,[88] suspended sentence, community service,[89] and parole.[90]

h) **Enugu State Administration of Criminal Justice Law:**[91] The Enugu State Administration of Criminal Justice Law[92] provides for non-custodial measure such as: compensation,[93] restitution,[94] fine,[95] conditional release of offenders,[96]probation order and conditions of recognizance,[97] suspended sentence and community service,[98] parole[99] and whipping.[100]

i) **Administration of Criminal Justice Law of Bayelsa State, 2019**[101] Administration of Criminal Justice Law of Bayelsa State, 2019 provides plea bargain,[102] deportation,[103] probation,[104] conditional release of offenders,[105] and community service[106] as non-custodial measures

j) **Anambra State Administration of Criminal Justice Law, 2010**[107]

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[83] Ibid., S 282.
[84] Ibid., SS 337-338.
[85] Ibid., S 334.
[86] Ibid., S 332(1)(a).
[87] Ibid., SS 450,451, 452, 453,454,455 and 456.
[88] Ibid., SS 445-448.
[89] Ibid., SS 457-463.
[90] Ibid., S 465 of Kaduna State ACJL, 2017.
[91]TranspatencLT, 'Administration of Criminal Justice Act/Laws' < https://v1.corruptioncases.ng/resources> accessed February 23rd, 2022.
[92] Ibid.
[93] Ibid.,S 440 of the Enugu State Administration of Criminal Justice Law No 1, 2017
[94] Ibid.,SS 442, 457.
[95] Ibid.,S 449.
[96] Ibid.,S 455.
[97] Ibid.,SS 458-468.
[98] Ibid.,SS 469-475.
[99] Ibid.,S 477.
[100] Ibid.,SS 478-481 of the Enugu State Administration of Criminal Justice Law No 1, 2017. It is important to note that this ACJL, distinctively includes whipping as a non-custodial measure for juvenile offenders compared to other states of the federation.
[101]TranspatencLT,'Administration of Criminal Justice Act/Laws' < https://v1.corruptioncases.ng/resources> accessed February 23rd, 2022.
[102] S 71 of Administration of Criminal Justice Law of Bayelsa State, 2019.
[103] Ibid.,S 333.
[104] Ibid.,SS 344-348.
[105] S 343 .
[106] Ibid., S 349 .
[107]TranspatencLT, 'Administration of Criminal Justice Act/Laws' < https://v1.corruptioncases.ng/resources> accessed February 23rd, 2022.

Anambra State Administration of Criminal Justice Law, 2010[108] did not expressly provide non-custodial measures as a segment under the Law. It however provides for fines, [109]compensation,[110] probation,[111]restitution[112] as punishments which this paper considers as non-custodial. It is important to note that this law did not make provision for parole and community service as non-custodial measures.

k) **Jigawa State Administration of Criminal Justice Law, 2019**[113]
Jigawa State Administration of Criminal Justice Law, 2019[114] provides for the following measures as non-custodial measures: plea bargain,[115] compensation,[116] restitution,[117] fine,[118] probation,[119]caning[120] community service and suspended sentence,[121] and parole.[122]

l) **Kano State Administration of Criminal Justice, Law 2019**. [123]
Just like other states ACJLs, this law provides for the following non-custodial measures: plea bargain,[124] restitution,[125] probation,[126] caning,[127]suspended sentence and community service,[128] as well as parole.

m) **Kogi State Administration of Criminal Justice Law, 2017**,[129]

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[108]Ibid.
[109] s 363 of the Administration of Criminal Justice Law of Anambra State, 2010
[110] Ibid., SS 391-394
[111] Ibid.,SS 396,399, 402-406
[112] Ibid.,S 398.
[113] TransparencIT, 'Jigawa State Administration of Criminal Justice Law, 2019' < https://v1.corruptioncases.ng/resources> accessed 23rd February, 2022.
[114] Ibid.
[115] S 274, Jigawa State Administration of Criminal Justice Law, 2019.
[116] Ibid., S 322.
[117] Ibid., S 324.
[118] Ibid., S 330.
[119]Ibid., SS 437, 439-443.
[120]Ibid., S 432.
[121] Ibid., SS 444-450.
[122] Ibid.,S 452.
[123] TransparencIT, 'Kano State Administration of Criminal Justice Law, 2017 pdf' < https://v1.corruptioncases.ng/resources> accessed February 24, 2022.
[124] S 272.
[125] SS 341-342
[126] Ibid., SS 436-441.
[127] SS 431-433.
[128] SS 442-448.
[129]TransparencIT, 'Kogi State Administration of Criminal Justice Law, 2017' <https://v1.corruptioncases.ng/resources> accessed February 23rd, 2022

Kogi State Administration of Criminal Justice Law, 2017 provides for the following measures: plea bargain,[130] compensation,[131] restitution,[132] probation,[133] suspended sentence and community service,[134] as well as parole.[135]

n) **Administration of Criminal Justice in the Courts of Nasarawa State, and the Related Matters, 2018**,[136]

Administration of Criminal Justice in the Courts of Nasarawa State, and the Related Matters, 2018 provides for the following measures: plea bargain,[137] compensation,[138] restitution[139] probation,[140] suspended sentence and community service[141] and parole.[142]

o) **Administration of Criminal Justice Law of Ondo State, 2015**[143]

Administration of Criminal Justice Law of Ondo State, 2015 provides for the following as non-custodial measures: plea bargain,[144] compensation,[145] fine,[146]probation,[147] suspended sentence,[148] community service[149] and parole.[150]

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[130] S 268 of Kogi State Administration of Criminal Justice Law, 2017.
[131] S 317.
[132] Ibid., S 319.
[133] SS 438-444.
[134] SS 445- 451.
[135] S 453.
[136]TransparencIT, 'Nasarawa State Administration of Criminal Justice Law, 2018' < https://v1.corruptioncases.ng/resources> accessed February 23rd, 2022.
[137] S 269 of Nasarawa State Administration of Criminal Law, 2018.
[138] S 311.
[139] S 313.
[140] Ibid., SS 426-432.
[141] SS 433-439.
[142] S 441,.
[143] S TransparencIT, 'Administration of Criminal Justice Law of Ondo State, 2015' < https://v1.corruptioncases.ng/resources> accessed February, 2022.
[144] S 247, Administration of Criminal Justice Law of Ondo State, 2015.
[145] Ibid.,S.
[146] Ibid.,S 290(6).
[147] Ibid.,SS 406-411.
[148] Ibid.,S 412 (1).
[149] SS 412(2)-418.
[150] S 419.

p) **Plateau State Administration of Criminal Justice Law, 2018**[151]
Plateau State Administration of Criminal Justice Law, 2018 also provides the following non-custodial sentences: plea bargain,[152] compensation,[153] restitution,[154] probation,[155] suspended sentence and community service[156] and parole.[157]

q) **River States Administration of Criminal Justice Law, No 7 of 2015**
River States Administration of Criminal Justice Law, No 7 of 2015 also provide for the following non-custodial measure: plea bargain,[158] compensation,[159] restitution,[160] probation[161] suspended sentence and community service[162]

Having considered the above mentioned states' ACJLs, it is noteworthy that, while there are similarities between these states laws with the ACJA, 2015 on non-custodial sentences, there are still peculiarities accommodated in certain states. For instance, most northern states such as Kano State, Jigawa State, Kaduna State included canning in their laws, considering that this punishment still remain a viable punishment in the northern part of Nigeria. This is also similar to Enugu state that recognizes whipping as a punishment. There are similarities in the ACJL of Lagos State, Bayelsa State and Anambra State. Also states such as: Kogi State, Nassarawa State, and Plateau State share some similarities in their provisions on non-custodial sentencing. Also, ACJLs of River State and Ondo State are similar.

1.5 Regulations

These relate to Practice Directions on Sentencing Guidelines available in the different states judiciary. These guidelines are set of rules made by various Chief Judges which judges and magistrates are expected to adhere to when imposing

[151]TransparencIT, 'Plateau State Administration of Criminal Justice Law, 2018' < https://v1.corruptioncases.ng/resources> accessed 24th February, 2022.
[152] Ibid.,S 284 Plateau State Administration of Criminal Justice Law, 2018.
[153] Ibid.,S 332.
[154] Ibid.,S 334.
[155] Ibid.,SS 448-453.
[156] Ibid.,SS 455-461.
[157]Ibid., S 463.
[158] S 277 , River States Administration of Criminal Justice Law, 2015.
[159] Ibid.,S 326,.
[160] Ibid.,S 328, .
[161] Ibid.,SS 463-469,.
[162] Ibid.,SS 470-476,.

sentences and making orders.[163] This research will consider Guidelines of Lagos State and FCT Abuja.

i. The Lagos State Judiciary (Sentencing Guidelines) Practice Directions, 2018, provides in Part 1 of the guideline, the objective and guiding principles of the Sentencing Guidelines. The Guidelines permits and requires that non-custodial sentence or treatment in lieu of imprisonment in each case should be considered.[164]

ii. Consolidated Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020[165]- This practice direction was made by the Honourable Chief Judge, of the Federal Capital Territory High Court, Abuja, pursuant to powers conferred by section 259 of the Constitution of the Federal Republic of Nigeria, 1999, section 490(f) and (g) of the Administration of Criminal Justice Act, 2015 and other enabling powers.

One of the objectives of this Practice Directions is to ensure that congestion in correctional centres is reduced to the barest minimum through the use of non-custodial sentences in line with section 470(2)(c) of the Administration of Criminal Justice Act, 2015, section 2(1) (b) of the Nigerian Correctional Services Act, 2019 and any other applicable provisions of the law.[166]

Order 1, Rule 4 provides for the guiding principles in applying non-custodial sentencing and Order 1, Rule 5 of the Practice Direction listed the non-custodial sentences that may be imposed by the courts as fine, compensation, restitution, probation, suspended sentence, community service, deportation and any other non-custodial sentence as may be prescribed by an Act of the National Assembly. The Practice Direction requires that when imposing non-

[163] Anabogbu S I, 'Non-Custodial sentencing in the Magistrate Court' (2021) Being a Paper Presented at the Virtual Refresher Course for Magistrates at the National Judicial Institute , Abuja (27-29 April, 2021) < https://nji.gov.ng/wp-content/uploads/2021/12/NON-CUSTODIAL-SENTENCING-IN-THE-MAGISTRATE-COURTS-by-Sumi-Anagbogu-Esq..pdf> accessed 27th February, 2022.

[164] National Judicial Institute, 'Sentencing; Practice and Procedure under the Administration of Criminal Justice Act and Criminal Justice Laws' delivered by Hon. Justice Olatunde H. Oshodi < https://nji.gov.ng/wp-content/uploads/2019/06/Paper-on-sentencing.pdf> accessed 28th February, 2022.

[165] Partners West Africa Nigeria, 'Consolidated Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020' < https://www.partnersnigeria.org/fct-courts-sentencing-guidelines/> accessed February 28, 2022.

[166] Consolidated Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020 . Ibid. Order I, Rule 1.

custodial sentences, the Court should be guided by the provisions of ACJA and other relevant laws relating to such sentence and the availability of facilities for implementation of the particular non-custodial sentence.[167]

1.6 Use of Non-Custodial Sentencing in Nigeria

This work has revealed that there are several legal frameworks for the application of non-custodial measures in Nigeria. The extent of the application will be considered.

a. **Community Service**

This measure is reflected in the ACJA, 2015, NCS Act, 2019, ACJLs of states and other penal laws, as a sanction for minor offences and misdemeanor. [168] Community Service Order can be seen as a court order that requires an offender to compensate society for the crime committed by performing work for the benefit of the community. As such, by this sentence, an offender is required to provide a specified number of hours of free labour in some public places by engaging in services such as: street cleaning, repair of run-down housing or hospital volunteer work, public toilet, collection of trash in parks etc.

Community service presents some benefits to the society as follows:

1. It helps cultivate the behavioral quality of an offender who undertakes in community work
2. It holds the offenders accountable for the harm they have caused to the community
3. It helps facilitate mechanism for the offender to acquire skills
4. By community service, the community is encouraged to become aware and involved in the justice system.
5. It provides a pool of human resources for the community for various services in the community.
6. It provides a platform for reintegration of offenders into the society since the offenders are in the community and not isolated in prison confinements.

[167] Ibid., Sub- Rule 2, Rule 5, Order 1.
[168] S 460, ACJA, 2015.

Flowing from the aforementioned benefits, researchers such as Ezeanokwasa and Ngede opine that community service reduces the high incidence of recidivism recorded in ex-convicts released after serving prison term.[169]

It is important to state at this juncture that under ACJA, 2015 and other penal laws, this non-custodial measure is not applicable to offenders that committed offences that involve the use of arms, offensive weapon, sexual offences or any offence which punishment exceed imprisonment for a term of three years.[170] As such, ACJA, 2015 enjoins the court in exercising its power as relating to community service to consider: the need to decongest the prison; the need to effect rehabilitation of prisoners through exposure to productive work or making them undertake productive work; and the need to ensure that convicts who commit simple offences do not mix with hardened criminals.[171]

Measures are put in place by ACJA, 2015 and other relevant penal laws to ensure that a convict under community service does not escape justice upon sentence to community service and this entails producing a guarantor which must undertake to produce the convict if he/she abandons or runs away from the community service.[172] The implication of being a guarantor is that where a defaulting convict escapes, the guarantor will be responsible to produce the convict before the court or pay a fine of N100,000 or more where such fails.[173]

It is important to state at this point that where the convict defaults in complying with the community service order and the registrar of the Community Service Centre informs the court, the court issues a summons of appearance to the convict, and where the convict fails, refuses or neglects to appear to the summon, the court is permitted to issue a warrant of arrest.[174] Upon appearance before the court where it is proven that convict defaulted, the court may vary the order to suit the circumstances of the case, impose fine or cancel the order of community service and impose any punishment which the convict initially ought to have been

[169] Ezeanokwasa J.O, & E. I. Ngede, 'Non-Custodial Sanctions in Nigeria Criminal Jurisprudence and their Applications During Sentencing: A Myth or Reality' (2021) *11 Unizik Journal of Public and Private Law* <. https://journals.ezenwaohaetorc.org/index.php/UNIZIKJPPL/article/download/1651/1692> accessed March 1st, 2022.
[170] ACJA, 2015, s 460(3).
[171] Ibid., S 460(4) (a)-(c).
[172] Ibid., S 461(8).
[173] Ibid., S 461(9).
[174] Ibid., S 463(1) & (2) of ACJA, 2015.

sentenced to in respect of the offence. However the period of the community service already performed may count in the reduction of the sentence.[175]

The application of this measure is yet to gain full acceptance in the Federal Courts considering that there are hardly any pronouncement on this measure. Although recently, Federal High Court, in Bauchi State sentenced three convicts (by name, Dahiru Ibrahim, Gambo Abdullahi and Umar Rabiu) who were found with cannabis sativa weighing 150g, 200g, and 300g respectively to three weeks community service.[176] The Convicts were sentenced to clean and sweep the premises of the Bauchi Custodial Centre on a daily basis for three weeks.

Some states such as Lagos State and Oyo State that have taken steps to enact their Administration of Criminal Law have utilized this measure for simple offences such as traffic offences. For instance, in Lagos State, pursuant to the Criminal Justice Law of Lagos State, 2011, a Magistrate has utilized this measure in the unreported cases of *COP v Abiodun Adebayo,*[177] *COP v Taiwo Aminu,*[178] *COP v Emeka Wisdom,*[179] *COP v Babarinde Ezekiel*[180] *and COP v Nelly Osa.*[181] In these cases, the Ikeja Magistrate Court sentenced all the accused persons to various community services ranging from one hour to twenty-four hours, to be performed within the premises of the court.

Even with these reported cases, there are scanty applications of this measure in the State. A Survey report written by Access to Justice, on the Implementation of the Administration of Criminal Justice Law 2011 of Lagos State as it relates to the application of Community Sentencing Order by Magistrates reveal that 82% of Magistrates employ this measure for most minor offences such as theft of mobile phones (especially where the items have been recovered), traffic or environmental offences. However, these magistrates expressed their lack of confidence in the effectiveness of the measure, considering that failure in supervision and enforcement remains an issue which prevents this measure from deterring crime. In fact, 18% of the magistrates reported that due to the challenge of enforcement, they

[175] Ibid, S 463(3) of ACJA, 2015.
[176] Abdulhamid H, 'Court Sentences three to Community Service in Bauchi' *Daily Post* (Bauchi State, November 19 2021) < https://dailypost.ng/2021/11/19/court-sentences-three-to-community-service-in-bauchi/> accessed 21 February, 2023.
[177] MIK/E/106/15.
[178] MIK/E/277/15.
[179] MIK/E/121/15.
[180] MIK/E/110/15.
[181] MIK/E/112/15.

do not make community service orders at all but would rather impose fines on persons convicted of minor offences or first time offenders.[182]

b. **Probation**

By the provision of ACJA, 2015, probation is considered as a type of recognizance, containing several conditions ordered by a competent court of justice to be entered by a convict. It requires that the convict should be under supervision of a person(s) known as a probation officer(s) who is of the same sex with the convict and consent to exercise supervision over the convict.[183]

This non-custodial measure is an old measure having found its way into our statute books in 1945 when the Criminal Procedure Act was enacted. It made provision for the probation of juvenile and adult offenders in sections 413 & 435-440 (now repealed in 2004).[184] Also, the Children and Young Persons Law of 1946 made provision for probation.

Probation order sets an offender at conditional liberty upon his/her continued good behavior and requires such offender to enter into bond or recognizance that stipulates conditions for his/her release and where any of the condition is breached the court may re-sentence the offender.[185]

Probation is expressly provided for in sections 453-459 of the ACJA, 2015. By these sections, where the court is of the opinion that a charge has been proven against a defendant, however considering the character, antecedent, age, health, mental condition, trivial nature of the offence or mitigating circumstances by which the offence was committed, it is inappropriate to inflict a punishment or order a nominal punishment, the court before convicting the defendant may make an order releasing the defendant on probation. This order requires the defendant to enter a recognizance with or without sureties to be of good behavior and appear at any time not exceeding 3 years. It also requires the defendant to be under the supervision of a probation officer (which must be persons of same sex with the defendant) who shall visit, receive reports and ensure that the defendant complies with the

[182] Access to Justice. 'A Report on the Implementation of the Administration of Criminal Justice Law, 2011 of Lagos State'<https://www.accesstojustice-ng.org/Research%20Report%20-%20Implementation%20of%20the%20ACJ%20Law.docx> accessed 21 February, 2023.
[183] ss 453 and 455 of ACJA, 2015.
[184] Cap C41, Laws of the Federation of Nigeria, 2004; Section 454 ACJA, 2015.
[185] Ani, C. C, 'Forging New Trends in Sentencing-Overview of UN Standard Minimum Rules for Non- Custodial Measures, and ACJL (Lagos State) 2011' (2011) 2 *Journal of Contemporary Legal Issues*, 148.

conditions of probation. More so, the probation officer is to advice, assist and befriend the defendant and when necessary make efforts to help the offender find a suitable employment. Finally, the probation officer shall report to the court as to the behavior of the defendant and in situation where the Defendant flouts the condition of his recognizance, the court may proceed to convict and sentence the probationer for the original offence without further proof of his guilt.

Probation presents some benefits to the offender, considering that the offender is given a second chance and a helping hand to put his or her life together. As it relates to the application of this measure, Anagbogu S I, a senior Magistrate of Anambra State Judiciary in his write up on the application of non-custodial sentencing in the Magistrate Courts,[186] observed that probation in practice was and is still dominantly used for juvenile delinquents.[187]

This paper agrees with the thought of his Worship, Senior Magistrate of Anambra State to the extent that, probation in the past and even in recent times was majorly used for delinquent juvenile. In fact, as far back as in 1948 when probation of juvenile offenders started, various Remand homes were established across the country to render probation services to juvenile offenders. The ACJA, 2015, Nigeria Correctional Services Act, 2019 and other state ACJLs extend the application of probation to adult offenders as well. However, judges and magistrates hardly apply this measure to adult offenders. This is as a result of the existing challenges that inhibit the success of this measure when imposed on adult offenders. For instance, challenges such as inefficient record keeping system, will encourage absconding convicts sentenced to probation. More so, the challenge of ineffective, inadequate and unskilled probation officers as a result of improper funding and adequate training will inhibit the proper supervision of probationer, thereby defeating the whole essence of probation. Inefficient or prompt reporting system will also inhibit the effective application of this measure to adult offender.

c. **Plea Bargaining**

Section 270 recognizes plea bargaining and extend it to all kind of offences except capital offences. More so, the ACJA, 2015 institutionalized the concept of restorative justice by providing for the right of the victim in section 270(2). By this, it is paramount for victims to be involved and to be consulted before the prosecutor enters the plea agreement. More so, the offer and acceptance of plea bargaining

[186] A paper which he presented at the Virtual Refresher Course for Magistrates at the National Judicial Institute, Abuja which was held from the 27th-29th April, 2021.
[187] Anabogbu., S. I ().

should be in the interest of justice, public interest, public policy and the need to prevent the abuse of legal process. Furthermore, section 270(10) provides the innovation which requires the voluntariness of plea agreement. It requires a plea agreement entered to be voluntary, without force or inducement on the defendant.

On the application of plea bargaining as it relates to ACJA, 2015 the court has had recourse to make several pronouncement on plea bargaining and the conditions for plea bargaining provided in section 270 (1) of the ACJA in the following cases: *Federal Republic of Nigeria v Ran-Yaks Nigeria Limited,*[188] *Federal Republic of Nigeria v Nkechi Caroline Amadi(Alias Onyemachi Uchechi),*[189] *FRN v. Michael Ogun,*[190] *Federal Republic of Nigeria v. Michael Ogun Charge*[191] *FRN v Air Mashal Adesola Amosu (retired) and 10 others*[192] and *Federal Republic of Nigeria v Umoru Musa.*[193]

It is important to note that the court is not bound to impose the sentence agreed upon in the plea bargaining agreement of parties. The court reserves the discretion to impose a sentence considered as appropriate on the basis of the totality of the circumstances of the case. This is an innovation introduced by section 270(11) of the ACJA and re-iterated by the court in the case of *Federal Republic of Nigeria v. Michael Ogun (Supra).*Note however that the court in *Federal Republic of Nigeria v Nkechi Caroline Amadi (Alias Onyemachi Uchechi)(Supra)* noted that plea bargaining and the repayment of moneys involved in a crime does not exonerate a convict or stand as a prison term, as it is not the intendment of the draftsmen of the ACJA, 2015 that once a convict has repaid or restored all money in issue, he should not be sentenced.

d. **Fine**

This is provided under substantive law such as ACJA, 2015, Criminal Code, Penal Code and under ACJL of States.

The court in the case of *Abdullahi v State*[194] noted that fine is a penalty used instead of imprisonment or complementary to imprisonment. Section 327 of the ACJA,

[188] FHC/MKD/CR/33/2010.
[189] FCT/HC/CR/16/2018.
[190] FCT/HC/CR/15/14.
[191] Ibid.
[192] FHC/L/280C/2016.
[193] FHC/LKJ/32C/2015.
[194] (2015)LPELR-25928 (CA).

2015 introduced some innovations which relates to a situation where a convict sentenced to pay fine, defaults in paying. Here the court is empowered to do either of the following: allow more time for the payment of the fine, direct that such fine be paid in installments, or postpone the sentence of imprisonment in default of the payment of fine etc. This is an improvement in the administration of our criminal justice where before the ACJA, 2015 a convict in default of payment of fine will have to serve a term of imprisonment as stated by the court in the case of *Abdullahi v State* (supra).

Also the court in the case of *Ogunbayo v State*[195]held that where the law prescribes imprisonment with an option of fine, in sentencing procedure, the fine comes first and in default, the imprisonment and not the other way round. The court in Nosdra *v EXXONMOBIL*[196] noted that it is a well-known law that fine is a criminal sanction. It may be specified as the punishment for an offender, usually a minor offence, but could also be specified and used as an option to imprisonment for major crimes or a complement to other punishments specified for such crimes

e. **Parole**

By the import of section 468 of ACJA, 2015, the court may order the release of a convict who is sentenced to a term of imprisonment for at least fifteen years or for life. The court makes this order based on the recommendation of the Comptroller-General of Correctional Facilities that the prisoner is of good behavior and has served at least one-third of his prison terms. This order suspends an inmate's remaining term of imprisonment and releases such from prison. By the import of section 40 of the Nigerian Correctional Service Act, 2019 the Comptroller General has the obligation to supervise, rehabilitate parolees and take other steps to ensure the effective implementation of non-custodial measures.

It is important to state that while this sentence does not reduce the term of imprisonment outside custodial centre, it has several advantages such as: one, it motivates inmates to conduct themselves well during their incarceration, since good behavior increases their chance of being considered for parole.[197] Secondly, a well-administered parole system can promote the rehabilitation and reformation of

[195] (2007)8 NWLR (pt. 1035) 157 SC.
[196] (2018)LPELR-44210 (CA).
[197] Ayinde, D. J, 'An Appraisal of the Legal Framework on Parole in Nigeria' (2022) 25(1) *Potchefstroom Electronic Law Journal (PELJ)* http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812022000100035.> accessed February, 2023.

inmates, and better prepare inmates for reintegration into society and reduce recidivism. Thirdly, it also helps in reducing congestion in correctional facilities.

A critical consideration of section 468(1) of ACJA, reveals some gaps which this paper considers. It is noticeable from this section that an inmate cannot demand for this measure as a right, even if he/she has been of good behavior. It is a discretionary recommendation of the Comptroller-General of the Nigerian Correctional Service. The Comptroller-General is not obligated to make this recommendation; neither can an inmate or his representative bring an application before the court that he/she be released on parole. The inmate cannot also bring an application before the court to compel the Comptroller-General of the Nigerian Correctional Service to consider or recommend him/her for parole. Although the discretion is to be exercised judiciously and judicially, the Comptroller General to a large extent has been empowered to determine the inmate who enjoys this privilege. This provision of the law is subjective, considering that the Comptroller –General through his report has to determine which inmate is of good behavior. This can be manipulated by a Comptroller General to favour some inmates to the detriment of the others.

f. **Restitution and Compensation**

This is provided by section 321(a) of the ACJA, 2015. By the import of this section, the court in addition to **or** in lieu of any other penalty authorized by law, may order the convict to make restitution or pay compensation to any victim of the crime for which an offender was convicted or to the victim's estate. This means that restitution and compensation can be used in lieu of any other penalty or in addition. In *Edun &Anor v. FRN*,[198] The Court of Appeal commenting on the order of compensation under the Penal Code Law noted that any person convicted of an offence under the Penal Code may be adjudged to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for any punishment. Also in *Suleiman v FRN*,[199] the Court noted that though section 319 of ACJA and section 78 of the Penal Code recognizes restitution and compensation, these sections however do not give room to any criminal court to arbitrarily award compensation to any victim of an offence, where they do not merit such amount of compensation. In fact, in *Mustapha v FRN*,[200] the court noted that though it is law that the court may order that compensation be paid to the victim of a crime and a term of imprisonment may be awarded for failure to pay compensation, however, the procedure is that, the entitlement for the compensation

[198] (2017) LPELR-45665(CA).
[199] (2018) LPELR-46710(CA).
[200] (2020) LPELR-50037 (CA).

must first be established and the other side heard before the award, as such the award for compensation must have been proved and justified.

Also in *Daisi v IGP*[201] the Court of Appeal noted that, pursuant to the provision of section 11 of the Advanced Fee Fraud Act, 2006, a court may order a person convicted of an offence to make restitution.

Having considered all these, though it will be safe to say that theoretically non-custodial measures exist in Nigeria, however, in practice, the application of probation, community service and restitution/compensation are largely myths in the Nigerian criminal justice system. Except in cases dealing with juvenile offenders, the courts universally perceive probation as a programme that concerns juvenile offenders alone. Of all the non- custodial measures discussed, the courts appear to favour the imposition of fines.

1.7 Challenges to the Use of Non-Custodial Sentencing in Nigeria

To start with, a major challenge to the application of probation and community service as non-custodial measures is the absence of appropriate facilities and logistics to maintain and monitor these measures. To enforce probation and community service order, as a necessity, there is need for a good supervisory mechanism. This is lacking in Nigeria. More so, lack of sufficient vehicles to enhance mobility as well as the uncoordinated link between the court, police and the probation officer serve as an obstacle in the implementation of probation and community service orders in Nigeria.[202] Furthermore, lack of political will on the part of the government is another factor that hinders the effective application of these measures in Nigeria.[203]

Other than cases dealing with juvenile offenders, judges and magistrates skeptically view non-custodial measures such as: probation and community service. Hence these measures are used mostly for juvenile offenders. As such, despite the availability of these measures in our laws, our courts seem to prefer the imposition of imprisonment and fines, and only use measures such as probation and community service when handling minor offences, using binding-over and conditional discharge.[204] This is saddening of our criminal justice system

[201] (2019) LPELR-47897(CA).
[202] Ezeanokwasa J.O, & E. I. Ngede I (n 170).
[203] Ibid.
[204] Owoade M A, "Reform of Sentencing in Nigeria- A Note on Compensation, Restitution and Probation" in Adetiba S (ed), p. 123-124.

considering that there are enabling grounds for robust judicial activism in this area. However, despite the discretionary powers given to magistrates and judges by enabling legal frameworks to apply these measures, they are swayed by the ideology of retribution and have placed emphasis on deterrence rather than the ideology of rehabilitation or reformation presented by non-custodial measures.[205]

Another challenge to the effective application of non-custodial measures in Nigeria is the absence of an efficient digital record keeping system of the data of convicts. An efficient record keeping system will aid the court in tracing or providing the location of an absconding convict's place of abode or domicile, where he/she defaults in carrying out the court's judgment.[206] This factor basically has discouraged judges and magistrates in sentencing offenders to non-custodial measures such as probation and community service.

Another challenge to the application of non-custodial sentence is the absence of effective skilled probation officers. Also inadequate funding, deter the functionality of probation officers or supervisors. For probation to apply effectively, the role of adequate finance and supervision cannot be overemphasized. For non-custodial measures to effectively function in Nigeria there is need for the activation of non-custodial special fund being that before now, budgetary constraint has been a major challenge to the implementation of these measures in Nigeria.[207]

1.8 Conclusion and Recommendations

Both at the federal and state level, Nigeria has enabling legal frameworks for the application of non-custodial measures, however this paper has revealed the court's preference in ordering fines and imprisonment over other non-custodial measures. Suffice it to say that it is not enough for these measures to be contained in our legal frameworks, there is need for their robust application.

This paper has explored international and regional legal instruments for non-custodial measures. It appraised the use of community service orders, probation, plea bargaining, fines, parole, restitution, and compensation as non-custodial

[205] Ezeanokwasa J.O, & Ngede E. I opcit.

[206] Non-Custodial Sentence as a Means of Prison Decongestion in Nigeria<https://thefirmaadvisory.com/new-blog/2020/1/17/non-custodial-sentence-as-a-means-of-prison-decongestion-in-nigeria> accessed February 21, 2023.

[207] Ogu O, 'Imperative for Proper Funding of Non-Custodial Service in Nigeria' (2020) <https://www.thecable.ng/imperative-for-proper-funding-of-non-custodial-service-in-nigeria> accessed 23rd February, 2023.

measures in Nigeria. The paper also discussed challenges inhibiting the robust application of non-custodial sentencing in Nigeria and recommends the following:

Firstly, to address the challenge of inadequate funding, there is need to focus first on the utilization of facilities and funds available to the Nigerian Correctional Service for the implementation of these measures. Also, there is need for proper funding from the budgetary allocation to ensure that there are adequate operational vehicles for non-custodial officers, security, communication and other logistics. There should be proper assignment of costs towards the rehabilitation of offenders serving non-custodial sentences. Also the federal and state government should enforce the provision of section 44 of the Nigerian Correctional Services Act, 2019 that requires a special non-custodial fund to be provided which the National Committee on Non-Custodial Measures shall administer.[208] Where necessary payments are made into the Special Non-Custodial Fund, there will be adequate funds to fund these measures. In addition, federal/ state ministries, departments and agencies as well as other stakeholders should key into the process of raising the necessary funds and take immediate steps to ensure payment into the Special Non-Custodial Fund provided by section 44(b) of the Act.

Secondly, there is need for government to consciously cultivate the political will to ensure the effective implementation of non-custodial measures by ensuring that necessary resources needed are adequately provided for efficient running of non-custodial programmes. Thirdly, there is the need for government to provide all resources needed to maintain a practicable community service and probation system which would certainly involve social welfare institutions such as correctional services departments, welfare services, community development centre etc. that is manned and operated by well-trained officers. Fourthly, there is need for more judicial activism in the application of non-custodial sanctions in the penal statutes for offenders convicted of non-violent and minor crimes. Fifthly, judges, magistrate alongside competent defence and prosecuting counsel as well as probation officers, should constitute powerful tools in making non-custodial sanction viable, famous and fit not only for the crime committed, but for the offender, victim and the community. Finally, there is the need to fully enforce the provisions of non-custodial sanctions provided in our penal laws. This paper has revealed avalanche of legal frameworks that provides for these measures, there is

[208] Where there shall be the following: (a.) such sums as may be provided by the government of the federation or a state for payment into the special non-custodial fund, (b.) such sums as may be paid by way of contribution under or pursuant to provisions of the Act and sums accruing to the Non-custodial Service by way of gifts, testamentary disposition, contributions from Philanthropic persons or organizations.

need for these legal frameworks to be enforced, so as to achieve the rehabilitative, restorative and reformative objective as opposed to retributive measures.

An Appraisal of Socio-Economic and Legal Issues on threats Affecting National Security in Nigeria

Amana Mohammed Yusuf[*] and Muhammad Nuruddeen[**]

Abstract

National security implies the ability of a state to provide for the protection and defence of its citizens, territorial boundaries and sovereignty. National security may appear to be narrowly understood, but in the real sense, it is all encompassing and pervades all areas of national existence. It covers such areas as terrorism and associated security threats, minimization of crime, socio-economic security, military security, energy security, environmental security, food security, and cyber-security amongst others. It is against this background that this paper seeks to appraise the socio-economic and legal issues affecting National security in Nigeria with a view to proffering formidable recommendations that will improve the effectiveness of legal structures put in place to address national security concerns in the country. To achieve this fundamental task, the paper adopts a doctrinal research methodology in order to assess the relevant laws with direct bearing on the subject under review. It discovers the existence of a legal framework for National security in the country. It further discovers that national security threats are common phenomenon globally and are being influenced by several factors and Nigeria is not an exception. Nigeria is being bedeviled by so many national security threats ranging from inter alia violence, banditry, secessionists' agitations, militancy and kidnapping, the conflict between farmers and herders, armed robbery, banditry and human trafficking. In all, this paper recommends that it is only through the instrumentality of effective laws and their implementation that threats to national security will be overcome to a greater extent.

Keywords: Threats, National, Security, Socio-economic, Legal, and Institutional

1.1 Introduction

Threats to national security are a global phenomenon. The threats may be external or internal and it varies in dimensions. National security implies the ability of a

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state to provide for the protection and defence of its citizens. The absence of National security is a threat to life, property and socio-economic wellbeing of the people. Threats to national security in Nigeria in most recent times are being perpetrated in different dimensions. Some part of the governance space in Nigeria today is under the control of bandits, secessionist, militants, kidnappers, terrorists, etc. Consequently, so many ungoverned spaces now exist in Nigeria and under the control of these non-state actors. The safety and wellbeing of Nigerians cannot therefore be guaranteed where there is threat to national security. These include violence of all kinds, banditry, secessionists' agitations, militancy, kidnapping, conflict between farmers and herders, armed robbery, human trafficking, etc. These threats have put to question whether legal measures exist at all to overcome them. National security concerns have been looked at and addressed from different perspectives. This paper seeks to appraise the socio-economic and legal issues affecting National security in Nigeria. This is done with a view to finding out the existence or absence or lack of formidable legal frameworks capable of addressing threats to national security in the country.

1.2 The Concept of National Security

The concept of national security may appear to be narrowly understood, but in the real sense, it is an all-encompassing and pervades all areas of national existence. It covers such areas as terrorism and associated security threats, minimization of crime, economic security, military security, energy security, environmental security, food security, and cyber-security amongst others.[1]

National security is conceived as a deliberate, conscious human activity to establish a state of security within a particular country.[2] It is said to involve a state in which the balanced physical, spiritual, psychical and material existence of an individual and the community as a whole is ensured in relation to other individuals,

[1] Singh, A. K., (2015), Concept of National Security: An Overview. JETIR, Vol. 2, Issue 12, available at www.jetir.org (ISSN-2349-5162); Donohue, L. K., (2011), The Limits of National Security. Georgetown Public Law and Legal Theory Research Paper No. 12-118. 48 Am. Crim. L. Rev. 1573-1756. Available at https://scholarship.law.georgetown.edu/facpub/1010; Chandra, S., and Bhonsle, R., (2015). National Security: Concept, Measurement and Management. Strategic Analysis. 39. 337-359. 10.1080/09700161.2015.1047217; Baldwin. D. A., (1997), Concept of security. Review of International Studies, 23, 5–26. Available at https://www.tau.ac.il/~daniel/pdf/37.pdf .

[2] Grizold, A. (1994). The Concept of National Security in the Contemporary World. *International Journal on World Peace*, *11*(3), 37–53. http://www.jstor.org/stable/20751984; Morolake Dairo, the Connection between National Security and Communication, Specialty Journal of Knowledge Management, 2017, Vol, 2 (4): 1-11. Available online at www.sciarena.com.

communities as well as to natural environment.[3] In this context, national security is said to have five identifiable characteristics, to wit:

1) ensuring the existence of the state as a political community, existence of the nation and the physical survival of its population;
2) protecting territorial integrity as the basic right of the state;
3) maintaining political independence as an attribute of internationally recognized national status of the state;
4) ensuring quality of life; and
5) Embedding of the vital interest of the state in the national security policy.[4]

In this respect therefore, national security is contextualized as the security of the national territory (land, air-space and territorial waters), protection of lives and property of the population of a state, existence and maintenance of national sovereignty, and the exercise by the state of its basic functions.[5]

From the perspective of crime and related issues, national security is considered as one of the many risks of modern society and it is linked to *drug trafficking, organized crime, corruption and terrorism, amongst others.*[6] National security concerns from this perspective are fueled by amongst others trans-boundary security issues.[7] Economic and financial crimes such as bribery, fraud, embezzlement of public funds, breach of public trust, money laundering, illegal arms deals, misappropriation of public funds, illegal oil bunkering, tax evasion, kidnapping amongst others constitutes serious national security. This is against the background that these crimes operate as clog to existing laws governing the economic activities of government.[8]

Indeed, national security cuts across areas such as health, food, education, socio-economic, cultural as well spiritual life of citizens. The security of every nation is vital for the survival and growth of its political, social and economic systems. That

[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Dru Stevenson (2011) Effect of The National Security Paradigm on Criminal Law, Stevenson 22 Stan. L. & Pol'y Rev. 129.
[7] Eriksson, J., & Rhinard, M. (2009). The Internal–External Security Nexus: Notes on an Emerging Research Agenda. *Cooperation and Conflict*, *44*(3), 243–267. http://www.jstor.org/stable/45084574
[8] Sergi, Anna. (2016). National Security vs Criminal law. Perspectives, Doubts and Concerns on the Criminalisation of Organised Crime in England and Wales. European Journal on Criminal Policy and Research. 22. 10.1007/s10610-016-9304-3.

is why various scholars have analysed the definition of concept of national security in different ways.

For instance, Makinda described the concept of national security as the capability of state in catering for the defence and protection of its people. To Momoh, national security entails the nation's effort and strategies in protecting its states and citizens against national crisis through power projections such as military power and economic might. The objective of a strong national security apparatus is to secure favourable living conditions for every member of a given nation. The key objectives of national security is extended to any measure or step taken to strengthen a nation as a whole by advancing her interest; ensuring a more stable entity; curbing crime; eradicating corruption, enhancing growth and development; improving the well-being of its citizens within and outside its shores as well as protecting her sovereignty and integrity natural resource and assets within and outside its domain. Now, the question is: has Nigeria put in place the needed legal structures that will adequately address problems affecting its national security particularly in the midst of kidnapping and terrorism currently bedevilling and posing serious threat to existence of the country? Before answering this question, it is apt at this point to identify the root causes of threats to national security in Nigeria as follows:

1.3 Causes of National Security Threats

The root causes of and threats to national security abound. The threats pose a serious danger to the peace, security and existence of a given nation. The factors causing threat to national security can be classified into two: namely internal and external. The duo are elaborated in the following sub-section:

1.3.1 Internal Threats (ITs): The ITs are the threats that the country face from internal forces and they include:

1. ***Organized crimes:*** organised crimes are specialised crimes consisting of crime-syndicates, cybercrimes, kidnapping, illegal drug trading, and prostitution.[9]
2. ***Redistribution of Wealth***: this is another internal factor that trigger threat to National security. In Nigeria, for example there is a wide gap between the rich

[9] Sacco, V. F. "Organized Crime." Encyclopedia of Crime and Justice. Retrieved July 25, 2023 from Encyclopedia.com: https://www.encyclopedia.com/law/legal-and-political-magazines/organized-crime.

and the poor. This has led to increase in unemployment rate and inadvertently leading to a rise in the crime rate.[10]

3. ***Economic Sabotage*:** This involves underground activities by unpatriotic citizens who engage in illegal activities undermining the security of a given country. Economic sabotage in this context include, counterfeiting, money laundering, smuggling and oil theft, vandalism and related crimes.
4. ***Corruption*:** Corruption is an economic virus that drains public resources, directing funds to the ruling class causing the populace to suffer and perpetuate in abject poverty.
5. ***Natural and Environmental Disasters:*** These are also internal factors causing a threat to national security and ultimately endanger a nation. Example of such disasters include flood, fire outbreak, earthquake, drought, and pandemic.
6. ***Internal Ethno-religious Conflicts***: religious extremism has become a global menace that threaten national security.[11] In Northern Nigeria, for example, the *Boko haram* religious terrorist sect is one of such that threatens Nigeria's unity and security. Still in the Eastern part of Nigeria, we also have *Biafran* agitators who are fighting for the secessions of some states from the Nigerian nation. In the South-South region of Nigeria, we have been facing Niger-delta crisis which for long threatens the survival of the Nigerian nation as well as international trade and tourism. All these ethno-religious crises are also a cause for concern.[12]
7. ***Severe Health Calamities***: The influx of diseases and illnesses like the *ebola* virus, laser fever and meningitis epidemic as well as Covid-19 pandemic are all considered as cause for concern threatening survival and existence of a nation and the world at large.
8. ***Porous Borders:*** the territorial boundaries of a country must be safeguarded against illegal importation of goods, smuggling of weapons and ammunitions. Where territorial boarders of a nation are porous it then becomes very easy for

[10] Ezeajughu, M. C., (2021), High Rate of Unemployment and Crime Increase in Nigeria, Sapientia Foundation Journal of Education, Sciences and Gender Studies (SFJESGS), Vol.3 No.1 March, p. 51-58 ISSN: 2734-2522 (Print); ISSN: 2734-2514 (Online).

[11] Hassan, H. A. (2022). Religion as a Security Threat: Case Studies of Extremist Christian Movements in Africa. *Journal of Religion in Africa*, *51*(3-4), 426-451. https://doi.org/10.1163/15700666-12340216.

[12] Gwom, S. (2019), Self-Determination through Secession under International and National Regimes: The Status of Biafra Agitators and Boko Haram Islamists In Nigeria. Gambia Law Review, Faculty of Law, University of the Gambia, Issue 2, Available at SSRN: https://ssrn.com/abstract=3421713; Okoye, C. (2016) Boko Haram Insurgency in Nigeria: Beyond the Issue of Unity and National Integration. *Open Journal of Philosophy*, 6, 311-318. doi: 10.4236/ojpp.2016.64031.

criminals to import small and light weapons.[13] This will also lead to illegal migration, influx of foreign terrorists, smuggling of expired drugs and harmful products into a country. All these will be at the detriment of people and national security of a given nation.

9. ***Advancement in Information and Communications Technology (ICT)***: A nation and its government is susceptible to threats from global internet hackers which usually leads to cybernetic crime. Sensitive information can be revealed through this risk and international trade relations. The ICT has now fueled fake news and hate speech which invariably threaten National security.[14]
10. ***Other Threats:*** Other threats include recession leading to currency devaluation, high inflation rates, weak global oil prices and high foreign exchange rates within the nation to mention but a few.

1.3.2 External Threats (ETs): This includes threats from outside the nation that can threaten foreign relations and also affect internal relations within a nation. External Threats include the following:

1. ***Multilateral Disputes***: Multilateral disputes constitute a threat to national security where tensions arise based on territory encroachment by neighbouring countries. For example, the dispute between Cameroun and Nigeria and current war going on between Ukraine and Russia.
2. ***International Currency Crisis:*** Nations can also be threatened by currency crisis as this can cause national anxieties, which increase political instability, socio-economic instability and dislocation involving poor people. For example, the forex exchange rate crisis in Nigeria is causing concerns and affecting our foreign relations. International ethnic, religious and cultural conflicts which could be border and regional conflicts are also a form of external threats. For example, the xenophobic crisis in South Africa.
3. ***Proliferation of Weapons of Mass Destruction*** is also a cause for concern within nations. There is a wide and increased propagation of nuclear materials and technologies on a global scale and illegal trading of such weapons across borders can cause unhealthy external relations between two countries.
4. ***Other External Threats*** include *transnational organized crime*, International Monetary Fund (IMF) estimates that two percent of the world economy is as a

[13] Ogbonna, C. N., *et al*., (2023), Border Governance, Migration Securitisation, and Security Challenges in Nigeria. *Soc* 60, 297–309. https://doi.org/10.1007/s12115-023-00855-8.

[14] Pate, U., and Ibrahim, A., (2021). Fake News, Hate Speech and Nigeria's Struggle for Democratic Consolidation: A Conceptual Review: In book: Research Anthology on Fake News, Political Warfare, and Combatting the Spread of Misinformation. 10.4018/978-1-7998-7291-7.ch022. pp.387-410 .

result of drug trafficking, a menace also predominant in Nigeria. Prostitution is another crime prevalent across jurisdictions in the world.

1.4 Indicators of a Strong National Security System

Indicators of a strong National security system operating in a given country abound. Suffice to mention a few as follow[15]: first is the existence of a formidable Socio-Political Stability which entails peace and harmony irrespective of gender, ethnicity or social status. This factor has greatly impeded national security in Nigeria. Nigeria today, is prone to several ethno-religious crisis threatening the national security system.[16] Secondly, evidence of Territorial Integrity is also important as every nation needs to be protected against resource exploitation. Nigeria's territorial integrity is under threat owing to its porous borders. This has made for ease the unchecked influx of small, medium and light arms which are used to perpetrate crimes and cause breach of national security. Thirdly, Economic Solidarity and Strength as well as a free - market economy are also strong indicator portraying the existence of a strong national security system. Factors such as corruption, economic sabotage, and uneven distribution of wealth have greatly influenced insecurity in Nigeria. Fourthly, Ecological Balance is also vital to the survival of every nation as it is dependent on the consciousness of preserving the environment regardless of industrial and population growth. Cultural Cohesiveness is the fifth factor. Unity in diversity is a key indicator of a strong national security system. The sixth indicator is Moral-Spiritual Consensus which is also another defining element of national security and it usually defines the vision which inspires the nation and it is displayed through acts of patriotism, words, national pride and the progress of the nation's goal. The seventh indicator is Peaceful Relations with other nations. Lastly and most importantly, the existence of comprehensive legal and institutional frameworks for National Security.

From the foregoing analysis, this paper deems it apt to focus specifically on whether Nigeria has put in place a comprehensive legal and institutional frameworks capable of addressing the identified threats to national security in the country.

[15] National Research Council. 2013. Climate and Social Stress: Implications for Security Analysis. Washington, DC: The National Academies Press. https://doi.org/10.17226/14682.

[16] The indigenes and settlers in Jos, the border conflicts between the Tiv and Jukuns and other similar crisis across Nigeria, the farmers and herders crisis, the boko haram conflict in the Northeast and banditry in the Northwest and North-central Nigeria, the crisis in Southern Kaduna, to mention but a few.

1.5 Legal and Institutional Frameworks with Impact on Threats to National Security in Nigeria

The question to ask at this point is whether there exists legal framework for addressing national security threats in this country. In Nigeria today, there are extant legislation that directly or indirectly impacts on matters of national security. The legislation includes but not limited to laws establishing institutions with jurisdiction over matters relating to national security; social and economic welfare laws with impacts on national security; penal laws proscribing and punishing acts of breaches of national security; and administration of criminal justice and procedural laws for bringing to justice of persons alleged to have committed breaches of national security.

1.5.1 Laws Establishing Institutions with Impact on Matters of National Security

Maintaining national and internal security in any country is a panacea for growth and development and collective responsibility.[17] This is because, globally, national security is fundamentally anchored on the existence of strong security institutions established by law with mandate to address matters of national security before they occur or after they have occurred.[18] The relevant legislation include:

1.5.1.1 The Constitution of the Federal Republic of Nigeria (CFRN) 1999, (as amended) The CFRN sets out the general framework for national security operations in Nigeria when it states that 'the security and welfare of the people shall be the primary purpose of government'.[19] In furtherance thereto, the CFRN establishes the Nigerian Police Force[20] and the Armed Forces of the Federation[21].

1.5.1.2 Other Federal Legislation: The National Assembly, by the powers conferred on it to make laws for the peace, order and good government,[22] made

[17]Oladele,F. A., (2020) Inter-Agency Cooperation and National Security; an Assessment of Internal Security Operations in Nigeria, International Journal of Management Sciences and Business Research, ISSN (2226-8235) Vol-9, Issue 2.
[18] Ibid.
[19] S section 14(2)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
[20] S section 214 .
[21] Ibid.,S Section 217 See also section 1(1) of the Armed forces Act, 1994 which provides to the effect that 'There is hereby established for the Federation an Armed Forces which shall be maintained and administered as set out in this Act and comprise the Nigerian Army, the Nigerian Navy and the Nigerian Air Force (in this Act referred to as the "Army", "Navy" and "Air Force") respectively'.
[22] See section 4(2) and (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

additional and separate laws for the Police and the Armed Forces, as well as laws establishing other security bodies/services.[23] The laws establishing these security bodies define their areas of operations. Interestingly, a review of the enabling laws establishing the security bodies assign to them specific powers to deal with matters of national security and to also take measures to address any issue capable of causing any threat to the national security.

For instance, the Armed Forces Act establishes the Nigerian Armed Forces (Army, Navy and Air Force) and legally charged them with the responsibility of the defence of the Federal Republic of Nigeria by land, sea and air and with such other duties as the National Assembly may, from time to time, prescribe or direct by an Act.[24] The armed forces and other relevant established national security institutions will be examined below.

National Security and the Armed Forces

In the context of national security, the operational use of the Armed Forces in Nigeria to overcome national security threats includes their use for suppressing insurrection and acting in aid of civil authorities to maintain and secure public safety and public order.[25] However, it appears the deployment of the Nigeria military for internal security operations and the discharge of their responsibilities is being constrained by other factors[26]and the fear always of being accused of gross violation of the rights of civilians and innocent citizens.[27]

National Security and the Police Force

Moreover, the Police Act, 2020 on the other hand set out the general framework for security operations for the Nigerian Police Force in Nigeria. The Act vests on the Nigerian Police the powers of detection and prevention of crimes and protection of

[23]Ibid., S Second Schedule, Part 1 Items 16, 17, 30, 38 and 45.
[24] S section 1(6) of the Armed Forces Act, 1994.
[25]Ibid., S sections 8(1) and (3).
[26] The factors includes but not limited to inadequacy in term of the numerical strength, inadequate equipment, lack of intelligence sharing and synergy in operations and collaboration with other security agencies of government, etc.
[27] Kalama, J., and Paul, F. D., (2019) The Role of the Military in Maintaining Internal Peace and Security in Nigeria, Research Journal of Humanities, Legal Studies & International Development, e-ISSN: 2536-6572 Vol. 3, No. 1, p.25. available at http://www.internationalpolicybrief.org/images/2019/AUGUST/RJHLSID/ARTICLE3.pdf.

the rights and freedom of every persons in Nigeria;[28] maintenance of public safety, law and order;[29] protection of lives and properties etc.[30]

National Security and the Economic and Financial Crimes Commission (EFCC)

The EFCC was established by the Economic and Financial Crimes Commission (Establishment) Act, 2004 and the legal framework for its general security operations are set out in section 6 of the Act. The Act significantly empowers the EFCC to investigate all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, and contract scam,[31] etc., all of which impacts on national security.

National Security and the Independent Corrupt Practices and other Related Offences Commission (ICPC)

The ICPC was established by the Independent Corrupt Practices and other Related Offences Commission, Act 2000. The ICPC is another institution with powers impacting on national security challenges. This is against the background that corruption is widely recognised as a global threat to national peace and security.[32] When corruption becomes entrenched, it undermines the development of state authority and its institutions, leaving a weak state with potentially more space for insecurity to spread.[33] In Nigeria, corruption is present at all levels of her national life. In this regards section 6 of the Independent Corrupt Practices and other Related Offences Commission, Act 2000 set out the duties of the Commission which includes: to receive and investigate any report of the conspiracy to commit, attempt to commit or the commission of such offence and, in appropriate cases, to prosecute the offenders etc.[34]

National Security and Intelligent Agencies

The Defence Intelligence Agency (DIA); the National Intelligence Agency (NIA); and the State Security Service (SSS) are the critical stakeholders in the Nigeria

[28] Section 4(a) Police Act, 2020.
[29] Ibid., Section 4(b).
[30] Ibid.,Section 4(c) .
[31] See section 6(1) of the Economic and Financial Crimes Commission (Establishment) Act, 2004
[32] See Müller, E., Corruption as a Threat to Stability and Peace, (Transparency International Deutschland e.V., 2014), ISBN: 978-3-944827-03-2.
[33] Ibid.
[34] See section 6(a) to (e) of Independent Corrupt Practices and other Related Offences Commission, Act 2000.

security architecture, especially as it concerns matters of national security. These agencies, in the context of overcoming national security threats are saddled with the responsibilities of intelligence gathering in Nigeria. The National Securities Agencies Act (NSA Act) creates these vital security organs[35] and essentially saddles them with the responsibility of: the prevention and detection within Nigeria of any crime against the internal security of Nigeria; the protection and preservation of all non-military classified matters concerning the internal security of Nigeria; and such other responsibilities affecting internal security within Nigeria as the National Assembly or the President, as the case may be, may deem necessary.[36]

In the context of national security management, these agencies are required to share intelligence regularly with other agencies, identify and confine key troublemakers and their sponsors, as well as conduct mop-up operation of illegal weaponry and raid of criminal hideouts.[37] The NIA on its part is responsible for monitoring likely external threats to Nigeria national security, especially as it concerns arms trafficking and sharing of intelligence.

National Security and the National Drug Law Enforcement Agency (NDLEA)
The NDLEA plays a significant role in addressing threats to national security. This is against the background most, if not all crimes against national security are linked to misuse of drugs and stimulating substances. Consequently, fighting drugs trafficking and preventing drugs misuse will go a long way in curbing drugs related crimes. The statutory functions of the Agency are provided under sections 3 and 4 of the National Drug Law Enforcement Agency Act.[38] Its general powers that may impact on the prevention of drugs uses and consequently address national security threats include but not limited to:

> The enforcement and the due administration of the provisions of the Act; the coordination of all drug laws and enforcement functions conferred on any person or authority, including Ministers in the Government of the Federation, by

[35] See section 1 of the NSA Act, 1986
[36] Ibid., section 2(3)(a)-(c)
[37] Ibid., These responsibilities especially that of the SSS has been expanded further by sections 2(3)(i)(a)-(g) and 3(1) of the State Security Service Instrument No.1 of 1999 to include: prevention, detection and investigation of threat of espionage, threat of subversion, threat of sabotage, economic crimes of national security dimension, terrorist activities, separatist agitations and inter group conflicts and threat to law and order. And to facilitate the discharge of its functions as above, the personnel of the SSS are conferred with the powers of a superior police officer in respect of searches and arrests.
[38] Cap. N30, LFN 2004.

> any such law; adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from drug-related offences or property whose value corresponds to such proceeds; adoption of measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances with a view to reducing human suffering and eliminating financial incentives for illicit traffic in narcotic drugs and psychotropic substances; and the taking of such measures which might require the taking of reasonable precautions to prevent the use of ordinary means of transport for illicit traffic in narcotic drugs including making special arrangements with transport owners.[39]

No doubt, some of the threats to national security like banditry, farmer-herders crisis are being attributed to the activities of foreigners who found their ways into Nigeria. Clandestine, illegal or undocumented migration is rampant in West Africa and Nigeria is a major receptor of labour migrants. This is attributed to Nigeria's attractive economy and porous borders. Virtually all the border entry points in Nigeria are used for drug trafficking, illegal migration, trafficking in persons, and illicit arms transfer into the country. Media reports have implicated some migrants from neighbouring West African countries in civil disturbance, urban and rural violence, theft, armed robbery and general insecurity of lives and property.[40]

National Security and the Nigerian Immigration Service (NIS)

The NIS is a critical stakeholder in national security management in Nigeria. This is because; the NIS is saddled with the responsibility of the identification and prevention of non-Nigerians from having access into Nigeria. In this regards, the Immigration Act, 2015, sets out the core mandates of the NIS which includes the control of persons entering and leaving Nigeria; the issuance of travelling documents only to *bona fide* Nigerians within and outside Nigeria. Also, foreigners wishing to enter into Nigeria must obtain and be issued with a resident permit and other relevant documents.[41] The NIS in the performance of its functions has also

[39] See section 3(a)-(e) of the National Drug Law Enforcement Agency Act, Cap. N30, 2004.

[40] See Adetula, V. A. O., (2015), Nigeria's Response to Transnational Organised Crime and Jihadist Activities in West Africa, Discussion Paper: No. X, Friedrich Ebert Stiftung, pp.1-32. Available at https://www.diva-portal.org/smash/get/diva2:946690/FULLTEXT01.pdf.

[41] See for instance sections 9, 12 and 19 of the Immigration Act, 2015.

promulgated regulations and policy instrument to complement the Immigration Act, 2015.[42]

National Security and the Nigerian Custom Service

Related to the uses of drugs is the use of arms and ammunition in causing infraction to national security by the perpetrators. This is against the background that illegal Imports or smuggling of arms is responsible for the proliferation of arms and ammunition in circulation in Nigeria. The presence and the use of these weapons can be checked if adequate measures to check their illicit importation and smuggling are put in place.

This brings to bear the strategic role of the Nigerian Customs as a vital stakeholder in national security management. National security is therefore impacted directly or indirectly by the activities of the Nigerian Customs. This is because; some of the functions of the Nigerian Customs have the potentials of addressing the root cause of the proliferation and use of arms and ammunition to cause the breaches of national security. The Customs and Excise Management Act 2004 establishes the Nigerian Customs Service. In the context of national security management, some of the function of the Nigerian Customs includes: Closely monitoring of imports into the country at all ports and border crossings points to prevent imports that could undermine the registration/election process and security (e.g. Weapons, etc.) and to liaise closely with other security agencies to cover all porous border areas.[43]

National Security and the Nigeria Security and Civil Defence Corps (NSCDC)

Another security agency with mandate to overcome national security threats, is the NSCD which is saddled with the responsibility of providing measures against any form of attack or disaster on national critical infrastructures in Nigeria and on its citizenry. Section 3(1) of the Nigeria Security and Civil Defence Corps Act, 2003[44] statutorily empowers it to among other things:

> Assist in the maintenance of peace and order and in the protection and rescuing of the Civil population during the period of emergency; maintain twenty-four-hour surveillance over infrastructures, sites and projects for the Federal, State and Local Government; arrest with or without a warrant, detain, investigate and institute legal proceedings by or in the name of the Attorney-

[42] See the Immigration Regulations 2017 and the Nigeria Visa Policy 2020.

[43] See sections 8, 18, 24, 46-47 of the Customs and Excise Management Act 2004 and sections 17, 18 and 19 of the Fire Arms Act, 2004; See also note 24.

[44] as amended by Section 1 of Act No. 6, 2007

> General of the Federation in accordance with the provisions of the CFRN against any person who is reasonably suspected to have committed an offence under this Act or is involved in any-criminal activity, activity aimed at frustrating any government program or policy, riot, civil disorder, revolt, strike, or religious unrest; monitor, investigate, and take every necessary step to forestall any planned act of terrorism particularly- cult and Ethnic militia activities, criminal activities aimed at depriving citizens of their properties or lives, and syndicate activity aimed at defrauding the Federal, State or Local Government; monitor, investigate, and take every necessary step to forestall any act of terrorism and report same to appropriate Federal Security Agency; provide necessary warning for the civilian population in times of danger; evacuate the civilian population from danger areas; carry out rescue operations and control volatile situations; assist in the provision of emergency medical services, including first aid, during any period of emergency; detect and demarcate any danger area; assist the Federal and State Fire Service in Fire-fighting operation.[45]

1.6 National Security Threats and Implementation of the Relevant Laws

From the legal perspective, suffices to state at this junction that, laws have been put in place through the creation of institutions with mandates to overcome threats to national security. The laws creating Nigerian security agencies vest them with enforcement powers and measures to fight national security threats. What remains to be seen is the effective implementation of the legal frameworks, a measure which goes beyond law and not within the scope of this paper. Notwithstanding the existence of these laws, research findings have shown that Nigerian security agencies are currently overwhelmed and ill-equipped to fight threats to national security.[46]

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[45] See section 1 (1)(a), (e)(i), (f)(i), (iv) and (v), (h)(i)-(ii) and (i)-(s) Nigeria Security and Civil defence Corps (Amendment) Act, 2007.

[46] See Ishaya, D. L., (2021), National Tragedy and Insecurity Threats in Nigeria: Implications to Security Woes and Challenges in the 21st Century, International Journal of Comparative Studies in International Relations and Development p-ISSN: 2354-4198 | e-ISSN: 2354-4201 Vol. 7, No. 1, pp. 131-141. DOI: 10.48028/iiprds/ijcsird.v7.i1.13; Nwagboso, C. I., (2018), Nigeria and the Challenges of Internal Security in the 21st Century, European Journal of Interdisciplinary Studies, Vol. 4, Issue 2, pp. 15-33. Available at https://revistia.org/files/articles/ejis_v4_i2_18/Chris.pdf; Folarin, S. F., and Oviasogie, F.O., (2014), Insurgency and National Security Challenges in Nigeria: Looking Back, Looking Ahead. Available at oai:generic.eprints.org:3243/core482; Diya, A. D.,

1.7 Laws with Social and Economic Impacts on National Security

Some of the root causes of national security threats have been linked to poverty and unemployment, economic and political marginalisation, corruption, and weak security institutions.[47] In the area of poverty, unemployment and economic marginalization, government has promulgated laws designed to advance the social and economic wellbeing of the Nigerians. The implementations of the laws have the potentials to dissuade and deter people from engaging in activities that threaten national security. Poverty creates inequalities that underpin many of the grievances that drive people to engage in activities that threaten national security. The provision of basic infrastructure in the rural areas will prevent rural-urban migration.[48]

The provision of schools and gainful employment in the rural areas will advance on the economy and wellbeing of the people in the area. Consequently, policies such as Safe Schools Initiative, provision of irrigation and agricultural development to provide alternative livelihoods for the unemployed, sensitization to prevent radicalization of youth, etc. will go a long way to check organized crime and illicit trafficking in drugs, arms and ammunition. It was on account of the struggle of the Nigerian people that the federal government has been compelled to enact some welfare laws to 'harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy; control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; the promotion of a planned and balanced economic development; that the material resources of the nation are harnessed and distributed as best as possible to serve the common good; that the economic system is not operated in such a manner as to

(2012), Solving Security Challenges in Nigeria through Intelligence Gathering and Surveillance. Available at SSRN: https://ssrn.com/abstract=2275986 or http://dx.doi.org/10.2139/ssrn.2275986.

[47] See Zubairu, N., (2020), Rising Insecurity in Nigeria: Causes and Solution, Journal of Studies in Social Sciences ISSN 2201-4624 Vol. 19, 2020, pp. 1-11; Olaniyi, E., and Ikechukwu, K., (2019), The impact of poverty, unemployment, inequality, corruption and poor governance on Niger Delta militancy, Boko Haram terrorism and Fulani herdsmen attacks in Nigeria, International Journal of Management, Economics and Social Sciences (IJMESS), ISSN 2304-1366, IJMESS International Publishers, Jersey City, NJ, Vol. 8, Iss. 2, pp. 58-80, https://doi.org/10.32327/IJMESS/8.2.2019.5; Robert-Okah, I., (2014), Strategies for Security Management in Nigeria: A Roadmap for Peace and National Security, An International Multidisciplinary Journal, Ethiopia Vol. 8(3), Serial No. 34, pp.1-17 ISSN 1994-9057 (Print) ISSN 2070--0083 (Online) DOI: http://dx.doi.org/10.4314/afrrev.v8i3.1.

[48]Johnson K. E., and Ifeoma U. (2018), Rural development as a panacea for rural–urban migration in Nigeria. *Art Human Open Acc J*. Vol. 2, No. 5. Pp.241-244. DOI: 10.15406/ahoaj.2018.02.00065

permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care; and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens'[49]etc as contemplated by the provision of section 16 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

In respect of education objectives, the Constitution in section 18 states that 'government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels; promote science and technology; strive to eradicate illiteracy; and to this end government shall as and when practicable provides: free, compulsory and universal primary education; free secondary education; free university education; and free adult literacy programme'[50].

In furtherance of the above provisions the People's Bank Act,[51] Nigerian Education Bank Act,[52] Free, Compulsory Universal Basic Education Act,[53] Child's Rights Act,[54]etc. were promulgated. But, sadly, the federal government has consistently breached the provisions of these welfare laws. Notwithstanding the provisions of the extant laws above and the provisions of section 16 and 18 of the 1999 constitution of the Federal Republic of Nigeria (as amended),[55] a report by the Bureau of Statistic shows that as at 2020, *more than 82 million Nigerians,* about 40% of its total population live below the poverty line[56] and that in sub-Sahara Africa, Nigeria accounts for the highest number of out of school children. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) have announced that 20.2 million, amounting to 10% out of the global 244 million out-of-school children are in Nigeria.[57]

[49] Ibid., See section 16(1)(a)&(b) and (2)(a)-(d) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
[50] See section .
[51]*The People's Bank Of Nigeria Act* Cap 67 Laws of the Federation of Nigeria, 2004.
[52]Nigerian Education Bank Act, Cap N104 Laws of the Federation of Nigeria 2004.
[53]Universal Basic Education Act 2004.
[54] The Child's Rights Act, 2003 Cap C50 LFN 2004.
[55] See sections 16 and 18 (1) and (3)(a), (c) and (d) of the 1999 Constitution of the Federal republic of Nigeria (as amended).
[56]The National Bureau of Statistics (NBS) Report, 2020. Available at https://www.nigerianstat.gov.ng/pdfuploads/NBS%20Newsletter%20Vol1%202020.pdf.
[57] UNESCO, (2022) 244M children won't start the new school year (UNESCO), Press Release. Available at https://www.unesco.org/en/articles/244m-children-wont-start-new-school-year-unesco

It is therefore not surprising that young persons who could have been in school or gainfully employed constitute the bulk of the perpetrators of activities with threats to national security.[58] Compelling government to do the needful becomes the only alternative. However, this may be constrained by the fact that chapter II of the 1999 Constitution (as amended) is not justiciable.[59]It is submitted that the justiciability of the social and economic rights, as well as the right to education can be accommodated under public interest litigation when the obligations are linked to the enjoyment of the rights under chapter IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended). This is against the background that the right to life for instance in chapter IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended) will be negated and meaningless if the obligation to provide affordable food, housing and healthcare under chapter II of the same Constitution is not fulfilled by the government. The realization and enjoyments of the rights life is founded on the obligation of the government to provide the necessary component for its actualization become meaningless if the government cannot be held accountable and be compelled to implement laws with impacts on economic and social wellbeing, as well as the education of the society. The saying that an idle man is the devils workshop is a clear confirmation that there is a link between poverty, unemployment and threats to national security.

1.8 Penal Laws with Impact on National Security

There is plethora of penal laws in Nigeria which impacts on national security. These laws proscribe and criminalize acts that constitute threats to national security. Against this background, acts such as kidnapping, terrorism, banditry, arson, bombing, assaults, stealing, abduction, money laundry, corruption and corrupt practices etc. are prohibited and sanctioned under the Criminal Code Act and Penal Code Act, Anti-kidnapping laws[60], Terrorism (prevention and Prohibition) Act 2022, Cybercrimes (Prohibition, Prevention, Etc) Act, 2015, *Robbery and Firearms*

[58] Chukwuma, O., (2013), Youth, Unemployment and National Security in Nigeria, International Journal of Humanities and Social Science Vol. 3 No. 21 Special Issue. Pp. 258-268.

[59] See section 6(6)(c) of the 1999 Constitution of the Federal republic of Nigeria (as amended) .

[60] State like Lagos and Nasarawa States have respectively passed anti-kidnapping laws: Nasarawa State Kidnapping (Prohibition) Law, 2019. Available at https://nsmoj.com/download/nasarawa-state-anti-kidnapping-prohibition-law/?wpdmdl=2783&refresh=6361b7054c1ae1667348229; Lagos State Kidnapping (Prohibition) Law, 2017. Available at https://laws.lawnigeria.com/2019/04/04/kidnapping-prohibition-law/

Act,[61] Firearms Act,[62] *Anti-Open Grazing Laws*[63] and the Suppression of Piracy and other Maritime Offences Act, 2019.

For instance, the Criminal Code Act[64] proscribes and punishes offences that threaten national security, to wit: offences against public order such as treason,[65] instigating invasion of Nigeria,[66] concealment of treason and treasonable felonies,[67] promoting inter-communal war[68] and overt acts connected thereto;[69] sedition and undesirable publications,[70]unlawful oaths to commit capital offences and other unlawful oaths to commit offences;[71] membership of and dealings with unlawful societies;[72] taking part in unlawful assemblies resulting to breaches of the peace and riot,[73] demolishing buildings, machinery, railway, etc., and injuring buildings, machinery, railway, etc.;[74] going armed so as to cause fear, gain Forcible entry and forcibly detain;[75] threatening violence, assembling for the purpose of smuggling and unlawful processions;[76] corruption and abuse of office;[77] impersonating members of Armed Forces or Police, unlawfully wearing of the uniform of the Armed Forces and selling, etc., uniform, etc., to unauthorised persons;[78] shooting at customs boats or officers, resisting officers engaged in preventing smuggling, resisting customs officers and Resisting public officers[79];

[61] Cap R11, LFN.
[62] Cap F28 LNF.
[63] Some states in Nigeria have promulgated laws criminalizing open grazing as a measure to check the menace of farmers-herders crisis. For instance, Benue state passed the Open Grazing. Prohibition and Ranches Establishment Law, Benue State, *No. 21 Vol. 42, 2017*; there is also the Lagos State *prohibition of open cattle grazing* Law, 2021; others are: Edo State Control of Nomadic Cattle Rearing/Grazing Law and for other Purposes, 2018; Oyo state Open Rearing and Grazing Regulation Law, 2019; Bayelsa State Livestock Breeding and Marketing Regulation Law, 2021.
[64] The Criminal Code Act, Cap. C38 Laws of the Federation of Nigeria, 2004.
[65] Ibid., section 37.
[66] Ibid., section 38.
[67] Ibid., sections 40 and 41.
[68] Ibid., section 42.
[69] Ibid., section 49.
[70] Ibid., sections 50, 51 and 59.
[71] Ibid., sections 53 and 54.
[72] Ibid., sections 62-68.
[73] Ibid., sections 69-71.
[74] Ibid., sections 76 and 77.
[75] Ibid., sections 80-83.
[76] Ibid., sections 86-88.
[77] Ibid., sections 98 and 104.
[78] Ibid., sections 109-111.
[79] Ibid., sections 194-197.

dealings and being in possession Juju and Criminal Charms,[80] Homicide, attempt to murder, written threats to murder and conspiring to murder;[81] acts intended to cause grievous harm or prevent arrest, grievous harm and attempting to injure by explosive substances;[82] Kidnapping, deprivation of liberty, and Compelling action by intimidation;[83] as well as conspiracy to commit these or other offences,[84] etc.

Similar proscriptions and punishment for offences that threaten national security are available under the Penal Code. The Jigawa state Penal Code Law,[85] for instance proscribes and punishes: offences against public peace, consisting of unlawful assembly, rioting, disturbance of public peace and inciting disturbance;[86] unlawful dealings and possession of charm;[87]homicide and causing grievous hurt;[88] kidnapping, abduction and forced labour,[89]etc. Specialized legal regimes like the Anti-kidnapping laws, Terrorism (Prevention and Prohibition) Act 2022, Cybercrimes (Prohibition, Prevention, Etc) Act, 2015, *Robbery and Firearms Act*,[90] Firearms Act,[91] *Anti-Open Grazing Laws*[92] and the Suppression of Piracy and other Maritime Offences Act, 2019 proscribe the specific offences to which they relate and prescribe appropriate punishments.

1.9 Administration of Criminal Justice and Procedural Laws with Impact on National Security

These laws set out the framework for trial procedures for persons standing trial for offences that threaten national security. The Administration of Criminal Justice Act, 2015 (ACJA) and Laws of the various states of Nigeria regulate trial

[80] Ibid., Sections 207-211.
[81] Ibid., Section 306, 323 and 324.
[82] Ibid., Sections 332, 335 and 336.
[83] Ibid., Sections 364-366.
[84] Ibid., Sections 508-518.
[85] Cap. P3 Vol. 3, Law of Jigawa state of Nigeria.
[86] Sections 100-114, Jigawa state Penal Code Law, Cap. P3 Vol. 3, Law of Jigawa state of Nigeria
[87] Ibid., Sections 214-219.
[88] Ibid., Sections 220-231 and 240-253.
[89] Ibid., Sections 271-281.
[90] Cap R11 LFN 2004.
[91] Cap F28 LNF 2004.
[92] Some states in Nigeria have promulgated laws criminalizing open grazing as a measure to check the menace of farmers-herders crisis. For instance, Benue state passed the Open Grazing. Prohibition and Ranches Establishment Law, Benue State, *No. 21 Vol. 42, 2017*; there is also the Lagos state Prohibition of Open Cattle Grazing Law, 2021; others are: Edo State Control of Nomadic Cattle Rearing/Grazing Law and for other Purposes, 2018; Oyo state Open Rearing and Grazing Regulation Law, 2019; Bayelsa State Livestock Breeding and Marketing Regulation Law, 2021.

procedures. It has as its core objectives: to 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.[93]

ACJA, 2015 contains innovative provisions geared towards curing most of the anomalies and lacuna in the existing criminal procedural laws. It was designed by eliminate delays in disposing of criminal cases and improving the overall efficiency of criminal justice administration in Nigeria. The Act (ACJA), is a deliberate effort to transform the criminal justice system from its present state of retributive justice into a justice system which is restorative and which attentively prioritizes the needs of the victims of crime, vulnerable persons, human dignity and the society. The general tone of the Act puts human dignity first, from the adoption of the word defendant (instead of accused), to its provision for humane treatment during arrest, to its numerous provisions for speedy trial, to suspended sentencing, community service, parole, compensation to victims of crime etc.[94]

Although these procedural laws have introduced measure to ensure speedy trial, there is still inordinate delay in the administration of justice in Nigeria. A number of circumstances could give rise to this delay: lawyers writing letters of adjournment of cases, inability of judges and magistrates to deliver judgments on time, failure of the police or prison authorities to produce accused persons in court for trial, etc. There is no doubt that such delays not only erode public confidence in the judicial process but also undermine the very existence of the courts.[95]

In the context of threats to national security, one of the major causes of banditry and farmers-herders crisis is the complaints by the perpetrators of the extrajudicial killings of their parents and relatives for no just cause and sometimes the arrest and detention of their parents and relatives in lieu of them by agents of the law enforcement agencies. Consequently, in retaliation, they have taken up arms to revenge the arrest, detention and killings of their loved ones. Thus, one major

[93] See section 1 ACJA 2015.

[94]Egbege, T., (2020),The Administration of Criminal Justice Act (ACJA) 2015: Overview and Tools for Protection of the Rights of Women and Children. Available at https://fida.org.ng/wp-content/uploads/2020/11/THE-ADMINISTRATION-OF-CRIMINAL-JUSTICE-ACT-ACJA-2015.pdf.

[95]Okogbule, N. S., (2005), Access to Justice and Human Rights Protection in Nigeria, SUR 3. Available https://sur.conectas.org//en/access-justice-human-rights-protection-nigeria/.

innovation of ACJA in this regards is the provision that proscribes arrest of persons in lieu of suspects,[96]as well as the introduction of other measures which reaffirm the rights of persons arrested on the suspicion of having committed an offence, to wit: entitlement to notification of cause of arrest[97] and to be accorded humane treatment, having regard to dignity of his person.[98]

Also in the context of overcoming threats to national security, another innovative provision of ACJA is the one dealing with suspended sentence and community service[99]. Pursuant to its restorative and reformative approach, the ACJA 2015 provides that a court, in furtherance of decongesting the correctional centres and rehabilitate prisoners, can make them undertake productive work and prevent convicts of simple offences from mixing with hardened criminals. This can be achieved by suspending the sentence of the said convict or the convict who may be asked to carry out community service in a community chosen by the court. This provision will go a long way in deflating the argument that correctional centres in Nigeria are breeding ground for hardened criminals. This argument may not be totally false if the congestion in the correctional setup are taken into consideration and it allows for the mix up simple offenders and hardened criminals in one place because of the delay in the administration of criminal justice system in Nigeria.

Also the speedy trial provisions such as the one dealing with stay of proceedings,[100]discourage application for stay of proceedings in a criminal matter before the court and consequently puts a gag on delays which can be caused to the trial process by interlocutory applications to stay proceedings pending appeal on preliminary matters even when the substantive issues are yet to be tried on the merits. Also the innovative provision on day to day trial[101]will operate as a clog against unnecessary applications for adjournment which is now put at only five (5) adjournments each and the interval for each such adjournment shall not exceed two weeks. Where this does not conclude the trial, the interval for adjournment will be reduced to seven (7) days each. Another interesting and innovative provision of ACJA 2015 is the one dealing with the objection to the validity of charge,[102]which requires that any objection as to the validity of the charge or information raised by

[96] Section 7 ACJA 2015.
[97] Ibid., Section 6.
[98] Ibid., Section 8(1).
[99] Ibid., Section 460.
[100] Ibid., section 306.
[101] Ibid., section 396.
[102] Ibid., section 396(2).

the defendant shall only be considered along with the substantive issues and a ruling therein made at the time of delivery of judgment.

The Act equally provides measures for witness protection under Section 232 by allowing the trial of some offences in camera. These include: (a) sexual related offences, (b) terrorism offences, (c) offences relating to economic and financial crimes,[103] (d) trafficking in persons and related offences, and (e) any other offence in respect of which an Act of the National Assembly which permit the use of such protective measures. By virtue of this provision, the name and identity of the victims of such offences or witnesses shall not be disclosed in any record or report of the proceedings. The Court in order to protect the identity of the victim or a witness may take any or all of the following measures: (a) receive evidence by video link. (b) Permit the witness to be screened or masked. (c) Receive written deposition of expert evidence. Subsection (5) makes the contravention of the provisions of section 232 an offence punishable to a minimum term of one year imprisonment. This will go a long way to allow witnesses to testify in cases that threaten national security without fear of being harmed or noticed.

All the above innovative provisions of ACJA 2015 will expedite trial and see to it that persons accused of committing offences that threaten national security are quickly tried and punished so as to serve as deterrence to others who will think twice before taking to the commission of such offences. These are innovative measures in our administration of criminal justice system that may greatly impact on threats to national security.

1.10 Recommendations

From the foregoing legal analysis, this paper suggests the following ways as means of curtailing some of the threats to National security in Nigeria:

1. Promoting and ensuring harmony, cordial relations and tolerance between the various religious and ethnic groups in Nigeria.
2. Grow the numerical strength of the personnel of our Armed Forces and the other security agencies in Nigeria.
3. Provision of adequate equipment and mandating intelligent sharing, synergy and collaboration amongst the security agencies in their operations.
4. Without the fear of being held accountable for the breach of fundamental human rights, in deserving circumstances, security agencies should explore the exceptions windows under the constitution and enabling laws establishing them in the professional discharge of their responsibility.

[103] Offences relating to threats to national security.

5. Effective and professional implementation of the scope of responsibilities conferred by law on each of the security agencies. This will go a long way in addressing security gaps and lapses by any of the security agency under whose scope of responsibility a task is assigned. In this regards, the Armed Forces takes charge of our territorial borders and will only be invited to attend to matters of internal security only in exceptional and deserving circumstances. The Police, the NSCDC, and the other intelligence agencies take charge of the internal security of the state within the framework of the enabling laws establishing each of the agencies. The EFCC and the ICPC within the enabling framework establishing them proactively take charge of the implementation of the laws prohibiting economic sabotage, corruption, fraud and other related crimes. The NDLEA, Immigration and the Customs Service should within the context of the laws establishing them ensure and take steps to check influx of drugs and illegal arms, as well as foreigners who may likely constitute serious security threats.
6. Concrete efforts should be made to address the issue of extra judicial killings and anyone found wanting should be punished in accordance with the law.
7. Strict compliance with the provisions of the law prohibiting arrest and detention in lieu of an offender by the security agencies should be ensured.
8. Urgent attention should be paid to the issue of inordinate delay in the administration of justice system in Nigeria. This is with a view to ensuring timely trial of offenders, so as to serve as deterrence to others.
9. Measures to ensure the justiciability of the socio-economic provisions embedded in chapter two of the 1999 Constitution of the Federal Republic of Nigeria, so as to hold the state accountable for the implementation of the bundle of rights contained therein, the enjoyment of which are linked to the rights contained in chapter four of the same constitution.

1.11 Conclusion

National security threats are common phenomenon globally and are being influenced by several factors. Nigeria is not an exception. Nigeria is being bedevilled by so many national security threats ranging from violence, banditry, secessionists' agitations, militancy and kidnapping, the conflict between farmers and herders, armed robbery, human trafficking, etc. There are several perspectives from which the issues of threats to national security can be addressed. This paper reviewed and analysed extant legal frameworks in Nigeria that directly or indirectly impacts on threats to national security in Nigeria. This paper finds from four different perspectives of legal intervention that there are provisions that create institutions with mandates to address root causes of threats to national security. This

paper concludes that if the provisions of the laws are fully implemented by the respective agencies of government, threats to national security will to a greater extent be overcome even before they manifest. The paper also finds that the failure of government to fulfil its obligations under chapter two of the 1999 Constitution of the Federal Republic of Nigeria (as amended) as it relates to social and economic, as well as the educational wellbeing of Nigerians accounts for the high rates of poverty and unemployment despite the existence of extant laws in that regards. This is against the background of the non-justiciability of chapter two of the constitution, which this paper argues and recommends that it is justiciable through the instrumentality of public interest litigation as it is the case in India and South Africa.[104] This can be made possible when the justiciability of chapter is linked with the rights contained in chapter four. In all, this paper concludes that through the instrumentality of law and the implementation of the extant legal framework with direct and indirect impacts on national security, threats to national security will be overcome to a greater extent.

[104] See the Indian and South Africa cases of: *Francis Coralie Mullin vs The Administrator, Union Territory of India (1981) AIR 746, 1981 SCR (2) 516; Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000*)

A Critical Appraisal of the Kano State Street Begging (Prohibition) Law, 2013

Aisha Haruna[*] and Ishaq Abubakar Baba[**]

Abstract

Begging is an act of solicitation of gratuitous gesture of another. It is a symbol of man's recognition of his inability to provide himself with all he needs singlehandedly. However, while societies approve and, in deserving circumstances, even set enabling mechanism for assistance, they mostly frown at holding unto begging as a means of an earning living. It is obvious that begging has, for a quite long time, become a problem of almost all societies in the globe with corresponding measures to address it. Notable among these measures is penal legislation the purpose of which is to deal, in punitive term, the remnant of the menace that survived other proactive ones. It was against this background that Kano State Seventh Assembly followed suit by enacting Kano State Street–begging (Prohibition) Law, 2013, which is a penal measure against begging in the state. This article is embedded by two fundamental considerations, namely: to examine the legal regime of begging in Kano State with a view to unveiling the desirability of Kano State Street-begging (Prohibition) Law, 2013 and other related legal issues on one hand, and to address some constitutional issues raised by same on the other hand. The article employs doctrinal research methodology through which it examines and analyzes the relevant data. Consequently, the article finds, in the main that the Law under review, though needful, is inconsistent with the constitution and other Laws of the National Assembly and, therefore, void and of no effect to the extent of the inconsistencies. Consequently, the article recommends that the Law be amended to clear the inconsistencies and that same be fully enforced in the state.

Keywords: Street begging, Prohibition, Children, Kano, Law

1.1 Introduction

To an average Nigerian, the mention of begging usually directs his/her mental vision to the dirty and unhealthy looking child with plastic bowls in hand or the aged handicapped adult roaming our streets solo or in cluster soliciting for alms from vehicle operators and other passersby. Though people hold general belief that

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begging is relegation, at least, to the practitioners and the society where its prevalence is out of proportion, societies, including Kano State, are mostly unmindful of other issues associated with it, such as its causes, types, and problems as a prelude to uncovering the best remedy to it. Commitment to this consideration, in the context of Kano State, logically calls for an important enquiry into the existence and sufficiency of legal measures against begging in the State prior to 19th December, 2013 when the Law under review was enacted. To answer these questions and more, this article critically examines the legal regime of begging in Kano State with particular reference to Kano State Street-begging (Prohibition) Law, 2013 and analyses other related legal issues. In so doing, the paper accounts for both proactive and reactive legal measures against begging, drawn from the Constitution, relevant administrative and criminal laws of Kano State and analyses their correlation to begging directly or indirectly. causes, types, modes and problems of begging secure light attention of the article in that they are meant to echo the relevance of the legal provisions analyzed, particularly proactive ones, in addressing the menace of begging in the State.

1.2 Meaning of Begging

Simply put, begging is an act of asking someone for something. To beg, in ordinary English, means to ask someone earnestly or humbly for something.[1] This, however, represents the general aspect of the term as one can invoke the word for purposes other than relegated ones. For instance, "I beg to second the motion, sir". Begging in this regard is to some extent synonymous to words such as asking, soliciting, and requesting, calling, appealing e.t.c. for something, which may include alms. [2]

Begging as a word derived its meaning from old English bedician "to beg" from Proto-Germanic Beth or, arguably, Anglo- French beggar of old French beggart.[3] By black's Law dictionary, to beg means to solicit alms or charitable aid.[4] In exploring the meaning of begging, it was once found that the act of a cripple walking along sidewalk while silently holding out his hand to receive money from passersby is begging for alms based on the statutory provision that used that phrase.[5]

[1]- www.oxforddictionaries.com/definition (retrieved on 07/08/2016).
[2] - Ibid.
[3] - www.etymonline.com (retrieved on 07/08/2016).
[4] -Black's Law Dictionary, 2nd Edition, available at thelawdictionary. org/beg (retrieved on 07/08/2016).
[5] - Re Hattler, 8 Abb. N.C. (N.Y.) 65, availble at openjurist.org (retrieved on 07/08/2016).

As for statutory and scholarly definition of begging, the term is seen differently, thus: Begging perceived as "a practice of imploring others to grant a favour, which could be in form of gift like money, clothes or food with no expectation of reciprocation or refund". This extends to the act of requesting for money, food or other forms of favour without an exchange in a public place and in the street where people frequently pass by.[6] Chukwulobe sees street begging as an act of stopping people on the street to beg for assistance which could either be in the form of giving money or food.[7] It often occurs for the purpose of securing a material benefit, generally for a gift or charitable donations.[8] To Balogun, begging is an act of relying on the financial grace of strangers without providing food or services in return, though it is just as much work as a wage job.[9] Shah holds that begging technically known as "panhandling" is defined as "a situation where the needy asks people for material benefits or money, often even basic amenities like food and clothing".[10]

In an attempt to provide an all-encompassing definition of begging, Adedibu battled with other technically related terms to say this on begging:

> It is important to state that while street and house to house begging and panhandling are synonymous, and may represent the general idea, of asking people for money, food etc., mendicancy and vagrancy connotes more than street begging. Mendicancy as an act of begging is usually associated with religious inclination. Vagrancy, on the other hand, refers to begging activity of the jobless, homeless and wonderers or vagabonds. It involves people who have been driven by natural disasters to leave home in search of richer areas as well as refugees who become beggars in the new places they migrate to[11]

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[6] - A. A. dedibu, M.O. Jelili, "Characteristics and Types of Beggars in Nigerian Cities: Implications for Public Policy" [2011] Center Point Humanities Edition (Vol. 14 No. 1) p. 324.

[7] C. Chukwulobe, 'Street Begging and its Prevalence in Niger State' [2011] Unpublished Project P. 2.

[8] Ibid.

[9] - A. Balogun, ' New Forms of Begging on Lagos Street' the Punch News Paper, 17th March,2012

[10] -N. Shah, 'Begging in India: Generously Putting Stop to It' [2011] Youth Ki Awaz: Online Platform for Young People Available at http// www.youngpeople.

[11] - A.A. Adedibu, M.O Jelili, "Package for Controlling Street Begging and Rehabilitating Beggars and Physically Challenged in Nigeria: Paper for Policy Consideration" [2011] Global Journal of Human Social Science (Volume ll Issue 1, Version 1.0 (Global Journal Inc. USA); L. Hunchao, 'Becoming Urban: Mendicancy and Vagrants in Modern Shanghai' [1999] Journal of Social History available at www.shanghaicentre.com .

From the foregoing, one can safely understand the term "begging", regardless of the language used, to mean one and only thing. That is, it is an act of soliciting for, usually, free life-support basic materials or money the real motive, intention, actor and mode employed notwithstanding. The rationale behind defining begging as such is that this definition is accommodative of all types of begging and beggars with no discrimination on account of the reasons, time, place, mode, status or any other peculiarity of a particular practitioner.

1.3 An Overview of Kano State Street Begging (Prohibition) Law, 2013

In order to appreciate any argument for or against the need on the part of Kano State Seventh Assembly to enact a special penal law against begging in 2013, it should be born in mind that some laws, such as Kano State *Zakat* and *Hubsi* Commission Board Law, 2003, Kano State Emergency Relief and Rehabilitation for the disabled Board Law, 2008, are enactments that relate to begging in an indirect sense. This is due to the fact that some provisions of these laws seek to rid the public in the state of certain socio-economic problems that often lead people to beg. Equally, Kano and Road Traffic Agency (KAROTA) Law, 2012, had some commitment to begging by tasking its Agents to safeguard highways of the activities of alms begging, among other activities.

In an attempt to rid the state of the daily increasing street roaming beggars, the Kano State House of Assembly passed into law Kano State Street-Begging (Prohibition) Law, 2013 with effective date of 19th December, 2013. This law has only 6 (six) main sections two wit: Section 1 is on citation and commencement date. Section 2 is interpretation. Section 3 criminalises begging. Section 4 provides a penalty for begging. Section 5 is about prosecution of an offender and section 6 is about violation of the law.

For the purpose of proper appreciation of this article, particularly the main question sought to be addressed in this heading, Sections 2, 3, 4 and 6 of this law must be reproduced here as follows:[12]

Section 2 of the law gives interpretations of child, street-begging, young person, state and adult. Of these key words, street-begging is interpreted, thus: "Street Begging includes begging on the roads, roundabouts, junctions, traffic lights and other public places..."

[12]Kano State Street Begging (Prohibition) Law, 2013.

Also, Section 3 of the Law provides that "From the commencement of this law, street begging is prohibited in the state". And Section 4 (penalty) provides that "Any person who violates the provisions of this law commits an offence and is liable on conviction to a term of imprisonment of not less than 4 months or to a fine of N10,000:00."

Section 6 of the law provides as follows:

(1) Where the court is satisfied that a person has violated the provisions of section 3 thereof, the court may:-
   (a) In case of a child or young person:-
      (i) Order his parents or guardians to enter into a cognizance to exercise proper care and guardianship; or
      (ii) Commit him to the care of any fit person whether a relative or not but who shares the same faith with the arrested person and is willing to undertake the care of him; or
      (iii) Notwithstanding anything to the contrary proceed under any relevant provisions of the children and young person's law.
   (b) In case of an adult who is a first offender reprimand and admonish him.
   (c) Impose the punishment provided by this law where the person is not a first offended (sic).

(2) In addition to the penalties prescribed by this law, the court may in appropriate circumstances:-
   (a) order the deportation of the convict to his country;
   (b) order the transportation and return of the convict to his state/Local Government of origin".

1.4 Constitutional Issues in the Kano State Street Begging (Prohibition) Law, 2013

The followings legal issues in relation to the street begging law in Kano State are worthy of examination under the following sub-heads.

1.4.1 The Constitutional Validity of the Law

The greatest challenge of this law lies in its constitutional validity. First, it is clear that the law is a criminal legislation considering the provisions contained in its sections 2,3,4 and 6. While one has to assume section 2 as the definition section of the law, the principle set out in section 36 (12) of the constitution in relation to legislations of this like must be observed. This, therefore, necessitates the consideration of both wide and narrow definitions of crime.

As in the case of most legal terms, it is very difficult to arrive at one concise and apt definition of crime.[13]

Defining crime involves two main approaches to wit: the sociological approach (wider scope) and legal approach (narrower scope). The first approach perceives the definition of crime as an anti-social behaviour having in its scope many acts, including host of acts that cannot pass the legal test of crime. By the narrower approach, which is the concern of this paper being a legal research, the construction of crime is exclusively by making reference to law. In essence, the question remains, whether the act in consideration is, by an existing law, labeled as a crime thereby warranting other procedural legal consequences?[14]

The consideration of the term crime in this article is best favoured by the second approach as it guards all other sins or vices that ought to be subject of consideration in other realms against intrusion here. According to Black's law Dictionary, "a crime is an act committed or omitted, in violation of a public law, either forbidding or commanding it; a breach or violation of some public right or duty due to a whole community, considered as a community."[15] In the same vein, Allen Gledhill considers a crime as "a human conduct which the state decides to prevent by threat of punishment liability of which is determined by legal proceedings of a special kind".[16] Moreover, Glanville Williams sees crime as "a legal wrong that can be followed by criminal proceedings which may result in punishment".[17]

Regardless of the varying languages adopted by scholars towards defining crime, in legal parlance, the term crime stands out with three basic characteristics, viz: it is an act or omission, proscribed (prohibited) by the state and it has a punishment for its occurrence.[18]

The foregoing three features by which crime is sought to be defined received constitutional succor with some further clarification affecting prohibiting instrument. For the purpose of appreciating constitutional agreement with these

[13] A.A. Adebayo, 'Social Factors Affecting Effective Crime Prevention and Control in Nigeria' [2013] International Journal of Applied Sociology (Volume 3, Issue 4) P. 71
[14] H.S. Chukkol, 'The Law of Crimes in Nigeria' (ABU Press Ltd., Zaria – Nigeria), p.1.
[15] Black's Law Dictionary Free Online Legal Dictionary' 2nd Edition (Available at thedictionary.org retrieved on 09/10/2017
[16] A. Gledhill, ' The Penal Codes of Northern Nigeria and the Sudan' (London, 1963)
[17] G. Williams, 'Text Book of Criminal Law' 2nd ed. (London, Stevens) p. 27
[18] E.O. Fakayode, 'Nigerian Criminal Code Companion' (Ethiope Publishing Corporation, 1977) p. 1

features of crime, the content of section 36 (12) of the Constitution is reproduced as follows:

> Subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a law of a state, any subsidiary legislation or instrument under the provisions of a law.

By the wordings of section 36 (12) quoted above, our constitution is absolutely in harmony with understanding of crime as being an act or omission which the state did not only prohibit, but provide punishment for its occurrence also. Clarifying further on that, the constitution is explicit on the state organs responsible for both the prohibitive and punitive legislative initiatives at all levels. Another definition of crime that fits the constitutional guide found in this section is proffered by Dambazau, thus: "an act or omission against public interest, and which is proscribed by law enacted by legislature in the overall interests of the society, and to which prescribed punishment is attached in the event of violation..." [19]

The presentation of several scholarly attempts to define crime on one hand and the constitutional dictate thereto on the other, leaves one with two ideas on legal definition of crime. First, both the scholarly and constitutional approaches considered revealed that crime is an act prohibited by the state, the violation of which attracts punishment. Second, the constitutional approach to the term makes it discernible that other than the general legal meaning of crime, specific legislative act is, as a matter of procedure, required to have a crime. This is by the presence of "unless that offence is defined ..." in the relevant section.

In *Geoge v. FRN*[20] the court held that: "By the provisions of section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999 all offences must be clearly defined". Expatiating further on this issue, the court of Appeal, in the case of *Bala James Ngilari v. State & Others*,[21] pointed out two important issues, thus:

[19] Ibid., n. 47 p. 72.
[20] *Geoge v. FRN* (2011) ALL FWLR P. 677.
[21] Appeal No: CA/YL/80C/2017 (available at support@legalpediaonline.com (retrieved on 31/1/2017) .

First, the court while adopting and travelling miles far beyond the decision in *Geoge V. FRN*[22] has this to say on the import of section 36 (12) of the constitution:

> The law is also settled beyond any doubt of peradventure that, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law. See Section 36(12) of the constitution. Section 201(1) and (4) of the Criminal Procedure Code also provides that, every charge shall state the offence with which the accused person is charged. The law and section of the law under which the offence is said to have been committed shall equally be clearly stated in the charge. It is equally the stance of the superior courts of record that, penal statutes must be construed strictly to the benefit of an accused person and where there is a reasonable construction that voids the penalty in any particular case, the court must adopt the one that is more lenient to an accused person. For an act that constitutes an offence cannot be left to conjecture". (Underlines mine).

Second, in this case, the Court of Appeal, perhaps conscious of the materiality of the word offence in the above ratio, went ahead to define same in these words: "An offence is an act or omission or conduct which is forbidden by the state and to which a punishment has been attached."

Other than solidifying the decision in *Geoge v. FRN* in the light of section 36 (12) of the constitution, further discernible compelling points on defining of offence by statute from the above ratios are three, to wit:

1) A criminal charge is valid only by its containing, among others, the law and section of the law under which the offence in question was alleged to have been committed. More so, such statement of the law and the relevant section must be made clearly. Now, by the use of "Under which the offence is said to have been committed", it implies one and only thing. That is, the law and specific section of the law that defined the act in question as an offence must form the basis of the criminal trial.
2) Determining an act that constitutes an offence so far it relates to Nigerian criminal justice system is a matter within the exclusive statutory dictate over which no one shall have power, not even courts. The use of the word conjecture (which is synonymous to assumption, belief, guess, hypothesis, imputation, inference, opinion, postulation, presumption and the likes)[23] is deliberate, not

[22] Supra note 20.

[23] Available at https://legaldictionary .thefreedictionary.com (retrieved on 5th November, 2017).

accidental. It was meant, in the decision, to clearly point out that it is not for the court to assume that a particular act is an offence in the absence of any written law defining such act to be an offence.

3) Penal statutes must be construed strictly in favour of the accused person to the extent of adopting reasonable construction, where there is one that voids the penalty in any particular case. By this position, one cannot help weighing sections 2 and 3 of the Kano State street-begging (prohibition) law, 2013 against section 36 (12) of the constitution in the light of judicial construction of the latter. The result of this, no doubt, brings the question of construction of sections 2 and 3 of the law under review to light in ascertaining whether street-begging was actually defined therein. Where no definition of street-begging could not be found in this law, which is actually the case, the court must, relying on section 36(12) of the constitution strictly, void not only the penalty provided by that law, but any charge arising therefrom.

Related to the foregoing and strengthening same is part of the decision of this case which defined offence as an act or omission or conduct prohibited by the state. It follows, therefore, by this definition that act, omission or conduct prohibited by law is identifiable only on clear definition as obtainable in all our penal legislations.

The position of Court of Appeal giving basis to the foregoing analysis, particularly as to construction of penal statutes, followed the position of Supreme Court in the case of *Nigerian Navy & Others v. LT. Commander S.A. Ibe Lambert*[24] when it held, thus:

> It is settled law that penal statutes are to be construed strictly to the benefit of the accused person and that where there is a reasonable construction that voids the penalty in any particular case, the court must adopt that construction. And if there are two possible constructions, the court must adopt the more lenient one.

The whole effect of the analysis drawn from sections 2 and 3 of the law in relation to the various authorities to which they are subjected is that same fell short of the stipulation of section 36 (12) of the constitution for which no conviction can be validly secured for the purported prohibited act (street-begging) as far the said law is concerned.

[24] (2007) 18 NWLR (pt. 1066) 300, (2007) LPELR – Sc. 139/2016.

1.4.2 Jurisdictional Competence of the Courts on Deportation under the Law

By section 6 (2) (a) of the Kano State Street-begging (Prohibition) Law, 2013, the court (Magistrate Court or Shari'ah Court) is empowered, in some cases, to order the deportation of any person convicted for street-begging in the State, if not a citizen of Nigeria.

It is obvious that one can take no issue with the fact that the court in the circumstance derived its power to grant the deportation order from the law made by the Kano State House of Assembly. However, conscious of the provisions of sections 4 (2) (3) (5) (6) (7) (a) of the constitution, any constitutionally jealous mind cannot help questioning the legislative competence of Kano State House of Assembly to venture into deportation arena.

Towards attending to this question, section 4 (2), (3) and (7) (a) of the constitution relating to the legislative powers of the National Assembly presents decisive road map. Even by literal construction of the said section and its environs, it is clear that matters within the Exclusive Legislative List are spared for the National Assembly and out of bound for its state counterparts. For ease of identification of matters within this legislative sphere, reference is made to Part 1 of the Second Schedule to the constitution by both subsections 2 and 7 (a) of section 4 of the constitution. To that end, while such reference in subsection 2 approves of the National Assembly's exercise of power in that box, that of subsection (7) (a) disapproves that of the State Assembly's.

Against the foregoing background, Part 1 Second Schedule to the constitution must be visited to the extent only of the fair demand of this article. The exclusive list, as designed by the constitution, contained 68 items. Of these items, deportation comes the 18th. It reads: "Deportation of persons who are not citizens of Nigeria."[25] Relevant to this article in this schedule also is item 68 being a supplement to any item mentioned therein. It provides: "Any matter incidental or supplementary to any matter mentioned elsewhere in this list".

Dwelling on the National and State Assemblies' legislative powers in the light of constitutional demarcation, Niki Tobi, JSC, in *A.G. Abia state v. A.G. Federation*[26] observed:

[25] Second Schedule, Part 1, Item 18 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[26] (2006) 16 NWLR (pt. 1005) 265 at 352 Paras. F-G and 353 – 354 Paras. 4 – 4.

> There are two legislative lists in the 1999 constitution. These are the Exclusive Legislative List and Concurrent Legislative List. The Exclusive List of Part 1 Schedule 2 to the constitution contains 68 items. By section 4 (2) only the National Assembly can exercise legislative powers on the 68 items. The Concurrent List contains 30 items... the Concurrent Legislative List clearly sets those items that the National Assembly can freely legislate upon. So to the House of Assembly of a State as it relates to section 4 (7) (b) of the Constitution. While the House of Assembly is prohibited from exercising legislative functions on matters in the exclusive legislative list, the House of Assembly can exercise legislative powers on matters contained in section 4 (7) (b) of the constitution. This is in respect of matters not included in the Exclusive List Set out In Part 1 of the Second Schedule to the Constitution and any matter included in the concurrent legislative list set out in the First Column of Part II of the Second Schedule to the constitution to the extent prescribed in the Second Column opposite thereto.

On further observation relative to the case above-which differs from that of this article, in fact, only not in substance-the apex court held also that from the provisions of section 4, it is clear that only the National Assembly has power to legislate on any matter incidental or supplementary to any matter or item mentioned in the exclusive list.

Following the footsteps of the apex court on this dictate, the Court of Appeal, in the case of *Chevron (Nig) Ltd. V. Imo State House of Assembly and Others*[27] summarized the House of Assembly's Legislative power as stipulated by subsection (7) of section 4 of the constitution in respect of any matter outside Exclusive Legislative List, matters contained in the Concurrent Legislative List and such matters which, by the specific provisions of the constitution, it is empowered to legislate upon.

By the analysis in the preceding item, the main concern raised by sections 5 and 6 (2) (a) in relation to section 251 (1) (i) of the constitution has adequately been addressed. In essence, sections 5 and 6 (2) (a) put together conclusively stand inconsistent with the provision of section 251 (1) (i) of the constitution. By the clear provision of the latter as copiously produced earlier, hearing and determination of

[27] (2016) LPELR – 41563 (CA).

civil questions bordering on aliens and deportation of persons who are not Nigerian citizens is within the exclusive judicial competence of the Federal High Court. This, was obviously interfered with by the former in that both Sharia and Magistrate Courts of Kano State derived from it competitive power to Federal High Court in that regard. Ahead of the considered view above on the legislative act of Kano State Seventh Assembly, the following issues must specifically be attended to in this segment for the purpose of more reasoned finding on the adjudicatory power of Kano State Sharia and Magistrate courts on deportation affairs:

A. Power to Make Deportation Order in Nigeria

The power to make order for the deportation of persons not being citizens of Nigeria is, by the provisions of both Immigration Act, 2015 and Administration of Criminal Justice Act, 2015 vested in the Minister of Interior. In essence, the power is executive one. In exercise of the power to make deportation order, the minister of interior may make such order at his own instance upon examining the case at hand or on the recommendation of the court. The relevant portions of the Act must be reproduced here:

Section 44(3) of the Immigration Act provides that the minister may, at any time by notice, add to or amend any category of prohibited immigrants in subsection (1) of this section and if he deems fit to be in public interest, may prohibit the entry into or stay in Nigeria of any other person or category of persons. Similarly, section 45(3) of the Immigration Act provides that if the minister is of the opinion that any person in Nigeria ought, at any time after his entry to be classed as a prohibited immigrant, he may make an order accordingly and the provisions of any such order shall have effect as if the person named in the order were a prohibited immigrant landing in Nigeria for the first time, any person affected by an order made under this subsection may be deported. Also, Subsection (4) of section 45 above reads:

> The provision of this section shall, if the minister thinks fit, extend and apply to any person who having entered Nigeria at any time in pursuance of a visitors permit or transit permit remains in Nigeria beyond the time allowed by such a permit or breaks any other condition subject to which such permit was issued whether or not he has been prosecuted for an offence under this Act.

Aligning with the above provisions, section 446 of the Administration of Criminal Justice Act, by its all-encompassing provision provides that subject to sections 440,444,445, the minister of interior shall, in the interest of peace, order and good

governance make an order of deportation and issue a written order directing that the defendant be deported to his country.

B. The Role of Court in Deportation Matters

Having shown that the power to make order of deportation in Nigeria lies in the minister of interior by the unambiguous provisions of Immigration Act and Administration of Criminal Justice Act above, the natural question that follows is, does the court have a role to play in deportation matters? The answer is indeed yes and same is found in sections 45 and 46 of the Immigration Act and sections 440, 441 and 442 of the Administration of Criminal Justice Act.

Section 45 of the Immigration Act provides that subject to sub-sections (2) and (3) of this section, any person who being a prohibited Immigrant enters Nigeria except in accordance with this Act commits an offence, and if convicted, the court may make a recommendation for the deportation of the offender.

In the same vein Section 46 of the Immigration Act provides that where the court convicts an offender under this Act or any other enactment for an offence punishable by imprisonment for a term of one year and above, the court may in addition to or in lieu of a sentence, recommend the deportation of the offender, and the minister may order his deportation accordingly.

By the provisions of sections 440, 441 and 442 of Administration of Criminal Justice Act paraphrased earlier, the court may recommend to the minister of Interior that persons liable under the sections (440, 441, and 442) being not citizens of Nigeria be deported.

With these provisions, it is decisive that the role of court in deportation matters is that of mere recommendation, in relevant circumstances, to the minister of Interior for the deportation of a particular person. The ultimate power to make the deportation order is the exclusive power of the minister of Interior regard having had to the provision of section 47 (3) of the Immigration Act and section 447 of the Administration of Criminal Justice Act. The sections empowered the minister of Interior to revoke existing deportation order or turn down courts for one. To this end, section 47 (3) of the Immigration Act provides that the minister may, if he thinks fit, revoke a deportation order at any time, whether before or after the person to whom it relates has left or been removed from Nigeria, but the revocation of a deportation order shall not affect the validity of anything previously done.

On its part, section 447 of the Administration of criminal Justice Act provides that where the minister of Interior decides that no order of deportation shall be made, he shall inform the court, and the court shall then proceed to make such order of imprisonment or other punishment as may be authorized by law.

Related to the settled question above is the desire to know with precision whether reference to court by the Acts is inclusive of all courts in Nigeria. For this, sections 116 of the Immigration Act and 494 of Administration of Criminal Justice Act are of help. Section 494 of the Administration of Criminal Justice Act interprets courts to include Federal Courts, Magistrates' Courts and Federal Capital Territory Area Courts presided by legal practitioners.

Towards addressing the question at hand, the foregoing provision cannot be safely acted upon. The Act is one of general application for criminal trials before Federal courts and State courts alike, hence the justification of giving wide interpretation to the word "court" to accommodate all courts in deserving circumstances. For this, however, since deportation is a special proceeding, the better determinant of court in contemplation is the interpretation found in section 116 of the Immigration Act. It interprets court, viz: "Court" means "Federal High Court."

Where it calls for external aid to justify the choice of one interpretation against the other, the pendulum would of course tilt to the latter. Obviously, the draftsmen of the Immigration Act acted along the trace set for them by the constitution in sections 4 and 251 which were extensively analyzed earlier. Apparent in the consideration of the draftsmen of Immigration Act is Item 9 of Part 1 of the Second Schedule to the constitution concerned with citizenship, among others, which is an indispensable preliminary to deportation. Therefore, it follows naturally that towards recommending the deportation of a defendant to the minister, the court must first determine his citizenship, the power of which is exclusively vested in the Federal High Court. The outcome of this constitutional analysis of the law exposes it to some other problems. There are:

1.4.3 Problem of Prosecution

Flowing from the constitutional defect identified above is that prosecution of offenders under this law will be susceptible to challenges from defence counsel on different grounds that may lead to the failure of the action in its entirety.

A. Loss of Legal Effect

Further to the foregoing, the portions of the law subjected to constitutional validity test under this heading are liable to be declared inconsistent with the Constitution and Immigration Act, 2015, when successfully challenged. The result of such declaration is that the law is void and without legal effect whatsoever to the extent of its inconsistencies in line with sections 1(3) and 4(5) of the Constitution.

B. Problem of Limited Coverage

As the name implies, and based on the begging prohibition in the law, all forms of begging, such as door-to-door begging, internet begging, political begging and the likes do not fall within the prohibited begging so long they are not practiced on the street or other public places.

C. Problem of Enforcement

Another important challenge of Kano State Street Begging (Prohibition) Law, 2013 is enforcement. This law, by its citation and commencement section (section 1), came into operation on the 19th December, 2013, a period of almost 10 years from its birth. From the onset, the enactment of Kano State Child Labor (Prohibition) Law, 2014 a year later, which partly prohibited child begging signifies failure of the former to meet some of the latter's specific objective (protecting child against all forms of neglect and exploitation, including child begging). With full enforcement of Kano State Street Begging (Prohibition Law), 2013, the provision of the Kano State Child Labor (Prohibition) Law, 2014 relating to criminalizing child begging would have been needless since begging Prohibition in the former is general.

1.5 Prospects of the Law

Kano State Street Begging (Prohibition) Law, 2013 appears to be the first special penal measure against begging generally. And as such, the greatest prospect of the law lies in its potentiality to rid Kano State of begging. By implication, the law, if fully enforced, would address all the problems associated with begging. The law will then influence the government's decision to formulate and implement some cushion policies to cater for the people detached from the beggary market. The Law, on meeting its objective through full enforcement, would set precedence to other states of the federation, particularly neighboring states as they may fear the migration of beggars from Kano State to their regions.

1.6 Findings

The findings of this article are as follows:

1. Kano State Street Begging (Prohibition) Law, 2013 was needful as at the date of its enactment as the extant laws on the subject suffer from one limitation or another.
1. The law fails the constitutional validity test set out in section 36 (12) of the Constitution to quality as a criminal legislation for which any person can be convicted having failed to define the act that constitutes the offence of Street-Begging in the State.
2. The act of the Kano State Seventh Assembly of vesting Kano State Sharia and Magistrate courts with the power to determine deportation of convict under sections 5 and 6 (2) (a) of the law is in excess of its legislative powers and in breach of the legislative powers of the National Assembly as set out in section 4(2) (3) (6) (7) (a) of the constitution respectively. Such Act is also in conflict with the law validly made by the National Assembly (Immigration Act, 2015)
3. The Kano State Sharia's and Magistrates' court power to order the deportation of convict back to his country under sections 5 and 6 (2) (a) of the law is inconsistent with the provision of section 251(1) (i) of the constitution and section 116 of the Immigration Act, 2015 and same interferes with the executive powers of the federation.

1.7 Recommendations

To address the problems identified by this article, the following measures are recommended.

1) That Kano State Street – Begging (Prohibition) Law, 2013 be amended to cure the constitutional inconsistencies it occasions by:
   a) Defining the act that constitutes the offence of street-begging in the state in line with section 36 (12) of the constitution of the Federal Republic of Nigeria, 1999 (as amended).
   b) By removing section 6 (2) (b) of the Law for being inconsistent with the provisions of the Constitution and Immigration Act, 2015.
2) That Kano State House of Assembly should, before considering any proposed bill, ensure the attainment of exhaustive legal expert view from refutable public or private authority thereon.
3) That the provisions of Chapter Two of the Constitution analyzed in this article, all the laws of Kano State with direct and indirect bearing on begging and the Kano State Street Begging (Prohibition) Law, 2013 (with the necessary amendment) be fully enforced in the State.

4) That the act of indiscriminate giving of alms to beggars shall also be criminalized to complement the existing legislation on the subject.

1.8 Conclusion

The Kano State Street Begging (Prohibition) Law, 2013 appears, by the outcome of this article, to have come at the time it is needed the most. The various segments of this article are mirrors through which the desirability of the law can be viewed. It is apparent that begging has been a menace bedeviling the state for quite a long time without efficient corresponding legal measure to curb it. The various laws of Kano State relating to begging enacted prior to the law under review (including Kano State Child Labor (Prohibition) Law, 2014) have been found by this article as inadequate to curtail the menace of begging generally. While the objective of some of these laws is about welfare, the attainment of which may close doors to beggary market, the objective of others is to deal with one form of begging or the other or to offer protection in favour of certain class of beggars. With this, the article concludes that a special penal legislation, as the one in consideration, to rid the State of all sorts of public beggars and begging was desirable at the moment. However, it is almost six years now since the enactment and commencement of the law, but the situation remains as it was before the new development. This, as observed by this article, results mainly from lack of enforcement of the law by State. Furthermore, it is of interest to note that although the law is besieged by so many challenges, such as constitutional defect, limited coverage, susceptibility to being declared inconsistent with the Constitution, it still stands the chance to meet its objective and some prospects when fully enforced. Conscious of the importance of enforcement of law to the realization of the objective of any piece of legislation, this article recommends that the law be enforced without ignoring its need for amendment.

The Standard of Proof beyond Reasonable Doubt in Rape Cases in Nigeria: an Analysis of Court of Appeal Decision in *Lukman Ya'u v. State CA/KN/164/C/2018* (Unreported)

Musa Adamu Aliyu[*] and Nasiru Adamu Aliyu [**]

Abstract

The standard of proof in criminal trials is always proof beyond reasonable doubt. It does entail proof beyond all shadow of doubt. The application of this standard is subject of review in the light of the case of Lukman v. State and appealed decision of the Jigawa State High Court. In the case under review, the appellant was convicted for rape and sentenced to 15 years imprisonment for raping a 14-year-old girl who was unconscious at the time the crime was committed. Consequently, the victim became pregnant and gave birth to a baby girl. The Court of Appeal in a lead judgment delivered by Hon. Justice Abubakar Datti Yahaya set aside the decision of the Trial Court holding that reasonable doubt exists in the case of the prosecution as the confessional statement used by the court was involuntary and the police ought to have conducted DNA test to unravel the culprit. This review opines the decision is a food for thought for the police as investigators of rape offences and the Ministry of Justice as the prosecuting ministry in Nigeria.

Keywords: Standard of Proof, Confessional Statement, Rape, Court of Appeal, Lukman Ya'u, State

1.1 Introduction

Proof beyond reasonable doubt is the standard of proof the prosecution must discharge to secure conviction in criminal trials. In the appeal under review the Appellant was arraigned for the offence of rape before High Court of Justice of Jigawa State. The story of the victim of the crime was that Appellant raped her while she was deep asleep. She became pregnant and delivered a baby girl whose paternity according to the appellate court has not been proved to be linked to the Appellant. The prosecution called three witnesses and tendered extra judicial statement recorded at the State Criminal Investigation Department. On his part the Appellant testified as accused person without tendering any documents. The learned Trial Judge was satisfied with the evidence led against the Appellant as

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such convicted the appellant and sentenced to 15 years calendar months of imprisonment. Dissatisfied with the decision, the Appellant appealed to the Court of Appeal, Kano Division and the Appellate Court determined the appeal against the Respondent – Prosecution at the Trial Court. Honourable Justice Abubakar Datti Yahaya in the lead decision faulted the Trial Court's decision on the grounds that the appellant's confessional statement was not voluntary and trial-within-trial was not conducted. The Court of Appeal suggested *obiter* that DNA test ought to have been conducted to ascertain paternity of the baby girls since the Prosecutrix claimed she was unconscious at the time the offence was committed. His Lordship Honourable Justice A.D. Yahaya was of the opinion that the entire case of the prosecution was predicated on inadmissible evidence and incredible testimony of the prosecutrix. His Lordship found that the Trial Court had predicated its decision on perverse findings and the findings had raised serious doubts in the mind of the Court of Appeal. His lordship concluded that the Court had no option other than to allow the appeal, discharge and acquit the Appellant.

1.2 Facts of the Case

The facts of the case were that the Appellant betrothed to the prosecutrix. One day he came to her house and they sat outside to chat. The Appellant brought out sweets and gave her, she took and she fell asleep. The Appellant according to the prosecutrix took that opportunity to remove her underwear pant and had sexual intercourse with her while asleep. When she woke up the Appellant had left and the prosecutrix observed that her pant was stained with blood and she felt pain in her private parts. She took the pants and entered into house flushed it down the toilet. The prosecutrix added that she did not disclose the incident to her parents. Thereafter, the prosecutrix missed her menstruation period and later realized she was pregnant. When confronted with the issue of the pregnancy, the appellant denied responsibility. The prosecutrix later delivered a baby girl at the age of 14 years.

The Appellant was charged with the offence of rape contrary to Section 282(1)(e) of the Penal Code Law of Jigawa State Cap. P3 Laws of Jigawa State before the Jigawa State High of justice. At the trial, the prosecution called three witnesses and tendered an extra judicial statement of the Appellant which the appellant denied ever making such a confessional statement. The Appellant testified without tendering any document. At the end of the trial the learned Trial Judge convicted and sentenced the Appellant to 15 calendar years of imprisonment. Dissatisfied with the judgment, the appellant challenged it before the Court of Appeal Kaduna Division but the appeal was eventually heard and determine by Court of Appeal,

Kano Division. Honourable Justice Abubakar Datti Yahaya (Presiding) delivered the lead decision and sets aside the judgement of the trial court by discharging and acquitting the Appellant. Honourable Justices Habeeb Adewale Abiru and Amina Audi Wambai concurred with the lead judgment.[1]

1.3 The Decision of the Court

The decision of the Court of Appeal per Honourable Justice Abubakar Datti Yahaya is that the prosecution had failed to discharge the burden of proof placed on it as provided by law. Such burden of establishing criminal cases is burden beyond reasonable doubt. In the wordings of His Lordship the decision of the High Court of Justice of Jigawa State was given in breach of Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the fact that evidence that ought not be used was considered in arriving at the judgement. Conclusively, His Lordship held the judgement as perverse and that such a decision ought not to be allowed to stand. According to His Lordship:

> It is the combination of all the ills I have highlighted above, misconceptions and perversity that triggered serious doubts in my mind, that the Appellant had made Exhibit P1. Dark shadows are also cast on its authenticity and voluntariness. These grave doubts combined, the result is that Exhibits P1 and P2 are not the confessional statement of the Appellant, they do not exist and should not have been given any weight or probative value by the trial court...It is therefore my findings, that the prosecution did not prove the offence the Appellant was charged with-rape-beyond reasonable doubt... I discharge and acquit the Appellant.[2]

1.4 Analysis

In criminal appeal an appellate judge has to be convinced that there is substantial error which led to miscarriage of justice before decision of Trial Court can be reversed.[3] The Court of Appeal had properly appraised the facts and evidence on record before arriving at the decision of discharging and acquitting the Appellant. His Lordship Honourable Justice A.D Yahaya was clear and unequivocal that the faults detected in the judgment of the Trial Court have raised serious doubts in his

[1] Decision of the Court of Appeal, Kano Division in Unreported Appeal No. CA/KN/164/C/2018, the judgment was delivered on Monday 29th day of June 2020 and available at website of the Jigawa State Ministry of Justice https://moj.jg.gov.ng/resources/judgement.
[2] CA/KN/164/C/2018 at pp. 27 – 39 of the Judgment.
[3] *Kim v. State* (1992) LPELR – 1691 SC at 29.

mind which made him to conclude that the prosecution had woefully failed to establish their case beyond reasonable doubt.[4]

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Reasonable doubt standard is critical in the Anglo-American Judicial system.[5] It is a doubt which prompts a reasonable and prudent person in the society to pause and have a second look at a serious issue in life before taking decision in believing the facts represented as true and correct.[6] His Lordship Justice Niki Tobi (of blessed memory) in *Abubakar & Others v Yar'adua*[7] described reasonable doubt which may warrant acquittal of an accused person as a doubt based on reason arising from evidence or lack of evidence and reasonable man and woman might entertain which is not fanciful:

> Reasonable doubt which will justify acquittal is doubt based on reason and arising from evidence or lack of evidence, and it is doubt which a reasonable man or woman might entertain and it is not fanciful doubt, is not imagined doubt, and is not doubt that the Court might conjure up to avoid performing unpleasant task or duty. See **Black's Law Dictionary, 6th Edition, page 1265**. A reasonable doubt is an honest misgiving generated by the insufficiency of the proof, which reason sanctions as a substantial doubt. It is a doubt which make the Court hesitate as to the correctness of the conclusion which it arrives at. The principle of proof beyond reasonable doubt is necessary because of the Constitutional presumption of the innocence of the accused, provided in **Section 36(5) of the Constitution.**[8]

The above positions of the Supreme Courts of the State of Nebraska (in the United States of America) and Nigeria on reasonable doubt clearly indicate that a judge must consciously satisfied himself on the guilt of an accused person anything short of that will lead to the acquittal of the accused. In the case under review, the Court of Appeal, Kano Division through Hon Justice Abubakar Datti Yahaya had applied the principle of reasonable doubt as expounded by the apex courts of Nigeria and

[4] *Supra* note 3.
[5] *Thomas V. Mulrine* "Reasonable Doubt: How in the World is it Defined?" (1997) 12, Issue 1 *American University International Law Review*, 199.
[6] *Victor v Nebraska* (1994) St Ct 1239, 1249.
[7](2008) LPELR –51 SC.
[8] 125, paras. D – E.

United States in the two decisions of *Vicor v. Nebraska* and *Abubakar & Others v Yar'adua.*[9]

Nigerian Superior Courts have consistently held that in proving an offence against an accused person, the prosecution is expected to use any of the means of proof. The guilt of an accused person charged with the commission of an offence can be established by any of the following: the confessional statement of the accused; circumstantial evidence and evidence of an eye witness. See *Adio v The State* (1986)2 NWLR (pt.24); *Emeka v The State* (2001)6 SC 227; *Egboghonome v The State* (1993)7 NWLR (pt.306) 383.[10]

Among the three means of proof, "there is no mode of establishing crime which is stronger than confessional statement. This is so, since no rational being will say a negative thing against his own interest; all things being equal."[11] A confessional statement is an admission made by a person charged with an offence stating and suggesting that he committed the offence. The Supreme Court per Adekeye JSC (as he then was) held that:

By virtue of Section 27 (1) and (2) of the Evidence Act, a confessional statement is a statement by an accused person charged with an offence stating that he committed the offence. The position of the law is that a free and voluntary confession which is direct and positive and properly proved is sufficient to sustain a conviction without any corroborative evidence so long as the Court is satisfied with the truth. There is however a duty on the Court to test the truth of a confession by examining it in the light of the other credible evidence before the Court.[12]

For a prosecution to secure conviction before a court of law based on a confessional statement, the confessional statement must be voluntary, direct, it must be unequivocal in the sense that it leads to the guilt of the maker.[13] In Nigeria, guilt of an accused person may also be established through direct evidence. It is an eye

[9] Supra notes 6 and 7 respectively in *Victor v Nebraska the State of Nebraska Supreme Court* opined that in proving a case beyond reasonable doubt, the government must establish a defendant's guilt beyond a reasonable doubt, requiring trial courts to avoid defining reasonable doubt in a way that might make the jury convict on a lower standard than due process demands and upon considering the instructions as a whole, the conclusion reached is that they correctly conveyed the concept of reasonable doubt to the jury.

[10] *Ojo v State* (2018) LPELR – 44699 SC at pp. 24 – 26.

[11] *Otoha vs. The State* (1975) 1 SC 55.

[12] *Adekoya v State* (2012) SC (Pt. III) 36.

[13] *Solola & Anor v State* (2005) LPELR - 3101 39, para D.

witness account which proved a fact without making any inference to connect the evidence to the fact.[14] In law direct evidence "linking an accused person with the commission of the offence he (accused) can safely be convicted for the commission of the said offence."[15] However, opposite to direct evidence is the circumstantial evidence, it is evidence that indirectly connects the accused person with the offence. The evidence "gives rise to a logical inference that such a fact exists or that the happening occurred."[16] The Apex Court has described circumstantial evidence as evidence which is capable of establishing guilt of an accused person with accuracy:

> Circumstantial evidence has been described as - the evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics ... See R v. Taylor & Ors. (1928) 21 CAR 20 at 21. *In R v. Teper* (1952) AC 480 at 489, it was held as follows:- "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another ... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.[17]

By the provisions of Sections 67 - 68 of the Evidence Act, 2011, a court is empowered to use expert evidence to form an opinion on issue of science. One of the persons considered in law as expert is a Medical Doctor based on his special field of scientific knowledge.[18] Evidence of an expert before a court which is unchallenged may be a conclusive proof of fact in issue.[19] Medical Report properly tendered in court proceedings can be used to establish offence of rape.[20]

In the instant case the prosecution at the Trial Court used confessional statement and oral evidence of the prosecutrix and that of PW2 who is an uncle to the prosecutrix. The ingredients of the offence of rape can be found in Section 282 of the Penal Code Law of Jigawa State:

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[14] *Dada v State* (2017) LPELR – 43468 41 para D.
[15] *Aiguoreghian & Anor v State* (2004) LPELR – 270 20.
[16] *Igbele v State (2005)* All FLWR (Pt. 285) 568.
[17] *Odogwu v State (2013)* LPELR - 42802 64-65 paras F-B.
[18] *Oladele v State (1993)* LPELR – 2548 23.
[19] *Obanor v Obanor (1976)* 2150 PP 6 –7 PARAS E – B.
[20] *Muazu v State (2018)* LPELR - 46768 CA 35 – 36 paras A-E.

> The essential ingredients of the offence of rape as stated and endorsed in a plethora of judicial authorities which the prosecution must prove are the following:- a. That the accused had sexual intercourse with the prosecutrix (the victim). b. That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force threat, intimidation, deceit or impersonation or when she is under the age of 14 years. c. That the prosecutrix (victim) is not his wife and d. That the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not. e. That there was penetration.

In establishing the offence, the 1st prosecution witness was the victim of the crime. She testified that it was the Appellant who raped her after he gave her sweet and she fell asleep. Under cross examination the prosecutrix admitted that if a person is asleep, he would not know what is happening. His Lordship Honourable Justice A.D. Yahaya commenced his judgment by raising doubts in the evidence placed by the prosecution at the Trial Court by faulting the oral testimony of the prosecutrix who testified as PW1.

The evidence of the witness was incredible as described by His Lordship, because, the witness claimed that the Appellant had removed her pants, had sex with her which caused blood stains on her under wear pants while she was asleep without feeling any pains.[21] My Lord Justice Yahaya opined that the evidence of the prosecutrix is not true unless at the time the incident took place she was drugged and there was no evidence on record which suggest that.[22] Another reason which made His Lordship to disbelieve the testimony of the prosecutrix was that the sexual intercourse in question had happened outside the prosecutrix's house which is an open accessible to public and nobody saw the duo while the illicit act was taken place. His Lordship opened up by baring his mind that the interrogatory questions or issues he pondered on and "...that raises serious doubt on the narration of the PW1."[23]

Linked to the above issue which raises doubt about the rape story narrated by PW1, the learned Justice of the Court of Appeal went further to punch the extra judicial statement of the Appellant. The confessional statement according to His Lordship

[21] Supra note 3, p 17.
[22] Supra note 10, 17 – 18.
[23] Supra note 9, p 18.

was not voluntary. From the record of the Trial Court the Appellant had at the time the extra judicial statement was sought to be tendered, objected to its admissibility on the ground that he did not make the statement although he said he was forced to sign the confessional statement. The Statement was critically evaluated and the court arrived at a decision that the supposedly statement was not made by the Appellant and the submissions of the Prosecution at the trial court and the findings of the trial Court were not borne out of records.[24] His Lordship further held that he was not satisfied that the extra judicial statements i.e., Exhibits P1 and P2 (Hausa language and English language version of the Statement) were voluntary. His Lordship found that "the trial court completely ignored that the objection was also that he (Appellant) was forced to sign it.[25] And according to His Lordship even if the statements were that of the Appellant, His Lordship opined that "I have grave doubts about them in the sense that I doubt if the Appellant made them..."[26]

The reasoning of His Lordship is like a double-edge sword. In one angle, My Lord had faulted the voluntariness of the extra judicial statements of the Appellant. In another breadth, His Lordship questioned its authenticity. To His Lordship, the prosecution ought to have proved the voluntariness of the statements through Trial-Within-Trial[27]. The position taken by His Lordship has once again brought out one major challenge prosecution are facing in Nigeria. Sometimes statements of the suspects at Police Stations or State Criminal Investigation Departments are obtained under duress. The Apex Court made an observation that in most cases statements given to the Police by uneducated suspects are not credible. "It must be noted that most crimes are committed by people with little or no education, consequently they are easily led along by the Investigating Police Officer to write incriminating statements which legal minds find almost impossible to unravel and resolve."[28]

In further appraisal of Exhibits P1 and P2 His Lordship Justice A.D. made alternative findings that even if the statements were voluntary, in His Lordship opinion there are serious questions and inconsistencies between the content of the statements and the testimony of PW1 - the prosecutrix.[29] "Whilst PW1 said she had her pant on and she saw it blood-stained on the fateful day, the confessional

[24] (2012) SC (Pt. III pp 22 – 24.
[25] Supra note 24, p 35.
[26] Supra note 11, p 27.
[27] .Supra, note 12; *Bazogun v AG Federation (1994) 5 NWLR PT 344*
[28] *Owhoruke v COP* (2015) LPELR - 24820 per Rhodes-Vivour JSCA at 22 para E – F.
[29] Supra note 13, p 28.

statement shows that she was not wearing any pant on that day. Again, the evidence of PW1 is that she fell asleep and did not know when he (Appellant) was defiling her. The confessional statement said nothing of the sort. It never said that she fell asleep before he allegedly had the intercourse with her."[30]

The inconsistencies pointed out by His Lordship led My Lord to opine that there was possibility someone else could have been responsible of doing the illicit act without PW1 knowing since she said at the time the incident was done outside their house she was deep asleep.[31] It was the foregoing finding that prompted My Lord to conclude that there was no evidence of penetration or evidence of unlawful sexual intercourse between the Appellant and the PW1.[32] My Lord went further and strengthened his finding of absence of illicit sexual intercourse with an opinion that thorough investigation was not done. And since the Appellant had given birth to a baby girl, the prosecution ought to have resorted to DNA test that would have solved the puzzle as who had illicit sexual intercourse with the PW1:

> It was a messy investigation if there was one. All that the police did, was to allegedly, record the statement of the Appellant. All the questions I raised, should have been part of what the police would investigate and inform the Ministry of Justice. A simple DNA test would have been able to show whether the baby girl is the daughter of the Appellant. The police did not conduct one and the Ministry of Justice as the prosecutor, did not order for one. The result is the serious lapses manifest in the whole saga.[33]

The question here is what is DNA (deoxyribonucleic acid)? "Is a molecule found in cells throughout the body that carries our genetic information."[34] It can be used to link a suspect with a crime or exclude him.[35] In the instant case, blood or other types of biological evidence may be collected from the Appellant and the child given birth by the prosecutrix. In Jigawa State after the case under review six (6) different DNA tests were conducted to establish case of rape against six suspects. The suspects were arrested for impregnating two young girls who gave birth to two

[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] (2015) LPELR - 24820 p 31.
[34] Lonsway, Kimberly A., Archambault, J., O Donnell, P., Ware, L. (2016) Role of DNA Evidence in Sexual Assault Investigations. Part 1: The ABC's of DNA Evidence. End Violence against Women International 5.
[35] Ibid.

boys and the girls claimed it were the suspects responsible for the pregnancy clarification needed. The suspects denied ever having sexual relation with the victims. The six DNA analysis of the samples taken from the suspects and the two babies at the Headquarters of the Jigawa State Command reveals that the alleged 'fathers' or suspects are excluded as the biological parents of the tested children. The conclusion is based on the non-matching alleles observed at the loci tested with PI equal to 0. The alleged parents lacked the genetic markers that must be contributed to the child by the biological fathers. The probability of paternity is 0%.[36]. The challenge with DNA in proof of rape where the victim of rape had given birth, the suspect denied the allegation and there was no eye witness is that it might be possible that the suspect and another person had sexual intercourse with the victim and the pregnancy may belong to another person who has not been identified and subjected to the DNA test. In law pregnancy alone is not evidence of penetration which is the significant element of rape. There could have been penetration slight without the victim becoming pregnant "Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape."[37]

The multifaceted gaps and questions raised by His Lordship in the case under review raise doubts and uncertainty. This made the Court of Appeal to conclude that the evidence of PW1 is incredible and that Exhibits P1 and P2 were inadmissible and ought to be expunged from record. There was no evidence of eye witness on record to support the charge of rape against the Appellant. One thing observable from the decision of the Court of Appeal which influenced the Court to allow the appeal was that the Appellate Court at various pages of its decision had made reference to findings of the trial court that were not supported by evidence on record.[38] It is the position of the law that once decision of a Trial Court is not supported by credible evidence on record such judgment is perverse and an Appellate Court has a duty to set it aside and acquit the defendant.[39]

[36] The samples of the two babies and six suspect were taken on 26th July, 2020 and 25th November, 2020 and they were exonerated from the allegation of rape after issuance of the result. The interpretation of the results were made in the presence of the suspects and the relations of the victims of the crimes.
[37] *Isa v State* (2016) LPELR – 40011 SC 14, paras C-D per Ogunbiyi JSC (as he then was).
[38] (2016) LPELR – 40011 SC 1423 - 25.
[39] *Edun & Anor v FRN* (2019) LPELR – 46947 SC per Peter-Odili JSC at 44 – 45, para B.

1.5 Conclusion

The case under review has restated the aged long position of the law that offence of rape like any other crime must be proved beyond reasonable doubt. The prosecution is duty bound as stated in the decision to establish their case through credible evidence. Establishing the offence of rape is predicated upon thorough investigation by the police and where a gap exists, prosecutors in the Ministry of Justice must guide the police to fill in the lacunae. In the instant case Court of Appeal opined that the Ministry of Justice ought to have guided the police to conduct DNA test to ascertain whether paternity of the baby girl given birth by PW1 could be linked to the Appellant. The Court of Appeal clearly indicated that it does not affirm findings of evidence by trial court which is predicated on inadmissible evidence in law. Where trial court believes evidence that is contrary to logical reasoning same will be rejected on appeal. Confessional statements used in the instant appeal were not voluntary and the evidence of PW1 was incredible. The Appellate Court justices in the instant appeal critically reviewed the findings of the trial court to ensure there is no any loophole in favour of the convict. Hon Justice A.D Yahaya in the lead decision had dispassionately evaluated evidence on record in the appeal devoid of sentiment and rightly came to the conclusion that there is reasonable doubt in his mind as such the Appellant was discharged and acquitted. The decision is a food for thought for the police as investigators of rape offences and the Ministry of Justice as the prosecuting ministry in Nigeria.