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This article examines the question of the scope of judicial review in Nigeria. The paper criticizes the traditional conception of judicial review which gives judicial review a strictly narrow and limited scope by limiting the concept to merely legality of an administrative or legislative action or in-action as well as the legality of decisions and actions of inferior courts and tribunal but not the merits of such an action. The paper finds that such an approach which is applied by Nigerian courts is not consistent with the current trends in administrative law in the Commonwealth. The paper therefore advocates an expansion of the scope of judicial review to the merits of an administrative action or decision. The paper prognosticates that with the coming into being of the Freedom of Information Act 2011, the National Environmental Standards and Regulation Enforcement Agency Act 2007, the Fundamental Rights Enforcement Procedure Rules 2009 and such decisions as the Court of Appeal decisions in Fawehinmi v. Abacha and Fawehinmi v. The President, Federal Republic of Nigeria & Ors, the storm towards giving judicial review an expanded scope in Nigeria has started gathering and it is only a matter of time before the traditional approach to judicial review would be swept away in favour of a liberal approach which would enable judicial review to extend to merits of a target activity in deserving cases.

I. Introduction

Judicial Review is important as an effective means of securing the legal control of our administrative process. It is a great and effective deterrent to administrative excesses and abuses. In man’s unending quest for liberty and freedom, judicial review is evolved as a means of effectively holding the government and its functionaries in check and stopping them from trampling on the rights of the individual. Judicial control appears to be the most effective means of imposing and enforcing the demands of the
rule of law on the administration. It clearly underscores the relevance of the theory of Montesquieu that if the liberty of the individual is to become a reality, power should be made to check power – an arm of government, like the judiciary, and not an individual should be set to oppose and check another arm of government.

Current jurisprudence on judicial review restricts the concept to the determination of the legality of a governmental measure but not the merits or wisdom of such an action or inaction. The question that arises is whether it is not desirable in certain circumstances to extend the powers of judicial review to the merits of a target activity? This paper examines that question proceeding upon the plank provided by the Court of Appeal decision in *Fawehinmi v. Abacha*.¹ In *Fawehinmi v. Abacha*, the Court of Appeal held that the power of judicial review in deserving circumstances extended to the merits of a target activity or decision. The Supreme Court disagreed with the Court of Appeal on the issue.² This paper finds that the Court of Appeal decision in *Fawehinmi v. Abacha* is a radical departure from traditional notions of judicial review and was nothing short of an extension of the powers of judicial review in Nigeria. The paper is of the view that the Court of Appeal posture is one worthy of sustenance and should be encouraged for the deepening of democracy and transparency in the conduct of the business of governance in Nigeria. Notwithstanding the position of the Supreme Court on the issue, it is thought that the Court of Appeal decision provides the new direction necessary for further development of judicial review in this country. The paper is also of the view that recent statutory developments are in accord with the Court of Appeal approach. Some of these developments have the effect of not only expanding the scope for judicial review by relaxing *locus standi* requirements, but also the possibility of expanding the frontiers of judicial review into the merits of target activity. The paper is divided into five parts. Part one introduces the concept of judicial review, its scope, nature as traditionally understood and relevance. Part two examines the extension of the power of judicial review in England in the case of *Padfield v. Minister of Agriculture, Food and Fisheries*.³ Part three outlines the case of *Fawehinmi v. Abacha*, makes a case for the extension

¹ [1996] 9 NWLR (Pt. 475) 710.
of the powers of judicial review to the merits of a case in exceptional circumstances. Part four examines recent statutory developments in the field of judicial review and the impact on the existing framework for the exercise of judicial review while in part five, the paper concludes that with the Court of Appeal decisions in *Fawehinmi v. Abacha* and *Fawehinmi v. President, Federal Republic of Nigeria & Ors.*, the enacting of the Freedom of Information Act 2011 (FOI Act), the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (NESREA Act) and the new Fundamental Rights Enforcement Procedure Rules 2009, the storm has started gathering and it is only a matter of time before the traditional notions of judicial review conceived of as restricted only to legality is blown away and replaced by a more liberal conception which extends judicial review to merits of a decision in deserving cases. The paper therefore recommends an adoption of the reasoning of the Court of Appeal by the Supreme Court at the earliest opportunity and a more rigorous application of the principle established by the Court of Appeal in *Fawehinmi v. Abacha*.

A. Meaning, Nature and Scope of Judicial Review

Judicial Review can be looked upon either as a power or a process. It is the power of the court or the process by which the court exercises a supervisory jurisdiction over the acts of the executive and legislative arms of government. According to Professor Nwabueze, judicial review is the power of the court in appropriate proceedings before it to declare a governmental measure either contrary or in accordance with the Constitution or

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7 The Rules which took effect on 1st December, 2009 were made on the 11th day of November 2009 by the then Chief Justice of Nigeria, Idris Legbo Kutigi, GCON.
other governing law, with the effect of rendering the measure invalid or void or vindicating its validity…”

In general terms, judicial review refers to judicial control of the other arms of government. In a technical sense, it refers to the judicial control by superior courts of record typified by the High Court, of both executive and legislative exercise of powers extending to exercise of powers by inferior courts and tribunals, such powers being exercised by the superior courts in their supervisory role. The supervisory jurisdiction of the court is not limited to the executive branch of government. It extends to the legislative arm of government. Thus, the Court of Appeal held in *Oruobu v. Anekwe & Ors* that “by virtue of s. 4(8) of the 1979 Constitution, the Courts have a supervisory jurisdiction over the exercise of legislative powers by the legislature and the National Assembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of the courts.”

By supervisory jurisdiction or supervisory role, we mean, that the courts must and generally do recognize that the statutory responsibility for performing a given administrative task belongs first and foremost to the administrative agency (or legislative house as the case may be) and that no other person or authority is competent under the law to exercise that function. Therefore, the courts can only review the action taken by the agency solely for the purpose of determining whether or not the agency has acted within the limits prescribed by the enabling statute. That is, the essence of the supervision. Judicial review therefore, has a strictly limited role in the administrative process. It does not apply to every act and decision of the administration. There is no automatic system of review applying generally and continuously to all acts of and decisions of the administration. Therefore, judicial review is often said to be peripheral and occasional, but its deterrent effect is spread like net over the whole length and

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9 Such a power is also to some extent vested on the Customary Court of Appeal being a superior court of record of first instance. See *R v. Northumberland Compensation Appeal Tribunal, ex Parte Shaw* (1952) 1 KB 338 on court with power of judicial review. In the case of the Court of Appeal and the Supreme Court, they also exercise powers of judicial review in an appellate capacity. Here, they do not exercise general powers but limit themselves to the legality of the questions raised.

10 (1997) 5 NWLR (Pt. 506) 618 at 634-635.
breadth of governmental activities, compelling officials to think twice before taking one step forward.

In Military Governor of Imo State v. Nwauwa, the Supreme Court expounded the principles governing the exercise of judicial review. In that case, the respondent challenged the exercise of power by the Military Governor of Imo State to remove him as the traditional ruler of Izombe following series of petitions and an inquiry set up by the Governor. The Supreme Court held that the Court of Appeal exceeded its jurisdiction in trying to substitute its own opinion or views for the views of the Panel of inquiry. According to the Supreme Court:

a) Judicial review is not an appeal;
b) The court must not substitute its judgment for that of the public body whose decision is being reviewed;
c) The correct focus is not upon the decision but on the manner in which it was reached;
d) What matters is legality and not correctness of the decision.
e) The reviewing court is not concerned with the merits of a target activity;
f) In a judicial review, the court must not stray into the realms of appellate jurisdiction for that would involve the court in a wrongful usurpation of power;
g) What the court is concerned with is the manner by which the decision being impugned was reached. It is legality, not its wisdom that the court has to look into for the jurisdiction being exercised by the court is not an appellate jurisdiction but rather a supervisory one.

B. Judicial Review Distinguished from other Court Procedures

Judicial review is quite different and must be distinguished from “appeal” or a normal adjudicatory proceeding. In the exercise of its normal constitutional function of adjudication, the judiciary has to entertain all actions, make all necessary determinations involving law and facts, and see that all parties get each his due according to the law of the land. In the case of an appeal, the courts may have to go into the merits of the case and the weight of evidence sustaining the decision; it may have to rehear all or some aspects of the case and find support or justification for the

11 (1997) 2 NWLR (Pt. 490) 675; see also Governor of Oyo State v. Folayan (1995) 8 NWLR (Pt. 413) 292.
decision given below; it may have to quash a decision appealed against and replace it with its own decision or do whatever the justice of the case demands.

In judicial review, on the other hand, as already stated, the courts must and generally do recognize that the statutory responsibility for performing a given administrative task belongs first and foremost to the administrative agency concerned and that no other person or authority is competent under the law to exercise that function. Therefore, the courts can only review the action taken by the agency solely for the purpose of determining whether or not the agency has acted within the limits prescribed by the enabling statute. The courts cannot go into the matter de novo or set aside the agency’s decision merely because the courts would have come to a different conclusion or decision. In other words, the courts’ view on the merits of the case should be disregarded and attention focused on whether the express and implied requirements of the enabling statute have been met – whether the agency has kept within the limits of its jurisdiction, whether it has applied the proper procedure and acted fairly on all concerned, whether it has acted reasonably in good faith by avoiding irrelevant, and considering relevant factors. In short, if the thing done is _intra vires_ and, in a proper case, there is no violation of the rules of natural justice and no error of law apparent on the face of the agency’s record, the courts cannot go any further. Where the above requirements are not met as where the requirements of the enabling statute have been disregarded, the courts can only quash what has been done or proclaim it invalid and leave the agency free to take back the case and exercise the functions once again.

Sometimes, it is difficult to draw a clear line between judicial review properly so called and a normal adjudicatory proceeding or even appeal. Such difficulties may be traced to the fact that unlike in England, where the power of judicial review is almost entirely of common law origin, in Nigeria, quite apart from its common law origin, the power of judicial review as well as all other judicial powers are traceable to the Constitution (the basic law of the land) which in section 6 vests all judicial powers in the courts. So, we find a situation where it is the same courts that exercise judicial review that also conduct normal adjudicatory proceedings as well as appeal in some matters. Again, the attitude of the Nigerian courts which show a shift away from technicality
to doing substantial justice\textsuperscript{12} has compounded the situation. The result is that the courts do not follow strictly the provisions of the various High Court Rules relating to the commencement of proceedings for judicial review. While the various High Court Rules provide for a two-phased applications (the first one is for leave to apply for judicial review brought \textit{ex parte} while the second one is the substantive application by way of summons or motion on notice), cases of judicial review are known to have been commenced by way of writ of summons, which is usually used to commence proceedings coming before the courts in the exercise of their normal adjudicatory process. A case in point is the case of the \textit{Military Governor of Imo State v. Nwauwa}\textsuperscript{13} which was commenced by way of writ of summons. The reasoning of the court in such cases as evidenced in such cases as \textit{Falobi v. Falobi}\textsuperscript{14} is that the mere fact that a case is brought to court under a wrong law or procedure should not be allowed to defeat the action provided that the court has jurisdiction to take cognizance of such cases. Consequently, today, we have cases in which the court is exercising normal judicial proceedings but in substance is a judicial review proceedings because what is in issue before the court is entirely the legality or otherwise of an administrative agency’s action or inaction. The result is that in Nigeria today, in order to determine whether a given proceeding is a judicial review proceedings or not, we have to look, not at the form of proceedings but the substance of such proceedings. If looking at the substance of the proceeding, it is the legality or legal validity or otherwise of an administrative action that is in issue, then it is a matter of a judicial review notwithstanding the form of action.

II. Judicial Review Extended in England

In \textit{Padfield v. Minister of Agriculture, Fisheries and Food}\textsuperscript{15}, the Agricultural Marketing Act, 1958, provided that, “if the Minister in any case so directs” a committee of investigation should investigate any dispute arising under the milk marketing scheme established under the Act. Milk producers from within and


\textsuperscript{13} Supra.

\textsuperscript{14} (1976) 9-10 SC 1.

\textsuperscript{15} (1968) A. C. 997.
around London complained that the price fixed for milk from outlying provinces did not take full account of the cost of transport from those provinces. Because the complainants were in the minority in the board, and any change in the price already affixed would affect the majority group adversely, the board refused to change the price. Although, the minister could, after an investigation by the committee, order modification in the price so as to take full account of the variable factors, he did not take any action; he said he did not want to interfere with the normal democratic machinery” of the scheme. In an action by the complainant, mandamus was issued to compel the Minister to set the machinery in motion to investigate the complaint as required by the Act, as otherwise, the protection provided by the Act for the minority on the board would become useless. In doing this, the court rejected the contention of the Minister that his power under the Act was absolute and unfettered. It maintained that the Minister had no power to thwart the policy or objects of the Act. As Lord Reid said, in such a situation, “our law would be very defective if persons aggrieved were not entitled to the protection of the court.” Their Lordships maintained that every statute conferring authority on an agency has some policy or objects in view, and it is for the courts to determine the said policy or object by construing the statute. Even where an unfettered discretion is granted to a minister by a statute, that in itself “can do nothing to fetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully, and where he acts lawfully, he can take a decision “which cannot be controlled by the courts; it is unfettered.” It is for the courts to determine whether and when his action is lawful.

The above decision fortified Lord Denning, M. R., in the view he expressed in Breene v. Amalgamated Engineering Union where according to his Lordship:

The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decisions is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is

16 (1971) 2 Q.B. 75
 Padfield is a landmark in modern administrative law because it established that even when the statute says that an administrative agency shall act if is satisfied, the courts may inquire into the factual situation to see if there are facts to support his finding of satisfaction and if there are none, to void his decision taken without the necessary factual support. By taking such a stand, the court in Padfield was threading on tracks uncharted before and what it succeeded in doing was nothing short of expanding the powers of judicial review in England.

III. The Case of Fawehinmi v. Abacha

In Fawehinmi v. Abacha, the Court of Appeal considered the exercise of discretionary powers by the Inspector-General of Police under the State Security (Detention of Persons) Act, cap 414 Laws of the Federation of Nigeria 1990 as amended by the State Security (Detention of Persons) (Amendment) Decree No. 11 of 1990 and came to the conclusion that the powers of the IGP were not unfettered powers. The Court of Appeal held that the Court could inquire into the factual basis for the exercise of discretion and would normally accept the opinion of the officer but if the opinion was one which no reasonable officer could in the circumstances reasonably hold, then, the Court would nullify the exercise of discretion and make an appropriate order. The Supreme Court disagreed with the Court of Appeal on this and held that the Decree vested an unfettered power on the IGP. What happened was that the appellant, Chief Gani Fawehinmi, was arrested on Tuesday, 30th January, 1996 at about 5.15 am at his residence in Ikeja, lagos by a horde of policemen and State Security Service (SSS) officers fully armed with guns. Without presenting any warrant of arrest or giving any reasons therefor, they arrested the appellant and took him away to SSS Lagos office at Shangisha, Lagos and detained him for about a week without allowing anybody to see him. Thereafter, he was secretly transferred to Bauchi prisons where he was further detained. As a

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17 At. p. 190.
result of the foregoing, an application for the enforcement of the appellant’s fundamental rights was filed at the Federal high Court Lagos on his behalf seeking declarations to the effect that his arrest and detention were illegal, an order of mandatory injunction for his release, an injunction restraining the respondents from further infringement of his fundamental rights, and damages to the tune of ₦10,000,000.00 (ten million naira).

After leave was granted and service of the appropriate processes effected on the respondents, they filed a preliminary objection to the action challenging the competence of the suit on the grounds that the respondents/applicants are immune to any legal liabilities for any action done pursuant to the Decree No. 2 of 1984 (as amended) and that the court lacked jurisdiction by virtue of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993 which oust the jurisdiction of the Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of the Decree. At the hearing of the preliminary objection, the respondents contended that the appellant was detained pursuant to a detention order made by the IGP under the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and consequently, the court has no jurisdiction to hear the action in that its jurisdiction was ousted by the Decree. However, the respondent’s counsel merely produced the said detention order in court but did not in any way tender it in evidence. The said detention order which was made on and dated 3rd February 1996 stated inter alia, the place of detention of the appellant as Bauchi Prison. The appellant counsel on the other hand contended that the IGP has no powers to issue the detention order in that Decree No. 11 of 1994 which sought to vest him with that power was otiose and that, the provisions of the said Decree No. 2 of 1984 are inferior to and cannot override the provisions of the African Charter on Human and Peoples’ Rights under which the appellant was seeking the afore-stated reliefs and also that the said detention order did not cover the period between 30th of January to 2nd of February 1996 of the appellant’s period of detention. The learned trial Judge , after hearing arguments on the objection, upheld the objection and struck out the suit whereupon the appellant appealed to the Court of Appeal. After a consideration of the relevant laws including the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended), the African Charter on Human and Peoples’ Rights
(Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990, and the 1979 Constitution, the Court of Appeal allowed the appeal and held *inter alia*, that:

By virtue of section 1 of decree No. 2 of 1984 (as amended), if the Inspector – General of Police is satisfied that any person is or recently has been concerned in acts prejudicial to State Security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such act, and by reason thereof it is necessary to exercise control over him, he may by order in writing direct that person to be detained in a civil prison or police station or other places specified by him. From the above, the considerations that inform the satisfaction of the Inspector – General of Police to issue detention order is rooted on empirical facts which he ought to come to dutifully and honestly and not by mere fanciful or wishful thinking. It imparts on him elements of discretion founded on hard core reasoning and endurable and unadulterated facts. Because the Inspector General of Police is discharging the duty on behalf of the public, they, it must be conceded, are entitled to know the situational premise on which the Inspector – General appears to have acted.19

According to Pats – Acholonu, JCA (as he then was):

Another point I wish to discuss is that the Detention of persons State Security to be appreciated by the people on whose behalf it is made, it is to be understood that the done as well as the detaining authority should be able to show how the appellant is a security risk to the State. By this I mean he is accountable to the public whose duty it is to discern whether the detention order was made in good faith. The new trend in this area of law now imposes on the detaining authority the duty he owes to Nigerian citizens to be ready to explain his actions, if not, an order of mandamus might lie. In such a case he should be precluded from taking any protection under the ouster clause,

19At p. 760. Emphasis added.
if it is found that the detention order is not in compliance with the statute.\textsuperscript{20}

In the words of Musdapher JCA (as he then was):

The courts have evolved mechanisms of interpreting discretionary powers restrictively. In this way, courts have been able to preserve the rule of law. In matters involving ordinary laws, the courts in Nigeria have the jurisdiction to examine in appropriate cases how discretionary powers are exercised. It is part of the Administrative law which frowns at abuse or misuse of power.\textsuperscript{21}

The respondents were not satisfied with the decision of the Court of Appeal, hence they appealed to the Supreme Court. The appellant also cross-appealed. The Supreme Court while agreeing with the Court of Appeal on the status of the African Charter on Human and People’s Rights however disagreed with the Court of Appeal’s position or decision on the extent of powers of judicial review of the actions of the Inspector General of the Police. According to Achike JSC (of the blessed memory):

\begin{quote}
The authority conferred with the power to issue detention orders under the State Security (Detention of Persons) Decree No. 2 of 1984 is vested with expansive power which is both discretionary and subjective. There is no obligation in him to disclose reasons in the way and manner he exercises his subjective discretion… . Now, let me return to the case in hand. It is quite clear that the provisions under section 1 (1) of Decree No. 11 of 1994 give the Inspector General of police a free and unfettered power to reach his conclusion, relying on such data and information that he may deem fit in being satisfied that any particular person’s act is prejudicial to state security. No reasons are given by the detaining authority to anyone as to how a detainee is or constitutes himself in acts detrimental to state security. Put tersely but frankly, it is manifest that the power vested in the detaining authority can be wielded arbitrarily and capriciously without any remedy or right to seek a review of the decisions of the detaining authority…learned cross-appellant’s counsel has urged that the phrase “if the Chief of Staff is satisfied” should be interpreted to mean “if the chief of staff has adequate reasons in fact to be satisfied”.
\end{quote}

\textsuperscript{20}Ibid. Emphasis added.
\textsuperscript{21}At p. 749.
With utmost respect to counsel, I am unable to accept this; it is an unwarranted encrustment on the plain and unambiguous provisions of the statute… . It is pertinent to remember that the relevant time of the operation of these Decrees was during the military regime, a time that the provisions of the 1979 Constitution had been substantially suspended and when judicial powers of the state had been radically eroded and inclusion of ouster of the jurisdiction of courts of law in statutes became the rule rather than the exception. It is against this background that the plenitude of subjective discretionary power conferred on the detaining authority could be better appreciated.  

The Supreme Court decision in Abacha v. Fawehinmi was delivered on 28th April, 2000 after the country had been returned to democratic rule in 1999 following several years of military interregnum. One would have thought that the decision would have been influenced more by democratic ideals rather than justifications for aberrations and atrocity perpetrated by military dictators. The views as expressed by Achike JSC above can be properly taken to be the view of the Supreme Court on the issue since it was not challenged by any other Justice of the Court. This in our humble view is rather unfortunate. This is because, the decision as it were, confers on an administrative agency unfettered discretion which is an anathema to the rule of law. This cannot be right because even the military government itself usually proclaims that it is operating the rule of law. A close reflection on the case of Padfield v. Minister of Agriculture, Food and Fisheries would reveal that in our Administrative Law, there is no such thing as unfettered power. Thus, even if a statute purports to vest power or discretion on an authority in absolute terms such as the Minister or some other body to take action if he is satisfied, the courts have ruled that he must be satisfied upon reasonable grounds. If there are no reasonable grounds to support his finding, it must be reviewed. As rightly observed by Lord Denning MR in Breen v. Amalgamated Union, Padfield is a landmark in modern administrative law. That was why His Lordship, Pats – Acholonu remarked that the trend they were adopting in the Court of Appeal is the current trend in this area of the law.

It is true that stricto sensu, judicial review is limited to pronouncing on the legality but not on the merits or wisdom of an administrative decision, action or inaction. The principle is

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23 Supra.
founded upon the doctrine of separation of powers which assign functions to the different arms of government. Thus, in judicial review, the reviewing court proceeds from the premise that the task at hand is one that belongs to a different arm of government and its role is limited to determining whether that arm of government has properly exercised the power within the ambit of the law. Where the concerned arm of government has not exercised the task within the law, it can only declare it illegal but it cannot impose its views or interpose its own decision for that of the agency concerned for that would also amount to a wrongful usurpation of authority. These principles were recently restated by the Supreme Court in *Egharevba v. Eribo.*

The principles as stated by the Supreme Court are no doubt correct. But they are not foolproof. In the first instance, it is recognized today that the principles of separation of powers are not as watertight as originally conceived by Montesquieu. This has also led to recognition of the principle of delegation of powers by the courts even in the face of hostile constitutional principles. The executive today exercise not only executive functions qua executive functions but also judicial and legislative function. Dealing specifically with review of administrative actions, the truth is that in many cases, where the boundary between legality and merits is to be drawn is often impossible. Some cases may be clear and pose no problem. But in some others, the issues of legality may be so intertwined with the merits that there can be no way of pronouncing on the one without expressly or impliedly pronouncing on the other. Such situations are comparable to cases where the courts are called upon to pronounce on their jurisdiction *in limine* but the court finds that it cannot make such a pronouncement without going into the merits of the case. In such cases, the courts have held that it is entitled to go into the merits of the case, take evidence and at the end of the day make a pronouncement. This principle could be extended to the exercise of powers of judicial review so that in cases where legality is tied up with the merits, the court can pronounce on the merits. On the other hand, since delegation has already been accepted by our courts, the principle could be developed that a court faced with a situation where the legality is so intertwined with the merits as to be inseparable, the court would be deemed to have been delegated

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with the power to act for the agency or other administrative body. That way, the issue of usurpation and separation of powers would have been effectively dealt with.

The views expressed above are strongly supported by the fact that where statutorily, an appeal lies from the decision of an administrative body to a court of law such as the High Court, the Court is placed in exactly the same position as the administrative body and the court could interpose its decision for that of the administrative body. It is a paradox that while the High Court exercising powers of appeal over the decision of an administrative agency could interpose its decision for that of the agency, the same court exercising powers of judicial review could not do so. It does not appear to stand to reason to continue to make this distinction especially in view of the fact that the High Court except in so far as the Constitution has provided otherwise remains a court of general jurisdiction. The essence of the general nature of the jurisdiction of the High Court is to enable it to do justice as between the warring parties. Where the circumstances so dictate, the general nature of the jurisdiction of the court should enable it to make a pronouncement on the merits or wisdom of an administrative decision. After all, that is the essence of power being check against power. If there are facts at the disposal of the agency which it may not find expedient to disclose to the aggrieved citizen, then, the agency should be under obligation to disclose the same to the court in privileged circumstances so as to enable the court reach a decision that meets the justice of the case. The effect of the traditional notions of judicial review as expounded by the Supreme Court is to curb the unlimited jurisdiction of the High Court but we think this should not be so. That unlimited jurisdiction should extend to making any decision as the justice of a case demands even in a judicial review proceedings.

VI. Recent Developments
Some landmark developments have occurred recently to further propel and intensify the move towards giving judicial review an expanded scope in Nigeria. These are the enactment of the Freedom of Information Act, the new Fundamental Rights (Enforcement Procedure) Rules 2009, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (the NESREA Act) and the decision of the Court of Appeal in Fawehinmi v. President, Federal Republic of Nigeria & Ors. These statutes and decision have the effect of demolishing

\[26\] 2007 14 NWLR (Pt. 1054) 275.
the debilitating effects of *locus standi* in many aspects of public law, fundamental rights proceedings and environmental proceedings respectively.\(^\text{27}\) In *Fawehinmi v. President, Federal Republic of Nigeria & Ors.*, two former Ministers were paid remuneration for their office in foreign currency and far in excess of what was provided for in the law, i.e. the Certain Political and Judicial Office Holders (Salaries and Allowances, etc) Act No. 6 of 2003. Chief Gani Fawehinmi went to court to challenge the legal validity of those payments. An objection was taken on behalf of the respondents on grounds *inter alia* that Chief Fawehinmi did not have *locus standi* to bring the action. The Court of Appeal, held that he had *locus standi*. Aboki JCA delivered the lead judgment with which Muhammad and Uwa JJCA concurred. According to His Lordship, Aboki JCA, the Supreme Court has departed from the former narrow approach in *Adesanya’s Case* and subsequent decisions on the issue of *locus standi*. On the other hand, the new Fundamental Rights Enforcement Procedure Rules in item 3(e) of the Preamble to the Rules provides that:

> The court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non – governmental organizations may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

i. Anyone acting in his own interest;

ii. anyone acting on behalf of another person;

iii. anyone acting as a member of, or in the interest of a

iv. group or class of persons;

v. anyone acting in the public interest; and

vi. association acting in the interest of its members or other individuals or groups.

Order 2 rule 2 of the new Rules then went ahead to provide that “an application for the enforcement of the Fundamental Right may be made by any originating process accepted by the court which

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shall subject to the provision of these Rules, lie without leave of Court”. While item 3(e) of the Preamble to the new Rules dismantled the impervious wall of *locus standi*, Order 2 rule 2 has the effect of relaxing any complexities or controversies as to the mode of commencement of proceedings. Order 2 rule 2 has thus laid to rest the argument whether the Fundamental Rights Enforcement Procedure Rules is the only way to commence an action complaining of an infraction of fundamental right. The dictum of Bello CJN in *Ogugu v State* to the effect that the provisions of section 42 of the Constitution for the enforcement of Fundamental Rights enshrined in Chapter IV of the Constitution are only permissible and do not constitute a monopoly for the enforcement of those rights which was confirmed in *Abacha v. Fawehinmi* has now been codified. According to Onuoha, and we agree with him, the 2009 Fundamental Rights Enforcement Procedure Rules is as revolutionary as it is breath-taking. It not only liberalized the issue of *locus standi* in relation to fundamental rights enforcement litigation in Nigeria, it also infused a great sense of urgency in the conduct of fundamental rights enforcement litigation in Nigeria.

The Freedom of Information Act (FOI Act) has very serious impact on the availability of judicial review in Nigeria. Section 1 of the FOI Act deals a very deadly blow on the doctrine of *locus standi* in Nigeria. It expressly gives the right of access to court to citizens to compel public authorities to furnish information under the Act. It provides as follows:

1. Notwithstanding anything contained in any other Act, Law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

2. An applicant under this Act needs not demonstrate any specific interest in the information being applied for.

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(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.

As evident from the provisions of section 1 of the FOI Act, it is no longer open to public agencies to argue that applicant for judicial review does not have *locus standi* where such an applicant challenges the non-release of information covered under the Act.  

The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 by section 7 of the Act imposes an imperative public duty on the agency to *inter alia* enforce compliance with laws, guidelines, policies and standards on environmental matters; enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation and such other environmental agreements as may from time to time come into force; and enforce compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation, including pollution abatement. On the other hand, by section 7 of the Act, the agency shall have power to *inter alia* prohibit processes and use of equipment or technology that undermine the environmental quality; conduct field follow-up compliance with set standards and take procedures prescribed by law against any violator; conduct public investigations on pollution and the degradation of natural resources, except investigations on oil spillage; etc. The provisions of sections 7 and 8 of the NESREA Act could easily lead to conflicts between the agency and other agencies as well as

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between the agency and individuals. The matters are also such that the courts could easily pronounce upon the merits in the event of a conflicting opinion based on empirical evidence. The nature of many of the matters places the courts in as good a position if not better than the agency in the event of conflict. There is therefore no valid reason why the courts cannot pronounce upon the merits of the target activity in the event of a dispute. More importantly, the Minister under the Act pursuant to section 34 of the Act has made several regulations (eleven of them in 2009)\(^{31}\) which have the effect of relaxing *locus standi* requirements in environmental matters. For instance, under Regulation 10 of the National Environmental (Noise Standards and Control) Regulations 2009:

1. Any person may complain to the agency in writing if such a person considers that the noise levels being emitted, or likely to be emitted, may be higher than the permissible noise levels under these regulations or reaching disturbing proportions.

2. In any such complaint under sub–regulation (1) of this regulation, it is not necessary for the complainant to show or prove personal loss or injury or discomfort caused by the emission of the alleged noise.

Questions may arise as to the utility and relationship of these provisions to judicial review cases. However, such questions would only arise if judicial review is pigeon-holed and given a highly restricted definition. But immediately judicial review is broadly defined to include the power of the court to scrutinize the actions and inactions of the government especially with a view to

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determining the legality or otherwise of such actions, the relevance of these new laws become apparent in that they underscore the very essence of access to justice. Most judicial review cases would essentially be cases touching on fundamental rights and freedoms including the right to fair hearing as well as environmental rights. This is apparently why under the old rules, judicial review proceedings and fundamental rights proceedings followed exactly the same procedure. A close scrutiny of the cases would reveal that it is the practice in judicial review cases that has been codified in fundamental right cases, i.e., that the action could be commenced either by writ of summons, application for judicial review or other originating process as witnessed in *Military Governor of Imo State v. Nwauwa.*

It is most probable that the rules relating to the commencement of judicial review proceedings would in due course be reviewed and relaxed to fall in line with the ethos of the moment as expressed in the new Fundamental Rights Enforcement Procedure Rules. The expressed intention of these laws is to increase access to justice. By expanding the mode of commencement of action which would naturally include judicial review as well as expanding the scope or category of persons who can come forward to ventilate a claim, the new laws have greatly increased the scope for judicial review. The net effect of these developments is that judicial review will become more available to aggrieved citizens especially in the area of fundamental rights and environmental rights.

V. Conclusion

The Supreme Court’s view, per Achike JSC in *Abacha v. Fawehinmi* on the reviewability of the powers of the IGP does not reflect the true and contemporary approach to exercise of discretionary power. Such views turn officials into leviathans. It cannot be supported. The Court of Appeal decision obviously provides a better line of authority because it promotes the rule of law and not rule of arbitrariness as supported by Achike JSC. It is the considered view of this paper that even though the Supreme Court over-ruled the Court of Appeal on this issue, the Court of Appeal decision has firmly laid the foundation for the proper development of the law. The attitude of the Court of Appeal is in tune with the basic philosophy informing the enactment of the FOI

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Act, the NESREA Act and the new Fundamental Rights Enforcement Procedure Rules 2009, which have increased access to justice. With the Court of Appeal decision and the coming into being of these new statutes, the storm has started gathering and it is only a matter of time before the views expressed above by Achike JSC would be swept away in favour of the trend established by the Court of Appeal. The Court of Appeal decision in deed provides the new direction for the development of our law on judicial review of administrative actions. For it shows not only that the courts are prepared to recognize the principle that there is nothing like unfettered power under our administrative law, but also, that, in deserving circumstances, the courts would break down the barrier between legality and merits of a claim, by going into the factual situation to determine the reasonableness or otherwise of an administrative decision in order to do justice. That judicial attitude is highly commendable and it is expected that the Supreme Court would use the earliest opportunity to take a second look at the Court of Appeal position in Fawehinmi v. Abacha with a view to adopting the trend canvassed therein. The challenge before the Supreme Court will be to delineate the conditions under which a court exercising powers of judicial review can go into the merits of the case. In tackling that question, it is submitted that there can be no hard and fast rule since a reviewing court must always have at the back of its mind that it is a superintending authority and that the only reason why it is called into play is to avoid a failure of justice. However, in exceptional circumstances, the court must be entitled to intervene by going further than just restricting itself to merely declaring the legality and not pronouncing on the merits. What is an exceptional circumstance must be left to be determined on the basis of each case. Finally, it is to be noted that while FOI Act, the NESREA Act and the Fundamental Rights Enforcement Procedure Rules 2009, have all relaxed locus standi requirements, the provisions of the FOI Act and the NESREA Act in particular have great potentials for extending judicial review to merits of a target activity.
LEGAL FRAMEWORK FOR THE PROTECTION OF SOCIO-ECONOMIC RIGHTS IN NIGERIA*

Abstract
Global political and social realities dictate the imperative of a holistic intellectual and practical embrace of human rights. The prevailing approach of abandoning the specious dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other hand, creates many heady legal questions. This paper examines the challenge of the justiciability of the latter category of rights within the frameworks of their statutory and constitutional protection in Nigeria. The paper argues that the courts should utilize their interpretative jurisdiction to expound the respect and protection bound obligations of the State towards the protection of socio-economic rights.

1. Introduction
One of the most tendentious issues in human rights discourse is the potency of socio-economic and cultural rights. The debate in respect of which so much intellectual stamina has been applied revolves on the twin questions as to the status of socio-economic rights as rights and the justiciability or enforcement of such rights. In other words, there is the recurring question of whether socio-economic rights are rights as known to a lawyer bred in the positivist tradition, the breach of which will attract legal repercussions. The problem of status entwines with the more intractable question of whether the courts can entertain a complaint of a breach of such right.

What seems to innervate this debate is the apparent lack of precision with which national and international instruments provide for social and economic rights in contradistinction to civil and political rights, notwithstanding the complementarity of these sets of rights, theoretically and practically. The vagueness of these rights has created interpretative challenges of immense proportions for the courts. Thus when we talk about the right to education or the right to adequate housing they are erroneously understood as imposing an immediate obligations on the State to provide free education for all or to provide houses for every citizen.

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Again, a critical issue in human rights discourse in Nigeria is the efficacy of socio-economic rights guaranteed in both the African Charter on Human and Peoples’ Rights (AFCHPR), and the Fundamental Objectives and Directive Principles of State Policy enshrined in Chapter II of the 1999 Constitution (as amended) in relation to section 6(6)(c) of the same Constitution. The section impliedly and expressly denies the justiciability of the socio-economic rights provided for in the Charter and Chapter II, respectively. Put differently, there is the crucial question whether the Charter which has been domesticated in Nigeria\(^1\) provides the platform for the justiciability of the socio-economic rights in Nigeria.

In this paper, we shall attempt to present a synoptic overview of efforts at the international level for the protection of economic, social and cultural rights, and then interrogate the legal and constitutional frameworks for their protection under Nigerian law and how their realization can be achieved through the courts.

2. **Nature of Socio-Economic Rights**

Without intending to enter into the definitional quandary of human rights,\(^2\) suffice it to say that, for our purposes in this paper, human rights are basically rights which inheres in every human person by virtue of common humanity. In this connection, human rights are both natural and universal. This assertion receives better clarification when we draw a distinction between human rights and legal rights.\(^3\) Human rights have their source in natural law and therefore, they are not the gift of any authority or government. However, human rights may be confirmed or crystallized by

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positive law or legal instruments.\(^4\) It is also farcical to think of human rights as a gift of western civilization. Clearly, concepts such as the right to personal liberty, freedom of association and right to fair hearing have always been ingrained in every society, traditional and modern. What may appropriately be referred to as “western” is “the normative or legal translation of the concept of human rights as we know it today”\(^5\).

It is instructive to note that the term “human rights” is not restricted to any particular brand of rights but an amalgamating phrase which captures both civil and political rights on the one hand and social, economic and cultural rights on the other hand. However, contemporary human rights scholarship has adopted a taxonomy of human rights,\(^6\) which labels socio-economic rights as second generation rights. Typical examples of social, economic and cultural rights include the rights to education, work, social security, food, and an adequate standard of living. These rights are protected both under the Universal Declaration of Human Rights (UDHR) and the International Covenants on Economic Social and Cultural Rights (ICESCR). Owing to the nature of these second generation rights they are referred to as “positive rights” because they require affirmative government action for their realization. Some authors have styled them welfare rights,\(^7\) rights of credit,\(^8\) or security oriented rights.

The debates as to the true nature of economic and social rights are older than the ICESCR. Indeed, sequel to the resolution of the General Assembly of the United Nations (UN) to formulate an International Bill of Rights, it was decided that the Bill should

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\(^6\) The four broad classification of human rights regime are: civil and political rights (first generation rights), social, economic and cultural rights (second generation rights), rights to development in peace and Justice (third generation rights), emerging or penumbra rights (fourth generation rights)

\(^7\) R. Plant, “A Defence of Welfare Rights, in Beddard and D.M. Hills (eds.). *op. cit.* , p. 22


take the form of two or more international instruments, namely a Declaration, a Convention (covenant) and Measures of Implementation.\textsuperscript{10} That decision was later modified in favour of having two Covenants instead of one, and that the measures of implementation shall be embodied in the texts of the Covenants. These two Covenants were to be simultaneously submitted and approved by the General Assembly and opened for signature at the same time.\textsuperscript{11} The reversal of the earlier decision to have one draft Covenant hinged on the differences in implementation strategies. It was reasoned that:

Economic and social rights are objectives to be achieved progressively. Therefore a much longer period of time is contemplated for the fulfilment of the objectives. For civil and political rights, states ratifying the Covenant will immediately be subjected to an obligation to give effect to the rights. The enactment of legislation is generally sufficient to effect the enjoyment of civil and political rights, while legislation is not sufficient for the attainment of socio-economic rights. Very much depends on the economic condition of the State. The machinery of complaint, the Committee on Human Rights envisaged for civil and political rights is not a suitable body for dealing with economic and social rights, since they can only be achieved progressively and since the obligation of members with respect to them are not as precise as those for the other set of rights.\textsuperscript{12}

It is for these reasons, and perhaps more, that in the ever growing literature on human rights law and praxis, jurists and commentators have continued to query the status of economic and social rights as rights, or at best relegated them as second-rate rights. In a turgid critique of socio-economic rights Professor Maurice Cranston said:

I believe that a philosophically respectable concept of human rights has been muddled, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category. The traditional human rights are political and civil such as the right to life, liberty, and a fair trial. What are now being put forward as universal rights are economic and social rights, such as the right to employment, insurance, old-age pensions, medical services and holidays with

\textsuperscript{10} General Assembly Resolution 217 F (III), Dec. 17, 1947;  
\textsuperscript{11} General Assembly Resolution 543 (VI ), Feb. 5, 1952  
\textsuperscript{12} See Roosevelt, General Assembly Official Records, 6\textsuperscript{th} Session 1951-2, Plenary Session, p. 505
pay. There is both a philosophical and logical objection to this. The philosophical objection is that the new theory of human rights does not make sense. The political objection is that the circulation of a confused notion of human rights hinders the effective protection of what are correctly seen as human rights.\textsuperscript{13}

Admittedly, the issues that have constituted serious challenges to the realization of economic and social rights include the vagueness of some of the norms, obligations imposed on State Parties to the ICESCR, and the monitoring mechanism. For instance, Article 2 (1) of the ICESCR is to the effect that each state party \textit{“undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means”}. This is in contradistinction to Article 2 (1) of the ICCPR by which each State Party \textit{“undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.”} A comparison of the two provisions will reveal that the ICCPR imposes on State Parties an immediate obligation to maintain a defined standard, while the ICESCR begs the question and makes the realization of economic and social rights merely promotional and a matter very much in the future. Again, since the realization of economic and social rights is dependent on \textit{“available resources”}, the situation is being exploited by many governments around the world with no political will to ensure respect for human rights principles.\textsuperscript{14} These governments have instead erroneously claimed that the promotion and protection of civil and political is by far cheaper for them to attain because their obligation is to a large extent limited to non-interference with their citizens rights.\textsuperscript{15}

The denouement of most analyses of the real and perceived challenges facing the realization of economic and social rights is to find a concrete platform for the non-justitiability of those rights. Most conclusions on the non-justitiability of economic, social and cultural rights are essentially based on an

\textsuperscript{13} M. Cranston, \textit{op. cit}, p. 65

\textsuperscript{14} See “Background Information on Economic, Social and Cultural Rights,” ICJ Review No. 55, p. 10

\textsuperscript{15} \textit{Ibid}. 

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integrative comparison with civil and political rights.\textsuperscript{16} This approach has proved inimical to the promotion and protection of economic and social rights, as it has ‘contributed to the existing timid and compromising attitudes to those rights’.\textsuperscript{17} Michael Addo’s revisionism of the concept of justiciability exposes the general unsuitability of transporting domestic law conceptions of justiciability to international law. For him a fuller understanding of the concept of justiciability must address the question of procedures, namely adversarial justiciability which refers to the mechanisms of judicial process and inquisitorial justiciability which envisions an institutional review and reporting system.\textsuperscript{18} He argues that both arms of rights are amenable to both procedures, though depending on the issues and circumstances.

Also, Yash Ghai and Jill Cottrell warn against confusing two aspects of justiciability. They draw a distinction between explicit non-justiciability on the one hand and non-justiciability predicated on appropriateness on the other hand.\textsuperscript{19} The first refers to situations where the constitution or some other law expressly exclude the jurisdiction of the courts as is the case under the Nigerian and Indian Constitutions, while the second distinction raises grave concerns of legitimacy for the court enforcement of economic and social rights because the courts may not be able to apply ‘clear standards or rules by which to resolve a dispute or where the court may not be able to supervise the enforcement of its decision or the highly technical nature of the questions, or the large questions of policy involved may be thought to present insuperable obstacles to the useful involvement of courts.’\textsuperscript{20}

No matter the pretensions or persuasion of any particular theorist, the truth is that because of the inter-relatedness and indivisibility of rights both branches of rights are worth pursuing together. Indeed, at a more specific level, it is not an over simplification to state that some economic, social and cultural rights are as justiciable as some civil and political rights. The problem lies in what Katarina Tomasevki refers to as “the

\textsuperscript{17} \textit{Ibid.}, p. 93
\textsuperscript{18} \textit{Ibid.}, p. 97
\textsuperscript{20} \textit{Ibid.}, p. 69
prevailing hostile intergovernmental environment towards efforts to institutionalize the justiciability of economic, social and cultural rights as a category”.\textsuperscript{21} In all, it seems that the debates about the nature of economic and social rights are only of philosophical interest, lack credibility and pragmatic value in the light of the constant inclusion of these rights in international instruments.\textsuperscript{22} International human rights jurisprudence is replete with instruments relating to gender discrimination, environmental protection and labour rights,\textsuperscript{23} which ensure the justiciability of some economic, social and cultural rights.

3. International Protection of Socio-Economic Rights

The United Nations Charter is the source of modern global promotion and protection of human rights, even though its provisions on human rights are of a general nature.\textsuperscript{24} The Universal Declaration of Rights (UDHR)\textsuperscript{25} and the ICESCR\textsuperscript{26} sifted and crystallized the rights. Articles 22-27 of the UDHR provides for socio-economic rights and Articles 6-15 of the ICESCR does same.

Both the UDHR and the ICESCR recognize the right to earn a living from work freely chosen.\textsuperscript{27} Also, the right to just and favourable conditions of work, to form and join trade unions and to strike is recognized.\textsuperscript{28} The right to social security and social insurance is recognized by both documents,\textsuperscript{29} in addition to the right to adequate standard of living.\textsuperscript{30} This involves amplitude of issues such as food, clothing, housing and Medicare. To this end, State Parties are obligated to improve methods of food production,

\begin{footnotesize}
22 J. Hausermann, \textit{op. cit.}, p. 55
23 There are several International Labour Organization (ILO) Conventions dealing with issues such as limitations of hours of work, principle of holidays with pay, fixing of minimum wages, minimum standards of safety, etc. Note for instance Convention No. 134 of 1970, No 114 of 1960, No. 139 of 1974.
24 See Articles 1 (3), 55 and 56.
25 It was adopted on 10 December, 1948 by resolution 217A (111) of the General Assembly.
26 Adopted by the UN General Assembly on 16 December, 1966.
27 See Article 23 UDHR and Article 6 ICESCR.
28 Article 8 ICESCR.
29 Article 23 UDHR and Article 9 ICESCR.
30 Article 25 UDHR and Article 11 ICESCR.
\end{footnotesize}
conservation and distribution of food, and ensuring an equitable distribution of world food supplies according to need.\(^{31}\)

In appreciation of the fact that the family is the fundamental group unit of society, Article 10 of the Covenant recognized the right to family protection and assistance. It accords mothers special protection before and after childbirth, during which period mothers should be entitled to paid leave with adequate social security benefits. It further obligates State Parties to criminalize the exploitation of children through child labour.

Article 21(2) of the Covenant recognizes the right of everyone to the highest attainable standard of physical and mental health. In furtherance of this right State Parties are to take the following steps:

a. Provide for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child.

b. Improve all aspects of environmental and industrial hygiene.

c. Prevention, treatment and control of epidemic, endemic, occupational and other diseases.

d. Creation of conditions which would assure to all medical service and medical attention in the event of sickness.\(^{32}\)

Ample provisions are made in Article 26 of the UDHR and Articles 13 and 14 of the ICESCR with respect to the right to education. Both instruments prescribe that primary, secondary and higher education be made available in order to realize the right to education. Specifically, primary education is to be compulsory and free to all, while secondary education is to be made generally available by the progressive introduction of free education. Higher education shall be made generally accessible to all, on the basis of capacity.\(^{33}\) Education shall be directed to the overall development of the human personality and to the strengthening of respect for human rights.\(^{34}\) At the regional level, the European Social Charter\(^{35}\) and the African Charter on Human and Peoples Rights\(^{36}\) represent separate regional efforts to protect economic, social and cultural rights. These regional instruments

\(^{31}\) Ibid.

\(^{32}\) Article 12 (2) (a) – (d) ICESCR.

\(^{33}\) Article 13 (2) (a) – (c) ICESCR.

\(^{34}\) Article 26 UDHR; Article 13 (1) ICESCR.

\(^{35}\) The Charter was signed in Turin in 1961 and took effect in 1965.

\(^{36}\) The African Charter was adopted at the Nairobi Summit of 1981 and came into force in 1986.
contain provisions similar to the ICESCR and UDHR in the ventilation of socio-economic rights.\textsuperscript{37}

In addition, there have been concerted efforts at the international level to develop and interlace socio-economic rights with civil and political rights. In 1986 the International Commission of Jurists (ICJ) organized a meeting of experts in Maastricht, the Netherlands to halt the deceptive bogey being propelled by some Western scholars that the ICESCR places no real or legal obligations on states and that the instrument was merely a statement of aspirations. The Limburg principles which emerged from the meeting observed that ‘although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable over time’. The Principles in guideline number 6 indicate that there are three levels of obligation in matters of economic, social and cultural rights, namely; the obligation to respect, to protect and to fulfil. As the Principles explained:

Like civil and political rights, economic, social and cultural rights impose three different types of obligation on states: the obligations to respect, protect and fulfil. Failure to perform any of these three constitutes a violation of such rights. The obligation to respect requires state to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus the right to housing in violated if the state engages in arbitrary forced evictions. The obligation to protect requires the state to prevent violations of such rights by third parties. Thus the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires state, to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus the failure of states to provide essential primary health care to those in need may amount to a violation.

Furthermore, the universality, indivisibility, interdependence and interrelatedness of human rights were restated at the Vienna Conference in 1993. The Vienna Declaration enjoins a global resolve to ‘treat human rights globally in a fair and equal manner on the same footing, and with the same emphasis’. Also, the

\textsuperscript{37} For instance, socio-economic rights are set out in Articles 13-18 of the African Charter on Human and Peoples’ Rights.
Bangalore Declaration and Plan of Action\textsuperscript{38} excoriated jurists for neglecting the pivotal issues of economic, social and cultural rights. The Declaration suggests that by concentrating on the familiar path of civil and political rights to the exclusion of economic, social and cultural rights, lawyers and judges have neglected to utilize the opportunities provided by the ICESCR and the challenge it presents. In the words of Adama Dieng, the Secretary General of the ICJ, on the occasion:

\begin{quote}
We are not downgrading civil and political rights. We are simply appealing to judges and lawyers everywhere to see the legitimate role of the law to address the vital issues of economic, social and cultural rights. To ordinary citizens, who never enter a court room or a police station, the most urgent human rights are often those concerned with access to, education, food and housing.
\end{quote}

So far, we have sketched an outline of the theoretical foundations of socio-economic rights and the international legal regime and efforts at providing a concrete bases for the realization of these rights. What we shall now do is to examine in some details the domestic protection of socio-economic rights adopting a two pronged approach, namely, the constitutional and statutory frameworks.

(i) Constitutional Framework
Before 1979, Nigeria’s past constitutional experiments had been concerned with the traditional civil and political rights. It was the 1979 Constitution of Nigeria that, for the first time, in line with the developing global trend provided for socio-economic rights. Chapter II of that Constitution is styled “Fundamental Objectives and Directive Principles of State Policy”. Its inclusion in that Constitution was quite polemical haven been subjected to the competing ideals of whether to include the Chapter and make it non-justiciable, by regarding it as presenting a philosophical road map to the good life; or to include it and make it justiciable,

considering its contents as determinants of state legitimacy; or to jettison it as being impolitic for inclusion in a legal charter.  

The 1999 Constitution also replicates the same Fundamental Objectives and Directives Principles of State Policy in its Chapter II, which runs from sections 13-24. The Chapter spells out the political, economic, social, educational, foreign policy and environmental objectives of Nigeria. It also outlines the national ethics, obligations of the mass media, directives on Nigerian culture and the duties of the Nigerian citizen. However, the tragedy of Chapter II of the Constitution is located in section 6(6)(c) of the Constitution, which provides that the judicial powers vested in the courts:

shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution.

Thus by virtue of section 6(6)(c), Chapter II of the Constitution is enfeebled as it is rendered non-justiciable. This in our view amounts to a dislocation of the foundation of the whole edifice of the Nigerian nation-state.

Item 60 of the Exclusive legislative list clothes the National Assembly with the power to establish and regulate authorities for the promotion and enforcement of the observation of the provisions of the Fundamental Objectives and Directive Principles of State Policy. In Attorney General of Ondo State v. Attorney General of the Federation & Ors, the Supreme Court held that section 4 (2) of the 1999 Constitution provides that the National Assembly has the power to make laws for the peace, order and good government of Nigeria, and by item 60(a) of the exclusive legislative list, it is vested with the power to legislate on matters within Chapter II of the Constitution. Mowoee argues that this Supreme Court decision makes nonsense of section 6 (6)(c) of the Constitution in relation to the non-justiciability of Chapter II

40 See Part I of the Second Schedule to the Constitution.
41 [2002] 9 NWLR (Pt. 772) 222.
42 K.K. Mowoe, Constitutional Law in Nigeria (Lagos: Malthouse Press Ltd, 2008), pp. 274-275. Professor Mowoe was re-echoing the view of Professor Nwabueze before the court in that case.
and that the power of the National Assembly to legislate with respect to item 60(a) of the exclusive legislative list is limited to the “establishment and regulation of authorities for the Federation or any part thereof in order to promote and enforce the observance of the Fundamental Objectives and Directive Principles”. Thus the phrase “enforce the observance” of the provision of Chapter II ‘is probably to be achieved not just through such established authorities but also through the investigative and other regulatory powers of the National Assembly’. These submissions do not hold the whole truth. As we shall argue anon, the efficacy of section 6(6)(c) will only arise in the absence of any provision to the contrary in the Constitution. The combined reading of item 60(a) of the exclusive legislative list and section 4(2) of the Constitution constitute an exception to the rule of non-justiciability of Chapter II in section 6(6)(c) of the Constitution. In our opinion, the decision of the Supreme Court has effectively opened a new vista in the quest to give the socio-economic rights enshrined in Chapter II constitutional potency. Instructively section 13 of the Constitution provides that:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of the Constitution. So, what the Constitution has done in effect by this provision in relation to item 60(a) of the exclusive legislative list and section 4(2) is to set a robust agenda for legislative action in addressing issues of socio-economic rights.

A perusal of the provisions of Chapter II of the 1999 Constitution will reveal that it draws inspiration from established human rights norms under the UDHR and ICESCR. This is instantiated by certain sections of Chapter II. Section 16(2)(d) which talks about suitable and adequate shelter, food, age, and pensions, sick benefit and welfare of the disabled, undoubtedly has its ancestry in Article 25 of the UDHR and Article 11 of the ICESCR. Section 18(1) and (3)(a) – (c) restate the right to education in Article 26 of the UDHR, and 13 and 14 of the ICESCR. The directive on Nigerian cultures is an adaptation of Article 15 ICESCR.43

It is perhaps the constitutional disability of Chapter II that accentuates the impression that there is no legal rationale for the

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43 See further section 17(a)-(h) which essentially mirrors Articles 6,7,10 and 11 of the ICESCR.
inclusion of a seeming charter of pious exhortations in a legal document such as the Constitution. Such mindset ignores the fact that a constitution is both a legal as well as a political charter. What is a constitution, if not the assemblage of principles governing the organization, structures and procedures of a political community within the contexts of a peoples’ cherished ideals and collective aspirations? It therefore follows that a constitution should not only be a vehicle of legal rules but also as a courier of the memorial for the organization of man into a political community. Great philosophers of the enlightenment era posit that the reason for man exiting the state of nature, which in the words of Thomas Hobbes was ‘short, brutish and nasty’, in favour of a political community was to achieve security and mutual advantage. A society in which the people live in dehumanizing conditions has divorced itself from the very reason for entering into the social contract. So what happens to the social pact when the welfare and security of the people are abandoned by government? David Hume, for instance said that the people ‘are freed from their premises, … and return to that state of liberty which preceded the institution of government’

The situation is even more compounded when there is nothing to serve as a constant reminder to those who govern of their responsibility to the governed. We surmise that the import and significance of Chapter II is to constantly keep welfare issues in the front burner and serve as a medium of silent social revolution, so that those in power will live in the consciousness of who their masters really are. It is a barometer to appraise our

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44 Professor Abiola Ojo, for instance said that matters in the objectives and directive principles smack of the contents of the manifesto of a political party and unsuitable for inclusion in the Constitution. See A. Ojo, “The Objectives and Directives must be Expunged” in W.I. Ofonagoro, et.al. (eds.), op. cit, p. 47.


47 Section 14 (2)(b) of the 1999 Constitution that “the security and welfare of the people shall be the primary purpose of government.”

48 Quoted in Wade Robison, "Hume and the Constitution", in Alan Rosenbaun,(ed.), op. cit., p.43.
nascent democracy. After all, section 14(2)(a) reminds everyone that “sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its power and authority”. It is perhaps for this reason that section 224 of the 1999 Constitution insists that the programme as well as the objects of a political party shall conform to the provisions of Chapter II of the Constitution.

Nevertheless, the emasculation of Chapter II has some intriguing interpretative concerns. In the first place, the question may be asked if the apparent conflict between section 13 of the Constitution which imposes a duty on all arms of government, including the judiciary, “to conform to, observe and apply” the provisions of Chapter II, and section 6(6)(c) actually ousts the jurisdiction of the courts in respect of same Chapter. It is settled law that in the interpretation of the Constitution the whole provisions must be considered together and that where there are two provisions, one enlarging the court’s jurisdiction and the other restricting its jurisdiction, the courts will guard its jurisdiction jealously by adopting a liberal interpretation in favour of assuming jurisdiction. The philosophical underpinnings of these judicial attitudes is to enable the courts to avoid injustice and absurdity. But, it will be the height of injustice and profound absurdity to apply a restrictive interpretation which will allow the duplicitous provision of section 6(6)(c) of the Constitution to cage the provisions of Chapter II. This is particularly so in the face of the preamble to the Constitutions which pontificates that the essence of the Constitution is ‘for the purpose of promoting the good government and welfare of all persons in our Country’. If Chapter II of the Constitution will help us to achieve these, then

51 See Anisminic v. Foreign Compensation Commission (1968) 2 AC 147 at 170; Sofekun v. Akinyemi (1980) 5-7 at 25-27; Oba Adeyemi v. A.G. Oyo State (1984) 1 SCNLR 525 at 602. Although the preamble does not form part of the Constitution in the sense that it cannot found a cause of action, it is in itself a manifestation and articulation of the intention of the framers of the Constitution and provides the philosophical basis of the Constitution. The courts have recourse to it in constitutional interpretation. See Adesanya v. The President of Nigeria (1981) 2 NCLR 358; A.G. of Ogun State v. A.G. Federation (1982) 3 NCLR 166.
section 13 of the Constitution ought to be preferred to section 6(6)(c) of the Constitution.\textsuperscript{53}

In the second place, the words “except” and “otherwise” appearing in section 6(6)(c) implodes it. Generally, the word “except” is exclusionary\textsuperscript{54} in nature and takes the form of a proviso, while the word “otherwise” literally means opposite\textsuperscript{55}, so, what those two words signify in the context of section 6(6)(c) of the Constitution is that the provision of that section will stand unless there is nothing to the contrary in any other provision of the Constitution. This view was endorsed by the Supreme Court in \textit{Federal Republic of Nigeria v. Anache}.\textsuperscript{56} Fortunately, section 13 which imposes a duty on the three arms of government to comply with the provisions of Chapter II, effectively excludes the import of section 6(6)(c).\textsuperscript{57} The net effect of this interpretative approach “is that if any of the persons mentioned in section 13 is found liable, he cannot escape liability by [invoking] the provisions of section 6(6)(c) of the Constitution.”\textsuperscript{58}

Now, with regard to Chapter IV (section 33-46) of the Constitution which deals with Fundamental Rights, the Constitution seems to establish an inverse relationship with Chapter II in terms of justiciability and protection. Thus Chapter IV which provides for civil and political rights is immediately justiciable and requires a \textit{four-fifths} majority of both Houses of the National Assembly which shall be approved by resolution of the Houses of Assembly of not less than two-thirds of the States of the Federation, for its alteration.\textsuperscript{59} But the alteration of Chapter II needs the \textit{two-thirds} majority of both Houses of the National Assembly.\textsuperscript{60} Consequently, if there is any conflict between the two Chapters it is clear that the provisions of Chapter IV will prevail.\textsuperscript{61}

\textsuperscript{55} \textit{Ibid.}, p. 1148.
\textsuperscript{57} Justice Oputa shares this view. See C. Okeke, (ed.) \textit{op. cit.}, p. 9.
\textsuperscript{58} \textit{Ibid.}
\textsuperscript{59} See 1999 Constitution, (as amended) section 9 (3).
\textsuperscript{60} \textit{Ibid}, s. 9 (2).
However, conventional wisdom and practical realities dictate that the realization of the two Chapters must be pursued simultaneously, because civil and political rights and socio-economic rights are not mutually exclusive categories but indivisible, interrelated and inter-dependent human goods which are secreted in the interstices of each other so as to attain the good life as promised in the preamble to the Constitution. Of what use is the right to a fair hearing when the proverbial common man cannot fund the process of activating the court’s jurisdiction. As Bhagwati, J. of the Indian Supreme Court said:

Together they are intended to carry out the objectives set out in the preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice, and ensuring the dignity of the individual not to a few privileged persons but to the entire people of the Country, including the have-nots and the handicapped, the lowliest and the lost.  

In the same vein, Chandrachud, J. said:

Our decision on this vexed question must depend on the postulates of our Constitution, which aims at bringing about a synthesis between Fundamental Rights and the Directives of State Policy, by giving to the former a place of pride and the latter, a place of permanence. Together not individually, they know the core of the Constitution. Together, not individually they constitute its true conscience. If the State fails to create conditions in which the Fundamental Freedom could be enjoyed by all, the freedom of the many will be at the mercy of the freedom of the few, and then all freedom will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.

It is therefore clear that both Chapters form one organic unit with the same view to free citizens from unreasonable restrictions from the State, and provide liberty to all.

In the ongoing exercise to amend the 1999 Constitution, one of the major issues presented for public debate and voting is whether Chapter II should be made justiciable and enforceable

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like Chapter IV of the Constitution.\textsuperscript{65} This question will viscerally elicit an affirmative answer. In this regard the draft 1995 Constitution provides a template for legislative action. In that Draft Constitution some of the respect, protection and fulfilment bound obligations for the realization of economic, social and cultural rights which are normally banished to Chapter II were moved to Chapter IV. For instance, under that Constitution the right to free and compulsory Primary Education,\textsuperscript{66} the right to free adult literacy programmes,\textsuperscript{67} the right to free medical consultation in government health institutions,\textsuperscript{68} the rights to eradicate corrupt practices, abuse of power, protect and preserve public property, and to combat misappropriation and squandering of public funds,\textsuperscript{69} were made justiciable.

(ii) \textbf{Statutory Framework}

In Countries with written constitutions, the constitution is always the \textit{fons et-origo} of all other laws, and naturally claims supremacy over those laws. In Nigeria, the 1999 Constitution announces in unequivocal terms its supremacy\textsuperscript{70} and that any other law that is inconsistent with it is void to the extent of the inconsistency.\textsuperscript{71} As has been shown the Constitution does not expressly clothe the socio-economic rights enunciated in Chapter II with justiciability. But the statutory protection offered socio-economic rights belies arguments against their justiciability. This juridical paradox instantly exposes the inherent defect in this approach.\textsuperscript{72}

In Nigeria, the examination of some statutes will reveal that they guarantee and render justiciable certain well known socio-economic rights under some international human rights instruments such as the UDHR and ICESCR. The Labour Act\textsuperscript{73}, for instance, in sections 13, 16, 18 and 34, makes provision for “just and humane conditions of work,” which are a re-affirmation


\textsuperscript{66} See the draft 1995 Constitution, section 45(1).

\textsuperscript{67} \textit{Ibid.}, section 45(2).

\textsuperscript{68} \textit{Ibid.}, section 43.

\textsuperscript{69} \textit{Ibid.}, section 35 (a)-(c).

\textsuperscript{70} See section 1 (1).

\textsuperscript{71} See section 1 (3).


\textsuperscript{73} See Cap. LI, LFN, 2004.
of Article 23 of the UDHR, Article 7 of the ICESCR and Article 15 of the AFCHPR. The Employees Compensation Act, which provides for compensation to an employee injured in the course of employment and the Nigerian Social Insurance Trust Fund (NSITF) Act, which provides for social security and insurance benefits for an employee are only embellishments and amplification of the provisions in the above mentioned human rights instruments. Also, the Child’s Right Act, 2004, and the Compulsory and Basic Education Act, 2004, give vent to the right to education provided for in Article 17(1) of the AFCHPR, Article 26 of the UDHR and Articles 13 and 14 of the ICESCR.

In this connection, the AFCHPR which provides a potpourri of rights presents us with a platform for further discussion. During the second military interregnum in Nigerian politics the status of the AFCHPR which is incorporated into Nigerian law was subjected to rigorous interpretation by courts in a most courageous manner. The courts adopted an attitude of according the Charter primacy over military decrees.

The judicial approach of according the African Charter primacy over other municipal laws was expanded by the Court of Appeal in Fawehinmi v. Abacha. In that case one of the issues raised for determination by the Court of Appeal was the effect of incorporating the African Charter into municipal law. It was held that the African Charter is sui generis, a legislation with international flavour, and a such no government will be allowed to contract out by local legislation it international obligations. Indeed, Pats-Achalonu JCA, pontificated that:

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74 This was signed into law on 17 December 2010.
76 The courage and ingenuity of Nigerian courts in using global human rights legal resources to shape governmental policy, decisions and actions have been extolled. See O.C. Okafor, “On the Patchiness, Promise and Perils of “Global” Human Rights Law” NIALS Diaspora Scholars Lecture, 2011, pp. 19-21.
77 See for instance, Opayemi Bamidele & Ors v. Professor Grace Alele Williams and the University of Benin, Unreported Suit No. 13/6m/89 (Benin); The Registered Trustees of the Constitutional Rights Project (CRP) v. The President of the Federal Republic of Nigeria & 2 Ors, Suit No. M/102/93 (Lagos); Oshevire v. British Caledonian Airways Ltd, (1990) 7 NWLR (Pt 163) 489.
78 (1996) 9 NWLR (Pt. 375) 710.
by not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal.\textsuperscript{79}

This decision was greeted with praise and ululation within the human rights community.\textsuperscript{80} However, it took the timely intervention of the Supreme Court\textsuperscript{81} to correct a jurisprudential anomaly which had crept into our legal system. For one, Nigerian legal system does not admit of any dichotomy or superiority complex in respect of Acts made or deemed to be made by the National Assembly. Beyond the admission that the African Charter is a statute with “international flavour” because of its pedigree, there is nothing in our corpus juris conferring primacy or higher pedestal on Cap. 10 in relation to other statutes made by the National Assembly. On this issue even the Supreme Court sounded contradictory in Abacha v. Fawehinmi.\textsuperscript{82} The Supreme Court stated, per Ogundare, JSC that:

if there is a conflict between it [i.e Cap. 10] and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.\textsuperscript{83}

He however disagreed that it was superior to the Constitution, with the caveat that it does not mean that its international flavour can:

…prevent the National Assembly, or the Federal Military Government before it, to remove it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another statute necessarily affected by the mere fact that it violates the African Charter or any other treaty for that matter.\textsuperscript{84}

\textsuperscript{79} Ibid., at p. 758.


\textsuperscript{81} Abacha v. Fawehinmi (2000) 6 NWLR (Pt. 660), 228.

\textsuperscript{82} Ibid.


\textsuperscript{84} Ibid., at p. 289.
This is an indirect way of nullifying the ‘greater vigour and strength’ mantra. As Justice C. C. ’Nweze wittily noted while appraising Ogundare, JSC’s statement, ‘if a treaty can be removed from our body of laws; can be repealed at will, and, if a local statute, which violates a treaty, cannot be invalidated by that treaty, can it be seriously argued that such a treaty overrides that domestic law? That answer would appear to be in the negative!’

Fortunately, it was Achike, JSC, who in his dissenting judgment restated the correct position of the law. He said:

The general rule is that a treaty which has been incorporated into the body of the municipal laws ranks par with the municipal law. It is rather startling that a law passed to give effect to a treaty should stand on a higher pedestal’ above all other municipal laws, without more, in the absence of any express provision in the law that incorporated the municipal law?

It is our submission that whatever conceptual errors the courts must have committed in their decisions during the repressive military era, as to the relationship between Cap. A9 in relation to other statutes and the Constitution should be understood in the light of the circumstances in which they were made. Most of the decisions were desperate attempts to secure a legal base for the protection of human rights against the brazen erosion of basic freedom by the military. Alternatively, they may be regarded as samples of judicial riot against totalitarianism.

These cases deal with violations of some of the liberty oriented rights under the Charter. What is not clear is the extent to which the decisions of the courts would have been affected if it were a socio-economic right that was in issue. The closest the court came to answering this question was in Ogugu v. The

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86 At p. 316.

87 Professor U. O. Umozurike argues that this problem stems from the *holus bolus* incorporation of the Charter into the law. He is of the view that it would have been better to rely on the Constitution as already incorporating civil and political rights, and that a resort to ‘other measures’ such as disseminating the knowledge in civics and in education would have been enough to satisfy our obligations in Article 1 of the Charter. See U. O. Umozurike, “The African Charter and Nations Laws: The Issue of Supremacy” in C.C. Nweze and O. Nwankwo (eds.) *Current Themes in The Domestication of Human Rights Norms* (Enugu: Fourth Dimension Publishing Co., Ltd, 2003 ), p. 49.
State, where the Supreme Court held that the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act was applicable and enforceable in Nigeria in the same manner and through the same procedure as any other laws. This clearly gives the impression that any category of rights under the Charter is enforceable by the Courts.

Arguably, since Cap. A9 (the AFCHPR) is still a sub-constitutional statute it is still inferior to the Constitution and matters which are not justiciable in it, namely economic and social rights in Chapter II, cannot be made justiciable by ‘judicial legislation.’ In this regard, Nweze has forcefully argued that even in respect of other domestic statutes by which socio-economic rights have been entrenched and consequently, made justiciable, those rights do not enjoy the juridical status of human rights. He posits that because those sub-constitutional statutes are not expressed to be made pursuant to any treaty obligations their justiciability is through the ordinary legal process of writ of summons and can only be redressed by ordinary private law remedies as opposed to fundamental rights where constitutional law remedies are awarded. For him, the rights created by these ordinary Acts of Parliament are at best “part of the heritage of traditional analytical jurisprudence.”

These arguments are plausible but they evince the dangers inherent in the subutilization of intellectual discourse relating to the justiciability of socio-economic rights. For instance, if we agree that the right to humane conditions of work provided for in the Labour Act is justiciable but deny the same right protected in Cap. A9 and recognized in Chapter II of the Constitution equivalent juridical potency as human rights on the pretext that the later is circumscribed by section 6(6)(c) of the Constitution would that not amount to rendering opaque the jurisprudential crystallization of socio-economic rights? Again, if by some contemplation the National Assembly through some pieces of legislation provide for the justiciability of all the socio-economic rights in Cap A9 and Chapter II of the Constitution, and as a result make them empty shells, as it were, will the corrosive provision of section 6(6)(c) of the Constitution be called in aid to defeat the juridical status of the rights created by those legislation as human

88 [1994] 9 NWLR (Pt. 366), 1
89 The Supreme Court also said that much in Abacha v. Fawehinmi (Supra)
90 C.C. Nweze, above note 79, p. 278.
91 Ibid.
92 Ibid.
rights? Clearly, invoking section 6(6)(c) in the circumstance will be otiose. Besides, if the tenuous argument that rights protected under the various sub-constitutional statutes of the legislature do not enjoy the juridical status of human rights is stretched further then it means that a country must operate a written constitution with an entrenched bill of rights before the citizens of that country can enjoy human rights. This is a startling proposition! The argument fecundates a sort of Diceyan dilemma as to whether human rights are better protected under a written or unwritten constitution. However, a discussion of this issue is outside the pale of this paper. But more specifically, it must be appreciated that human rights do not owe their creation or existence to a constitution. While we crave for the elevation of economic, social and cultural rights to constitutionally guaranteed fundamental rights, we must observe that the entrenchment of fundamental rights in a constitution only testifies to a nation’s accepted minimum, not maximum, content of human rights. It does not make such rights immutable. Thus the character and content of other rights protected by other Acts of parliament are not diminished by their packaging. If it were so then a country like Britain, with no formal bill of rights and an unwritten constitution, will need to make a new beginning in human rights circles. Moreover, giving legislative impetus to socio-economic rights accord with the Limburg Principles’ “obligation to fulfill” which carries with it the implication that a State should ‘take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization’ of socio-economic rights.

5. The Role of the Courts in the Justiciability Question.

Thus far, we have seen that the Constitution does not admit of express justiciability of Chapter II of the Constitution. The decision to make Chapter II of the Constitution non justiciable was informed by the exaggerated fear that investing the courts with the competence to make mandatory orders directing the government to provide specific social and economic rights “would be palpably impudent as being fraught with the danger of destructive confrontation”.  

93 This fear dissolves in the face of the more coercive power of judicial review of legislative and executive actions, the exercise of which has curtailed legislative and executive lawlessness, and shunted governments onto the path

of good governance. Indeed, in other climes the recognition and enforcement of social and economic rights by the courts have become *de rigueur* and no cataclysm has ensued. Interestingly, the ECOWAS Court has had occasion to order the Nigerian government to make adequate arrangements for the free and compulsory education of every Nigerian child, and the African Commission on Human and Peoples’ Rights has endorsed the observance of the respect bound obligation for the realization of economic, social and cultural rights.

Section 13 of the Constitution enjoins all authorities and persons exercising legislative, executive or judicial power, to conform to, observe and apply the provisions of Chapter II of the Constitution. Also, Section 14 takes it further by stating that “the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.” One only needs to read eight further sections to discover the true foundations of an ideal Nigerian State. Therefore, a society that stifles the means to self-actualization negates the first principle for the establishment of a political community and thereby discharges its citizens from any form of political obligation. As Professor Nwabueze remarked:

> An unjust society cannot maintain its unity and cohesion because it cannot arouse in its members a strong enough feeling of loyalty, what is worse, it also arouses him to intense indignation and disaffection. It is a denial of the individuals worth as a human person, a manifestation by society of uncaring attitude towards him. An individual or group denied recognition by society cannot but feel alienated and disaffected.

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96 See *SERAP v. Federal Republic of Nigeria & Universal Basic Education Commission, ECW/CCJ/APP/08/08*.


In the words of Justice Oputa:

While it is true that the courts cannot right wrongs overnight, it is also true that the reaffirmation of — say the Directive Principles — by the courts will build up a body of public opinion which may compel all “the persons and institutions” enumerated in section 13 of the Constitution to wake up and do what is expected of them. Also, in its judgments on justiciable issues like the Right to life, the courts can call on the legislature to actualize the expectations in the Directive Principles by passing appropriate and enabling Laws.99

It must be admitted that as a result of our courts lethargic attitude towards expanding the jurisprudential frontiers for the justiciability of Chapter II, the Nigerian judiciary is facing a legitimacy crisis as to whether it really deserves such cognomens as “the fountain of justice”, “the last hope of the common man”, “the bastion of human rights,” “the watch-dog of the Constitution” etc. The courts must begin to interpret the constitution with a view to securing a concrete basis for the justiciability of socio-economic rights. To be able to do this, the courts must shed ‘the phonographic theory of common law tradition that judges do not make law, and are concerned with legal not social justice.’100 The myth of formalism and legal justice must be exploded so as not to through interpretation manacle social justice. In an attempt to grapple with this problem, the Indian Supreme Court says Justice Bhagwati,

…started wielding judicial power in a manner unprecedented in its history and developed the strategy of Public Interest Litigation calculated to bring social justice and human rights within the reach of the common man.

He continued:

What the Court did was to bring about a revolution in the judicial process. The Court expanded the frontiers of fundamental rights and natural justice and in the process rewrote some parts of the Constitution. The right to life and personal liberty enshrined in Article 21 of the Indian Constitution was converted de facto and de jure into procedural due process clause contrary to the intention of the makers of the Constitution. This expanding right was construed, through a process of judicial interpretation to encompass the right to bail, the right to speedy trial, the right to dignified treatment in

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99 C. Okeke (ed), op. cit., p. 11.
100 K. K. Mowoe, op. cit., p. 284.
custodial institutions, the right to legal aid in criminal proceedings, the right to live with basic human dignity, the right to livelihood, and above all, the right to a healthy environment. The Supreme Court developed a new normative regime of rights insisting that the State cannot act arbitrarily but instead, must act reasonably and in public interest on pain of its action being invalidated by judicial intervention.\textsuperscript{101}

The breath taking incursions made by the Indian Supreme Court present a model for our courts.

A few instances will exemplify the approach of the Indian Courts. In \textit{Deo Singh Tomer v. State of Bihar},\textsuperscript{102} it was held that a persons’ right to hearing was intrinsic to his right to life. Similarly, in \textit{Mohim Jain v. State of Katamaka},\textsuperscript{103} the Indian Supreme Court invalidated a state law which permitted medical colleges to charge exorbitant admission fees on the ground that it discriminated against the poor, and in effect curtailed the right to education which is essential to the right to life. Also, in \textit{UPSE Board v. Harri Shanker}\textsuperscript{104} the court re-affirmed that the right to education is an intrinsic part of the right to life. The court observed that though it cannot enforce the observance of the principles, they are nevertheless bound to evolve, affirm and adjust principles of interpretation which will further and not hinder the goals set out in the Directive Principles.

The plenary powers vested in the courts under the 1999 Constitution is a clear indication that the courts have been positively assigned a role for setting an agenda for public policy. Thus the Nigerian courts have a constitutional leeway to make public policy choices and programmes depending on the needs of society. As Justice Oputa rightly observed:

\ldots although the courts are creatures of the Constitution yet their interpretative jurisdiction (their power to interpret the Constitution) does seem to place them above the Constitution. The Constitution is a mere skeleton. It is interpretation by the courts that adds flesh and infuses blood into the skeleton to


\textsuperscript{102} (1988) AIR SC 1782.

\textsuperscript{103} (1992) AIR SC 1964.

\textsuperscript{104} (1999) AIR SC 65.
make it a living organism. It is therefore not an idle boast to say that the Constitution is what the judge say it is.\(^{105}\) Every society, and more especially every democratic society is often confronted with certain critical questions which relate to issues of social justice, protection of human rights, curbing executive lawlessness, checking corruption, etc. To grapple with these issues, the courts must, therefore, consciously engage in judicial law making so as to exemplify the interrelatedness of law and social change. Thus in a developing society, such as ours, ‘there is nothing in law to conserve when the citizens are suffering from poverty, hunger, employment, etc.’\(^{106}\) Furthermore, a broad constructionist approach should not be compromised by the courts in the interpretation of the provisions of the Constitution, for as Kayode Eso, JSC pointed out “a narrow interpretation straight-jacketed on the fear of a judge not being a legislator into the confines of words which might even be equivocal is with respect a negation of the true essence of justice.”\(^ {107}\)

In the realm of justiciability of Chapter II of the Constitution what we expect of our courts is to demonstrate a preparedness to, as the courts in India have done, through progressive interpretation utilize the justiciable and enforceable provisions of Chapter IV, to make Chapter II enforceable. It is gratifying to note, however, that the Nigerian courts seem to be waking up from long and deep slumber. The attitude of the Supreme Court in *Atake v. Afejuku*\(^ {108}\) is quite commendable. In that case one of the issues was whether the appellant, a retired judge could represent himself as a legal practitioner in view of section 256 of the 1979 Constitution which provides that a judicial officer on ceasing to hold office cannot ‘appear or act as a Legal Practitioner.’ In holding that the appellant could represent himself the court had recourse to the non-justiciable section 17(2)(a) in Chapter II of the 1979 Constitution and section 33(1) of the justiciable Chapter IV of the same Constitution. Similarly, in *Adamu v. A.G. Borno State*,\(^ {109}\) it was held that where in the implementation of Fundamental Objectives and Directive Principles of State Policy,


\(^{106}\) Oputa, JSC’s Valedictory Address, October 1989.

\(^{107}\) *Fawehinmi v. Akilu* [1987] 4 NWLR, p. 848.


say on ground of religion, a breach of a citizen’s fundamental right of freedom of religion and freedom from discrimination occurs, that breach of fundamental right is justiciable.

5. Conclusion
Our survey has shown that at the international and national levels there exists a coherent body of laws for the protection of socio-economic rights. What seems to have stunted the growth and speed of efforts at realizing these rights is the philosophical obscurantism about the nature of socio-economic rights, which has accentuated the problem of justiciability of these rights. However, current global economic realities hint at the imperativeness of pursuing a socio-economic agenda for the upliftment of the materially poor in societies.

We have also demonstrated that to make socio-economic rights pragmatic and not esoteric, the courts must rise equal to the occasion through progressive and broad interpretation to make Chapter II of the Constitution justiciable. It is by doing this that the civil and political rights which we also cherish can be meaningful. In this wise, it is suggested that the respect and protection bound obligations for the realization of socio-economic rights should be made justiciable in the current effort at amending the Constitution, while the fulfilment bound obligations should progressively be made justiciable.

The seemingly new approach of Nigerian courts to an expansive interpretation of Chapter II of the Constitution notwithstanding, the thrust of our argument is that our courts should adopt, as an ideology rather than an ad hoc basis, a broad and progressive interpretative approach to the Constitution which showcases the complementarity and justiciability of Chapters II and IV of the Constitution.
A CRITICAL ANALYSIS OF THE CONSTITUTION (FIRST ALTERATION) ACT

I. Introduction
The first serious effort at amending the 1999 Constitution of the Federal Republic of Nigeria was during the tenure of President Olusegun Obasanjo (1999–2007). The National Assembly during the period set up a Joint Constitution Review Committee composed of members of the Senate and the House of Representatives headed by the then Deputy Senate President, Ibrahim Mantu. The Joint Constitution Review Committee after making some proposals held Zonal public hearings on their proposals. However, after the Zonal public hearings, their proposals could not be passed by the requisite majority of the Houses of the National Assembly. That adventure was particularly infamous and highly discredited because it was perceived as a vehicle for extension of President Obasanjo’s tenure of office. Part of the amendment sought in the process was an amendment that would allow the president to run for a third term in office.

In 2009, President Umaru Musa Yar’Adua sought 14 amendments to the Land Use Act. He forwarded a bill cited as the Land Use Act (Amendment) Bill 2009 or the Constitution (First Amendment) Bill 2009 to the National Assembly for the purpose of the amendment.\(^1\) It is clear now that the bill was not passed.\(^2\) Following local and international outcry against the widespread malpractices observed during the 2007 general elections, President Umaru Musa Yar’Adua on 28\(^{th}\) August, 2008 constituted an Electoral Reform Committee for the reform of the Nigerian electoral process.\(^3\) The Electoral Reform Committee recommended, \textit{inter alia}, that the National Assembly should undertake a comprehensive review of the provisions of the 1999 Constitution to effect changes that are required to ensure free and

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\(^3\) In any case, since the bill was not passed during the life of the Parliament in which it was introduced, if the proposal is still taken seriously, it has to begin its life afresh in the current Parliament.

The Committee is also known as “Uwais Panel”, taking the name from its chairman, Hon. Justice Mohammed Uwais, retired Chief Justice of Nigeria.
fair elections.\textsuperscript{4} On receipt of the report of the Electoral Reform Committee, President Yar’Adua forwarded to the National Assembly several bills seeking the alteration of certain sections of the Constitution. The Constitution Alteration Bills were passed by each House of the National Assembly with some variations. The different versions of the bills passed by the two Houses of the National Assembly were harmonized by a Committee of both Houses. After the harmonization, each of the two Houses passed the harmonized version with the requisite two-third majority of all their members. The harmonized bill was then transmitted to the State Houses of Assembly. Each State House of Assembly deliberated on the bill, approved some sections of the bill and rejected some sections. The National Assembly collated the resolutions of the State Houses of Assembly, sifted the provisions that had the support of at least two-third majority of all the State Houses of Assembly and considered the Constitution (First Alteration) Act as passed.

So far three amendments (or alterations) have been made to the Constitution. The Constitution of the Federal Republic of Nigeria (First Alteration) Act\textsuperscript{5} was passed by the Senate on 2\textsuperscript{nd} June, 2010 and by the House of Representatives on 3\textsuperscript{rd} June, 2010. On 16\textsuperscript{th} July, 2010 it received the approval of two-third majority of the State Houses of Assembly.\textsuperscript{6} The Constitution of the Federal Republic of Nigeria (Second Alteration) Act was passed by the Senate on 3\textsuperscript{rd} November, 2010 and by the House of Representatives on 4\textsuperscript{th} November, 2010. On 29\textsuperscript{th} November, 2010 it received the approval of two-third of the State Houses of Assembly.\textsuperscript{7} The Constitution of the Federal Republic of Nigeria (Third Alteration) Act was passed by the Senate on 14\textsuperscript{th} December, 2010 and the House of Representatives on 15\textsuperscript{th} December, 2010. It received the approval of two-third majority of the State Houses of Assembly on 8\textsuperscript{th} January, 2011.\textsuperscript{8} The Constitution (Alteration) Acts were considered passed on the respective dates they received the approval of the State Houses of Assembly.

\textsuperscript{5} Act No. 1 of 2010. The date the Act was based on the initial assumption that the Act does not require presidential assent. The succeeding paragraphs will show that presidential assent to the bill was given in 2011 after judicial pronouncement in favour of presidential assent.
\textsuperscript{6} See the Schedule to the Constitution (First Alteration) Act No. 1 of 2010.
\textsuperscript{7} See the Schedule to the Constitution (Second Alteration) Act No. 2 of 2010.
\textsuperscript{8} See the Schedule to the Constitution (Third Alteration) Act No. 3 of 2011.
Assembly. The National Assembly considered presidential assent to the bills unnecessary.\(^9\)

The question of whether presidential assent to the amendment bills was required was canvassed before the courts. In *Olisa Agbakoba v. The Senate*,\(^10\) a Federal High Court sitting in Lagos presided over by Justice Okechukwu Okeke declared the constitution amendment process inchoate without the President’s assent. In *Chief Great Ovedje Ogboru & Anor v. Dr. Emmanuel Ewetan Uduaghan & 2Ors*,\(^11\) the Supreme Court held that by the provision of section 58(1) of the 1999 Constitution, bills for the amendment of the Constitution must be passed by both the Senate and the House of Representatives and assented to by the President. Upon the judicial pronouncement in favour of presidential assent, the Constitution Alteration Bills were forwarded to the President for assent. The President assented to them on 4\(^{th}\) March, 2011.

The amendments are far-reaching, touching several sections of the Constitution. This work seeks to critically analyze the amendments made to the Constitution through the Constitution (First Alteration) Act.\(^12\) The purpose of each amendment and whether the amendment will achieve the desired objective will be considered. Though section 9 of the 1999 Constitution which provides for the procedure for the alteration thereof used the word “alteration” instead of “amendment”, in this work the words “amendment” and “alteration” in relation to the Constitution will be used interchangeably.\(^13\) We will now examine the amendments.

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\(^10\) The decision was reported in the newspaper but the citation was not given. See I. Uwaleke, “National Assembly’s Constitution Amendment Breeds More Crises” *The Guardian*, November 16, 2010 p. 71.


\(^12\) The alterations made through the Constitution (Alteration) Acts Nos. 2 and 3 will not be considered in this work.

\(^13\) A learned writer has made a distinction between amendment and alteration of the Constitution. In his view, amendment is a more ambitious effort than alteration of a document. See A. Kalu, “The Constitution (Alteration) Bill 2010, Hints for the Legislature”, *Vanguard* June 25, 2010 p. 44. The distinction appears, however, to be without a difference.
II. Constitution (First Alteration) Act: A Critical Analysis

The Constitution (First Alteration) Act introduced the following amendments to the 1999 Constitution:

A. Sections 66, 107, 137 & 182 of the Constitution: Disqualification for Indictment by Judicial or Administrative Panel of Enquiry

Section 66 of the 1999 Constitution was amended by deleting subsection (1)(h). Similar amendments were made to sections 107, 137 and 182. The deleted provision reads as follows:

No person shall be qualified for election to the . . . if:

(h) he has been indicted for embezzlement or fraud by a Judicial Commission or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government, respectively; or . . .

The precursor to the amendment was the Supreme Court decision in Action Congress v. INEC.\(^{14}\) The Supreme Court held in that case that the disqualification in section 137(1) clearly involves a deprivation of right and a presumption of guilt for embezzlement or fraud in derogation of the safeguards in section 36(1) and (5) of the Constitution. According to the Court, the trial and conviction by a court is the only constitutionally permitted way to prove guilt and therefore, the only ground for the imposition of criminal punishment or penalty for the criminal offence of embezzlement or fraud. The Court reasoned that the penalty of disqualification for embezzlement or fraud solely on the basis of an indictment for those offences by an Administrative Panel of Enquiry implies a presumption of guilt, contrary to section 36(5) of the 1999 Constitution, whereas conviction for offences and imposition of penalties and punishments are matters pertaining exclusively to judicial power.\(^{15}\) The Supreme Court reaffirmed this proposition in Rt. Hon. Rotimi Chibuike Amaechi v. INEC & 3 Ors.\(^{16}\) The decision in these cases cannot be supported. They border on declaring a constitutional provision unconstitutional. The drafters of the Constitution should be presumed to be aware of section 36(1) and (5) before inserting the deleted subsection in the Constitution. It is a rule of statutory interpretation that constitutional provisions should be interpreted harmoniously and

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\(^{14}\) [2007] 12 NWLR (Pt. 48) p. 222.

\(^{15}\) At pages 259-260, 266, 293, 295, 309, 310.

\(^{16}\) (2008) 5 NWLR (Pt 1080) 227.
not otherwise. In *Hon. Justice Raliat Elelu-Habeeb (Chief Judge of Kwara State) & Anor v. Attorney General of the Federation & 2 Ors*,\(^\text{17}\) it was held that each provision of the Constitution is supreme thus forming part of the supreme law. A section of the Constitution must be read against the background of other sections of the Constitution to achieve a harmonious whole.\(^\text{18}\)

The decisions in the *Action Congress and Rotimi Amaechi cases* are in accord with the Supreme Court decisions in *Denloye v. Medical and Dental Practitioners Disciplinary Committee*;\(^\text{19}\) *Sofekun v. Akinyemi & 3 Ors*;\(^\text{20}\) *Garba v. University of Maiduguri*;\(^\text{21}\) and *F.C.S.C. v. Laoye*\(^\text{22}\) to the effect that where an allegation against a person borders on commission of a crime, only a court, as opposed to an administrative tribunal, can entertain the matter. One cannot but agree with Professor Ben Nwabueze that the decisions are clearly misconceived, both because a finding of guilt for a criminal offence by a commission of inquiry or a disciplinary committee is not a conviction for that offence, and because dismissal from office based on such a finding is not a punishment but only a disciplinary penalty. Judicial power is not usurped by a finding of guilt which does not operate as a conviction for a criminal offence and which is intended to serve merely as a basis for disciplinary action. Disciplinary proceedings and criminal trial operate on completely different planes and serve entirely different purposes.\(^\text{23}\) In a case where a statute enacted by the Ceylonese legislature in 1965 was applied to vacate the parliamentary seats of certain persons who had been found guilty of bribery by a commission of inquiry, the Judicial Committee of the Privy Council held that the removal of the culprits from their parliamentary seats was not in all the circumstances, punishment for a criminal offence, as to be a usurpation of judicial power.\(^\text{24}\) According to the court, the purpose of the statute was to make public life pure. Similarly, the purpose of the deleted sub-section was to ensure that only credible persons are elected to public offices. The danger created by the

\(^{17}\) [2012] 13 NWLR (Pt. 1318) 423.

\(^{18}\) At pp. 520-521.

\(^{19}\) (1968) 1 All NLR 306.


\(^{22}\) [1989] 2 NWLR (Pt. 106) 652.


\(^{24}\) *Kariapper v. Wijesinba* [1976] 2 AER 485 discussed in Nwabueze *op. cit.*
amendment is that when persons facing corruption charges or who have been indicted for corruption are elected to public offices, it becomes more difficult to bring them to justice as they can use their official positions to frustrate their trials. Secondly, some of them may be elected to offices where they will enjoy immunity from prosecution upon being sworn in. Moreover, such persons are likely to engage in more corrupt practices when elected into office. There is no doubt that it is possible to abuse the deleted sub-section as happened between the then President Obasanjo and Governor Orji Uzor Kalu, then Governor of Abia State. However, the judiciary will intervene whenever there is such abuse or threat of such abuse.

It is regrettable that many political office holders who are facing trial for corrupt practices are allowed to hold their offices even when on trial. Sections 66(1) (h), 107(1) (h), 137(1) (h), and 182(1) (h) of the Constitution should have been strengthened to require that any elected person who is charged to court for criminal offence should stand suspended from office and the emoluments of the office suspended until the final determination of the criminal charge. Under the Civil Service Rules a civil servant who is charged to court for a criminal offence will be interdicted pending the final determination of the criminal charge. The reason for the double standard cannot be appreciated.

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25 See section 308 of the Constitution confers immunity from criminal prosecution on incumbent President, Vice-President, Governor and Deputy-Governor.
26 When the then President Olusegun Obasanjo sent a list of indicted politicians, including the then Governor of Abia State, Orji Uzor Kalu, to the Independent National Electoral Commission based on a submission from the Economic and Financial Crimes Commission (EFCC), Governor Orji Uzor Kalu in turn based on a purported report of a Commission of Inquiry he set up, published a White Paper where President Olusegun Obasanjo, his daughter, Governors Umaru Musa Yar’Adua of Katsina State and Goodluck Jonathan of Bayelsa State (as they then were) were indicted on various grounds. In the election petition case of Umaru Musa Yar’Adua & Anor v. Alhaji Atiku Abubakar & 3 Ors., [2008] 19 NWLR (Pt. 1120) 1, the Supreme Court held that the Governor of a State (in this case Abia State) can only set up a Commission of Inquiry in respect of public officers in his State. He has no constitutional competence to set up a Commission of Inquiry to inquire into the activities of public servants in any other State.
B. Sections 69 & 110: Recall (Senate & House of Representative Members, etc) Verification of Signature by INEC

Section 69 of the Constitution was altered in paragraph (a) by inserting immediately after the word “member” in line 4, the words, “and which signatures are duly verified by the Independent National Electoral Commission (INEC)”. Section 69 reads as follows prior to the amendment:

69. A member of the Senate or of the House of Representatives may be recalled as such a member if-

(a) there is presented to the Chairman of the Independent National Electoral Commission a petition in that behalf signed by more than one half of the persons registered to vote in that member’s constituency alleging their loss of confidence in that member; and

(b) the petition is thereafter, in a referendum conducted by the Independent National Electoral Commission within ninety days of the date of receipt of the petition, approved by a simple majority of the votes of the persons registered to vote in that member’s constituency.

The purpose of the amendment is to prevent fraud by ensuring that the signatories to a proposal for a recall of a member of the National or State Assembly are authenticated through verification by the INEC.

C. Section 75: Ascertainment of Population

Section 75 of the Constitution provides for using the 1991 population census of Nigeria or any other census to be conducted thereafter for the ascertainment of the number of inhabitants of Nigeria or any part thereof for the purpose of determining the size of a Senatorial District or Federal Constituency. The amendment made to the section was to remove the specific reference to the 1991 population census of Nigeria. Consequently, section 75 of the Constitution was altered by deleting:

(a) The expression, “the 1991 census of the population of Nigeria or” in line 3; and

(b) The words, “after the coming into force of the provisions of this part of this Chapter of this Constitution” immediately after the word “Assembly” in lines 4 and 5.

The purport of the amendment is that at any time the prevailing population census will be used in determining the size of a Senatorial District or Federal Constituency.
D. Sections 76(1) & (2); 116(1) & (2); 132 (1) & (2); and Section 178 (1) & (2): Time of Election to National Assembly and State Houses of Assembly, etc.

Section 76 of the Constitution was altered as follows:

(a) In subsection (1), line 2, by inserting immediately after the word “Commission” the words, “in accordance with the Electoral Act”

(b) In subsection (2), by substituting for the words-

(i) “sixty days before and not later than the date on which the House stands dissolved”, in lines 2 and 3, the words, “one hundred and fifty days and not later than one hundred and twenty days before”.

(ii) “Three months” in lines 3 and 4 the words “ninety days”; and

(iii) “One month” in line 4, the words “thirty days.

Prior to the amendment, section 76(1) reads as follows:

76. (1) Elections to each House of the National Assembly shall be held on a date to be appointed by the Independent National Electoral Commission.

The amendment is intended to overcome the Supreme Court decision in Attorney General of Abia State & 35 Ors., v. Attorney General of the Federation. Some provisions of section 15 of the Electoral Act 2001 relating to the date of elections were challenged for constitutionality in that case. The Supreme Court held that some provisions of the said section 15 of the Electoral Act 2001 were either in pari materia with some subsections of sections 76 (1) & (2); 116 (1) & (2); 132 (1) & (2); and section 178 (1) & (2) of the Constitution and consequently inoperative while those inconsistent with them were held void.

The amendment to section 76 (1) which added to the section the phrase “in accordance with the Electoral Act” may serve the selfish interest of the party to which the majority of the members of the National Assembly belong by taking away from the INEC and vesting on the National Assembly the power to determine the order of elections through the instrumentality of the Electoral Act. The order of elections is very important because of the possibility of bandwagon effect. The amendment to subsection (2) of section 76 is desirable to ensure that elections are conducted early enough to give room for petitions arising from elections to be possibly determined before the swearing in of the candidates whose elections are challenged. Similar amendments were made to section 116 (1) & (2) in respect of election to State Houses of Assembly.

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27 [2002] 6 NWLR (Pt. 763) 264
Assembly; section 132 (1) & (2) in respect of presidential election; and section 178 (1) & (2) in respect of time for INEC to conduct governorship election.

E. Section 81: Authorization of Expenditure from Consolidated Revenue Fund (First Line Charge for INEC, National Assembly and Judiciary)

Section 81 of the Constitution was altered by substituting for the existing subsection (3) a new subsection “(3)” which reads as follows:

(3) The amount standing to the credit of the –
(a) Independent National Electoral Commission
(b) National Assembly, and
(c) Judiciary,
in the Consolidated Revenue Fund of the Federation shall be paid directly to the said bodies respectively; in the case of the Judiciary, such amount shall be paid to the National Judicial Council for disbursement to the heads of the courts established for the Federation and States under section 6 of this Constitution”.

The amendment is intended to promote the independence of the above institutions. 28 Before the amendment, only the judiciary enjoyed financial autonomy under the section. 29 It is surprising that while the State Houses of Assembly voted in favour of the amendment in respect of the National Assembly, the proposal for similar amendment to section 121(3) (a) & (b) in favour of State Houses of Assembly failed as a result of failure to obtain the support of the requisite number of State Houses of Assembly for the proposal. This shows clearly that State Houses of Assembly are tied to the apron strings of the governors and that the members do not want to loosen themselves from the strings. 30 In apparent


30 For the States that supported the proposal, see The Source Magazine Vol. 27 No. 15 of August 2, 2010 p. 15.
justification of the status quo, the Speaker of Akwa Ibom State House of Assembly, Samuel Ikon, explained that it was possible for the National Assembly to implement financial autonomy because they know they will get it from the federal government. According to him, since State governments rely mostly on allocation from the federal government, it was not possible to peg the percentage of the Assembly budget on the estimated cash inflow. “The autonomy would have been possible if the percentage of money due the State Assemblies were predicated on the actual amount available for the State rather than on some impracticable provisions”, he argued. To him, if the amendment had been passed, there would have been constitutional crisis in many States to the extent that governors would have been impeached or would have faced impeachment threat for violating the constitutional provisions. This contention is an illogical effort to rationalize the rejection by State House of Assembly of their financial autonomy.

F. Section 84: Recurrent Expenditure of INEC to be a Charge upon the Consolidated Revenue Fund (First Line Charge)

Section 84 of the Constitution was altered by inserting immediately after the existing subsection (7) a new subsection “(8)”-

(8) The recurrent expenditure of the Independent National Electoral Commission, in addition to salaries and allowances of the Chairman and members shall be a charge upon the Consolidated Revenue Fund of the Federation.

This amendment is also intended to promote the independence of INEC.

31 A. Macauley, “We Rejected the Autonomy to avert Constitutional Crisis, says A’Ibom Assembly Speaker” Daily Independent 24^th^ August, 2012 p. 8. On the contrary, however, the State Houses of Assembly have recently started agitating for constitutional amendment that will guarantee their autonomy. The Chairman of the Conference of Speakers of State Houses of Assembly, Hon. Garba Inuwa, has urged the National Assembly to consider an amendment that enables state assemblies to receive their money directly as a first charge on the state allocation. He said that the measure would go a long way in helping the state legislature to realize their full autonomy and free them from undue interference from any quarters. See O. Ezigbo, “Governors, State Assemblies Disagree over Autonomy” Thisday, 26^th^ May 2012 p. 1.
G. Sections 135(2) and 180(2): Tenure of Office of the President and Governor Respectively in Case of Rerun Election

Sections 135 (2) and 180 (2) of the Constitution were altered by inserting immediately after the existing subsection (2) a new subsection (2A) which reads as follows:

(2A) In the determination of the four year term, where a re-run election has taken place and the person earlier sworn in wins the re-run election the time spent in the office before the date the election was annulled, shall be taken into account.

This amendment seeks to ensure that persons whose elections were annulled do not gain undue advantage if they win the re-run election. As may be recalled, the Supreme Court held in *Peter Obi v. Independent National Electoral Commission*[^32] that the tenure of a Governor who succeeds in an election petition begins to run from the date the oath of office was taken. The amendment seeks to exclude a Governor or President who win re-run election after the nullification of his initial election from spending more time in office than he would have spent if his election had not been nullified. Section 180 (2) & (3) (as amended) was in issue in the consolidated Supreme Court cases of *Congress for Progressive Change (CPC) v. Admiral Murtala Nyako & 2 Ors*[^33]; *Independent National Electoral Commission (INEC) v. Senator Liye Ibeke*[^34]; *Independent National Electoral Commission (INEC) v. Chief Timipre Sylva & 4 Ors*[^35]; *Independent National Electoral Commission (INEC) v. Alhaji Aliyu Magatakarda Wamako & Anor.*[^36]; *Independent National Electoral Commission (INEC) v. Alhaji Ibrahim Idris & Anor.*[^37] The High Court had held in *Congress for Progressive Change (CPC) v. Admiral Murtala Nyako & 2 Ors.*[^38] as follows:

Arising from the legal standpoint that oath of allegiance and oath of office taken by the plaintiff on 29/5/2007 have been rendered nullities by the nullification of their elections as a

[^32]: 2007 11 NWLR (Pt. 1046) 565
[^34]: Unreported suit No. SC.266/2011 (judgment delivered on 27th January, 2012).
[^38]: Unreported suit No. SC.357/2011 (judgment delivered on 27th January, 2012).
Governor before the re-run election which they subsequently won, and in view of the other legal postulation that the amendment of section 180(2) made pursuant to the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010 does not apply to the plaintiff, it is obvious that the inexorable conclusion to reach is that the four year term of office of all the plaintiff must be calculated from the dates they took their oath of allegiance and oath of office after the fresh elections conducted in 2008.

This decision was affirmed by the Court of Appeal. The Supreme Court consolidated the case with other similar cases mentioned above and held that in calculating the four year tenure of a Governor, the period spent in office before the nullification of his election will be reckoned with to ensure that he does not spend more than four years in office as provided for in the Constitution.

H. Sections 145 and 190: Acting President or Governor during Temporary Absence of the President or Governor

Section 145 of the Constitution was amended by substituting for the section a new section “145” which reads as follows.

145(1) Whenever the President is proceeding on vacation or is otherwise unable to discharge the functions of his office, he shall transmit a written declaration to the President of the Senate and Speaker of the House of Representatives to that effect, and until he transmits to them a written declaration to the contrary, the Vice President shall perform the functions of the President as Acting President.

(2) In the event that the President is unable or fails to transmit the written declaration mentioned in subsection (1) of this section within 21 days, the National Assembly, shall mandate the Vice President to perform the functions of the office of the President as Acting President until the President transmits a letter to the President of the Senate and Speaker of the House of Representatives that he is now available to resume his functions as President.

Similar amendment was made to section 190(1) in respect of Governors. The amendment is a fallout from the lacuna observed in the Constitution when the late President Umaru Musa Yar’Adua, on November 23 2009, travelled out of the country to Saudi Arabia for medical treatment without handing over to the Vice-President. This created a vacuum in the Presidency as the Vice President could not exercise the functions of the President without a handover of power to him.
The un-amended section 145 of the 1999 Constitution grants the President the discretion to transmit a letter to the Senate President and the Speaker to inform them that he would be going on vacation or be otherwise unable to discharge the functions of his office. In a suit filed by the Nigerian Bar Association against the Minister of Justice and Attorney General of the Federation, the NBA prayed the Federal High Court to rule that, in view of the fact that the President omitted or failed to transmit to the President of the Senate and the Speaker of the House of Representatives a written declaration that he was proceeding on (medical) vacation, the Vice President should be sworn in under the doctrine of necessity. The Federal High Court held that it was not mandatory for the President to write the National Assembly whenever he is proceeding on a vacation and his failure to do so does not amount to a breach of the Constitution. \(^{40}\)

An eminent Nigerian constitutional lawyer, Professor Ben Nwabueze, observed that section 145 of the Constitution is clumsily worded. To him, under the provision of section 145, the Vice President cannot validly discharge the functions of the office of President unless and until the conditions specified in the section has been satisfied i.e. until the prescribed written declaration has been transmitted to the two presiding officers of the National Assembly. \(^{41}\) Eventually the two Houses of the National Assembly, in order to plug the vacuum, passed resolutions confirming the Vice President as Acting President after 79 days of absence of President Yar’Adua on health grounds. \(^{42}\) The amendments to

\(^{40}\) See Nigerian Bar Association v Attorney General of the Federation & Federal Executive Council (unreported) judgment of the Federal High Court delivered on 29\(^{th}\) January, 2010 by Justice Dan Abutu, Hon. Chief Judge of the Federal High Court. For a criticism of the decision, see C. Akiri, “Abutu’s Judgment on NBA V AGF: Matters Arising” The Guardian, Tuesday, February 9, 2010 p. 72.


\(^{42}\) While supporting the action of the National Assembly but criticizing the reasons for the action, a learned commentator, Onyeka Osuji, observed that the first US Vice President to assume the office of President was John Tyler after the death of William Henry Harrison in 1841, noting that the US Constitution at that time did not provide for succession in such circumstance. The practice was said to have continued without explicit constitutional provision until the 25\(^{th}\) Amendment to the US Constitution. See O. Osuji, “Power Vacuum: Did the End Justify the Means?” Thisday, Tuesday, 23\(^{rd}\) February, 2010 p. vii.
section 145 and 190 are intended to prevent reoccurrence of such vacuum in the executive offices of the President or Governor.\textsuperscript{43}

I. Sections 156(a) and 200(a): Qualification for Membership of INEC and SIECs

Section 156 of the Constitution was altered in subsection (1) (a), line 2, by:

Inserting immediately after the word, “Representatives”, the words, “provided that a member of any of these bodies shall not be required to belong to a political party, and in the case of the Independent National Electoral Commission, he shall not be a member of a political party.

Similar amendment was made to section 200(a) in respect of State Independent Electoral Commissions (SIECs). This amendment became necessary because under the un-amended section 156 of the 1999 Constitution, no person shall be qualified for appointment as a member of INEC unless he is qualified for election as a member of the House of Representatives. To be qualified for election as a member of the House of Representatives under section 66 of the Constitution requires that a person must be a member of a political party. It is considered that appointment of a member of a political party to INEC or SIEC membership will affect the independence of the Commission. However, the amendment did not go far enough to achieve the desired objective. Politicians have circumvented the provision by resigning their membership of political parties prior to their appointment as INEC or SIEC members. After their resignation, they will contend that they are not members of a political party at the time of their appointment. An example is the case of Bauchi State where Abdulmumini Kundak who was appointed Chairman of Bauchi State Independent Electoral Commission acknowledged that he was a card-carrying member

\textsuperscript{43} However, much still depend on the disposition of the legislature. A test case on the implementation of the new section 190 of the Constitution has been provided by the case of the Governor of Taraba State, Danbaba Suntai, whose private jet crashed on 28\textsuperscript{th} October, 2012. After the accident, he was flown to a German hospital. He did not transmit any letter regarding his absence to the House of Assembly. See S. Ezea, “How Suntai’s Case Might Test Amended Constitution” \textit{The Guardian}, November 1, 2012 p. 49. Already the Attorney-General of the State and the Taraba State Chapter of the Nigerian Bar Association has pronounced that there is no vacancy in the Government House of the State. See C. Akpeji, “No Vacancy in Taraba Government House, Says Attorney-General, NBA,” \textit{The Guardian}, November 1, 2012 p. 3.
of the PDP before his appointment but says that before his name was submitted to the Bauchi State House of Assembly for screening, he resigned his membership of the party.\textsuperscript{44} The amendment should have stipulated that a candidate for appointment should not have been a member of a political party at all or for a specified period preceding the date of the proposed appointment.\textsuperscript{45}

\textbf{J. Section 160: Powers and Procedure of INEC}

Section 160 of the Constitution was altered in subsection (1), line 4, by inserting immediately after the word “functions”, the words, “provided that in the case of the Independent National Electoral Commission, its powers to make its own rules or otherwise regulate its own procedures shall not be subject to the approval or control of the President”. The amendment tries to enhance the independence of INEC.

\textbf{K. Section 228(a) and (b): Powers of the National Assembly with Respect to Political Parties}

Section 228 was amended by substituting new paragraphs (a) and (b) for the existing ones after the opening paragraph, ‘The National Assembly may by law provide-’. The new paragraphs (a) and (b) introduced by the amendment read as follows:

\begin{quote}
228 (a) and (b)-
(a) Guidelines and rules to ensure internal democracy within political parties, including making laws for the conduct of party primaries, party congresses and party conventions; and
(b) The conferment on the Independent National Electoral Commission of powers as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that
\end{quote}


\textsuperscript{45} The Minority Leader of the House of Representatives, Femi Gbajabiamila, recently instituted an action against the President, INEC and others seeking a declaration, inter alia, that the purported confirmation of Ambassador Mohammed Anka, Maj. Gen. Bagudu Mamman, Alhaji Yakubu Shehu and Mr. Eddy Nwatalari, all members of the PDP for appointment to the offices of INEC Resident Electoral Commissioner is unconstitutional, null and void for violating section 156(1)(a) of the Constitution as amended. See B. Nwannekanma, B. “House Minority Whip sues President, INEC, Others over RECs Nomination” \textit{The Guardian}, November 22, 2011 p. 96.
political parties observe the practices of internal democracy, including the fair and transparent conduct of party primaries, party congresses and party conventions. This amendment follows the recommendation of the Electoral Reform Committee that relevant provisions of the Constitution should be amended to ensure internal democracy in Nigerian political parties. Following this amendment, section 87 of the Electoral Act 2010 (as amended) provides for democratic party primaries and the justiciability of party primary election disputes contrary to the doctrine of political question. The doctrine which shielded party primary election disputes from judicial inquiry was most eloquently enunciated in Nigeria by the Supreme Court in the cases of Hon. Onuoha v. Chief R.B.K. Okafor & 2 Ors., and Bashir Mohammed Dalhatu v. Ibrahim Saminu Turaki. The constitutional amendment and the provision of section 87 of the Electoral Act 2010 (as amended) sought to bury the doctrine in so far as party primary election disputes are concerned. However, in the consolidated cases of Senator Yakubu Garba Lado & 42 Ors. v. Congress for Progressive Change (CPC) and 5 ors and Dr. Yusha’u Armiyau v. Congress for Progressive Change (CPC) and 47 ors, the Supreme Court held that by virtue of section 87(4) (b) (ii), (c) (ii) and (9) of the Electoral Act 2010 (as amended), where there is one single primary and a contestant wins and his name is not forwarded to the Independent National Electoral Commission (INEC), he can complain before the court; but where parallel primaries were held by different factions of a political party, the court will have no jurisdiction to determine which of the candidates is the rightful candidate of the party. The Supreme Court further introduced the concept of non-justiciability of pre-primary election disputes in that case. This decision has whittled down the efficacy of the amendment made to this section.

47 (1983) 2 SCNLR 244.
L. Section 229: Deletion of Interpretation of the Word “Association”
Section 229 of the Constitution was altered by deleting the interpretation of the word “association”. Prior to the amendment, section 229 of the Constitution read as follows:

In this Part of this Chapter, unless the context otherwise requires –
“association” means anybody of person corporate or unincorporated who agree to act together for any common purpose, and includes an association formed for any ethnic, social, cultural, occupational or religious purpose; and “political party” includes any association whose activities include canvassing for votes in support of a candidate for election to the office of President, Vice-President, Governor, Deputy Governor or membership of a legislative house or of a local government council.

The amendment to this section is necessary because the definition of the word “association” in that section to mean “anybody of persons corporate or unincorporated who agree to act together for any common purpose, and includes an association formed for any ethnic, social, cultural, occupational or religious purposes” will be in conflict with other sections of the Constitution conferring power over regulation and formation of political parties, particularly sections 221, 222, 223, 224 and 228 of the Constitution.

M. Section 233(2) – Extension of Appellate Jurisdiction of the Supreme Court to Governorship Election Petition Appeals
Section 233(2) of the Constitution was altered in paragraph (e) by-
(a) substituting for the word “or” after the word “President” in subparagraphs (i), (ii) and (iii), a comma-“,”; and
(b) inserting immediately after the word “Vice-President” in subparagraphs (i), (ii), (iii), the words, “Governor or Deputy Governor.”

The purpose of the amendment is to enable appeals in governorship elections to go up to the Supreme Court. Perhaps the loss of Ekiti and Osun States governorship by the ruling People’s Democratic Party through the decisions of the Court of Appeal may have influenced the amendment.
N. Section 239(a),(b)&(c) – Extension of the Original Jurisdiction of the Court of Appeal to Governorship Election Petitions

Section 239 of the Constitution was altered by-
(a) substituting for the word “or” after the word “President” in paragraphs (a), (b) and (c), and comma- “,”; and
(b) inserting immediately after the word “Vice-President” in paragraphs (a), (b) and (c), the words “Governor or Deputy Governor.

The amendment to this section extends the original jurisdiction of the Court of Appeal to election petitions involving the office of Governor or Deputy Governor. The rationale for the amendment cannot be easily appreciated. The Court of Appeal is already over-burdened with cases. Secondly, if there is something wrong with the Election Tribunals why should they continue to hear other petitions?51

O. Section 246 (1) (b) & (3) – Renaming of National and State Assembly Election Tribunals

The un-amended section 246 (1) (a) & (3) of the Constitution reads as follows:

246(1) – An appeal to the Court of Appeal shall lie as of right from-
(a) decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals on any question as to whether …
(3) The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final.

Section 246 was altered as follows:
(a) in subsection (1)(b), by-
(i) substituting for the words, “National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals”, the words “National and State Houses of Assembly Election Tribunals”,
(ii) deleting subparagraph (ii), and
(iii) renumbering the paragraph appropriately; and
(b) in subsection (3), line 2, by inserting immediately after the word “final”, the words, “provided that an interlocutory application may be decided during the delivery of judgment.

51 The section has, however, been further amended through the Constitution (Second Alteration) Act 2010.
The amendment to this section became necessary as a result of the amendment of section 285 of the Constitution to create only one Election Tribunal – National and State Houses of Assembly Election Tribunal. Prior to the amendment, section 285 created two Election Tribunals - National Assembly Election tribunals and Governorship and Legislative Houses Election Tribunals. The new proviso to subsection (3) enables the Court of Appeal to determine interlocutory applications during final judgment.

P. Section 251 – Extension of the Jurisdiction of the Federal High Court

Section 251 of the Constitution was altered by inserting immediately after the existing subsection (3) a subsection “(4)”, which reads as follows:

(4) The Federal High Court shall have and exercise jurisdiction to determine any question as to whether the term of office or a seat of a member of the Senate or the House of Representatives has ceased or his seat has become vacant.

The amendment to the section has enlarged the jurisdiction of the Federal High Court to include the question whether the term of office or the seat of a member of the Senate or the House of Representatives has ceased or become vacant. Prior to the amendment, jurisdiction over the matter was vested on Election Tribunals by section 285 of the Constitution. The position was, however, found unsatisfactory because Election Tribunals sit only on ad hoc basis. Whether this additional jurisdiction is exclusive is not clear.  

Q. Section 272 – Extension of the Jurisdiction of the State High Court

Section 272 of the Constitution was altered by inserting immediately after the existing subsection (2) the following new subsection “(3)” -

(3) Subject to the provisions of section 251 and other provisions of this Constitution, the Federal High Court shall have jurisdiction to hear and determine the question as to whether the term of office of a member of the House of Assembly of a State, a Governor or Deputy Governor has ceased or become vacant.

The amendment to this section similarly extends the jurisdiction of the Federal High Court to questions as to whether the term of office of a member of a House of Assembly, Governor or Deputy Governor has ceased or become vacant. However, since section

52 The issue will not be explored in this paper as a result of constraint of space.
272 of the Constitution provides for the jurisdiction of the State High Court, why was the jurisdiction of the Federal High Court in respect of these matters contained in this section instead of section 251? The implication is that a person who reads section 251 (including the amendment to the section) will not know the extent of the jurisdiction conferred on the Court by the Constitution except the person also reads section 272. Furthermore, whether this additional jurisdiction is exclusive is not clear.\(^53\)

**R. Section 285: Election Tribunals**

Section 285 of the Constitution which deals with Election Tribunals was altered as follows:

(a) by substituting for the existing subsection (1) the following new subsection “(1)”-

(1) There shall be established for each State of the Federation and the Federal Capital Territory one or more election tribunals to be known as the National and State Houses of Assembly Election Tribunals which shall, to the exclusion of any Court or Tribunal, have original jurisdiction to hear and determine petitions as to whether-

a) Any person has been validly elected as member of the National Assembly; and

b) Any person has been validly elected as member of the House of Assembly of a State”;

(b) by deleting subsection (2);

(c) in subsection (3), lines 1 and 2 by substituting for the words “National Assembly, Governorship and Legislative Houses Election Tribunals”, the words, “National and State Houses of Assembly Election Tribunals”;

(d) in subsection (4), line 2 by substituting for the word, “two”, the word, “one”;

(e) by inserting the following new subsection “(5)” –“(8)”:  

5) An election petition shall be filed within 21 days after the date of the declaration of result of the elections.  

6) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition.  

7) An appeal from a decision of an election tribunal or court shall be heard and disposed of within 60 days.

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53 The issue will also not be explored in this paper as a result of constraint of space.
from the date of the delivery of judgment of the tribunal.

8) The Court in all appeals from election tribunal may adopt the practice of first giving its decision and reserving the reasons therefore to a later date.

The first observation is that subsection (2) of the original provision was deleted without any provision for renumbering the remaining subsections. The amendment introducing time limitation for the determination of election petitions may be aimed at stopping the situation where election petitions keep on lingering, until at times, the tenure of the office runs out. The amendment became necessary in view of the Supreme Court decision in *Unongo v. Aku* to the effect that the legislature cannot fix the time within which the judiciary will determine a case.

It is, however, submitted that the Constitution should have merely empowered parliament to fix the period for the filing and determination of election petitions through ordinary legislation. If this approach is adopted, the time fixed can be regularly adjusted by law as experience dictates instead of going the whole hug of amending the Constitution if the time limitations do not serve the interest of justice. A legal luminary, Chief Mike Ahamba, SAN, has pertinently observed that the misfortune of the whole amendment was that procedural matters were planted into the Constitution. In *Baxter v. Commissioners of Taxation (N.S.W.)* a U.S. court referred with approval to the following passage from the judgment of Story, J in *Martin v Hunters’ Lessee*:

> The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers … Hence its powers are expressed in general terms, leaving to the legislature from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model

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56 (1907) 4 C.L.R. 1087 at 1105.
the exercise of its powers, as its wisdom and the public interest should require.\textsuperscript{57}

The amendment introducing time limitation has led to an ugly result where several petitions were struck out on the ground that they were not determined within the period limited for their determination. In \textit{All Nigeria Peoples Party (ANPP) v. Alhaji Mohammed Goni \& 4 ors}\textsuperscript{58}, the Supreme Court held that where an election tribunal fails to comply with the provision of section 285(6) of the 1999 Constitution as amended, the jurisdiction to continue to entertain the petition lapses or becomes spent and cannot be extended by any court order howsoever well intentioned. In \textit{Chief Great Ovedje Ogboru \& Anor v. Dr. Emmanuel Ewetan Uduaghan \& 2 Ors}\textsuperscript{59} the Supreme Court held that by virtue of section 285(7) of the 1999 Constitution (as amended), an appeal from a decision of an Election Tribunal or the Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of delivery of judgment of the tribunal or Court of Appeal. The Court of Appeal was therefore under a statutory obligation to hear and determine the appellants’ appeal within the period of sixty days prescribed by the Constitution but it failed to do so when it delivered the reason for its decision on the 72\textsuperscript{nd} day after the judgment of the election tribunal was delivered. In the circumstance, the judgment of the Court of Appeal was given contrary to section 285(7) of the Constitution (as amended) and is therefore null and void. Thus, in pursuit of speedy dispensation of election petition cases, what has been achieved is an unfortunate situation where justice denied is preferred to justice delayed.

\textbf{S. Alterations to the Schedules of the Constitution}

Part 1, Item 56 of the Second Schedule to the Constitution was altered by inserting before the word “Regulation” the word, “Formation”. The import of the amendment is that the National Assembly can now not only make laws regarding the regulation of political parties but also the formation of political parties, thus overcoming the Supreme Court decision in \textit{Independent National Electoral Commission (INEC) \& Anor v. Alhaji Abdulkadir Cited in E. I. Kachikwu, and M. A. A. Ozekhome, “Extending the Frontiers of Constitutionalism: Should a Constitution contain only Legal Rules?” (1978-1988) \textit{N.J.R}. pp. 74-105.\textsuperscript{57}
\textsuperscript{58} [2012] 7 NWLR (Pt. 1298) p. 147.
\textsuperscript{59} [2012] 11 NWLR (Pt. 1311) p. 357.
Balarabe Musa & 5 Ors\textsuperscript{60}. In that case, INEC Guidelines and the Guidelines for the Registration of Political Parties in the Electoral Act 2002 were declared unconstitutional for introducing additional requirements outside the stipulations of section 222 of the 1999 Constitution.

Item (F) of the Third Schedule to the Constitution was altered as follows:

(a) by substituting for paragraph 14, the following new paragraph “14”

14(1) The Independent National Electoral Commission shall comprise the following members-

a) A chairman, who shall be the Chief Electoral Commissioner; and

b) Twelve other members to be known as National Electoral Commissioners.

(2) A member of the Commission shall-

a) be non-partisan and a person of unquestionable integrity; and

b) be not less than 40 years of age in the case of the National Commissioners.

(3) There shall be for each State of the Federation and the Federal Capital territory, Abuja, a Resident Electoral Commissioner who shall-

a) be appointed by the President subject to confirmation by the Senate;

b) be a person of unquestionable integrity and shall not be a member of any political party; and

c) not less than 35 years of age”; and

(b) in paragraph (15) (c), line 2, by inserting immediately after the word “finances”, the words, “conventions, congresses and party primaries.

The Sixth Schedule to the Constitution was altered as follows:

(a) by deleting, the word “Assembly” and inserting immediately after the word “National” the words “and State Houses of Assembly Election Tribunals” in Heading “A”;

(b) in paragraph 1 (1), line 1, by deleting immediately after the word “National” the word “Assembly”, and inserting the words, “and State Houses of Assembly Election Tribunals”;

(c) in subparagraph (2), line 1, by substituting for the word “four”, the word” two”; and

\textsuperscript{60}[2003] 3 NWLR (Pt. 806) p. 72.
(d) By deleting-
   (i) Heading “B”, and
   (ii) Paragraph 2(1), (2) and (3).

The amendments to the schedules are intended to reflect the amendments to the body of the Constitution already discussed above.

III. Conclusion

As an organic law of a dynamic society, the Constitution of the country will always be amended from time to time as the need arises. However, the amendment ought to serve the purpose of social engineering and not elitist or class interest. The amendments made to sections 66, 107, 137 and 182 of the Constitution will serve elitist interest or the interest of the corrupt and inept political class in Nigeria. The amendments to sections 76(1) and (2) and 116(1) and (2) relating to time of election; and the amendment to section 132(1) and (2) relating to the date of election will undermine the independence of INEC. These amendments are open to manipulation by the party controlling the majority members in the National Assembly to its advantage to the detriment of the opposition political parties. The amendments which have incorporated into the Constitution time limitation for the determination of election petitions ought to be expunged from the Constitution. The matter should be left to be regulated by ordinary laws so that changes can as often be made as considered necessary or expedient. It is suggested that the Supreme Court should at the earliest opportunity take a second look at its decisions in Chief Great Ovedje Ogbor & Anor v. Dr. Emmanuel Ewetan Uduaghan & 2 Ors61 and All Nigeria Peoples Party (ANPP) v. Alhaji Mohammed Goni & 4 Ors62 to nip the ugly situation arising from the decisions in the bud. It is unfortunate that the Supreme Court has resurrected the doctrine of political question in relation to party primary election disputes notwithstanding the effort to bury the doctrine through the constitutional amendments and the Electoral Act 2010 (as amended). The situation calls for further amendment of the Constitution to bring the so-called issues of pre-primary election disputes and party primary election disputes involving factions of a party or the holding of parallel party primaries within justiciability.

HOW MUCH FORCE IS STILL LEFT IN THE TAXES AND LEVIES (APPROVED LIST FOR COLLECTION) ACT?

Introduction
By Decree No. 21 of 1998, the then Federal Military Government of Nigeria enacted the Taxes and Levies (Approved List for Collection) Decree (the “Decree”). The Decree was a response to the complaints of “multiple taxation” by tax payers, especially businesses. The complaints ranged from the number, types, and rates of taxes and levies (jointly, “taxes” hereafter) imposed by states and local government councils, to the manner of collection of these taxes. At the time the objective of the Decree was to restrain the “excesses” of state governments and local government councils in the exercise of their taxing powers. The Decree then specifically allocated the power to collect specified taxes among the federal government, the state governments and the local government councils; and, in some cases, went further to fix the amount of tax to be collected.

Upon the coming into effect of the 1999 Constitution (the “Constitution”), the Decree survived, by virtue of section 315 of the Constitution (“section 315”), as an existing law and became the Taxes and Levies (Approved List for Collection) Act (the “Act”). However the position of this article is that the Act should not have survived to date, but should have been (i) actively abrogated as part of the undertaking that gave rise to the 2004 edition of the Laws of the Federation of Nigeria (“LFN”), (ii) ignored as having impliedly ceased to have any force or effect upon the coming into force of the Constitution, or (iii) struck

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2 See Part II, Schedule to the Decree.

down as unconstitutional by the courts on the occasions that they
were invited to pronounce upon the constitutionality of the Act.
In the following parts of this article we shall first resolve the
question whether the Act falls within the scheme of section 315 as
a law, being a statute which may survive (or has survived) as
either an Act of the National Assembly or a Law of the House of
Assembly of a state ("House of Assembly"). Thereafter we shall
review the attitude of the courts to the Act, which will disclose
that, in the cases that have come before the courts, no thought was
given to the provisions of section 315 in the consideration and
determination of the applicability of the Act to states and local
government councils. The next part of the article will examine
what should be the correct response to the Act. The article will
close with a concluding section.

The Act as an existing law
The effect of section 315 is that an existing law would remain in
force and effect either as an Act of the National Assembly, i.e. a
statute with application throughout Nigeria (or in the Federal
Capital Territory) or as a Law of the House of Assembly –
depending on which of the legislatures has power under the
Constitution to legislate on the subject matter of the existing law.
Recognising that some of the existing laws may offend certain
provisions of the Constitution in their existing forms, and may
thereby be void by reason of inconsistency with the Constitution,5
section 315 further provides that these laws could continue to

4 By s. 315(4)(b) of the Constitution, existing law means “any law and includes
any rule of law or any enactment or instrument whatsoever which is in force
immediately before the date when this section comes into force or which
having been passed or made before that date comes into force after that date”.
It is uncertain what the phrase “rule of law” within this definition of existing
law implies, especially as it seems to have been used in contrast with
“enactment or instrument”. Does it suggest common law rules or case law
principles? If so, it hardly makes any meaning within the context of s. 315 as it
is unimaginable how the President, the Governor, or any other “appropriate
authority” can modify common law rules to bring them in conformity with the
provisions of the Constitution. In our view, existing laws within the meaning
of s. 315 must necessarily be limited to statutes and subsidiary legislation
made thereunder.

5 See the Constitution, S. 1(3). See also Stabilini Visinoni Ltd v FBIR (2009) 13
NWLR (Pt. 1157) 200; Fasakin Foods (Nig.) Ltd v Shosanya (2006) 10
NWLR (Pt. 987) 126; Cadbury Nigeria Plc v FBIR (2010) 2 NWLR (Pt. 1179)
561.
operate with such modifications as would bring them into conformity with the provisions of the Constitution. Specifically section 315(1) provides that –

Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be –

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and
(b) a Law by a House of Assembly to the extent that it is a Law with respect to which a House of Assembly is empowered by this Constitution to make laws.\(^6\)

It must quickly be added that the power granted to the courts or any tribunal established by law to deal with existing laws is wider than the power granted to the “appropriate authority”\(^7\) for the reason that the courts and tribunals are empowered to declare invalid any provision of an existing law on the ground of inconsistency with not merely any provisions of the Constitution: the power of the courts in this regard also extends to occasions where the existing law is inconsistent with the provisions of any other existing law, a law of a House of Assembly, or an Act of the National Assembly.\(^8\)

The Act no doubt survived as an existing law upon the coming into force of the Constitution. Thus the question that arises regarding its continued applicability is whether it should continue to apply as an Act of the National Assembly or a Law of a House of Assembly (for it is only when it can validly apply as either an Act of the National Assembly or a Law of a House of Assembly that it would be saved under the provisions of section 315). \textit{Fawehinmi v Babangida}\(^9\) presented the Supreme Court with an opportunity to deal with a similar question. The case involved the applicability of the Tribunal of Inquiry Act\(^10\) (formerly

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\(^6\) Emphasis added.

\(^7\) S. 315(4)(a) of the Constitution defines “appropriate authority” to mean the President in relation to any law of the Federation, the Governor in relation to an existing law deemed to be a Law made by the State House of Assembly, and a law revisor who is appointed by any law to revise the laws of the Federation or of a State.

\(^8\) See the Constitution, s. 315(3).

\(^9\) [2003] 3 NWLR (Pt. 808) 604.

Tribunal of Inquiry Decree of 1966)\(^{11}\) as an existing law under the Constitution. The respondent contended that ‘tribunal of inquiry’ was a residual matter and therefore the Tribunal of Inquiry Decree could not take effect as a federal legislation with nationwide application because the National Assembly did not have legislative competence over such matter. Upholding the respondent’s contention, the Supreme Court held that the Tribunal of Inquiry Act was not applicable to the states as an existing law because the subject matter of the Tribunal of Inquiry Act was within the exclusive competence of the states.\(^{12}\) The Tribunal of Inquiry Act would nevertheless apply as an Act of the National Assembly within the Federal Capital Territory, Abuja by virtue of the power of the National Assembly to legislate therefor. In the words of Ejiwunmi, JSC–

...the 1999 Constitution did not make any provision for Tribunals of Inquiry. In the absence of such a provision, the National Assembly cannot pass a general law on tribunals of inquiry to affect the entire federation... \textit{It remains to be said that under the 1999 Constitution, the establishment of tribunals of inquiry is now a residual matter which only the states can promulgate}.\(^{13}\)

The Supreme Court thus decided that the subject matter of the Act was not within the competence of the National Assembly. The Tribunal of Inquiry Act was accordingly declared void and of no force and effect to the extent that it purports to apply in the states of the federation.

The Supreme Court however took a different approach in \textit{Attorney General of Lagos State v. Attorney General of the Federation}.\(^{14}\) In that case, the Lagos State Government challenged the validity of the Nigerian Urban and Regional Planning Act\(^{15}\) on the ground that urban planning is not a matter on the exclusive or concurrent legislative lists, and can therefore only be legislated upon by a House of Assembly. The Supreme Court upheld the contention of the plaintiff and held that urban planning was a matter on the residual list and, therefore, could only be legislated upon by the legislature of a state. The Supreme Court, as per Uwaifo, JSC nevertheless held further that the National Urban and

\(^{11}\) Decree No. 41 of 1966.
\(^{12}\) “Exclusivity” here is limited to the territory of each state.
\(^{13}\) \textit{Fawehinmi v. Babaginda, supra} note 8 at 652. Emphasis added.
\(^{14}\) [2003] 12 NWLR (Pt. 833)1.
Regional Planning Decree No. 88 of 1992 was deemed to be an Act of the National Assembly but limited in application only to the Federal Capital Territory, Abuja, as well as a Law of a House of Assembly. In dealing with the continued applicability of the said Decree as a Law of the House of Assembly of Lagos State by virtue of section 315, Uwaifo, JSC reasoned thus –

Being an Act applicable in the FCT, I need not discuss the implications since they are not in issue in this case. As a law in Lagos, which is the plaintiff state, that state cannot be concerned with any of the provisions in it relating to the Federal Government. The Governor of Lagos or any person appointed by any law to revise or rewrite the laws of the State [as ‘appropriate authority’ per section 315(4) (a)] can by order make such modifications in the text of that law (i.e. Decree No. 88 of 1992), as it stands, in the manner he considers necessary or expedient to bring it into conformity with the provisions of the Constitution. He may do so by only omitting all the provisions relating to the Federal Government or may repeal the entire law as it applies to Lagos State per s. 314(4)(c) …Let me assume that he takes the first alternative. What will be left will be incoherent and incomprehensible because they are not amenable to the ‘blue pencil rule’; that is to say, the good is not separable from the bad as the sections relating to the State are invariably tied to the responsibility of the Federal Government under the Decree. This completely exposes as unrealistic any attempt to save any of the provisions which affect Lagos State.¹⁶

While Uwaifo, JSC would seem to have preferred the second of the two options he proposed, i.e. the repeal of the entire statute by Lagos State (being the approach consistent with the approach adopted in Fawehinmi v Babangida),¹⁷ he nevertheless, in line with the decision of the majority of the Justices of the Supreme Court who sat on the appeal, gave reliefs and consequential orders that merely nullified certain provisions of the statute in question as those provisions applied to Lagos State,¹⁸ apparently in line

¹⁷ Fawehinmi v. Babangida, supra note 8.
¹⁸ Specifically, Uwaifo, JSC in granting the second relief sought by the plaintiff in the matter granted a “… DECLARATION that the provisions of sections 1(2) & (3), 2(i), 3, 4, 5, 8, 9, 10, 11, 12, 28, 30 to 46, 47 to 63, 75, 76(30 and 86 to 88 of the Urban and Regional Planning Act (Decree No. 88 of 1992)
with his first option. It is however possible to justify the order made by Uwaifo, JSC on the basis that Lagos State did not ask for an annulment of the entire statute: the court merely, as it is limited in its power to do, granted the relief sought by the plaintiff. One may therefore speculate that had Lagos State asked for an annulment of the entire statute, the court would have granted that relief.

In arriving at its decision to annul certain provisions of the statute, the Supreme Court, as per Uwaifo, JSC, relied on section 315(3), which empowers a court of law or tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provisions of any other existing law, a law of a House of Assembly, an Act of the National Assembly, or any provision of the Constitution. It may therefore be deduced from the decision in Attorney General of Lagos State v Attorney General of the Federation\(^{19}\) that the continued applicability of an existing law, which requires modification as contemplated by section 315, either as an Act of the National Assembly or a Law of a House of Assembly is subject to either of two major factors, \(viz\). (i) the making of the relevant modification by the appropriate authority, or (ii) the invalidation of the offending provisions of such statute by the court or any other competent tribunal upon an application thereto. In the latter case, it is submitted that the application could be made even in the course of litigation where it is sought to apply the existing law. The continued applicability of the said existing law is, in the technical sense, not put in abeyance – even though the continued applicability of its offending sections becomes in substance ineffectual and inoperable. The court may also in the exercise of its interpretative jurisdiction effect the required modification – and this is likely to be the case where such modification is not fundamental. It must nevertheless be added that until an existing law is modified by the appropriate authority or by the court, lawyers may be in some difficulty when called upon to advise their clients on such statutes. It is also possible that until the Supreme Court exercises its interpretative jurisdiction

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\(^{19}\) Attorney General of Lagos State v Attorney General of the Federation, supra above n 13.
with regard to any such statute, the specific contents of such statute would remain indeterminate.\textsuperscript{20}

While the strict words of section 315(2) empower the appropriate authority to “modify” the “text of any existing law”, it would seem on the authority of\textit{Attorney General of Lagos State v Attorney General of the Federation},\textsuperscript{21} especially the judgment of Uwaifo, JSC, that the power contemplated therein includes the power to repeal any existing law. It may, however, be argued that section 315(2) does not contemplate the repeal of an existing law for the reason that the object of the entire section is to ensure the continued applicability of the said law. The power to repeal such law exists outside of section 315 and inheres in the relevant legislature as a component of its power to legislate on the subject matter covered by the said existing law. It may, therefore, be argued further that it would constitute an unlawful usurpation of the legislative power of a House of Assembly or the National Assembly for a Governor or the President, as the case may be, to purport to repeal an existing law by virtue of section 315(2); and such purported repeal of an existing law would thereby be void.\textsuperscript{22}

The force of this argument may however be assailed by the provision of section 315(4)(c), which defines “\textit{modification}” to

\begin{itemize}
\item \textsuperscript{20} This uncertainty is compounded by the growing body of conflicting decisions of High Courts and the Court of Appeal, and even the Supreme Court generally in various areas of the law. Prof. RACE Achara in a speech delivered at the 2008 Law Week of the Enugu Branch of the Nigerian Bar Association also pointed out some conflicting decisions of the Supreme Court in the following cases: \textit{Atolagbe v. Awuni} [1997] 7 SCNJ 1; \textit{Offor v. Osagie} [1998] 1 SCNJ 122; \textit{Amadi v. NNPC} [2000] 79 LRCN 1951; \textit{Savannah Bank Ltd. v. Ajilo} [1989] 1 NWLR (Pt. 97) 302; \textit{Yaro v. Arewa Construction} [2008] 154 LRCN 163; \textit{Calabar Central Co-operative v. Ekpo} [2008] All FWLR (Pt. 418) 198.
\item \textsuperscript{21} \textit{Attorney General of Lagos State v Attorney General of the Federation}, above n 13.
\item \textsuperscript{22} To argue otherwise would be an encroachment on the express provisions of the Constitution reserving legislative powers to the legislature. The power given to the appropriate authority under section 315 of the 1999 Constitution is limited to the purpose of making an existing law conform to the Constitution, so as to save that law and not to obliterate or destroy it. The applicable principle of statutory construction is as expressed in the Latin maxim: \textit{Interpretare et concordare leges legibus, est optimus interpretandi modus}; meaning that to interpret in such a way as to harmonise laws with laws is the best mode of interpretation.
\end{itemize}
include “addition, alteration, omission or repeal”. The appropriate authority may therefore rely on the provision of section 315(4)(c) to repeal an existing law – so that it ceases to have any force or effect. This would however depend on the interpretation that the courts put on the precise wording of section 315(2) where reference to the modification power of an appropriate authority is limited to “modification in the text”\(^\text{23}\) of the existing law. On the contrary, there can be no challenge to the proposition that the relevant legislature may exercise an inherent power to repeal an existing law without reference to, or despite the provisions of section 315.

In applying the reasoning in *Fawehinmi v. Babaginda*\(^\text{24}\) and *Attorney General of Lagos State v. Attorney General of the Federation*,\(^\text{25}\) to the circumstance of the Act, the answer to the question as to the scope of the continued applicability of the Act would depend on which of the legislatures as between the National Assembly and a House of Assembly has the power to legislate on the subject matter covered therein, *i.e.* the allocation of the power to collect sundry taxes (and in some instances the rate of tax) in Nigeria as among the federal government, the state governments and the local government councils. The answer to this question is in the Constitution. The Constitution allocates the legislative powers of the federation between the federal government and the governments of the component states. Under the Constitution, there is a clear-cut division of legislative powers between the National Assembly (for the federal government, including the Federal Capital Territory, Abuja) and the respective Houses of Assembly (for the respective state governments).\(^\text{26}\) For this purpose, the Constitution provides for two legislative lists: the exclusive and the concurrent lists. The National Assembly has exclusive powers to make laws with respect to any matter contained in the exclusive list.\(^\text{27}\) It also has concurrent powers with the Houses of Assembly to make laws with respect to any matter contained in the concurrent list, but only *to the extent*

\(^{23}\) Emphasis supplied. It may argued the power to effect a repeal “in the text” of an instrument may not authorize the abrogation of the entire instrument.

\(^{24}\) *Fawehinmi v. Babaginda*, supra above n 8.


\(^{26}\) In *Fasakin Foods (Nig.) Limited v. Shosanya* (2006) 4 KLR (Pt. 216) 1447 the Supreme Court held that the separation of the legislative powers of the federal and state governments in the Constitution is sacrosanct.

\(^{27}\) See the Constitution, s. 4(3).
provided for in the concurrent list.\textsuperscript{28} Finally, it has powers to make laws in respect of any other matter in respect of which it is empowered to make laws by any specific substantive provision of the Constitution.\textsuperscript{29} It must also be added that the National Assembly exercises the legislative powers of a House of Assembly with regard to the Federal Capital Territory, Abuja.

On the other hand, the Houses of Assembly have power to legislate on matters contained in the concurrent list, to the extent prescribed therein.\textsuperscript{30} They may also legislate on any other matter with respect to which they are empowered to make laws in accordance with the provisions of the Constitution.\textsuperscript{31} Finally, they have power to legislate on any matter not included in either the exclusive or the concurrent lists.\textsuperscript{32} The power of a House of Assembly to legislate on any matter not included in the exclusive list or concurrent list or reserved to the federal government under any other provision of the Constitution is also exclusive. These matters in respect of which a House of Assembly has exclusive power to make laws are otherwise known as residual matters. In \textit{Attorney General of Abia State v Attorney General of the Federation} Niki Tobi, JSC explained the law as follows:

\begin{quote}
\ldots the Constitution of the Federal Republic of Nigeria 1999, like most constitutions, does not provide for a residual list. And that is what makes the list residual. The expression emanates largely from the judiciary, that is, it is largely a coinage of the judiciary to enable it exercise its interpretative jurisdiction as it relates to the constitution. Etymologically, ‘residual’ merely means that which remains. In legislative or parliamentary language, residual matters are those that are neither in the exclusive nor concurrent legislative list.\textsuperscript{33}
\end{quote}

A similar statement is found in \textit{AG, Ogun State v. Aberuagba}\textsuperscript{34} where the Supreme Court stated that –

\begin{quote}
A careful perusal and proper construction of section 4 would reveal that the residual legislative powers of the government were vested in the States. By residual legislative powers within the context of section 4 [of the Constitution], [it] is meant what was left after the matters in the exclusive and concurrent
\end{quote}

\begin{footnotes}
\footnotetext[28]{See the Constitution, s. 4(4)(a).}
\footnotetext[29]{See the Constitution, ss. 4(4)(b) & 4(4) and Part II of the Second Schedule.}
\footnotetext[30]{See the Constitution, s. 4(7)(b).}
\footnotetext[31]{See the Constitution, s. 4(7)(c).}
\footnotetext[32]{See the Constitution, s. 4(7)(a).}
\footnotetext[33]{[2006] 16 NWLR (Pt. 1005) 265 at 380.}
\footnotetext[34]{(2002) Vol. 2 WRN 52; (1985) 1 NWLR (Pt. 3) 395 at 405.}
\end{footnotes}

legislative lists and those matters which the Constitution expressly empowered the Federation and the States to legislate upon have been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. The Federation has no powers to make laws on the residual matters. Therefore, to determine where the power to legislate on a given matter lies, recourse must be had to the legislative lists in the Constitution and any substantive provision thereof which grants power to the National Assembly or the House of Assembly to make laws with regard to any specific matter. Where a matter does not fall under the exclusive or concurrent lists, it is regarded as a residual item if no other provision of the Constitution vests legislative power in respect thereof in the National Assembly or the House of Assembly; and only a House of Assembly\(^{35}\) can legislate on it. The exercise of legislative power by the National Assembly on such matter will violate the Constitution and will consequently be nullified by the courts.\(^{36}\) In *Attorney General of Abia State v Attorney General of the Federation*,\(^ {37}\) the Supreme Court nullified an Act of the National Assembly which sought to monitor the distribution of monthly allocations of revenue from the federation account to local governments on the ground that local government is a residual matter under the Constitution and the National Assembly thus lacked the competence to legislate on it.\(^ {38}\) A study of the Constitution would disclose that the powers of the National Assembly to make laws with regard to taxation are limited to the exclusive list (item 16, customs and excise duties; item 25, export duties; item 58, stamp duties; and item 59, taxation of incomes, profits and capital gains), and the

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\(^{35}\) It is to be noted that the National Assembly exercises the legislative powers of a House of Assembly with regard to the Federal Capital Territory. Thus reference to the legislative powers of a House of Assembly will also apply to the National Assembly with regard to the Federal Capital Territory.

\(^{36}\) See *Attorney General of Ogun State v. Aberuagba* [1985] 1 NWLR (Pt. 3) 395. The Supreme Court decided in that case that the legislative competence of the National Assembly is limited to those matters on which it is expressly or by implication empowered to make laws by the Constitution. See also *Doherty v. Balewa* (1961) 1 All NLR 604.

\(^{37}\) *Attorney General of Abia State v Attorney General of the Federation*, above at note 32.

\(^{38}\) See also *Attorney General of Abia State v Attorney General of the Federation* [2002] 6 NWLR (Pt. 763) 264.
concurrent list (items 7 and 8). The provisions of items 7 and 8 of the concurrent list merely provide a guide for the exercise of the powers of the National Assembly under the provisions of items 58 and 59 of the exclusive list. A close look at the powers of taxation of the National Assembly under the Constitution as aforesaid shows that the powers therein are limited to the types of taxes specified in items 58 and 59 of the exclusive list, i.e. stamp duties, capital gains tax and income tax (which is typically a tax on profits). They do not extend to the power to impose all manner of taxes, which may be imposed by a government on its citizens. It would therefore seem that these other taxes, which are not specifically enumerated in the Constitution, are reserved to the states under their residual legislative power. Thus in Attorney General of Ogun State v. Aberuagba, the Supreme Court held that a state could validly legislate to impose sales tax on transactions that occur within the boundaries of the state, the imposition of sales tax being a power incidental to the residual power of a state to regulate intra-state trade and commerce. The Supreme Court also held that the federal government could validly and exclusively legislate to impose sales tax on inter-state and international transactions, the imposition of sales tax being a power incidental to the exclusive power of the federal government to regulate inter-state and international trade and commerce.

It would, therefore, seem from the decision of the Supreme Court in the Aberuagba case that the power of the federal government to impose taxes relates to (i) the taxes expressly reserved to the federal government under the Constitution, (ii) taxes that may be incidental to the items listed on

39 These items read thus:

“7. In the exercise of its powers to impose any tax or duty on –
   (a) capital gains, incomes or profits of persons other than companies; and
   (b) documents or transactions by way of stamp duties,

The National Assembly may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of law imposing it shall be carried out by the Government of a State or other authority of a State.

8. Where an Act of the National Assembly provides for the collection of a tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State.”

40 Attorney General of Ogun State v. Aberuagba, supra above n 35.
the exclusive list and the concurrent list, and (iii) taxes that may be incidental to the matters over which the federal government is specifically granted powers under some other provisions of the Constitution. The decision would also seem to have established the principle that states can legislate to impose any other manner of taxes not reserved to the federal government under the Constitution either directly or as incidental to any of the items listed in the exclusive list or the concurrent list or a matter reserved to the federal government under some other provisions of the Constitution.

If the power of the National Assembly to impose a tax can be incidental to any other power vested in that legislature by the Constitution, the question would then arise as to why in the first place it was necessary for the makers of the Constitution to expressly allocate to the National Assembly the power to impose specific and named taxes in the Constitution. Such express creation of taxing powers may, therefore, seem to be redundant if the power to impose taxes ordinarily inhered in any other general power over any matter, so that once a general power over a matter is vested in a person or authority such person may in the exercise of that general power impose a tax in relation thereto. While there is authority, though with regard to a specific statute passed by a legislature, that the power to impose a tax is not to be implied, it would seem that the view is generally held that incidental power to impose a tax may arise from a general power to regulate the subject matter in respect of which that tax is imposed. The validity of this view is however debatable if its force is not limited to the incidental power to impose taxes that are directly related to or necessary for the exercise of the underlying power that has been expressly created by the Constitution.

It is, however, thought that the Supreme Court in the Aberuagba case did not have to justify the power of a state government to impose sales tax on the basis that such power is incidental to the residual power of a state government to regulate intra-state trade and commerce. It was open to the Supreme Court to have held that the power to impose sales tax within the territory of a state is a residual power. This is because any power not

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41 Subject nevertheless to the limitation on the exercise of powers by the federal government over items in the concurrent list, as discussed below.
43 Peterswald v. Bartley (1904) 1 CLR 497. See also Nwabueze, “Federalism in Nigeria under the Presidential Constitution” 1983, 221.
reserved to the federal government in the Constitution may be exercised by a state government as a residual power.

The Constitution also empowers a House of Assembly to legislate for the collection, by its local government councils, of any tax not reserved to the federal government. Thus items 9 and 10 of the concurrent list are to the following effect:

9. A House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the Law providing for such collection by a local government council.

10. Where a Law of a House of Assembly provides for the collection of tax, fee or rate or for the administration of such Law by a local government council in accordance with the provisions hereof it shall regulate the liability of persons to the tax, fee or rate in such manner as to ensure that such tax, fee or rate is not levied on the same person in respect of the same liability by more than one local government council.

The above provisions vest in a House of Assembly the power to legislate on the collection and administration of any tax, fee or rate by a local government in respect of any matter on which it can validly charge tax. The only rider to this power however is that it must be exercised in accordance with the Constitution, i.e. that such tax is not one of the taxes specifically reserved to the federal government in the Constitution – these being customs and excise duties, export duties, stamp duties, and taxation of incomes, profits and capital gains – or being a tax that the federal

44 The power to impose such a tax being residual: see I. A. Ayua – The Nigerian Tax Law, (1996), 33. The decision of the Supreme Court in Knight Frank & Rutley v. Attorney-General of Kano State [1998] 7 NWLR (Pt. 556) 1 would, however, seem to suggest that a local government council, and not a state government, has the power to impose tenement rates. For a critical review of this decision, see R. A. C. E. Achara, “Can Nigerian Local Government Councils Autonomously Impose Rates?” Journal of African Law, (2003), Vol. 47, No. 2 at 221. Prof Achara argues, and rightly too, that the Constitution has not vested any legislative power in local government councils in Nigeria; and so they cannot legislate to impose or collect any tax or rate or levy (generally, “tax”), except by way of a power delegated to them by a House of Assembly. In Shell Petroleum Development Co. Nigeria Ltd v. Burutu Local Government Council [1989] 9 NWLR (Pt. 165) 318, which was decided after the Knight Frank case, the Court of Appeal merely recognised the power to “collect” (and not the power to “impose”) rates in a local government council. No reference was made to the Knight Frank case in the Shell case.
government may impose in the exercise of a power incidental to a power expressly vested in the federal government in the Constitution. What this implies is that the power to legislate for the purpose of the imposition and or administration of any tax outside of those reserved to the federal government falls under the legislative competence of a House of Assembly.\footnote{It should be noted that with regard to the express provisions of the Constitution, this is more so when the reference to the powers of the federal government to make laws for the collection of taxes in the concurrent list is also limited to the taxes described in items 58 and 59 of the exclusive list in contradistinction to the taxing powers that are expressly reserved to the states in items 9 and 10 of the concurrent list.} It is also important to note that the provisions of the concurrent list relating to taxes are limited to “collection” of taxes or the power to collect taxes – and do not extend to the power to impose taxes.\footnote{On the difference between the power to “impose” taxes and the power to “collect” and or “administer” taxes, see Elias, “Company Mergers And Land Transfer Taxes” (unpublished position paper) 3–4; Kanyip, above n 1 at 6, citing Abiola Sanni – “Division of Taxing Powers” in M. T. Abdulrazaq (ed.)–CITN Nigerian Tax Guide and Statutes (Lagos: The Chartered Institute of Taxation of Nigeria, 2002), 651; and also Nigerian Agricultural and Cooperative Bank v. Jigawa State Board of Internal Revenue [2000] 1 NRLR 62.} Also the scheme of the allocation of the power to collect taxes in the concurrent list as between the federal government and the states is such that the doctrine of covering the field may not apply, in its classical formulation, in most cases.\footnote{It is also arguable that the doctrine of covering the field may not apply to the allocation of the powers to pass legislation to impose and or collect taxes in Nigeria. Thus a case such as Attorney General of Lagos State v. Eko Hotels Ltd & Anor (2008) All FWLR (Pt. 398) 235; (1960 – 2010) NTLR 809, which relied largely on the doctrine of covering the field for its conclusion may not have been properly decided.} This is because the Constitution has expressly determined the extent and or limit of the competence of each tier of government in the federation in respect of most of the matters listed therein, so that no tier of government can validly legislate or exercise competence over a matter that has been expressly reserved to the other tier of government in the concurrent list. To argue otherwise would be to challenge the express wording of section 4(4)(a) of the Constitution, which unambiguously provides that the extent of the legislative powers to be exercised by the National Assembly in respect of matters contained in the concurrent list shall be limited to the extent therein provided, as follows:
The above argument is reinforced by the writing of Prof. Nwabueze with regard to the 1979 Constitution as follows:

Perhaps the most remarkable feature of the concurrent legislative list is that there is no co-existence of powers at all in respect of four of the five matters included therein – allocation of revenue (item A), antiquities and monuments (item B), archives (item C) and collection of taxes of taxes (item D). The delimitation in the schedule restricts the federal and state governments to specific aspects of the matters, thus making those aspects exclusive to the one or the other. The result is that, while these matters are dealt with under the concurrent legislative list, their inclusion therein in no way implies that the power of the federal and state governments to act over any aspect of them co-exist together.\(^9\)

The analysis above reveals that the Constitution has not empowered the National Assembly or the House of Assembly to allocate taxing powers, but has only given them the power to make legislation to impose and collect taxes; these taxes being largely enumerated in the case of the National Assembly but residual and unenumerated in the case of the House of Assembly. It will therefore take an amendment of the Constitution for a reallocation of the powers to legislate on the imposition and collection of taxes presently vested in the National Assembly and Houses of Assembly respectively to occur. And the process of constitutional amendment is one that involves the joint legislative action of both the National Assembly and the Houses of Assembly.\(^50\) Thus the power to legislate on the allocation of the power to collect sundry taxes and levies generally (which is the subject matter of the Act) is not a power that is either vested in the National Assembly or in the House of Assembly of any state.

The subject matter of the Act (\textit{i.e.} the allocation of powers to collect sundry taxes) being a matter on which neither the National Assembly nor the House of Assembly is empowered by the Constitution to make laws, it is arguable that the provisions of section 315 cannot operate to enable the Act to continue to have effect either as an Act of the National Assembly or as a Law of a House of Assembly. It is also arguable that the Act should have

\(^{48}\) Emphasis supplied.

\(^{49}\) Nwabueze “Federalism in Nigeria under the Presidential Constitution” 1983, above at note 42 at 61.

\(^{50}\) See the Constitution, s. 9(3).
ceased to have effect upon the coming into force of the Constitution on 29 May 1999 for the reason that the subject matter of the Act has been covered by Parts I and II of the Second Schedule thereto, read together with the constitutional law principle relating to legislative competence over residual matters. The courts for now would seem to think differently.

The Attitude of the Courts to the Act

The first reported case on the matter would seem to be *Mobil Producing Nigeria Unlimited v Tai Local Government Council & Ors*, 52 a judgment of the Federal High Court. In that case the plaintiff sued the defendants for the imposition and collection of “illegal taxes and levies” and the mounting of road blocks for the purpose of collecting these taxes and levies. Three issues were framed for determination, namely (i) whether the 1st defendant has the legal right to legislate on and impose the said taxes and levies outside those allowed by law, (ii) whether the imposition of the said taxes is unconstitutional, null and void, and (iii) whether the defendants’ action in mounting road blocks are illegal, an offence and a breach of sections 41 and 44 of the Constitution. The contested taxes and or levies related to community development, effluent discharge pollution, educational youth empowerment, and Niger Delta development permit. The cardinal argument of counsel for the plaintiff was that the power of the 1st defendant, a local government council, to impose and or collect taxes and levies is limited by the fourth schedule to the Constitution, the Act, and the Rivers State Local Government Law. The court gave judgment for the plaintiff and held that –

The 1999 Constitution in the Fourth Schedule also listed the functions of the Local Government council. From the provision of Decree No. 21 [the Act] and Fourth Schedule of the 1999 Constitution the Local Government has limited power on areas in which they can levy and impose taxes …. Therefore any attempt by any Local Government to collect or demand taxes or levies outside the areas specified under the 1999 Constitution or Part III of Decree No. 21 will be outside the ambit of their power. Furthermore, under Section 1(2) of Decree No. 21 of 1998 the Minister of Finance may on the advice of the Joint Tax

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51 No claim is made here that the two cases discussed here are the only cases on the point that the courts have decided. The two cases discussed here are however the only cases that I found in existing law reports.

52 (1960 – 2010) 1 NTLR 182 (The case was filed in 2003 and decided on 12 May 2004.)
Board amend the Schedule to this Decree. I am not aware of any such amendment nor has it been brought to my attention.\textsuperscript{53}

We take the view that the court could have decided the case by reference to the Constitution only. Reference to the Act, in our view, was misconceived. As we have argued above, the Act could only have continued in existence beyond 29 May 1999 either as an Act of the National Assembly or a Law of a House of Assembly. But as we also explained, the subject matter of the Act is not a matter in respect of which either the National Assembly or a House of Assembly could make laws. It is perhaps for this reason that the court repeatedly referred to that statute as Decree No. 21. The court would have therefore declared the Act inconsistent with the Constitution, acting under the powers created by section 315(3), and proceeded to test the validity of the contested taxes and levies by reference to the provisions of S. 4 of the Constitution and Parts I and II of the Second Schedule thereto wherein the legislative powers of the National Assembly and Houses of Assembly are listed. And assuming that the court found that the Rivers State House of Assembly is empowered to impose those taxes and levies for the benefit of local government councils in the state, the court would then have gone further to inquire into whether any enabling law to that effect was in force in Rivers State.

The judgment is also confusing as to its ratio due to the continued reference by the court to the joint application of the Act and the Constitution as the basis for its judgment. We submit, on the bases of the arguments that we have canvassed earlier, that the Act and the Constitution cannot co-exist. The import of the Act is the allocation of the powers to collect taxes among various “tiers” of government in Nigeria. A similar objective has been accomplished by the Constitution. (Indeed the Act went beyond this in Part II of its schedule to fix rates of certain taxes). And in aggravation of this difficulty, the Act contains provisions that are clearly inconsistent with the provisions of the Constitution for which reason the Act should be declared null, void and of no effect\textsuperscript{54}. (And section 315(3) enables the court to do so). First, the Act would seem to override any law on the same subject matter.\textsuperscript{55}

\textsuperscript{53}Ibid. at 195
\textsuperscript{54}See the Constitution, S. 1(2)
\textsuperscript{55}The Act, s. 1(1): “Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, or in any other enactment or law, the Federal Government, State Government and local government shall
The Act by so doing puts itself on a collision course with the provisions of section 4 of the Constitution and the allocation of taxing powers in the federation in Parts I and II of the Second Schedule to the Constitution. For example, the Act would seem to suggest that a House of Assembly may not validly legislate to create a tax in the state (in addition to the taxes listed in Schedule II of the Act) being a tax in respect which legislative power is not reserved to the National Assembly in the Constitution. Second, the Act gives power to the Minister of Finance to amend the Schedule thereto, which implies a power to alter the present constitutional allocation of powers to legislate on tax matters between the National Assembly and a House of Assembly.

A similar decision was reached by the Court of Appeal in *Eti-Osa Local Government v Jegede.* The central issue in that case as framed by the court was “whether the Local Government can impose taxes outside the provisions of Decree 21 of 1998 which now form the provisions of Schedule II Part III of the 1999 Constitution ....” Further in the judgment the court propounded the “crux of the matter” as “whether the Appellant has the authority to impose ... tax outside the items in Schedule III of the 1999 Constitution and Part III of Decree No. 21 of 1998 without reference to the Joint Tax Board as provided for in section 1(2) of Decree No. 21 of 1998”. The court then went on to adopt the following decision and reasoning of the High Court as its decision –

…The respondents in this case which is the Eti-Osa Local Government has no legislative power of their own to impose or determine taxes and levies, outside the enable Law Decree No. 21 of 1998 which is general application .... Where such residual power to collect taxes is given by the State Government, to the Local Government, it must be in conformity with the provisions of the enabling law. Thus the powers of the Local Government to make Bye Laws are subject to the enabling Law which gives the Local Government Power to collect taxes. Any attempt to

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be responsible for collecting the taxes and levies listed in Part I, Part II and Part III of the Schedule to this Act, respectively”. See also s. 2(1).

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56 [2007] 10 NWLR (1043) 537.
57 *Ibid*, at 553.
58 *Ibid*, at 557.
59 *Ibid*, at 558. In the words of Dongban-Mensem, JCA, who read the lead judgment, “In a well considered ruling, the learned trial Judge held that the appellant as defendant, has no power to legislate and impose the said tax.... I cannot possibly fault this well garnered decision of the trial court.”
act outside the ambit of Part III of Taxes and Levies (Approved list for collection) Decree No. 21 of 1998 will be futile. I therefore hold that the respondent … has no power to legislate and demand whatever taxes and levies it deems fit outside the provisions of Taxes and Levies Approved List for Collection Decree No. 21 1998.  

Further in the judgment, the court stated that the “central Government has the controlling machinery” and that there was nothing “unconstitutional with the requirement of the Local Government, the third tier of Government to root its taxes through the Joint Tax Board”.  

With due respect to the Court of Appeal, the reasoning of the court in the decision in the Eti-Osa Local Government case (supra) is difficult to support in law. First, as we argued in relation to the Mobil case (supra), the Act can be neither an existing law deemed to be Act of the National Assembly nor a Law of a House of Assembly: there is therefore no legal basis for its continued application post 29 May 1999. Second, the federal government does not have the “controlling machinery” with regard to all taxes in Nigeria (the context in which the statement was made). The Constitution has clearly defined the extent of the express and implied taxing powers of the federal government as limited to the items listed in the Constitution. Second, there is no basis in law for a local government to obtain the approval of the Joint Tax Board for its taxes. The power to regulate the imposition and collection of taxes by local governments is vested exclusively in the House of Assembly. The only valid inquiries that the court should have made in the circumstance were (i) whether the tax sought to be collected by Eti-Osa Local Government was one of the taxes reserved to the federal government in the Constitution, and (ii) if the answer to the first question is in the negative, whether the tax is supported by a law of the House of Assembly of Lagos State. 

What to do with the Act
We have continued to suffer the effect of the Act beyond 2004 because it survived the revision of the laws of federation that was

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60 Ibid, at 558.  
61 Ibid.  
62 Ibid. at 559.  
63 The court was, nevertheless, right to have held that a local government council does not have the power to impose a tax.  
64 See items 9 and 10, Part II, Second Schedule to the Constitution.
undertaken then (the “2004 revision”). Perhaps, if due consideration had been given to the Act in the course of that undertaking, the Act should have been deleted as a law of the federation. The difficulty with this approach is that the law by which the 2004 revision was undertaken is unknown. Section 315(4)(a)(iii) under which such power would have been exercised refers to a person appointed by law. It is also doubtful that the National Assembly may validly appoint a person to revise a law the subject matter of which falls outside its legislative competence under the Constitution. These arguments may, perhaps, explain why the Act was not affected by the effort that gave rise to the 2004 LFN.

It would, however, seem that the President of the Federal Republic of Nigeria should have validly exercised the power to repeal the Act at the time of the 2004 revision on the authority of section 315(4)(a)(i). A comparison of sub-paragraphs (i) and (ii) of section 315(4)(a) would show the intention of the draftsman to give the President wider powers with regard to the “modification” of existing laws than he gave to the Governors and the legislature. This is because while sub-paragraph (i) gives the President power in relation to “the provisions of any law of the Federation”, sub-paragraph (ii) gives the Governors power in relation to “the provisions of any existing law deemed to be a Law made by the House of Assembly of that State”. Thus the power of the President to modify an existing law is not limited to “the provisions of any existing law deemed to be an Act of the National Assembly”; for had the draftsman intended such limitation, he would have said so expressly as he did with regard to the power of Governors. This drafting approach would seem to suggest that the draftsman of section 315 was well aware (as we have contended above) that some of the decrees that were promulgated by the Federal Military Government prior to the coming into force of the Constitution may neither qualify as laws which may be deemed to be Acts of

65 “Appropriate authority” under s. 315 includes any person appointed by any law to revise or rewrite the laws of the Federation or of a State (s. 315(4)(a)(iii)); and “modification” includes addition, alteration, omission or repeal (s. 315(4)(c)).

66 What we know is that the 2004 revision/2004 LFN was later authenticated in 2007 by an Act of the National Assembly following questions by lawyers as to the legal basis of the 2004 LFN. See Revised Edition (Laws of the Federation of Nigeria) Act 2007, with the following long title “An Act to enable effect to be given to the Revised Edition of the Laws of the Federation of Nigeria”. The commencement date of this Act is 25 May 2007.
the National Assembly (being statutes dealing with matters in respect of which the National Assembly is empowered to make laws under the Constitution), nor as laws which may be deemed to be Laws of a House of Assembly (being statutes dealing with matters in respect of which a House of Assembly is empowered to make laws under the Constitution). Each of these decrees would then qualify as “a law of the Federation”, being laws that up till 29 May 1999 applied to the entire federation. We take the view that Decree No. 21 is one of such decrees. We also take the view that the President would have validly repealed all the provisions of Decree No. 21 as “a law of the Federation” – the power to repeal being included in the definition of “modification” contemplated by section 315. It would thereafter have been valid for the 2004 LFN to have been printed without the Act. Nothing stops the President presently from repealing the Act.

It is also open to a court before which it is sought to invoke the force of the Act to declare the Act as void and of no force and effect to the extent of its inconsistency with the Constitution. Assuming however that it is possible to save the Act under section 315 with respect to Part I of its Schedule as an Act of the National Assembly, then it would be open to the court to declare the Act null, void and of no effect with regard to its purported application to the states and local government councils with regard to the collection of all manner of taxes (on the authority of Fawehinmi v. Babaginda). This would be the case with regard to the prohibition on the use of any person other than a tax authority to assess and collect taxes and erection of road blocks to collect any tax. While it has been argued that these specific provisions are valid for all cases, it is submitted that the provisions will apply validly only in cases where the National Assembly has legislative competence. With regard to the limitation of the exercise of power to collect tax to a tax authority only, the provision will not apply to taxes that may be imposed by a state government in the exercise of its residuary legislative

68 Fawehinmi v. Babaginda, supra note 8. However, Hon. Justice Kanyip’s central argument in the paper (above at note 65) is that, save for the specific provisions of the Act relating to restriction of the exercise of the power to assess and collect tax to a tax authority and the prohibition on the use of road blocks in the collection of taxes, the Act is otherwise unconstitutional.
69 Ibid at 5.
powers. Also, the prohibition on erection of road blocks in the course of collection of a tax will apply only in relation to taxes in respect of which the National Assembly has competence and or in respect of a road block erected on a federal highway. It is nevertheless thought that what would be left of the Act after the severance of its unconstitutional provisions both as an Act of the National Assembly and a Law of a House of Assembly will be so different from the original scheme and content of the Act that such an exercise would be unrealistic and a waste of the time of the court.

Another response to the Act is to presume that it has ceased to validly exist upon the coming into force of the Constitution. This option cannot be valid based on the current state of the case law on the point. As the case law stands presently (i.e. that “[a]ny attempt to act outside the ambit of Part III of Taxes and Levies (Approved list for collection) Decree No. 21 of 1998 [by any of the Federal Government, State Government or Local Government] will be futile”), the Act operates in superiority to any Law of a House of Assembly made in exercise of its constitutional power to impose taxes other than as limited by the provisions of Parts I and II of the Second Schedule to the Constitution. Though this state of the law is unsatisfactory, it will take a contrary decision of the Supreme Court to definitively mark a change in the case law.

**Conclusion**

Notionally, the Act would seem to have survived under the Constitution as an existing law. But in strict legal theory, it can hardly operate as such. We have shown that each existing law is meant to be continued in force as either a “deemed Act of the National Assembly” or a “deemed Law of the House of Assembly”. Where an existing law cannot continue in force as either of the two, then no legal basis exists for its continued existence. The basis of the operation of an existing law as either a “deemed Act of the National Assembly” or as a “deemed Law of the House of Assembly” is the locus of the power to legislate over the subject matter of the existing law under the Constitution as between the National Assembly and the State House of Assembly. But the power to legislate over the substance of the subject matter of the Act under the Constitution is located jointly in the National Assembly and the State House of Assembly, i.e. by way of an Act to amend the Constitution. Indeed beyond that, the subject matter

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70 Eti-Osa Local Government v. Jegede, supra above n 54 at 558.
of the Act has been comprehensively addressed by the Constitution, and is meant to be so addressed for so long as the Constitution remains in force. It is no doubt true that the Act covers two other issues, which do not purport to allocate tax collection powers to the federal, state and local governments, i.e. the prohibition on the use of tax consultants and road blocks in the collection of taxes. But these issues are insignificant to warrant the continued existence of the Act. For these reasons, we have argued that the Act should have ceased to have effect upon the coming into force of the Constitution on 29 May 1999.

Our courts, however, have failed to see this inoperability of the Act under the Constitution in the numerous circumstances in which they had the opportunity to pronounce thereon. Rather they have made pronouncements that suggest that the Act not only operates under the Constitution but also operates above any enactments that may be made by a State House of Assembly in exercise of its constitutional powers. The Court of Appeal has also fallen into this error. It missed its opportunity in *Éti-Osa Local Government v. Jegede* 71 to pronounce the Act inoperable under the Constitution. It rather adopted a posture that suggests that the Act operates alongside the Constitution. In effect, given the principles of *stare decisis* as they operate under our judicial system, even a contrary pronouncement by the Court of Appeal might not be sufficient to settle the controversy. Only that of the Supreme Court can settle the controversy from a judicial perspective.

In a similar vein, the President, who arguably has the power under section 315(4)(a)(i) of the Constitution to repeal the Act, has not exercised this power till date. Hence the confusion arising from the presence of the Act in the corpus of our laws has continued to thrive.

It is only to be hoped that the Supreme Court, as soon as it is presented with the opportunity, should annul the Act. Otherwise, the President may take the initiative to repeal the Act and save us the possibly long wait for the intervention of the Supreme Court.

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CARBON TAXATION AS A POLICY INSTRUMENT FOR ENVIRONMENTAL MANAGEMENT AND CONTROL IN NIGERIA

Abstract
Gas flaring, oil spills, and other environmental hazards resulting from the activities of oil companies in Nigeria remain major headaches for the country. Farm land, fish ponds, marine environment and the entire ecosystem are polluted and endangered in Nigeria at an alarming rate without concrete and effective regulatory regime put in place to curtail the ugly trend that is threatening our environment and every other living thing dependent on it. One policy instrument that could assist in regulating the effect of environmental pollution resulting from gas flaring and oil spills in Nigeria is the introduction of carbon tax. This type of taxation is expected to discourage gas flaring and oil spills emanating from the activities of oil companies in the country. Also, it is expected to raise enough revenues that could be ploughed back to combat threats to the environment. This paper discusses the essential elements in designing an effective carbon tax regime in Nigeria. The argument here is that taxation being an instrument for regulating taxpayer behaviour, carbon tax when properly enforced could serve as a veritable policy instrument for reducing environmental pollution and promoting healthy environment in Nigeria.

Keywords: Nigeria, Niger Delta, Carbon Tax, Environment, and Pollution.

1.0 Introduction:
Global warming resulting from the emissions of CO₂ and other chemical substances in the atmosphere is a serious challenge to the global community. Despite that developed countries are the worst culprits generating activities that cause global warming, the challenge for safe environment is exacerbated by the unregulated environmental pollutions taking place in some third world countries. This state of affair is, undoubtedly, worse in developing countries that produce oil and gas in commercial

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1 For the purpose of this paper, it must be noted that the phrase “Carbon dioxide or CO₂” is used to refer to not only carbon dioxide but also other greenhouse gases such as methane, nitrous oxide, and sulphur hexafluoride.
quantities. For instance, in Nigeria, gas flaring and other questionable exploratory activities are prevalent in the country causing untold environmental deterioration and economic hardship.\(^2\) Since the discovery of oil in Nigeria and the commencement of exploratory activities by oil majors in the country, environmental pollution has constituted one of the greatest challenges facing the country. The evidence and disastrous consequences of environmental pollution in Nigeria are more pronounced in the Niger-Delta region of the country, where fossil fuels abound in commercial quantities and exploratory activities take place on daily basis. Oil majors carrying out the exploratory activities in this region do so with impunity; giving less regard to the environment that sustains the lives of people and the entire ecosystem. There is evidence that not the same precautions taken by these companies while carrying out the same activities in their home countries—within the Northern hemisphere—are, in the least, considered while operating in Nigeria or any other developing country within the Southern Pole who, unfortunately, lacks a well-informed leadership with a focused direction and determined political will to call the defaulting oil companies to order.\(^3\) Thus, the activities of these oil majors give rise to series of environmental hazards such as acid rain; destruction of farmlands and marine environment; and the occurrence of other negative externalities. In addition, the prevalence of this unfortunate situation has given rise to high degree of criminality in not just the Niger-Delta region but also the entire country: as kidnapping and armed robbery activities have been on the increase following the criminal activities of some groups in the Niger-Delta region agitating and clamouring


\(^3\) Christian Purefoy, “Nigerians Angry at Oil Pollution Double Standards” online: CNN available at <http://articles.cnn.com/ 2010-06-29/world/nigeria.oil_1_oil-spills-oil-production-oil-companies?_s=PM:WORLD> last accessed on October 30, 2012.)
for resource control and the immediate manifestation in their communities of positive physical evidence of multibillion petrodollars earned by the Nigerian government from their ancestral homes.

This paper is not prepared to recite the unfortunate environmental situations taking place in Nigeria – especially in the Niger-Delta region of the country. Rather, it is designed to advocate for the use of a tax regime that could help regulate the activities of oil majors, raise more revenues for the Nigerian government, and, thus, makes available financial resources that could be ploughed back to encourage clean and safe environment in the country. This is to say that taxation being an instrument for regulating taxpayer behaviour, the government could through tax policies – such as the introduction of carbon tax – regulate the conduct of oil companies operating in Nigeria from further polluting the environment or causing environmental hazards. Therefore, carbon tax could serve as a veritable instrument that could be deployed by the Nigerian government to achieve positive results in the campaign for safe environment. Consequently, this paper advocates for the introduction of carbon tax in Nigeria.

In presenting the argument that carbon tax could serve as a veritable instrument for regulating environmental pollution from source and also serve as means for generating revenues that could be ploughed back to combating environmental pollution, this paper is divided into two sections. The first section attempts to describe what “carbon tax” stands for and the justification for its introduction in Nigeria. The second section examines the four essential elements that must be seriously defined and considered to establish the contours, limits, use, and boundaries of operation for the proposed carbon tax. The four essential elements considered under this section are: defining the tax base for the operation of the carbon tax; identifying the subject(s) to be made liable to carbon tax (taxpayer/collection point); specifying the applicable tax rate; and the use of revenues generated from the tax.

2.0 Understanding Carbon Tax and the Need for its Introduction in Nigeria:
As earlier stated, this section of the paper attempts to explain, to the barest minimum, what “carbon tax” stands for. The definition is not intended to be holistic; rather it is defined to the extent that the phrase “carbon tax” is used to regulate the emissions of targeted substances causing environmental pollution in Nigeria; and overall, global warming. This section also attempts to justify
the need for the imposition of carbon tax in Nigeria. It argues that Nigeria is ripe enough for the imposition of carbon tax as a policy instrument for the control of activities of major environmental polluters in the country.

**2.1 Carbon Tax Defined:**
First, carbon tax falls within the pigouvian group of taxes: that is, taxes that are designed to ensure that private parties feel the social and economic burdens of their actions. Specifically, carbon tax could be defined as a brand of taxation that taxes the carbon content or the emitted carbon dioxide emanating from combusted fossil fuels. It is also known as carbon dioxide tax or CO$_2$ tax. In every fossil fuel (such as coal, oil, and gas) there is always the ubiquitous presence of carbon and hydrogen atoms. It is the synergistic bond between carbon and hydrogen atoms that is the source of energy for every fossil fuel. This bond equally gives rise to the release of heat when fossil fuel is combusted. Indeed, when fuel is burnt, all carbon atoms are quickly converted into CO$_2$ and released into the atmosphere. Though carbon dioxide is generally innocuous when released, it gets permanently settled in the atmosphere where it traps heat re-radiated from Earth’s surface and thereby causes harmful climatic changes leading to global warming and other environmental hazards. It is in a bid to regulate the amount of heat or CO$_2$ released into the atmosphere that carbon tax resurfaced as a complementary instrument that could be used alongside other regulatory instruments to control the

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4 The phrase “Pigouvian Tax” is derived from the teachings of the 20$^{th}$ Century British economist named “Arthur Pigou”. Arthur Pigou understood that in certain circumstances market forces fail to allocate resources efficiently and equitably; and that the transactions of individual(s) do impose cost on others who are entirely not a party to the transaction(s) giving rise to the cost or negative externalities impacting on them. Because of this, there must be a way to ensure that the economic and social burdens arising from the transactions of individuals are shifted back to them: so they can as well bear the cost. And for those whose activities benefit others who are not party to the transaction(s), they (purveyors of the transaction) must somehow be compensated according to the Pigou’s teachings. See Greg Mankiw, “Smart Taxes: An Open Invitation to Join the Pigou Club” online: Harvard University, [http://www.economics.harvard.edu/files/faculty/40_Smart%20Taxes.pdf](http://www.economics.harvard.edu/files/faculty/40_Smart%20Taxes.pdf) (Last accessed on October 30, 2012). See also: Gilbert E. Metcalf and David Weisbach, “The Design of a Carbon Tax” (2009) Vol. 33 Harvard Environmental Law Review 499 at pp. 500-503.


emission of CO\textsubscript{2} into the atmosphere.\textsuperscript{7} Thus, it may be safe to say that carbon tax is an environmental tax or tax on pollution that is designed to impose a tax cost on some activities or products that are deleterious to the environment.\textsuperscript{8} Because of its punitive nature, some American scholars have preferred to call it “sin tax”.\textsuperscript{9} At the same time, carbon tax could be designed to confer tax benefits to certain activities or products that are generally considered beneficial to the environment.\textsuperscript{10}

\textbf{2.2 Why Carbon Tax Must be Introduced in Nigeria:}

The prevailing global expert-opinion is that human activities contribute immensely to the problem of global warming. As a result, the global community has been in search of ways to curb the growing intensity of global warming. This search gave rise to the 1992\textit{United Nations Framework Convention on Climate Change} (UNFCCC). Expectedly, the UNFCCC is an international environmental treaty that is designed to achieve the “…stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system [and]…to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”\textsuperscript{11} Nigeria is a party to the UNFCCC, which gave birth to the Kyoto Protocol aimed at curbing global warming. Though Nigeria is not one of the Annex 1 countries with a higher and greater commitment to the Kyoto Protocol, it eventually ratified the Protocol on December 10, 2004. What this means is that, if not for anything, Nigeria owes

\textsuperscript{7} Ottinger and Moore, \textit{ibid.} at 110.


\textsuperscript{9} Ottinger and Moore, \textit{loc. cit.} note 6 at 104. According to the authors, it is safer and reasonable to tax activities or functions the society discourages. In their own words at page 104 of the article, the authors argue that: It is much sounder social policy to tax functions society wishes to discourage than those which it seeks to encourage. Hence, increasing attention is being focused, particularly in Europe and Japan and in international forums, on taxing pollution. In the United States, there has been a tendency on the part of governmental entities in recent years to impose “sin taxes” as excises on activities society wishes to discourage, most prominently the sale of tobacco products, liquor, guns and the like. A pollution tax can be considered a type of "sin tax."

\textsuperscript{10} \textit{Ibid.}

the moral duty to curb anthropogenic activities giving rise to global warming threatening its own environment.

Regardless of Nigeria’s general commitment to curb activities giving rise to global warming, the unwholesome activities of oil companies within its borders are threatening its people and the environment. Unfortunately, owing to the activities of oil companies in Niger-Delta region of Nigeria, acid rain, gas flaring, pollution of farm lands and destruction of aquatic environments are daily occurrences in the country. These negative externalities have also inspired violence and criminality in the Niger-Delta region of the country because of the indifferent attitude, complicity, and alleged collusion of corrupt government officials with oil majors who are bent on destroying the Niger-Delta environment at the altar of corporate profit; and, also, violating the rights of inhabitants of the indigenous communities in the area. Unfortunately, the oil companies involved in destroying the Niger-Delta environment are only interested in the unconscionable maximization of petro-dollar profits arising from the sale of oil and gas products. The unholy killing of Ken Saro Wiwa and eight others of the Ogoni stock who fought oil companies for environmental atrocities committed in the Niger-Delta is a reminder of the terrible consequences of environmental pollution in Nigeria. Not quite long, armed conflict, gangsterism and criminality have surged up in the struggle for safe environment and resource-control. Simply put, the genesis of the criminality and environmental crises engulfing the Niger-Delta region of Nigeria emanates from the activities of oil companies: most of whom do not care about the negative effects of their activities to the host communities and the human environment at large.

One question that has remained effectively unanswered is: how can the activities of oil companies operating in the Niger-Delta region be regulated and controlled to the extent that oil companies themselves will assist in checkmating their excesses; and probably bear the cost of the negative externalities they generate against other members of the society? One important

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12 The same violence and criminality have snowballed into other parts of the country. For instance, kidnapping which was a political tool adopted by the Niger-Delta militants against foreign oil workers to press home their demands has turned out big money-making industry for many criminals in the entire country. At present, many high-net worth individuals and even middle class workers are kidnapped in Nigeria for ransom.
instrument that is used to control and regulate the activities or behavioural patterns of taxpayers is taxation. Apart from raising revenues needed for the provision of public goods, taxation is equally used to induce certain types of behaviours: that is, taxes could be imposed on certain goods, services, or activities to either encourage or discourage certain behavioural patterns.\textsuperscript{14} In this case, the introduction of carbon tax in Nigeria is promoted in order to help tackle some of the unwanted behaviours of oil companies leading to oil spillage and other activities inimical to the environment. True to its pigouvian nature, the introduction of carbon tax will ensure oil companies are charged for the cost they impose on the society.\textsuperscript{15}

Unfortunately, carbon tax is not meant to solve all the problems emanating from the activities of oil companies; but the argument is that it could help render oil companies accountable for their activities in Nigeria by instilling in them the culture of self-regulation, responsibility and accountability through the internalization of social and economic costs generated by the targeted companies. And monies realized therefrom could be ploughed back to lessen/correct the evil effects of environmental pollution in the society. Carbon tax in Nigeria is, therefore, proposed to mitigate the environmental hazards caused by the activities of oil companies by putting a cost on the consequences of burning fossil fuels.

Opponents of this mode of taxation are likely to complain of the imposition of double or multiple-taxation against oil companies; especially when it is realized that the targeted oil companies are equally subject to other types of taxation: such as petroleum profit and education taxes.\textsuperscript{16} But the good news is that

\textsuperscript{13} Reuven Avi-Yonah, “The Three Goals of Taxation” (2006), 60 Tax Law Rev. 1-28. Indeed, taxation is often employed to regulate social and economic behaviours of taxpayers: provided compliance is assured. See also: Jirinwayo Jude Odinkonigbo, \textit{Improving Tax Compliance in Nigeria: Challenges and Prospect}, (Germany: VDM Verlag Dr. Muller Aktiengesellschaft & Co., 2009) at 78-117; 176-347.

\textsuperscript{14} Ottinger and Moore, \textit{loc.cit}, note 6 at 104. See also: Odinkonigbo, \textit{loc. cit}, note 13.

\textsuperscript{15} Greg Mankiw, \textit{loc.cit} note 4 at 5.

\textsuperscript{16} The Petroleum Profit Tax Act, 2004 (PPTA) vests the ownership of all on-shore and off-shore revenues derivable from oil exploration activities within the territorial waters and continental shelf of Nigeria on the government of the Federal Republic of Nigeria. Considering that revenues accruing from oil explorations within the territorial waters and
these taxes, unlike the proposed carbon tax, are not punitive and cannot be legitimately avoided by any company without sanctions. Therefore, the criticism that carbon tax encourages multiplicity of taxation in Nigeria is unfounded because the proposed carbon tax is punitive and avoidable. It is not imposed on companies that do not violate certain environmental regulations. Put differently, the proposed carbon tax is designed to punish only companies that flare gases or allow the escape of oil and gas causing harm to the environment—because it is a “sin tax”.

Some argue that carbon tax hampers economic progress. Their argument is that economic development and environmental growth are antithetical to each other. In their view, when a nation desires economic development, such a nation should be prepared to condone certain hazards that follow industrialization. In rebutting this argument, it must be noted that anything that seems to be a “development” which, in fact, causes enormous hardship on the people and society is not development strictly so-called. It is conceded that every coin has two sides; that is, certain activities that are helpful to humans may at the same time constitute a problem if not well managed. That is why it is necessary that a balance is struck. Hence, every activity that stimulates development is controlled to the extent that its adverse effect is either avoided or mitigated. Therefore, we cannot sacrifice our

continental shelf of Nigeria belong to the Federal Government, the PPTA imposes a higher tax rate compared with the other tax legislation governing different sectors of the economy. Thus, the governing rate for new companies within the first five accounting periods of their operations is 65.75%; while companies carrying on business after the first five accounting periods of their operations are mandated to pay 85% of their chargeable profits. On education tax, the Education Tax Act, 2004 imposes on every incorporated company in Nigeria the payment of an education tax at the rate of 2% of the company’s profit, which are paid into the Federal Government’s Education Trust Fund. See: Ade Ipaye, “Overview of the Tax Environment: Issues and Challenges” in M. T. Abdulrazaq, ed., CITN Nigerian Tax Guide Statutes (Lagos, Nigeria: The Chartered Institute of Taxation of Nigeria, 2002) 2 at 5.

17 Thomas Conefrey, et al “The Impact of a Carbon Tax on Economic Growth and Carbon Dioxide Emissions in Ireland” online: The Economic and Social Research Institute <http://www.esri.ie/UserFiles/publications /20080821092420/WP251.pdf> last accessed on October 30, 2012). In this article, the authors argue that carbon tax could inspire economic growth or the reverse. This, according to them, depends largely on the use of realized revenues. In the case of Ireland, which is the focus of their study, economic growth could be achieved if revenue realized from the imposition of carbon tax is used to reduce income tax rather than as lump sum payout to families.
environment and safety on the altar of corporate profit. Beside this, Mankiw whose view is widely respected in matters of economics argues that carbon tax, being Pigouvian in nature, is admirable and could be implemented to transfer the cost of externalities to those who impose such cost on the society. He likened the opposition to the introduction of carbon tax to the behaviours of ignorant voters who are not well informed of the rationality and technicalities of their decisions. Same is said of politicians who may be well informed but must flow with ignorant voters in order to earn popularity amongst them (ignorant voters).  

3.0 Factors Governing the Introduction of Carbon Tax in Nigeria:

Having examined the rationale behind the introduction of carbon tax in Nigeria, it is necessary to consider certain factors or indices that will govern the introduction of the proposed tax. Janet Milne\(^\text{19}\) and David Duff\(^\text{20}\) respectively highlighted the factors that ought to be considered before the imposition of carbon tax. The factors are: defining the tax base for the operation of the carbon tax; identifying the subject(s) to be made liable to carbon tax (taxpayer/collection point); specifying the applicable tax rate; and the use of revenues generated from the tax.\(^\text{21}\) This paper considers the above factors relevant for consideration in the Nigerian case. So, let us start with the first factor.

3.1 Determining the Tax Base for the Proposed Carbon Tax:

Generally, tax base is seen as the sum of taxable assets, incomes and assessed values of taxable properties in a given tax jurisdiction. This is to show that tax base is the identified subject matter that is legally presented for taxation in a given tax

\(^{18}\) For this, see Mankiw, *loc. cit.* note 4 at page 4. It is interesting to note that Mankiw copiously cited the Bryan Caplan’s book entitled “The Myth of the Rational Voter: Why Democracies Choose Bad Policies”. In this book, Caplan discusses the irrationality of the so-called rational voters in exercising their democratic choices. When scrutinized by experts, these choices made by ordinary people, who are in the majority, are generally not favourable to them and society at large. This situation leads to divided opinions between experts on one hand and uninformed voters, who are in the majority, on the other: thus, giving rise to parallel division amongst the two camps.

\(^{19}\) Milne, *loc. cit.* note 5 at 1-30.


In calculating the total revenue realizable in any tax regime, the tax base must be identified and known. Hence, the basic formula for the computation of total revenue in a tax jurisdiction is simply: \( \text{Tax Revenue} = \text{Tax Base} \times \text{Tax Rate} \). This formula justifies the understanding that tax base must first be identified, and in addition to the rate at which the base will be taxed before the expected or realizable total revenue (subject to compliance rate) can be projected or determined.

For the purpose of successful implementation of carbon tax in Nigeria, there is a need to identify the very subject(s) that carbon tax could be levied on. The clear identification of the subject(s) that is/are available for carbon taxation shows that it is not everything or persons within jurisdiction that will be imposed the carbon tax. Now, considering that the main essence of introducing carbon tax in Nigeria is to instil in the major culprits of environmental pollution the spirit of self-administered control and compliance to the extent that environmental pollution is drastically reduced, it is pertinent to identify the targeted taxpayers whose behaviours need to be influenced by the imposition of carbon tax. In order to realize the goals of the proposed carbon tax, the targeted taxpayers must be the major contributors or causes of environmental pollution in Nigeria; so that a noticeable effect could be witnessed when their conducts or activities are regulated. This could come in the form of abstinence from activities causing environmental pollution or the payment of financial penalties in the form of taxation that could be ploughed back to remedy the negative effects caused by taxpayer(s). Presently, there is no enforceable price payable by oil companies that pollute the environment through uncontrolled emissions discharged into the Nigerian environment. Further, on the negative impacts of global warming in Nigeria, springs that are sources of natural water supply in most communities are drying up; desert encroachment accelerated by drought is threatening the country; and poor harvest worsening poverty in the country has led to over reliance on the importation of food items. Our tax regime is expected to deter actions or omissions inimical to the country and at the same time encourage responsible actions based on choice.

In the context of environmental management and control designed to prevent or control environmental pollution, the use of

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carbon or CO$_2$ as a tax base offers the most direct link to the environmental problem that is the target of carbon tax.\textsuperscript{23} It must be noted that the major environmental problem facing Nigeria is the problem of oil spills, gas flaring, and other negative results of energy-related activities that are directly linked to oil companies involved in oil exploration in the country. Therefore, the targeted tax base (taxable commodities) open to the proposed carbon tax in Nigeria must be energy-related. Already, it is a known fact that the carbon content of any fuel or emitted CO$_2$ is directly linked to a source of energy: fossil fuel in this case. Bearing in mind that the proposed tax intends to trigger a desired behavioural change on the part of the major emitters, it may be better to target the carbon content of combusted fuel or emitted CO$_2$, which is the cause of pollution in the environment. The carbon content of combusted fuel or the emitted CO$_2$ are easily measured in tons. The ability to measure (with the aid of scientific equipment) combusted carbon content of any fuel and that of emitted CO$_2$ solves the problem of measuring the tax base for the purpose of taxation. In order to avoid arguments relating to culpability and guilt,\textsuperscript{24} it is advocated that the tax base here should be restricted to emitted CO$_2$.\textsuperscript{25}

3.2 Identification of Subject(s) Liable to the Proposed Carbon Tax (Taxpayer/ Collection Point)

\textsuperscript{23} Janet Milne \textit{supra} note 5 at 4.

\textsuperscript{24} In Nigeria, there is the incessant and uncontrolled emission of gaseous substances from the activities of oil companies involved in oil exploration; and at the same time, the prevalence of oil spills in surrounding environment. Considering that the proposed carbon tax is expected to discourage these unwanted incidents, the tax base must be able to capture these. If we decide to tax only flared gaseous substances, the tax regime will not cover spilled oil destroying the environment. Therefore, both flared gaseous substances and the contents of spilled oil substances must be taxed. The problem here is that oil companies are likely to argue that most spilled oil in the environment are due to criminal activities in the Delta region; and that they will not be punished for crime committed by others. The problem then will be how to identify spilled oil directly blameable on the activities of oil companies; such as those resulting from negligent conducts. Even when these are detected, the oil companies could contest it; leading to litigations and other forms of judicial or quasi-judicial contests without end. Regardless of the argument above, the activities of oil companies leading to the emission of gaseous substance and even oil spills first involve the combustion of fuel from its natural state resulting to the emission of CO$_2$. And emitted CO$_2$ are readily taxable regardless of whether the final product is spilled, flared or not. So, having emitted CO$_2$ as the tax base is advisable and could place a check on the oil companies.

\textsuperscript{25} The Canadian Province of British Columbia carbon tax does not apply to all greenhouse gas (GHG) emissions but to only emissions from combustion of fossil fuel and other specified combustibles.
Now that we have identified what the tax base should be, the next in line is the determination of the subject(s) that will be liable to the proposed carbon tax. It is Janet Milne who observed that:

…an important design question is determining who will pay the tax. From an environmental perspective, the tax or ultimate incidence of the tax should fall on taxpayers who are most able to change their behaviour in ways that will achieve the environmental goal. Political, economic, and administrative considerations, however, may come into play.

In determining who this proposed carbon tax should be levied on, we must consider the taxpayer whose behavioural changes will most likely bring forth good result in the fight against environmental pollution. Also, the economy of ability to pay and the state of our national development must be considered. Presently, Nigeria is desirous of encouraging industrialization in non-oil sectors of the economy and overall improvement in raising the populace out of poverty through job creation and employment. Therefore, the design of any tax regime in Nigeria must be geared towards supporting government policies. It follows that an extension of the proposed carbon tax to non-oil sector may discourage prospective investors. In order to avoid this, it is the position of this paper that the non-oil sector of Nigerian economy should be exempted from the imposition of carbon tax: instead, there should be tax incentive in this area of the economy. The oil sector is an area most companies, especially the multinational oil companies, compete to edge out competitors, including local investors. It is desirable that companies involved in oil exploration who emit carbon dioxide should be the targeted taxpayers for now. This could extend to non-oil companies as the country’s economy grows.

The next issue is the determination of the point of collection for the proposed tax. Commenting on this, Janet Milne maintains that: “In finding the right collection point, a tax proponent needs to balance the administrative considerations, the environmental impacts, and the political repercussions…”

Oil and gas issues are matters generally reserved for the Federal government of Nigeria by the Constitution of the Federal

26 Milne, *loc. cit.* note 5 at 5.
They are issues that can only be legislated upon by the National Assembly. And the duty to collect taxes directly payable by companies regardless of their locality in the country falls within the province of the Federal Inland Revenue Service (FIRS) – a collecting agency for the Federal Government of Nigeria.\(^\text{29}\) The collection of the payment of carbon tax, if eventually implemented, will definitely be the duty of the FIRS. For administrative convenience and the need to emphasis the much needed behavioural change(s) expected of the oil companies, the collection of the proposed carbon tax should be as far upstream as possible. With the aid of experts, the FIRS should be in a position to measure tons of emitted carbon dioxide by each defaulting oil company.

### 3.3 Determining a Tax Rate for the Proposed Carbon Tax:

In determining the rate at which the proposed tax will be imposed, it may be necessary to consider a rate capable of inducing the desired change. Very often, it may be difficult to state, without equivocation, the exact rate at which penalties could be set to deter the doing of prohibited act(s). Psychologists and other social scientists have propounded theories and hypothesis pointing to what could be done to encourage compliance. The economic theory of compliance is one of the earliest theories imported into the field of taxation. Allingham and Sandmo argue that punishment must be set at a level that culprit will feel the pain and see that there is no benefit to disobedience or non-compliance.\(^\text{30}\)


\(^{30}\) See Michael G. Allingham and Agnar Sandmo, “Income Tax Evasion: A Theoretical Analysis” (1972) 1 Journal of Public Economics 323-338. Amongst the works of early protagonists of this theory, the classical work of Michael G. Allingham and Agnar Sandmo stands out as a *locus classicus* in this area. The puzzle that this work seeks to unravel is the reason why people pay taxes. It is based on the economic theory of crime discussed by Gary Becker in one of his literal classics. See Gary Becker, “Crime and Punishment: An Economic Approach” (1968) 76 Journal of Political Economy 169-217. Thus, the economic theory of crime incorporated into taxation by the duo of Allingham and Sandmo maintains that taxpayer behaviours are generally determined by the interactions of the following variable: the effects of discovery of tax non-compliance (maybe through investigation, audits, or any other means); and the severity of possible punishments attractable by the offence committed in relation to taxpayer’s gain from non-compliance. The economic theory explains the decision to evade tax as a matter of maximizing possible utilities. It considers taxpayers as rational and amoral beings who always seek to maximize personal gains over moral issues. As stated above, the benefits of evasion; the probability of detection; and severity of punishment that the system could hand down to a
To set a tax rate that will be effective, it must be remembered that the main essence of the proposed tax is to influence a behavioural change on the part of oil companies whose activities contribute immensely to polluting the environment and contributing to the problems of global warming. Again, it may be necessary while considering the rate at which the proposed carbon tax will be imposed, to ensure that consequent tax burden is not transferred to Nigerian final consumers—who are generally considered poor. Also, the government must consider the competitiveness of the Nigerian oil in the international market place.

Definitely, the tax rate will not be imposed per barrel because we have already chosen to tax the emitted CO\(_2\). Therefore, the tax rate will be based on emitted CO\(_2\). For instance, the Nigerian government could decide to impose N200 per ton of emitted CO\(_2\).

### 3.4 The Use of Revenues Generated from the Proposed Carbon Tax:

With the high rate of gas flaring and consequent environmental pollution arising from huge emissions of CO\(_2\) by oil companies operating in the Niger-Delta region of Nigeria, it may be convenient to say that hundreds of millions of US dollars are likely to be realized from the implementation of the proposed carbon tax. But the next question is: of what use will the realized funds be put into? In Milne’s opinion, “…the revenue from the tax can help build a package that reduces the regressivity of the tax itself and may produce broader benefits that can have significant political and policy implications”\(^{31}\).

From our previous discussions, it is obvious that the major reason for the proposed introduction of carbon tax in Nigeria is to help alleviate some of the environmental problems facing the country. Oil companies are the major cause of environmental hazards in the Niger-Delta. That is why the proposed carbon tax is designed to target them for possible behavioural changes or payment of penalties in the form of carbon...
tax—which is generally seen as “sin tax”. For proper use of realized revenue, the benefit of the oil companies; inhabitants of the polluted environment; and the society at large must be factored in. Restoration of damaged environment and prevention of future pollution will, obviously, benefit all stakeholders in the environment. To this extent, funds realized from the imposition of carbon tax could be ploughed back to support different clean-the-environment programs in the country; especially in the Niger-Delta region. Also, certain percentage of the funds may be directed towards alleviating poverty and the sufferings of inhabitants of polluted environment in the Niger-Delta.

4.0 Conclusion
The problem of environmental pollution in Nigeria is well-known globally. Gas flaring, oil spills and other activities of oil companies leading to destruction of the environment have remained unchecked in the country. These have led to protest, violence and series of criminal activities in the Niger-Delta region of the country. This paper recognizes these socio-economic problems threatening the country. It argues that in addition to existing regulations, taxation could be employed to induce or compel desirable behavioural changes on the part of oil companies. It identifies taxation as a socio-economic instrument that could be deployed by government to augment other existing instruments in achieving targeted goal(s). In this instance, carbon tax, which is considered a “sin tax” – one of the Pigouvian taxes – can be employed to shift the socio-economic costs or burdens placed on the society back to the major polluters of the environment. Oil companies have been identified as the major polluters of the environment in Nigeria and, therefore, must be held accountable for their actions. In designing the carbon tax regime, four essential elements must be identified and clarified. They are: defining the tax base for the operation of the carbon tax; identifying the subject(s) to be made liable to carbon tax (taxpayer/collection point); specifying the applicable tax rate; and the use of revenues generated from the tax. These factors are considered in this paper and the finding is that the introduction of carbon tax in Nigeria will be beneficial to the country. If well implemented, the introduction of carbon tax in Nigeria will
encourage desired behavioural changes on the part of the targeted oil companies; and also make available appreciable revenue that could be ploughed back to keep the environment safe and clean. What is needed to carry these into effect is the enactment of appropriate legislation by the National Assembly on the subject discussed in this paper and effective implementation of the law thereof by the appropriate enforcement bodies and or agencies.
MEDICAL NEGLIGENCE: LIABILITY OF HEALTH CARE PROVIDERS AND HOSPITALS

Abstract

The health care system in Nigeria has recorded unimaginable and unsatisfactory performance in quality delivery for a very long time. Medical services are still not accessible to many people, especially the poor. When accessed, patients receive sub-standard care in many cases due to the negligence on the part of one health care provider or another. On the other hand, when services are unaffordable, the patients go to quacks who may provide cheaper services, while causing greater harm or damage to the injured patients and their families. The truth is that many people in Nigeria do not know their rights, and many have limited knowledge. Certainly, if those patients become better informed of their rights and the reality of their taking out successful law suits against negligent health care providers, the quality of health care may improve in Nigeria. This paper therefore discusses the liability in negligence of these health care providers whether civil or criminal while suggesting a stiffer punishment for quacks who have continued to cause havoc in the society by their nefarious activities.

Introduction

Generally, negligence is a breach of a legal duty to take care which results in damage to the claimant. Medical negligence is, therefore, a breach of a duty of care by a person in the medical profession, to a patient, which results in damage to the patient. Criminal or civil proceedings may be instituted against health care providers for negligence in the performance of their duties. These health care providers could be said to be those who are qualified and appropriately registered (where necessary), to practice any of the health related professions within the medical field. They include doctors, nurses, ophthalmologists, physiologists, physiotherapists, dentists, pharmacists, laboratory scientists, radiologists, and a host of others. These people have held

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themselves out to serve members of the public, and their patients rely on their skills and knowledge. The existence of this relationship between the provider and his patient gives rise to duty of care, the breach of which makes the provider liable where the breach is unjustifiable. Thus, any individual who has been injured by the wrongful act of such a health care provider has the right to institute civil action against him or her in order to be compensated for the injury suffered. On the other hand, the State can institute criminal proceedings against such health care provider, in order to push him for the offence he committed.

A medical doctor who has performed an operation and negligently left scissors in the patient’s abdomen, thereby causing the death of the patient, may be sued in a civil action for damages, and he may also be prosecuted and convicted for committing the crime of manslaughter. Therefore, both civil and criminal proceedings may be taken out against such negligent health care provider for the same wrongful act.

This paper discusses the liability in negligence of health care providers/hospitals with a view to determining the extent of the liability arising therefrom.

1. Criminal Liability

Criminal law obviously applies to health care providers, and the purpose of criminal prosecution is to punish the offender. In Nigeria, criminal law codes apply, i.e., the Criminal Code which applies in the Southern States, and the Penal Code, which applies in the Northern States as well as the Federal Criminal Code and Federal Penal Code.

If health care providers in their practices become grossly negligent causing bodily harm, or reckless in the care of others, they will be liable in criminal proceedings. Section 303 of the Criminal Code provides that, it is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and such a person by reason of any omission to observe or perform that duty. An anaesthetist was found guilty of manslaughter where

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he caused the death of a patient due to his gross negligent in attention during surgery.\textsuperscript{4}

It follows, therefore, that if a health care provider does not use reasonable care, or his conduct falls below the standard of care required by law, he is said to be negligent. This means that, if he does not use reasonable care or he negligently performs his duties and thereby causes the death of a patient, he is guilty of manslaughter. However, his negligence or incompetence must be so great as to show a disregard for life and safety and to amount to a crime against the state, and conduct deserving punishment.\textsuperscript{5}

Consequently, for criminal liability, the degree of negligence required of health care providers is that it should be “gross” and not “mere” negligence. In Kim v State,\textsuperscript{6} the Supreme Court held that the degree of negligence required in the medical profession to render a practitioner liable for negligence is that it should be gross and not mere negligence, and that the court cannot however, transform negligence of a lesser degree into gross negligence by giving it that appellation. The court referred to and followed the case of Akerele v R.\textsuperscript{7} Here, the accused, a qualified medical practitioner administered injections of a drug known as Sobita to children as a cure for yaws. A number of children died, and he was charged with manslaughter of one of the children. The case of the prosecution was to the effect that the accused had concocted too strong a mixture and thereby administered an overdose to the deceased, amounting to gross negligence. He was found guilty of manslaughter and sentenced to imprisonment for 3 years. WACA upheld the conviction, but the accused further appealed to the Privy Council which held that the negligence of the accused did not amount to gross negligence and allowed the appeal. According to the court, “It must be remembered that the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence by giving it that appellation.”

Thus, the health care provider owes to his patient or client a duty of care not to act negligently. This is so whether or not there is an agreement between them. He must possess reasonable skill and use that skill in every case. What is important is that the

\textsuperscript{4}R. v. Adomako See R. v [1944] 3 All E. R. 78 (HOL, England)
\textsuperscript{6}[1992] 4 NWLR (Pt. 233) p. 17
\textsuperscript{7}[1942] 8 WACA 5
provider acts as an average reasonable health care provider would act in the circumstances of the case.

**Special Cases of Rash and Negligent Act.**

By section 343 of the Criminal Code,

(1) Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person…

(e) gives medical or surgical treatment to any person whom he undertakes to treat; or

(f) dispenses, supplies, sells, administers, or gives away any medicine, or poisonous or dangerous matter;… is guilty of a misdemeanour, and is liable to imprisonment for one year.

While this section creates the offence of misdemeanour for negligent act which only endangers human life or is likely to cause harm to another person, section 303 creates the offence of manslaughter for grossly negligent acts which cause death. Therefore, the punishment in criminal proceedings instituted against a health care provider may be imprisonment or fine or both. So long as negligence, whether it causes death or not, is not of such a high degree or is not gross as to be sufficient to convict for manslaughter, the charge should come under section 343 of the Criminal Code. It is the same where an act that is grossly negligent does not result in death. Here, one cannot be convicted of manslaughter, but may be conveniently convicted under section 343.

It is noteworthy that the degree of negligence which the prosecution must prove to establish the offence of manslaughter differs in cases of misdemeanour. Although the negligence which constitutes the offence of misdemeanour must be of a higher degree than the negligence which gives rise to a claim for compensation in a civil court, it is not of so high a degree as that, which is necessary to constitute the offence of manslaughter. Nevertheless, the prosecutor in proving negligence is required to present compelling evidence to show that the health care provider’s action fell short of the required professional standard. This, he will do, by presenting expert evidence of what that

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8 This is less serious offence than a felony.
9 This is a felony and a serious offence.
10 See *Dabholkar v R.* (1948) AC 221 at 224-225.
standard should be. The prosecutor in the circumstance is indeed expected to establish his case beyond reasonable doubt.

**The Unskilled Person**

An individual who is unskilled may decide to act as a health care provider.\(^1^1\) Such a person cannot excuse his act by saying that he did his best, if his best fell below the required standard of care. For instance, if a carpenter holds himself out as a doctor and performs an operation on another person, he will be expected to show the average competence normally possessed by qualified medical doctors. He will be guilty of the consequence of falling short of that standard. This is because the law requires him to possess the requisite skill and to use it. He will, in any case, be guilty of an offence involving negligence only if his conduct is negligent. It is the same in the case of a nursing sister, who runs a maternity home, parades as a doctor, and performs a caesarean section on a pregnant woman, who subsequently dies by bleeding to death. Obviously, she does not have the knowledge of a qualified surgeon. Therefore, she acted in an incompetent manner in reckless disregard for the life and safety of the woman. She will be found guilty of the consequences of her act.

The activities of quacks, in the area of healthcare, have taken a toll on the lives of many Nigerians, especially the women folk. The courts, therefore, seem to punish them seriously for their negligent acts in order to discourage them. In the case of State v. Okechukwu,\(^1^2\) where a quack was sentenced to nine years imprisonment for manslaughter, the court noted as follows:

> …I would stress that the incidence of medical quackery has been a cankerworm which must be stamped out if lives of innocent citizens must be protected from sudden and unnatural death. It is extremely dangerous for an ignorant mountebank like the accused to dabble in medical science for which he is least qualified. This type of offence is very common nowadays and a deterrent sentence is called for in this case. Ignorant persons should not be allowed to experiment with lives of others.\(^1^3\)

In spite of decisions like this, the activities of quacks continue to increase. It seems that if greater punishment like life sentence is given to them, they will definitely be deterred from carrying on with their deadly activities.

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\(^1^1\) Such an individual is known as a quack. In Nigeria, quacks abound.

\(^1^2\) (1965) E.N.L.R 91

\(^1^3\) *Ibid*, at p. 94.
2. Civil Liability
When health care providers are alleged to have failed to observe the legal principles and standards concerning the care of patients, civil litigation may result. The most common and potent basis of civil liability for medical malpractice cases is negligence. Thus, where a health care provider administers treatment to a patient negligently and injury is caused to the patient, he may sue for negligence against the provider for the injury suffered. The rationale for liability for negligence of a health care provider is that, someone harmed by the actions of such a provider deserves to be compensated by the injuring party.

In law, a plaintiff must establish three elements in order to succeed in an action for medical negligence. The elements include:

a. that the health care provider owed the plaintiff a legal duty of care;
b. that the provider was in breach of that duty;
c. that the plaintiff suffered injury/damage as a result of the breach.

Duty of Care
A health care provider owes a duty to a patient. Thus, if he undertakes to care for, or treat a patient, whether there is an agreement between them or not, he owes that patient a duty of care. He does not owe a duty of care to anyone who needs aid and who can be reasonably assisted; rather he owes the duty to a patient he has undertaken to care for/treat, whether there is an agreement between them or not. The question is what is meant by a duty of care? “Duty” simply means that obligation recognized by law to take proper care to avoid causing injury to another in all circumstances of the case.

In Hedley Byrne & Co Ltd v Heller & Partners Ltd, Lord Morris noted as follows:

…it should now be regarded as settled that if someone possessed of a special skill undertakes quite irrespective of

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contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise…

Again in *R v Bateman*\(^{17}\) the court explained that:

…if a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient or client, he owes a duty to the patient or client to use due caution, diligence, care, knowledge and skill in administering treatment…

Therefore, where a patient relies on the skill and knowledge of a provider with respect to his/her health, a duty of care arises. Providers owe a duty to give adequate counselling to patients, to warn patients of the risks involved in the medical treatment being offered, to conduct a proper examination and to make proper diagnosis; duty to administer injections, anaesthesia, x-rays, etc properly, to avoid wrongful treatment, to see their patients or clients, to inform patients adequately, etc.

Similarly, hospital authorities owe the same duty of care to patients accepted for treatment in their hospitals. In America and other jurisdictions where “Good Samaritan Laws” exist, if a nurse or doctor freely offers services to someone in an emergency situation, he would not be held liable if anything goes wrong. Thus, a nurse who hears a neighbour’s shout for help, because she is delivering her baby in the staircase, and offers her services, would not be exposed to civil liability if something goes wrong; it is the same in the case of a doctor who renders help at a scene of a road accident. However, this “Good Samaritan Law” does not apply in Nigeria. Rather, the health care provider in such cases will be held liable to the degree of care of a reasonable health care provider in the circumstance.

**Breach of Duty**

Breach of duty means that a defendant’s conduct fell below the required standard expected of him. A health care provider will be in breach of the duty he owes a patient or client if he fails to exercise the standard or care, which the law expects of him. For the health care provider, the standard is that of the ordinary, reasonable health care provider with the skill of the defendant.

The fact that a mishap occurs does not establish negligence on the part of the provider as long as he followed the approved procedure for the treatment offered. There must be some form of standard against which the conduct of the health provider is measured.

\(^{17}\)[(1935) 94 K.B. 791.]
A care provider has to be examined – that is the standard of a reasonable, skilful health care provider of the same experience, placed in the same circumstances. It is noteworthy that the standard is relative, i.e. in each circumstance, the standard will be judged by factors as time, place and availability of facilities.\(^\text{18}\) For instance, if a provider acts under emergency conditions, where he may act without the necessary equipment, the standard expected of him may be lower than that of one acting under normal conditions. But this is no excuse for a provider who knows that facilities are unavailable and inadequate, to undertake treatment under such conditions, especially when there is a nearby hospital or medical centre with necessary facilities.

Similarly, the standard of care expected from local providers in villages cannot be in accordance with current trends in some urban areas like Lagos, where there has really been a lot of technological development. In the case of Warnock v Kraft\(^\text{19}\) it was explained that:

...a doctor in a small community or village not having the same opportunity and resources or keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities...

Even a house officer is not expected to show the same standard of skill and care as a registrar or a consultant who is a specialist in a particular area. It is pertinent to note that, a doctor, nurse, anaesthetist, or any other health care provider, who holds himself out to a patient as possessing special skill and knowledge in a particular area of health care, must exercise the same degree of care and skill as those who generally practice in that field. A nurse who undertakes a complicated In-Vitro Fertilization (IVF) surgery must conform to the standard of a qualified obstetrician. If not, she will be liable in negligence for undertaking such treatment with full knowledge that as a nurse, she does not have the special skill and knowledge and facilities required for that type of surgery. Thus, the standard of care is that of the member of the skilled group to which she holds herself as belonging. The more skill and knowledge you hold yourself as possessing in the profession, the more the standard of the professional with such skill you will be held to have. A chemist who holds himself out to


\(^{19}\) (1938) 85 p. 2\(^{nd}\) 505 in Susu, *Ibid*; p. 156.
be a pharmacist will be judged as if he were a pharmacist.\textsuperscript{20} It is apparent, therefore, that the test is the standard of the ordinary skilled man exercising and professing to have that special skill which is not part of the ordinary equipment of the reasonable man.\textsuperscript{21} In \textit{Bolam v. Friern Hospital Management Committee},\textsuperscript{22} the court said:

\begin{quote}
...But where you get a situation, which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill; neither that of a specialist of perfection; nor that of one with Olympian reputation, but an average yardstick of reasonableness and objectivity. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.
\end{quote}

It should be noted that members of various professions, from their own expertise and experience, have practice standards or guidelines by which their disciplinary authorities determine and measure the competence and standards by which providers have performed their various tasks. The consequence of having such practice standards is that, providers who fail to comply with them, may be held to be in breach of their duty. In Nigeria, for example, the Medical and Dental Practitioners Act\textsuperscript{23} regulates the medical and dental professions. This Act sets up the Medical and Dental Council of Nigeria. The Council listed acts constituting professional negligence to include, making mistake in treatment, failure to advise or proffering wrong advise to a patient, making incorrect diagnosis, failure to attend to a patient, etc.\textsuperscript{24} In the case of one Mrs. Olabisi Onigbanjo, decided by the Medical and Dental Practitioners Disciplinary Tribunal (M.D.P.D.T.),\textsuperscript{25} a doctor who was charged with negligently leaving a large surgical

\begin{footnotes}
\item[20] See \textit{Kelly v. Carrol} (1950) 219 p. 2\textsuperscript{nd} 79 A.L. R. 2\textsuperscript{nd} 1174.
\item[21] See \textit{Blyth v. Birmingham Water Works} (1856) 11 Ex, 781.
\item[22] See McNair J. in \textit{Bolam v. Friern Hospital Management Committee} [1957] 1 WLR 582 at 586.
\item[25] See s. 17 of the Medical and Dental Practitioners Act , LFN 2004.
\end{footnotes}
drape in the abdomen of the woman after surgery, was found guilty. He was suspended from practice for six months.26

Apart from the disciplinary action which may be taken against the medical practitioner by the Medical and Dental Council of Nigeria, or by an employer, for negligently performing his duties below the practice standards, the courts can of course use those standards to measure such a provider’s duty of care. The court may hold a provider liable because he has performed below those standards. But, for the court, compliance with those standards does not necessarily mean that the legal standards have been satisfied. The court, at the end of the day, sets the standards, and “may find that the standard of practice the profession has set is unacceptable to the wider community.”27

Interestingly, medical science is an area where changes do occur, and therefore, a health care provider must be in tune with current skill. He must keep abreast of new developments, and is expected to be familiar with his own specialist literature.28 In Roe v. Minister of Health,29 the anaesthetist injected the two plaintiffs with contaminated anaesthetic, which caused them paralysis from the waist downwards. The anaesthetist was held not to be negligent because the risk of such contamination was not generally appreciated by competent anaesthetists at that time. However, there is a textbook published in 1957, which contains a clear warning on the use of this anesthetic;30 so that any provider that continues with the old system after this warning will not escape liability for negligence. Before the warning the danger was unforeseeable.

There is need to maintain a balance between the skill and the due diligence required of a provider at a point in time. McNair explained as follows:-

…Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because

30 See Okonkwo, op. cit.
there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pigheadedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: I do not believe in antiseptics. I am going to continue to do my surgery. That clearly would be wrong…

It is necessary to take the circumstances of each case into consideration. Where a provider recognizes the limits of his skill, it is advisable that he should make timely referral of his patient to other appropriate provider who will be able to offer the patient the care he or she needs. This is to avoid his being involved in any breach of duty.

A provider may not only be liable in negligence due to lack of skill or care in the performance of the procedure, but may also be liable where the injury is caused by defective disclosure of information, because, had relevant information been given, the patient would have chosen not to have the procedure, and therefore may not have been exposed to its risk. It is for the provider, in order to avoid negligence, to ensure that “appropriate information is provided. This is to assist the decision made by, or on behalf of the patient concerning what, if any treatment to receive.” For example, a provider may give assurance that a procedure will terminate a pregnancy, or that fertilization procedure will exclude the risk of pregnancy. In the case of Thake v. Maurice, the plaintiffs not wishing to have any more children, consulted the defendant, a surgeon, to see if the plaintiff could be sterilized by vasectomy. With the 1st plaintiff’s consent, the surgeon performed the vasectomy operation, yet the 2nd plaintiff became pregnant, and by the time she recognized the symptoms, it was too late for abortion. In an action against the defendant, the plaintiff partly claimed that the defendant failed to warn them that there was a small risk that the 1st plaintiff might become fertile again. There was no evidence to show that that the defendant had not performed the operation properly, and at the time of the operation it was known in medical circles that in rare cases, the effect of the operation could be reversed naturally. The court held that the failure by the defendant to give his usual warning that there was a slight risk that the 1st plaintiff might become fertile

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32 McNair in Bolar v Friern Hospital Management Committee, supra, p. 587.
34 (1968) Q. B. 644. See also Eyre v. Measday [1986] 1 All ER 488
again amounted to a breach of duty of care which he owed to the plaintiffs because, the warning was necessary to alert the 1st plaintiff to the risk that she might again become pregnant. Moreover, the risk of this 1st plaintiff failing to appreciate promptly that she had become pregnant ought to have been in the reasonable contemplation of the defendant.

In every case, the law requires that the health care provider’s conduct must not fall below expectation or standard. Therefore he must always act like a reasonable, skilful and competent provider in order to avoid liability.

**Damage**

In an action for negligence, when a plaintiff has proved existence of duty of care and its breach by the health care provider, he must prove that he suffered damage as a result of the breach in order to succeed and be compensated. This remedy is recognized by law in order to assuage the feelings of the injured plaintiff. But, it must be shown that the health care provider’s breach of duty, as a matter of fact, caused the damage. That is to say, that the plaintiff must show a causal link between the damage he suffered and the provider’s act. In *Ajaegbu v. Etuk*, the plaintiff was unable to establish that the damage suffered was as a result of the breach of duty by the medical practitioner.

The onus of proof lies with the plaintiff, and usually, if a provider does not admit negligence in a given case, then the plaintiff will have to call evidence to show negligence on the part of the provider i.e. to show that the conduct of the provider fell below the required standard in a particular case. Such evidence which assists a plaintiff and even the court in determining that a provider acted below the required standard of care is primarily the testimony of experts, which in turn relies on learned treatises, articles in medical journals, research reports, etc. Expert evidence is used because it is only a health care provider who can show that another health care provider in the same field acted below the required standard. The problem encountered here, however, is the reluctance of these providers to give the needed expert evidence, because they do not want to blame or expose a colleague. According to Okonkwo, this silence is sometimes referred to as the “conspiracy of silence”.  

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35 (1962) 6 ENLR. 196.
In *Hatcher v Black*, 37 Lord Denning stated that:

…it would be wrong, and indeed, bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient or a surgeon operating at a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action in negligence can wound his reputation as severely as a dagger can his body…”

In the same vein, Okonkwo opines that,

…a surgeon is not liable in negligence merely because an operation is unsuccessful or because grave harm results from or because a mistake, or an error of judgment has occurred. If it were so, doctors would out of fear of litigation, rarely show that degree of initiative and confidence which is necessary for the proper exercise of their noble profession. 38

As true as the above statements are of doctors and probably of other health care providers, yet if a provider’s mistake or error of judgment can be shown to be the result of a breach of duty, which has caused damage to a plaintiff, he should not be allowed to escape liability. In other words, if damage would not have occurred but for a provider’s act, then his act caused the damage and he should be liable. On the other hand, if the damage would have occurred despite the provider’s act, then his act did not cause the damage and he should escape liability. In *Barnett v Chelsea and Kensington Hospital Management Committee* 39, the claimant’s husband and two of his fellow night watchmen went to the hospital and complained that they had been vomiting for three hours after drinking tea. The nurse called the casualty doctor by telephone and told him of the complaint. Instead of going to see them, the doctor instructed the nurse to tell them to go home and consult their own doctors later. This was an error of judgment and a breach of the doctor’s duty of care. In any case, the men left and later that day the claimant’s husband died of arsenic poisoning, and the coroner’s verdict was that of murder by persons unknown (arsenic was introduced into the tea). The court, however, found the doctor/hospital in breach of duty, but the

breach was not a cause of the death because, even if the deceased had been examined and treated with proper care by the doctor, it would probably have not been possible to save his life. Thus, there was no causal link between the negligent act of the doctor and the injury eventually suffered by the claimant’s husband. The claimant’s case failed.

**Remoteness of Damage**
Assuming the doctor’s act in the above case caused the injury suffered, would the law hold him liable for all the direct consequences of his act? The answer is in the negative because, he will be held liable only for those consequences of his act, which a reasonable man would foresee as the natural and probable consequences of his act. But those consequences, which a reasonable man would not foresee, are regarded by the law as being “too remote”. In such case, the defendant escapes liability. The next question is: what is the defendant expected to foresee? He is not expected to foresee the exact extent of the damage suffered by the plaintiff or the precise sequence of its infliction .According to Lord Denning M. R., “it is not necessary that the precise concatenation of circumstances should be envisaged….”

However, it is enough if the damage that is foreseeable is of the same “kind” as the damage, which actually occurred. In that case the provider will be held liable for that damage.

**Proof of Negligence: Res Ipsa Loquitur**
The burden of proving negligence rests with the plaintiff, and if, at the conclusion of evidence, it has not been proven on a balance of probabilities, that the defendant was negligent, the plaintiff’s case fails. The plaintiff, who suffers injury, must therefore prove affirmatively that his injury was caused by the carelessness of the defendant.

At times, the establishment of the relevant evidence may be very difficult for the plaintiff, that is, to show that some specific act or omission of the health care provider was negligent. This is so, because the plaintiff is most likely to be a layman, and

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41 See Overseas Tankship (UK) Ltd. v. Miller Steamship Co Pty Ltd. (The Wagon Mound) (No. 2) [1967] A. C. 617.
42 That is, proving duty of care, breach of the duty and consequential damage to the plaintiff.
medical science is a very specialized area. He may not, therefore, know or understand what actually happened. Consequently, he needs to call expert evidence; if not, he will find himself going through an impossible burden of proof and in the end will fail to establish what in truth, is a valid claim. More so, the judge will also have to rely on expert evidence to decide the case, as he may lack the knowledge or even the experience to be able to draw the appropriate inferences. For example, he may not know the standard required in a complicated surgical operation or the required composition of the ingredients for a particular drug. Only medical experts will know. The judge would, therefore, need expert evidence too. Unfortunately, as already noted, these health care providers are usually reluctant to testify against fellow providers. All these are obstacles that hinder prosecution of cases against them.

Justice would not be done if the plaintiff is allowed to go without a remedy because of the difficulties encountered in proving his case. Though the plaintiff may not be in a position to locate the exact act or omission that caused the injury, and the defendant alone may know, the plaintiff is assisted by the doctrine of *res ipsa loquitur*. This is a Latin expression, which means that “the thing speaks for itself”. The entire doctrine was stated by Erle, C. J. in *Scott v London and St. Kathrine Docks Co*\(^{44}\) thus:

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\text{…Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care…}
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Once the plaintiff can show that the thing that caused the damage was under the management or control of the defendant or his servants, and the accident was such as would not ordinarily have happened if proper care was taken, the court will infer negligence against the defendant. The plaintiff will no longer be called upon to prove negligence on the defendant’s part because, the surrounding circumstances amply raise an inference of negligence. The onus of proof then shifts to the defendant, which if not discharged, will lead to his liability.

In cases of *res ipsa loquitur*, the plaintiff is saying he does not know how the damage occurred. If he knows, the maxim will not apply. The doctrine therefore only applies when looking at a

\(^{44}\) (1865) 3 H & C 596. See *Osuigwe v Unipetrol* [2005] 5 NWLR (Pt. 918) 261.
set of facts, which the plaintiff cannot explain, the natural and reasonable inference to be drawn from them is that what has happened was the result of some act of negligence on the part of the defendant. In the case of *Igbokwe & Ors v. University College Board of Management*, a woman who just delivered her baby fell from the 4th floor of the hospital building. A doctor had specifically asked a nurse to keep an eye on her, but she was found fatally wounded after her fall. The court found the hospital negligent on the application of *res ipsa loquitur*.

The doctrine of *res ipsa loquitur* has been applied in the medical cases. In *Mahone v. Osborne*, it applied where after abdominal operation, swabs were left in the body of the patient. The same was the case in *Fish v Kapur*, where a dental extraction resulted in a jaw fracture. Again the maxim was applied in the case of *Cassidy v Ministry of Health*, where a plaintiff who entered a hospital to be cured of two stiff fingers ended up after the treatment with four stiff fingers, and as a result, lost the use of his left hand.

**Contributory Negligence**

The defence available to health care providers is that of contributory negligence. If the plaintiff’s own negligence leads to the damage he sustains, in whole or in part, it is known as contributory negligence. Contributory negligence is want of care by a plaintiff for his own safety, which contributes to the damage, while also the defendant’s fault partly contributes to the damage. The court will reduce the damages recoverable, so that the plaintiff will not recover in full. Section 234 of Anambra State Torts Law 1986 provides as follows:

…Where any party suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim, in respect of that damage, shall not be defeated by reason of fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regarded to the share of the claimant in the responsibility for the damage.

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45 (1961) WNLR 173.
48 [195]) 2 K. B. 343.
The onus is, therefore, on the defendant to raise the defence of contributory negligence.\footnote{NRC v Emeahara & Sons [1992] 2 NWLR (Pt. 352) 206.} He does not have to show that the plaintiff owes him a duty of care, rather, he has to show that the plaintiff has failed to take reasonable care for his own safety in respect of the damage in question, and that by reason of this, the plaintiff contributed to his own injury. The standard of care expected of the plaintiff is the same as that in negligence itself, the same reasonable man’s test is applicable to him.

With respect to apportionment of damages, the judge in appropriate cases would reduce damages to such an extent as he thinks just and equitable, having regard to the share of the claimant in the responsibility for the damage.\footnote{See section 234 (1) ASTL, 1986 and other Torts Law of various states.} There is no mathematical formula for this.

3. Liability of Hospitals

Vicarious Liability

Vicarious liability is the liability a master incurs to a third party for the wrong of his servant committed in the course of employment. It does not matter that the master was not at fault himself. This means that for the liability of a master to arise, a relationship of master and servant as distinct from employer and independent contractor has to exist.\footnote{I. P. Enemo, The Law of Tort (Enugu: Chenglo Ltd, 2007) p. 306.}

A hospital authority is, therefore, vicariously liable for the negligence of the health care providers it employs. These health care providers are the servants of the hospitals, which employ them: for example, radiographers,\footnote{Collins v Herbertsdhire C.C. [1947] K. B. 598; Cassidy v Ministry of Health [1951] 2 K.B. 343.} house-surgeons,\footnote{Collins v Hertfordshire C.C. [1947] K. B. 598; Cassidy v Ministry of Health [1951] 2 K.B. 343.} full time assistant medical officers,\footnote{Collins v Ministry of Health, ibid.} anaesthetists, etc, are all servants of the hospital authority for the purposes of vicarious liability.\footnote{Roe v Minister of Health, [1954] 2 Q.B. 66.}

Vicarious liability of the master arises on the primary liability of the servant. The servant is the principal tortfeasor while the master is the accessory. Thus, a plaintiff could sue both the health care provider and the hospital jointly. He may also sue either of them. The usual thing is to join the employer as a defendant. At times, the plaintiff may not be able to specifically
identify which of the several servants of the master was negligent. For example, a patient who has been injured during an operation in a hospital may not be able to identify which one or more of the team of surgeons, anaesthetists, nurses, etc., involved in the operation was careless. It was held in *Cassidy v Ministry of Health*\(^{56}\) that, in such a situation, the hospital authority will be vicariously liable, unless it can show that there was no negligent treatment by any of its servants. It is usually better for an injured plaintiff to join the hospital (master) as a defendant because, it is richer than any of its servants and will be in a better position to pay than the servant (provider).

**Primary Liability of Hospitals**

We should not confuse vicarious liability with primary liability of hospitals. Apart from vicarious liability, a hospital, may commit a breach of duty of care, which it owes to another, i.e. a hospital may be in breach of its own duty to another; for example, where a hospital is at fault for selecting an unskilled person on its staff who conducts himself in a wrongful manner, or allowing such a person to continue in employment; or where it provides defective equipment for use by the health care providers under its employment.

**Occupier’s Liability**

This deals with liability of an occupier of premises for damage done to visitors to the premises. An occupier, according to Lord Denning in the case of *Wheat v Lacon*\(^{57}\) is, “a person who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully upon his premises.” A visitor is generally a person to whom an occupier has given express or implied permission to enter his premises.

An occupier owes a “common duty” of care to visitors to his premises. This “common duty” is defined in section 238 (2) of *ASTL 1986*\(^{58}\) as “a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.” This common duty of care therefore requires hospitals to guard against

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\(^{56}\) Supra.


\(^{58}\) Same as s. 2 (2) Occupiers Liability Act 1957.
danger, which may arise from the state of disrepair of their premises, or danger arising from ongoing activities on the land, such as construction work, or repairs. Also, it includes the maintenance of lifts, adequate lighting at night for safety reasons and also maintaining other equipment in the hospital.\(^{59}\) In *Slade v Battersea and Putney Group Hospital Management Committee*,\(^{60}\) a 67 year old lady visiting her husband in a hospital slipped and fell on a part of the floor of the ward where polish had just been spread, while she was leaving. Due to the fact that polish had just been spread, the floor was slippery and dangerous, and there was no sign to warn users. The woman succeeded in an action for damages against the hospital authority.

Therefore, the hospital authority owes a common duty of care to all persons lawfully on its premises to ensure that its premises are reasonably safe. If it does not fulfil this duty to the visitor, it will be liable in damages for any injury caused to a person lawfully on its premises. Such visitors include patients and relatives visiting patients, the hospital workers or employees.

However, the hospital must in proper cases be prepared for children to be less careful than adults and may expect that a person, in the exercise of his calling, will appreciate and guard against any special risk “ordinarily incident to that calling”.\(^{61}\) The hospital can of course escape liability by giving warning notice to visitors. If, therefore, it has warned the visitor of danger in the premises, and the visitor still gets injured, the hospital will be absolved from liability, provided in all the circumstances, the warning was enough to enable the visitor to be reasonably safe. Consequently, only sufficient and adequate warning that will enable visitors to be reasonably safe will absolve the hospital from liability. To determine the sufficiency of the warning to visitors, all the circumstances must be taken into consideration.

**Conclusion**

The health care system in Nigeria has really recorded unimaginable and unsatisfactory performance in quality delivery for a very long time. Patients who are able to access medical services receive sub-standard care in many cases due to negligence on the part of one health care provider or another. Those who cannot afford the services of professionals go to quacks that may provide cheaper services, while causing greater

\(^{59}\) See Okonkwo, *op. cit.*, p. 129.

\(^{60}\) [1955] 1 All E. R. 429.

\(^{61}\) See s. 238 (3) ASTL 1986
harm or damage to the injured patients and their families. In order to eliminate or minimize this ugly situation, patients should not hesitate to sue negligent health care providers. Hospitals should also employ only qualified health practitioners in order to improve healthcare delivery. The law should provide stiffer punishment for gross negligence so as to deter quacks from toying with lives of the vulnerable who consult them for medical treatment. Such a step would promote a better and safer health care delivery system in Nigeria.
LEGAL REMEDIES FOR CONSUMERS OF
TELECOMMUNICATIONS SERVICES IN NIGERIA*

Abstract
With the deregulation of the telecommunications sector in 2002, the sector has remained one of the fastest growing sectors of the Nigerian economy. Deregulation and the introduction of the Global System for Mobile Communications (GSM) have revolutionized telecommunications in the country. The consequent expansion of the industry and its consumer base has been followed by consumer complaints in various forms. The Nigerian Communications Act, which regulates the telecommunications industry, established the Nigerian Communications Commission and provides for licensing of operators, quality of services and dispute resolution in the industry. This paper examines the remedies available to a consumer who suffers loss or damage as a result of poor quality services. It is argued herein that there is adequate mechanism for redress for consumers of telecommunication services in Nigeria.

1. Introduction
Since its deregulation in 2002, the telecommunications industry in Nigeria has witnessed a phenomenal growth. Major telecommunication services in Nigeria include telephony, internet and other forms of data transmission. Two of these services, telephony and internet, have had tremendous boost with the introduction of the Global System for Mobile Communications (GSM) in the country. From less than 500,000 connected lines before deregulation in 2002 the number of connected lines rose to over one hundred and forty-one million as at August 2012. Out of this number over one hundred and five million lines are active.¹ This means that much more people in Nigeria now have access to

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¹ A breakdown of the active lines shows that Mobile (GSM) accounts for 101, 404,011 million lines; mobile Code Division Multiple Access (CDMA) accounts of 3,347,716 million lines while fixed wired and wireless lines account for only 488,088 lines. This puts the country’s teledensity at approximately 75.17 per cent based on an estimated populated of 140 million. See “Subscriber Data 2010” http://www.ncc.gov.ng, retrieved October 25, 2012. Teledensity is a measurement of how many telephones are available, expressed as the number of telephone lines for every 100 people in a country.
telecommunication services than was the case a decade ago. Consequently, consumers of telecommunication services in Nigeria have become diverse and include all categories of persons: politicians, businessmen and women, civil servants, petty traders, farmers, artisans and students.

The growth of the industry and the consequent expansion of its consumer base have been followed by intense consumer complaints. Consumer complaints in the telecommunication industry in Nigeria relate mainly to tariff charges and quality of services. Complaints relating to tariffs include over-charging for services or excessive deduction of credits, inappropriate billing, multiple charges and charging for services not rendered, such as for text messages not delivered. Major complaints relating to quality of services include inability to re-charge due to defective recharge card or network failures; call setup failure including service interruption, cross talk, dropped calls, voice impairment; disconnection or suspension of telephone and internet lines. Other complaints include misleading advertisements and scam messages sent to subscribers; faulty, substandard or defective equipment supplied by service providers or their agents; proximity of sites or masts to residential building or offices and pollution by generators.

Generally, consumers of goods and services are entitled to certain basic rights under the law. These rights include the rights to basic needs, safety, information, choice, representation, redress, education, healthy environment and not to be exploited. A very important aspect of consumer right is the right to redress. The ability of the consumer to obtain redress for loss, injury or damage suffered as a result of defective products or shoddy services is the hallmark of any consumer protection system.


2. The Legal Framework for Consumer Redress in the Telecommunications Industry in Nigeria

Consumers of telecommunication services in Nigeria can obtain redress under statute or under the general law. The statutes identified as relevant in this regard include the Nigerian Communications Act, 2003, the Consumer Protection Council Act, 1992, the Utilities Charges Commission Act, 1992 and the Public Complaints Commission Act, 1975. The relevant provisions of these statutes are discussed hereunder. Under the general law, the relevant areas include the law of contract and tort of negligence.

2.1 The Nigerian Communications Act 2003

This is the principal statute that regulates the provision and use of telecommunications services and networks in Nigeria. The stated objectives of the Act which came into force on the 28 July, 2003 include to provide a regulatory framework for the industry and to protect the rights and interests of service providers and consumers within Nigeria. It established the Nigerian Communications Commission (NCC) charged with the responsibility of regulating the telecommunications sector in Nigeria. The functions of the Commission in relation to consumer protection include:

a. protecting the interest of consumers against unfair practices and generally promoting the interests of the consumers of telecommunications services;

b. ensuring that licensees implement and operate at all times the most efficient and accurate billing system;

c. developing and monitoring performance standards and indices relating to the quality of telephone and other communications services and facilities supplied to consumers in Nigeria having regard to the best international performance indicators;

d. examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communications industry, using such dispute-resolution methods as the Commission may

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5 No. 19 of 2003.
7 Cap U17, LFN, 2004.
9 See ss. 1 and 2 of the Act.
10 S. 2(1).
determine from time to time including mediation and arbitration.\textsuperscript{11}

Of importance to this discourse are the provisions of the Act and its subsidiary legislation relating to resolution of consumer complaints and consumer redress. The Act makes detailed provisions for the resolution of consumer complaints through Alternative Dispute Resolution (ADR) processes.

The Commission is conferred with powers to resolve disputes between persons who are subject to the Act\textsuperscript{12} regarding any matter under the Act or its subsidiary legislation.\textsuperscript{13} However, an attempt shall first be made by the parties to resolve any dispute between them through negotiation before the involvement of the Commission.\textsuperscript{14} The Commission may publish guidelines setting out the principles and procedures that it may take into account in resolving disputes or a class of disputes. Subject to the objectives of the Act and any guidelines issued by the Commission, it may resolve the dispute in such manner including but not limited to ADR processes and upon such terms and conditions as it may deem fit. In carrying out its dispute resolution functions, the Commission is to be guided by the objective of establishing a sustained dispute resolution process that is fair, just, economical and effective and shall not be bound by technicalities, legal forms or rules of evidence and shall at all times act according to the ethics of justice and the merits of each case.\textsuperscript{15}

Under Chapter VII, Part I (sections 104–106) of the Act dealing with consumer protection and quality of service, all service providers are required to meet such minimum standards of quality of service as the Commission may from time to time specify and publish; deal reasonably with consumers, and adequately address consumer complaints. The Commission is empowered to use any of its powers under the Act in the resolution of complaints received from consumers in relation to

\textsuperscript{11} S. 4 (1) (b), (c), (h) and (p).
\textsuperscript{12} Persons subject to the Act include service providers and consumers. “Consumer” is defined in the Act as “...any person who subscribes to and uses a communication service” while "communications" means any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms; see section 157.
\textsuperscript{13} S. 73.
\textsuperscript{14} S. 74 (1).
\textsuperscript{15} S. 76 (1) and (2).
matters of customer service and consumer protection including but not limited to quality of service or the failure by a licensee to comply with a consumer code. The Commission shall establish procedures or guidelines for the making, receipt and handling of complaints of consumers regarding the conduct or operation of licensees and may, at its discretion, institute alternative dispute resolution processes for the resolution of the complaints or disputes provided that the licensee’s dispute resolution procedures shall first have been exhausted by the consumer before presentation of the complaint to the Commission.\(^\text{16}\) Under section 106, the Commission may designate an industry body to be a consumer forum and to prepare a consumer code, and the consumer code prepared by such body shall be subject to the prior approval of and ratification by the Commission. The Commission may require licensees to prepare individual consumer code for their respective customers, and such consumer code shall be subject to the prior approval of and ratification by the Commission. A consumer code prepared by a consumer forum, the Commission or licensees shall include model procedures for reasonably meeting consumer requirements, the handling of customer complaints and disputes including an inexpensive arbitration process other than court, and procedures for the compensation of customers in case of a breach of a consumer code, and the protection of consumer information. Other matters which the consumer code shall address include, but are not limited to, further recourse available to a consumer who is dissatisfied with the licensee’s complaints-handling procedures together with specific details of compensation and refund schemes offered by licensee to its customers, the provision of information to customers regarding services, rates and performance, and any other matter which, in the opinion of the Commission, may be of concern to consumers.

In the exercise of the foregoing powers, the Commission has made and published a number of regulations and guidelines to protect the interests of consumers of telecommunication services in Nigeria. These include:

(a) Dispute Resolution Guidelines 2004;
(b) Consumer Code of Practice Regulations 2007;\(^\text{17}\)
(c) Enforcement Processes, etc Regulations 2005;\(^\text{18}\)

\(^{16}\) S. 105 (1) and (2).
\(^{17}\) S.I. No. 32 of 2007.
\(^{18}\) S.I. No. 7 of 2005.
Suffice to say that the guidelines and regulations are intended to better secure that the interest of the consumer, the Dispute Resolution Guidelines and the Consumer Code of Practice Regulations are considered most germane to the discourse here.

2.1.1 NCC Dispute Resolution Guidelines 2004

Pursuant to sections 4 (p) and 75 (2) of the Nigerian Communications Act, 2003, the Commission has established procedures or guidelines for the making, receipt and handling of complaints of consumers regarding the conduct or operation of licensees. The Dispute Resolution Guidelines, 2004 incorporates the procedure for the resolution of small consumer claims not exceeding One Million Naira and which do not involve complicated issues of law or examination of witnesses. The main objective of the Guidelines is to obtain fair resolution of disputes by arbitration without unnecessary delay and expense. Therefore, the procedure is designed to provide a forum for inexpensive, fair, impartial and effective arbitration as a means of resolving consumer-related disputes in the telecommunications sector. The Commission administers arbitration under the procedure independently, and not under the Arbitration and Conciliation Act. Arbitrators are selected by appointment from the Commission’s panel of experienced arbitrators. The rules provide for a “documents only” determination. However, an application for arbitration under these Rules does not relieve either party of any obligation to pay any amounts, which are due to the other party and are not in dispute.

An arbitrator appointed under the Guidelines may issue an interim ruling where a dispute directly affects the ability of a party to continue to provide uninterrupted services to its customers. The arbitrator shall issue final decision and file same with the Commission not later than six months after the filing of the petition for arbitration which period may be extended by the arbitrator after due consultation with the Commission. The Arbitrator's decision must be reasoned and ensure the resolution of issues presented by the parties such that the resolution meets

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20 S.I. No. 3 of 2012.
22 See Chap. 2 paras 5 and 6 of the Guidelines.
the requirements of the Act, NCC regulations and guidelines. It should, where appropriate, indicate schedules for the implementation of the decision.\textsuperscript{23} The Commission shall review the arbitrator’s draft decision with a view to ensuring that same complies with the requirements of the Act and NCC regulations and guidelines. No decision shall be rendered by the Arbitrator until it has been approved by the NCC. The decision of the arbitrator as approved by the Commission is final and binding until set aside by a competent court of law.\textsuperscript{24}

Fixing deadlines for the conclusion of proceedings under the procedure is proper so as to prevent delays that could prolong proceedings reminiscent of adjudication. However, the requirement that the arbitrator’s decision should be submitted to the Commission in draft for approval may not make for independence of the arbitrator or arbitral tribunal. It would have been better if the arbitrator or tribunal is allowed to hand out a decision which is made subject to review by the Commission if any of the parties expressed dissatisfaction with same.

2.1.2 Consumer Code of Practice Regulations, 2007

The Consumer Code of Practice is a general consumer code which serves as minimum requirements for any individual consumer code to be prepared by a licensee. All licensees are bound by the Code until their individual consumer codes have been approved by the Commission. Rights of Consumers under the General Code include free information on services to be provided including detailed information on complaints handling processes of licensees. Part VII (paragraphs 39–49) of the Code deals with complaints handling. The Code mandates licensees to provide, and from time to time review and update their consumer complaints handling procedures. Information on their complaints handling processes, in various media and formats and in easily to understand language, should be made available, including as specifically directed by the Commission from time to time. They are to ensure that consumers can easily identify how a complaint may be lodged, either at a licensee’s premises or using identified forms of telecommunications. The information on the complaints handling processes shall contain information to consumers about their rights to complain; how licensees can be contacted in order to make a complaint and the types of supporting information including documents a complainant needs to furnish when making

\textsuperscript{23} Chap. 3, para 10.
\textsuperscript{24} Ibid., para. 11.
a complaint. Licensees are required to record all complaints and their outcomes and to categorise and analyse complaints to allow for the identification of recurring problems.25

Licensees are enjoined to make adequate provision to ensure that people with physical disabilities or other special needs are able to access their complaint handling processes, and to provide reasonable assistance where a consumer specifically requests assistance in lodging a complaint.26 Written complaints are to be acknowledged by the licensees and non-written complaints shall be taken as acknowledged at the time the complaint was communicated to the licensee. No consumer complaint shall remain unresolved for more than three (3) months and consumers shall be advised of the outcome of their complaint and any resulting decision by the licensee. Where a consumer is not satisfied with a decision on his or her complaint, the licensee shall give the consumer the option of pursuing a suitable escalation process within the licensee’s organisation. Where a complaint and any resulting escalation process is not resolved to the consumer’s satisfaction within sixty (60) days of its initial communication to the licensee, the licensee shall inform the consumer of his right to refer the complaint to the Commission.27

Complaint handling processes shall be provided free of charge except in certain specified circumstances where a licensee is authorised to impose a reasonable charge which shall be identified and agreed to by the consumer before being incurred.28 Licensees are prohibited from imposing any disconnection or credit management action regarding any service which a complaint or billing dispute relates while the complaint or dispute is being investigated.29

The Commission oversees compliance with the General Consumer Code and any other applicable consumer codes. The penalty for the breach of an applicable consumer code is the imposition of administrative fines as provided in Chapter IV of the NCC Enforcement Regulations 2005. In imposing penalties for such breach the Commission is enjoined to consider the seriousness of the breach, past conduct of the licensee with respect

25 Paragraphs 39, 45 – 47.
26 Paragraph 40.
27 Paragraph 41.
28 Paragraph 42.
29 Paragraph 44.
to compliance with the code and any compensation offered by the
licensee to affected consumers for the breach.

Section 128 of the Nigerian Communication Act vests the
NCC with powers to regulate numbers and number portability in
Nigeria. Number Portability allows subscribers to change their
service providers without changing their telephone numbers. This
provides immense benefits to subscribers as they can more easily
change service providers without having to notify all their friends
and contacts of a number change.\(^{30}\) Pursuant to this power and in
furtherance to the NCC’s objectives of protecting consumer
interest through the development, monitoring and enforcement of
compliance with regulations by telecommunications service
providers in order to ensure better quality services, fair pricing
and competition, the Commission developed a framework for
Mobile Number Portability (MNP) in Nigeria.\(^{31}\) The document
provides the regulatory, legal and technical framework for the
implementation of MNP in Nigeria. It sets out the business rules
to manage the processes for porting mobile numbers between
mobile service providers and subscribers, licensed by the
Commission to provide mobile telecommunications service in
Nigeria, and covers such consumer related topics as charging and
billing, customer care, customer complaints, dispute resolution
and fraud prevention. However, the practical implementation of
the MNP is yet to commence.

2.1.3 Nigerian Communications Act Provisions: Bar to
Recourse to other Avenues for Redress?

A cursory look at some of the provisions of the Nigerian
Communications Act and its subsidiary legislation relating to
complaints handling may give the impression that the Act
procedure is intended to constitute a bar to recourse to other
avenues for redress. For instance, section 74 (1) provides that an
attempt shall first be made by the parties to resolve any dispute
between them through negotiation before the involvement of the
Commission. And where a dispute is eventually taken to the
Commission as prescribed in the Act, section 78 (1) provides that
the decision of the Commission shall be binding on the parties and
the Commission may direct a party to a dispute to abide by the
decision of the Commission. A decision made by the Commission

\(^{30}\) It will also be of great importance to business subscribers and organisations
who need consistency for their contact details.

\(^{31}\) See Nigerian Communications Commission, *Nigerian Mobile Number
may be enforced by the Court as if the decision is a judgment of such Court provided that the Commission had issued a certificate to the complainant for leave to proceed to the Court for the enforcement of the decision.\(^{32}\) Then sections 86–88 provide that a person who is aggrieved or adversely affected by any decision of the Commission made pursuant to the exercise of the powers and functions under the Act or its subsidiary legislation may request in writing to the Commission for a statement of the reasons for the decision and subsequently for a review by the Commission of the decision. Thereafter, an aggrieved person can only appeal to the court for a judicial review of the Commission’s decision or other action. “Decision” includes any action, order, report and direction.\(^{33}\) The decision or direction of the Commission that is the subject matter of an application for judicial review shall subsist and remain binding and valid until it is expressly reversed in a final judgement or order of the Court. A person shall not apply to the Court for a judicial review unless that person has first exhausted all other remedies provided under the Act.\(^{34}\)

It is humbly submitted that the above provisions which essentially introduce, Alternative Dispute Resolution (ADR) processes of negotiation, arbitration and mediation, do not constitute an absolute bar to recourse to other avenues of redress such as the courts or the Consumer Protection Council. The requirement that for a person to apply for judicial review he or she must first exhaust all other remedies provided under the Act applies where a person from the onset decides to follow the Act procedure. The provisions would not be applicable where an aggrieved consumer decides at the onset to sue in contract for breach of contract or in tort for negligence. That is to say, that the conditions apply to determinations by the NCC and not to suits in which the Commission is not a party and its decision is not up to review. The provisions are not adequate to oust the jurisdiction of the courts as provided in the 1999 Constitution of the Federal Republic of Nigeria.\(^{35}\)

Similarly, the procedure does not constitute a bar to recourse to bringing a complaint to the Consumer Protection Council. In recognition of the possibility of regulatory overlaps in the telecommunication sector, the Commission and the Council

\(^{32}\) S. 78 (1) and (2).

\(^{33}\) S. 86 (4).

\(^{34}\) See generally, ss. 86 – 88.

\(^{35}\) See s. 6, Constitution of the Federal Republic of Nigeria, 1999.
executed a Memorandum of Understanding (MoU) in 2005 by which they agreed to “fully co-operate and collaborate with each other in the discharge of their functions as it relates to the protection of consumers of products and services in the telecommunications sector”. The MoU covered specified issues of which consumer complaints is not one. The issues covered by the MoU include sales promotion, registration of products and services and provision of information relating to standards, grades and quality of telecommunication services, equipment manufactured or sold in Nigeria and approved tariffs.\textsuperscript{36}

\textbf{2.2 The Consumer Protection Council Act}

The principal purpose of this statute is to protect consumers against hazardous products and shoddy services, and to provide speedy redress to consumer complaints through negotiation, mediation and conciliation. It established the Consumer Protection Council (CPC) which is the apex consumer protection agency in the country. The Council’s mandate covers both goods and services and has direct bearing on consumer redress. The functions and powers of the Council are elaborately set out in sections 2 and 3 of the Act and include to:

(a) provide speedy redress to consumer complaints through negotiation, mediation and conciliation;

(b) cause an offending company, firm, trade association or individual to protect, compensate, provide relief and safeguards to injured consumers or communities from adverse effects of technologies that are inherently harmful, injurious, violent or highly hazardous; and

(c) provide redress to obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade associations or individual.

Section 4 of the Act provides for the establishment of a State Consumer Protection Committee to assist the Council in each state of the Federation. The State Committee, subject to the general supervision of the Council, is empowered to receive, investigate and act on complaints from consumers. A consumer or community that has suffered loss, injury or damage as a result of the use or impact of a product or service may make a complaint in writing to, or seek redress through the State Committee.\textsuperscript{37} Whereupon an investigation by the Council or State Committee of

\textsuperscript{36} See Memorandum of Understanding (MOU), available online at http://www.ncc.gov.ng retrieved on February 8, 2010.

\textsuperscript{37} S. 6.
a complaint by a consumer, it is proved that the consumer’s right has been violated; or that a wrong has been committed by way of trade, provision of services, supply of information or advertisement, thereby, causing injury or loss to the consumer; the consumer shall, in addition to the redress, which the State Committee, subject to the approval of the Council, may impose, have a right of civil action for compensation or restitution in any competent court.\(^3\) This means that in addition to any compensation awarded by the State Committee, the consumer can institute action in court for damages against the wrongdoer. While it is clear that the consumer can bring an action in court based on breach of contract or tort of negligence, the above provision does not make it clear whether the civil action can be based solely on the breach of the Act so that the consumer will not have to prove privity of contract or negligence on the part of the wrongdoer. It has been suggested that should be amended to clearly bring out the intendment of the legislature.\(^4\)

Also, a cursory look at the above provisions would give the impression that consumer complaints to the Council need not be founded upon a breach of contract or negligence. However, it is submitted that, the Council would more readily oblige and grant remedy to a consumer where the wrong which caused the injury or loss to the consumer results from a deliberate wrongful act or negligence on the part of the supplier of goods or provider of services. A contrary interpretation would constitute serious disincentive to commerce and industry.

Subject to the MoU between the NCC and CPC consumers of telecommunication services can have recourse to the Council for redress. However, the CPC does not have offices in all the states of the Federation. Many states are yet to establish State Consumer Protection Committees as required under its enabling statute. The State Committee is pivotal to the effective discharge of the functions of the Council and its absence in any state might make it impracticable for the Council to fully discharge its mandate in such a state. Owing to the small nature of many consumer claims, the consumer might prefer to endure his or her loss than to travel long distances to lodge complaints with the Council where to reach the nearest offices of the agencies would entail considerable expense on his or her part.

\(^3\) S. 8.

2.3 The Utilities Charges Commission Act, 1992
This Act establishes the Utilities Charges Commission (UCC) to keep watch on public utilities regarding their obligations and has powers *inter alia* to:

(a) evaluate on a continuing basis trends in tariffs charged by public utilities and determine permissible increases;

(b) study requests from consumers, the public and private utility providers on charges in utility rates and make appropriate recommendations; and

(c) advise the government on guidelines within which increase in tariffs should be confirmed by the scheduled utilities.

The Act does not define the term “public utilities” but “the scheduled utilities” are listed in schedule 2 to the Act. One of the scheduled utilities under the Act is the Nigerian Telecommunications Limited.\(^{40}\) It is submitted that the list of utilities under the regulatory ambit of the Commission is not exhaustive because apart from those specifically mentioned, the schedule covers “any other public utility as may be determined by the Commission.” A public utility has been defined as “a company that provides necessary services to the public, such as telephone lines and service, electricity, and water.”\(^{41}\) A public utility is therefore, a business charged with a public interest and may be owned by the government or private individuals. As asserted by Kanyip,\(^{42}\) public utility refers to the nature of business

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\(^{40}\) Others are the National Electric Power Authority (now Power Holdings of Company of Nigeria), the Nigerian National Petroleum Company (NNPC), the Nigerian Airways (now Virgin-Nigeria) – domestic operations, the Nigerian Railway Corporation (NRC), Ferry Services Organisation, the Nigerian Ports Authority (NPA), State Water Boards (or Corporations), Road Transport Organisations, State Transport Organisations, the Nigerian Postal Services and any other public utility as may be determined by the Commission. See Schedule 2 to the Act.


\(^{42}\) See B. B. Kanyip, “Service Liability under Nigerian Consumer Law” in F. N. Monye (ed.), *Consumer Journal*, Vol. 1 No. 1 (Enugu: Consumer Awareness Organisation, 2005) pp. 79 – 97. The author categorised public utilities into three, namely: (1) those that furnish some form of public transportation of passengers and goods for hire, eg. for example, railways, airlines, waterways; (2) those that furnish some form of communication for hire between specific terminal points, for instance, telephone, postal services, radio messages, internet services, etc., and (3) those that furnish some form of services within
not ownership or operation. The regulation of public utilities is in harmony with the state’s power to protect or promote the good and general welfare of the citizens. Notwithstanding the business factor or economic interest, it is the public interest in the welfare of the citizenry that is paramount. While the Act did not generally include the telecommunications sector in the list of scheduled utilities, the Commission can make a determination to that effect. If this is done, it will enable the Commission extend its regulatory oversight to the sector and properly evaluate and regulate tariffs and charges in the industry which at present appear to be determined largely by market forces.

Under the Act, any scheduled utility intending to vary or increase its charges, tariffs or rates shall first seek the Commission’s approval for such permissible increase. A person aggrieved by any tariff or rate imposed or services provided by a scheduled utility may forward his complaint in writing to the Commission which shall inquire into the cause and circumstances of the complaint and endeavour to bring about a settlement. In fixing any rate or coming to a decision the Commission is enjoined to, among other things, consider the interests of consumers by ensuring that they are not made to absorb avoidable costs. These provisions furnish an avenue for consumers to seek redress in appropriate cases through the Commission and the settlement that the Commission can procure may include payment of compensation to an aggrieved consumer.

2.4 The Public Complaints Commission Act, 1975
This Act establishes the Public Complaints Commission. A Commissioner appointed under section 2 of the Act shall have powers to investigate, either on his own initiative or following complaints lodged before him by any other person, any administrative or other action taken by:

the home or place of business or at least on the premises of the consumer such as supply of natural gas, electricity, water, waste and sewage disposal, etc.

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44 It may be argued that this will create a regulatory overlap between UCC and NCC. But since the mandate of the former extends beyond the telecommunications sector while that of the latter is restricted to that sector, the two bodies can always work out an effective collaboration to ensure maximum protection of consumers in that sector. This is what happened between NCC and CPC.
45 S. 7.
46 S. 8.
(a) any department or ministry of the Federal of any state government;
(b) any statutory corporation or public institution set up by any government in Nigeria;
(c) any company incorporated under or pursuant to the Companies and Allied Matters Act,\(^{47}\) whether owned by any government or private individuals in Nigeria; or
(d) any officer or servant of any of the aforementioned bodies.\(^{48}\)

After the investigation, the recommendations that the Commissioner may make to the appropriate person or responsible agency include further consideration of the matter and modification or cancellation or alteration of the offending administrative, ruling or other act.

This provides an important avenue for pursuing consumer redress against public enterprises, especially where such enterprises enjoy immunity of action. But apart from government ministries and departments, its jurisdiction extends to incorporated companies. Most telecommunications service providers in Nigeria are companies incorporated under the Companies and Allied Matters Act and therefore, subject to the Act. In appropriate cases, the Commissioner can recommend payment of compensation to a consumer by a service provider. However, the Commission’s jurisdiction is limited, as it cannot investigate certain matters.\(^{49}\)

Even where a matter falls within the jurisdiction of the Commission, it has no powers to enforce its decision but can only make recommendations to the appropriate person or administrative agency.\(^{50}\) Such recommendations are not binding on the recipient who may decide to ignore it without incurring any legal sanction.

\(^{48}\) S. 5.
\(^{49}\) S. 6 (1). These include matters in which the complainant has not, in the opinion of the Commissioner exhausted all available legal or administrative procedures and matters in which the complainant has no personal interest.
\(^{50}\) S. 7.
2.5 Law of Contract

The law of contract pervades all spheres of human activities, the provision of services inclusive. Consumer protection under the law of contract is concerned with the entitlements of persons who enter into a consumer transaction. It focuses on the provision of remedy for consumers where there is a breach of any of the terms of the contract by suppliers of goods and services. It would appear that consumer protection under the law of contract is more evident in the case of sale of products where in addition to the express terms of the contract, the consumer can rely on the terms implied under the Sale of Goods Laws. The shortcomings of the law of contract in relation to consumer protection generally lie in certain inherent principles of law including the doctrines of privity and freedom of contract. By the doctrine of privity of contract, subject to certain recognised exceptions, only a person who is a party to a contract can sue or be sued on the contract. In order words, only a person who is a party to a contract can acquire a right or assume an obligation under it.

In consumer protection, the implication of this principle is that if a consumer who has suffered loss, injury or damage as a result defective goods or shoddy services was not privy to the contract for the supply of the goods or services, he would not have any contractual remedy against the supplier. A right of action in contract will only avail a consumer, if he or she is the purchaser of the goods or services in respect of which loss, injury or damage was sustained. Thus, a gratuitous donee or casual borrower cannot recover in contract. This rule poses a severe limitation on consumer protection.

The Nigerian Communications Act seems to strongly uphold the doctrine of privity by its definition of “consumer” as any “person who subscribes to and uses a communication

51 Such implied terms include conditions as to description, merchantability, fitness for purpose and correspondence with sample. See, for example, ss. 542–544, Contract Law of Enugu State, Cap. 26, Revised Laws of Enugu State, 2004.

52 See Price v Easton (1833) 4 B & Ad 433; Tweddle v. Atkinson (1861) 1 B & S 393; Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd. [1915] AC 847; Shuwa v. Chad Basin Authority (1991) 7 NWLR (Pt. 205) 550;

service”.

This is very restrictive and excludes persons who use communications services but are themselves not subscribers. For example, the Act definition excludes a person who uses a GSM phone with a line which he received as a gift since such a benefactor would not be the subscriber. In the absence of any contractual relationship, such persons may only have right of action in tort where they suffer harm, loss or injury as a result of such services. This is not in consonance with the widely accepted definition of the term “consumer” which includes a person who purchases, uses or is affected by a product or a service. For example, the Consumer Protection Council Act defines the term “consumer” to mean “an individual who purchases, uses, maintains or disposes of product or services.”

It is therefore suggested that the phrase “person who subscribes to and uses...” in the definition of consumer in the Nigerian Communications Act be amended to read “person who subscribes to or uses...”.

Freedom of contract generally means that a person is free to enter into a contract with any person he or she chooses and that parties to a contract are free to contract on any terms they want. Presumably, it could also be said that every person has the freedom to refuse to contract if either the term or the other party is not suitable to him. This philosophy presumes that the parties are able to negotiate on an equal footing, have equal bargaining powers, are equally able to look after their own interests and have full understanding of the consequences of their actions and the terms of the contract. In reality, this is not always the case. Businesses often find it more convenient to use pre-printed (standard form) contracts rather than negotiate each contract on an individual basis. Such standard form contracts often contain exclusion, exemption or limiting clauses. The present position of

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54 S. 157. This definition applies to the General Consumer Code of Practice which in paragraph 2 provides that all terms used in the Code are either defined in the Code or have the meanings ascribed to them in the principal Act. The Code does not define the term “consumer” and therefore, the Act definition applies.


56 This is, however, subject to the principles of illegality, incapacity, duress, undue influence, mistake and misrepresentation, the presence of which can vitiate the contract.
the law in Nigeria in relation to exclusion or limiting clauses does not in any way enhance consumer protection.\(^{57}\)

### 2.6 Tort of Negligence

The principle of negligence holds a person who does any act without exercising reasonable care liable for damages to all those it is reasonable to say he had in contemplation while doing the act or omission in question, for any damage it is reasonable to say he should foresee as arising from his conduct. It has three vital ingredients: duty of care, breach of duty and consequential damage. Generally, for a claimant to succeed in an action for negligence he must not only show that the defendant owed him a duty of care but also that the defendant is in breach of the duty. This he has to do by showing that the defendant did not exercise reasonable care in the matter that is in issue as a result of which he has suffered the damage sought to be redressed.\(^{58}\)

In relation to consumer protection, the problem posed by the doctrine of privity of contract can be overcome through the law of tort. A gratuitous donee or an innocent bystander who suffers injury, loss or damage as a result of a defective product or the negligent act of another can sue in negligence without being weighed down by the requirement of contractual relationship. The tort of negligence, however, has its limitations which constitute serious difficulty in consumer protection. For example, liability arises only where the plaintiff can prove fault against the defendant, and he cannot recover for pure economic loss unaccompanied by physical injury to person or property. He must prove the particular act or omission of the defendant that amounts to a breach of duty of care, and will fail if there is no causal link between his injury, loss or damage and the act of the defendant complained of. This makes the tort of negligence an inappropriate head of claim for consumers of telecommunication services except perhaps for cases where personal injury or damage to property is caused by defective product supplied by a service provider or his faulty operational equipment.

### 3. Forms of Consumer Redress in the Tele-communications Industry

The remedies available under the law for consumers of telecommunications services in Nigeria are diverse. They include monetary compensation, repair, refund and replacement of articles.

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such as faulty recharge cards and equipment. Such remedies can be obtained through the relevant regulatory agencies and public bodies discussed above. For example, under section 53 (1) of the Nigerian Communications Act, the Commission has powers to issue directions to any person regarding the compliance or non-compliance with any licence condition or provisions of the Act or its subsidiary legislation. And in its powers to resolve consumer disputes under section 105 (1) of the Act, the Commission may use any of its powers under the Act. Under the NCC Act procedures, therefore, the types of remedy an aggrieved consumer can obtain is very wide indeed. It is entirely at the discretion of the Commission and may range from compensation to refund, repair and replacement. The Commission also has powers to impose administrative penalty for non-compliance under the NCC (Enforcement Processes, etc) Regulations 2005. Similarly, the redress which the State Consumer Protection Committee can, subject to the approval of the Consumer Protection Council, impose includes compensation, refund, repair and replacement.

Redress under the general law includes damages for breach of contract and for negligence, rescission, repudiation and specific performance of contract and injunction against breach of contract. These judicial remedies are obtainable only from the court following successful litigation by a claimant. Litigation in Nigeria is frustratingly time-consuming, technical and expensive. Considering the low level of literacy in the country, it is doubtful that the average Nigerian consumer of telecommunication services knows his rights under the law and how to enforce them. Even if he knows his rights, he may not have the financial wherewithal to pursue claims in court to enforce the rights in court. This accounts for the paucity of decided cases or consumer claims against service providers in the telecommunications industry. But there is a glimmer of hope in this direction as claims for poor quality services against telecommunication service providers have begun to emerge.

Recently, a human rights activist and lawyer filed a suit against the NCC and MTN Communication Ltd. at the Federal High Court Abuja claiming ₦2 million damages. The claim of the Plaintiff is that from December, 2009 – April, 2010, a period of about four months from when the Plaintiff began the subscription of the MTN Fast Link Internet Service there was no time the Plaintiff really got value for his money as the service provided was erratic and unreliable and of the poorest quality; that he would load a ₦500 voucher which was supposed to last for 24 hours but the service would work for some thirty minutes or one or two hours and then pack up; that the service which was most of the time bad almost always frustrated the work of the Plaintiff
who is a Legal Practitioner and used the Internet to research national and international trends in legal practice.

The Plaintiff alleged that he lodged a complaint against the erratic, poor quality, and unreliable service of the MTN with the NCC on the 22nd February, 2010, and the NCC promised to commence investigation and get back to the Plaintiff but that NCC never investigated the complaint as required by its enabling statute. Instead of addressing the averments of the Plaintiff, MTN filed a preliminary objection to the effect that the Court has no jurisdiction in the case. The court dismissed the preliminary objection and held that it has jurisdiction by virtue of Section 251 of the Constitution and Section 138 of the Nigerian Communication Act, which provides that the Federal High Court shall have exclusive jurisdiction over all matters, suits and cases arising out of or pursuant to or consequent upon the NCC Act.  

4. Channels of Redress for the Consumer of Telecommunications Services

It has been argued that the redress procedure under the Nigerian Communications Act and its subsidiary legislation does not constitute a bar to other avenues of redress through the courts or other regulatory agencies. The following steps are therefore recommended for consumers who have suffered loss or damage to access the remedies available under the law in the telecommunications industry.

First, the consumer should lodge a complaint with the service provider and then follow and exhaust the complaints handling procedure of the service provider. In the event that the consumer’s complaint is ignored or not resolved to his or her satisfaction, such a consumer should report to the Nigerian Communications Commission (NCC). The Commission has powers to order a licensee or service provider to pay compensation to a consumer in appropriate cases and to give directions to any person regarding the compliance or non-compliance with any licence conditions or provisions of the Nigerian Communications Act or any its subsidiary legislation. The Commission receives consumer complaints through, letters, e-mail and orally by physical visits to its offices by consumers as well as at the Telecom Consumer

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Parliament (TCP) and Consumer Outreach Programmes (COP) organised from time to time by the Commission.\textsuperscript{60}

A consumer who has suffered loss, damage or injury owing to a defective product or service of a telecommunication service provider can also lodge a complaint with the Consumer Protection Council or a State Consumer Protection Committee, the Public Utilities Charges Commission or Public Complaints Commission, as discussed above.

Finally, a consumer can before or after exhausting the procedure for complaints to the service provider, regulatory agency or public bodies, institute a civil action in court either in contract or tort as may be appropriate. This option should be the last resort because of the problems inherent in our court system such as high cost of litigation and technicalities which usually delay court proceedings.

Where a consumer needs advice or assistance in pursuing his or her rights under the law he or she can approach any non-governmental consumer association many of which are in existence in the country.\textsuperscript{61}

5. Conclusion
From the foregoing, one can safely conclude that save for a few observable lapses, the law has made adequate provisions for redress for the consumer of telecommunications services in Nigeria. The provisions of the Nigerian Communications Act and the Consumer Protection Council Act in this respect are far-reaching. The vibrancy of the Nigerian Communications Commission in using the powers conferred on it by the enabling statute to make the necessary subsidiary legislation is quite commendable.

Remedies under the law of contract and the tort of negligence are obtainable essentially through litigation. In this regard, delay and high cost of litigation can constitute impediments to consumer redress in the telecommunications

\textsuperscript{60} See “Consumer Complaints” at http://www.ncc.gov.ng last accessed on 8 February, 2010.

sector. This makes resort to the regulatory agencies and public bodies more suitable alternatives. Thus, resort to the courts for redress under the general law should be the last option and should be embarked upon only when it is inevitable, such as where a dispute involves a question of law or where the service provider involved proves recalcitrant.

Commendable as the provisions of the relevant statutes are, however, there are a few problems which hamper consumer access to redress through the agencies. For example, NCC like the CPC does not have offices in all the States of the Federation. This situation may affect the number of consumer complaints made to the Commission when compared with the volume of telecommunication business and the number of consumers of telecommunications in Nigeria. Presently, the level of consumer satisfaction with the industry is quite low as one constantly hears complaints of frustrations encountered by the consumers in making and answering calls. It is therefore, recommended that to ensure effective coverage of the grassroots, the relevant regulatory agencies: NCC and CPC, should establish offices in all the States of the federation and have outposts in every local government area.

A measure that will greatly enhance consumer satisfaction in the telecommunications industry in Nigeria is the implementation of Mobile Number Portability (MNP). When fully and effectively implemented, the programme will remove barriers to free choice of service provider by a subscriber, ensure further increase in the level of open competition among network operators and act as an incentive for service providers to improve their quality of service and consumer satisfaction. The Federal Government approved the implementation of the programme since 2010 but its implementation has not gone beyond paper works.\(^\text{62}\) It is recommended that NCC should pursue the MNP project with vigour to ensure that it is implemented without further delay.

Finally, there is need to constantly educate the Nigerian consumer on his rights under the law and the need to enforce those rights. It is only when this is done that the consumers of telecommunication services in Nigeria can fully avail themselves of the remedies available to them under the law.

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\(^{62}\) Following approval by the Federal Government in the 2010, the NCC set up machinery to ensure that MNP is implemented by all telecommunications operators in Nigeria before the end of September, 2010. Unfortunately, the programme is yet to commence. See NCC and the Press, “Press Release: Number Portability Project – Towards Improving Quality of Telecommunication Services in Nigeria” at http://www.ncc.gov.ng retrieved January 31, 2011.
RECONCILING THE SEEMING CONFLICT IN
SECTIONS 4 & 5 OF THE NIGERIAN ARBITRATION
AND CONCILIATION ACT∗

Abstract
The appropriate remedy for a breach of an arbitration agreement is not damages but specific performance. Also, a court before which an action which is subject of arbitration agreement is brought has the power to stay proceedings when a proper application is made by a party to the arbitration agreement. The enactment of sections 4 and 5 of the Nigerian Arbitration and Conciliation Act to govern both domestic and international arbitrations appears peculiar to Nigeria and this has drawn severe criticisms from learned scholars as to the exact scope and application of the two sections. This paper is a humble attempt to reconcile the seeming differences pointed out by earlier writers. This paper makes the important discovery that even though section 4 contemplates third party actions, the practical effect is that the respondent in an application for stay can always oppose an application brought under section 4 by insisting on the stiff conditions under section 5 where the action to be stayed was commenced by a party to an arbitration agreement.

1. Introduction
Where provision is made in an ordinary arbitration agreement and proceedings are brought in a law court in respect of a matter, which is the subject of the arbitration agreement, the proper remedy is an application for a stay of proceedings. A party to an arbitration agreement who has a right of reference is entitled within an appropriate time to enforce the arbitration agreement to stay any court action, which is the subject of an arbitration agreement.1 Sections 4 and 5 of the Arbitration and Conciliation Act2 provide for stay of proceedings but different interpretations

1 We have demonstrated elsewhere that the appropriate remedy for a breach of arbitration agreement is no longer damages but its enforcement. See J. F. Olorunfemi, “What is the Appropriate Remedy for a Breach of an Arbitration Agreement in Nigeria”, Uniuyo Journal of Commercial and Property Law, Vol. 1, December 2010, pp. 148-162.

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Reconciling the Seeming Conflict in Sections 4 & 5 of the Nigerian Arbitration and Conciliation Act – J. F. Olorunfemi

on the scope and application of the sections have been the subject of controversy. We would examine the sections by paying particular attention to the peculiar words used by the draftsman. We would also evaluate the views of some commentators and make a comparative analysis of the sections with analogous provisions with a view to bring out the uniqueness of section 4 and also ascertain the true scope and application of the two sections under the Act.

2. The Scope of Sections 4 and 5.

Section 4 of the Act provides as follows:

(1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration. (2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued and an award may be made by the arbitral tribunal while the matter is pending before the court.

And section 5 of the Act provides that:

(1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(2) A court to which an application is made under sub-section (1) of this section may, if it is satisfied - (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, and that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Although the provisions of sections 4 and 5 appear seemingly incompatible, there is no doubt that the two sections govern stay of court proceedings. Section 4 when read alone applies to a third party action and an action brought by a party to an arbitration agreement. Section 4 can be regarded as a wider provision when compared with section 5, which is restrictive. Section 4 also gives wider room for the applicant to move to stay the proceedings and
it is mandatory for the court to grant the application when it is properly made.

Section 5 applies only to an action brought by a party to an arbitration agreement in respect of any matter, which is the subject of an arbitration agreement. Unlike section 4, the application of section 5 is limited in scope since it can be invoked by a party to an arbitration agreement only against an action instituted by another party to the arbitration agreement. The wide meaning ascribed to “taking steps in the proceedings” and the two conditions prescribed under section 5 (2) can put spanners in the wheel of an application for stay which can only be granted at the discretion of the court. The effect is that if a party to an arbitration agreement in breach of an arbitration agreement brings an action, the applicant can only effectively come under section 5. This is because even when the application is brought under section 4, the respondent may oppose the application under section 5 in order to deny the applicant of the easier conditions under section 4. Therefore, if we construe section 4 to apply only to an action brought by a party to an arbitration agreement contrary to the express words of that section, section 4 will be permanently rendered ineffective. In *M. V. Parnomos Bay v. Olam (Nig.) Plc.* where the defendant/applicant applied for stay pursuant to sections 4(1) and 5(1), the Court of Appeal held that sections 2 and 4 of the Act are controlled and limited by section 5(2) of the Act.

One of the basic principles of interpretation of all constitutions and statutes is, of course, that the lawmaker will not be presumed to have given a right in one section and taken it away in another. A meaningful interpretation of the two sections is that which preserves the potency of section 5 without disturbing the application of section 4. Since it is trite law that the court cannot in the guise of interpreting a statute annul or modify its provisions, the need to bring the two sections into harmony is imperative. Where two sections exist side by side in respect of the same subject matter, the specific provisions are by implication excluded from the general provisions. Here, the specific

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Consequently, it is humbly submitted that section 4 should be construed and applied to a third party action while section 5 is applicable only to an action brought by a party to an arbitration agreement.

3. Procedure for Application for Stay
An application for stay of proceedings under the Act will be supported with an affidavit exhibiting a copy of the arbitration agreement.\(^7\) Where there is an agreement to refer the subject matter of a counter claim, the counter claim will be stayed on the application of the plaintiff.\(^8\) Proceedings have also been stayed where the parties had agreed to submit disputes to a foreign court or foreign courts.\(^9\) Under section 4, the action sought to be stayed may be a third party action and the third party action must be subject of the arbitration agreement sought to be enforced. The applicant must be a party to the arbitration agreement and the application must be made within the time stipulated under section 4(1). On the other hand, under section 5, the action sought to be stayed must be the subject of an arbitration agreement between the applicant and the respondent and the application must be made within the time stipulated under section 5(1). The court must also be satisfied that there is sufficient reason why the matter should be referred.

Where there is any doubt whether there is an effective arbitration agreement, the court should construe the agreement where necessary.\(^10\) The burden to oppose the application for stay of proceedings is on the respondent.\(^11\) The success of an application for stay is based on the circumstance of each case.\(^12\)

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\(^7\) As proof of the arbitration agreement.
\(^8\) \textit{Spartalia & Co v. Van Hoorn Bitt} (1884) Rep. in Chambers 216; W.N (1884) 32.
\(^10\) \textit{Modern Building Wales Ltd. v. Limmer & Trinidad Co. Ltd.} (1975) 2 All E.R 549 C.A.
\(^11\) \textit{Hodson v. Railway Passengers Ass. Co.} (1882) 9 Q.B.D 188.
\(^12\) \textit{Lyon v. Johnson} 58 L.J; 40 Ch. D 579.
For example, in a case, by a written agreement, the plaintiff undertook to manage a brewery of the defendant for five years; and there was a provision that any dispute should be referred to arbitration. Before the time expired, the defendant dismissed the plaintiff for misconduct, the plaintiff having brought an action for wrongful dismissal; it was held that this is a proper case for staying proceedings. In another case, the defendant agreed to employ the plaintiff as his agent for carrying on his business in a specified district for fifteen years; and the agreement contained a clause for referring to arbitration any disputes on the construction of the agreement, or any payment, act or thing relating to or arising out of the agreement. Before the term expired, the defendant dismissed the plaintiff from his employment for alleged misconduct, and gave notice to refer the matters in dispute between them to arbitration, but among the matters in dispute, he did not specify the dismissal of the agent. Both parties appointed arbitrators, but before anything more was done, the plaintiff brought an action against the defendant to restrain him from dismissing him and from appointing another agent. The defendant moved to stay proceedings in the action on the ground of the agreement to refer all matters to arbitration. It was held that the defendant having taken upon himself the decisions of the matters in difference by arbitration, the court ought not to exercise their power of staying proceedings in the action and that it was too late after the commencement of the action for the defendant to withdraw his dismissal of the plaintiff in order that it might be included in the arbitration.

Where the stay succeeds and there is arbitration and award, the cause of action merges in the award. A stay may be lifted to allow an application for summary judgement. Where an action referred to in section 5 (1) had not been stayed, an award made in respect of the same subject matter under the arbitration agreement referred to under section 5 (1) is no bar to the action.

13 Wickham v. Hardy 28 L.J; Ex. 215.
14 Davis v. Starr .Ch. 808; Ch.D 242; 60 L.T; W.R 481 C.A.
Under section 5, the court can make an order for stay but no word was said as to whether it could refer the parties to arbitration. The court had in a case stayed the proceedings indefinitely. At other occasions, the court usually stays the proceedings pending the determination of the arbitration.

Where arbitration fails, may be, due to an irregular appointment of the arbitral tribunal and the award thereof is set aside, an action instituted thereafter in breach of the arbitration agreement may still be stayed. This is because the fact that the plaintiff has refused to nominate an arbitrator even if the reference cannot proceed until he has nominated one would not be a ground for refusing a stay. Judicial attitude to the stay of an action which is the subject of an arbitration agreement can be summarized in the decision of the Supreme Court in *Misr ((Nig.) Ltd. v. Salah El Assad.* In that case, learned counsel for the plaintiff/respondent had argued that the arbitration clause was vague and therefore useless and the court therefore had a duty to resolve the impasse as an earlier arbitration conducted in respect of the clause had been set aside by the court. The Supreme Court held that it would be asking too much of any court to sanction an unwarranted departure from the terms of a contract into which two free and able parties entered unless such a contract or any part of it had been lawfully abrogated. The Supreme Court added that despite the observations of the trial judge on the clause, the clause still remained the contract of the parties and the ordinary rules relating to contract must apply. The Supreme Court therefore,

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18 *Misr (Nig.) Ltd. v. Salah El Assad* 1 All N.L.R. 172. (S.C.).
20 *Misr (Nig.) Ltd. v. Salah El Assad* (supra).
21 *Manchester Ship Canal Co. Ltd. v. Pearson & Sons Ltd.* (1900) 2 Q.B. 606 C.A; It was held in *Succula Ltd. v. Harland & Wolff Ltd.* (1980) 2 Lloyd’s Rep. 381 That the court should not intervene with an established reference unless convinced that it is the only right course to take. The failure of arbitration does not amount to revocation of the arbitration agreement. This is because an arbitration agreement can only be revoked either in writing by the parties or by the leave of the court upon the application of the party by virtue of section 2 of the Act. Another reason is that some arbitration agreement may make the delivery of an arbitral award a condition precedent to an action at law. See *Scott v. Avery*(1856) 5 H.L Cas 811. See generally Olorunfemi, *supra* note 1 at pp. 152-158.
22 *Supra* note 18.
could not accede to the argument of counsel for plaintiff/respondent that even though the clause remained in the contract, yet the court could treat the clause as un-enforceable and therefore discountenance it in the enforcement of rights under the contract. Finally, the Supreme Court allowed the appeal and stayed the action of the plaintiff indefinitely, according to it, “in accordance with section 5 of the Arbitration Act”.23

Respected and prolific learned writers have commented on sections 4 and 5 of the Act. Few of their comments include the following:

Sections 4 and 5 of the Arbitration Act… provide for indirect enforcement of the arbitration agreement.24 It is strange why these two sections dealing with the same issue should be drafted into the Act by the Legislature. The presence of these two similar but different-in-effect sections in the Act has generated a lot of legal comments.25 The provisions of sections 4(2) and 5(1) of the Act pose some important legal questions.26 In the same piece of legislative enactment, we have two conflicting sections, that is sections 4 and 5 on the same subject matter.27 Any party applying for a stay would of course prefer to come under section 4 than section 5 where the court is allowed to exercise some initiative in granting or refusing a stay.28 As between the two sections, section 5 is a better provision for the arbitral system. A situation in which every application for a stay must be granted may have an overwhelming effect on the

23 C.f. Obembe v. Wemabod Estates Ltd., supra note 19 where the action was stayed pending arbitration.
It is very clear that the two sections are contradictory and not in any way complimentary. Their concurrent presence in the Act without their respective scopes of operation being specified is a sad commentary to the federal legal drafting infrastructure. It is one of the embarrassing manifestations of the lack of consultation and avoidable hurry that sometimes attend legislative drafting in Nigeria, both of which are, in turn, part of the tragedy, that military rule has on the legal system. So long as the two sections are there, the courts have foisted upon them, the unenviable task of interpreting them in a way that will give life and validity to each section.

Although the applicant is not bound to come under both sections, where he comes under section 4, as is most likely, it may be possible for the respondent to raise section 5, thereby insisting that the conditions therein be satisfied before the stay may be granted. Whether the court of first instance regards section 5 as relevant in the circumstances, or if it does, whether it finds that conditions exist for the exercise of its discretion against the applicant are issues which could be litigated up to the Supreme Court. This matter is dealt with by sections 4 and 5 of the Decree. Unfortunately, the two sections cannot be easily harmonized as they appear in some respects, to be in conflict. Something should be done to clarify section 4 and its relationship with section 5.

Some of the commentators argued further that the plaintiff whose action is to be stayed under section 4 must be a party to the arbitration agreement. The critics of section 4 have however left unanswered the question as to what remedy or action a party to an arbitration agreement can take to enforce it when his liability to a

third party is arising from the subject matter of an arbitration agreement, especially where the proceeds thereof would help to settle the dispute between the third party and the defendant/applicant. We shall attempt to examine the veracity of these claims and humbly submit that the scope and application of the two sections are different. Section 4 contemplates a third party action while section 5 deals only with an action brought by a party to an arbitration agreement.

Ezejiofor argued that the person who may request for an order of stay must be a party to the arbitration agreement and the plaintiff whose action is to be stayed must be a party to the arbitration agreement.\textsuperscript{34} It is true that the applicant under sections 4 and 5 of the Act must be a party to the arbitration agreement.\textsuperscript{35} It is also a fact that the Court of Appeal held in \textit{N.L.N.G Ltd. v. A.D.I.C Ltd.}\textsuperscript{36} that “the first party referred to in section 5(1) of the … Act is a plaintiff in the action while the second party is a defendant.” It is apparent from the decision that their lordships in the Court of Appeal were construing section 5 of the Act. The same construction cannot with due respect be extended to section 4 which is wider in scope. The relevant portion of section 4 reads, “A court before which an action which is the subject of an arbitration agreement is brought …”\textsuperscript{37} while the corresponding portion of section 5 reads “If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement….” The difference between the two sections is clear. The Supreme Court in \textit{Osadebay v. A.G. Bendel State}\textsuperscript{38} has held that where a statutory provision is clear, it cannot be construed and stretched beyond its context.

\textsuperscript{34} Gaius Ezejiofor, “Scope of Section 4 of The Nigerian Arbitration And Conciliation Act,” 1997/98 an unpublished L.L.M Lecture Notes, delivered on September 21,1998 at Faculty of Law, University of Nigeria, Enugu Campus as a rejoinder to some of the views informally expressed by the current writer during the 1997/98 L.L.M. Course Work. The lecture was delivered after the publication of the book – Ezejiofor, above note 29.

\textsuperscript{35} See \textit{Alfred Mc Alpine Construction v. UNEX Corp.}\textsuperscript{(1994)} NPC 16 CA.


\textsuperscript{37} This is similar to s. 9(1) of the English Arbitration Act, 1996 which provides that “A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration …”

\textsuperscript{38} \textit{Supra} note 4 at 574.
If its language and legislative intent are apparent, a judge is not enclothed with authority to distort its meaning in order for it to conform to his own views of sound social justice. There is nothing in section 4 limiting its application to an action brought by a party to an arbitration agreement. The best we can concede with respect is that section 4 could be literally construed to apply to both third party action and an action brought by a party to the arbitration agreement. This would be so if we construe section 4 alone without regard to the provisions of section 5 but the two sections must be read together since they both govern the stay of court proceedings. Therefore, while we agree that the applicant under section 4 must be a party to an arbitration agreement, the action which is the subject of arbitration agreement could have been brought by a third party.

It is also the view of Ezejiofor that the defendant can only request for a stay in respect of an action commenced by a party with whom he has entered into arbitration. This proposition is with due respect most applicable to an application under section 5. In RGE (Group Services) v. Cleveland Offshore, a third party action was stayed pursuant to section 4 of the English Arbitration Act, 1950. The court held that:

Since the issues raised in the third party proceedings were issues which fell within the ambit of clause 27 and since they could not be determined by the court since the court had no power to open up, review and revise any certificate, the third party proceedings would be stayed.

The opinion of learned authors on the question of arbitration and third parties was that:

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40 Ezejiofor, 1997/98 Lecture Notes, supra note 34.
41 (1986) 11 Con. L.R.77 where A contracts with B and B sub-contracts with C. C makes claims against B, which claims are bound up on B’s ability to obtain payment from A. There was an arbitration clause between A and B but none in the sub-contract between B and C. C commences action in the court against B. B issues a third party notice against A, claiming to be indemnified against C’s claim. The court stayed the third party’s action.
Most arbitrations take place between persons who have from the onset been parties to the arbitration agreement, and to the substantive contract underlying that agreement. It occasionally happens, however, that the claim is made by or against someone who was not originally named as a party. In such circumstances, the question whether the claim can be and must be the subject of arbitration may give rise to considerable difficulty.

Other learned authors, \(^{43}\) were more positive while commenting on sections 9 and 86 of the English Arbitration Act, 1996 when they said that:

There is no longer any scope for the court refusing a stay of proceedings on the ground that third parties are involved and that it would be preferable for the dispute to be dealt with by one tribunal (i.e the court) in order to avoid the possibility of inconsistent decision.

On whether the court can compel a plaintiff/third party, Ezejiofor submitted that when the court orders a stay, it must refer the parties to arbitration and the parties must be those who had contracted to arbitrate and if the plaintiff is not a party to the arbitration agreement, the court cannot refer him to arbitration with respect to an arbitration agreement between the defendant and another person. \(^{44}\) Under section 57(1) of the Act, the word “party” means, “a party to the arbitration agreement or to conciliation or any person claiming through or under him and parties shall be construed accordingly”. Where in the course of construing any statute difficulty arises to its real import, due regard must be had to the scheme of the legislation. The object or policy of the legislation often affords the answer to problems arising from ambiguities or doubts which it contains or implies, for it is a canon of interpretation that all words, if they be general, and not precise, are to be restricted to their fitness to the particular matter to be construed. \(^{45}\) So, where a statute has defined a particular word, a court of law is bound to use the particular definition. It has no business to go outside the definition in search

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\(^{44}\) Ezejiofor, *Lecture Notes*, supra note 34.

of other meanings. Therefore, it is not the third party/plaintiff that would be referred but the parties to the arbitration agreement.

It has been submitted that the words “unless it finds that the agreement is null and void, inoperative or incapable of being performed” ought to have been included in section 4 of the Decree for these are, in fact, the concluding words of Article 8.1 of the Model Law which the Nigerian Decree purports to copy. A similar reason had been given to criticize the application of section 4 to both domestic and international arbitration simply because the Model Law purportedly copied in section 4 apply only to international arbitration. It is doubtful with respect, if we can extend the same argument to every provision of the Model Law where the corresponding sections under the Act apply also to domestic arbitration. The Act has made adequate provisions for the attack of an arbitration agreement on any of those afore-stated grounds if any party so wishes. For example, section 2 of the Act provides for the revocation of an arbitration agreement and a party can oppose an application under section 4 by proving that the arbitration agreement is null and void, inoperative or incapable of being performed. By deleting those words, the duty is no longer on the court to satisfy itself that those conditions did not exist before granting an application under section 4, but the burden is on the respondent to, in appropriate cases, oppose an application for stay under any of those heads. When an agreement is null and void, the only benefit the party opposing it will gain is a declaration to that effect. The law does not compel the impossible – lex non cogitadimpossiblia. The phrase is a compendious legal jargon that connotes a state of actual nullity and a state of legal non-existence.

Secondly, the arbitral tribunal has jurisdiction under section 12 to determine the validity of an arbitration agreement and the decision of the arbitral tribunal can invariably be set aside under section 30 of the Act. Fortunately, there is nothing restraining the Nigerian Legislature from adopting the Model Law in a modified fashion.

47 Orojo & Ajomo, supra note 32 at 317.
48 Ibid, at 321.
49 See sections 2 and 12 of the Act.
According to Orojo and Ajomo, the problem in our sections 4 and 5 is that the two have been enacted to apply to all types of arbitrations instead of section 4 applying only to international arbitration, as was the intendment in the Model Law. It is understandable that in international arbitration, stay of proceedings should be relatively mandatory, since it is highly desirable that parties should be made to keep their agreement to arbitrate rather than go to a domestic court for resolution of their dispute. Accordingly, it was strongly urged that the Act should be amended by transferring section 4 from Part I to Part III of the Act, which deals with international arbitration.\(^{50}\) We foresee two situations arising if this submission is accepted. First, enforcement of domestic arbitration against a third party action under section 4 would be hampered while section 5 would continue to enjoy its application to international and domestic arbitration. Secondly, the new section 4 would apply to an action brought by a party to an international arbitration agreement as well as a third party action that is the subject of an international arbitration agreement. If section 5 is limited to domestic arbitration, the consequence is that the problem of conflicting actions will arise in relation to actions brought by a party to an international arbitration agreement because of the effect of section 4(2) since the proposed section 4 would apply also to an action brought by party to an arbitration agreement.\(^{51}\) What we would therefore humbly recommend instead is the modification of section 5, to among other reasons, make it also suitable for international arbitration.

On the part of Nwakoby, section 4 is a challenge on the inherent discretion of the court to either grant or refuse an application made before it. It is a challenge in the jurisdiction of the court and is also unconstitutional. Section 5(1) is preferred. Section 4 should be replaced.\(^{52}\) The word “shall” in section 4(1) is traditionally mandatory. Is it then a matter of “must” such that when the arbitration agreement is null and void, inoperative or

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\(^{50}\) Orojo&Ajomo, supra note 32 at 321.

\(^{51}\) See Doleman & Sons v. Osset Corp., supra note 17. See also Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd. (1984) 2 A.C. 175.

incapable of being performed, the court would still grant the order?  

On an application for summary judgment in a case with an arbitration clause, if the defence depended on a point of law in which the plaintiff was clearly right, the court would give judgment for the plaintiff and would dismiss any cross-application for a stay since there would be no dispute to go to arbitration. If the plaintiff was not clearly right, the court would grant leave to defend and would stay the action, so as to refer the dispute to arbitration if the application for stay was properly made.53

The court must satisfy itself that there is a dispute that relates to the arbitration agreement as at the date of writ. It was held in *Lueng (Peter) Construction Co. v. Tai Poon*54 that at the time of the issue of the writ, there was no dispute because the evidence showed that the issue raised by D in relation to the plumbing and drainage had not by then been raised with P and accordingly, the court had no jurisdiction to stay the proceedings. The Supreme Court55 held that where the grant of a stay would spell injustice to the plaintiff, as where the action was already time-barred in the foreign court and denying the plaintiffs any redress, justice is better served by refusing a stay than by granting one. The court declared further that it does also seem that the court may refuse to order a stay of proceedings where the defendant establishes that he would suffer injustice if the case is stayed or that he cannot obtain justice from the arbitral tribunal or that the agreement between the parties is null and void, inoperative or incapable of being performed.

To Amucheazi, it is doubtful if an arbitral tribunal would commence or continue proceedings when an action is going on before a court. What purpose does the section serve? It appears to be in conflict with section 4(1). If it is allowed to continue, the whole essence of the application for stay would have been defeated.56 The provision of section 4(2) may make the court’s

53 See *S. I Sethia Liners v. State Trading Corp. of India* (1985) 1 W.L.R 1398 C.A where s. 1 of the English Arbitration Act, 1979 which was similar to section 4 of the Act as regards the word “shall” was similarly construed.
54 (1985) 4 Con. L.R 299, H.K. C.A.
56 Amucheazi, above n. 28 at 96.
refusal to order a stay ineffective as the arbitral proceedings “may nevertheless be commenced or continued” and an award made by the arbitral tribunal may be binding on the party that has commenced an action in court.\textsuperscript{57} Our humble view is that section 4(2) is only applicable to third party actions under section 4. Section 4(2) provides that where an action referred to in subsection (1) of section 4 has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court. The application of section 4(2) is limited to section 4 and not applicable to section 5. This may be in recognition of the fact that the plaintiff to the action under section 4 might not be aware that the action is the subject of an arbitration agreement and where he is aware, he might still institute his claim since he is not a party to the arbitration agreement. When this happens, the arbitral tribunal may not have to discontinue its proceedings simply because the matter is pending in court and the tribunal may commence proceedings since the parties in court may not exactly be the same with those before the arbitral tribunal. For the defence of \textit{estoppel per rem judicatam} to operate, the parties, the subject matter and the issue must be the same.\textsuperscript{58}

Since an agreement to submit a dispute to arbitration does not oust the jurisdiction of the court, the defendant may choose not to make any application to stay the action between him and the third party but instead commence or continue arbitration with the other party to the arbitration agreement and an award made therein may be used to settle the third party. Section 4(2) therefore creates an additional facility to the defendant who is willing to arbitrate and an award arising therefrom would not be regarded as a usurpation of the judicial powers of the court on a pending action.

The legislative principle in section 4(2) is similar in a way to what may be referred to as judicial activism or judicial legislation by the English Court of Appeal in \textit{W. Bruce Ltd v. J. Strong}\textsuperscript{59} where their Lordships\textsuperscript{60} held that where a defendant in an


\textsuperscript{59} (1951) 2 K.B. 447, (1951) 1 All E. R. 1021.

\textsuperscript{60} Somervell L.J with Singleton L.J. & Denning, L.J.
action brings in a third party (another defendant), the latter is entitled to a stay if there is an arbitration clause in the contract between him and the defendant even though the same subject matter will be under consideration in both the action and the arbitration.

The effect of section 4(2) is also to, so far as it relates to section 4 of the Act, exclude the principle in *Doleman & Sons v. Osset Corporation*[^61] to the effect that where an action has been brought contrary to an arbitration agreement and no application for a stay has been made, the matter before the court cannot be arbitrated unless the parties have, after the commencement of the proceedings, agreed *de novo* to refer the matter to arbitration.

### 5. Privity of Contract and Arbitration Agreement

There is no doubt that an arbitration agreement is based on contract. Some scholars may therefore argue as we have seen above that a third party can neither compel arbitration or be compelled to participate in arbitration. Others may even argue that a third party action cannot be stayed based on an arbitration agreement not signed by a third party based on the general principles of privity of contract. We must first point out that the general rule of privity of contract has exceptions based on statutory provisions, veil piercing, estoppel, trusts, restrictive

[^61]: *Supra* note 17. For contrary views, See Gaius Eziejiofor, “Enforcement Of Specific Performance Of An Agreement To Arbitrate: *Royal Exchange Assurance v. Bentworth Finance*(Nig.) Ltd. (1976) 6 U. I. L. R. 293” (Unpublished) at 7-8, where the learned author, while commenting on § 4(2) said that “arbitration will not be commenced or continued if the request for a stay is refused, because it was made out of time; otherwise a situation will be created in which two parallel proceedings on the same matter go on simultaneously, one before the arbitral tribunal and the other before a court. The result will be the production of an award and a judgment on the same dispute. It is indeed very unlikely that any arbitral tribunal will want to engage in arbitral proceedings while the same matter (is pending in court) particularly as it has a discretion as to whether or not to do so. If the decision of the court and the arbitral tribunal are conflicting, as they are indeed be, which of them prevails. It would certainly not have been the intention of the authors of the Act to deliberately introduce this confusion in the system. And in the expectation that the first of the two decisions would prevail over the other on the principle of *res judicata*, there would be an indecent competition between the court and the arbitral tribunal to be the first to rush down a decision”.

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covenants, collateral contracts, agency, assignment, negotiable instruments, unjust enrichment etc. With the ever increasing complexity on contractual frameworks and corporate structures, Kunal Mimani and Ishan Jhingran submitted that one of the common questions which both, arbitral tribunals and national courts face is whether a non-signatory can be held bound by an arbitration agreement.

A range of legal theories have been developed to facilitate this determination either for or against including such non-signatories. Equitable estoppel prevents a party who knowingly accepts the benefits of a contract containing an arbitration agreement from avoiding the obligation to arbitrate. This theory has so far been recognized only in the United States and Canada, where two theories have been recognized for holding a party bound by an arbitration agreement under estoppel. The first theory is that a non-signatory who knowingly accepts the direct benefits of a contract containing an arbitration agreement can be compelled to arbitrate by a signatory. The second theory is that a non-signatory can compel arbitration with a signatory when the issues the non-signatory is seeking to resolve are inherently inseparable or inextricably intertwined with the agreement and the non-signatory is closely related to the signatory. Primary indicia of a third-party beneficiary interest will be whether the non-signatory files a claim against one of the signatory parties.

The strict rules of privity could be incrementally relaxed in order to conform to the commercial reality and justice. It has been suggested that lawyers engaged in drafting contracts which contain arbitration clauses must be sensitized to the fact that a non-signatory may be added to the arbitration. If this risk exists, then clients must be advised of this risk, and, language be added to the contract and, arbitration clause, to minimize the risk of a


related non-signatory party being bound by the arbitrator’s decision. Where a party to an arbitration agreement sues a third party in court and the third party wishes to stay the court proceedings in view of intended arbitration proceedings between the parties to the arbitration agreement, the court will stay proceedings, perhaps on the basis that the resolution of certain issues in the arbitration will have the effect of determining the court proceedings. This was the situation faced by the Singapore High Court in the recent case of *Shanghai Construction (Group) General Co. Singapore Branch v Tan Poo Seng*. The court was called upon by the defendant to exercise its inherent jurisdiction to stay the proceedings until an “intended arbitration” between Shanghai Construction and Top Zone (a related third party) was heard. The court agreed. The defendant was the director and shareholder of a company called Top Zone Construction & Engineering Pte Ltd (“Top Zone”). The plaintiff, Shanghai Construction, had subcontracted certain construction works to Top Zone under a subcontract agreement. That subcontract agreement contained an arbitration clause. Top Zone requested the plaintiff to make certain payments directly to one of its (Top Zone’s) subcontractors. The plaintiff did so and paid out a sum of $454,451.60. In return, the defendant issued a cheque for $450,000.00 in favour of the plaintiff. Subsequently, disputes arose between the plaintiff and Top Zone following which Top Zone stopped its works and withdrew from the site. There was no repayment of the sum of $454,451.60 and the plaintiff subsequently sought to present the defendant’s cheque for payment. However, the cheque was dishonoured as payments had been stopped.

A court has “to manage its own business with due regard to the resources available to it and the interests of other litigants, as well as the interests of the immediate parties themselves.” However, the Singapore High Court also considered that the

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64 Ibid.
Reichhold cases stood for the proposition that the “justification for granting a stay pending arbitration pursuant to the inherent jurisdiction of the court has been extended beyond preventing the abuse of the court’s process...to include the efficient resolution of disputes and management of cases”.

6. Conclusion
In spite of the stiff conditions under section 5 such as “taking steps” and the two conditions under section 5(2)(b), the attitude of the court especially since the enactment of the Act is to decline to determine matters, which are the subject of an arbitration agreement. Except for few modifications, largely nomenclature, section 5 of the Act is an adopted version of section 4 of the English Arbitration Act, 1889. The 1889 Act had since undergone several changes that made it imperative for something to be done on section 5 to make it meet the growing phenomenon in Arbitration. Judicial decisions on applications brought under section 5 portray the spirit of Arbitration than the letters of that section. It is humbly submitted that section 5 of the Act be modified to accord with judicial attitude in order to enhance its suitability for international arbitration and bring it into conformity with the general intendment of the Act.

The National Committee on the Reform and Harmonisation of Nigerian’s Arbitration and ADR laws has not only recommended the merging of sections 4 and 5 into one section, the Reforms Bill by virtue of section 5 thereof, retains the unique features of section 4 of the Nigeria Act on the power of the court to refer the parties to arbitration; the widening of its scope to third party actions and also provides that an arbitral proceedings may be commenced or continued and an award may be made by the arbitral tribunal while the matter is pending before the court.

This attempt has revealed that the Reforms Bill also seeks to introduce a new section 5(3) which provides that:

Notwithstanding sub-section (1) of this section, any person carrying on business in Nigeria who is a consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in Nigeria, whether for final discharge or for discharge for further carriage, may bring an action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in Nigeria and any arbitration clause which purports to limit or preclude this right shall be null and void.
The new section 5(1) of the Reforms Bill seeks to provide that:
Except in the case mentioned in sub-section (3) of this section, where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

We also found that the Reforms Bill seeks to adopt the legal jargon “the court shall grant a stay unless satisfied that the agreement is null and void, inoperative or incapable of being performed” contained in article 8.1, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and section 86 of the English Arbitration Act, 1996. In view of our earlier submission that the words represent a state of legal nullity, we recommend that the words be expunged from the proposed Bill.
THE REQUIREMENT OF CORROBORATION IN THE PROSECUTION OF SEXUAL OFFENCES IN NIGERIA: A REPEAL OR REFORM?∗

Abstract

Previously, in many common law jurisdictions, the position was that for a charge of rape, defilement or other forms of sexual offence to be proved beyond reasonable doubt, the prosecution must offer corroborative evidence outside the usual testimony. After some intense lobbying, this provision requiring corroboration has been expunged from the Evidence and procedural law of many jurisdictions. As a result, there have been cry outs and criticisms against the law on certain grounds. However, a sexual offence is an offence under the Code and it is quite discriminatory that a different means of proof should be prescribed for these offences. How will it be if the Acts of Criminal Procedure in Nigeria prescribe a different form for proving Robbery, another for Forgery and the likes? The purpose of this paper is to examine whether the removal of Section 179(5) of the repealed Evidence Act,¹ which required corroboration of sexual offences, is justifiable.

1. What is Corroboration?

The word ‘corroborate’ is derived from two Latin words “cor” and “robur” which means “to strengthen”. Lord Reading in King v. Baskerville² defined corroboration as: “some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.” The Nigerian Supreme Court in Nwambe v. State,³ defined corroboration as the confirmation of a witness’ evidence by independent testimony. In Director of Public Prosecutions v. Kilbourne,⁴ Lord Simon stated: “Corroboration is therefore nothing other than evidence which “confirms” or “supports” or “strengthens” other evidence... . It is, in short, evidence which renders other evidence more probable.” Bargen and Fishwick⁵

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4 (1973) A.C. 729.
define the concept as follows:” Corroboration refers to the need for the complainant’s evidence to be supported by some other independent evidence implicating the accused person”.6

From the definition of Lord Reading above, it is noticed that one of the problems with legal scholars and judges is that they have accorded the concept of corroboration a meaning which is akin to testimony itself. Corroboration is not a total testimony or evidence which reiterates the case against the accused. Corroboration is, instead, an independent piece of evidence that confirms the testimony of the complainant or the evidence adduced by the prosecution. As seen from its etymological view, to corroborate is “to strengthen” and not “to repeat”.7

2. History of Corroboration

Corroboration in law is a practice which originated from Romano-Canonical influence in law. In the Old Testamentary recordings of the Bible, it is said that: “At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death”8 and;”One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.”9

In the New Testament it is phrased as follows;”But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established”10 and; “In the mouth of two or three witnesses shall every word be established.”11

In Roman law,12 the history of the concept of corroboration can also be traced from the Justinian Code. There, it read:

The Emperor Constantine to Julian, Governor we have already directed that witnesses should testify after having been sworn, and that the preference should be given to those of honourable reputation. In like manner, we have ordered that no judge shall

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6 Ibid., p. 69.
7 See Lord Hewart C.J’s dictum in R. v. Whitehead, where the learned Law Lord stated that corroboration was not repetition.
8 Holy Bible (KJV), Deuteronomy 17:6.
9 Holy Bible (KJV), Deuteronomy 19:15.
10 Ibid., Matthew 18:16.
11 Ibid., II Corinthians 13:1.
12 Which forms the foundation of Civil Law.
in any case readily accept the testimony of only one witness; and now we plainly order that the evidence of only one witness shall not be taken, even though he should be distinguished by senatorial rank.\textsuperscript{13}

Against the word of a Cardinal, for example, forty-four witnesses were required.\textsuperscript{14} The same constitution appears in the Theodosian Code\textsuperscript{15}:

We have previously commanded that before they give their testimony, witnesses shall be bound by the sanctity of an oath, and that greater trust shall be placed in witnesses of more honourable status. In a similar manner, we sanctioned that no judge should easily allow the testimony of only one person to be admitted in any case whatever. We now manifestly sanction that the testimony of only one witness shall not be heard at all, even though such witness should be resplendent with the honour of the glorious Senate.

The basis of the corroboration rule is in ‘the rule of numbers’ which is that the more the number, the stronger the evidence. The introduction of corroboration rule into the Scottish legal system was based on the disbelief of the judge to deliver credible judgement, which was characteristic of ancient Europe.\textsuperscript{16} This paved the way for the introduction of corroboration to enable a judge deliver very probable and sound judgements. This agrees with the biblical injunction that, “Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses; but one witness shall not testify against any person to cause him to die”.\textsuperscript{17}

It was also believed at that time that judges were as ignorant as any individual viewing the case at all and because of lack professionalism of the judges, there was a need for many witnesses. However, with the growth of legal scholarship in the late $18^{th}$ and $19^{th}$ century, there emerged formal rules guiding criminal and civil trials. There were formal standards of discharging the burden of proof which includes, the ‘balance of probabilities’ in civil cases and proof ‘beyond reasonable doubt’.

\textsuperscript{13} Book IV Title XX Concerning Witnesses. The instruction is dated 334 AD cited in Wigmore, Evidence (3rd ed., 1940) p. 2032.
\textsuperscript{15} Ibid., The Trustworthiness of Witnesses and of Instruments (De Fide Testium et instrumentorum). Interestingly, the testimony of a single Bishop might be in a different category (see also Sirmondian Constitution 333).
\textsuperscript{16} Carlo way Law Review on Scottish law cited in Wigmore., op cit., p. 2034.
\textsuperscript{17} Holy Bible (KJV), Numbers 35:3.
in criminal cases. An American author, Irving Younger states that, “Gradually, as other modes of inquiry into the truth became fashionable, the rather primitive formalism of the rule of number gave way to conceptions of evidence and of proof more congenial to the modern mind.” Hence, such codified rules of procedure paved the way for expunging of the concept of corroboration from the legal system of many European countries.

The above is one of the reasons why the expunging of corroboration is commendable. The concept is a mechanical one which does not fit into the system of modern juristic practice. Such perfunctory rules have been done away with owing to advancement of modern society and the dynamism of law.

3. Views on Corroboration

There are divergent views on the issue of corroboration, some of which have threatened to erode the originality of the concept and have helped some mediocre judges shy away from handing out judgements without fear and favour. However, judicially, there are two discernible views on corroboration, which can be classified into two schools of thought, namely:

a. The Liberal view; and
b. The Restrictive view.

The Liberal View is that which construes the written testimony in the light of the situation presented and tends to effectuate the spirit and purpose of the maker. It resolves all reasonable doubts in favour of the written testimony. In applying the liberal view on the issue of corroboration, judges tend to use circumstantial evidence to determine corroboration. In Igboanugo v. State, the trial judge stated that “corroboration need not be direct, oral evidence. It is quite sufficient even if it is merely circumstantial evidence of the accused person himself.” This appears to be the position where the accused testimony is inconsistent or false. For

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18 Evidence Act, 2011, as amended, ss. 134 and 135
23 Ibid., p. 262.
instance, in *R. v. Knight*[^24], the lies of the accused were held to corroborate the story of the complainant. However, in *Francis Okpanefe v. State*,[^25] although the Supreme Court referred to *R v. Knight*, it arrived at a different conclusion when it held that circumstantial evidence was not sufficient corroboration[^26].

The Restrictive View, on the other hand, adopts a strict construction and considers words narrowly, usually in their historic context. It resolves all reasonable doubts against the applicability of a particular word[^27]. Applying this view to the issue of corroboration, the judges usually require direct evidence which points to the fact that the accused is actually the one that committed the crime[^28]. Judges in this school are prone to making the mistake of regarding corroboration as repetition. There is the need to apply caution in this regard as over reliance on this approach will most likely result in unjust consideration of the case of the complainant.

### 4. Corroboration of Sexual Offences

The repealed Evidence Act[^29] in S. 179(5) provided thus:

> A person shall not be convicted of the offence mentioned in Sections 218, 221, 223, or 224 of the Criminal Code upon the uncorroborated testimony of one witness.

The relevant sections of the Criminal Code[^30] are as follows:

S. 218: Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning.

Any person who attempts to have unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning.

S. 221: Any person who-

[^24]: [1966] 1 All ER 647, 649.
[^26]: *Ibid.*, Ademola, CJN called the plea of *alibi* “spurious”.
[^27]: W. Lile., *et al.*, *op. cit*.
[^29]: Cap E14, LFN, 2004
[^30]: Virtually all the states in the south where the Criminal Code used to apply have their respective Criminal Code Laws (CCL). In Enugu state, there is CCL, Cap 30, Revised Laws of Enugu State, 2004. In Lagos, it is retained as Cap 17, Laws of Lagos State. The provisions are similarly worded but may sometimes be differently named or classified.
(1) has or attempts to have unlawful carnal knowledge of a girl being of or above thirteen years and under sixteen years of age; or
(2) knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her; is guilty of a misdemeanor, and is liable to imprisonment for two years, with or without caning.
S. 223: Any person who-
(1) procures a girl or woman who is under the age of eighteen years to have unlawful carnal connection with any other person or persons, either in Nigeria or elsewhere; or
(2) procures a woman or girl to become a common prostitute, either in Nigeria, or elsewhere; or -
(3) procures a woman or girl to leave Nigeria with intent that she may become an inmate of a brothel elsewhere; or
(4) procures a woman or girl to leave her usual place of abode in Nigeria, with intent that she may, for the purposes of prostitution, become an inmate of a brothel, either in Nigeria or elsewhere; is guilty of a misdemeanor, and is liable to imprisonment for two years.
S. 224: Any person who-
(1) by threats or intimidation of any kind procures a woman or girl, to have unlawful carnal connection with a man, either in Nigeria or elsewhere; or
(2) by any false pretence procures a woman or girl to have unlawful carnal connection with a man, either in Nigeria or elsewhere; or
(3) administers to a woman or girl, or causes a woman or girl to take, any drug or other thing with intent to stupefy or overpower her in order to enable any man, whether a particular man or not, to have unlawful carnal knowledge of her; is guilty of a misdemeanor, and is liable to imprisonment for two years.
Collectively, these offences are referred to as Sexual offences.  
All the sections listed above contain a proviso that: “a person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness.” By this provision, it is obvious that as far as the legal content of these

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31 They are differently named in the various State Criminal Code Laws but the offences are the same. For instance, in Enugu State CCL Cap 30, they are grouped under a section as offences against morality. Sections 196-216.
sexual offences are concerned, there is a mandatory requirement for corroboration. The prosecution in order to secure a conviction must adduce evidence to corroborate the complainant’s testimony. However, under the Evidence Act, 2011, the former section 179(5) has been expunged. This is clearly a reform of the law but obviously not a repeal of the requirement of corroboration for sexual offences under Nigerian law. By the provisions of Evidence Act, there is a clear indication that corroboration is no longer required, as a matter of law, for the conviction of any person that commits any of these sexual offences. Thus, the court may now convict on the strength of the case and no more on the corroborative evidence. This apparent contradiction in the present state of the law is the main crux of this discourse.

Lawyers and judges have in the past been criticised for displaying bias in their treatment of women who are victims of sexual assault. It has been argued that this biased treatment of women comes from views about women which are based on myths and stereotypes. These views fail to recognise the dignity of womanhood. In their report on Sexual Assault Law Reform, Bargen and Fyswick argue that stereotypes of women differ according to the category into which they are usually placed. Accordingly, the degree to which ‘she’ may lie depends upon the category of “woman” into which she is placed.

Corroboration was required in almost all cases of sexual assault and corroborative evidence was usually defined in an absurdly narrow way. The rule was based on myths and beliefs about women which are incorrect and clearly discriminatory. According to Woods:

> It is stressed that the present practice is regarded as being grossly offensive to women and discriminatory. Is it really possible that rape victims as a class are more prone to falsehood than, for example, businessmen giving evidence in cases where their own financial advantage is in issue? Why not have a rule that judges should always warn juries that it would be

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32 It was passed in May, 2011 and it repealed Evidence Act, Cap. E14, Laws of the Federation, 2004.
34 J. Bargen and E. Fyswick, *op. cit.*, p. 70.
“dangerous to convict” on the uncorroborated evidence of a businessman?  

The common law rule was justified by the need to protect the accused person against the risk of unjust conviction: 

Because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all. 

This had the effect of placing sexual offence complainants in a category of unreliable witnesses. There is no evidence to suggest that sexual assault complaints are false. In fact, a report from India and Britain showed that the rate of rapes is not commensurate with the convictions for rape. The report from India showed that rape was the fastest growing crime in India with over 22,900 incidences in 2011 and yet the rate of conviction for the offence was completely incommensurate. 

In *Santhosh Moolya and Surendra Gowda v. State of India*, the Indian Supreme Court stated thus:

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38 In Britain, the government estimates that as many as 95% of rapes are never reported to the police at all. Of the rapes that were reported from 2007 to 2008, only 6.5% resulted in a conviction on the charge of rape. The majority of convictions for rape resulted from an admission of guilt by the defendant, whereas less than one quarter of all those charged with rape were convicted following a successful trial. Prosecutors have accepted a number of failures in dealing with rape, particularly since the publication in 2007 of the Without Consent report, which was highly critical of some aspects of the way the police and prosecuting authorities deal with rape cases. see http://www.hindu.com/2010/04/28/stories/2010042861390800.htm last accessed on 01/06/2012  
39 *Ibid*. It is pertinent to mention that these countries have abolished the corroboration rule.  
Any statement of rape is an extremely humiliating experience for a woman, and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her, and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for.\textsuperscript{41}

According to Justice Sathasivam, quoting an earlier judgments,

When a First Information Report is lodged by a lady with regard to the commission of offence like rape, many questions would obviously crop up for consideration before she finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only giving it a serious thought, must have decided to lodge the FIR.\textsuperscript{42}

It is a brave female or parent who knows what she faces in the criminal justice process that will come forward to make a complaint about the violator. In Nigeria, it is almost a term of opprobrium as the victim of such offence is looked upon with scorn. Sometimes, it leads to stigma. Many parents have concealed such offences against their female children or even compounded felonies to avoid making such public. For the few who are courageous enough to come to court, they face a process which considers their testimony as insufficient and unreliable.

In fact, in a country like Trinidad and Tobago, court sessions on sexual offences are conducted in camera and the names of the complainant and the accused are not published. The truth is that most offences of this nature are committed in private and that leaves the victim as the sole witness and also the sole “exhibit” as a result of the after-effects.

The requirement of corroboration had led to absurd consequences such as those described by Roch J in the English case of \textit{R. v. Chance} \textsuperscript{43}. In that case, it was pointed out that:

Where for example, a woman was raped and then robbed in her own home; presumably a judge would be required to explain to the jury that it would be dangerous to convict the accused on

\footnotesize{\textsuperscript{41} A Bench of Justices comprising JJs. P. Sathasivam and R.M. Lodha.  
\textsuperscript{43} [1965]1 All ER, 611.}
the uncorroborated evidence of the victim in relation to her story of the sexual assault, but not dangerous as far as the robbery was concerned.\(^44\)

In the case of *Francis Okpanefe v. State*,\(^45\) the appellant appealed against a decision of the appeal court convicting him on a two-count charge of rape and attempted rape. The complainant (1st P.W), who was found by the learned trial judge to be a girl aged twelve years at the time of the alleged offences, in her evidence said that the accused called her and asked her to bring him water and when she did so he pushed her into his room and forcibly had sexual intercourse with her against her will. She did not make a report to her parents or to anyone else of what the accused had done. A week later the accused again called her and, when she went, forced her into his room and, according to her, again forcibly had sexual intercourse with her against her will but, as a result, she was this time in pain and could not walk properly so that her mother seeing this questioned her and she then told her mother what had happened. On the second occasion the accused gave her a shilling because she was crying. The 2nd P.W., the mother of the accused, confirmed the story of the complainant as to finding her in a distressed condition and said a shilling dropped from the complainant’s clothes when she examined her. In the medical report tendered as evidence by the prosecution the fact that the girl had been forcibly raped as a result of the rupture of her hymeneal ring. However, the doctor in the report said there was no connection between the appellant and the rape. The court held that the earlier complaint made to her mother, the money and the medical report and the fact that the appellant’s plea of alibi failed was not sufficient to amount to corroboration.\(^46\)

### 5. A Reform under the Evidence Act, 2011

The need for corroboration in the proof of sexual offences has been expunged from the Evidence Act, 2011. The implication of this is that in cases where there is need to prove the commission of any of the sexual offences, corroboration is no longer required, at least procedurally. When compared with other offences which

\(^{44}\) *Ibid.*

\(^{45}\) (1969) ANLR 411.

\(^{46}\) See *Anomo v. Anomo*[1997] EWCA Civ 2097
require corroboration, it is discovered that historically the use of corroboration in proof of sexual offences is faulty. This can be gleaned from the three major offences requiring corroboration in almost every rule of evidence in any country in the world—Perjury, Sedition and Treason. These three have their roots in the common law system. It was the severity of the punishments that accompanied these offences that paved the way for the requirement of proof through corroboration. Years after, the rules on corroboration still exist in proving these offences.

There is a suspicion that in sexual cases the presumption of innocence to which the defendant is entitled is likely to give way to “the respect and sympathy naturally felt by any tribunal for a wronged female ...” This alleged danger of unfair prejudice against the accused has two elements. First, the heinousness of the offence may arouse such indignation in the judges and that they will be hasty to convict. Secondly, judges are thought to be “pre-inclined to believe a man guilty of an illicit sexual offence he may be charged with, and it seems to matter little what his previous reputation has been”.

A third element relates to the fact that the Commission of a sexual offence “is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent”. All these justifications have been criticised.

47 In medieval England, there was a form of punishment called “Attainder” for any person that commits either the offence of treason or sedition. The most important consequences of attainder were forfeiture and corruption of blood. For treason, an offender's lands were forfeited to the king. For felonies, lands were forfeited to the king for a year and a day and then, because felonies were considered a breach of the feudal bond, escheated (forfeited) to the lord from whom the offender held his tenure. Subsequently, in Magna Carta (1215), the crown renounced its claim to forfeiture in the case of felony. Even harsher than attainder was the doctrine of corruption of blood, by which the person attainted was disqualified from inheriting or transmitting property and his descendants were forever barred from any inheritance of his rights to title. All forms of attainder—except the forfeiture that followed indictment for treason—were abolished during the 19th century. See Wigmore., op. cit., note 16.


50 Ibid.

There is therefore little or no firm basis for the existing corroboration rule. Moreover, there are several positive arguments in favour of amending it, which in our opinion are formidable and convincing.

Five arguments\(^{53}\) are posited in favour of reform as follows:

1. The rule encourages the false assumption, which is insulting and derogatory to women; that women “are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it.”\(^{54}\) This is clearly an assumption which is in breach of the constitutional right of freedom from discrimination\(^{55}\) which gave rise to women rights movements globally.

2. The need to give the warning in every case, regardless of the strength of the evidence or the extent to which corroboration is in fact available, will inevitably suggest that every complainant should be viewed with suspicion. There may be many cases where such suspicion is unfounded. For example, there are some cases which are strong in several respects, but contain nothing which amounts in law to corroborative evidence. In such cases, almost the last thing the judges rehearse in their mind before verdict is the warning that it would be dangerous for them to convict.

3. The form of the warning - to the effect that it is dangerous for the judge to convict on the complainant's uncorroborated evidence, but that he may do so if satisfied beyond reasonable doubt of the defendant's guilt - is almost a contradiction in terms, and therefore a likely confusion.

4. The corroboration warning adds little or nothing to the existing rules on the burden and standard of proof, and is therefore an unnecessary and anachronistic extension of them.

5. The technical distinction between evidence which does and evidence which does not amount to corroboration is subtle and difficult for a judge to apply, and may be even more

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\(^{54}\) Ibid.

\(^{55}\) CFRN, 1999, section 42.
difficult to understand. Errors in judge's summing up on corroboration therefore result in a disturbing number of mistrials in rape cases.\textsuperscript{56} However, there was never a basis for such law in the proof of sexual offences against females. The introduction of such was based on a stereotyping and bias. In Iran for instance, to secure conviction against an accused for rape, there is formally a need for corroboration of the testimony by up to four witnesses.\textsuperscript{57} This is ridiculous, degrading and therefore clearly unconstitutional.\textsuperscript{58}

The assumption that a woman may make false allegations motivated by fantasy or the other oft-quoted reasons, with their implications of untrustworthiness, was said to be insulting. Considering the situation in our local milieu, it is clear that no woman or girl would falsify allegations and subject herself going through such societal stigmatization and distinction as a result of her plight.

The rules of corroboration are also unclear on what or what does not constitute corroboration. This can be gleaned when comparison is made between the cases of \textit{Okpanefe v. State};\textsuperscript{59} \textit{Ipahar v. State};\textsuperscript{60} \textit{R. v. Knight}\textsuperscript{61} and \textit{Anomo v. Anomo}.\textsuperscript{62} Further complications arising from the nature of the defence case also affect the way in which the principles of corroboration applied. A simple example is where a defendant admits to having sexual intercourse but denies that it was non-consensual (a very common defence to a rape allegation); traces of semen found on the complainant or at the scene would ‘corroborate’ an allegation of sexual intercourse or contact but would not corroborate the allegation of lack of consent, whereas bodily injuries such as scratches or bruising, or torn clothing, could.

A further criticism of the rules was the fact that they were an exception to general principles and considered to be a glaring

\textsuperscript{56} Irving Younger., \textit{op. cit.}, p. 212.
\textsuperscript{58} CFRN, 1999, ss. 34 & 42: rights to dignity of the human person and freedom from discrimination.
\textsuperscript{59} Supra.
\textsuperscript{60} Supra.
\textsuperscript{61} [1966] 1 A.E.R. 647.
\textsuperscript{62} Supra.
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anomaly, and contrary to the interest of justice. As Karibi-Whyte said in *Abdu Mohammed v. State*, “unless corroboration is required by law, the evidence of a single witness of the right probative value has always been accepted as sufficient proof for the offence as charged.” The evidence of a prosecutrix should be judged based on the strength of her case and the accused should, according to the law, be found guilty only if the prosecutrix can prove the accused beyond reasonable doubt. The formal rules of proof in law should be applied and not any other perfunctory method of proof in cases of law. Our legal system has developed the formal rules of proof and this should be applied to sexual cases. Therefore, the removal of the need for corroboration makes the procedural law lucid but has not cleared every uncertainty which existed as a result of the corroboration rules. The existence of the provision in the affected sections of the Criminal Code implies that for the prosecution to prove its case beyond reasonable doubt there must be other evidence in corroboration of the complainant’s testimony. This has the effect of producing the same result as under the repealed Evidence Act. Moreover, the court has no discretion to deny the admissibility of the corroborative evidence since the Evidence Act does not abrogate the application of any existing law. The Act provides thus: “Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.” It is, therefore, our position that the rule of corroboration as it applies to sexual offences does not merit just a reform but a repeal. The Criminal Code and Criminal Code Laws of the affected states need to be amended to reflect the same position under the Evidence Act. The established formal rules of proof as it applies to even more serious crimes should also apply in respect of sexual offences.

6. The Attitude of the Court after the Abrogation
There has not been any Nigerian case to explain the attitude of the court to the present state of the law. However, the attitude of the courts in Britain is quite relevant as Nigerian courts tend to follow their steps. Shortly after the corroboration rules’ abrogation in the UK, two applications for leave to appeal against convictions for

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63 Okpanefe v. State (Supra).
65 Evidence Act, 2011 as amended, section 3.
indecent assault were heard by the Criminal Court of Appeal in *R v Makanjuola* and *R v Easton*. It was argued that the judge should have, in his discretion, given the full corroboration warning notwithstanding its abolition. The basis of this was that the underlying rationale of the common law rules could not just disappear overnight. The Court of Appeal dismissed such contentions on the basis that because the rules had been abrogated by statute, any attempt to re-impose the same, albeit by way of a quasi application of the same warning requirement under a different label, was against policy.

In *Makanjuola*, Lord Taylor CJ summarised the post-abolition position in these terms:

1. Section 32(1) (of the Criminal Justice and Public Order Act 1994) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
2. It is a matter for the judge’s discretion what, if any, warning, he/she considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he/she chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised, and the content and quality of the witness’s evidence.
3. In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will be the need for an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.
4. If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
5. Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the

66 [1995] 3 All ER 730.
67 *Ibid*, at 732 per Lord Taylor CJ.
68 *Supra*.
judge’s view of the evidence and his/her comments as to how the jury should evaluate it rather than as a set-piece legal direction.

6. Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

7. Finally, the Court of Appeal will be disinclined to interfere with the judge’s exercise of his/her discretion save in a case where that exercise is unreasonable. 69

_Makanjuola_ has been followed in other common law jurisdictions in numerous cases. 70

In _HKSAR v. Chan Sau Man_, 71 the CA rejected the argument that the trial judge had erred by failing to give a corroboration direction. Counsel for the applicant submitted that although the rule that a jury should be ‘warned of the danger of convicting without corroboration had been abrogated’, the old rule that ‘a warning had to be given should not entirely be rejected’. He relied on Lord Taylor CJ’s comment in _Makanjuola_, 72 that:

> Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution.

Such an argument was, however, rejected by the court:

> This was a straightforward case where the complainant’s evidence, the accuracy of her evidence and her veracity, on the central issue stood alone. The judge had meticulously pinpointed all the areas in the evidence where her account was materially disputed and had invited the jury to look at her evidence with

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71 [2001] 3 HKLRD 593.
72 Supra., p. 596.
care. In the circumstances, the judge was perfectly entitled, in the sensible exercise of his discretion, to adopt this course.\textsuperscript{73} It follows from the above that without the mechanical rules of corroboration, a judge has wide discretion in deciding how to sum up a case. Although it was suggested in \textit{Makanjuola} that if there is an evidential basis for suggesting that the evidence of a witness may be unreliable, it may be appropriate for the judge to warn the jury to exercise caution in dealing with such evidence, however, the judge is no longer obliged to give a full warning on uncorroborated evidence.

\textbf{7. Position in other Jurisdictions}

\textbf{a) England}

The sexual offences in the Crimes Ordinance are similar to those governed by the Sexual Offences Act 1956 of the United Kingdom.\textsuperscript{74} The requirements of corroboration set out in the Sexual Offences Act, 1956 (which were closely related to the corroboration warning required for complainants in sexual offences) in relation to offences of procuring unlawful sexual intercourse and prostitution were repealed by section 33(1) of the Criminal Justice & Public Order Act, 1994. The common law requirement for corroboration warning was repealed by section 32 of the 1994 Act.

\textbf{b) New South Wales}

In New South Wales, the Crimes (Sexual Assault) Amendment Act 1981 abolished the corroboration requirement in cases of sexual assaults. Under the new provision the judge is given discretion to comment where appropriate on the weight to be given to the evidence of the individual witness. There is also a statutory requirement that the judge warn the jury that a late complaint is not necessarily a false one and that there may be good reasons why a victim of a sexual assault may hesitate or refrain from making a complaint.

\textbf{c) Singapore}

The position in Singapore is aptly capture by Rajah JA in \textit{XP v. Public Prosecutor}\textsuperscript{75}:

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\textsuperscript{73} Supra., p.599.
\textsuperscript{74} UK, SOA, 1956, cited J. H. Wigmore \textit{op. cit.}, p. 331.
\textsuperscript{75} [2008] 4 SLR(R) 686; [2008] SGHC 107, HC(Appellate), VK Rajah JA, 4 July 2008
\end{flushright}
There is no formal legal requirement for corroboration (see s 136 of the Evidence Act), nor is it a strict rule that judges must remind themselves of the danger of convicting based on the testimony of one complainant. However, there is good reason for the case law-devised reminder that a complainant's testimony must be unusually convincing in order to prove the Prosecution's case beyond a reasonable doubt without independent corroboration. Since the warning is not a rule of law and as section 136 of the Evidence Act expressly does away with the formal, legal need for corroboration, a judge who concludes that a witness's testimony is unusually convincing will not be bound to formally direct himself as such. If the appellate court disagrees on the evidence that the witness was unusually convincing, or finds a reasonable doubt notwithstanding the ostensible credibility of the testimony, then the conviction will be set aside because a reasonable doubt exists, and not because the judge did not remind himself of the standard.

d) India

As considered earlier, the Indian Supreme Court has held

76 SanthoshMoolya and SurendraGowda v. State of India, see above n 43.

that there is no requirement for corroboration in sexual offences.

e) Barbados

The Sexual Offences Act of Barbados provides in Section 28 as follows:

Subject to section 31, where an accused is charged with an offence under this Act, no corroboration is required for a conviction but trial Judge shall warn the jury that it may be unsafe to find the accused guilty in the absence of corroboration.

It can be gleaned from Section 31 of the Act


that the need for corroboration in sexual offences is dispensed with. However, it is at the judge’s discretion to warn himself. Here, corroboration is not a necessity but a tool.

f) Trinidad and Tobago

One innovation to protect the victim of a sexual offence in Trinidad and Tobago is that court sessions are done in camera
unless the court directs otherwise and in reporting the case, the
real name of the victim is not used. Also, independent testimony
is not a necessity. One is concerned with what the law describes
as corroboration. Corroboration is independent evidence which
implicates a person accused of a crime by connecting him with it.
In sexual offences cases, judges were required to warn the jury
that it was dangerous to convict a person upon the uncorroborated
evidence of a woman who complained that she was the victim of a
sexual offence. 78 The reason for this warning was the mistaken
belief or widely held perception that women often lie about being
raped. The law in Trinidad and Tobago, 79 expressly removed this
requirement. Section 15A of the Evidence Act states that it is not
obligatory for the Court in sexual offences cases to give the jury a
warning about convicting the accused on the uncorroborated
evidence of the complainant. The judge however can exercise his
discretion to advise the jury of the need for corroboration.

The question of whether a judge is required to give the
jury a corroboration warning in sexual offences cases was
considered by the Court of Appeal of Trinidad and Tobago in Mymoon v The State. 80 The appellant was convicted of serious
indecency on a minor. The minor was under the age of sixteen
years. The Court stated that section 11 of the Administration of
Justice Miscellaneous Provisions Act (No. 28 of 1996) removed
the requirement for a full corroboration warning to be given where
a person is charged with a sexual offence. The Court explained
that the position now is that a trial judge has discretion whether or
not to give the old corroboration warning to the jury in matters of
sexual offences. It was not obligatory. The precedent is the
English case of R. v. Gilbert. 81 The Privy Council in that case held
that the question whether to give a corroboration warning in
sexual offence cases is a matter for the discretion of the trial
judge.

g) United States of America
It seems that legislating on such sexual crimes in the United States
is left to the different states. Many American jurisdictions follow
the common law rule, imposing no requirement of corroboration

78 P. Murphy, op. cit., p. 635.
79 The Evidence Act Chapter 7:02 and the Administration of Justice
80 TT 2002 CA 81 (Criminal Appeal No. 73 of 2000) decided 10 October 2002.
in sex offense cases.\textsuperscript{82} It is fairly well known, however, that charges of sexual misconduct are easy to make and difficult to rebut.\textsuperscript{83} Accordingly, several states have chosen to depart from the common law rule.

The United States Supreme Court’s decision in \textit{Carmell v. Texas}\textsuperscript{84} exemplifies this point in the area of evidential rights. In that case, the court examined the constitutionality of a Texas statute that repealed a corroboration arrangement for cases of rape and sexual assault. Under the old arrangement, a rape defendant could not be convicted upon his complainant’s testimony if the latter was not corroborated by the complainant’s prompt outcry or by evidence extraneous to the complainant.\textsuperscript{85} The new statute provided that the jury can convict the defendant on the uncorroborated testimony of such a young complainant if it finds it credible beyond all reasonable doubt.\textsuperscript{86}

\textbf{h) South Africa}

According to Kriegler\textsuperscript{87} a Judge of the Constitutional Court of South Africa, sexual offences have distinctive features which require exercise of caution in order to ensure that justice is done. He opined that sexual offences are inherently intimate and committed in seclusion where only the accused and the victim are


\textsuperscript{83} A classic expression of this perception is that of Lord Chief Justice Hale: “The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony.... It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, the never so innocent.” 1680 Pleas of the Crown I, 633, 635, cited in Wigmore, \textit{op. cit.}, above n 16, at pp. 342-45.


\textsuperscript{86} See \textit{Carmell}, at 518-519.

\textsuperscript{87} In \textit{S v D} (1992) 1 SACR 143.
privy to the commission, therefore, “the adjudicator of the facts must throughout be cautious of the special problems in sexual offence cases and it must be clear from the Court's evaluation of the facts, that the evidence was approached and considered in this manner.”

It is pertinent to note that the rule of corroboration is not a statutory requirement in South African law. In fact, the opposite view forms part of Section 208 of the Criminal Procedure Act, which provides that an accused may be convicted on the evidence of a single witness. It has however, become a rule of practice and has been consistently applied by the courts. Therefore, the South African courts have come to hold disparate views on the issue of corroboration in sexual offences.

i) Hong-Kong
The rules on corroboration in sexual offences in Hong Kong were abolished in 2000. The corroboration rules were said to work particularly to the disadvantage of victims of sexual offences. Although obviously not gender specific, it is an undeniable fact that the majority of ‘victims’ in such cases are females. The rules were said to be inflexible and unfair, especially when they were required irrespective of the particular facts of the case or the perceived reliability of the complainant’s evidence, as the law required that a standardised warning be given in all circumstances. The proposal for the abolition of corroboration in sexual offences was given new impetus in 1998. It was reignited in HKSAR v. Kwok Wai Chau.

j) Australia
Section 341(5) of the Evidence Act, South Australia, 1929 provides that in proceedings in which a person is charged with a sexual offence, the judge is not required by any rule, law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.

k) Canada
In 1983, amendments were made to the Criminal Code that specifically abolished some rules that perpetuated bias against women. Section 274 of the Canadian Criminal Code provides that, in relation to certain sexual offences, no corroboration was required for a conviction and, further, that the judge should not instruct the jury that it was unsafe to convict in the absence of

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88 Nikki Naylor, Evidentiary Rules, Women’s Legal Centre, p. 2-4, cited in S v. D (supra)
89 CPA South Africa, Act 57 of 1977 as amended.
90 The Evidence Ordinance, 2000, Hong Kong, s. 4B.
The special rules of corroboration were repealed according to the Criminal Justice and Public Order Act, 1994.

Also, the old rule that a judge must warn a jury of the dangers of convicting a defendant on the uncorroborated evidence of an accomplice or the victim of a sexual assault was abolished. Similarly, magistrates acting in their summary capacity no longer need to give the corroboration warning.

**Conclusion**

There are no (or no longer) formal rules regarding corroboration of a woman’s testimony in cases of sexual assault in many parts of the world (e.g., parts of Latin America, Canada, Fiji, Ghana, Israel, South Africa, the United Kingdom, the United Republic of Tanzania, Zimbabwe and most parts of the United States). However, the requirement of many legal systems to meet “a particular level of proof in order to prosecute”, coupled with the

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widespread distrust of women, has led to the continued demand for authentication of a victim’s claim. The historical assumption of an inherent lack of credibility of the evidence of women and girls in sexual offences cases which led to the evolution of the corroboration rules under the common law is now widely regarded as discredited and without any scientific basis. It was therefore vital that the common law practice should be abrogated, and that the statutory provisions, which are based on the same discredited assumption, be abolished consequentially. Assessments of credibility should be made not by assumption but by a full evaluation of the merits of the case.

There must be sustained efforts by the State (such as continuous training of law enforcement personnel and judicial officers, sensitizing the media, educating the public) to challenge the stereotype attitudes dominant in Nigeria which help to perpetuate violence against women and girls. Such progress as this will help the society’s move towards a wholesome legal and overall development.

The evidence of a prosecutrix should be judged based on the strength of her case and the accused should according to the law be found guilty only if the prosecutrix can prove the commission of the offence beyond reasonable doubt. It is not unlikely that had this been the law in the time of Okpanefe v. State, the decision would have been different.

The reform envisaged by the amendment in the Evidence Act is indeed laudable and in furtherance of justice for victims of

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94 For instance, Sweden has the best laws on prostitution in the world and this was achieved with an objective look on the way to curb sex trade. In Sweden, the red-light districts or taverns are not raided and the prostitutes arrested. Instead what the Swedish authorities did was consider the fact that since it was a society built on the tenets of Democracy, there was a need to ensure equality of all persons in the State. Therefore, any act of any person to purchase the body of another through any form of consideration was criminalised. See Gunilla Ekberg, “The Swedish Law that Prohibits the Purchase of Sexual Services”, Ministry of Industry, Employment and Communications, *Violence against Women*, (October, 2004) Vol. 10 No. 10, 1187-1218.

95 *Supra.*
This has, however, not totally removed the obstructive barrier and discrimination occasioned by the corroboration requirement in sexual offences in Nigeria by virtue of the provisions of the Criminal code. We therefore humbly suggest that the corresponding provisions in the Criminal code should be equally repealed at the earliest opportunity to give effect to the current global trend in the protection of rights of women and girls.

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96 One of the fastest growing crimes in the world, yet conviction rates for rape and other sexual offences are still very low globally. Available at www.guardian.co.uk/UKnews/rape_convictions_rates_still_very_low.htm last accessed on June 12, 2012.
OPTIMIZING THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN GLOBAL SECURITY

Abstract

The growing threat to global peace and security today clearly undermines the primary objectives of the United Nations (the UN) to maintain international peace and security. The existing system governing global security is obviously porous. The non-compulsory nature of the jurisdiction of the International Court of Justice (ICJ) and the perceived inefficiency and politics of veto power at the Security Council of the UN necessitates further action to restore and maintain global peace and security. This paper reviews the International Criminal Court (ICC) Statute and shows how its proscriptions and other provisions will remedy the mischief in the UN system and contribute to the maintenance of global security. The paper suggests ways of optimizing the role of the ICC in maintaining global peace and security.

1. Introduction

Global security is the international protection of persons, objects, properties, institutions or situations to avoid being harmed by any risk, war, danger, threat or crime. Achieving global security is the objective of the international community. Through the ages, humankind has been on a long search for order and stable existence in society. Law plays a central role in this search, as it is the instrument with which every society creates for itself a framework of principles within which to develop. The primary objective of the United Nations Organization (the UN) is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.¹

The UN has hitherto sought to achieve these lofty objectives using the instrumentality of the Security Council, the General

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¹ Art. 1(1) of the Charter of the UN, 1945.
Assembly, and the International Court of Justice (ICJ). The Security Council has the primary objective of maintaining global security under the Charter of the UN.² The Council may take both measures involving and those not involving the use of force in achieving this objective.³ On its part, the General Assembly may discuss any question or matter on the maintenance of global peace and security, and may make recommendations to the members of the UN or to the Security Council, provided the Council is not itself dealing with the same matter.⁴ Finally, the ICJ is the principal judicial organ of the UN⁵ with jurisdiction over matters of global peace and security.

The UN system has however not been effective in maintaining global security. Wars of aggression, grave violations of human rights and humanitarian atrocities, genocide, crimes against humanity and war crimes have continued to be the order of the day even after the inception of the UN. The UN system is emasculated by the arbitrary use of veto power at the Security Council, the fact that General Assembly resolutions lack binding force of law, and the principle that the jurisdiction of the ICJ in contentious cases is founded upon the consent of the parties⁶ (which is often withheld). Again, the fact that only States and possibly international organizations (to the exclusion of individuals) are traditionally the subject of international law makes it difficult for the UN machinery to dispense sanctions to individuals who breach global security. Modern scholars tend to indicate however that individuals are also subjects of international law, even if at subsidiary level. International instruments and bodies routinely confer rights and obligations on individuals especially in the context of humanitarian and human rights law. Malcolm N. Shaw observes that modern practice does demonstrate that individuals have become increasingly recognised

² Art. 24 ibid.
³ Arts. 41 and 42 ibid.
⁴ Arts. 10, 11, and 12 ibid.
⁶ The ICJ noted in the Application for the Interpretation and Revision of the Judgment in the Tunisia/Libya Case, ICJ Rep. [1985] 192 at 216, that it was ‘a fundamental principle’ that ‘the consent of states parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases,’ citing here the Interpretation of Peace Treaties case, ICJ Rep. [1950] 71. See also Cameroon v Nigeria, ICJ Rep. [2002] para. 238.
as participants and subjects of international law.\(^7\) In spite of this
development, the UN system remains clearly incapable of
restoring and maintaining global security, especially with regard
to individual responsibility for international crimes. This
necessitates the emergence of the ICC (the Court) with clear
statutory mandate to investigate and prosecute individuals who
violate global security. The thesis of this paper is that the
proscriptions and other provisions of the ICC Statute will remedy
the mischief in the UN system and contribute to the maintenance
of global security; these provisions nonetheless raise salient issues
which should be addressed.

This paper is divided into five parts. Part I is the
introduction. Part II briefly reviews the establishment of the ICC
as a precursor to the discussion in Part III of the objectives and
activities of the Court. Part IV highlights the salient issues raised
by the ICC Statute and offers suggestions for the optimization of
the Court. Part V embodies the concluding remarks.

1. The International Criminal Court Statute
The Second World War (WWII) marked the climax of the
breakdown of global security. After about forty million human
lives were lost in the war, the international community resolved to
establish an independent permanent ICC.\(^8\) The ICC would have
jurisdiction over the most serious crimes of concern to the
international community as a whole. Efforts to realize this end
took the world community through various rigorous stages like

\(^7\) M. N. Shaw, *International Law*, (5\(^{\text{th}}\) edn., Cambridge University Press,
Cambridge, 2005) 232. See also R. Mullerson, “Human Rights and the
Individual as a Subject of International Law: A Soviet View” (1990) 1
*European Journal of International Law* 33.

\(^8\) It was Mr. Donnedieu de Vabre, the French Judge of the Nuremberg Tribunal,
who first raised the question of establishing an independent permanent ICC at
the International Law Commission (ILC) on May 13, 1947 at about the same
time the trials of the WWII criminals were going on. The permanent ICC did
not immediately materialize. But aspirations for it were revived in the 1980s
with a proposal before the UN General Assembly by Latin American states,
led by Trinidad and Tobago. See letter dated August 21, 1989 from the
Permanent Representative of Trinidad and Tobago to the UN Secretary-
General, UN General Assembly Official Records (GAOR), 47\(^{\text{th}}\) Session,
Annex 44, Agenda Item 152, *UN Doc.A/44/195* (1989). The matter was
referred by the General Assembly to the ILC. See UN GA Resolution 44/39,
setting up Military Tribunals in Nuremberg and Tokyo in 1946\(^9\) to try war criminals of the WWII; and establishing the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991;\(^\text{10}\) and the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between January 1, 1994 and December 31, 1994.\(^\text{11}\)

These efforts culminated in the convening of the Rome Conference attended by 160 States from June 15 to July 17, 1998, which adopted the ICC Statute on the last day of the Conference. The ICC came into effect on July 1, 2002. It was established by Article 1 of the Statute. It is a permanent institution and has the power to exercise jurisdiction over persons for the most serious crimes of international concern—genocide, crimes against humanity, war crimes and *aggression*—and shall be complementary to national criminal jurisdictions. The ICC has a mission to fulfil the aspirations of the UN for a secure world. So, it is brought into relationship with the UN by Article 2 of the Statute. The seat of the ICC is at The Hague in the Netherlands, though the Court may sit elsewhere when it considers it desirable.\(^\text{12}\)

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\(^{9}\) These tribunals were set up by the Nuremberg Charter i.e., the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, 8 UN Treaty Series (UNTS) 249 and the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal) 1946, respectively. By the General Assembly Resolution 95(1) on December 11, 1946 the UN endorsed and unanimously adopted the principles of international law recognised by the Nuremberg and Tokyo Charters and the judgments of the tribunals.


\(^{11}\) The ICTR was set up by the UN Security Council Resolution 955 of November, 1994.

\(^{12}\) Art. 3 of the ICC Statute.
There are two ways in which the ICC has overcome the identified shortcomings of the UN system in global security. It has compulsory international criminal jurisdiction and can prosecute individual perpetrators of global security (not just apportion state responsibility like the ICJ does).

A. Compulsory International Criminal Jurisdiction
Unlike the ICJ jurisdiction that is activated by the consent of the parties, the ICC has compulsory jurisdiction over international crimes. A state which becomes a party to the ICC Statute thereby accepts the jurisdiction of the Court. The Court may exercise its jurisdiction with respect to an international crime if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the ICC prosecutor by a state party;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the UN; or

(c) The prosecutor has proprio motu initiated an investigation in respect of such a crime.\(^\text{13}\)

In the case of paragraphs (a) and (c) above, the Court may exercise its jurisdiction if one or more of the following states are parties to the statute or have accepted the jurisdiction of the Court, that is: (i) the state on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft; (ii) the state of which the person accused of the crime is a national. In other words, the need for consent of a state of territoriality or nationality is dispensed with. Jurisdiction of the Court is automatic and compulsory for states parties.

In the case of a situation concerning non-states parties, paragraph (b) above empowers the Security Council, pursuant to its power of action with respect to threats to the peace, breaches of the peace and acts of aggression under Chapter VII of the UN Charter, to make a referral. Thus, even if a state is neither a party to the UN Charter nor the ICC Statute its citizens are still subject to the ICC jurisdiction. The ICC will still have jurisdiction over any international crime committed in the territory of such state. This is so for two reasons. First, the crimes within the ICC jurisdiction have crystallised into customary international law binding on all States irrespective of treaty affiliation and from

\(^\text{13}\) See Arts. 13 and 15, \textit{ibid.}
which no derogation is allowed. Second, the power of the Security Council to bind non-States parties to the ICC Statute derives from the UN Charter which in Article 2(6) provides that:

The organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.\(^{14}\)

Giving the Court compulsory global criminal jurisdiction helps to ensure that it can investigate and prosecute all acts or omissions amounting to breaches of global security, no matter where they are committed.

B. Individual Criminal Responsibility

Malcolm N. Shaw observes that despite the modern trend in making international law binding on individuals,\(^{15}\) only States have traditionally been recognised as subject of this system of law. This made it difficult to actually punish individuals who committed breaches of global security. Today, the ICC Statute has entrenched individual criminal responsibility in international law. According to Article 25 of the ICC Statute, the Court shall have jurisdiction over natural persons only. Under the statute, a person shall be individually responsible and liable for punishment if he, with intent and knowledge, commits a crime; orders, solicits or induces the commission of such a crime; aids, abets or otherwise assists in the commission of the crime; or in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose; or attempts the commission of a crime. This provision on individual criminal responsibility is without prejudice to the responsibility of states under international law. It is a bold step forward. What hitherto obtained was that individual perpetrators of the worst breaches of global security hid under the principle that individuals were not subjects of international law and went scot free while the state on behalf of which the crime was committed received political reprimand or ineffective economic sanctions that did not

\(^{14}\) Emphasis added.

\(^{15}\) Supra, note 8 at 177. However, it is less clear that in practice this position was maintained. The Holy Sea (particularly from 1871 to 1929), insurgents and belligerents, international organizations, chartered companies and various territorial entities such as the League of Cities were at one time or another treated as possessing the capacity to become international persons. See the Western Sahara case, ICJ Rep. [1975] 12 at 39, 59.
go far enough in curbing the menace. Making individual perpetrators of international crime responsible for their acts or omissions is the major role the ICC Statute plays in global security today.

2. Objectives and Activities of the Court
The objective of the UN system in global security is to eradicate grave crimes that threaten the peace, security and well-being of the world. Sharing the same objective, the ICC affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.\textsuperscript{16} To this end, the statute vests jurisdiction in the Court with respect to (a) genocide, (b) crimes against humanity, (c) war crimes, \textit{and (d) the crime of aggression}. Jurisdiction over the first three crimes is conclusive and already operational, but inconclusive over the fourth. The Court shall exercise jurisdiction over the crime of aggression once provision is adopted in accordance with Articles 121 and 123 of the Statute setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

Precisely, what the ICC Statute is trying to prevent and punish is a hugely important question, as it provides an insight into what role the Court is set up to play and how, by playing this role, it can foster global security. A good review of the elements of international crimes has been done by authors like Kriangsak Kittichasaree, \textit{International Criminal Law}\textsuperscript{17} and Antonio Cassese, \textit{International Criminal Law}\textsuperscript{18}. This paper attempts to ascertain how precisely the proscription and punishment of these international crimes may help in restoring and maintaining global security.

Article 6 of the ICC Statute makes genocide an international crime. For the purpose of the ICC Statute, genocide means any of the following acts committed with intent to destroy, in whole of in part, a national, ethnic, racial, or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent birth within the group; and forcibly transferring children

\textsuperscript{16} Preamble to the ICC Statute, para. 4.
\textsuperscript{17} (Oxford University Press, Oxford 2001).
\textsuperscript{18} (Oxford University Press, Oxford 2003).
of the group to another group. By proscribing genocide the ICC Statute assumes a crucial role in the campaign for global peace and security and a conscious move to equal respect for all groups of the human family. Genocide is the gravest form of humanitarian atrocity. If the ICC regime succeeds in halting incidents of genocide, that will be a sure plus for global peace and security. Through its activities the Court is pursuing the objective of eradicating genocide. In *ICC Prosecutor v Omar Hassan al-Bashir*, the Sudanese President al-Bashir is indicted for three counts of genocide committed against the Fur, Masalit and Zaghawa ethnic groups in Sudan. Al-Bashir’s genocide caused grave human rights and humanitarian abuses and culminated in the breakup of the country into Sudan and South Sudan on July 1, 2011. In reaction, the ICC issued its first and so far only arrest warrant for counts of genocide. As at October, 2012, proceedings in the case are stayed pending when al-Bashir is arrested. One is however optimistic that this commendable trend will send shivers down the spines of prospective perpetrators of genocide.

Crimes against humanity rank next in gravity to genocide among international crimes. Article 7 of the ICC Statute proscribes crimes against humanity. For the purpose of the ICC Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; torture; rape; sexual slavery; enforced prostitution; persecution; enforced disappearance of persons *etc.* Curbing the spate of perpetration of crimes against humanity is yet another plus for the ICC in the campaign for global security. These are crimes that deal devastating blow on human life and dignity and shatter the peace of the world. The ICC is not flinching from the proscription of these crimes. In *ICC Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui*, the perpetrators are charged with the crimes against humanity of murder, rape and sexual slavery. These crimes were allegedly perpetrated in the village of Bogoro in the Ituri District of Eastern Democratic Republic of Congo (DRC) from January to March 2003. Hopefully, by prosecuting this and related cases the ICC

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19 Case No. ICC-3-2-2010, App. Ch., decision reversing Pre-Trial Chamber (PTC) 1’s decision not indicting the accused with genocide.

20 Case No. ICC–24–11-2009, ICC T. Ch. II.
will bring peace to DRC which seems jinxed with constant socio-political strife.

Again, in *ICC Prosecutor v Callixte Mbarushimana*, the accused is charged with the crimes against humanity of murder, torture, rape, inhumane acts and persecution. So many other charges of crimes against humanity on the situations in Northern Uganda, Central African Republic, Darfur Sudan, Kenya, and Ivory Coast are being prosecuted at the ICC. Though proceedings in all these cases are still on-going as at October, 2012, they give hope that the global community through the ICC is now all out to punish criminals against humanity and thereby maintain global security.

Till date, law has not been able to ban war-making. The best that has been done is to prescribe rules governing war. The breach of these rules constitutes war crimes. Article 8 of the ICC Statute proscribes war crimes. These are crimes committed in violation of international humanitarian law applicable during armed conflicts. The statute proscribes war crimes committed during both international and internal armed conflicts. The proscription of war crimes encapsulates the basic laws and customs applicable in both categories of armed conflicts. These basic rules ensure the adoption of the principles of distinction, proportionality and precaution, which govern hostilities and limit their scope, means and methods. The statute provides specific principles governing each type of armed conflict.

So far, the ICC has not charged anyone with war crime in an international armed conflict. This is a puzzle. For, during the lifetime of the statute, the US, Britain and Australia formed the “coalition of the willing” and invaded Iraq on the pretence that Iraq possessed Weapons of Mass Destruction (WMD), beginning

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25 *ICC Prosecutor v Samoei Ruto and 6 Others* Case No. ICC-8-3-2011, ICC PTC II.
26 *ICC Prosecutor v Laurents Gbagbo* Case No. ICC-27-11-2011, ICC PTC I.
in March 2003 until the last troupe of US soldiers was withdrawn in December 2011. Anthony Dworkin reported that the coalition committed wilful killing, torture and inhuman treatment in Iraq. The coalition wilfully caused great suffering and serious injury to the body and health of Iraqis. Similarly, Thomas Franck and Martti Koskenniemi reported that in the invasion, the coalition caused extensive destruction of Iraqi civilization and unlawfully and wantonly appropriated Iraqi oil wealth in a manner not justified by military necessity. War crimes were also committed in the international armed conflict between Russian and Georgia in August, 2008, following a previous Georgian war in South Ossetia and Abkhazia. About 2,000 South Ossetian, 228 Georgian and 872 Abkhazian civilians were killed in the war.

This writer thus urges the ICC prosecutor to charge the perpetrators of these international war crimes accordingly. These crimes are not subject to any statute of limitation. To gain global acceptance and legitimacy the ICC Statute must apply generally to all and sundry.

Again, it is urged that the ICC prosecutor should investigate the 2011 bombing campaign of the North Atlantic Treaty Organisation (NATO) in Libya. In its campaign in Tripoli Libya from May to October 2011, against forces loyal to ousted Muammar Gaddafi, NATO allegedly directed attack against a civilian population, killing civilians. This amounts to war crime. The NATO attack was an international armed conflict since it involved the military operation of foreign states (the US, Britain, France etc) in Libya. Being directed against a civilian population made it a serious violation of the laws and customs applicable in international armed conflict.


30 This is contained in a November 2008 Amnesty International report, which cited both Georgia and Russia for war crimes. Available ibid., p. 69. Retrieved on August 1, 2011.

31 Art. 29 of the ICC Statute.

However, the ICC is investigating and prosecuting cases of war crime falling out of internal armed conflicts. In *ICC Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui*, the accused persons are charged with the war crime of committing outrages upon personal dignity during internal armed conflict in the village of Bogoro in the Ituri District of Eastern DRC from January to March 2003. Proceedings in the case are on-going as at October, 2012.

The ICC has also commenced proceedings in the war crimes allegedly committed in the internal armed conflict that took place in Sudan in 2007. In *ICC Prosecutor v. Bahar Idriss Abu Garda*, the accused person is charged with the war crime of intentionally directing attack against personnel, installations, material, units, or vehicles in a humanitarian assistance or peacekeeping mission for allegedly attacking African Union Peacekeepers at the Haskanita Military Base in Darfur, Sudan in September 2007. Similarly, the accused persons in *ICC Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo*, are charged with the same crime allegedly committed during an attack carried out on September 29, 2007, against African Union Mission in Sudan (AMIS), stationed at the Haskanita Military Group Site in the locality of Umm Kadada, North Darfur in Sudan. Proceedings in both cases are equally on-going as at October, 2012.

The ICC has initiated fresh proceedings in the situation in the Democratic Republic of Congo (DRC). In *ICC Prosecutor v. Thomas Lubange Dyilo*, the accused was charged with the war crime of conscripting children below the age of fifteen and using them to participate actively in hostilities, committed in the DRC for the period beginning from September 2002, when the Force Patriotiques pour la Liberation du Congo (FPLC) was founded, and ending in August 2003. Similarly, the accused persons in *ICC Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, were charged with the same crime as in *Dyilo* committed in the village of Bogoro in the Ituri District of Eastern DRC from January to March 2003.

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33 Case No. ICC-24-11-2009, ICC T.Ch. II.
34 Case No. ICC-17-5-2009, ICC PTC I.
35 Case No. ICC-17-8-2009, ICC PTC I.
36 Case No. ICC-17-3-2006, ICC T. Ch. I.
37 Case No. ICC-24-11-2009, ICC T.Ch. II.
38 Again, proceedings in both cases are still on-going as at October, 2012.
Generally, the proscription of war crimes by the ICC Statute is a bold step at curbing the disastrous effect of war on humankind. International law may not be able to ban war making totally but it does place a limit to the conduct of a belligerent. It prescribes limits to the means and methods of warfare, and defines protected persons, objects and objectives against which attacks cannot be directed. As Benjamin B. Ferencz puts it, the statute makes it clear that ‘war-making is no longer a national right but has become and henceforth would be condemned as an international crime’. It is hoped that the norms of this statute will play invaluable role in maintaining global peace and security. But the statute also raises salient issues that need be resolved for the optimization of the Court.

3. Optimizing the Role of the ICC for Global Security: Issues and Concerns

No doubt, the ICC Statute has good objectives: to eradicate grave crimes that threaten global peace, security and well-being. But the emergence of the statute and the activities of the Court so far have raised fundamental issues that cast doubt on their viability. Observers are beginning to ask: Is the ICC not a cure worse than the ailment? In checking genocide and other crimes against international order under compulsory international jurisdiction, is the ICC not just another tool for continuation of imperialism and hegemony by the West and Europe? Does such hegemony not implicate racism (by whites), the cultural destruction of non-westerners, material exploitation, selective conviction and elimination through imprisonment (especially of radical voices) and all the other ills that the ICC is said to have set out to cure in the first place? Is the statute, as it stands, well equipped to curb twenty-first century menace to global security in a fair and objective manner? Is the ICC not a mask for the evisceration of state sovereignty and global domination with all the risks of totalitarianism that are entailed? These issues are raised and addressed in this part of the paper.

A. Security Council’s Power to Pre-determine Aggression

Article 39 of the UN Charter empowers the Security Council to make predetermination that act of aggression has occurred before

measures are taken to restore or maintain international peace and security. Scholars like Carrie McDougal\(^{40}\) contend that this provision applies to the effect that the Council’s predetermination is a condition for the exercise of the ICC jurisdiction over aggression. This contention seems to find support in Articles 5, 121 and 123 of the ICC Statute which make aggression an inchoate crime subject to amendment that must be consistent with the Charter of the UN. This issue of predetermination is responsible for why aggression has not metamorphosed into a full international crime today.

Article 5(1) (d) of the Statute places aggression as the fourth, i.e., the last crime within the ICC’s jurisdiction. However, Article 5(2) provides that the Court shall exercise jurisdiction over this crime once a provision is adopted in accordance with Articles 121 and 123 (amendment provisions) defining the crime and setting out the conditions under which the ICC shall exercise jurisdiction with respect to this crime. In any case, such a provision shall be consistent with the relevant provisions of the Charter of the UN.\(^{41}\)

At the First Review Conference of the ICC Statute held in Kampala Uganda in May/June 2010, Liechtenstein, which chaired the Special Working Group on the Crime of Aggression,\(^{42}\) proposed an amendment to the crime. The amendment which was adopted on June 11, 2010 defines aggression in accordance with UN General Assembly Resolution 3314 (XXIX) 1974 to mean:

Invading another state; bombing another state; blockading the ports or coastlines of another state; attacking the land, sea, or air forces, or marine or sea fleets of another state, violating a status of forces agreement; using armed bands, groups, irregulars or mercenaries against another state; allowing territory to be used


\(^{41}\) Emphasis added.

\(^{42}\) The Special Working Group on the Crime of Aggression (SWGCA) was directed by the Assembly of States Parties to the ICC Statute to form a definition for the crime of aggression.
by another state to perpetrate an act of aggression against a third state.\textsuperscript{43} This definition is likely to be generally acceptable as it merely codifies existing jurisprudence on aggression. However, the aspect of the amendment setting out the conditions under which the Court shall exercise jurisdiction with respect to aggression is unlikely to receive general acceptance. The amendment retains the principle that the ICC prosecutor must wait for a determination of the Security Council regarding an act of aggression. If the Security Council determines that an act of aggression has taken place, the prosecutor may initiate proceeding. If the Security Council does not act within six months, the prosecutor can proceed provided the Pre-Trial Chamber of the Court approves of that move.\textsuperscript{44} This implies that the Security Council’s power of predetermination can oust the ICC jurisdiction if a state begins a war of aggression and concludes same within six months, and the Council consistently fails to make determination within the period. It shows that the Court cannot act proactively to stop ongoing aggression. It cannot for instance make an order restraining a party from committing aggression. This is unduly preferential to the Council, which seems to have primacy over the Court. Sadly, the Review Conference made no progress here. The retention of the Security Council’s power of predetermination is the greatest undoing of the Court. Coupled with its power of deferral,\textsuperscript{45} the Security Council is still in a very comfortable position to decide whether the Court investigates or prosecutes any crime of aggression or not. Of course, if the Council does not determine an act of aggression has taken place in a given incident, and the prosecutor proceeds with the approval of the Pre-Trial Chamber, the Council will immediately enter a deferral under Article 16 and the Court is effectively ousted.

\textsuperscript{43} Resolution RC/Res. 6: the Crime of Aggression (PDF) International Criminal Court 10 June 2010. Available at \url{www.iccnow.org} p. 2. Retrieved on September 11, 2011. While the amendment will come into force one year after being ratified (i.e., on June 11, 2011) the amendment text says that only crimes of aggression committed one year or more after the thirtieth ratification are within the jurisdiction of the Court. Furthermore, a decision is to be taken by the Assembly of States Parties with a two-thirds majority votes on January 1, 2017 to actually exercise jurisdiction. See \textit{ibid.}, at 4.

\textsuperscript{44} \textit{Ibid.}

\textsuperscript{45} The Security Council’s power of deferral is a different issue raised in this paper and addressed below, note 59.
If the question is whether the Security Council should make predetermination on the existence of aggression as a condition for the exercise of ICC jurisdiction over the crime, the answer should be a firm ‘no’. The ICC jurisdiction should not depend on the Security Council determination. Truly Article 39 of the UN Charter provides that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or acts of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

But the Security Council’s power of determination under this provision is exclusive only where the Council wants to make recommendations or take measures under its power in the Chapter VII of the UN Charter. The power is not exclusive in a situation where the ICC prosecutor has taken hold of or is investigating or prosecuting a crime. No power of predetermination for ICC jurisdiction flows from Article 39 of the UN Charter. Elizabeth Wilmshurst correctly observes that:

It is clear that the Council does not have exclusive responsibility with regard to threats to international peace and security. Its responsibility is exclusive only for the purpose of its powers under Chapter VII which includes deciding upon economic sanctions and other responses to breaches of the peace.

Any rule that would subject judicial proceedings for an alleged crime of aggression to the veto power of each of the permanent members of the Security Council should be rejected as fundamentally flawed both in international law and international legal policy. The use of veto power by Russia and China, especially, in Security Council’s resolution in the on-going crisis in Syria, and in the situation in Sudan etc., makes one worry that members of the Council can easily oust or control the Court as they wish. International criminal justice should not sacrifice its legitimacy at the altar of power politics. Global security should not be compromised with the selfish interest of anyone. This writer shares the hope of Claus Kress that:

The political leadership will soon be inspired with a genuine will to secure the life, property and institutions of the world, and should assume its responsibility to close, ideally by

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This living enthusiasm is preferable to the pretended compromise that Carrie McDougal envisions, which calls for a spirit of compromise only from one side, that is, the vast majority opposing a grant of exclusive power to the Security Council.\footnote{Supra note 41 at 279.} McDougall suggests ‘that the ability of the five permanent members of the Security Council to exercise their veto is a necessary component of the \textit{compromise} solution that is to be successful’.\footnote{Ibid., at 280.} The present writer joins in disagreeing with McDougall on this view. The deplorable note of stronger permanent members of the Security Council against the rest of the world is too loud to bear. The rest of the world is urged instead not to bow to the alleged demand of real politicking, but to work for a peaceful world where aggression will be punished by the Court without the Security Council or anyone having power of predetermination.

A pragmatic way of excluding the predetermination power of the Security Council is to amend Article 5(2) of the ICC Statute, expunging therefrom any reference to the UN Charter. This will make it clear that the Security Council has functions of a political nature assigned to it, whereas the ICC exercises purely judicial functions. Also Article 2 of the ICC Statute should be amended to break the relationship between the UN and the ICC and make the ICC an independent international legal person.

\textbf{B. Non-proscription of Weapons of Mass Destruction (WMD)}

The ICC Statute prohibits weapons, projectiles, materials and methods of warfare which, by their nature, can cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles, material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the statute. This is to be done by an amendment in accordance with the relevant provisions of Articles 121 and 123 of the statute.\footnote{Art. 8(2) (b) (XX) of the ICC Statute.} The Annex required to be

\begin{footnotesize}
\begin{enumerate}
\item Supra note 41 at 279.
\item Ibid., at 280.
\item Art. 8(2) (b) (XX) of the ICC Statute.
\end{enumerate}
\end{footnotesize}
added to the Statute making a comprehensive list of prohibited weapons has not been made till date, so the proscription of WMD remains inchoate. This raises the issue as to whether the statute is well poised to handle the deadliest forms of threat to global peace and security in the twenty-first century. Kriangsak Kittichaisaree observes that this prohibition is beyond doubt a rule of customary law. He adds that:

The problem, nevertheless, is that at present the international community of nations has not been able to universally endorse a comprehensive ban on the use of the most obvious candidate for this prohibition – nuclear weapons, chemical and biological weapons and anti-personnel landmines, among others.\(^{51}\)

In the more pessimistic view of Antonio Cassese, ‘it is extremely unlikely that such amendment will ever be agreed upon’.\(^{52}\) The failure of the First ICC Review Conference (2010) to adopt the required Annex dramatically answers the scepticism of Cassese. The ICC Statute has thus failed to incorporate provisions that are meaningful and relevant to modern armed conflicts. As things stand now, the ICC Statute governs nineteenth, but ignores twenty-first century war technology. It is submitted that any general prohibition of weapons which by their nature can cause superfluous injury or unnecessary suffering or that are inherently indiscriminate must eventually contemplate WMD. This has always been a concern to some, if not all, of the world powers, who seem to be afraid of losing their right to modern war technology. Whenever you hear the UN or the US with Britain or France warning Iran or North Korea not to proliferate nuclear war technology, know that one war power is afraid of losing monopoly of modern war technology to another. I do not know why they are inventing and gathering these deadly weapons, who they want to use it to kill. Their actions threaten our world. Actually, it is not the UN or the US that should carry propaganda on WMD, it is the ICC that should prosecute and punish those who make wars by unconventional means and methods. The failure to proscribe WMD lays the ICC Statute open to ridicule. The statute prohibits bullets which expand or flatten in the human body, but not WMD. This is absurd. The next Review Conference is hereby urged to draw up a comprehensive prohibition of WMD for inclusion in the Annex to the statute. The list must include

\(^{51}\) Supra note 18 at 180.

\(^{52}\) Supra note 19 at 60.
nuclear weapons, chemical and biological weapons and anti-personnel landmines, among others.

**C. Non-Proscription of International Terrorism**

International terrorism is the use or threat of violence to intimidate or cause panic, especially as a means of affecting cross-boundary political conduct. Terrorism is not a composite of the several distinct offences already proscribed under the statute. It has distinct *mens rea* not already captured in other specific international crimes to wit: the intention to use violence or threat of it to terrorize or intimidate the public, especially for political purposes. It is notorious that one man’s terrorist is another man’s freedom fighter. Nelson Mandela would once have been termed a terrorist. Same goes for the Mau-Mau fighters in colonial Kenya. But recent developments like the September 11, 2001 attack in the US and the bombing of the UN house in Nigeria on August 26, 2011, now clarify the distinction between terrorism and freedom fighting. We do not think anyone will characterize the activities of the *boko haram* in Nigeria or of *al-shabab* in Somalia as freedom fighting. Anyone who is fighting for freedom should be able to come out openly, state their grievances and utilize the conventional means and methods of fighting. If on the other hand you are fighting as a faceless group, wasting innocent lives and burning down government institution and religious houses for no known cause you will rightly be called a terrorist.

States have their various laws on national terrorism like the (Nigerian) Prevention of Terrorism Act 2011. But the ICC Statute does not proscribe international terrorism which is about the gravest crime being committed everywhere in the world today. This raises the issue as to whether the ideology of the statute is in tandem with the present reality of global security, or whether it actually addresses the real security concerns of the people of the world today. It is imperative to include international terrorism as a core crime in the ICC Statute. This is one of the most heinous crimes that strike at the heart of global peace and security. Its indiscriminate nature claims the lives of innocent, unsuspecting victims. The Rome Conference of 1998 seriously considered including the crime within the statute and placed it in Resolution E as part of the Final Act of the Conference, which the Review Conference may later consider including within the ICC’s jurisdiction. But the First Review Conference, 2010 did not complete this inclusion. Essentially the reason behind resistance to the inclusion is the fear of politicization of the ICC. The League of Arab States opposed the inclusion on the ground that the international community has not yet been able to define ‘terrorism’ in such a way as to be generally acceptable.
This fear of politicization is not real. International terrorism is by no means more political than aggression nor any other international crime under the ICC jurisdiction. As for definition, Article 1(2) of the Convention for the Prevention and Punishment of Terrorism of November 16, 1937 defined terrorism as:

Criminal act directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or to the general public.\(^{53}\)

General Assembly Resolution 53 on “Measures to Eliminate Terrorism” adopted on December 11, 1995 adopts implicitly and improves on the definition of terrorism quoted above, and reiterates that:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.\(^{54}\)

The latest multilateral effort to define ‘terrorism’ in an international agreement appears in Article 5 of the UN Convention for the Suppression of Terrorist Bombing 1998. It provides:

Each state party adopts measures as may be necessary, including where appropriate, domestic legislation to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.\(^{55}\)

The quoted paragraphs represent giant strides in providing a generally acceptable definition of international terrorism. This crime is long-overdue for inclusion within the ICC jurisdiction. It is urged that the next Review Conference of the ICC should move the crime from Resolution E into the Statute as a core crime. The

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53 This provision never entered into force. See *League of Nations Publications* C.94.M.47.V.
54 *UN Doc. A/RES/5/53.*
Review Conference should build upon the quoted definitions in distilling the definition of international terrorism and formulating the elements of the crime. The definitions may not be perfect, but at least they can serve as a guide to the meaning and elements of the crime sought to be proscribed. Everyone knows it is both desirable and feasible for the ICC to exercise jurisdiction over international terrorism. But the political will to adjust national or group behaviour or interests for global security is lacking.

Terrorism has taken a drastic dimension in the world today. The insurgence of al Qaeda, al-shabab, ansar al-dine, boko haram, etc., and the July 22, 2011 bombing of the office of the Prime Minister of Norway are recent worrisome dimensions to terrorism. They demand immediate inclusion of the crime in the ICC jurisdiction. Giving the ICC active jurisdiction over international terrorism should be the natural reaction to incidents like the bombing of the UN House in Abuja. The UN works globally for peace, security and international cooperation and an attack on the UN is, in the words of William Hague, an attack on these principles.56 UN Secretary-General Ban Ki-Moon calls it an assault on those who devote their lives to helping others.57

D. Independence of the ICC and Security Council’s Power of Deferral

The statute gives the Security Council a role in terms that violate international law, which may thwart the generality of application of its principles and lead to miscarriage of justice. The Council has power to refer situations to the ICC, to defer investigation or prosecution at the Court, and set conditions for the exercise of the Court’s jurisdiction over aggression. All these when some permanent members of the Council like the US, Russia and China are not ready to ratify the statute. This raises the issue as to the independence of the ICC.

Article 16 of the Statute gives the Security Council power to defer investigation or prosecution at the ICC. It provides thus:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months

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56 UK Foreign Secretary William Hague, Quoted in D’Banj and Mo’Hits, ‘UN House in Abuja Bombed!’ Available at www.perculiarinternationalmagazine.org, p. 4. Last accessed on August 26, 2011.

57 UN Secretary General, Ban Ki-Moon’s reaction to the bombing of the UN House in Abuja, quoted ibid., at 5.
after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

This provision contains no limit as to the number of possible renewals the Council can make. In effect, the Council can bar the ICC prosecutor permanently from conducting an investigation or prosecution. Through this provision the ICC Statute accepts that justice through the Court could undermine international peace and security. With this provision in force the ICC will never be independent. It will always work in line with the whims of the Security Council which may at all times defer investigation or prosecution of its members and allies. Article 16 should be expunged from the Statute at the next Review Conference so as to arrest the threatened primacy of the Security Council over the ICC. Article 16 does not only negate the doctrine of separation of powers, it undermines the human rights of the parties before the Court. It abrogates the rights of the parties to have their cause heard. It perpetuates impunity of the offender. It will be contrary to rule of law if the ICC system does not leave the discretion to investigate or prosecute a situation solely with the prosecutor, but makes it somewhat dependent on political decisions. The power of the prosecutor to institute or undertake criminal proceedings or to discontinue it at any stage should be subject only to his conscience and good faith. In its exercise, the prosecutor should only be required to have regard to the public interest, the interest of justice and the need to prevent the miscarriage of justice.\footnote{\textsuperscript{58} This is also the position in national systems. See in the case of Nigeria, \textit{Diepreye Alamieyesigha v. Federal Republic of Nigeria} [2006] 16 Nigerian Weekly Law Reports (NWLR) (Pt. 1004) 1 Court of Appeal (CA).}

\textbf{E. Fusion of Investigation and Prosecution Powers in the ICC Prosecutor}

Articles 15 and 42 of the ICC Statute fuse the investigation and prosecution roles in the ICC prosecutor. These roles are mutually exclusive. Their fusion in one body raises issues of bias and partiality of the Court. The fusion also touches and concerns the presumption of the innocence of the accused person. Concern over this fusion reflects, at least in part, this author’s background as a lawyer of common law provenance. A civil law practitioner would likely not be bothered by this as judges in some civil law countries investigate cases as part of their adjudicatory function. Be that as it may, the statute adopts adversary, not inquisitorial criminal
procedure\textsuperscript{59} and should fine-tune the system at the Court in line with the trend in the adversary traditions where investigation and prosecution powers are separated.

The ICC procedure should be restructured to separate the powers. Separation has fundamental advantages over fusion. If, for instance, the prosecutor’s mind is biased at the investigation stage the bias may be carried through to prosecution to the detriment of the suspect. If the prosecutor has strong convictions concerning the result of his investigation this will ossify at prosecution and prejudice the accused person’s right to presumption of innocence.

In the major national systems operating common law, like Nigeria, the roles are separated with the police investigating and the Attorney General prosecuting. In England and Wales, the police investigate and the Crown Prosecution Service (CPS) prosecutes. In the US, the prosecutor does not initiate his own investigation. He relies on the result and the evidence collected through police investigation. Separation of these roles is less pronounced in civil law countries, yet major national systems operating the latter tradition endeavour to separate the roles. In Germany, for instance, the police investigate crimes—a role auxiliary to the ensuing prosecution by the prosecutor.

The fusion of investigation and prosecution roles at the ICC is a fundamental procedural defect. The next Review Conference should separate the roles in line with what obtains in the national systems. A body responsible for international criminal investigation should be established for the ICC. The body should be able to make balanced investigation of situations and come up with incriminating as well as exculpating information. The investigator should be independent of the prosecutor. The prosecutor should step in only after investigation and use the result of the investigation for prosecution. The work of the investigator will help the prosecutor to perform his duties in an objective manner. Objectivity demands that the prosecutor actively utilizes incriminating as well as exculpatory evidence at trial. This approach will safeguard the guaranteed right of the accused to fair trial and presumption of innocence and reduce the chances of bias on the part of the prosecutor.

\textsuperscript{59} See Arts. 62 – 76 of the Statute.
F. Undue Focus of the ICC on Africa

The operations of the Court seem unduly focused on Africa, overlooking or condoning similar crimes committed in other parts of the world. This raises the issue of whether the ICC is western imperialism in disguise. Africa is worried, justifiably, that the continent seems to be the target of the ICC. All the seven situations under investigation and prosecution so far by the ICC are in Africa—the DRC, Uganda, Central African Republic, Sudan, Kenya, Libya and Ivory Coast. Only Africans (including three Presidents of states: al-Bashir of Sudan, former Ivorian President Laurents Gbagbo and now deceased Muammmah Gaddafi of Libya) have been indicted in the twelve cases so far instituted at the ICC. This is so despite the fact that acts similarly amounting to international crimes have been committed in other parts of the world in the lifetime of the ICC. President George W. Bush led the coalition of the willing that committed international crimes in Iraq in 2003. President Vladimir Putin led Russia to commit international crimes in the war against Georgia in August 2008. Why have these Presidents of states not been indicted like their counterparts in Sudan, Ivory Coast and Libya? The Court has double standards. That is why. That is what raises fear of hidden objectives other than international criminal justice. Africa fears that the ICC is western imperialism in disguise. To buttress this fear, the League of Arab Nations joined voice with Africa to condemn the ICC indictment of al-Bashir. Likewise, the African Union condemned the warrant of arrest against now deceased Muammmah Gaddafi. The ICC does not seem to be doing much to dispel the palpable suspicion and fear of bias against Africa.

To play its role in maintaining global security, the ICC should expand its operations to other parts of the world and do so objectively. The Court should investigate and prosecute the crimes against humanity committed in the invasion of Iraq by the coalition of the willing in March 2003. It should investigate the same crimes committed in the Russian war against Georgia resulting from Georgian invasion of South Ossetia and Abkhazia in August 2008 and the chronic armed conflicts between Israel and Palestine. If the ICC proceeds with the arrest of al-Bashir, let it also arrest Bashar al-Assad for committing similar crimes in the on-going armed crackdown on protester in the uprising in Syria. Let the ICC Statute be applied generally and equally to everyone everywhere in the world. Focusing unduly on Africa alone will only polarize the world and nibble at global peace and security.
G. Evisceration of State Sovereignty and International Totalitarianism

Even if the ICC is not western imperialism in disguise, one can express genuine fear that it concentrates a key power in an institution and by so doing eviscerates the sovereignty of states, especially weaker states, in Africa or otherwise. A situation where the ICC can indict and possibly prosecute a sitting President of a state marks a radical departure from what international law and relation used to be. More importantly, the location of such power in one global institution portends ill by making it a tool potentially for totalitarianism on a global scale. Most institutions are ultimately amenable at some point in their history to abuse, none perhaps more so than criminal courts. As we speak, every tyrannical regime from Russia to Myanmar readily resorts to the criminal justice process to stifle opposition. The ICC’s potentials for such abuse on a global scale cannot be gain-said.

4. Conclusion

A great majority of people in the world will crave peace and orderly existence but there seem to be strong socio-political or ideological factors perpetuating continual terror, war, strife and discord across the globe today. The pre-2002 legal and institutional framework adopted by the international community for ensuring global security became obviously ineffective, necessitating the establishment of the ICC by the Rome Conference. There is hope that the ICC will play a significant role in restoring global peace and security. But that hope will be realized only if the salient issues identified in this paper are resolved, ideally by consensus of the world political leadership according to law.
UNDERSTANDING AND APPLYING THE PUBLIC INTEREST OVERRIDE TO FREEDOM OF INFORMATION EXEMPTIONS: GUIDELINES FROM INTERNATIONAL BEST PRACTICES

Abstract
Nigeria joined the league of progressive States in promulgating a Freedom of Information Act in 2011, which seeks inter alia to make public records and information more freely available, and to protect public records and information to the extent consistent with the public interest and protection of personal privacy. In line with the objective of protecting public records, the Act incorporates exceptions as to documents that are not subject to disclosure under the FOI Act. This is intended to cater to legitimate secrecy interests of the State while at the same time not denying the public’s need or right to know. These exemptions are made subject to the “Public Interest” test or override. This test has never been legislatively defined in any FOI Act and is usually left to the discretion of the public authority. This article attempts to critically examine the public interest test as it has operated in other jurisdictions as well in order to facilitate the understanding of its application for policymakers, lawyers, the judiciary called upon to review a denial of access to information, and the general public desirous of gaining access to public information.

1. Introduction
Freedom of information has been recognized as a fundamental human right, bedrock of rights and an essential aspect of the right to freedom of expression. The importance of the right to freedom of information has resulted in promulgation of freedom of information legislation in many countries of the world as well as constitutional provisions implicitly recognizing this right and making provisions for its enforcement. Nigeria joined the league

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*Nonso Robert Attoh & Chioma Nwabachili, Lecturers, Faculty of Law University of Nigeria, Nsukka.
1 UNGA Res 59(1) 1946.
2 Ibid.
of progressive states with a Freedom of Information Law when
the Nigerian Freedom of Information Act received presidential
assent on May 28 2011.

Freedom of Information legislation have been in existence
for over 250 years beginning with the Swedish legislation. Also
attempts have been made by international organisations to develop
a model Freedom of Information Law and also to define the
essential features of a good Freedom of Information Law.\(^4\)
Therefore the Nigerian law was modelled on the freedom of
information legislation existing in some countries of the world.\(^5\)

One of the principles recognized as a feature of a good freedom of
information legislation is the principle of limited scope of
exceptions which stipulates that exceptions to the right of access
to public information should be clearly and narrowly drawn and
be subject to strict ‘harm’ and ‘public interest’ tests.\(^6\)

This principle reflects the underlying conflict between the
need to cater to legitimate secrecy interests of the State and the
public’s need or right to know. Exemptions are necessary to
ensure that government is not under a legal obligation to disclose
information that would harm essential government interests.
Equally to allow broad and undefined exceptions to the right to
know would defeat the objective of the freedom of information
and leave the government with wide latitude to deny request for
information on flimsy grounds, thus the ‘harm’ test or the ‘public
interest’ test. The Public interest test is a common feature of
Freedom of Information laws deriving from the Model Freedom
of Information Law drafted by an organisation called ‘Article 19.’
Article 22 of the Model freedom of information Law reads:

Notwithstanding any provision in this Part, a body may not
refuse to indicate whether or not it holds a record, or refuse to

\(^4\) Article 19, The Public’s Right To Know: Principles on Freedom of Information
Legislation, (London: 1999), A Model Freedom of Information Law, (London:
2001).

\(^5\) As at 2006, nearly 70 countries around the world had adopted comprehensive
Freedom of Information Acts to facilitate access to records held by
government bodies and another fifty have pending efforts see D. Banisar,
Freedom of Information Around the World 2006, available at
on 20 October 2011.

\(^6\) Ibid., ‘The Public’s Right to Know: Principles on Freedom of Information
Legislations”, Principle 4,
communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.\textsuperscript{7}

Thus the concept of public interest test is a universally acknowledged principle underlying all freedom of information legislation, though subject to different interpretations in different jurisdictions. Even though in this work, we draw examples from few jurisdictions (New Zealand and Australia), the practices and interpretations are almost universal and may be seen as best practices at least within the Common law jurisdiction to which Nigeria belongs. The Nigerian Freedom of Information Act follows the globally accepted practice and provides for the ‘public interest’ test. Thus the following exemptions in the Act are all subject to the ‘public interest’ test.

1. Defence and international affairs exemption;\textsuperscript{8}
2. Law enforcement and investigation exemption;\textsuperscript{9}
3. Personal information exemption;\textsuperscript{10}
4. Third party information exemption.\textsuperscript{11}

The Act also recognizes a public institution’s right to deny requests for information relating to the test questions, scoring keys and examination data used by them for administering examinations or determining the qualifications of an application for a licence or employment and similar information. This exemption is also subject to the ‘public interest’ test.\textsuperscript{12} It is worthy to note from the outset that the test of public interest will only come into play where first of all, the information being requested falls within any of the above exemptions under the Act. The Act however leaves out two exemptions without expressly subjecting them to the ‘public interest’ test. These are the professional and statutory privileges exemption\textsuperscript{13} and course or research material exemption\textsuperscript{14}. The rationale for not subjecting these exceptions to the usual test of ‘public interest’ is not apparent from the Act especially as these exceptions are regarded as qualified

\textsuperscript{8} Freedom of Information Act 2011, s. 11(2).
\textsuperscript{9} Ibid, s. 12(2).
\textsuperscript{10} Ibid, s. 14(3).
\textsuperscript{11} Ibid, s. 15(4).
\textsuperscript{12} S. 19(2).
\textsuperscript{13} S. 16.
\textsuperscript{14} Ibid, s. 17.
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Exemptions in other freedom of information laws and subject to the ‘public interest’ test.

The Act also makes provisions for what may be referred to as absolute exemptions for published materials available for purchase by the public, library or museum materials kept solely for public reference or exhibition purpose and materials placed in the National Library, Museum or non-public sections of the National Archives on behalf of private persons or organisations other than government or public institutions.15 The Act does not apply to such information and any public institution receiving a request for such information can outrightly reject the request without applying any public interest test.

The Act also provides that one of the grounds on which the Court can order an institution to disclose information after it has denied the application for information is, where the Court makes a finding that the interest of the public in having the record being made available is greater and more vital than the interest being served if the application is denied.16 Having recognised the centrality of the ‘public interest’ test in the effective administration of the freedom of information regime, the need for a proper understanding of the meaning of the phrase, the various aspects of the public interest and the factors that should be considered in coming to this finding cannot be over-emphasized. This is more cogently reinforced by the realization that most litigation surrounding the freedom of information requests would revolve around refusals to disclose information which would stand or fall on the requirement of ‘public interest.’ This article therefore attempts to throw light on this all important aspect of the freedom of information Act, highlighting its importance to lawyers, policy administrators, judges and even the public interested in access to public information and record.

2. Meaning of ‘Public Interest’

Freedom of Information legislation, deliberately do not define ‘public interest’. This is in recognition of the fact that public interest would vary with time and the circumstances of each situation. This failure to define it categorically therefore allows individual determinations to be made with regard to the specifics of each case. At general law, public interest’ is wide and expansive and according to Lord Hailsham, “categories of public

15 Ibid, s. 26.
16 Ibid., s. 25(1)(c).
Thus public interests cover a wide range of situations and interests which are not static, but are dynamic and evolving continually with the progress and development of every society. That is the reason why, the courts have held that questions to be considered in identifying the public interest are inevitably subjective.\(^{18}\)

According to the Black’s dictionary, public interest is:

1. The general welfare of the public that warrants recognition and protection.
2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.\(^{19}\)

Public interest has been described as “a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and the wellbeing of its members.\(^{20}\)” The Office of the Information Commissioner Queensland defines it as follows:

The ‘public interest refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public Interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit.\(^{21}\)

In the United Kingdom’s Information Commissioner’s Office Guidelines, it is simply defined as ‘something that serves the interest of the public’.\(^{22}\)” From the above definitions, a common thread that is identified in the concept of public interest is the notion of well-being or general welfare of the public and the promotion of good order and functioning of community and governmental affairs. Therefore the concept of ‘public interest’ refers to matters which foster the good order of society, as well as the well-being or welfare of citizens and which the public has a stake in ensuring its existence and which merits legal regulation


\(^{20}\) *Director of Public Prosecution v. Smith* 199111 VR 63 at 75.


\(^{22}\) Ibid.

and recognition. The courts have held that public interest does not mean the same thing as that satisfies curiosity or merely provides information or entertainment. For a matter to be in the public interest it must be relevant for maintaining the good order and welfare or well-being of the public. It has also been held to be distinguishable from "what is of interest to the public to know".

The court differentiated the two ideas as follows:

Similarly it is necessary to distinguish between ‘what is in the public interest and what is of interest to know’... The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and governmental institutions tacitly accepted and acknowledged to be for the good order of the society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.... There are several and different factors and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public it follows that such form of interest per se is not a facet of public interest.

In essence, events which are in the interest of the public to know are merely events which attract public attention and may or may not be for the benefit or wellbeing of the public. Thus, where it merely attracts attention without more, it will not be sufficient to override the exemptions clearly enacted for withholding information under the Act. In Australia, the courts have held that the concept of public interest is not synonymous with the interest of government and may also in certain cases embody the public concern for the right of an individual.

Many Nigerian statutes incorporate the idea of public interest without necessarily defining what is meant by the concept. Others simply give specific instances of what constitutes public interest in the context of the particular Act. For example the

23 R. V Inhabitants of the County of Bedfordshire (1855) 24 L.J.Q.B. 81 at 84 Per Lord Campbell LJ.
24 Lion Laboratories Ltd V. Evans’ (1985) QB 526 at 533 Per Griffith LJ.
26 Harris v Australian Broadcasting Corporation (1998) 78 ELR 236.
27 Re Bartlett and the Department of Prime Minister and Cabinet (1987) 7 AAR 355.
Preamble to the Land Use Act provides that whereas it is in the public interest that the right of all Nigerians to the land of Nigeria be asserted and preserved by law; and whereas it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved.

Thus, under the Land Use Act, there is a public interest in recognizing and preserving the right of all Nigerians to the land of Nigeria by law and similarly protecting and preserving the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits of the land in sufficient quantity to enable them to provide for their individual sustenance and that of their family. This is the particular public welfare and well being or public interest identified in the context of the Land Use Act. This is a particular instance of public interest defined by our statutes.

Order 1 Rule 2 of the Fundamental Rights Enforcement Rules 2009 (as amended) provides that “Public interest” includes the interest of Nigeria society or any segment of it in promoting human rights and advancing human rights law.” This definition under the Fundamental Rights Enforcement Rules also does not delineate the parameters for determining public interest but also identifies one instance of public interest which is the promotion of human rights and advancement of human rights law by the Nigerian society. It achieves this by the use of the legislative device “includes.” Another instance is provided by the Land Use Act in section 28 also defines overriding public interest as it relates to the specific cases of customary and statutory right of occupancy. The same situation obtains in respect of Nigerian case law, which has so far not yet made a pronouncement on what amounts to public interest and only defined public welfare in the case of Kabirikim v Emefor.28 The court in that case while interpreting the Commission of Inquiry Law Cap. 25 Laws of Northern Nigeria 1963, held that “Public welfare means a society’s well-being in matters of health, safety, order, morality, economics and politics”.29

In a freedom of information context, it has primarily been held that in a representative democracy, the citizens have a right

28 (2009) I4NWLR (Pt. 1162) 602 SC.
29 Supra, p. 641.
to seek to participate in policy formulation on any issue of concern to them. Therefore, FOI legislation are important in that they provide the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right. This implies that there is a public interest in access to government information *per se*. The public’s wellbeing and welfare in democratic participation is thus served by access to government information.

Therefore in the light of all the above explanations, it is our humble submission, that in the Nigerian context, public interest would cover the need to protect the rights guaranteed to the individual by both national and international legislation, fight the cankerworm of corruption and terrorism, ensure access to government information, enhance the development of the economy and ensure the smooth and effective running of government. It is also our view that Chapter 2 of the 1999 Constitution providing for the Fundamental Objectives and Directive Principles of State Policy is indispensable to a proper understanding of what constitutes ‘Public Interest’ in the Nigerian context. We will now examine other jurisdictions that have operated a Freedom of Information Law to see this concept in operation.

3. **Practical Guidelines from other Jurisdictions**

The exemptions contained in any Freedom of Information Act are either absolute exemptions or qualified exemptions. Absolute exemptions are cases where the right to know is totally and wholly displaced. Qualified exemptions are instances where a public authority, despite having identified a possible exemption, must still consider whether there is a greater public interest in providing the information to the applicant or in maintaining the exemption.

Where a qualified exemption applies to information that has been requested, the public institutions are required to carry out a ‘public interest’ test. This test requires weighing the public interest considerations in favour of disclosing the information and the public interest consideration in favour of protecting it from disclosure. Whenever the public interest in withholding the information outweighs that of disclosing it, it is then validly withheld. The courts have held that:

*The public Interest is not one homogenous undivided concept. It will often be multi-faceted and the decision maker will have to consider and evaluate the relative weight of these facets*
before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that “the public interest” can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or international obligations may be of overriding significance when compared with other considerations.\footnote{Mckinnon v Security Department of Treasury [2005] FCARC 142, per Tambalin J.}

The expression “in the public interest” has been held to “impart a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope or purpose of the statutory enactment may enable”.\footnote{O Sullivan v Farrar (1989) 168 CLR 210 at 216.} It is submitted that to aid the public official in making this discretionary value judgment, the decision maker may receive guidance from international materials where elements of public interest have been identified in a variety of contexts. This is without prejudice to the overriding importance of the decision maker being socially aware and conversant of the prevailing socio-economic circumstances of his particular environment (in this case Nigeria), which will circumscribe and define matters that are for the welfare of the public and also serve as a yardstick in measuring the relevance of foreign materials.

Foreign jurisdictions recognize certain factors as relevant in determinations of what constitutes public interest. Some of those recognised are as follows:

1. Public participation in government: This factor becomes relevant if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority or encourage participation in public debates.

2. Government accountability: Disclosure in this context promotes accountability and transparency by placing an obligation on authorities and officials to provide reasoned
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explanations for their decisions, in order to improve the quality of decisions and administration.

3. Promoting accountability and transparency in the spending of public money:
   a. The disclosure of information may lead to greater competition and better value for public money. It may also assure the public of the personal probity of elected leaders and officials.

4. Public awareness: There is public interest in allowing individuals and companies to understand decisions made by public authorities affecting their lives, to know the reasons for the decisions and, in some cases, assisting individuals in challenging those decisions.

5. There is public interest in bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.

6. Special interest of class (Justice to an individual): This includes the public interest in the right of individuals to have access to records, of community members being provided with ways to ensure the accuracy of personal information held by the government, of individuals receiving fair treatment in accordance with the law in their dealings with the government, and in the right of individuals to pursue legitimate private rights and interest.  

There are also factors that can favour non-disclosure. These include:

1. Potential damage to community interests;
2. Protecting Private interests (Fairness to an individual); and
3. Need to avoid serious damage to the proper working of government at higher levels.

Factors which are irrelevant include:

1. The possible embarrassment of Institutions or other officials;


33 Ibid.
2. The possible loss of confidence in Institutions or public authority;
3. The seniority of persons involved; and
4. The risk of an applicant misinterpreting the information.\textsuperscript{34}
5. The overtly technical nature of the information.\textsuperscript{35}

In relation to possibility of criticism and embarrassment consequent on disclosure the court in Australia held as follows:

It may be sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be relevant detriment to the government that publication of materials concerning its action will merely expose it to public discussion and criticism. It is unacceptable that there should be a restraint on the publication of information relating to government, when the only evil of that information is that it enables the public to discuss, review or criticize government actions.\textsuperscript{36}

In relation to the risk of an applicant misinterpreting the information, the Australian court held that such claims are ...based on rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it, and can judge what is necessary or unnecessary in democratic society.\textsuperscript{37} According to the court, it is best left to the judgment of individuals and the public generally as to whether information is too confusing to be of benefit or whether debate is necessary.\textsuperscript{38} The court simply said that the government is not in the role of a patriarch nor of a special superior class and should not assume it is in the best position to determine what is confusing or not, but should leave such decisions to the individual or to the public.

The New Zealand Ombudsman has provided certain practical guidelines for making public interest determinations

\textsuperscript{34} Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002.

\textsuperscript{35} Coulthart and Princess Alexandra Hospital and Health Services District (2001) 6 QAR 94

\textsuperscript{36} Commonwealth of Australia v John Fairfax and Sons Ltd. [1980] 147 CLR 39 at 51.

\textsuperscript{37} Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60.

\textsuperscript{38} Ibid.
which we have modified to fit into our own freedom of information Act. The guidelines provide step by step procedure to be followed by a decision maker in arriving at a determination of the public interest to be given priority in any freedom of information request. It provides that for an agency to answer the question of public interest it would have to take the following steps:

(1) Identify whether one of the grounds for exemption set out in the Act applies to the information at issue.\(^\text{39}\)

(2) Identify the considerations which render it desirable, in the public interest, for the information to be disclosed.\(^\text{40}\) The guideline lists the following factors that can often assist an agency in identifying those considerations which favour the release of information:

a. The content of the information requested. What does the information requested actually say? Is the content of the information such that its release would, in some way, promote the public interest?

b. The context in which that information was generated. Such background information if released will often enable the public to participate in the decision making process.

c. The purpose of the request. Although a requester is not required to explain his or her purpose in requesting information, knowing why the information is required by the requester is often helpful in identifying the considerations favouring disclosure of the information and assessing whether those considerations outweigh the interest in withholding the information.

(3) Assess the weight of these competing considerations and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information. If an agency, after identifying and weighing these competing interests, finds them to be evenly balanced then the information

\(^{39}\) For example, the relevant exemptions under our law are defence, international relations, personal information, law enforcement and administrative enforcement proceedings, commercial information etc and these are the relevant public interests to weigh against other considerations favouring release.

\(^{40}\) We have examined some of these interests earlier as including public awareness, transparency and accountability of government, accountability in spending public funds etc.
at issue should be withheld. An agency will need to consider how the public interest is best served. Are the considerations favouring disclosure of the information such, that the public interest would be best served by disclosure of the actual information requested? While there may be a public interest in release of some information about a particular situation, this may not necessarily be met by release of the particular information requested. There is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits”.

It is clear therefore that there is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits and calls for exercise of discretionary value judgment. This has led to the recognition that it requires a certain level of skill to make the determinations that stand the test of reasonableness. Accordingly, “... it (public interest) is a test that must be applied by an adjudicator who has no interest in the outcome of the proceeding and who is skilled by professional experience in weighing ... one against another.”

This calls for every institution to put a procedure in place that will make possible an objective evaluation of any request for information. However each determination should still be made on its own merit and must take into account different relevant factors that may influence the decision. This also calls for highly skilled and professionally experienced public officials to be involved in these determinations. This highlights the importance of proper training for staff in the operation of the Act as provided for in the Act itself as a duty that a person entitled can compel its performance through a court action. In the final analysis, it was held in Eccleston’s case that “It is inherent in the process of balancing competing interest that one or more interests whether public, individual or government interest, will in fact suffer some prejudice, but that prejudice will be justified in the overall public interest.”

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43 FOI Act 2011, s. 12.
44 Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60.
Those are true words, recognizing the conflicting interests which exist in the society and which can only be met by the fine art of social engineering and applying the principle of utilitarianism. That is the difficult task the public official is called upon to perform and he must not fold his hands and declare that he has been left with no guidelines to assist him. He must draw from his wealth of experience, his practical knowledge and he must derive assistance from such foreign materials where the public interest has been identified in various contexts.

4. **Illustrative Cases**

4.1. **Defence and International Relations Exemption**

In a UK case, the office of the Deputy Prime Minister was asked for a copy of the London Resilience Team Report which contains findings and recommendations for improving the emergency planning and response arrangements in London for coping with serious terrorist incidents. This request was refused on grounds of national security and defence and the denial was upheld by the ombudsman. Despite recognizing the very strong public interest in matters that had the potential to cause harm to the security of London and the importance of such independent scrutiny in holding the government to account, it was found that the benefit of disclosure was outweighed by the harm that would be caused to security. Such release of the information could allow terrorists access to information about weaknesses and vulnerabilities of London to respond to a terrorist attack.

4.2. **Personal Information**

In another case, a journalist suspected that a university staff member was being paid by a university without having to perform any duties and he asked the university whether the staff member was receiving a salary and for details of her duties. The university refused the request on the grounds of withholding her personal information in order to protect her privacy. It was held on appeal to the Ombudsman that the public interest in the accountability of a public body overrode the staff member’s privacy interests.

In a case decided in Ireland, a requester sought access to the total expenses paid to each member of the Oireachtas in

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45 Case No. A.21/04.
46 No A6737.
relation to travel expenses, telephone and party expenses, secretarial and office administrative expenses and all other expenses paid as from April 1998. The office released information on an anonymous basis but argued that the identities of the members and how much each received was personal information which was entitled to exemption. The Irish information commissioner held that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy which the members might enjoy in relation to details of their expenses claims. He also held that a failure to disclose the requested information has the potential to damage public confidence in the integrity of members of the house.

In *Burke and Department of Families, Youth and Community Care*\(^48\) certain documents involving an Anglican Youth Service and the former Director of that Service was involved. The information sought was in connection to the former Director who had prior convictions for indecent dealings with young persons. The former Director was also acquitted of other charges relating to improper dealings with a young person. Based on this, the Information Commissioner considered the strong public interest in maintaining the privacy of the affairs of the Director and in ensuring that he was treated fairly in respect of allegations of wrongdoing which had not yet been proven in a court of law, and of which he had been acquitted in one respect. Balanced against that were also significant public interests favouring disclosure of the information like the protection of the welfare of children in care and children ‘at risk’ which was one of the most important responsibility of the state and which was undertaken by the respondent agency. Also the fact that there was a funding arrangement entered into by the agency with community service organisations such as the youth service, under which public funds were advanced to such organisations, imposed a duty to ensure that public funds were properly targeted to achieve the objects for which the funds were advanced. Thus disclosure of the information would serve the public interest in accountability for the discharge of the function of child welfare and child protection.

\(^48\) *Burke and Department of Families, Youth and Community Care; King (third party)* (1997) QICmr 19, (1997)4 QAR 205.
and promote informed scrutiny and debate on such issues of community concern. He thus concluded that the public interests both for and against disclosure was finely balanced, but that the public interest favouring disclosure was stronger and therefore disclosure was in the public interest.

In *NHL and the University of Queensland*, the request was made for documents relating to the handling by the respondent university of complaints of sexual harassment made by the applicant and others against an employee of the university. As regarding information which concerned the shared personal affairs of the alleged sexual harasser and the applicant, the Information Commissioner accepted that there was a public interest in a person whom has made a complaint of sexual harassment being given access to information which will provide an understanding of how the agency dealt with the complaint, the outcome of the complaint and the reasons for that outcome. Thus such information could be disclosed to the applicant.

However as concerning information which solely concerned the personal affairs of the alleged sexual harasser and information which concerned the shared personal affairs of the alleged sexual harasser and persons other than the applicant, he held that there was a strong public interest in preserving the privacy of individuals other than the applicant. There was also a public interest in the agency’s ability to respond constructively to incidents of sexual harassment. This ability would only have reasonable prospect of success if the process was kept confidential to the parties involved as disclosure under the FOT Act might discourage and prevent others from making legitimate complaints. Thus the weight of public interest did not favour disclosure of information which did not relate at all to the personal affairs of the applicant.

### 4.3 Commercial Information

In a case in the United Kingdom, a requester asked the Department of Transport to disclose the prices at which 27 British Rail businesses were sold to buyers in the private sector. The request was denied on the ground of third party commercial confidences and on another ground not contained in our Act. The ombudsman in his decision noted that:

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It is common ground that the public interest requires the details of the proceeds from the sales of assets formerly in public ownership should be made public. The question is when? I appreciate the department’s arguments that, where there remains to be sold businesses akin to those already sold, the premature disclosure of the selling prices achieved is capable of having a prejudicial effect on the negotiations for the sale of the remaining businesses.

Thus, where there was no similarity between the business sold and the businesses left to be sold, and so, where releasing the price would not prejudice future negotiations, the public interest recognised above prevails and the exemption would not apply.

In another case, a requester demanded access to certain records related to two companies involved in poultry processing. The Department of Agric and Food refused access on the ground of commercial information and on another ground. The information commissioner accepted that the records contained information which could damage the reputation and commercial interests of the companies. But he however found that there was significant public interest in the public knowing that the department carried out its regulatory functions in the area of health, food safety and the control of diseases. And therefore, the interest of the public, as ultimate consumers of poultry products outweighed any public interest in protecting the commercial interests of the companies.

In another United Kingdom request, the complainant requested details of service standards, waiting times and persons who gave up waiting at a specified post office. The Post-Office withheld information concerning service standards on the grounds of prejudice to commercial interests. The Information Commissioner agreed that the nature of the withheld information engaged the commercial interests of the Post-Office, which was increasingly losing its monopoly and was competing with other service providers. He recognised the public interest in the

openness and accountability of the post office in the use of public funds, but this was of a lesser weight as the information requested was not entirely useful or meaningful in assisting public understanding. Public interest against disclosure included the fact that the information would disclose marketing strategy used at post office service counters, the information could be used by competitors in a misleading way; disclosure could prejudice the marketing strategies of post offices in selling certain private sector goods and services.

4.4. Public Interest in a Particular Applicant Having Access to Information

In Pemberton and the University of Queensland, the Information Commissioner considered the possibility of the circumstances of an individual applicant raising the weight of the individual’s “need to know”, thereby making the public interest in the disclosure of documents to that particular applicant of determinative weight, depending on the factors favouring non-disclosure. It involved a claim by an academic for access to certain referee reports provided in connection with applications for promotion made by the requester. The Commissioner held that the provision that an applicant for access need not show a special interest in the information sought does not carry necessary implication that an applicant having a personal stake or involvement in the subject matter of particular documents, which is greater than other members of the public, has no greater right to obtain than anyone else. He decided that the public interest in a person having access to what is recorded against him or her is to be taken into account in determining the scope of the public interests involved. He concluded that:

Dr Pemberton is a researcher (and teacher) in a field of science (molecular microbial genetics) where progressive research is capable of producing significant benefits for the wider community. His duties include supervising research undertaken by graduate students in his specialist field. If senior academics, of Professorial calibre, hold opinions to the effect that Dr. Pemberton’s work on behalf of the university (and indirectly on behalf of the wider community has shortcomings, or needs to be redirected or improved in some way in order for him to be accessed as having made a sufficiently distinguished contribution to the university, and his academic discipline, as to make him worthy of promotion to professor, then I consider it to be not only in Dr Pemberton’s personal interest, but in the
wider public interest, that those opinions be conveyed to Dr Pemberton. Significant sums of public money are contributed to fund research of the kind in which Dr Pemberton is engaged, and to fund the employment of academics generally. **It is in the public interest that academics and researchers direct their efforts in a way that optimises the benefit to the wider community from the investment it makes in the tertiary education sector and in scientific research.**

In *Shaw v. The University of Queensland*, the requested documents related to disputes between some members of staff in a faculty at the University of Queensland. The Information Commissioner upheld the review decision to grant access to most of the documents to the requester. He regarded the decisive interest in this case to be the public interest in the requester having access to documents which concerned her as an individual, allied with the public interest in the fair treatment of an individual against whom allegations damaging to professional reputation and career prospects had been made. He rejected the claim that substantial adverse effect on the management or assessment by the university of its personnel could reasonably be expected from disclosure.

**4.5 Other Instances of Public Interest**

1. Public interest in not releasing list of questions and answers used by a regulatory agency in conducting a fit person assessment in respect of carers of children where the questions were intended to assess a person’s character and integrity, physical and mental fitness, qualifications, skills and experience as opposed to merely demonstrating knowledge by the applicant.

2. Strong public interest in enabling police officers to make comprehensive and unreserved statements to assist with the process of law and order. Release of witness statements, police internal reports and related letters would inhibit

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54 *Mrs S and the Scottish Commissioner for the Regulation of Care (Care Commission)*, Decision 007/2005.
officers’ and witness’ statements and be prejudicial to their function. Thus such disclosure is against public interest.\textsuperscript{55}

3. Considerable public interest in public having information about criminal acts committed by persons who have diplomatic immunity and publication of details of the countries involved may act as deterrent against commission of future offences. However prejudice to international relations with countries involved that may refuse to co-operate with authorities in the future would outweigh the public interest in disclosure.\textsuperscript{56}

4. It is contrary to public interest in the fair treatment of individuals, in cases of unfounded and damaging allegations of improper conduct, to prematurely disclose such allegations which had not been properly investigated. But where the public officer had been fairly treated procedurally and given opportunity to answer adverse comments, the public interest in fair treatment of individuals should be weighed against clear public interest in ensuring that allegations of improper conduct against government agencies and employees were properly investigated and appropriate corrective actions taken\textsuperscript{57}.

5. Significant public interest in enhancing the accountability of government agencies and officials in respect of performing their duties in dealing with proposals of large scale development which was likely to have substantial social, economic and environmental effects on an area. Such interest extends to reports of experts about the possible effects of such developments and also to factors which may have influenced government agencies and officials in deciding whether to approve a particular land use and what conditions should apply to that land use\textsuperscript{58}.

\textsuperscript{55} Mr Robert Bennett and Chief Constable of Grampian Police. Decision 018/2005.

\textsuperscript{56} Public Authority: Foreign and Commonwealth Office, FAC0069504, 05/01/06

\textsuperscript{57} Pope & Queens/and Health: Hammond and Robbins (Third Parties) [1994] QICmr 16, (1994) 1 QAR 616.

6. Public interest in a land owner being treated fairly in the course of government acquiring his property and as such disclosing to him information that would give him an opportunity to subject the agency’s valuation to detailed critical analysis is not against public interest\(^{59}\).

7. Public interest in applicant having information that would enable him/her pursue a remedy\(^{60}\).

8. Public interest in the rights of an individual\(^{61}\).

9. Public interest in disclosing information useful to taxpayers in seeking to comply lawfully with the requirements of Taxation Office\(^ {62}\).

10. Public interest in an individual having access to the substance of allegations made against the individual so as to enable the individual present his/her case in answer to such allegation. Also there is a public interest in a prisoner having access to documents relevant to his or her incarceration\(^{63}\).

11. Public interest in a person who complained to a government agency having access to documents relevant to that complaint\(^{64}\).

12. Strong public interest in protecting the privacy of victims of crime and their families especially in circumstances where the victim was a minor and the crime was of a sexual nature\(^{65}\).

13. Public interest in applicant checking to see whether records held about him were accurate and being able to correct any inaccurate or out of date information\(^{66}\).


\(^{61}\) *Re James* [1984] 6 AUD 687 at 701.


\(^{64}\) *Green and Parliamentary Commissions for Administrative Investigation* (1994) QICmr 15, (1994) 1 QAR 598


\(^{66}\) *Ainsworth v Department of Gaming and Racing District Court of NSW* (unreported) cited in M. Carter and A. Bannis, *Freedom of Information:*
14. Public interest in fair treatment being accorded to an applicant in a case where the university awarded him a doctorate degree 14 years after it was submitted and seven years after it had been initially rejected\(^{67}\).

15. Public interest in the office expenditure of the Prime Minister’s office in terms of total personnel salaries while withholding details of each individual employee’s salary to protect the privacy of such individuals\(^{68}\).

5. **Nigerian Freedom of Information Cases**

The Nigerian Freedom of Information Act has been in operation for a short period of time and has not yet generated very copious requests and court action in respect of denials of information. A few human rights organisations have, however, instituted action against public institutions and bodies on the refusal or neglect to provide requested information.

The first case on the FOI Act was filed by the Committee for the Defence of Human Rights against the Economic and Financial Crimes Commission seeking an order of Mandamus directing the EFCC to make available information to the applicant on the allegation that the leadership of the CDHR collected 52 million Naira from an unnamed suspect being investigated by the Commission.\(^ {69} \) In July 2011, the Federal High Court agreed with the Counsel to the CDHR, that the EFCC should disclose the source of its information\(^ {70} \).

Socio-Economic Rights and Accountability Project (SERAP) equally filed another suit\(^ {71} \) against the Petroleum Product Pricing Regulatory Agency and 2 others seeking for

\(^{67}\) Bennett v Vice Chancellor, University of New England [2000] NSW ADT 8.

\(^{68}\) Case No. W41517.

\(^{69}\) FHC/L/CS/784/201 J Unreported.


\(^{71}\) Suit no. FHC/CS/L/222/20 11 Unreported.
information on the details and basis of spending of the fuel subsidy in 2011.\textsuperscript{72}

In February 2012, the FHC in Lagos, granted leave to Socio-Economic Rights and Accountability Project (SERAP) to seek an order of Mandamus compelling the Federal Government to make available to it documents on spending of received public funds.

Two civil society organisations, Socio-Economic Rights and Accountability Project (SERAP) and Women Advocates Research and Documentation Centre (WARDC) also in 2012, sued\textsuperscript{73} the Governor of the Central Bank of Nigeria (CBN), Sanusi Lamido over a request for information relating to the spending on fuel ‘subsidy’ in 2011 and in particular, the authorisation of the sum of ₦1.26 trillion, paid by the CBN\textsuperscript{74}

In June 2012, the courts held, in a case filed by Legal Defence and Assistance Project (LEDAP) against the National Assembly leadership that the Act permitted the Non-Governmental Organisation to demand any public information such as the details of salaries, emoluments and allowances earned by the Legislators. It was held that the information was of public interest since the salaries, emoluments and allowances were paid from public funds. This was contrary to the previous decision of a Lagos High Court that salaries and emoluments of lawmakers were personal information not covered by the FOI Act.\textsuperscript{75}

This motley assortment of few cases will demonstrate the difficulties that can arise from applying the public interest test. The case between the CDHR and the EFCC best illustrates this. Ordinarily the EFCC could have justified its refusal to provide the

\textsuperscript{72} Available at http://saharareporters.comlnews-page/fuel-subsidy-spending-court-grants-permission-interrogate-government, last accessed on 15 July 2012.

\textsuperscript{73} Suit no. FH/IKICS/23//201 2 unreported.

\textsuperscript{74} Available at http://www.thenigerianvoice.com/nvnews/86833/1/court-to-hear-fuel-subsidy-suit-against-cbn-on-may.html, last accessed on 15 July 2012; http://leadership.ng/nga/articles/16825/2012/02 /20/serap_ sues_sanusi_over _fuel_subsidy_payment_document.html last accessed on 15 July 2012.

information on the grounds of it being a record compiled for law enforcement purposes which would unavoidably disclose the identity of a confidential source as provided under Section 12(1)(a)(iv). This would have raised very germane issues of the correct interpretation of the word “source”, the required confidentiality whether explicit or implicit and the nature of information entitled to the protection which is beyond the scope of this article and has been treated in another as yet unpublished work. Also the conflicting decisions on the request for lawmaker’s remuneration and allowances would not have occurred had the court been conversant with the case cited above regarding the Irish Members of parliament (Oireachtas)\(^76\)

6. Conclusion

It is our conclusion that public interest invariably changes with time and with changes in the conception of the society as to its interests and as to what would foster its welfare and order. It is dependent on a people’s level of development, education, culture and exposure. It would also differ in different geographical and cultural milieus. Thus what might fall under public interest in England, might not necessarily qualify as public interest in Nigeria. We therefore submit that it is important in a democratic dispensation like ours that is just setting out on the journey of information freedom, for the Attorney- General to publish guidelines identifying factors to be taken into consideration in making decisions about ‘public interest’ as it relates to the Act and should review and update these guidelines periodically as circumstances change. These guidelines will assist those involved in implementing the Act in making valid decisions of what constitutes public interest.

Such a guideline would also be of immense help to the judiciary called upon to judicially review a decision denying access to information and the public who will be bringing requests for information. This is even more compelling in view of the duty imposed by the Act on Public institutions to provide adequate training for its officials on the public’s access to information or record held by the government or public institutions.\(^77\) We would suggest that such guidelines need not reinvent the wheel as ample illustrations abound in our laws. Relevant considerations may include protection of proprietary rights of individuals, advancing human rights law and promoting human rights, government accountability and transparency in spending public funds, public

\(^76\) Note 37 above.
\(^77\) Freedom of Information Act 2011, s. 13.
awareness of government actions and reasons for them, and most importantly curbing corruption. Proper and adequate training should also be given to public officials who are involved in processing requests for information as provided for by the Act as determination of what lies in the public interest calls for exercise of discretion. This discretion can only be properly exercised by public official who possess certain skills.

Equally, Freedom of Information legislation are not self executing and can only become relevant when they are utilized by the public. It is therefore imperative that the informed public, mass media and academic community armed with examples that demonstrate public interest are emboldened to bring requests for information that will serve the public interest. In that way, the freedom of information regime would succeed in Nigeria.

Making decisions about public interest involves a discretionary judgment, which requires balancing various interests some of which are conflicting. The ability to do so successfully would depend on so many factors. The public officer must be armed with sufficient knowledge of typical situations engaging the public interest, and so must the lawyer and the judge. The words of Lord Hailsham remain apposite that “the categories of public interest are not closed”. We must discover with each situation our peculiar public interest which disclosure or withholding of information would serve in line with international best practices.

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78 Re Eccleson and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60, paragraph 46.
DEVELOPING A STATUTORY FRAMEWORK FOR ADR IN NIGERIA

Abstract
This article aims at examining the role of Alternative Dispute Resolution (ADR) mechanisms in the resolution of commercial disputes and strongly advocates for the enactment of laws to harmonize and facilitate the operations and use of these mechanisms in settling disputes in Nigeria. It was discovered that only arbitration and conciliation have got statutory framework in Nigeria. The practical implication of this state of affairs is that the use of other forms of ADR in Nigeria is not legally organized, coordinated and harmonized leading to a lacuna in the resolution of commercial disputes at the Federal level. The article demonstrates in a unique manner the importance of having a legislative framework for all forms of ADR in settling disputes and suggests practical ways to achieve this legislative framework.

1. Introduction
Dispute or conflict is part and parcel of human life, and must always be present. But they have to be resolved in such a manner as to ensure peace, stability, harmony and progress in all aspects of human society. The basic means of dispute resolution is through mutual negotiation, failing which the intervention of a third party ensues. A third party is either approached by the disputants or he intervenes *suo motu* (on his/her own accord) to help resolve the dispute. With the passage of time, this gave rise to court system and Alternative Dispute Resolution (ADR).

Alternative Dispute Resolution mechanism is a basket of procedures outside the traditional process of litigation or strict determination of legal rights.¹ It may also be elucidated as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.²

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This mechanism exists in different forms like arbitration, mediation, conciliation, negotiation, mediation-arbitration (med-arb), mini-trial, etc.

The good thing about ADR is its ability to give each party a sense of being right. People naturally dislike being told that they are wrong. This view is supported by some learned authors who maintain that while in any dispute, one party may be right and the other wrong, there could also be some element of right on each side; or one party may be morally right and another legally right; or genuine differences of perception or concepts may allow each to be right from different vantage points. ADR is as old as human history. Jesus Christ who lived more than two thousand years ago spoke in favour of settlement out of court. He said:

If someone brings a lawsuit against you and takes you to court, settle the dispute with him while there is time, before you get to court. Once you are there, he will hand you over to the judge, who will hand you over to the police, and you will be put in jail. There you will stay, I tell you, until you pay the last penny of your fine.

Also in the Holy Koran, there is a similar teaching by Prophet Mohammed.

The emergence of ADR has also been described as a legal transplant. This is because “the ADR movement that has recently developed in modern societies has been described as a return to a simple model of dispute settlement used in the past and in modern non-Western societies.” In Nigeria, only arbitration and conciliation have received statutory backing at the Federal level, whereas all the other forms of Alternative Dispute Resolution are gradually taking hold as means of resolving disputes. This is still mostly at the State level but even at that, the provisions of the

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4 Good News Bible, Mt. 5:25 & 26; Lk. 12; 58 & 59.
8 Although in some States in Nigeria for example Lagos State, recourse to Alternative Dispute Resolution is provided for.
Laws or Rules of courts on Alternative Dispute Resolution mechanism is still nebulous and devoid of any meaningful contribution to the effective advancement of Alternative Dispute Resolution Mechanism. It is therefore necessary at this juncture to explicitly state that the purpose of this article is to examine the possibility of creating a proper legal framework for each aspect of all the forms of ADR systems that are in popular usage in Nigeria in an Act of the National Assembly. This no doubt will inject an effective and efficient ADR mechanism into the Nigerian legal system.

2. ADR and Arbitration: The Controversy
It is necessary to analyze the controversy surrounding arbitration as an ADR mechanism before dwelling on the crux of this work. Alternative Dispute Resolution seems to have abandoned arbitration as an integral part of the mechanism. Opinions differ considerably about whether to classify arbitration as ADR or not. This is because arbitration shares the features common to both ADR properly so-called and litigation. In one camp are those who think that arbitration should not be grouped with other forms of ADR. Prominent among this group are Redfern and Hunter. For them, arbitration would have been included in ADR if the latter is used in a wide sense of methods of resolving disputes other than those adopted by the courts. But for the fact that ADR is not always used in this wide sense, arbitration is not included in ADR. In support of their view, the authors quoted Carroll and Dixon stating that:

Arbitration presents an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility. However, it is nonetheless fundamentally the same in that the role of the arbitrator is judgmental. The function of the judge and the arbitrator is not to decide how the problem resulting in


the dispute can most readily be resolved so much as to apportion responsibility for that problem.\textsuperscript{11}

For this school of thought, therefore, although arbitration is a great alternative to litigation, nevertheless, it is not ADR \textit{strict sensu} (in a strict sense) because it is judgmental and imposes a decision on one of the parties. There is therefore a winner-loser phenomenon. Arbitration is closer to litigation in its method than it is to ADR. An agreement to arbitrate is enforceable by the courts, whereas an agreement to enter into an ADR process will not be so enforced. However, in Australia, the court has held that agreement to conciliate could be enforced where it has the certainty necessary for legal enforceability.\textsuperscript{12} The judge defined what is enforced as “not cooperation and consent but participation in a process from which cooperation and consent might come”. There is yet no such rule of law in English or Nigerian legal systems. Arbitration is governed by the applicable law whereby its process and outcome are pre-determined in accordance with an objective regulatory standard. In ADR, for example, mediation, the process and outcome are determined solely by the will of the parties.

In arbitration, a party’s task is to prove his case and convince the arbitral tribunal that he is right; whereas in other forms of ADR, the task is to convince or compromise with the other party since the outcome must be accepted by both parties. While an arbitrator is empowered to make a binding award, in other forms of ADR like mediation, a mediator has no power to make a binding decision. The procedure adopted in arbitration is different from that obtained in other forms of ADR. Arbitrators must act in accordance with the rules of natural justice, that is to say, they must hear both parties together and at the same time. On the other hand, mediators are free to see the parties independently and privately, and because of the duties of confidentiality, may not even disclose to one party what they have been told by the other.\textsuperscript{13}

On the other side of the camp are those who see arbitration as ADR because of the attributes it shares in common

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with them, which are absent in litigation.\textsuperscript{14} These features \textit{inter alia}, are party autonomy in the choice of arbitral tribunal,\textsuperscript{15} convenience of the parties in the choice of time and venue for the proceedings, informality in its conduct, privacy and cordiality of the parties, during and after the resolution of the dispute which makes the relationship to continue unsoiled.

It is the nature of arbitration that puts it in its present curious state and rightly so. It has developed over the years with legislative interventions which formalized it to its present status. However, because arbitration has some features of ADR properly so-called, and some others of litigation, this peculiarity marks it out distinctly as a unique form of dispute resolution machinery with advantages outweighing disadvantages. We therefore classify arbitration as ADR - a special type of ADR, and place it topmost in the list of ADR methods on account of the reasons given in this work. Variety is the spice of life. It is a healthy development that there should be different types of ADR so that people could have the freedom to make their choice from a wide range of available options. This feature of multiple choice is the major reason why we advocate for the use of arbitration and other forms of ADR in the management of various disputes which arise regularly on account of human interactions. It is praiseworthy to note that this has been introduced in Nigeria by the concept of Multi-Door Courthouse in Lagos and Abuja.

3. The Provisions of Law on Alternative Dispute Resolution Mechanisms in Nigeria

There is definitely a clear legal roadmap on how to deploy arbitration and conciliation in the resolution of disputes in Nigeria. The law vis-à-vis arbitration is as outlined in section 1(1) of the Arbitration and Conciliation Act thus:

\begin{quote}
Every arbitration agreement shall be in writing contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which
\end{quote}

\textsuperscript{14} See A. F. Afolayan and P. C. Okorie, \textit{Modern Civil Procedure Law}, (Lagos: Dee-Sage Nigeria Ltd., 2007), p. 564 – where the authors while admitting that there are many features which distinguish arbitration from ADR, nevertheless maintained that arbitration will be considered as part of ADR in their book.

\textsuperscript{15} Although it can be said that this autonomy in the choice of arbitral tribunal is extinguish in institutional arbitrations, there still exists some degree of that autonomy in that the parties are presumed to know the \textit{modus operandi} [mode of operation] of a particular arbitration institution before they choose to arbitrate under it.
provide a record of the arbitration agreement or in exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

Also any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract. Consequently in the case of *Continental Sales Limited v. R. Shipping Inc.* the Court of Appeal explained how arbitration should be commenced in the following terms:

Where the arbitrator or arbitrators are bound to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

Thus, it is certain that under both case law and statute, arbitration has a very definite legal guideline on its commencement, hearing and rendering of an award. With respect to conciliation, section 38 of the Arbitration and Conciliation Act stipulates that: “A party who wishes to initiate conciliation shall send to the other party a written request to conciliate under the provisions of this Part of this Act”. The Arbitration and Conciliation Act went further to make elaborate provisions on conciliation.

The poser presently is: besides the erudite adumbration of pundits on the other types of Alternative Dispute Resolution mechanisms, what is the legal procedure or legal anchorage of those Alternative Dispute Resolution mechanisms in Nigeria? Scholars are apt to commend the Rules of Courts that encourage recourse to Alternative Dispute Resolution Mechanism. No matter how commendable these Rules are, if they do not vividly outline the procedure for attaining the needed resolution of acrimonious relationship, their usefulness may be greatly limited. Most recent of these Rules is Order 16 Rule 1(1) of the Court of Appeal Rules 2011 which provides that:

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16 Arbitration and Conciliation Act, section 1(2).
18 Ibid., p. 169 lines 30-40. This is exactly the provision of the English Arbitration Act 1996.
At any time before an appeal is set down for hearing, the court may in appropriate circumstances upon the request of any of the parties refer the appeal to the Court of Appeal Mediation Programme (CAMP); provided that such appeal is of purely civil nature and relates to liquidated money demand, matrimonial causes, child custody or such other matters as may be mutually agreed by the parties.

With utmost respect and irrespective of the fact that the programme is tagged Alternative Dispute Resolution, it is not at all alternative dispute resolution. In Adeosun v. Governor of Ekiti State & Ors., the Supreme Court held that an appeal is an invitation to a higher court to find out whether on proper consideration of the facts placed before it and the applicable law, the lower court arrived at a correct decision. The Court of Appeal reiterated this position in Udeh v. Nwankwo when it held that an appeal is not a new action but a continuation of the subject matter of the appeal and is for the purpose of inviting the appellate court to find out whether, on proper consideration of the facts placed before it, and the applicable law, the lower court or tribunal arrived at a correct decision. It is incontrovertible from the foregoing that Alternative Dispute Resolution cannot be found in whatever guise at the appellate level. Thus the provision of Order 16 of the Court of Appeal Rules 2011 does not by any stretch of imagination tantamount to Alternative Dispute Resolution.

Order 16 of the Court of Appeal Rules 2011 is better situated within the fringe of out-of-court settlement. In the case of Cadbury Nigeria Plc. & Ors v. Securities and Exchanges Commission & Anor., the Court of Appeal defined out-of-court settlement as the settlement and termination of a pending suit arrived at without the courts participation. Thus, any form

19 See Court of Appeal Rules 2011, Or. 16 R. 1(2).
21 Ibid., p. 35 lines 5 – 10. See also the cases of Oredoyin v. Arowolo [1989] 4 NWLR (Pt. 114) 172 at 211 and Iweka v. SCOA [2000] 7 NWLR (Pt. 664) 325.
25 Ibid., p. 76.
of settlement obtained at the appellate level is not an alternative to court litigation and thus cannot be eligible to be properly called an alternative to dispute resolution. Therefore the provision of Order 16 does not constitute a legal framework for the advancement of Alternative Dispute Resolution mechanism.

Besides the Court of Appeal Rules 2011, there are other Rules of Court that have advocated for the utilization of Alternative Dispute Resolution Mechanisms in the settlement of disputes. Order 25 Rule 2(c) of the High Court of Lagos State (Civil Procedure) Rules 2004 provides that pre-trial Conference should be explored before a matter goes into full hearing for the purpose of promoting amicable settlement of the case or adoption of Alternative Dispute Resolution. Order 17 of the High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004 provides that: “A judge with the consent of the parties may encourage settlement of any matter(s) before it, by either arbitration, conciliation, mediation or any other lawfully recognized method of dispute resolution.”

The underlined brings the problem under study to the front burner. Besides arbitration and conciliation, there is no other form of Alternative Dispute Resolution mechanism that is statutorily recognized under a federal legislative framework in Nigeria. This has exposed the imperative and indeed urgent need to have a legal framework for the other ADR mechanisms other than arbitration and conciliation in Nigeria.

Assuming without conceding that these rules put on the toga of an enactment and the judge finally succeeds in getting the parties to concede to mediation, negotiation or even facilitation, what is the procedure for the commencement of these processes? How will the outcome of the process be treated? Are the parties going to be bound or will the outcome of the exercise be a mere appeal to their conscience to tow the path of peace? These issues are nebulous and are attributed to lack of clear and ascertainable legal framework on ADR mechanisms in Nigeria.

4. The Need for a Legal Framework for ADR
By legal framework we mean legislation - law and rules that will guide the use of these processes, just as we already have arbitration laws, arbitration rules, conciliation laws, and conciliation rules. A legal framework here is meant to be a set of laws or rules of law that is used as an anchorage for the effective operation of Alternative Dispute Resolution mechanism in

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26 Emphasis supplied.
Nigeria. As already noted, only two aspects of ADR – arbitration and conciliation – have received legislative backing in Nigeria. This is unacceptable in the light of the impact ADR is making on the Nigerian society. There is therefore the urgent need to provide a legislative framework for the other forms of ADR as has been achieved in some jurisdictions. \(^{27}\) This can be done either by incorporating mediation, negotiation, med-arb, mini-trial, etc into the Arbitration and Conciliation Act, or by enacting a fresh piece of legislation altogether.

5. Arguments for and against Institutionalizing ADR

Some may argue that institutionalizing non-binding ADR options will ossify them thus rendering them unattractive as they will thereby lose their flexibility. \(^{28}\) They also argue that it was because arbitration was institutionalized by legislation that it has been hijacked by judicial process.

We think otherwise. Providing a formal framework for ADR especially mediation will enhance its operations for the following reasons:

- It will provide uniform rules for its application. This will in turn make it more attractive for both local and foreign investors. It will promote greater use of ADR as the Law and Rules will encourage the use thereof, and sometimes make the use mandatory if circumstances so allow.

- It will not remove the flexibility of ADR, as some people fear. Like Conciliation Rules already established\(^ {29}\), statutory backing for mediation will not only preserve the nature and essence of mediation as a non-binding ADR process, but will also enhance its operation by creating a conducive legal environment. The courts will be brought in very minimally only for areas where their services are inevitably needed in order to do justice and realize the intention of the parties. It will not be far-fetched to envisage abuses when ADR becomes widely accepted and used. A form of judicial control will become imperative to safeguard against such abuses.

The above suggestions are in line with the earlier thesis that arbitration occupies a special place among ADR systems. Arbitration has not been hijacked by the judicial process which

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\(^{27}\) See for example the United States Uniform Mediation Act 2001 which is a legal framework for Mediation and was enacted with the principal purpose of harmonizing similar State laws; the Mediation Act of Trinidad and Tobago 2004; the Australian Mediation Act 1997 and the Commercial Mediation Act 2010 of Ontario, Canada.

\(^{28}\) See Redfern and Hunter, *op. cit.* p. 45 para. 1-94.

\(^{29}\) See Arbitration and Conciliation Act, *op. cit.*, note 7. Part II of the Act is on Conciliation. Schedule 3 is Conciliation Rules.
then makes it to become another form of litigation except in name. It has been argued elsewhere by the present writer that ADR process needs the help of the court to fully realize its objectives. What is urged is that court’s interventions should be as minimal as possible in order to retain party autonomy, informality and flexibility which are the hallmarks of ADR. Legislative framework and the court’s necessary intervention will not destroy these options as ADR process.

Progress in this line of thought has already been made in both foreign and local jurisdictions. In UK, civil litigation has undergone radical changes as a result of the review of the Civil Procedure Rules under the chairmanship of Lord Woolf. One of the major reforms introduced by the new Civil Procedure Rules of April 1999 is the development of active case management which includes encouraging the parties to use ADR procedure if the court considers it appropriate. Sanctions are normally imposed on parties who should have taken the benefit of ADR mechanisms but failed to do so, and case law has equally followed the new procedure.

In the United States, Congress in 1998 enacted the Alternative Dispute Resolution Act, with respect to the use of alternative dispute resolution processes in the United States District Courts.

In Nigeria, certain jurisdictions have gone a step further in institutionalizing and enabling a proper framework for ADR. In Lagos State, for instance, the legislature did this by enjoining the courts to promote reconciliation and amicable settlement of disputes before them. Also, High Court Rules provide for a Pre-Trial Conference, in which the Judge issues a pre-trial conference notice in Form 17 for the purpose of, among others, promoting amicable settlement of the case or adoption of alternative dispute

31 English Civil Procedure Rules, 1999, r. 1.4(e).
32 See Dunnett v. Railtrack Plc (2002) WLR 2434, where the Court of Appeal refused to make a cost award against Miss Dunnett who had been unsuccessful in her action against Railtrack Plc both at first instance and on appeal on the ground that Railtrack had refused her earlier offer to mediate the dispute. See also Cable & Wireless Plc v. IBM United Kingdom Ltd (2002) EWHC (Ch.) 2059.
resolution. In Abuja, it is mandatory to include a pre-action counseling certificate while commencing a civil action in the High Court of the Federal Capital Territory.

Some form of ADR has also been applied in criminal matters. Compounding of offences is provided for in a few federal enactments. In Section 41 of the National Park Service Act, the National Park Service has the power to compound offences. Also, the Births, Deaths, etc. (Compulsory Registration) Act empowers the Registrar-General to compound offences, and the commission to make regulations for the compounding of offences. Also, the Customs and Excise Management Act provides that the Board may stay or compound any proceedings for an offence.

This trend of introducing some form of alternative dispute resolution in criminal cases is also seen in anti-graft statutes. The Economic and Financial Crimes Commission Act provides that the Commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit not, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence. Also, the Corrupt Practices and Other Related Offences Act empowers the Independent Corrupt Practices and other Related Offences Commission to issue a certificate of indemnity to a witness upon full disclosure of things he has been lawfully asked, and such

35 Order 25, Rule 1 (1) (c) of the High Court of Lagos State (Civil Procedure) Rules, 2004.
36 Order 4 Rule 17 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004 provides that A certificate of pre-action counseling signed by Counsel and the litigant, shall be filed along with the writ where proceedings are initiated by counsel, showing that the parties have been appropriately advised as to the relative strengths or weakness of their respective cases, and the Counsel shall be personally liable to pay the costs of the proceedings where it turns out to be frivolous.
38 But this is without prejudice to the powers of the Attorney-General of the federation under section 174 of the Constitution of the Federal Republic of Nigeria 1999.
40 Ibid., s. 45 and 49 respectively.
42 Ibid., section 186.
44 Ibid., section 13(2).
certificate shall be a bar to any proceedings in respect of the things disclosed.\(^{46}\)

State legislation are also adopting the trend of introducing some form of ADR in criminal justice. Section 26 of the Magistrate Court Laws of Lagos State provides that “in criminal cases, a Magistrate may encourage and facilitate the settlement in an amicable way of proceedings for common assault or for any other offence not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by him.”

In the North, the Criminal Procedure Code, in section 339, makes detailed provisions for the compounding of offences. Subsection (1) of the section provides that the offences punishable under the sections of the Penal Code described in the first two columns of Appendix C of the Criminal Procedure Code may subject to the subsequent provisions of this section, be compounded by the persons\(^{47}\) mentioned in the third column of that Appendix. Some of the offences\(^{48}\) may be compounded without the leave of the court at any time before the accused person has been convicted by the court or committed for trial to the High Court, while other offences\(^{49}\) may be compounded before the accused person has been convicted by a court or committed for trial, only with the consent of the court which has jurisdiction to try the accused person for the offence or to commit him for trial.\(^{50}\)

However, in the Southern states, the Criminal Code expressly forbids the compounding of offences\(^{51}\). Section 127 provides that:

Any person who asks, receives, or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a felony, or will abstain from, discontinue, or delay a prosecution for a felony, or will withhold any evidence thereof, is guilty of an

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\(^{46}\) *Ibid.*, section 63.

\(^{47}\) These persons are those who bear the direct consequence of the act constituting the offence, for example, the person to whom hurt is caused, or who is defamed, or who is compelled to labour etc.

\(^{48}\) These are offences mentioned in Part I of Appendix C of the CPC. They include causing hurt, criminal trespass, defamation, criminal intimidation, adultery, among others.

\(^{49}\) The offences mentioned in Part II of Appendix C of the CPC. They include causing grievous hurt, house trespass to commit an offence punishable with imprisonment, unlawful compulsory labour, among others.

\(^{50}\) CPC section 339 (5).

\(^{51}\) Especially felonies.
The introduction of compounding of offences is a progressive and therefore a welcome development considering the number of criminal cases pending before the courts in Nigeria. It is our humble view that the South should borrow a leaf from the North in this regard. We also advocate applying ADR in the prosecution of as many offences as possible. A visit to some of the prisons in Nigeria will clearly show that our courts are over-crowded with cases, and the need to provide a legal framework for ADR settlement of minor criminal cases becomes very apparent. In some of these prisons the number of detainees awaiting trial outnumbers those serving their sentences. Many detainees have actually stayed longer than the maximum period they would have served if found guilty. And of course, there is no gainsaying the fact that a good number of them are innocent, that is to say, that if they had been tried, they would have been found not guilty of the offences as charged. For these types of people, the judicial system has woefully failed them. They have not got the justice they truly deserve. Some of them die in detention and others finally get freedom, not from the courts, but from the prerogative of mercy following a politicized and orchestrated tours of the prisons by either the president, the governor or the Chief Judge of a State. If ADR is applied to criminal matters surely many of these detainees would not be in prison because there would have been an amicable settlement of the offence. This is known as ‘victim-offender mediation. The advantage of this is the pacification of the offender by assuaging his emotional feelings.

Happily, the Nigerian Legislature is in the process of amending the Arbitration Act. This is a golden opportunity to provide for the needed legal framework for all forms of ADR especially for mediation. It is suggested that there should be two Acts on ADR in the country. One will cover only arbitration while the other will cover mediation, conciliation and all the other forms of ADR which are in popular usage. To this effect, the

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52 A visit to some of our prisons puts forward this issue of delay in justice delivery so forcefully and in such a practical language that elicits the deepest pity ever imagined in the consciences of human beings. For example, in Kuje Prison at Abuja, the Capital of the Federal Republic of Nigeria, the prison capacity is for 320 inmates, but the actual inmates there number 474, out of which only 40 are convicted while a whooping number of 434 are still awaiting trial. In Medium Kirikiri Prison, Lagos, Nigeria, its capacity is 704 whereas the actual number of inmates is 1,163 out of which 1,061 are awaiting trial. A very pathetic case is in Onitsha Prison, (Onitsha is in the Eastern part of Nigeria) where a detainee is still awaiting trial for 29 years because of an allegation that he stole 750,000.00 naira (an equivalent of 5,000 dollars).
section on conciliation in the present Act, should be excised and joined with the other forms of ADR to produce the second Act. The first Act shall be called Arbitration Act, while the second shall be called Alternative Dispute Resolution Act. Or, in the alternative, a single piece of legislation can still be retained by expanding the present Act to include mediation and all the other forms of ADR in popular usage, and shall be called Arbitration and ADR Act.

6. Other Things Necessary for Institutionalizing ADR in Nigeria

It shall be provided in the new Act/Acts that its/their provisions shall take precedence over any other law on the same subject that is in conflict with its/their provisions. This will remove uncertainty in the law which hitherto has existed because of the provisions of various State laws and High Court rules on ADR that are in conflict with some provisions of the principal Act. For example, whereas section 29 of the Arbitration and Conciliation Act provides for a limitation period of 3 months for impeaching an award, some of the State laws and High Court Rules provide for 15 or 30 days.53

6.2. Need for Greater Awareness:

6.2.1. Concept of Multi-door Courthouse:
Entrenching an effective ADR mechanism in the country can only come through awareness of its existence and usage. To this end, the concept of multi-door courthouse in some States in Nigeria is highly commendable. Multi-door courthouse concept is a court of law in which facilities for ADR are provided. It is an integration of ADR with the court system in which disputants have the choice of other ADR processes that may be appropriate for a particular case. This concept recommends the channeling of disputes for settlement to different fora such as specialized tribunals. The approach gives room for screening and referral. This is the approach adopted in the Pilot Projects in Cambridge Massachusetts, Tulsa, Oklahoma, Houston, Texas and Washington DC.54 Based on certain criteria, the screening clerk

53 See for example, , Anambra State High Court Rules, Order 29 Rule 13; Benue State High Court (Civil Procedure) Edict, Order 19 Rule 13(2); Plateau State High Court (Civil Procedure) Rules, Order 19 Rule 13; High Court of the Federal Capital Territory, Abuja (Civil Procedure) Act, Order 19 Rule 13(2).
54 W. O. Egbewole, “ADR and International Commercial Transactions”, Modern
of the court will determine for the litigant which process fits a dispute. So far in Nigeria only Lagos, Kano, Kwara States and Abuja the Federal Capital Territory operate the scheme. We urge that all the States of the Federation should adopt the concept and practice and afford their citizens the opportunity of a multi choice in dispute resolution in their courts.

6.2.2. Introduction of ADR into the University Academic Curriculum.
Presently, only very few universities in Nigeria offer ADR in their course content. University authorities are urged to include its study in their curricula especially for such disciplines as Law, Medicine, Management, Engineering and Environmental studies. In the law faculties, it may not be necessary to make it a compulsory course, as it is not a core law subject. Suffice it that it be offered as an elective and surely, majority of the students would study it.55

6.3. Need for Virtual Library
There is a dearth of literature on the subject in the country. Local materials are very few. Foreign materials are also scarce and where available are very expensive to procure. However, there is a way out which is internet facilities and virtual library. There are lots of materials on ADR on the World Wide Web. Many websites offer free and downloadable materials on ADR and these can be found using any internet search engines.56 Besides the free materials, access to richer and more authoritative materials can be obtained by subscription. Individuals and faculties can, and are seriously urged to subscribe on-line for virtual library. Indeed, it has become imperative for all faculties in the universities to go online in order to supplement the poor library holdings in our higher educational institutions. Institution/faculty/corporate subscription is cheaper than private subscription. Subscription to virtual library will give the staff and students access to journals, texts, periodicals and other publications which cannot be got locally. This has to be considered as a priority in this information technology age.57

55 In the Faculty of Law, University of Nigeria, Enugu Campus, where it is offered as an elective, about 80% of law students freely choose to study it every year.
56 E.g. Google, Yahoo, etc.
57 Examples of bodies that offer virtual library and other services are LexisNexis and JSTORE.
6.4. Law Reform
The Arbitration and Conciliation Act contains typographical, draftsman’s and substantive errors that need to be amended. A lot of ink has flown from learned authors in calling for these amendments.\(^{58}\) Efforts should therefore be made to amend sections 4, 5, 7, 12, 30, 32 and 54. Inelegant sections and provisions should be re-drafted. The Legislature should come out with an elegant and standard arbitration and ADR Acts/Act which at least should take care of and amend all the sections and provisions that have been pointed out by writers as indicated above.

7. The Draft Federal Arbitration and Conciliation Bill and the Proposed Uniform State Arbitration and Conciliation Bill
It is praiseworthy to note that finally, there is an ongoing process to amend the arbitration and conciliation laws of Nigeria. A national committee set up in 2005 came out with two draft bills as enunciated above. The committee also introduced an innovation – the Arbitration Claims and Appeals (Procedure) Rules.\(^{59}\) The Uniform State Arbitration and Conciliation is for the States of the Federation. Some States have promulgated their Arbitration Laws.\(^{60}\) The draft Federal Bill is yet to be passed by the National

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59 These are to regulate applications to court in arbitration matters. They are contained in Third and Second Schedules of the Federal and Uniform States Arbitration and Conciliation Bills respectively.

60 On 18 May 2009, Lagos State of Nigeria enacted two new arbitration laws: the Lagos Arbitration Law (Law No. 10 of 2009), which applies to all arbitration with Lagos as the seat, unless the parties have expressly agreed otherwise, and the Lagos Court of Arbitration Law (Law No. 8 of 2009) which establishes the Lagos Court of Arbitration. See “Nigeria enact two new arbitration laws” (13
Assembly. The State Arbitration Laws that have come into force and the draft Federal bill yet to be passed have, to a large extent taken care of the shortfalls in the current Arbitration and Conciliation Act. The drafters of the bills have indeed taken cognizance of the much ink that have flown as regards the lacunae in the current Act and have addressed them.61

8. Suggestions for the Nigerian Legislature on ADR

The answers the Legislature will give to the following questions will help in shaping the new ADR Act: Should there be court’s intervention?62 If yes, when and how shall the court intervene? Should the courts be empowered to encourage or compel the use of ADR as we have seen in Lagos and Abuja?63 Should there be pre-action protocols or pre-trial conferences as obtains in Lagos State Civil Procedure Rules? Should there be sanctions in the event of a default or an act or step contrary to the proposed Act? Could the settlement or agreement arising out of mediation be converted to arbitral award on agreed terms?64 Should we adopt or


61 The offending sections 4, 5, 7, 12, 30, 32 and 54 (as pointed out above), have been amended. Some innovations introduced in the new bills are: (1) general principles and scope of application which states inter alia that the object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay and expense – section 1 (a) – (d); (2) appointment of a sole arbitrator if the parties are silent on the number of arbitrators – section 6(3); (3) provision of an umpire – section 8; (4) immunity of arbitrator – section 15; (5) power of court to grant interim measures – section 18 and a greatly enlarged provisions on interim measures in line with the 2006 amendment on the Model Law on interim measures. These cover sections 18 to 28 of the new bills; (6) application of statutes of limitation to arbitral proceedings – section 33; (7) powers of the arbitral tribunal to grant remedies – s. 36; (8) consolidation and concurrent hearing of arbitral proceedings – section 38; (9) power of the arbitral tribunal to award interest, exercise a lien over its award until fees are paid, and order security for costs – sections 44, 47 and 51 respectively. It should be pointed out that Lagos is ahead in this law reform. The Lagos State Legislature has gone ahead to replace words regarded as archaic with modern terminology. Such words as “null and void” in section 12(2) of the current Act were replaced with “invalid, non-existent or ineffective” – section 19(2) of Lagos State Arbitration Law, etc. Lagos State Arbitration Law also permits non-Nigerian to be appointed as arbitrator – section 8(3)(i).

62 See Arbitration and Conciliation Act, op. cit., note 7, section 34.

63 See above para. 5.

64 See Arbitration and Conciliation Act, op. cit., above n 7, s. 25 and UNCITRAL
modify the provisions of the Australian Legal Profession Reforms Act, 1993\(^6\) providing for statutory mediation, or the English Civil Procedure Rules,\(^6\) already discussed, or the American Public Law 105-315?\(^6\)

9. Conclusion

This article has attempted to explain the various types of ADR and showcased their advantages over litigation. The national courts are overwhelmed with multifarious problems ranging from frequent and unnecessary adjournments, harsh and unfriendly technicalities, and over-strict formalities to delays and high cost of litigation. ADR provides an alternative, and legal practitioners and other professionals are urged to employ its services in resolving their clients’ disputes. To better achieve this, there is a serious need to clothe all forms of ADR with legislative garbs so as to put them in a deliverable state for effective use in the country. Providing them with legal framework promotes their ease of use and will assure local and foreign investors that commercial disputes can be resolved quickly and amicably. In arguing for a proper legal framework, it allays the fears of some people that to do so would ossify ADR as a non-binding settlement mechanism.

It should not, by any stretch of imagination be understood that we hereby advocate a complete dismantling of the entire court system. By no means! Of course no reasonable and sensible person will advocate that. The court system has come to stay and it is an indispensable tool in the administration of justice world over. What we are strongly canvassing for here is that because of

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\(^6\) Arbitration Rules, Art. 34.


\(^6\) See Department for Constitutional Affairs, Civil Procedure Rules (1 October 2010).

the shortcomings of the court system, it needs some assistance. There is the need to offer a table of multiple choices in dispute resolution so that people can have a variety to choose from. In other words, there should be an alternative to litigation. This alternative to litigation should be strongly anchored in the Nigerian legal system. The surest way to do this is by providing a proper and formal legal framework for its use.

The Nigerian Arbitration and Conciliation Act should be amended to correct all forms of errors therein contained and to streamline the law on arbitration. It should also be expanded to include provisions for all the other forms of ADR. Alternatively, a new piece of ADR legislation should be enacted.

There is the need for greater awareness to be created about the existence and use of ADR in the country. We have also suggested the ways this can be done, by the inclusion of the study of ADR in all the tertiary institutions in the country, by the use of virtual library to augment the weak local library holdings, by organizing seminars, training and symposia on ADR, by the adoption of the concept of multi-door courthouse in all the States of the Federation. If these suggestions are implemented, there is no doubt that Nigeria will be more conducive, friendlier and a more attractive environment for the family, social, political and commercial life to thrive.