THE NIGERIAN JURIDICAL REVIEW

Vol. 17 DOI: https://doi.org/10.56284/tnjr.v17i **(2022)**

FACULTY OF LAW
UNIVERSITY OF NIGERIA, ENUGU CAMPUS, ENUGU, NIGERIA

THE

NIGERIAN JURIDICAL REVIEW

VOLUME 17 (2022)

ISSN: 2651 - 6055

FACULTY OF LAW
UNIVERSITY OF NIGERIA, ENUGU CAMPUS

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NIGERIAN JURIDICAL REVIEW

VOLUME 17 (2022)

To be cited as: **(2022) 17 Nig J R**

ISSN: 2651 - 6055

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PUBLISHED BY

Faculty of Law, University of Nigeria,
Enugu Campus

IMPACT OF THE PUBLIC PROCUREMENT ACT 2007 ON THE FUNCTIONS OF GOVERNING COUNCILS OF FEDERAL UNIVERSITIES IN NIGERIA

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Abstract

Nigeria's Public Procurement Act 2007 was a response to the World Bank's assessment of Nigeria's Public Procurement system in 1999. The assessment revealed weaknesses in the system which called for urgent reforms. The Country`s Procurement Assessment Report (CPAR) showed that Nigeria's public procurement system was without a legal framework, hence the setbacks. This paper investigates the impact of the Public Procurement Act 2007 on the functions of the governing councils of federal universities in Nigeria, applying the doctrinal research methodology. The study finds that there was another federal legislation: Universities (Miscellaneous Provision) Act No 11 of 1993 (as Amended) that established the federal universities' governing councils and vested in them the authority to run these universities. The powers of the vice chancellors under the Public Procurement Act 2007 overlap with the functions of the governing councils under the extant 1993 Act. While the later Act made the Vice Chancellor the accounting officer with special responsibilities on issues relating to procurement, it was silent on the level of authority that the governing councils could exert on the universities. The paper also finds some merits and demerits of the Public Procurement Act 2007 in federal universities and concludes that there are still weaknesses in the enforcement and enforceability of the Act. It recommended chiefly, an amendment of the Public Procurement Act 2007 together with the Universities (Miscellaneous Provisions) Act 1993 to resolve the overlapping mandates.

Keywords: Corruption, due process, public sector, overlapping responsibilities, resource management, vice-chancellors.

1. Introduction

Public procurement is the application of public resources by government, its agencies and institutions for the procurement of goods, services and works. The

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intention of the Public Procurement Act 2007 is to conserve public funds by ensuring that due process is followed in the procurement of goods and services in the public sector. The resultant effect is that the best quality and quantity of goods and services are procured at the best cost, from the right sources and for good purposes.[1] It is the process of acquiring goods and services by public authorities.[2] This has to do with contractual obligations entered into for that purpose between these institutions of government and the private sector concerns in areas such as military, education, health, infrastructural services and so on. Strong procurement management in the public sector is a tool for achieving political, economic and social goals.[3]

The Public Procurement Act 2007[4] has been adjudged as a piece of legislation that has revolutionized the regulation or framework in Nigeria's public procurement arena.[5] In the whole of the African Continent, Nigeria is one of the countries that have enacted legislation for the purposes of guiding public procurement in line with the set standards by the African Development Bank concept.[6] This enactment is part of the widely acknowledged activities targeted at the reformation of the public sector for better service delivery by the government.[7]

By the advent of democracy in 1999, the government was met with the realization that there were loopholes in the nation's procurement system in public-owned institutions and government structure generally and that this has continued to fuel corruption in that sector.[8] In recent times, African states such as Ghana, Lesotho, Kenya, Sierra Leone, etc have also introduced certain reforms in their public sector arena targeted at the creation of more effective and

[1] World Bank, *Public Procurement Reforms*, (Washington DC: World Bank 2012) 2.
[2] H Kari, F Mona and I Jan, *The Basics of Integrity in Procurement: A Guide Book* (Norway: Michelsen Institute 2010) 1.
[3] NSD Nkinga, 'Public Procurement Reform: The Tanzania Experience' (Paper Presented at the Joint WTO-World Bank Regional Workshop on Procurement Reforms and Public Procurement for the English-Speaking African Countries held at the Royal Palm Hotel, Dar Es Salaam, Tanzania from 14–17 January 2003).
[4] Act No 14, 2007.
[5] SO Olatunji, TO Olawumi and HAOdeyinka, 'Nigeria's Public Procurement Law-Puissant Issues and Projected Amendments' [2016] 6*Public Policy and Administration Research* 73.
[6] Ibid 73.
[7] Ibid.
[8] OA Jacob, 'Procurement Law in Nigeria: Challenge for the Attainment of its Objectives' [2010] 12 *University of Botswana Law Journal*, 131; CC Ekwekwuo, 'A Case Study of the Nigerian Procurement Monitoring Programme and its Portal and Observatory' [2016] *Wyith Limited and Wyith Institute* 1.

efficient public procurement activities.[9] With these developments, it would be trite to say that there have been conscious efforts by African states to enhance their policies and laws on public procurement as a means of strengthening their institutions by reducing corruption and costs in government procurement, leading to more effective and efficient delivery of public goods in the society.[10]

Incidences have arisen where the Governing Councils of Nigeria's public universities have been embroiled in disagreements and conflicts with the management of these great citadels of learning owing to procurement issues and award of contracts by the management. The most recently pronounced was the one by the University of Lagos Governing Council and the management of that institution that drew the attention of the Federal House of Representatives, which advised the Governing Council of that University to focus on their supervisory functions and to source for improved funding of that institution. [11]They further advised that the Federal Minister of Education should call both parties and interpret their various roles as provided for in the Public Procurement Act 2007.[12]

With the current development, it has become expedient that a study is conducted to ascertain the impact of the Public Procurement Act 2007 on the functions of the governing councils of federal universities. This would go a long way in ascertaining whether the functions of the governing councils have changed since the enactment of the Act or whether there has been an abuse of powers and privileges either by the management of the universities or their governing councils. The result of this paper would serve as a guide in the future relationships between these two relevant bodies in their respective roles in the administration of Nigeria's public universities in the future and put an end to the attendant disputes that have occurred from time to time.

2. A Discourse on the Public Procurement Act, 2007

In Nigeria, the reforms leading to the enactment of the Public Procurement Act, 2007 were facilitated by the World Bank in 1999 through an assessment of

[9] O Familoye, DR Ogunsemi and OA Awodele, 'Assessment of the Challenges Facing the Effective Operations of the Nigeria Public Procurement Act 2007' [2015] 3(11) *International Journal of Economics, Commerce, and Management,* 960.

[10] Olatunji, Olawumi and Odeyinka (note 5) 73.

[11]M Alabi, 'UNILAG Crisis: Reps Absolve Management of Corruption Allegation, Fault Governing Council Composition' *Premium Times* (Online, 31 May 2019) 1 <https://www.premiumtimesng.com/news/top-news/332688-unilag-crisis-reps-absolve-management-of-corruption-allegation-fault-governing-council-composition.html> accessed 8 September 2021; G Dike, 'Don't Meddle in UNILAG's Internal Affairs, Reps tell Governing Council' *The Sun* (Online, 4 June 2019) 1 <https://www.sunnewsonline.com/dont-meddle-in-unilags-internal-affairs-reps-tell-governing-council/> accessed 8 September 2021.

[12] Ibid.

Nigeria's public procurement system. The assessment revealed the weaknesses in the system and made strong recommendations for reforms.[13] The Country`s Procurement Assessment Report (CPAR) showed that the majority of the setbacks in Nigeria's procurement system stemmed from the fact that the country had operated her public procurement system without any legal framework.[14]

Under the old procurement regime, the minister of finance was in charge of procurement. This practice beclouded transparency in the process as there was no established direction for the procurement processes leading to the non-availability of the process to the public.[15] The Public Procurement Act 2007 has now become a piece of legislation guiding the public procurement process in the country and it is aimed at promoting the value of public funds, increase 'fairness transparency, accountability, efficiency and effectiveness.'[16]

The 2007 Act is primarily tailored in line with the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement.[17] The Act has thirteen parts with each of the parts structured to achieve the desired aims specified above. The Act created the National Council on Public Procurement and the Bureau of Public Procurement, which together acts as the regulatory authorities to monitor and oversee public procurement in the Nigerian public sector. These authorities are also responsible for 'harmonizing the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria'.[18]

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[13]SW Elegbe, 'The Reform and Regulation of Public Procurement in Nigeria' [2012] 41(2) *Public Contract Law Journal* 339.

[14] Ibid 340.

[15] Ibid.

[16] AO Enofe, O Okuonghae and OI Sunday, 'The Impact of Public Procurement Act on Government Accountability in Nigeria' [2015] 1(8) *Journal of Political Science and Leadership Research* 116.

[17] EM Ezeh, 'Public Procurement Reform Strategies: Achieving Effective and Sustainable Outcomes' [2013] <*http://www.cips.org/Documents/Engr*> accessed 8 September 2021; NM Eze, 'Due Process in the Procurement System: the Nigeria Experience' [2015] (9655) (7) *International Journal of Engineering Sciences & Research Technology* 235; O Familoye, DR Ogunsemi and OA Awodele, 'Assessment of the Challenges Facing the Effective Operations of the Nigeria Public Procurement Act 2007' [2015] 3(11) *International Journal of Economics, Commerce, and Management* 957; KT Udeh, Nigerian National Council on Public Procurement: Addressing the Unresolved Legal Issues [2015] 2(1) *African Public Procurement Law Journal* 1.

[18] Public Procurement Act No. 14, 2007 Introductory Note.

The National Council on Public Procurement is under the chairmanship of the minister of finance with other members as the attorney-general of the federation; secretary to the government of the federation; head of service of the federation; the economic adviser to the president and six other members with part time portfolios drawn from the following bodies: the Nigeria Institute of Purchasing and Supply Management; the Nigeria Bar Association; Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture; Nigeria Society of Engineers; civil society; and the media with the Director General of the Bureau of Public procurement as the secretary of the council.[19]

There is also the provision allowing for attendance to meetings of the Council by any other person which the council deems to be part of it but with limitations on voting and quorum rights.[20] The President has the prerogative to appoint members of the council.[21] This provision limits the independence of the government from the activities of the council. Since the President has already appointed certain statutory officials as members, the professional bodies involved, not the president, should have the prerogative of nominating their members.

The Council under the Act is empowered to perform the following functions:

(a) consider, approve and amend the monetary and prior review thresholds for the application of the provisions of this Act by procuring entities;
(b) consider and approve policies on public procurement;
(c) approve the appointment of the Directors of the Bureau;
(d) receive and consider, for approval, the audited accounts of the Bureau of Public Procurement; and
(e) approve changes in the procurement process to adapt to improvements in modern technology;
(f) give such other directives and perform such other functions as may be necessary to achieve the objectives of this Act.[22]

It is clear that the Council has the power to oversee and make public procurement policies and also to determine who the directors at the Bureau of Public Procurement (BPP) might be.[23] The objectives of the BPP include the following:

[19] Ibid s 1.
[20] Ibid s 1(3).
[21] Ibid s 1(4).
[22] Ibid s 2.
[23] Ibid s 3.

(a) the harmonization of existing government policies and practices on public procurement and ensuring probity, accountability and transparency in the procurement process;
(b) the establishment of pricing standards and benchmarks;
(c) ensuring the application of fair, competitive, transparent standards and practices for the procurement and disposal of public assets and services; and
(d) the attainment of transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system.[24]

The functions of the BPP were further provided in the Act to include: making policies and guidelines for public procurement in the country with approval from the Council;[25] publicizing and clearing any grey issues regarding the Act;[26] granting certificate of procurement as approved by the Council;[27] supervision of procurement related policies;[28] oversee tender costs and store national data on it;[29] publication of procurement journal containing huge contracts in hard and soft copy and archiving it;[30] sustain a database nationally of categories of contractors and providers of services;[31] archive all information and plans set for procurements.[32]

Other functions include: conducting research and surveys on procurement;[33] training and developing professionals in procurement;[34] conducting reviews per period on procurement policies and render advise to the Council;[35] preparation and updating of threshold of bidding and contracts;[36] eschewing procurement which is unfair and tainted with fraud and also to apply sanctions administratively if the need arises;[37] reviewing of procurement and contract processes for all institutions affected by the Act;[38] auditing of procurements and submission of the reports to the National Assembly twice yearly.[39] Furthermore, creation, updating and keeping of database relating to

[24] Ibid s 4.
[25] Ibid s 5(a).
[26] Ibid s 5(b).
[27] Ibid s 5(c).
[28] Ibid s 5(d).
[29] Ibid s 5(e).
[30] Ibid s 5(f-g).
[31] Ibid s 5(h).
[32] Ibid s 5(i).
[33] Ibid s 5(j).
[34] Ibid s 5(k).
[35] Ibid s 5(l).
[36] Ibid s 5(m).
[37] Ibid s 5(n).
[38] Ibid s 5(o).
[39] Ibid s 5(p).

procurement and technology;[40] and the setting up of an internet portal in line with section 16(21) of the Act which stipulates the responsibility of procurement and accountability on the chief accounting officer or any other delegated officer.[41]

The general powers of the BPP with regards to the enforcement of the provisions of the Act are provided for in section 6. The Act applies strictly to the activities that relate to the procurement of commodities, services, and works as embarked upon by the Federal Government of Nigeria and all bodies responsible for procurement under it or any other body which gets at least 35 per cent of funds for the appropriation of the procurement from the Federal Government's share of Consolidated Revenue Account.[42]

The Act does not apply to procurements in relation to special commodities, services, and works relating to national security or defence except with the approval of the president.[43] That is to say that state and local governments and their agencies are not covered under this Act, except where such particular procurement is done through the federation consolidated account to the threshold of at least 35 per cent of the cost of the contract or procurement. All activities of agencies of the government under the Act must follow the fundamental principles of procurement as established under the Act[44] subject to the exceptions stated above in the award of contracts and procurements, otherwise, a breach will occur. In instances where the BPP has set review thresholds, there shall be no disbursement for contracts or procurement from federal funds except where such a cheque or other form of payment document is accompanied by a 'no objection certificate' to an award granted by the Bureau.[45] The BPP shall set the conditions for the award of a 'no objection certificate' when such situations above arise and any procurement in that category not accompanied by the certificate shall be null and void.[46]

All persons bidding for procurement contracts must, apart from the provision of all documents required in the bid, also be professionally and technically qualified for the job, possess the required financial strength, and have the equipment and other infrastructure required and the due personnel for its execution.[47] Furthermore, they must possess the adequate legal capacity, not be insolvent, bankrupt or involved in the winding up process, and must be tax,

[40] Ibid s 5(q).
[41] Ibid s 5(r).
[42] Ibid s 15(1)(a-b).
[43] Ibid s 15(2).
[44] Ibid s 16(1).
[45] Ibid s 16(2).
[46] Ibid s 16(3)-(4).
[47] Ibid s 16(6)(a).

pension and social security contributions up to date.[48] Such persons must also not have any of its directors having been convicted in any jurisdiction for any crime tainted with fraud, finance-related offences, criminal deceit, or falsifying of facts on any issue.[49]

There must also be a disclosure of clash of interest through an affidavit relating to whether any officers of the procurement body and of the BPP are in any way formerly or currently related and a confirmation of the authenticity of all information in the bid.[50] Other relevant parts of the fundamental principles are provided in section 16 (7) - (28). The approving authority for procurements as provided in the Act is the Parastatal Tenders Board in the case of agencies of government, parastatal, or corporation as the case may be, and the Ministerial Tenders Board in the case of ministries or extra-ministerial bodies.[51]

The Act defines the accounting officer as one who is responsible for the oversight of procurement processes as in permanent secretaries in the ministries and the director-general in extra-ministerial agencies or officer of coordinate status.[52] He/she shall be fully responsible for the planning, organization, and assessment of tenders and the execution of procurement contracts. He/she has a duty to ensure compliance with the provisions of the Act and failing which he/she shall bear liability even if he/she delegated the duty and did not perform it personally. He/she constitutes the procurement committee, endures adequate appropriation is provided, and integrates his/her entity's procurement expenditure into its yearly budget. Also, he/she insists on the use of appropriate procurement methods, constitutes the evaluation committee and liaises with the BPP to ensure the implementation of the procurement regulations.[53]

Under the above provision, the liability for breach of the provisions of the Act is strict on the accounting officer. The Act makes it mandatory for every procurement entity to set up a procurement planning committee for every financial year and the members of such committee include the accounting officer who chairs it and the representatives of the following units in that establishment: the procurement unit whose representative shall be the secretary; the particular unit that requests the procurement; the finance unit; the unit in charge of planning, research and statistics; technical staff in the entity whose competence is on the area of that specific procurement; and the legal unit.[54]

[48] Ibid s 16(6)(b)-(d).
[49] Ibid s 16(6)(e).
[50] Ibid s 16(6)(f).
[51] Ibid s 17(a).
[52] Ibid s 20(1).
[53] Ibid s 20(2).
[54] Ibid s 21.

The tender's board established under the Act shall have responsibility regarding the procurement of commodities, works and services and the BPP has the onus of creating guidelines for this board.[55] In all prequalification issues, the tender's board chair shall set up a technical sub-committee which shall constitute the staff with professional qualifications in the procurement entity and the secretary of the board shall be the chair for the purpose of evaluation of bids. The decision of the tender's board shall be sent to the minister for the purpose of implementing it.[56]

Each procurement entity shall make choices regarding the basic qualification for the contractors, suppliers of goods and the service providers and these qualifications shall be made available in the advertisement for prequalification and the prequalification criteria made by the planning committee of the procurement body must be strictly adhered to and only those bids which fall in line with that criteria will be considered.[57] Upon request, the procuring entity shall supply the prequalification criteria to the bidders and can only charge the cost of printing and sending them.[58]

The procurement entity has the burden of replying any demand for further clarification made by the bidder ten days to the deadline for submission.[59] Open competitive bidding is prescribed by the Act and it defined this form of bidding as 'the process by which a procuring entity based on previously defined criteria, effects public procurements by offering to every interested bidder equal simultaneous information and opportunity to offer the goods and works needed.'[60] The bid that is the least responsive in evaluation in terms of the specification of work and the quality shall be declared the winner.[61]

Both national competitive and international competitive bidding are acceptable under the Act and the onus to set financial thresholds for the bidding shall rest on the BPP and this is to be done from time to time.[62] The invitation for bids is to be advertised. In the case of national competitive bidding, advertisement shall be on the notice board of the procuring entity, its official website, and the procurement journal.[63] In the case of international competitive bidding, the advertisement shall be in at least two national newspapers, the official website of the procuring entity and the BPP, the procurement journal as

[55] Ibid s 22(1)-(3).
[56] Ibid s 22(4)-(5).
[57] Ibid s 23(1).
[58] Ibid s 23(2).
[59] Ibid s 23(4).
[60] Ibid s 24(1)-(2).
[61] Ibid s 24(3).
[62] Ibid s 25(1).
[63] Ibid s 25(2)(ii).

well as in one publication recognized internationally. All advertisements shall be done not less than six weeks before the deadline for the submission of the bid.[64]

A bid security of not more than two per cent of the price of the bid is to be issued through a bank guarantee from a reputable bank which the procuring body accepts.[65] Every bid is to be in a written form and in line with the specified form for that particular bid and this has to be signed by an official empowered to create a binding contract with the bidder and conveyed in an envelope which must be sealed.[66] The bids must be submitted in a secured box and must be in English language and a receipt is to be issued upon submission showing the date and time it was delivered.[67] Bids received after the deadline must be sent back to the contractor or supplier and no communication is allowed between the supplier and the procuring body after the advertisement for the bid.[68]

Procurement bodies are free to reject any bid prior to acceptance or cancel the bidding process due to public interest without any liability arising in either of such rejection or cancellation.[69] The validity period of a bid shall be as stated in the document of tender and the procurement entity may choose to extend such a period for a specific period.[70] The Act allows the bidder to reject any such extension, upon which the extension fails and the original expiry date still holds.[71] The bidder may also amend or call back his/her bid at the pendency before the expiration date and this would be successful if received by the entity before the expiry date.[72]

There are laid down procedures under the Act for the opening of the bids which meet the deadline or extended deadline criteria and also the laid down procedure for the examination of bids.[73] In evaluating the bids, the method adopted shall remain that which is stated in the document soliciting for the bids and the aim of evaluation shall be for the selection of the 'lowest responsive bid' amongst the bids that met the deadline for submission.[74] The procedures for evaluation are also specified in the Act.[75] For the acceptance of bids, the standard remains the bidder who bids the lowest cost amongst the

[64] Ibid s 25(2)(i).
[65] Ibid s 26(1).
[66] Ibid s 27(1).
[67] Ibid s 27(2)-(4).
[68] Ibid s 27(5)-(6).
[69] Ibid s 28(1)-(2).
[70] Ibid s 29(1)-(2).
[71] Ibid s 29(3).
[72] Ibid s 29(4)-(5).
[73] Ibid ss 30 and 31.
[74] Ibid s 32(1)-(2).
[75] Ibid s 32(3).

responsive bidders but it may not necessarily have to be the lowest bidder in so far as the entity shall show cause for their selection in line with the provisions of the Act.[76]

The letter of acceptance must then be sent to the bidder who won the bidding.[77] Preferences may be granted to domestic bidders rather than foreign bidders with certain conditions.[78] On the issue of mobilization, not more than 15 per cent of the fees can be paid to the contractor cum supplier and must be supported by a bank guarantee or insurance bond for a domestic person and a bank guarantee alone for a foreigner and no further fees shall be granted the person except there is an 'interim performance certificate' issued in line with the contract.[79]

A 'performance guarantee' of not less than ten per cent of the contract sum or the sum of money equalling the mobilization fee as demanded by the supplier in procurement contracts shall be a *conditio sine qua non* for such awards.[80] The payment of executed contracts is to be made timeously and with due diligence. If such a payment delays for more than 60 days, it shall be deemed delayed.[81] If payment is delayed, an interest rate as stated in the contract shall be applicable and all such specifications for interest payments shall be stated in the contract.[82] It is also obligatory for the procuring entity to keep records of procurement proceedings and this shall be made available on demand to those bidders who failed to secure the contract.[83]

Two-stage tendering or restricted tendering may be adopted by the procuring entity under certain conditions under the Act.[84] The procedure for the request of quotations is specified in the Act as well as the provision for direct procurement as well as emergency procurements in certain circumstances.[85] In circumstances requiring the hiring of consultants for ascertained needs as well as unascertained needs, the Act makes provisions for that in sections 44 and 45 respectively. The relevant documents required in the proposals are also specified as well as that for clarifying and modifying such requests.[86]

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[76] Ibid s 33(1)-(2).
[77] Ibid s 33(3).
[78] Ibid s 34.
[79] Ibid s 35.
[80] Ibid s 36.
[81] Ibid s 37(1)-(2).
[82] Ibid s 37(3)-(4).
[83] Ibid s 38(1)-(3).
[84] Ibid ss 39 and 40.
[85] Ibid ss 41, 42 and 43.
[86] Ibid ss 46 and 47.

The guidelines for the submission of proposals and the criteria for evaluating the proposals as well as the procedure for selection generally and the selection in conditions where the price is a determinant and in cases where price does not determine are also provided.[87] It is incumbent on the BPP to review and issue recommendations for investigation by any relative agency in circumstances where it deems fit or where there is a palpable suspicion that a crime has been committed in breach of the Act and may take further actions in respect to that as stipulated.[88] There are provision and guidelines for an administrative review to be sought by a bidder in circumstances of the breach of the provisions of the Act or on any delegated legislation made under the Act or in the particular contract by a procurement disposing entity.[89]

For the cases concerning the disposal of properties belonging to any government entity, the procuring entity shall also be the disposing entity and the provisions under this are subject to the provisions of the Public Enterprises (Privatization and Commercialization) Act 1999.[90] The rules concerning the planning for disposals are also specified under the Act.[91] The Code of Conduct for all parties involved in the procurement and disposal processes shall be set by the BPP and approved by the Council.[92]

The Act prescribes certain actions that constitute offences[93] and prescribes punishments including the general punishment for contravention by a non-public officer which creates a criminal liability punishable with a term of imprisonment of not less than five years but not more than ten years and this comes without an option of fine.[94] It is an offence to enter or attempt to enter a collusive agreement with a contractor, supplier, or consultant that results in increased procurement sum. Procurement by fraud, splitting of tender, bid-rigging, influencing the procurement process, altering procurement documents, using fake documents, and refusing the BPP access to procurement records are also offences under the Act.[95] The Federal High Court has exclusive jurisdiction to try offenders under the Act.[96]

Any officer of the BPP or any other public officer in the procuring entity who commits an offence under the Act shall be liable to imprisonment for a term of not less than five years without an option fine. Such an officer would

[87] Ibid ss 47-52.
[88] Ibid s 53.
[89] Ibid s 54.
[90] Ibid s 55(1)-(2).
[91] Ibid s 56.
[92] Ibid s 57(1).
[93] Ibid s 58.
[94] Ibid s 58(1).
[95] Ibid s 58(4).
[96] Ibid s 58(2).

also be dismissed summarily from service.[97] This does not state the upper threshold of the punishment in the case of such contravention by a non-public officer. If the offender is a juristic person, it shall be liable to be barred from taking part in any procurement for a term of not less than five years and also be fined for an amount of money which is 25 per cent of the value of the procurement sum.[98] Upon the conviction of a juristic person, the directors of such a juristic person shall be liable to a minimum of three and a maximum of five years' prison term without an option of a fine.[99]

From the foregoing, the Act is quite elaborate and comprehensive with its provisions on issues regarding public procurement by the ministries, departments, and agencies of the Nigeria government. If the institution overseeing the Act possesses the willpower to effectively ensure the enforcement of the provisions of the Act, it would go a long way in reducing corruption in public procurement. Unfortunately, political and parochial interests in the system still remain a cog in the wheel of progress as public servants remain easily compromised in the Nigerian system, coupled with a judiciary that is not sufficiently effective. The fact that punishments under the Act (imprisonment) are without the option of a fine is a pointer to the intendment of the lawmaker to curb corruption and ineffectiveness in public procurement in the country.

3. Structure, Functions and Powers of Governing Councils of Federal Universities

Nigerian Universities have been structured in such a way that there is a governing council at the apex of University governance.[100] It is the highest ruling organ of the Universities from which other powers are devolved. The function, contributions, and roles played by the governing councils in the governance of Universities are enormous, pivotal and cannot be underestimated. The governing councils make policy decisions in areas of recruitment of teaching and non-teaching staff, criteria for admission of students for various programmes in the Universities, processes leading to the graduation/award of degrees of the Universities, sourcing, and management of funds for physical infrastructural development in the Universities and more importantly recruitment and employment of principal officers of the Universities.[101] The fact that the major role played by the governing councils of Universities revolves

[97] Ibid s 58(5).
[98] Ibid s 8(6).
[99] Ibid s 58(7).
[100] See University of Nigeria Act, *Laws of the Federation of Nigeria (LFN)* 2004 s 5; AT Adetunji and BA Mojeed-Sanni, 'Problems Posed by the Governing Council in the Development of Nigeria University' [2015] 3(9) *GE-International Journal of Management Research* 33.
[101] Ibid 42.

around policy formulation and not direct implementation of decisions most times results in their functions and activities being masked and are not easily recognized by the undiscerning public.[102] Over the years, the quality of membership of the governing councils especially the appointment of external members of the governing councils by the government has been bedevilled with corruption, nepotism, favouritism, political interference and outright disregard of the extant rules and regulations guiding the setting up of the governing councils to the effect that non-qualified and inexperienced people are appointed into the councils leading to unnecessary bitterness, rancour and acrimony in the relationship between the governing councils and the University management.[103]

These governing councils of federal universities are established by law and have the ability to sue and be sued as legal persons/entities.[104] The principal Act establishing the governing councils of Nigerian Universities is the Universities (Miscellaneous Provisions) Amendment Act 2003 (As Amended).[105] This Act applies to Universities under the control of the Government of the Federation as confirmed by such a University is listed in the schedule in the Act.[106] The governing council is made up of the Pro-Chancellor; the Vice-Chancellor; the Deputy Vice-Chancellors and one person from the federal ministry responsible for education. Others are four persons representing a variety of interest and broadly representative of the whole federation to be appointed by the National Council of Ministers; four persons appointed by the Senate from among its members; two persons appointed by the Congregation from among its members; and one person appointed by Convocation from among its members of proven integrity, knowledgeable and familiar with the affairs and tradition of the University.[107]

The membership of the council may be categorized in two ways, viz: the ex-officio members who are members by virtue of their offices such as the vice-chancellor, the representative of the federal ministry of education *etc* and the non-ex-officio members whose membership is not as a result of their offices.[108] The second category is the external and internal members, the

[102] Ibid 42.
[103] Ibid 43.
[104] J Shu'ara, 'Governance of Federal Universities in Nigeria: General Responsibilities of the Governing Council' (Text of a Paper Delivered at the Retreat for the Governing Council of the Federal University of Agriculture, Abeokuta at the Lagos State Resource Centre, Akodo–Lekki, Epe Road on the 13th of May 2010).
[105] Act No. 11, 1993, as amended in 2012.
[106] Universities (Miscellaneous Provisions) Act No. 11 of 1993 (As Amended) s 1.
[107] Ibid s 2.
[108] Ehi Oshio, 'Composition and Tenure of Governing Councils of Federal Universities Under Nigerian Laws' 2 <https://www.nigerianlawguru.com/articles/labour%20law/COMPOSITION%20AND

external members being those members who are not part of the University community like the Pro-Chancellor, representative of the federal ministry of education, and so on while the internal members are the vice-chancellor and so on.[109]

The council has a statutory tenure of 4 years, except if a situation arises in which the council is adjudged to be 'incompetent and corrupt,' it would then undergo a formal dissolution by the visitor of the University and thereafter, a fresh council shall be set up for effectiveness.[110] There is no uniformity in the powers of the council of each University; rather, the powers of the council are applicable in line with the statutes establishing each University. To this end, any law or regulation that is not consistent with the laws of any University shall not be applicable to such University.[111] That is to say that this Act with regards to the powers of the council of any particular university is subject to the individual statutes and regulations guiding such a university. The council shall independently perform her functions and obligations for the 'good management, growth and development of the university.'[112] They shall ensure that the distribution of funding in the university is in compliance with the budgeted threshold for personnel; overhead; research and development; development of library; and equity in expenditure as it relates to both academic and non-academic issues.[113] The governing council and their roles are defined under the Act which establishes their existence and as such, it is expected that they abide by them.

The council is the body that governs every university and has the custodial rights, power of control, and can dispose of all property and finances that the university owns.[114] Among others, it is the functions of the council to participate in the making, amendment or revocation of statutes; to govern, manage and regulate the finances, accounts, investments, property, business, *etc* of the University and for that purpose appoint bankers, solicitors to audit the accounts of the university; to borrow money on behalf of the university and to invest any money belonging to the university; to sell, buy, exchange, lease or accept lease or dispose of real or personal property on behalf of the University; to enter into, vary, perform and cancel contracts; to determine in consultation with the Senate all University fees; to establish after considering the

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%20TENURE%20OF%20GOVERNING%20COUNCILS%20OF%20FEDERAL%20UNIVERSITIES%20UNDER%20NIGERIAN%20LAWS.pdf> accessed 12 September 2021.

[109] Ibid 2.

[110] Universities (Miscellaneous Provisions) Act No. 11 of 1993 (As Amended) s 2A.

[111] Ibid s 2AA.

[112] Ibid s 2AAA(1).

[113] Ibid s 2AAA(2)(a)-(e).

[114] Shu'ara (note 104) 16.

recommendations of Senate, faculties, institutes, departments and prescribe their organizations, constitution and functions; to authorize after considering the recommendation of Senate the establishments for both academic and administrative staff and with the approval of Senate suspend, or abolish any academic post; and to regulate the salaries and to determine the conditions of service of staff. The functions of the council also include to exercise powers of removal from office and other disciplinary control on staff; to institute in consultation with Senate, fellowship, scholarship, prizes and other endowments; to promote and to make provision for research; to award honorary degrees and other distinctions in consultation with Senate; to supervise and control the residence and discipline of students and to make arrangements for their health and general welfare; as well as to provide for the welfare of all staff and their spouses, children, and dependents including payment of pensions and other retirement benefits.[115]

The foregoing powers and functions of the governing council under the Universities (Miscellaneous Provisions) Act 2003 seem inconsistent with the Public Procurement Act 2007, especially the function of 'entering into, varying, performing and cancelling contracts.[116] This is obviously a function of the accounting officer under the 2007 Act. Even the function of acquiring and disposing of property by the governing council is also inconsistent with the provisions of the Public Procurement Act 2007 section 55, which empowers the procurement entity, not the governing council, to also serve as the disposal entity. Thus, this overlap in the roles of the management of the Universities and those of the governing council may have been fostered by the assumption of duties not specified in the enabling laws. This may be responsible for the unhealthy rivalry and acrimony between the governing councils and management in some Universities.

4. Impact of the Public Procurement Act 2007 on the Functions of Governing Councils

There are usually issues bothering on several interests of persons and groups which play relevant or in some cases untoward roles in any university system especially as it relates to the administration of the University by the management team vis-a-vis the governing councils.[117] At times, these interests lead to serious acrimonies, rancour and utter disagreement between the University management led by the vice-chancellor who is the chief executive of the University on one the hand and the pro-chancellor who is the chairman of the governing council on the other hand. A recent case in point was the rift

[115] Universities (Miscellaneous Provisions) Act 2003 (as amended) ss 2AA and 2AAA; Shu'ara (note 104) 16-18.
[116] Public Procurement Act 2007 s 15.
[117] Adetunji and Mojeed-Sanni (note 100) 35.

between the vice-chancellor and the Pro-Chancellor of the University of Lagos. Another case in point was the rift between the vice-chancellor and the governing council of the University of Port Harcourt. In both cases, the governing councils were dissolved by the Federal Government citing councils' highhandedness as the reason for the dissolution.[118]

These conflicts have caused frictions in the running of these Universities and have cast doubt on the quality of leadership that exists in these Universities.[119] The Academic Staff Union of Universities (ASUU) has always taken sides as it benefits them when such disagreements arise. For instance, they took sides with the vice-chancellor during the University of Lagos debacle.[120] The registrar of that University was suspected to have taken sides with the governing council based on the statement citing wrong-doing by the erstwhile vice-chancellor, which he made to the press after the vice-chancellor was purportedly sacked from office by the council.[121]

Looking at the functions of the governing councils side by side with the Public Procurement Act 2007, one sees that the Act does not have any provision for the recognition of the governing council in any public procurement capacity. The Act has cognizance only of the functions of the vice-chancellor, who is an accounting officer, being the responsible officer in issues of public procurement.[122] The Act vests the vice-chancellor with the responsibility of overseeing the processes of public procurements, as his position is akin to that of the director-general of extra-ministerial departments.[123]

That is to say that if any of the provisions of the Public Procurement Act 2007 is contravened, the accounting officer who happens to be the vice-chancellor in the case of these federal Universities would be liable. This is notwithstanding whether the contravention arose from his subordinates or those he delegated such function that led to the contravention.[124] Thus, if the vice-chancellor abdicates such responsibility to the governing council or seeks their directive for the exercise of such powers granted him under the Public Procurement Act 2007, and then he has committed a breach of that Act. If any further breach arises, in terms of accountability, the liability would be on him

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[118] Ibid 35; A Wahab and others, 'Breaking: Governing Council sacks UNILAG VC' *Vanguard* (Online 12 August 2020) 1 <https://www.vanguardngr.com/2020/08/breaking-governing-council-sacks-unilag-vc> accessed 12 September 2021.
[119] Adetunji and Mojeed-Sanni (note 100) 35.
[120] Wahab and others (note 108) 1.
[121] Ibid 1.
[122] Public Procurement Act 2007 s 20(2).
[123] Public Procurement Act 2007 s 20(1).
[124] Ibid s 20(2)(a).

and not on the council except there are evidence of misappropriation by the council, then the liability may be joint, as the court may deem fit.

The Universities (Miscellaneous Provisions) Act 2003 states clearly that 'the powers of the council shall be exercised, as in the law and statutes of each University'.[125] This provision makes the powers of the governing councils as provided in the above cited 2003 Act subject in its application to the law and statutes of each university. If such provisions in the procurement Act are inconsistent to the law and statutes of any of these Federal Universities, then such laws shall not apply. The specific law of the university takes precedence.[126] This confirms the legal principle that specific provisions of the law take precedence over the general provisions.[127] This is founded on the principle – *generalia specialibus non derogant* – specific provisions derogate from general ones.

Owing to the periods of the enactments of many of the statutes establishing most of these federal Universities, especially those of them that were enacted long before 2007 when the Public Procurement Act was enacted, it is obvious that the law-maker did not envisage that a time would come when there would be a procurement legislation guiding federal Universities. Even the amendments in the Universities (Miscellaneous Provisions) Act 2003 did not take care of this challenge. The law-maker in enacting the Public Procurement Act 2007 had more focus on how the Act would be applied in the civil service, mostly ministries, departments and agencies. The law-maker might not have considered its application to the University system. Otherwise, the Act should have had specific provisions to resolve this imbroglio explicitly and reduce issues of overlapping responsibilities between the vice-chancellors and governing councils of the Universities. As it stands, the Public Procurement Act appears to undermine the powers of the governing councils.

The governing councils are empowered by the Universities (Miscellaneous Provisions) Act 2003 to 'be free in the discharge of its functions and exercise of its responsibilities for the good management, growth, and development of the university.'[128] This provision that grants autonomy to these councils may have necessitated the struggle by the governing councils to take total control of these universities, thereby trying to usurp the powers of the vice-

[125] Universities (Miscellaneous Provisions) 2003 s 2AA.

[126] Y Akinpelu, 'UNILAG Crisis: What the Law says on the Removal of the Vice-Chancellor' *Premium Times* (Online 12 August 2020) 1 <https://www.premiumtimesng.com/news/headlines/408564-unilag-crisis-what-the-law-says-on-removal-of-vice-chancellor.html> accessed 12 September 2021.

[127] *Orubu v NEC* [1988] 5 NWLR (Pt 94) 323; *Akpan v State* [1986] 3 NWLR (Pt 27) 288; *Tsume v Peveraga* [2001] 2 NWLR (Pt 698) 556 at 572.

[128] Universities (Miscellaneous Provisions) 2003 s 2AAA.

chancellors and other principal officers of the universities as the case may be. The mention of the fact that the governing councils are to ensure 'good management' may have pushed these governing councils to view the management function which they are contesting as being legitimate and as such, the award of procurement and contract services in their own opinion should be a part of it. Furthermore, it is still arguable that the governing councils' role to ensure good management is only limited to ensuring the disbursement of funds in compliance with the approved budgetary allocation for specific items like the personnel cost, research and development, and other such issues necessary for the development of the University.[129]

The Federal Government as of 2021, through its minister of education, seems to have taken a position on the side of the University management as the minister was quoted as handing out a warning to the governing councils of universities not to meddle in the daily administrative functions of universities.[130] He further threatened sanctions for council members who explore other functions aside from the mandate given to them.[131] Likewise, the House of Representatives, in 2019, asserted that the vice-chancellors are the accounting officers within the meaning of the Public Procurement Act 2007. The governing councils should not meddle with this role, but focus on their supervisory role of policy formulation and fund generation for the University.[132]

A cursory look at the Financial Regulations of the University of Lagos confirms that the vice-chancellor is the chief accounting officer while the council takes general control and superintendence of policies, finances and properties of the University.[133]On the other hand, it says that the vice-chancellor 'shall be responsible to the council for the overall management and control of the funds of the University and shall be the chief accounting officer of the University.'[134]These provisions of the University of Lagos Financial Regulations can be said to be in line with both the Public Procurement Act 2007 and the Universities (Miscellaneous Provisions) Act 2003 and is similar with the financial regulations of other federal Universities in the country. If the provisions of these Regulations are inconsistent with these Acts, then the Regulations are void to the extent of their inconsistency.

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[129] Ibid s2AAA(2).

[130]Johnbosco Agbakwuru, 'FG Cautions Governing Councils of Varsities' *Vanguard* (Online 11 May 2017) 1 <https://www.vanguardngr.com/2017/05/fg-cautions-governing-councils-varsities/> accessed 12 September 2021.

[131] Ibid 1.

[132] Alabi (note 11) 1; Dike (note 11).

[133] University of Lagos, *University of Lagos Financial Regulations* (Lagos: University of Lagos Press and Bookshop Ltd 2016) 1.

[134] Ibid 1.

Thus, the Public Procurement Act 2007 may not have changed much with regards to the functions of governing councils of federal Universities, except as these functions overlap with the statutory duties of vice-chancellors. Yet, the Act has provided the much-needed statutory framework for public procurement in Nigeria's federal Universities. Just like every other thing in life, there seems to be some advantages and disadvantages of the application of the Public Procurement Act 2007 by the federal Universities in Nigeria.

As part of the advantages, the application of the Act discourages corruption in the university system and enhances effectiveness. Poor funding has been the bane of the Nigerian University system and as such, the application of the Public Procurement Act 2007 helps in encouraging frugality in expenditure and limiting bogus wastage of resources. It promotes 'competitiveness, value for money and professionalism in the public sector procurement system'.[135]It promotes transparency and fairness in the award of procurement contracts in the sense that regular issues such as nepotism and corruption could be reduced to the barest minimum. It gives room for academics to run the universities and this would in turn help the universities to achieve their mandate in research and development easily and reduce the burden of having to pass through the council headed by a pro-chancellor, who, most times, may not be a seasoned academic. It reduces the influence of external forces from meddling with the procurement processes in the Universities. It reduces the bottlenecks that may arise due to long bureaucracies of having to pass through the council at all times in the award of contracts for the development of the University in line with its core mandates.

On the downside, the disadvantages of the application of the Act may include the fact that the institution that is tasked with the enforcement of the Act, namely: the BPP may not have the capacity in terms of staffing and the spread of its offices nationwide to be able to actually oversee the effective enforcement of this Act. The prosecution of offences under the Act is left to the Attorney-General of the Federation who may delegate it to any Attorney-General of a State or any other legal practitioner so appointed by the Attorney-General of the Federation.[136] This may hinder the quick and effective prosecution of offenders under the Act as the office of the Attorney-General of the Federation is deeply encompassed with many responsibilities that may not enable it to actually drive the prosecutions effectively. The BPP should have been granted powers to prosecute offenders just as is applicable to agencies such as the Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and other Related Offences Commission (ICPC), and so on,

[135] Olatunji, Olawumi and Odeyinka (note 5) 75.
[136] Public Procurement Act 2007 s 58(3).

subject to the overriding powers of the Attorney-General of the Federation as provided for in the Constitution.[137]

Still on the downside, since the Public Procurement Act 2007 places the implementation of the provisions of the Act and liability for contravention thereof on the accounting officer, the vice-chancellor alone,[138] he may take advantage of the provision to manipulate the award of procurement contracts without due process in line with the Act. The period and processes for administrative review for a bidder who is dissatisfied with the bidding process is not encouraging. He has to, first of all, seek review from the accounting officer and then to the BPP if he is dissatisfied and finally to the Federal High Court.[139] This process may discourage a bidder from seeking review. The Act has no provision for the assessment of the viability of procurements and contracts through a distinct cost-benefit analysis.[140] This may encourage the vice-chancellor to appropriate procurements and contracts only on areas where he has pecuniary interests and neglect other areas, thereby militating against the overall development of the University's mandate.

5. Conclusion

The Public Procurement Act 2007 is a revolution in the area of public sector procurement in Nigeria. The Act has done a lot in providing a legal guide and probable sanctions that would ensure transparency, fairness, and accountability in public procurement. Although corruption is still ravaging the entire Nigerian system, the situation would have been worse if such an Act was not enacted. However, the National Council on Public Procurement, the BPP and the Office of the Attorney-General of the Federation, and the federal judiciary still have a long way to go in the enforcement of this noble legislation especially during this period of economic downturn in the country.

Despite the existence of this federal legislation, there is still a high level of corruption in public procurement in the country leading to wastages by the three tiers of government. Public procurement laws must be replicated at the state and local government levels. It also has to be strictly enforced at these three levels of government to realize the full gains. Although this paper analyses the impact of the Public Procurement Act 2007 on the functions of the governing councils of federal Universities, unfortunately, little or nothing has been done on this subject matter as it affects state government-owned Universities as well.

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[137]The Constitution of the Federal Republic of Nigeria 1999 (As Amended), s174.

[138] Public Procurement Act 2007 s20.

[139] Ibid s54.

[140] KA Wahab, 'Importance of Due Process in University Governance' [2006] <http://www.unijos.edu.ng/Partnership/Advancements/Advancement%20home_files/JOS%20SPEECH.ppt> accessed 13 September 2021.

The study finds that the governing councils of federal Universities in Nigeria seem not to be at ease with the provisions of the procurement Act with respect to the limits of the power of autonomy granted to them under the Universities (Miscellaneous Provisions) Act 2003. However, the intervention of the Federal Government through the minister of education seems to have laid the matter to rest for now. It is expedient that the National Assembly amends both the Public Procurement Act 2007 and the Universities (Miscellaneous Provisions) Act 2003 to separate the functions of the governing councils from those of the vice-chancellors of federal universities in the country. This will provide a lasting resolution to the imbroglio in the relationship between the university management and the governing councils. It will also help to curb corruption and entrench efficiency in management.

It is also recommended that the BPP be strengthened and given a nationwide spread so as to enhance its supervision and enforcement of the provisions of the Public Procurement Act 2007. Again, the Bureau should be granted the powers to prosecute alleged offenders under the Act so as to strengthen its enforcement mechanism. All the stakeholders in the universities should be continuously enlightened on the provisions of the procurement Act so as to assist in checking the vice-chancellor and his subordinates from manipulating procurement procedures under the Act for corrupt and pecuniary purposes.

EFFECTS OF COVID-19 ON LABOUR RELATIONS IN NIGERIA: NAVIGATING THROUGH THE MURKY WATERS BY BALANCING CONTENDING INTERESTS

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Abstract

The outbreak of Covid-19 in Nigeria and the need for its curtailment, led the government to take drastic safety measures. Some employers have resorted to remote working which made apparent, the lack of usefulness of certain categories of workers. Some employers subsequently resorted to unilateral termination of employment, pay cuts, redundancy declaration, asking workers to proceed on leave with or without pay, no work, no pay, alteration of contracts of employment, all in a bid to remain afloat. Most of these measures, aside not meeting up to minimum best practices, are at variant with the socio-economic aspect of employment relations as they have exposed the affected workers and their dependants to hardship. This paper, adopts desk-based methodology in examining the effects of covid-19 on employment relations in Nigeria by interrogating the proprietary of the cost cutting measures adopted by employers to weather the storm of covid-19 and their socio-economic effects on the workforce and the nation at large. It found that covid-19 has set at loggerhead, the interest of the workers and employers which requires balancing through dialogue and transparent renegotiations of terms and conditions of contract and creation of employment by the government. It makes recommendations on how to balance this contending interest for a buoyant and harmonious employment relation during and post covid-19 Nigeria.

Keywords: Covid-19, employment relations, employer, Nigeria, salary, worker.

1. Introduction

The *ex* parte outbreak of the novel coronavirus (Covid-19) pandemic first in Wuhan China, has disrupted all human activities all over the world.[1]

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There is no sphere of human life, that its disruptive and destructive effect is not felt.[2] It has spread all over the world with an unprecedented momentum resulting in thousands of deaths and destruction of business enterprises. The virus was reported in Nigeria, in March, 2020 which was diagnosed from an Italian man who just returned from Italy. In a bid to curb its spread, the government at both the Federal and State levels, adopted restriction of movement and bound inter-state movements exempting frontline workers. Several places regarded as public places were locked down and this led to the shutting down of work places. Non-pharmaceutical methods such as observation of social distancing, regular washing of hands with soap and running water for at least 10 seconds, use of facemasks were introduced to curb the spread of the virus. Persons who own business places were urged to strictly comply with the covid-19 guidelines so that it could be defeated just like erstwhile Ebola virus. While most employees are willing and ready to report at work and employers willing to open their workplaces, they are unable to do so as this would amount to violation of the lockdown directives.

The continuous lockdown of workplaces and inability of workers to report at work as expected, has led to serious economic downturn on the balance sheet of many employers. Traditionally, the employer has a duty to provide work for its employees (subject to payment of remuneration), pay remuneration for work done, duty of care while the employee is expected to exercise reasonable care and skill and carryout faithfully, reasonable instructions of the employer.[3] Covid-19 has negatively impacted on the ability of both parties to discharge their duties towards each other therefore warranting a rethink on how best to manage employer-employee duties amidst and post covid-19.Not surprisingly, in a bid to assuage the economic cum financial difficulties caused by the pandemic, some employers have resorted to automation of their operations and adoption of working remotely requiring their workers to work from home via the internet to keep operations on-going although at a low scale. The automation of certain operations and adoption of remote working, in some organisations, have made the lack of need of certain

[1]See <https://www.who.int/emergencies/diseases/novel-coronavirus-2019event-as-they-happen> accessed 19 June 2020.
[2]DT Eyongndi, 'The Nigerian Police and Human Rights Violations in the Enforcement of Covid-19 Lockdown Directives: An Appraisal' (2012) 2 *Uganda Police College Journal of Law Enforcement and Crime,* 199-242.
[3]*Sule v. Nigerian Cotton Board* (1986) 2 QLRN 102.

categories of workers apparent which was concealed before the invasion of the audacious covid-19 pandemic. This is capable of causing redundancy to set in culminating in the relieving of the employees whose services are no longer needed or crucial.

Due to the compelling disruptive effects of the pandemic, expectedly, most employers have found themselves in the dilemma of abiding by minimum labour standard and "saving" their businesses and some have responded by engaging in various cost cutting practices. Some employers have resorted to unilateral reduction of salaries of workers, compelling workers to go on compulsory leave with or without pay, retrenchment of workforce, declaration of redundancy, reduced working hours, earn as you work, non-payment of salaries, unilateral alteration of the terms and conditions of employment, etc. all in a bid to stay afloat. Work, is an integral aspect of human life and has its social and economic effects. When a man or a woman is gainfully employed, aside earning an income to meet his/her personal needs, the needs of the dependants like children, siblings, aged parents, wards, etc. are also met from the income hence, disengagement from employment, does not only affect the person directly working but other legitimate interests involved.[4] In fact, without a means of livelihood, it is practically impossible, for any human being to lay claim to any other human rights as gainful employer as a precursor to livelihood, is the bed rock for the enjoyment of all other rights.[5] This makes true the aphorism that a hungry man is an angry man and an angry man is an unreasonable and an unreasonable certainly, is of minimal value to him/her and cannot make any meaningful contribution to society.[6]

This paper is divided into six sections. Section one contains the introduction. Section two interrogates employee-employee duties amidst Covid-19 pandemic particularly the employer's duty of care, provision of work and payment of remuneration. Section three discusses the trade

[4] S Dane, M Akyuz and MI Opusunju 'Effect of COVID-19 on the Performance of Small Businesses in Nigeria' (2021) 9(8) *Journal of Research in Medical and Dental Science* 12-19.

[5] DD Sasu, 'Main worries for business in Nigeria due to the Coronavirus (COVID-19) Outbreak as of April 2020' <https://www.statista.com/statistics/1122741/main-worries-for-business-in-nigeria-due-to-the-coronavirus/> accessed 26 November 2021.

[6] OE Enesi, UA Ibrahim 'Effect of COVID-19 Pandemic on the Performance of Small and Medium Business Enterprises in Abuja-FCT, Nigeria' (2021) 9(5) *Open Journal of Business and Management* 2261-2276.

union/workers association as a navigator through the murky waters of balancing the contending interest in labour relations amidst covid-19. Section four interrogates suspension of contractual rights and obligations intra covid-19. Section five deals with how to balance contending labour relations interests in Nigeria during and post covid-19; while section six contains the conclusion and recommendations.

2. Explicating Employer-Employee Duties amidst COVID-19

The aim here is not to extensively comment on the duties of the parties to an employment contract but to highlight, selected few which are relevant to the subject of covid-19. From the meaning of a contract of employment, the employer agrees to remunerate the employee who in turns, agree to render his services and labour to the employer for the wages received.[7] It is apposite to state at this juncture that the existence of an employer-employee relationship is the basis for corresponding rights and obligations between the parties. The contract of employment is what distinguishes employer-employee relationship from independent contractorship. Explicitly, the employer has a duty to remunerate or pay wages to the employee for work done. Thus, an employer owes the employee duty to pay wages or salary in accordance with the terms of the contract express or implied.[8]The quantum of wage payable by the employer is as expressly stated in the letter of employment or where in the unlikely event is silent, as reasonably inferred based on *quantum meruit* basis as was held in *Ekpe v Midwest Development Corporation*[9]although, *quantum meruit* will not be used to overcome the express provision of the contract.[10] Once the duty to pay wage exists, the employer is, at common law, to continue to pay such remuneration to an employee who is ready and willing to work, whether or not work is provided for the employee.[11]

At common law, the sickness of an employee does not absolve the employer from payment of remuneration unless the contract of employment expressly state so hence, the employer's duty to remunerate subsists during the ailment of an employee.[12] Consequently, Oji and

[7]*Co-operative & Commerce Bank (Nig.) Ltd. Plc. v. Rose* [1998] 4 NWLR (Pt. 544) 37.
[8]*Browning & Ors. v. Crumlin Valley Collieries Ltd.* [1926] 1 KB 522.
[9] (1967) N.M.L.R. 407.
[10]*Re Richmond Gate Property Co Ltd.* (1964) 3 All E.R. 936.
[11]*Davonald v. Rosser & Son* [1906] 2 KB 728.
[12]*Warburton v. Cooperative Wholesale Society Ltd.* (1 K.B. 663); *Warren v. Whittingham* (1902) 18 T.L.R. 500; *Storey v. Fulham Steel Work* (1907) 24 T.L.R. 89.

Amucheazi[13] have opined that it is in consequence, a legal misconception when Greer J in *Borwning v Crumlin Valley Collieries Ltd,* [14]stated that 'the consideration for work is wages, and the consideration for wages is work.' However, a protracted sickness of the employee, may strike at the root of the contract thereby frustrating same and absolving the parties from the obligation of further performance. Section 16 of the Labour Act[15] contains guidelines for remuneration when an employee is sick.

Moreover, the employer owes the employee duty of care and this could be regarded as paramount. It has been pointed out that the basis for this obligation on the employer towards the employee is the existence of a contract of employment. The employer, at all times, is duty bound during the subsistence of the contract of employment, to take reasonable measures to ensure the safety of the employee in the course of employment.[16] Everything that would guarantee the safety of the employee in the course of the employment must be put in place while anything that can expose the employee to danger must be eliminated.[17] Whether the employer acts personally or through its agent or representative, this duty is not displaced.[18] The scope of this duty was stated by Parker L. J. In *Davie v New Merton Board Mills Ltd.*[19]The liability of the employer for harm arising from breach of this duty is personal and vicarious as stated in *Paris v. Stepney Borough Council.*[20] The vicarious nature of this duty extends to volunteers offer help at the behest of the employee. The Supreme Court of Nigeria in *Iyere v Bendel Feed and Flour Mill Ltd.* [21]reinstated the employer's duty of care towards the employee. Hence, in all the circumstances of the case, the employer must take reasonable care so as not to expose the employee to avoidable and unnecessary risk particularly reasonably foreseeable one.[22]

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[13] EA Oji, and OD Amucheazi, *Employment and Labour Law in Nigeria* Lagos: Mbeyi and Associates (Nig.) Ltd., 2015,120-121.
[14] (1964) 3 All E.R. 936.
[15] Labour Act Cap. L1 Laws of the Federation of Nigeria (LFN) 2004.
[16] *Wilson's and Clyde Coal Co. Ltd. v. English* [1938] A.C. 57 at 84.
[17] *Hudson v. Ridge Manufacturing Co. Ltd.* (1975) 2 QB 348.
[18] CK Agomo, *Nigerian Employment and Labour Relations Law and Practice*, Lagos: Concept Publications Ltd., 2015, 134.
[19] [1958] 1 Q. B. 210.
[20] [1951] 1 All E. R. 42 at 50.
[21] (2008) 12 CLRN 1.
[22]*Latimer v. A.E.C. Ltd.* [1959] AC 643.

Furthermore, the employer is not under a duty to provide work so long as the wages of the employee are paid.[23] Asquith J in *Collier v Sunday Referee Publishing Co*[24]stated the general position of the law on the issue of provision of work when he state thus 'provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all my meals out.' The implication of this postulation is profound as it implies that once an employee is willing and ready to work; he is entitled to his/her pay whether or not he/she is actually provided with work.[25] It is not a breach of contract for an employer not to provide an employee with work so long as the employee is remunerated accordingly. This justifies the payment of salary in lieu of notice which has the implication that the employee should disengage without working for the period payment has been made.[26] However, the above position, is not absolute or untrammelled same is amenable to permissible exceptions. Thus, where failure to provide work will lead to loss of fringe benefits such as publicity or tips, payment of wages will not suffice[27] as in the case of *Clayton (Herbert) and Jack Waller Ltd v Oliver*.[28]

Where the employees wage is contingent on the provision of work; eg, a commission earner,[29] the employer is duty bound to provide work.[30] Where the duty is not only to provide work but the work to be so provided, must be of a particular nature, the employer has a duty to provide same.[31] Where the employee is a piece-worker, ie, the productivity determines the quantum of wage earned, the employer is duty bound to provide work to the extent the employee is willing and capable to perform.[32] Where continuous work is required to sharpen the skill and increase the productivity of the employee that is where the employment of a nature that is 'practice makes perfect' provision of work cannot be overridden by payment of wages. The position in *Langton v*

[23]*Turner v. Sawdon & Co* (1901) 1 KB 653.
[24] (1941) 2 KB 647 at 650.
[25] Oji and Amucheazi (n 11) 114.
[26] See *Konski v Peetc* (1915) 1 Ch. 530.
[27]*Yetton v. Eastwood Froy Ltd* (1966) 3 All ER 353.
[28] (1930) AC 209.
[29]*Turner v Goldsmith* (1891) 1 KB 544.
[30]A Emiola, *Nigerian Labour Law,* (4th ed, Ogbomosho, Emiola Publishers Ltd, 2008) 96.
[31]*Clayton (Herbert) and Jack Waller Ltd v Oliver* (1930) AC 209.
[32]*Devonald v Rosser & Son Ltd* (1906) 2 KB 728.

Amalgamated Union of Engineering Workers[33]the inherent right of man to work was emphasised by Lord Denning M.R. and payment of salary will not avail its detraction. Section 17 of the 1999 CFRN, enjoins the government to create an enabling environment for its citizens to secure suitable employment this is in recognition of the inherent right of man to work. Section 17 of the Labour Act buttresses the constitutional provision to the extent that for every day an employee, presents him/herself for work and is fit, the employer has to provide work and failure to so do, will not disentitled the willing and able employee from being remunerated.[34] It must be noted that, essence of working, is not just to make ends meet but there is a natural satisfaction that is derived from working which cannot be quantify in monitory terms and this, the law must protect.

Conversely, the employee on the other hand, is under a duty to carry out lawful and reasonable orders of the employer.[35] Where the employee fails to obey lawful and reasonable order of the employer, it amounts to repudiation of the contract of employment.[36] This duty, has nothing to do with sentiments or morals, it is simply an issue of whether the order is lawful and reasonable.[37] Whether or not, an employee will be adjudged to have breached the duty of obedience on a single act depends on the circumstances of the peculiar case.[38]Breach of this duty, is tantamount to gross misconduct and punishable with summary dismissal.[39] The breach strikes at the root of the contract and destroy confidence which is the basis for the interaction.[40] The duty of obedience does not extend to illegal acts.[41]

Furthermore, an employee is expected to offer faithful service to the employer in the course of the employment. Thus, the service of the employee must be with good faith and fidelity. The facts of a particular case will determine whether or not, the act or omission of an employee

[33] [1974] 1 All ER 980 at 987.
[34]Agomo (n 13) 133.
[35]*Sule v Nigerian Cotton Board.* (1986) 2 QLRN 102.
[36]*Pepper v Webb* [1969] 1 WLR 514.
[37]*Turner v Mason* (1945) 14 M & W 112.
[38] Oji and Amucheazi, (n 11) 129.
[39]*E. CN v Nicol* (1969) 1 N. M. L. R. 265.
[40]*Nigerian Arab Bank Ltd v Shuaibu* [1991] 4 NWLR (Pt 186) 450; *Sinclair v Neighbour* (1967) 2 WLR 1.
[41]*Gregory v Ford* [1951] 1 All ER 121.

has breached the duty of faithful service.[42]The personal interest of an employee must not intertwine with that of the employer throughout the course of employment.[43]In *Osakwe v Nigerian Paper Mills Ltd*[44] it was held that an employee is expected to always be of good conduct by diligently serving the employer by protecting the property and interest of the employer as well as be in harmony with co-employees to engender efficiency in service delivery. Thus, the employee must shun any conduct that is injurious to the business of the employer as failure to do so would attract discipline.[45] Act such as absenteeism without permission, dishonesty, using the employer's money to gamble, disobedience, misappropriation of the employer's money have been held as breach of this duty by an employee.[46]

The employee in rendering faithful service to the employer, must bring to bear skill and care. When the employee applied for the job, there was an implied undertaking that he/she, possessed the skill needed to perform the work satisfactorily.[47] By this warranty, he has a responsibility to demonstrate that skill in effectuating the employment contract.[48]

3. Trade Union/Workers Association as a Navigator

One of the corner stones of healthy employment and industrial relations is, the existence and recognition of trade unions by employer. Although, the definition of trade under section 48 of the Trade Union Act, provides that, both employers and employees could operate trade unions, the real essence of trade unions, lies with employees trade unions. The underpinning philosophy of trade unionism, is best exhibited through employees' trade union that of employers, is a mere façade. Trade unions are the vanguard for the protection of workers' rights and serves as an intermediary between the employer and workers in settling disagreements

[42]*Maja v Stocco* (1968) NMLR 372.
[43]*Abukugho v African Timbers & Plywood Ltd* (1966) 2 All NLR 87.
[44] [1998] 10 NWLR (Pt 568) 245.
[45]*Lasis Yusuf v Union Bank of Nig Ltd* [1996] 6 NWLR (Pt. 457) 457 at 632.
[46]*Udegbunam v Federal Capital Development Authority* [2003] 10 NWLR (Pt. 829) 487; *Mahah v Standard Bank (Nig) Ltd* (1976) ECSLR 199; *Olatunbosun v NISER* [1988] 3 NWLR (Pt 80) 25.
[47]*Garabedien v Jamakani*(1961) 1 All NLR 177.
[48]*Nunnink v Costain-Blansevoort Dredging Ltd* (1960) LLR 90.

or issues that have the potential of becoming a problem all in a bid to foster industrial harmony and peace within the work place.[49]

Unfortunately, most employers, particularly within the private sector, neither permit nor recognise trade unions in their employ.[50] Trade unions operate to balance the imbalanced power equation between the employer and workers in an employment relationship especially in a clime like Nigeria where several factors tilt the labour pendulum in favour of the employer.[51]The refusal to permit the forming or recognition of existing trade union is done basically to ensure that, when there is violation of workers' rights, as it is usually the case, there will be no concerted agitation against same from the workers.[52] This obnoxious practice has continued despite being contrary to the provisions of the 1999 Constitution of the Federal Republic of Nigeria particularly section 40, the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act as well as international human right legal instruments.[53] While no category of employees within the master servant employment sphere is immune, casual workers, are affected most as employers treat them as disposable waste. Aside being constrained to work under perilous employment conditions,[54] their lack of financial wherewithal (this is due to the fact that the hallmark of their employment is poor remuneration) to undertake litigation against employers who brazen infract their right of freedom of association.[55]

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[49] PAK Adewusi, 'Trade Unions: Nuisance or Benefits in the Development of University Education in Nigeria?' (2008) 2(3) *Labour Law Review,* 117-123.

[50]CS Ibekwe, 'Protecting Non-Standard Workers' Right to Freedom of Association and Trade Unionism' (2015) 6(2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 170.

[51] PAK Adewusi, 'The Role of Trade Unions in the Enhancement of Civil Liberties in Nigeria' (2007) 1(3) *Labour Law Review* 87-103.

[52]GG Otuturu, 'Trade Unions (Amendment) Act 2005 and the Right to Strike in Nigeria: An International Perspective' (2014) 8(4) *Labour Law Review* 33-46.

[53] RA Denesi 'Contract Labour and the Right to Freedom of Association in the Oil and Gas Industry in Nigeria' <https://www.academia.edu/5441918/Contract_Labour_and_the_Right_to_Freedom_of_Association_in_the_Oil_and_Gas_Industry_in_Nigeria> accessed 23 March 2021.

[54] RA Danesi, Labour Standards and the Flexible Workforce: Casualization of Labour under the Nigerian Labour Laws' <www.ajol.info/indexphd/eajphr/cart/view//39344/7848> accessed 15 March 2021.

[55] TM Fapohunda, 'Employment Casualization and Degradation of Work in Nigeria' (2012) 3(9) *International Journal of Business and Social Science* 257.

The government as regulator, has not helped the growth of trade unions but has seen them with suspicious eyes. The disassembling of the Nigerian Labour Congress (NLC) as the only central labour union is an attestation to this. The government being afraid of the growing popularity and power of the NLC under Adams Oshiomhole, sought a tactical way of whittling its power, the result was the amendment of the Trade Unions Act by the Trade Unions (Amendment) Act, 2005 which decentralised unions.[56] This singular act, has created a seemingly "divide rule" policy in trade unionism in Nigeria. Unfortunately, aside the anachronistic table-banking unproductive labour agitations by some central trade union bodies, these unions have failed or neglected to explore the option of litigation for and on behalf these affected workers under public interest litigation either to protect the constitution or enforcement of the rights of the affected employees.[57] At a time like this, when circumstances beyond the control and contemplation of the employer and employee have created critically hardship which threatens employment contracts, negotiation becomes a vital tool in navigating the murky waters.

The point must be noted that contract of employment is individual ie where an employer has a certain number of employees, each of them, has a separate and distinct contract of employment with the employer. Situation such as the pandemic, requiring negotiation, in the absence of a trade union, the employer can only legitimately vary the contract of employment, after negotiation with each and every employee individually. However, where there is in existence or operation, a trade union or recognise employees' association, all that the employer need to do, is to engage the leadership of the union or association and negotiate with them as the lawful representatives of the employees.

It is therefore, mutually beneficial that employers recognise and respect the rights of their employees to form or join trade unions. The essence of trade unions within an employ, is not necessarily to engage in cacophonous activity against the employer.

4. Suspension of Contractual Rights and Obligations intra Covid-19

The issue here is, can an employer or employee, use covid-19 as a factor to suspend the performance of contractual obligation or assertion of

[56] RA Denesi, 'The Trade Union (Amendment) Act, 2005 and Labour Reform in Nigeria: Legal Implications and Challenges' (2007) 1(1) *Labour Law Review*95-115.
[57] OO Animashaun, 'Equality at the Workplace: The Challenges Ahead' (2007) 1(3) *Nigerian Journal of Labour Law and Industrial Relations* 4.

accrued rights/privileges? It is worthy to note that labour relations stands on two basic common law principles, the principle of *laissez faire*[58] and *pacta sun servanda.*[59]By the former, everyone having the requisite legal capacity, is permitted to enter into contractual relations with others within the bounds of law.[60]By the later, once such contractual relationship is created, the parties are expected to perform their obligations under the contract and not to renege from same.[61] Thus, when an employer and employee enters into an employment contract, they are under a duty to perform towards each other, their obligations arising from the contract and shall not abdicate from same due to inconvenience or other unpleasant occurrences.[62] One generally acknowledged effect of covid-19 on employment relation is alteration of the position of the parties with attendant untold hardship especially the employer.

Under section two of this paper we have underscored the point that the employer has a duty to pay remuneration, provide work and tools with which the employee will use to work and ensure the safety of the employee in the course of effectuating the contract of employment. The employee on the other hand, has the duty to perform the work of the employer with the best skill and knowledge at his disposal, be honest and minimise or avoid exposing the employer to loss. Covid-19 has become an albatross to the fulfilment of these obligations as parties have adopted palliative measures. For instance, some employers have resorted to directing their employees to proceed on furlough or mandatory leave without pay for either a short or long period as a cost cutting measure instead of laying them off. . Some employers, have exploited this option but with half pay. It is apposite to note that employers who opt for the option of half-pay as an alternative to retrenchment must do so in compliance with Article 8 of the ILI Convention Protection of Wages Convention (Convention 95) of 1949 whose objective is to guarantee the payment of wages in full and timely by the employer. The Convention prescribes that wages deduction shall only be implemented in accordance with national laws, regulations, arbitral award or collective agreement reached between the employer and employees. In compliance with the

[58] E Chianu, *Employment Law* (Akure, Bemicov Publishers (Nig) Ltd, 2004) 4.
[59] *Adedeji Adedoyin v African Petroleum Plc.* [2016] 67 N.L.L.R. (Pt 238) 1 at 37, paras E-H.
[60] *Attorney General Rivers State v Attorney General, Akwa Ibom State* (2011) 3 MJSC 1.
[61] Agomo (n 13) 68.
[62] Oji and Amucheazi (n 11) 12-15.

non-pharmaceutical covid-19 safety measures, it has become imperative for employers to require the employees to work remotely. It is important to note that, the fact that an employee is working remotely does not absolve the employer from the duties imposed on him/it discussed in section two above. The employer's duty of care like any other subsists because the remoteness of the work does not take it outside the confines of being "in the course of employment" and any injury sustained would have arisen from or connected to the employment as contemplated under section 7(1) and 8(1) of the Employees Compensation Act (ECA) and Article 5 ILO Employment Injury Benefits Convention Recommendation 121[63] Section 7 of the ECA makes an employee entitled to compensation for injury sustained outside the employer's principal place of work while Section 8, entitles an employee to compensation for mental stress. Thus, where the employee sustained physical injury while working remotely from home or some other place other than the employer's workplace or succumb to mental stress arising from working remotely, the employer will be liable to pay compensation. It is therefore necessary that the employer ensures that the working conditions and environment of an employee working remotely is safe and secure and the nature and volume of work to be done, is not such that would expose an employee to mental stress.

Another issue is, various measures put in place by the government have put a strain in many employment relationships making the performance of contractual obligations impracticable or at a high risk and even cost. The issue is, will the doctrine of frustration contract based on covid-19 inure a party, to abdicate from performing contractual obligations? Generally, where an incident, takes place subsequent to the consummation of contractual relationship and without the input of the parties or reasonably foreseeable by them, rendering further performance impracticable, such an event is regarded as a frustrating one and will absolve the parties from their obligation of further performance.[64]The Supreme Court of Nigeria, in *Mazin Engineering Ltd. v. Tower Aluminium (Nig.) Ltd.*[65]defined frustration as "a premature determination of an agreement between parties lawfully entered into, owing to the

[63] Article 5 ILO Employment Injury Benefits Convention Recommendation 121 of 1964.
[64] T Adeshina, and O Okonkwo, 'Frustration of Contract in Nigeria' <www.jacksonettiandedu,com> accessed March 15 2021.
[65][1993] 5 NWLR (Pt 295) 526.

occurrence of an intervening event, or change of circumstances so fundamental as to be regarded as by law as striking to the root of the agreement and entirely beyond what was contemplated by the parties when they entered into the agreement."[66]Thus, for an event to frustrate a contract, it must occur after the consummation of the contract, without the knowledge of the parties rendering its performance practically impossible, illegal or radically different from what the parties had intended as at the time they entered into the contract.[67] Also, the event sought to be relied upon, must not be within the contemplation of the parties, either of them by their action or omission, occasioned its occurrence or same is not so fundamental to have changed the basis of the contract.[68]

Hence, does Covid-19 qualify as a frustrating event to absolve parties to an employment contract from further performance of their obligations thereunder?[69] The answer is not straightforward as it might seems. Before further adumbration, it is apposite to note that, frustrating events include but not limited to events such as outbreak of war, subsequent change in legal regulation, death or incapacitating ailment of either party,[70] destruction of the subject matter of the contract,[71] protracted illness or imprisonment of either of the parties, outbreak of disease, etc.[72]While it might be argued that covid-19 pandemic can justifiably suffice as a frustrating event, it can also be safely argued that covid-19, will not suffice as a frustrating event. There is consensus on the fact that covid-19 has brought unprecedented hardship having negatively affected individual and corporate economy. However, this is mere hardship or inconvenience that the law does not recognise as event that ordinarily, makes further performance impossible. In some other

[66]*Gold Links Insurance Co Ltd v Petroleum Special Trust Fund* (2008) LPELR-4211 (CA); *NBCI v Standard (Nig) Engineering Co Ltd* [2002] 1 NWLR (Pt. 768) 104; *Addax Petroleum Development Nig Ltd v Loycy Investment Company Ltd & Anor* (2017) LPELR-42522 (CA).
[67]*Diamond Bank Ltd v Prince Alfred Amobi Ugochukwu* (2007) LPELR-8093 (CA).
[68]*Federal Ministry of Health v Urashi Pharmaceutical Ltd* (2018) LPELR-46189 (CA).
[69] *Rockonon Property Co Ltd v NITEL & Anor* (2001) 7 NSCQR Vol 7 171 at 183.
[70]*Okereke & Anor v Aba North Local Government Authority* Unreported Suit No CA/PH/179/2004; *Aiico Insurance Plc v Addax Petroleum Development Co Ltd* (2014) LPELR-23743 (CA).
[71]*UBN Plc v Omni Products (Nig) Ltd* [2006] 15 NWLR (Pt 1003) 660.
[72]*Attorney General, Cross River State v Attorney General of the Federal & Anor* (2012) LPELR-9335 (SC).

instances, covid-19 has successfully crippled some business rendering them incapable of meeting their financial obligation towards their employees. It is apposite to note that, given the nature of employment relationship and its impact on the economy, what is expedient is for the employer and employee to seek creative solutions (such as the ones discussed in section five of this paper) in overcoming the challenges thrust at them by the pandemic in way that the relationship is not terminated but preserved to their mutual benefit.

Some employers may even be tempted to invoke *force majeure* amidst covid-19 to exculpate themselves from their obligations to their employees. While *force majeure* in deserving and legitimate instances, will exculpate parties from further performance, it is not a one size that fits all. Of course, there is no statutory definition of the term *force majeure* save that it is a common law creature and judicial meaning have been ascribed to it by Nigerian courts. In *Globe Spinning Mills (Nig) Plc v Reliance Textile Industries Ltd,*[73] *force majeure* was to be a common law clause in contracts which provides that one or both parties can cancel a contract or be excused from either part or complete performance of the contract on the occurrence of a certain event or events beyond the party's control. What this means is that, *force majeure* by itself, is a shapeless or colourless concept that means nothing except what the parties says it is.[74] What is being canvassed is that just like water takes the shape of whatever container it is put into and the colour of whatever substance it is mixed with, *force majeure* in itself, is meaningless and is only framed on whatever event (s) that the parties choose to tie it to. It must therefore be specifically provided by the parties and is exclusively applicable to the precisely mentioned occurrences and cannot be superimposed or presumed by the court. Whatever supervening event (s) the parties agree as a *force majeure* incident, is the only thing, as far as that contract is concerned, that the court will countenance. It is strictly interpreted and does not give any room for assumption or discretion. The Court have approved based on parties agreement that incidents regarded as act of God (eg earthquake, landslide, volcano, death) and man precipitated

[73](2017) LPELR-41433 (CA).

[74] M Dugeri, 'Covid-19 Pandemic-Impact on Performance of Contracts' <https://mikedugeri.wordpress.com/2020/07/13/covid-19-pandemic-impact-on-performace-of-contracts/> accessed 16 March 2021.

incidents like war, riot, strikes, crime, etc. are *force majeure* events.[75] It is worthy to note that *force majeure* clauses are predominant in commercial contracts and rarely in employment contract however, there is the possibility that, with the wake of covid-19, these clauses, will soon be a regular feature of employment contracts. While occurrences beyond the control of the parties, have come within the confines of *force majeure,* and convid-19 is one of such however, it is our vehement contention that, covid-19 without being expressly mentioned (or the use of other terms that are synonymous or depictive of covid-19 such as plagues, epidemic, pandemic, acts of government or include a sweeping phrase like "acts beyond the parties' reasonable control bearing in mind that the term 'Covid-19' was only coined after its occurrence) in an employment contract, will not qualify as *force majeure.*[76] This is because of the doctrine of sanctity of contract and the fact that both the court as well as parties, are bound by the terms of a contract and a court cannot in interpreting a contract, rewrite it hence, *expressio unius est exclusio alterius*.[77]

At present, the level of unemployment and underemployment in Nigeria, is unprecedented. As at December, 2020, the unemployment rate of Nigeria stood at 27.1% which represents 21.7 million Nigerian while the underemployment rate stood at 28.6%.[78] A combination of this, placed the unemployment and underemployment rate at a whopping 55.7% and the number of persons, willing and able to work i.e. ages 15-65years is estimated to be 119, 871. 186 (One Hundred and Nineteen Million, Eight Hundred and Seventy One Thousand, One Hundred and Eighty Six) persons.[79]The labour market is saturated with unemployed graduates with no realistic plan to create employment opportunities by the government. Any action of an employee. that is capable of leading to an influx of persons into the labour market (such as mass retrenchment of employee), must be avoided at all reasonable cost. In other words, a situation where the action of an employer will lead to rendering

[75]*Globe Spinning Mills (Nig) Plc. v Reliance Textile Industries Ltd* (2017) LPELR-41433 (CA).
[76]*Baker Marine Nigeria Ltd v Chevron Nig Ltd* (2006) LPELR-715 (SC).
[77] EE Alobo, *Modern Nigerian Law of Contract* (Calabar, University of Calabar Press, 2012) 4.
[78] S Oyekanmi, 'Nigeria's Unemployment Rate Jumps to 27.1 as at 2020 Q2' <https://nairametrics.com/2020/08/14/breaking-nigeria's-unemployment-rate-jumps-to-27.1/> accessed 20 December, 2020.
[79]*Ibid.*

employees jobless, must be avoided particularly when the current level of unemployment in Nigeria is unprecedentedly high. The effect of unemployment is better imagined than experienced. Aside its impact on the economy, it is reasonable linked to criminality and other vices in the society. While the ultimate goal is security of employment but under the prevailing circumstances, job security, must be rigorously pursue. The government must ensure that the Ministry of labour and productivity watch against covid-19 related retrenchment or loss of It is acknowledge that the sudden occurrence of covid-19 brought about severe hardship and a swift change to human relations however it should not disrupt employment relations in a way and manner that unbearable hardship is inflicted on the employees by employers or *vice versa.* Disruptions such as this, are occurrences which humans must use their best skill and knowledge to surmount and ensure that only unavoidable minimal discomfort is caused.

5. Balancing Contending Interest During and Post CoVID-19

From the foregoing, it is crystal clear that, Covid-19 pandemic has heightened the contention between the interest of the employer and employee as parties in to an employment contract. While the employer seeks to remain in business, maximise profit and minimise cost, the employee on the other hand, seeks improved terms and conditions of employment, better working conditions, enhanced remuneration and security of employment even during insecure periods like the pandemic. The role of the law is to creatively create a balance between these contending interests with mutually beneficial outcomes. It is apposite to note that, covid-19 has exacerbated the rate of unemployment in Nigeria as many persons that were employed, have lost their jobs. Prior to the advent of Covid-19, one obvious fact about Nigeria is the unprecedented high level of unemployment and underemployment which is a situation that cannot be controverted by any reasonable person. Every year, thousands of graduates are churned into the already overcrowded labour market without hope of securing any job left not suitable job owing to the high level of unemployment and underemployment in Nigeria with the government not taking proactive steps to create jobs or an enabling environment of entrepreneurship.[80] This situation, has led to a significant

[80] I Ukazu, 'Unemployment: Too Many Graduates Fighting for Too Few Jobs' (*University World News: AFRICA Edition,* 24 November 2021)

rise in precarious forms of employment particularly casualization of labour in both the public and more in the private sector, buttress the high level of unemployment and underemployment that is ravaging Nigeria with no feasible, cogent and futuristic plan in place by the government at various levels.[81] When job creation is mouthed by the government, and lifting of Nigerians from poverty, a careful examination of the strategy and implementation plan, would reveal that what is intended or done is "giving someone fish as opposed to teaching one how to fish."[82] They are mere palliative measures which have no sustainability and can therefore, only further impoverish the people than make them economic and financially buoyant.[83] It is therefore, pertinent that, the impact covid-9 has on employment relations in Nigeria, is creatively tackled and all contending interests, are beneficially balanced.

One of the ways out of the subsisting quagmire is for employers to engage their employees through their representatives of trade union in honest, transparent and insightful dialogue through collective bargaining to renegotiate the terms and conditions of employment. Employers must strenuously resist the temptation of unilateral alteration of the terms and conditions of employment and foisting same on their employees. Doing this could lead to catastrophic altercations which can disrupt employment relations. An employer who is unable to continue paying full salary, can tactfully and successfully negotiate with the employees to reduce the amount of salary being paid as an alternative to declaring some employees redundant. Giving the prevailing situation, employees, would prefer reduction in wages than being paid full and risk being without employment. This arrangement can subsist for the inclement financial period until the company's financial fortunes improve and are able to

https://www.universityworldnews.com/post.php?story=20211113143735211 18 accessed December 2021.

[81] DT Eyongndi, 'An Analysis of Casualization of Labour in Nigeria' (2016) 7(4) *The Gravitas Review of Business and Property Law*, 102-116; PE Emechi and DT Eyongndi 'Casualisation of Labour Practice in Nigeria and Ghana: What Lessons are there for Nigeria?' 2017-2018, *Nigerian Current Law Review,* 121-162.

[82] MN Umar, 'Job Creation in Nigeria: Challenges, Opportunities and the Role of Micro, Small and Medium Enterprises (MSMEs)' A paper delivered at the *3rd Annual CESA Economic Policy and Fiscal Strategic Seminar*, at Transcorp Hilton Hotel, Abuja, on 8 December 2011.

[83] E Ayeni and others, 'Job Creation and Youth Empowerment in Nigeria, 2011 –2020 (2020)' 2(1) *Iraqi Journal of Social Science,* 3-19.

revert to the *status quo.* At present, there is a greater need for job security in Nigeria, any reasonable measure that can be explored to achieve this has to be carefully examined by all the parties.[84]

One reality which covid-19 has brought to the fore is that, employers and employees must begin to think outside the box and see themselves as partners in progress. The orthodox means of doing things has proven inadequate and obsolete in the face of prevailing realities. While the pandemic was at its prime, working remotely became an unavoidable option, being able to use internet enable devices and platforms for meetings became indispensable, these realities, are going to continue post covid-19. Employers must ensure that the necessary facilities and gadgets are acquired while employees must acquire the necessary skills and expertise to efficiently use these facilities. The new normal has become a way of life and everyone in and employment contract, must evolve and adapt otherwise, the person will be unfit for continuous employment.

6. Conclusion and Recommendations

Extrapolating from the above analysis, it is crystal clear that covid-19 has affected all facets of human endeavours and employment relationship is not an exception. Several measures have been adopted to prevent its spread and to cushion its effects. In employment relations, it has led employers to adopt various survival measures legitimate and illegitimate such as unilateral alteration of terms and conditions of employment, working remotely, termination or suspension of contract of employment, declaration of redundancy, mandatory leave. The employees on the other hand, desire continuity of the employment with secured benefits and privileges despite the ravaging situation. Thus, the interests of both parties, seems diametrically opposed and must be balanced so as not to abruptly disrupt the polity. Suspension of contractual obligations as a leeway would not be of mutual benefits hence, the parties, within the confines of the law, must seek creative measures that will balance their interest in a way and manner that is mutually beneficial. While the employer could resort to frustration of contract as a possible means of absolving himself from the burden of further performance, this option, although legal and legitimate, will have the negative effect of adding to

[84] GG Otuturu, 'Job Security and the Nigerian Workers: Issues, Prospects and Challenges' (2015) 9(2) *Labour Law Review*33-53.

the already saturated labour market, more unemployed persons with its attendant negative effects.

Negotiation and transparent dialogue is suggested as the best option in doing this. Thus, it is counterproductive for employers to engage in the practice of refusing their employees to form or join trade unions because, it is cheaper to engage in dialogue with employees through their union than having to renegotiate terms and conditions of employment with every single employee bearing in mind the personal nature of employment contract.

Also facilities that can aid renegotiated agreements to be seamlessly performed, should be provided by the employer while the employees, should acquire or upgrade their skills and knowledge to stay relevant in contributing their significant quota to the growth of their organisations.

The government as regulator-employer, through the Ministry of Labour, Employment and Productivity, should keep an eagle eye and swiftly intervene in cases of covid-19 induced retrenchment or mass termination to check against such and ensure that, only in deserving and genuinely unavoidable cases, can retrenchment or mass termination be allowed.

Human resources and personnel managers, is suggested that going forward, in drafting employment contracts, should carefully examine and incorporate well-crafted *force majeure* clauses which could aid amiable resolution in cases such as Covid-19. The government should intensify its effort on creation of gainful employment opportunities and provision of social security benefits which its citizens, could fall back on during and post covid-19 like it is done in more civilised climes.

EXAMINING THE EXTENT OF THE APPLICATION OF THE UNITED NATIONS CONVENTION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE IN NIGERIA

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Abstract

The right of persons to be protected from enforced disappearance is an offshoot of the fundamental right to personal liberty. The United Nations International Convention on the Protection of all Persons from Enforced Disappearance (ICPAPED) came into force on 23 December 2010. Nigeria proclaims her commitment to its spirit and has ratified the Convention but is yet to domesticate the same. This article examines the extent of the application of the Convention in Nigeria. It argues that state practices are far from complying with the letters and spirit of the Convention as various acts of enforced disappearance of persons occur in the country. In this context, while pointing out concrete instances of state complicity in enforced disappearances, the paper highlights some of the recorded incidents of forced disappearances in the country committed by both state agents and non-state actors. It identifies the challenges militating against the effective implementation of the Convention and concludes by offering suggestions on how its application can be made more effective in Nigeria.

Keywords: Enforced disappearance, International Convention on the Protection of All Person from Enforced Disappearance, human rights, personal liberty, human dignity, Nigeria

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1. Introduction

The right to be protected from enforced disappearance as an offshoot of the right to personal liberty is an essential aspect of human rights.[1] Historically, this right can be traced to the promulgation of the Magna Carta in England in 1215, further strengthened with the passing of the Habeas Corpus Act in 1679 to protect persons from arbitrary arrests and detentions.[2] In international human rights law, a forced (or an enforced) disappearance occurs when a person is secretly abducted or imprisoned by a state or political organisation, or by a third party with the authorisation, support, or acquiescence of a state or political organisation, followed by a refusal to acknowledge the person's fate and whereabouts, with the intent of placing the victim outside the protection of the law.[3]

Until the dictatorships and civil wars in Latin America in the 1970s and 1980s, in which governments used enforced disappearances in a systematic – and often coordinated – way, the issue of the disappearance of persons generated neither international concern nor proper national or international judicial response.[4] Indeed, the term *desaparecido* (disappeared) often used to describe victims, is a Latin American invention.[5] As one author bluntly asserts, the systematic practice of enforced disappearances (as we know it today) is the ultimate contribution to the history of human cruelty made by Latin America.[6]

According to the Rome Statute of the International Criminal Court, which came into force on 1 July 2002, when committed as part of a widespread or systematic attack directed at any civilian population, a 'forced disappearance' qualifies as a crime against humanity and, thus, is not subject to a statute of limitations. On 20 December 2006, the United

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[1] Article 1(1) Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133, UN Doc A/RES/47/133 (18 December 1992); see also International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: The Right of Family Members – A Practitioners Guide* (2016) 10-12.

[2] DK Stevenson, *American Life and Institutions* (1987) 34

[3] See article 2 ICPAPED, see also H Jean-Marie and L Doswald-Bec, *International Committee of the Red Cross Customary International Humanitarian Law: Rules* (2005) 342.

[4] J Zalaquett 'The Emergence of "Disappearances" as a Normative Issue', in CB Walling and S Waltz (eds) *Human Rights: From practice to policy: Proceedings of a Research Workshop* (2010) at 11.

[5] AE Dulitzky 'The Latin-American Flavour of Enforced Disappearances' (2019) 19(2) *Chicago Journal of International Law* at 423–489.

[6] Ibid.

Nations General Assembly (UNGA) adopted the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAPED).[7] The Convention, which affirms respect for the right of all persons not to be subjected to enforced disappearance, can be said to be an offshoot of the fundamental right to personal liberty. It opened for signature in Paris, France on 6 February 2007 and entered into force on 23 December 2010, in accordance with its article 39(1) which states that it shall enter into force on the thirtieth day after the date of deposit with the Secretary General of UN of the twentieth instrument of ratification or accession. Nigeria is a state party to the convention having acceded to same on 27 July 2009.[8] The core provisions of the convention include that:

(a) no one should be subjected to enforced disappearance,[9] or held in secret detention;[10]
(b) widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law;[11] and
(c) each state party is to take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law as well as to ensure easy means of reporting and investigating alleged acts of enforced disappearance.[12]

It makes provisions for access to information for people interested in a disappeared person, such as relatives of the person deprived of liberty, their representatives or counsel[13] and for the training of law enforcement personnel and those involved in the custody or treatment of those deprived of liberty to prevent them from engaging in enforced disappearances.[14] It also mandates state parties to include the offence of

[7]Res A/RES/61/177.
[8]United Nations, 'Chapter IV – Human rights: International Convention for the Protection of All Persons From Enforced Disappearance' 20 December 2006, *United Nations Treaty Collection* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4> accessed 10 June 2020).
[9] ICPAPED, art 1.
[10] Ibid, art 17.
[11] Ibid art 5.
[12] Ibid arts 5 and 12.
[13] Ibid arts 18 – 20.
[14] Ibid art 23.

enforced disappearance as an extraditable offence[15] and provides for mutual legal assistance and co-operation among states in dealing with the issue of enforced disappearances.[16]

This paper sets out to examine the extent to which Nigeria has protected persons from enforced disappearance. It argues that as a result of peculiar considerations, Nigeria promotes adherence to the tenets of ICPAPED only in theory, while going against its spirit and intendment in practice. It begins with a review of general African literature dealing with the politics of enforced disappearances in the continent; before going on to engage with the specifics of enforced disappearances in Nigeria, particularly under on the *Boko Haram* Insurgency and the counter-insurgency programme of the federal government. The paper then looks at the challenges militating against the proper implementation of ICPAPED in Nigeria and concludes by offering suggestions which, if adopted, will aid in the effective implementation of the convention in the country.

2. The Politics of Enforced Disappearances in Africa

Over the years, a number of African states have relied on enforced disappearances to silence political opposition, activists and human rights defenders.[17] Under apartheid in South Africa and in many of the conflicts in Africa, from the Algerian civil war in the 1990s, Libya under Muammar Gaddafi, Sudan during the civil war, and Zimbabwe under Robert Mugabe, opponents of the government or people just in the wrong place at the wrong time, have disappeared.[18] More recently, dozens of protesters, human rights defenders and professionals in Zimbabwe and Sudan demanding political changes have been subjected to enforced disappearances.[19] While the context and scale of enforced disappearances vary in African countries, nevertheless, all enforced disappearances share common elements which make them a distinct crime and one of the gravest human rights violations.

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[15] Ibid art 13.
[16] Ibid arts 14 and 15.
[17] E Nudd, 'African States Cannot Deny Enforced Disappearances Any Longer', 19 November 2019, *Open Democracy*, <https://www.opendemocracy.net/en/african-states-cannot-deny-enforced-disappearances-any-longer/> accessed 8 April 2020.
[18] Redress, 'African Commission Session Discusses Enforced Disappearances in Africa' (22 October 2019) <https://redress.org/news/african-commission-session-discusses-enforced-disappearances-in-africa/> accessed 8 April 2020.
[19] Ibid.

In Libya during the Gaddafi regime, the state and its agencies systematically used enforced disappearances, torture and other ill-treatment to target political opponents, students, journalists, human rights defenders and anyone critical of or perceived as posing a threat to the regime, whether inside or outside Libya.[20] Thousands of victims were arrested and disappeared for years, with their whereabouts unknown and the government refusing to disclose information about their fate or location.[21] After the fall of Gaddafi in 2011, the situation in Libya deteriorated and the pattern of enforced disappearance continued to be a widespread practice. Militias linked to the two governments in the east and west are accused of being responsible for torture and other ill-treatment and enforced disappearances across the country.[22] Since 2019, there has been a sharp increase in incidences of enforced disappearance in Libya. On 17 July 2019, Siham Sergiwa, a prominent women's rights defender and a sitting member of the House of Representatives (HoR), was abducted and forcibly disappeared. Sergiwa had before then criticized the Libyan National Army offensive on Tripoli and called for the formation of a civilian state. As at the time of writing, her whereabouts remain unknown.[23]

Almost three decades after the Algerian civil war ended, people are still searching for their relatives that disappeared during the war. At least 150,000 people were killed in the violence and 7,200 were disappeared. While some of the abductions have been ascribed to the Islamists, the majority can be attributed to the Algerian state. This assertion is corroborated by of relatives of disappeared persons who testify that their relatives were taken away by the police or military men.[24] After the conflict, the Algerian government passed the Charter for Peace and National Reconciliation in 2005 to provide amnesties to state security forces for past violations and grant some compensation to the

[20] Lawyers for Justice in Libya, 'Enforced disappearances: Combating enforced disappearances in Libya' <https://www.libyanjustice.org/enforced-disappearances> accessed 8 April 2020.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] J Howell, 'Investigating the Enforced Disappearances of Algeria's "Dark Decade": Omar D's and Kamel Khélif's Commemorative Art Projects' (2016) 12(2) *The Journal of North African Studies* at 213 – 234.

families of the disappeared. But the government refused to reveal the truth about what had happened to those missing.[25]

In South Africa, it is believed that as many as 2,000 people might have been disappeared during the apartheid years.[26] The Khulumani Apartheid Reparations Database contains the records of the disappearance of 1,200 people.[27] While 477 of these cases were officially recognised by the Truth and Reconciliation Committee (TRC), those working in the field have estimated that there are another 1,500 cases that are not officially recorded.[28] A good example of a disappeared person in South Africa is that of Nokuthula Aurelia Simelane, a lady of 23 years who disappeared in 1983. She was last seen some five weeks after being abducted, in the boot of a policeman's motor vehicle in Johannesburg. The security branch of the South African Security Police and the police from Soweto were alleged to be responsible for her disappearance.[29]

During Idi Amin's eight-year military dictatorship, agents of the state abducted and 'disappeared' countless Ugandan citizens, as well as foreign nationals.[30] Although most of the disappeared were men, disappearance was not simply a masculine phenomenon. This disturbing pattern of violence also had a profound impact on women and their children.[31] In Zimbabwe, during the reign of Mugabe, a major human rights crisis developed as the authoritarian government used whatever methods it considered necessary (including enforced disappearances) to

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[25] Ibid.

[26] J Sakin, 'Dealing with Enforced Disappearance in South Africa (With a Focus on the Nokutula Simelani Case) and Around the World: The Need to Ensure Progress on the Rights to Truth, Justice and Reparations in Practice', (2015) *Speculum Juris* at 21 – 48.

[27] Ibid.

[28]JD Aronson, 'The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons' (2011) 5(2) *International Journal of Transitional Justice* at 262 – 281.

[29] UN Working Group on Enforced or Involuntary Disappearances Post-sessional document 103rd session (7–16 May 2014) A/HRC/WGEID/103/1 25 July 2014 17.

[30]AC Decker '"Sometime You May Leave Your Husband in Karuma Falls or in the Forest There": A Gendered History of Disappearance in Idi Amin's Uganda, 1971–79' (2013) 7(1) *Journal of Eastern African Studies* 125 – 142.

[31]*Heba Naguib, '"Only truth could heal this pain": Algerian women speak of their search for the disappeared', 3 August 2016, International Centre for Transitional Justice (ICTJ),* <https://www.ictj.org/news/algeria-women-disappeared-truth > accessed 23 March 2020.

ensure its continued survival.[32] This method of governance appears to have continued even after the fall of Mugabe. Accordingly, in September 2019, a major fall-out of the industrial action by medical doctors demanding better pay and working conditions was the disappearance from home of the president of the Hospital Doctors Association, *Dr* Peter Magombeyi, who was tortured by government forces for three days before being found, in a serious condition, several kilometres outside Harare.[33]

In Sudan, almost a dozen protesters disappeared in June 2019 following a violent crackdown by security forces or paramilitaries.[34] Following the outbreak of nation-wide anti-government protests that led to the ousting of Al-Bashir in April 2019, Sudanese national security forces and government-backed paramilitaries used the practice of enforced disappearances to 'preserve national security'. The victims of these enforced disappearances are often tortured and taken away, and their families left with no information on their whereabouts.[35]

In Africa, people who have disappeared are beyond the protection of the law and at the mercy of their captors. Many of their rights are denied: rights to security and dignity of the person, not to be arbitrarily deprived of liberty, to humane conditions of detention, to legal representation and to a fair trial. In some cases, other rights are also infringed: the right to family life, the rights of the child, freedom of thought, expression, religion and association and the right not to be discriminated against. The scale of the problem is not adequately captured in the African continent, due to gaps in understanding, absence of the necessary legal framework, and lack of accurate statistics. Despite the widespread and systematic pattern of enforced disappearances in

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[32] Lorna Davidson and Raj Purohit, 'The Zimbabwean human rights crisis: A collaborative approach to international advocacy' (2004) 7 *Yale Human Rights. & Development Law Journal* 108 – 131.

[33] Nudd (n 17).

[34] Ibid.

[35] Eva Sanchis and Linda Patumi, 'International Day of Victims of Enforced Disappearances: Time for African States to End This Practice' (30 August 2019), *African Centre for Justice and Peace Studies*, <https://www.acjps.org/international-day-of-victims-of-enforced-disappearances-time-for-african-states-to-end-this-practice/ > accessed 25 March 2020.

Africa, only 16 of the 54 African States are parties to the ICPAPED.[36] Furthermore, there is no regional instrument in Africa that can enhance understanding of the concept and provide practical measures to ensure its prohibition and prevention. In this context, many African states lack the necessary framework to investigate, prosecute and provide reparations to victims of enforced disappearances.[37]

3. Protection of all persons from enforced disappearance in Nigeria

International human rights law is essential for the Nigerian system as a means of explaining and interpreting the scope and content of the rights and liberties enshrined in the Nigerian Constitution. Nigeria is a member of many international organisations and has ratified several international and regional instruments that preserve and protect human rights. In this context, the country has ratified all core international human rights treaties, and has equally ratified many regional instruments within the African Union (AU) and the Economic Community of West African States (ECOWAS). By acceding to ICPAPED, Nigeria undertook the obligation of implementing same through national legislation and to take measures to prevent and punish enforced disappearances. However, Nigeria adopts the dualist approach in the execution of international treaties to which she is a party.[38] As a result, treaties validly concluded between Nigeria and other subjects of international law do not automatically transform into Nigerian laws without their being domesticated, that is, being specifically enacted into law by the National Assembly in accordance with section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Unfortunately, the National Assembly is yet to enact a legislation that will domesticate the ICPAPED in the country. However, the crime of enforced disappearance, to a large extent, can be enforced under certain extant laws in Nigeria.

In Nigeria, acts of enforced disappearance of persons may be viewed as a violation of fundamental rights as well as a crime. Although there is no specific legislation creating an offence of 'enforced disappearance', the core provisions of ICPAPED have their equivalents

[36] These are Burkina Faso, Central African Republic, Gabon, Gambia, Lesotho, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Seychelles, Togo, Tunisia and Zambia. See Sarkin (n 26).

[37] Redress (n 18).

[38] CE Okeke and MI Anushiem, 'Implementation of Treaties in Nigeria: Issues, Challenges and The Way Forward', *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 9, 2 (2018) 216 – 229.

under the Nigerian Constitution,[39] relevant international legal instruments to which Nigeria is a party as well as various national statutes, which prohibit and penalise acts of enforced disappearance. In addition to the constitutional guarantees of rights to dignity of the human person and personal liberty, there are national and state laws that prohibit acts of enforced disappearance of persons.

An act of enforced disappearance is illegal in Nigeria and would amount to a breach of fundamental rights not only under international legal instruments directly applicable under the laws of Nigeria (notably the rights to liberty and security of person under article 9 of the International Covenant on Civil and Political Rights and articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights), but also under the 1999 Constitution (as amended). Essentially, Chapter IV of the Nigerian constitution contains provisions dealing with fundamental rights. These provisions protect the right of all persons not to be arbitrarily deprived of their liberty and, in case of detention, sets out a series of basic safeguards which must be complied with.

Bearing in mind that the right to personal liberty is one of the most central human rights connected to the essentialist rudiments of an individual's physical freedom, acts of enforced disappearance in Nigeria may also constitute offences under federal and state laws that prohibit abduction, kidnapping and trafficking in persons, such as the Criminal Code (applicable in the Southern states),[40] the Penal Code (applicable in the Northern states),[41] Trafficking in Persons (Prohibition) Enforcement and Administration Act (TPPEAA);[42] the Violence Against Persons (Prohibition) Act (VAPPA);[43] the Administration of Criminal Justice Act (ACJA),[44] (and its adaptations under state laws); the anti-kidnapping laws as well as criminal procedure laws of various states in the country.

Regarding domestic criminal law, the Criminal Code in section 364 prohibits unlawful imprisonment of persons, the essential ingredients of which include imprisoning a person and taking him out of Nigeria

[39]Especially, section 35 of the 1999 Constitution, which states in (1) that, 'Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law'.
[40]Cap C38 Laws of the Federation of Nigeria (LFN) 2004.
[41]Cap 53, LFN 1990, applicable in the Northern States.
[42] Act No 4 of 2015.
[43] The VAPPA Act 2015.
[44] ACJA 2015.

without his/her consent and imprisoning any within Nigeria in such a manner as to prevent him from applying to a court for his release or from discovering to any other person the place where he is imprisoned, or in such a manner as to prevent any person entitled to have access to him from discovering the place where he is imprisoned. Under section 365 of the Criminal Code, it is a crime for any person to unlawfully confine or detain another in any place against his will, or otherwise unlawfully deprive another of his personal liberty.

Similarly, section 255 of the Penal Code makes it an offence for a person to restrain or confine another person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits. Under section 259 of the Penal Code, whoever wrongfully confines a person in such manner as to indicate an intention that the confinement of that person may not be known to a person interested in the person so confined or to a public officer or that the place of the confinement may not be known to or discovered by any such person or public officer, is guilty of a crime. According to section 258 of the Penal Code, whoever keeps a person in wrongful confinement knowing that a warrant or order or writ for the production or liberation of that person has been duly issued, shall be punished with imprisonment for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of chapter XVIII of the code.

Again, section 1(1) of the Anti-Torture Act[45] requires the government to ensure that the rights of all persons, including suspects, detainees and prisoners are respected at all times and that no person placed under investigation or held in custody of any person in authority shall be subjected to physical harm, force, violence, threat or intimidation or any act that impairs his free will. Under the Child Rights Act,[46] sections 21−52 contain provisions which protect every child from child labour, child trafficking, ritual killing, sexual, physical, emotional abuses and neglect.

In the area of administrative institutions, Nigerian government established the National Human Rights Commission (NHRC), which has been awarded 'A' status by the International Coordinating Committee of National Human Rights Institutions and has benefited from technical

[45] Anti-Torture Act 2017.
[46] Act No 26 of 2003

assistance and capacity building initiatives of the UN and donors to enhance its monitoring, reporting and investigation activities. The commission has actively engaged the Nigerian Army and security agencies regarding on-going counter-insurgency operations, especially in Borno state and other parts of the north-east of the country, through organizing human rights dialogues between the army and civil society organisations to enhance co-operation. It has held public hearings on evictions and violations by security forces and co-ordinated independent monitoring by non-governmental organisations (NGOs) of the mass trial of some suspected *Boko Haram*[47] detainees. The commission has also undertaken prison audits and monitored human rights aspects of elections. In 2015, the military authorities granted NHRC access to monitor court-martials of military officers in cases of human rights abuses and violations.

4. Enforced Disappearances in Nigeria Committed by State Actors

While the Nigerian government proclaims its commitment to combating the practice of enforced disappearance in the country, it has been accused of resorting to the same practice in their counter-terrorism strategies. For example, the Nigerian security forces have been accused of using various counter-terrorism methods that fall within the definition of enforced disappearance. In 2018, the UN Office of the High Commissioner for Human Rights (OHCHR) reported violations of human rights and international humanitarian law, including extra-judicial killings, enforced disappearances, arbitrary arrests and detention, allegedly committed by Nigerian security forces during counter-insurgency operations.[48] According to the UN report, young men suspected of being members of *Boko Haram* were being arbitrarily arrested and detained by the army, police and civilian vigilante groups and after such arrests, relatives of those arrested were unable to locate them in detention and in many cases such persons were never seen again.[49]

[47] *Boko Haram* is a popular name for the Islamic sect, *Jama'atu Ahlis Sunna Lidda'awati wal-Jihad* – which in Arabic means 'People Committed to the Propagation of the Prophet's Teachings and Jihad'. *Boko Haram* loosely translated from Hausa language means 'Western education is forbidden'.

[48] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights', UNGA/A/HRC/WG.6/31/NGA/2 (27 August 2018) para 22.

[49] OHCHR, 'Violations and Abuses Committed by Boko Haram and the Impact on Human Rights in the Countries Affected' UNGA/A/HRC/30/67 (9 December 2015) para 63.

The office of the Prosecutor of the International Criminal Court included two cases against the Nigerian security forces in its preliminary examination of the situation in Nigeria.[50] Similarly, Amnesty International (AI) published a list of names and pictures of more than 1,200 people arrested in Borno state between 2011 and 2014 whose whereabouts, according to several sources and some relatives of the victims, remain unknown.[51] While the list is by no means a comprehensive compilation of all missing people, it is one measure of the massive impact the operations of the military and police have had in Borno state.

Some of the names on the list include Ahmed Bello, Modu Abubakar and Ibrahim (not their real names). Ahmed Bello was arrested by soldiers in July 2012 during a cordon-and-search operation following a bombing in Maiduguri. His mother and brother told AI that on that day, Ahmed went to school to pay his exam fees, but never returned home.[52] In June 2013, after a joint team of Department of State Services (DSS) and army came to arrest Modu Abubakar, a 23-year-old student, at his house in Yola but he was not at tome, his father later accompanied him to the DSS station in Yola, where the DSS accused Modu of 'offering suspicious people a place to stay' and detained him. A month later, Modu's father was told his son was transferred to another station. He searched the nearby stations and prisons but could not find him and all security agencies denied knowing anything about his case.[53] According to information obtained by Amnesty International, as of August 2013, Modu was alive and in military detention. A photo showing Modu holding a placard with his name (which a senior military officer gave to AI) was among 81 photos of detainees in 23 Armoured Brigade Military

[50] *Bojana Djokanovic,* 'Human Rights in Nigeria – Chibok Abductions and Disappearances' *International Commission on Missing Persons*, <https://www.icmp.int/news/human-rights-in-nigeria-chibok-abductions-and-disappearances/ > accessed 4 June 2020.

[51] The list compiled by a human rights defender who asked relatives of people arrested by the military to come and register their names on file with Amnesty International. See Amnesty International, 'Stars on their shoulders, blood on their hands: War crimes committed by the Nigerian military', (2015) *Amnesty International Limited*, <https://www.amnesty.org/download/Documents/AFR4416572015ENGLISH.PDF> accessed 7 June 2020.

[52] Ibid.

[53] Ibid

Detention Camp.[54] According to the metadata on the photo, it was taken on 7 August 2013. As at June 2015, however, Modu was not released and the family did not receive any further information regarding his fate or whereabouts.[55]

In September 2013, Ibrahim, aged 25 years, who just started his own carpet trading business, was travelling by bus from Maiduguri to Dikwa market when he was abducted by the military. Fellow passengers old his father that at a military checkpoint in New Marte (92 kilometres from Maiduguri), the military stopped the bus and took him away, hands tied behind his back, accusing him of being a *Boko Haram* member. Ibrahim's father told AI that the military in New Marte told him that his son had been taken to Giwa barracks. A local civilian Joint Task Force (JTF) member checked at the barracks and confirmed that Ibrahim was being held there. After the attack on Giwa barracks by *Boko Haram,* another member of the civilian JTF told Ibrahim's family that they had seen him as he fled the barracks during the attack.[56]As at the time of this writing, Ibrahim's whereabouts remain unknown.

Apart from Amnesty International, the Legal Defence and Assistance Project (LEDAP) has documented over 28 cases of enforced disappearances in the North East of Nigeria since 2017. Large numbers of relatives have laid complaints about the disappearance of their brothers, husbands, sons and fathers after they were arrested by the military. Some of the victims have remained in detention without being allowed access to medical and legal assistance; while the victims have lamented about their inability to access their relative. One of such cases of enforced disappearance is that of two brothers, Usman and Amiru Mohammed Gambo, who were arrested as they were on patriotic call to join a youth volunteer group known as the Borno State Youth Orientation and Empowerment Scheme (BOYES) established by the office of the Governor of Borno state. According to their brother, Ali Mohammed, the two brothers and some other men who also wanted to join the volunteer group were classified as terrorists, arrested and taken into detention where they have been held till date and all efforts to reach the victims by

[54] All photos are on file with Amnesty International.
[55]Amnesty International (n 51).
[56] Amnesty International interview, July 2014 cited in Amnesty International (n 51).

the family members and legal officers have yielded no result and there is fear that the brothers might have been killed or had died in detention.[57]

In a statement issued to mark the International Day of the Victims of Enforced Disappearances in 2018, AI called on the Nigerian government to release those who have been subjected to enforced disappearance in the country, accusing the government of holding several persons in secret detention facilities across the country without charge or trial.. According to the organisation:

> So many families are still searching for loved ones who have not been seen for many years. In some cases, families live with the pain of not knowing whether their loved ones are alive or dead. It's time the government did the right thing – and either release these detainees or charge them with a recognizable criminal offence in a fair trial without recourse to death penalty.[58]

AI lamented the continued use of enforced disappearance by the Nigerian government as a governance mechanism, accusing the government of using it as a tactic to 'silence critics and instil fear' in civilian populations who were facing the double threat of armed groups and military operations. While insisting that some detainees have been held incommunicado for about nine years without access to their families or lawyers, the group added that others have received court judgments ordering their release from custody, but security agencies have continued to defy the orders. It cited the case of a journalist, Abiri Jones, who was detained for more than two years without trial and who was only released following pressures from civil society organisations.[59]

AI also reports that from figures provided by the Islamic Movement of Nigeria (IMN, also popularly called Shiites), the fate of at least 600 of their members has been unknown since the Shiites clashed with the military in December 2015 in Zaria. Crucially, several people suspected of being associated with *Boko Haram*, Niger Delta agitators,

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[57]Chino Obiagwu, *Report on the Human Rights Situations in Nigeria submitted to the Office of the Human Rights Council in Geneva during the 31st Session of the UPR Working Group* (LEDAP, 2018) 5.

[58] Channels Television, 'Nigeria Must Account for Victims of "Enforced Disappearance", says Amnesty International', 3 August 2018, *Channels Television*, <https://www.channelstv.com/2018/08/30/nigeria-must-account-for-victims-of-enforced-disappearance-says-amnesty-international > accessed 5 June 2020.

[59] Ibid.

and pro-Biafra activists in the country were arbitrarily arrested and detained by the DSS in recent years.[60]

5. Enforced disappearances by committed non-state actors in Nigeria

While this paper engages primarily with enforced disappearances in which the state is complicit, it is equally necessary to note that enforced disappearances are also carried out by non-state actors in Nigeria; notably *Boko Haram*, civilian vigilantes, militant groups in the Niger Delta and herdsmen. The acts of enforced disappearances perpetrated by these groups are discussed in the following paragraphs.

5.1 Boko Haram

In recent years, one of the most glaring examples of enforced disappearance conducted by non-state actors is that perpetrated by *Boko Haram*.[61]*Boko Haram* (which pledged its allegiance to the Islamic State in 2015) has waged a ten-year insurgency to establish an independent Islamic caliphate in the northeast of Africa's biggest economy.[62] Founded earlier in 2002 in Maiduguri, Borno state by Mohammed Yusuf (late), the sect had by 2015 rapidly grown into a ravaging army occupying a sizeable part of the northeast of the country.[63] In prosecuting its activities, members of the sect engage in acts of enforced disappearances such as kidnapping for ransom, abducting of young boys and girls, women and children.[64] Kidnapping of school girls has been a *Boko Haram* horror mark. A good example is the abduction on 14 April 2014, of 276 female students from the Government Secondary School in Chibok, Borno state by members of the group. 57 of the girls managed to escape from their captors; 107 of them have so far been released following protracted

[60] Ibid.

[61] Victor C Iwuoha, 'United States' Security Governance in Nigeria: Implications on Counterterrorism Strategies against Boko Haram', (2019) 54(8) *Journal of Asian and African* Studies1175 – 1194.

[62]*Bojana Djokanovic,* 'Human rights in Nigeria – Chibok abductions and disappearances'.

[63]J T Omenma, I E Onyishi and AA Okolie, 'A Decade of Boko Haram Activities: The Attacks, Responses and Challenges Ahead', (2020) *Securities Journal*. DOI: https://doi.org/10.1057/s41284-020-00243-5.

[64]Claire Felter, 'Nigeria's battle with Boko Haram', 8 August 2018 *Council on Foreign Relations*, <https://www.cfr.org/backgrounder/nigerias-battle-boko-haram > accessed 24 March 2020.

negotiation between the Federal Government and the group, while 112 are still missing.[65]

On 19 February 2018, 110 school girls aged 11–19 years were kidnapped by *Boko Haram* members from the Government Girls' Science and Technical College (GGSTC), Dapchi, Yobe State. After a month, on 21 March 2018, 106 kidnapped children, including 104 of the Dapchi School girls and two others were released by their abductors.[66] Five of the school girls were reported (by their released school mates) to have died, while one named Leah Sharibu is still being held by the insurgents because she refused to convert from Christianity to Islam as the insurgents demanded.[67] Apart from the school girls, many people, especially young men (forcefully recruited as fighters) girls, women and children are being forcibly held by *Boko Haram* insurgents.

5.2 Civilian Vigilantes

The inability of Nigerian security forces to protect civilians from *Boko Haram* attacks and the general deterioration of the security situation in the north-east of the country, led to the emergence of local self-help/defence groups, known as Civilian Joint Task Force (JTF or *Kato da Gora* meaning "man with a stick" in the local language). These groups operate with the tacit approval of the security forces, and it appears that the authorities benefited from their activities against *Boko Haram*. According UN reports, the civilian JTF has assisted Nigerian security forces in identifying and arresting *Boko Haram* suspects, controlling security checkpoints, providing information and monitoring the movement of people, and has also used firearms against *Boko Haram* in self-defence and to safeguard communities. However, there have been allegations of beatings, detention of suspects, killings and the recruitment of children by JTF. The civilian vigilantes had allegedly killed some falsely-identified *Boko Haram* suspects, including, in at least one case, a person with a disability.[68] Thus, although JTF appears to have brought security and order to communities, some members of the communities,

[65]Ibid.

[66]James Okolie-Osemene and Rosemary I Okolie-Osemene, 'Nigerian women and the trends of kidnapping in the era of Boko Haram insurgency: Patterns and evolution' (2019) 30 (6-7) Small Wars & Insurgencies 1151 – 1168.

[67] Jacob **Zenn**, 'Kidnapping girls in Nigeria: Cases from Chibok and Dapchi', (2018)11(3) *Combating Terrorism Centre Sentinel* 1 – 8.

[68] OHCHR, 'Violations and abuses committed by Boko Haram and the impact on human rights in the countries affected', paras. 64 - 68.

especially young unmarried men and boys had been under pressure from peers to join JTF out of fear of being suspected to be members of *Boko Haram* and also because the army could kill one who refused to co-operate with JTF.[69]

5.3 Niger Delta militants

Under agitation for resource control by indigenous people of the Niger Delta region (the oil producing area of Nigeria), several armed groups sprang up in the area.[70] The groups engaged in acts of terror and violence such as abduction and kidnap for ransom of expatriate and Nigerian oil workers. This led to violent confrontations between the armed groups and government security forces, until June 2009, when the Federal Government of Nigeria under President Umaru Yar'Adua (late) declared amnesty to the militants. The amnesty programme has helped significantly in resolving the protracted security challenges in the region and averting an imminent collapse of the Nigerian oil industry.

5.4 Herdsmen Activities in Parts of the Country

Clashes between pastoralists (cattle herders) and crop farmers have been on the increase in recent years in Nigeria. These conflicts usually involve disputes over land between herders and farmers. The most impacted states are those in the Middle Belt region of the country like, Benue, Taraba, Plateau Kaduna and Nasarawa,[71] although there have been incidents of clashes in states in the south such as Enugu, Ebonyi, Anambra, Delta, Edo and Oyo.[72] Whenever and wherever such clashes occur, human lives are lost and properties, including homes, farms and cattle are destroyed. There have been reported cases of missing persons who were never seen after such incidents. For example, on 3 September 2018, Major General Idris Alkali (rtd), who was travelling from Abuja to

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[69] Ibid paras. 69 – 71.

[70] Oludotun Adetunberu and Akeem O. Bello 'Agitations in the Niger Delta Region, Oil Politics and the Clamours for Restructuring in Nigeria', *International Journal of Peace and Conflict Studies* 5, 1 (2018) 115 – 125.

[71] Mathew T Page 'The Intersection of China's Commercial Interests and Nigeria's Conflict Landscape' (2018) *United States Institute of Peace*, <https://www.usip.org/sites/default/files/2018-09/sr428-the-intersection-of-chinas-commercial-interests-and-nigerias-conflict-landscape.pdf > accessed 10 June 2020.

[72] Chukwuechefulam K Imo 'The Demographic Implication of Nomadic Fulani Herdsmen and Farmers Clashes in Nigeria', *International Journal of Development and Management Review* 12, 1 (2017) 45 – 58.

Bauchi through Plateau State, disappeared.[73] Following an intensive search by a military task force set up by the Chief of Army Staff, the dead body of General Alkali was recovered from an abandoned well in Guchwet, Jos South Local Government Area of Plateau State on 30 October 2018. Some persons suspected to be the perpetrators were arrested and have been standing trial.[74]

Other instances of enforced disappearances by suspected herdsmen include; the abduction of Mrs Margaret Emefiele, the wife of Nigeria's Central Bank Governor, Godwin Emefiele along the Benin-Agbor Road on Thursday, 29 September 2016; abduction of Oba Oniba of Ibaland, Oba Yushau Oseni from his palace by armed gunmen on 16 July 2016; a priest, Reverend Father John Adeyi was kidnapped on 24 April 2016 and was eventually found dead after his abductors had collected two million Naira ransom from his family members.

Having ratified ICPAPED, the Nigerian state has certain international obligations to combat the practice of enforced disappearance. Under international law, states are obliged to investigate cases of human rights violation within their territories, end impunity and bring perpetrators to justice.[75] Nigeria faces multiple challenges in fulfilling its obligations to victims and their families. The effectiveness of state action is limited by corruption, a generally limited understanding of the rights of citizens, and by a contrastingly focused and ruthless strategy being implemented by insurgent groups such as *Boko Haram*.[76]

6. Challenges to the effective implementation of the ICPAPED in Nigeria

As was pointed out earlier, under the Nigerian Constitution, a treaty is not justiciable in the domestic courts unless it has been domesticated by

[73]Seriki Adinoyi 'Tension in Jos as Army Discovers Grave of Missing General', 27 October 2018, *This Day Newspaper*, <https://www.thisdaylive.com/index.php/2018/10/27/tension-in-jos-as-army-discovers-grave-of-missing-general/> accessed10 June 2019.

[74]Pulse, 'Suspected Killers of Gen Alkali Remanded in Prison' 6 November 2018, *Pulse.ng,* <https://www.pulse.ng/news/local/suspected-killers-of-gen-alkali-remanded-in-prison/vbs0qlt > accessed 8 April 2020.

[75]Ewelina U Ochab 'The International Day of the Victims of Enforced Disappearance', 29 August2018, *Forbes*, <https://www.forbes.com/sites/ewelinaochab/#24c17cf27e76> accessed 7 November 2020.

[76]Ibid.

an Act of the National Assembly.[77] On the authority of the case of *African Reinsurance Corporation v. Abate Fantaye*[78] supported by a long line of English cases of the common law tradition, it would appear that a person may not be able to invoke the jurisdiction of a municipal court to directly enforce the provisions of ICPAPED in Nigeria.[79] This makes it impossible for Nigerian courts to entertain matters bordering on the provisions of the convention. Without doubt, this is a set back to the proper implementation of the convention.

Essentially, Nigeria's domestic laws do not consistently promote accountability for human rights violations and some stand in direct conflict with international standards concerning the right to remedy. Although there are constitutional provisions safeguarding human rights, provisions like sections 174 and 211 of the Constitution (which relate to the power of the attorneys-general of the federation and of a state to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria) creates a system of 'legal impunity' because an attorney-general, as an appointee of the government, will find it difficult prosecuting security personnel who are also working for the same government. The implication of this is that victims of enforced disappearances become more or less convinced that the state stands with the alleged perpetrators of these violations and are indifferent to the violation of their rights.

While the convention protects the individual's right to a competent judicial authority, nevertheless, government contradicts Nigeria's treaty obligations by failing to provide access to justice to victims of enforced disappearances. Although NHRC functions in part to investigate and report on human rights violations, including the widespread system of impunity for such violations, its mandate prevents it from addressing cases that implicate state agencies. In this context, the commission may not expressly investigate members of the armed forces,

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[77] Dele Peters, 'The Domestication of International Human Rights Instruments and Constitutional Litigation in Nigeria' (2000) 18 *Netherlands Quarterly of Human Rights*1 357-378. DOI: https://10.1177/092405190001800304.

[78] [1986] 3 NWLR (Pt 31) 811.

[79] MT Ladan, 'An Overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and Issues in Domestic Implementation in Nigeria' (2013) *Afe Babalola University Journal of Sustainable Development Law and Policy* 37 – 56.

which restricts its ability to address human rights violations committed by the military.

Exacerbating the existing weaknesses in the legal framework, government officials do not adequately enforce laws in the statute books that are intended to protect human rights and guarantee the victims' right to remedy. Thus, individuals are not sufficiently protected by domestic laws and do not have legal recourse when violations occur. Further, the general lack of co-operation from Nigeria's security forces prevents victims from ascertaining the truth, achieving justice, and, ultimately, accessing adequate remedies. Courts rarely make inquiries into human rights abuses, especially when it involves state agents, even though they possess inherent powers to do so. What is obtainable in Nigeria is a system in which access to justice is conditioned on the government's acquiescence to the investigation and prosecution of its own agents. Under this 'impunity unless sanctioned' regime, as was seen in the requests by AI above, many requests for authorisation to prosecute are usually ignored by the Nigerian government.

There is also the phenomenon of under-reporting of disappearance cases. Reasons for which include poverty; illiteracy; feelings of powerlessness; fear of reprisal; weak administration of justice and ineffectual reporting channels; institutionalized systems of impunity; a practice of silence and; in some cases, restrictions on the work of civil society organisations on this sensitive issue.

7. Strengthening the Application of ICPAPED in Nigeria

The first recommendation on strengthening the application of ICPAPED in Nigeria is that the state should, without further delay, domesticate the convention which it had ratified more than 10 years ago. The National (and state) Assemblies should establish a special procedure, with statutory backing that will localise the convention and criminalise enforced disappearance as an autonomous offence, as was done with the UN Convention on the Rights of the Child (UNCRC).[80] The proposed domestication statute(s) should impose sanctions that are commensurate with the extreme gravity of the acts of enforced disappearances. The legislation will also explicitly rule out the possibility that persons who have or are alleged to have committed enforced disappearances will

[80] UNGA Res 44/25 (20 November 1989) *UNTS*, Vol. 1577, <https://www.refworld.org/docid/3ae6b38f0.html> (10 November 2019).

benefit from amnesty or similar measures that may exempt them from criminal responsibility and sanctions. It will also recognise the right to know, and ensure that the systematic violation by authorities of the right of the families of missing persons and victims of enforced disappearances to an effective investigation and to know the truth is punished as a crime.

The Nigerian executive, judicial, and legislative departments need to muster a strong political will to investigate, prosecute, and punish the perpetrators of enforced disappearances that often result in extrajudicial executions. They should acknowledge the use of enforced disappearances on their territories and give clear instructions that enforced disappearances will not be tolerated and those who commit it will be brought to justice and held to account. There is a legal and moral obligation on the Nigerian state to conduct exhaustive and impartial investigations into allegations of violations of the right, to identify, bring to justice and punish the perpetrators. The state should provide adequate and effective remedies – including prompt, fair and adequate compensation, restitution and rehabilitation – to victims of enforced disappearances and their kin.[81] It should also take effective measures to avoid the recurrence of such violations.[82] As was rightly observed by Special Rapporteur, Bacre Waly Ndiaye:

> It is the obligation of Governments to carry out exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish the perpetrators, to grant compensation to the victims or their families and to take effective measures to avoid future recurrence of such violations. The Special Rapporteur has noted that impunity continues to be the principal cause of the perpetuation and encouragement of violations of human

[81]Perfecto Caparas 'The Challenge of Combating Impunity in Extrajudicial Executions and Enforced Disappearances through Judicial Interpretation and Application of International Human Rights Law', *Social Science Research Network*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561778> accessed 10 June 2019.

[82]Council of Europe Commissioner for Human Rights *Missing Persons and Victims of Enforced Disappearance in Europe* (Strasbourg, Council of Europe, 2016) <https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-/16806daa1c > accessed 10 June 2020.

> rights, and particularly extrajudicial, summary or arbitrary executions.[83]

To do this effectively, government must place the families of missing persons and victims of enforced disappearances and their right to know the truth at the centre of all actions concerning these issues, especially by promoting a multidisciplinary assessment of their needs. The Nigerian state should support organisations and associations, in particular non-governmental organisations (NGOs) and associations of relatives concerned with establishing the fate of missing and disappeared persons.

Nigeria must ensure that perpetrators of enforced disappearance, including accomplices, those who order, solicit, induce the commission of, attempt to commit, or participate in an enforced disappearance are prosecuted and sanctioned. The continuous nature of the crime of enforced disappearance must be duly taken into account, and no statutory limitation shall apply to crimes against humanity, irrespective of the date of their commission. The state should adopt adequate measures to protect the ill-treatment, reprisals and intimidation of all persons participating in the investigation of complaints, witnesses and relatives of missing persons, victims of enforced disappearance as well as their counsel.

It is further recommended that Nigerian law of evidence be amended to institutionalise the doctrine of command responsibility and to allow the prosecution and trial of persons based on the doctrine of command responsibility, adopting the provision of ICPAPED(articles 6 and 7) and Rome Statute provisions (articles 28 and 33), along with international law precedents (as established in the cases of *Re Yamashita*[84] and *Tadic*[85]). Through the principle of conspiracy, as embedded in current international criminal law jurisprudence on the doctrines of command responsibility and common purpose, the liability of the members of the chain of command, whether as principal, accomplice, or accessory, can be determined according to the circumstances of the case. While extant domestic legislation may have

[83]UN General Assembly 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Laws' (2016) A/RES/60/147, 21 March 2006, para 4 at 5.
[84]327 US 1, 66 S Ct 340, 90 L Ed 499.
[85]*Prosecutor v Dusko Tadic*, IT-94-1-A and IT-94-1-Abis.

touched on this position, amending the Evidence Act[86] to insert an express provision of this nature will lead to better clarity in the law and a more effective application of the Convention.

The laws establishing the Nigerian armed forces[87] and the Police[88] should be amended to mandate officers or members of these forces to report any other officer(s) or member(s) of the forces who promote, facilitate, condone, tolerate, encourage, or abet the perpetration of enforced disappearances and extrajudicial executions in any way. Finally, the Federal Government of Nigeria should formulate a training programme for members of the security forces and personnel on enforced disappearances and summary executions according to the international human rights and humanitarian law framework. They should also raise community awareness through media campaigns about the evils of extrajudicial executions and enforced disappearances and the need for citizens to report cases without undue delay.

8. Conclusion

Enforced disappearance is a crime under international law and a violation of multiple human rights, including the right to personal liberty and security, the right to recognition as a person before the law, the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment, the right to a fair trial, and the right to life. Enforced disappearance also violates the economic, social and cultural rights of the disappeared person and his or her family. While the Nigerian state pontificates on her adherence to preventing the enforced disappearance of people within her jurisdiction, the reality is that enforced disappearance by state security forces are still rife in the country. This article has examined the application of ICPAPED in Nigeria, which the country ratified more than ten years ago but is yet to domesticate. In this context, the application of the Convention in domestic courts has not been given the force of law. In this context, the application of the Convention in domestic courts has not been given the force of law. By not domesticating the Convention, the Nigerian government's claim to adherence to the tenets and spirit of the Convention appears to be mere window dressing. While enjoining the Nigerian state to quickly domesticate the Convention, the paper has proffered suggestions which

[86]No 18 of 2011.
[87]The Nigerian Armed Forces Act, Cap A20 LFN 2004.
[88]The Police Act, Cap P19 LFN 2004.

will help strengthen the effective application of the Convention, not only in the country but in the continent of Africa in general.

PRIMARY HEALTH CARE APPROACH TO ACHIEVING UNIVERSAL HEALTH COVERAGE IN NIGERIA: ARE EXTANT LEGAL AND POLICY REGIMES ADEQUATE?

Obiajulu Nnamuchi[*] and Maria Ilodigwe[**]

> *Universal health coverage should be based on strong, people-centred primary health care. Good health systems are rooted in the communities they serve. They focus not only on preventing and treating disease and illness, but also on helping to improve well-being and quality of life.*
>
> WHO (12 Dec 2021)

Abstract

The Declaration of Alma-Ata was quite categorical in projecting primary health care (PHC) as the key to attaining health for all or universal health coverage (UHC). PHC is not only the first level of interface between a patient and the health system, it is also the foundation of health systems and a crucial determinant of whether a health system is on a path to attaining UHC or otherwise. More recently, the World Health Assembly went a step further in not only affirming the link between PHC and UHC but also identifying a vital component of actualizing this goal, namely, social health insurance (SHI) system of health financing. In essence, to succeed in attaining UHC, countries must integrate PHC approach and SHI system into their national health architecture. This is critical given that for long, the capacity of PHC to deliver on its key mission, namely, improving efficiency in health care delivery, has been hampered by cost. Yet, cost challenges can be mitigated by adopting a SHI method of paying for health care. Nonetheless, whether extant legal and policy frameworks in Nigeria sufficiently address (if at all) this very crucial component of UHC is not at all clear – hence the significance of this paper.

Keywords: Primary health care, social health insurance, universal health coverage, access to health care, national health insurance scheme.

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1. Introduction and Preliminary Background

At the International Conference on Primary Health Care held in 1978, and which birthed the Declaration of Alma-Ata, the global community proclaimed quite categorically that not only is it the responsibility of governments to protect and promote the health of their people, the task can only be fulfilled by ensuring adequate health and provision of social measures.[1] Participating nations, including Nigeria, affirmed, as the goal of the international community in the coming decades, 'the attainment by all peoples of the world by the year 2000 of a level of health that will permit them to lead a socially and economically productive life.'[2] The key to attaining this target was identified as primary health care (PHC). In other words, nations interested in achieving optimal health for the people in their jurisdictions must be prepared to devote necessary resources and attention to this level of health care. These commitments were subsequently affirmed and elaborated in the Declaration of Astana,[3] which was the outcome document produced at the Conference that marked 40 years since the Alma-Ata Declaration was adopted.[4] As to what a PHC approach to achieving UHC entails, the Declaration of Astana was unequivocal, that the vision is a PHC that is of 'high quality, safe, comprehensive, integrated, accessible, available and affordable for everyone' and 'provided with compassion, respect and dignity by health professionals who are well-trained, skilled, motivated and committed."[5] PHC is defined as "essential health care based on practical, scientifically sound and socially acceptable methods and technology' and which is 'universally accessible to individuals and families in the community through their full participation and at a cost that the community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination.'[6]

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[1] Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

[2] Ibid, para V.

[3] Declaration of Astana, Global Conference on Primary Health Care, From Alma-Ata towards Universal Health Coverage and the Sustainable Development Goals, Astana, Kazakhstan, 25 and 26 October 2018.

[4] UNICEF, 'Astana Global Conference on Primary Health Care: A Renewed Commitment to Primary Health Care to Achieve Universal Health Coverage' <https://www.unicef.org/eca/stories/astana-global-conference-primary-health-care> accessed 30 May 2022.

[5] Declaration of Astana (n 3) Prmbl, para. 3.

[6] Declaration of Alma-Ata (n 1) para. VI.

Deducible from this definition are key components of PHC. Apart from being essential and constituting the basic tier of health care, the methods and technologies through which it is delivered must meet practical, scientific and social acceptability, and must be accessible to everyone in the community. Based on the idea that social inclusion is an essential element of the success of health systems, the participation of those whose health and wellbeing will be affected by the design, implementation and monitoring of the PHC must be integrated into the process. Social inclusion plays a significant role in acceptability, the degree of which depends on the extent to which individuals and households are allowed to participate in the process that would result in the introduction and subsequent operation of PHC in the community.

The last component is cost or affordability. It has two elements, namely, cost of introducing and operating PHC, which is borne primarily by the government and cost of accessing services, to be met by individuals and households. For countries desirous of attaining UHC, this last component needs to be taken seriously for although there may be several factors hindering access to health care, by far, the most significant is cost. This is particularly true in countries, most of them in the developing world, that rely on fee-for-service method of paying for health services.

Fee-for-service, also called out-of-pocket (OOP) cost or user fees, system of paying for health care means paying at the point of service, akin to purchasing ordinary commodities at a shop or market. A remarkable feature of cash payment for health care is absence of financial risk protection and a largely unresponsive health system. In such systems, all things being equal, health status is dependent on ability to pay, such that the affluent invariably enjoys better health outcomes than the poor. This explains why such systems are bemoaned as unfair and inequitable. It is a common phenomenon in emerging health systems, where although, in some cases, services at public health establishments are subsidized, OOP expenses coupled with unofficial charges render health care expensive for the common man.

Given the high number of Nigerians living in extreme poverty (on less than $1.90/day), 40 per cent of the population,[7] it is obvious that

[7] T Adeniji and Nwagba, 'Aid for Productivity: Innovating to Overcome Poverty in Africa through Enterprise' 10 <aid-for-productivity-digital-file-v7 (2).pdf> accessed 30 May 2022.

access to health care is a huge challenge in the country. True, there is a vibrant private health sector, with state-of-the-art technology and well-trained providers, but their services are unaffordable to the vast majority of the people. As a result, health care access remained a lingering problem for successive administrations in the country, at least since late 1970s. The situation took a dramatic turn in early 1980s, following the liberalization of the health sector as part of broader structural reforms to counteract worsening economic conditions in the country. The reforms led to the replacement of free and subsidized health care services with user fees as the bedrock of health care financing in the country, and with this development came a surge in the number of private health care establishments throughout the country. The consequence of this abrupt change was a precipitous decline in key heath indicators in the country, as only those with financial resources were able to keep up with rising cost of health services.

It was against this background (rising morbidities and mortalities in the country) that a decision was reached in 1984 by the National Council on Health, the highest policy-making body on health in Nigeria,[8] to seek a better way of financing the health system.[9] Following several meetings and consultations, it was decided that a social health insurance (SHI) system of funding the health system should be adopted. The result was the promulgation of the National Health Insurance Scheme (NHIS) Decree (now Act) 35 of 1999, which, for the first time, established a SHI system of financing health care in the country.[10] The NHIS, like all SHI systems, envisages a shared responsibility of paying for health care between the people and the government, the aim being to ensure that lack of funds does not pose a barrier to access to health care. Two legal regimes govern SHI in Nigeria, namely, the NHIS Act 1999 and NHIS Operational Guidelines, which were first issued in 2005 and revised in 2012. Nevertheless, whether these regimes, together with those on PHC, are sufficient to eventuate in UHC in Nigeria is not at all clear – hence the significance of this paper.

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[8] National Health Act, 2014 (Act No. 8 of 2014), s. 5 (NHA).

[9] For a robust discussion on the processes that resulted in the transition from user fees to a social health insurance system of paying for health care, see O Nnamuchi, 'The Nigerian Social Health Insurance System and the Challenges of Access to Health Care: An Antidote or a White Elephant?' (2009) 28 (1) Medicine and Law 126 – 129.

[10] National Health Insurance Scheme (NHIS) Act, Cap N42, Laws of the Federation of Nigeria (LFN) 2004.

Strikingly, the declining health indicators that compelled policymakers to seek new ways of sourcing funds for the health system are yet to be reversed. By all standards of measurement, the current state of health in Nigeria is appalling. Healthy life expectancy at birth in the country stands at 54.4 years, better than only 14 countries in Africa and lower than the regional mean of 56 years.[11] Even worse is maternal mortality rate (MMR). At 917 deaths per 100,000 live births, the MMR in Nigeria is better than just three countries in Africa.[12] The regional mean is 525.[13] The under-five mortality rate is equally atrocious, at 117 deaths per 1000 live births, the worst globally – a position it shares with Somalia, a war-torn failed state.[14] Nigeria shoulders the highest burden of malaria in the world. Latest data indicates that in 2020, 29 of the 85 countries that were malaria endemic accounted for about 96 per cent of malaria cases and deaths, with Nigeria having the highest number – at 26.8 per cent.[15] Four countries are responsible for more than half of all malaria deaths globally, the highest number (31.9 per cent) in Nigeria.[16] Malaria and the vast majority of the diseases and illnesses responsible for poor health outcomes in the country are amongst the common diseases treatable at the PHC level, making studies such as this, which is aimed at recalibrating the health system through the instrumentality of PHC and SHI, more urgent now than ever before.

Following this introductory background, Part II evaluates PHC system in Nigeria in the context of the relevant legal and policy regimes governing health care delivery at that level in the country. The purpose of the evaluation is to determine whether, as presently configured, sufficient focus has been placed on that tier of health care delivery as a vehicle to UHC. Along similar trajectory, the task of Part III is to determine whether the relevant frameworks on SHI in Nigeria are robust enough to advance the country toward UHC. The conclusion – Part IV – is that extant frameworks are adequate as building blocks of a UHC-bound health system, but the goal will not be realized in absence of

[11] WHO, *World Health Statistics 2021: Monitoring Health for the SDGs, Sustainable Development Goals* (Geneva: WHO, 2021) 20 82 – 88.
[12] Ibid.
[13] Ibid. 88.
[14] Ibid, 83 – 89.
[15] WHO, *World Malaria Report 2021* (Geneva: WHO, 2021) 25.
[16] Ibid.

incorporating the suggestions of the paper into the health architecture of the country.

2. Primary Health Care in Nigeria and Relevant Legal and Policy Frameworks

The principal concern of this section is whether extant legal and policy frameworks on PHC in Nigeria are sufficient to advance the country toward UHC. This question is critical, given that no nation has been able to achieve health for all without having in place a high performing PHC system.

2.1 Critical Preliminary Points

Prior to unpacking the central concern of this section, two preliminary points would need to be made. The first is that the declared intention of policymakers in Nigeria is to build the national health system on PHC. The National Health Policy, first published in 1988 and revised in 2004 and 2016 (the last being the current version), was very clear in declaring its overall objective to be to 'strengthen Nigeria's health system, particularly the [PHC] sub-system, to deliver effective, efficient, equitable, accessible, affordable, acceptable and comprehensive health care services to all Nigerians.'[17] To accentuate the importance of this particularization, the policy document proclaims PHC to be 'the bedrock'[18] and 'central focus'[19] of the national health system– in other words, the foundation of health care delivery in the country.

The second noteworthy point is that PHC is the first point of interaction of individuals and households with the health system; the first contact in a continuing health care process.[20] The lowest, albeit not the least of the three tiers of health care delivery system, the PHC is the point at which common presentations of diseases and illnesses are treated and referrals made, in appropriate cases, to secondary health care (SHC) or tertiary health care (THC) level, depending on the nature of the presentation. This is the reason PHC is referred to as the 'gate keeper' of the health system, in that by implementing appropriate referral system, PHC providers are able to ensure that less difficult cases are managed at this level, and only serious conditions are treated at the more specialized

[17] FMoH, 'National Health Policy 2016: Promoting the Health of Nigerians to Accelerate Socio-economic Development' XV (2016).
[18] Ibid, 27.
[19] Ibid, 45.
[20] Declaration of Alma-Ata (n 1) par. VI.

tiers of health care delivery. Restricting deserving cases to PHC centres, where cost of treatment is not exorbitant, means that higher charges that could have been accumulated had the same conditions been treated at SHC and THC levels, are saved.

Institutionalizing an appropriate referral regime promotes efficiency by ensuring that each tier of health care delivery system restricts itself to what it does best. In this way, health conditions are handled by the appropriate providers, thereby mediating the inefficiency and inequality that result from disproportionate reliance upon hospital and specialized care (termed 'hospital-centrism' by WHO) by many countries, including – quite paradoxically – developing ones.[21] The challenge presented by hospital-centrism is poor return on investment. In other words, the cost-benefit ratio is grossly negative.[22] More specifically, WHO faults hospital-centrist approach on the basis of unnecessary medicalization and pathogenesis as well as absence of preventive care and its adverse impact on human beings and social dimensions of health.[23] This is a challenge that should be taken seriously by policymakers, considering that the result of inaction would be depletion of resources that could have been channelled to PHC, which provides a more equitable as well as efficient and effective avenue for providing health services and improving the overall health of the population[24] – all of which are important components of UHC.

The Alma-Ata Declaration proclaims that PHC addresses the main health problems in the community, including promotive, preventive, curative and rehabilitative services,[25] the implication being that the amount of funds that would be saved by committing to the gate-keeping function of this level of health care delivery will be quite substantial. This is especially important to Nigeria given the nature of its disease burden. As affirmed by a former Minister of Health and chairman of the National Primary Health Care Development Agency (NPHCDA) in 1998, "80 to

[21] WHO, *The World Health Report 2008: Primary Health Care Now More Than Ever* (Geneva: WHO, 2008) 11.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Declaration of Alma-Ata (n1) par. VII (ii).

90 per cent of the health problems of our people can be tackled at the primary health care level."[26]

2.2 Principle or Pillars of Primary Health Care

Resource preservation is not the only advantage of PHC that is useful to attaining UHC. There are others that are not readily thought of as having cost implications but which, in the long run, ultimately result in savings to the health system. Numbering four, these are the pillars of PHC, what are required in terms of establishing a comprehensive health system based on PHC. As evident in the Declaration of Alma-Ata, these pillars are equity, social or underlying determinants of health, multisectoral or intersectoral collaboration and community participation.[27] Strikingly, these pillars are also elaborated in the National Health Policy.[28] These pillars or principles, which underlie both the Declaration and National Health Policy, are critical to building and sustaining a health system. Their integration into the two most important health policy documents on PHC in the country signals a great desire on the part of authorities to reap the dividends of building the health system on the basic level of health care delivery.

(i) Equity

The World Bank defines equity, the first of the four pillars, in terms of equality of opportunity and avoidance of deprivation in (health) outcomes.[29] The function of equity in a health system is to ameliorate prior and existing imbalances not only in access to health care and social health determinants but also in health outcomes. Although the task of equity is traditionally understood as being to protect poorer households from being 'disproportionately burdened with health expenses as compared to richer households,'[30] its tentacles are not so constricted. Imbedded within the walls of equity are goods and services that are necessary for maintaining the health and wellbeing of the poor and disadvantaged. Prioritization of their interests, so as to nullify extant inequality, placing them on the same pedestal as the rest of society, is a central mission of

[26] O Ransome-Kuti, 'Who Cares for the Health of Africans?: The Nigerian Case,' 6, International Lecture Series on Population Issues, The John D. and Catherine T. MacArthur Foundation, Kaduna, Nigeria, 19 March 1998.

[27] Declaration of Alma-Ata (n 1) para(s) II (equity), VII-3 (underlying health determinants) and VII-4 (multisectoral collaboration), VII-5 (community participation).

[28] National Health Policy 2016 (n 17) xiii – 66.

[29] World Bank, *World Development Report 2006: Equity and Development* (New York: The World Bank &Oxford University Press, 2005) XI, 76 – 80.

[30] United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 14, The Right to the Highest Attainable Standard of Health (Twenty-second session, 2000)' para. 12(b), U.N. Doc. E/C.12/2000/4 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).

equity and PHC. The National Health Policy seeks to address this by establishing "solid and evidence-based mechanisms and directions" that would "significantly improve the health status of all [Nigerians] to enable them lead fully healthy and fulfilling lives."[31] Improving the health status of everyone in the country would require mitigation or nullification of factors that make access to care a luxury for some but not others, placing everyone on the same path to the best attainable state of physical and mental health. It requires particularization of the concern of the less privileged throughout the chain of processes involved in health care delivery.

(ii) Underlying Health Determinants

The second principle, namely, underlying or social determinants of health[32] are the conditions in which human beings live and work. The WHO Commission on Social Determinants of Health adopts a cosmopolitan position,[33] defining the term as 'the structural determinants and conditions of daily life' including 'their access to health care, schools, and education, their conditions of work and leisure, their homes, communities, towns, or cities' as well as 'their chances of leading a flourishing life.'[34] The significance of this principle is its emphasis on factors other than therapeutics that have impact upon human health. These factors, notes the U.N. Committee on Economic, Social and Cultural Rights (Committee on ESCR) in 2000,[35] include access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health, in addition to facilitating the participation of the population in all health-related decision-making at the community, national, and international levels.[36] As a recent WHO publication clarifies, '[w]hile medical care can prolong survival and improve prognosis after some serious diseases, more important for the health of the population as a whole are the social and economic

[31] National Health Policy 2016 (n 17) 78.
[32] Declaration of Alma-Ata (n 1) para. VII (3).
[33] WHO Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health* (Geneva: WHO, 2008) 1.
[34] Ibid, 1.
[35] General Comment No. 14 (n 30) para. 11.
[36] Ibid.

conditions that make people ill and in need of medical care.'[37] In other words, whilst not discounting the importance of access to drugs, it is important to note that access alone is inadequate to maintain a healthy life. More is needed, and that is availability of socioeconomic conditions that are conducive to a healthy life. In fact, when critically scrutinized, access to medical care would be found to be an integral component of social determinants of health, as one of several elements that ensures good health.[38] The National Health Policy affirms the importance of social health determinants by reiterating the commitment in the Rio Political Declaration on Social Determinants of Health, namely, that governments will take appropriate action on the social determinants of health in order to create vibrant, inclusive, equitable, economically productive and healthy societies.[39] Nigeria not only participated in the WHO-sponsored World Conference on Social Determinants of Health, which took place in Rio de Janeiro, Brazil, and gave birth to the Declaration, it also endorsed the document.[40]

(iii) Intersectoral Collaboration

The third principle is intersectoral or multisectoral collaboration. It speaks to the involvement of and cooperation of multiple actors and sectors of the economy in addressing different components or factors that are required to sustain PHC. The Declaration of Alma-Ata was quite clear, emphasizing that in addition to the health sector, PHC involves all related sectors and aspects of national and community development, in particular agriculture, animal husbandry, food, industry, education, housing, public works, communications and other sectors – all of whose efforts must be coordinated and directed toward the same goal.[41] This is a derivative of the concept of social health determinants and recognizes that the attainment of any human right or subset thereof such as PHC is not feasible through the sole effort of one sector alone; instead, a

[37] R Wilkinson and M Marmot, 'Introduction' in R Wilkinson & M Marmot (eds.), *Social Determinants of Health: The Solid Facts 7* (2nd ed, Copenhagen: WHO Regional Office for Europe, 2003).
[38] Ibid.
[39] National Health Policy 2016 (n 17) 2.
[40] WHO, 'World Conference on Social Determinants of Health, List of Delegates and Other Participants' 7 December 2011 <https://cdn.who.int/media/docs/default-source/documents/social-determinants-of-health/world-conference-on-sdh-lop.pdf?sfvrsn=588aa100_5> accessed 30 May 2022.
[41] Declaration of Alma-Ata (n 1) par. VII (4).

multisectoral collaborative approach is required. This collaborative approach is accorded recognition by the National Health Policy. A stated policy orientation of the Nigeria's health system is the establishment of multisectoral collaboration mechanisms to promote synergy and leverage capacity to address the social determinants of health.[42] Based on the premise that "many of the determinants of health outcomes are outside the health sector," the policy document urges greater effort in strengthening this collaboration.[43] Multisectoralism is not limited to just inter-ministry collaborative arrangements. Emphasized throughout the National Health Policy is engagement of civil society organizations and other stakeholders – to create a broad public/private partnership, which is crucial to unleashing the full benefit of multisectoral collaborative mechanism as a tool for achieving UHC.[44]

(iv) Participation

Participation, the fourth principle, involves social inclusion and ownership of PHC processes and ultimate outcomes. The type of participation envisaged by the Declaration of Alma-Ata centres on the planning, organization and implementation of PHC, both individually and collectively.[45] Although the National Health Policy seems to have clearly placed emphasis on "community ownership/participation" (and not also upon individuals), even declaring it as one as its ten policy thrusts,[46] the emphasis deserves no importance since the term 'community' is a conglomeration of individuals. Recognizing that the requisite knowledge and expertise for meaningful participation in the planning, organization, operation and control of PHC may not be readily available in the general population, the Declaration requires capacity building through such education as is necessary for productive participation of the communities.[47] Similar approach is envisioned in the National Health Policy as evident in the stipulation, as one of the goals of the health system, to strengthen and sustain active community participation and ownership in health planning, implementation, monitoring and evaluation.[48] None of these is possible in absence of adequate knowledge base on the operation of PHC.[49]

[42] National Health Policy 2016 (n 17) 43.
[43] Ibid, 25.
[44] See particularly, National Health Policy 2016 (n 17) 25, 56.
[45] Declaration of Alma-Ata (n 1) par. VII (5).
[46] National Health Policy 2016 (n 17) XV.
[47] Declaration of Alma-Ata (n 1) par. VII (5).
[48] National Health Policy 2016 (n 17) 56.
[49] FMoH, National Health Policy 2004, Chapter 4, 4:3 (stipulating that the health system shall 'develop, through appropriate education and information, the ability of communities to participate').

Effective participation is ensured by decentralization of the management of the local health system through the committee system of the National Health (NHA) 2014, the first comprehensive legal framework on health in Nigeria,[50] and National Health Policy such as ward development committees, village development committees, health facility management committees and so forth.[51] The mandate of these committees include, inter alia, monitoring of health services, community mobilization, and participation in programme implementation.[52] The community participation mandate builds on two of Bamako Initiative's major objectives, namely, to use PHC to improve health outcomes by requiring public participation in decision-making and decentralized implementation of programmes at the level of the local government health system.[53]The aim of the Initiative, which was a formal statement adopted by African Ministers of Health in 1987 at a conference of the health ministers of African countries jointly sponsored by UNICEF and WHO in Bamako, Mali, was to expand access to good quality PHC through more efficient use of resources. [54]

The idea of community participation as a principle of PHC approach to attaining UHC has crucial advantages. Aside from empowerment and democratization of the process, integrating the opinion of the people in decision-making ensures that not only are their needs met, but the needs are also operationalized in the desired manner, in a way that best advances their interests. Since members of the community are the primarily affected parties (end users), they have the greatest stake in the success of the process, including maximization of resources, and are, therefore, best suited to discuss the right mix of initiatives and strategies needed to achieve the best result.

2.3 Principles of Primary Health Care and Non-Implementation

Neglecting to implement or poorly implementing any of the four principles of PHC would attract a negative result, for instance, unwillingness to buy into the processes or the programme itself, thereby frustrating the actualization of UHC. And this raises a very interesting

[50] National Health Act (n 8) s. 1(2).
[51] National Health Policy 2016 (n 17) 46, 56.
[52] Ibid, 24.
[53] K Pangu, 'The Bamako Initiative' <https://apps.who.int/iris/bitstream/handle/10665/330655/WH-199> accessed 30 May 2022.
[54] Ibid.

concern. Bearing in mind that, at least in theory, serious commitment to the principles discussed in this section would result in institutionalizing a high performing PHC system in the country, the question becomes, would this institutionalization be sufficient in itself to result in UHC? Negative, the response must be. The explanation is simple. PHC is just one amongst three tiers at which health care is accessed in a health system. Despite the value of an effective delivery of services at the PHC level, as this section articulates, care must also be provided at the other levels, failing which the health system cannot be said to be high performing. Nevertheless, since the largest burden of diseases and illnesses (in the case of Nigeria, 80 – 90 per cent)[55] is tackled by way of PHC interventions, a more defensible statement is that an optimally functioning PHC, more than the other two tiers, places the country's health system on a more robust and sustainable trajectory toward UHC.

3. Social health Insurance System in Nigeria and Relevant Legal and Policy Frameworks

As previously indicated, the emergence of SHI in Nigeria is rooted in access difficulties of the late 1970s and early1980s.[56] Although multiple factors compelled the exodus from subsidized and free health care to user fees, the latter giving birth to SHI in the country, the most challenging are squandermania, kleptocracy and poverty – all of them serious contributors to the spike in cost of health care services. The surge in preventable morbidities and mortalities are some of the more visible manifestations of the impact of these social ills. Widespread poverty, which remains an intractable challenge even today,[57] resulted in denial of health care to a large proportion of the population, on account of inability to pay for required services. Consequently, the National Council on Health concluded, and rightly so, that unless reversed, this downward spiral would continue, worsening an already atrocious health landscape. This was the background to the emergence of SHI in the country, a product of wide consultation with stakeholders of different stripes and submissions by a vast array of relevant professional bodies. It was this broad-based support that led, as explained previously, to the establishment a SHI system in Nigeria via NHIS Act, 1999. Despite the urgency of the situation, however, implementation of the statute was delayed, owing to logistical

[55] Olikoye Ransome-Kuti, 'Who Cares for the Health of Africans?: The Nigerian Case,' International Lecture Series on Population Issues, The John D. and Catherine T. MacArthur Foundation, March 19, 1998, Kaduna, Nigeria, at 6.
[56] Nnamuchi (n 9) 128 (tracing the origin to the Health Insurance Bill which was introduced in the then National Parliament in Lagos in 1962).
[57] Adeniji and Nwagba (n 7).

difficulties, until 2005 when the first NHIS Operational Guidelines were published. A subsequent Guidelines issued in 2012 is currently in force.

(a) Social Health Insurance and the National Health Insurance Scheme

The NHIS is a SHI system, which is designed as a public-private partnership – that is, shared financial arrangement between the government and the people – and aimed at providing accessible, affordable and quality health care for all Nigerians. The NHIS Operational Guidelines 2012 defines a SHI as "system of health insurance that is financed by compulsory contributions which is mandated by law or by taxes and the system's provisions are specified by legal statute."[58] A distinguishing characteristic of SHI systems is that payment for coverage is not related to health risk (age or health history/status, for instance) but by ability to pay, and it is non-profit based. SHI is a form of health care financing that is based on risk pooling.[59] It pools not only the health risks of the population, it also pools resources; that is, the contributions of individuals, households, and other entities including businesses and the government.[60] It is from these contributions that funds are used to pay for members of the pool when illness strikes. SHI offers protection against financial and health burden that arises upon exposure to diseases and illnesses, and it is a relatively fair method of paying for health care.[61] Specific objectives of the NHIS Act are set out in section 5 and include:

(a) ensure that every Nigerian has access to good health care services;

(b) protect families from the financial hardship of huge medical bills;

(c) limit the rise in the cost of health care services;

(d) ensure equitable distribution of health care costs among different income groups;

(e) maintain high standard of health care delivery services within the Scheme;

(f) ensure efficiency in health care services;

(g) improve and harness private sector participation in the provision of health care services;

(h) ensure adequate distribution of health facilities within the Federation;

[58] FMoH, National Health Insurance Scheme, Operational Guidelines, revised in 2012, 15 (2012).
[59] WHO, 'Social Health Insurance: Report of a Regional Expert Group Meeting New Delhi, India, SEA-HSD-265' 13 – 15 March 2003, 1 (2003).
[60] Ibid.
[61] Ibid.

(i) ensure equitable patronage of all levels of health care; and,

(j) ensure the availability of funds to the health sector for improved services.

To appreciate the significance of these stipulations, they should be situated within the broader goal of expurgating barriers to access to health care in the country. First, they are to be understood in the context of the National Health Policy provisions on health financing, the goal of which is to '[e]nsure adequate and sustainable funding that will be efficiently and equitably used' in providing 'quality health services and ensuring financial risk protection in access to health services for all Nigerians, particularly the poor and most vulnerable'[62] Second, the stated vision of the National Health Policy is UHC for all Nigerians.[63] Its mission is to harness resources necessary for achievement of UHC as stipulated in the NHA[64] and Sustainable Development Goals (SDGs).[65] Reference to the SDGs is very important, for not only is one of them (SDG 3) exclusively devoted to health and health care, the rest of the SDGS, as shown in a recent paper,[66] are inseparable from health.

The third point to note is the impact or significance of the NHA to health governance in Nigeria. The statute charts the path for the national health system to follow in achieving UHC, namely, (a) it shall provide for persons living in Nigeria the best possible health services within the limits of available resources; and (b) protect, promote and fulfil the rights of the people of Nigeria to have access to health care services.[67] To have a right to health care means that regardless of socioeconomic status, everyone is entitled to access health services when needed.[68] The vernacular of "rights" is critical to the goal of health for all, in that it infuses force and urgency to the attainment of a basic human yearning, namely, access to health care. Right to health is the legal equivalent of UHC, the difference being that one is a legal term whilst the other is

[62] National Health Policy 2016 (n 17) 46.
[63] Ibid, 26.
[64] National Health Act (n 8) s. 1(1)(c) & (e).
[65] National Health Policy 2016 (n. 17) 26.
[66] O Nnamuchi, 'The Sustainable Development Goals (SDGs) and the Right to Health: Is there a Nexus?' (2020) 32 (2) Florida Journal of International Law 147 – 181.
[67] National Health Act (n 8) s. 1(1)(c) & (e).
[68] O Nnamuchi, 'Securing the Right to Health in Nigeria under the Framework of the National Health Act' (2018) 37 (3) Medicine and Law 477 – 532.

domiciled in health economics and health policy. Regardless of disciplinary cleavages, however, the goal is the same, as the objectives specified in section 5 of the NHIS Act amply demonstrate.

Responsibility for setting in motion the necessary strategies or measures to actualize these objectives is vested in the Scheme (the central implementing authority of the NHIS Act), including:

(a) registering health maintenance organisations and health care providers under. the Scheme;
(b) issuing appropriate guidelines to maintain the viability of the Scheme;
(c) approving format of contracts proposed by the health maintenance organisations for all health care providers;
(d) determining, after negotiation, capitation and other payments due to health care providers, by the health maintenance organisations;
(e) advising the relevant bodies on inter-relationship of the Scheme with other social security services;
(f) the research and statistics of matters relating to the Scheme;
(g) advising on the continuous improvement of quality of services provided under the Scheme through guidelines issued by the Standard Committee established under section 45 of this Act;
(h) determining the remuneration and allowances of all staff of the Scheme;
(i) exchanging information and data with the National Health Management Information System, Nigerian Social Insurance Trust Fund, the Federal Office of Statistics, the Central Bank of Nigeria, banks and other financial institutions, the Federal Inland Revenue Service, the State Internal Revenue Services and other relevant bodies; and,
(j) doing such other things as are necessary or expedient for the purpose of achieving the objectives of the Scheme under this [statute].

Viewed in light of the foregoing discussion on the obstacles regarding access to health care and the ameliorating qualities of SHI system of health financing, it becomes less difficult to understand the far-reaching powers vested in the authority charged with implementing SHI in the country and the underlying rationales. These powers or responsibilities are critical to realizing the objectives of the Scheme. While each of the duties are important, two clearly stand out as being directly related to setting in motion the process that would result in extending coverage to participants, namely, sections 6(b) and 6(j). The two provisions empower the implementing authority to issue guidelines that are needed to maintain the viability of the Scheme and to do all such other things as are necessary or expedient for the purpose of actualizing the objectives of the Scheme. It was on the basis of this authority that the Scheme issued "Operational Guidelines" (Guidelines) for implementation

of the programmes in 2005. However, owing to some deficiencies, some of which were explored in a 2009 paper,[69] the Guidelines were revised in 2012.[70] The revised framework contains elaborate provisions on the implementation of the Scheme, including the principal actors, programmes and the levels as well as types of participation, required contributions, applicable benefit packages, management of the programmes, health maintenance organizations (HMOs) and so forth.

(b) Coverage Programmes of the National Health Insurance Scheme

There are three avenues through which people can obtain coverage under the Scheme, namely, Formal Sector Social Health Insurance Programme, Informal Sector Social Health Insurance Programme and Vulnerable Group Social Health Insurance Programme. The Formal Sector Social Health Insurance Programme provides coverage to employees in the public sector (Federal, State and Local Governments), members of the Armed Forces, Police and other Uniformed Services as well as students of tertiary institutions. Also included are employees of organized private sector organizations, those employing ten or more persons.[71] The Informal Sector Social Health Insurance Programme, as its name implies, is designed for individuals and businesses operating in the informal sector of the economy. Those covered under this programme include individuals working in companies with 10 or less employees, artisans, voluntary participants, rural dwellers and others not receiving coverage under the Formal Sector or the Vulnerable Group Programmes.[72] There are two sub-programmes through which coverage can be obtained in the informal sector, namely, Voluntary Contributors Social Health Insurance Programme (VCSHIP) and Community Based Social Health Insurance Programme (CBSHIP).

The VCSHIP is a health insurance that is available to willing individuals and employers with less than ten employees.[73] Participation in VCSHIP is restricted to individuals who are not currently covered by any of the NHIS programmes and those who may have been unsatisfied with their health care services.[74] Included within this category are

[69] Nnamuchi (n 9) 151 – 163.
[70] Operational Guidelines (n 58)
[71] Ibid, s 1.1.0.
[72] Ibid, s 1.2.0.
[73] Ibid, s 1.1.6.1.
[74] Ibid, s 1.1.6.1.

interested individuals, families, employers of establishments with less than ten staff, and actively self-employed individuals as well as political office holders at the three tiers of governments and retirees not currently covered by any of the NHIS prepaid programmes.[75] Also eligible to obtain coverage under the VCSHIP are foreigners or persons with temporary residency status and Nigerians in Diaspora.[76] CBSHIP, on the other hand, is a health insurance plan for a cohesive group of households /individuals or occupation-based groups, formed on the basis of the ethics of mutual aid and the collective pooling of health risks, in which members take part in its management.[77] Participation is voluntary and open to all residents of the participating communities/occupation-based groups, including retirees.[78] To qualify for registration as a CBSHIP, at least 50 per cent (or a minimum of 1000 members) of a community or occupation-based group must be willing to participate.[79]

The third category, Vulnerable Group Social Health Insurance Programme, is an insurance plan that provides health care coverage to individuals who cannot engage in any meaningful economic activity due to their physical status, including age,[80] and mental status.[81] Eligibility for enrolment under this programme is restricted to physically challenged individuals, prison inmates and children less than five years old. Other eligible participants include refugees, victims of human trafficking, internally displaced persons and immigrants as well as pregnant women, orphans[82] and mentally challenged persons.[83]

(c) National Health Insurance Scheme and Key Challenges

The idea behind the foregoing discussion on SHI and NHIS is to show the existence of a structure in place that powerfully complements other efforts of the government in its desire to extend UHC to the population. Yet, it must be noted that although the law establishing NHIS was enacted more than two decades ago and implementation began in 2005, several challenges are obstructing the realization of the vision behind the

[75] Ibid, s 1.1.6.3.
[76] Ibid, s 1.1.6.3.
[77] Ibid, s 1.2.1.1.
[78] Ibid, s 1.2.1.2.
[79] Ibid, s 1.2.1.2.
[80] Ibid, s 1.3.1.
[81] Ibid, s 1.3.2.1.
[82] Ibid, s 1.3.1
[83] Ibid, s 1.3.2.1.

statutory regime.[84] Amongst these obstacles are widespread poverty, which makes enrolment difficult; poor mobilization campaign prior to unveiling of the scheme, as a result of which the vast majority of people are unaware of the existence of the scheme and benefits of participation; inequitable benefit packages; restriction of coverage to four biological children for participants in the formal sector; absence of coverage for cost of transportation to points of service; corruption; and, non-mandatory participation.[85] Whilst each of these challenges has a role to play in derailing the march to UHC in the country, the most critical is the last one – that is, having no law that makes participation in the various programmes of the scheme compulsory, a point to be revisited in the conclusion.

4. Conclusion: A Half-Hearted Approach to Universal Health Coverage or What?

This statement by WHO, describing UHC as 'access to key promotive, preventive, curative and rehabilitative health interventions for all at an affordable cost,'[86] is quite remarkable for many reasons. Implicit in the postulation are two very important components of UHC, namely, unfettered access to health services (equity in access to health care), and availability of access without subjecting users to financial hardship (financial risk protection).[87] The interplay between these two distinct elements in the context of the legal and policy frameworks governing PHC and SHI in Nigeria has been the primary concern of this paper. Focusing on PHC recognizes that whilst the higher tiers of care cannot be discounted in building the health architecture of any nation, it is the PHC that sets the overall tone and trajectory of the health system. As it goes, so does the entire structure, explaining why WHO has consistently urged maximum deployment of resources to that level of health care delivery.[88]

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[84] O Nnamuchi, et al., 'Successes and Failures of Social Health Insurance Schemes in Africa – Nigeria versus Ghana and Rwanda: A Comparative Analysis' (2019) 28(1) Annals of Health Law and Life Sciences 135 – 145.

[85] Nnamuchi (n 9) 151 – 163.

[86] WHO, 'Social Health Insurance Sustainable Health Financing, Universal Coverage and Social Health Insurance' Fifty-Eight World Health Assembly, A58/20, Provisional agenda item 13.16, 7 April 2005, Report by the Secretariat, para. 2 <http://apps.who.int/iris/bitstream/10665/20302/1/A58_20-en.pdf?ua=1> accessed 30 May 2022.

[87] WHO**,** *The World Health Report 2010: Health System Financing: The Path to Universal Coverage* **(**Geneva: WHO, 2010) X.

[88] World Health Report 2008 (n 21).

It is specifically for this reason that the position of PHC in any strategy aimed at achieving UHC must command supreme attention. The second component, paying for health services without exposing individuals or households to financial ruin, represents the other half of what is needed to put a nation solidly on a UHC map. So, how is Nigeria faring on these two fronts?

A carefully considered analysis of the legal and policy frameworks on PHC in Nigeria reveals a striking consistency with global standard and best practice, as contained in the WHO-sponsored Declarations of Alma-Ata[89] and Astana.[90] In the same vein, the enactment of the NHIS Act and Operational Guidelines was guided by one consideration, which was to provide coverage to everyone and protect them against health and financial risks. The various programmes of the NHIS, despite noted shortcomings, are directed at achieving UHC prerequisites. The NHA seeks to plug some of these shortcomings, particularly financial deficits, by doling out funds to PHC and other areas of need in the health system, including the NHIS.[91] Moreover, the NHA recognizes the importance of exempting the vulnerable from having to shoulder the cost of health care at public health establishment,[92] thus complementing the NHIS Act, which grants contribution-free participation to this demographic under the Vulnerable Group Social Health Insurance Scheme.[93]

Whilst these stipulations are certainly laudable, the reality on the ground suggests that additional measures are necessary. At just 5 per cent coverage rate,[94] it is obvious that the NHIS in Nigeria is grossly underperforming, especially when compared with similarly placed countries. Two African countries, namely, Ghana and Rwanda, introduced SHI at relatively the same time as Nigeria; yet, coverage rates

[89] Declaration of Alma-Ata (n1).
[90] Declaration of Astana (n3).
[91] National Health Act (n 8) s 11.
[92] Ibid. s. 3.
[93] Operational Guidelines (n 58) s.1.3.
[94] GO Alawode and DA Adewole, 'Assessment of the Design and Implementation Challenges of the National Health Insurance Scheme in Nigeria: A Qualitative Study among Sub-National Level Actors, Healthcare and Insurance Providers' (2021) 21(124) *BMC Public Health* <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-020-10133-5> accessed 30 May 2022.

are significant higher in both countries, at 40[95] and 92[96] respectively. This suggests that the SHI in Nigeria needs retooling, specifically by responding to the challenges responsible for the country's underperformance versus other countries. Non-compulsory participation in the NHIS clearly stands out amongst the factors identified in the previous section, and for a very good reason too. There is no country that has been able to use SHI to significantly boost access to health care, even if yet to attain UHC, in which participation is not mandated. As affirmed by WHO, 'in the long run, participation will need to be compulsory if 100 [per cent] of the population is to be covered.'[97] Remarkably, the National Health Insurance Authority bill, which was signed into law on May 19, 2022, repealing the NHIS Act, makes health insurance mandatory throughout the country.[98] Although details are not yet available, it is hoped that this turning point could be the catalyst needed to reposition the country on a path to expanded access and UHC.

Furthermore, in addition to mandatory contribution to the NHIS, policymakers should also be cognizant of the fact that countries that have attained UHC are those with high public expenditure on health and low OOP spending. This can be evaluated in the context of the commitment by African governments in 2001 to allocate at least 15 per cent of their annual budget to health.[99] Available record indicates that in Nigeria, the domestic general government health expenditure (GGHE-D) as a percentage of general government expenditure (GGE) is 4.4 per cent,[100]

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[95] MA Ayanore and others., 'Health Insurance Coverage, Type of Payment for Health Insurance, and Reasons for not being Insured under the National Health Insurance Scheme in Ghana' (2019) 9 (39) *Health Economics Review* <https://healtheconomicsreview.biomedcentral.com/articles/10.1186/s13561-019-0255-5> (accessed 30 May 2022). The figure could be higher given that the latest survey was in 2014.

[96] Pacific Prime, 'Rwanda Health Insurance' <https://www.pacificprime.com/country/africa/rwanda-health-insurance/#:~:text=Rwanda%20healthcare%20system,most%20successful%20in%20the%20world> (accessed 30 May 2022)

[97] World Health Report 2010 (n 86) 89.

[98] N Adebowale, 'UPDATED: Buhari Signs Health Insurance Bill into Law' (Premium Times, 19 May 2022) <https://www.premiumtimesng.com/news/headlines/531087-updated-buhari-signs-health-insurance-bill-into-law.html> accessed 30 May 2022.

[99] Abuja Declaration on HIV/AIDS, Tuberculosis and other related Infectious Diseases, OAU/SPS/ABUJA/3, para. 26 <http://www.un.org/ga/aids/pdf/abuja_declaration.pdf> accessed 30 May 2022.

[100] WHO (n 11) 103.

which is considerably lower than many countries in Africa such as Kenya (8.5 per cent), Namibia (10.7 per cent), Madagascar (10.5 per cent), Malawi (9.8 per cent) and South Africa (13.2 per cent)[101] as well as the African mean budgetary allocation, which is 6.8 per cent.[102] Regarding OOP, Nigeria fares poorly as well. Measured in terms of population with household expenditures on health greater than 25 per cent of total household expenditure or income, 4.1 per cent of the population is affected, the third highest in Africa, after Benin and Sierra Leone,[103] and worse than the regional mean,1.8 per cent.[104] The reverse is the case in high performing health systems. A commonality amongst countries that have attained UHC is high government expenditure on health and low OOP spending by the citizenry. In Canada, government spending on health is 19.5 per cent of total spending,[105] whereas Germany and the United States recorded 20 and 22.5 per cent respectively.[106] OOP spending was also very low in these three countries. In none of them was the proportion of individuals with health expenditures that is greater than 25 per cent of total household expenditure or income) up to one per cent.[107] This is a remarkable achievement, one that compellingly commends itself to policymakers in Nigeria.

In the final analysis, an appropriate he summation must be that whilst on the right track, investment in the nation's PHC system and NHIS as well as an enabling environment in the nature of implementing legal and policy regimes should be seen for what they really are, as vital steps in the journey to UHC. They represent the foundation of a structure albeit with critical missing parts, which must receive urgent attention going forward otherwise previous efforts would smack of a half-hearted response to a very serious problem. This is certainly a situation that harbours nothing positive for the country or its health system.

[101] Ibid, 101 – 105.
[102] Ibid, 105.
[103] WHO, *World health Statistics 2020: Monitoring Health for the SDGs, Sustainable Development Goals* (Geneva: WHO, 2020) 51 – 55.
[104] Ibid, 57.
[105] WHO (n 11) 99.
[106] Ibid, 99 – 105.
[107] WHO (n104) 51 – 57.

PROTECTION OF TRADITIONAL KNOWLEDGE AND ITS RELEVANCE TO NATIONAL ECONOMIC GROWTH AND DEVELOPMENT IN NIGERIA

Nneka Chioma Ezedum*

Abstract

Nigeria is a country that is richly blessed with abundance of natural resources, good vegetation and fertile soil for cultivation. The country also has diverse ethnic groups, culture and customs. This way of life of the people can be perceived in the activities, traditions and customs that have been handed down to them by their forefathers. Overtime, communities expanded and there was influx of people to the different communities in the country. These people become exposed to this way of life and they benefit from it individually and collectively. This information or knowledge acquired is generally utilized by others without the local or indigenous communities benefitting in any form from their cultural heritage. It is general knowledge that intellectual property protects the activities of the intellect or mental faculty. Could this traditional knowledge (TK) of the people require protection under intellectual property? Would it not be appropriate that these people are recognized as the custodians of the TK? Their consent sought before usage, and benefits arising thereof be given to them on prior agreed terms. This will further strengthen the economic system of the society. Doctrinal research method was used in this work, and reliance was placed on both primary and secondary source of information as the work discussed the need for protection of traditional knowledge (TK), the progress made so far and the challenges to providing proper legal and institutional framework for protection of TK.

Keywords: Traditional knowledge, intellectual property, indigenous peoples, culture and custom, public domain

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1. Introduction

Traditional knowledge (TK) is the cultural identity of a people. It is their culture and heritage by which the people are known. It is usually as old as the people because it is handed over to them by their forefathers and they proudly pass it down to each generation. The transition to each generation could be done orally and is traced back to the people. TK is a living body of knowledge that is developed, sustained and passed down to generations, it comes in diverse forms and can be seen in the way the people utilize it for agriculture, to handle their health needs, to preserve the environment and generally as a way of life

It is could be said that TK is generally owned by a community or a people and not the property of an individual. It is different from the general concept of intellectual property (IP), which is to protect and reward the original work, product or innovation of a person or company for a limited period. How then can these communities benefit from their cultural heritage being used by others?

The general view is that traditional practices are in the public domain, free and available for anyone to make use of. This view however generalizes the traditional customs and practices of indigenous peoples. It gives unrestricted access and encourages misappropriation and misuse of their cultural heritage. This misuse and misappropriation is what enables a cosmetic or pharmaceutical company use traditional remedy and thereby apply for the patent without recognizing the custodians of such traditional remedy or allowing them the economic benefits of such use. This misappropriation could also be seen when a traditional dance step or folk song is copyrighted without as much as acknowledging the indigenous people who own the song or allowing them benefit from the economic exploitation of the traditional right.

TK is unique and its practices are not generally accommodated under the conventional IP administration. However the fact remains that indigenous people ought to have their rights protected and should benefit from the exploitation of their cultural practices. This work examines the importance of TK, the benefits of its commercialization, the progress made in creating its protection and concludes by providing recommendations and stating the challenges envisaged in providing a legal framework for protection of TK.

To achieve the aim of this work, aside from the introductory part, the paper is further categorized into four sections. The second section is

on the concept of Tk. Here a definition of TK is attempted, its examples provided and the rationale for TK protection stated. . The section further discusses the relationship between TK and information in the public domain, the possibility of ownership of TK and the basis for the protection of indigenous peoples right. The third section examines the existing legal protection for TK and the human right perspective to TK protection. Section four discusses what is obtainable in India and the progress the country has made in providing adequate protection for its TK. while the lasts section suggests recommendations for effective protection of TK in Nigeria, and thereafter the conclusion.

2. Concept of Traditional Knowledge

2.1 Meaning of TK

TK is the knowledge and practices of a particular society which form part of their cultural identity and passed down from the forefathers to their progeny. The World Intellectual Property Organization (WIPO)[1] defines TK as 'Knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.' The concept has been described as knowledge systems and innovations which have evolved in a traditional context, usually among particular tribes or group of people sharing similar boundaries, culture and beliefs, which systems have been transmitted from generation to generation.[2] It has played, and still plays, a vital role in the daily lives of vast majority of people. It is essential to food security and health of millions of people in the world, particularly the developing world.[3]

TK generally includes cultural heritage, practices and knowledge systems of indigenous peoples and local communities.[4] In its strict sense and in the traditional sense, it can be referred to as the knowledge

[1]WIPO 'Traditional Knowledge'< https://www.wipo.int/tk/en/tk > accessed 2 February 2021.

[2] Adegoke O Oyewunmi *Nigerian law of Intellectual Property* (1st edn, Lagos, University of Lagos Press and Bookshop Ltd, 2015) 249.

[3] F Addor and A Grazioli ' Geographical Indications beyond Wines and Spirits: A Roadmap for Better Protection for Geographical Indications in the WTO TRIPS Agreement' 2002, <https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=geographical=+indictions+beyond+wines+and+spirits&btnG=#> accessed 31 May 2022

[4] Intellectual Property, *Traditional Knowledge and Traditional Cultural Expressions/ Folklore: A Guide for Countries in Transition* (Geneva: WIPO Publication 2013).

resulting from activities of the intellect which includes the know-how, practices, innovations and skills of an indigenous people.

TK can also be defined as a form of knowledge which is passed from one generation to another generation. This happens within a particular community, it is used to identify a community's customs and spiritual life. For many communities, TK forms part of a holistic world-review, and is inseparable from their very ways of life and their cultural values, spiritual beliefs and customary legal systems.[5] TK often transmits the history, beliefs, aesthetics, ethics, and traditions of a particular people. For example, plants used for medicinal purposes also have symbolic valu-e for the community. Many sculptures, paints, and crafts are created according to strict rituals and traditions because of their profound symbolic or religious meaning.[6]

2.2 Examples of TK and the Rationale for Protection

TK which is an indigenous peoples' way of life, their customs and cultural practices include:

(a) Knowledge with respect to agricultural practices and science; for example local irrigation system.
(b) Medical knowledge (pharmacognosy) with respect to traditional medicine and use of plants and herbs to treat disease and infection; for example, the use of Neem plant (dogoyaro) and Bitter Leaf (Onugbu) to treat malaria and typhoid fever.
(c) Traditional hunting and fishing techniques for example, the San people use the *hoodia* plant to stave off huger while out hunting.
(d) Traditional industrial/technical knowledge that indigenous people use in making fabric. Examples include the tie and dye system, Aso-oke of Ogun State, Nigeria, the *Akwette* of Anambra State, Nigeria.
(e) TK with respect to folk lore, masquerades and cultural dance of indigenous people; for example, the Atiliogu dance of Anambra people.

[5] Finley Y Karngar, *The Interplay Between Traditional Knowledge and Geographical Indications: A Case Study of Liberia*, Master of Laws in Intellectual Property, WIPO University of Turin, Collection of Research Papers, (Geneva: WIPO Publication No 797 E/10 WIPO 2010).
[6] Kamil Idris, *Intellectual Property - A Power Tool for Economic Growth* (Geneva: WIPO) 238.

TK is used to meet the needs of the community but concerns arise in instances where resources of communities are used by multinational companies for commercial use. TK is valuable, that is why modern industries and agriculture maximize it. The evidence is in many plant based medicines, health products and cosmetics that are derived from TK. It could also be seen in non-wood forest products as well as handicraft. The examples are limitless, they include the use of traditional remedy or local plant used by a pharmaceutical company and the resultant product could be patented by that company. According to the African Centre for Bio-Safety:

> International businesses, institutions and other players have created profitable private monopolies over African patrimony by staking out patent claims on Africa's genes, plants and related traditional knowledge. The patent claims are not only economically unjust, but are a moral affront to the many generations of Africans who have cared for and created the continent's rich genetic and cultural diversity.[7]

There is economic benefit in the protection of TK. The government can help achieve the alleviation of the poverty of the indigenous people by ensuring protection of their cultural heritage by way of TK and ensuring that this knowledge is used for the development and growth of the economy of the custodians of such knowledge. It can form a basis for growth of culture-related enterprises and industries in that community thereby reducing poverty and total dependence on others.

Misappropriation of their TK has become a matter of great concerns to indigenous communities. There could be a complete take over by big companies who would not attribute the source of their products to the custodian of the knowledge nor provide economic benefits to them. Companies can visit any indigenous community and be exposed to their indigenous knowledge, with the changing times and the movement into the digital age, easily acquire same…..and any process may be easily documented and scientifically practiced[8]. This brings to mind the case where India forced the United States Patent and Trademark

[7] See African Centre for Biosafety, Pirating African Heritage: The Pillaging Continues, (Briefing Paper 2009) 3 cited in Adegoke Oyewunmi, "*Nigerian Law of Intellectual Property*' (n3)

[8] Kasim Musa Waziri and Awolowo Omotayo Folasade, 'Protection of Traditional Knowledge in Nigeria: Breaking the Barriers' (2014) 29 *Journal of Law, Policy and Globalization*, 176 – 184.

Office (USPTO) to revoke the patent granted to University of Mississippi Medical Centre for the use of turmeric to heal wounds.[9] This was done upon discovering that turmeric was widely used in India as a medicine, a food ingredient and a dye.[10] This is a commendable act of the protection of TK.

TK is a great asset; it is a source of food and provides traditional healthcare/medication to indigenous communities. According to World Health Organization (WHO), up to 80 per cent of the world's population depends upon traditional medicine for its primary health needs.[11] There are over 1300 medicinal plants used in Europe, of which 90% are harvested from wild resources; in the United States, about 118 of the top 150 prescription drugs are based on natural sources.[12] Pharmaceutical industries use natural compounds from plants for drug production. Natural therapies for weight loss are derived from herbs and plants, Cosmetics and personal care industries use extracts from traditional plants species for their beauty products. For instance, Ayurveda is a traditional Indian beauty treatment. It is said to be the oldest holistic approach to health and well-being having been around for about 5,000 years.[13]

> In March 1999, the Body Shop introduced a line of Ayurvedic-inspired products (such as a pillow spray of kaphas), and in October 1999 a three-woman team, including model Christian Turlington, launched the upscale skin-care regimen Sundari. Both lines use essential oils and herbs cultivated predominantly in India. Says Sundari co-founder Ayla Hussein, who grew up in Pakistan and attended Harvard Business School: "We take ideas that are thousands of years old and use modern technology to maximize its efficacy." Lindsey Oliver, manager of an Ayurvedic spa called Rag in Fairfield, Iowa, says that

[9] KS Jayaraman, 'US Patent Office withdraws Patent on Indian Herb' <https://www.nature,com/articles/37838> accessed 18 April 2022.
[10] G Krishna Tulasi & B. Subba Rao, 'A Detailed Study of Patent System for Protection of Inventions' Indian Journal of Pharmaceutical Sciences. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3038276/> accessed 31 May 2022
[11] Idris (n 6) 238.
[12] Chinese Medicine, 'Conservation and Sustainable Use of Medicinal Plants: Problems, Progress, and Prospects' <https://cmjournal.biomedcentral.com/articles> accessed 13 April 2021.
[13] Idris (n 6) 247.

> when the resort opened seven years ago, she couldn't get magazines interested. Now she reports, "Vogue calls us".[14]

From the above, it can be deciphered that the companies that utilize the traditional plants commercialize them and are economically empowered. How do the communities, the custodians of these TK benefit from this commercialization?

The livelihoods of indigenous peoples worldwide depend on the preservation and protection of TK. Indigenous peoples and rural communities have developed an intimate knowledge of the use and functioning of biological and natural resources over centuries of total dependence on these resources.[15] Therefore to ensure that indigenous communities benefit and also have some form of control over the use of their TK by persons or companies, there should be protection of this knowledge.

Protection of TK is also a means of attracting national and foreign investment, simply because these foreign companies and developed countries need the TK for R&D(research and development) and without the ease of bio-piracy, they are compelled to enter into legitimate partnerships with either the government or the people.[16] This legitimate partnership ensures that the economic benefits of such a partnership returns to the custodians of the TK, thereby enhancing the economy of the country.

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[14] Ibid.

[15] Kasim Musa Waziri and Awolowo Omotayo Folasade, ' Ibid (n 8)

[16] Ibid. Biopiracy is the unethical or unlawful appropriation or commercial exploitation of biological materials(such as medicinal plant extracts) that are native to particular country or territory without providing fair financial compensation to the people or government of that country or territory. <https://www.merriam-webster.com> Examples of biopiracy include Patenting of Azadirachta indica- Neem: Indians shared their knowledge in this regard. In 1994, US Department of Agriculture and an American company- WR Grace received a Europena patent that included various methods that are used for controlling fungal infections in plants by using a composition extracted from neem. Biopiracy of African super-sweet berries: the plant, Pentadipiandra brazzein found South Africa is a vital source of protein and utilized because it is a low-calorie sweetener, much sweeter than sugar. Recent developments involve isolation of the gene encoding brazzein that has been sequenced and patented in the USA. What is Biopiracy <https://byjus.com> accessed 18 April 2022.

2.3 Traditional Knowledge and the Public Domain

The public domain consists of knowledge and information available to the general public to use freely without restriction. There is no internationally accepted standard for the public domain, that is to say countries are free to classify what amounts to public domain in consideration of their national values and priorities.

Notably, the monopoly and incentives awarded those who have made creative and innovative processes are just for a period with respect to the specific duration for the different areas of IP. At the expiration of the monopoly, it is expected that such innovations will be in the public domain and available to the general public for use without fear of infringement, and especially for use in creating more innovative works.

TK does not *strictu sensu* have duration of use, but it is not also in the public domain because it is not the right of individuals or companies. It is the heritage of a people, a form of their culture, tradition and their pride. There has been notable progress in the discussions concerning the proprietary rights of custodians of TK, however to insinuate that TK is merely an extension of the public domain would be totally out of place. Thus, according to Okodiji:

> The treatment of traditional knowledge as merely an extension of the public domain has significant implications for the welfare and economic developments opportunities of indigenous groups. This view undermines treaties that already acknowledge or require protection for the rights of indigenous groups and traditional knowledge holders, and it also violates central tenets of the international IP framework, such as non-discrimination and protection for non-economic interest (ie) moral rights) associated with certain cultural goods.[17]

There is controversy and argument by scientists and researchers that TK comprises of what they use for the progress of science and research innovations. That this knowledge is the 'common heritage of mankind'[18] and should be freely exploited in the furtherance of science

[17] Ruth L Okediji, 'Traditional Knowledge and the Public Domain' (Centre for International Governance Innovation (CIGI Papers No 176, June 2018, 10) https://www.cigionline.org/publications/traditional-knowledge-and-public-domain/ accessed 01 February 2022

[18] This phrase was first introduced in the Preamble to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Its application

and the benefit of mankind. However, can this argument stand the aim of IP in the protection of rights? There is no confusion as to what a good administration of IP Law seeks to do, it protects the innovation of individuals from undue exploitation and ensure that the economic benefits thereof accrue to these innovators. Intellectual property rights are first of all property rights. Secondly, they are property rights in something intangible. And finally, they protect innovations and creations and reward innovations and creative activity[19]

> Patents give temporary protection to technological inventions and design rights to the appearance of mass produced goods; copyright gives longer lasting rights in……literary, artistic and musical creations: trademarks are protected against imitations so long at least as they continue to be employed in trade…this is a branch of the law which protects some of the finer manifestations of human achievements.[20]

This protection should be extended to indigenous people, as a form of preservation of their cultural heritage and most importantly to prevent others from claiming IP rights in TK.

2.4 Possibility of Ownership of TK

It may be asserted that TK is communally owned and belong to a particular people. However in a situation where an individual who is part of a particular community has carved a niche for himself with his people's TK by creating a work that is somewhat original, how can such a person benefit from his additional input to the TK?[21] Would such a person be permitted some form of exclusivity in the right? On the other hand, where a company that has used the TK of a people and developed it to such an extent as to amount to an inventive activity or an original

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placed certain geographical areas, such as the seabed and ocean floor, off-limits from claims of ownership See art 136 of the United Nations Convention on the Law of the Sea, 10 December 1982 (entered into force 16 November 1994).

[19] P Torremans and J Holyoak, *Holyoak and Torresmans Intellectual Property Law* (2nd edn, Butterworth 1998) 12.

[20] W Cornish and D Llewellyn, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights*(5th edn, London, Sweet & Maxwell, 2003) 3.

[21] For instance a patent in the yellow yam in Nigeria which is known to aid in the treatment of diabetes, was granted to one Dr Maurice Iwu by the United States Patent Office. Cited in Kasim Musa Waziri and Awolowo Omotayo Folasade, Ibid (n 8). Could this be said to be an inventive activity. What about the people in his community that have been using the same knowledge, and who possibly shared that knowledge with him.

work, what is the fate of the company considering the scope of IP protective in relation to the particular area of IP.

It is recognized that there is great benefit in the commercialization of TK, it is said to play an important role in the global economy, with the market value of plant-based medicines sold in developed countries estimated to be worth billions[22]. Restricting the use of TK to only the local community would be depriving the society at large the benefits the exploitation would birth, because the custodians of the TK might not have the technical know of maximizing the potentials of the TK. Furthermore, the local community might be constrained financially and would not be able to explore the various areas that the TK could be used and the products that can be derived thereof. However, if protection of TK is provided for under the IP regime, ownership, licensing and duration could be factored in and made applicable the same way it is obtainable in the different areas that IP cover. For instance, under patent, because of the importance of patented inventions to the society the duration is limited to 20 years and within this period only the patentee has the right to grant license of an invention and exclude others from making, using or selling an invention in the country wherein it was obtained without the consent or permission of the owner of the invention.[23] With respect to copyright, the duration differs from 50 to 70 years depending on whether the work is a literary, artistic, sound recording, etc; while for trademark protection is for 15 years in Nigeria. Within the duration of protection, the owner of the relevant IP is compensated and enjoys remuneration exclusively pending when the IP enters the public domain for general and free use.

Because of the peculiarity of TK as being owned and used communally, its transition to the public domain is not foreseeable. However, the same way other right owners of the various areas of IP enjoy the economic benefits which result from the commercialization and exploitation of IP, custodians of TK should equally enjoy the commensurate benefits that come from the exploitation and

[22] Graham Dutfield, 'TRIPS-Related Aspects of Traditional Knowledge' CASE W. RES.J. INT'L, Spring 2001. Pp.233, 243 & 244. Cited in Fasogbon Adeniyi, 'Protecting Traditional knowledge Through *Sui Generis* System in Nigeria Prospects and Challenges' https://scholar.google.com/scholar?hl=en&as_sdt=%2C5&q=protecting+knowlege+through+sui+generis+system+nigeria&btnG= accessed 31 May 2022

[23] Patents and Designs Act, Cap P2, Laws of the Federation of Nigeria (LFN) 2004, s 6.

commercialization of their TK. This could be achieved, and in this way individual and companies can have access to TK, acknowledge the custodians of the TK and upon agreed terms be able to use the TK. Culture is known as a people's way of life, communities should not be deprived from laying claim on their cultural practices without due compensation. This would be a win-win situation.

2.5 Protection of the Rights of Indigenous Peoples and TK

Colonization caused a great injustice to indigenous people. Apart from their land being taken over by their colonial masters, their resources were equally taken. This includes their TK. This resulted in indigenous people not being able to use their resources in ways that are peculiar and particular to them. Their culture and customs which were their heritage from their forefathers were looked down on and termed as inferior. The quality of their cultural values and customs diminished to pave way for what was seen as modern. Certain customs and practices, which are adverse to natural law, were abolished, so it is not in doubt that modernization has its advantages. However, these advantages should not negate the importance of TK to indigenous peoples. This guided the decision of the United Nations to recognize that people can be different and there is diversity in culture, and diversity and cultural richness contribute to the common heritage of mankind.[24] Thus, the UN acknowledges that indigenous peoples ought to be respected in line with their cultural heritage and should not be discriminated on rather they deserve respect and equality as attributed to mankind: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[25]

There were concerns raised by Nigeria and some African countries with respect to this declaration in relation to the absence of the definition of the term 'indigenous peoples'. It was stated that 'A clear and

[24] United Nations Declaration on the Rights of Indigenous Peoples, Res 61/295 adopted on 13 September 2007.
[25] Ibid art 31.

unambiguous definition will delimit the term and avoid its misuse especially in countries where all the ethnic groups are indigenous.'[26] The apprehension was against the different indigenous tribes in Nigeria agitating for exclusivity from the nation/state 'Nigeria' if a clear definition of the term was not provided in the Declaration. This concern is based on the fact that Nigeria has 371 indigenous tribes and the country as an entity gained political independence in 1960 but the different ethnic groups could leverage on the Declaration to try and break out as separate States.

In view of the current trend in IP and discussions going on with respect to the protection of TK , the author believes these concerns are unfounded. The intention of the UN is not to create chaos of some sort but rather to protect the interest of people generally and avoid discrimination and ensure that the customs and cultural practices of all indigenous peoples are protected and given free expression.

3. Legal Protection of Traditional Knowledge

3.1 Sui Generis Approach to Protection of TK

The fact still remains that TK is unwritten and regulated by customary law that is basically not codified. This could be challenging in trying to make it fit into the already established IP system. IP is structured to protect original works whereas TK is an established and existing custom or culture of a people. TK is owned by a community or a people, and transmitted from generation to generation unlike regular IP which its monopoly is for a provided duration.

Protection of TK under the current IP system can be challenging because of the uniqueness of TK. For instance protecting TK under the copyright system would have been ideal because some of the works eligible for protection therein which are literary, musical, artistic works are also the areas in which TK is expressed. For any work to be eligible for protection in the copyright system, sufficient effort must have been put into giving the work an original character and the works must have been fixed in a definite medium.[27] TK is basically expressed and passed down orally by the custodians and the criteria of fixation would be

[26] Unrepresented Nations and Peoples Organization (UNPO) 'Ogoni: Nigeria Opposes Indigenous Rights Declaration' (28 May 2007) <https://unpo.org/article/6763> accessed 13 April 2022.

[27] Copyright Act, Cap C28, Laws of the Federation of Nigeria (LFN) 2004, s1.

difficult to meet. In addition, the duration for copyright protection is 70years following the death of the author for literary, musical and artistic works, whereas TK has no time limit. Patent law has been the most discussed IP rights in relation to TK because the knowledge embedded in TK is often of a technical nature, thus resembling what patents are meant to protect.[28] TK not being documented also poses a challenge in this regard, patent law requires that for an invention to be patentable it must be new, results from an inventive activity and must be capable of industrial application.[29] These criteria make protecting TK difficult. Another area to be looked at is protecting TK as a trade secret but the nature of TK requires express communication within the particular community.

Considering a defensive protection approach would be effective in stopping third parties from acquiring intellectual property rights over TK. This could be better achieved where there is a comprehensive database of TK. This way a quick reference could be made to such a database by appropriate authority when considering applications for the grant of patents. This will help eliminate the grant of patents to third parties for TK. In terms of positive protection, there is a need to equip the host communities and custodians of TK and enable them to control the use of their TK, promote its use and benefit from the commercial exploitation of its use. One suggestion is a community rights regime where ownership rights over TK are vested in the indigenous peoples instead of being focused on single owners.[30]

Sui-generis is used to describe something different, unique and in a class of its own. A sui-generis approach could be a combination of some IP protections with some other forms of protection. The government may choose to extend protections to genetic resources and/or knowledge to a community in the form of patents, trade secrets, copyright, farmers and breeder's rights or another creative form not currently established in the IP regime.[31] A sui-generis system could ensure that a data base of the TK of its people is maintained, and any

[28] Kamrul Hossain and Rosa Ballardini, 'Protecting Indigenous Traditional Knowledge through a Holistic Principle-Based Approach' *Nordic Journal of Human Rights* <https://www.tandfonline.com> accessed 18 April 2021.
[29] Patents and Designs Act, Cap P2, LFN 2004, s 1.
[30] Ibid (n 26)
[31] Balavanchth Kalaskar, 'Traditional Knowledge and Sui-Generis Law' (2012) 3 (7) *International Journal of Science and Engineering Research* 2.

application for patent is checked therein to forestall grant of patent to its local knowledge. If a sui-generis approach is sustained, a persons or companies wishing to use the TK of indigenous peoples would need to obtain their prior authorization and consent. This way the terms and conditions for such grant are outlined and the benefits of such relation are noted.

In the *sui-generis* approach, the criteria for protection as stated under the regular IP laws will not be strictly adhered to. Hence, the criteria for novelty and definite monopoly will not be exercised therefore TK does not have to be new, non-obvious and capable of industrial application to be protection, neither should the protection be exercised for a definite period. Also protection of TK will be provided for communities/indigenous people. Since TK is local and indigenous knowledge, the sui-generis laws could be laws that are peculiar to that community or society as long as they are not against universally accepted standards or human right laws.

3.2 Existing Protection for TK

Nationally, some countries have laws that protect TK example Kenya, Zambua, Peru, Costa Rica, etc. In 2000 Panama passed a *sui-generis* law known as 'Panama's Special System for Registering the Collective Rights and Indigenous Peoples for the Protection and Defence of Their Cultural Identity and Traditional Knowledge and Setting out Other Provisions'.[32] Equally some others have come together at the regional level provide some protection for TK. In 2010, member States of the African Regional Intellectual Property Organization (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions[33]. The scope of protection offered by the Swakopmund Protocol confers on the owners of rights exclusive right to authorize the exploitation of their TK and the right to prevent anyone from exploiting their right without their prior informed consent.[34]

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[32] Graham Dutfield, 'Protecting Traditional Knowledge and Folklore' A Review of Progress in Diplomacy and Policy Formulation. UNCTAD/eTCTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development October 2002, p-36 cited in Balavanchth Kalaskar, 'Traditional Knowledge and Sui-Generis Law') ibid

[33] Explanatory Guide to the Swakopmund Protocol https://www.aripo.org/wp-contents/uploads/2020/04/Explanatory-Guide-to-the-Swakopmund-Protocol.pdf accessed 31 May 2022

[34] Swakopmund Protocol, s 7.

India has put legislative mechanisms to protect and enforce the traditional rights of its people. India has not just made protection of TK a domestic affair but has gone ahead to fight for the IP rights of its indigenous people outside in other jurisdictions where their rights are violated or about to be misappropriated.[35] As Anderson puts it:

> In India, where the awareness of intellectual property law is very low, the momentum towards protection of the indigenous properties increased after the basmati, tumeric and neem disputes. The WTO and its "drug denying obligations" (high prices of drugs on account of product patent regime) served to increase this awareness. As a consequence of this, in December 1998, the First Inter-Ministerial Committee on Protection of Rights of Holders of Indigenous Knowledge was convened. The discussions included protection of traditional knowledge and the possibility of introducing local self-government for administering the communities and their knowledge. The issue of identifying local communities was highlighted in this meeting. Many of the local communities lost their traditional identity (over a period of time). The knowledge of this community has also become generic over a period of time. With this in mind, various bills, including the Protection of Plant Varieties and Farmers Rights Bill, 1999, and the Bio Diversity Bills of 1999 were drafted.[36]

These laws are limited in the sense that they can only be enforced in the countries they are enacted.

WIPO has always been strategic in making and streamlining IP laws while considering both the interest of the right owner and the general public. Sometime in 2000, WIPO established a committee to look at TK and some other related areas. The aim of the Committee known as the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)was to develop an international system that would give adequate protection to these areas of

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[35] John Atoyebi, 'Securing the Intellectual property Rights of Indigenous Peoples Through Human Rights Guarantees: Prospects and Challenges' <https://journals.ezenwaohaetorc.org> accessed 20 April 2022.

[36] D Anderson, 'Against, Supersession (January 10, 2011). Canadian Journal of Law and Jurisprudence, Vol XXIV, No.1. 2011 cited in John Atoyebi, 'Securing the Intellectual property Rights of Indigenous Peoples Through Human Rights Guarantees: Prospects and Challenges' ibid.

law and to recommend a formal treaty for countries who would choose to ratify it.[37]

There is also article 8(j) of the Convention on Biological Diversity (CBD)[38] which requires parties, subject to their national laws 'to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.' Also the Nagoya Protocol[39] to the CBD on Access and Benefit Sharing deals with TK associated with genetic resources, and addresses issues like prior and informed consent, equitable remuneration and maintenance of community laws and procedures as well as customary use and exchange.[40]

Protection afforded under national laws is restricted as it can only be exercised in the country where it is passed, that is why there is a pressing need for a legal instrument that is internationally binding. An internationally binding instrument might require documentation of TK so that a data base of all TK with the requisite custodians of the TK known. The benefit of these is information on who owns what is made public to avoid misappropriation. The flip side of the coin is that when this information is made public and can be accessed on the internet, there is a limit to what people can be prevented from using the information to do, but this can be prohibited by making specific provisions to that effect.

[37]World Intellectual Property Organization (WIPO), 'Traditional Knowledge and Intellectual Property –Background Brief <www.wipo.int/pressroom/en/briefs/tk-ip.html> accessed 19 April 2022

[38]Article 8(j)-Traditional Knowledge, Innovation and Practices https://www.cbd.int/traditional/ accessed 31 May 2022

[39]The Nagoya Protocol on Access and Benefit Sharing, https://www.cbd.int/abs/ accessed 31 May 2022

[40] Dr Marisella Ouma, 'Traditional Knowledge: The Challenges Facing International Lawmakers' *WIPO Magazine* February 2017 https://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html accessed 02 February 2022. In the late 1990's and early 2000S India won a number of landmark legal battles to revoke patents relating to the country's traditional knowledge, including in relation to the use of turmeric (for its antiseptic properties) and neem (for its properties as a pesticide). India has since established a Traditional Knowledge Digital Library which catalogues its wealth of traditional knowledge to guard against its misappropriation.

3.3 Human Right Perspective to TK Protection

The United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) is the most comprehensive international instrument on the rights of indigenous people. Generally, it established a universal framework of minimum standards for the survival, dignity and wellbeing of the indigenous peoples of the world,[41] and has been noted to be the first human rights international document that deals with the rights of indigenous peoples. Article 11(1) of UNDRIP provides that indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as artefacts, designs, ceremonies, technologies and visual and performing arts and literatures. It also provides that the people have a right to practice their culture, their right to participate in matters affecting them directly or through their chosen representatives and their rights to traditional medicine.[42]

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, TK and traditional cultural expressions, as well as the manifestations of their sciences, technology and culture, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, TK, and traditional cultural expressions.[43] UNDRIP established that indigenous peoples are entitled to the full enjoyment of their human rights without discrimination.

The African Charter on Human and Peoples' Rights (African Charter)[44] also considered the collective rights of peoples or communities. In its provision it considered the Charter of the Organization of African Unity (now African Union) which stipulates that 'Freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. This it

[41]United Nations Declaration on the Rights of Indigenous Peoples <Https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indiginous-peoples.html#> accessed 02 February 2022.
[42] UNDRIP art 24.
[43] Ibid art 31(1).
[44] OAU Doc CAB/LEG/67/3 rev 5, 21 I.LM 58 (1982), entered into force 21October 1986.

meant to achieve by ensuring complete eradication of colonialism in a bid to achieve a better life for African people, and to promote international co-operation putting into consideration the Charter of the United Nations and the Universal Declaration of Human Rights. Article 2 of the African Charter provides for freedom from discrimination. This means that all humans are equal and unique, and are entitled to every form of protection as required by Law. It provides for rights of all peoples to equality and rights[45], right to property.[46] Property can be tangible and intangible. It also provides for the right to freely dispose their wealth and natural resources.[47] Wealth and natural resources form part of TK and this articles recognizes the need to prohibit the misappropriation of a peoples TK which will invariable deprive them of their right to dispose of them according to their will. The charter goes further to provide for their right to economic, social and cultural development[48] and others. Commercialization of TK is one way a community can grow economically and achieve maximum development. Harnessing and utilizing TK is fundamental to achieving economic growth in a community, and the indigenous people have a right to enjoy the benefits of this commercialization which can be achieved by protecting their rights and ensuring access to their TK can be gotten with their consent upon agreed terms. Anything contrary to this will be tantamount to deprivation and misappropriation.

Internationally, there is notable progress in the right of indigenous people over their TK. Discussions are on-going at WIPO with the aim of developing an international legal instrument that will bind all the countries that choose to ratify it.

4. Lessons from India

Aside from developing the Patent Act, Copyright Act and the Trademark Act in India, some recent legislation which protect TK include the Biology Diversity Act, 2002, the Protection of Plant Varieties and Farmer's Rights Act, 2001 and the Geographical Indications of Goods (Registration and Protection) Act, 1999.[49]

[45] African Charter art 19.
[46] Ibid art 14.
[47] Ibid art 21.
[48] Ibid art 22.
[49] Shambhu Chakrabarty and Ravneet Kaur, 'A Primer to Traditional Knowledge Protection in India: The Road Ahead' <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8172557/> accessed 20 April 2022.

To further solidify their position of combating bio-piracy, India resorted to a significant *sui generis* protection of TK. As at 2011, India was able to cancel or succeed in withdrawing 36 applications to patent traditionally known medical formulations. They were able to do this by developing a Traditional Knowledge Digital Library (TDKL), a data base which contains 34 million pages of formatted information on some 2.260,000 medical formulations in multiple languages.[50] This ensures that patent offices round the world do not grant patent to applications founded on India's wealth of TK. Initially due to language barrier, because most of their medicinal knowledge existed in their local dialects and when searches were conducted in line with patent applications, this medicinal knowledge did not show up as prior art[51] and they had to spend a lot of money and effort challenging the patent grant. With the coming into effect of the TDKL database, patent examiners can easily identify a patent application that does not satisfy the criteria of novelty.

India went on to make available the TDKL to the patent offices of the countries that have signed the TDKL Access Agreement so they could have easy access to India's data base of knowledge and prior art. One would wonder why a developed country would voluntarily sign such an agreement that would restrict their ability to grant patent that would favour the developed country's economy, but it's a wise decision to take because the penalty and damages that the infringing country would be mandated to pay would be avoided by the non-grant of patent of a prior art.

This development has impacted significantly on protecting the country's TK. There has been a positive drop in bio-piracy cases and frivolous filing of patent applications related to Indian Systems of Medicines (ISM). This success showed by India in protecting TK has inspired countries like China and Finland to follow suit. This is a positive and gives hope to other countries because 'when a seed is removed from

[50]VK Gupta, Protecting India's Traditional Knowledge, www.wipo.int/wipo_magazine/en/2011/03/article accessed 20 April 2022.

[51] Prior art is information that has been made available to the public in any form before a given date that might be relevant to a patent's claim of novelty and inventiveness. Patent would not be granted to invention that has been described as prior art.

its environment, it dies halfway to its destination, and the same could happen to indigenous knowledge'.[52]

5. Recommendations and Conclusion

Nigeria could borrow a leaf from what has been established in India. A database of the TK of the ethnic groups and different communities that make up Nigeria is highly recommended. The first step to take is to educate and sensitize the people to enable them divulge information regarding their TK. This is because of the marginalization and misuse of the TK by companies who had made promises that they did not fulfil. The communities would be informed of the need for a data base of the nation's TK so that subsequent use of the TK would require permission and consent on agreed terms. Nigerian government would have to set up a system in place to get this TK, there would be need to seek out the chiefs and traditional rulers/ leaders of these communities. As a way of encouraging this idea, there could be a form of compensation put in place for previously exploited TK, which would be done after obtaining and confirming the authenticity of TK claims.

It is also recommended that clarity of the process for the financial benefits of the consented use of TK should be outlined. The benefits accruable to the communities for access to TK and requisite penalty for misappropriation or violation of their rights should be put in perspective. Another area of concern would be in terms of how the economic entitlement be will be accessed by the communities. Would it be by way of structural development of the communities and economic investment in the communities? Would it be by mobilizing and equipping different groups of people or individuals who actually work on the TK. For instance, for the production of Akwette, there are individuals of the community who produce it as a means of livelihood, would these people be economically and financially empowered.

In conclusion, though it is a relief that concerns regarding protection of TK are being raised which gives hope that such concerns will soon be resolved and a favourable solution to the misappropriation of TK will be achieved in the near future. However, there are possibilities that countries who benefit from the commercialization of TK might be impeding the progress of providing protection to TK. For instance, how

[52] Quote by Piaroa Elder, an Indigenous community of Venezuela cited by Chakrabarty and Kaur (n 49).

the Indian Neem case took about 15 years before the patent granted to WR Grace was revoked on account of the neem tree being used in farming practices and specifically an Indian factory owner explained how he had been producing pesticides based on the neem tree in manners similar to those patented by WRGrace.[53] It is true that it is the turmeric and neem cases that gave way to the setting up of TKDL in India. However, let us imagine that the developed countries also faced the challenges associated with misappropriation of TK, would an international legislation for the protection and proper administration of TK not be in place currently?

[53]Martin Fredriksson, 'Balancing Community Rights and National Interest in International Protection of Traditional Knowledge: A Study of Indian's Traditional Knowledge Digital Library'(2022) 43 (2) *Third World Quarterly* 352 – 370. https://www.tandfonline.com/doi/full/10.1080/01436597.2021.2019009 accessed 31 May 2022

DYSFUNCTIONAL NIGERIAN INSURANCE INDUSTRY: FAILURE OF LAW OR REGULATION?

Ebelechukwu Okiche,[*] Emeka Adibe[**] and Clara Obi-Ochiabutor[***]

Abstract

This work interrogates the reason for the poor performance of the Nigerian insurance industry. The reason for doing this is that there is a strong correlation between insurance and development. The illiterate villager in the remotest part of Nigeria understands the advantages of "pooling" in risk mitigation. A system of coming together to contribute resources into a pool in order to take a small percentage of same to compensate the few members of the group who suffer risks is very much part of the everyday life of the traditional Nigerian society. This is what insurance is all about. Insurance, as we see it today, developed from this rudimentary aspect to the sophisticated business which it has become today. Being that our people are familiar with the tenets of insurance what then is the problem of Nigeria's modern insurance industry that makes it remain at the lowest ebb in terms of performance in the financial services industry? Is the problem that of inadequacy in our law or ineffective regulation? Using the doctrinal *method, the study examines both the legal and the institutional framework for insurance business to ascertain what the problem is. Our finding is that notwithstanding some grey areas in the Insurance Act, 2003, the major problem of the industry is failure of regulation. We recommend that the regulator, the National Insurance Commission (NAICOM) be more proactive to enable the industry take its pride of place in Nigeria as is the case all over the developed world.*

Keywords: Insurance law, insurance industry, insurance regulation, National Insurance Commission, Nigeria

1. Introduction

Studies have established that there is a direct correlation between insurance and economic growth and development.[1] This is because

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insurance is one of the key players in financial services sector. It stands out as first among equals in this area because of the edge it has over and above other members of the class. Like banking and credit financing service, insurance provides means for investments and financing of projects, but unlike them, insurance is the only means of risk spreading and compensation financing. Insurance is meant not only to cushion the citizens from the effect of the harsh realities of life, but also to enhance the quality of their lives. One thing, which is very certain, is that calamities such as deaths, fire outbreaks, burglaries, accidents, sickness, *etc* must occur but the only uncertainty is when.[2] Thus, as a risk transfer mechanism, insurance not only affords investors the peace of mind needed to invest but also provides the long term funds to do so. For individuals and families, it acts as a buffer when calamities occur. Hence the loss of the bread winner in a family need not signal the end of the children's education or that the family would from then live in penury.[3]

From time immemorial till date some form of rudimentary insurance exists in many Nigerian societies.[4] Under this scheme, tribal associations such as women group, age grades, and social clubs and so on contribute into a pool through dues, levies and donations paid by their members from which a sum of money is presented to any member or his next of kin in the event of a disaster in accordance with the guideline of the association. In the event of death such payments depending on the financial strength of the association, could cover funeral expenses and the immediate financial needs of the deceased family just like a life insurance policy does[5]. Some associations have even been known to give scholarships to children of their deceased members same way children education under insurance policy could ensure that children do not drop out of school in the event of the death of parents. In addition to above some of these associations also assist their member by lending money them to grow their businesses and finance such projects as marriages, buildings, school fees among others. All these go to show that the idea of

[1] BY Iyodo and others 'Effect of Insurance Industry Performance on Economic Growth in Nigeria' in *International Journal of Business and Financial Research* a <www.bluepenjournals.org/ijbfmr> accessed 23 March 2021.
[2] EL Okiche, 'Consumer Protection and Claims Settlement in Insurance Contracts in Nigeria' i [2010-2011] (6) *Consumer Journal*
[3] Ibid.
[4] MC Okany, *Nigerian Commercial Law* (Onitsha: Aficana-Fep Publishers Ltd, 2001) p.662.
[5] Ibid.

insurance is not alien to the average Nigerian. However, the Nigerian economy has grown so sophisticated that this form of quasi-insurance is no long able to cope and generally unpopular, hence the need for insurance in its modern form. Having regard to all these benefits of insurance what then is the reason for the dismal performance of the industry in Nigeria? Our research answers this question. The paper is divided into eight parts. Part one introduces the work; Part two clarifies some concepts used while part three gives a historical background of insurance. Legal and Institutional framework are discussed in part four. Part five is on overview of the Nigerian insurance industry; part six compares the situation in Nigeria with three select jurisdictions. Part seven concludes the work while part eight makes recommendations for improvement

2. Conceptual Clarifications

It is important to explain the sense in which some concepts are use in this work for proper understanding.

2.1 Insurance

There is no universally accepted definition of insurance.[6]. However, we adopt with approval the definition given by Channel J, many decades ago. For him insurance is:

> a contract for the payment of a sum of money, or for some corresponding benefits such as the rebuilding of a house or the repairing of a ship, to become due on the happening of an event which event must have some amount of uncertainty about it and must be of a character more or less adverse to the interest of the person effecting the insurance.[7]

Thus, insurance contract is an agreement to pay a sum of money to the insured party or to provide him with some corresponding benefits at the happening of the insured peril.

[6]The situation is compounded by the fact that the major statute, The Insurance Act, 2003, Cap I17, Laws of the Federation of Nigeria (LFN) 2004(hereinafter referred to as The Insurance Act) which regulates insurance business in Nigeria, does not define the concept.

[7]*Prudential Insurance Co v Inland Revenue Commissioners* (1904) 2 KB 658 at 664, see also *Lucana v Crawford* (1808) 127 ER855,*Charles Chime v United Nigeria Insurance Co Ltd* (1972)2 ECSLR 808 at 811.

2.2 Regulation

It is the practice that in enacting sector specific laws the legislature always provides for the institution, ie the regulatory body responsible for implementing and enforcing the provisions of such laws.[8] For insurance, the regulatory authority is the National Insurance Commission (NAICOM). It has the responsibility of making sure that the provisions of the law regarding insurance are implemented to the later. So a breached, non-implementation or non-enforcement of the law is simply a failure of regulation. This is the sense in which the word 'regulation' is use throughout this work.

3. Historical Background of Insurance in Nigeria

Modern insurance business as we know it today started in Nigeria with the advent of the British This was done by the British companies appointing agents whom they gave powers of attorney to canvass for insurance businesses, issue cover notes and service claims on their behalf.[9] With time these agencies transform to branch offices of the parent companies in London. The Royal Exchange Assurance was the first British insurer to open a branch office in Nigeria in 1921. After 28 years, three other insurers, Norwich Union Fire Insurance Co Ltd, the Tobacco Insurance Co Ltd and Legal and General Assurance Society Ltd came on board. By the time Nigeria had her independence in 1960, there were 25 insurance companies in the country with three of them, the Great Nigeria Insurance Co Ltd, the Nigerian General Insurance Co Ltd and the Universal Insurance Co Ltd, being wholly indigenous.[10] Thereafter, the number of insurance companies in Nigeria continued to grow exponentially to the extent that as at December 2005, there were 107 insurance companies in Nigeria.[11] However, following the recapitalisation exercise that took place in the insurance industry between

[8] For examples, National Agency for Food and Drug Administration and Control (NAFDAC) Cap N1 LFN 2004, ss 1 and 2 establishes the Agency and its functions; Nigerian Communications Act, 2003, ss 3and 4 establishes the Nigerian Communications Commission and charges with the functions of implementing and enforcing the provisions of the Act; Standards Organisation of Nigeria (SON) Act 2015, ss 3 and 4 establishes the standards Council of Nigeria responsible also for implementing and enforcing the law.

[9] Irukwu (n 6).

[10] Yinka Lijadu, *The Federal Might; A Publication of NICON* (Vol 2 No 3) 3.

[11] Tony Iji and others, Special Report on Insurance Leaders in Nigeria' *Financial Standard* (Monday, 30 July 2007) 28.

2005 and 2007 which saw a lot of insurance companies go under, the number reduced to 51, made up of 49 Underwriters and 2 Reinsurers.[12] As at 31 December, 2020, Nigeria has 13 composite insurance companies, 28 that transact general business, 14 life companies and two reinsurers in Nigeria. Other players in the industry include 457 insurance brokers, 34 loss adjusters and many insurance agents.[13] In addition, there are two Takaful-Insurance[14] companies in Nigeria. Also in 2018 NAICOM licensed GOXI Micro-insurance Company Limited as the first micro-insurance company in Nigeria.[15]

However, it was only in 1961 that government came in to regulate insurance business for the first time. Since then, the government has been known to use both legislative[16] and judicial[17] instruments to ensure good insurance practice. Currently the two major statutes that regulate core insurance business in Nigeria are the Insurance Act[18] and the National Insurance Commission Act.[19] Two other statutes on insurance which are sector specific are the Pension Reform Act[20] and the National Health Insurance (NHIS) Act.[21] Being special types of insurance, the law removed them from the purview of Insurance Act and as such they are

[12]EL Okiche 'The Impact of Recapitalization Law on Nigerian Insurance Industry' (2012)1 *Journal of Contemporary Law* 218.
[13] NAICOM, <http://www.naicom.gov.ng>, visited 23/6/2021.
[14] Ibid, This is a form of insurance that is compatible with the principle of the *Shari'ah,*.
[15] Ibid, micro-insurance is defined as 'insurance developed for low income populations, low valued policies, micro and small scale enterprises provided by licensed institutions, run in accordance with generally accepted insurance principles, and funded by premiums.'
[16] These are Insurance Company Act No 53 of 1961, Insurance (Miscellaneous) Provision of 1964 , Insurance Company Regulation 1968, Insurance Decree No 59 of 1976, Insurance Decree No 40 of 1988,Insurance Decree No 62 of 1992, and Insurance Decree Nos.1&2 of 1997.
[17] Some of the cases are *Leadway Assurance Co Ltd v Zeco Nig Ltd* (2004) 22 WRW 1 SC on the meaning of claim , *WIC Ltd v Owolabi* ,[2002] 499 WRN 102 C A on terms of insurance policy, *Niger Insurance Ltd v AP Ltd* (2005) 17 WRN 105 CA on subrogation rights, *Ajaokuta Steel v Corporate Insurers Ltd* [2004] 41 WRN on the interpretation of s. 50 (1) Insurance Act 1997, *MSC Ltd. v Unipolars* (2001) 43 WRN 153 on utmost good faith.
[18] Note 6 above
[19] The National Insurance Commission Act, Cap.N53, LFN 2010 hereinafter called the NAICOM Act.
[20] Cap. P4 LFN, 2010.
[21] National Health Insurance Scheme Act, Cap 42, Laws of the Federation of Nigeria (LFN) 2004.

outside the scope of this work. Prior to the enactment of the current Insurance Act in 2003, the argument within the insurance industry was that the problem of insurance was lacked of relevant legislation to drive the industry. This is the reason the Act was lauded as a "beautiful piece" of legislation at its promulgation.[22] The question is "why has the industry not been able to perform optimally by contributing substantially to the nation's Gross Domestic Product (GDP)? This paper seeks to answer the poser by raising two questions:

i. Why has insurance failed in Nigeria?
ii. What is the way forward in making sure that insurance takes its pride of place in Nigeria in comparison with what obtains in advanced nations?

These questions are answered by examining both the legal and the institutional framework for insurance business to see whether the problem is that of inadequacy in law or non-implementation of the law by the regulatory authority.

There is a dearth of academic literature on insurance failure in Nigeria but some stakeholders in the industry had from time to time proffered some reasons mainly in the pages of newspapers. Most of them finger negative attitude of Nigerians towards insurance as a result of lack of trust in the industry**,** lack of skilled personnel, presence of touts, ignorance and poor knowledge of insurance services by the populace, lack of innovative products, inadequate deployment of technology in the industry and lack of synergy among players in the industry resulting in such things as rate cutting and high cost of acquiring businesses.[23] For us all these are merely symptoms of the illness of the industry and not the ailment proper. Our study goes to the root of matter by looking at laws regulating insurance practice in Nigeria for a proper diagnosis to be

[22] Sola Alabadan, 'Need to Examine Grey Areas in Insurance Act,' Daily Independent Newspaper Wednesday, July 23, 2008, C9.

[23] See generally Mohammed Kari, Increasing Insurance Penetration through Value Creation, paper presented at a seminar organised by the Chartered Insurance Institute of Nigeria (CIIN) in Ibadan, Oyo state. <https://allafrica.com/stories/201811190069.html,> Nike Popoola, 'Failed Policies, Declining Confidence Slow Insurance Industry's Growth' < https://punchng.com/failed-policies-declining-confidence-slow-insurance-industrys-growth,> K. Abd-Khalio, 'Enforcing Compulsory Insurances' <https://leadership.ng/2019/02/24/enforcing-compulsory-insurance> all visited 29 March 2021.

made. Thus our work does not only fill a knowledge gap but also seeks to chart a new course for the industry.

4. Legal and Institutional Framework for Insurance Business in Nigeria

This segment of the work examines the two major[24] statutes on insurance business in Nigeria; the Insurance Act[25] and the National Insurance Commission Act.[26]

4.1 Legal Framework

Insurance was regulated for the first time in Nigeria in 1961 by the Insurance Company Act 1961. For the first time, there were requirements for registration with the Registrar of Insurance. The applicant was to supply the classes of insurance to be transacted, margin of solvency and paid up capital.[27] The Act was ineffective and frequent breaches occurred.[28] Three years later, it was amended by Insurance (miscellaneous provision) Act 1964 which made provision for the investment of insurance funds[29]. In 1976, both Acts were repealed by what was considered a revolutionary legislation, the Insurance Decree (now Act) 1976 which introduced for the first, the requirement of registration under the Companies Act 1968[30] in addition to the registration with the Registrar of Insurance.[31] It not only raised the minimum paid up capital from N500,000 and N100,000 to N500,000 & N800,000 for life and general business of insurance respectively,[32] but for the first time provided for the concept of statutory deposit with the Central Bank as additional security.[33]

In 1991, the Insurance Decree (now Act) 1991 came to repeal the 1976 Act. The major innovation of the Act was the provision that

[24]Other Acts that regulate Insurance are the Motor Vehicle (Third party) Act, 1950, and the Marine Insurance Act, 1961.
The National Insurance Corporation Act, 1969, The Nigerian Reinsurance Corporation Act, 1999 and The Nigerian Council of Registered Insurance Brokers Act, 2003.
[25] Note 6 above.
[26] Note 19 above.
[27]Insurance Companies Act 1967, s 7.
[28]*State v Daboh* CCHCJ/11/75 at 1739.
[29]Insurance (Miscellaneous Provision) Act 1964, s 9(4).
[30]Insurance Act, 1976, 3(1) (9).
[31]Ibid. s 3 (3).
[32]Ibid, s 8(1).
[33]Ibid, s 9.

payment of premium is a precondition for insurance cover,[34] the popular "no premium, no cover" slogan. In 1997 two Decrees, Insurance Decrees numbers 1 and 2 were enacted and the 1991 Act repealed. For the first time insurance regulation and supervision were placed on a body corporate with perpetual succession.[35] The 1997 Insurance Act re-enacted all the provisions by the earlier Acts in addition to making detailed problems for the regulation of insurance intermediaries and loss adjusters.

Six years after this, the current Act, Insurance Act 2003, came to replace the 1997 Act. The new Act consolidated all the gains made by all the previous law by not only re-enacting all the provisions necessary for sound insurance practice but in addition, improved on them. It made detailed provisions on classification of insurance business,[36] registration of insurance companies,[37] share capital,[38] modes of operation of insurers,[39] including even the modalities of the hiring and firing of Chief Executive Officer of insurance companies.[40] Most importantly, the Act reiterated the importance of the classes of insurance that it made compulsory[41] and the common law position regarding settlement of claims which it statutorily enhanced to remove the hardship insureds used to face.[42] The Act also gives NAICOM power to implement the provisions of the Act.[43] Stakeholders in the insurance industry who before the enactment of the Act argued that "the industry lacked relevant legislation to make it contribute meaningfully to the nation's economy" lauded the Act.[44]

However, some grey areas have been noted in the law. For instance, there has been a lot of discontentment over the issue of depositing part of the paid up share capital with the Central Bank of

[34]Ibid, s 37.
[35] The National Insurance Commission (NAICOM).
[36] The Insurance Act, 2003, s 2.
[37] Ibid, ss 3 – 8.
[38] Ibid, ss 9 – 10.
[39] Ibid, ss 11 – 29.
[40]Ibid, s 13.
[41] Ibid, ss 64, 65 and 68.
[42] Note 2 above.
[43] The Insurance Act, 2003, s 86.
[44] Note 22 above.

Nigeria which Bank is mandated to pay an uncomplimentary interest rate. The law is that:

> (1) An insurer intending to commence insurance business in Nigeria after the commencement of this Act shall deposit the equivalent of 50 per cent of the paid-up share capital referred to in section 9 of this Act (in this Act referred to as the 'Statutory Deposit') with the Central Bank which pays interest at 5%.
>
> (2) Upon registration as an insurer, 80 per cent of the statutory deposit shall be returned with interest not later than 60 days after registration.
>
> (3) In the case of existing companies an equivalent of 10 per centum of the minimum paid-up share capital stipulated in section 9 shall be deposited with the Central Bank.
>
> (4) Any statutory deposit made under subsection (1) of this section shall attract interest at the minimum lending rate by the Central Bank on every 1stof January of each year.[45]

The question is, why pay interest at minimum lending rate instead of competitive rate? This has been a source of resentment to stakeholders.

Again the Act makes copious provisions 'no premium, no cover'[46] on premium paid to insurers directly or indirectly through brokers but curiously did not say anything on premium paid to the agent. The presumption is that once premium is paid by the insured to the broker, the insurer is deemed to have received it.[47] Is it the same with premium paid to the agent? Given the agency relationship in common law and in the absence of a statutory clarification, does the agent operate for the insured or the insurer?[48] In view of this defect, it is argued that the section should be reviewed by the appropriate authority.

Another area is the issue of code of conduct. The Act provides that 'every registered insurer, reinsurer, insurance agent, insurance broker or loss adjuster shall subscribe to and conform to the Code of Conduct of the insurance profession.'[49] Is Code legally enforceable? In other words, what is the legal status of Code? Does the insured have any remedies if

[45] The Insurance Act, 2003, s 10 (1) (2) (3) and (4).
[46] Ibid, s 50(1).
[47] Ibid, s 50(2).
[48] Compare s 54 (2) and (3).
[49] Ibid, s 79.

he is injured by the breach? Finally, who has the locus to challenge the breach? These questions need answers.

All in all, the Act has been hailed as being insurance -friendly both to the insurer and the insured.[50] Moreover, the unclear areas do not hinder core insurance business. Be that as it may, it is pertinent to note that two bills (2008 and2018) in respect of the amendment of the Act have been stuck in the National Assembly. [51]

4.2 Institutional Framework for Insurance Regulation

The main institution set up by law to regulate insurance business in Nigeria is the National Insurance Commission (NAICOM).[52] The Commission is "a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name." [53] Its principal object is to ensure the effective administration, supervision, regulation and control of insurance business in Nigeria.[54] To this end, the Commission shall -

(a) establish standards for the conduct of insurance business in Nigeria;

(b) approve rates of insurance premiums to be paid in respect of all classes of insurance business;

(c) approve rates of commissions to be paid in respect of all classes of insurance business;

(d) ensure adequate protection of strategic Government assets and other properties;

(e) regulate transactions between insurers and reinsurers in Nigeria and those outside Nigeria;

(f) act as adviser to the Federal Government on all insurance related matters;

(g) approve standards, conditions and warranties applicable to all classes of insurance business;

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[50] Note 33 above.
[51] EO Gam-Ikon, 'Where is The Insurance Amendment Bills of 2008 and 2018?' <https://www.proshareng.com/news/Insurance/Where-Are-The-Insurance-Amendment-Bills-Of-2008-And-2018-/46749 > accessed
[52] National Insurance Commission (NAICOM)Act, Cap.N53, Laws of the Federation of Nigeria (LFN.) 2010
[53] Ibid, s.1 (1) & (2).
[54] Ibid, s.6.

(h) protect insurance policy- holders and beneficiaries and third parties to insurance contracts;

(i) publish, for sale and distribution to the public, annual reports and statistics on the insurance industry;

(j) liaise with and advise Federal Ministries, Extra Ministerial Departments, statutory bodies and other Government agencies on all matters relating to insurance contained in any technical agreements to which Nigeria is a signatory;

(k) contribute to the educational programmes of the Chartered Insurance Institute of Nigeria and the West African Insurance Institute; and

(l) carry out such other activities connected or incidental to its other functions under this Decree.[55]

In addition to the above, the Insurance Act says "Subject to the provisions of this Act, the National Insurance Commission (in this Act referred to as "the Commission") shall be responsible for administration and enforcement of this Act and is hereby authorised to carry out the provisions of this Act."[56] From the foregoing we can see that both supervisory and regulatory powers are given to NAICOM. There is a difference between the two even though the both terms are most often used interchangeably. Each of them refers to different levels of intervention. Supervision generally relates to higher level activities such as authorising firms to operate in the market and collecting and analysing statistical returns, while regulation relates to the setting of and enforcing of standard and rules by which firms operate.[57]

Thus, NAICOM has the power to register and grant licences to all operators in the industry which include insurance brokers, insurance agents, loss adjusters, reinsurance and insurance companies.[58] It not only prescribes the minimum capital requirement for industry but also has an unfettered power to increase it whenever and to whatever amount it deems fit.[59] Appointment of Chief Executive Officers[60] of insurance

[55] s7 (a)-(l).
[56] The Insurance Act, s.86.
[57] D. Atkins and I Bates, *Risk, Regulation and Capital Adequacy* (London: The Chartered Insurance Institute, 2007).
[58] The Insurance Act, ss.3-8, 34-49.
[59] Ibid, s 9.
[60] Ibid, s 13.

companies and even any changes[61] thereof are subject to the approval of the Commission. NAICOM is empowered, through its inspectorate department, to undertake routine and special investigations of operators to ensure that they operate according to the provisions of Insurance Act, the relevant Regulations and Policy Guidelines made pursuant to the Act.[62] Companies can neither advertise,[63] nor innovate and introduce new products without recourse to NAICOM.[64] Where there are cases of breaches of the provisions of the insurance law and insolvency, the Commission is empowered to suspend an operator from carrying on business, withdraw its licence, take over its management, or even liquidate the company. [65] All these underscore how wide, unfettered and extensive the oversight functions available to the regulator are. In fact, the powers and authority available to the Commission have been described as ,stifling,'[66] yet it had failed to use such wide powers to effectively police the industry.

5. An Overview of the Nigerian Insurance Industry

As at 31 December 2019, Nigeria has 13 composite insurance companies, 28 that transact general business, 14 life companies and two reinsurers. Other players in the industry include 457 insurance brokers, 34 loss adjusters and many insurance agents.[67] In addition, there are two Takaful-Insurance[68] companies in Nigeria. Also NAICOM has in 2018, licensed GOXI Micro-insurance Company Limited as the first micro-insurance company in Nigeria.[69] Regarding operating capital, the Nigerian insurance industry has the highest in Africa. The minimum capital base currently in operation in the industry for the different classes of insurance are 2 billion naira for a company that transacts life business, 3 billion naira for general insurance, 5 billion naira for a composite company and 10 billion for reinsurance company. The industry

[61] Ibid, s 4.
[62] Ibid, 101
[63] ibid, s 74
[64] Ibid, s 16
[65] Ibid, ss 32-33.
[66] Note 2 above
[67] NAICOM,<http://www.naicom.gov.ng,> visited 23 March, 2021.
[68] Ibid, This is a form of insurance that is compatible with the principle of the *Shari'ah,*.
[69] Ibid, micro-insurance is defined as 'insurance developed for low income populations, low valued policies, micro and small scale enterprises provided by licensed institutions, run in accordance with generally accepted insurance principles, and funded by premiums.'

contributes less than 1% to the nation's GDP as shown in Table 1 below:[70]

Table 1: Contribution of the Insurance Industry to Nigeria's GDP

YEAR	TOTAL GDP (₦'BILLIONS)	INSURANCE SECTOR GDP (₦'BILLIONS)	INSURANCE CONTRIBUTION TO TOTAL GDP (%)
2014	67,152.79	258.89	0.3855%
2015	69,023.93	272.07	0.3942%
2016	67,931.24	278.76	0.4104%
2017*	68,490.98	270.68	0.3952%
2018*	69,810.02	287.24	0.4115%

*Provisional figures

This dismal performance of the industry has been a source of worry and embarrassment to well-meaning Nigerians and the nation at large. According to the erstwhile Minister of Finance, 'only three million out of 180 million Nigerians possessed insurance policies to protect themselves from uncertainties.'[71] This simply means that about 99% of Nigerians are not insured. Given that traditionally Nigerians are familiar with risk management albeit in a rudimentary form what could be the problem? This becomes even more worrisome when compared to the insurance industries of other African countries, which despite operating with much lower capital bases contribute substantially to their nations' GDP.[72] Table 2 below depicts the contributions of the insurance industry to the national GDP in selected African countries:

[70] From Nigeria Bureau of Statistics, <https://www.nigerianstat.gov.ng> visited 29 March 2021

[71] K Adeosun, 'Only Three Million Nigerian Have Insurance Policies' <https://punchng.com/only-three-million nigerians-have-insurance-policies-adeosun/Punch> visited 23 March, 2021.

[72] EY African Insurance Intelligent Centre < https://www.ey.com/za/en/newsroom/news-releases/news-,> visited 23 March, 2021.

Table 2: Contribution of the Insurance Industry to the National GDP in Selected African Countries

Country	South Africa	Malawi	Tanzania	Kenya	Ghana	Nigeria
Total Life Premium in US$	39,975,000	24,000,000	36,000,000	644,000	199,000	544,000
Non-Life premium	8,666,000	57,000	213,000	819,000	184,000	1,003,000
Insurance Penetration [73]	13.9%	1.9%	0.5%	2.4%	1.0%	0.3%
Capital Base in dollars	Risk based 1,200,000 (insurance companies) 1.500,000 R/ins	Life-12,200 Gen. 81,000 R/ins 162,000	463,000 for all companies	No explicit requirement for insurance groups.	3.3 million	12,800,000 19,100,000 68,000,000
Population in millions	54	16.7	4.7	44.9	26.8	177.50

A look at this can shows that the South African insurance industry, which despite operating with a much lower capital base contributes substantially to that nation's GDP and has an insurance penetration rate of 13.9% compared to that of Nigeria which is 0.3%.

A very recent report, the 4th Africa Insurance Barometer, a research commissioned by the African Insurance Organisation (AIO) on African insurance industry, launched at its 46thConference & General Assembly held in June 2019 in Johannesburg, South Africa is even more instructive. The report shows that in spite of the fact that African countries were able to grow premium from $59.4 billion in 2016 to $67.7 billion in 2017, it was only the Nigerian market that recorded a negative growth. Total real premium growth was positive in Egypt (9.8 per cent),

[73] Insurance penetration refers to the ratio between the values of premiums written in a particular year in a particular country's to the GDP.

Namibia (7.8 per cent) and Morocco (3.0 per cent), stagnant in South Africa (0.1 per cent) and negative in Nigeria (-10.5 per cent).[74]

A look at insurance data from jurisdictions outside Africa will help buttress our point on failure of the Nigerian insurance industry.

(a) The United Kingdom

The UK insurance industry is the largest in Europe and the fourth largest in the world.[75] In 2017, it contributed £29.1 Billion to the UK economy and it paid the highest in tax to the UK government more than any other sector.[76] In addition, as of 2016, there were 113,600 direct jobs created by the UK insurance industry. [77] According to the OECD, in 2018, the insurance penetration of the UK (which is the ratio of total insurance premiums compared to domestic product) stood at 13.1 per cent.[78]

(b) The United States of America

According to the OECD, the insurance penetration of the United States stands at 11.3 per cent.[79] The US has the biggest insurance market in the world and in 2018; the insurance industry contributed $564.5 Billion Dollars to the US economy, a total of 2.8percent GDP contribution.[80] According to the US Insurance Information Institute, the insurance industry created 2.7 million jobs in 2018.[81]

(c) India

[74] The 4th Africa Insurance Barometer, at https://pulse.schanz-alms.com/africa-insurance-barometer/2019.html, visited 29/3/2020.
[75]Association of British Insurers, UK Insurance and Long Term Savings Key Facts (December 2019) https://www.abi.org.uk/globalassets/files/publications/public/key-facts/key_facts_2019_spread.pdf accessed 29 March 2020.
[76]Ibid see also Statistics Research Department, 'Insurance Industry in the United Kingdom-Statistics and Facts https://www.statista.com/topics/4511/insurance-industry-uk/ accessed 29 March 2020.
[77] Ibid.
[78]OECD, 'OCED Stats' https://stats.oecd.org/Index.aspx?QueryId=25444 accessed 29 March 2019.
[79]Ibid.
[80] US Insurance Information Institute, 'Insurance Industry at a Glance' <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/introduction/insurance-industry-at-a-glance> accessed 23 March, 2021.
[81]Ibid.

Even though insurance penetration in India is low and stands at about only 3.69 in 2019[82] it cannot be compared to Nigeria's situation. However, the insurance industry is still one of the biggest in the world and it is expected to grow to up to $220 billion by 2020.[83] In 2019, the total life and non-life premium paid out stood at over $18 billion dollars.[84]

6. Lessons from Other Jurisdictions

Having come this far, we can now address the question of what the problem of the Nigerian insurance industry is. We would look at South Africa to find out what it is doing right that we are getting wrong to enable us reposition our nation's insurance industry. The reason for choosing South Africa is not far-fetched. First, its insurance market is by far the most developed in Africa and one of the most developed in the world.[85] In 2016, its insurance penetration which is the highest in Africa stood impressively at 13.9 per cent;[86] some studies put it even higher at 16.99 per cent.[87] According to Price Waters Coopers, in the same 2016, the South African industry was the 19th most advanced in the world and accounted for 0.89% ($42 Billion) of the total world markets.[88] In comparative terms, Nigeria in 2016 was ranked 71 in the world and had a penetration rate of a mere 0.30%.

The current law in South Africa is the Insurance Act, 2017[89] which took effect in July 2018.[90] Before the commencement of the Act,

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[82]India Brand Equity Foundation 'Indian Insurance Industry Overview and Market Development Analysis' <https://www.ibef.org/industry/insurance-sector-india.aspx> 29 March 2020.

[83]Ibid see also Ashwin Manikandan, 'Insurance Sector in Need of Positive enablers, say Industry Leaders' *Economic Times of India,* (16 December 2019) <https://economictimes.indiatimes.com/industry/banking/finance/insure/insurance-sector-in-need-of-positive-enablers-say-industry-leaders/articleshow/72764825.cms?from=mdr> last visited 2 April, 2021.

[84]Ibid.

[85]Ibid 13.

[86]OECD, 'OCED Stats'< https://stats.oecd.org/Index.aspx?QueryId=25444> accessed 29 March 2021.

[87] PWC, Ready and Willing, the African Insurance Industry Poised for Growth' <https://www.pwc.co.za/en/assets/pdf/south-african-insurance-2018.pdf> accessed 23 March, 2021.

[88]Ibid.

[89] Gazette copy at <www.gpw.online.co.za,> accessed 29 March, 2021.

the Long-Term Insurance Act (LTIA) 1998 and the Short-Term Insurance Act (STIA), 1998 were in operation. The 2017 Act has now replaced and combined many parts of both Acts.[91] Both the old laws and the new law, which is merely a consolidated legal framework for insurance, are basically same with the Nigeria Insurance Act. The major difference between the Nigeria and the South African insurance industries is the regulation of the industries. This is the conclusion of PWC which says that "Compared to the rest of Africa, the South African insurance market is highly competitive and more mature, with diversified multi-channel distribution models, helped by strong institutions and a sound regulatory environment."[92] Under the old dispensation, Financial Services Board (FSB) regulated the whole insurance industry. There is need to note that it was under the old regime of regulation, akin to our own regulation that the phenomenal growth of the South African market happened.

With effect from 1 April 2018 following the enactment of the Financial Sector Regulation (FSR) Act, there is now "a sophisticated system of financial sector regulation known as 'Twin Peak' system."[93] The Act establishes two regulatory agencies to oversee insurance and other financial services which are. The Prudential Authority (PA) responsible for regulating banks, insurers, cooperative financial institutions, financial conglomerates and certain market infrastructures[94] and the Financial Sector Conduct Authority (FSCA) responsible for market conduct and consumer protection.[95] The South Africa's insurance industry is now said to be "growing at an unimaginable speed"[96] as a result of these changes.

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[90] Claudia Jackson, 'Insurance and Reinsurance in South Africa: Overview' <https://uk.practicallaw.thomsonreuters.com/1-505 2026?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> 29 March 2020.

[91] Ernie Vyver and Nicolle Britton, 'South African Insurance Bill Signed into Law' <https://www.clydeco.com/insight/article/south-african-insurance-bill-signed-into law?utm_source=Mondaq&utm_medium=synd,> accessed 23 March 2021.

[92] Note 88 above.

[93] Financial Services Board 'Understanding the FSA Act' *Twin Picks Newsletter, Iss 2* <https://www.fsca.co.za/TPNL/2/understanding.html> accessed 23 March 2021.

[94] The Prudential Authority at https://www.prudentialauthority.co.za>, accessed 29 March, 2021.

[95] The Financial Sector Conduct Authority (FSCA) < **https://www.fsca.co.za,>** accessed 29 March, 2021

[96] Note 87 above.

It is instructive to note that the South African insurance industry does not have a high capital base requirement.[97] For one South Africa operates a "risk base" regime. This means that the share capital requirement of every company depends on the risk it tends to underwrite. Currently to underwrite the highest risk, an insurer and even a reinsurer in South Africa need a capital base of 1.5million dollars only as against Nigeria's whooping sums of 19.1 and 68 million dollars for insurance and reinsurance business respectively. As if this is not enough, NAICOM is currently beefing up the minimum paid up by at least 200% bringing the capital of composite insurance and reinsurance to 18 billion naira ($58,631,922) and 20 billion naira ($65,146,580) respectively as against South Africa' 1.5 million dollars.[98]

It is submitted that this is one of the major reasons the Nigeria industry is dysfunctional. First very high capital base whittles down core insurance business. To raise the outrageous amount needed to capitalise, money is source from the capital market. Of course shareholders who invested in the insurance companies want returns on their investments. This puts pressure on operators who, in order to give satisfy the investors veer into other areas considered more lucrative. Thus investment income, instead of premium income is now the priority of insurers. This vindicates the erstwhile chairman of the Nigeria Insurance Association (NIA), Odukale, who, in the early days of the consolidation exercise warned that "the new capital base will force insurance companies to focus more on investments to the detriment of insurance practice."[99] Conversely in South Africa operator concentrate on classes of insurance that impact on the citizens such as motor accidents, life and health among others to grow their premium.[100]

Secondly the regulator in Nigeria always insists on uniform share capital for every insurer instead of risk-based capitalization which is the model used in South Africa. Here companies capitalise based on the risks they want to underwrite. The reason given by NAICOM for the high capital is that it will enable Nigerian companies partake in the nation's oil and gas sector by taking advantage of the local content policy of the

[97] Note 74 above
[98] Ibid .
[99] Prince Cookey, 'Consolidation Train Moves to Insurance Industry' *Financial Standard* (Monday, 30 January 2006) 15.
[100] Note 92 above

federal government. Must every operator insure oil and gas risks? Some companies should be allowed to have their clientele among small income earners just as is happening in South Africa where some insurers have their capital base as low as $1.2 million and expand their energy on middle and low income earners. This makes for healthy competition leading to innovative products from operators and hence deeper insurance penetration. The Nigerian model leads to the opposite. All the insurance companies concentrate on chasing oil and gas businesses to the detriment of the individual who actual needs these insurance policies. No wonder insurance penetration is ridiculously low in Nigeria.

Another evil of high capital requirement is that the Nigerian industry prices itself out of the market. After each recapitalisation, companies which could not meet the high capital requirement usually go under with the attendant loss of employment.[101] This has earned the regulator the name "undertaker" amongst stakeholders. Flowing from this, because insurance and reinsurance especially are international in nature foreigner take advantage of the situation (with naira being so weak) to invest Nigeria giving rise to capital flight further reducing the contribution of insurance to the nation's GDP.

So many other aspects of ineffective regulation by NAICOM abound but we shall point out just a few more. In spite of the enormous powers given to the Commission, it presence is not adequately felt in the industry. For instance, it is not known that the Commission has proceeded against any broker who did not remit premium collected to the insurer within the time stipulated by the Act.[102] The Act stipulates that "[W]here an insurance business is transacted through an insurance broker, the insurance broker shall, not later than 30 days of collecting the premium paid (sic) to the insurers collected by him."[103] This is an offence punishable variously and could even lead to the cancellation of the broker's license.[104]

Again, the Commission has failed in driving the enforcement of the five classes of insurance made compulsory by the law in Nigeria These are; Third Party Motor Insurance,[105] Insurance of Public Buildings

[101] Over 30 companies went under after the 2005 recapitalisation exercise, note 2, 220
[102]Insurance Act, 2003, s.50 (2).
[103] Ibid, s 41(1).
[104] Ibid, s 41 (2)-(4).
[105] Ibid, s 68.

and Buildings under construction,[106] Health Care professional Indemnity,[107] Group Life Insurance, [108] and Employer's liability.[109] In addition to these, no person is allowed to transact an insurance or reinsurance business in respect of life or property classified as domestic business with a foreign company.[110] With the population of Nigeria estimated at over 200 million, the number of vehicles (defined by the Act to include tricycles and motor cycles) on our roads and number of public buildings (which include every conceivable building)[111], one could only imagine the amount of "unearned" premium in the Nigerian insurance industry. It has been estimated that the nation loses NI trillion annually as a result of non-enforcement of these insurances.[112] Enforcement of the five classes of insurance made compulsory by law is one of the strengths of the South African market.[113] This has led to South Africa, with a mere population of 56 million people, controlling 71.7 % of the entire Africa insurance market.[114]

The Regulator has failed to use the humongous powers given to it by the law to enforce international best practices and ensure that insurers conform to the standard of insurance practice the world over. A few examples will suffice. It is trite that the primary obligation of an insurer is the payment of genuine claims. Unfortunately, most Nigerian individual policy holders do not get their claims paid. This again is the effect of weak and ineffective regulation by the Commission. NAICOM

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[106] Ibid, ss 65 and 68.
[107] Health Care professional Indemnity Act s 45.
[108] Pension Reform Act, s 9 (3).
[109] Employee Compensation Act, 2010.
[110]Insurance Act, s.72.
[111] Public building" is defined as Public building" includes a tenement house, a hostel, a building occupied by a tenant, lodger or licensee and any building to which members of the public have ingress and egress for the purpose of obtaining educational or medical services, or for the purpose of recreation or transaction of business, s 65(2).
[112] K. Abd-Khalio, 'Enforcing Compulsory Insurances' <https://leadership.ng/2019/02/24/enforcing-compulsory-insurance> accessed 23 March, 2021.
[113] Global Legal Group, 'Insurance and Reinsurance in South Africa' <https://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/south-africahttps://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/south-africa> accessed 23 March, 2021.
[114]Atlas Magazine, Insurance News Around the World, <https://www.atlas-mag.net/en/article/the insurance-market-in-africa-2016-2017,> accessed 23 March 2021.

has never wielded the big stick given to it under the Act.[115] If it had ever cancelled the license of any company for refusal to pay claims, it will not only send a strong signal to operators, but will also act as a strong advertisement that the industry has "repented of its sin" and also permanently cure the apathy and lack of trust in the industry of the populace.

NAICOM has failed to rid the Nigerian insurance industry of quacks 23 years after inception. This does not happen in developed economies. The genesis of the problem of touting in the industry is that from inception, insurance used to be an all comers affair as there was no government regulation until 1961. People used to collect money in the name of premium with no intention of fulfilling the obligation of claims settlement.[116] Many people came to regard insurers as fraudsters. With NAICOM set up to police the industry, one would have thought that this would have stopped. It is disheartening that so many years after inception, illegal and unregistered insurance companies still abound in the society especially at motor licensing offices. They collect 'premium, without ever intending to pay any claim.

7. Conclusion

Risks and uncertainties of life are everyday realities of human existence and these constitute a source of tension to the average human being. As no human being thrives in tension, people seek ways of at least reducing these risks if they cannot be eliminated entirely. This is where insurance, the only means of risk transfer mechanism, comes in to create the peace of mind needed to make life more meaningful. No wonder insurance is so popular in saner climes. As a matter of fact, this social function of insurance is even more important than its economic function. This is why in decrying the ineffective standardization in the Nigerian industry a commentator says, "[T]he benefits of standardising, indeed, go beyond generating more premium but puts insurers in a much better position to respond to claims and contribute more to the expansion of our national economy through creation of more jobs and protection of our collective wealth."[117] This is what development is all about. Being that most

[115] Insurance Act, s 8(1) m.
[116] Note 2 above .
[117] EO Gam-Ikon, 'The Benefits of Standardizing the Insurance Industry <https://www.proshareng.com/news/INSURANCE/The-Benefits-of-Standardizing-the-Insurance-Industry/45334> accessed 23 March, 2021.

Nigerians are already at home with the tenets of insurance as shown by the great patronage enjoyed by *isusu* and thrift schemes, the only thing needed for insurance to thrive is the upping of regulation by NAICOM which will ensure the enforcement of the provisions of the Act. When this is done, all other problems such as lack of confidence in the industry, lack of skilled personnel, inadequate deployment of information technology, lack of innovative products, presence of touts, among others already identified as mere symptoms[118] will be things of the past.

8. Recommendations

Our findings show that the problem of the Nigeria insurance industry is that of regulation rather than that of law. The regulator must shelve every aspect of increasing the minimum capital base of the industry for now as this is not the problem of the industry. Data has clearly shown that a high share capital base is not synonymous with insurance penetration.[119] Besides, huge capital requirement defeats core insurance business.

The most important preoccupation of NAICOM should be how to deepen insurance penetration in Nigeria. In this regard enforcement of the compulsory insurances is key. Also, the regulator should aid operators in innovative products and services creation by producing precise guidelines for product development rather than having every single request submitted to it and operators having to wait for months or even years for approval.[120] Creation of awareness at grassroots through aggressive public education and massive publicity in the motor parks, markets, churches and media should be embarked upon. Once the general public knows that insurance is not just to satisfy the law but to protect them, the story will change. Again, the Commission must take active steps to rid the industry of quacks Nothing stops NAICOM from organising constant and sustained raids at motor licensing offices across the nation. There is no gainsaying the fact that the moment one or two of these fake insurers are prosecuted the rest will know that it is no longer business as usual. This is where NAICOM needs to partner and synergise with the various industry operators in order for the nation to benefit from various self-regulatory policies put in place by other stakeholders.

The Regulator must ensure that insurance operation complies with laid down procedures for insurance practice through constant monitoring as provide

[118] 23 above.
[119] Note 72 .
[120] The Insurance Act,s.2(5)&(6).

by the law. For instance, routine inspection of all insurance institutions in Nigeria once every 2 years is a provision of the law.[121] By doing this diligently, companies which do not render their financial statements, cut rates or indulge in other unethical practices would be detected.

NAICOM should stop acting as a toothless bull dog by being more proactive. It needs to purge itself of always engaging in policy somersault like it did in the suspended Tier Base Minimum Solvency Policy, State Insurance Producers , and Bancusure to mention but a few. Policies must be well thought before they are made public. Also, because NAICOM is a going concern, the importance of sustainability of polices cannot be overemphasised. A case in point is the Market Development and Restructuring Initiative (MDRI) aimed at ensuring the enforcement of the compulsory insurances in the country which was not effectively sustained. [122]

Finally, insurance practitioners who are the major players in the insurance industry should be represented in the board of NAICOM as this will make for effective partnership. The Board,[123] as presently constituted has nobody representing the interest of insurance operators thus practitioners do not make any direct input on matters concerning them. This is unlike what happens in other jurisdictions. In South Africa for instance, insurance Practitioners and policy holders are represented in the board of the Financial Service Board (FSB) the regulator of insurance in that jurisdiction. We call for the amendment of the NAICOM Act in this regard.

[121] The NAICOM Act s. 31 (1a).

[122] Ebere Nwoji 'NAICOM to Relanuch MDRI Initiative' <https://www.thisdaylive.com/index.php/2016/07/20/naicom-to-relaunch-mdri-initiative/> accessed 23 March 2021..

[123] The NAICOM Act, s 2.

COVID-19 CRISIS, WILDLIFE TRAFFICKING AND ENVIRONMENTAL GOVERNANCE IN NIGERIA

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Abstract

Illegal wildlife trade and wildlife trafficking are global environmental risks which is underscored not just by its convergence with other serious crimes but by the cross-border and trans-boundary nature of the crime, and its implications in many global health problems. The COVID-19 crisis, currently estimated to have been contracted from bats by humans through an intermediate host such as a pangolin, has propelled the global health implications of wildlife trade onto the global stage, thereby questioning global and national environmental governance structures to combat illegal wildlife trade and trafficking. Through a literature-based desk review, this paper appraises international environmental regulation such as the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES); wildlife regulatory governance in Nigeria such as The Endangered Species (Control of International Trade and Traffic) Act and their implications in the current global pandemic. It finds that weak legal systems, lack of enforcement capacity, high corruption levels and insufficient coordination, knowledge, and capacity are among the critical drivers of this crisis. It recommends legal and policy prioritization and effective environmental governance with regards to combatting wildlife trafficking as a panacea for present and future pandemics.

Keywords: COVID-19 pandemic, wildlife crime, illegal trade in wildlife, poaching, wildlife conservation law.

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The author is grateful for the insightful criticisms by scholars during the presentation of this paper at the University of Nigeria, Faculty of Law International Conference held virtually on 11 November 2020 with the theme: Law and National Development under COVID_19 Era.

1. Introduction

Wildlife (traditionally referred to undomesticated animal species and all organisms that grow in the wild) brings significant ecological, cultural, and economic benefits to countries and regions around the world.[1] Africa is home to a diverse populations of some of the most iconic wildlife species but these are under threat due to the illegal wildlife trade (IWT) and wildlife trafficking. Wildlife trafficking and illegal trade, smuggling, poaching, capture, or collection of endangered species, protected wildlife, derivatives, or products thereof[2] is a current challenge to environmental governance, globally and in Nigeria. In fact, the Covid_19 pandemic has put in focus the credibility of environmental governance structures for the control of wildlife crime in global and national levels of government. International agreements, national policies and legislations, local decision-making structures, transnational institutions, and environmental NGOs are all examples of the forms through which environmental governance takes place. [3]

Wildlife trafficking, being a transnational crime, affects all countries through its impacts on biodiversity, human health, security and socio-economic development. [4] The UNODC emphasizing the threat that wildlife trafficking poses to nature and human health, notes that the trafficking of some wild species such as the pangolins, birds, turtles, tigers, bears and many more, increases the potential for transmission of zoonotic diseases.[5] It further notes that pangolins, which were identified as a potential source of coronaviruses, are the most trafficked wild mammals in the world, with seizures of pangolin scales having increased

[1] World Bank Group; *Analysis of International Funding to Tackle Illegal Wildlife Trade* (The World Bank 2016) <www.worldbank.org> accessed 29 September 2020.

[2] UNODC, Criminalization of wildlife trafficking, E4J Module Series: Wildlife Crime, <https://www.unodc.org/e4j/en/wildlife-crime/module-3> accessed October 7, 2020

[3] AI Osawe and OM Ojeifo, 'Environmental Governance in Nigeria: The Community Perspective' *Public Policy and Administration Research,* (2016) 6(2), <https://www.iiste.org/> accessed October 7, 2020

[4] UNODC, World Wildlife Crime Report 2020, United Nations Office on Drugs and Crime, 2020 <https://www.unodc.org/documents/data-and-analysis/wildlife/2020/World_Wildlife_Report_2020_9July.pdf;> B Oghifo, 'Nigeria: Wildlife Crime Impacts Environment, Biodiversity, Health, Says UNODC World Report 2020' *ThisDay* July 14 2020, <https://allafrica.com/stories/202007140612.html> accessed October 5, 2020

[5] UNODC, Ibid.

tenfold between 2014 and 2018.[6] Illegal pangolin trade in Nigeria seems to have grown significantly in recent years with Nigeria's role in the trafficking being primarily a transit and logistical one through its international airports and Lagos port.[7] Given the above problem statement, the goal of this paper is to appraise environmental regulatory framework for wildlife trafficking control and the implications of weak environmental governance for the current COVID_19 pandemic. Specifically the paper seeks to: a) examine the international environmental regulation for illegal wildlife trade; b) appraise Nigerian environmental governance in relation to its commitment to international agreements; c) examine the crises of wildlife trafficking and its relationship to the current global pandemic.

The methodology is doctrinal as it reviewed academic literature, extant legislations and scientific journals on ecology, conservation, emerging zoonotic diseases[8] and the COVID-19 outbreak. It accesses websites of authoritative bodies such as the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), Centres for Disease Control and Prevention (CDC) and the World Health Organization (WHO) and examines reports addressing the illicit wildlife trade from prominent intergovernmental organizations and non-governmental organizations such as the United Nations Office on Drugs and Crime (UNODC) as well as the news media.

2. International Legal Framework for Wildlife Protection

The past decades have witnessed a massive increase of environmental rules adopted in international fora, such as global or regional agreements[9] and a consequent increased impact of these sources onto national legal

[6] Ibid.

[7] Oghifo, (n 4); C Uwaegbulam, 'Experts Seek Laws to Combat Illegal Wildlife Trade in Africa" *The Guardian*, April 13, 2020. <https://guardian.ng/property/experts-seek-laws-to-combat-illegal-wildlife-trade-in-africa/> accessed 3 October 2020.

[8] One Health, 'Zoonotic Diseases' Medicine net defines 'Zoonotic' as pertaining to zoonosis: a disease that can be transmitted from animals to people or, more specifically, a disease that normally exists in animals but that can infect humans. There are multitudes of zoonotic diseases. <https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html > accessed 6 July 2021

[9] FAO Wildlife Law: International and National Dimensions, <http://www.fao.org/3/Y3844E/y3844e04.htm> accessed July 05, 2021.

systems. [10] International agreements adopted at the global and regional level concern wildlife or have some potential impact on it is numerous. This section briefly outlines the contents of the principal global agreements, as they have widely contributed to the development of national legislation.

2.1 The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)[11]

The Convention protects endangered species by restricting and regulating their international trade through export permit systems. For species threatened with extinction which are or may be affected by trade,[12] (such as western gorilla, chimpanzee, tigers, cheetah, elephant), export permits may be granted only in exceptional circumstances and subject to strict requirements; the importation of these species also requires a permit, while trade for primarily commercial purposes is not allowed. For species which may become endangered if their trade is not subject to strict regulation,[13] export permits (including for commercial trade) can only be granted if export is not detrimental to the survival of those species and if other requirements are met. For species subject to national regulation and needing international cooperation for trade control,[14] export permits may be granted for specimens not obtained illegally. Additions and deletions of species from Appendices I and II are

[10] Constitution of Federal Republic of Nigeria,1999, (as amended in 2011), hereafter CFRN 1999 s 20 item 60 (a) 2nd Schedule confers the powers of legislation on wildlife on the central government.

[11] CITES is a multicultural treaty to protect endangered plants and animals which was adopted at Washington in 1973 and entered into force on 1 July 1975. There are 183 parties to the convention.

[12] Ibid listed in Appendix I, such as the western gorilla (*Gorilla gorilla*), the chimpanzee species (*Pan spp*), tigers (*Panthera tigris* subspecies), , leopards (*Panthera pardus*), cheetah (*Acinonyx jubatus*), some populations of African bush elephant (*Loxodonta africana*).

[13] Ibid listed in Appendix II, the great white shark (*Carcharodon carcharias*), the American black bear (*Ursus americanus*), Hartmann's mountain zebra (*Equus zebra hartmannae*), green iguana (*Iguana iguana*), queen conch (*Strombus gigas*), Emperor scorpion (*Pandinus imperator*), Mertens' water monitor (*Varanus mertensi*), bigleaf mahogany (*Swietenia macrophylla*) and lignum vitae 'ironwood' (*Guaiacum officinale*).

[14] Ibid listed in Appendix III. For instance in Nigeria, the 5 top endangered species are: West African lion, Cross River Gorilla, Cameroonian forest shrew, White-throated guenon, Red-eared guenon

made by the Conference of Parties, according to established criteria.[15] The Convention requires states to adopt legislation that penalizes trade in and possession of covered species, and to provide for the confiscation or return to the state of illegal exports.[16] In the last decade, the Conference of Parties has adopted several resolutions on enforcement and compliance.[17]

CITES does not define wildlife crime as such, but it strongly influences national legislation on wildlife crime, and provides a means for international cooperation against trafficking. [18] Parties to CITES are required to "penalise" illegal trade, which may include the criminalization of serious offenses. It is an agreement of remarkable power and scope and it is so important because wildlife protection laws are usually situated in broader national environmental legislation.

2.2 The Convention on the Conservation of Migratory Species of Wild Animals (CMS)[19]

This is another International Agreement which requires cooperation among 'range' States hosts to migratory species regularly crossing international boundaries. Regarding species considered as endangered,[20] states must conserve and restore their habitats; prevent, remove or minimize impediments to their migration; prevent, reduce and control factors endangering them; and prohibit their taking. [21] This Convention does not regulate wildlife trafficking but provides for conservation of migratory species.[22] Nigeria is a party to this convention.[23]

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[15] This is done by notifying the CITES Secretariat (Article XVI). There is nonetheless an expectation that other States at the Conference of the Parties and the Animals and Plants Committees are consulted when species are added or removed (Resolution Conf 9.25 (Rev CoP17)).

[16] Article VIII, para(s) 1- 3.

[17] CITES Resolution 9(9) and 9(10) 1994, Resolution 11(3) 2000. <https://cites.org/sites/default/files/eng/cop/09/E9-Res.pdf> accessed July 02, 2021.

[18] FAO (n 9).

[19] CMS also known as Bonn Convention was adopted in Bonn in 1979. It entered into force on 1 Nov 1983, As of September 2020, there are 131 Member States to the Convention. https://www.ecolex.org/details/treaty/convention-on-the-conservation-of-migratory-species-of-wild-animals-tre-000495/ accessed July 09, 2021.

[20] Ibid, listed in Appendix I.

[21] Ibid, listed in Appendix II.

[22] Examples include tuna and tuna-like species (albacore, bluefin, big eye tuna, skipjack, yellow fin, black fin, little tunny, wahoo, pomfret, marlin, sailfish, swordfish, saury, West African Elephants and ocean going sharks, dolphins and other cetaceans.

2.3 The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)[24]

While CITES and the Bonn Convention are species-based treaties, the protection of specific habitats important for wildlife is also achieved through area-based treaties such the Ramsar Convention and World Heritage Convention.[25] Parties to the Ramsar Convention must designate wetlands in their territory for inclusion in a List of Wetlands of International Importance, and promote their conservation and wise use. Nigeria is a contracting party.[26]

2.4 The Convention Concerning the Protection of the World Cultural and Natural Heritage

The World Heritage Convention provides for the identification and conservation of sites of outstanding universal value from a natural or cultural point of view, to be included in the World Heritage List. While responsibility for conservation is primarily vested in the state where the site is located, the Convention also provides for international assistance funded by the World Heritage Fund. The World Heritage Convention is a powerful instrument for the protection of nature, with strong relations to the national protective instruments.[27] Its sites are home to the world's most exceptional wildlife on earth. The World Heritage Convention makes an important contribution to protect species by giving an international protection status to areas which harbour the most remarkable species. The transnational mangrove ecosystem of the Sundarbans in Bangladesh and the Sundarbans National Park in India are the world's largest remaining habitats for the Bengal Tiger and other threatened, flagship species such as Irrawaddy and Ganges River

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[23] Nigeria acceded to this treaty on 15/10/1986.

[24] The Ramsar Convention was adopted in 2 February 1971 and became effective on 21 December 1975. There are 171 Member States to the Convention. <http://portal.unesco.org/en/ev.php> accessed July 06, 2021

[25] Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention, adopted in Paris, 1972). There are 194 Member States to the Convention as of 23 Oct 2020 <https://whc.unesco.org/en/conventiontext/> accessed July 06, 2021.

[26] Nigeria became a state party on 2 February 2001.

[27] The World Heritage Convention and the Protection of Biodiversity Hotspots 2007 Ministry of Agriculture, Nature and Food Quality, Department of Knowledge, The Netherlands <https://edepot.wur.nl/146234> accessed July 05, 2021.

dolphins.[28] Most importantly, the Convention can help to safeguard wildlife sanctuaries by enforcing its rigorous standards of integrity, management and protection.[29]

2.4 Convention on Biological Diversity (CBD)[30]

The CBD is an international legal instrument that has been ratified by 196 nations.[31] It is a process-oriented sustainable development convention, which takes account of economic interests and considerations of equity. Its main objectives, as spelt out in article 1, are 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.'[32] There is a growing recognition that biological diversity is a global asset of tremendous value to present and future generations. At the same time, the threat to species and ecosystems has never been as great as it is today. Species extinction caused by human activities continues at an alarming rate.[33] This biological diversity is the sine qua non for the resilience of ecosystems and life forms and their ability to prevent and to recover from disasters and adverse conditions. The Convention defines biodiversity as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species, and of ecosystems.'[34]

More recently, an increased consideration worldwide of the interaction of species and all other living organisms with each other and with human activities has led to the concern for the protection of biodiversity as a whole - a development reflected in Convention on

[28] 'World Wildlife Day, 3 March 2020' Monday, (2 March 2020) <https://whc.unesco.org/en/news/2087> accessed July 05, 2021.

[29] Bastian Bertzk and others 'World Heritage and Species: Safe Havens for Wildlife?' (October 2014) <Bertzkyetal2014WorldHeritageandSpecies.pdf> accessed 5 July 2021.

[30] Convention on Biological Diversity adopted at Rio De Janiero in 1992.

[31] UN, 'Convention on Biological Diversity, Key International Instrument for Sustainable Development' <https://www.un.org/en/observances/biological-diversity-day/convention> accessed July 05, 2021.

[32] Laurence Boisson De Chazournes 'Convention on Biological Diversity and its Protocol on Biosafety', *United Nations Audiovisual Library of International Law* <https://legal.un.org/avl/pdf/ha/cpbcbd/cpbcbd_e.pdf> accessed July 05, 2021.

[33] 'History of the Convention' [6.23.2021] <https://www.cbd.int/history/> accessed 5 July 2021.

[34] Convention on Biological Diversity, UNEP/CBD/94/1

Biological Diversity, and which is being gradually incorporated into national legislation. Under the Convention, conservation and sustainable use of biodiversity[35] are to be pursued by adopting specific strategies and also by incorporating relevant concerns into any plans, programmes and policies.[36] To use biodiversity in a sustainable manner means to use natural resources at a rate that the Earth can renew them. It is a way to ensure that we meet the needs of both present and future generations.[37] Sustainable use of biodiversity must be a consideration in national decision-making.[38] Among the obligations for parties are the restoration of threatened species and, specifically, the adoption of legislation for the protection of endangered species.[39] Parties are also required to identify and control potential sources of adverse impacts on biodiversity,[40] and to regulate and manage them.

Under this Convention, emphasis has thus switched from management of species to management of processes which may potentially harm them.[41] Illegal wildlife trade and wildlife trafficking are two major wildlife crimes which have become inimical to the survival of many species, hence international efforts and funding have been channelled toward combatting this threat.

3. National Laws for Combating Wildlife Crime in Nigeria.

Nigerian environment is governed by comparatively well-established laws,[42] body of regulations and institutional frameworks. In spite of these

[35] In most countries regulatory (command and control) instruments and economic instruments (e.g. taxes, fees and charges, tradable permits and environmentally motivated subsidies) are the preferred choices for the conservation and sustainable use of biodiversity. See Laurence (n 32).

[36] Ibid, art 6.

[37] Convention on Biological Diversity; Sustainable Use of Biodiversity - <https://www.cbd.int › media › undb-factsheet-sustainable-e> accessed July 05, 2021.

[38] Ibid, art 10.

[39] Ibid, art 8.

[40]Ibid, art 7.

[41] COBD, arts 7 and 14; Shine and De Klemm., *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* (IUCN Environmental Policy & Law Centre, 1999) cited in FAO (n 11) 5.

[42] Some of the relevant laws are the Endangered Species (Control of International Trade and Traffic) Act, the Nigerian National Park Service Act, 2006, National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, (NESREA) 2007, and National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011

laws, body of regulations and institutions implementing and enforcing established, wildlife trafficking has continued to be a grave threat to wholesome environmental governance in Nigeria.[43] The foremost conservation laws in Nigeria include:

3.1 The Endangered Species (Control of International Trade and Traffic) Act[44]

This Act has its roots in the Convention on International Trade in Endangered Species of Wild Fauna and Flora**.**[45] CITES is being implemented in Nigeria through the three Designated Authorities, scientific, management and enforcement authorities. The *Scientific Authority* includes the National Parks Service (NPS), Forestry Research Institute of Nigeria (FRIN) which conducts non-detrimental findings on the status of wildlife species and advises the Management Authority accordingly. The *Management Authority* is the Federal Ministry of Environment through the Federal Department of Forestry (FDF) which issues permits and certificates on trade or possession of any specie covered under the appendices schedules in the case of local laws. The *Enforcement Authority* is the National Environmental Standards and Regulations Enforcement Agency (NESREA), which enforces the provisions of the Convention, the Endangered Species (Control of International Trade and Traffic*)* Act and the National Environmental Regulations[46] on wildlife protection. The Endangered Species Act is to provide for the conservation and management of Nigeria's wild life and the protection of some of her endangered species in danger of extinction as a result of over-exploitation, as required under CITES treaty.

Section 1(1) of the Act prohibits the capture, hunting and trading of endangered species which are listed in the first and Second Schedule.

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[43] AL Ibijola, 'Towards Bridging Gaps in Environmental Governance in Nigeria: Limitations' Unpublished LL.M Thesis, Faculty of Law, University of Benin, 1.

[44] As amended in 2016, Laws of the Federation of Nigeria (LFN) 2004 Cap E12.

[45] CITES (n 11). The Endangered Species (Control of International Trade and Traffic) (Amendment), Act, 2016; and The National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011 SI No 16 are the encompassing legal instruments for CITES Enforcement in Nigeria.

[46] For example: National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011, SI No 15 Gazette No 42. Vol 98 of 6 May 2011. The Purpose: to protect endangered species of fauna and flora; and prevent their extinction by controlling international trade in their living specimens, parts and derivatives.

The animals listed in the first schedule are animals threatened with extinction such as Chimpanzees, Porcupine, African Palm Squirrel, Gorillas and Pangolins. As earlier noted, Pangolins are the most trafficked animal in the world and the Cross River Gorilla is the rarest Gorilla species on earth.[47] The Animals listed in the second schedule are animals which though are not under threat of extinction but may become so threatened unless trade in respect of such species is controlled. Trade in animals mentioned in the second schedule is only permitted when the trader has obtained a permit to do so.[48] This permit (export or import permit) is granted by the Minister[49] who does so after due consideration of the prospects of the continued survival of the specie in question. Animals in the second schedule include Ostriches, Wild Cow, Wild Buck, Grown Elephant and all exotic animals. Efficient and Effective deterrent measures are necessary to ensure proper compliance to the tenets of the Act. Hence with the amendment of Act in 2016,[50] penalties which were egregiously out of tune with the economic reality were reviewed upwards in order to have a more deterrent effect and reflect current economic realities.

Any person who, in contravention of the provisions, hunts, captures, possesses, trades or otherwise deals in a specimen of wild fauna and or flora without the appropriate permits[51] shall be guilty of an offence and liable on conviction: in respect of a specimen under the First Schedule, to a fine of five hundred thousand naira (N500,000) or five (5) years imprisonment or both such fine and imprisonment; in respect of a specimen under the Second Schedule, to a fine of three hundred thousand naira (N300,000) or three (3) years imprisonment or both such fine and imprisonment; in respect of a specimen under the Third Schedule, to a fine of one hundred and fifty thousand naira (N150,000) or eighteen (18) months imprisonment or both such fine and imprisonment.[52] Any person

[47] WWF 'Gorrila News" <https://wwf.panda.org/discover/knowledge_hub/endangered_species/great_apes/gorillas/cross_river_gorilla/> accessed 5 July 2021. The World Wide Fund for Nature (WWF) states that Cross River gorillas are the world's rarest great ape.

[48] The Endangered Species (Control of International Trade and Traffic) Act, s 1(2).

[49] Minister of the Government of the Federation charged with responsibility of matters relating to wild life which currently is the Minister of Environment.

[50] Endangered Species (Control of International Trade and Traffic) (Amendment) Act, 2016.

[51] Ibid, s 5(1).

[52] Ibid, s 5(2)(a-c).

who engages in the use of fake, forged, inappropriate, expired or altered permit and or certificate for the conduct of trade shall be guilty of an offence and liable on conviction to: a fine of two hundred and fifty thousand naira (N250, 000) in respect of a first offence; and two (2) years imprisonment without the option of a fine in respect of a second or subsequent offence.[53] Any person who aids, abets, conspires or partakes in the carrying out of illegal trade or smuggling of specimens of species of wild fauna and flora shall be guilty of an offence and liable on conviction to a fine of one hundred and fifty thousand naira (N150,000) or one (1) year imprisonment or both such fine and imprisonment.[54] Any Airline or Shipper, Cargo Handler or Courier service provider who engages in freighting illegally acquired species of wild fauna and flora shall be guilty of an offence and liable on conviction to a fine not exceeding two million naira (N2, 000,000).[55]

In all of these offences, the court may on conviction, order the forfeiture of the specimen; forfeiture of any vehicle, vessel, weapon or instrument used in committing the offence; and make such orders, including surcharging convicted person(s) and or organisation(s), the cost for the upkeep and or maintenance of live specimens of wild fauna and flora involved in the illegal shipment.[56]

Prior to the 2016 amendment, trading, hunting or capturing animals listed under the first schedule attracted a penalty of One Thousand Naira (N1000) while doing same for animals in the second schedule attracted a paltry penalty of Five Hundred Naira (N500). A diligent poacher in 2014 or 2015 would gladly pay these fines which were negligible sacrifices in the face of the mammoth profits they make.[57] This is a welcome development but its deterrence on wildlife trafficking still remains negligible.

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[53] Ibid, s 5(3).
[54] Ibid, s 5(4)
[55] Ibid, s 5(5).
[56] Ibid, s 5(7).
[57] MT Laden; 'Review of NESREA Act 2007 And Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' *Law Environment and Development (LEAD) Journal* (2012) 116, <http://www.lead-journal.org/content/12116.pdf> accessed 5 March 2022.

3.2 The Nigerian National Park Service Act, 2006[58]

The Nigeria National Service (NPS) established under the Act[59] is responsible for preserving, enhancing, protecting and managing vegetation and wild animals in the National Parks of Nigeria. The objective of the Service as it relates to biodiversity protection is the Protection of Endangered Species of Wild Life and Animals and their habitats.[60] The Functions of the Service include to: preserve, enhance, protect, and manage vegetation and wild animals in the National Parks;[61] advise the Federal Government on the development and preservation policy of the National Parks, including the Financial requirements for the implementation of such policy;[62] advise the Federal Government on the declaration of areas for the purpose of protecting Wildlife Species, Biotic Communities as Sites of Special Interest or of aesthetic value.[63] Section 30 of the Act places 'restrictions' (not prohibitions) on hunting, capturing or destroying of animals in the park and as well damaging plants in the park. This is because the Conservator General may issue a permit authorizing a person to hunt wild animals in a National Park if he is satisfied that a wild animal ought to be hunted for the better preservation of other animal life in the National Park or a wounded animal ought to be destroyed or in order to ensure that the Population of a particular specie does not exceed the carrying capacity of the National Park.[64] This power of granting permits is anti-conservation and may be subject to abuse if not exercised judiciously.

The penalties for the contravention of the above restrictions range from Jail Terms to Fines. Where the offence is that of hunting, wounding, killing or capturing of a mother of a young animal, large mammal or any endangered, protected or prohibited species, the penalty is imprisonment for a term not less than three months but not exceeding ten years without the option of fine.[65] Contravention of the restrictions attracts a penalty of a fine not less than One Thousand Naira (N1000 naira) but not exceeding Five Thousand Naira (N5000) or imprisonment for a term not less than a

[58] Cap N65 LFN 2004.
[59] National Park Service Act, s 1.
[60] S. 6(C) NPS Act.
[61] S 7(a) NPS Act.
[62] Ibid, s 7(b)
[63] Ibid, s 7(c)
[64] Ibid, s 30(4) (a-b).
[65] Ibid, s 37(2) (a)

year but not exceeding five years or to both fine and imprisonment.[66] Where the offence is committed by a body corporate, the penalty is a fine of not less than One Hundred Thousand Naira (N10, 000) but not exceeding One Million Naira (N1, 000,000).[67] These penalty provisions are apparently out of tune with current realities and needs urgent review.

3.3 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, (NESREA) 2007[68]

The federal government, in line with section 20 of the 1999 Constitution[69] established the National Environmental Agency (NESREA) as an institution under the supervision of the Federal Ministry of Environment, Housing and Urban Development.

Section 2 of the establishing Act provides that the Agency shall have responsibility for the protection and development of the environment, *biodiversity conservation* and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines. NESREA is concerned with the enforcement of the guidelines and legislation on sustainable management of the eco system, biodiversity conservation and the development of Nigeria's natural resources.[70] This confers NESREA with a wide range of powers.[71] Some of the key functions as they relate to biodiversity protection are to: enforce compliance with laws, guidelines, policies and standards on environmental matters;[72]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.[73] enforce compliance with guidelines and legislations on

[66] Ibid, s 37(2) (c)
[67] Ibid, s 37(2) (d)
[68] Cap F10 LFN 2004.
[69] This Section states that the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.
[70] S 7(d) NESREA Act.
[71] Ibid, s 8.
[72] Ibid, s 7(a).
[73] Ibid, s 7(c)..

sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources;[74] create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations other than in the oil and gas sector and publish general scientific or other data resulting from the performance of its functions;[75]

In order to provide for effective enforcement of environmental standards, regulations, rules, laws, policies and guidelines, the Minister of Environment is empowered to make regulations for the general purposes of carrying out or giving full effect to the functions of the Agency.[76] In exercise of this power, there are about thirty three Regulations under the Act, out of which about a few Regulations[77] are more incidental to biodiversity protection:

3.4 National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011[78]

The purpose of the Regulations is to protect endangered species of fauna and flora; and prevent their extinction by controlling international trade in their living specimens, parts and derivatives.

4. COVID-19 and Illegal Wildlife Trade/Trafficking

As the world continues to grapple with the deadly pandemic that has taken lives and crippled many investments globally and nationally, two crucial questions come to mind - what is the origin of the pandemics and how can it be curtailed? Much as there is not as yet a definitive answer to the origin of the virus, scientific reports posit that Covid-19 occurred naturally[79] and that the primary source of the infection is a live animal

[74] Ibid, s 7(e).
[75] Ibid, s 7(i).
[76] Ibid, s 34.
[77] National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011; National Environmental (Wetlands, River Banks and Lake Shores) Regulations, 2009; National Environmental (Watershed, Mountainous, Hilly and Catchment Areas) Regulations, 2009; National Environmental (Coastal and Marine Areas Protection) Regulations, 2011; National Environmental (Permitting and Licensing System) Regulations, 2009; National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations, 2009, National Environmental (Alien and Invasive Species) Regulations, 2013.
[78] SI No. 15 Gazette No 42. Vol 98 of 6 May 2011.
[79] N Choudhury, (2020). 'COVID-19 Research: Scientists Prove That China Did Not Create Coronavirus' Open Access Government.

market (wet market) in Wuhan, China where the first suspects tested positive to the virus.[80] Scientific report proffered evidence that the causative virus known as SARS-Cove-2 is a beta-coronavirus that originated in bats, much like SARS and MERS diseases.[81]

Although it is currently unknown as to precisely how the virus was transmitted from animals to humans, current research suggests that COVID-19 potentially was transmitted from bats to another susceptible animal, such as a pangolin[82] and then to a human.[83] Bats are frequently stored and sold in wet markets and are often transported alongside large groups of uncommon and illicitly traded animals that are consumed by humans. This form of transportation and storage allows the spread of pathogens between bats and different, sometimes exotic, and rare creatures that can carry and advance diseases under severe, stressful situations.

Just like the current pandemic, global health crisis originating from zoonotic transmission is not novel; in fact, over the last 20 years, several deadly diseases are thought to have originated from live animal or wet markets,[84] where foreign, rare, and sometimes endangered species are often sold, among other goods, by traveling suppliers. Wet markets facilitate and heavily contribute to the practice of illicit wildlife trade and in turn, this practice has led to the spread of zoonotic diseases among the animals and to customers at markets. As a fact, there is a well-documented history of regional and even global pandemics originating from the transmission of diseases from animals to humans due to the

<https://www.openaccessgovernment.org/covid-19-research-3/83955/>. accessed 21 September 2020.

[80] AA Aguirre and others 'Illicit Wildlife Trade, Wet Markets, and COVID-19: Preventing Future Pandemics, (2020) *World Medical and Health Policy*. DOI: 10.1002/wmh3.348.

[81] Centre for Disease Control and Prevention (CDC). 'Key Facts about Human Infections with Variant Viruses.' <https://www.cdc.gov/flu/swineflu/keyfacts-variant.htm.> accessed September 21, 2020.

[82] Rated as the most illegally traded mammal in the world. See J Conciatore, (2019). 'Up to 2.7 Million Pangolins Are Poached Every Year for Scales and Meat' *African Wildlife Foundation.* <https://www.awf.org/blog/27-million-pangolins-are-poached-everyyear-scales-and-meat> accessed 21 September 2020.

[83] Choudhury (n 66).

[84] Ibid, 5. Wet markets are where fresh meats, produce, and animals are often stored to be sold in open-air environments, in close proximity, with little to no health safety precautions or sanitation measures

practice of wet markets and illegal wildlife trafficking.[85] It is certain that without cooperative, comprehensive, and enforced policies on wildlife trade and of endangered species, such as the pangolin, in place there will continue to be a spread of global sickness and international loss of life.[86] There is no guarantee that another more deadly outbreak could not emerge from another clime as long as international environmental governance remains hollow and enforcement regimes remain weak. Stopping the trafficking in wildlife species is a critical step not just to protect biodiversity and the rule of law, but to help prevent future public health emergencies.

5. Wildlife Trafficking and the Challenge of Environmental Governance

From the foregoing, it is obvious that there is robust regulatory framework for environmental governance at the national and international levels administration. It is therefore worrisome that these efforts have not been able to stem the tide of wildlife trafficking and hence the ever-evolving consequences such as the current global health crises. This paper posits that there are many factors which pose a challenge to environmental governance in relation to poaching and trafficking in wildlife especially in Nigeria and these include:

5.1 Lack of Ownership and Value of Wildlife by Local Communities

Current international funding and research have been geared towards involving local communities in wildlife conservation. In protected areas, community members are mostly engaged as eco-guards and rangers, yet the same local communities harbour poachers, aid and abet the wildlife trafficking operations by supplying and hoarding guns and arms used in perpetrating the crime.[87]

5.2 Ineffective Land Use Planning

Intensive production and infrastructure development is a challenge to effective wildlife regulation. Government priority is often geared towards development investments through infrastructural development, industrial and agricultural production to the detriment of conservation. Poor land use planning is driving critical species to extinction. Most parts of

[85] CDC (n 81).
[86] AA Aguirre (n 67) 31.
[87] HU Agu and ML Gore, 'Women in Wildlife Trafficking in Africa: A Synthesis of Literature' *Global Ecology and Conservation* 23 (2020) 3.

protected areas have become grazing routes inadvertently turning pastoralists into poachers and illegal wildlife harvesters.

5.3 Weak Legal Systems

Inadequacies of legislation and inconsistency in the way legislation is enforced are echoed by NGOs in looking at various aspects of wildlife crime.[88] The picture that emerges through available literature of different jurisdictions is that of a lack of internationally agreed standards for wildlife protection, CITES and other Wildlife Conventions notwithstanding.[89] This allows state to implement their own standards as required, this national wildlife law is developed in a piecemeal fashion as and when required in a manner that creates inconsistency and hence weak legal systems. Juxtapose African systems where the offence of wildlife trafficking attracts death sentence and life imprisonment in Kenya and Uganda but mere paltry sums as fine in Nigeria.

5.4 Lack of Enforcement Capacity

Sequel to the weak legal system is a lack of enforcement capacity. While international law and domestic laws in Nigeria provide for wildlife protection and creates wildlife crimes, the extent to which such laws are actively enforced by criminal justice agencies is highly dependent on political and practical considerations. Nigerian enforcement regime still suffers from capability gaps, including insufficient personnel, expertise, training, funding and equipment (vehicles, communication and other equipment).

5.5 High Corruption Levels

Studies revealed that not only do individual corrupt acts enable wildlife trafficking to happen, but also that corrupted structures (the criminal justice system, and economic and political foundations) in some societies enable trafficking to thrive and also increase the resilience of trafficking to reduction measures.[90] Nigerian wildlife trafficking regulatory system has been implicated as a weak link in regional law enforcement in West

[88] Angus Nurse, *Policing Wildlife: Perspectives on the Enforcement of Wildlife Legislation* (Palgrave Macmillan 2015) 115.
[89] Ibid.
[90] Tanya Wyatt, K Johnson, L Hunter, R George, R l Gunter, 'Corruption and Wildlife Trafficking: Three Case Studies involving Asia', *Asian Criminology* (2018) 13:35–55

Africa.[91] It has been alleged that some criminal networks bribe their way through the seaports and airports despite the robust regulations and huge resources and efforts invested in fighting illegal wildlife trade in Nigeria.[92] The corrupt acts fall within the broad categories of bribery, patronage, diplomatic cover and permit abuse.[93]

5.6 Insufficient Coordination, Knowledge and Capacity

In the fight against wildlife trafficking is inimical to optimum environmental governance.[94] International collaboration as well as interagency synergy is necessary for exchange of information and for strengthening the capacity of enforcement structures.

5.7 Lack of Awareness of Impact of Wildlife and Wildlife Product Consumption

Wild meats and wildlife products are still in high demand despite the reoccurring zoonotic disease such as Ebola, SARS and even the current COVID_19 pandemic. Given that illegal wildlife trade are often profit driven, environmental policy fails to consider human behaviour, both collectively and individually, as a major source of environmental harm and illegal wildlife exploitation. Environmental education and awareness creation is therefore crucial in the fight against wildlife trafficking.

6. Conclusion and the Way Forward

It is heart-warming that Nigeria has extensive legislations, treaties, institutions and policies on environmental governance with the aim of protecting the environment. Despite these, environmental degradation such as deforestation, oil spillage, improper waste management, desertification, erosion and currently illegal wildlife still feature on the nation's environmental landscape. The devastation resulting from the spread of COVID-19 globally and in Nigeria is a crucial pointer and should serve as a future warning for what is to come, if practices such as illicit wildlife trade and trafficking are allowed to continue on a global scale. A combination of factors ranging from loss of habitat to increased human-animal interactions through the illicit wildlife trade has increased the likelihood of novel zoonotic diseases emerging and spreading. This

[91] UNODC; Is Nigeria evolving into a Transit Hub for Wildlife Trafficking? <https://www.unodc.org/nigeria/en/is-nigeria-evolving-into-a-transit-hub-for-wildlife-trafficking.html> accessed September 21, 2020.
[92] Ibid.
[93] T Wyatt 2018.
[94] World Bank, (n 10).

pandemic began in China, but there is no guarantee that a similar pandemic could not begin elsewhere. This paper finds that wildlife decimation and illegal trade and trafficking persist because the laws, regulations and commitment have failed to resonate to effective environmental protection. It concludes that poor enforcement of regulatory laws and inadequate infrastructure and manpower is militating against the attainment of environmental governance in Nigeria thereby making Nigeria a weak link in the transit hub of illegal wildlife trafficking in sub-Saharan Africa. It becomes apposite that the following be urgently addressed.

6.1 Prioritization of Wildlife Policy Implementation

The issue of wildlife trafficking is not on the front burner of legal and policy implementation in Nigeria. This may be excused given the security and other developmental issues bedevilling the nation. Wildlife trafficking being a cross-border crime, should as a matter of priority occupy the front burner of issues requiring the attention of government and policy makers. Nigeria cannot afford to be lax in its regulation and enforcement, not only for its internal security and sustainable development but also for its pride of place a leader in the committee of nations and its commitment to International Environmental Agreement.

6.2 Strengthen Law Enforcement and Environmental Governance

Much as it may seem that a total ban on trade in wildlife trade could destroy these people's livelihoods or even lead to a black market facilitated by corruption with even greater risks, but the risk of continued illicit trade could be greater considering the present pandemic. Enforcement of regulations through diligent inspections and prosecution of offenders are crucial to successful control of illicit wildlife trade and trafficking.

6.3 Education and Awareness of the Dangers of Illicit Trade in Wildlife

There is need for public health outreach campaigns that inform people of the dangers of exotic meats and markets that have live wild animals. This could be achieved through various media outlets especially the social media platforms. In Nigeria and most of Africa, the most driving factor for illegal wildlife trade is the quest for wealth but the current devastations (economic and socio-psychological), occasioned by Covid_19 could be used as the basis for this campaign and the major focus should be to change attitudes and beliefs, which are major drivers of wildlife trade in Africa

6.4 Global and Inter-agency Cooperation and Exchange of Information

Wildlife trafficking is a transnational organized crime that has that trans-border nature hence, global cooperation to crack down illicit networks is required to tackle the menace. International law enforcement and cooperation should be a priority as many countries feature in varied degrees across the wildlife trafficking geography from *source* through *transit* to *demand/consumption* spaces. Collaboration with multiple stakeholders within and outside Nigeria - Customs, Police and National Environmental Standards and Regulations Enforcement Agency (NESRA), as well as the World Customs Organization, Interpol and the CITES secretariat – is imperative.

ADOPTING THE ELECTION PETITION MODEL AS A MEANS OF FAST TRACKING JUSTICE DELIVERY IN THE REGULAR COURT SYSTEM IN NIGERIA: PROBLEMS AND PROSPECTS

Samuel I Nwatu[*] and Chidebe Matthew Nwankwo[**]

Abstract

It is a truism that sound and credible elections are a sine qua non for sustainable democracy. The citizens in a society do not only desire a credible system for the selection of their leaders, but also seek functional and unbiased institutional processes to settle election matters. Consequently, election petition remains a viable and reorganized alternative open to any person or party dissatisfied with the conduct of an election to ventilate his or her grievances. Over the years, litigants/petitioners have continued to patronize the election petition tribunals/courts with minimal or no success as most of the petitions ended up being thrown out for non-compliance with the applicable electoral legislations or technicalities. Consequently, this paper analyses the current election petition model in Nigeria with a view to highlighting practices that may be adapted to the regular court process to improve speedy dispensation of justice. The paper adopts a doctrinal methodology which undertakes a comparative study of Nigeria and other relevant foreign jurisdictions. The paper analyses the procedural and institutional aspects of the election petition system viz-a-viz the court system in Nigeria and further examines the practice in other foreign jurisdictions with an attempt to identify norms and practices that can be adopted to strengthen the election petition model in Nigeria.

Keywords: Court system, election petition, justice delivery, Nigeria.

1. Introduction

Election petition remains a viable and reorganized alternative open to any person or party dissatisfied with the conduct of an election to ventilate his

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or her grievances. Over the years, litigants/petitioners have continued to patronize the election petition tribunals/courts with minimal or no success as most of the petitions ended up being thrown out for non-compliance with the applicable electoral legislations or want of proof.

A total of 3,479 petitions have been filed in the four election cycles in Nigeria, between 2007 and 2019. This number not only highlights the frequency with which election outcomes are challenged post-election cycles, but also demonstrates the importance of an effective court system to the electioneering process in Nigeria. The post 2007 electoral reforms have culminated in a more robust election petition model in Nigeria. The amendment of the Electoral Act 2010, the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) (Constitution) as well as the introduction of stricter rules of procedure has brought some sanity to the process of adjudication of election matters.

2. Critical Features of the Election Petition Model in Nigeria

An election *simpliciter* implies an institutional process which embraces the entire gamut of activities ranging from accreditation, voting, and collation to recording on all the relevant electoral forms, transmission and declaration of results.[1] For there to be an election known to law, all these constituent elements of an election must be shown to have taken place. If any of these constituent of activities is disrupted, it affects the conclusion of the election thus warranting the institution of a remediation process through an election petition before a tribunal. The Electoral Act 2010 is mute on the definition of an election petition. However, in *All Nigerian Peoples Party v The Independent National Electoral Commission*,[2] the court defined election petition as 'a formal written request presented to a court or tribunal for enquiry into the validity or otherwise of a candidate's return when such return is allegedly invalid'.

There shall be established two types of election tribunal for each state of the federation which are vested with original jurisdiction over the trial of election petitions. The first of the election tribunals is the National and State Houses of Assembly Election Tribunals that deals with the petition from the national and state Houses of assembly. The said

[1]PI Kelechi, *Modern Nigerian Election Petitions and Appeals Law* (Chudanog Publishers 2017) 1.
[2][2004] 7 NWLR (Pt 871) 55.

tribunals are vested with exclusive original jurisdiction to hear and determine whether any person has been validly elected as a member of the national and state houses of assembly. The second of the election tribunal is the governorship election tribunal which is vested with exclusive original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of governor and deputy governor.[3]

Election Petitions proceedings are often described as being *sui generis* in nature. This attribute has been cited as the basis for the peculiarity and distinctive jurisprudential leaning of courts and tribunals in formulating and restating legal principles in election petition matters in comparison to regular court procedure.[4] The distinct or *sui generis* nature of election petition proceedings is derived from two main features. First, the strict time requirement for the dispensation of election petitions as enshrined in the Constitution[5] and other relevant electoral laws.[6] Section 285(6) of the Constitution provides that the Election Petition Tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition. An election petition itself shall be filed within 21 days after the date of the declaration of result of the elections.[7] An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.[8] To meet this timeline, Tribunals are permitted to sit on all days of the week including Saturdays and Sundays[9] and processes can be filed at any time even at midnight.[10]

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[3]S 285(1)(a)(b), (2) of the CFRN 1999 as amended.

[4] PI Nwafuru, 'Election Petition: The Judicial Policy behind the Legal Principles Forbidding the Dumping of Documents' <https://www.linkedin.com/pulse/election-petition-judicial-policy-behind-legal-dumping-nwafuru/> accessed 23 November 2021.

[5]Constitution of the Federal Republic of Nigeria 1999.

[6]Other laws and regulations governing elections in Nigeria are the Electoral Act (2010) Cap E6 *Laws of the Federation of Nigeria 2004*; Independent National Electoral Commission (INEC) Regulations and Guidelines for the Conduct of Elections 2019.

[7]The Nigerian Constitution s 285(5).

[8] The Nigerian Constitution s 285(7).

[9]The Electoral Act 2010 (as amended) s 25(1) provides thus, 'No formal adjournment of the Tribunal or Court for the hearing of an election petition shall be necessary, but the hearing shall be deemed adjourned and may be continued from day to day until the hearing is concluded, unless the Tribunal or Court otherwise directs as the circumstances may dictate.' S 26(2) provides that after an adjournment of hearing of an

Another time management strategy of election petitions under the Constitution is found in section 285(8) of the Constitution (as amended by the 4th Alteration Act, 2017) which provides that the Tribunal or Court shall suspend its ruling on all preliminary objections and interlocutory applications touching on competence of the Petition or Pre-election matters and deliver such ruling at the stage of final judgment. The apex court has in recent times underscored the importance of the time-bound nature of election petition matters in the constitutional system. In *Oke v Mimiko*[11] the Supreme Court held thus:

> The general principle of the law is that election matters are *sui generis*. They are limited by time span especially the gubernatorial one. They cannot withstand everlasting time span (*ad infinitum*). They must be concluded within a given time span in order to allow the winning candidate (governor-elect etc) assume his responsibilities of the office. He has a very limited number of years. Time lapse will seriously affect his term of office unlike in other ordinary civil matters with no time bar. In any event, in all cases, there must be end to litigation.

The second justification for the sui generis character of election petition matters in Nigeria is the abhorrence of tardiness in the process and procedure of litigation. Election petitions have peculiar features which modify the operation of certain rules of civil proceedings. Hence, some technical defects or irregularities which in other proceedings are considered too immaterial to affect the validity of the claim, could be fatal to proceedings in election petitions.[12] In *Orubu v National Electoral Commission,*[13] it was held that election petitions are peculiar in nature, and because of their peculiar nature, and centrality to an effective democratic system they are 'regarded with an aura that places them over and above normal day to day transaction between individuals which give rise to ordinary claims in court.'[14] The strictness of the standard of

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election petition the 'hearing may be continued on a Saturday or on a Public Holiday if circumstances dictate'.

[10]Note 3.

[11][2014] 1 NWLR (Pt 1388) 225, 247 – 248 paras G –F.

[12]C Ubanyionwu, 'Strategies and Procedures for Expediting Election Petitions and Appeals' [2011] 2 *Nnamdi Azikiwe Journal of International Law and Jurisprudence* 322.

[13][1988] 5 NWLR (Pt 94) 323, 347.

[14]Ibid.

procedure and the consequence of procedural inaccuracy in election petition matters is best captured by the Supreme Court in *Buhari v Yusuf,*[15] where the court held thus:

> Election petitions are distinct from the ordinary civil proceedings: see *Obih v Mbakwe.*[16] It is such that in certain circumstances the slightest default in complying with a procedural step which otherwise either could be cured or waived in ordinary civil proceedings could result in fatal consequences to the petition. Examples are: *Benson v Allison,*[17] *Eminue v Nkereuwen,*[18] which were decided on failure to give security before presenting a petition as required by the rules; *Ige v Olunloyo,*[19] decided on application to amend the prayers sought in a petition, which application was brought after the time allowed for filing the petition. So an election petition is neither seen as a civil proceeding in the ordinary sense nor, of course, a criminal proceeding. It can be regarded as a proceeding *sui generis*.

These two features are the main pillars upon which the election petition model in Nigeria is built. Therefore, due to the importance of these proceedings to the maintenance of our democratic system, it may be considered one of the most functional aspects of the Nigerian judicial system, albeit it is not without its own flaws which have prompted recent reforms.

3. Practice Directions

In time past the issue as to whether a specific time span should be stipulated within which election petitions are concluded has always generated unending debates among Nigerian legal practitioners, jurists and politicians alike. Election petition cases were characterized by undue delays leading to criticism from stakeholders in the electoral process.[20]

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[15][2003] LPELR-812(SC).
[16] [1984] All NLR 132, 200 per Bello, JSC; 211 per Eso and Aniogolu, JJSC.
[17] [1955-56] WRNLR 58.
[18] [1966] 1 All NLR 63
[19] [1984] 1 SCNLR 158.
[20]A consequence of the delays during this period has changed the electoral map of Nigeria. Various verdicts from the election petition tribunals and the Court of Appeal have automatically introduced staggered system into the gubernatorial elections in the country. For instance, the case of *Chris Ngige v Peter Obi* stands as a reference point in the analysis of the problems and challenges of the adjudication of electoral matters. Peter Obi, the then governorship candidate of the All Progressive Grand Alliance

To salvage the situation, then President of the Court of Appeal, in exercise of the (presumed) powers conferred on him by the Constitution 1999 section 285(3) and other powers issued new practice directions christened 'Election Tribunal and Court Practices Directions 2007' on 29 March 2007. The practice directions were published in the Federal Republic of Nigeria official gazette of 4 April 2007 and took effect retrospectively from 3 April 2007. The practice directions were made applicable to presidential, governorship, national assembly and states assembly election petition.

The most recent practice directions titled 'Election Tribunal and Court Practice Directions 2011' were introduced by Justice Isa Ayo Salami in 2011. Some of its important provisions are discussed infra. However, it is pertinent to highlight some recent decisions on practice directions in the election petition system in Nigeria.

In *Dele Taiwo Ololade v INEC,*[21] the court of appeal, Mohammed JCA held thus:

> Practice direction therefore remains in force having been made with the intention of guiding the courts and the legal profession on matters of practice and procedure. Practice directions are overridden by the rules of court only when they are in conflict with the rules. But when practice directions as issued or co-exist harmoniously with the rules of court, a party or counsel who ignores them does so at his peril.

The importance of Practice directions in understanding the nature of operation of the election petition model in Nigeria cannot be overstated. Okoro, JCA evinces the essence of practice directions in *Ado v Mekara*[22] thus, 'as the purport of practice directions is to aid the quick dispensation of justice especially in election matters, time becomes of the essence and this makes it mandatory for the strict compliance with the directives. The court will always frown at any attempt to circumvent or treat the practice direction with levity.[23] Consequently, it may be adduced

(APGA) filed his case on 16 day of May 2003 challenging the declaration of Dr Chris Ngige as the winner of the election. The tribunal took more than two years to hear all the witnesses and delivered judgment on 12August 2005. The appeal came up for hearing on 23January 2006 and judgment was delivered on 15March 2006. The petitioner waited for 35 months to receive justice out of a mandate of 4 years.

[21][2008] JELR 53372 (CA).

[22][2009] 9 NWLR Pt 1147.

[23]See also *Jimoh Ojugbele v Musemi Ltd Olamidi* [1999] 9 NWLR (Pt 621) 167.

that the main objectives of practice directions are: 1) to ensure just, efficient and speedy dispensation of justice; 2) to discourage the institution of frivolous actions in the courts; 3) to afford the courts the opportunity of knowing the cases of the parties beforehand; 4) to ensure diligent prosecution of cases by litigants and their counsel

The 2011 Practice Directions introduce certain provisions that merit mention and were hitherto applicable to election petition matters under the previous rules. For instance the directions introduce the sum of Two Hundred Thousand Naira (₦200,000.00) as security costs to be deposited with the tribunal or court. It further provides further deposit of the sum of Two Hundred Thousand Naira (₦200,000.00) to make up for costs of service of notices, registered postings and all other expenditures which may be occasioned by the petitioner.[24]

Regarding election appeals, the 2011 Practice Directions stipulate that the appellant shall file in the registry of the tribunal his notice and grounds of appeal within 21 days from the date of the decision appealed against.[25] The secretary of the tribunal shall within a period of not more than ten days of the receipt of the notice of appeal, cause to be compiled and served on all the parties, the record of the proceedings.[26] Within a period of ten days after the service of the record of proceedings, the appellant shall file in the Court, his written brief of argument in the appeal for service on the respondent.[27] The respondent on their part shall file in the court his own brief of argument within five days after service of the appellant's brief.[28] These provisions highlight the importance of speedy adjudication of electoral matters and the realization by the judiciary that time is often of the essence in ensuring that governance does not suffer because the question over the rightfully elected individual persists.

4. Improving the Regular Court System in Nigeria: Borrowing a Leaf from the Election Petition Model

The election petition model is not without its weaknesses. However, the provisions governing the procedure in general have clearly improved over the years. The current model appears to have solved the problems

[24]The Election Tribunal and Court Practice Directions 2011 Order 3 and 4.
[25]Practice Directions 2011 Order 6.
[26]Order 8 2011 Practice Directions 2011 Order 8.
[27]Ibid Order 10.
[28]Ibid Order 12.

that previously bedevilled election petition matters such as lengthy hearing, complex and irregular filing procedures, deliberate time-wasting by lawyers etc. Thus, the procedure of election petition matters are guided by the Rules of Procedure for Election Petitions found in the First Schedule of the Electoral Act 2010, the Election Petition Tribunals and Courts Practice Direction 2011, and certain aspects of the Constitution. Some of the current practices of the election petition model which can be transfixed into the general court process for fast and effective dispensation of justice include:

I. The Practice Directions 2011 Order 4 make provision for deposit of a fixed sum in the court coffers to cover for cost of service of notices, processes, registered posting and similar expenditures. If this is practiced in regular courts, it will expedite proceedings as court processes and notices are served on intended parties immediately without recourse to the action or inaction of the other party. This may also help prevent the filing of frivolous actions if applied in regular courts.

II. The First Schedule of the Electoral Act 2010 Order 47(1) provides that no motion shall be moved and all motions shall come up at the pre-hearing session except in extreme circumstances with leave of tribunal or court. By implication, applications will not be entertained during hearing save in the final address. If this procedure is adopted, proceedings will be concluded quicker as the wheel of justice will not be made to turn slow by barrage of applications put up by counsel.

III. As highlighted earlier, the extant electoral laws make several provisions intended to abridge the time for filing a petition and reply. For instance, the First schedule of the Electoral Act 2010 Order 16(1) provides that 'if a person in his reply to the election petition raises new issues of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the registry, within five days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of fact'. This can be applied in regular court process. Rather than the 42 days or 21 days to file a statement of defence, the defendant can be afforded just 5 or 7 days to reply. This will certainly put counsel on their feet and cases will be speedily determined.

IV. Section 258(8): 'Where a preliminary objection or any other interlocutory issue touching on the jurisdiction of the tribunal or court in any pre-election matter or on the competence of the

petition itself is raised by a party, the tribunal or court shall suspend ruling and deliver it at the stage of final judgment'.

5. Election Petition beyond Nigeria: Lessons from Abroad

Defective and fraudulent elections are not the exclusive preserve of Nigeria alone. Irregular conducts of elections are common in Africa[29] and this warrants robust election petition systems characterized by effective adjudication of election disputes. In typical fashion, aggrieved political contestants often look to the judiciary for redress where elections have been assailed with anomalies and results disputed. Due to the constitutional and institutional weaknesses the judiciary is tasked with the ultimate responsibility of determining the ultimate outcome of the poll. Consequently, in order to protect the right to choose in an election, and to promote and safeguard democracy, the judiciary must be competent, honest, learned and independent. Such a judiciary plays a transformative role in democracy as an impartial umpire in a democracy.

It is often the case that disputed elections are the norm in Africa, and hopes of a constitutionalism revival[30] which were being harboured due to few instances of successful election in Africa have been dashed by the recent uptick in the number of military coups in the region.[31] Huefner classifies the causes of disputed or failed elections into two categories, namely: fraud and mistake.[32] Fraud in this context refers to the deliberate unfair manipulation of the electoral system by parties, candidates, or their supporters. Mistake on the other hand is the unintentional disturbance of the electoral process usually by electoral officials.[33] Ben Nwabueze aptly describes the consequences of dysfunctional electoral systems 'robbery of the right of the people to participate in their own government' and

[29]SI Lindberg, *Democracy and Elections in Africa* (JHU Press 2008) 10, 14.

[30]In the early 2000s, the change of government from military rule to democratic dispensations in some West African states led to a perceived constitutionalism revival in the African region. However, the recent resurgence of the culture of coups in some African States namely Burkina Faso, Mali, Chad, Guinea and most recently an attempted coup in Guinea Bissau appear to have put such hopes to bed. HK Prempeh wrote an article about the time of the constitutionalism revival entitled 'Africa's "Constitutionalism Resurgence": False start or new dawn' [2007] 5 *International Journal of Constitutional Law* 460.

[31]As at the time of writing, the West African Sub-region has witnessed four coups over the period of two years.

[32]SF Huefner, 'Remedying Election Wrongs' [2007] 44 *Harvard Journal on Legislation* 265.

[33]Ibid.

'therefore the greatest offence that can be committed against the constitution and the people'.[34] This is a worthy observation because failed elections have the effect of denying the people their consent as a basis of the right to govern. Most African constitutions or electoral laws anticipate the fatal potentialities of irregular elections and thus make statutory provisions for redress. This is because election wrongs or allegations of wrongs often have a bearing on the legitimacy of the electoral process.[35]

A transparent redress mechanism inherent in an effective election petition system, which commands the respect of the people, lends legitimacy and credibility to the election and 'serves as a peaceful alternative to violent post-election responses'.[36] Furthermore, the failure of any society to prioritize an effective electoral dispute mechanism as a *sine qua non* of its constitutional system 'can seriously undermine the legitimacy of an entire electoral process'.[37]

Kabba identifies five patterns generally associated with election petitions in African courts, namely: (a) all cases are decided in favour of the incumbent candidate, the candidate sponsored by the ruling party, or the presumptive winner. (b) Many cases are dismissed on minor procedural technicalities without consideration of the merits. (c) There is misuse of the substantial effect rule. d) In some countries, the resolution of disputes is inordinately delayed so as to render the whole process nugatory. (e) Judges simply fail to address the issues presented before them by constraining themselves from making appropriate decisions.[38]

These challenges of adjudication are prevalent in most jurisdictions but the most decisive approach for any judicial system is the degree to which these systemic defects are managed and made un-apparent to the common man. An effective judicial system and above all a legal order must be perceived as being just. As argued earlier, election

[34]B Nwabueze, 'Nature and Forms of Elections Rigging' (21 July 2008) *Niger Delta Congress* <http://www.nigerdeltacongress.com/articles/nature_and_forms_of_elections_ri_htm> accessed 10 May 2021.
[35] O Kabba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' [2015] 15 *African Human Rights Law Journal* 330, 331.
[36]C Vickery, 'Understanding, Adjudicating, and Resolving Election Disputes' IFES Conference Papers 14 February 2011.
[37]The Carter Centre, *Guide to Electoral Dispute Resolution* (2010).
[38]Kabba (n 35) 335.

petition procedures are shrouded in technicalities. Thus, many cases are dismissed on minor technicalities. A combination of the technicality bound nature of election petition cases and the un-readiness of judges to apply purposeful judicial approach in adjudicating these cases has often led to unsatisfactory outcomes which weaken the electoral process. So far, the Nigerian legal system has attempted to shorten the length of election petitions through legislative amendments and improvement of the rules of court. However, questions remain over the imbalance in the election petition process in comparison to regular court process.

It is trite that the process of adjudication is a formal and institutionalized method of reasoned conflict resolution.[39] Thus, its main objective is to settle disputes fairly and on the basis of applicable laws exercised through two main pillars of substantive and technical or procedural rules. Those rules that apply to the fairness or merits of the case are considered substantive rules, while those that govern the manner of resolving a dispute are considered technical or procedural.[40] It follows therefore that adjudication should ideally be a system that balances substantive justice with procedural rules. Procedural rules and technicalities are manifestly 'handmaids rather than mistresses'[41] of substantive justice. These technical rules are instruments available to the judiciary to help it to render substantive justice and are, therefore, not ends in themselves.[42] Lord Penzance observes in 1878 thus:

> Procedure is but the machinery of the law after all – the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve.[43]

[39]LL Fuller, 'The Forms and Limits of Adjudication' [1978] 92 *Harvard Law Review* 353.
[40]W Morrison, *Common Law Reasoning and Institutions* (University of London External Programme 2006) 36.
[41]CE Clark, 'The Handmaid of Justice' [1938] 23 *Washington University Law Quarterly* 298.
[42]Kabba (n 35) 338.
[43]*Henry JB Kendall v Peter Hamilton* [1878] 4 AC 504.

However, these two pillars of the adjudication do not easily complement each other in practice as observed by British legal historian Holdsworth,[44] thus:

> One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.

It is clear that courts all over the world inevitably struggle to attain a balance between these two aspects of adjudication in regular civil matters and this conundrum becomes ever more difficult to resolve in election petition matters that go the root of producing credible leadership in a democratic society. Nevertheless, the aggrieved citizen must approach the courts expecting that courts look at the merit of their cases without being unduly fettered by technicalities even in election petition matters. Judges are therefore vested with the duty to do substantive justice irrespective of the nature of the matter before the court. Recognizing the complexity of the function of substantive justice some constitutions spell out the standard expected of the judge. For example, the Constitution of Kenya requires that 'justice shall be administered without undue regard to procedural technicalities'.[45]

A cursory look at some of presidential election petition cases across the African region reveals that the preference of judges is to avoid determining these high stake matters on merit and an over reliance on technicalities. In *Rally for Democracy and Progress v Electoral Commission of Namibia,*[46] election petition was brought by the opposition following the 2009 presidential and parliamentary elections in Namibia. The petition sought to void the presidential election in Namibia, *inter alia*, for noncompliance with electoral laws. The Electoral Act 1992 section 10 required that election petitions could only be presented within 30 days from the date of announcement of results. The petitioners

[44]WS Holdworth, *History of English Law* (1922) 251.
[45]Constitution of the Republic of Kenya 2010 Art 159(2)(d).
[46][High Court] Case A01/2010.

presented their petition on the thirtieth day at 16:30 and, therefore, within the statutory requirement. The registrar of the High Court of Namibia accepted the petition. However, a rule of court did not allow the filing of a process on any day after 15:00. Because the petition was filed after 15:00, the Court held that the petition was invalid for being filed out of time and, therefore, in the eyes of the law there was no valid petition to adjudicate on.[47]

In *John Opong Benjamin v National Electoral Commission*[48] a petition was brought by the losing opposition leader, John Opong Benjamin, and other opposition leaders against the election of Ernest BaiKoroma during the Sierra Leone elections of 2012.[49] The Constitution of Sierra Leone Article 55(1) provides that anyone with a grievance in a presidential election should petition the Supreme Court within seven days of the results being declared. The election was held on 17 November and the results were declared only on 23 November.[50] The petitioners filed their petition on 30 November, the seventh day after the declaration of results. Furthermore, rules of court required that petitioners submit the names of counsels acting for them at the court registry in a separate notice, and that, within five days of filing the election petition, the petitioners make payment for security of costs.[51] The petitioners' lawyers had indicated their contact details by including it on the petition, but not in a separate notice, and made security of cost payments on 5 December. The court, however, struck out the petition, holding that it had been filed out of time due to a delay in payment for costs and for not complying with the requirement of lawyers' contact details to be in a separate notice.

Election petitions in Nigeria have long been characterized by strict adherence to technicalities and these have sometimes produced unfavourable political outcomes. One of the striking cases of a presidential election petitions determined by technicalities is *Atiku Abubakar v Umaru Musa Yar'Adua.*[52] The petition arose from the presidential elections of 21 April 2007. The petitioner, Atiku Abubakar, had polled 2, 637, 848 votes against the winner, Umaru Musa Yar'Adua

[47]Ibid paras 44 and 45.
[48]SC 2/2012 [Supreme Court of Sierra Leone Judgment of 14 June 2013].
[49]Ibid.
[50]C Thorpe, 'Statement from the NEC Chairperson on the Conduct and Results of the Presidential Elections held on 17 November 2012' (23 November 2012).
[51]*Benjamin*, (n 48) paras 25-29.
[52]SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008.

who had received 24,638,638 votes. Prior to the election, the Independent National Electoral Commission of Nigeria (INEC) had disqualified the petitioner from the election and his name excluded from the ballot papers. This was based on the INEC's erroneous view that the petitioner had been indicted for corruption and was therefore unqualified for presidential office.[53] His name was finally printed on the ballot papers, only four days before the election, through a ruling to that effect by the Supreme Court.[54]

The petitioner sought to challenge the election of Yar'Adua on the following grounds:[55] (a) The 1st petitioner [Abubakar] was validly nominated by the 3rd petitioner [Abubakar's party] but was unlawfully excluded from the election; alternatively that: (b) the election was invalid by reason of corrupt practices. (c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, as amended; and (d) the 1st respondent was not duly elected by majority of lawful votes cast at the 21 April 2007 presidential election.

The applicable provision, on which the majority based its decision, states[56]: an election may be questioned on any of the following grounds: (a) that a person whose election is questioned was, at the time of election, not qualified to contest the election; (b) that the election was invalid by reason of corrupt practices or noncompliance with the provisions of this Act; (c) that the respondent was not duly elected by majority of lawful votes cast at the election; or (d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

The justices of the Supreme Court reasoned that grounds (a), (b) and (c) above were separated from ground (d) by the use of the word 'or', a disjunctive used to express an alternative or choice.[57] Since the petitioner's name ultimately made it onto the ballot paper and partook in the election, he could not, therefore, plead ground (d) as he had not been excluded from the election. In the view of the majority, the use of the word 'or' meant that the petitioner had to choose between the alternatives and could, therefore, only plead one set of grounds.

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[53]Ibid.
[54]Ibid.
[55]Ibid.
[56]Electoral Act 2006 s 145(1).
[57] SC 72/2008 (n 52).

Having considered the fact that the petitioner's name appeared on the ballot paper, the Supreme Court declined the invitation to consider whether his initial disqualification may have constituted constructive exclusion from the election as it had left him with barely four days to campaign.[58] The majority of the apex court judges agreed that since the petitioner took part in the election, his petition on the basis of ground (d) collapsed and, since the word 'or' denoted alternatives, the rest of the petition collapsed and, therefore, other grounds would not be entertained.[59] This decision is a far cry from an earlier decision of the Supreme Court which strongly condemned judges occupying themselves with technicalities at the expense of substantial justice and advised that judges had a duty to shy away 'from submitting to the constraining bind of technicalities'.[60]

6. Conclusion

The current election petition model has introduced critical provisions aimed at reducing the time for the determination of election petitions and appeals. It has also attempted to remedy the long standing problem of unnecessary technicalities and the cynical lawyer whose purpose is to waste the time of the court and the public. However, these challenges remain and the provisions alone are not enough. The general institutional malaise plaguing the current judicial system also rears its head in the election petition system.

The same context can be applied within the African region where the courts have maintained a tradition of entertaining election petitions that often end in the same predictable outcome as highlighted above. However, certain jurisdictions appear to better appreciate the dilemma which the election petition judge is faced with in trying to balance substantive justice with the strict technical requirements of the adjudicatory process. Constitutional provisions such as those contained in the Constitution of Kenya 2010 Article 159(2)(d) serve the purpose of giving judges the backing to freely entertain election petition matters on its merits and ensure that justice is essentially served. The weight of political expediency should not be enough to subvert the cause of justice

[58]Ibid.
[59]Ibid.
[60]See *Amaechi v Independent National Election Commission* [2008] Supreme Court of Nigeria Judgment 22, 93.

and it is imperative that the common man reposes faith in the system, or at least willing to do so.

Furthermore, the institutional challenges found in the regular court system must be addressed to ensure that the election petition process enjoys the general functionality of the system. From a Nigerian perspective, effective justice delivery in the general court system will benefit from digitization of the court system in Nigeria, specialization of Nigerian court judges, employment of more judicial staff to man the various courts and proper equipment of our courts.

CONTEXTUALIZING PAEDIATRIC EUTHANASIA WITHIN THE FRAMEWORK OF CHILDREN'S RIGHT

Nduka Chinenyeze Njoku*

Abstract

Given the universal recognition of the sanctity of human life and the robust protection of fundamental right to life as the most important and foundation of all rights, euthanasia poses considerable legal, moral and ethical challenges. These challenges become more dire and profound with respect to paediatric euthanasia. The article aims at providing insight into the complex legal and ethical challenges which euthanasia especially paediatric euthanasia engenders and explores the import of autonomy rights granted under the rubric of the Child Rights Convention in ameliorating the challenges. This is achieved by examining the meaning and nature of euthanasia, categories and arguments in favour and against euthanasia generally and in particular paediatric euthanasia and the competency of a child in taking end of life decisions. The articles analysis some of the provisions of the Belgian and Netherlands euthanasia laws. The paper believes that given the gravity associated with the decision to request euthanasia and the finality of such a decision, children, especially younger children, should be offered intensive palliative care and be precluded from requesting euthanasia.

Keywords: Euthanasia, child rights, paediatrics euthanasia, autonomy, end-of-life.

1. Introduction

The sanctity of human life is universally accepted and protected. The Universal Declaration of Human Rights (UDHR) and other major international and regional treaties on human rights protect human life in one form or the other.[1] Equally, constitutions of various countries and municipal laws secure the inviolability of human life. The robust international and municipal laws protecting right to life is reflective of the great value which is placed on human life. Indeed, the law permits individuals to kill in self-defence. The only condition for deprivation of

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[1] See Universal Declaration of Human Rights (UDHR) art 3 and the International Covenant on Civil and Political Rights (ICCPR) art 6(1).

life within the strictly constitutional exceptions. It is generally accepted that virtually all cultures and societies value human life and protect same within the rubrics of the law.

The question that arises is what is the value of human life? There are three competing views of human life namely vitalism, the sanctity/inviolability of life and quality of life. Vitalism holds the view that human life is an absolute moral value. As a result of the absolute moral worth of the human life, it is wrong or immoral to shorten the life of a patient or fail to make effort to prolong it. This is still so whether that life is the life of extremely disabled new born baby or an elderly patient with advanced cancer illness, vitalism forbids shortening the patient's life and necessitates its prolonging. Notwithstanding the suffering, pain, huge cost of treatment, it must be administered. The vitalist school of thought demands that human life should be preserved at all cost.[2]

The second school of thought with respect to value of human life is that human life is created in the image of God. It necessarily follows that human life is imbued and instilled with an intrinsic dignity which safeguards it from unjustified attack. The idea that human life has an inherent value and dignity is the foundation for the belief that a person must never deliberately or intentionally kill an innocent human being. This is the quintessential essence of the right to life.[3] Accordingly, the theoretical foundation of the right to life is the principle that human beings are instilled with an inherent self-worth because they possess fundamental capacity intrinsic in human nature. This ultimate innate ability has a domino effect in the form of development of rational and logical abilities in the nature of understanding and making of choices.[4] The sanctity or inviolability of the human life as a result of its dignity and self-worth, which prohibits intentional killing, is at the core of the medical ethics and the Hippocratic Oath.[5] The modern reaffirmation of the Hippocratic Oath was made by the World Medical Association in 1948.[6] The right not to be deliberately killed is available to all regardless

[2] John Keown, *Euthanasia, Ethics and Public Policy* (2nd ed, Cambridge University Press, 2018) 37.
[3] Ibid 38.
[4] Ibid 39.
[5] Ibid 39. National Library of Medicine, 'The Hippocratic Oath' <http://bit.ly/2klqdNb. Greek Medicine - The Hippocratic Oath (nih.gov)> last accessed 11 May 2022).
[6] 'I will maintain the utmost respect for human life'. Adopted by the 2nd General Assembly of the World Medical Association, Geneva, Switzerland, September 1648.

of inability or disability. The right asserts that 'human life is not only an *instrumental* good, a fundamental basis of human flourishing. It is … not merely good as a means but is, like other integral aspects of a flourishing human life such as friendship and knowledge, something worthwhile in itself.'[7] The sick and the dying enjoy this worthwhile good to the degree that they are able to do so. Although human life is a fundamental good, it is not the highest good to which all the other basic goods must be sacrificed in order to ensure its preservation. The idea does not demand the preservation of life at all costs.[8]

The third principle of the value of human life is the Quality of life. This doctrine believes that the value of life is instrumental in ushering a means for a life of sufficient worth. This principle is not only interested in measuring the worthwhileness of the patient's treatment but also the worthwhileness of the patient's life. It believes that lives of some patients fall below a minimum quality threshold because of disease, pain, injury or disability. This is the basis for the idea that since some lives are not worth living, it is legitimate to intentionally end such life which can be effected by act or by intentional omission. The act or omission may be at the patient's request or not.[9] This intentional ending of human life for the benefit of the patient is regarded as euthanasia.

2. Conceptual Clarification

There is no generally accepted definition of euthanasia. This may lead to confusion as to the clear meaning of what the term entails. Nevertheless, there are certain features that are common to all of them. There is shared agreement that euthanasia involves a decision that has the consequence of shortening life. Secondly, euthanasia is restricted to the medical environment because it entails a patient's life being terminated by a doctor and not by a relative or a friend. Thirdly, death which occurs as a result of euthanasia is believed to be of advantage to the patient. It is the third characteristic of euthanasia which differentiates it from the offence of murder.[10]

The last amendment was by the 68th WMA General Assembly, Chicago, United States (October 2017) <http://bit.ly/2kg9CdI. WMA Declaration of Geneva – WMA – The World Medical Association> accessed 11 May 2022.

[7] Keown (n 2) 40.

[8] Ibid.

[9] Ibid 42.

[10] Ibid 10.

The word euthanasia is a derivative from the Greek words *eu-* and *thanatos* which means a good, happy or easy death.[11] It refers to the 'act of painlessly putting to death persons suffering from incurable conditions or diseases, and usually is limited to cases in which the goal is to serve the interests of the victim, with the purpose of death being to end the physical, emotional, or existential pain and suffering of the subject.'[12] Jacob Appel and other scholars emphasis that patients' choice of euthanasia in order to end unremitting pain and suffering do not apply in all cases. Patients may choose euthanasia not because of unrelenting pain and unbearable suffering but because of fear of loss of autonomy. Other reasons not related to pain and sufferings are the wish of some patients not to constitute unnecessary physical and emotional burden on others as well as not to dissipate family financial resources. Euthanasia is also the intentional killing of a patient which may be by act or omission as part of the patient's medical care. It constitutes one of the weightiest matters confronting the modern world.[13] It could also be defined from the point of view of not prolonging the life of a patient. This was the approach adopted by John Harris when he defined euthanasia as the 'implementation of a decision that a particular individual's life will come to an end before it need do so, a decision that a life will end when it could be prolonged.'[14] Such decision may entail direct interventions or withholding of life-prolonging measures.

Euthanasia 'connotes the active, intentional termination of a patient's life by a doctor who believes that death would benefit the patient.'[15] Intentionality is therefore key to most definitions of euthanasia. The central aim or purpose of the doctor's conduct must be the termination of the life of the patient. However, this definition seems to recognise only active euthanasia and not passive euthanasia and other forms of euthanasia. The definition therefore seems to be too narrow or

[11] Brianne Donaldson and Ana Baizeli, *Insistent Life: Principles for Bioethics in the Jain Tradition* (Oakland: University of California Press, 2021) 203.
[12] Jacob M Appel 'Paediatric Euthanasia' in Michael J Cholbi (ed) *Euthanasia and Assisted Suicide: Global Views on Choosing to End Life* (Santa Barbara: Praeger, 2017) 351.
[13] John Keown 'Introduction' in John Keown (ed) *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (Cambridge: Cambridge University Press, 1997) 1.
[14] John Harris, 'Euthanasia and the Value of Life', in John Keown (ed) *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (Cambridge: Cambridge University Press, 1997) 6.
[15] Keown (n 2) 10.

inadequate. Euthanasia is the 'deliberate ending, by a third party, of a patient's life upon his or her explicit request, by the administration of lethal substances.'[16] For a conduct to amount to euthanasia there must be an intentional ending of the patients life, a clear unambiguous request by the patient demanding that his or her life be terminated by the use of deadly drugs and the administration of the drugs by a third party such as a doctor or nurse.[17] It is argued that to cause or allow an individual a gentle and easy death for any reason other than the good of the one who dies is not euthanasia.[18]

Under Belgian Euthanasia Act, euthanasia is 'understood to be the act which intentionally terminates the life of a person at his/her request and which is carried out by an individual other than the person in question.'[19] The issue of assisted suicide marks an important difference between the Belgian Act on euthanasia and that of Dutch and Luxembourg Acts on euthanasia. While the Belgian Act is not applicable to assisted suicide, the Dutch and Luxembourg Acts both apply to assisted suicide and euthanasia.[20] Section 1(b) of the Dutch Act defines assisted suicide as intentionally helping another person to commit suicide or providing him or her with the means to do so while section 1 of the Luxembourg Act defines assisted suicide.[21] The central difference between euthanasia and physician-assisted suicide (PAS) is the role of the physician in both concepts. In voluntary active euthanasia (VAE) the physician intentionally terminates the life of the patient while in PAS, the physician intentionally assists the patient to take his own life. The physician's assistance may take the method of providing the patient the means to commit the suicide. The physician may provide the patient with lethal drugs or give advice to the patient about methods to adopt to achieve his aim.[22]

Advocates for the legalization of PAS contend that there is a significant moral difference between PAS and euthanasia. They argue

[16]Mannaerts and Mortier, 'Minors and Euthanasia,' 255. <https://biblio.ugent.be/publication/3 41701/file/6792733.pdf>
[17]Ibid 255.
[18]Ibid 205.
[19] Section 2 of the Belgian Act on Euthanasia of 28 May 2002.
[20] David Albert Jones and others, *Euthanasia and Assisted Suicide: Lessons from Belgium*, (Cambridge: Cambridge University Press, 2017) 9.
[21] Ibid 9.
[22] Keown (n 2) 6.

that under PAS the patient makes the final decision and performs the fatal act while in VAE it is the physician who decides whether the patient's life should end. PAS, they argue is a decisive expression of the patient's autonomy and the patient remains in control. Conversely, VAE is an application of medical decision-making and the doctor is in control of it. PAS also creates opportunity for the patient to change his mind.[23] Some argue that there is no significant moral difference between PAS and VAE. They argue that the seeming autonomy in PAS is exaggerated. In PAS the patient cannot require the physician's assistance because the physician will not agree to offer assistance to end the patient's life until the physician determines that it is proper to do so. The moral argument for PAS that it protects the autonomy of the patient has been interrogated. If PAS guarantees and respects the autonomy of a suffering patient, why should a similar autonomous request by a patient for a VAE be discountenance? Finally, it has been argued that the physical difference between deliberately ending the patient's life and intentionally helping the patient to end his own life can be insignificant.[24]

2.1 Classification of Euthanasia.

There are categories of euthanasia. Euthanasia taxonomy is differentiated into two, namely, euthanasia achieved by killing the patient, usually described as active euthanasia. It involves intentional act of a doctor with the aim of shortening the life of the patient. Active euthanasia is used to refer to a direct action that causes a patient's death. Voluntary active euthanasia obliges a doctor to act directly upon a patient who has made a request for the action. It may entail directly administering a lethal dose of medication to a patient who has no intention of living any longer.[25] It is imperative to recognize that euthanasia not only includes deliberate termination of a patient's life by an act of the doctor such as injecting a lethal substance into the patient's body but also incorporates intentional termination of patient's life by an omission. This is accomplished by failing to prolong the patient's life. This type is regarded as passive euthanasia. Passive euthanasia is usually achieved by withdrawing lifesaving treatment from the patient. It denotes an indirect action characterized by the removal or withholding of care instead of a direct action. Voluntary passive euthanasia is when a competent patient decides,

[23] Ibid 17.
[24] Ibid 18.
[25] Donaldson and Baizeli (n 11) 203

based on informed decision-making ability, to refuse life-supporting treatment. These life sustaining treatments may include food and fluids. The legal and moral import of this type of euthanasia is that it constitutes a patient's act of omission because he refuses or removes further treatment. The natural consequence is that the underlying disease is allowed to take its course usually leading to the death of the patient instead of a direct act of commission which act causes the death of the patient.[26] There are at least two situations where termination of treatment does not amount to passive euthanasia. The first situation is where a patient exercises his right to refuse treatment. It is a general principle of patient's right that a competent adult has the right to refuse treatment, even if that treatment is necessary to prolong the life of the patient.[27] This right can only be overridden in certain special circumstances. One of such circumstances is where the patient has a dependent child. The second situation is where the patient refuses to undergo a treatment. This is because no one can be compelled to administer treatment which the patient have not consented to.

Equally, cutting across the active and passive euthanasia debate are the voluntary euthanasia, which occurs when the patient autonomously requests the termination of life and non-voluntary euthanasia, which is characterized by inability of the patient to competently give consent to termination of life. In the latter type of euthanasia, the person killed is incapable of understanding the choice between life and death. The individuals that fall within this category are gravely deformed or severely retarded infants and the people who have permanently lost the capacity to understand the issue involved.'[28]

There is also involuntary euthanasia which is the termination of life of a patient who is competent but his views on the issue are overruled.[29] In this case, the person killed is capable of consenting to his or her own death but does not do so. It could be that he is not asked or he is asked but has chosen to go on living. Killing someone who has not consented to being killed can be considered as euthanasia only when the motive for killing is the need to prevent suffering on the part of the

[26] Ibid.
[27] *Okonkwo v MDPDT* (1999) 9 NWLR (Pt 617) 1 at 27 para B and 28 para G.
[28] S Uniacke and HJ McCloskey 'Peter Singer and Non-Voluntary 'Euthanasia': Tripping Down the Slippery Slope' (1992) 9 (2) *Journal of Applied Philosophy* 207
[29] E Garrard and S Wilkinson, 'Passive Euthanasia' (2005) 31 (2) *Journal of Medical Ethics* 64.

person killed.[30] Although, the euthanasia taxonomy maybe helpful within the realms of ethics especially in determining euthanasia that may be less morally offensive, it is nevertheless confusing. This paper will be predicated on what may be described as voluntary euthanasia.

2.2 Schools of Thought in Euthanasia

There are different schools of thought in euthanasia. The first is that active euthanasia and passive euthanasia are not morally significant. Rachels, argues that there is no substantial moral difference between active and passive euthanasia. Accordingly, there is no significant difference between killing and letting to die. He argued that active euthanasia is more humane than passive euthanasia. This is because in passive euthanasia the patient will die in a matter of days with more anguish and suffering before death while active euthanasia will result in quick and painless death. He submitted that active euthanasia is preferable to passive euthanasia because active euthanasia does not prolong a patient's pain and suffering.[31] Passive euthanasia is slow and painful. It entails the patient spending days in agony. Secondly, Rachels claims that the doctrine which prefers passive euthanasia over active euthanasia leads to decisions concerning life and death on irrelevant grounds.[32] The argument that there is a significant moral difference between active and passive euthanasia, he contended, is that people believe that killing a person is morally worse than letting someone die.[33] He concluded that the distinction between active and passive euthanasia is founded on a distinction that has no moral importance. Another scholar has contended that the predicament of prolonged dying or the dilemma of active and passive euthanasia has its foundation in a medical cast of mind that determines success by medicines ability to prolong death, even in the stark reality of inevitability of death.[34]

The second school of thought is that active euthanasia is wrong while passive euthanasia is acceptable. This is in contradistinction with Rachels contention that there is no moral significance between active and passive euthanasia. Will Cartwright argues that a more probable

[30] Uniacke and McCloskey (n 28) 207.
[31] James Rachels, Active and Passive Euthanasia 2. <https://sites.ualberta.ca/~bleier/Rachels_Euthanasia.pdf> accessed 16 April 2022.
[32] Ibid 2.
[33] Ibid 3.
[34] ML Tina Stevens, *Bioethics in America: Origins and Cultural Politics*, (Baltimore: The John Hopkins University Press, 2000) 79.

explanation of killing and letting die would be that a person kills someone if that person initiates a causal sequence that ends in that other person's death, while one lets someone die if one allows an already existing causal sequence to lead to his death, when one could have prevented this outcome. With respect to euthanasia, he concluded that the distinction is diminished but still important.[35] DeGrazia and Millum also argue that not all the modalities in which a patient's death can be made to occur earlier than it would with full use of life-support measures are morally equivalent. It is widely believed, they pointed out, and that forgoing life support can be morally permissible while active euthanasia is impermissible.[36] In the United States voluntary passive euthanasia is regarded as legally and morally acceptable. The reason is that it is thought to protect patient autonomy and promote patient wellbeing.[37]

The third school of thought is that both active and passive euthanasia are different from the cessation of extraordinary means of treatment to prolong life. Under this scenario, if the condition of the patient, facilities and resources available are considered ordinary, the physician is not only required to continue treatment but also required to commence treatment. For example, providing food and fluids are regarded as ordinary care. However, if the care is regarded as extraordinary in the sense of difficulty to obtain treatment or treatment is expensive, the physician is neither required to start treatment nor is he morally required to continue treatment.[38]

The fourth school of thought is that doctors cannot be agents of harm. The American Medical Association (AMA) believes that permitting physicians to engage in euthanasia would eventually cause more harm than good. AMA's opposition is predicated on the fact that 'Euthanasia is fundamentally incompatible with the physician's role as a healer, would be difficult or impossible to control, and would pose serious societal risks… could readily be extended to incompetent patients

[35] Will Cartwright, 'Killing and Letting Die: A Defensible Distinction' (1996) 52 (2) *British Medical Bulletin* 354.
[36] David DeGrazia and David Millum, *A Theory of Bioethics* (New York: Cambridge University Press, 2021) 83.
[37] Adam Feltz, 'Everyday Attitudes about Euthanasia and the Slippery Slope Argument' in Michael Cholbi and Jukka Varelius, *New Directions in the Ethics of Assisted Suicide and Euthanasia*, (Springer 2015) 216.
[38] Bernard Gert and others, *Bioethics: A Systematic Approach,* (2nd ed, New York: Oxford University Press, 2006) 313.

and other vulnerable populations.[39] This is perhaps flowing from the age long belief that the whole essence of medical practice is to safeguard life and not otherwise. It is equally believed that legalization of euthanasia would result in loss of hope, fear of medical institutions, and likely lead to involuntary euthanasia.[40]

2.3 Theoretical Foundation of Euthanasia

The theoretical foundation of euthanasia is usually anchored on circumstances where people are under intractable pain and unbearable suffering. In situations where there is no hope of recovery as a result of the terminal nature of the illness, coupled with intolerable suffering and pain, it is better to allow the sick to die in dignity than to die a slow and painful undignified death. Nevertheless, it has been argued that most individuals who decide to terminate their own lives are not stirred by physical pain. The commonest reasons offered by people that want to take their lives, according to this view point, are that they are afraid of loss of autonomy and that they do not want to be a burden on others.[41]Some of the reasons for patients requesting euthanasia are, for those of sound mind, their loss of autonomy, decreasing ability to participate in enjoyable activity.

Again, those who request assistance in dying have higher levels of depression, hopelessness and lower level of spirituality than others who are terminally ill but are not requesting euthanasia.[42] It is therefore contended that the suffering which those demanding for euthanasia are undergoing is existential rather than physical pain and suffering and as a result the goal of euthanasia is not to relieve present suffering but to relieve the possibility of future suffering. Such existential concerns will not be pertinent to small children . John Lantes points out that an infant having unbearable suffering can be treated by 'high quality palliative

[39] American Medical Association, Code of Medical Ethics on Euthanasia. <https://www.ama-assn.org/delivering-care/ethics/euthanasia> accessed 16 April 2022.
[40]Uniacke and McCloskey (n 28).
[41] Oregon Health Authority, 'Oregon Death with Dignity Act: Data Summary 2016 <http://public.health.oregon.gov/Provider PartnerResources/EvaluationResearch/DeathwithdignityAct/Documents//year19.pdf >
[42] KA Smith and others, 'Predictors of Pursuit of Physician Assisted Death'(2015) 49 (3) *J. Pain Symptom Manage* 555-561.

care.'[43] He further argued that children generally neither fear being a burden on others nor apprehensive about the future loss of autonomy as adults do. Accordingly, different considerations apply in considering euthanasia for children.

Euthanasia weakens the practice of palliative care since euthanasia may essentially amount to killing the patient instead of relieving his pain and the more doctors practice euthanasia the less incentive they have to practice relieving pain. It equally emasculates the demand for palliative care since euthanasia will be regarded as a simpler and cheaper option than palliative care.

Significantly, legalization of euthanasia undercuts our compassion for those suffering and in pain. Some people may indeed tell individuals that are suffering and in pain that 'Euthanasia is legal, this person did not choose it. If she is refusing euthanasia and is choosing to suffer rather than die, that is her problem. Why should we help her when she is not even helping herself?'[44] The legalization of euthanasia therefore puts enormous pressure on those who are terminally ill and under intolerable pain and unbearable suffering. Accordingly, euthanasia endangers the life of those that are terminally ill particularly those who decided not to kill themselves.[45] Euthanasia is inappropriately described as a means of relieving suffering and pain.

A suffering person who is relieved of suffering is in a position to experience the relief of suffering. But a person who is killed is dead, and so such a person no longer has any bodily experiences. The corpse of a person who has been killed neither feels pain nor the relief of the pain. A corpse feels nothing. Indeed, human beings who are killed no longer exist at all, so euthanasia does not relieve their suffering.[46]

2.4 Child Euthanasia

Child euthanasia is the causing or hastening the death of a child, under the age of 18 years, who is suffering from an intolerable and painful terminal disease for reasons of mercy, especially to allow the child to die

[43]Marije Brouwer and others Quality of Living and Dying: Pediatric Palliative Care and End-of-Life Decisions in the Netherlands'' (2018) 27(3) *Cambridge Quarterly of Healthcare Ethics* 376-384.
[44]Ibid 2.
[45]Ibid 2.
[46]Ibid 2.

in dignity.[47] It is the 'ending of life in a way that, given the unbearable circumstances of a child's dying can make it gentler, easier, and more humane for both the child and for the parents in whose arms you can help that death to occur'[48] Euthanasia entails a competent patient choosing to die founded on the individual's evaluation of his life. Opponents of child euthanasia contend that children under the age of 18 lack the capacity of giving informed consent for significant life decisions especially end of life decisions.[49] It is for this reason that we do not permit children to give consent regarding their own sterilization, to vote in elections, to join the military, or to get married. 'The choice to end one's own life or to authorize another person to end one's own life is much more serious than the choice to join the military, to get married, to have sexual intercourse because those decisions can be reversed and do not completely change an individual's life in every respect.'[50] However, it has been argued that euthanasia should be available to competent and incompetent children who suffer unbearably when there is no other method of relieving their suffering and pain. Euthanasia is sometimes anchored on autonomy or self-determination demonstrated by the voluntary application for euthanasia and in the kindness of doctors to bring to an end unbearable suffering and pain when there are clearly no other options.[51]

3. Legal Framework for Child Euthanasia

Under the Nigerian law, both attempting to commit suicide[52] and aiding suicide[53] are criminal offences. As a result both adult and paediatric euthanasia are criminal offences in Nigeria. The Belgian Euthanasia Law, 2002 was amended in 2014 to legalize euthanasia for minors. The law allows euthanasia for a minor who has the capacity to judge. A minor having a capacity to judge has been interpreted to mean 'having full ability to judge the situation and the full weight of the request for and the

[47] Article 6 (1) of the Convention on the Rights of the Child (CRC). CRC was adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November, 1989 and entered into force on 2nd September, 1990. Euthanasia is not available in Nigeria for both adults and children. See also Section 3(1) of the Child Rights Act, 2003.
[48] Ibid 3.
[49] Brouwer and others (n 42).
[50] Ibid 2.
[51] Ibid 3.
[52] Section 327 of the Criminal Code Act Cap C28 Laws of the Federation of Nigeria 2004.
[53] Ibid s 326.

consequences of euthanasia.'[54] This paper believes that the test of capacity to judge is similar to the test for determining the competence of a child to be a witness in the Law of Evidence where the child must show that he is rational and understands the questions put to him and can provide rational answers to those questions. In order for a child to consent to euthanasia, he must be conscious at the time of the request and should sign the written request. To determine the ability of the child to request euthanasia, a child psychiatrist or psychologist should assess the child. This is dissimilar to the test in Evidence to determine a child's ability to give evidence where it is the trial judge that makes the determination. Euthanasia in Belgium is restricted to children with terminal physical diseases and not psychiatric diseases.

There is no lower age limit under the Belgium law unlike in the Netherlands where the lower age limit is 12 years.[55] In the Netherlands only five euthanasia cases were registered between 2002 and 2012. Out of this number, four of the children were between the ages of 16 to 17 years except one child that was 12 years old.[56] In Belgium, between the years 2002-2007 only four patients of less than 20 years were euthanized. In 2002-2003 only one patient was euthanized, in 2004 -2005 only two patients were reported while in 2006-2007 one patient was reported. These four patients between 18 and 19 years represent 0.05 per cent of the total number of 7066 euthanasia cases within that period which shows extreme low prevalence of euthanasia in the age group of below 20 years. In 2012-2013 there were no reported cases of euthanasia of children or a patient under the age of 20 while in 2016 euthanasia of a 17 year old was reported. A 2013 survey showed that a legal framework for paediatric euthanasia existed only in Netherlands and Luxembourg.[57]

An important question to be considered is how a paediatric psychiatrist or psychologist is to objectively assess a child's capacity to judge. By the amendment to the 2014 Belgian Euthanasia law, the basis for euthanasia was changed from legal capacity to capacity to judge. This is because only adults and not children have the full legal capacity to make determination of issues. As a result of the position of the law, a

[54] Stefaan Van Gool and Jan De Lepeleire, 'Euthanasia in Children: Keep Asking the Right Question,' in David Albert Jones and others, *Euthanasia and Assisted Suicide*, (Cambridge: Cambridge University Press, 2017) 173.
[55] Ibid 173.
[56] Ibid 174.
[57] Ibid 175.

child cannot have the full capacity.[58] It has been suggested that in order to determine a child's capacity to judge, we have to consider the age of the child, type of disease the patient is afflicted with, the patient's level of personal development and the capacity to judge their own situation and requests.[59] A person begins to understand the meaning of death from the age of about seven years and becomes aware of the mortality of all human beings, including himself from the age of 12 years. Assessing a child's capacity to judge should be done individually. There is a broad recognition that children above 14 years can take decisions for themselves in the same manner adults do. This is also accepted for medical decisions. These children that are above 14 years are regarded as mature minors and can take medical decisions like adults.

The Dutch law provides that children aged 12 to 16 are legally permitted to request for euthanasia so long as their parents support the request while children between the age of 16 or 17 are allowed to legally request and receive euthanasia solely on their own determination subject to the fact that their parents must be informed of the child's decision.

4. Ethical Considerations in Child Euthanasia

There are well founded fears that euthanasia or end of life decisions made by children may easily be susceptible to be manipulated to reflect the concerns of those around them. It may not be out of place for request for euthanasia for a child not be for the child's interest but because of the concerns of the parents. In child euthanasia, as is also in adult euthanasia, hypothetical situations do not determine real-life actions and importantly neurological or psychological concerns mean children cannot be expected to take these decisions themselves without any input from adults.

4.1 Neonatal Euthanasia

The neonatal euthanasia or euthanasia for new born is euthanasia for severely defective new born babies whose health conditions are hopeless and under intolerable or unbearable suffering. The euthanasia is available under strict and narrow legal circumstances. If a new-born's prospect in life is very grim, then neonatal euthanasia might be permissible in the circumstances.[60] End-of-life decisions have been described as 'medical

[58] Ibid 177.
[59] Ibid 177.
[60] AAE Verhagen 'The Groningen Protocol for Newborn Euthanasia: Which Way Did the Slippery Slope Tilt?' (2013) 39 *J Med Ethics* 294.

decisions with the effect or the probable effect that death is caused or hastened.'[61] End-of-life decisions with respect to new-born babies include the 'decision to withhold or withdraw life-sustaining treatment, the decision to administer medication with potentially life-shortening effect to alleviate pain and suffering and the decision to deliberately end the life of physiologically stable new-borns with lethal drugs that otherwise would not have died.'[62] Two national surveys conducted in the Netherlands in 1995 and 2001 showed that 65% of infants less than 12 months of age died because life-sustaining treatment was withheld or withdrawn.[63] The survey revealed that 60% of the neonate euthanasia related to babies with incurable diseases and inevitable death while the remaining decisions were based on quality of life reasons. The survey further revealed that in 1% of all the patients, treatment was administered with the clear intention to accelerate death. The babies that were euthanized were those that had difficult and complicated inoperative congenital malformations. The main issues were spina bifida combined with other complexities.[64]

In order to ensure transparency and to identify conditions in which neonatal euthanasia might be appropriate, the Groningen Protocol was developed in 2002 by Eduard Verhagen and Pieter Sauer.[65] The Protocol was refined, published and ratified in 2005 by the Dutch Paediatric Association.[66] The Groningen Protocol for neonatal euthanasia developed five major criteria for neonatal euthanasia namely '(1) diagnosis and prognosis must be certain, (2) hopeless and unbearable suffering must be present, (3) a confirming second opinion by an independent doctor, (4) both parents give informed consent and (5) the procedure must be performed carefully, in accordance with medical standards.'

The Groningen Protocol was criticized for two main reasons. Firstly, it was thought that it will lead to the 'slippery slope'. According

[61] Ibid 39.
[62] Ibid 39.
[63] A Van der Heide and others *Medical End-of-life Decisions made for Neonates and Infants in the Netherlands* cited in Verhagen (n 60) 39.
[64] Ibid.
[65] Neil Francis, 'Neonatal Deaths under Dutch Groningen Protocol Very Rare Despite Misinformation Contagion' (2016) 1(1)*Journal of Assisted Dying* 7.
[66] E Verhagen and PJJ Sauer 'The Groningen Protocol - Euthanasia in Severely Ill Newborns' 352(10) *New England Journal of Medicine* 959-962 cited in Francis, ibid 8.

to this argument the Groningen Protocol is only a first step down a slippery slope which would then lead to a wide use of neonatal euthanasia. This will then lead to erosion of norms in medical practice and in the society. Secondly, it was argued that ending the life of neonatal amounts to a breach of the doctor's obligation to preserve life and will have negative impact on the societal perception of the medical profession.[67] The proponents of the Protocol contend that the Groningen Protocol ensures that doctors are accountable to the society for their decisions. They also believe that the processes required by the Groningen Protocol will reinforce patients' trust in their doctors[68] The Dutch authorities made a Regulation which incorporated a version of the Groningen Protocol which Regulations were latter revised. The revised Regulation pertaining to neonatal euthanasia provides at article 7(a) 'In the event of termination of life of a new-born, the doctor has carefully acted if:

> (a) the doctor is convinced there is enduring and unbearable suffering of the new-born, which among other things means that the discontinuation of medical treatment is justified, that is, prevailing medical opinion has established that intervention is futile and there is no reasonable doubt about the diagnosis and resulting prognosis;
> (b) the doctor fully informed the parents of the diagnosis and the resulting prognosis and that both the doctor and parents believe that there is no reasonable alternative solution to the new-born's situation;
> (c) the parents have agreed to the termination of life;
> (d) the doctor has consulted at least one independent physician who provides a written judgment on the due diligence of the case, or, if an independent physician cannot reasonably be consulted, the doctor consults with the new-born's healthcare team, who provide a written judgment as to the due diligence of the case; and

[67] Nuffield Council on Bioethics, *Decision making: Ethical Issues. Critical Care Decisions in Fetal and Neonatal Medicine* (London: Nuffield Council on Bioethics, 2006); K Costelo 'Euthanasia in Neonates' 334(7600) *BMJ* 912-13 in Venderhag and Sauer (n 66) 4.

[68] H Lindemann and M Verkerk 'Ending the Life of a Newborn: The Groningen Protocol' *The Hastings Centre Report* (2008) 38(1) 42-51.

(e) the termination of life is conducted with due medical care.[69]

The Dutch Regulation established a Commission known as the Central Expert Commission Late Pregnancy Termination and Termination of Life in New-borns[70] to regulate neonatal euthanasia.[71] In the first nine years of the establishment of the Commission, 2006 to 2014 two cases of neonatal euthanasia were reported to the Commission.'[72] This number is at variance with 22 cases of neonatal euthanasia that were reported to local authorities over nine years prior to the making of the Regulation.[73]

Under Nigerian law it is an offence for a physician to withhold medical treatment to a patient and if death occurs as a result of the withholding of such treatment, then the physician may be charged with the offence of murder.[74] It has been held that 'if a patient refuses to give informed consent, the law is that the medical practitioner will not proceed to administer the medical measure or treatment.'[75] Also 'an adult of sound mind has a right to choose what medical treatment made available to him to subject himself to and when to refuse. The court should not allow medical opinion of what is best for the patient to override the patient's right to decide for himself whether he will submit to the treatment offered him.'[76]

4.2 Children, Euthanasia and Autonomy

The issue which calls for consideration is whether where euthanasia is legally permissible for adults, should children competently and legally request for euthanasia? A fortiori, should age alone be the sole criterion for the validity of a request for euthanasia? Some of the arguments against children euthanasia are similar to the arguments against allowing children take medical decisions affecting their health namely that children are incapable, incompetent or immature to make a euthanasia decision and that children should not be burdened with this kind of

[69]Netherlands Government Gazette 2016, Regulation of the Minister of Security and Justice and the Minister of Health, Welfare and Sport of 11 December 2015.
[70] Ibid.
[71] Francis (n 65) 9.
[72]Ibid 9.
[73]Ibid 9.
[74] Section 303 of the Criminal Code Act.
[75]*Okonkwo v MDPDT* (n 27) 26 para C.
[76]Ibid 27 para B and 28 para G.

decision. The issue of lack of autonomy or competence is central to the request for euthanasia by adults both in Netherlands and Belgium where euthanasia is legal.

Autonomy simply means self-rule.[77] It also means free will, independence or sovereignty. 'An autonomous person is an individual capable of deliberation about personal goals and of acting under the direction of such deliberation.'[78]An autonomous individual is that person who is capable of deliberating about his personal goals and taking actions pursuant to such deliberation. Autonomy is essential as a component of a flourishing life and a basis for rights claim.[79] Individuals who are autonomous have some rights that are founded in their autonomy. An autonomous person has the right to determine whether other individuals may do anything to his body or not. He can exercise his right of autonomy by refusing medical treatment. He may exercise that right by doing something which is not for his wellbeing such as giving consent to a medical research that may provide data for other people.

Therefore, autonomy in the sense of personal sovereignty is different from the purpose of promoting a person's wellbeing. The right of autonomy permits an individual to exercise the right in ways that are detrimental to his wellbeing.[80] This was graphically expressed by Joel Feinberg as follows: 'There must be a right to err, to be mistaken, to decide foolishly, to take big risks, if there is to be any meaningful self-rule; without it, the whole idea of *de jure* autonomy begins to unravel'[81] Autonomy is important with respect to patient empowerment and helping patients to make informed decisions. The capacity for autonomous action is seen as a total capacity. A person is either competent or not. A middle-aged adult has autonomous rights while a young child does not. This global view of autonomous action has been criticised because it is

[77] DeGrazia and Millum (n 36) 98.
[78] National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, The Belmont Report (Washington, DC: US Government Printing Office, 1978). <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/read-the-belmont-report/index.html#xbasic> accessed 14 May, 2022.
[79] DeGrazia and Millum (n 36) 98.
[80] Ibid 98.
[81] Joel Feinberg, Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution,' (1982) 58*Notre Dame Law Review* 445-429, 461.

contended that autonomous action is either task specific or domain-specific.[82]

The request for euthanasia must originate from a functionally competent person being a person who has the necessary capacities to make such a decision.[83] The fundamental reason for permitting personal choice is the 'principle of respect for persons and their moral worth, acknowledging their capacity for self-determination.[84] Nonetheless, the right to self-determination is only significant if the individual is properly informed and has at his disposal sufficient information to enable him make the relevant decision; is taking the decision voluntarily and has the capacity to make such a decision. Applying this to euthanasia, the question arises as to whether children, by virtue of their being minors, have the autonomy to make such decisions? Are children capable of making such far reaching decisions the import of which is final?. Can children make serious decisions that have the consequences of life and death?.[85]

It has been argued that some children up from the age of 8 are capable and competent to make difficult decisions regarding their medical treatment.[86] The right of self-determination, it is contended, has no age limit. In Netherlands, the Groningen Protocol provides an option of euthanasia for infants younger than 1 year of age.[87] Under the Groningen Protocol parental agreement is a prerequisite for euthanasia for neonates. This, it is argued, provides for the extension of the notion of self- determination to what is called parental determination.[88] In that regard the parent provides the necessary specific information and perspective on the child's suffering, intimate knowledge of the child and their opinion on the child's quality of life upon which the doctor may exercise his beneficence or kindness in carrying out the act of euthanasia.

[82] DeGrazia and Millum (n 36) 101.
[83]D Mannaerts and F Mortier 'Minors and Euthanasia' (2006) 257, DOI:10.1163/EJ.9789004148949.I-337.124.
[84] Ibid 258.
[85]Ibid 258.
[86]IM Hein and others, 'Key Factors in Children's Competence to Consent to Clinical Research' (2015)16(1) *BMC Med Ethics* 74.
[87]Ministerie van Veiligheid en Justitie en dwe Minister van Volksgezonheid, *Welfare and Sport. Regulation late-term abortion and termination of lives of neonates* (in Dutch). De Staatscourant. 2016; (3145); 1-8.
[88]Ibid Regulation 4.

The idea of parental determination is not without its own legal and moral challenges such as difficulties which may occasion when parents, in exceptional circumstances, prioritize their own needs instead of that of the child.[89]In such circumstances the best interest of the child should be prioritized in accordance with the obligations imposed by the Convention on the Rights of the Child.(CRC) [90]Accordingly, with respect to child euthanasia, the best interest of the child should guide the decision as to whether to euthanize the child or not and the method for such euthanasia.

Consigning paediatric euthanasia to the margins is believed to be reassuring to many because the intentional killing of children and adolescents is more disquieting than the same practices among competent adult patients. Nevertheless, there are at least two circumstances where paediatric euthanasia might be considered to be morally acceptable and might be the basis of legislation regarding paediatric euthanasia. These are where a child is suffering horribly and intolerably from incurable cancer and in that circumstance the child and the parents request lethal injection or administration of drugs to put an end to his pain. Another circumstance is where a new-born with defects that cause severe, unremitting and chronic pain is to be given an overdose of pain medication or lethal treatment.[91]Generally, children are precluded from taking decisions affecting their lives because they are vulnerable and therefore legally incompetent to exercise their rights based on autonomy or self-determination. The reasoning behind this idea is that children lack the competence which adults possess.[92] It is only in exceptional circumstances such as some emergency situations[93], specific medical

[89]Ibid Regulation 4.

[90] Article 3(1) of the Convention. Similar provisions are contained in Article 4 of the African Charter on the Right and Welfare of the Child and Section 1 of the Child Rights Act, 2003.

[91]Ibid 13.

[92]B Ambuel and J Rappaport, 'Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion', (1992) 16 *Law and Human Behavior*, 129–54.

[93]A minor may consent to medical treatment if he will be in serious danger unless health care services are provided(emergency care) – in such circumstances he or she is a 'conditional minor'. This consent to medical treatment is not based on the minor's capacity to consent, but on a theory of *implied consent* by the parents.

situations[94] or when dealing with an emancipated minor[95] are children allowed to make medical treatment decisions otherwise such treatment decisions are made by their parents.[96] Even in those circumstances the exceptions are not granted because the child is believed to possess self-determination and competence but because it is necessary to secure medical care. Nevertheless, recent developments in roles in treatment decision making suggests that children and adolescents should be properly be involved in taking decisions affecting them and that upon acquiring decision making capacity they should indeed be the principal decision makers on issues affecting them. A child who is a patient and is capable of exercising these rights can do so without intervention by parents or guardians. In that regard, a child may give consent to or refuse consent to treatment without parental or guardian consent if it is determined that he is competent to make the decisions.[97]

When the legal competence is in issue, there are two standards that are usually adopted in its determination.[98] They are the presumptive standard and the evidential standard.[99] The presumptive standard stipulates that once a child attains a certain age he is presumed to be competent. An individual is therefore presumed to be functionally competent upon attaining a specific age and the legal competence then

[94]This condition might relate to certain problem-related medical treatments, for example sexually transmitted diseases, contraception, drug abuse and psychiatric problems.

[95]Emancipated minors refer to those minors who live independently of their parents. They may consent to medical care, and refuse it, as if they were adults. There are various criteria to determine who is an emancipated minor such as marriage, parenthood, financial independence. See H Kunin, 'Ethical Issues in Paediatric Life-Threatening Illness: Dilemmas of Consent, Assent, and Communication' (1997) 7(1) *Ethics and Behavior* 43–57.

[96] SE Zinner, 'The Elusive Goal of Informed Consent by Adolescents' (1995) 16 (4) *Theoretical Medicine* 323–31; TL Kuther, 'Medical Decision-making and Minors: Issues of Consent and Assent', (2003) 38 (150), *Adolescence* 343–58.

[97]Mannaerts and Mortier (n 83) 258.

[98]S Elliston, If You Know What's Good for You: Refusal of Consent to Medical Treatment by Children' in S McLean, *Contemporary Issues in Law, Medicine and Ethics* (Aldershot: Dartmouth, 1996).

[99] Ibid.

necessarily attaches to him or her.[100] This presumption of competence, like some presumptions, is subject to be rebutted.

Conversely, despite the fact that a child has not attained the presumed age of competence, yet the child may possess sufficient capacity that amounts to functional competence. This is referred as the evidential standard. The evidential standard is usually referred to as mature minor rule[101] or the Gillick[102] competent child. The Gillick case determined the right of a child under 16 to give consent to medical treatment and the House of Lords held that a child under 16 years of age had the legal competence to consent to medical treatment if the child had sufficient maturity and intelligence to understand the nature and implications of that treatment as well as the risks involved and alternative courses of action. The Gillick competence determination is similar to deciding the competence of a child to give evidence in court. The child's competence is determined by the ability of the child to understand questions put to him and provide rational answers to those questions. Therefore, a distinction between legal competence and functional competence is usually made regarding children who are patients. Accordingly, it is believed that children especially mature minors are capable and competent, unless rebutted, to give consent to medical treatment and indeed take end of life decisions such as terminating life-sustaining treatments. In the case of Okekearu v Tanko[103], the Nigerian Supreme Court held that in the absence of any medical evidence to the contrary, a child of 14 years is competent to give consent for medical treatment and consent to the amputation of one of his fingers. Freyer has opined that that there is now agreement among relevant health professionals and lawyers that adolescents of about 14 years of age should be presumed to be functionally competent to take medical decisions including end-of-life decisions.[104] The CRC recognizes the

[100] For instance, consent to treatment of a 16 year old should be sought in the UK. This consent shall be regarded as valid in law as if he or she is an adult.

[101]The 'mature minor doctrine' is the common-law rule (originated in the USA) that allows an adolescent who is mature to give consent for medical care. See GS Sigman and C O'Connor 'Exploration for Physicians of the Mature Minor Doctrine,' (1991) 119 (4) *Journal of Paediatrics* 520–25.

[102]*Gillick v West Norfolk and Wisbech AHA* (1986) AC

[103] (2002 15 NWLR (Pt 789) 657, 670.

[104]D Freyer, 'Care of the Dying Adolescent: Special Considerations' (2004) 113 (2) *Paediatrics* 381–388.

right of the child to take decisions pertaining to that child.[105] As a result children have the participation right of expressing their views on issues that concerns them and in this regard children can take health decisions affecting them. It equally recognizes the evolving capacity of the child regarding issues concerning the child. Although, there is no equivalent of article 12 in Nigeria's Child Rights Act, 2003[106] nevertheless, that Act recognizes the Nigerian Child's right to privacy under section 8 of the Act.

Mannaerts and Freddy Mortier conclude that some children in certain circumstances may be considered capable of acquiring understanding into their health condition and situation and therefore can be seen as being competent to decide end-of-life matters. They believe that children can exercise the power to determine and request for euthanasia. Paediatric euthanasia should therefore be legitimate especially in those countries where euthanasia has become legally acceptable. If a child is suffering from an incurable and unbearable pain and exhibits sufficient competence then the child can request for euthanasia.

This paper acknowledges the very difficult and traumatic challenges which a child suffering from incurable disease and unbearable pain brings to the child and indeed the entire family. The end-of-life, especially euthanasia, decisions are a specie of medical decisions and has an extraordinary character. It is different from other medical decisions such as consenting to medical examination and treatment. Particularly, the exceptional character of euthanasia stems from the fact that such decisions are final and irreversible. Adult euthanasia is still controversial and as a result it is permitted by extremely few countries. Even in those countries that permit adult euthanasia, there are very strict guidelines that must be followed by the patient and the physician before the request can be acted upon. This is despite the fact that adults are believed to possess self-determination, competence and autonomy. Paediatric euthanasia is even more controversial because of the vulnerability and lack of capacity of children. The paper also believes that the doctrine of mature minor and

[105] Article 12 of the CRC provides that "State parties assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

[106] However, an equivalent of Article 12 CRC can be found in Article 12 of the African Charter on the Rights and Welfare of the Child which Nigeria has ratified.

the standard of evidential competence may apply to other aspects of health care decisions especially if the decision is to ensure access to health care for children. This paper also believes that Gillick competence is insufficient for a child to make a determination regarding euthanasia. The Gillick competence principle was developed to enable certain categories of children to access medical treatment and not for the purpose of making end-of-life decisions.

The legalization of euthanasia undoubtedly puts enormous social and psychological pressure on terminally ill persons to end their own lives and relieve the family and care givers from the task of caring for them. A fortiori, permitting child euthanasia will put even more pressure on terminally ill children who are still under the influence of others especially their parents and guardians. The rights of autonomy and rights of participation especially right to express views and other rights such as privacy provided under the CRC are for the purpose of protecting children, secure their wellbeing and protect their best interest. The rights are not for the purpose of imposing severe and arduous responsibilities on children. This paper is of the view that it is bewildering to allow children to determine euthanasia; and to place such a heavy burden and responsibility of such a decision on children, a decision that is extremely difficult and traumatic even for adults, is to stretch insensitivity and lack of empathy to the extreme.

5. Conclusion

Definition of euthanasia has several approaches. Despite that, the essential features of euthanasia are that the act of euthanasia has the consequence of shortening life and is restricted to the medical environment. In euthanasia death which occurs is believed to be of advantage to the patient. There seems to be too much emphasis on unremitting pain and suffering as the reason for demand for euthanasia. However, fear of loss of autonomy and dissipating family financial resources are the main reasons given by those asking for euthanasia

There are significant moral and legal differences between active and passive euthanasia. Indeed, even within the realms of morals carrying out euthanasia has emotional, psychological and traumatic consequences even on the doctors that carry out such acts. Child euthanasia is even more disquieting.

Generally, children are ill-prepared to request for euthanasia as a result of their tender years. However, some minors have the capacity to

take medical decisions including end-of-life decisions. Data has shown that legalization of child euthanasia in some countries has not lead to the slippery slope anticipated. Legalization of child and neonate euthanasia requires extreme care and regulation to restrict it to those circumstances where it is inevitable.

IMPACT OF CLIMATE CHANGE REGIME IN MAINTAINING INTERNAL SECURITY IN NIGERIA

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Abstract

Scientific and empirical data in the last three decades confirm the climate change phenomenon on human and natural systems. One of such impacts is drought which cause natural resource scarcity, hence agro-conflict in Nigeria. This Paper aims to examine the effectiveness of the climate change regime in maintaining internal security in Nigeria. The method adopted is the doctrinal approach which is based on both primary and `secondary sources of data collection. The primary source includes statutes while the secondary sources include text books, journal articles, internet materials and lecture notes. Findings reveal that although climate change does not fit into the mode of traditional threats to national security, such as war, terrorism and insurgency, its non-violent and gradual manifestation tend to disguise its impact on the civic, political and socio-economic lives of the citizenry. Findings further reveal that climate change polices and sustainable internal security is central and complimentary of each other, as a result, the Nigerian State must work towards both. As adoption, awareness and implementation of climate polices could reduce insecurity to modest levels in the country. Findings also reveal that the Nigerian State appears to have effective climate change regime to deal with security issues, but the problem boils down to enforcement of the regimes. This, in so many ways, has affected the capacity of the security agencies to maintain law and order in the country. It is recommended that solutions cannot be attained through force alone but by strict implementation of the Climate Agreements.

Keywords: Climate change regulation, internal security, sustainable development, law enforcement, Nigeria.

1. Introduction

The term 'environment' include water, air, land and all plants and human beings and animals living therein and the harmonious inter-relationship

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which exist among these or any of them.[1] It is important as it provides for the food chain and the ecological system; is a source of natural beauty and man's only home. It is in the recent times under pressure,[2] which is due to the fact that man's quest for harnessing nature for his development was seen from nature's wealth creating abilities.

The climate is definitely changing and it has become one of the greatest challenges currently facing humanity,[3] apart from hunger, poverty, disease and overpopulation. It is not restricted to any national boundary as its impacts are already being felt both in the developing and developed countries. In Nigeria, Climate change manifests as epileptic seasonal variations. For instance, the rainfalls previously occur between March and September with a break in August in the middle belt.[4] But now, the rain lasts beyond September and sometimes even falls during Christmas in December. Furthermore, the dry season that starts in October/November is distorted, that no one really knows when the dry season would start or end.[5] These occurrences are believed to have been caused by climate change.

It is an uncomfortable fact that human activities seem to constitute the root cause of the international as well as national environmental problems.[6] However, the problem is no longer about whether or not there is climate change, but on the actual cause of climate change and its impact. In 2001, the Intergovernmental Panel on Climate

[1] National Environmental Standards Regulations and Enforcement Agency (Establishment) Act, 2007, s 37.

[2] EU Onyeabor, 'Precautionary and Environmental Management and Control: How far so far in International Environmental Law?' [2011] (3)(1) *Nigerian Journal of Petroleum, Natural Resources and Environmental Law*; 58.

[3] Theodorou Petros, 'How do Cities Mitigate and Adapt to Climate Change? Could (Synergies Among) Cities be the Drivers for Global Action on Climate Change? Examples from Los Angeles and Durban', <https://climate-exchange.org/2014/02/12/how-do-cities-mitigate-and-adapt-to-climate-change-could-synergies-among-cities-be-the-drivers-for-global-action-on-climate-change-examples-from-los-angeles-and-durban-2/> accessed 7 November 2021.

[4] EU Onyeabor, Lecture Notes on Climate Change and the Law, Faculty of Law, University of Nigeria Enugu Campus. 11 October 2016.

[5] *Ibid.*

[6] JC Carlson and GWR Palmer and BH Weston, *International Environmental Law and World Order: A Problem-Oriented Course Book,* with a Contribution from David Bollier (3rd edn, West Publishing Company USA 2012) vii.

Change (IPCC)[7] concluded that 'there is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities'. Areas identified as major contributor to human induced climate change are the Agriculture, Land Use Change, Industrial Activities and the Energy Sector. Furthermore, the Court in *Environmental Defence Society v Auckland Regional Council and Contact Energy Ltd*[8] gave a judicial node to the assertion that the present rise in global temperature is induced by human activity. Such human activities include deforestation, industrial activities, cooking with open fire, bush and waste burning, overpopulation, agriculture, fossil fuel usage and urbanization among others. It should be noted that the developed countries have over the years developed through the use of fossil fuel and are better equipped to deal with the adverse impacts of climate change. The developing countries which Nigeria is one of, unlike the developed countries is in dilemma. This is as a result of the fact that even though they are battling with crippling poverty and inequality at home, they need to develop to save their people out of poverty and at the same time, cut GHGs (Greenhouse Gas) emissions in order to save the world from global warming.

The policies, standards and agreements at the international level have sought to put a balance to particularly ensure that the needs of the States for economic development do not prohibit the need to protect the environment and in particular the climate. But it appears that failure to share limited resources well underlies many of the violent conflicts that dot the country's social landscape, pitting neighbour against neighbour, Muslim against Christian, patron against client, citizen against the State.[9] Furthermore, the Nigerian government does not want to commit itself to a climate agreement whose economic effects are unpredictable. This allows some reflection on climate change and its impact on the Nigerian security system. Moreover, there is also the need to discuss what the communities and government can do to overcome insecurity in order to address the issue

[7] United Nations Intergovernmental Panel on Climate Change, Fourth Assessment Report (AR4), 2007. p. 7

[8] [2002] NZRMA 492.

[9] Vivan Ezra and others, 'Climate Change and its Effect on National Security in Nigeria', [2014](2)(4), 6-10. ISSN 2348-1226 (online), *International Journal of Interdisciplinary Research and Innovations,* <https://www.researchgate.net/publication/307433891_CLIMATE_CHANGE_AND_ITS_EFFECT_ON_NATIONAL_SECURITY_IN_NIGERIA> accessed 16 October 2021.

of disharmony in the country leading to economic and political instability and civil unrest; why it continues to exist; and what steps might be required to narrow it.

The paper in addressing the impact of the climate change regime in maintaining internal security in Nigeria is in five sections. The first section is the introduction; the second section discusses the change regime ((what is climate change, instances of its impact on the human environment, the international legal instruments on climate and its national implementations); the third section discusses climate change and internal security management in Nigeria; while the fourth section is the recommendation and the fifth, the conclusion.

2. Climate Change Regime

Climate change is one of the greatest challenges to ever confront the international community. It respects no national boundary as its impacts are already being felt both in the developing and developed countries of the world. Climate change refers to the response of the planet's climate system to altered concentration of carbon dioxide (CO_2) and other Greenhouse Gases (GHGs) in the atmosphere.[10] Whereas, the climate changes when the total amount of energy from the Sun that is kept in the Earth's atmosphere changes,[11] the energy changes spread out around the globe upsetting climate processes. This change in energy is then distributed around the globe by winds, ocean currents, and other mechanisms to affect the climates of different regions.[12] There are many causes for these energy shifts. Scientists have linked to climate change[13] the interdependence of the global economy on CO_2 emitting energy sources.[14]Although, nature could be said to be a cause of climate

[10] Chris Wold and David Hunter and Melissa Powers, *Climate Change and the Law* (LexisNexis New Jersey 2009) 2.

[11] Earth Eclipse 'Natural and Man Made Causes of Climate Change', --<http://www.eartheclipse.com/climate-change/natural-nd-man-made-causes-of-climate-change.html> accessed 11 November 2021.

[12] What's Your Impact, 'What Causes Climate Change?' --<http://whatsyourimpact.org/climate-change/causes> accessed 11 November 2021.

[13]New York Times, 'What the Paris Climate Meeting Must Do' Editorial, *New York Times (*28 November 2015) <http://www.nytimes.com/2015/11/29/sunday/what-the-paris-climate-meeting-must-do.html> accessed 14 October 2021.

[14]Seth Bornstein, 'Earth is a Wilder, Warmer Place since Last Climate Deal Made', (29 November 2015), <http://www.apnews.excite.com/article/20151129/eu-climate-countdown-since-1997-edf9d62e51.html> accessed 14 October 2021.

change,[15] it is the manmade causes that had over the times caused global warming and resultant impacts in the climate system.

One of the implications of climate change is in extreme weather events[16] that have threatened all countries and its impacts are not confined to national boundaries. Further warming is unavoidable due to past heat-trapping emissions; unless today's emissions are aggressively reduced.[17] According to the IPCC[18] the extent of climate change effects on individual regions will vary over time and with the ability of different societal and environmental systems to mitigate or adapt to change. The IPCC predicts that increases in global mean temperature of less than 1.8°F - 5.4°F (1°C - 3°C) above 1990 levels will produce beneficial impacts in some regions and harmful ones in others.[19] It is noteworthy that the World Bank stated that the developing countries are the most vulnerable to climate change impacts.[20]

Environmental and socio-economic impacts of climate change include, amongst others - shrinking ice sheets and declining arctic sea ice,[21] ocean acidification,[22] higher temperatures and warming oceans,[23] melting ice and sea level rising seas,[24] decreased snow cover

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[15] PJ Poses, 'Roles of Religion and Ethics in Addressing Climate Change' *Ethics in Science and Environmental Politics*; [2007] (31)(49) 4, <http://www.int-res.com/articles/esep/2007/E80.pdf>, accessed 11th February, 2017.

[16] SI Ladan, 'Climate Change in Extreme Weather Events: A Case Study of Hailstorms in Katsina Metropolis, Katsina State, Nigeria' *International Journal of Environmental Studies [2011] (8) (1),* 76-85 at 76.

[17] 'Global Warming Effects around the World', -- <http://www.climatehotmap.org/global-warming-effects/> accessed 17 November 2021.

[18] 'The Consequences of Climate Change', -- <https://climate.nasa.gov/effects/> accessed 17 November 2021.

[19] *Ibid.*

[20] World Bank, *World Development Report 2010: Development and Climate Change* (The International Bank for Reconstruction and Development 2010) xx

[21] 'Climate Change: How Do We Know?', -- <https://climate.nasa.gov/evidence/> accessed 17 November 2021.

[22] *Ibid.*

[23] 'Climate Change Threats and Solutions: What Can We Do to Make a Difference?', -- <https://www.nature.org/ourinitiatives/urgentissues/global-warming-climate-change/threats-solutions/> accessed 17 November 2021.

[24] 'Climate Change Consequences', -- <https://ec.europa.eu/clima/change/consequences_en> accessed 17 November 2021.

and glacial retreat,[25] changing landscapes, wildlife habitat and ecosystems,[26] increased risk of storms, droughts[27] and floods and agriculture and food supply.[28] Climate impacts are also felt on the coral reefs,[29] water resources,[30] coastal areas,[31] society and communities at risk (climate refugees),[32] energy sector,[33] forests,[34] and people and the environment,[35] public health,[36] transportation,[37] economy[38] and

[25] 'The Effects of Climate Change' (2 October 2016) <https://www.wwf.org.uk/updates/effects-climate-change> accessed 17 Nov 2021.

[26] 'Plants, Animals, and Ecosystems', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/ecosystems.html> accessed 17 November 2021; <https://www.epa.gov/climate-impacts/climate-impacts/ecosystems>, 'Climate Impacts on Ecosystems' accessed 17 November 2021.

[27] WP Cunningham and MA Cunningham, *Environmental Science: A Global Concern* (12th Edn, McGraw-Hill Companies 2012) 330.

[28] 'Climate Impacts on Agriculture and Food Supply', -- <https://www.epa.gov/climate-impacts/climate-impacts-agriculture-and-food-supply> accessed 17 November 2021; 'Effect of Climate Change on Agriculture', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/agriculture.html> accessed 17 November 2021.

[29] 'The Effects of Climate Change' (n 25).

[30] 'Impacts of Climate Change', -- <http://www.davidsuzuki.org/issues/climate-change/science/impacts/impacts-of-climate-change/> accessed 17 November 2021; 'Climate Impacts on Water Resources', -- <https://www.epa.gov/climate-impacts/climate-impacts-water-resources> accessed 17 November 2021; 'Water Supplies', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/water.html> accessed 17 November 2021.

[31] 'Effect of Climate Change on Coastal Areas', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/coastal.html>, ' accessed 17 November 2021; 'Climate Impacts on Coastal Areas', -- <https://www.epa.gov/climate-impacts> accessed 17 November 2021.

[32] 'Climate Impacts on Society', -- <https://www.epa.gov/climate-impacts/climate-impacts-society> accessed 17 November 2021; Navdanya, 'Climate Change', <http://www.navdanya.org/climate-change> 17 November 2021.

[33] 'Climate Impacts on Energy', -- <https://www.epa.gov/climate-impacts/climate-impacts-energy> 17 November 2021; 'Climate Change Effect on Energy', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/energy.html> accessed 17 November 2021.

[34] 'Effects on Forests', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/forests.html> accessed 17 November 2021; 'Climate Impacts on Forests', -- <https://www.epa.gov/climate-impacts/climate-impacts-forests> accessed 17 November 2021.

[35] 'Effects on People and the Environment', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/> accessed 17 November 2021.

recreation.[39] Furthermore, all the regions of the world[40] - Africa, Asia, Australia and New Zealand, Europe, Latin America, North America, Polar Regions, Small Islands – are not spared from climate impacts.

Nigeria, like other African countries are badly hit by the effects of climate change because of extreme poverty and absence of technology to combat such effects[41]. Others include the topography, climate, vegetation, soils, economic structure, population, energy demands and agricultural activities,[42] limited human and financial resources, history and weak institutions.[43]Rainfall variation is projected to continue to increase. Precipitation in southern areas is expected to rise and rising sea levels are expected to exacerbate flooding and submersion of coastal lands. Droughts have also become constant in Nigeria, and are expected to continue in Northern Nigeria, arising from a decline in precipitation and rise in temperature. Lake Chad and other lakes in the country are drying up and at risk of disappearing.[44]

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[36] 'Effects on Health', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/health.html> accessed 17 November 2021.

[37] 'Climate Impacts on Transportation', -- <https://www.epa.gov/climate-impacts/climate-impacts-transportation> 17 November 2021.

[38] 'Climate Change Threats and Solutions: What Can We Do to Make a Difference?' (n 23).

[39] 'Effect on Recreation', -- <https://www3.epa.gov/climatechange/kids/impacts/effects/recreation.html> accessed 17 November 2021.

[40] 'Climate Change 2007: Synthesis Report - IPCC', -- <https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_full_report.pdf> accessed 12 October 2021.

[41] NM Idris, 'The Effects of Climate Change in Nigeria', (18 April 2011), <https://environmentalsynergy.wordpress.com/2011/04/18/the-effects-of-climate-change-in-nigeria/> accessed 17 November 2021.

[42] Nkechi Isaac, 'Mitigating Negative Effects of Climate Change in Nigeria', (26 April, 2016), <http://www.leadership.ng/features/521690/mitigating-negative-effects-climate-change-nigeria-2> accessed 17 November 2021.

[43] World Bank (n 20). 6.

[44] 'Climate change in Nigeria: Impacts and responses', -- (2019) *Institute of Development Studies (IDS)* <https://www.preventionweb.net/publications/view/68975>, accessed 19 October 2021.

According to Ebele and Emodi,[45] evidence have shown that climate change impacts on Nigeria arose from various climate change related causes experienced due to the increase in temperature, rainfall, sea level rise, impact on fresh water resources, extreme weather events, flooding, drought and desertification in the north and increased health risk. There are however, two extremes of the expected challenges of the climate change in Nigeria, viz: increase in rainy and dry season with each lasting approximately six months on the average, that is, April to October and October to March respectively.[46]

To tackle the adverse impact of climate change, most countries of the world in June 1992 convened and adopted an international treaty - the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC highlights two fundamental response strategies to address climate change - adaptation processes and mitigation mechanisms- which are provided for in Art 4 on the commitment of States Parties. The purpose of mitigation is prevention of further warming not reversion of the already done warming. Adaptation processes on the other hand is how we adjust to climate impact, it involves the active involvement of different actors.[47]While adaptation aims to lessen the adverse impacts of climate change through a wide-range of system-specific actions; mitigation looks at limiting climate change by reducing the emissions of GHGs and by enhancing sink opportunities.[48] According to United Nations Environmental Programme (UNEP),[49] while climate change mitigation involves taking practical actions to manage risks from climate impacts, protect communities and strengthen the resilience of the economy; adaptation refers to dealing with the impacts of climate change.

[45] NE Ebele and NV Emodi, 'Climate Change and Its Impact in Nigerian Economy', [2016] (10)(6) *Journal of Scientific Research and Reports*, DOI: 10.9734/JSRR/2016/25162.

[46] Uche Ngene, 'Climate Change: Any Impact on Nigeria?', <http://www.vanguardngr.com/2012/10/climate-change-any-impact-on-nigeria/> accessed 17November 2021.

[47] EU Onyeabor, Lecture Note on Climate Change and the Law, Faculty of Law, University of Nigeria Enugu Campus. 7 March, 2016.

[48] 'Adaption and Mitigation: Responses to Climate Change' <http://know.climateofconcern.org/index.php?option=com_content&task=article&id=142> accessed 12 October 2021.

[49] 'Climate Change Mitigation - UNEP' <www.unep.org/climatechange/mitigation/> accessed 13 September 2021.

As a result of low adaptive capacities and the projected impacts of climate change, a consensus has emerged that developing countries are more vulnerable to climate change than developed countries. This according to Nzeadibe and others,[50] is due to the predominance of rain-fed agriculture in their economies, the scarcity of capital for adaptation measures, their warmer baseline climates and their heightened exposure to extreme weather events. This could be attributable to the general belief that the developing countries is to adapt to climate change while the developed countries mitigate.

Having discovered the inadequacies of the UNFCCC and its subsequent 1997 Kyoto Protocol, the United Nations in 2015 at the 21st Conference of Parties (COP 21) held in Paris, France, adopted the Paris Agreement. The Paris Agreement 2015 seeks to accelerate and intensify the actions and investment needed for a sustainable low carbon future.[51] Its central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C. The Agreement also aims to strengthen the ability of countries to deal with the impacts of climate change. To reach these ambitious goals, appropriate financial flows, including by, before 2025, setting a new goal on the provision of finance from the US$ 100 billion floor, and an enhanced capacity building framework, including an Initiative for Capacity Building, will be put in place: thus supporting action by developing countries and the most vulnerable countries, in line with their own national objectives. The Agreement plans to enhance transparency of action and support through a more robust transparency framework.

Here in Nigeria, the concern to protect the environment gave rise to the creation of the Federal Ministry of Environment in 1999 to ensure effective coordination of all environmental matters, which were hitherto fragmented and resident in different line Ministries. The creation was intended to ensure that environmental matters are adequately

[50] TC Nzeadibe and others, 'Climate Change Awareness and Adaptation in the Niger Delta Region of Nigeria', *African Technology Policy Studies Network, Working Paper Series* [2011] (57) ISBN: 978-9966-1552-6-9.

[51] 'The Paris Agreement', -- <http://unfccc.int/paris_agreement/items/9485.php> accessed 8 September 2021.

mainstreamed into all developmental activities;[52] as a result, the Ministry took over environmental protection functions of various Federal Government Agencies, Ministerial Departments and Units upon its establishment.[53]National efforts to address climatic change are guided by a number of principles[54] including the following:

1. Strategic climate change response is consistent with national development priorities;
2. Climate change is addressed within the framework of sustainable development, which ensures that climate change response must be sensitive to issues of equity, gender, youth, children and other vulnerable groups;
3. The use of energy as a key driver for high economic growth is pursued within the broad context of sustainable development;
4. Mitigation and adaptation are integral components of the policy response and strategy to cope with climate change;
5. Climate change policy is integrated with other policies to promote economic and environmental efficiency;
6. Climate change is cross-cutting and demands integration across the work programmes of several government ministries/agencies/parastatals and stakeholders, and across sectors of industry, business and the community; and
7. Climate change responses provide viable entrepreneurship opportunities.

Since the submission of its first national report to the UNFCCC in 2003, Nigeria has made some progress on climate change governance.[55] In its National Development Plan (Vision 2020), the government recognizes climate change as threatening its economic prosperity and future development. For improving policy formulation and co-ordination in this area, the Ministry of the Environment created a Special Climate

[52] 'Federal Ministry of Environment: Introduction', -- <http://www.environment.gov.ng/> accessed 10 September 2021.
[53] 'About the Ministry', -- <http://www.environment.gov.ng/about> accessed 17 November 2021.
[54] Michal Nachmany and others, 'Climate Change Legislation in Nigeria' in *The 2015 Global; Climate Change Legislation Study: A Review of Climate Change Legislation in 99 Countries* <http://www.lse.ac.uk/GranthamInstitute/legislation/countries/nigeria/> accessed 29 October 2021.
[55] *Ibid.*

Change Unit was transformed into the Department of Climate Change.[56] In recognizing the need for an adequate response strategy to climate change, the National Assembly passed the Nigerian Climate Change Act, 2021 which was further assented to by the President on the 18 November, 2021. The Act demonstrates Nigeria's commitment to net-zero emissions as reiterated by President Muhammadu Buhari at the COP26 conference in Glasgow in 2021.[57] Notable highlights of the Act include: Scope and Purpose of the Act, Establishment of the National Climate Council and Secretariat, Carbon Budge, Climate Fund and Nation Climate Change Action Plan.[58] Furthermore, key aspects of the Act include its provision for nature-based solutions such as Reducing Emission from Deforestation and forest Degradation **(**REDD+) and environmental-economic accounting**,** and the push for a net zero emissions deadline for Nigeria.[59]

Besides these efforts to improve the country's institutional capacity to deal with climate change, there have been several policy initiatives with relevance to climate change.[60] For example, since 2007, civil society organizations and international donor organizations have been working together to identify climate change vulnerabilities and develop a comprehensive adaptation strategy. In 2011, these efforts resulted in the publication of the National Adaptation Strategy and Plan of Action on Climate Change for Nigeria (NASPA-CNN). The Strategy outlines responses to climate change in key areas such as agriculture (crops and livestock), freshwater resources, coastal water resources and fisheries, forests, biodiversity, health and sanitation, human settlements and housing, energy, transportation and communications, industry and commerce, disaster, migration and security, livelihoods, vulnerable groups, and education. However, the policy document did not find official support. Instead, in 2012, the Executive Council approved the adoption of a National Climate Change Policy and Response Strategy (NCCP-RS). NCCP-RS aims to provide a framework for responding to

[56] *Ibid.*
[57] OM Atoyebi, 'The Nigerian Climate Change Act 2021: Nigeria's Antidote to the Global Climate Crises' <https://omaplex.com.ng/wp-content/uploads/2021/12/THE_NIGERIAN_CLIMATE_CHAN> accessed 20 April 2022.
[58] *Ibid.*
[59] 'Climate Change Bill 2021 (Bill No. 31 of 2021)', -- <https://www.parliament.gov.fj/wp-content/uploads/2021/08/Bill-31-Climate-Change-Bill-2021.pdf> accessed 20 April 2022.
[60] Michal Nachmany and others (n 54).

climate change-induced challenges such as increased flooding and rising sea levels. There are also plans to create a National Strategic Climate Change Trust Fund (NSCCTF) and develop a National Appropriate Mitigation Action (NAMA) document. In 2013, a National Policy on Climate Change was finally approved and adopted by the Federal Executive Council. This forms the basis for any new climate change law.[61] The challenge of the Climate Change Unit is that it exists at the Federal Ministry of Environment as a technical department without information as to its establishment, structure and functions. As a result the environmental protection objective of establishing it would no longer be feasible.[62]

The second institution on climate change governance in Nigeria is the National Environmental Standards Regulations Enforcement Agency (NESREA). The NESREA (Establishment) Act, (NESREA Act) 2007, was enacted as Act No. 25 and commenced on the 30th of July 2007.[63] The Act[64] repealed the Federal Environmental Protection Agency Act 1992[65] and in s 1 established the NESREA, which shall be the enforcement Agency for environmental standards, regulations, rules, laws, policies and guidelines.[66] The vision of the Agency[67] is to ensure a cleaner and healthier environment for all Nigerians, while the mission is to inspire personal and collective responsibility in building an environmentally conscious society for the achievement of sustainable development in Nigeria. The Agency also collects, analyses, stores, and retrieves environmental data and information for input into national planning and development.[68] The obstacles of NESREA emerge from the Act itself, it lacks enforcement mechanisms; the Act is silent as to

[61] *Ibid.*
[62] 'About the Ministry' (n 53).
[63] EU Onyeabor, 'NESREA Act and the Protection of the Nigerian Environment' unpublished lecture Note Series, Department of International and Comparative Law, Faculty of Law, University of Nigeria Enugu Campus, 2016, 3.
[64] The Act was signed into law by President Umaru Musa Yar'Adua, GCFR, and this has been published in the Federal Republic of Nigeria Official Gazette [31 July 2007] (94)(92).
[65] NESREA Act (n 1) s 36.
[66] *Ibid.* s 1(2)(a)
[67] 'National Environmental Standards Regulatory and Enforcement Agency (NESREA)', -- <http://www.environment.gov.ng/nesrea.html> accessed 30 September 2021.
[68] 'NESREA: What We Do', -- <http://www.nesrea.gov.ng/activities/index.html> accessed 17 November 2021.

whether the Agency has the powers to prosecute the offenders; and oil and gas which are the main cause of global warming are not within the ambit of the Agency.[69]

3. Climate Change and Internal Security Management in Nigeria

Now, although the relationship between climate change and conflict is apparently weak, FC Onuoha and GE Ezirim[70] argue the connection between climate change and national security is complex, non-linear, and, at best, uncertain. Nevertheless, its implications for national security are more pronounced in states and regions of the world where environmental and natural resource challenges have added greatly to the matrix of political, socio-economic, religious, and cultural tensions threatening the survival of people and the stability or legitimacy of the state.[71]

Climate change pose threats to the security situation in Nigeria through conflict over resources. This is exacerbated by increasing water and food scarcity. Desert encroachment and steadily depleting vegetation and grazing resources in the North have prompted massive emigration and resettlement of people to areas less threatened by desertification. This has resulted to communal clashes among herdsmen and farmers and inter-ethnic clashes, some of which have turned deadly.[72]

In Nigeria, rising temperatures, more erratic rainfall (causing both droughts and floods) and rising sea levels along the southern coast have contributed to large-scale changes in the agricultural sector, increased tensions over arable land and changed access to the country's oil revenues.[73] Environmental changes also contribute to population

[69] NESREA Act (n 1) s 7(g).

[70] FC Onuoha and GE Ezirim, 'Climatic Change and National Security: Exploring the Conceptual and Empirical Connections in Nigeria', (January 2010), <https://www.researchgate.net/publication/268575717_255_Climatic_Change_and_National_Security_Exploring_the_Conceptual_and_Empirical_Connections_in_Nigeria> accessed 19 September 2021.

[71] FC Onuoha and GE Ezirim (N 70).

[72] Huma Haider, 'Climate change in Nigeria: impacts and responses', (10 October 2019), <file:///C:/Users/B/Documents/CC%20and%20sustainable%20internal%20security%20in%20Nig/675_Climate_Change_in_Nigeria.pdf> accessed 19 September 2021.

[73] Adam Day and Jessica Caus, *Conflict Prevention in an Era of Climate Change: Adapting the UN to Climate-Security Risks* (United Nations University New York 2020) 35,

displacements across the country and the broader region, not only through diminishing arable land, but increasingly due to sea level changes. More than 50 million people may need to be relocated due to sea level rises alone in the coming years. And with a population highly dependent upon agriculture, amidst long-standing tensions around land and natural resources, changing environmental conditions present serious and immediate risks to the country.[74]

According to Adishi and Oluka,[75] the reality of growing aridity of several parts of northern Nigeria has been universally acknowledged. They posit that about 35% of land areas that were cultivable before the 1960s are increasingly getting arid in 11 of Nigeria's northernmost states (Borno, Bauchi, Gombe, Adamawa, Jigawa, Kano, Katsina, Yobe, Zamfara, Sokoto, and Kebbi). As a result, "the livelihoods of some 15 million pastoralists in northern Nigeria are threatened by decreasing access to water and pasture- shortages linked to climate change".

For many communities in Nigeria, especially the southeast zone (Abia, Anambra, Ebonyi, Enugu, and Imo States), erosion and the associated flooding constitute serious environmental hazards.[76] Increase in the frequency of heavy rains and flooding had led to widespread erosion and siltation with more dramatic impact on these areas. Its impacts include destruction of valuable property, loss of livelihood, loss of soil nutrients and biodiversity, productivity collapses, and loss of flora and fauna due to the transportation of sand deposits or pollutants to other natural ecosystems. Loss of productivity and valuable property undermine food security, personal security, and social order in a community with consequences for internal displacement.[77]

Furthermore, the problem of coastal erosion/flooding due to sea-level rise and storm surges constitute a significant source of threat to life,

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<file:///C:/Users/B/Documents/CC%20and%20sustainable%20internal%20security%20in%20Nig/UNUClimateSecurity.pdf> accessed 19 September 2021.

[74] *Ibid.*

[75] Eric Adishi and NL Oluka, 'Climate Change, Insecurity and Conflict: Issues and Probable Roadmap for Achieving Sustainable Development Goals in Nigeria', [2018],(4)(8). 12, ISSN: 2545-5303, *International Journal of Social Sciences and Management Research,* <file:///C:/Users/B/Documents/CC%20and%20sustainable%20internal%20security%20in%20Nig/Climate%20Change,%20Insecurity.pdf> accessed 19 September 2021.

[76] FC Onuoha and GE Ezirim (n 70).

[77] *Ibid.*

property, livelihoods, and infrastructure in the Niger Delta.[78] And this is made worse by the destruction of mangrove forests due to oil exploitation activities. Flooding is widespread in the Niger Delta because of low relief, the reduced hydraulic capacities of water channels, and high rainfall. In the mangrove swamp forest areas, diurnal tidal movements result in floods exacerbated by rising sea levels, coastal erosion, and land subsidence.

Climate change also weaken the economic base that determines military capacity, as income from and employment in primary sectors such as agriculture, forestry, fishing and mining, and from environmentally dependent services like tourism, are all be adversely affected by environmental change.[79] Furthermore, climate change-induced shifts in economic opportunity, for instance, undercut existing trade relationships that act as barriers to violence, leaving mistrust, rumour, and broken agreements in their place.[80] Two examples illustrate the problem.[81] In the south, many farmers now plant over grazing routes long agreed upon with Fulani herders, in some cases leading to violence. Their reasons are partly climate related: shifts in planting techniques driven by changing rains and temperature. Migration is also something of a wild card among the climate change-induced conflict risks.

As cropland becomes unproductive and previous settlements become unliveable as a result of harsh environmental condition (drought, desert encroachment, and desertification), people are forced to compete for available arable land or migrate to a new settlement.[82] Against this backdrop, the rate of migration and cross-border movement in the northern region (with international borders with the Republics of Cameroon, Chad, and Niger) has intensified with serious implications for resources and identity conflicts in the region, and even beyond. Both the competition for scarce resources (arable/grazing land, fresh water, etc.) and eco-migration triggered by climate change-induced shrinkage of

[78] *Ibid.*
[79] Tochukwu Nwauba, 'Climate Change: An Emerging Threat to Nigeria's National Security', [2018](6)(11) Page No.: SH-2018-327-337, e-ISSN : 2321-3418, International Journal of Scientific Research and Management, <https://ijsrm.in/index.php/ijsrm/article/view/1882> accessed 19 September 2021.
[80] Vivan Ezra and others (n 9).
[81] Vivan Ezra and others (n 9).
[82] FC Onuoha and GE Ezirim (n 70).

Lake Chad, underpin actual and potential conflicts in some parts of the northeast zone of Nigeria.

Moreover, the Fulani herdsmen are nomadic and habitually migratory. Due to expansive desertification, drought and unchecked deforestation in Northern Nigeria, the herdsmen naturally seek greener pastures southward.[83] As the resultant migration has intensified, so too has violent clashes over grazing lands with local farmers in the south and pastoral herdsmen whom the former accuses of wanton destruction of their crops and forceful appropriation of their lands.

It is noteworthy that crop farmers produce more than 80% of Nigeria's food.[84] Leaving this critical lifeblood of the country's economic and cultural life at the mercy of herders and their cattle is not an option. Farmers, the majority of whom are women, constitute the bedrock of the country's informal economy. And the unofficial farming sector is the country's highest employer of labour. Now, this key economic sector is under siege. The on-going resource and environmental tension represented by the clash between herders and crop farmers has embedded religious significance. Most itinerant herders are northerners and adherents of the Islamic faith. Their clashes with farmers happen mainly in the central and southern regions, where most people are Christian and animist.[85] The herder-farmer crisis demonstrates the reality of the climate change and resource control interface, and its embedded security challenges. The scarcity of water and shrinking of grazing fields in the desert north appear to be pushing herders southwards to the grasslands of the savannahs and forests.

Furthermore, the Nigeria's biodiversity[86] (which relates to the diversity of ecosystems, species, and genetic traits within species which exists in a particular area: wetland, rainforest, savannah grasslands, plant and animal diversity, and various primate sub-species) is its natural assets critical for human survival and national development. This is essentially because biodiversity provides the reservoir for genetic materials, which

[83] Tochukwu Nwauba (n 79).
[84] Chidi Oguamanam, 'Nigeria faces new security threat fuelled by climate change and ethnicity', (12 May, 2016), <https://theconversation.com/nigeria-faces-new-security-threat-fuelled-by-climate-change-and-ethnicity-58807> accessed 19 September 2021.
[85] Chidi Oguamanam (n 84).
[86] FC Onuoha and GE Ezirim (n 70).

can be used for pharmaceutical development, wood for fuel and furniture, and food security. New analyses suggest that about 15-37% of a sample of 1,103 land plants and animals would eventually become extinct as a result of climate changes that are expected by 2050.[87] Regrettably, Nigeria is experiencing progressive decline of its biodiversity. Natural water bodies, like streams, lakes, and springs, are drying up due to climate-induced changes, like drought, in the Northern parts of the country and the worsening incidence of erosion in the southern parts, which is transporting pollutants to these water bodies. The intrusion of saline water as a result of erosion into streams, lakes, and rivers has led to the reduction in freshwater supplies and fish fauna. Nigerian forests are equally affected by climate change, manifest in the decreasing forest density, poor tree growth and development, increased incidence of pests and diseases that attack and decimate forest plants and trees, and disruption and reduction of the fruiting intensity of some trees. Thus, many species of plants and animals in the country are becoming extinct.[88] The impact of biodiversity depletion has been worse on the local people, who depend on it for their livelihood, especially for nutritional and medicinal purposes.

Health wise, the effects have been even more terrible. The phenomenon of climate change has been known to have intensified spread of even more diseases. Extreme weather conditions have in many cases served as disease vectors or provided favourable niches to them. Tochukwu Uwauba[89] posits that water scarcity due to drought creates the tendency for concentration of users around remaining limited sources of water. Under such circumstances, according to him, there is increased the possibility of additional contamination of the limited resources of water and transmission of water-borne diseases like cholera, typhoid fever, Guinea worm infection, and river blindness and the increasing temperature will mean northward migration of mosquitoes and malaria fever.

The national security implications of the sudden disruption of the oil industry in the Niger Delta by climate variability cascade disastrously through the Nigerian economy.[90] It induces forced migration; disrupts

[87] *Ibid.*
[88] *Ibid.*
[89] Tochukwu Nwauba (n 79).
[90] FC Onuoha and GE Ezirim (n 70).

socioeconomic livelihoods; constricts national revenue; deepens poverty which causes robbery, theft, looting, kidnapping, depletion of the moral values and other social vices; and consequently stretches the government's capacity to provide for the citizenry.

The implication of the foregoing[91] is that more demands would be made by the citizens on the government to assist in preventing or mitigating the impact of climate shocks on the people. If a government is perceived to be incapable of addressing these climate-triggered stressors, it can produce heightened senses of marginalization and deprivation amongst the affected population and a stronger sense of resentment towards the government. It can equally fracture the fabrics of harmonious co-existence among hitherto peaceful groups that are divided along different cultural, ethnic, religious, and political linings. The net effect could prove very unsettling for the stability and security of a state.

Although the local people and communities have lived with these hazards of Boko Haram insurgency, banditry, kidnapping, sectarian violence, youth radicalisation, violent extremism, militancy, pastoralists' and sedentary farmers' conflicts, and separatist agitations among others for many years and have evolved ways of dealing with them, climate change is already exacerbating their impacts with consequences for security and stability in Nigeria.

4. Recommendations

Climate change is a global problem with enormous challenges which must be met by joint co-operative action. It therefore requires global, regional and national partnerships and the promotion of alternative sources of energy internally on a country by country basis. To design an effective mitigation strategy in such a way that it helps ensure sustainable development, the GHG emission pattern, available mitigation options, role of technology and market-based mechanisms ought to be known.

Furthermore, to reduce the effects of cutting GHG emissions, which are the source of the present climate change, Nigeria, being dependent on coal, oil and gas exports for her foreign exchange should diversify her economy to encourage other sectors of the economy. The Nigerian government needs to find a non-fossil fuel, non-carbon-producing form of energy or be faced with a choice: warm the planet or crush her economy. It should be noted that climate change mitigation is not about cutting carbon

[91] *Ibid.*

emissions now; rather, it is about making sure that future generations do not use fossil fuels. That means investing in energy research and development of renewable technologies. This paper advocates for intergenerational solidarity wherein the four principles of sustainable development are adopted - intergenerational equity, sustainable use, equitable use and integration.

Furthermore, in a bid to safeguard the environment, we need to go back our indigenous religious values and practices. As African traditional religion is very close to nature, with structures, practices and sanctions that can effectively protect the environment, such beliefs and practices can serve as alternative tools in mitigating climate change in Nigeria, such as countering deforestation.[92]

Moreover, a critical challenge involves the need to sustain the political will and current momentum that provides Nigerians and foreigners with leeway to operate. While not discussed extensively in this Paper, it is generally recognized that there is need to strengthen environmental laws at all levels in Nigeria, to hold individuals, groups, firms, including Multinationals accountable for any action against the environment, which in turn fuels national insecurity. Be that as it may, the security agencies should adhere to their mandate, which is to ensure the safety of lives and properties in Nigeria. It is also imperative that the institutional mandate of security agencies and the Ministry of Environment should be respected and be adherent to without blocking the progress made in the safeguard of lives and properties in Nigeria.

However, governments and development partners will have to continue investing in the development of knowledge, skills and capacities required to mitigate and adapt to climate change; and, in due course, maintain national security. This can be done by enhancing the partnership with other governmental and public partners and by setting appropriate instruments to foster communication and participation among a wide range of actors (private sector, civil society, academic and research institutions, the large public).[93]

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[92] Huma Haider (n 72).

[93] Evaluation Office of United Nations Environment, Terminal Evaluation of the UN Environment Project, 'Support for the Implementation of the National Biosafety Framework of Nigeria' (March 2018) viii <https://wedocs.unep.org/bitstream/handle/20.500.11822/25450/3655_2018_te_unenvir

The Paper further recommends that governments at all levels must intensify action on promoting environmental education and monitoring. Environmental education involves a conscious effort aimed at imparting individuals with knowledge, skills, values, and awareness of the changes in the environment.[94] Hence, environmental education, with specific attention on climate change, must be integrated in academic curricula of Nigerian schools. Furthermore, F.C. Onuoha and G.E. Ezirim posit that the government should move quickly to boost all environmental regulatory and security institutions and agencies in the country through sustained capacity building, greater funding, and inter-agency collaboration to improve their efficiency in preserving and monitoring environmental and security trends in the country. Furthermore, that information sharing and discussions on climate related conflicts should be undertaken largely between Nigeria government officials, scientists and researchers. The Nigerian farmers and the general public however need continuous education on the subject.

As Nigeria presents a complex terrain of interconnected social, political and economic factors, contributing to the risks of insecurity and this Paper recommends that governance matters here. It is the Government's response to climate driven resource shortages or natural disasters that influences whether their consequences increase violence or not. Improved resource management, large-scale mobilization of funds and better service delivery are needed for Nigeria to better adapt and decrease its vulnerability to climate change.[95] According to Adam Day and Jessica Caus, efficient governance, however, is not just done by the State, but is also a community responsibility. Looking for opportunities to educate and build local resilience and governance capacities as well as strengthening local conflict and dispute resolution mechanisms is crucial in this here. The backdrop for the reflections on these issues is the 1999 Constitution of the Federal Republic of Nigeria, s14 (2)(a) and (b), which stipulates that "the security and welfare of the people shall be a primary purpose of government" and "the participation of the people in the government shall be ensured in accordance with the provision of this Constitution". Deriving from this provision, it is argued that government

onment_gef_speg_biodiversity_msp_Nigeria_National_Biosafety_Framework.pdf?sequence=1> accessed 2 November 2021.

[94] FC Onuoha and GE Ezirim (n 70).

[95] Adam Day and Jessica Caus (n 73).

tends to lose its essence when it is unable to guarantee the basic internal security[96] and welfare requirements of society.

While some level of debate is useful when looking at major social problems, society must definitely move on and actually address the issue. To do nothing about the problem of climate change is akin to letting a fire burn down a building because the precise temperature of the flames is unknown, or to not address the problem of smoking cigarettes because one or two doctors still claim that it does not cause lung cancer.[97] One should not also lose focus of the admonition of the UNFCCC Art 3(3) that, 'where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason to postponing such measures' that will, at a reasonable cost, prevent dangerous consequences in the climate system.

In the final analysis, it is recommended that all hands must unselfishly be on the deck to save man's only home before it is too late to reverse the damage caused every day. And it is all about TEAM which means Together Everyone Achieves More.

5. Conclusion

Climate change is a global phenomenon, closely tied to fossil fuel-based development, which exposes countries to various degrees of vulnerability. Nigeria's vulnerability to climate change is too in-depth to be ignored. From massive flooding; rising heat waves; growing desertification; droughts; dried up water bodies; erosions; the spread of diseases; food insecurity; forced migration; attendant resource conflicts; disrupted socioeconomic livelihoods; constricted national revenue; to deepened poverty which causes robbery, theft, looting, kidnapping, depletion of the moral values and other social vices. The developing counties which Nigeria is part of are in dilemma unlike the developed countries. This is as a result of the fact that even though they are battling with crippling poverty and inequality at home, they need to develop in order to save their people out of poverty and at the same time, they need

[96] IM Alumona, 'The State and Internal Security Management in Nigeria in Internal Security Management in Nigeria', [24 July 2019], 49-68 <https://link.springer.com/chapter/10.1007/978-981-13-8215-4_3.> accessed 19 September 2021.

[97] 'Climate Change Deniers', -- <http://www.davidsuzuki.org/issues/climate-change/science/climate-change-basics/climate-change-deniers/> accessed 10 October 2021.

to cut GHG emissions in order to save the world from global warming. The impact of climate change on the Nigerian security would definitely be on the rise especially if the government fails to put in place stringent adaptation and mitigation measures that could help individuals and communities cope with the challenges in the years and decades to come. We therefore encourage the Nigeria Government to stick to the Climate Agreements. In the final conclusion, climate change polices and sustainable internal security is central and complimentary of each other, as a result, the Nigerian State must work towards both. As adoption, awareness and implementation of climate polices could reduce insecurity to modest levels in the country.