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Main Articles

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Editor's Foreword

Covid-19 was one pandemic too many that took the world by storm! Economic and social life was grounded to a halt in real practical terms. That was a few months following the emergence of the new Coronavirus in Wuhan China on December 31, 2019, when the first case was officially reported. As the pandemic ravaged the world, non-stop, defying all known control measures, the Director-General of WHO, Dr. Tedros Adhanom Ghebreyesus, declared COVID-19 a pandemic disease on 11th March 2020, when the statistics of infections and deaths became alarming, having spread to 114 countries with 1, 118,000 positive cases and 4291 deaths! Despite the development of emergency vaccines to control the menace, as at November 2021, the pandemic has developed many variants, to wit, Delta and Omicron!

This was the same time the vision of this journal was conceived. As a direct response to finding a solution to this global lethal disease, this maiden edition was dedicated to research on and studying the occurrence, the effect, and solution to this dastardly disease using the instrumentality of the law.

As a result, a publication call was made, and a few papers were selected to form this volume. The challenges of a new beginning and the Covid itself delayed the publication and defied the timelines set for so doing. We, therefore, apologize to the contributors for this delay. On behalf of the editors of *Atlanta Law Journal,* we congratulate everyone whose article featured in this first edition. It is my conviction that it would form a good resource base for researchers, historians, health experts, and policy-makers on the legal angle to the Covid-19 pandemic as a 2020 global nightmare.

Chukwu Amari Omaka, Ph.D, Ph.D, SAN
Professor of Law

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Legal Response to The Outbreak of Covid-19 Pandemic: The Impact on Human Rights

*Grace A. Arowolo

ABSTRACT

The COVID-19 pandemic constitutes the largest global public health crisis in a century, with daunting health and socioeconomic challenges in almost all the continents of the world. Given the exceptional situation and to stop further transmission of the disease and preserve lives, Nigeria, like other countries affected by the virus, had to adopt extraordinary measures like extensive lockdowns in many States of the Federation including a cessation of social and economic activities, except those relating to essential services. These measures were backed up by COVID-19 Regulations 2020, which by necessity restricted the freedom of movement and many other human rights of citizens granted under the Nigerian Constitution. In line with the objective of this article, the paper examined the impact of these legal measures taken by the Nigerian Government on citizens' human rights. The article found, that although these measures followed existing public health advisories, they raised significant constitutional and human rights issues including questions on the constitutionality of COVID-19 Regulations, grievous violation of human rights, and several reports of gender-based violence. The article argued that respect for all forms of human rights is fundamental to the success of the public health response and recovery from the pandemic. The article, therefore, proposed that considering the emerging lessons of the pandemic in Nigeria, entrenching a strong framework of human rights within a pandemic containment legislation, for example, the Infectious Diseases Bill currently before the National Assembly is imperative.

ESSAY CONTENTS

I. INTRODUCTION

The outbreak of coronavirus worldwide is so devastating that it has been likened to war-like situations. According to the United Nations (UN), the coronavirus pandemic is the defining global health crisis of our time and the greatest challenge that the world has faced since World War Two.[1] The United States President, Donald Trump, while describing the steps taken so far to curb the pandemic stated; "The federal government has done something that nobody has done… other than perhaps wartime. And that's what we're in: We're in a war."[2] Other political leaders also had recourse to war metaphors[3] while the Nigerian President, Mohammadu Buhari described stopping the virus as "a matter of life and death" and must be achieved through citizens' sacrifice.[4]

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[1] United Nations Development Programme (UNDP), "COVID-19 Pandemic: Humanity Needs Leadership and Solidarity to Defeat the Coronavirus, accessed August 15, 2020, https://www.undp.org/content/undp/en/home/covid-19-pandemic-response.html#covid19dashboard.

[2] "Remarks by President Trump in a Meeting with Supply Chain Distributors on COVID-19," March 29, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-supply-chain-distributors-covid-19>.

[3] For example, Greece's Prime Minister announced; "We are at war. With an enemy who is invisible." See; PM says Greece at war with 'invisible enemy' Coronavirus, Reuters, Published March 17 2020, https://www. reuters.com/article/us-health-coronavirus-greece-pm/pm-says-greece-at-war-with-invisible-enemy-coronavirus-idUSKBN2142T5.

[4] COVID-19 Regulation, 2020, Nigeria, para. 4 (1).

The World Health Organization (WHO) declared the coronavirus disease (COVID-19) outbreak a Public Health Emergency of International Concern (PHEIC) on January 30, 2020,[5] and called for governments to take urgent and aggressive action to stop the spread of the virus.[6] The war-like situation of the coronavirus disease was confronted with responses and measures that severely limited the enjoyment of personal freedoms, to an extent that was unprecedented in democratic countries in times of peace.[7] Billions of people around the world were put under some sort of lockdown.[8] Concerns about the impact of such measures on human rights were raised by the UN High Commissioner for Human Rights and other human rights experts[9] because such measures can open the way to the abuse of emergency regulations and the overreach of executive powers as both the pandemic and the responses to it are putting human rights to test.[10]

In many African countries, legal measures taken by governments responding to the COVID-19 pandemic in 46 African countries south of the Sahara include legislative action. That is the passage of laws and regulations, orders, and other practices that have not been codified.[11] For example, declarations of states of emergency were made in Angola, Botswana, and Cape Verde, while declarations of national states of disaster were adopted in Malawi, South Africa, and Zimbabwe.[12] Countries like Botswana; Burkina Faso, Kenya, and Liberia adopted declarations of (public) health emergencies.[13] The enforcement of these laws resulted in human rights abuses including torture and murder of some citizens.[14]

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[5] World Health Organization, "Coronavirus Disease 2019 (COVID-19) Situation Report," accessed June 17, 2020, .https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200226-sitrep-37-covid-19.pdf?sfvrsn= 2146841e_2 [Google Scholar]

[6] "Coronavirus confirmed as pandemic by World Health Organization," BBC News, March 11, 2020, https://www.bbc.com/news /world-51839944

[7] Alessandra Spadaro, "COVID-19: Testing the Limits of Human Rights," *Eur. J Risk Regul*., (Apr 7 2020), p. 1.

[8] Helen Davidson, "Around 20% of Global Population under Coronavirus Lockdown", The Guardian, Published March 24, 2020, https://www.theguardian.com/world/2020/mar/24/nearly-20-of-global-population-undercoronavirus -lockdown>.

[9] Davidson, "Around 20%."

[10] Sparado, "COVID-19," 1-9.

[11] International Centre for Not-for-Profit Law (ICNL), "African Government Responses to COVID-19: An Overview from the COVID-19 Civic Freedom Tracker," accessed august 5, 2020, https://www.icnl.org/post/analysis/african-government-response-to-covid-19.

[12] International Centre for Not-for-Profit Law (ICNL), African Government Responses."

[13] *Ibid.*.

[14] "COVID-19 Lockdown: Human rights in Africa at Risk as Governments take Heavy-Handed Action," news24, April 9, 2020, https://www.news24.com/news24/africa/news/covid-19-lockdown-human-rights-in-africa-at-risk-as-governments-take-heavy-handed-action-20200409

In Nigeria, during the President's first speech after the outbreak of coronavirus on 29th March 2020,[15] he directed the lockdown and cessation of all movements in Lagos and Ogun States, and the Federal Capital Territory (FCT), Abuja, and the cessation of all economic activities except those relating to essential services.[16] This was for an initial period of 14 days with effect from 11 pm on Monday, 30th March 2020.[17] These measures were enforced with the aid of COVID-19 Regulations 2020 that was adopted on 30th March 2020 under the provisions of the Quarantine Act 2004.[18] The enforcement of the Regulations in Nigeria raised some constitutional, human rights, and legitimacy issues[19] while several other lockdown orders and directives by the government across various states were also issued and implemented by law enforcement agents, such as the police and army without any procedure for enforcement.[20] Consequently, there were several reports of violation of the rights of Nigerians including civil, political, and socioeconomic rights.[21]

Towards this end, this article examines how Nigeria's legal responsibility towards the eradication of COVID-19 impacted human rights. It analyses the various provisions of the Constitution and relevant international human rights laws on human rights protection, and the conditions under which Nigeria may legitimately limit or derogate from certain human rights. It recommends among others, that entrenching a strong framework of human rights within a pandemic containment legislation, for example, the Infectious Diseases Bill currently before the Nigerian National Assembly is essential so that human rights and rule of law are not whimsically sacrificed especially when emergency powers are exercised without the declaration of a state of emergency.[22] It concludes that while the curtailment of certain freedoms might be temporarily necessary to deal

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[15] Abiodun Odutola, "President Muhammadu Buhari's Full Speech on COVID-19 Pandemic," accessed September 7, 2020, https://nairametrics.com/2020/03/29/president-muhammadu-buharis-full-speech-on covid-19-pandemic.

[16] Cheluchi Onyemelukwe, "The Law and Human Rights in Nigeria's Response to the COVID-19 Pandemic," accessed September 3, 2020, https://blog.petrieflom.law.harvard.edu/2020/06/04/the-law-and-human-rights-in-nigerias-response-to-the-covid-19-pandemic/

[17] Odutola, "President Muhammadu Buhari's Full Speech.".

[18] Cap Q2, Laws of Federation of Nigeria (LFN), 2004.

[19] Onyemelukwe, "The Law and Human Rights."

[20] Collins Okeke, "The Impact of COVID-19 Regulations on Human Rights and the Rule of Law in Nigeria," accessed September 5, 2020, https://oal.law/covid-19-regulations-human-rights-in-nigeria/.

[21] Onyemelukwe, "The Law and Human Rights."

[22] Lukman Abdulrauf, "Nigeria's Emergency (Legal) Response to COVID-19: A Worthy Sacrifice for Public Health?," accessed May 18, 2020, https://verfassungsblog.de/nigerias-emergency-legal-response-to-covid-19-a-worthy sacrifice-for-public-health//: https://doi.org/10.17176/20200518-133659-0.

with the COVID-19 outbreak, such curtailment should be carefully limited and constantly monitored to avoid abuses.[23]

II. HIGHLIGHTS OF THE OUTBREAK AND SPREAD OF CORONAVIRUS (COVID-19)

The World Health Organization (WHO) described COVID-19 as a new disease, distinct from other diseases caused by coronaviruses[24] , and is primarily transmitted from person to person through respiratory droplets that are released when someone with COVID-19 sneezes, coughs, or talks. These infectious droplets can drop in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.[25] A physical distance of at least 1 meter (3ft) between persons is suggested by the World Health Organization (WHO) to avoid infection, although some WHO member states have also recommended maintaining greater distances whenever possible.[26] Due to the fast spread of the disease, WHO declared COVID-19 a pandemic, having met the epidemiological criteria of infecting 100,000 people in at least one hundred (100) countries.[27] The origin of the coronavirus disease has been traced to a wholesale seafood market in Huanan in China.[28] Chinese health authorities employed rapid public health measures and closed the market on January 1, 2020,[29] although thousands of people in China, including many provinces and cities like Hubei and Beijing, had been infected by the disease which also traveled to other countries including Thailand, Germany and the United States.[30] As of today, September 29, 2020, 33,423, 469 cases of COVID-19 have been reported, including 1,002 678 deaths.[31]

Africa's first COVID-19 case was reported earlier in February in Egypt while the second case was detected in Algeria involving an Italian adult,

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[23] Sparado, "COVID-19," 1-9.

[24]World Health Organisation (WHO), "COVID-19 Strategy Update," WHO, Geneva, Switzerland. April 2020, pp. 1-15.

[25] Centre for Disease Control (CDC), "COVID-19, Overview and Infection Prevention and Control Priorities in non-US Healthcare Settings," Aug. 12, 2020 https://www.cdc.gov/coronavirus/2019-ncov/hcp/non-us-settings/overview /index.html

[26] Centre for Disease Control (CDC), "COVID-19 Overview."

[27] Ewen Callaway, "Time to Use the P- word? Coronavirus Enter Dangerous New Phase, *Nature*: 579, DOI: 10.1038/d41586-020-00551-1.

[28] Yu Chen, Qianyun Liu and Deyin Guo, Emerging Coronaviruses: Genome Structure, Replication, and Pathogenesis," *Journal of Medical Virology*, 92 (4) (2020): 418–423, DOI: 10.1002/jmv.25681.

[29] Yi-Chi Wu, Ching-Sung Chen and Yu-Jiun Chan, "The outbreak of COVID-19: An overview," *Journal of the Chinese Medical Association,* 83 (3) (2020), 217, doi: 10.1097/JCMA.0000000000000270.

[30]World Health Organization, "2019-nCoV Situation Report," accessed June 21, 2020, https://www.who.int/ emergencies/diseases/novel-coronavirus-2019/situation-reports/.

[31] European Centre for Disease Prevention and Control (ECDC), "COVID-19 Situation Update Worldwide, as of 29 September 2020," https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases.

who arrived in the country on February 17, 2020.[32] The first coronavirus case in Nigeria was confirmed on February 27, 2020, which is also the case of an Italian citizen who works in Nigeria and returned from Milan, Italy to Lagos, Nigeria on February 25, 2020.[33] Presently, the WHO African Region is reported to be observing a sustained decrease in cases and deaths; most from the top most affected countries of South Africa, Ghana, Ethiopia, and Cameroon.[34] The Nigeria Disease Control Centre's (NCDC) report shows that as of September 28, 2020, there are 58,460 confirmed cases, 49, 895 discharged cases, and 1,111 deaths in Nigeria.[35]

III. RESPONSE TO THE OUTBREAK OF COVID-19 PANDEMIC

A. International Response and Human Rights Concerns

To preserve and maintain human rights while responding to COVID-19, the UN and WHO issued guidelines to assist member States. The UN COVID-19 Guidance[36] provides that human right is at the heart of the response and "respect for human rights across the spectrum, including economic, social, cultural, civil and political rights, will be fundamental to the success of the public health response and recovery from the pandemic" while measures that restrict human rights should be proportionate to the evaluated risk, necessary and applied in a non-discriminatory way and used for legitimate public health goals that do not deny other human rights.[37] The guidance also noted that some rights cannot be restricted even during a state of emergency including the application of the principle of non-refoulment, the prohibition of torture and ill-treatment, the right to freedom of thought, conscience, and religion while access to health care for everyone must be provided without discrimination. It, therefore, obliged States' Parties to cooperate to tackle the virus and to mitigate the unintended effects of measures designed to halt the spread of COVID-19.[38]

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[32] World Health Organization (WHO), "A Second COVID-19 Case is confirmed in Africa," accessed June 25, 2020, https:// www.afro.who.int/news/second-covid-19-case-confirmed-africa.

[33] Nigeria Centre for Disease Control (NCDC), "First Case of Corona Virus Disease Confirmed in Nigeria," accessed June22, 2020, ttps://ncdc.gov.ng/news/227/first-case-of-corona-virus-disease-confirmed-in-nigeria.

[34] World Health Organization (WHO), "COVID-19 Situation Update for WHO African Region," accessed September 9, 2020 (External Situation Report, 28), https://www.afro.who.int/health-topics/coronavirus-covid-19.

[35] Nigeria Disease Control Centre (NCDC), "COVID-19 Situation Report, Monday 28th September 2020," https:// ncdc.gov.ng/diseases/sitreps/?cat=14&name=An%20update%20of%20COVID-19%20outbreak%20in%20 Nigeria.

[36] United Nations Human Rights Office of the High Commissioner, "COVID-19 Guidance," accessed September 10, 2020, https://www.ohchr.org/ EN/NewsEvents/Pages/COVID19Guidance.aspx.

[37] United Nations "COVID-19 Guidance."

[38] United Nations, "COVID-19 Guidance."

According to WHO, "all countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights"[39] because human rights frameworks provide a crucial structure that can strengthen the effectiveness of global efforts to address the pandemic.[40] WHO emphasized that measures adopted by States' Parties to reduce transmission and minimize the impact of COVID-19, including quarantine and the restriction of movement of individuals should be implemented only as part of a comprehensive package of public health and social measures.[41] WHO advised that Protecting human rights can help address public health concerns, by requiring, for example, that proactive measures such as ensuring accurate information are made available and that stigmatizing and discriminatory behavior and practices are identified and stopped.[42] WHO also advised on several methods to help prevent the spread of the virus and to save health systems across the world from a complete collapse. For example, health washing, social distancing, and staying at home.[43]

To achieve the foregoing, lockdowns between and within nations of varying stringency were imposed.[44] In Africa, as early as 20 March 2020, some African Union (AU) Member States were imposing lockdowns and curfews to prevent further COVID-19 transmission within their borders including the closure of airports, seaports, and land borders, isolation and quarantining of persons, banning of religious, sporting and social gatherings, closure of schools and universities, and complete or partial 'lockdown' of some countries.[45] Due to these early efforts, some AU Member States have seen a reduction in average daily case growth.[46] Some of these measures as well as their enforcement have implications on the

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[39] World Health Organization "Media Briefing," https://www.who.int/dg/speeches/ detail/who-directorgeneral-s-opening-remarks-at-the-media-briefing-on-covid19---11-march-2020.

[40] World Health Organization, "Addressing Human Rights as Key to the COVID-19 Response," accessed July 29, 2020, https://www.who.int/ publications/i/item/addressing-human-rights-as-key-to-the-covid-19-response

[41] World Health Organization, Addressing Human Rights."

[42] WHO/OHCHR, "Fact sheet 31: Right to Health," accessed September 15, 2020, https://www.ohchr.org/ Documents/ Publications/ Factsheet31.pdf.

[43] World Health Organization, "COVID-19 Response," accessed July 19, 2020, https://www.who.int/health-cluster/ news-and-events/news/COVID19/en/.

[44] University of Oxford, "Coronavirus Government Response Tracker," accessed July 29, 2020, https://www.bsg. ox.ac.uk/research/research-projects/coronavirus-government-response-tracker

[45] Mary Izobo and Folasade Abiodun, "Enforcement of Lockdown Regulations and Law Enforcement Brutality in Nigeria and South Africa," AfricLaw, 23 June, 2020, https://africlaw.com/2020/06/23/enforcement-of-lockdown-regulations-and-law-enforcement-brutality-in-nigeria-and-south-africa

[46] Marguerite Loembé, Akhona Tshangela, Stephaniem Salyer, "COVID-19 in Africa: the Spread and Response," *Nature Medicine*, 26, (2020), 999, https://doi.org/10.1038/s41591-020-0961-x

right to freedom of movement, freedom of association, and freedom of assembly. The police, and in some cases the army, were called upon to enforce compliance with the lockdown regulations which generated a lot of controversies and public outcry as there were severe violations of human rights in the process.[47] Across the African region, there were widely reported cases of violence against citizens by security forces who were deployed to enforce curfews and lockdowns[48] due to their use of excessive force as was reported in many countries including Zimbabwe,[49] Nigeria.[50] Kenya[51] and South Africa.[52]

B. The Initial Measures to Contain COVID-19 Pandemic in Nigeria

Initially, the President gave a speech on 29th March 2020,[53] wherein he directed the lockdown and cessation of all movements in Lagos and Ogun States, and the Federal Capital Territory (FCT), Abuja, and the cessation of all economic activity except those activities relating to essential services.[54] This was for an initial period of 14 days with effect from 11 pm on Monday, 30th March 2020. [55] The affected states recorded the majority of confirmed cases of COVID-19 in Nigeria.[56]

This presidential speech was heavily criticized by lawyers and subjected to debates bordering on the legality of the president's orders.[57] The speech was described as a "presidential fiat restricting civil liberties." Some lawyers argued that in the absence of a law enabling restrictions to civic freedoms, the legality of the COVID-19 containment measures is

[47]Izobo and Abiodun, "Enforcement of Lockdown Regulations."
[48] United Nations, "UN raises alarm about police brutality in COVID-19 lockdowns," accessed August 30, 2020, https://Aljazeera.com/amp/news/2020/04/raises-alarm-police-brutality-covid-19-lockdowns-200428070216771 .html.
[49] Fadzai Ndangana, "ZADHR Condemns Human Rights Violations during Lockdown," accessed July 20, 2020, https:// allafrica.com/stories/202005220776.html.
[50] Agence France-Press, "African Man Shot Dead for Breaking Virus Curfew," accessed July 5 2020, https://www. courthousenews.com/African-man-shot-dead-for-breaking-virus-curfew/.
[51] Agnes Odhiambo, "Tackling Kenya's Domestic Violence Amid COVID-19 Crisis: Lockdown Measures Increase Risks for Women and Girls," accessed August 10, 2020, https://www.hrw.org/news/2020/04/08/tackling-kenya's domestic -violence-amid-covid-19-crisis.
[52] Breakfast Siviwe, "South Africans Urged to 'Respect Human Rights' Amid COVID-19 Pandemic," accessed August 30, 2020, https://www.thesouthafrican.com/news/south-africans-urged-to-respect-human-rights-amid-covid-19 pandemic/.
[53] Abiodun Odutola, "President Muhammadu Buhari's Full Speech on COVID-19 Pandemic," accessed September 7, 2020, https://nairametrics.com/2020/03/29/president-muhammadu-buharis-full-speech-on covid-19-pandemic.
[54] Onyemelukwe, "The Law and Human Rights."
[55] Odutola, "President Muhammadu Buhari's Full Speech."
[56] Victoria Ibezim-Ohaeri, COVID-19: The legality and limits of the president's emergency powers On April 3, 20201:18 am, https://www.vanguardngr.com/2020/04/covid-19-the-legality-and-limits-of-the-presidents-emergency-powers/.
[57] Odutola, "President Muhammadu Buhari's Full Speech."

questionable. For instance, Agbakoba argued that it is illegal to seek to impose sanctions or restrict citizens' movement without a legal framework and therefore recommended that the National Assembly should, as a matter of urgency, pass a Coronavirus Act 2020. Adegboruwa contended that rather than resorting to presidential fiats, the President should invoke his powers under the Constitution to declare a state of emergency which must be approved by the National Assembly while some other lawyers urged the president to issue regulations under the Quarantine Act of 1926 for the safety and protection of Nigerians.[58] These arguments necessitated the taking of a legal step by the president.

IV. POWERS OF THE NIGERIAN GOVERNMENT TO MAKE LAWS

Nigeria is a federal republic comprising three tiers of government including the central government, 36 States,[59] the Federal Capital Territory (FCT), and 774 local governments, area councils inclusive.[60] Legislative power at the federal level is vested in the National Assembly[61] while legislative power of a State is vested in the House of Assembly of that State.[62] The federal executive power is vested in the president while the executive power of a State is vested in the Governor.[63]

Only the National Assembly can legislate over matters listed under the exclusive legislative list[64] while the National Assembly and States' Houses of Assembly have the power to legislate over issues listed under the concurrent legislative list of the Constitution[65] but if there is a conflict between the laws made by both the National and State Assembly that of the National Assembly prevails.[66] The National Assembly also has the authority to make law for the Federal Capital Territory, Abuja, acting in the same manner as a State House of Assembly.[67] There is also the Residual List which is not provided for in the Constitution. It was defined in the case of *Attorney General of Ogun State v Aberuagba*[68] as what is left after Exclusive and Concurrent Lists and the state governments have authority to legislate on those issues.

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[58] Abiodun Odutola, "President Muhammadu Buhari's Full Speech."
[59] Constitution of the Federal Republic of Nigeria (1999), Section 3(1).
[60] Constitution of Nigeria, section 3 (6); "Country Profile 2019: The Local Government System in Nigeria," accessed September 26, 2020, https://www.clg.uk>default>assets>File>Country_profiles.
[61] Constitution of Nigeria, Section 4 (1).
[62] Constitution of Nigeria, Section 4 (6).
[63] Constitution of Nigeria, Section 5.
[64] Constitution of Nigeria, section 4 (2); Part 1 schedule II.
[65] Constitution of Nigeria Section 4 (4) (a) and 4 (7); Part II Schedule II.
[66] Constitution of Nigeria Section 4 (5).
[67] Constitution of Nigeria, Section 299.
[68] (2002) 2 WRN 52.

A. The Legal Response to the Containment of COVID-19 Pandemic in Nigeria

As provided in section 1 of the Nigerian Constitution and held by the Supreme Court in the cases of Independent *National Electoral Commission (INEC) v Musa*[69] and *Attorney General Abia State v Attorney General of the Federation,*[70] the Constitution is the supreme law of Nigeria and any other law that contradicts its provisions shall be declared null and void.[71] Coronavirus (COVID-19) was categorized as an epidemic that requires emergency actions[72] to curb the further spread. It also requires making emergency regulations, laws, or orders. The Nigerian Constitution contains key aspects that are relevant to fundamental human rights and the declaration of a state of emergency regarding public health crises. The legal authority of the Nigerian federal government to take extraordinary measures during public health crises can be exercised based on either the emergency powers of the president and the legislature under section 305 of the 1999 Constitution or the authority accorded to the executive body also by the Constitution under the Quarantine Act, 1926.[73] The latter is premised on the exclusive legislative jurisdiction accorded to the federal government under the Constitution on issues of "quarantine" and "any matter incidental or supplementary" to it.[74]

To declare a state of emergency in Nigeria, section 305 (1) and (2) of the Constitution empowers the President, by an instrument published in the Official Gazette of the Government of the Federation to issue a Proclamation of a state of emergency in the whole Federation or any part thereof immediately after which the President shall transmit copies of the Official Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting with their respective members and decide whether or not to pass a resolution approving the Proclamation. This form of check reflects a kind of distrust of those who wield the authority of the state, at least concerning the protection of individual rights, and that distrust is at its greatest when it comes to the exercise of executive power.[75] The purpose of the check, therefore, is to

[69] (2003) 3 NWLR (pt806) 72.
[70] (2002) S C 28/2001.
[71] Constitution of Nigeria; section 1 (3).
[72] World Health Organization, "Coronavirus Disease 2019 (COVID-19) Situation Report."
[73] Cap Q2, Laws of the Federation of Nigeria (LFN), 2004.
[74] Hanibal Goitom, "Nigeria: Legal Responses to Health Emergencies," accessed June29, 2020, https://www.loc.gov/ law/help/health-emergencies/nigeria.php.
[75] John Ferejohn and Pasquale Pasquino "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law,* 2 (2), (2004), 210: https://doi.org/10.1093/icon/2.2.210.

prevent an abuse of power.[76] Under section 305 (6) of the Nigerian Constitution, if the legislative houses fail to pass a resolution approving the declaration within 10 days, then such a declaration shall immediately cease to have an effect.

The only situations under which the president can declare a state of emergency as provided in section 305 (3) are: when the Federation is at war or is in imminent danger of invasion or involvement in a state of war; there is an actual breakdown of public order and public safety; there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger; there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation; there is any other public danger which constitutes a threat to the existence of the Federation, or the President receives a request to do so following the provisions of subsection (4) of this section.[77] This constitutional provision does not admit any other circumstances that are not listed in section 305.

The declaration by the Director-General of WHO on 30th January 2020, that the outbreak of COVID-19 constitutes a Public Health Emergency of International Concern (PHEIC),[78] qualifies the COVID-19 pandemic as an emergency constituting a public danger to public safety within the provision of section 305 of the Constitution over which the Nigerian President has the power to declare a state of emergency in a manner that is consistent with the provision of section 305 (1) and (2) discussed earlier. Instead of exercising his power to declare a state of emergency under section 305, the President issued a regulation under the provisions of sections 2, 3, and 4 of the Nigerian Quarantine Act of 1926[79] most probably because the Act is regarded as the primary law governing matters concerning public health crises in Nigeria[80] and because previous calls to declare a state of emergency during the Ebola pandemic was rejected.[81]

Section 2 of the Quarantine Act empowers the president to declare coronavirus as a dangerous infectious disease. This is based on the definition of "dangerous infectious disease" in section 2 of the Quarantine Act as; cholera, plague, yellow fever, smallpox, and typhus and includes any disease of an infectious or contagious nature which the president may, by notice, declare to be a dangerous infectious disease. Under section 3 the

[76] Abdulrauf "Nigeria's Emergency (Legal) Response."
[77] Constitution of Nigeria, Section 305 (4).
[78] World Health Organisation (WHO), "COVID-19 Public Health Emergency of International Concern (PHEIC).
[79] Cap Q2, LFN, 2004.
[80] Goitom, "Nigeria: Legal Responses to Health Emergencies."
[81] Abdulrauf, "Nigeria's Emergency (Legal) Response."

President has the power to declare any place an infected local area while section 4 empowers him to make regulations for purposes among others, to prescribe the steps to be taken within Nigeria upon any place being declared to be an infected local area and for preventing the spread of any dangerous infectious disease from any place within Nigeria.

The exercise of this power resulted in the making of COVID-19 Regulation 2020 which essentially provides for: the restriction/cessation of movements in Lagos, FCT Abuja, and Ogun State for an initial period of 14 days with effect from 11 pm on 30th March 2020; suspension of passenger aircraft operation although seaports in Lagos were to be made operational; provision for relief materials to be made for communities around Lagos and Abuja whose livelihoods will be affected by restrictive measures; support of the private sectors and individuals and government's commitment to the fight against the virus, while also emphasizing the need for the personal sacrifice of individuals to control and contain the spread of the virus. Penalty for contravention of the provisions of the Regulation attracts a fine of N200 or imprisonment for a term of six months or both.[82] This Regulation gives legal backing to the various measures outlined in the President's first National Broadcast on March 29, 2020.[83] The content of the president's first speech and the provisions of the Regulation are essentially the same.[84]

B. Controversy over the President's Response

The constitutionality of the President's decision to act under the Quarantine Act generated legal controversy in that, questions were raised regarding the difference between the emergency powers under the Quarantine Act and those provided in section 305 of the Constitution.[85] It has been rightly posited that both powers are different mainly because the declaration of a state of emergency requires legislative approval while the use of emergency powers under the Quarantine Act is a purely executive function[86] but requires a notice to be issued. The power was properly exercised as being granted by the Constitution.

[82] Qurantine Act, Nigeria, section 5.
[83] Johnbosco Agbakwuru, "Buhari Signs COVID-19 Regulations 2020: Declares Pandemic Dangerous Infectious disease," Vanguard Newspaper, Nigeria, https://www.vanguardngr.com/ 2020/03/buhari-signs-covid-19-regulations-2020/.
[84] Muhammadu Buhari, "Full Speech: Buhari Speaks on Covid-19," Daily Trust Newspaper, Nigeria, March 29, 2020, https://dailytrust. com/full-speech-buhari-speaks-on-covid-19.
[85] Abdulrauf, "Nigeria's Emergency (Legal) Response."
[86] Abdulrauf, "Nigeria's Emergency (Legal) Response."

The foregoing also led to the argument that the Quarantine Act of 1926 cannot legalize restriction of movement by the President.[87] The president's action by applying the Quarantine Act has however been defended and justified [88] based on the fact that the power to enact subsidiary legislation like the COVID-19 Regulation is conferred on the president by the National Assembly in sections 3 and 4 of the Quarantine Act while also noting that section 45 (1) of the Constitution permits the adoption of a law limiting certain constitutionally guaranteed fundamental rights if it is "reasonably justifiable" and done "in the interest of …public health." This includes laws limiting the right to freedom of movement. While powers over quarantine issues fall within the exclusive legislative list of the Constitution over which only the Federal government could legislate,[89] some States (including Lagos[90] and Ekiti[91]) also issued their regulations. These should be declared null and void for contravening constitutional provisions.

Furthermore, the Quarantine Act was described as old and archaic having been established as a Law in 1926, several decades ago such that one of the diseases identified in the document was eradicated over 35 years ago, and the penalties spelled out in the Act are so meager highlighting the need for a revision.[92] No doubt, the Quarantine Act is a colonial law that ought to have been discarded and replaced.[93] This is why attempts were made in the past to replace the Act. For example, a Public Health Bill[94] was listed in 2004 in the Nigerian Senate for possible enactment as a Law but the Bill is yet to be ratified by legislators.[95] Soon after the COVID-19 outbreak, the Control of Infectious Diseases Bill 2020, was also passed by the National Assembly.[96] This bill seeks to repeal the Quarantine Act and

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[87] Joseph Onele, "Why the Quarantine Act of 1926 Cannot Legalise Restriction of Movement by the President," Business Day Newspaper, Nigeria, April 1, 2020, https://businessday.ng/opinion/ article/why-the-quarantine-act-of-1926-cannot-legalise-restriction-of-movement-by-the-president/.

[88] Onele, "Why the quarantine Act of 1926 cannot Legalize Restriction of Movement."

[89] Constitution of Nigeria, schedule II contains the exclusive list. Under section 8 of the Qurantine Act, State Governors can only make Regulations when any declaration under section 2 or 3 or this Act has not been made by the President.

[90] Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020.

[91] Ekiti State Coronavirus (Prevention of Infection) Regulations 2020.

[92] Olusesan Makinde and Clifford Odimegwu, "A Qualitative Inquiry on the Status and Adequacy of Legal Instruments Establishing Infectious Disease Surveillance in Nigeria," *Pan African Medical Journal*, 31: 22, (2018), 1, https:// doi: 10.11604/pamj.2018.31.22.14119.

[93] Femi Falana, "Nigeria: CID Bill 2020 - in Whose Interest? This Day Newspaper, Nigeria, published 26 May, 2020, https:// allafrica.com/ stories/202005260255.html.

[94] Bill for an Act to Establish the Nigeria Public Health (Quarantine, Isolation and Emergency Health Matters Procdure) Act 2004.

[95] Makinde and Odimegwu, "A Qualitative Inquiry."

[96]Policy and Legal Advocacy Centre (PLAC), Control of Infectious Diseases Bill 2020, accessed July 5 2020, placing.org>wp>content> uploads>2020/05-control-of-infectious…

enact the Control of Infectious Diseases Bill, makes provisions relating to quarantine and regulations for preventing the introduction into and spread in Nigeria of dangerous infectious diseases, and for other related matters.[97]

The Bill classified coronavirus as a dangerous disease in its 2nd schedule. It increases the penalty for contravention of the provisions of any Regulation made by the President to #500,000 (instead of #200 stipulated in the Quarantine Act presently in operation), or to imprisonment for a term not exceeding 6 months or to both.[98] The Bill, which went through the first and second reading the day it was passed in the House of Representatives was criticized on several grounds including the fact that it was hurriedly passed, it is superfluous, illegal, and unconstitutional.[99] Further consideration of the Bill was stepped down pending the time it is put forward for a public hearing where stakeholder contributions will be sought to make improvements to the Bill before it is reviewed and debated by the Committee of the House.[100] Considering the devastating effect a disease outbreak could have, it is hoped that this will be done as soon as possible.

C. Laws Protecting Fundamental Human Rights in Nigeria and their Reservation Clauses

Chapter four of the Nigerian Constitution provides for the fundamental rights of all Nigerian citizens in sections 33- 44 including the right to life, freedom of movement, freedom of religion and conscience, dignity, nondiscrimination, expression, personal liberty, freedom from torture, inhuman or degrading treatment, right to privacy, fair hearing, freedom of thought, conscience and religion, expression, assembly and association and freedom of movement.

Section 45 (1), however, allows for derogations from some of these rights in certain situations. It states that: "Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society… in the interest of defense, public safety, public order, public morality or public health…" That is, rights to privacy, freedom of religion and conscience, freedom of expression, freedom of association, and freedom of movement, can be limited by any law that is reasonably justifiable *inter alia* in the interest of public health.

[97] Policy and Legal Advocacy Centre (PLAC), "Control of Infectious Diseases Bill."
[98] Policy and Legal Advocacy Centre (PLAC), "Control of Infectious Diseases Bill," section 79.
[99] Falana, "Nigeria."
[100] James Kwen, "Why Criticism swells around Infectious Diseases Control Bill," Business Day, Nigeria, May 10, 2020, https://businessday.ng/politics/article/why-criticism-swells-around-infectious-diseases-control-bill/

This constitutional provision limiting the rights guaranteed in chapter IV of the Constitution has been criticized for being imprecise and nebulous, and as such, constituting a real drawback in the effort to promote human rights.[101] The argument was that what law is "reasonably justifiable in a democratic society" does not enjoy any definition, neither is it capable of any precise articulation[102] and therefore poses a very grave danger to the optimal realization of human rights.[103] Despite this argument, in the Nigerian case of *DPP v. Chike Obi*[104] which was followed in *Queen v. Amalgamated Press,*[105] the Court held that the sedition law, though it gravely circumscribed the constitutionally guaranteed right of freedom of speech, was "reasonably justified in a democratic society." Also, in the Nigerian case of *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu & Anor,*[106] the Supreme Court held that all freedoms are limited by state policy or overriding public interest. Consequently, Onyemelukwe, posited that laws such as quarantine laws, which often restrict the rights to freedom of movement and association are constitutional in Nigeria when a public health justification is established.[107]

Nigeria is also a party to major international human rights instruments including the Universal Declaration of Human Rights (UDHR), 1948, International Covenant on Civil and Political Rights (ICCPR), 1966[108] the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966[109] and the African Charter on Human and Peoples' Rights (ACHPR).[110] All these international instruments provide for certain fundamental rights and freedoms similar to those provided in chapter IV of the Nigerian Constitution but only the African Charter is justiciable in Nigeria, having been enacted by the National Assembly into the African Charter on Human and Peoples' Rights (Ratification and Enforcement

[101] Jacob A. Dada, "Impediments to Human Rights Protection in Nigeria," *Annual Survey of International & Comparative Law,* 18, no. 1, Article 6, (2012), 1.
[102] *Olawoyin v. Attorney Gen. of N. Region,* [1961] 1 N.L.R 269 (Nigeria).
[103] Dada, "Impediments to Human Rights Protection in Nigeria."
[104] *D.P.P. v. Chike Obi,* [1961] 1 N.L.R. 186 (Nigeria).
[105] *Queen v. Amalgamated Press,* [1961] 1 N.L.R. 199 (Nigeria).
[106] *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu*, [2001] 3 S.C.N.J. 106
[107] Cheluchi Onyemelukwe, "IHR Implementation in Nigerian Law- Mapping of Legal Authorities and Analysis of Legislation at Federal Level," accessed August 25, 2020, https:www.ncdc.gov.ng>common>docs>protocols.
[108] Adopted by General Assembly Resolution 2200A (XXI) on 16 December 1966. Nigeria ratified in 1993.
[109]Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Nigeria ratified in 1993.
[110] The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev.5 (1981). Nigeria ratified in 1983.

Act).[111] This complies with the requirement of section 12 of the Nigerian Constitution that an international treaty must be enacted into national law for it to be enforceable in the Nigerian court. By this act of domestication, it was held in the Nigerian case of *General Sanni Abacha and Others v Gani Fawehinmi*,[112] that the provisions of the African Charter are enforceable in Nigerian courts in the same way as domestic or municipal law. The Supreme Court also emphasized that the Nigerian Constitution takes precedence over all other laws including domesticated international treaties.

The position of the African Charter with regards to derogation from human rights was discussed in the case of *Media Rights Agenda, Constitutional Rights Project v Nigeria African Commission on Human and Peoples' Rights*[113] where it was stated that, unlike other international human rights instruments, the African Charter does not contain a derogation clause. Therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The case recognized that the only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27 (2) which provides that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality, and common interest" while the reasons for possible limitations must be founded in a legitimate state interest and limitations of rights must be strictly proportionate with, and necessary for the advantages which are to be obtained. Derogation from rights during a pandemic will be covered by this section.

It has been argued, however, that generally, the instances of permissible derogation are not well-defined and as such, susceptible and amenable to abuse especially in Nigeria.[114] However, derogations have been justified since it is made to protect communities, States, and their institutions.[115] States resort to derogation to preserve the essential fabric of society.[116] It allows the states to anticipate and take early restrictive measures and

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[111] African Charter on Human and Peoples' Rights (Ratification and Enforcement Act, No. 2, Cap A9, Laws of Federation of Nigeria, 2004.
[112] (2000) 6 NWLR (Pt. 660) 228.
[113] Communication Nos. 105/93, 128/94, 130/94 and 152/96, paras. 67, 68. Derogation from rights can also be implied from the provisions of articles 6, 11 and 12 due to reasons and conditions previously laid down by law.
[114] Dada, "Impediments to Human Rights Protection in Nigeria."
[115] Amrei Müller, "Limitations to and derogations from economic, social and cultural rights," *Human Rights Law Review*, 9 (4), (2009) 557, https://doi.org/10.1093/hrlr/ngp027.
[116] Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International*
Jurisprudence, 2nd Edition (Cambridge: Cambridge University Press 2017) 202.

derogations to avoid more severe derogations later.[117] Therefore COVID-19 crisis fits into those criteria for derogation especially when there is an actual and imminent threat to all individuals' right to health and right to life.[118]

V. THE IMPACT OF THE LEGAL RESPONSE TO COVID-19 PANDEMIC ON HUMAN RIGHTS IN NIGERIA

Although emergency regulations and measures generally gave extended powers to the executive and drastically reduced civil liberties in all targeted countries during the pandemic[119] the case of Nigeria has been excessive having been listed by the UN as one of the countries that flouted peoples' human rights in the guise of checkmating coronavirus spread which it called "a human rights disaster."[120] The manner of enforcement of COVID-19 Regulations in Nigeria led to reports of human rights abuses in several parts of the country.[121] The rights that were affected include the freedom of movement, freedom of peaceful association and assembly, freedom of belief and worship, right to life, and freedom from torture and degrading treatment. Many people were killed by law enforcement officers in the process of enforcing the COVID-19 Regulations.[122] For example, a man was reportedly killed in Delta State while he was out to get drugs for his pregnant wife contrary to lockdown regulations.[123] Also, a pregnant woman in Port Harcourt had a miscarriage on her way to hospital after policemen detained her for being out during lockdown while another pregnant woman was arrested and detained by policemen for stepping out to buy food.[124] As of 14th April 2020, 11 patients reportedly died from

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[117] Audrey Lebret, "COVID-19 pandemic and derogation to human rights," *Journal of Law and Biosciences*, Volume 7, Issue 1, (January-June 2020), 015, https://doi.org/10.1093/jlb/lsaa0151-15.

[118] Lebret, "COVID-19 Pandemic."

[119] International Institute for Democracy and Electoral Assistance (IDEA), "The Impact of the COVID-19 Crisis on
Constitutionalism and the Rule of Law in Anglophone Countries of Central and West Africa," (Analytical report, Webinar 28 May 2020), International Institute for Democracy and Electoral Assistance, Sweden, (2020), 1.

[120] United Nations Human Rights Office of the High Commissioner, "COVID-19: States Should not Abuse Emergency Measures to Suppress Human Rights – UN experts," accessed July 15, 2020, https://www.ohchr.org/EN/ News Events/Pages/DisplayNews.aspx?NewsID=25722

[121] Onyemelukwe, "The Law and Human Rights in Nigeria's Response to the COVID-19 Pandemic."

[122] BBC News, "Coronavirus: Security Forces Kill more Nigerians than Covid-19, April 18, 2020, https://www. bbc.com/news/world-africa-52317196.

[123] Izobo and Abiodun, "Enforcement of Lockdown Regulations."

[124] Philip Obaji, "Women Abused by Police Enforcing COVID-19 Rules in Nigeria," Aljazeera News, September, 2020, accessed September 25, 2020, https://www.aljazeera.com/indepth/features/women-abused-police-enforcing-covid-19-rules-nigeria-200824123139951.html

COVID-19 while law enforcement agents extra-judicially killed 18 persons while enforcing the regulations.[125]

The report also confirmed that on July 28, 23-year-old Nigerian, Pamela was allegedly raped by a police officer in the guise of enforcing the government's coronavirus guidelines, specifically for not wearing a nose mask while traveling in a bus and is still on sickbed till now.[126] The Federal Special Anti-Robbery Squad (F-SARS) was accused of rape, unlawful killings, and torture in Edo State in Nigeria where Hamilton Obazee was allegedly tortured to death by F-SARS officers in March and this triggered several demonstrations to demand the closure of the controversial police unit.[127]

The report of the Nigeria National Human Rights Commission (NHRC) confirms that a total of 105 complaints were monitored/received from twenty-four States (24) out of the 36 States of the federation for human rights violations allegedly perpetrated by security agencies and Sexual and Gender-Based Violence (SGBV) by other actors during the initial lockdown period. The report confirmed that there were cases of extrajudicial killings, violation of the right to freedom of movement, unlawful arrest, and detention, seizure/confiscation of properties, sexual and gender-based violence (SGBV) including domestic violence such as spousal violence and parent-child abuse, discrimination, torture, inhumane and degrading treatment and extortion,[128] landlord-tenant violence, neighbor-to-neighbor violence, homeowner-house help violence, boyfriend-girlfriend violence, violence on widows, police-sex worker violence, police-citizen violence, visitor-caught-in-lock-down child rape.[129] Rape and molestation of minors involving high profile older men and patricide were also rampant[130] to the extent that the Nigeria Governors

[125] Ishaq Khalid, "Coronavirus: Security Forces kill More Nigerians than Covid-19, 16th April, 2020, BBC News, https://www.bbc.com/news/world-africa-52317196.
[126] Obaji, "Women Abused by Police Enforcing COVID-19 Rules in Nigeria."
[127] Philip Obaji, "Women 'abused' by police enforcing COVID-19 Rules in Nigeria."
[128] Tony Ojukwu, "Nationl Human Rights Commission Press Release on COVID-19 Enforcement so Far: Reports on Incidents of Violation of Human Rights," 15th April 2020, accessed July 24, 2020, https://www.nigeriarights.gov.ng/ nhrc-media/press-release/100-national-human-rights-commission-press-release-on-covid-19-enforcement-so-far-report-on-incidents-of-violation-of-human -rights.
[129] Ejiro Umukoro, "Sexual and Gender-Based Violence: Hidden Social Pandemic Under Radar of COVID-19 Lockdown," The Guardian Newspaper, Nigeria, June 3, 2020, https://guardian.ng/features/focus/sexual-and-gender-based-violence-hidden-social-pandemic-under-radar-of-covid-19-lockdown/.
[130] Umukoro, "Sexual and Gender-Based Violence."

Forum declared a state of emergency on Sexual and Gender-Based Violence.[131]

The report shows that over 3,600 rape cases were recorded across Nigeria during the lockdown[132]while the Inspector-General of Police disclosed that the Nigerian police recorded 717 rape cases between January and May 2020 and the police arrested about 799 suspects in connection with rape cases while 631 cases had been conclusively investigated and charged to court, 52 cases are still under investigation.[133] These cases must be concluded while the culprits are adequately punished under the law.

Socio-economic rights, like the right to food, and the right to housing, (although non-justiciable under Nigerian law), were gravely affected by the pandemic. With a limited welfare system and poor data, the government was unable to provide sufficient support, which has bred dissatisfaction and mistrust.[134] Palliative aid to the poor and vulnerable was characterized by coordination problems.[135] The eligibility criteria for the Federal Government Covid-19 palliative aid include the inability to recharge mobile phone with N100, bank balance not more than N5000, and referral by a community leader.[136] These criteria fell short of standard indicators (disability status, income, employment, and education) for measuring household poverty.[137] Therefore, palliative aid meant to cushion the effect of the Covid-19 lockdown on the poor and vulnerable did not achieve its intended objectives. Palliative aid was allegedly given to political party loyalists at the expense of the poor and vulnerable in society.[138]

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[131] Sunday Aborishade, "Nigeria Recorded 3, 600 Rape Cases During Lockdown" Punch Newspapers, Nigeria, July 13, 2020, https://punchng.com/nigeria-recorded-3-600-rape-cases-during-lockdown-minister/.

[132] Esther Iroanusi, "At Least 3,600 Rape Cases Recorded During Lckdown– Minister," The Premium Times, Nigeria, Published July 14, 2020, https://www.premiumtimesng.com/news/top-news/402783-at-least-3600-rape-casesrecorde d-during-lockdown-minister.htm

[133] Xinhua, "Nigeria's Police Chief Confirms Arrest of 799 Suspects of Rape cases, Xinhua, Published June 16, 2020, accessed August 12, 2020, http://www.xinhuanet.com/english/2020-06/16/c_139141302.htm.

[134] Onyemelukwe, "The Law and Human Rights."

[135] Olu Awofeso and Paul Irabor, "Assessment of Government Response to Socioeconomic Impact of Covid-19 Pandemic in Nigeria," *Journal of Social and Political Sciences*, Vol.3, No.3, (July 2020), 677, https://DOI: 10.31014/aior.1991.03.03.201

[136] Lawrence Njoku, Kelvin Ebiri, Seye Olumide, "Why Controversy over FG's COVID-19 Palliatives Persists." The Guardian Nigeria, published on April 26, 2020, https://guardian.ng/news/why-controversy-over-fgscovid- 19-palliatives-persists/.

[137]The World Bank, "Nigeria Economic Report, No. 2, July 2014," accessed August 16, 2020, https://www. documents.worldbank.org>curated.

[138] Njoku, Ebiri and Olumide, "Why Controversy over FG's COVID-19 Palliatives Persists."

The Emergency Economic Stimulus Bill passed by the House of Representatives on March 24, 2020, was only meant to support big businesses that are registered under the Companies and Allied Matters Act to maintain their workers whereas the largest percentage of Nigeria's total GDP and total workforce comes from businesses in the informal sector that is mostly unregistered and could not get these benefits.[139] The CBN's stimulus package offers a credit of 3 million Naira to poor families impacted by COVID-19. However, the loan requires collateral and is not interest-free and therefore not affordable to the poor. The food assistance promised by the government to vulnerable households did not get too many of them as the distribution system is marred by corruption and opaque accountability.[140]

The pandemic also heightened inequality and increased the marginalization of vulnerable communities. [141] For example, people living with disabilities, the elderly, widows, minors and out-of-school children, persons living with HIV/AIDS, Internally Displaced Persons, and refugees disproportionally suffered the effect of the lockdown.[142]

In summarizing the impact of the government's response on human rights, the NHRC stated that the action of the law enforcement agents speaks volumes of the protocols and rules of engagement for law enforcement in Nigeria as well as the efficiency level and capacity of law enforcement agents to deal with the civil population which is a sheer display of impunity and reckless disregard for human life. The NHRC also found that the various human rights violations recorded during the period arose as a result of excessive or disproportionate use of force, abuse of power, corruption, and non-adherence to international and national human rights laws and best practices by law enforcement agents.[143]

VI. RECOMMENDATIONS

First and foremost is the duty (imposed on Nigeria like other countries) to respect, protect and fulfill the right to life, including basic healthcare. [144]

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[139] Siddharth Dixit, Yewande Kofoworola and Obinna Onwujekwe, "How well has Nigeria responded to COVID-19? Brookings Nigeria," Published July 2, 2020, https://www.brookings.edu/blog/future-development/2020/07/02/how-well-has-nigeria responded-to-covid-19/.

[140] Dixit, Kofoworola and Onwujekwe, "How well has Nigeria responded to COVID-19?."

[141] Samuel Kanu, "The Challenges of Persons Living With Disabilities Amid COVID-19 in Nigeria," Businessday Newspaper, Nigeria, Published May 29, 2020, https://businessday.ng/opinion/article/the-challenges-of-persons-living-with-disabilities-amid-covid-19.

[142] COVID-19: Joint Memo by Civil Society Organizations in Nigeria (CSOs) in Nigeria, accessed September 20, 2020, https:www.osiwa.org>wp-cntent>uploads>2020/05>…

[143] Ojukwu, "National Human Rights Commission Press Release."

[144]Lucy Singh, Neha Singh, Behrouz Maldonado, "What Does 'Leave no One Behind' mean for Humanitarian Crises-Affected Populations in the COVID-19 Pandemic?" *British*

States that do not implement measures against communicable diseases, like disease control, access to water, sanitation, and hygiene which are necessary to prevent the spread of COVID-19 violate this human rights duty.[145] The right to health is an inclusive right comprising of access to health care and other factors for healthy living like safe drinking water and adequate sanitation; safe food; adequate nutrition and housing; healthy working and environmental conditions; health-related education and information, gender equality, and the building of hospitals.[146]

The Constitution's most explicit provision on the right to healthcare in Nigeria is section 17(3) (d), which guarantees "adequate medical and health facilities for all persons." This right falls under chapter 2 of the Constitution which relates to issues regarded as fundamental objectives and directive principles of State policy (economic social and cultural rights) and by section 6 (6) (c) is not justiciable.[147] The Supreme Court, however, pronounced the justiciability of socio-economic rights in the case of *Attorney General of Ondo State v Attorney General of the Federation and Others*.[148] The National Health Act was enacted in 2014 in compliance with the decision in this case. Under section 11 of the Act, a basic minimum package of health services is to be provided for citizens including the provision of essential drugs, vaccines, and consumables for healthcare facilities and the development of human resources for primary healthcare. Despite this, the health status of Nigeria is in a deplorable state[149] due to fiscal constraints.[150] The consequence is that Nigerian public hospitals are still grossly underfunded and health services are not properly managed, which has resulted in a comatose state of health infrastructure.[151]

Nigeria's health system before the pandemic was described as nearly non-existent.[152] In most of the cities, health systems are completely dilapidated as they have not received adequate attention, and some government

Medical Journal Glob Health, Vol. 5 issue 4, (2020), 1, DOI: 10.1136/bmjgh-2020-002540.

[145] Singh, Singh and Maldonado, "What does 'Leave no One Behind' Mean."

[146] Office of the United Nations High Commissioner on Human Rights (OHCHR), "The Right To Health," (Factsheet No. 31), accessed July 13, 2020,https://www.ohchr,org

[147] But section 13 of the same Constitution and item 60 (a) under the exclusive legislative vests power in the legislature to promote and enforce the observance of chapter 2 of the Constitution.

[148] (2002) 9 WNLR (Pt. 772) 222.

[149] Obiajulu Nnamuchi, "The Right to Health in Nigeria," accessed June 25, 2020, http://ssrn.com/abstact= 1622874>.

[150] Stanley Ibe, "Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities*," Afr. hum. rights law j.,* vol.10 n.1, (2010), 197.

[151] The Concluding Observations of the Committee on Economic, Social and Cultural Rights on Nigeria's 1996 Report on ICESCR, E/C.12/1/Add.23 of 13th May, 1998 paragraph 28.

[152] Bernard Kalu, "COVID-19 in Nigeria: a Disease of Hunger," *The Lancet*, Vol. 8 issue 6, (April 29, 2020): 556.

officials have contributed to health system collapse by encouraging medical tourism.[153] The COVID-19 pandemic has thrown up challenges for Nigeria's health system and also emphasized its weaknesses, across the board.[154] Having suffered several infectious disease outbreaks and mass chemical poisoning for several years, there is an immense need to tackle the problem[155] by using the maximum available resources at national and international levels to ensure availability, accessibility, and quality of health care as a human right to all without discrimination, including for conditions other than COVID-19 infection; and ensure that the right to life is protected throughout.[156]

Secondly, the advent of the COVID-19 pandemic in Nigeria has relegated the management of other illnesses and chronic medical conditions including, cancers, diabetes, and hypertension to the background[157] and resulted in many deaths. For instance, on Monday, 27th April 2020, 24-year-old Judith Omonua who had been battling with a heart condition for three years died after missing a scheduled surgery due to lockdown.[158] Therefore, the use of resources to curtail the spread of COVID-19 must be balanced with that of addressing other health issues.[159]

Thirdly, while promoting the right to life and health, States must align these measures with other human rights obligations, especially civil and political rights.[160] All responses to COVID-19 must be deeply rooted in the cross-cutting principles of respect of human dignity, independence, and autonomy of the person, non-discrimination and equality, respect of diversities, and inclusion.[161] This will include that the most vulnerable and

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[153] Kalu, "COVID-19 in Nigeria."
[154] Adie Offiong, "Nigeria: A pandemic and a Weak Health System, Good Governance Africa," Published 22nd July, 2020, https://gga.org/nigeria-a-pandemic-and-a-weak-health-system/.
[155] Obinna Onwujekwe, Chima Onoka, Nkoli Uguru., "Preferences for Benefit Packages for Community-Based Health Insurance: An Exploratory Study in Nigeria," *BMC Health Serv. Research*, 10, 162 (2010). https://doi.org/ 10.1186/1472-6963-10-162.
[156] António Guterres, "COVID-19 and Human Rights: We are all in this Together," accessed September 2, 2020, unsdg.un.org> sites>default>COVID-19-and-Human – Rights.
[157] Kelvin Ebiri, Chukwuma Nuanya, Onydiaka Ugoeze, "How COVID-19 pandemic Undermines Fight against Other Diseases," The Guardian, Nigeria, Published May 3 2020, https://guardian.ng/saturday-magazine/cover/how-covid-19-pandemic-undermines-fight-against-other-diseases/.
[158] Ebiri, Nuanya and Ugoeze, "How COVID-19 pandemic Undermines Fight against Other Diseases."
[159] Njal Hostmaelingen and Heidi Bentzen, "How to Operationalize Human Rights for COVID-19 Measures," *BMJ Global Health Journal,* Vol. 5, Issue 7, (July 2020), DOI: 10.1136/bmjgh-2020-003048
[160] Hostmaelingen and Bentzen, "How to Operationalize Human Rights for COVID-19 Measures."
[161] Civil society's Call to States: We are in this together, don't violate human rights while responding to COVID-19, (Civil and political rights and COVID-19 (HRC virtual informal

marginalized sections of the population, such as persons living with disabilities and the homeless, have sufficient access to the services needed,[162] access to health and provision of services and facilities and emergency shelter, especially for homeless people, including children in street situations to be protected,[163] promotion of a more gender-inclusive society, where women and girls' rights are protected.[164]All allegations of rape, torture, and other forms of violence need to be properly investigated, prosecuted, and concluded.

Fourthly, human rights and humanitarian rights should characterize the implementation of the COVID-19 lockdowns and curfews[165] and any pandemic outbreak. Security forces in Nigeria should avoid the use of excessive force in enforcing lockdowns and curfews no matter how disobedient or stubborn the people might be, the use of persuasive communications and mild force should suffice.[166]

Fifthly, the Quarantine Act needs to be replaced with another law that contains a strong framework of human rights. The Infectious Diseases Bill currently needs to be revived in this manner.

Sixthly, the economy of Nigeria needs to be revived. According to the World Bank, Nigeria's economy was still recovering from the 2016 recession when the COVID-19 pandemic emerged in early 2020.[167] The global spread of the pandemic and the subsequent collapse of international oil prices reportedly destabilized Nigeria's macroeconomic balance. Before COVID-19, the number of Nigerians living in poverty was expected to increase by about two million, largely due to population growth and it has been predicted that without strong fiscal reforms, the macroeconomic implications of COVID-19 in 2020 and 2021 will be severe including loss of life, and the possibility of five million more Nigerians being pushed into poverty.[168] Policy options in critical areas that

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conversation, 2020, Joint WS), accessed July 13 2020, https://imadr.org/cprights-covid-19-hrc-9april2020-joint-ws/.

[162] Amnesty International, Nigeria: "Authorities must uphold human rights in fight to curb COVID-19," accessed April 30, 2020, https://www.amnesty.org/en/latest/news/2020/04/nigeria-covid-19/

[163] Amnesty International, "Authorities Must Uphold Human Rights."

[164] Jessica Young and Camron Adib, "The Shadow Pandemic: Gender-Based Violence and COVID-19, (International Growth Centre), accessed August 15, 2020, https://www.theigc.org/blog/the-shadow-pandemic-gender-based-violence-and-covid-19/May 19, 2020.

[165] Ben Odigbo, Felix Eze and Rose Odigbo, "COVID-19 Lockdown, Controls and Human Rights Abuses: the Social Marketing Implications," *Emerald Open Research* (2020) 1.

[166] Odigbo, Eze and Odigbo, "COVID-19 Lockdown."

[167] Gloria Joseph-Raji, Steve Loris, Gui-Diby, "Nigeria in Times of COVID-19: Laying Foundations for a Strong Recovery, 2020," International Bank for Reconstruction and Development / The World Bank, Washington DC, (2020).

[168] Joseph-Raji, Steve Loris and Gui-Diby, "Nigeria in Times of COVID-19."

can help Nigeria recover from the impact of the COVID-19 pandemic were recommended *inter alia* as containing the outbreak and preparing for a more severe outbreak; enhancing macroeconomic management to boost investor confidence; safeguarding and mobilizing revenue; reprioritizing public spending to protect critical development expenditures; stimulate economic activity, and protecting poor and vulnerable communities. This will aid Nigeria to refocus action on ending poverty and inequalities and addressing the underlying human rights concerns that have left the country vulnerable to the pandemic to build a more inclusive and sustainable world.[169]

V. CONCLUSION

There is no doubt that COVID-19 regulations have had a significant impact on human rights and the rule of law in Nigeria. However, the truth is that Coronavirus has exposed human rights gaps that must be fixed because promoting human rights now will help societies emerge more resilient from this pandemic.[170] Embracing human rights as an integral part of our public health response will not only provide ethical guidance during these difficult times but set the foundation for how the world responds to public health crises going forward.[171] The Nigerian government has a responsibility in ensuring that women, people with disabilities, and other minority groups have access to the resources needed to thrive, especially during a global pandemic. In addition to increasing the representation of minority groups at all levels of government, public, private and civil sector stakeholders must work together to enact holistic policies that work for all Nigerians.[172]

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[169] Guterres, "COVID-19 and Human Rights."

[170] Yoni Ish-Hurwitz, "Coronavirus Has Exposed Human Rights Gaps. We Need to Fix this," accessed September 10, 2020, https://www.weforum.org/agenda/2020/04/coronavirus-has-exposed-human-rights-gaps-we-need-to-fix-this-covid-19

[171] World Health Organization (WHO), "Addressing Human Rights as Key to the COVID-19 Response," accessed September 30, 2020, https://www.who.int/publications/i/item/addressing-human-rights-as-key-to-the-covid-19 response

[172] Dalberg Advisors, "Sexual and Gender-Based Violence in Nigeria: Lessons from COVID-19," Businessday Newspaper, Nigeria, Published Aug 28, 2020, https://businessday.ng/opinion/article/sexual-and-gender-based-violence-in-nigeria-lessons-from-covid-19/.

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Rape And Sexual Violence Against Women and Children During the Covid-19 Lockdown in Nigeria

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ABSTRACT

Since the outbreak of the Covid-19 pandemic, there has been a drastic increment of cases of rape in Nigeria which has resulted in public outcry and condemnation. The worrisome trend in the reported cases is the murder of most victims especially females. The effects of rape, are multifaceted and it affects both the victim and the society at large. It renders the victim emotionally and psychologically traumatized. This paper adopts the doctrinal methodology examining the quagmire of increment of rape cases in Nigeria in the wake of the Covid-19 pandemic by highlighting the consequences of rape, the legal framework on rape in Nigeria. It also discusses various forms of sexual violence and the challenges in investigating and prosecuting rape cases in Nigeria. The paper examines the criminal justice system and the adjudication of rape cases in Nigeria. The paper found that the legal framework on rape is inadequate as at present, except for the Federal Capital Territory, Abuja is inadequate and obsolete. The attitude of investigating personnel especially the police is an albatross to the successful investigation and prosecution of rape cases in Nigeria. The paper, therefore, makes vital recommendations on how to curb the rape epidemic in Nigeria post-covid-19.

ESSAY CONTENTS

I. INTRODUCTION

The vices of rape and other forms of sexual assault are not new in our society, they have been perpetrated in various degrees and have been constantly frowned upon by society. However, the current trend and the various forms of which the vice is being perpetrated calls for an urgent review of the existing laws and the justice system concerning sexual offenses. In the previous years, the victims of rape were vulnerable to being accused and blamed for their assault.[1] However, with the growing awareness of rights, this trend is gradually on the decline. The current definition and conceptions about rape are described to include penetration, irrespective of the form it takes, that is whether it be genital, oral, or anal. This penetration must have been done by the perpetrator or using his body or object forcefully and without the consent of the victim.[2] The scope of this definition has been widened compared with the classical definition of rape which was defined as; unlawful sexual intercourse committed by a man with a woman, not his wife through force and against her will. [3] Between January and May of the year 2020, the Nigerian Police claimed to have recorded about 717 rape cases.[4] Given this upsurge in rape cases and other sexual abuses, it will be appropriate to regard it as an epidemic that requires immediate attention from the appropriate authorities. The fact that the escalation of rape cases has been recorded under the Covid-19 lockdown is obvious and undebatable. In recent weeks there have been grievous murders associated with rape and sexual violence. This has led to a series of protests by Civil Society Organizations on the streets and online, calling on appropriate authorities to curb this vice. Some Governors across the various states in Nigeria have pledged and declared war against perpetrators of this crime. There have been calls for the strengthening of existing laws to reflect the seriousness of this crime. Ekiti State, for example, has opened a sex offender register to identify and shame perpetrators to serve as deterrence for future offenders. The aim of imposing the lockdown is to curb the spread of the Covid-19 virus, how long the

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[1] C.R. Gravelin, M.Biernat, and C.E, Bucher, 'Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociological Factors,' 9 *Frontiers in Psychology*, 2019): 1-22, available at https://www.semanticschlar.com>blamin DOI:10.3389/fpsyg.2018.02422 (accessed 19 June 2020).

[2] S, Brownmiller, *Against Our Will: Men, Women and Rape*, New York, NY: Simon & Schuster (1975); M.P. Koss, C.A, Gidycz, C and N. Wisniewski, 'The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students', 55 *Journal of Consulting and Clinical Psychology* (1987):162-70, Doi:10.1037//0022-006X.55.2.162; M.P. Koss and M.R. Harvey (ed.), *The Rape Victim: Clinical and Community Interventions*, (ed.) Thousand Oaks, CA: Sage Publications, 1991; R.M. Hayes, K. Lorenz, and K.A. Bell, 'Victim blaming others: Rape Myth acceptance and the Just World Belief', 8 *Feminist Criminology* (2013):202-20, DOI: 10:117/1557085113484788.

[3] B.A. Garner, (ed.) *Black's Law Dictionar*y, Thompson West (2004) p.1288.

[4] See the report of M. Adamu, Inspector General of Police. The Premium Times, 15th June, (2020) available at https://allafrica.com/stories/202006150851.html#goc (accessed 19 June 2020).

lockdown will persist cannot be ascertained particularly since children are presently at home. The implication of this is that the children and women remain trapped at home with those who had abused them or could abuse them. Poverty has also been identified as a mitigating factor contributing to underreporting and not having the zeal to prosecute rape cases. This article identifies the scourge of rape and sexual violence against these vulnerable categories of people and urges the relevant authorities to identify it as an epidemic that must be eradicated urgently.

This paper is divided into six parts, the first being the conceptual clarification of rape and sexual offenses. The second part examines the prevalence of rape and other forms of sexual violence. The third examines the possible causes of rape and an examination if the Legal framework on sexual offenses in Nigeria. The fourth section examines and discusses the Legal framework on Rape and Sexual Violence in Nigeria and Matters Arising. The fifth discuss matters arising from these laws. The sixth, the forward, while the final section concludes the article.

II. CONCEPTUAL CLARIFICATIONS OF RAPE AND SEXUAL OFFENCES

It is appropriate to understand the definitions of rape and sexual offenses. This is important because it provides fundamental information about the basic concepts on which this paper is based. Another aim of this exercise is to discover the origin, meaning, and application of both concepts in comparison with contemporary usage with the sole aim of determining whether the terms are used appropriately following its etymological background to identify the modifications and additions if any, and the extent of these modifications or additions.

The etymological definition of rape can be traced to the Latin verb "*rapere*" (*supine stem raptum*) which means; to grab, to carry off. After the 14th century, the term rape has been broadened to include; to seize and take away by force. [5] Under Roman law, where a female is forcefully carried off, whether with her consent or not constituted "*raptus.*"[6] Under Roman law, rape was categorized as a crime of assault. It was later modified to accommodate and understood as "an attack against a victim's husband or father and as a crime that devalued women through their presumed loss of virginity. The term rape is sometimes used interchangeably with sexual assault[7] In Medieval English law, rape has been defined to refer to either kidnapping or sexual violation.[8] It can be observed from the various etymological definitions of rape that, the definitions ascribed to it have been gradually modified and enlarged over the years. The lexicon defines rape as an "unlawful sexual activity and usually, sexual intercourse carried out forcibly or under threat of injury

[5] B.J. Keith, 1996, *A Most Detestable Crime: New Philosophical Essays on Rape*, Oxford, University Press. New York (1996) 16.
[6] *Ibid.* p. 16
[7] J. Petrak, B. Hedge, *The Trauma of Sexual Assault Treatment, Prevention and Practice*, Chichester: John Wiley & Sons, ISBN: 978-0-470-85138-8 (2003) 2.
[8] J. Corinne, J.S. *Rape and Ravishment in the Literature of Medieval England*, Boydell & Brewer (2001) 20.

against a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception.[9]

Scholars have defined rape as forced unwanted sexual intercourse, sometimes called sexual assault, which may happen to both men and women of any age.[10] Scholarly definitions of sexual assault and rape are sometimes used interchangeably, however, it is not unusual for state laws to draw a legal distinction between these two concepts. The precise nature of the extent of force utilized in rape has been described as some of the contributing factors that have created so many ambiguities in the definition of rape.[11] These concepts though appear similar when explaining the social definitions, legally are different. The legal sexual definition of sexual violence is defined to include; sexual exploitation, trafficking, female genital mutilation, child sexual abuse. an attempt to obtain a sexual act, unwanted sexual comments or advances, the use of force or coercion involving threats or physical force at the home or workplace.[12] Omoera describes rape as an act of violence, not necessarily perpetrated to seek sexual fulfillment but motivated by the desire for power and control over another person.[13] This assertion is corroborated by Cooper who asserts in his work that rape is predominantly influenced or motivated by intense anger towards a victim or a need to overpower a victim.[14] Slegh and Ruratotoye share the same opinion and posit that sex through coercion is done with the intent to abuse, humiliate, and dehumanize the victim.[15] Cahill states that rape is usually motivated not for sexual motivation but the need for domination and power.[16] Bourke describes rape in his work as an environmental disaster, an embodied violation of another person, and a felony that violates the rights of another through sexual intercourse without the victim's consent.[17] The concept of violence against women has been adopted in describing a wide range of acts, which include, rape, sexual assault, murder, physical assault, emotional abuse, stalking, prostitution, genital mutilation, pornography, and sexual harassment.

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[9] See the Definition of Rape in Merriam-Webster, available at https://www.merriam-webster.com (accessed 21 June 2020).

[10] See Medhelp, *Was I Raped*? (2008) Available at https://www.medhelp.org/rape/survivor (accessed 21 June 2020).

[11] See Rape, legal Definitions of Rape, available at study.sagepub.com>default>files (accessed 21 June 2020).

[12] Sexual Violence: Prevalence, Dynamics, and Consequences. World Health Organization, available at www.who.int>publications (accessed 21st June 2020); J. El-Bushra and L.E Piza, 'Gender-related Violence: Its Scope and Relevance'. 1 *Journal of Gender and Development* 1(2) (1993):1-9; P.D. Rozee, 'Forbidden or Forgiven? Rape in Cross-Cultural Perspective, 17 (4) *Psychology of Women Quarterly* (1993):499-514.

Women Q. (1993):449-514 [Google Scholar]; L. Heise et al. 'Defining "Coercion" and "Consent" Cross-Culturally,' 24 (2) *Psychology, Medicine, SIECUS Report*. (1996):12-4.

[13] O.S. Omoera and B.K Awolola, 'Child Abuse and the Media: A Survey of the Oredo Local Government Area of Edo State, Nigeria', 5 *Pakistan Journal of Social Sciences* (2008):128-33.

[14] O.S. Omoera and B.K Awolola, 'Child Abuse,' supra note 13, p.132.

[15] See Slegh and Ruratoye, in, O.T. Akinwole and O.S. Omera, *A Review of Literature: Rape and Communication media Strategies in Nigeria* (2013) p.5 available at https://www.ajol.info (accessed 25 June 2020).

[16] R. Thornhill, *Human Rape: Evolutionary Analysis*, 4(3) Ethology and Sociobiology (1983):137, available at https://www.sciencedirect.com>pdf (accessed 21 June 2020).

[17] R. Bourke, *Rape Work: Victims, gender and Emotions in Organizations and Community Context*, New York, Routledge (2001); in, Akinwole and Omoera (2013) supra note 15 p. 5.

From the various etymological, lexical, and scholarly definitions given above, one thing that appears unique is the fact that rape and sexual violence in whatever form is generally reprehensible behavior. These definitions allude to the fact that there are several variations of sexual abuse emerging over the years. Rape was initially restricted to female victims however, which the changing tide, children, both male and female adults have now been recognized as victims. This paper adopts the use of rape and sexual violence, sexual assault, and sexual abuse interchangeably but strict interpretations were legally appropriate.

III. PREVALENCE OF RAPE AND OTHER FORMS OF SEXUAL VIOLENCE

Rape and other sexual offenses are global issues of which are not limited to Nigeria or African countries. Research reveals that in American society, there is the possibility of one out of every four women being sexually abused which in turn causes psychological trauma and other consequential health problems.[18] There have been incessant outcries condemning this vice, and in October 2017, victims of sexual violence and harassment flooded the social media speaking publicly, condemning and raising awareness of sexual violence.[19] There were allegations of virtual sexual harassment of children as well. These forms of sexual violence are globally recognized as a social and human concern that needs urgent attention.[20] The United Nations report provides that over 250,000 cases of rape and attempted rape are reported yearly throughout the world.[21]

In Nigeria, rape and sexual violence are now becoming one of the most common crimes with a persistent increase in reported cases. The majority of these reports reveal that children and women of all ages are the most vulnerable to these attacks. The tide is gradually changing as what existed in the past was underreporting of rape cases because of the societal stigma associated with it. Rape is not only regarded as criminal to the victim but society frowns against it with extreme disdain.[22] Several civil rights organizations and the Nigerian Police have brought to the limelight the prevalence of sexual forms of violence against women and children to the public. Some of these acts are perpetrated by close relatives, neighbors, and strangers, or by security personnel when women are in their custody.[23] The Nigerian Criminal law does not recognize spousal rape but with the escalation of sexual violence, there have been reported cases of marital spousal

[18] R. Campbell and S.M. Wasco, 2005. 'Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions' *Journal of Interpersonal Violence* (2005)127-131, available at https://doi.org/10.117/0886260504268604 (accessed 21 June 2020).
[19] V. Tyson, 'Understanding the Personal Impact of Sexual Violence and Assault'. 40 (1) *Journal of Women, Politics & Policy* (2019): 174-83, available at https://doi.org/10.1080/1554477X.2019.1565456 (accessed 21 June 2020).
[20] M. Abeid, *et al*. 'Knowledge and attitude towards Rape and Children Sexual Abuse-A Community Based Cross-Sectional Study in Rural Tanzania', 15 *BMC Public Health* (2015):1-12, available at https://doi.org/10.1186/s128889-015-1757-7 (accessed 21 June 2020); C.J. Onyejekwe, *Nigeria*: The Dominance of Rape'10 (1) Journal of International Women Studies (2008): 46-63, available at https://www.researchgate.net>2680 (accessed 21 June 2020).
[21] See *The Multimedia Encyclopedia of Women in Today's Worlds. Rape, Legal Definitions of-Sage Publications*, available at study.sagepub.com > default > files, (accessed 21 June 2020).
[22] O.J. Alao, 'An Examination of Impact of Rape on the Victim and The Socio-Development of Nigeria', IX(III) *Afro Asian Journal of Social Sciences* (2018): 1-8 Quarter III ISSN: 229-313.
[23] *Ibid.*. p. 302.

rape. There is are variations of sexual offenses ranging from blitz rape[24] (stranger rape), spousal rape (though this is yet to be recognized in Nigeria);[25] group rape; rape by parents, relatives, other relations, and sexual slavery.

The UN Women recently reported a rise in domestic violence against women and identified the fact that for every three months the lockdown persists they could be an additional 15million cases of gender-based violence. The implication is that women may not have access to modern contraceptives and there would be an estimate of 325,000 unintended pregnancies.[26] Kuar is of the position that if his prediction becomes a reality, it will negatively affect the third goal of the 2030 Agenda for Sustainable Development Goals (SDGs). The prospect of reducing maternal deaths globally may not be achieved.[27] Kuar identifies the fact that the spread of Covid-19 is indiscriminate with the victims it infects, however evidence abounds that the pandemic has widened the existing inequalities between both genders. The traditional view has been that women and children are seen as weak and vulnerable in society.[28]

The persistence of the COVID- 19 pandemics has increased this inequality, for criminally minded people who now take advantage of the lockdown to sexually abuse women and children. In addition to this, the consequences of these abuses could lead to an increase in unwanted pregnancies during the lockdown. There may be an increase in death as a result of unsafe abortions.[29] There has been a subtle plea for legalized abortions during this period to abate the spike of badly executed abortions. In the words of Dr. Musonda Makasa, he states thus "Medical doctors and other health practitioners have shifted to Covid-19 fight and comprehensive safe abortion may not be achieved as an emergency even when it is."[30] It is worthy to mention that abortion is legally restricted in Nigeria and can only be performed to save the life of a woman.[31]

IV. POSSIBLE CAUSES OF RAPE

It is eminent at that point to understand the possible reasons why people get involved in rape offenses and to examine whether victims contribute to their vulnerability to victimization. This is done to understand why the trend persists and the reasons for the sudden escalation. This could assist in creating increased knowledge that could help prevent and ameliorate the epidemic of rape and other sexual assaults. Studies have revealed that there exist some cognitive traits and

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[24] W. Mosadomi, (2008). *Jitters in Suleja: Men seeking AIDS Cure Rape Teenage Girls*. Lagos: vanguard Publishers, in, Akinwole and Omoera (2013) supra note 15 p. 7.

[25]M. Kolawole, *Womanism and African consciousness in Africa*, Lagos Third World Press (1999) in, Akinwole and Omoera (2013) supra note 15 p. 7.

[26] See Kuar Jameen. 14th May 2020. Covid-19 Lockdowns leading to a Rise in Violence against Women and Girls. International Federation of Gynecology and Obstetrics, available at https://www.figo.org>COVID-19-loc (accessed 20 June 2020.

[27] *Ibid.*.

[28] *Ibid.*.

[29] Abortion in Nigeria, Gutterman Institute, 2015.: https://www.guttmacher.org>aborti

[30] See Dr. M. Makasa, OBGYN, University Teaching Hospital, Zambia. Cited, in, J. Kuar, 2020, supra note. 24

[31] For laws criminalizing abortion in Nigeria, See, the Criminal Code, Sections 228; 229; 230; 297 and 328. The Penal Code, See; Sections 232, 233, 234, 235and 236. Under the Sharia Penal Code, for example, see Bauchi State Sharia Penal Code Law Cap (1980) (2001) Laws of Bauchi State 2007. SS. 208-212.

attitudinal bases closely related to the desire for acts of uncontrolled sexual aggression. Several explanations for this behavior which range from neuropsychological deficits,[32] deviant Sexual Preferences which emanate from the desire for non-consensual sexual relationships to consensual relationships,[33] and personality disorders and traits have been identified.[34]

In addition to the kinds of rape identified earlier are partner rape, stranger rape, acquaintance, and date.[35] The causes of rape have also been identified to be, victim precipitation, male pathology, and male hostility.[36] In general, the effect of rape on victims is well recognized in addition to medical changes on physical and mental health and social relationships.[37] The traditional myth concerning response to rape is that society blames victims for their rape particularly where the perpetrator was known to the victim. Lonsway and Fitzgerald corroborate the fact that these rape myths which come in the form of attitudes and beliefs are widely accepted. In consequence of this belief is that t indirectly justifies male sexual aggression against the female gender.[38]

Nicholas Groth, [39] a clinical psychologist in his work identified a detailed analysis of three different reasons for rape. The first kind of rape he identified is rape as a result of anger. He identified that the reason for this form of rape is the desire for the perpetrator to humiliate his victim through physical violence. He states further that those who perpetrate this form of rape deliberately utilize sex as a weapon to defile and degrade the victim. He posits further that anger rape is usually associated with brutality much more severe than the normal force that would be utilized to subdue and overpower a victim. The offender in most cases beats up the victim

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[32] C.C. Joyal; D. Black and N. Baniot., 2007, 'The Neuropsychology and Neurology of Sexual Deviance: A Review and Pilot Study Sexual Abuse,' 19 (2) *A Journal of Research and Treatment* (2007):155-73, DOI:10.1007/s11194-007-9045-4 (accessed 22 June 2020)

[33] M.L. Lalumiere; V. Quinsey et al. 'Are Rapists Differentially Aroused by Coercive Sex in Phallometric Assessments'? 998 (1) *Annals of the New York Academy of Sciences* (2006):211-24. Doi:10.111/j.1749-6632.2003.tb07307.x. See also W.L. Marshall; M. Fernandez and M. Yolanda, 'Phallometric Testing with Sexual Offenders' 20 (7) *Clinical Psychology Review* (2000):807-822. doi: 10.1016/S0272-7358(99)00013-6.

[34] J. Bamford; S.B. Chou; and K.D. Brown 2016. 'A Systematic Review and Meta-analysis of the Characteristics of Multiple perpetrator Sexual Offences', 28 *Aggression and Violent Behaviour* (2016):82-94. DOI: 10.1016/j.avb.2016.04.001.

[35] G. Cowan, 2000. *Beliefs about the Causes of Four Types of Rape*, 42 Springer (2000):807-823, available at https://doi.org/10.1023/A:1007042215614 (accessed 22 June 2020).

[36] G. Cowan, *Beliefs about the Causes of Four Types of Rape*, supra note 42. p.815.

[37] Z. Kamdar; N; Jayendrakumar; K. Kosambiya et al. 'Rape: is it a lifestyle or Behavioral problem'? 59 (1) *Indian Journal of Psychiatry* (2017):77-82; See also K. Bachar; B. Fisher and F. Cullen, 'From Prevalence to Prevention', in C.E. Renzetti; J.R. Bergen, R (ed). *Sourcebook on Violence against Women*, Thousand Oaks, CA: Sage Publications (2001) pp 117-42; See also R. Campbell, 'The Psychological Impact of rape Victims 'experiences with the Legal, medical, and mental health systems'. 63 *American Psychologist* (2008):702-17. [Google Scholar]. See also M.P Koss; P.G. Koss, et al. 'Deleterious Effects of Criminal Victimization on Women's health and Medical Utilization', 151 (2) *Arch Internal Medicine* (1991):342-7 [PubMed] [Google Scholar]; A. Waigandt; D. Wallace, D *et al*., 1990. "The Impact of Sexual Assault on Physical Health Status' 3 *Journal of Trauma Stress* (1990): 93-101.

[38] K.A. Lonsway; L.F. Fitzgerald, 'Rape Myths: In Review', 18 *Psychology Women Quarterly* (1994):133-64.

[39] N. Groth, *Men who Rape. The Psychology of the offender*. New York: Premium Press (1979) pp. 44-45. ISBN 978-306-40268-5.

mercilessly, tearing the victim's clothes before eventually raping the victim. Groth states that perpetrators in this category are fully conscious of their actions.

The second category of rapist has been identified as a power assertive rapist. This form of rapist has been recognized to possess some feelings of inadequacies. Hence, they adopt the practice of rape to compensate for these inadequacies. These rapists believe that it is natural for their victims to make initial refusal of their sexual demand, so they have to overpower their victims. Those who get involved in this form of rape strongly believe that their victims enjoy what they do to them. Rapists in this category end up being serial rapists over a period.[40]

The third category of rape offenders is the Sadistic Rapists. These categories of offenders derive immense satisfaction from sexual intimacy associated with anger and infliction of severe pain upon the victim. The anguish the victim feels during the rape gives them intense erotic feelings. The perpetration of this form of rape involves thorough planning and strategizing. These offenders are known to either disguise in addition to blindfolding their victims[41]

Asides from the explanations given above for violence against the vulnerable in society, many researchers and theorists have tried to get answers for the reasons why offenders chose to engage in this form of vice. Some of these theorists and researchers have identified biological factors such as androgenetic hormonal influences; evolutionary theories; personality traits and disorders, mental disorders.[42] They also identify those structural features in the family peer group, religion, media encourage male violence against women for they are generally portrayed as vulnerable and weak.[43] Feminist scholars proffer explanations of sexual violence to have taken its stems in the patriarchal social systems.[44]

The above suggestions for the possible causes of rape tend to tilth more to the fact that sexual violations are perpetrated by the male gender alone. However recent trends have revealed that the female gender now perpetrates sexual violence on children as well. The current trend in which rape and other sexual abuses are being perpetrated corroborates the possible reasons for rape postulated by researchers. However, it has been argued by some scholars that sexual assault cases may not be mental cases, they wonder why culprits do not rape unclad women on the streets with mental health issues. [45] The effect of consuming hard drugs which have

[40] Center for Sex offender Management Lecture Content & Teaching Notes Supervision of Sex Offenders in the Community, National Sexual Violence Resource Center. Available at https://www.csom.org/ (accessed 25 June 2020).
[41] N. Groth, *Men Who Rape*, note 46. p.44.
[42] Causes and Consequences of Violence against Women. In Understanding Violence against women. (1996) pp.49-92 available at https://www.nap.edu>read>chapter (accessed 22 June 2020)
[43] R.J. Gelles and M.A. Staua, 'Determinants of Violence in the Family. Toward a theoretical Integration' in W.R. Burr et al. *Contemporary Theories about the Family*, New York, Free Press (1989) pp. 549-58.
[44]P.C. McKenry; T.W Julian et al. 'Towards a Biopsychosocial Model of Domestic Violence', 57 *Journal of Marriage and Family* (1995):307-30; N.M Malamuth; Linz, D et al. 'Using the Confluence Model of Sexual Aggression to Predict Men's Conflict with Women: A ten-year follow-up study', 69 (2) Journal of Personality and Social Psychology (1995):353-69.
[45] Rising Sexual Violence: Taking Responsibilities as lawyers. Parents and Employers, University of Ibadan 2001 Law Class Webinar Series, 27 June 2020.

become a common phenomenon among the youth could trigger deviants into assaulting the vulnerable within their environment.

V. THE LEGAL FRAMEWORK ON RAPE AND SEXUAL VIOLENCE IN NIGERIA AND MATTERS ARISING

A. The Constitution of the Federal Republic of Nigeria 1999

Chapter IV of The Constitution of Nigeria provides for the fundamental rights of her citizens.[46] Section 34 specifically provides thus:

34(1) Every individual is entitled to respect for the dignity of his person, and accordingly
(a) no person shall be subjected to torture or inhuman or degrading treatment;
(b) no person shall be held in slavery or servitude; and
(c) no person shall be required to perform forced or compulsory labor.[47]

It is apposite to state that rape and sexual violence of any nature amount to the violation of a victim's right to dignity. A close examination of the wordings of this section of the Constitution, it can be observed that the law does not explicitly mention delineating actions that could amount to a violation of the right to human dignity. However, there are oral accounts of formally reported complaints by victims who were held hostage as sex slaves by their masters. Subsections (34) (1) (b) and (c) could be interpreted to read and accommodate cases where victims are subjected to extreme brutality, rape, and other forms of sexual violence. It has become expedient to enlarge this law by specifically making provisions for a list of acts that could amount to a breach of the dignity of the human person.

B. The Penal Code Northern States Federal Provisions Act (No. 25 1960)[48]

The Penal Code Act is a law applicable to the Northern States in Nigeria. Section 268(1) of this Act provides that; 'every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.'[49] In addition to this provision Subsection (2) of the same section provides that; 'Everyone who commits an aggravated assault is guilty of an indictable offense and liable to imprisonment for a term not exceeding fourteen years."[50] The law provides an exception to this rule in its Section 55(1) (d) which provides that an assault committed by a husband on his wife where there are married is no offense where the native law and custom recognizes such 'correction' as lawful and where there is no grievous hurt. It is worthy of mention that the 'correction' mentioned in this law is not limited to spousal relationships but extends to parent, guardian, schoolmaster, apprentice.

It is apposite to state that the above could be tantamount to sex discrimination which can promote disproportionate infliction of violence to women and children. In other words, it can be argued that the provision of this law[51] has taken back with the left hand what it had given with the right hand in its sections 268(1) and (2).

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[46] See Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999.
[47] See Section 34(1) (a) (b) (c) Constitution of the Federal Republic of Nigeria, 1999.
[48] The Penal Code Act for the Northern States was adopted 1960-09-30.
[49] See Section 268(1) Penal Code Act for Northern Nigeria 1960.
[50] See Section 268(2) Penal Code Act of Northern Nigeria 1960.
[51] Section 55(1) (d) The Penal Code Northern States 1960.

C. The Criminal Code Act of Nigeria

The Criminal Code Act[52] has a limited application to the southern states of Nigeria. Chapter 29 of the Criminal Code makes provisions for the punishment of assault.[53] Anyone who unlawfully commits an assault is guilty of a misdemeanor and liable if no greater punishment is provided than imprisonment for one year. Section 352 provides that: 'Any person who assaults another with intent to have carnal knowledge of him or her or against the order of nature is guilty of a felony and liable to imprisonment for fourteen years.[54] The Act also makes provisions protecting male persons from unlawful or indecent assaults. It prescribes a punishment of three years to offenders found guilty of this felony.[55]

Section 357 of the Criminal Code makes provisions for assaults on females. The Act specifically defines rape thus:

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or using threats or intimidation of any kind, or by fear of harm, or using false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offense which is called rape.[56]

The punishment for rape under the Criminal Code is imprisonment for life, with or without caning.[57] Attempt to commit rape carries a lesser offense, a maximum of fourteen years maximum, with or without caning.[58] The Act also makes extensive provisions for cases involving the abduction of females with intent to marry or force to have carnal knowledge. When found culpable the culprit is guilty of a felony and liable to imprisonment for seven years.[59] Where the victim involved is under sixteen years of age, such an offender is guilty of a misdemeanor, and is liable to imprisonment for two years.[60] It is not a defense that culprit was not aware that the victim was a minor.[61]

From the aforementioned, the general rule in practice to sustain a charge and secure a conviction for rape, the following elements must be successfully established:

i. that the accused had sexual intercourse with a woman against her will;
ii. that the intercourse or act was unlawful and not within a spousal relationship;
iii. there was penetration;
iv. the accused had the intention to forcefully have intercourse with the victim without consent (*men's rea*); and
v. corroboration of the compliant.

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[52] The Criminal Code Act Cap C 38 Laws of the Federation of Nigeria 2004.
[53] See Section 351 Criminal Code Act
[54] See Section 352 Criminal Code Act.
[55] See Section 353 Criminal code Act.
[56] See Section 357 Criminal Code Act.
[57] See Section 358 Criminal Code Act.
[58] See Section 359 Criminal Code Act.
[59] See Section 361 Criminal Code Act.
[60] See Section 362 Criminal Code Act, See also *Isa v. Kano State* (SC.35/2013) [2016] NGSC 62 (29 January 2016)
[61] See Section 363 Criminal Code Act.

As exhaustive as these ingredients which must be established before a conviction of rape can be secured appear, they are not devoid of shortcoming. Sometimes the absence of any of these ingredients makes it difficult in securing a conviction in rape or other forms of indecent assaults, even where it is obvious that rape has been committed. The issue of consent is one of the challenges that put an end to the proceedings in the culprit's favor. Consent is not defined anywhere in Nigerian law however, it has been stated that a minor cannot give consent.[62] At common law, consent is vitiated in certain situations where violence or threat is used, or the victim was been deceived as to the nature of the act. Another issue identified under this act is that presumes that all victims of rape will be females. However, this lacuna has been taken care of in the subsequent Laws.[63]

In *Adeoti v. State,*[64] it was held by the Court of Appeal that rape is committed where consent is obtained by force or by threat or intimidation. It was further decided that the most fundamental element to secure a conviction of rape is penetration. This requirement must be proved if otherwise, the prosecution will fail. There doesn't need to be a rupture of the hymen, what is necessary is penetration however slight it may be.[65]

Generally, to find the presence of consent even though not expressly defined anywhere under the Nigerian Laws, the following must be present. There must be violence against the complainant during the act, however, the criticism against this is that the sexual intercourse must have been procured without the use of violence, threat, or fraud, but using serious abuse of power or trust. It is worthy of mention that women and children are also vulnerable to abuse by medical practitioners, prison officers, or therapists in various forms. It has become expedient to determine rape on a larger coast to examine whether the law of rape should deal exclusively with rape obtained by only obvious violence or visible threats. It is apposite given the spike of sexual assaults to expand the law to accommodate issues dealing with consent to provide specific definitions of consent, coupled with a non-exhaustible list of situations that illustrates lack of consent. Some States in other climes have introduced in their legislations, clarity, and guidance in defining consent.[66]

The possible reason for the requirement of corroboration in a rape charge is to minimize the possibility of convicting an innocent person. The Evidence Act[67]requires corroboration of sexual offenses or other related matters. As a matter of practice, the corroboration of evidence is a requirement for conviction. However, it is difficult to prove because of the near impossibility of having witnesses (direct evidence) because of the nature of the crime involved. Corroborative evidence must implicate the accused concerning the offense charged. In *Police v. Suara Sunmonu;*[68] *Akpanefe v. The State*[69] and *Sambo v.*

[62] See Section 363 Criminal Code Act.
[63] See Section 1 Violence against Persons (Prohibition Act, 2015.
[64] (2009) All FWLR (Pt 454) 1450.
[65] See also *Ogunbayo v. State* (2007) All FWLR (Pt.365) 408.
[66] See The Northern Territory of Australia Criminal Code Section 192 and the Crimes of Rape Act 1991.
[67] The Nigerian Evidence Act.
[68] (1957) W.R.N.L.R. p.23.
[69] (1969) 1 All NLR 420.

State[70] the court held that the accused could not be convicted upon the uncorroborated evidence of the prosecutrix. The Judge may, however, after paying attention to that warning, nevertheless convict if they are satisfied with the truth of the evidence.[71] The piece of evidence offered as corroboration must be cogent, compelling, and unequivocal.[72] Corroborative evidence must confirm the following: that sexual intercourse had occurred; that it took place without the consent of the victim; and that the accused was the person who committed the crime.

It is submitted that the issue of corroboration of evidence in securing a conviction of rape should be left to the discretion of the trial judge.[73] This was the position held in *Iko v. The State* [74]where the court after listening to all evidence and in the absence of corroboration may convict the accused if convinced and the judge is satisfied with the truth.[75] It is further submitted that the requirement of corroboration be repealed or abolished in rape cases for it is quite obvious that offenders carry out this activity in secrecy which leaves the perpetrator and the victim as the only witnesses to the crime. The requirement of corroboration could be to the detriment of the victim were strictly enforced. In the case of *Rabiu v. State*[76], the Court of Appeal held inter alia that the evidence needed to be corroborated by an independent witness. The dilemma is this, who witnessed the act when it was committed? It is submitted that the victim in this situation is qualified to testify to the crime.[77] The usual practice by the courts is to convict for lesser offenses where the initial charge cannot be sustained. It is our opinion that this is a serious injustice to the victim. It is appropriate that judges apply the issue of dispensing with corroboration judiciously and in good faith. Upon conviction, the jail term should be proportionate to the crime and not just a bare minimal conviction.[78]

The offenses of the abduction of girls under sixteen years out of the custody of her parents carry a jail term of two years upon conviction. Surprisingly, a crime of this nature particularly when it bothers on the welfare of a young person is accorded minimal years of jail term under the Criminal Code Act. In the celebrated case of *Ese Oruru*, the girl was about fourteen years old when she was abducted in 2015.[79] The abductor was arraigned 8 March 2016 and the defense argued in favor of the abductor stating that Ese was seventeen years old. Recently a Federal High Court found her abductor, Mr. Yunsa Dahiru guilty of abduction, raping, and impregnating a young person.[80] He has been sentenced to 26 years imprisonment. This case is a welcome development however, what is most worrisome is the

[70] (1993) 6 NWLR (Pt. 300) 399.
[71] See also Sections 218, 221,221and 224 of the Criminal Code which come under this category.
[72] *Sambo v. State* supra. See also *Upahar V. State* (2003) 6 NWLR (Pt. 816) 230.
[73] See *Reekie v. The Queen* (1954) 14 WACA 501.
[74] (2001) 14 NWLR (Pt. 732) 221.
[75] *Oludotun Ogunbayo v. The State* SC. 272/2005.
[76] (2005) 7NWLR (Pt. 925) p. 496.
[77] (2011) 7NWLR (Pt. 1234) 393.
[78] Posu v. State
[79] 12 August 2015.
[80] Finally, Court Sentences Ese Oruru's Abductor to 26 years, The Guardian News, available at https://www.legit.ng>1331877 (accessed 25 June 2020).

duration it took for the victim to get justice. The speed at which cases involving rape, sexual assaults should be considered in order not to delay justice.

D. The Child's Right Act 2003

The Child's Rights Act is an Act enacted to protect the rights of the Nigerian Child.[81] The Act specifically provides in its first section that: 'in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or Legislative authority, the best interest of the child shall be the primary consideration.[82] The minimum age prescribed for contracting a valid marriage under the Child's Rights Act is eighteen years.[83] This Act also makes it unlawful to have carnal knowledge of a child and anyone who commits does this commits an offense and is liable upon conviction for life.[84] Knowledge about the age of the child is immaterial,[85] neither can the fact that the offender believed that child had given consent will be acceptable in defense.[86] The Act also criminalizes other forms of sexual abuse and exploitation in any manner not already mentioned in Sections 31(1)-(3).[87] As encouraging as this Act appears, some States in Nigeria have are yet to domesticate it. The reason is that the section is contrary to their religion and culture. Child marriage is quite notorious in the northern parts of Nigeria and evidence abounds concerning sexual violence perpetrated against children and young women.[88] This was the case of a seventeen-year-old girl who killed her husband not knowing that consummation of the marriage was necessary.[89] Another reported case of child marriage was the case of Asalia Umari aged fourteen who poisoned her husband and friends because she was happy about the marriage.[90]

E. Violence against Persons (Prohibition) Act 2015 (VAPPA)

This Act was specifically enacted to eliminate violence in public and private life, prohibit all forms of violence against persons, and provide maximum protection and remedies for victims and punishment of offenders.[91] The enactment of this Act was a welcome development in addressing the lacunas that were present in the Criminal Code and the Penal Code Act. The definition given to rape under this Act was enlarged to accommodate the growing trend of sexual assaults and the recognition of both sexes as possible victims of this crime. The Act specifically provides in its Section1 that:

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[81] Child's Rights Act 2003 Act No.26. Enacted 31 July 2003.
[82] Section 1 Child's Rights Act 2003.
[83] Section 21 Child's Right Act 2003.
[84] Section 31(1) and (2) Child's Right Act 2003.
[85] Section 31(3) (a) Child's Right Act 2003.
[86] Section 31(3) (b) Child's Right Act 2003.
[87] Section 32 (1) (2); 33 (1) (2) Child's Right Act 2003.
[88] V. Sharma, 'Can marry Women Sau No to Sex? The repercussion of the Denial of Sexual Act', 44 *Journal of Family Welfare* (1998) pp.1-8.
[89] Teenage Wife Kills Husband over Sex, says she didn't know its marital obligation, The Vanguard online news. 24 May 2020, available at https://www.vanguardngr.com (accessed 25 June 2020)
[90] The child bride forced into marriage makes a poisoned meal that her husband and three of his friends in Nigeria. The Daily Mail, available at https://www.dailymail.co.uk (accessed 25 June 2020).
[91] Violence Against Persons Prohibition Act 2015. (VAPPA).

1 (1) A person commits the offense of rape if,

a. He or she intentionally penetrates the vagina, anus, or mouth of another person with any other part of his body or anything else;

b. The other person does not consent to the penetration; or

c. The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or employing false or fraudulent representation as to the nature of the act of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.[92]

It is crystal clear from the definition above that rape and other sexual actions initially prohibited in other laws have been considerably enlarged to accommodate dynamics in sexual violence. Some of these are recognition of gang rape recognition of anal and oral sex and setting a minimum penalty of twelve years imprisonment for these crimes. This takes away the discretion to impose minimum punishment by a judge. A thorough examination of this Act enlarges the possible victims of rape and recognized both genders. The Act also recognizes the various forms of body invasion and penetration not limited to the vagina. This perhaps has laid to rest the outdated biased view that only females could be raped and victim-blaming. The Act also improves the punishment for offenders depending on the nature of the sexual crime.[93] The most interesting aspect of this Act is that makes provision for appropriate victim compensation[94] and a mandatory register of sexual offenders is maintained in various states.[95]It is worthy of mention to state that Nigeria now has a sexual offender and service provider Register (NAPTIP) as required in VAPPA. This register has a database of persons convicted of sexual offenses since 2015. This was mandated in Section 44 VAPPA 2015 which is aimed at assisting the public, state bodies, and police to identify recidivist offenders. Lagos and Ekiti States have so far complied with this provision. However, the extent to which victim compensation is been practiced cannot be determined at the moment.

As laudable as the Act (VAAPA) appears, it would be appropriate to re-examine the issue of victim compensation. No amount of compensation paid to a victim of rape or other forms of sexual violence serves as adequate compared to the dignity lost. It would have been much more appropriate to state a minimum amount payable to a victim. This would serve as a deterrence to the offender and those planning to offend. It is quite worrisome that some states are yet to enact their laws.

VI MATTERS ARISING

From the foregoing, it is quite obvious that there exists a comprehensive legal framework on sexual violence in Nigeria. However, despite these numerous laws, the crime remains unabated and incidences reported are grown by the day. This period of the Covid-19 lockdown can be said to have an increase in the number of reported sexual assaults hence the reference to it as an epidemic that needs to be

[92] See Section 1 VAPPA 2015.
[93] See Sections 2(1); 2(1)(a); 2(1)(b); 2(1)(c) VAPPA 2015.
[94] See Section 3 VAPPA 2015.
[95] See Section 4 VAPPA 2015.

urgently addressed with the same zeal as the Covid-19 virus is been addressed. One would wonder why the sudden rise in reported cases. Some of the possible reasons for this rise could be associated with the fact that victims are now much more enlightened and desire to seek justice. However, human rights activists have maintained that the direct consequences of the lockdown have culminated in forcing vulnerable persons to their attackers. In the words of Dr. Sam Abah, 'there is no spike in sex-related crimes amidst the Covid-19 pandemic and lockdown. What you are seeing is what is called ‘’trending”, there is a spike in media and community attention.[96] Though Abah has the right to express his opinion, evidence abounds that there is a spike in the increase of reported cases during the lock-down. Whether there is a spike in a rape case or not is irrelevant. Sexual assault is legally and morally wrong and should be condemned. What is needed at the moment is to address this epidemic is an urgent and collective effort by everyone.

Raped victims may suffer physical and psychological consequences sequel to the assault. This could range from emotional detachment; sleep disturbances acute stress reactions, poor work, and social adjustments; anxiety; post-traumatic disorder; fear, and loss of self-worth.[97] In a study on rape and medical consequences among girls and women victims in Congo, it was observed that during armed conflicts, victims of rape came down with sexually transmitted diseases; pelvic pain; unwanted pregnancies; abortions, and the birth of a child.[98] Medical consequences suffered by raped victims are; suicidal attempts; depression; the development of extreme anger and post-traumatic depression. Some victims presented more than one psychological response in the aftermath of rape. [99]

The Lagos State Domestic and Sexual Violence Team (DSVRT) reported that the team had recorded an increase in cases of sexual and domestic violence since March 2020. Some of the core factors that probably motivated this rise could be associated with gender inequality and idleness for potential deviants. Chukwu Emmanuel Madujibe, a human rights and constitutional lawyer, is firm of the position that the traditional view of regarding women as less inferior to men persists. In corroborating Madujibe’s position, women are still been treated as objects that need their actions approved by the male gender in certain customs. This belief triggers the action to subdue the vulnerable in society to emphasize this inequality.

The fact that there is a lockdown as a result of the pandemic extends the time spent together by people, hence, violence is prone to occur where there are deviants. In addition to this, the difficulty in achieving justice when rape charges are filed in

[96] C. Ogbeche, Covid-19: Rape, another Pandemic? The Blueprint. 12 June 2020, available at https;//www.blueprint.ng (accessed 25 June 2020).
[97] R. Campbell, E. Dworkin and G. Cabral, ‘An Ecological Model of the Impact of Sexual Health on Women’s Mental Health’, 10 (3) *Trauma Violence & Abuse* (2009):225-46; R. Campbell and S.M. Wasco, ‘The Psychological Impact of rape Victims,’ 63(8) *American Psychologist* (2008):702-17; R. Campbell, Understanding Rape and Sexual Assault, (2005) pp 127-131, available at https://www.svri.org>files (accessed 29 June 2020).
[98] G. Ndziessi, G. Bintsene-Mpika et al, ‘Rape and Medical Consequences among Girls and Women Victims during the Post-Armed Conflict Context in Congo,’ 9(1) *Open Journal of Epidemiology* (2019):75-81.
[99] B.O. Rothbaum; E. B.Foa and W. Walsh, ‘A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims,’ 5 *Journal of Traumatic Stress* (1992):455-75.

court would not deter a potential rapist from caring out his plan. It is difficult securing a conviction for rape where no evidence exists, probably this has stemmed the tide of blindfolding the witness in other to cover the victim's identity. The perpetrators are also aware that their victims are most likely to refrain from making a formal complaint to the appropriate authorities hence they take advantage of this to perpetrate their act. Besides this, the response from the police has been reported largely to be to the disadvantage of the victim. There have been instances where collusion has been detected to frustrate the prosecution of the case.

Poverty and illiteracy have also been identified as a barrier contributing to low reportage and prosecution of rape cases. A poor family may be intimidated by an offender from a higher social class; hence they lack the zeal to pursue rape and other sexual violence cases. The reason why there is an epidemic of rape during the lockdown in our opinion is that perpetrators are taking advantage of the closeness they are to the vulnerable, which are the women and children. Another reason could be because issues of rape are shrouded in secrecy to avoid stigmatization of the victim, hence the culprits take advantage of this and are never prosecuted. There have been reports of fathers abusing children, this has created a lot of crises within the families, for the victim's mothers are usually threatened to cover up the act. The fact that those parents/guardians of victims are ignorant of the victims' rights has also left this vice unabated or settled at the family or community level. Unknown to these 'peacemakers' condoning acts of sexual offenses directly or through the discouragement of reporting encourages the act of rape and other forms of sexual assaults. The present lockdown as a result of Covid-19 has exposed the need to address this vice vigorously.

THE WAY FORWARD

It is our position that all key players in the society ranging from the Federal, State, and Local Government, community heads, religious bodies, civil societies, and educational sectors and families consider rape as an epidemic within the Covid-19 pandemic that must be eradicated. The struggle to reduce the occurrence of rape to at least its barest numbers should not be left to the law enforcement agents alone but should be identified as a collective responsibility. It is important to note that sexual assault is not limited to the physical act alone, it could verbal act or other visual actions that coerces another to partake in unwanted sexual attention or contact.[100] Sexual offenders are no longer limited to male perpetrators, there are exists reported cases of female perpetrators and they are driven by the same motivation.[101] The fact that there is a very low reportage of male sexual abuse makes scholarly materials on this vice almost lag behind that of the opposite sex.[102]

Having gone through scholarly works, it is quite obvious that sexual assault occurs globally and particularly in the developing world.[103] This paper addressed the reasons for this vice as recorded by scholars and identified the need to adopt a

[100] P.J. Isely and D. Ghrenbeck-Shim, 'Sexual Assault of Men in the Community', 25(2) *Journal of Community Psychology* (1997):159-66.
[101] W.C. Holmes and G.B. Slap, 'Sexual Abuse of Boys, Definition, Prevalence, Correlate, Sequelae, and management' 280(21) JAMA (1998):1855-62.
[102] K. Bell, 'Female Offenders of Sexual Assault', 25 (1) *Journal of Emergency Nursing* (1999):241-3.
[103] U.O. Eze, 'Prevention of Sexual Assault in Nigeria', 11(2) *Annals of Ibadan Postgrad Med* (2013):65-70.

different approach in curtailing the occurrence of sexual violence and rape. As identified earlier, despite the improvements made in the Criminal Procedure Act and the Criminal Code Act, by the enactment of the Violence against Persons Act, sexual violence persists on the increase.

It is recommended that a two-dimensional approach be adopted in curtailing this vice, which are the preventive measures and a revamp of the system of administration of justice/legal instruments in the fight against this epidemic. Previous studies in sexual assault prevention in other climes have testified to the efficacy of these interventions. We strongly posit that sexual assault can be prevented if certain actions are urgently implemented. Some of these actions are addressed thus:

The Federal and State Governments of Nigeria, though there, are expected to make education compulsory and free for all children from primary classes to Junior Secondary Schools (JSS 3). The Universal Basic Education (UBE) introduced by the Federal Government of Nigeria is expected to make education free at the levels discussed above for all children.[104] Education of children particularly the female child equips them for economic challenges. This is turn lowers the inequality created by the society where females are seen as disadvantaged. Ignorance has also been identified as a contributing factor to the culture of silence adopted by uneducated people when rights are been violated. It is only when there is an awareness of rights that a breach of such rights can be identified coupled with the ability to seek justice despite obvious challenges. Sexual assault will be greatly curtailed if the government makes it mandatory for children to attend schools. These children will otherwise be on the streets probably hawking where they are more susceptible to sexual abuse. In addition to this, parents or guardians of wards who fail to enroll children in schools should be prosecuted.

Another primary prevention of sexual violence is the early identification of individuals that manifest signs of violent and aggressive behavior. This is where community efforts come in. There should be in place an urgent need to change the orientation of such identified as potentially dangerous persons. They should be encouraged to equip themselves with skills when they do not intend to pursue higher education. There should be communal efforts in assisting people within this category to be useful to become themselves and society. Campaigning against the use of hard drugs among the youth should also be taken seriously. If this re-orientation is left unattended, there is every possibility that they turn around to become deviants within their community. Politicians within these communities should desist from using these categories of people for selfish gains alone during the election, but should in addition this equips them with skills and organize training on moral and social responsibilities.

There should be in place constant education and public enlightenment, for this has been identified as a fundamental tool in changing the way of life of a people. Culture, tradition, and belief form the core values of a people. Belief is something that is imbibed and lies within an individual. Belief could be described as a personal commitment to an ideology and stories we tell ourselves to define our

[104] R. O.A. Aluede, 'Universal basic Education in Nigeria: Matters Arising', 20 (2) *Journal of Human. Ecol*ogy (2006)97:101.

sense of reality.[105] The various beliefs and myths about sexual abuse should be demystified, victim-blaming should be discouraged for no reason is excusable for the justification of rape. Even where a person is indecently (scantily) dressed, this should lead to sexual assault. It is advocated that religious bodies, trade unions, community leaders, women leaders, families, and non-governmental educations rise to this challenge. To vigorously address this epidemic. Though the campaign against rape, sexual abuse, and sexual violence by various civil organizations have been quite encouraging in recent times, particularly during this period of lockdown due to the Covid-19 pandemic. This enlightenment aims to create a form of awareness on the need for parents and guardians to protect their children and to give a voice to those who are been abused or have been abused. It is strongly believed that the persistent campaign against these vices will make the crime less attractive to perpetrators.

The news media also have a role to play in mitigating the occurrence of various forms of sexual abuse. There should be radical campaigns against rape and other sexual vices in print and online media. It has been identified that there could be a change in public attitude through persistent campaigns against these vices.[106] On 25 June 2020, the rape of a thirteen-year-old by a 70-year-old man was reported in Gombe State.[107] With this awareness created by the media, the child involved was to be identified, given appropriate medical care. public awareness of this crime makes prosecution almost inevitable.

The media could be described as the eyes and eyes of the people hence, their role in the fight against prevention and reportage of sexual offenses cannot be underestimated. Evidence abounds media reportage, for example, that sexual assaults are not discriminatory. Young person's particularly teenagers deserve urgent attention as well. There should be modalities in place for prevention from sexual abuse. There should be programs specifically organized for their age group to educate them on having proper sexual orientation and preventive initiatives. The schools, religious houses, and civil societies have a huge role to play in this regard.

Early recognition and protection of vulnerable people such as those with mental challenges who may not possess the cognitive mental ability to refuse a sexual offer is necessary. These groups of people are prone to sexual abuses for they may not be able to communicate their abuse nor identify those who perpetrate these offenses against them. These categories of vulnerable persons certainly cannot seek help by reporting and cannot prosecute abuses except with the assistance of a third party where available. Children with mental challenges need adequate and special protection from their parents/guardians, society, and the government. It is expected that every society monitors and pays close attention to these groups of persons, for studies have confirmed that adequate training in behavioral skills equips them with sexual prevention skills.[108]

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[105] J.L. Uso-Domenech and J. Nescolarde-Selva. What are Belief Systems? Available at https://www.vub.ac.be>FOS>cfp> (accessed 26 June 2020); I. E. Nwosu, Mobilizing People's Support for Development: An analysis of Public Enlightenment Campaigns in Africa', 1(1) *Africa Media Review* (1986):46-65.

[106] U.O. Eze, 'Prevention of Sexual Assault in Nigeria,' supra note 106.

[107] Reported by the TVC News, 25 June 2020.

[108] See G. Esatgate, Sex Consent, and Intellectual Disability', 34 (3) *Australian Family Physician*(2005):163-66; R.G. Miltenberger, J.A. Roberts; S. Ellington, et al, 'Training and

The possible stigma faced by the victims of rape deter them from reporting abuses, women, and children, parents/guardians should be encouraged to see sexual abuse as a violation of their rights and make formal complaints when such cases occur. The official processes of reporting cases frustrate victims' zeal, to seek justice. It is recommended that a much more speedy and confidential approach be adopted by the appropriate authorities. The government should in addition to prosecuting rape cases provide logistic support and medical attention immediately after the rape and during the period of prosecution. The delay in the administration of justice cannot be denied in Nigeria, and this comes with its challenges. Persistent adjournments and the inability of relevant witnesses to make an appearance in courts to give evidence could be frustrating. Victims end up getting frustrated and do not appear in court to give evidence. It is recommended that given the spike in rape cases, specialized courts be put in place to address speedily cases of sexual abuse. There should be a specific time for the conduct of trials and where appeals emanate judgments they should also be conducted timeously.[109] The Covid-19 pandemic has brought about the sudden realization of the need to go virtual in almost all spheres of activities in Nigeria. Courts now have virtual sittings; it is suggested that mandatory evidence from expert witnesses or other witnesses be given through this medium to avoid unnecessary delays in trials when the need arises.

The shortcomings in the legal system should also be addressed for where there is an absence of corroboration, the courts expect to see clear evidence of violence and bruises. This hinders the conviction of several culprits. Many cases are reported but the rate of conviction is extremely low. All States are encouraged to enact their Child's Rights Act which should address the scourge of sexual abuse of children. Extreme punishments such as life jail terms should be adopted without room for modifications. Parents who fail to report abuses perpetrated against their young children should also be prosecuted.

In addition to the above Government at all levels through the Ministry of health should provide Rape Kits at government hospitals and specially trained personnel to handle this kit. Medical examination for rape cases in other climes is done with the aid of rape kits. Rape kits contain aids for forensic evidence. In addition to this, the government support should bear financial responsibilities for forensics, not all victims can afford the high cost. There should be an aggressive procurement of forensic testing facilities to identify culprits, particularly where children are abused. Victims who are socially and economically disadvantaged should be supported. This support should be extended to psychological care and rehabilitation of the victim.

Generalization of Sexual Abuse Prevention Skills for Women with Mental Retardation', 32(3) *Journal of Applied Behavior Analysis* (1999):385-388; J. Aylott, 'Preventing Rape and Sexual Assault of People with Learning Disabilities', 8(13) *British Journal of Nursing* (1999):871-76.

[109] For example, see section 396 (4) Administration of Criminal Justice Act 2015, provides that upon arraignment where day to day trial is impracticable, no party shall be entitled to more than five adjournments from arraignment to final judgment, provided that interval between each adjournment shall not exceed fourteen working days.

The police are not equipped monetarily to source and provide evidence in court while some have been accused of violating people in their custody.[110] There have been reported cases of police collusion with culprits, this practice should be discouraged and officers found wanted should be prosecuted. These issues have to be addressed as a matter of urgency to mitigate the plight of rape victims.

VIII CONCLUSION

Rape and sexual violence have become an epidemic that must be urgently eradicated. This cannot be achieved except we close the gap between what we know about rape and what we do. The escalation of this vice within the Covid-19 lockdown is alarming and disheartening. The existing legal instruments appear to be insufficient in addressing these issues and the administration of the justice system has lacunas that put a rape victim at a disadvantage. This vice has been within the society all this while, but the lockdown has aggravated its occurrence and necessitated the need to urgently curb this menace. Government alone cannot address issues of sexual violence, if what we need is the eradication of this epidemic, then there must be in place a comprehensive approach against sexual violence. This will involve all spheres of government, community leaders, religious organizations, educational sectors at all levels, and civil rights organizations. The government is encouraged to adopt much more proactive measures by investing in research that will influence policies. This paper identified that it has become necessary to invest in preventive measures in the area of sexual violence. Identifying factors that are associated with an increased risk particularly for children will help identify better preventive measures.

This paper finally notes that the existing laws on sexual violence should be backed up with an enabling environment. With the rise of reported sexual assault cases, every single person has a role to play to eradicate this vice. This can only be successfully achieved through a combination of all relevant stakeholders who believe in justice and human dignity. The right to dignity is a fundamental human right that is guaranteed by the constitution, women, and children should be adequately protected from sexual assaults.

[110] Lagos DPO Rapes Woman in his Office. Legit, in. Welcome to Mirabel: The First Centre Supporting Rape survivors in Nigeria, The Guardian 25 January 2016 (accessed 26 June 2020).

3

The Effect of Covid-19 On Marine Environment - Evolving the Law and Securing the Health

*Amari C. Omaka, SAN & **Lois N. Omaka- Amari

ABSTRACT

December 31, 2019, heralded the worst pandemic in contemporary world history. It was the day when the first case of coronavirus was officially reported in Wuhan, China. The World Health Organization (WHO) described coronaviruses (known as Covid-19) as a group of viruses that affect human beings through zoonotic transmission. WHO declared it a global health emergency in 2020. This paper discussed the effect of Covid-19 on the marine environment, from a legal and environmental health perspective. The aim was to develop insights into the nexus between human activities and their impact on water and associated ecological, health, and human systems. In doing this, the researcher utilized conceptual and analytical research methods, drawing facts equally from empirical studies relating to the subject. It was found, inter alia, that the coronavirus, which led to city lockdowns, restriction of movement, and paralysis of businesses across the globe, had both positive and negative effects on the marine environment. It was also found that the positive effect far outweighed the negative effects. Findings supporting the positive impacts revealed that it was a result of restriction in human activities, shutting down on commercial activities. In addition, carbon emissions decreased and so was the quantum of effluents on watercourses. It was recommended that if the healthy and sanitary practices which was the feature of the Covid-19 peak period, the lost glory of the marine environment and indeed the ecology can be restored significantly. It was concluded that if the gains of lockdown are sustained and if sufficient mitigative measures and strategic government policies are put in place the marine environment would be safer than ever before.

ESSAY CONTENTS

I. INTRODUCTION

If it were a tale written in literature, no one would have believed it. It would have been too abstract to imagine. From the wake of 2020, the world has been convulsing, grounding global economic activities to a halt.[1] Hence, life across the world has been at a standstill, no thanks to the new coronavirus! According to the World Health Organization (WHO), coronaviruses (CoVs) are a group of viruses that affects human beings through zoonotic transmission, after a similar thread about 100 years ago.[2] In the current Coronavirus, it was on December 31, 2019, that the first case was officially reported in Wuhan, China with symptoms of unexplained low respiratory infections. At that time, WHO classified it as "pneumonia of unknown etiology". WHO eventually found that, unlike the earlier assumptions, this novel coronavirus can be transmitted from person to person. Thus, on January 12, 2020, WHO found that Coronavirus was actually the reason for this infection, and officially named it COVID-19 on 11th February 2020, which is an acronym of 'Coronavirus disease 2019.'[3] The Director-General of WHO, Dr. Tedros Adhanom Ghebreyesus, declared COVID-19 a pandemic disease on 11th

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[1] "Uncharted territory: Legal experts weigh in on the COVID-19 outbreak" https://today.law.harvard.edu/roundup/uncharted-territory-legal-experts-weigh-in-on-the-covid-19-outbreak/

[2] Snehal Lokhandwala and Pratibha Gautam "Indirect impact of COVID-19 on environment: A brief study in Indian context" Department of Environmental Science & Technology, Shroff S.R. Rotary Institute of Chemical Technology, Ankleshwar, Gujarat. Environmental Research, Volume 188, September 2020, 109807.

[3] Cascella M., Rajnik M., Cuomo A., Dulebohn S.C., Napoli R.D. StatPearls Publishing; 2020. Features, Evaluation and Treatment Corona Virus (COVID-19), NCBI Bookshelf. [Google Scholar].

March 2020 while briefing the international media, regarding the 13-fold increase in positive cases in China, and unprecedented spread of the disease to 114 countries with 1,118,000 positive cases and 4291 deaths![4] As of August 13, 2020, the world has recorded 20,405,695 confirmed cases and 743,487 deaths (WHO, 2020)[5], unfortunately, the virus is still ravaging across the globe with no known cure and no 100% confirmed preventive vaccine. So as at the date of this research, locking down in homes, usage of Personal Protective Equipment (PPE), such as face masks, hand sanitizing, and social distancing appears to be the only preventive measure deployed by all nations including Nigeria. By and large, while the world is groping for a solution to contain this deadly disease, the virus is taking its toll on the environment and public health. Pockets of vaccines are being tried, albeit with various controversies and conspiracy theories.[6]

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[4] World Health Organization. 2020. WHO-Director-general-s-opening-remarks-at-the-media-briefing-on-covid-19.www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19 Retrieved from: [Google Scholar].

[5] WHO Coronavirus Disease (COVID-19) Dashboard, Data last updated: 2020/8/13, 10:23am CEST.

[6] Vanguard News "COVID-19: Misconceptions, conspiracy theories stall vaccination progress in Nigeria" https://www.vanguardngr.com/2021/09/covid-19-misconceptions-conspiracy-theories-stall-vaccination-progress-in-nigeria/ September 21, 2021; Ayyadurai, S. R. E. Indictment & Firing of Anthony Fauci. *Shiva4Senate*, https://shiva4senate.com/petition-fire-fauci/ (3 April 2020); Cimons, M. U.S. Measles Experiment Failed to Disclose Risk. *The Washington Post*, https://www.washingtonpost.com/ archive/politics/1996/06/17/us-measles-experiment-failed-to-disclose-risk/6a4dd6ce-7add-4daa-8c5e-6e5fc343b996/ (17 June 1996); Colson, T. Trump says 'everyone knows' that Dr. Fauci is a Democrat, despite the fact that he is not a member of any party. *Insider*, https://www.businessinsider.com/donald-trump-claims-dr-fauci-is-a-democrat-no-evidence-2020–10 (16 October 2020); Fichera, A. Instagram post misrepresents FDA document about monitoring vaccine safety. *FactCheck.org*, https://www.factcheck.org/2021/03/scicheck-instagram-post-misrepresents-fda-document-about-monitoring-vaccine-safety/ (14 May 2021); Fischer, B. Fauci knew about HCQ in 2005–nobody needed to die. *One News Now*, https://onenewsnow.com/perspectives/bryan-fischer/2020/04/27/fauci-knew-about-hcq-in-2005-nobody-needed-to-die (27 April 2020); Funke, D. Facebook posts falsely claim Dr. Fauci has millions invested in a coronavirus vaccine. *PolitiFact*, https://www.politifact.com /factchecks/2020/apr/15/facebook-posts/facebook-posts-falsely-claim-dr-fauci-has-millions/ (15 April 2020); Hoft, J. Smoking gun: Fauci lied, millions died — Fauci was informed of hydroxychloroquine success in early 2020 but lied to public instead despite the science #FauciEmails. *Gateway Pundit*, https://archive.is/kgwEx#selection-612.0–612.1 (3 June 2021); Kennedy, R. F. Death by coincidence? *The Defender*, https://childrenshealthdefense.org /defender/death-by-coincidence/ (14 January 2021); Kertscher, T. Claim blaming COVID vaccine for Hank Aaron, Marvin Hagler deaths lacks evidence. *Politifact*, https://www.politifact.com /factchecks/2021/mar/16/aubrey-huff/claim-blaming-covid-vaccine-hank-aaron-marvin-hagl/ (16 March 2021); Mercola, J. [@mercola]. Major conspiracy [tweet]. *Twitter*, https:// mobile.twitter.com /mercola /status/1384214816907087872 (19 April 2021); Olorunnipa, T. et al. Drug promoted by Trump as coronavirus 'game changer' increasingly linked to deaths. The Washington Post, https://www.washingtonpost.com/politics/drug-promoted-by-trump-as-coronavirus-game-changer-increasingly-linked-to-deaths/2020/05/15/85d024fe-96bd-11ea-9f5e-56d8239bf9ad_story.html (15 May 2020); Reuters Staff. Fact check: Dr. Fauci was not the first CEO and other false claims about biotech company Moderna. *Reuters*, https://www.reuters.com /article/uk-factcheck-moderna-fauci-gates/fact-check-dr-fauci-was-not-the-first-ceo-and-other-false-claims-about-biotech-company-moderna-idUSKBN25S5GD (1 September 2020); Tucker Carlson Tonight. J&J vaccine paused over blood clot

Studies have shown that anthropogenic activities are the key drivers of environmental pollution of all types.[7] Consequently, as traffic of men, engines, automobiles, aviation and commercial movements are virtually paralyzed for months, it is expected that pollution loads to the environment should necessarily be on a decline, especially as particulate matter and carbon emissions level has dropped significantly.[8] This paper, therefore, examines the effect of covid-19 on the marine environment and the general health sector.[9] The aim is to develop insights into the nexus between human activities and impact on water and associated ecological, environmental, and sociological human systems, during the pandemic, at the recovery of the natural systems after the pandemic, and possible subsequent degradation pathways as economic activities pickup up at the normalization of natural systems. Again, access to primary healthcare is sacrosanct and a fundamental human right,[10] this paper will also show the clog that the COVID-19 pandemic has placed on water health which ultimately compromises the public healthcare system.

II. CONCEPTUAL CLARIFICATIONS

A. The Environment

The environment is our surroundings, which include the air, water, land, forests, and the conditions in which a person, animal, or plant lives or operates. It is the entire ecology and all other external factors surrounding and affecting a given organism at any time; and the social and cultural forces that shape the life of a person or an animal population.[11] Rau and Wooten[12] gave a broader definition of our subject. According to them, the word environment is "the whole complex of physical, social, cultural, economic and aesthetic factors which affects individuals and communities and ultimately, determines their form, character relationship, and

concerns. *Facebook*, https://www.facebook.com/TuckerCarlsonTonight/videos/1145773552514245 / (13 April 2021).

[7] Schlacher, T.A., Lucrezi, S., Connolly, R.M., Peterson, C.H., Gilby, B.L., Maslo, B., Olds, A.D.,Walker, S.J., Leon, J.X., Huijbers, C.M., et al., 2016.Human threats to sandy beaches:a meta-analysis of ghost crabs illustrates global anthropogenic impacts. Estuar.Coast. Shelf Sci. 169, 56–73.

[8] Ali Yunus, Yoshifumi Masago, Yasuiaki Hijioka "COVID-19 and surface water quality: Improved Lake water quality during the lockdown" National Centre for Biotechnology Information. https://pubmed.ncbi.nlm.nih.gov/32388159/. See also Stone, M., 2020. Carbon emissions are falling sharply due to coronavirus... [WWW Document]. URL.https://www.nationalgeographic.com/science/2020/04/co-ronavirus-causing-carbon-emissions-to-fall-but-not-for-long/, Accessed date: 13 August 2020.

[9] Snehal Lokhandwala and Pratibha Gautam, op cit.

[10] See MedicalNewsToday "How the pandemic has affected primary healthcare around the world" https://www.medicalnewstoday.com/articles/how-the-pandemic-has-affected-primary-healthcare-around-the-world. Retrieved 2020/08/31.

[11] Amari Omaka. Nigerian Conservation Law and International Environmental Law Treaties (Princeton Publishers, Lagos 2018)

[12]John G. Rau & David C. Wooten (ed*.) Environmental Impact Analysis Handbook*, McGraw Hill Publishers (1980).p.5-8.

survival". Rau and Wooten went further to categorize the dimension of the environment into four:

(a) The physical environment (natural and constructed), which includes land climate, vegetation, wildlife, the surrounding land uses and the critical character of an area, imposture/ public services, air, noise, and water pollutions.
(b) The social environment, which includes community facilities, services, and the character of community facilities and services.
(c) The aesthetic environment-scenic area, vistas, views including the architectural character of findings.
(d) The economic environment, which includes employment, land ownership pattern, and land, values.

Professor Eugene Arene [13]adopted the concept of the environment as defined by Black's Law Dictionary.[14] He defined the environment as the totality of physical, economic, cultural, aesthetic, and social circumstances and factors that surround and affect the quality of people's lives; the surrounding, conditions, influences, or forces, which influence or modify. This definition was quoted with approval and adopted in the Supreme Court case of *Attorney General of Lagos State v. Attorney General of the Federation of Nigeria and 35 others.*[15]

B. Water and marine environment

Marine environment means any watercourse, such as rivers, streams, lakes, canals, creeks, oceans, and indeed all water bodies. According to the learned writer, citing a Greek philosopher - Thales, "All life is water"[16]. This makes water the most basic natural resource. He highlighted that between two-thirds to half of the inhabitants of the world have no access to safe and adequate water. [17] Thus, as a way of seeking a solution to this unfortunate state of affairs, the UN declared the 1980-1990 "Water and Sanitation Decade."[18] The world body, consequently, directed the World Health Organization (WHO) to take all necessary measures to make safe and adequate water available to all people. Water was therefore defined in the book as colorless, transparent, tasteless, and odorless, liquid, which is a compound of hydrogen and oxygen; the liquid or fluid that falls from sky or clouds in form as rain and subsequently exist in and as, lakes, streams, seas, and

[13] See Eugene Arene: *An Assessment of Policies for A Healthier Environment*. Kuru. Nov. 1991.
[14] Sixth edition p.534
[15] (2003) FWLR part 168 909 at 946; Amari Omaka. Nigerian Conservation Law and International Environmental Law Treaties (Princeton Publishers, Lagos 2018)
[16] Olasunmbo Martins *Water Resources management and Development in Nigeria*, Martins pg 2; Amari Omaka (2018). Fundamentals of International Maritime and Water Law (Princeton Publishers, Lagos, 2018), P.3
[17] *Ibid.*.
[18] *UNDP Regional HRBA to Water Programme for Europe & CIS*
O&A on Water Governance. Websites: The Rights to Water and Sanitation Information Portal | UN Independent Expert on Right to Water and Sanitation Webpage, 2010

oceans. All living things are principally constituted of water. It is chemically represented with the symbol H_2O.[19]

C. Infectious waste

According to NESREA Guidelines for handling infectious and medical waste generated from the treatment of COVID-19,2020, infectious waste is a waste suspected to contain pathogens e.g. laboratory cultures, waste from isolation wards, tissues (swabs), materials, or equipment that have been in contact with tubing, catheters, IGS toxins, live or attenuated vaccines, soiled plaster and other materials contaminated with blood, urine, sputum, feces of infected patients. Within the context of the above definition, all materials including Personal Protective Equipment (PPE) used for the treatment of COVID-19 that had been declared a global pandemic are considered infectious waste.

D. Primary Healthcare

According to WHO, primary healthcare is "a whole-of-society approach to health and well-being centered on the needs and preferences of individuals, families, and communities… it ensures people receive comprehensive care — ranging from promotion and prevention to treatment, rehabilitation, and palliative care — as close as feasible to people's everyday environment."[20]

E. Public Health

This is the branch of medicine dealing with the health of the population as a whole, especially as the subject of government regulation and support. Public health addresses issues bothering on hygiene, epidemiology, and disease prevention. It is the science of protecting the safety of, and improving the health of communities through education, policy-making, and research for and prevention of diseases through environmental health.[21] In other words, p*ublic health is simply* the art and science of preventing disease, prolonging life, and promoting physical and mental health, environmental sanitation, personal hygiene.[22] It is an area in health sciences that aims at protecting and improving the health of individuals, communities, and the greater population.

III. STATE RESPONSES TO COVID-19

A. The emergence of sundry legal regime

The foregoing lays the foundation that life and business world over have come to a standstill engendered by many countries enforcing a lockdown and shutting off

[19] Amari Omaka (2018). Fundamentals of International Maritime and Water Law (Princeton Publishers, Lagos, 2018), P.2

[20] See MedicalNewsToday "How the pandemic has affected primary healthcare around the world" https://www.medicalnewstoday.com/articles/how-the-pandemic-has-affected-primary-healthcare-around-the-world. Retrieved 2020/08/31.

[21] "what-is-public-health?" https://www.publichealth.pitt.edu/careers/what-is-public-health

[22] Public health | Definition, History, & Facts | Britannica. https://www.britannica.com › ... › Medicine

of their citizens from work and regular bustling lifestyles due to the novel coronavirus (COVID-19) that hit the world in the first quarter of 2020 through the substantial part of the year 2020, with little or no hope of an immediate solution. For the first time in contemporary history and several decades, life on earth ground to halt. In Nigeria, many states shut down businesses, markets, air, and land transportation/travels, with minor exceptions on food/drugs and essential services; inter-state borders closed and restricted airport and inter-state travel to curtail the spread of COVID-19. Malls, open markets, shops, and business centers in many states are being closed and sometimes allowed to open at specific hours for state agencies to disinfect those spaces for COVID-19.[23] Research and studies have shown that increased industrialization and anthropogenic activities in the last two decades polluted the atmosphere, hydrosphere, and biosphere.[24] This international pandemic drastically slowed down the pace of industrialization and economic activities. This was done with the instrumentation of the law and high-powered state regulations.

According to State's Public Health Law and the Federal Quarantine Act, Q2 LFN 2004, many state governments and the Federal Government of Nigeria enacted laws on COVID-19 and other infectious diseases; and have undertaken more stringent measures such as instituting curfews. Below is a list of some of the laws enacted at the peak of the pandemic between March to April 2020.

1. On 27th March 2020, Lagos for example, enacted, The Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020
2. Ekiti State: 29 March | The Ekiti State Corona Diseases (Prevention of Infection) Regulations, 2020 which sets out regulations for preventing the spread of Coronavirus disease in Ekiti State.
3. The Ebonyi State Corona Diseases (Prevention of Infection) Regulations, 2020 which
4. FG: After the presidential address to the nation on 29th, on then 30the March | President Mohammandu Buhari signed The Federal Government of Nigeria COVID-19 Regulations, 2020 which declared COVID-19 a dangerous infectious disease and to provide guidelines that put in place measures to curtail the effect of the COVID-19 pandemic on economic activities and livelihood in Nigerians.
5. NSE: 15 April | Guideline to companies on holding virtual meetings in the wake of the COVID-19 pandemic.

[23] "State and regulatory responses to Covid-19 in Nigeria" Published by Brooks & Knights on 20 Apr 2020, https://www.lexology.com/library/detail.aspx?g=afefb8de-48be-4808-b6e4-37e3bf8c7639.

[24] Ali Yunus, Yoshifumi Masago, Yasuiaki Hijioka "COVID-19 and surface water quality: Improved lake water quality during the lockdown" National Centre for Biotechnology Information. https://pubmed.ncbi.nlm.nih.gov/32388159/.

6. NESREA: 16 April | NESREA Guidelines for Handling Chemicals Used for Disinfecting Surfaces Against Coronavirus (COVID-19).
7. NESREA: 16 April | NESREA Guidelines for handling infectious and medical waste generated from the treatment of COVID-19.[25]

B. General Provision of the Covid-19 Law in Nigeria

The above discussion has shown that Nigeria was as hit as most parts of the world with ravages of covid-19. However, Lagos State has about 50% of the COVID-19 cases in Nigeria.[26] Being the commercial nerve center of Africa's largest economy in Africa, the State with its estimated 20 million population, which is about 10% of Nigeria's population, is a significant stakeholder in Nigeria's ability to stem the tide of the COVID-19 Pandemic. Thus, in discussing the legal framework for the prevention and control of the pandemic in Nigeria, it is apposite to use the Lagos state law as a model.

Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020, otherwise referred to as "the Law" in this article, was assented to by the Governor of Lagos State Mr. Babajide Olusola Sanwo-Olu on the 27th day of March 2020. The Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020, which we are using as a case study, designated COVID-19 as a Dangerous Infectious Disease within the meaning of section 2 of the Quarantine Act, noting that it constitutes a serious and imminent threat to the public health of the people. It grants the Governor powers to direct a potentially infectious person within Lagos State to go to a place specified for COVID-19 screening or to go into isolation.

The Law gives the Governor the power to restrict movement within, into, or out of the State, particularly the movement of persons, vehicles, aircraft, and watercraft. The Law also gives the Governor the power to, and he indeed restricted or prohibited the gathering of persons, the conduct of trade, business, and commercial activities within the state, and to order the temporary closure of markets, except those selling or manufacturing essential services.

Section 5 of the Law labels COVID-19 as a Dangerous Infectious Disease which constitutes a serious and imminent threat to the public health of the people in the Local Area. The Law has declared COVID-19 as one of such in Lagos State. This

[25] Government's COVID-19 response measures. https://www.pwc.com/ng/en/covid-19/government-covid-19-response-measures.html.

[26] Bidemi Olumide and Kitan Kola-Adefemi in their briefing note on the Covid-19 in Nigerieris most populous city and the Lagos State's Infectious Diseases (Emergency Prevention) Regulations 2020, 29 April 2020.

is *impari materia* with Section 2 of the Federal Quarantine Act which sets out Dangerous and Infectious Diseases in Nigeria.[27]

Section 14 of the Law provides that the Governor may direct that medical practitioners and health workers notify the Governor, through the Ministry of Health or any other designated health officer, of persons with COVID-19 symptoms. The Governor may prohibit the transmission or dissemination of false information on COVID-19. In the light of so many conspiracy theories sounding the pandemic and many false claims of cure, the Governor may also prohibit persons from promoting unverified or unapproved cures, vaccines, or similar medicinal items that purport to cure, alleviate or reduce instances of persons infected or believed to be so affected.[28]

Under the provisions of section 6, the Governor may direct that:

1. a person who is potentially infectious including a child should report at a designated place for screening and assessment;
2. a potentially infectious person who fails or refuses to go to a place specified for screening and assessment be forcefully removed; and
3. a potentially infectious person including a child should go into isolation for an initial period of 14 days.

In the case of an order against a child, the Governor's directions are to be carried out by the child's parent or guardian. While provisions for the proper care of potentially infectious persons placed in an isolation center are to be borne by the State, this will not be the case in the instance of a person or child that is forcefully removed as both the cost of removal and isolation will be borne by the person or child's parent/guardian. Accordingly, the Governor has the power to, where necessary, direct that anyone who is potentially infectious, be forcefully removed and placed in an isolation center or other designated place. The question, who is a "potentially infectious" person has been left to the Governor to decide. Thus, the Governor may:

1. restrict movement within, into, or out of the Local Area, except for the transportation, movement or procurement of medical supplies, other essential supplies, and essential services personnel; and
2. restrict and prohibit gatherings;
3. impose requirements for obtaining written approval for gatherings;
4. order the temporary closure of public places where the gathering of persons occur;

[27] Section 2 of the Federal Quarantine Act which sets out Dangerous and Infectious Diseases in Nigeria.
[28] Section 13.

5. order the temporary closure of markets save for essential needs markets, and impose restrictions on the number of persons that may be present in the public place;
6. direct a relevant security agency to break up any gathering of persons in the Local Area and take all persons who do not comply with the Governor's directives into custody for screening, assessment, or isolation;
7. restrict the conduct of trade, business, and commercial activities for such period as may be deemed necessary;
8. order the closure of public, educational and vocational institutions for such period as may be deemed necessary.[29]

However, this is largely a derogation from the fundamental right to free movement within Nigeria. Section 14 (1) expressly provides that "every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof…" However, such derogation is constitutionally recognized under Nigerian law.

In case of death, by virtue of section 12, the Governor can specify what manner and conditions which the remains of a person infected with COVID-19 shall be transported, stored, and disposed of, including an order for the cremation of the remains. While treating the person, or in an isolation center, the Governor may give direction against the offense of hoarding or refusal to supply food, drugs, and other essential goods and services. Such direction may include that such food, drugs, and other essential goods be seized, forfeited, or used for alleviating the supply needs in the Local Area.[30]

Except, the application of section 17, the Law appears to create an offense in section 11 for which it has not prescribed a conventional punishment. However, the relevant provisions of the Federal Competition and Consumer Protection Act, 2018 may, where appropriate, be invoked to punish an offense of the conspiracy or decision or convince to profiteer or unreasonably inflate the price of any goods or services. Without prejudice to the express provisions of law, the Governor can impose any restriction, requirement, or give any directive he deems necessary to curtail the spread of COVID-19 and may particularly in this regard:

1. order any person to stay at home for a defined period;
2. deploy law enforcement agents to enforce directives on the restriction of movement or access to public places;
3. allocate spaces for or construct isolation centers and sanitary stations or anchorages;

[29] See sections 7, 8, 9 and 10
[30] See section 11

> 4. subject to the payment of adequate compensation, take over possession of any property to use as isolation centers and as storage for pharmaceutical and medical equipment or supplies.[31]

Section 17 is the punishment and enforcement part of the Law. The Law creates four categories of offenses. These offenses are punishable with a fine and or imprisonment under the Law or the Federal Quarantine Act and Lagos State's Public Health Law. These include:

1. failure to comply with a restriction, prohibition, or requirement imposed under the Law;
2. provision of false or misleading information (whether recklessly or intentionally) to cause panic or disaffection among members of the public;
3. obstruction of any person from carrying out his duties under the Law; and
4. doing anything contrary to the provisions of the Law.

It can however be argued that the Law can create offenses or allow punishment under any extant law, especially where the substantive law has not expressly provided offenses. Much as the Governor exercise his powers to, forthwith, enforce or directives by seizures, forfeitures or for the utilization of seized goods to alleviate supply needs as provided by section 11, however, the situation would be different where a court of record is called upon to convict a person further to the provision of section 17 of the Law.

Pursuant to section 16, The Governor has powers to exercise any of his powers directly or delegate any other person to do so on his behalf. Such directive, shall, however, be in writing. In exercise of such powers by the Governor or his assignee, it may be exercised orally, in writing, or in any other manner considered expedient in the circumstance.

IV. COVID-19 AND WATER AND PUBLIC HEALTH

NESREA Protocol on Sound Disposal: NESREA in response to the COVID-19 pandemic issued guidelines and policy documents to control environmental abuses that can worsen the incidence of plague. Thus, On April 16, 2020, NESREA made public its regulation known as "NESREA Guidelines for Handling Chemicals Used for Disinfecting Surfaces Against Coronavirus (COVID-19)" and also "NESREA Guidelines for handling infectious and medical waste generated from the treatment of COVID-19, 2020".[32]

The major crux of these regulations is to control reckless spraying of any chemicals or discarding of medical and other unhealthy substances that could aid the spread of COVID-19. Consequently, the throwing of covid and other dangerous medical

[31] See section 15

[32] Government's COVID-19 response measures. https://www.pwc.com/ng/en/covid-19/government-covid-19-response-measures.html.

wastes into watercourses is forbidden. Thus, in line with NESREA and WHO Guidelines, and international best practices, medical waste generated from the treatment of highly contagious diseases such as COVID -19 can only be managed under the provisions of the current and extant environmental and public health laws.

A. Positive effects

One of the greatest gains of covid-19 and its resultant lockdown of business and industries is the safety of the environment. With economic activities ground to a halt, the aquatic and other spheres of the natural environment of this country have started healing themselves. Scripps Institute of Oceanography reported that the use of fossil fuels, which are mostly offshore/or marine sourced, would decline by about 10% around the world owing to the COVID-19 spread.[33] The decline is gain to the marine environment as less pollution to watercourses would occur. The creeks and waters of the Niger Delta have witnessed less pollution since the lockdown. The same goes for air pollution that could arise from gas flaring. According to the Ministry of Ecology and Environment, China, the air quality went up 11% in the category 'good' in as many as 337 cities.[34] In as much as these improvements in environmental cleanliness may probably be considered to be temporary, the current level of pollution in the atmosphere, biosphere, and hydrosphere could be much lower than the pre-COVID-19 period when the guidelines and legislations that were enacted by different states are continuously implemented even after the pandemic.[35]

Secondly, and flowing from the number one point above, COVID-19 has given birth to so many environmental and public health laws that are geared towards the preservation of the environment and the safety of our waters and marine life. These include NESREA Guidelines for Handling Chemicals Used for Disinfecting Surfaces Against Coronavirus (COVID-19); NESREA Guidelines For Handling Infectious And Medical Waste Generated from the Treatment of COVID-19, 2020 and Infectious Diseases (Emergency Prevention) Regulations 2020 of different states of the federation. The marine environment would be the greatest gainers when corona-virus-engendered laws are continuously and effectively implemented after the pandemic.

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[33] Scripps Institute of Oceanography report on covid. https://scripps.ucsd.edu/

[34] Henriques, M., 2020. Will Covid-19 Have a Lasting Impact on the Environment? [WWWDocument]. URL.https://www.bbc.com/future/article/20200326-covid-19-the-im-pact-of-coronavirus-on-the-environment, Accessed date: 11 August 2020.

[35] Ali Yunus, Yoshifumi Masago, Yasuiaki Hijioka "COVID-19 and surface water quality: Improved Lake water quality during the lockdown" National Centre for Biotechnology Information. https://pubmed.ncbi.nlm.nih.gov/32388159/.

Thirdly, it has led to safer rivers. In a study conducted in India by Snehal Lokhandwala and Pratibha Gautam at the peak f the covid global lockdown, at the waters of Ghaziabad which is the biggest city of Western Uttar Pradesh, second-largest industrial city of Uttar Pradesh, and a part of the National Capital Region, reveals the improvement in the quality of several rivers of India including Ganga, Cauvery, Sutlej, and the Yamuna, etc. The primary cause is the lack of industrial effluents entering the rivers due to the lockdown situation under this pandemic situation.[36] The same was the case of Rivers Niger and Benue because fewer wastes were dumped there during the near-comprehensive lockdown.

The DO (Dissolved Oxygen) levels of river Ganga as per reports has gone above 8 ppm and BOD (The dissolved biochemical oxygen demand) levels down below 3 ppm (parts per million) at Kanpur and Varanasi (SANDRP, 2020) which ranged around 6.5 ppm and 4 ppm in 2019 respectively (Pathak and Mishra, 2020).[37] Apart from direct effluent and wastes deposits in the rivers, the lockdown engendered massive reduction of irrigation water demand, reduction of religious and cultural activities like puja, bathing, cremations on the banks of the rivers.[38]

Fourthly, the COVID-19 pandemic incidental lockdown has seen to the growth of wild marine life. Reports from the locals living around coastal areas show robust thriving of marine life within the lockdown.[39] Similarly, in a study along the Ganga river tributaries, the researchers stated that "real-time water monitoring data provided by CPCB state that 27 out of 36 monitoring units placed at different places wherein the river Ganga flows were found suitable for propagation of wildlife and fisheries and bathing.[40] CPCB also has three real-time monitoring stations in Kanpur and their findings show that the water quality improved the same way marine life blossomed. That was evidenced data information as reported through these monitoring stations during lockdown period."[41]

Fifthly, the lockdown led to cleaner beaches. Within the peak of the lockdown spanning April – July 2020, the beaches of Lagos such as Bar Beach, Eleko Beach, Lekki Beach, and other beaches across Nigeria were spick and span. The debris of cans, cellophane bags, and sundry wastes that used to litter along the coast was absent. The Banks of River Niger along Onitsha and Asaba witnessed a great

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[36] Snehal Lokhandwala and Pratibha Gautam "Indirect impact of COVID-19 on environment: A brief study in Indian context" Department of Environmental Science & Technology, Shroff S.R. Rotary Institute of Chemical Technology, Ankleshwar, Gujarat. Environmental Research, Volume 188, September 2020, 109807

[37]Total dissolved solids (TDS) is measured as a volume of water with the unit milligrams per liter (mg/L), otherwise known as parts per million (ppm). According to the EPA secondary drinking water regulations, 500 ppm is the recommended maximum amount of TDS for your drinking water.

[38] Snehal Lokhandwala and Pratibha Gautam, *op cit.*

[39] Mr. Idam Obila's oral testimony. He is a local fisherman at *Esu* river at Amasiri Afikpo North LGA of Ebonyi State, that fishes and other marine live were having a field day in the waters and beaches of the river.

[40] The Tribune, March 2020.

[41] Snehal Lokhandwala and Pratibha Gautam, 2020, *op cit.*

improvement in terms of cleanliness. Snehal Lokhandwala and Pratibha Gautam, reports clean and pristine waters in major Indian watersides. According to them, "River Yamuna also in most parts of Delhi is appearing clearer, blue and pristine after years. The toxic foam caused due to mix of detergents, chemicals from industries and sewage has vanished clearly in southeast Delhi's Kalindi Kunj. As per Karnataka State Pollution Control Board, the quality of water in Cauvery and tributaries like Kabini, Hemavati, Shimsha, and Lakshamanathirtha is also back to what it used to be before decades. The pollution discharge has drastically fallen sharply in Buddha nullah which carries effluents from 2423 industrial units into Sutlej River in Punjab during this lockdown."[42] Across the globe, "The lack of tourists, as a result of the social distancing measures due to the new coronavirus pandemic, has caused a notable change in the appearance of many beaches in the world. For example, beaches like those of Acapulco (Mexico), Barcelona (Spain), or Salinas (Ecuador) now look cleaner and with crystal clear waters."[43]

Sixthly, the pandemic has caused a positive behavioral change towards health and the environment. It has improved personal and public hygiene and sanitation. For sure restriction cannot be forever, but the incidence of coronavirus has made all and sundry sensitive to the environment, developed the attitude of regular watching of hands with running water, and enhanced water-related hygiene. In all, it has changed humanity to be adopt more responsible behavior that can help man and the ecology.

Finally, the pandemic did not only bring a general improvement on the state of the environment, but the rivers have become clean and clear and marine life is visible. "Undoubtedly COVID-19 has brought a fearful devastating scourge for human being but it has emerged as a blessing for natural environment providing it a "recovery time". We have also learned that the environmental degradation caused by humans is not irreversible. In just 1–2 months, "recovery of nature" is being witnessed by everyone. This is a signal for us to understand and react. Government and Policymakers should take necessary steps so that this healing process does not become a temporary thing."[44]

We recommend a need for rigorous study on the effect of the implementation of such short-term lockdown as an alternative measure for pollution reduction and its effect on the economy. This study may also be used as a reference document to analyze post covid condition as well to analyze the effect of reduced pollution on health data of sensitive receptors. At present when the entire globe is struggling to

[42] *Ibid.*.
[43] Abderrahmane Noui, Lamia Al-Naama & Shurooq Talab Jaafar (2020) "Impact of the coronavirus (covid-19) on the environment and water resources" https://www.researchgate.net/project/Impact-of-the-coronavirus-covid-19-on-the-environment-and-water-resources, accessed on 13/6/2020
[44] Snehal Lokhandwala and Pratibha Gautam

frame proper strategies to combat Covid-19, the early lockdown implemented has shown an absolute way towards restoring ecosystem and environment."[45]

B. Negative effects

By way of reiteration, the objective of this paper is to identify the impact of the coronavirus (COVID - 19) on the environment and water resources. We have discussed the positive impacts above, here are the few negative impacts of the virus on the marine environment.

Firstly, the pandemic exposed Nigeria's poor portable water system challenge. Many public places, such as markets and rural communities had no access to portable running water to cope with the WHO/NCDC protocol on regular watching of hands with running water. This is not just a Nigerian problem but appears to be common among developing nations. In the wake of the global call by WHO for regular washing of hands to fight the new coronavirus pandemic, the UN recalled that about 2.2 billion people do not have access to drinking water and, worst of all, that 4.2 billion - more than half of the world's population either have no access or are deprived of safe sanitation systems.[46]

Secondly, as projected by WHO there was a surge in the volume of medical wastes all over the country, most of which found their way into the nearest water sources in big cities of Nigeria. Some watercourses in the hinterland witnessed some deposits of healthcare wastes daily as a result of the pandemic. Internationally, Medical waste is also on the rise. Calma reported that hospitals in Wuhan produced an average of 240 metric tons of medical waste per day during the outbreak, compared to their previous average of fewer than 50 tons. In other countries such as the USA, there has been an increase in garbage from personal protective equipment such as masks and gloves.[47] Most of these wastes ultimately find their way to municipal water bodies and finally to international waters.

Thirdly, the pandemic has led to Increased domestic waste. Research has shown that the generation of organic and inorganic waste is indirectly accompanied by a wide range of environmental issues, such as land, air, and water pollution.[48] In the

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[45] *Ibid.*.

[46] Abderrahmane Noui, Lamia Al-Naama & Shurooq Talab Jaafar (2020) "Impact of the coronavirus (covid-19) on the environment and water resources" https://www.researchgate.net/project/Impact-of-the-coronavirus-covid-19-on-the-environment-and-water-resources, accessed on 13/6/2020

[47] Calma, J. Calma "Positive and negative indirect effects of COVID-19 on the environment" https://www.theverge.com/2020/3/26/21194647/the-covid-19-pandemic-is-generating-tons-of-medical-waste (2020). Accessed date: 5 April 2020,

[48] M. Mourad **"**Recycling, recovering and preventing "food waste": competing solutions for food systems sustainability in the United States and France".J. Clean. Prod., 126 (2016), pp. 461-477; K. Schanes, K. Dobernig, B. Gözet "Food waste matters-a systematic review of household food waste practices and their policy implications" J. Clean. Prod., 182 (2018), pp. 978-991

wake of the COVID-19 lockdown, the quarantine policies, established in virtually all the countries in the world compelled consumers to increase their demand for online shopping for home delivery. The result is that organic waste generated by households skyrocketed; in the same manner, food purchased online is shipped packed, thus increasing inorganic wastes. Like the massive generated medical wastes, these inorganic wastes ultimately get flushed into municipal and international waters.

Fourthly, is the challenge of Reduction in waste recycling and over-criminalization of water. Waste recycling has remained one of the best systems of pollution control in both developed and developing nations.[49] However, due to the deadly wave of the pandemic, many countries such as Italy and the USA have stopped recycling programs in some of their cities, to curtail the risk of COVID-19 spreading in recycling centers.[50] In Nigeria, most of the untreated and unrecycled wastes head for the rivers and water canals especially in major cities like Lagos, Ibadan, Aba, Onitsha, Port Harcourt, Benin City, Kaduna, and Kano.

Similarly, fumigation and detoxification have remained a regular feature as one of the major ways to stop the spread of the new coronavirus. These chemicals being spread regularly are drained into rivers and streams, thus constituting health hazards to humans, flora, and fauna that depend on the polluted waters as a source of sustenance. For example, "China has asked wastewater treatment plants to strengthen their disinfection routines (mainly through increased use of chlorine) to prevent the new coronavirus from spreading through the wastewater. However, there is no evidence of the survival of the SARS-CoV2 virus in drinking water or wastewater.[51] On the contrary, the excess of chlorine in the water could generate harmful effects on people's health."[52]

V. CONCLUSION

From the foregoing, it is evident that the effect of COVID-19 on the marine environment is both positive and negative. But the good news is that the positive effect far outweighs the negative effect. This is essential because, as the human activities are restricted in most of the areas and sectors, factories, companies, air transport systems, vehicular movements, and the market/production sectors are all ground to a halt, the aquatic and other spheres of the natural environment of this country have started healing itself. In addition, carbon emissions have decreased

[49] M. Liu, S. Tan, M. Zhang, G. He, Z. Chen, Z. Fu, C. Luan Waste paper recycling decision system based on material flow analysis and life cycle assessment: a case study of waste paper recycling from China. J. Environ. Manag., 255 (2020), Article 109859.
[50] B. Bir https://www.aa.com.tr/en/health/single-use-items-not-safest-option-amid-covid-19/1787067 (2020) Accessed date: August 13, 2020.
[51] WHO https://www.who.int/publications-detail/water-sanitation-hygiene-and-waste-management-for-covid-19 (2020) Accessed date: August 14, 2020.
[52] M. Koivusalo, T. Vartiainen Drinking water chlorination by-products and cancer. Rev. Environ. Health, 12 (1997), pp. 81-90/ View Record in ScopusGoogle Scholar.

and so is the quantum of effluents on watercourses, hence the quality of air, land, and water has witnessed an unprecedented improvement, not only in Nigeria but the world over.[53] My conclusion is anchored in these succinct words of Snehal Lokhandwala and Pratibha Gautam:

> *It is a time for policymakers and the government to plan strategies to come to normal life in the post-Covid era. From the previous discussion, it is clear that a one-month lockdown has done such a miraculous change in environmental condition which was beyond thinking for us just a couple of months back. This is also true that lockdown conditions cannot be imposed forever, industries cannot be shut down for infinite time or vehicular movement cannot be restricted for a much longer time but the patterns can be changed and more responsible behavior can be adopted. It is a known fact that anthropogenic activities are the major cause behind the degraded environmental condition and disturbed ecology, but in the last two months, it has become evident that still it can be restored significantly if sufficient mitigative measures and strategic government policies are planned before removing all the restrictions.*[54]

[53] Snehal Lokhandwala and Pratibha Gautam, *op cit.*
[54] Indirect impact of COVID-19 on environment: A brief study https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7299871/

4

Covid-19 And the Advent of Virtual Court Hearing

*David T. Eyongndi

ABSTRACT

By late 2019, the deadly coronavirus (Covid-19), invaded the world with disruptive effects which led the World Health Organization (WHO) to declare it as a pandemic and laid down guidelines for its curtailment. By March 2020, Nigeria recorded its first covid-19 case. To curtail its spread, the federal and state governments, adopted measures such as partial and total lockdown which led to the lockdown of courts. The lockdown of courts meant lockdown of pending cases and lack of access to file new cases notwithstanding the overwhelmed court dockets. This amounted to the denial of access to justice which could result to resort to self-help with its attendant negative consequences. To address this, the various Head of Courts, issued Practice Directions permitting the courts to attend to cases considered as "urgent, time-bound and essential" while the virtual hearing was adopted to avail more access to courts for other matters. However, the adoption of virtual hearing raised controversies as to its constitutionality vis-à-vis the provisions of section 36(3) of the 1999 Constitution of the Federal Republic of Nigeria, which is impari materia with most constitutions globally in terms of physical court sittings. Similarly, infrastructure deficit and technical know-how were other issues confronting the deployment of virtual hearings as a covid-19 and post covid-19 adjudicatory platforms. This paper discussed the advent of virtual court hearings in courts, using Nigeria as a case study. As a method, it adopted the doctrinal method of legal research. It also interrogated the adoption of a virtual court hearing in Nigeria, and its constitutionality under Nigerian law. It discussed the benefits of virtual hearing and examined the challenges confronting it. It found, among other things, that virtual hearing is inevitable in the circumstances. It finally made vital recommendations towards overcoming the identified challenges posed by the virtual hearing process in Nigeria, including the gains thereof.

ESSAY CONTENTS

I. INTRODUCTION

Since the outbreak of the novel coronavirus also known as Covid-19, a new normal has been created as the pandemic has destroyed and disrupted human activities.[1] It has left devastating effects on human activities and even led to the loss of lives all over the world. Maybe very few countries, are yet to record a death resulting from Covid-19.[2] Since its audacious outbreak, and the rising number of deaths, on the 30th day of January 2020 the World Health Organization, declared it a pandemic and issued guidelines for its curtailment.[3] Governments all over the world, have endeavored to abide by the safety guidelines issued by the WHO.[4] The adherence to these guidelines requires minimizing, if not eradicating physical communication and contact, regular washing of the hands with soap for at least forty seconds, use of alcoholic base hand sanitizer, etc. One way to effectively ensure this has been through the adoption of lockdown either total or partial. This lockdown which affected most parts of the world drastically affected the court system, normally known for physical court appearance and attendance. Covid-19 thus, brought into being, a new normal in court systems globally! That is to say, virtual and non-physical court hearings in many parts of the world. This paper discusses the advent of virtual court hearings in courts, using Nigeria as a case study.

On the 25th of February, 2020, the first case of covid-19 was confirmed in Lagos, Nigeria by an Italian man who came into Nigeria from Milan, Italy making it the first reported case in sub-Saharan Africa.[5] The Lagos State Government as a precautionary measure to contain the spread of the virus declared a lockdown. This action was subsequently fortified by the Federal which declared a fourteen days lockdown in Lagos, Ogun State, and the Federal Capital Territory, Abuja.[6] Sooner than later, other States in Nigeria adopted various preventive measures ranging from partial to total lockdown with restrictions on inter-state travels.[7] This action, let to the disruption of activities in all sectors in Nigeria including the judiciary.

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[1] China's first confirmed Covid-19 Case Traced back to November 17, 2019, see *South China Morning Post,* 3rd March, 2020.

[2] At present, Madagascar is reported to have no case of covid-19 related death.

[3]See https://www.who.int/emergencies/diseases/novel-coronavirus-2019event-as-they-happen (accessed 19 June 2020).

[4]This guideline includes maintaining of at least two meters of social distance, avoidance of crowded places, use of nose mask or face shield, regular washing of hands with soap for at least forty seconds, use of alcohol base hand sanitizers, coughing into the elbow, self-isolation where there has been possible exposure to the virus.

[5]Available online at https://www.google.com/amp/s/www.bbc.com/news/ampworl-africa-51671834 (accessed 20 June 2020.

[6]Covid-19: President Imposes Lockdown on Lagos, Ogun, FCT. Available at <https://nairametrics.com/2020/03/31/covid-19-president-imposes-lockdown-on-lagos-ogun-fct/> accessed 30 June 2020).

[7] *Ibid.*.

The Chief Justice of Nigeria (CJN) on the 23rd of March, 2020 issued a Directive to all Heads of Court enjoining them to lock down the Courts for an initial two weeks[8] which was subsequently extended *sine die* on the 6th of April, 2020.[9] The lockdown of courts is not peculiar to Nigeria as several other African countries aside from European nations have adopted the same measure.[10] This lockdown of courts in Nigeria brought about undesirable but unpreventable consequences as it restricted access to justice.[11] The lockdown down of courts meant lockdown of cases that were already pending in courts, and new cases could not be filed this is so despite the already congested and overburdened court dockets.[12] For how long are disputants to wait to have their cases determined especially cases where time is of the essence as a result of the lockdown given the aphorism that justice delayed is justice denied? This is so even though access to court, is a right guaranteed under the Constitution.[13] To avoid a total denial of access to court, restricted access is accorded to criminal and urgent civil cases which are essential and time-bound (e.g., fundamental right enforcement proceedings). The implication of this is that other matters, considered not coming within this special circumference, are kept at abeyance till such a time when "normal" physical court appearance is possible.[14]

Even these palliative measures, is unarguably, inadequate given the fact that Courts exist, to settle legal disputes between parties.[15] To address this issue and prevent the temptation of resorting to self-help, with its attendant negative consequences, various Practice Directions (PD) were issued whereby virtual court hearing of cases was adopted. While the adoption of the virtual court hearing of cases, is a welcomed development, it is shrouded in various controversies which threaten its potentials in alleviating the pangs of Covid-19 in the administration of the justice sector of Nigeria. These controversies range from the statutory, human capacity to the infrastructural deficit. Section 36(3) of the 1999 Constitution of the Federal Republic of Nigeria[16] provides that court proceedings, as well as delivery of judgments/rulings, shall be done in public to the extent that a judge's chambers, do not fulfill the requirement of a public hearing. This has led to two diametrically opposite schools of thought on the constitutionality of virtual court hearings in

[8] See Circular No. NJC/CIR/HOC/11/631 of 23rd March, 2020.
[9]Halimah Yahaya, 'Coronavirus: Nigeria Extends Shutdown of Courts' available at https://www.premiumtimesng.com/news/top-news/3866322-coronavirus-nigeria-extends-shutdown-of-courts.html (accessed 30 June 2020).
[10] Josephine Jarpa Dawuni, "The Gendered Face of COVID-19: Women and Access to Justice" Available at <https://www.unodc.org/dohadeclaration/en/news/2020/04/gendered-face-of-covid19-women-and-access-to-justice.html> (accessed 20 June 2020).
[11] Oyebode Aluko, "COVID-19 Pandemic and Limited Access to Law and Justice" Available at https://esq-law.com/covid-19-pandemic-and-limited-access-to-law-and-justice/ (accessed 15 June 2020).
[12]George Etomi, 'COVID-19 Impact on Legal System in Nigeria is Devastating' Available at https://guardian.ng/features/covid-19-impact-on-legal-system-in-nigeria-is-devastating-says-etomi/ (accessed 20 June 2020).
[13] Section 6(6) (b), 36(1) and 46 of the 1999 Constitution of the Federal Republic of Nigeria Cap. C23 LFN 2004.
[14]Emuobonuvie Majemite and Okorie Kalu**,** 'The COVID 19 Directives of the Chief Justice of Nigeria and State of the Judiciary' Available at https://punuka.com/the-covid-19-directives-of-the-chief-justice-of-nigeria-and-state-of-the-judiciary/ (accessed 20 June 2020).
[15] Footnote 13 *supra.*
[16] Section 36(3) of the 1999 Constitution of the Federal Republic of Nigeria Cap. C23 LFN 2004.

Nigeria. One school of thought has argued that virtual hearings do not fulfill the constitutional requirement of public hearing thus, proceedings conducted through it, are null and void and of no effect whatsoever. Conversely, another school of thought has argued that virtual court hearing, is constitutional as there is no other platform that can be more public than the World Wide Web (WWW). These opposing views have led to a jigsaw as to the constitutionality of virtual court hearings foisted on the Nigerian judiciary by the audacious covid-19.

Aside from this, there is the concern of infrastructural deficit to jumpstart and sustain virtual court hearings assuming that same is adjudged constitutional. At present, there are epileptic internet services and electricity supply which are two pillars upon which the stricture of virtual court proceedings is built and maintained. Aside from this, the necessary facilities for operating seamless virtual court proceedings are capital intensive. Both the Federal Government and State Houses of Assembly of the constituent States, had appropriated and passed their budgets before the invasion of covid-19 and procure and setting up of infrastructure for a virtual court hearing is not captured. While supplementary budget, would have been a leeway, the pandemic has greatly affected the prices of crude oil which is the mainstay of Nigeria's export commodity which accounts for a larger part of her revenue. This fall in oil prices has let the Federal Government, review downward, its budgets and some States too. Thus, immediate funding is a major drawback. The benefits of the virtual court hearing as a new normal post-covid-19 court hearing platform cannot be emphasized despite these challenges which require creatively navigating these horrendous challenges towards harnessing the benefits. This paper is an effort toward examining the challenges plaguing virtual court proceedings in Nigeria as a response to the covid-19 pandemic by proffering workable solutions towards the attainment and sustenance of speedy justice delivery.

This paper is divided into six parts. Part one contains the introduction. Part two examines the right of access to court and the hierarchy of courts in Nigeria. part three examines the quagmire of a virtual court hearing and the controversies surrounding same as a covid-19 dispute delivery palliative. Part four contains the benefits of virtual court proceedings while advocating for its deployment and sustenance as a post-covid-19 alternative justice delivery mechanism. Part five examines the Presidential Executive Order No. 10 of 2020 as a harbinger of virtual court proceedings in Nigeria and argues for its expeditious implementation. Part six contains the conclusion and recommendations.

II. ACCESS TO JUSTICE AND HIERARCHY OF COURTS IN NIGERIA

Courts are created to ensure that persons who have justifiable grievances, can ventilate the same instead of resorting to self-held with its attendant negative consequences. The total or partial lockdown of courts invariably means the total or partial lockdown of access to justice. The hierarchy of courts in Nigeria reinforced by the doctrine of *stare decisis,* engenders predictability of decisions of the court and thereby creating certainty of judicial determinations. The hierarchy of courts, which is a lubricant to access to justice in Nigeria for an aggrieved party, is allowed to have an unfavorable determination/review of decisions up to the final Supreme Court. This section of the paper, discusses the trajectories of access to justice, by highlighting its albatross and catalysts as well as the impact of the

hierarchy of courts on access to justice in Nigeria through the lens of covid-19. It also charts a court for post-covid-19 settlement of disputes in Nigeria.

Section 6(5) of the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN) lists and prescribes the hierarchy courts in Nigeria. Access to justice is a right ably recognized under Nigerian law and international human rights instruments. Section 17 (1) (e) of the 1999 CFRN[17] envisages that the government shall direct its policies to ensure that independence, impartiality, and integrity of courts of law, and easy accessibility thereto shall be secured and maintained. Section 36(1) makes it mandatory for anyone to have access to the court or tribunal constituted by law to have his cause determined to be accorded fair hearing within a reasonable time and the independence and impartiality of such a court or tribunal shall be secured.[18] Section 46 thereof permits anyone whose right is threatened to be violated or has been violated, to apply to a High Court within the state for redress. Article 8, 10and 11 of the Universal Declaration of Human Rights[19] (UDHR) as well as Article 7 of the African Charter on Human and Peoples Rights[20] both guarantee the right of access to court and the independence and impartiality of adjudicatory bodies be it courts or tribunals in the determination of the rights and obligations of persons.[21]

The Nigerian justice system does not exist for the big and mighty but for all. Like any other system, it exists for delivery of speedier, cheaper, and competent justice thus, the stream of access to justice must remain flowing, pure and fresh for all to drink and quench their thirst.[22] It has been argued and rightly so in our view that access to justice in any society is critical and fundamental.[23] Indeed it is not only the most basic requirement of any system of justice or the most basic human rights of any system that that purports to guarantee legal rights but also the hallmark of any sane and civilized society.[24] Access to justice would not mean just access to lawyers and courts. It is much broader than this as it encompasses a recognition that everyone is entitled to the protection of the law and that whatever rights we seek to protect are meaningless unless those rights can be enforced with minimal constraints to the aggrieved persons and under circumstances ensuring that all manner of people are treated fairly according to the law and can get appropriate redress in circumstances when they are treated unfairly.[25]

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[17]Although Chapter 2 of the 1999 Constitution of the Federal Republic of Nigeria Cap. C23 LFN 2004 is regarded as non-justicieable, the profoundness of this section cannot be overemphasized as it serves as a guide for the formulation and implementation of governmental programs and policies.
[18]Oyelowo Oyewo, *Modern Administrative Law and Practice in Nigeria*, Lagos, Unilag Press and Bookshop Ltd. (2016) P. 244
[19] Universal Declaration of Human Rights, 1948.
[20] African Charter on Human and Peoples Rights, 1988.
[21]T.S.A. Zakariya, 'Access to Justice-A Fundamental Human Right' Being a Paper presented at the 17th Commonwealth Law Conference, Hyderabad, India on 7th February, 2011.
[22] Felicia Anyogu, *Access to Justice in Nigeria: A Gender Perspective,* Enugu, Ebenezer Production, (2009) P. 312.
[23] Charles Olaniyi Adekunle 'Access to Justice in Nigeria: An Extrapolative Appraisal of Its Socio-Legal Barriers' available at https://www.researchgate.net/publication/303483098_Access_to_justice_in_Nigeria_An_Extroplative_Appraisal_of_its_socio-Legal_Barriers/ (accessed 23 June 2020).
[24]Wahab Shittu, 'The Challenges of Access to Justice' Guardianonline 21st July, 2015 Available at https://m.guardian.ng/opinion/the-challenges-of-access-t-justice-justice/ (accessed 24 June 2020).
[25] *Ibid.*.

Within this context, access to justice entails normative legal protection, legal awareness, legal aid and counsel, timeous adjudication, enforcement, and civil society oversight, and many others.[26] Thus, there cannot be said, rightly that there is access to justice where citizens, especially the marginalized groups not only conceive the system as frightening or alien, or in circumstances where citizens have no lawyers either because they are indigent and cannot, therefore, afford one, or where citizens lack information or access to knowledge about their rights and how they can be protected as well as where the system is fundamentally weak and slow in delivering justice to the citizens without favor.[27]
According to Angwe[28] access to justice runs on four wheels that is:

> *A proper adjudicatory system be it court, tribunal, or commission where an aggrieved person goes and seek redress for legal wrongs; accessibility of these proper adjudicatory systems in terms of distance and expense by an aggrieved person from the trial to appellate levels; the process of getting justice must be necessarily affordable to all classes of persons, legal aid and pro bono legal services should be available for the financially vulnerable justice seekers; and the adjudicatory system should be speedy as justice delayed is justice denied.*[29]

The provision of fundamental human rights is useless and until access to justice is guaranteed.[30] Aside from inordinate delay, which is endemic in Nigeria's justice delivery system, lack of adequate resources for optimal performance, understaffing in judicial officers especially at the Magistracy and High Courts[31] level is worrisome, shoddy police investigation, lack of technical know-how, illiteracy, poverty,[32] high cost and lack of a workable legal aid system, and many others, are challenges confronting access to justice in Nigeria.[33] Thus, the lockdown of courts due to the compelling influence of covid-19 is a *force majeure* embargo on the right of access to the court. The adoption of a virtual court hearing is an antidote to the continuous partial lockdown and its concomitant delay of justice delivery because, in the delivery of justice, time is always of the essence. Onu JSC (as he

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[26] *Ibid.*.
[27] *Ibid.*.
[28] Benson Angwe, 'Access to Justice and Protection of Rights of Citizens' Being a Paper Delivered at a Session on the Refresher Course for Magistrates on Modern Judicial Practice and Procedure-Modernizing Judicial Practice and Procedure held at the Andrew Otutu Obaseki Auditorium, National Judicial Institute, Abuja from 24th – 28th April, 2017.
[29] Muhammad Ribadu Ayuba, 'Justice Delayed is Justice Denied: An Empirical Study of Causes and Implications of Delayed Justice by the Nigerian Courts' available at https://www.researchgate.net/publication/334443381 (accessed 24 June 2020).
[30] C.I.N. Emelie, "Legal Education and Access to Justice in Nigeria" (2017) 2(1) *Research Journal of Humanities, Legal Studies and International Development,* P. 149.
[31] Richard Otaru, 'Access to Justice and Fair Hearing' Being a Lecture delivered at the Nigerian Institute of Advanced Legal Studies, Lagos held in the Conference Hall, on 2nd December, 2010.
[32] Marshal Umukoro, 'Access to Justice in the Lower Courts: Re-examining the Civil and Criminal Jurisdiction of Magistrate Courts in Nigeria' being a Paper delivered at the 2016 Conference of all Nigerian Judges of the Lower Courts held at the National Judicial Institute, Abuja, 21st-25th November, 2016.
[33] *Ibid.*. at Pp. 137-139.

then was) in *Elabanjo v. Dawodu*[34] noted that "the essence of administration of justice, it must be emphasized, is to make access to justice as quick as possible and as cheap as possible."[35]

To enhance access to justice in Nigeria especially post covid-19, there is a need to increase the knowledge and professionalism of personnel to dispense justice; there is a need to support the enforcement of remedies and ensure that the remedies are adequate and commensurate with the nature of the wrong suffered or offense committed, there must be guaranteed procedural fairness and dispassionate application of the law to all and sundry facilitating transparency;[36] the independence and autonomy of all form of the judiciary must be established and respected at all times by all persons and institutions, there is need to strengthen civil society activities towards the promotion and protection of the rights of citizens and access to justice for the aggrieved through public interest litigation.[37]

The hierarchy of Courts in Nigeria is enumerated in the relevant section of the 1999 Constitution. From the highest to the lowest in the Supreme Court of Nigeria,[38] the Court of Appeal,[39] the Federal High Court, the High Court of the Federal Capital Territory, Abuja, the National Industrial Court of Nigeria, the State High Courts (all the High Courts are courts of coordinate jurisdictions)[40] the State Customary Court of Appeal, the State Sharia Court of Appeal, the Customary Court of Appeal of the Federal Capital Territory, Abuja, the Sharia Court of Appeal of the Federal Capital Territory, Abuja (these courts are of coordinate jurisdiction),[41] the Area Court and Magistrate Courts. By this constitutional arrangement, the decision of a superior court in terms of hierarchy is binding on all inferiors ones.[42] For example, the decision of the Supreme Court is binding on the Court of Appeal and all the courts beneath by operation of the principle of *stare decisis.*[43] Where an inferior court, departs from the precedent set by a superior court, other than for established exceptions, the *judex,* would be reprimanded for judicial overzealousness and impunity.[44] This doctrine forms one of the pillars of judicial certainty and predictability of outcomes of judicial proceedings.[45] It

[34] [1986] 5 NWLR (Pt. 46) 952.
[35] Nlerum Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' (2005) 3(2) *Sur International Journal on Human Rights* 96-98.
[36] Femi Falana, 'Access to Justice, Bill of Rights and Independence of the Judiciary' in M. Gidado *et al,* eds *Stabilizing the Polity through Constitutional Re-Engineering Essays in Honor of Bola Ige,* Enugu, Chenglo Ltd (1999) 22.
[37] Deborah Rhodes, 'Access to Justice: An Agenda for Legal Education and Research' (2013) 62(4) *Journal of Legal Education* 531-532.
[38] See section 230 (1) and 233 (1) of the 1999 CFRN Cap. C23 LFN 2004.
[39] See section 237 (1), 240, 141 (1) (2), 242, 243, 244, 245, and 246 of the 1999 CFRN Cap. C23 LFN 2004.
[40] See section 245C, 249, 251, 255, 257, 270 and 272 of the 1999 CFRN Cap. C23 LFN 2004.
[41] See section 260, 262, 265, 267, 275 277, 280, and 282 of the 1999 CFRN Cap. C23 LFN 2004.
[42] *Clement v. Iwuanyanwu* [1998] 3 NWLR (Pt. 107) 54.
[43] *Stare decisis* is a legal maxim which means stick to what has been decided, it operates to ensure that lower courts abide by the decision handed down by superior courts on the judicial organogram and it is aided by the principle of judicial precedent.
[44] *Oshodi & 2 Ors v. Eyi Funmi* (2003) 3 NSCQR 320.
[45] Jacob Dada, The Judiciary, Hierarchy, Function, Problems and Prospects' in G.O. Ozumba, ed *Citizenship Education* Aba, Vitalis Book Company (1999) P. 98.

occupies a prominent place in Nigeria's adversarial adjudicatory system.[46] However, an inferior court, under permissible circumstances, such as a judgment deliver in want of jurisdiction, a decision delivered *per incuriam*[47] , and judicial distinguishing, can depart from the subsisting decision of a superior court without any infraction to the doctrine of judicial precedent.[48]

III. COVID-19 AND THE EMERGENCY OF VIRTUAL COURT HEARING IN NIGERIA

Due to the lockdown of courts in Nigeria and the imperative of continuous dispensation of justice, the judiciary, at both federal and state levels, adopted virtual hearings of cases. The 1999 CFRN and enabling laws, empower the heads of the various Courts to make and issue practice directions for the regulation of practice and procedures in those Courts.[49] Pursuant to this power, in the wake of the covid-19 pandemic, the various High Court Chief Judges, have issued practice directions to regulate court proceedings amid the pandemic giving prominence to a virtual court hearing.

The Chief Justice of Nigeria as the Chairman of the National Judicial Council (NJC) issued the "National Judicial Council Covid-19 Policy Report and Guidelines for Court Sittings and Related Matters"[50] Part E thereof, make copious provisions on the adoption and operation of virtual hearing of cases by various courts in Nigeria.[51] The practice direction makes it permissible for the court to adopt virtual hearing for all matters except extremely urgent and time-bound cases or cases that are seriously contentious requiring the calling of witnesses and tendering of evidence.[52] It enjoins the Courts and counsel as well as litigants, to cooperate towards ensuring seamless virtual hearings to ensure continuous justice delivery amidst covid-19. The Chief Judge of Lagos State to address the challenges thrust upon the judiciary by the pandemic issued the "Lagos State Judiciary Remote Hearing of Case (Covid-19 Pandemic Period) Practice Direction".[53] The essence of the Practice Direction was to ensure the hearing of cases via various digital platforms such as zoom, skype, or any other audio-visual platform. Under this Practice Direction, the High Court of Lagos State, Ikeja

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[46] Emmanuel Ikegbu, Sunday Duru, and Emmanuel Dafe, 'The Rationality of Judicial Precedent in Nigeria's Jurisprudence' (2014) 4(4) *American International Journal of Contemporary Research,* 149-158.

[47]The Latin maxim *per incuriam* means "done in error" this is when a court delivered a judgment based on an error presented by a party or its own misconception of the facts and as such, it would be prudent for a lower court not to slavishly follow such a decision as it will amount to persisting in error to the detriment of the litigant and even the justice delivery system itself.

[48] *Adisa v. Olayiwola* [2000] 10 NWLR (Pt. 890) 378; *Mene Kenon & 2 Ors. v. Chief Albert Tekan & 5 Ors.* [2001] 4 NWLR (Pt. 732) 45; *Oladeji (Nig.) Ltd. v. Nigerian Breweries Plc.* [2007] 5 NWLR (Pt. 1027) 415.

[49] See section 274 of the 1999 CFRN, section 52(1) of High Court of Ogun State 2006; section 254F (1) of the 1999 CFRN, Section 36 of the National Industrial Court Act, 2006, Order 1 Rules 8(3) of the National Industrial Court (Civil Procedure) Rules 2017.

[50] *National Judicial Council Covid-19 Policy Report and Guidelines for Court Sittings and Related Matters of Ref. No. NJC/CIR/HOC/II/660 of 7th May, 2020.*

[51]Section 1, 2, 4, 6 and 7 of the *National Judicial Council Covid-19 Policy Report and Guidelines for Court Sittings and Related Matters of Ref. No. NJC/CIR/HOC/II/660 of 7th May, 2020.*

[52]*Ibid.*. section 3.

[53] *Lagos State Judiciary Remote Hearing of Case (Covid-19 Pandemic Period) Practice Direction of 4th May, 2020.*

division delivered judgment through virtual hearing in The People of Lagos v. Mr. Olalekan Hammed.[54] The Practice Direction issued by the Chief Judge of the High Court of the Federal Capital Territory, Abuja, Justice I. U. Bello, approves of the deployment of virtual hearing by providing that:

> *Causes and matter and other proceedings that can be determined on the basis of affidavit evidence may, as far as practicable, be heard and disposed of by Remote Hearing on virtual platforms such as Zoom, Microsoft Teams, Skype, or other audio or video platform as may be approved by the Chief Judge. This includes cases initiated by originating summons or originating motion, application for enforcement of fundamental right and interlocutory motions, as well as the adoption of written final addresses and delivery of judgments/rulings. All participants in a remote hearing shall dress appropriately for court proceedings.*[55]

The Chief Judge of Ogun State, in the exercise of his constitutional power and discharge of his functions, issued the Ogun State High Court Practice Direction.[56] Section 6 and 7 thereof deal with the virtual hearing of cases during the pandemic. It prescribes the modalities for using virtual hearing of cases, the duty of counsel and the litigant as well as that of the Court registry, the media to be adopted for the conduct of the proceedings, mode of service of hearing notices and processes, and the dressing expected of counsel during such proceedings.[57] Proceedings of virtual hearings under the Practice Direction, are to be taken manually and electronically by the court and other parties can only record the proceedings with the permission of the court.[58]

In the same vein, the NICN, in response to the covid-19 pandemic, adopted a virtual hearing via the Practice Direction issued by the President of the Court.[59] The profoundness of this practice direction requires exhaustive articulation. Section 7 thereof, enjoins the various divisions of the NICN, (with exception to time-bound, extremely urgent, and essential matters) to avoid physical court sittings as much as possible to curb the spread of covid-19. All matters that do not require the taking of evidence (such as matters commenced via originating summons), shall be adjudicated through virtual hearing.[60] Hearing notice of all virtual shall be served online particularly through the court website. Such hearing notice shall be made accessible to members of the public unless it is an *ex parte* application. Except with the prior permission of the judge or consent of the other party in writing, none of the parties to a virtual hearing shall be physically present in court or chambers of the judge while the proceedings are ongoing.[61] The Court shall ensure that there is available necessary equipment for virtual hearing before

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[54] Suit No. ID/9006C/2019 judgment delivered on 4th May, 2020.
[55]Section 9 High Court of the Federal Capital Territory, Abuja Covid-19 Practice Direction, 2020.
[56]The Ogun State High Court Practice Direction No. 2 of 5th May, 2020.
[57]*Ibid..* section 6 and 7.
[58]*Ibid..* Section 8.
[59]Section 7 of National Industrial Court of Nigeria Practice Directions and Guidelines for Court Sitting 2020 issued on the 13th day of May, 2020.
[60] *Ibid..* Section 6 (2) (4).
[61] *Ibid..* Section 6(7) (b).

adopting same. To fulfill the requirement for a public hearing of cases, the court shall ensure that there is live streaming of all virtual court proceedings through a publicized uniform resource locator (URL) or web address of the court or any other social media channel so that members of the public can observe the proceedings. The details of the virtual court hearing shall be publicized in the same manner as the conventional sitting and the web address shall be adequately publicized.[62]

Surprisingly, there has been expressed, concerns that despite its wide adoption by the various head of courts, virtual hearing, does not pass the test of constitutionality going by the provisions of section 36(3) of the 1999 CFRN. The section requires that court proceedings, as well as delivery of judgments, shall be held in public. By the requirement of public, it is contended that it connotes in the conventional open court as opposed to any other space. The operational words of the section are "shall" which connotes compulsion on the part of the court to adopt public hearing of its proceedings as was held in *Onochie v. Odogwu*[63] in *Oviasu v. Oviasu*[64] which involved the hearing of a divorce petition in the office of the judge, the Supreme Court, set aside the decision of the trial court on the basis that the hearing of the petition in the chambers of the judge as opposed in open court, obliterated from the requirement of public hearing of cases and therefore, was a fundamental irregularity that is fatal to the action. The public was held to mean "a place open to everyone without restriction. Anything, gathering or audience which is not private is public." In *Alhaji Nuhu v. Alhaji Ogele,*[65] the decision of an Upper Area Court was set aside by the Supreme Court because the same was delivered in Chambers instead of open court. Similarly, the Supreme Court *in Edibo v. The State*[66] in which the plea of the accused person who was charged for culpable homicide was taken in the Chambers of the trial judge, the Supreme Court, upturn the decision of the Court of Appeal affirming his culpability since the plea was not taken in a proceeding that was conducted in public.[67] Thus, Nigeria Supreme Court, having pronounced a judge's Chambers as not fulfilling the requirement of a public hearing, from the plethora of cases, is argued that virtual hearing, through whatever means, would not pass the litmus test of public hearing too. This seems to be the covert reasoning of the antagonist of the virtual court hearing in Nigeria.

However, another school of thought has argued that virtual hearing is a matter of procedure and not substantive and does not raise a constitutional issue thus, any debate, on it, is unfounded.[68] Thus, going by the proviso to section 36(4), the court is permitted to step aside from the requirement of public hearing in the interest of

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[62] *Ibid.*. Section 6 (13).
[63] [2006] 6 NWLR (Pt. 975) 65 at 89.
[64] (1973) 11 SC 315.
[65] [2003] 18 NWLR (Pt. 852) 251.
[66] [2007] 13 NWLR (Pt. 1051) 306.
[67] Adegboyega Awomolo. "Virtual Court Hearing does not Pass the Test for Proceedings Conducted in Public; there is Need for Constitutional Amendment" available at www.barristerng.com/virtual.court.hearing-does-not-pass-the-test-of-proceedings-conducted-in-public-there-is-need-for-constitutional-amendment (accessed 29 June 2020).
[68] Kemi Pinhero, "Is Constitutional Amendment Required For Virtual Court Hearings In Nigeria?" Available at https://thenigerialawyer.com/is-constitutional-amendment-required-for-virtual-court-hearings-in-nigeria-by-kemi-pinheiro-san/ (accessed 18 June 2020). He stated that virtual hearings relates to how courts carry out their functions and therefore a matter of procedure. Thus not a constitutional matter.

public health and safety, and covid-19 being one, virtual court trials is essential in achieving this.[69] Trial or hearing in public entails a situation where the public is not barred from attending. A trial is sufficiently public if members of the public have access to where it is taking place. The actual presence of the public is, however, not necessary.[70] Abdul, Anyasi, and Adebo,[71] have argued that contrary to the position that section 36(3) makes virtual hearing unconstitutional, the interpretation of the constitution, requires a liberal approach to achieve the end of justice as was held in *Skye Bank v. Victor Iwu*.[72] In line with this contention, in *Nafiu Rabiu v. The State & Anor,*[73] the Supreme Court *per* Udo Udoma JSC (as he then was) held that the Constitution was enacted for the current generation and generations unborn. Thus, it must be interpreted broadly or following the requirement of the time. The Supreme Court in *Mohammed v. Nwodo*[74] while holding that a judge's chambers do not constitute public as the requirement of justice demands that, it must not only be done but must be seen to have been done, hence, the judge's chambers, is not a place that ordinarily, the public would have access to. Thus, a public place is not merely the four walls of a court per se but the ability or possibility of interested members of the public, to have access to the place is what is paramount. Thus, in *Oba Jacob Oyedipo & Anor v. J. O. Oyinloye*[75] the Supreme Court held that:

> *When the court sits in Chambers, all that it means is that the judges of the court are transacting the business of the Court in Chambers instead of in open court. It does not mean that the court is not sitting in public. A court can sit in open court and yet decide to exclude members of the public other than the parties or their legal representatives from the hearing in the exercise of its statutory powers. A judge may sit in Chambers without excluding members of the public. It is therefore not unconstitutional to sit in Chambers.*[76]

We contend that the argument against the constitutionality of virtual hearing particularly in the wake of the covid-19 pandemic is not only misconceived, is playing the ostrich in the presence of prevailing circumstances. The law is a progressive phenomenon and if the society evolves and the law remains stagnant, it is neither good for the society, not the law itself. We align with the position that a virtual court hearing is constitutional given the fact that what constitutes a public hearing is not as much if at all, the place where the proceedings take place but the liberty of members of the public to have access to the proceedings. One would wonder, which other place could be more public than the World Wide Web (www)? A zoom meeting, can accommodate a minimum of one hundred persons and some, could accommodate as many as one five hundred persons at a go, which

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[69]A. Onanuga, "Why Virtual Proceedings is Legal, Constitutional by Falana" available at https://www.thenationonlineng.net (accessed 28 June 2020).
[70]A. Awomolo. *Footnote* 60.
[71]Abdullateef Abdu, Nonso Anyasi, and Oluyemi Adebo, "Are Virtual Hearings Really Unconstitutional?" available at www.lawyard.ng/2020/06/15/are-virtual-court-hearings-really-unconstitutional/ (accessed 30 June 2020).
[72] [2017] 16 NWLR (Pt. 1590) 24.
[73] (1982) 2 NCLR 293.
[74] (2001) LPELR-1859 (SC).
[75] [1987] 1 NWLR (Pt. 50) 36.
[76] *Hartmont v. Foster* (1881) 8 QBD 82 at 84.

courtroom, in Nigeria or even in any part of the world, has the capacity of five hundred seats at a go?

The various guidelines and practice directions adopting virtual court hearings have expressly made it compulsory, for the court to provide details of the sitting and link to the public to enable any person who might be interested to join. The fact that virtual hearings have lock-in details, does not detract from being public. Even a conventional courtroom has doors and, in some instances, members of the public, are screened by security personnel before being allowed to enter the court hall, would it not be preposterous for anyone to argue that the screening and the door to the courtroom, makes the proceedings to detract from being public? The same is tenable with the lock-in details required for virtual court hearings through the various platforms. The restriction does not tantamount to the denial of access but is a necessary security check to guarantee the integrity and seamlessness of the proceedings.

Another argument is that virtual hearing attracts extra cost to the litigant who has to purchase data for internet services to gain access to the proceedings. Again, a litigant just as his/her counsel, would naturally commute to court, and doing this, involve spending money. Thus, the money spent on data is synonymous with the one spent on commuting to court. In this regard, the benefit of virtual hearing is that unlike commuting for a physical court sitting, with the risk of accident, virtual hearing, eliminates this risk to the person, as he can participate from the comfort of his bedroom just by having an internet-enabled device.

It is apposite to note that in the cases in which the Supreme Court voided proceedings held in judge's chambers, the issue of the virtual hearing was not raised and the court has not had an opportunity to pronounce on it. They were decided based on their peculiar fact and circumstances and covid-19 virtual court proceedings are based on the prevailing global health crisis which requires special consideration. The fact that no case has been found in Nigeria where a virtual hearing has been done and affirmed by the appellate court, is not a reason for it not to be adopted. The Supreme Court in *Brigadier General James Abdullahi v. Nigerian Army*[77] the Court quoted with approval, the immortal dictum of Lord Denning MR in *Parker v. Parker*[78] where the Law Lord held that:

> *What is the argument on the other side? Only that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both.*

Defamation committed via online platforms has been held to be actionable as it passes the test of publication. The Australian High Court in *Wilson v. Bauer Media Ltd*.[79]awarded damages to actress Rebel Wilson against Bauer Media Ltd. because of its article in Women's Day Magazine where it alleged that she lied about her

[77] (2018) LPELR- 45202 (SC).
[78] (1954) 15 All ER 22.
[79] [2017] VSC 521 (Australia).

age, name, upbringing, and life events. This false statement made her lose income and her claim for general and special damages succeeded. In *Lachaux v. Independent Print Ltd*.,[80] the English Court awarded damages for harm suffered by the claimant due to a series of false online publications by the defendant. The English Court in *Mohammed Hussein Al Amoudi v. Jean Charles Brisard & Anor*[81] once there is proof of false online publication that defames the plaintiff, the defendant is liable in damages for defamation. Similar decisions have been reached by the English Court in *King v. Lewis*[82] and *Jameel v. Dow Jones Inc*.[83] these decisions from other commonwealth jurisdictions shows that publishing defamatory materials on the internet (website), passes the test of publication to the public one would therefore wonder why virtual hearing such as zoom, skype, GoToMeeting, duo, and other platforms, should not qualify as public places.

While it has been argued that there is a need to amend the 1999 CFRN, to expressly provide for the virtual hearing of cases by the courts, it is vehemently contended that while the same is desirable, nonetheless, it is not expedient. The reason is that a purposively and liberal interpretation of the 1999 CFRN, would address the concerns being expressed on the constitutionality of virtual court hearings in Nigeria. The incessant constitutional amendment, especially on issues that could be resolved through tact and interpretative ingenuity like this, is an act of legislative immaturity. Aside from the fact that same is not expedient in this instant case, the cost and process of a constitutional amendment, when considered, further makes it needless. Since the advent of covid-19, the legislature has gone on recess, how to convene plenary, public hearings, and the required input of the various State Houses of Assembly is a herculean task that would require time. It is unimaginable, for anyone to contend that while litigants bear the brunt of covid-19, on their livelihood, those who have legitimate grievances but which do not fall within the categories of "urgent, time-bound and essential" matters, would have to wait until when the constitution is amended before they could be heard. This would be elevated from the above substance which is bad for the polity.

It is apposite to note that only litigation is enmeshed in this quagmire. Alternative Dispute Resolution (ADR) especially arbitration, had risen over and above these shackles. Online Dispute Resolution has been adopted before the outbreak of the covid-19 pandemic and most arbitral institutes, have issued Guidance Notes for remote hearings.[84] Thus, ongoing arbitral proceedings conducted under the ICC or any other institution which has a similar Guidance Note, upon the invasion of covid-19, the proceedings would continue under the provisions of the Guidance Notes. This is to ensure that the proceedings are not delayed by the impelling effect of covid-19.[85] While the various practice directions adopting virtual hearings, limit it to "urgent, time-bound and essential" matters, as a post-covid-19 adjudicatory option, virtual hearings, should be extended to all cases just as offline court

[80] [2017] WWCA Civ. 1334 (England).
[81] (2006) 3 All ER 294.
[82] (2004) EWCA Civ 1329.
[83] (2005) QB 946; (2005) 2 WLR 1614.
[84] See ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic issued 9 April, 2020.
[85] See Chartered Institute of Arbitration Guidance Note on Remote Dispute Resolution Proceedings. Available at https://www.ciarb.org (accessed 30 June 2020).

proceedings. No case is not essential or time-bound hence, deployment of virtual hearing should be upgraded and expanded to become every day and every case affair especially post covid-19 which befell the universe *ex parte*. All must be done to safeguard the integrity of the proceedings and documents filed from the unfriendly activities of the cyber miscreant who takes pleasure in wreaking havoc on online communication.

IV. HARNESSING THE GAINS OF VIRTUAL HEARING IN POST-COVID-19 NIGERIA

It is needless to argue against the point that virtual hearing is an untapped goldmine, a treasure chest that if diligently explored, is capable of bequeathing several benefits. The easiest identifiable benefit of virtual hearing that has been identified above is the fact that it takes away the danger associated with commuting to court. The possibility of accidents occurring either for counsel or litigants commuting to court cannot be overemphasized. However, the adoption of virtual hearing prevents this as there is no need for either counsel or litigant to commute to court but can attend the proceedings from the comfort of their homes/office via an internet-enabled device.

Virtual hearing promotes accountability and responsibility of action of both counsel and the judge/justices. Most of the virtual hearing platforms are made up of audio-visual effects that record whatever is said or done. The awareness that one is being watched by an unlimited number of persons, tends to instill discipline in the way and manner counsel conduct themselves and the judge too. Unlike the traditional court, where an allegation of misconduct either on the part of the judge or counsel in the course of proceedings, is by mouth reportage and sometimes difficult to substantiate, the production of an audio-visual account of such, makes it difficult, if not impossible to deny. The effect of this is that it makes the stakeholders in any adjudication be at their best and minimize shenanigans.

Where there is a dispute as to the record of proceedings, a replay of the video or audio recorded would naturally dispel any controversies. Already, due to the covid-19 pandemic, the already congested docket of the courts, is been overwhelmed requiring speedy and expeditious settlement of cases. The conservation of time, as well as monetary and human resources, are necessary in ensuring that the back lock of cases is settled post-covid-19. A virtual court hearing is capable of achieving this since it saves time and resources. Quite often than not, lawyers and litigants commute for several hours under torrential road conditions, just to get to court and be informed that the court, for one reason or the other, is not sitting.[86] All the resources expended on the trip, coupled with the precious time, just goes down the drain. This unfortunate situation is avoidable through a virtual court hearing.

Despite the above advantages, at present, in Nigeria, several factors threaten the efficiency and effectiveness of virtual court hearings. Foremost is infrastructure

[86] Olaniyan Babafemi, "A Simplistic View on Virtual Court Proceedings and the Requirement of Public Hearing" Available online at https://thenigerianlawyer.com/a-simplistic-view-on-virtual-court-proceedings=and-the-requirement-of-public-hearing/ (accessed 30 June 2020).

deficiency.[87] Most of the Courts lack the facilities for seamless virtual proceedings as the facilities are capital intensive. The general technological apathy or deficiency of most lawyers especially the "senior" one is another challenge that makes the use of virtual court hearing problematic as the same is complicated by the suspicious attitude some have towards technological innovations. Most lawyers and even judges, are comfortable with the traditional offline courtroom practice and might find it difficult to adopt.

The epileptic electricity supply and internet services are also challenges that confront virtual court hearings in Nigeria. [88]A strong internet network service and constant electricity supply, are *sine qua non* for efficient virtual hearing. In a situation wherein the course of the proceedings, there is a power interruption or network failure, would only cause disenchantment. One can imagine the wearisomeness of a situation where intermittently, in the course of proceedings, the counsel or judges, keeps on asking "can you hear me, or I cannot hear you clearly or at all."[89] This has been the experience in some test run exercises and has made too many a lawyer doubt the readiness and possibility of adopting a virtual court hearing as a complement to an offline court hearing for post-covid-19 disputes settlement.

There is a need for professionalism in the case management system especially with the filing of cases. The process of filing should be manned in a way and manner that is user-friendly and does not lead to unnecessary delay due to cumbersomeness. The trial court judges should proactively deploy firmer case management to forestall the encroachment of dilatory tactics that have plagued the traditional offline litigation in virtual hearings. Grant of adjournment should be sparingly permitted except in exceptional cases justifying same. The Court should firmly discourage the practice of woods winking the Court by legal practitioners by tenaciously holding unto technical rules of the evidential rule just to frustrate the proceedings. It is also expedient for the Courts to adopt the technique of dry run or mock trial to test run a hearing before the actual time. This will ensure that challenges that could crop up to frustrate the proceedings, could be identified and addressed before the date and time of the actual hearing. There should be a backup plan to ensure that in the likely event that one of the main participants, goes off the proceedings, contacts can be established and access restored without unnecessary delay.

V. CONTEXTUALISING EXECUTIVE ORDER NO. 10 AS AN HARBINGER FOR VIRTUAL COURT HEARING IN NIGERIA

The 1999 CFRN, recognizes the doctrine of separation of powers when it divided governmental powers into the three arms of government- the executive, legislature,

[87] Uzodinma Amulu, "Virtual Court Proceedings in the Nigerian Legal System: Constitutional Challenges and More" Available at https://www.google.com/amp/s/dailytimes.ng/virtual-court-proceedings-in-the-nigerian-leg.al-system--constitutional-challenges-and-more/ (accessed 30 June 2020).

[88]Joseph Onyekwere and Bridget Onochie, "Lawyers Differ on Practicability of Virtual Court" available online at https//www.google.com/lawyers-differs-on-practicability-of-virtual-court/ accessed 30 June 2020.

[89]Muiz Banire, "Is Nigeria ready for Virtual Court Hearing?" Available online at <https//thenigerianlawyer.com/is/Nigeria/ready/for/virtual/court/hearing/> accessed 30 June 2020.

and judiciary.[90] By this doctrine, each organ of government is deemed separate and independent from the other as far as their powers and functions are concerned.[91] This doctrine; ensure the autonomy and interdependence of each organ of government at the various tiers of governance to the extent that each of these organs, exercised the allotted governmental power assigned to it under the Constitution and other enabling laws.[92] The legislature makes the law, the judiciary interprets while the executive executes the laws.[93] An important aspect of the autonomy of these organs of government is financial autonomy which, unfortunately, has not been practiced.

Over the years, in Nigeria, the Judiciary has had to depend solely on the Executive for funding as funds allocated to it, are managed and controlled by the Executive. This has placed the other arms of government, especially the judiciary in a struggling position to meet up its financial demands. In the wake of the covid-19 pandemic, one of the concerns expressed by the judiciary was the lack of funds to acquire the necessary infrastructure. As at the time, the budgets of the federation and the various States had been passed, and no funds are available to acquire or bust the available infrastructure. This has served as a setback to the aggressive deployment of a virtual court hearing in Nigeria. The imperative of the judiciary being financially autonomous to buster the use of virtual hearing, cannot be overemphasized.

Sections 80 and 120 of the 1999 CFRN established one Consolidated Revenue Fund (CRF) for the Federation and each State and no money shall be withdrawn from the funds except in the way and manner prescribed by the National or State House of Assembly.[94] Section 81 thereof, gave financial autonomy to the National/State Houses of Assembly and the judiciary as it provides that money standing to these arms of the government in the CRF shall be paid to the heads of the organs.[95] For the judiciary, the National Judicial Council (NJC) shall receive the money for onwards disbursement to the various heads of courts established under the Constitution.[96] Despite this financial autonomy of the judiciary, in practice, it has depended on the Executive arm of government for funds for every project which has made it seem helpless and hapless considering the truism that "money answereth all things" because he who pays the piper, dictates the tune. This situation has rendered the judiciary, financially handicap at the mercy of the Executive which manages its funds.

Fortunately, on the 22nd day of May 2020, President Mohammadu Buhari signed Executive Order No. 10 of 2020 under the powers vested in him by section 5 of the 1999 CFRN as the President of the Federal Republic of Nigeria. The Executive Order is meant for the implementation of the Financial Autonomy of State

[90] See sections 4, 5 and 6 of the 1999 CFRN Cap. C23 LFN 2004.
[91] Ademola Taiwo, *Separation of Powers: A Key Principle of Democratic Governance,* 2nd ed., (Ibadan, Ababa Press Ltd, 2018) 10.
[92] Graig Koseman, *Nigerian Federalism and Separation of Powers* (Ibadan, Sulak-Temik 2001) 23.
[93] Ben Nwabueze, *Ideas and Facts in Constitution Making,* (Ibadan, Spectrum Books Ltd, 1993)186-187.
[94] See section 80 (4) and 120 (2) of the 1999 CFRN Cap. C23 LFN 2004.
[95] *Ibid.*. section 121 (3).
[96] *Ibid.*. section 81(3).

Legislature and State Judiciary.[97] Section 1(b) of the Executive Order directs the Accountant General of the Federation to deduct from source (that is the federation account) money allocated to any State that has failed to release money meant for the legislature or judiciary of that State in line with the financial autonomy guaranteed by Section 121 (3) of the 1999 CFRN. Under the Order, for the purposes of appropriation to the State Judiciary, each State Judiciary of the federation shall set up a State Judiciary Budget Committee (SJBC) to serve as an administrative body. The SJBC shall have the duty of preparing, administering, and implementing the budget of the State Judiciary in accordance with its local circumstances.[98] The heads of the various State Court and the Chief Registrars shall serve as Chairmen and Secretaries of the SJBC. The Order makes provision for Special Allocation for the Judiciary to enable her to undertake capital development projects.[99] The Order is to take effect from the 20th day of May 2020.

The potential of this Executive Order in furthering the financial fortune of the judiciary as well as aiding its effectiveness and efficiency is apparent. Of special interest, is the provision of extraordinary funds for the judiciary to undertake capital-intensive projects of which procurement and management of virtual proceedings infrastructure is part. It is therefore expected that the legislature and other stakeholders, shall do all within the shortest possible time to give full effect to Executive Order No. 10 to ensure that funds meant for the judiciary are managed by them with a proper accountability mechanism put in place to prevent misappropriation. This will enable them to set up the required infrastructure for a virtual court hearing.

VI. CONCLUSION AND RECOMMENDATIONS

Extrapolating from the above analysis, it is crystal clear that Covid-19 has invaded the world with disruptive effects, and no sphere of human life is spared not even the justice delivery sector. In Nigeria, just as in most African countries, Covid-19 has exposed the inherent shortcomings in the justice delivery sectors by foregrounding the human, systemic and infrastructural deficits. In a bid to navigate the horrendous terrain which Covid-19 has plunged the legal sector into, and successfully live with the new normal, virtual court hearing aided by technology has been adopted in Nigeria. The adoption of virtual court hearings has spiked several controversies ranging from constitutionality of same, lack of funding, infrastructural deficit, and limited human capacity. These hurdles are not insurmountable, redirection of political will, legislative intervention, attitudinal change, infrastructural development, and adequate funding are possible leeways.

The inevitable outcome of post-covid-19 justice delivery in Nigeria is the unprecedented deployment and galvanizing of virtual court hearings particularly taking into cognizance the fact that the effect of covid-19 is bound to linger longer than anticipated. The benefits of the virtual court hearing as a complement to

[97]Stephen Ibyem, 'Buhari's Executive Order No. 10 of 2020: Maters Arising' available at https://thenigerialawyer.com/buharis-executive-order-no-10-of-2020-matters -arising/ (accessed 3rd July 2020).

[98] Section 3 of the Presidential Executive Order No. 00-10 by the President of the Federal Republic of Nigeria for the Implementation of Financial Autonomy for the State Legislature and State Judiciary and for other Related Matters, 2020.

[99] *Ibid.*. section 6.

physical court proceedings, cannot be overemphasized. Aside from aiding speedy and cheaper justice delivery, virtual court hearing also eliminate the hassle of commuting to court, promotes efficiency in justice delivery, and saves judicial time and cost. As the world of justice delivery is moving forward and acclimatizing to the present disruption thrust on it by the Covid-19 pandemic, Nigeria and other African nations, cannot remain stationary because this is bad for all stakeholders and users of the justice delivery sector.

Based on the findings above, it is hereby recommended that:

a. The government should commence a systematic infrastructural setup to enable maximal deployment of the virtual court hearing as the new normal for justice delivery during and post covid-19 pandemic in Nigeria and other African nations where there is an infrastructure deficit.
b. There is a need to encourage and promote public-private partnership given the capital intensiveness of procuring and maintaining virtual hearing facilities. By partnering with private virtual services provides including internet service providers, a lack of funds to wholly acquire and maintain the facilities by the government, would not negatively impact the deployment of a virtual court hearing.
c. Given the constitutional controversies that have trailed the adoption of virtual court hearing since its introduction in response to the Covid-19 pandemic, it is considered, desirable although not expedient to amend the 1999 Constitution of Nigeria to fully give the same constitutional impetus in clear and unambiguous terms.
d. The judiciary, at the federal and state levels, should engage in rigorous capacity development of judges and judicial staff on the intricacies of virtual hearing to ensure a seamless deployment. Concurrently, the Nigerian Bar Association (NBA), through its Continue Legal Education (CLE) modules, should insist on the enlightenment of its members on how best to adapt to the new normal of the virtual court hearing as there is a dire need for attitudinal change.
e. There is a need, aside from the various Practice Directions, issued by the various Head of Courts, in a fire brigade approach due to the self-imposing and overwhelming disruptive incursion of Covid-19, to enact a well thought out procedural guide to regulate virtual court hearings in both the Federal and State Courts in Nigeria by amending the various Rules of Courts.
f. The various State Houses of Assembly, without any further delay, should move and implement the laudable Executive Order No. 10 issued by President Mohammadu Buhari to ensure that the judiciary is fully and finally financial severed from the apron string of the Executive, always going cap in hand to them for funding which hampers its effectiveness and efficiency because he who pays the piper, dictates the tune.
g. The circumference of cases in which virtual hearing is applicable should be expanded to make it applicable to all cases and to exist as an alternative or complement to the traditional physical court sitting as a post-covid-19 adjudicatory option.

5

Covid -19 Pandemic: Appraising the Powers of The President to Restrict the Movement and Assembly of People

*Ifeolu J. Koni

ABSTRACT

The order of restriction of movement of people resident in the Federal Capital Territory (FCT), Abuja, and two South Western States of Lagos and Ogun, as part of the measures designed to curb the spread of the novel coronavirus pandemic, contained in a nationwide broadcast by President Muhammadu Buhari on 29 March 2020, attracted criticisms from some human rights lawyers and activists who contended that the action is illegal and unconstitutional. This article appraised the legal basis for the presidential directive to determine whether it is valid in law. The study adopted the doctrinal research methodology and relied on the provisions of the relevant laws such as the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Quarantine Act, African Charter on Human and Peoples' Rights, and International Covenant on Civil and Political Rights. The study reveals that having regard to the powers vested in the President under section 4 of the Quarantine Act, the order shutting down the affected areas for the initial period of 14 days is valid under both municipal and international law. It further reveals, however, that the Quarantine Act relied upon by the President may not, from the naturalist perspective, measure up to the requirement of the derogation clause (section 45) of the Constitution. For this reason, the study recommends an amendment of the Act in a way that the powers to order a lockdown of an affected area will be made subject to the provision of sufficient palliatives to the affected citizens to mitigate the pains of such an action.

ESSAY CONTENTS

I. INTRODUCTION

When the index case of the dreaded coronavirus (COVID-19) pandemic was reported in Nigeria on February 27, 2020, there were palpable fears that the disease, which broke out in China by the end of December 2019, could spread like bush fire in the country, if not promptly contained. Consequent upon this, several measures were taken by both the Federal and many State Governments to curb the spread of the disease but the one that attracted criticisms from human rights lawyers and activists like Ebun-Olu Adegboruwa, SAN, Femi Falana, SAN, and the Nobel Laureate, Wole Soyinka, was the lockdown of the Federal Capital Territory (FCT), Abuja and two States, Lagos and Ogun, by President Muhammadu Bahari, for an initial period of 14 days, effective from April 1, 2020. The lockdown was announced by the President in a nationwide broadcast on the evening of Sunday, March 29, 2020.[1]

The controversy centered on the legality of the step taken by the President. The commentators were of the view that while the lockdown itself might be necessary and expedient given the real danger to public health that a community spread of Covid-19 could pose, the measure ought to be backed by law. It is intended in this paper to examine the legality of the lockdown ordered by Presidents and Heads of States, using the Nigeria President as a case study. Since the critics are not challenging the propriety of the presidential order but its alleged illegality, this paper aims at appraising the action concerning the relevant laws to ascertain whether or not there is a legal justification for it.

The announcement of the lockdown by the President attracted a prompt response from Adegboruwa, Senior Advocate of Nigeria (SAN), who argued that the Nigerian leader does not have the right to do so without legal backing. In a statement titled "Buhari lacks the power to restrict movement in Lagos, Abuja, Ogun", the senior lawyer contended that the restriction of movement without lawmakers' approval is illegal[2]. According to him, the Constitution requires that the President should first declare a state of emergency which must be approved by the National Assembly before shutting down States. In his words:

> *We are running a constitutional democracy and it is illegal for the President to take over the affairs of any State of the Federation without the express consent of that State through their elected representatives. It is only the Governor of the State through the House of Assembly of the State that can make any declaration concerning the people of that State. Little wonder that the President could not cite any law that he relied upon for his declaration. I support every measure taken to contain the coronavirus pandemic but such must be in accordance with the law. If we*

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[1] For more details on the presidential broadcast, see "Lagos and Abuja on lockdown to stop coronavirus in Nigeria", accessed April 22, 2020, https://www.cfr.org.

[2]Ebu- Olu Adegboruwa, "Buhan Lacks Power to Restrict Movement in Lagos, Abuja, Ogun," accessed April 22, 2020. www.newspotng.com.

> *allow this to stay, then tomorrow the President may just impose total restriction on all States of the Federation for whatever reason.*

Adegboruwa advised the President to reverse the restrictions and work with the States concerned under the laws of the land. Also reacting to the lockdown, another human rights lawyer and Senior Advocate of Nigeria, Femi Falana, insisted that the presidential order is not enforceable without legal backing.[3] In a press statement issued on the lockdown, the senior lawyer was reported to have said that "It is my view that democracy thrives more on obeying and promoting the rule of law rather than the whims and caprices of the leaders against the led". He argued that although the President is empowered to adopt any measures, he deemed fit to combat the dangerous disease, nonetheless, such measures have to be spelled out in a Regulation made under section 305 of the Constitution or under the Quarantine Act "otherwise, the presidential order on the restriction of movement in the affected areas cannot be enforced by the police". Falana expressed concern that even though the civil rule was restored 21 years ago, the psyche of the political class has not been demilitarized; hence decisions taken by rulers are required to be obeyed with immediate effect and without any legal backing. In support of his view, he cited the case of *Okafor v Governor of Lagos State,*[4] where the Court of Appeal called on all authorities to appreciate the need to govern the country under the rule of law. Falana recalled that in that case, the directive of the Governor of Lagos State restricting the movements of citizens and residents during the State's monthly environmental sanitation exercise was struck down because of its unconstitutionality.

In his reaction to the presidential directive, Nigeria's Nobel Laureate and Professor of Dramatic Literature, Wole Soyinka, described the action as illegal and unconstitutional. The playwright, in a statement, said the President lacked the powers to unilaterally lock down a State, as there was no war or emergency.[5] In the statement titled, ''Between Covid and Constitutional Encroachment,'' Soyinka stated that "constitutional lawyers and our elected representatives should kindly step into this and educate us, mere lay minds". He further noted as follows:

> *The worst development I can conceive is to have a situation where rational measures for the containment of the corona pandemic are rejected on account of their questionable genesis. This is a time for unity of purpose, not nitpicking dissensions. So, before this becomes a habit, a question: does President Buhari have the powers to close down State borders? We want clear answers. We are not in a war emergency. Appropriately focused on measures for saving lives and committed to making sacrifices for the preservation of our communities, we should nonetheless remain alert to any encroachment on constitutionally demarcated powers. We need to exercise collective vigilance, and not*

[3]Femi Falana, "Presidential Order not Enforceable without Legal Backing," accessed April 22, 2020, http://saharareporters.com/2020/03/30.
[4]*(2016) LPELR 41066 CA.*
[5] Adamu Abuh, et al, 'Soyinka, others disagree on lockdown of Lagos, Ogun over coronavirus' (The Guardian, Lagos, Nigeria < https://www.guardian.ng> accessed September 30, 2020.

> *compromise the future by submitting to interventions that are not backed by law and Constitution.*[6]

However, in a well-researched reaction to the foregoing criticisms, Nigeria's Minister of Justice and Attorney General of the Federation, Abubakar Malami, Senior Advocate of Nigeria, argued that the critics were wrong and that they misconstrued the law[7]. The learned Attorney General contended that by a community reading of sections 5, 14, 20, and 45 of the 1999 Constitution, sections 2, 6, and 8 of the Quarantine Act and article 4 of the International Covenant on Civil and Political Right (ICCPR) and Article 11 of the African Charter on Human and Peoples' Rights, the President's declaration is valid, legal and enforceable. The Chief Law Officer of the country clarified the statement that the President did not make a declaration of a state of emergency under section 305 (1) of the Constitution which would have required the concurrence of the National Assembly. He further argued that even at that, section 305 (6) (b) permits a proclamation of a state of emergency for ten days without the approval of the National Assembly when the Parliament is not in session, as in the present situation wherein the National assembly has shut down.

The Vice-President of Nigeria, Yemi Osinbajo, a Professor of Law and Senior Advocate of Nigeria, also lent his voice to the debate while speaking at a Google Hangout organized by Covid 19 call center in Abuja, Nigeria.[8] Reacting to the question posed by Soyinka and the views expressed by two senior lawyers, Ebun-Adegboruwa and Falana, the Vice-President opined that it is unnecessary for anyone to question the legality of the President's order because it is backed by an Act of the National Assembly. According to him, under the Act, the President has powers to make regulations of any kind that could curb infectious diseases. He stated further, on the legality of the shutdown order:

> *Regarding the legality of the shutdown announced by the President yesterday, I think it is entirely legal. These steps are proactive, very relevant, important, and backed by law. I am not sure some of the people who have commented on the issue have come across the Quarantine Act of 1926; it's been published in all of the laws of Nigeria, every edition of the Laws of the Federation of Nigeria, is there.*

II. APPRAISAL OF THE RELEVANT LAWS

The primary objective of this paper is to determine whether or not the declaration made by the Nigerian President on Sunday, March 29, 2020, for the lockdown of the FCT, Abuja, and the two Western States of Lagos and Ogun, is valid in law. We intend to do this by examining the provisions of the relevant laws, against the groundswell of opinions and criticisms that attended the action. The laws considered relevant to this subject matter are:

(a) The Constitution of the Federal Republic of Nigeria, 1999 (as amended).[9]

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[6] Abuh, "Soyinka, others disagree."

[7] Eric Ikhilae, "AGF Slams Adegboruwa, other Critics," *The Nation*, March 30, 2020.

[8] "Buhan's Lockdown Order is Legal, says Osinbajo," accessed April 22, 2020, https://thenigerialawyer.com.

[9] This document is referred to subsequently in this paper as "the Constitution" or "the 1999 Constitution" or "the Nigerian Constitution."

(b) The Quarantine Act.[10]
(c) African Charter on Human and Peoples' Rights.[11]
(d) International Covenant on Civil and Political Rights.

A. The 1999 Constitution of Nigeria

The provisions of the Constitution that are relevant to this discourse are: Sections 5 (1) (2) & (3), 14 (2)(b), 38, 40, 41, 45 and 315 (1)(a) & (4)(b). They will be considered in turn.

Section 5 (1) (2) & (3). The section reads as follows:

> 5 (1) Subject to the provisions of this Constitution, the executive powers of the Federation-
> (a) shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and Ministers of the Government of the Federation or officers of the public service of the Federation; and
> (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly, and to all matters with respect to which the National Assembly has, for the time being, power to make laws.
> (2) Subject to the provisions of this Constitution, the executive powers of a State-
> (a) shall be vested in the Governor of that State and may, subject as aforesaid and to the provisions of any law made by a House of Assembly, be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of that State or officers in the public service of the State; and
> (b) shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State, and to all matters with respect to which the House of Assembly has, for the time being, power to make laws.
> (3) The executive powers vested in a State under subsection (2) of this section shall be so exercised as not to –
> (a) impede or prejudice the exercise of the executive powers of the Federation;
> (b) endanger any asset or investment of the Government of the Federation in that State; or
> (c) endanger the continuance of a federal government in Nigeria.

Let us examine these provisions in the light of the declaration made by the President on the restriction of movement in some parts of the country. The declaration made by the President can be situated within section 5 (1) (a) i.e. he did it in the exercise of his executive powers as the President of Nigeria. The subsection also says the powers can be exercised subject to the "provisions of any law made by the National Assembly". The relevant law here will be the *Quarantine Act* since the order signed by the President two days after making the declaration was made pursuant to the Act. According to news reports, President Buhari on Tuesday, March 31, 2020, signed the *Quarantine Order* which empowers him to

[10]Cap Q2, Laws of the Federation of Nigeria 2004.
[11] Cap A9, Laws of the Federation of Nigeria 1990.

lockdown and extends lockdown as President of the country.[12] The Constitution says he can exercise the executive powers either directly or indirectly through the Vice President or any of his Ministers or any officer of the public service of the Federation. In the instant case, the President did exercise his constitutional powers directly. The presidential declaration can also be situated within section 5 (1) (b) since the matters dealt with in the order relate to issues in the *Quarantine Act*, which is deemed to be a law made by the National Assembly under section 315 (1) (a) of the Constitution.

The Governor of a State enjoys similar executive powers under section (5) (2) of the Constitution but the draftsman was careful in not creating conflict or confusion between the President and the Governor by inserting subsection (3) in the same section which emphasizes the need for the latter not to impede or prejudice the actions of the President or endanger any asset or investment of the federal government in his State while exercising the executive powers vested in him by the Constitution. The intention of the legislature by this restriction placed on a State Governor is to give priority or supremacy to the President when decisions bordering on national interest, such as the Quarantine Declaration, are to be taken. It is instructive to note that the President mentioned in his nationwide broadcast that he carried the governors of Lagos and Ogun States along before deciding to order a lockdown of the two States, along with the Federal Capital Territory (FCT), Abuja.

Section 14 (2) b. This section provides as follows:

> (2) It is hereby, accordingly, declared that –
> (b) the security and welfare of the people shall be the primary purpose of government.

Arguably, the declaration made by the President was in pursuance of this fundamental objective. The purpose of the order, as contained in the broadcast, is to curb further spread of the deadly Covid-19 disease which, as of the time the declaration was made, had reached 97 in confirmed cases, with one fatality.[13] It is important to state that section 14 (2)(b) under consideration is under Chapter II of the Constitution which deals with the Fundamental Objectives and Directive Principles of State Policy that are not justiciable, that is, not enforceable in court.[14] Nonetheless, the subsection underscores one of the fundamental obligations of the Government i.e to address with all seriousness issues bordering on the security and safety of the citizens. Its non-justiciability does not in any way affect the duty placed on Government to discharge this obligation.

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[12]Levi Johnson, "Buhari Signs Quarantine Order for Lockdown," accessed April 23, 2020, https//www.thecheernews.com.

[13]"Full Address of President Buhari on COVID-19," accessed April 23, 2020, https://www.youtube.com. The number of confirmed cases as of 7 May 2020 had risen to 3145 while no fewer than 103 people had lost their lives to the pandemic. Indeed, the figures have continued to rise on a daily basis. As of the last check, confirmed cases and number of deaths stood at 58, 647 and 1,111 respectively. See <covid19.ncdc.gov.ng> accessed September 30, 2020.

[14]See CFRN 1999, S6 (6)(c). See also *Attorney-General of Ondo State v Attorney-General of the Federation (2002) 10 NSCQR 1035.*

Section 38 (1). The Constitution provides under section 38 (1) as follows:

> 38 (1) Every person shall be entitled to freedom of thought, conscience, and religion, including the freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance.

The foregoing is the provision of the Constitution that allows religious organizations like churches and mosques to organize crusades, open-air services, etc. without let or hindrance. One of the measures contained in the presidential order is the prohibition of large gatherings that can facilitate the community's spread of this disease. The question then is, can the presidential directive amount to a violation of the constitutional right of the religious faithful to assemble or congregate freely to manifest and propagate their religion? The question must be answered in the negative having regard to section 45 (1) of the Constitution which lists the right to freedom of religion as one of the fundamental human rights from which there could be a derogation, through a legislative process, on such grounds as public safety and public health.

Section 40. This section reads as follows:

> 40. Every person shall be entitled to assemble freely and associate with other persons, and in particular, he may form or belong to any political party, trade union, or any other association for the protection of his interests:
> Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.

The right guaranteed the individuals by this provision- to assemble freely and associate with other persons- is in direct conflict with the social and physical distancing measure contained in the presidential order, and for that matter with all the measures adopted by many State Governments to curb the spread of this disease. The legality of what has now become a global campaign for social (physical) distancing can be tested against this provision. The draftsman must have considered this by including this particular right among the fundamental human rights that are violable on grounds of national security, public safety, public order, public morality, or public health.[15] Section 45 (1) of the Constitution specifically states that nothing in this section (among other sections) shall "invalidate any law that is reasonably justifiable in a democratic society in the interest of defense, public safety…public health…." Concerning this provision, the presidential order can be justified on grounds of public safety and public health, and, in this connection also, the *Quarantine Act* under which the President made his declaration, may qualify as a "law that is reasonably justifiable in a democratic society" embodying those grounds.

Section 41 (1). This section states that:

[15]See again CFRN 1999, s 45 (1).

41 (1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom.

Any order restricting the movement of people, such as the one contained in the presidential declaration, is *prima facie* an infringement of this provision of the Constitution. But as argued concerning section 40 and even section 38, the right to freedom of movement is not undeniable, having regard to the provisions of section 45(1) of the 1999 Constitution. The argument in respect of those provisions cited earlier applies here and is hereby adopted.

Section 45
This is the saving provision for several instances that would have amounted to a violation of people's fundamental rights as entrenched in Chapter IV of the Constitution. It imposes restrictions on or derogation from some selected fundamental rights. The section states as follows:

> 45 (1) Nothing in sections 37, 38, 39, 40, and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-
> (a) in the interest of defense, public safety, public order, public morality, or public health; or
> (b) for the purpose of protecting the rights and freedom of other persons

This provision has been referred to repeatedly during our consideration of sections 38, 40, and 41 of the Constitution. The intention of the draftsman in inserting this section in the 1999 Constitution is detectable from the marginal note to this section, namely, to operate as a restriction on or derogation from some fundamental human rights. It states the grounds upon which the affected rights can be suspended.

It is important to state, however, that these rights cannot be denied or suspended, or derogated from without legislative backing. In other words, the President cannot by a mere announcement in radio and television broadcast make any order which violates any of those rights without the backing of the law, that is, a law made by the National assembly. But with the Regulation made by the President two days after the declaration, it seems that the order has the backing of the law, that is, the *Quarantine Act*.

Section 315 (1)(a) & 4(b). This is another saving provision for all existing laws, before the coming into force of the 1999 Constitution. The section reads thus:

> 315 (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be –
>
> (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws.
> (4) In this section, the following expressions shall have the meanings assigned to them, respectively;
> (b) "existing law" means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force after that date.

The history of this provision dates back to 1960 when Nigeria became a sovereign State. Section 3(1) of the Nigerian (Constitution) Order-in-Council 1960 preserved and protected all existing laws, including statutes of general application that were in force in England on the 1st day of January 1900 and all enactments made under the Order. The 1963 Republican Constitution which repealed the 1960 Independence Act and the Nigerian (Constitution) Order-in-Council 1960 equally preserved all existing laws, subject to the provisions of the said Constitution.[16] Furthermore, the Constitution of the Federal Republic of Nigeria, 1979, which was in operation during the Second Republic, contained a provision, preserving all existing laws.[17]

Significantly, subsection (4)(b) of section 315 of the 1999 Constitution defines what is meant by the term 'existing law'. Simply put, it means any law or enactment or rule of law that is in force immediately before the date that this section of the Constitution came into force. The question now is, can the *Quarantine Act* that the President relied upon to make regulations backing the Restriction Order be described as an existing law within the meaning of this provision? The question must be answered in the affirmative as the Act itself is included in the laws of the Federation of Nigeria, 2004 edition.[18]

B. The Quarantine Act

The objective of the Act is inferable from its long title. It reads as follows:

An Act to provide for and regulate the imposition of quarantine and to make other provisions for preventing the introduction into and spread in Nigeria, and the transmission from Nigeria, of dangerous infectious diseases.

The provisions material to the subject matter of this paper is contained in sections 2, 3, 4 & 8.

Section 2, Quarantine Act. This section deals with the interpretation of some keywords and phrases in the Act. The ones that are of relevance to us here are: "dangerous infectious disease" and "local area". According to the section, "dangerous infectious disease' means "cholera, plague, yellow server, smallpox, and typhus, and includes any disease of an infectious or contagious nature which the President may, by notice, declare to be a dangerous infectious disease within the meaning of this Act".

Although the ravaging coronavirus is not specifically mentioned it can be argued that this disease is contemplated for two reasons. One, the use of the word "plague" envisages a contagion of coronavirus' nature. There is no better way of describing this pandemic that has brought the entire world literally on its knees than to call it a plague. In any event, there is no particular disease that is named "plague"; the term simply means "an epidemic disease that causes high mortality; pestilence, an infectious disease caused by a bacterium…"[19] Two, the use of the words "includes

[16]See Osita N Ogbu, *Modern Nigerian Legal System* 3rd ed. (Enugu: SNAAP Press Ltd., 2013), 60.
[17]See the Constitution of the Federal Republic of Nigeria 1979, s 274.
[18]It is titled Cap Q2, Laws of the Federation of Nigeria 2004.
[19] Dictionary.com, "plague," accessed April 24, 2020, https://www.dictionary.com.

any disease" implies that more diseases not specifically named in this section can be accommodated provided they can be adjudged dangerous and/or infectious. It is a basic rule of interpretation of statutes that when the word "include" is used in an enactment it means more items of the same kind can be accommodated.[20] In the light of the foregoing, the description of the ravaging Covid-19 pandemic as a dangerous and infectious disease is proper and valid.

The second term is "local area" which is defined by section 2 of the Act to mean 'a well-defined area, such as a local government area, a department, a canton, an island, a commune, a town, a quarter of a town, a village, a port, an agglomeration, whatever may be the extent and population of such areas".
From the wordings of this section, as of the definition of "local area", it seems the delimitation of the FCT, Abuja, Lagos, and Ogun States as more or less epic centers can be situated within this definition. Having regard to the phrase "whatever may be the extent and population of such areas", it is submitted that there is no limit as to the geographical area that can be declared as "local area" under the Act.

Section 3. This section deals with the power of the President to declare any place as an infected area. It states that "The President may, by notice, declare any place whether within or without Nigeria to be an infected local area, and thereupon such place shall be an infected local area within the meaning of this Act". In the order made by the President, the FCT, Abuja, Lagos, and Ogun States were effectively declared as infected areas. It is submitted that the power to do that flows from section 3 of this Act.

Section 4. This section confers on the President's extensive powers to make regulations on measures designed to contain the spread of a dangerous or infectious disease. The section is reproduced hereunder for emphasis and ease of reference:
The President may make regulations for all or any of the following purposes –

(a) prescribing the steps to be taken within Nigeria upon any place, whether within or without Nigeria to be an infected local area;
(b) prescribing the introduction of any dangerous infectious disease into Nigeria or any part thereof from any place without Nigeria, whether such place is an infected local area or not;
(c) preventing the spread of any dangerous infectious disease from any place within Nigeria, whether an infected local area or not, to any other place within 'Nigeria;
(d) preventing the transmission of any dangerous infectious disease in Nigeria from any place within Nigeria, whether an infected local area or not, to any place without Nigeria;
(e) prescribing the powers and duties of such officers as may be charged with carrying out such regulations;
(f) fixing the fees and charges to be paid for any matter or thing to be done under such regulations, and prescribing the persons by whom such fees and

[20] The word "include" is very generally used in interpretation to enlarge the meaning of words or phrases occurring in the body of a statute. See *Mahalakshmi Oil Mills v State of Andhra, AIR (1989) 1 SCC 164*. See also *Law Dictionary,* "include," accessed April 24, 2020, www.legalcrystal.com.

charges shall be paid, and the persons by whom the expenses of carrying out any such regulations shall be borne, and the persons from whom any such expenses incurred by the Government may be recovered; and
(g) generally, for carrying out the purposes of this Act.

The regulations under which the President made an order of restriction of movement in the affected States were anchored on the provisions of this section. The fatal question is, can the President rely on the powers vested in him under this section to order a restriction on movement? One of the human rights lawyers who challenged the legality of the President's order, Ebun- Olu Adegboruwa, has equally argued that the President cannot rely on the *Quarantine Act* to deny the people of their right to freedom of movement as guaranteed under section 41 of the Constitution.[21] The learned Senior Advocate argued that the Act only permits the President to quarantine those already infected while those not infected with the disease should be allowed to move about freely. With the greatest respect to the learned Silk, this argument is both morally and legally defective. It is either the senior lawyer did not advert his mind to section 4 of the *Quarantine Act* or he completely misconstrued the law. The overarching purpose of the Act is to save lives by curbing the spread of a dangerous and infectious disease, like COVID- 19. And all the powers vested in the President under section 4 of the Act are tailored towards the accomplishment of this objective.

By section 4(b), the President has a compelling obligation to make regulations generally for carrying out the purposes of the Act. It is not stated in section 4 or anywhere in the Act that the President can only adopt measures that affect the infected. It is a standard practice in public health that human-to-human transmission can only be curbed through physical distancing and, in pandemic cases, restriction of movement. 'This is well captured under section 4 of the Act based on which the measures contained in the presidential order can be validated in law.

Section 8 of the Act deals with the powers vested in a State Governor to adopt similar measures if the President fails to discharge the obligations placed on him under sections 2, 3, and 4 of the Act. The Governor is required to act subject to the same conditions and limitations. In other words, the Governor can only invoke the powers conferred on him by section 8 of the Act where the President fails to act. It is instructive to note that Governors of other States of the Federation have adopted similar measures to contain the spread of this dangerous disease in their States, acting under this section.

C. African Charter on Humans and Peoples' Rights (ACHPR)

The African Charter on Human and People's Rights (ACHPR), otherwise known as the Banjul Charter, is an international human rights instrument that is intended to promote and protect human rights and basic freedoms on the African continent. The provisions of the Charter that are germane to this paper are Articles 11 and 12.

Article 11 ACHPR. The article states as follows:

[21]Ebu- Olu Adegboruwa, ''Why Quarantine Act of 1926 Cannot Legalize Restriction of Movement by the President,'' Sahara Reporters, https//www.saharareporters.com.

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics, and rights and freedoms of others.

Again, this Article recognizes the salient fact that as important as freedom of assembly is, there can be a derogation from it on grounds of national security, public health, safety, etc. What this means is that this right, which is also recognized under section 40 of the 1999 Constitution of Nigeria, is not absolute. In the context of the restriction order made by the President, it can be argued that this Article has not been violated for the reasons already stated in this paper, particularly as they relate to section 40 of the 1999 Constitution.

Article 12 ACHPR

The relevant provisions of this Article are embodied in subsections (1) and (2) which read thus:

> (1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
>
> (2) Every individual shall have the right to leave any country including his own and to return to his country.
>
> This right may only be subject to restrictions, provided for by law for the protection of national security, law, and order, public health, or morality.

The freedom guaranteed to individuals by this Article is also not absolute but subject to the powers of the Head of State of each country to order restrictions on the grounds enumerated under subsection (2). One important point that must be stressed is that the restrictions recognized by the ACHPR must be sanctioned by law i.e., a legislative instrument. Again, it can be argued that the *Quarantine Act* qualifies as such an instrument, and the regulations made thereunder by the President to order a lockdown of some parts of the country as part of the measures to curb the spread of the coronavirus are valid in law.

D. International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly Resolution 2200A (XXI) on December 16, 1966, and in force from March 23, 1976, following Article 49 of the Covenant.[22] The provisions material to this paper is contained in Article 4 (1) and (2) which state as follows:

Article 4

> (1) In a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Charter may take measures derogating from their obligations under the present Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
>
> (2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.

[22]International Covenant on Civil and Political Rights https://treaties.un.org/doc/publication/unit.

This Article allows States Parties to the Charter to derogate from some of the civil and political rights created under the instrument. The point should be made that the measures amounting to derogation can only be taken in times of public emergency that is life-threatening and must not be inconsistent with their obligations under international law and should not be discriminatory. Another important point to make is that the rights that cannot be violated under any circumstance have been spelled out under Article 4(2).[23] It is pertinent to note that freedoms of movement and assembly are excluded from the category. It seems, therefore, that the presidential order is not inconsistent with the country's obligations under this international instrument vis-à-vis freedom of movement and right to peaceful assembly and association.

III. APPLICATION OF THE RELEVANT LAWS

The foregoing review of the relevant laws has shown that there is a legal basis for the order made by the Nigerian leader, President Muhammadu Buhari, for the shutdown of the FCT, Abuja, Lagos State, and Ogun State as part of the measures adopted to curb the continuous spread of the ravaging Covid-19 pandemic. The review has also revealed that the action is legally valid from the perspectives of both municipal and international law. Little wonder that, apart from the Ebu-Olu Adegboruwa, SAN, other commentators who had earlier challenged the legality of the presidential order, seemingly withdrew from further criticisms after the country's Attorney-General and Minister of Justice, Malami, and the Vice-President, Osinbajo, explained the legal justification for the action. As noted earlier in this paper, Adegboruwa, who stood by his criticism, either misconstrued the law or did not advert his mind to the relevant provisions of the *Quarantine Act*. There is also the likelihood that the learned Silk anchored his criticism on a stale law, *Quarantine Act 1926*. The operative law is the *Quarantine Act, Cap Q2, Laws of the Federation of Nigeria (LFN) 2004*. Adegboruwa has argued that the Act only empowers the President to isolate the infected individuals while those not infected can move freely. With due respect to the learned Silk, there is no such provision in Cap Q2 LFN 2004. All the steps taken by the President are validated under the provisions of the *Quarantine Act 2004.* The same conclusion applies to the relevant provisions of the 1999 Constitution, African Charter on Human and Peoples' Rights, and the International Covenant on Civil and Political Rights already cited and analyzed in this paper.

IV. CONCLUSION

The foregoing conclusion, notwithstanding, it is pertinent to address the justification or otherwise of the much-talked-about *Quarantine Act* which, from our analysis in this paper, invests the President with the *vires* to do what he did. The derogation clause in the Constitution (section 45) talks of 'any law that is reasonably justifiable in a democratic society.' We have said in this paper that the *Quarantine Act* can be situated within this phrase. But can we in all honesty say that this Act is reasonably justifiable in a democratic society? From the point of view of legal positivism, the answer may be yes. This is because to the proponents

[23]The rights declared to be inviolable are very fatal ones, like right to life (article 6), the rule against torture and degrading treatment (article 7), freedom against slavery and servitude (article 8), freedom from unlawful imprisonment (article 11) and the rule that no person shall be punished for an offence not known to law (article 15).

of positivist jurisprudence, the law must be divorced from moral and ethical considerations. Accordingly, the law is law, whether good or bad, just or unjust.[24]

However, from the natural law perspective, this law *(Quarantine Act)* needs to "wear a human face". The Act was enacted originally in 1926, during the colonial era, although it is published in the current edition of the Nigerian laws as "Cap Q2, LFN 2004". It will therefore be correct to describe the Act as one of the "legal colonial relics", saved by section 315 of the 1999 Constitution. The socio-economic situation of Nigeria in 1926 can never be the same as what obtained in the 22nd century. This is why it is important to take another look at the *Quarantine Act*. Law, as argued by the natural law, and even the Marxist theorists, must address issues of welfare and economic survival of the people; otherwise, it loses its relevance to the society it is meant to serve.[25] It is for this reason that the Nigerian Law Commission should consider amending sections 4 and 8 of the Act which confer on the President and a State Governor respectively the powers to make regulations on quarantine. In amending these provisions, a proviso should be introduced to each that will, *inter alia,* make the exercise of the powers conferred by the sections subject to the provision of substantial palliatives, in form of money, food, materials, etc., that can relieve the citizens, especially the vulnerable, less privileged members, of the affected local areas of the economic and social pains arising from the quarantine measures adopted by the respective leaders. This is to bring the *Quarantine Act* in conformity with the requirement of section 45(1) of the Constitution, namely that the law under which derogation from the fundamental rights donated by sections 37-41 of the 1999 Constitution can be validated must be "reasonably justifiable in a democratic society".

[24] See, for example, the postulation of Jeremy Bentham as cited in Ebunoluwa P Bamigboye, "Positive Theory of Law," in *Jurisprudence and Legal Theory in Nigeria,* ed. Adewale Taiwo and Ifeolu John Koni (Lagos: Princeton & Associates Publishing Co. Ltd., 2019), 200-202.
[25] Kazeem Olaniyan, "The Natural Law School: Another Viewpoint" in *Jurisprudence and Legal Theory*, 171-172.

6

Legal And Contemporary Issues on Covid-19 In Nigeria

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ABSTRACT

The effect of the Covid-19 pandemic outbreak on the legal landscape in Nigeria is diverse and multifaceted. Its effect has gone way beyond every conceivable outcome and has affected not only the health of the individuals in any given community and the health sector, but movement, travel, social interactions, businesses, and the day-to-day lives of the Nigerian people. Adopting the sociological jurisprudence school of legal theory which recognizes the relationship betwixt and among law, society, technology, and accepted social culture, this paper charts the effect of Covid-19 on identified segments of the legal landscape and the society viz; health, labor, tourism, criminal law, and procedure, family law, as presented by legal scholars in various legal subfields. A holistic approach to resolving the legal issues brought about by Covid-19 is recommended as the best foot forward such as; respecting the basic human rights of citizens would ensure that the vulnerable can access medical care; health data accumulated based on the pandemic is managed wisely (and not subject to3abuse); defaulters of Covid-19 regulations are handled in a manner that reflects respect for the rule of law and due process; medical waste management is handled in such a way that it does not affect the community and result in the spread of disease, inter alia.

ESSAY CONTENTS

I. INTRODUCTION

Most pandemic outbreaks, which have arisen in the last 50 years, have been successfully contained; with the world counting the loss of lives, and acknowledging the devastating effect of the pandemic on the affected persons, their families, the direct society of the affected group of people and health institutions.[1] However, nothing in recent times can be compared to the effect of the Coronavirus (Covid-19) pandemic outbreak, which has not just affected the physical wellbeing of Nigerian citizens and health institutions, but also impacted the social, economic, developmental, legal, day to day activities, and interactions of Nigerians, along with citizens of most countries of the world.

A pandemic outbreak, as with any disease, hits the human body which suffers the ravages that the disease can wreck. This impact is then multiplied across a vast multitude of affected persons who have to deal with the debilitating effect of the pandemic on themselves, their families, society in general, and the health institutions of the affected locale.[2] The novel Covid-19 was identified in Wuhan, China in December 2019 and confirmed by the World Health Organization (WHO)

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[1]Eleesha Lockett. "What is a pandemic?" Assessed July 13, 2020, https://ww.healthline.com/health/what_is_a_pandemic

[2]See generally, Wuqi Qiu, Shannon Rutherford, Ayan Mao, and Cordelia Chu, "The pandemic and its impacts," Health, Culture and Society, no 9-10(2017):1 World Health Organization. "Infection prevention and control of epidemic-and pandemic-prone acute respiratory diseases in health care," WHO Interim Guidelines, assessed July 10, 2020, https://www.who.int/csr/resources/publications/who_CDS_EPR_2007_6c.pdf?ua=1

as a pandemic outbreak in January 2020[3]. It subsequently spread to the whole world and found its way into Nigeria: on February 27, 2020, the Federal Ministry of Health reported the first confirmed case of Covid-19 in Lagos State-an an Italian who works in Nigeria and who had shortly returned from Milan[4]. The pandemic outbreak has since spread to the thirty-six states of the federation and the Federal Capital Territory and the country has consequently recorded cases in the thousands with a growing number of fatalities.

In response to the pandemic outbreak and in light of the debilitating effect that it can wreak, the Federal government invoked Section 305 of the Constitution, the Quarantine Act,[5] and signed a Quarantine Order pronouncing a state of emergency under the perceived public health danger. State governments also swung into action to contain the spread of the pandemic and enacted Infectious Diseases (Emergency Prevention) Regulations to try to ensure that health institutions and other concerned agents of the Nigerian legal system were able to combat the pandemic outbreak effectively. These regulations include the lockdown of land and air borders, movement restrictions, social distancing, and instructions on personal hygiene. Federal and State action did not end with regulations to combat the disease alone, as other regulatory responses include those by the Legislature, the Judiciary[6] and the following Ministries, Departments and Agencies of the government amongst others: Nigerian Centre for Disease Control (NCDC);[7] Central Bank of Nigeria (CBN);[8] Securities Exchange Commission (SEC);[9] Federal Inland Revenue Service (FIRS),[10] and Nigeria Stock Exchange (SEC).[11]

This research holistically adopted the sociological jurisprudence model of legal theory, because of its ability to incorporate other theories and in recognition of the relationship shared by law, society, technology, and accepted social culture[12]. In

[3] World Health Organization, assessed June, 22, 2020, http://www.who.int

[4] It was also the first reported case in Africa

[5] Cap. C23 Laws of the Federation of Nigeria 2004

[6]National Judicial Council "Re: National Judicial Council Covid-19 Report Guidelines for Court Sittings and Related Matters in the Covid-19 period" assessed June 20, 2020, https://njc.gov.ng/30/news-details

[7]Nigerian Centre for Disease Control, "Guidelines," assessed June 20, 2020, https://covid19.ncdc.gov.ng/guideline/

[8]Central Bank of Nigeria, "Circular to all other financial institutions," assessed June 20, 2020, https://www.cbn.gov.ng/Out/2020/CCD/CBN%20CIRCULAR%20TO%20OFIS-%20REGULATORY%20FORBEARANCE%20FOR%20THE%20RESTRUCTURING%20OF%20CREDIT%20FACILITIES%20OF%20OFIS%20IMPACTED%20BY%20COVID-%2019.pdf

[9]Securities and Exchange Commission, " Circular to all Regulated Entities and the Market-Update on COVID 19," assessed June 20, 2020, https://sec.gov.ng/circular-to-all-regulated-entities-and-the-market-update-on-covid-19/

[10]Federal Inland Revenue Service, "Press Release," assessed June 20, 2020, https://www.firs.gov.ng/PressRelease/COVID19ECFIRS;

[11]http://www.nse.com.ng/mediacenter/news_and_events/Pages/covid-19-our-response.aspx

[12]See generally, Mathieu Deflem, Sociology of law: visions of a scholarly tradition. (New York: Cambridge University Press, 2008); James A. Gardner, The sociological jurisprudence of Roscoe Pound. Villanova Law Review. 7,no.1(1961):1-26. Here the historical origins of Sociological jurisprudence is traced from Montesquieu, to Rudolph Von Jhering, to Roscoe Pound who is recognized for stabilizing the theory. According to Pound, Sociological jurisprudence takes into account the social facts that the law comes from and to which it is meant for. Particularly, Pound avers that sociological jurisprudence consists of six programmatic guidelines; 1. Studying the actual social effects of law; 2. Focusing on the effect of law to prepare for adequate legislation; 3. Seeking to contribute to an equitable application of law in all cases; 4. Seeking to make the rule of law more

that vein, this paper demonstrates how the law and society interface during the Covid-19 pandemic outbreak and makes recommendations on how the law can be adapted to adequately respond to the current social conditions, in recognition of the fact that law is a means to an end.[13] Roscoe Pound is recognized as expounding on the law as "*experience developed by reason and reason tested by experience,"*[14] and it is in this context that this research aims to show the way that law can be used to navigate the current legal and social landscape brought about by the Covid-19 pandemic outbreak. Nigeria presently has to confront and overcome the complexities that the pandemic has wrought on various sectors of the economy and life of the nation from the legal standpoint- from health, environment, labor, criminal justice, tourism, family relations, and patents to human rights. This article highlights research done by some legal scholars on the effect of Covid-19 on identified segments of the Nigerian legal landscape viz; health, labor, tourism, human rights, family relations, and criminal and procedural laws in Nigeria.

This article is divided into eight parts; the first being this introduction. The second part examines the effect of the Covid-19 pandemic on health-related issues. Here four topics discuss the following legal issues: (i) Health Data Privacy during Public Health Crisis (ii) Vulnerabilities and Health Inequities, (iii) An Environmental Perspective of Covid-19 and; (iv) Patents and Herbal Medicine. The third part considers the influence of Covid-19 on Labor law and assesses the effect on Employment Contracts in Domestic and International Transactions. The fourth section analyses the Legal Status of Tourists Affected by Travel Bans and Lockdowns. The fifth part explores Human Rights in two contexts: (i) Human rights concerns of Covid-19, (ii) Human Rights Litigation. And the sixth part considers criminal law and procedure viz; (i) Covid-19 and Correctional institutions, and (ii) Covid-19 and the prosecutorial powers of the Attorney General. The seventh part assesses the effect of the Covid-19 pandemic on family life and social relations, and the eight-part assesses the effect of Covid-19 on education. Each of the segments discussed will contain recommendations on overcoming the identified legal issue, then the last part will conclude on the work.

II. COVID-19 AND THE HEALTH LANDSCAPE

A. Health Data Protection in Nigeria during the COVID- 19 Pandemic

Sharing of health data poses legal, ethical, and technical challenges to privacy management particularly in health emergencies. Large-scale health databases acquired during health pandemics such as the present Covid-19 pandemic outbreak cannot be understood simply as up-scaled versions of previous collections of data; they generally bring together much larger and more diverse sets of information creating higher risks of privacy infringement. This calls for an assessment of

effective in light of the law's enforcement function; 5. Seeking to contribute to an equitable application of law in all cases; and 6. Aiming to advance the ultimate purpose of law in terms of social control.

[13]Mathieu Deflem, *Sociology of law.* Cambridge University Press 2012: 1-14 Accessed April 12 2020. Sociology of Law (cambridge.org)

[14]Roscoe Pound, New Paths of the Law (Nebraska: University of Nebraska Press, 1950)

existing data protection ethical, and legal frameworks and the protection they offer to data subjects during health pandemics.

Novel technologies enable the automated and quasi-autonomous collection and analysis of data across different technological and geographical domains, connecting different data collections more easily, while storage technologies allow these data to be kept for undefined lengths of time conflicting in important ways with individual privacy rights. This is because the subjects of the data are no longer aware of the extent of data collected and the uses that data collected from them can be deployed. Anonymization is also not a guarantee in large data collections such as data amassed during pandemics, which in turn may affect not only the privacy rights of individuals but also the rights of whole groups for cultural ethnic, or geographic reasons. Furthermore, Covid-19 interventions like contact tracing create an avenue for access into otherwise private and confidential spheres of an individual.

The research highlights the importance of protecting the privacy and confidentiality of data subjects because privacy is lost when confidentiality is breached and people gain access to an individual's health record or data; or when the individual can no longer control the information. The privacy of citizens, their homes, and correspondences is protected by Section 37 of the Constitution of the Federal Republic of Nigeria (CFRN). However, containing Covid-19 spread necessitates the use of personal information without the consent of the person and sometimes invasion of homes of persons.[15] Contact tracing is also an important tool in combating pandemics.[16] During a public health crisis, are there situations where the state through medical personnel can divulge personal health records or data of patients? In *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo,* [17] it was held that a clear and compelling overriding public interest is the only justification for overriding the choice of an individual. Furthermore, the National Health Act[18] provides that a healthcare worker or provider may disclose personal record or data of an individual to any other person, health care provider, or health establishment as is necessary for any legitimate purpose within the ordinary course and scope of his or her duties where such access or disclosure is in the interest of the user.

Preparation for and implementation of the protection of health data are important steps towards ensuring protection. In the current situation, not enough attention has been given to exactly how confidentiality is protected, and what will happen if it is breached. The National Health Act provides that a health care provider may examine a user's health records for treatment with the authorization of the user; and for the purposes of study, teaching, or research with the authorization of the

[15] See generally, Schwab, A.P., Frank, L. & Gligorov, N. Saying Privacy, Meaning Confidentiality. The American Journal of Bioethics 11 no.11, 44-45 (2011); Solove, D. J. Understanding privacy. (Harvard University Press: Cambridge, MA, 2008); Solove, D.J. Conceptualizing Privacy, California Law Review. 90, 1087 (2002); Gostin, L.O. Public Health Law: Power, duty, Restraint. (University of California Press: Berkeley, 2008).

[16]Ferretti, L. Wymant, C., Kendall, M., Zhao, L., Nurtay, A., Abeler-Dörner, L., Parker, M., Bonsall, D., Fraser, C. Quantifying SARS-CoV-2 transmission suggests epidemic control with digital contact tracing. Science, accessed, March 31, 2020, DOI: 10.1126/science.abb6936

[17] (2001) LPELR-1856(SC)

[18] Section 27 of the National Health Act, 2014

user, head of the health establishment concerned, and the relevant health research ethics committee.[19] Where the study, teaching or research reflects or obtains no information as to the identity of the user concerned, the Act dispenses with the necessity of obtaining the authorizations of the user, head of the health establishment concerned, and the relevant health research ethics committee.[20]

The National Health Act provides a framework for the regulation, development, and management of a health system and sets standards for rendering health services in Nigeria. Section 26(1) of the Act provides that all information concerning a health care user, including information relating to his or her health status, treatment or stay in a health establishment is confidential. This presupposes that all health records or data of individuals, without exception, are confidential and should not be divulged to third parties by medical practitioners. It imposes responsibility on persons in charge of health establishments to set up control measures to prevent unauthorized access to those records and to the storage facility in which, or system by which, records are kept.[21] Failure to carry out this responsibility is an offense that can make such persons in charge liable on conviction to imprisonment for a period not exceeding two years or to a fine ofN250,000.00 or both.[22]

(i) The Freedom of Information Act, 2011

The intent of the Freedom of Information (FOI) Act is to make public records and information more freely available and accessible to the public. The Act is also enacted to protect public records and information to the extent consistent with the public interest and the protection of personal privacy.[23] The Act[24] provides that application for information that contains personal data of patients among others must be denied. The health records of individuals are information that contains private data and are thus not contemplated by the drafters of the act as part of records or information to be made more freely available and accessible to the public. To buttress this, Section 16(b) of the Act provides that an application for information that is subject to health workers-client privilege may be denied. This Section also takes patient health data or record out of the purview of the disclosure and accessibility. However, such information although consisting of private data can be disclosed if the individual to whom it relates consents to the disclosure;[25] or the information is publicly available.[26]

The Act further provides that where disclosure of any information containing personal data would be in the public interest, and if the public interest in the disclosure of such information far outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom a request for disclosure is made shall disclose such information.[27] This implies that there must be justification and evidence to prove that the public interest in the

[19] Section 28(1) of the National Health Act, 2014
[20] Section 28(2) of the National Health Act, 2014
[21] Section 29(1) of the National Health Act, 2014
[22] Section 29(2) of the National Health Act, 2014
[23] Preamble to the Freedom of Information Act, 2011
[24] Section 14(1)(a) of the Freedom of Information Act, 2011
[25] Section 14(2)(a) of the Freedom of Information Act, 2011
[26] Section 14(2)(b) of the Freedom of Information Act, 2011
[27] Section 14(3) of the Freedom of Information Act, 2011

disclosure of such information outweighs the protection of the privacy rights and interests of the owner of such information.

(ii) Nigeria Data Protection Regulation, 2019

The objectives of the Nigeria Data Protection Regulation (NDPR) include the safeguard of the rights of natural persons to data privacy and the prevention of manipulation of personal data which includes patient information and health record.[28] Article 2.1 of NDPR provides that personal data shall be collected and processed in accordance with specific, legitimate, and lawful purposes consented to by the Data Subject. However, further processing may be done only for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes; and any person or entity carrying out or purporting to carry out such data processing shall not transfer any personal data to any other person. Such persons who are entrusted with the personal data of a data subject or who are in possession of the personal data of a data subject owe a duty of care to the said data subject and shall be accountable for his acts and omissions concerning such data.

There will be lawful processing of personal data where the data subject gives consent[29] or where there is a need to protect vital interests of the data subject or another natural person[30] or where there is a need to perform a task in the public interest or the exercise of official public mandate vested in the controller.[31] Obtaining the consent of the data subject requires the disclosure of every material information as well as ensuring that the data subject has the legal capacity to give such consent. The consent must also be obtained without fraud, coercion, or undue influence. The data subject should also be informed of the probability of transferring his data to a third party for any reason whatsoever.[32] For instance, where a health care practitioner or institution suspects or makes a diagnosis that a patient has an infectious disease, the patient must be informed of the suspicion or diagnosis and the fact that same is reportable to the public health department or the center for disease control.

The Regulation also imposed on the data controller or processor liability for the actions and inactions of third parties handling personal data of data subjects. Thus, if a medical practitioner or institution discloses his patient's health data to a third party for any reason whatsoever, the health care practitioner or institution will be held liable for the outcome of how the third party handles such information. This is buttressed by the requirement for a third-party processing contract between the third party and the data controller.[33] For instance, disclosing the identity of a patient with an infectious disease like Covid-19 may subject such an individual to stigmatization and discrimination even after the patient has been discharged. If such disclosure was done without the consent of the patient and does not come within any of the exceptions provided by law, the health care practitioner or

[28] Article 1 of the Nigeria Data Protection Regulation, 2019
[29] Article 2.2(a) of the Nigeria Data Protection Regulation, 2019
[30] Article 2.2(d) of the Nigeria Data Protection Regulation, 2019
[31] Article 2.2(e) of the Nigeria Data Protection Regulation, 2019
[32] Article 2.3 of the Nigeria Data Protection Regulation, 2019
[33] Article 2.7 of the Nigeria Data Protection Regulation, 2019

institution will be held liable for the stigmatization or discriminatory acts.[34] The regulation further provides that data controllers or processors should develop security measures to protect personal, sensitive, and confidential data.[35] In addition, the regulation provides that the privacy right of a data subject shall be interpreted to advance and never to restrict the safeguards the Data Subject is entitled to under any data protection instrument made in furtherance of fundamental rights and the Nigerian laws.[36]

Generally, ethics involves judgments about the way we ought to live our lives, including our actions, intentions, and habitual behavior. Analyzing issues with ethical undertone involves the identification of relevant principles, the ability to apply the principles to the particular situation, and making judgments on the weight to be attached to competing principles where it is impossible to satisfy them all giving credence to the provisions of relevant laws. Thus, adherence to the principle of autonomy as it touches the concept of informed consent, privacy, confidentiality, and the protection of private and sensitive data particularly during a public health crisis should be weighed on the scale of the provisions of the relevant laws and balanced with the ethical value of protecting public health and wellbeing.

B. Vulnerabilities and Health Inequities in a Global Pandemic

Covid-19 is an exposition that no country is without a vulnerable population that is exposed to the risk of the pandemic. Every class, social strata, and race is affected; however, the effect and fatality are more within the vulnerable population. Racial/ethnic disparities, economic and social inequality in access to healthcare, and non-implementation of the right to health have contributed to health inequities and vulnerability to the risk of the infection.

In the United States, the healthcare system's long-term structural and systemic inequities have contributed to the high risk of infection and fatality in the Black community[37] with the likelihood of a rapid community-to-community transfer to the whole population.[38] In South Africa, extreme inequality puts the poorest population at risk,[39] while in Nigeria, the risk of infection is higher among low-income groups who are less likely to take the necessary precautions.[40] Health inequities and vulnerabilities are the difference in health status and accessibility to health care in population groups,[41] due to social, economic, and political factors;

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[34] Article 2.4(b) of the Nigeria Data Protection Regulation, 2019

[35] Article 2.6 of the Nigeria Data Protection Regulation, 2019

[36] Article 2.9 of the Nigeria Data Protection Regulation, 2019

[37]Gassam J, "Covid-19 Reveals Racial Inequities in U.S. Healthcare System: Strategies for Solutions," Forbes Diversity & Inclusion, accessed May 4, 2020, https://www.forbes.com

[38]BMJ. "Covid-19: the Painful Price of Ignoring Health Inequities," Thebmjopinion, assessed May 4, 2020, https://blogs.bmj.com

[39]Alyssa, H. "Covid-19 Pandemic: In a Nation of Extreme Inequality, South Africa's Poorest are Most at Risk" assessed, May 4, 2020, https://www.atlanticcouncil.org

[40]Most of the people in this group live in overcrowded residence with no basic amenities like water and healthcare facilities. Going by the recent directive of government that come May 4, 2020, there will strict enforcement on the use of face masks in public, it is unlikely that low-income households will be able to afford or sustain the use of masks for every member of the household.

[41] Word Health Organization, "Definition of Health Inequities" Assessed May 4, 2020, https://www.who.int.

such as lack of education, low employment status, low income, gender, and racial inequality, low-quality healthcare, poor housing, sanitation, and environment.

Covid-19 as a global pandemic is no doubt an exhibition of the vulnerabilities and health inequities within populations spanning across countries irrespective of the level of economic development. Vulnerable populations due to poverty and lack of access to healthcare are at a higher risk of the pandemic. In addressing vulnerability and health inequities among population groups, governments need to acknowledge the fact and existence of health inequities, commit to social and economic rights as fundamental human rights,[42] redesign and restructure the health care systems to encompass the content and features of the right to health and finally, prioritize health care in national budgets to provide health care for all in the prevention, treatment, and control of not only the Covid-19 epidemic but also other diseases.[43]

C. An Environmental Perspective of Covid-19 in Nigeria

Health care facilities produce, particularly during the Covid-19 pandemic, various waste products, including medical waste, and with it, the increased risk of transmitting Covid-19 and other infections such as Hepatitis B and C (HBV and HCV), the Human Immunodeficiency Virus (HIV), and Hemorrhagic diseases such as Lassa fever and Ebola, if the disposal is not handled properly.[44] Thus, the waste generated because of the non-pharmaceutical interventions, particularly health care waste may have far-reaching consequences for public health and the environment. The World Health Organization (WHO) has stated that 15% of healthcare wastes are hazardous and infectious, and that unsatisfactory medical waste management can lead to a significant risk of new infectious diseases globally.[45]

In a country where scavenging of dump-sites is common, the manual handling and sorting of waste may lead to the risk of needle-stick injuries and the risk of getting infected with the virus as well as other associated infectious diseases such as hepatitis B, hepatitis C, and HIV.[46] The wearing of face masks which is now the norm would further increase the quantity of waste to be handled.

Regular waste collection and sound waste sorting, processing, treatment, and final disposal are therefore crucial elements for maintaining the protection of human health and the environment during the time of the Covid-19 Pandemic. The World Health Organization in the wake of the Covid-19 pandemic, released guidelines be followed, including assigning responsibility and sufficient human and material

[42]Chapter II, Fundamental Objectives and Directive Principles of States Policy. Constitution of the Federal Republic of Nigeria 1999

[43]Economic Covenant, Op cit. Art.12

[44] Tobin, E.A., Ediagbonya, T.F., Asogun, D.A. & Oteri, A.J. "Assessment of Healthcare Waste Management Practices in Primary Health Care Facilities in a Lassa Fever Endemic Local Government Area of Edo state, Nigeria." AFRIMEDIC Journal 4 (no.2):16-24 (2013)

[45]World Health Organization. "Fact sheet: Health care waste." World Health Organization, assessed May 6, 2020, https://www.who.int/news-room/fact-sheets/detail/health-care-waste .

[46] Ijeoma, U.C., Sansam, S., Srun, S., Vannara, H., Sanith, S., Sopheap, T., Newman, R.D., Gadde, R., Dejana, S., Hassani, A.S. & Ly, V. Notes from the Field: Public Health Response to a Human Immunodeficiency Virus Outbreak Associated with Unsafe Injection Practices — Roka Commune, Cambodia. Morbidity and Mortality Weekly Report 67(4):135-136 (2016)

resources to segregate and dispose of waste safely.[47] These guidelines were developed on the basis that with the spread of the virus and the non-pharmaceutical interventions, the volume of waste particularly infectious waste during the Covid-19 outbreak is expected to increase, especially through the use of PPE. Therefore, it is important to increase the capacity to handle and treat this healthcare waste. This research seeks to examine the legal framework for the management of waste and pollution in Nigeria, viz: The Nigerian Constitution[48]; The National Health Care Waste Management Policy 2013; The National Environmental Standards and Regulations Enforcement Agency (NESREA)[49] and; The Environmental Sanitation and Waste Control Regulations 2009[50].

Although the Control of Infectious Diseases Bill 2020, the Covid-19 Regulations[51], Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020[52] all represent legislation made according to the emergence of the Covid-19 pandemic and the need to slow its spread, it is important to note that none of these regulations make any mention of waste management or how the waste generated from the quarantine should be managed.

In the wake of the current pandemic, it is obvious that there are provisions of the law that provide an enabling environment for the effective management of waste in Nigeria. The problem which is characteristic of environmental laws in Nigeria is the problem of enforcement. Another identifiable gap is the failure of the existing legislation to provide a framework to deal with the waste generated by the non-pharmaceutical intervention to Covid-19. These include the use of face masks, sanitizers, and the regular washing of hands. There is also the identified gap of how waste generated at home by a person under quarantine or isolation are to be treated bearing in mind that such waste may have the potential of being contaminated and if not well managed may lead to the spread of the virus.

There is no better time than the present for NESREA to ensure that the draft National Environmental (Healthcare Waste Control) Regulations expands the definition of health care waste and how it can be generated. Also, it is necessary for all personnel involved in waste management to be trained on the peculiarity of the current pandemic, particularly those involved in the day-to-day waste collection. It is recommended that all staff involved in handling potential infectious solid waste be equipped with personal protective equipment used for medical waste handling as every waste should now be regarded as potential infectious solid waste.

There is a need for regulatory agencies on environmental protection to rise to the challenge of proper monitoring and compliance with environmental policies and laws. As enlightenment is ongoing about the virus, its causes, and symptoms, it is

[47]World Health Organization. "Interim Guidance; Water, Sanitation, Hygiene, and Waste Management for The Covid-19 Virus," World Health Organization, assessed May 9, 2020 https://www.who.int/publications-detail/water-sanitation-hygiene-and-waste-management-for-covid19.

[48] 1999 (as amended).

[49] National Environmental Standard and Regulations Enforcement Agency (Establishment) Act 2007

[50] Regulations No. 28 of 2009, Vol. 96, No. 60.

[51] The Regulations were made pursuant to The Quarantine Act. Cap Q2 Laws of the Federation 2004

[52] The Regulations were made pursuant to the Public Health Law Cap P16 Laws of Lagos State 2015

also necessary that public enlightenment on specific guidance for waste collection in infected households and the provisions of services, in general, is carried out. There is also the need to focus attention on the disposal of non-pharmaceutical interventions such as masks, surgical gloves, used bottles of hand sanitizers, and water used to wash hands in public places. This can be done by providing special cans or bins in public places and designated areas in residential areas. These special bins carefully marked will be for the collection of used masks and other related waste. Such waste will be collected separately and delivered for treatment and disposed of properly as though it were waste emanating from a health care facility.

D. COVID-19 and Pharmaceutical Patents and Compulsory Licensing

A new strain of the Coronavirus (Covid-19) was discovered in Wuhan, China in December 2019. Since then, it has spread outside China and affected all countries economically, socially, and physically.[53] Nigeria is not left out, as the effect of the pandemic is being felt daily, and the country is now fighting against the disease.[54] As a result of the deleterious effect of the pandemic, countries are in a race to find a cure or a vaccine that will manage and if possible, eliminate the virus. The Covid-19 pandemic has created untold hardship worldwide. The ongoing rapid spread of the virus is challenging the capacity of governments and the World Health Organization (WHO) to quickly put in place, a globally coordinated response to the pandemic.[55] There is currently no proven and safe cure against covid-19, but if there is, intellectual property rights would arise and government must ensure that there are legislative and procedural frameworks in place to ensure that pharmaceutical patents, data exclusivity, and trade secrets are protected.[56]

This research discusses pharmaceutical patents in line with the importation of the "Madagascar Cure" for Covid-19 and possibly any other "touted" cure for Covid-19. It has been stated that least developed countries are not required to provide patents for pharmaceutical products or processes simply because if they grant such patents, there may be obstacles to its accessibility.[57] Pharmaceutical patents have however been controversial where the high cost of drugs and medicines protected by patents can work against the proper address of public health issues in developing countries.[58]

In a bid to cut down the high cost of medicine, the World Trade Organization tackled the issue through the Doha Declaration which uses compulsory licensing and parallel importation to cut the cost of pharmaceutical products.[59] A challenge that may arise is that compulsory licensing is not statutorily used in Nigeria

[53] Southcentre. "The Covid-19 Pandemic: R&D and Intellectual Property Management for Access to Diagnostics, Medicines and Vaccines," Southcentre, accessed, May 11, 2020, https://www.southcentre.int/wp-content/uploads/2020/04/PB73_The_COVID-19-Pandemic-RD-Intellectual-Property-Management/

[54] Southcentre; The outbreak of the virus was declared a public health emergency by the World Health Organization on 30 January 2020 but it was later declared to be a pandemic on 11 March 2020

[55] Tellez, V.M. The Covid-19 Pandemic: R&D and Intellectual Property Management for Access to Diagnostics, Medicines and Vaccines. Policy Brief, No.73, accessed May 12, 2020, https://www.southcentre.int>wp-content>uploads>2020/04

[56] Tellez, V.M., "The Covid-19 Pandemic.

[57] Article 66, Trade-Related Aspects of Intellectual Property (TRIPs) Agreement 1995

[58] Bainbridge, D.I. Intellectual Property. (London: Pearson Publishing, 2012) 19..

[59] Bainbridge, "Intellectual Property."

because of its low pharmaceutical manufacturing capacity. Compulsory licensing is more effective in countries that can manufacture drugs locally. The trade-related aspect of intellectual property (TRIPs) addresses this problem by enabling countries such as Nigeria to issue compulsory licensing for drugs and vaccines to be imported from overseas under a TRIPs compulsory licensing framework.[60] The flexibilities of TRIPs will however be required for its incorporation under the Constitution of the Federal Republic of Nigeria.[61]

The protection that is afforded under a patent, is that it stimulates technological development as it encourages indigenous inventive activity. Investment in the inventive effort is however perceived favorably by prospective investors when it is backed by legal protection.[62] A viable patent regime would help to enable the transfer of technology from technologically advanced countries to less developed countries. There seems however to be a wide gap between indigenous capabilities and the astounding developments in advanced countries. Nigeria, as a developing country, is yet to catch up in the area of scientific, technological capacity, and innovation, and this is noted by the low rate of patenting activity in the country.

In a bid to curtail the virus, world leaders have propelled various treatment modalities that have not been clinically tried by necessary agencies to prevent and cure acute respiratory syndrome. To date, there are no evidence-based treatments for covid-19.[63] The President of Nigeria, Muhammed Buhari has validated the import of Madagascar cure which is meant to cure covid-19. The World Health Organization (WHO) had warned against the use of CVO without any medical supervision and has cautioned against self-medication. The WHO further said that the concoction for the patients suffering from Covid-19 has not been approved.[64] This could also raise Public Health issues under the National Health Act.[65]

The importation of the Madagascar cure for Covid-19 raises several issues as medical experts including Doctors, Pharmacists, and Nurses have opposed the plan by the Federal Government to import the herbal cure for the treatment of Covid-19 patients in Nigeria. This is because there is a belief that if Nigerian researchers are given adequate financial and technical support, they would be able to come up

[60]Adewopo, A. 2020. Intellectual property rights, pharmaceutical patents and Public Health: Adopting Compulsory and Government Use Licenses in COVID-19 Emergency. Nigerian Institute of Advanced Legal Studies, accessed May 14, 2020 https://www.nials.edu.ng/pdf/2020_ipr_covid_19_report.pdf; Lehman, B. 2003. The Pharmaceutical Industry and the Patent System. International Intellectual Property Institute, 2003; Oyewumi, A.O. Nigerian Law of Intellectual Property. (Lagos: University of Lagos Press and Bookshop Ltd, 2015) 142-143.

[61] Section 12, The Constitution of the Federal Republic of Nigeria, 1999 (As amended)

[62] Nigerian Constitution, 1999.

[63] American Journal of Emergency Medicine. Non-evidenced based treatment: An unintended cause of morbidity and mortality related to ZCOVID-19. American Journal of Emergency Medicine, accessed May 13, 2020, https://www.ajemjournal.com/article/50735-6757(20)30317-X/pdf

[64] The Guardian. Nigeria: COVID-19- Buhari directs validation of Madagascar Herbal Mixture's Efficacy. The Guardian, accessed May 13, 2020, http://allafrica.cim/stories/202005/20119.html

[65] Section 1, National Health Act 2014

with a cure or vaccine to combat the Covid-19 pandemic and be at par with developed countries.[66]

Patents may be validly obtained in respect of improvements to existing inventions. The provision of improvement of patents is useful in a developing country such as Nigeria because of its capacity of stimulating indigenous inventors to adapt or improve upon foreign inventions to suit local conditions, which would render the product or process, useable in local practice but in guaranteeing the supply of needed vaccinations and drugs for Nigerians, it should be within the reach of citizens, concerning it's being affordable. The mechanism which should, therefore, be put in place is to ensure compulsory licensing under the Nigerian Patents and Designs Act to cut the cost of imported drugs and medicine. Also, for a patent to be applicable, therefore, it must satisfy the three requirements which are newness, inventive activity, and its capability of industrial application.[67] The Federal and State governments should issue appropriate legal instruments pursuant to a provision under the Patents and Designs Act for compulsory licenses. There should also be regulatory action so that, such drugs and vaccines would be available and affordable to the Nigerian public.

III. COVID-19 AND THE LABOUR LANDSCAPE

A. Employment contracts in domestic and international transactions

Following the global spread of the Coronavirus (Covid-19), pandemic,[68] the nations of the world are exploring proactive measures including physical distancing, lockdowns, and border closure, among others, to contain the spread of the disease. Many offices have been shut, while some businesses are being carried out virtually, and some employees are requested to work from home, although not every type of work can be performed effectively online, albeit public institutions and civil service by virtue of their job schedules are yet to fully integrate the concept of working remotely from home[69]. The reality of the moment brings about productivity decline with corresponding incapacitation of employers to sustain current payroll costs, especially in the private sector.

Employment contracts may be frustrated due to an occurrence beyond the control of the parties, like an outbreak of disease, among other incidents capable of discharging the parties from their contractual obligations. Modern employment relations expect both the employer and employee to make reasonable adjustments to ensure there is a sustained exercise of rights and fulfillment of obligations as permitted in the circumstance, in order to avoid strained relationships. What remains controversial is whether the nature of Covid-19 can be appropriately regarded as a *force majeure* condition that envisages the stay safe and keeps well

[66] Chukwuma, Muanya, Adelowo Adebumiti, Azimazi Momoh Jimoh & Nkechi, Onyedika-Ugoeze, "Why Nigeria should avoid Madagascar's COVID-19 drug" 13 May 2020, https://guardian.ng/news/why-Nigeria-should-avoid-Madagascar's-Covid-19-drug/

[67] Section 1 (1) (b) Nigerian Patents and Designs Act, Laws of the Federation 2004

[68] The World Health Organization has declared as a pandemic on the 30th January, 2020. In order to contain the spread of COVID-19 in Nigeria, the President Gen. Muhammadu Buhari issued the COVID-19 Regulations 202015 and the Governor of Lagos state, Babajide Sanwo-Olu issued the Infectious Disease (Emergency Prevention) Regulations 2020 implementing a total lockdown of activities and a ban on all public gatherings, exempting only essential services personnel from the restrictions.

[69] In Nigeria, many business arrangements still require presence of employees to resume at a physical office in order to carry out their job schedule from 8a.m to 4p.m.

practices occasioning the situation that impedes or prevents an employer or the employee from performing one or more of their respective contractual obligations.

The position of law is that a *force majeure* clause may be relied upon as a defense by the employer in suspending employees' right to be remunerated and discharging obligation on the employer to pay salaries in such circumstance, provided the clause has been expressly stated and duly signed in the contract of employment[70]. Failure to do so means that a supervening event such as the Covid-19 pandemic cannot be described as a force majeure event, to provide a legal defense for non-performance by the employer. Employers in the private sector economy may have to take tough decisions on how to manage this challenge which may include offering a pay cut to their staff, downsizing, withholding salary, shutting down and massive retrenchment of non-essential staff. Invariably, the situation will have an adverse impact on employment relationships globally.

The International Labor Organization maintains a system of international labor standards (ILS) aimed at promoting opportunities for workers to obtain decent and productive work, under conditions of freedom, equity, security, and dignity. The ILS provides a useful decent work compass within the context of the crisis response to the Covid-19 outbreak. The ILS upholds provisions respecting safety and health, working arrangements, protection of specific categories of workers, non-discrimination by ensuring compliance with social security or employment mechanism protection[71]. The aim of these provisions is to guarantee that workers, employers, and government maintain decent work ethics while adjusting to the Covid-19 pandemic. In this regard, the ILO labor standards on employment, social protection, wage protection, SMEs promotion, or workplace cooperation contain specific guidance and formulate policy measures that would encourage a human-based approach to the crisis and its recovery[72]. In the same vein, the objectives of ILS are geared towards promoting and contributing to a culture of social dialogue and workplace cooperation that are key to building recovery and preventing a downward spiral in employment and labor conditions during and after the crisis.[73]

Averting job losses and sustaining income levels is the major concern of the ILO, estimating that up to 25 million jobs could be lost worldwide because of the Covid-

[70] If employment contracts provide for the *force majeure* condition, the employer can, in exercising this power, notify the employee that the parties are discharged from carrying out their obligations from the date of occurrence of the event. As such, issues like payment in lieu of notice requirement, severance packages, terminal benefits, or consultation with union representatives must be strictly followed in line with international best practices in compensating an employee for the loss of earnings incurred as a consequence of the termination.

[71] In 2019, the Centenary Declaration for the Future of Work reaffirmed that the setting, promotion, ratification and supervision of international labor standards is of fundamental importance to the ILO.

[72] Their guidance extends to the specific situation of certain categories of workers, such as nursing personnel, domestic workers, migrant workers, sea farers or fishers, who we know are very vulnerable in the current context.

[73] International labor standards illustrate expected conduct and embody resilience in front of concrete situations in the world of work and are fundamental to any long-lasting and sustainable response to pandemics including the Covid-19. Developed and periodically reviewed and where needed revised over the past century, international labor standards respond to the changing patterns of the world of work, for the purpose of the protection of workers and considering the needs of sustainable enterprises.

19 pandemic[74]. In this regard, the ILS further enjoins social dialogue by the parties on the compelling need to include selective measures to stabilize economies and address employment problems, including fiscal and monetary stimulus measures aimed at stabilizing livelihoods and income as well as safeguarding business continuity.

Generally, all ILO legal instruments lay down the basic minimum social standards agreed upon by all the players in the global economy, however, countries may implement higher levels of protection and enhanced measures to better mitigate the impact of the crisis. It is within this context that, the federal and states governments are adopting different measures; total or partial lockdowns to restrict movement of people with attendant consequential effects on job performance and by extension labor relations.

IV. COVID-19 AND THE TOURISM LANDSCAPE

A. The legal status of tourists affected by travel bans and lockdown

The tourism industry which accounts for 10 percent of global GDP and jobs,[75] has led the globalization process in the areas of transportation, communications, and financial systems;[76] while also contributing to the increase of regional development in various regions of the world.[77] Cultural tourism is an aspect of tourism that involves 'the movement of persons to cultural attractions away from their normal place of residence, to gather new information and experiences to satisfy their cultural needs[78]. Thereby qualifying as an expression of the right to cultural life.[79] Representing around 40% of all global tourism,[80] cultural tourism plays a vital role in economic development[81], and the Covid-19 lockdown has led to some tourists becoming stranded in foreign countries. Will such foreigners automatically become illegal immigrants at the expiration of their visas? Where they are regarded as illegal immigrants, what are the options available to such immigrants to prevent the risk of prosecution by the host country?

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[74] See the Employment Policy Convention, 1964 (No.122)

[75]The Nation. Lockdown: More woes for tourism industry (1), The Nation, April 13, 2020, https://www.thenationonlineng.net/lockdown-more-woes-for-tourism-industry-1/

[76] Lee, Pera & Deborah, McLaren, "Globalization, Tourism, and Indigenous Peoples: What You Should Know About the World's Largest Industry," Planeta, November 1999, https://www.planeta.com/globalization-1999/.

[77]OECD. The Impact of Culture on Tourism, OECD, accessed, May 6 2020, https://www.oecd-ilibrary.org/industry-and-services/the-impact-of-culture-on-tourism_9789264040731-en.

[78] Greg Richards, Cultural Tourism in Europe (Wallingford: CABI, 1996), accessed May 6, 2020, www.tram-research.com/atlas; Office of National Tourism. "Fact Sheet No 10 Cultural Tourism: ICOMOS Charter for Cultural Tourism," accessed, May 6 2020, http://www.icomos.org/tourism/

[79] ICESR, General Comment 21, para 50(c); Borowiecki, K.J. and Castiglione, C. Cultural participation and tourism flows: An empirical investigation of Italian provinces. *Tourism Economics,* 20(2): 241-62 Accessed 14 April, 2020 www.Dcita.gov.au/swg/publicationsculttour.html.

[80]"OECD: The Impact of Culture on Tourism Paris," OECD, p.159. Accessed, May 6, 2020 http://www.em.gov.lv/images/modules/items/OECD_Tourism_Culture.pdfParis

[81]Richards G. Tourism Development Trajectories – From Culture to Creativity? Tourism Research and Marketing, Barcelona. Paper presented to the Asia-Pacific Creativity Forum on Culture and Tourism, Jeju Island, Republic of Korea, 3-5 June 2009, Accessed, May 6, 2020 http://www.tram-research.com/atlas/APC%20Paper%20Greg%20Richards.PDF

Adopting the legal theory of jural relations under international law, the status of an individual is an important concept in appreciating the implications of jural relations.[82] Status is sought because of the psychological benefit it confers on the holder.[83] Status determines whether an individual enjoys a right or privilege. It identifies whether such a person is under a legal disability or the liability of a duty. Status can be defined as the attributes and descriptions that determine the identity of a person in society.[84] The Supreme Court of Nigeria in *Okulate & Ors v Awosanya & Ors* defined status as 'the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations.'[85]

Where there is a right, there is a corresponding duty. An individual enjoys liberty or privilege when he does not have a strict right and as such the other party has no duty towards him.[86] A tourist who enters a foreign country with a valid visa has a legal right to be in that territory since he keeps to the terms and conditions of the contractual relationship guiding the issuance of the visa between him and the host country. A breach of which attracts a remedy. In the case of the breach of terms of a visa by a foreigner, the State is usually entitled to the automatic right of deportation.[87] In Nigeria, once a foreigner overstays on an expired visa, the Minister charged with responsibility for immigration has the discretion to prosecute and deport him.[88]

However, the Covid-19 travel bans and lockdown may be relied on to warrant the application of the doctrine of *force majeure* which connotes that the performance of the terms of a contract is rendered impracticable by the occurrence of certain events outside the control of the party in breach of the contract.[89] On the strength of the above, two alternatives can be made available to this class of persons. First, provisions can be made to convey such people back to their countries of origin through the host State liaising with the embassy bearing the flag of the foreign nationals.[90] This can be premised on the need to ensure the reunification of such persons with their family which is a principle recognized under international law.[91] Such people are allowed to go back to their home country where they have access to the required financial resources to cater for themselves and to access resources

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[82] Adaramola, F. Jurisprudence. 4TH Edition (Durban: Lexis Nexis Butterworths, 2008) 143.
[83] Renshon J. Fighting for Status: Hierarchy and Conflict in World Politics (Princeton; Oxford: Princeton University Press, 2017) 3
[84] Mohammad, A., Ramazani, B., & Zadeh, M. Personal status and exceptions of the national law enforcement regarding it. Macapa 7(1), 61-70 (2017).
[85] *Okulate & Ors v Awosanya & Ors* (2000) LPELR 2529 (SC)
[86] *Cole v. PC* 443A (1936) 3ALL ER 107
[87]Gibney, M.J. & Hansen, R. Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany, and the United Kingdom. New Issues in Refugee Research, Working Paper No 77.
[88] Immigration Act (amended version of 1990) Section 19(4) Cap. 11 Laws of the Federation of Nigeria (LFN) 2004
[89]Katsivela, M. Contracts: Force Majeure Concept or Force Majeure Clauses? Uniform Law Review 12(1), 101-119 (2007).
[90]Evacuation of Nigerians stranded in COVID-19 wracked U.S. begins. Accessed, May 6 2020 from Evacuation of Nigerians stranded in COVID-19 wracked U.S. begins - P.M. News (pmnewsnigeria.com)
[91]Maddali, A.O. Left Behind: The Dying Principle of Family Reunification Under Immigration Law. University of Michigan Journal of Law Reform 50(1), 107 (2016).

that might have been available by their National government to cater for its resident citizens. Secondly, the host country can ensure that the foreigners within the host country are given the opportunity of extending their visas so that they can be returned to the status of legal immigrants.[92]

Therefore, though the continued presence of a tourist with expired travel documents on the soil of the host State is illegal and strips him of his rights while giving the host state the right to prosecute and deport him. The doctrine of *force majeure* will come into play and the host state will exercise their discretion to confer a privilege on such immigrant to prevent prosecution and deportation while other avenues may be exercised to put an end to his illegal status.

V. COVID-19 AND THE HUMAN RIGHTS LANDSCAPE

A. *Human Rights Concerns of Covid-19*

As a response to the Covid-19 pandemic, the federal and state governments in Nigeria have put in place several measures including Covid-19 Regulations 2020 and other Directives to cope with the pandemic. The Regulations and Directives also empower the security agencies to ensure compliance and enforcement of the stay-at-home order following the lockdown. President Muhammadu Buhari announced on April 13, 2020, that a lockdown that had been in place since March 30, 2020, in Lagos state, neighboring Ogun state, and the Federal Capital Territory, Abuja, would continue for another 14 days. Several other state governments have also initiated full or partial lockdowns involving a variety of restrictions, which have seen the police and army called out to enforce them. These measures have no doubt, thrown up some incidences of human rights concerns.

The Covid-19 pandemic outbreak is laying bare some of the most glaring vulnerabilities of our societies; Millions of the people at greatest risk of the contagion are those whose needs are often overlooked. To uphold their fundamental rights to life and health and prevent the pandemic from spreading rapidly across the whole of the country, urgent measures must be taken to resolve the specific risks and impacts of Covid-19 on these vulnerable groups. Remarkably, International human rights law guarantees everyone the right to the highest attainable standard of health and obligates governments to take steps to prevent threats to public health and to provide medical care to those who need it. Human rights law also recognizes that in the context of serious public health threats and public emergencies threatening the life of the nation, restrictions on some rights can be justified only when they have a legal basis, are strictly necessary, based on scientific evidence, and neither arbitrary nor discriminatory in the application, of limited duration, respectful of human dignity, subject to review, and proportionate to achieve the objective.

The scale and severity of the Covid-19 pandemic rise to the level of a public health threat that could justify restrictions on certain rights, such as those that result in the imposition of quarantine or isolation, limiting freedom of movement. At the same

[92] Anumeha Chaturvedi COVID-19: 4000 Foreign Tourists stuck in India following VISA suspension. Retrieved May 6 2020 from tourists: COVID-19: 4000 foreign tourists stuck in India following visa suspension - The Economic Times (indiatimes.com)

time, careful attention to human rights such as is contained under chapter four of the 1999 Constitution of the Federal Republic of Nigeria (as amended), as it relates to non-discrimination, right to life, right to movement, rights to association, respect for human dignity and other human rights principles such as transparency. This is in a bid to foster an effective response amidst the turmoil and disruption that inevitably results in times of crisis and limit the harms that can come from the imposition of overly broad measures that do not meet the criteria, as set by the international human rights principles. Many people outside of the formal system are devastatingly affected by the measures. In its report about Nigeria's Coronavirus lockdown period, the Nigerian Human Rights Commission (NHRC), a government agency, noted that Nigerian security forces have a reputation for brutality, and it claimed to have received more than 100 complaints across 24 of Nigeria's 36 states - including Lagos, Ogun, and Abuja.[93]

Moreover, millions of Nigerians, observing the Covid-19 lockdown, lack the food and income that their families need to survive. The lockdown prevented many Nigerians working in informal sectors from traveling to work or conducting their businesses. An increase in food prices as a result of the lockdown also means that many cannot stock up on necessities and any disruption to their daily livelihood has a huge and significant impact on their ability to meet their most basic needs. Nigeria's other major economic responses to Covid-19 may not adequately protect the rights of the people most likely to lack adequate food, shelter, and other essentials.

The government needs to combine public health measures with efforts to prevent the pandemic from destroying the lives and livelihoods of society's poorest and most vulnerable people in the country. Under international human rights law, Nigeria's government has an obligation to protect people's right to an adequate standard of living, including adequate food and nutrition, the highest attainable standard of health, and the right to social security. In times of economic crisis, countries must demonstrate that they have made every effort to mobilize all available resources, including international assistance. Nigeria's federal and state governments should ensure the rights to food, shelter, and other necessities for people losing jobs or income during the Covid-19 pandemic. The economic assistance that the government has announced in response to the virus has exposed inadequacies in Nigeria's social protection systems and risks excluding the country's poorest and most vulnerable people.

A. Human Rights Litigation during a Pandemic

The successive constitution of the Federal Republic of Nigeria since 1979 continues to provide for the fundamental rights of persons. The constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) in chapter IV provides for the inalienable rights of persons which are twelve (12) in number. Under this provision, any person whose right is being infringed or likely to be infringed shall have the *locus* to bring an action to enforce such rights in court by either seeking a restraining order or damages in line with the Fundamental Rights Enforcement Procedure Rules. The rights are Right to life (ii) Respect for the dignity of persons

[93] It had also found "8 separate incidents of extrajudicial killings leading to 18 deaths" as at the time when the total number of deaths resulting from COVID-19 are just 12.

(iii) Right to personal liberty (iv) Right to a fair hearing (v) Right to private and family life (vi) Freedom of thought, conscience, and religion (vii) Right to freedom of expression and the press (viii) Right to peaceful assembly and association (ix) Right to freedom of movement (x) Right to freedom from discrimination (xi) Right to acquire and own immovable property, and (xii) freedom from compulsory acquisition of property.

These rights are no doubt very essential for the all-round development and well-being of persons and the country. As a result of the importance of these rights, the provisions are always enshrined in the constitution and are enforceable except in some developing countries that experienced *coup d'etat.* For example, during the past military *regimes in* Nigeria, the junta usually promulgated the constitution suspension and modification decree which primary target was to render the provisions on fundamental rights inoperative. It is instructive to note that Section 45 of CFRN 1999 (as amended) provides for situations that may give rise to restriction on, and or derogation from fundamental rights. The law provides *inter-alia* as follows:

(1) Nothing in sections 37, 38, 39, 40, and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-

(a) In the interest of defense, public safety, public order, public morality, or public health; or
(b) For the purpose of protecting the rights and freedom of other persons.

(2) An act of the National Assembly shall not be invalidated by reason that only that it provides for the taking during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this constitution, but no such measures shall be taken in pursuance of any such Act during any periods of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency.

The "period of emergency" is defined as a period during which there is in force a proclamation of a state of emergency declared by the President in the exercise of the power conferred on him under section 305 of the constitution. Remarkably, the emergence and spread of the C*oronavirus* pandemic otherwise known as Covid-19 worldwide, Nigeria inclusive, has brought about countries of the world taking certain measures to contain the spread of the virus. Such measures include restriction of movement (lockdown) imposed on residents of some states of the federation and the Federal Capital Territory, ban on assembly (social gatherings and religious activities), and closure of public offices like courts, etc. The steps taken by the government at both the Federal and state levels are no doubt infractions on fundamental rights as enshrined in the constitution.

A clear violation of the right to a fair hearing is making it impossible for any person to access justice through the court system. The court reiterated this position in the case of *LASEPA v. Mobil Oil Producing Unlimited*[94]where it held that the doors of the court shall not be shut against anyone who desires to vent his grievances,

[94] (2000 FWLR Pt.7 P.1202 at P.1216 paras. E-H)

whether real or imaginary. Arguably, the court system can still operate effectively during the pandemic using internet/electronic means without necessarily having the litigants and lawyers in the courtroom. Mostly, people arrested for violation of 'lockdown' are usually meted with excessive punishment without trial. The issue of police and armed forces brutality has become the order of the day. It is however a welcome development that some of the meetings are done through technological devices, but this still falls short of the international best practices.

Significantly, the laws providing for fundamental rights should be made to accommodate an unforeseen situation like the Covid-19 pandemic. Therefore, any violation of the human rights of citizens during the period of Covid-19 should be challenged in the court of law and measures that could have been taken to preserve some of the rights by deploying modern technology.

VI. COVID-19 AND THE CRIMINAL LAW AND PROCEDURE LANDSCAPE

A. Correctional Institutions in the Covid-19 Pandemic Era

The outbreak of the COVID-19 pandemic in the early part of the year 2020, affected the 3 components of the Criminal Justice System comprising the law enforcement, the courts, and the correctional institutions also known as prisons. The 3rd component plays a crucial role in upholding the Rule of Law and houses those remanded in custody, which constitutes the majority and those serving sentences of imprisonment. Before the 18th century, correctional institutions were used primarily as a temporary facility for the confinement of persons awaiting trial and debtors and not facilities for serious offenders.[95] The decline in the use of capital punishment and banishment of offenders made imprisonment the most severe form of punishment and accounted for using prisons as permanent facilities, which resulted in overcrowding and congestion, a menace that strikes most prisons or correctional centers all over the world with occupancy rate standing over 100 percent. The Covid-19outbreak presents an unprecedented crisis for correctional institutions all over the world. The congestion and overcrowding provide a compromising condition to the virus. The facilities are a ticking time bomb for infection and an incubator for the disease.

The World Health Organization, issued some precautionary measures and advice for the public, to reduce the chances of being infected or spreading Covid-19.[96] The fundamental rules are the social distancing rule, which requires maintaining at least 1-meter (3 feet) distance between persons; the avoiding overcrowding rule, similar to the social distancing rule; the use of face mask in public rule and the regular/ frequent washing of hand with soap or alcohol-based gel rule. Overcrowding and congestion, a formula for disaster, coupled with inadequate

[95] Andrew G Coyle, "Prisons: Definition, History and Fact," Encyclopedia Britannica, accessed May, 8, 2020, https://www.britannica.com/topic/prison

[96]World Health Organization. "Coronavirus Disease (Covid-19) Advise for the public "World Health Organization, accessed April, 29, 2020, https://www.who/int/emergencies/disease/novel-coronavirus-2019/advise-for-public

funding in most of the correctional institutions globally have made most of the WHO rules impracticable, if not impossible. These facts make the inmates so vulnerable to the Coronavirus. However, it is commendable that the shortage of surgical face masks and hand sanitizers in the Covid-19 period resulted in the prison industry program making the items for the prisons and the community which is commendable as useful, rehabilitative, and money-earning work. To prevent the spread of the virus, there are international guidelines to be adhered to and many countries passed new legislation while others applied some existing laws. Some examples are The United Nations Standard Minimum Rule for the Treatment of Prisoners[97]; in Nigeria, the Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020, and the Oyo State Coronavirus Disease (Emergency Prevention) Regulation 2020. In the United Kingdom, the Health Protection (Coronavirus, Restriction) Regulation 2020 and the Social Security (Coronavirus) (Prisoners) Regulations 2020 apply[98] In the United States of America, the Public Health Service Act extends and covers correctional institution cases of Covid-19.

The Early Release from Prison Program which is a compassionate scheme where inmates are released from the correctional facility before the completion of the Judicial sentence or due date, has been recommended by the WHO as a precautionary measure to prevent the spread of coronavirus as a result of congestion and overcrowding. It applies to non-violent and non-sexual offenders, inmates with chronic disease, fragile and elderly inmates with complex medical conditions, inmates serving a few years sentence with a few months to serve, and Awaiting Trial Persons that had spent many years in custody. This program can result in "release in error" cases where prisoners are released inadvertently, and such error could result in more damage of an irreparable loss within the short time of the mistaken release. "Freedom Shock" can also result from the program, when the beneficiaries of the early release program are not prepared for the "rushed release" and are not given and allowed a proper re-entry process back to life in the community.[99]

The permanent early release of prisoners in this pandemic era, with no proper re-entry or follow-up program into the community, has societal and criminological implications and should be checked. Globally, governments have continued to release prisoners and detainees to decongest facilities because of the pandemic. Legal suits are emerging on Covid-19correctional institutions related issues. In *Tre McPherson, Pattkate William-Void, John Doe, John Roe and Thomas Cave (representing themselves and others) v. Ned Lamont and Rollin Cook (in their official capacities)* in the District of Connecticut, USA, some inmates complained that the ongoing Covid-19pandemic places them at unreasonable risk of infection. *Hafeez v. The United Kingdom*[100] (application 14198/20) is a case relating to the

[97] United Nations Revised Standard Minimum Rules for the Treatment of Prisoners. A/RES/70/175. (Nelson Mandela Rules) Adopted on 17 December 2015

[98] www.legislation.gov.uk

[99]Rivero D. 2016. The Federal Prison System has a Big Problem with a little Number. Splinter News 27 May 2016. Accessed May 10, 2020 from Splinternews.com/the-federal-prison-system-has-a-big-problem-with-a little-number.

[100]Alex Ewing (2020) "European Court of Human Rights to Consider Impact of Covid-19" UK Human Right Blogs, accessed April 18, 2020,

health condition of a 60-year-old remanded inmate awaiting extradition. In Nigeria, the case of *the State v Olalekan Hameed* (ID/9006C/2019) attracted a lot of national and international reactions, where death sentence by hanging was passed on an inmate on Monday, 4 May 2020, during a virtual court sitting via the zoom app in Lagos State, as part of social distancing measures to combat Covid-19 pandemic.[101]

Effective testing on prisoners released is highly recommended to ensure they are not carrying the virus back to their communities while Periodic testing for prison workers who come from outside the institution is mandatory. Palliative measures should be given to and must accompany the released beneficiaries, to reduce the recidivism problem. The permanent early release of prisoners in the Covid-19 era, with no proper re-entry or follow-up program into the community, has societal and criminological implications. Therefore, investing in "Second Chance Grants"[102] to credible NGOs for training and follow-up of the beneficiary of early release is highly recommended.

A proactive step to protect the prison official by supplying protective gear is recommended. The introduction of the virtual court sitting in many jurisdictions is welcomed and expedited actions for remand cases and the increase in the use of non-custodial sentences are advocated. Access to necessary information and educational materials on the Covid-19 pandemic should be made available to the inmates without compromising the issue of security and there is the need to invest more in rehabilitative programs before opening the gates of prison and flooding communities with persons who ought not to be there.

B. COVID-19 and the Prosecutorial Powers of the Attorney General

The position of the Attorney General (AG) is widely accepted and seemingly settled at law[103] and statute in Nigeria, following the Supreme Court case of *State v. Ilori* and Ors.[104] One important feature of the broad powers of the AG is the unfettered discretion accorded the office in the decision to prosecute, not to prosecute, and to discontinue prosecution[105]in Nigeria. The arrest, public trial, and conviction of Funke Akindele Bello, a popular Nigerian actress, and producer and her husband Abdul Rasheed Bello for hosting a birthday party during the Coronavirus (Covid-19) pandemic outbreak,[106] has brought to the fore questions about the wide powers of the Attorney General of the Federation and Attorneys General of the various states in the country to exercise prosecutorial discretion.

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https://ukhumanrightsblog.com/2020/04/18/european-court-of-human-rights-to-consider-impact-of-covid-19/

[101]Onozure Dania (2020) "Lagos Virtual Court Session: Court sentences driver to death by hanging over murder of employer's mother," Vanguard, May 5, 2020 https://www.vanguardngr.com/2020/05/lagos-virtual-court-session-court-sentences-driver-to-death-by-hanging-over-murder-of-employers-mother/

[102] Lichtblau, E. 2016. "Obama administration seeks to curb inmates return to prison" The New York Times, April 25, 2016 https://nytimes.com/2016/04/25/us/politics/Obama-inmates-recidivism

[103] See Section 174 and 211 of the 1999 Nigerian Constitution (as amended). Cap.C23, Laws of the Federation of Nigeria, 2004

[104](1983) 14 NSC 69. See also, Fidelis Nwadialo. *The criminal procedure of the Southern States of Nigeria.* 2nd ed. (Lagos: *MIJ Publishers, 1987).*

[105] Also known as *nolle prosequi*

[106]"Nigeria: Nollywood star arraigned for breaching coronavirus rules," *Aljazeera,* April 07, 2020, https://www.aljazeera.com/2020/04/nigeria-nollywood-star-arraigned-for-breaching-coronavirus-rules-200407074854464.html

The major bone of contention in respect of selective prosecution during the current lockdown in Nigeria as a result of Covid-19 is that it raises questions about the "public interest" angle of the duties of the AG in relation to ensuring confidence in the integrity of the administration of justice, which is often associated with the statement by Heward C.J. to the effect that; "…Its of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done"[107].There has been outright condemnation of the actions of the Nigerian AGs, in their perceived selective prosecution of breaches of the lockdown and social distancing orders, in situations where the public expects scrupulous fairness and the complete absence of political interference in the prosecution of criminal infringement. For instance, although some other members of Funke Akindele's party were arrested, and prosecuted, the charges against them were dropped by the AG, Lagos State[108]. Also in the Federal Capital Territory, none of the over one hundred (100) people who attended the televised burial of Mallam Abba Kyari - the Chief of Staff of the President, who died of complications brought on by Covid-19 infection- in breach of the extant lockdown and social distancing orders were prosecuted.

The perceived selective prosecutions raise questions about the objectivity of the AGs in prosecuting cases of infraction of the lockdown and social distancing orders as contained in the Quarantine Act, State (Emergency Prevention) Regulations, its effect on the containment of the spread of the Covid-19 pandemic outbreak, and diminished faith in the ability of the government to effectively manage the disease and the country in general. Subjecting the independence and impartiality of the Attorney General's prosecutorial decision making, both in perception and reality, during the current lockdown and social distancing orders to judicial review can help uphold the rule of law and improve public confidence in the office of the AG, leading to greater respect for and adherence to lockdown and social distancing orders, thereby, in part, hopefully advancing the fight to successfully eradicate the Covid-19 pandemic in Nigeria.

VII. IMPACT OF COVID-19 ON FAMILY LIFE AND SOCIAL RELATIONS

The family is the smallest unit in the social structure of every society. It is generally accepted that the family is the basis of every human community and the family may be regarded as the nucleus of society. The word family is difficult to define in one sense it means all persons related by blood or marriage, in another it means all members of the household, including parents and children with perhaps other relations, lodgers, and even servants.[109] Black's Law Dictionary defines family to include the following a group consisting of parents and their children; a group of persons connected by blood, by affinity or by law, and a group of persons, usually

[107] *R. v. Sussex Justices, Ex parte McCarthy* (1924)1 KB 256, 259

[108]Joseph, T. "Breaking: LASG pardons Gbadamosi, Naira Marley for flouting lockdown orders," Independent Newspaper, Accessed April 08, 2020, https://www.independent.ng/breaking-lasg-pardons-gbadamosi-Naira-marley-for-flouting-lockdown-orders/

[109] Lowe N. and Douglas G. Bromley's Family Law *(*London: Butterworths, 1998) 3.

relations, who live together.[110] In the case of *Oloba v. Akereja*[111] the Supreme Court of Nigeria stated that the concept of family in the Nigeria context is wider than that of the English context. In the Nigerian context, Family includes blood relationships in its widest connotation even to the 100th degree of relationship by marriage and any person whether related to him or not who is wholly or mainly dependent upon him.

In the English context, the family consists of the father and those who reside with him of whom he is in *pater familias.* Family law functions to define and change the status of the parties; resolve disputes; serve as an avenue for protection, and give direction on inheritance and property sharing.[112] It is important to state that Marriage is the foundation of a marital relationship and it is a special contract between parties that involves legal relations with rights and obligations.[113] A major consequence of marriage is cohabitation in a family home and the right to a consortium. The consortium is the benefits that one person, especially a spouse, is entitled to receive from another, including companionship, cooperation, affection, aid, financial support, and (between spouses) sexual relations.[114] A consortium can also be extended to be filial which covers the relationship between children and parents.[115] Thus, living together is a corollary effect of marriage. Apart from married couples, many men and women cohabit with children; though the law does not confer rights and obligations on such practices, it has become a fact of life in Nigeria.[116] The foremost significance of the family home (whether the parties are married or not) requires that they should be given special handling.[117] The primary function of a family home is to provide shelter for the members.[118] On the whole, married couples and cohabiting couples live together with challenges of family life and social relationships.

Family life and social relations are germane to the sustainable development of a country and impact the economy. Family life is defined as the routine interactions and activities that a family has together. When members of a family enjoy each other's company and spend a lot of time doing things together, this is an example of good family life.[119] Family life occurrences have an impact on the competence, strength, and general well-being of all.[120] In essence, the family determines the quality and health of the members.[121] Before the outbreak of the Covid-19 pandemic all over the world, family life had been threatened by a lot of issues ranging from spousal battering/assault, child abuse, and different levels of violence including emotional challenges. Mind-blowing statistics from reliable organizations like WHO revealed a difficult time in family life. According to

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[110] Garner B.A. Black's Law Dictionary (St. Paul, MN: West Publishing Co., 2009).
[111] (1988) 3 NWLR (Part 84) page 508
[112] Lowe and Douglas, Bromley's, 4-5.
[113] Nwogugu E.I., Family Law in Nigeria (Ibadan: HEBN Publishers Plc, 2014) 3-4.
[114] Garner, B.A. Black's Law Dictionary (St. Paul, MN: West Publishing Co., 2009).
[115] Garner, Blacks.
[116] Nwogugu, Family Law 14-15.
[117] Lowe and Douglas, Bromley's, 134.
[118] Lowe and Douglas, Bromley's.
[119] Your Dictionary, Family Life meaning. Accessed May 18,2020
https://www.yourdictionary.com/family-life
[120]Weiss J. "Family Health" 'Encyclopedia of the Social and Behavioral Sciences,' accessed May 20, 2020, sciencedirect.com.
[121] *Weiss, Family Health.*

WHO, 1 in every 3 women experience a form of physical and sexual violence in their lifetime from an intimate partner or a family member.[122] Despite the challenges in family and marital relations, the social life of Nigerians was very vibrant and at some point in history; Nigeria was described as one of the happiest people on earth.[123] Parts of the activities involved in social life include but are not limited to the naming ceremony, child dedication, marriage celebration, burial ceremony, birthday celebration, house warming celebration, graduation party, and so on. In short, every special achievement deserves to be celebrated, and such was the lifestyle of Nigerians before the advent of Covid-19 and its attendant consequences.

Ever since the discovery of the index case of Covid-19 in February 2020, in Nigeria, family life for some has become an illusion and there are silent prayers that the situation improves so that what they considered normal life would continue. Parts of the measures taken by the Federal Government to curb the spread of the virus are lockdown, restriction of movements, and curfew directions. These directives have brought to the fore the challenges with family life in Nigeria. In settings where the spouses are artisans or daily paid workers, there is financial strain and emotional stress. More so, that the enforcement of lockdown has brought victims of domestic violence and perpetrators proximity for extended periods. The world is in a state of chaos now because of the challenge caused by the aggressive nature of the Coronavirus Pandemic (Covid-19). The impact is mostly felt on the socio-cultural and economic lives of people. Unfortunately, even as the world is grappling with the effects of Covid-19 most vulnerable groups and individuals like the elderly, women, and children suffers the most.[124]The lockdown is adding another public health crisis to the toll of the new coronavirus: Mounting data suggests that domestic abuse is acting as an opportunistic infection, flourishing in the conditions created by the pandemic. In a survey conducted in 2020, regarding the impact of coronavirus, 41% of respondents in Hong Kong stated that the outbreak of the coronavirus had a major impact on their family life.[125] Comparatively, 12% of respondents in Japan thought the outbreak of Covid-19 had a major impact on their family life in 2020.[126]

Section 37 of the Constitution provides for the right to private and family life. Interpreting this section in the light of Section 45 of the Constitution on the issue of public health emergencies is a difficult task.[127] This right does yield itself to an easy interpretation as 'family life is not expressly mentioned in that section and most of the time it is taken to mean personal autonomy. Effective operation of

[122] World Health Organization. "World Report on Violence and Health," accessed May 20, 2020, https://www.who.int/violence_injury_prevention/en/.

[123] In 2003, Nigeria was described as the happiest set of people in the world by World Values Survey. See, "World Happiness Report, Nigeria ranks 85 out of 156 countries," International Centre for Investigative Reporting, accessed May 21, 2020, www.icirnigeria.org.

[124] Okoro T. C. "COVID-19 lockdown: Rising cases of sexual and gender-based violence against women, girls" The Cable, Accessed April 17, 2020, https://www.thecable.ng/covid-19-lockdown-rising-cases-of-sexual-and-gender-based-violence-against-women-and-girls

[125] Moore M. "Impact of COVID-19 Outbreak on Family Life" APAC 2020 by Country or Region Statistica, Accessed April 22, 2020, https://www.statista.com/statistics/1103363/apac-covid-19-impact-on-family-life-by-country/.

[126] Moore, Impact of Covid-19

[127] Section 37 of the 1999 Constitution of the Federal Republic of Nigeria provides for the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications.

family and social life is predicated on a good support system and if this is lacking, there is impairment of the general well-being of individuals. Social support is connected to improved quality of life and lesser depressive tendencies.[128] In addition, the quality of family life sways the development of individual differences in vulnerability for multiple forms of mental illness and addictions.[129] Several human rights of individuals have been infringed in the course of the Covid-19 pandemic and many more rights are being infringed upon daily. The situation can be likened to two pandemics – the Corona Virus and the hunger cum anger virus. Many social events have been canceled and some are postponed *ad infinitum*. Some marriages were conducted through Zoom and other internet handles[130], the legality of such contracts is not the major focus here, rather how to live a normal life despite the difficulties. It is important to state that marriages conducted during the Biafra War[131] were later validated after the war.[132] To give effect to the provisions of the Constitution in a time of public emergency as this is problematic. However, there are other ways of ameliorating the challenges caused by the pandemic on family and social relations. The period of lockdown and restricted movement is a time of loneliness and social isolation which includes social distancing. All hands must be on deck to tackle the situation and restore normalcy as soon as practicable.

A pandemic situation can be compared to war and a disaster. Thus, the level and state of preparedness are very important, soldiers prepare before the war and not during the war. In essence, stakeholders should have foresight in terms of social security like what is happening in some developed countries. The issue of palliation must go hand in hand with lockdowns for effectiveness. In addition, there must be the preservation of shelter accommodations to temporarily house the abused and the vulnerable. The time of pandemic is a period of collective fight and life is sacrosanct thus, the government needs to provide avenues of making distress calls to relevant authorities on time. Taking a cue from the decision of the United States of America Supreme court in *Roe v. Wade, [133]*it reasoned that certain areas of private life – marriage, sexual relationships, procreation, the upbringing of children – are so important that they deserve protection even though they are not expressly mentioned in the Bill of Rights. It is important to understand that violence in whatever form or sphere is a significant public health problem and its broad understanding is necessary for successful intervention to prevent it and its

[128] "Benefits of Family and Social Relationships for Thai Parents," National Centre for Biotechnology Information, accessed May 7, 2020, www.ncbi.nlm.nih.gov

[129] Zhang T. Y., Calji, C., Diorio, J.C., Dhir, S., Turecki, G & Meaney M.J. The Epigenetics of Parental Effects. Epigenetic Regulation in the Nervous System: Basic Mechanisms and Clinical Impact. Elsevier Academic Press 85-119 (2013)

[130] Omotayo J. 2020, Covid-19 lockdown: Lagos church holds 1st online wedding using Zoom accessed May 10, 2020 from https://www.legit.ng/1323197-covid-19-lockdown-lagos-church-hold-1st-online-wedding-using-zoom.html.

[131] The Nigerian Civil War (also known as the Biafran War and the Nigerian-Biafran War) was a civil war in Nigeria fought between the government of Nigeria and the secessionist state of Biafra from 6 July 1967 to 15 January 1970.

[132] The Marriage (Validation Act of 1971) sought to validate some of the marriages purported to have been celebrated under the Marriage Act between May 30, 1967 and Aug. 11, 1971 in the East Central State of Nigeria. . Please note that this Law is no longer in force because it has fulfilled its purpose and as such is not replicated in the 2004 Laws of the Federation.

[133] 410 U.S. 113 (1973).

health and social impacts.[134] On a final note according to the words of the popular song by Gwen Guthrie, 'No Romance without finance' in essence where there is no fund or palliative, living together becomes a mirage.[135]

VIII. SUSTAINING THE RIGHT TO EDUCATION DURING A PANDEMIC

Education plays an important role in human life. It is an integral part of development. It is essential for economic, social, political, and cultural development, building human capacities, and creating opportunities. It is the true essence of human development. Education is a right.[136] For the complete and harmonious development of the personality of any child or human being, he or she must be given proper education. Without education, no human being will be able to assert his or her rights. The Universal Declaration of Human Rights (UDHR) provides for the right to education for all. It states further that education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory, whilst technical and professional education shall be made generally available and higher education shall be equally accessible to all based on merit.[137]

The Nigerian government is obliged to formalize the education system in Nigeria starting from primary school up to the university level.[138] Section 18 of the Constitution of the Federal Republic of Nigeria 1999, as amended, makes provisions relating to education. In the section, the government is expected to formalize policies geared towards equal and adequate educational opportunities at all levels, promoting science and technology, eradicating illiteracy, by providing free, compulsory Universal Primary Education, free University Education, and a free Adult Literacy Program. These provisions are however not justiciable. In line with its obligations under Art.26 of the Universal Declaration of Human Rights (UDHR),[139] the Federal Government has enacted the Universal Basic Education Act, 2004, to provide free and compulsory universal basic education for children up to junior secondary school.[140] So also does section 15 of the Child's Right Act. Read together, they provide for an enforceable right to education for the Nigerian child, up to the junior secondary school.

The effect of Covid-19 is being felt in all sectors worldwide, and its consequences will be felt for years to come. With regards to education, the effects of Covid-19 are expected to destabilize this sector, by truncating whatever efforts are being made to transform and improve it. The worst-hit programs are science and technology, as students will be unable to access laboratories for their practical sessions. Countries including Nigeria had to close their educational institutions as

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[134] Rutherford A, Zwi, A.B., Grove N.J. & Butchart, A. Violence: a glossary. Journal of Epidemiology and Community Health 61(8), 676-680 (2007)

[135] Guthrie G. 1986, Good to Go Lover. Contemporary R&B accessed May 10, 2020. https://lyrics.az › gwen-guthrie › good-to-go-lover.

[136] UDHR 1948

[137] Art. 26 Universal Declaration of Human Right 1948. See also Art.17 African Charter on Human and Peoples' Rights, Art.13 International Covenant on Economic, Social and Cultural Rights, 1966; Art.28 Convention on the Rights of the Child 1989.

[138] Amuda, Y J. Child education in Nigeria: hindrances and legal solutions. Procedia Social and Behavioral Sciences 15, 3027–3031(2011) 3027.

[139] Other international instruments are, Art.13 International Covenant on Economic, Social and Cultural Rights, 1966; Art.28 Convention on the Rights of the Child 1989.

[140] Section 2 UBE Act 2004. See also, section 15 Child's Right Act 2003.

part of their lockdown measures to contain the spread of the virus. These institutions have had to resort to using online technologies for distance learning, with the result of laying bare the digital divide within the country. This divide cuts across institutions, some being better equipped and experienced than others, and between students, the rich and urban dwellers, and the poor who live not only in the rural areas but also 'down town' who cannot afford internet, even when available and 24-hour electricity.

To curb the spread of the Covid-19 pandemic, most governments have closed educational institutions. According to UNESCO, these closures are affecting over 72% of the world's student population.[141] School closures come at high social and economic costs. The effect however is particularly severe for the most vulnerable and marginalized children and their families. There is a real risk of regression for children whose basic, foundational learning (reading, math, languages, etc.) was not strong, to begin with.[142] Furthermore, millions of children who have already been deprived of their right to education, particularly girls, are being more exposed to health and well-being risks (both psychosocial and physical) during Covid-19.[143] The resulting disruptions will exacerbate already existing disparities within not only the education system but also in other aspects of their lives. Learning is interrupted, especially for those who have little or no other educational opportunities beyond school. Secondly, not all parents are equipped and prepared for long-distance and homeschooling, especially those with limited education and resources. Thirdly, are the challenges relating to creating, maintaining, and improving distance learning, considering the time constraint.[144] Disruption in learning affects mainly girls, refugees, displaced and migrant children, children and youth with disabilities, young people affected by trauma or mental health issues. For the most vulnerable children, education is lifesaving, as it provides safety and protection, whilst instilling hope for a brighter future.

While learning might continue unimpeded for children from higher-income households, children from lower-income households are likely to struggle to complete homework and online courses because of their precarious housing situations. Beyond the educational challenges, however, low-income families face an additional threat: the ongoing pandemic is expected to lead to a severe economic recession. Previous recessions have exacerbated levels of child poverty with long-lasting consequences for children's health, well-being, and learning outcomes.[145]

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[141] Figures correspond to number of learners enrolled at pre-primary, primary, lower-secondary, and upper-secondary levels of education [ISCED levels 0 to 3], as well as at tertiary education levels [ISCED levels 5 to 8]. Enrolment figures based on latest UNESCO Institute for Statistics data. accessed May 10, 2020 COVID-19 Educational Disruption and Response https://en.unesco.org/covid19/educationresponse

[142] Covid-19 and Education in Emergencies. accessed May 10, 2020 https://www.educationcannotwait.org/covid-19/ 0

[143] *Ibid.*.

[144]UNESCO. "Covid-19 Educational Disruption and Response," UNESCO, accessed May 10, 2020, https://en.unesco.org/covid19/educationresponse.

[145] Gonzalo Fanjul. Children of the Recession The impact of the economic crisis on child well-being in rich countries. *UNICEF Innocenti Report Card 12 Children in the Developed World.* UNICEF Office of Research, Florence (2014). accessed May 10, 2020 from https://www.unicef-irc.org/publications/pdf/Children_of_austerity.pdf.

The World Health Organization (WHO) made a call for state parties to "Fulfil the right to education—even if schools are temporarily closed".[146] Consequently, to ensure education systems respond adequately, UNESCO has recommended that states "adopt a variety of hi-tech, low-tech and no-tech solutions to assure the continuity of learning." The federal and state governments have adopted various methods to ensure that the children and youth have access to education. These include 'school on air' and the use of cable television. Institutions have had to resort to using online technologies for distance learning, with the result of laying bare the digital divide within the country. This divide cuts across institutions, some being better equipped and experienced than others, and between students, the rich and urban dwellers, and the poor who live not only in the rural areas but also 'down town' who cannot afford internet, even when available and 24-hour electricity. The adoption of the ICT teaching method raises issues of quality and safety, especially with under-aged children. Quality online learning requires that the teaching materials be prepared by a professional instructional designer that the teachers and lecturers are pedagogically trained for delivering the program and the students are equally exposed to the pedagogy of online learning.[147]

While ICT has been recommended and is being used, it has not ensured that education for all is preserved. It is therefore essential to explore other means to guarantee education for all. it is suggested that portable solar radios be provided to each family especially in remote places. This will ensure continuity in learning for most learners who are unable to access digital learning resources during this period. When schools re-open, there should be, in place method of recovering lost time. This could be in form of extended hours of school time by additional 2hours and weekend class. Institutions should adopt ICT to ensure that tools are in place to protect child rights and privacy.

IX. CONCLUSION

These forays into the effect of Covid-19 on the Nigerian legal and social landscape reveal the far-reaching effects of the pandemic on all sectors in Nigeria. The above discussions have identified the effect of the pandemic on identified aspects of the legal landscape and made recommendations on the best move forward. From all indications, the end of the Covid-19 pandemic is not in sight and Nigeria will have to navigate the current "normal" as best it can. As such, the nation will have to contend with the legal effects of the Covid-19 pandemic for a while to come. The segments of the legal landscape discussed here are in no way exhaustive, they are, however, an indication of some of the effects of the pandemic and the herculean task ahead to stabilize the nation and seek the best possible health, economic, social, and legal outcome for the country. It may be argued that these areas of the law are distinct and should be considered separately, however, it is necessary to recognize that the various sectors of the Nigerian society and economy are intertwined and where there is a problem with one part, it tends to affect other areas of the Nigerian business, legal and regulatory landscape.

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[146]Human Rights Dimensions of Covid-19 Response. A WHO Publication, retrieved from www.who.int on 8/5/2020. p.13

[147]Mohamedbhai G. "Covid-19: What consequences for higher education?" University World News, accessed May 10, 2020, https://www.universityworldnews.com/post.php?story=20200407064850279.

7

From Warsaw to Montreal Conventions: A Review of The Law on Air Carrier's Liability for Safety of Passengers and Goods in The Post Covid-19 Pandemic Era

*Raymond C. Onyegu

ABSTRACT

In the first quarter of 2020, the world was besieged by a global pandemic that emanated from Wuhan China in late 2019. The ravages of Covid-19, as the disease was known, affected every sector of the world economy. However, the aviation industry was the worst hit. This paper, therefore, is a review of the law on air carriers' liability for the safety of passengers and goods in the post-Covid-19 pandemic era, taking the legal framework from Warsaw to Montreal Conventions on air travels. An analytical research methodology was adopted in the course of the work. The paper found, inter alia, that in the wake of the disease and post-recovery, the virus has, virtually, changed the way individuals and organizations do business, introducing an active online business culture and working from home attitude. Specific to the aviation sector, it found that certain developments emerged, to wit, the activation of the resolutions of the 40th Assembly of the International Civil Aviation Organization (ICAO) which was held in Montreal between September and October 2019 which developed far-reaching resolutions on strategies for achieving the safety goals for air travelers; airlines were mandated to strictly comply with national and international aviation rules and regulations, and endeavor to promote their heightened duty of care; airlines have to ensure strict observance of the internationally guaranteed right to health of passengers as contained in the United Nations International Health Regulations. It was recommended, among other things, that not only should airlines comply with safety and health rules, air passengers should also comply with instructions given to them by crew members to promote the safety of passengers. It was concluded that it is only a full activation of the international and regional corporation in the field of aviation security, as contained in the Declaration on Aviation Security adopted by the 37th Session of the ICAO Assembly that will guarantee the promotion, protection, fulfillment, and enjoyment of the rights that are enshrined in the Warsaw and Montreal Conventions.

ESSAY CONTENTS

I. INTRODUCTION

The aviation industry was one of the first casualties of the Covid-19 pandemic. And, in the last nineteen months, the virus has, virtually, changed the way individuals and organizations do business: employees who started working from home at the peak of the pandemic now prefer maintenance of that status quo; every industry, business, or organization, irrespective of how they are different from one another, is challenged to reinvent and redefine "work" and change how they think about space, cybersecurity, meetings, travel, events, and policies.[1] Not only that they cannot afford to forget the ways employees currently find balance through their families, but they must also reconcile themselves with the evolving mindset that being in an office full-time is not an un-expendable business imperative.[2] A report on the global impact of the pandemic on the aviation sector released early this year by the International Air Transport Associations (AITA) found that[3]:

1. Aviation-supported jobs, such as Aircraft Electrical Installers or Technicians, Pilots, Aircraft Manufacturing Engineers, Airport Operations Managers, Air Traffic Controllers, Aviation Maintenance Engineers, Quality Control Personnel, Flight Stewards/Stewardesses and Air hostesses, fell by 46 million down to 41.7 million (-52.5%);

2. Direct jobs (at airlines, airports, manufacturers, and air traffic management) fell by 4.8 million, a 43% reduction compared with the pre-Covid-19 situation;

3. Nearly 39, 200 special repatriation flights took nearly 5.4 million citizens home after borders were closed in March 2020;

4. Nearly 46, 600 special cargo flights airlifted 1.5 million tons of cargo, mostly medical equipment, to areas in need during the height of the pandemic response; and

5. Airlines suffered an estimated loss of US$273 billion due to a cut-off of up to 90% flight capacity and a loss of about 1.5 billion air travelers in comparison with 2019.

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[1]. Mckinsey & Company, "Covid-19: Implications for business" < www.mckinsey.com>, accessed on, June 5, 2021. by 2:15pm.

[2].*Ibid.*

[3]. Released on January, 28, 2021, "Aviation; Benefit Beyond Borders" <www.airlines.iata.org> accessed on June 5, 2021, by 2:18pm.

Another report released in the same month, by the International Civil Aviation Organization (ICAO),[4] estimates that airlines utilized only about 50% of their passenger capacity, flew only 2.699 billion passengers, and lost revenue of about USD371 billion. Tourism which accounted for 7% of global trade in 2019 and which is ranked the third-largest export category (after fuels and chemicals) is also estimated to have suffered a deficit of US$910 billion to US$1.2 trillion, in 2020, fueling fear of global reduction of GDP of 1.5% to 2.8%.[5]

Add the above scenario to the lingering threat of international terrorist attacks as well as the need to develop a Communication, Navigation and Surveillance matrix and Air Traffic Management (CNS/ATM) infrastructure to deal with emerging threats of cyber-attacks and corporate espionage, then the picture of the daunting challenges confronting the aviation sector becomes clearer. We embarked upon this review to identify those challenges and make recommendations on they can be resolved.

The threats posed by the virus are still very much with us. And as airlines grapple with the challenge of returning to business, the controversies concerning the rights, liabilities, and obligations of air carriers, on one hand, and protection of their passengers and goods, on the other, which the courts were dealing with in the pre-pandemic era will most certainly return to the front burner of aviation discourse-they are matters which both the Warsaw and Montreal Conventions are concerned with. This paper will underline the heightened duty of care imposed on airlines to promote passenger and crew safety; familiarize themselves with their potential post-covid-19 liabilities; and, sensitize them on their now special and strategic obligations to comply fully with domestic and international health and human rights standards. It will also alert aviation law practitioners about the need to prepare themselves sufficiently to enable them to assist their clients in contending with emerging legal challenges.

II. THE WARSAW CONVENTION[6]

In the beginning, individual countries developed and applied their respective regulations for the carriage of persons and goods by air. This disjointed legal and policy system led to the conflict of laws and the consequent need for uniformity in the international aviation regulatory framework. A common approach for the determination of rights, liabilities, and obligations of air carriers and their

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4. "Global Estimates of Impact" <https://www.icao.int/sustainability/Pages/Economic-Impacts-of-COVID-19.aspx> Accessed on May 27, 2021, 6:30am.

5. "Tourism and Covid-19-Unprecedented Economic Impacts"<www.unwto.org> Accessed on June 5, 2021, by 6:10am.

6. Formally entitled Convention for Unification of Certain Rules Relating to International Carriage by Air, the Convention was originally signed in Warsaw, Poland on 12 October, 1929, and amended at The Hague, Netherlands in 1955 and in Guatemala City in 1971. Courts in the United States have held that, at least for some purposes, the Warsaw Convention in its original version, is a different instrument from the Warsaw Convention as amended by the Hague Protocol. See "The Postal History of ICAO; The Warsaw System on Air Carrier Liability" <https://applications.icao.int/postalhistory/the_warsaw_system_on_air_carriers_liability.Issuhtm#:~:text=Signed%20on%2012%20October%201929,instruments%20of%20private%20international%20law.> accessed on May 27, 2021, by 7:15am.

6. Udom U E, "From Warsaw to Montreal: An Analytical Framework on Legal and Policy Issues Relating to Carriage of Goods By Air", paper presented at a Workshop on "Air Carrier Liability and Insurance" organized by Nigerian Civil Aviation Authority (NCAA), 1st and 2nd July, 2014.

passengers, including the broader issues of aviation insurance and protection of consumer rights of air travelers had to be agreed upon.[7]

The Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly referred to as the Warsaw Convention was signed at Warsaw, capital of Poland, on October 12, 1929.[8] It came into effect on the 13th of February, 1933. The Convention is divided into five chapters: (I) Definitions; (II) Document of Carriage, Luggage and Passenger Ticket; (III) Liability of Carriage; (IV) Provisions Relating to Combined Carriages; and (V) General and Final Provisions. The Warsaw Convention came into being for the main purpose of establishing a uniform system of regulations of international air travel to end the dilemma of conflict of laws that airlines and passengers were facing. The Convention also sets out to offer protection to airlines by limiting their liability in accident and injury claims, as well as loss of baggage and cargo. We focus particularly on the articles that deserve closer attention as they keep propping up in litigation of air accidents. Those provisions will likely challenge the courts and lawyers in dealing with matters that may come up during the post-covid-19 era.

Article 17 provides that the carrier is liable for any damage suffered in the event of death, wounding, or any other bodily injury sustained by a passenger, if the accident which resulted in such damage took place on board the aircraft, or in the course of any of the operations of embarking or disembarking. It should be noted that article 17 of the Warsaw Convention was lifted verbatim and repeated as article 17 of the successor Convention, the Montreal Convention.

In *Doe v. Etihad Airways*[9], the United States Court of Appeals, Sixth Circuit, was faced with the question of whether a passenger could recover damages for a nonphysical injury. The court answered in the positive by holding "that as a matter of the first impression, a passenger could recover damages for mental anguish and other nonphysical injuries regardless of whether the injuries were caused directly by her bodily injury or more generally by the accident that caused the bodily injury. In that case, the passenger and her husband sued Etihad Airline under the Montreal Convention, 1999, seeking damages because she alleged that while flying as an international passenger in the airline's plane, she was pricked by a hypodermic needle which lay hidden within the seatback pocket in front of her, causing her physical injury by drawing blood from her body, and causing her shock, mental anguish, emotional distress, and fear of contagion and causing her husband loss of consortium. The lower court denied the claim for damages for nonphysical injury and loss of consortium. The plaintiffs appealed. The Court further observed that the "interpretation of the Warsaw, which is a longstanding predecessor treaty to the Montreal Convention, have at least some persuasive values in interpreting parallel provisions of the Montreal Convention, concerning the liability of international air carriers to passengers"[10]

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7. *Ibid.*
8. Available at: https://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html. Last visited on Thursday, May 27, 2021.
9 470 U.S. 392, 403 (1985)
10. P.879.

In *Air France v. Saks,*[11] the United Supreme Court rejected the conclusion reached by the lower court that the language, history, and policy of the Warsaw Convention and the Montreal Agreement imposed absolute liability on airlines for injuries proximately caused by the risks inherent in air travel. It, therefore, stated that Plaintiff's loss of hearing which occurred during a normal operation of the aircraft's pressurization system was not an "accident" within the meaning of Article 17 of the Warsaw Convention. The court, therefore, held that "Liability under Article 17 arises only if a passenger's accident is caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's internal reaction to the usual, normal, and expected operation of the aircraft, in which case it has not been caused by an accident under Article 17." The result is that the loss of hearing which the passenger suffered when the aircraft was descending into the Los Angeles International Airport did not qualify as an accident under Article 17.

Article 18 applies to cases of liability of carriers for damage occasioned by destruction, loss of, or damage to, luggage or goods during carriage by air. Article 19 deals with the liability of the carrier for damage caused by delay on carriage by air of passengers, luggage, or goods. Article 20 identifies the party on whom the burden of proof concerning damage of baggage lies: where such damage occurs, the carrier can only disclaim liability if he can prove that he or his agents had taken all necessary measures to avoid the damage, or that it was impossible for him or them to take such measure. Thus, it reverses the burden of proof, which in civil liability claims, normally lies on the claimant. So, there is a presumption of liability, which is rebuttable by the carrier.

Under Article 19, close attention must be paid to the distinction between flight delay and flight cancellation: where a passenger is eventually allowed to take the same flight to his destination, though at a later time, it comes under Article 19; but where a passenger is not given another opportunity to reach his destination with the same airline, it is a case of cancellation of the flight. Cancellation does not fall within the substantive cope of Article 19 or any other provisions of the Montreal Convention; it is considered as a case of non-performance, or the breach of a contract as was decided in *Fangbeng Fuondjing v. American Airlines Inc.*[12] In that case, a delayed departure of the passenger's connecting flight from Washington DC to New York, which led to a four-day delay in New York was held to be a delayed flight within the definition of Article 19 of the Montreal Convention.

Defense of contributory negligence against the passenger is available to a carrier where the carrier can prove that the passenger's negligence contributed to the injury suffered. In such a circumstance, the carrier can avoid or limit its liability.[13] Concerning losses which were incurred in the course of carriage of passengers, registered luggage, and goods, Article 22 spells out the limits of liabilities, as follows:

i. For each passenger – 125 francs;

[11]. 470 U.S. 392 (1985)
[12] 2011 WL 1375606
[13] Article 21

ii. For registered luggage or goods – 250 francs/kilos
iii. For objects which the passenger takes charge himself – 5,000 francs per passenger.

Article 23 deals with jurisdiction, creating four different for a for commencement of actions for damage by a plaintiff. The following courts have jurisdiction:

i. Where the carrier is ordinarily resident;
ii. Where the carrier has its principal place of business;
iii. Where the carrier has an establishment by which the contract of carriage was made;
iv. At the place of the carrier's destination.

Article 23 avails the plaintiff the option of choosing any of the above forums to litigate his claim. The Warsaw Convention sets a two-year limit within which a plaintiff must file a claim, from the date of arrival at the destination, or from the date the aircraft ought to have arrived, or on the date on which the carriage stopped.[14]

Although the main goals for adopting the Warsaw Convention were, not only, to achieve uniformity in the rules governing the aviation industry, but to also, protect the fledgling aviation industry by setting limits of liability, it didn't take too long to realize that the limits which were set in 1929 were ridiculously low. It, therefore, became necessary to enter into new protocols for purpose of mainly increasing the limits of liability and, in deserving cases, clarifying contentious issues in the main Convention.[15] The Protocols included:

i. The Hague Protocol – September 28, 1955;
ii. The Guadalajara Convention – September 18, 1961;
iii. The Guatemala City Protocol – 1971; and
iv. The Montreal Protocols – 1975.

While the Warsaw Convention was contracted among nations, several of the protocols and agreements that followed thereafter were entered into by airlines. The variety of contracting parties to the different conventions and protocols led to substantial complications; the process of determining the applicable protocols to given factual situations in prosecuting claims became quite a daunting challenge.[16] Against the foregoing, it became imperative that a comprehensive international legal framework be put in place to address both the shortcomings of the Warsaw Convention and the evolving challenges of modern aviation. Under that objective, the International Civil Aviation Organization (ICAO) convened a conference in Montreal in 1999, which eventually gave birth to what is today known as the Montreal Convention.

[14]. Article 29 of the Warsaw Convention
[15]. Article 29 of the Warsaw Convention.
[16]. *Ibid.* par. 7

III. THE MONTREAL CONVENTION[17]

Commonly known as the Convention for the Unification of Certain Rules for International Carriage by Air, the Montreal Convention is a multilateral treaty adopted a diplomatic conference of the members of the International Civil Aviation Organization (ICAO) with the main objective of providing a more equitable compensation for airline passengers in the event of death or personal injury, and damage to baggage and cargo during international air carriage. It was further aimed at attaining a more efficient operation of international carriage by air of passengers, baggage, and cargo.[18] The Montreal Convention is more passenger-friendly than the Warsaw Convention, although it still preserves the basic protection provisions for the airlines.[19]

While the Warsaw Convention generally regulates liability for international carriage of persons, luggage, or goods performed by aircraft for financial reward, the Montreal Convention specifically set more defined rules of compensation for travel disruptions, whether they are flight delays, flight cancellations, or boarding violations. It emphasizes that airlines are liable for damage caused by delays in the carriage of passengers.[20] The Montreal Convention is a comprehensive international treaty that addresses private international law. The Convention "represents a significant shift away from a treatment that primarily favored airlines to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers and shippers"[21]

The Montreal Convention was not intended to be an amendment to the Warsaw Convention; it is an entirely new treaty that supersedes and replaces it.[22] The Warsaw Convention was considered anachronistic, having been brought into existence in 1929, at a time the aviation industry was still in its infancy. However, in practice, both Conventions currently exist and operate side by side, because many of the parties to the Warsaw Convention have not, to date, acceded to the Montreal Convention.[23]

The Montreal Convention has the following principal features:

1. It deals with the liability of the carrier for damage sustained in case of death or bodily injury of a passenger onboard the aircraft or in the course of any operation of embarking or disembarking.[24] It also imposes liability on the carrier for destruction or loss of or damage to checked-in baggage. The Convention further deals with the liability of the carrier for damage to cargo[25]

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[17]. Signed on May 28, 1999, the Convention became effective on November 4, 2003. It is published in English, Arabic, Chinese French, Russian and Spanish. Available at www.iata.org, last visited on Wednesday, June 2, 2021

[18]. *Ibid.* par. 7.

[19]. *Ibid.* par. 7

[20]. Available at http://claimcompass.eu, last visited on Wednesday, June 2, 2021

[21]. *Weiss v. El Al Isr. Airlines Ltd, 433 F. Supp. 2d 361, 364-65 (S.D.N.Y. 2006).*

[22]. Cotter C. E. (2012). "Recent Case Law Addressing Three Contentious Issues in the Montreal Convention". Air and Space Lawyer Vol. 24, No. 4 (2012) published by the American Bar Association, p.24

[23]. *Ibid.*.

[24]. Article 17

[25]. Article 18

and imposes liability on the carrier for damages occasioned by the delay of passengers, baggage, or cargo.[26]

2. Article 21 creates a two-tiered system of liability for the death of or bodily injury of a passenger. The first tier creates strict liability for claims up to 100, 000 SDRs. In this category, it is immaterial whether or not the carrier was at fault and the liability cannot be reduced or excluded except where the airline can prove that there was contributory negligence on the part of the passenger. The second tier of liability here is fault-based, for claims exceeding 100, 000 SDR. However, under this article, the onus of proof does not lie with the plaintiff; it lies with the carrier. Thus, it is the responsibility of the airline to prove that that the damage was not due to its negligence or any other wrongful act or omission on its part.

3. The Convention sets the limits of liability for damage or delayed baggage to 1000 SDRs per passenger; damaged or delayed cargo- 175 SDRs per kilogram, and for delay of passengers, up to 4, 150 SDRs.[27] There is a provision for periodic review of carriers' liability limits, taking inflationary trends into account. The provision makes the review self-activating, doing away with the need for constant or regular convening parties and updating of agreements to be merely to address inadequacies of the limits of liability, as was done post-Warsaw.[28]

4. The different nation-states may require their airlines to make advance payments to accident victims to assist them or their dependents to enable them to meet immediate needs.[29] The Convention specifically excludes punitive, exemplary, or other non-compensatory damages in any claim arising from international carriage by air. There is an exclusivity provision that bars any other heads of a claim whenever the facts fall within the liability provision of the Montreal Convention.[30]

5. The Convention creates a "fifth jurisdiction" in addition to the four planks under the Warsaw Convention. The fifth jurisdiction is the place of residence of the passenger at the time of the accident if it is a country to or from which the carrier operates, and where it has premises.[31] Article 35 maintains the period of limitation at two years from the date of arrival of the carrier at the destination, or from the date it ought to have arrived, or from the date on which the carriage stopped. Article 50 contains a mandatory provision that each country must ensure that their airlines maintain adequate insurance to cover possible liabilities under the Convention.

IV. WARSAW TO MONTREAL – THE JURISPRUDENCE

As observed above, although it was intended that the Montreal Convention would address the issues and inadequacies in the Warsaw Convention and completely

[26]. Article 19
[27]. Article 22
[28]. Article 24
[29]. Article 28
[30]. Article 29
[31]. Article 33

replace and supersede the latter, in practice, both Conventions are operating side by side. Certain operational words and phrases are common to both legal instruments. Several of them are not defined in the two instruments. Although they are basic and simple English words, a body of case law has, over the years, developed over their meaning and application to the liability clauses. Because of the similarity in language, the courts have relied heavily on Warsaw judicial precedents and pronouncements in the interpretation and definition of matters arising from post-Montreal litigations. For example, the most notoriously litigated issues in both conventions arise from the wordings of Article 17 which covers the liability provision of air carriers. Article 17(1) of the Montreal Convention provides that:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident, which caused the death or injury took place on board the aircraft in the course of any operations of embarking or disembarking.

To succeed in a claim, the plaintiff must prove that:
1. There was an accident; and
2. The accident took place on board the aircraft or in the course of any operations of embarking or disembarking.

What is an accident within the definition of Article 17? In *Air France v. Saks,*[32] the United States Supreme Court defined it as "an unexpected or unusual event, or happening that is external to the passenger." In that case, the plaintiff suffered a hearing loss, severe pain, and pressure in one of her ears, due to cabin depressurization while the aircraft was descending in the process of landing. The United States Supreme Court held, reversing the lower court's doctrinaire-based decision of "absolute liability" for any injury caused during travel. The court held that an "unexpected or unusual event" relates to the accident, not the injury. There must be a causative link between the unusual event and injury. The Court's ratio has been applied in several other cases and different jurisdictions. They include:

i. *Rafailo v. El Al Israel Airlines Ltd,*[33] where it was held that the fall of a passenger, who slipped on a discarded plastic bag, was not caused by an accident within the definition of the Convention, as such item would expectedly litter the aisle in the course of a flight;

ii. *Wipranic v. Air Canada,*[34] where the passenger in the front seat next to the plaintiff caused the tray table the plaintiff was using to shake and spill hot tea on the plaintiff. The plaintiff brought a claim against the defendant under Article 17 of the Warsaw Convention and Article 21.1 of the Montreal Convention, contending that Air Canada was liable to her for injuries caused by the tea which spilled on her thigh. Applying the definition of the United States Supreme Court in Air France v. Saks that an "accident" under the Warsaw Convention is "an unexpected or unusual event or happening that is

[32]. Supra, at para 7
[33]. 2008 WL 2047610
[34]. 2007 WL 24441066

external to the passenger", the court held that the incident was an accident. It reasoned that "The slide of the tea off the tray table and its fall onto the plaintiff's lap were events "external" to the plaintiff.

iii. In *Garcia Remos v. Transmeridien Airlines Inc.,*[35] The plaintiff broke his arm when another passenger fell on her. The court held that, although the facts of the case disclosed an unusual and unexpected event, hence an accident, it fell outside Article 17 because it had no connection with the operation of the aircraft.

V. EMBARKING AND DISEMBARKING

The terms, "Embarking and Disembarking" are not defined in both Conventions, and so the courts continue to grapple with how to apply them in factual situations to make them fit into judicial definitions. The courts tend to construe them narrowly. In *Ramos v. American Airlines,*[36] the court identified the following four points to consider in determining whether the plaintiff was embarking or disembarking the aircraft:

I. The nature of the passenger's activity at the time of the injury;
II. Restrictions on the passenger's movement;
III. The imminence of actual boarding; and
IV. The proximity of the passenger to the boarding gate,

In *Walsh v. Koninklijke Luchtuaart,*[37] a passenger who tripped on a metal bar near the departure gate was held to be "embarking". In another case, a passenger who fell while walking up a faulty elevator after arriving at the airport was held to be disembarking.[38]

The definition of delay as contained in Article 19 of the Montreal Convention has been a matter of considerable litigation. It is essential, for purposes of that particular Article (19) that a "delay" is distinguished from "cancellation" or contractual non-performance. In a case where the plaintiff's flight was so delayed that he missed his connecting flight to Cameroon, and only arrived after the Memorial Service for which he traveled from Washington to attend, the Court held that his claim should be classified as a "delay" under Article 19 of the Montreal Convention and should not be considered as a case of non-performance of the contract.[39]

The case of *Paradis v. Ghana Airways*[40] is an authority that a delay cannot be converted to non-performance of a contract of carriage by air where the plaintiff elects to fly with another airline as a result of delay by the defendant carrier. The effect of that choice by the plaintiff is that the plaintiff's claim can only be established under Article 29 of the Montreal Convention, and cannot be founded in contractual non-performance because of the exclusivity clause.

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35. 385 F Supp. 2d 137
36. 2011 WL 5075647
37. 2011 WL 4344158, Maatschappij N. V.
38. *Ugaz v. American Airlines Inc., 576 F. Supp. 2d 1354*
39. *Fangbeng Fuondjing v. American Airlines Inc. 2011 WL 1375606*
40 Ltd., 348 F. Supp. 2d 106

V. AIR CARRIER'S LIABILITY IN THE POST-COVID-19 PANDEMIC ERA

The purpose of embarking on this review is to refresh the memory of and re-educate, both the flying public and players in the aviation industry, particularly aviation law practitioners on their rights and responsibilities, given the far-reaching impact which the Covid-19 pandemic has had on the aviation industry.

As explained in the introductory paragraphs of this paper, the pandemic signaled increased travel restrictions and a slump in demand among travelers. Massive reduction in passenger numbers has resulted in flight cancellations, or where the airlines decided to fly, their planes flying empty between airports. Airlines suffered massively reduced revenues, forcing them to lay off employees or declare bankruptcy. For those who have attempted to avoid refunding canceled trips to diminish losses, what remedies are available to the affected passengers? How will the sector and its passengers deal with the challenges confronting them under the circumstances?

VI. CONCLUSION

The summary of it all is that there are certain developments in the aviation sector that practitioners and Member States need to familiarize themselves with. To illustrate, the 40th Assembly of the International Civil Aviation Organization (ICAO) that met in Montreal from 24th September to 4th October 2019 adopted far-reaching resolutions on strategies for achieving the goal of a safe and orderly development of civil aviation, leveraging on international cooperation among the Member States and all other stakeholders.[41] The challenges facing the industry demands that every stakeholder and Member States be exposed to intensive sensitization on that and other relevant legal instruments.

Airlines are duty-bound to comply with national and international aviation rules and regulations, and endeavor to promote their heightened duty of care. They have to ensure strict observance of the internationally guaranteed right to health of passengers as contained in the United Nations International Health Regulations.[42] Air passengers should comply with instructions given to them by crew members; those instructions and directives are given to promote the safety of passengers and goods. A situation where passengers engage in a physical confrontation with flights crews is a major threat to safe and orderly air transportation. The threats currently facing the civil aviation industry are so complex and real that it requires

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[41]. Adopted by the 40th Assembly of the International Civil Aviation Organization (ICAO) in Montreal Canada on 4 October, 2019
https://www.icao.int/Meetings/a40/Documents/Resolutions/a40_res_prov_en.pdf, accessed on June 5, 2021, by 9:38pm.

[42]. First adopted by the World Health Assembly (WHA) in 1969 and last revised in 2005 as a "binding instrument of international law that aims for international collaboration to "prevent, protect against, control, and provide a public health response to international spread of infectious diseases", among others. It is binding on 196 countries, including 194 Member States to the World Health Organization. The IHR defines rights and obligations of countries in handling of public health events and emergencies that have the potential to cross borders. Those obligations extend to non-state actors, including airlines, because the international institutions that make laws that regulate aviation are inter-governmental institutions.
<https://treaties.un.org/doc/Publication/UNTS/Volume%201286/volume-1286-I-10921-English.pdf> accessed on June 5, 2021, by 10:14pm.

the development of an effective global response to tackle them. We also submit that it is only a full activation of international and regional collaboration and corporation in the field of aviation security, as contained in the Declaration on Aviation Security adopted by the 37th Session of the ICAO Assembly[43] that will guarantee the promotion, protection, fulfillment, and enjoyment of the rights that are enshrined in the Warsaw and Montreal Conventions.[44]

[43]. Adopted in New Delhi, India in February, 2011, https://www.icao.int/Security/Pages/RegionalAviationSecurityConferences.aspx, accessed on June 5, 2021, by 10:23pm.

[44]. See also the "The Nature of States Parties' Obligation' as contained in General Comment No. 3 adopted by the United Nations Committee on Economic, Social and Cultural Rights, pursuant to Article 2, par. 1 of the United Nations Covenant on Economic, Social and Cultural Rights, at its Fifth Session in Geneva, Switzerland, on December 14, 1990 <https://www.refworld.org/pdfid/4538838e10.pdf> accessed on June 5, 2021, by 10:34pm.

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Limited Liability Partnership and Limited Partnership as Vehicles for Business in Nigeria: Challenge and Prospects

*C. E. Halliday & **G. C. Okara

ABSTRACT

In a bid to improve the ease of doing business in Nigeria by ensuring that entrepreneurs can form partnerships and also enjoy reduced personal liability, the Companies and Allied Matters Act 2020 (CAMA 2020) in Nigeria, provided for the establishment of Limited Liability Partnerships (LLPs) and Limited Partnerships (LPs) as vehicles for business in Nigeria. Similarly, it is indisputable that in 2009 the Lagos State Government had enacted the Partnership (Amendment) Law of Lagos State which made provisions for the creation of LLPs and LPs; and was only applicable within the territory of Lagos State. Nonetheless, with the enactment of the CAMA 2020, it is abundantly evident that Nigeria now has holistic legislation for the practice and procedure of LLPs and LPs in Nigeria. This paper which adopted the doctrinal methodology analyzed the concept of LLP and LP as vehicles for business organizations in Nigeria; benefits of LLP in Nigeria; the viability of LLPs in the United Kingdom (UK) and India; the challenge and prospects of LLP under the extant laws in Nigeria. This paper observed that there exists a jurisdictional challenge in the determination of matters arising from LLPs and LPs domiciled in Lagos State. Thus, this paper recommended that the provisions of section 83 of the Lagos State Partnership (amendment) Law 2009 should be amended *in tandem with the unequivocal provisions of sections 1(1) (3);* 251 (1) (e) of the Constitution of the Federal Republic of Nigeria 1999, as amended and section *868 (1) of the CAMA 2020 to be brought to fruition the commercial imperativeness of establishing LLPs and LPs.*

ESSAY CONTENTS

I. INTRODUCTION

In the course of floating a business organization in Nigeria, there are a plethora of corporate vehicles that can be adopted by the 'promoters' of a prospective business organization, these corporate vehicles include the practice of partnership, which may take the shade of a limited liability partnership or a limited partnership company. Essentially, a limited partnership is a hybrid of a general partnership and the concept of limited liability. It is a kind of partnership in which some partners have limited liability similar to the shareholders of a company.[45] It contrasts with the principles of general partnership in that a limited partner is not responsible for the conduct or acts of the other partners.[46] It is worthy of note that several professionals have long used this vehicle to float their businesses due to ease of formation, tax reduction, and organizational flexibility. Despite these benefits, it remains an area of concern that business entities are not separate from the partners. As a result of these partners' assets are unprotected and also, they are exposed to liability for the actions of other partners. In addition, partnerships are dissolved upon the death or withdrawal of one of the partners, thereby endangering the business.[47]

Before the enactment of the CAMA 2020,[48] partnerships in Nigeria were regulated by the United Kingdom Partnership Act of 1890[49] while the Companies and Allied Matters Act, Cap C20 LFN 2004 (repealed) which regulated the operations of companies did not repeal the UK Partnership Act rather it limited the number of

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[45]. "Limited Partnership: A Focus on Registration under the Lagos State Partnership Law by Offshore Entities," Adeyemi B, accessed 16 November, 2020, https://www.dcsl.com.ng/data/content/_1357638361_TN84X70FE7.pdf.
[46]. "Limited Partnership."
[47]. "CAMA 2020 and the Introduction of Limited Liability Partnership," Nexia, accessed 16 November, 2020, https://nexianigeria.com/cama-2020-and-the-introduction-of-limited-liability-partnership/.
[48]. Companies and Allied Matters Act 2020, (CAMA 2020), ss. 746-810.
[49]. Which constitutes part of the Statute of General Application that was in force in England on 1st January, 1900; "A Review of Limited Liability Partnership under the Partnership Law of Lagos State 2019" Ajibade S P A, accessed 16 November, 2020, http://www.spaajibade.com/resources/a-review-of-limited-liability-partnerships-under-the-partnership-law-of-lagos-state-2009/.

people allowed in a partnership to twenty (20) persons.[50] Furthermore, in 2009 the Partnership Law was incorporated into the laws of Lagos State as an alternative to the weaknesses of the existing forms of business organizations. Following the views of developed countries like the United States of America and the United Kingdom, Lagos State incorporated the law of limited liability partnership.[51] Nonetheless, its application was restricted to Lagos State and this ultimately led to the introduction of Limited Liability Partnerships in CAMA 2020.

Fundamentally, this paper seeks to critically examine the concept of limited partnership and limited liability partnership as vehicles for business organizations in Nigeria; the benefits and features of limited liability partnership in Nigeria; examine the viability of limited liability partnerships in the UK and India; the challenge and prospects of limited liability partnership under the Partnership (Amendment) Law of Lagos State, 2009 and the CAMA 2020.

II. LP AND LLP AS VEHICLES FOR BUSINESS ORGANIZATIONS IN NIGERIA

A limited partnership (LP) is a business organization that consists of not more than 20 persons in which one or more persons known as general partners are liable for all debts and obligations of the partnership, and one or more persons described as limited partners who at the time of joining the partnership contributes thereto a sum or sums as capital or property valued at a specified amount who are not liable for debts or obligations arising from the partnership beyond the amount of contribution made.[52] It therefore logically follows that a limited partnership occupies a middle-point between a partnership and a limited company in that it is an amalgam of limited and unlimited partnership.[53]

As a general rule, a limited partnership must be registered and where such a mandatory registration is not done, the limited partnership will be considered a general partnership, and each of the limited partners will be a general partner. Also, a limited partner must not participate in the management of the partnership business and cannot bind the firm, although he can provide advice to the partners on the state and prospects of the partnership after he or his agents has inspected the books of the partnership. Where a limited partner takes part in the management, he will be liable for debts and obligations arising from the partnership during the period that he engages as if he was a general partner.[54] Accordingly, in the absence of any express or implied agreement between the partners, a majority of the general partners may decide on any difference relating to the ordinary matters that connect with the partnership business; the share of a limited partner in the partnership can, with the consent of the general partners, be assigned by him and the assignee will become a limited partner having all the rights of the assignor; where a limited

[50]. CAMA (repealed), s. 19 (1).
[51]. CAMA 2020, s. 795 (2); Amadike N, "The Introduction of Limited Liability Partnership Law in Lagos State of Nigeria as an Alternative to the Existing Forms of Business Organization: Echoes of a New Dawn?," Global Journal of Politics and Law Research 8, no 1 (2020): 69.
[52]. Amadike, "The Introduction of Limited Liability Partnership Law in Lagos State of Nigeria as an Alternative to the Existing Forms of Business Organization," 77.
[53]. Okany M C, Nigerian Commercial Law (Africana First Publishers Plc, 2009), 630.
[54]. Amadike, "The Introduction of Limited Liability Partnership Law in Lagos State of Nigeria as an Alternative to the Existing Forms of Business Organization," 78.

partner suffers his share to be charged for his separate debt, the other partners does not have the right to dissolve the partnership; the introduction of a new person into the partnership can be done without the consent of the existing partners, and the limited partnership cannot be dissolved by the limited partner giving a notice.[55] Taxation under this form of organization is subject to the Personal Income Tax Act.[56]

In the same stead, the CAMA 2020 for the registration of a limited partnership (LP);[57] in comparison, while a limited liability partnership (LLP) limits liability for all partners, an LP only limits its liability for some partners.[58] Essentially, section 795(3) of the CAMA 2020, provides that a limited partnership shall consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons called limited partners, while an LLP does not have such limitation under Nigerian *corpus juris.* Additionally, the limited partner cannot have significant money invested in or hold major decision-making power in the business; where they do, they risk losing their status as a limited partner and forfeiting their limited liability status.[59]

In Nigeria, limited liability partnerships like limited partnerships are governed by the general rules on partnerships unless there are specific provisions in the laws creating them to the contrary.[60] Under section 67 of the Partnership (Amendment) Law of 2009, it is self-evident in its proviso that:

> *Provided always that in the event of a conflict between any provisions of any general law relating to partnerships and the specific provisions of this Law as may be amended from time to time, the provisions of this Law shall supersede and the provisions of the general law relating to partnerships shall be considered modified to the extent of any inconsistency with respect to its application to Limited Liability Partnerships.*

Thus, it is an ineluctable fact that the laws governing partnerships in Nigeria relate to and govern limited partnerships and limited liability partnerships incorporated in Nigeria.[61] Consequently, it suffices to state that an LLP is a dynamic business vehicle attractive to professionals and others who seek to do business and limit their liability without going through the process of formally incorporating a limited liability company.[62]

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[55]. Ejiofor, Okonkwo and Iloegbune, Nigerian Business Law (London: Sweet & Maxwell 1982) 256- 257.
[56]. Personal Income Tax Act (as amended) 2011, s. 1.
[57]. CAMA 2020, s. 746 (1).
[58]. CAMA 2020, ss. 767; 795 (3).
[59]. Olaniyi O and Akhator J, "A Review of Limited Liability Partnerships under the Companies and Allied Matters Act, 2020," Business Day, October 27, 2020, 13.
[60]. "Limited Liability Partnership as Veritable Vehicles of Carrying on Business," Adeyemi, O, accessed 20 November, 2020, https://aolulaw17.medium.com/limited-liability-partnerships-as-veritable-vehicles-of-carrying-on-business-fa8edb0d55d9.
[61]. "Limited Liability Partnership as Veritable Vehicles of Carrying on Business,".
[62]. "Limited Liability Partnership," Lagos State Government, accessed 20 November, 2020, http://www.lagosstate.gov.ng/.

III. BENEFITS AND FEATURES OF LLP IN NIGERIA

Owing to the need for a more dynamic form of partnerships in Nigeria to address the increase in litigation resulting in personal liability by partners and the consequent threat to partnership entities and their partners has necessitated the introduction of a form of partnership that would provide a limitation of liability analogous to that enjoyed by directors of a limited liability company. More so, the benefits of a Limited liability partnership in Nigeria are as follows:

A. Liability of Partners

Ordinarily, it is trite law that the liabilities of members of a company are usually limited to the number of shares they own in the company or/and the amount they have guaranteed the company upon the dissolution of the company and nothing more or less.[63] This state of affairs finds a strong footing in Limited Liability Partnerships. Limited Liability Partners are not ordinarily liable to be sued for partnership debt.[64] This is in tandem with section 58(4) of the Partnership (Amendment) Law of 2009 which provides *inter alia:*

> *A Limited Liability Partnership may sue and be sued in its registered name however a limited liability partnership will be liable to be sued in his personal capacity for acts of the partnership in… cases of fraud, misrepresentation, and other improper conduct alleged to have been committed by the limited liability partner; and with the written consent of the Commissioner where it is established that it is in the reasonable interest of the public for an action to be maintained against an individual or a limited liability partner.*

Furthermore, under a general partnership, every partner is liable jointly with other partners for all debts and obligations of the firm incurred while he is a partner and after his death, his estate is also severally liable in due course of administration for such debts and obligations in so far as the debts and obligations remain unsatisfied, subject to the prior payment of his separate debts.[65] It is upon this premise that section 75(3) of the Partnership Law of Lagos State 2009 provides that "a limited liability partner shall not be liable for the debts or action or inaction of the partnership or limited liability partnership beyond the amount subscribed by such limited liability partner under the current registration and/or partnership agreement". The general implication of this is that partners in an LLP are immune personally to lawsuits if an entity decides to take them to court. This is quite at variance with what obtains in limited partnerships which must consist of one or more persons called general partners where there is at least one general partner with unlimited liability, the same cannot be said of the LLP as no such provision is made.[66]

Thus, it has been argued that the most impactful benefit of an LLP is that the partners enjoy limited liability.[67] In other words, in an event where the entity is

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[63]. "Limited Liability Partnership as Veritable Vehicles of Carrying on Business".
[64]. *Fawehinmi v Nigeria Bar Association (NBA) (No.2) [1989] 2 NWLR (pt 105) 558*
[65]. "A Review of Limited Liability Partnership under the Partnership Law of Lagos State 2009".
[66]. *Ibid.*.
[67]. "CAMA 2020 and the Introduction of Limited Liability Partnership".

sued, the liability of its partners would be limited only to the amount contributed by each partner for the formation of the LLP.[68] Nonetheless, it is imperative to note that the limited liability protection enjoyed in an LLP will be broken if the liability originates from an intentional, fraudulent, and unauthorized act of the partner.[69]

B. Legal Personality

Akin to a business name, a partnership has no independent corporate legal existence, distinct from that of its members, because partnership law is based on the law of agency with each partner becoming an agent of the others. However, by section 58 (4) of the Partnership Law of Lagos State 2009, an LLP is conferred with legal personality, as it can sue and be sued in its registered name.[70] A significant aspect of the LLP however is that a partner in an LLP will be liable to be sued in his personal capacity for acts of the partnership in cases of fraud, misrepresentation, and other improper conduct alleged to have been committed by such partner. The LLP partner will also be liable where it is established that it is in the reasonable interest of the public for an action to be maintained against such individual. Such action, however, can only be maintained through written consent by the Commissioner for Justice.[71] In the same vein, by section 765 of CAMA 2020**,** a partner of an LLP is an agent of the LLP, and not of other partners. Hence, a partner cannot be liable, directly or indirectly for an obligation carried out following the partnership agreement. He cannot be liable for the wrongful act or omission of any other partner of the LLP.

Conversely, under a general partnership where every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, binds the firm and his partners unless the partner so acting has no authority to act for the firm in the particular matter and the person with whom he is dealing with either knows that he has no authority or does not know or believe him to be a partner.[72]

Submissively, it is pertinent to note that the main feature of a partnership is the relationship between the members, whereas with an LLP it is the act of association that creates the entity. This can be gleaned from the fact that in a partnership, every member is an agent of the partnership and an agent of the other partners whereas in an LLP every partner is an agent of the LLP itself but not of the other partners.

C. Generational Wealth Transfer

Owing to the salient features of limited liability partnership in Nigeria, it has been argued that LLPs have the proclivity to serve as a veritable tool for generational wealth transfer.[73] Primarily, the rights of a partner to a share of the profits and losses of an LLP and to receive distributions per the LLP agreement are

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[68]. CAMA 2020, s.766.
[69]. CAMA 2020, s. 769 (3); "A Review of Limited Liability Partnerships under the Companies and Allied Matters Act, 2020,".
[70]. CAMA 2020, ss. 746(1); 756 (a).
[71]. Partnership (amendment) Law 2009, s. 58 (4).
[72]. "A Review of Limited Liability Partnership under the Partnership Law of Lagos State 2009,".
[73]. "A Review of Limited Liability Partnerships under the Companies and Allied Matters Act, 2020,".

transferable either wholly or in part, subject to the provisions of the partnership deed. Accordingly, this level of flexibility enables an LLP to act as a catalyst for effective generational wealth transfer.

D. Perpetual Succession

Limited liability partnerships like every company continually exist despite the death of its partners.[74] Thus, the life of the LLP is not affected by the demise, retirement, insolvency, or withdrawal of any of the partners.[75] As a corollary, by section 763 (1) CAMA 2020, a person may cease to be a partner of a limited liability partnership following an agreement with the other partners or, in the absence of an agreement with the other partners as to the cessation of being a partner, by giving a notice in writing of at least 30 days to the other partners of his intention to resign as a partner.

However, it is worthy to note that the cessation of a partner from the limited liability partnership does not by itself discharge the partner from any obligation to the limited liability partnership, the other partners, or any other person which he incurred while being a partner.[76] Again, by section 748 of the CAMA 2020, if the membership of the LLP falls below two members, and the LLP continues to trade for more than 6 months with just one member, only that member would be liable for the obligations of the partnership incurred during that period.[77]

E. Flexibility

A limited liability partnership has the organizational flexibility of a partnership and the provisions dealing with the day-to-day running of the LLP will normally be contained in a written limited liability partnership deed. Similarly, professionals who use LLPs tend to rely heavily on reputation. Most LLPs are created and managed by a group of professionals who have a lot of experience and clients between them. By pooling resources, the partners lower the costs of doing business while increasing the LLP's capacity for growth. Most important, reducing costs allows the partners to realize more profits from their activities than they could individually.[78]

Essentially, these professional workers are paid a salary and often have no stake or liability in the partnership. The important point is that they are designated professionals qualified to do the work that the partners bring in. This is another way that LLPs help the partners scale their operations. Professional workers take away the detailed work and free up the partners to focus on bringing in new business.[79] Also, the internal structure of LLPs is flexible because of the easy

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[74]. Okara G C and Alikor Z, "Underpinning the Nitty Gritty of Companies: An International Law Perspective," Journal of Property Law and Contemporary Issues**,** 11, no 2 (2019): 262.
[75]. CAMA 2020, ss. 746 (2); 763 (2).
[76]. CAMA 2020, s. 763 (4).
[77]. "CAMA and the New Face of Partnership Structure: An Overview of Limited Liability Partnership (LLPs) in Nigeria," Akusobi M, accessed 20 November, 2020, https://thenigerialawyer.com/cama-2020-and-the-new-face-of-partnership-structure-an-overview-of-limited-liability-partnerships-llps-in-nigeria/.
[78]. "CAMA and the New Face of Partnership Structure."
[79]. "Limited Liability Partnerships: the Pros and Cons," Small Firms Services Ltd, accessed 20 November, 2020, https://www.simpleformations.com//llp-benefits-and-disadvantages.htm.

platform to bring partners in and let partners out based on the letters of a partnership deed. This comes in handy as an LLP can always add partners who bring existing business with them.[80]

In sum, it is the flexibility of an LLP for a certain type of professional that makes it a superior option to a limited liability company or other corporate entity. Akin to a limited liability company, an LLP itself is a flow-through entity for tax purposes.

F. Ease of Incorporation

Generally, by sections 753 to 754 of the CAMA 2020, a less herculean and well-structured process for the incorporation of an LLP in Nigeria is provided.[81] Accordingly, by section 753 (1) CAMA 2020, an LLP can be formed by two or more persons associated with carrying on a lawful business to maximize profit. The incorporation documents must state the: name of the limited liability partnership; the proposed business of the limited liability partnership; address of the registered office of the limited liability partnership; name and address of each of the persons who partners of the limited liability partnership on incorporation; name and address of the persons who are to be designated partners of the limited liability partnership on incorporation; and contain other information concerning the proposed limited liability partnership as the Corporate Affairs Commission may prescribe must be filed in the manner and with the fees, as may be prescribed by the Corporate Affairs Commission from time to time.[82]

Furthermore, upon submission of the incorporation documents, within fourteen (14) days, the Corporate Affairs Commission is mandated to register the documents and issue a certificate of incorporation which must be signed by the Corporate Affairs Commission and authenticated by its official seal.[83] More so, it is pertinent to state that an LLP will not be registered in Nigeria by a name which, in the opinion of the Corporate is undesirable; or identical or too nearly resembles that of any other partnership, business name, limited liability partnership, body corporate, or a registered trademark.[84]

G. Designated Partners

The provision of designated partners under the CAMA 2020 concerning LLPs in Nigeria serves as a major insignia of LLPs in Nigeria. It is against this backdrop that by virtue of section 749 of CAMA 2020, a limited liability partnership must have at least two designated partners, provided that in case of a limited liability partnership in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of the limited liability partnership or nominees of the bodies corporate shall act as designated partners.[85] Additionally, the designated partners must have

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[80]. "A Review of Limited Liability Partnerships under the Companies and Allied Matters Act, 2020,".
[81]. *Ibid.*.
[82]. CAMA 2020, s. 753 (2).
[83]. CAMA 2020, s. 754.
[84]. CAMA 2020, s. 757 (2).
[85]. CAMA 2020, s. 749 (1).

the same rights and duties towards the LLP as any other member but with extra responsibilities. These include duties such as signing and delivering the accounts and annual returns and notifying the Corporate Affairs Commission of any changes in membership, registered office address, or name.[86]

In happenstances of any vacancy among the designated partner, a limited liability partnership is statutorily mandated to appoint a designated partner within 30 days of a vacancy; provided that if no designated partner is appointed, or if at any time there is only one designated partner, each partner is deemed to be a designated partner.[87]

IV THE VIABILITY OF LLPs IN THE UK AND INDIA

It is not in doubt that a limited liability partnership is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership.[88] Most importantly, the Limited Liability Partnerships Act 2000 and the Limited Liability Partnership Act 2008[89] respectively provide a template for the operational structure of LLPs in the jurisdictions of the UK and India. Therefore, this standpoint seeks to evaluate the viability of LLPs in the UK and India.

Similar to how partnerships are treated in other countries, the UK Limited Liability Partnerships Act 2000 provides for individual members to be subject to taxes and not the partnership;[90] since an LLP is not a company or a corporation, or any other legal entity.[91] In India, a limited liability partnership enjoys having perpetual succession.[92] Thus, any change in the partners of a limited liability partnership in India does not affect the existence, rights, or liabilities of the limited liability partnership.[93]

In the jurisdictions of the UK and India, for a limited liability partnership to be incorporated two or more persons associated for carrying on a lawful business to maximize profit must subscribe their names to an incorporation document[94] which must be delivered to the registrar either the incorporation document or a copy authenticated in a manner approved by the registrar.[95] Nonetheless, under the India Limited Liability Partnership Act 2008, where the number of partners of a limited liability partnership is reduced below two and the limited liability partnership carries on business for more than six months while the number is so reduced, the

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86. CAMA 2020, ss. 749 (2)-(5); 750.
87. CAMA 2020, s. 751.
88. "FAQs on Nature of Limited Liability Partnership (LLP)," Ministry of Corporate Affairs, accessed 21 November, 2020, http://www.mca.gov.in/MinistryV2/natureoflimitedliabilitypartnershipllp.html.
89. Act No.6 of 2009.
90. UK Limited Liability Partnership Act 2000, ss. 11-12.
91. "UK Limited Liability Partnership," Offshore, accessed 21 November, 2020, https://www.offshorecompany.com/company/uk-llp-2/.
92. Limited Liability Act 2008, s. 3(2).
93. Limited Liability Act 2008, s. 3(3).
94. Limited Liability Partnership Act 2000, s. 2(1) (a); Limited Liability Act 2008, ss. 6(1); 11(a); "UK Limited Liability Partnerships: Key Features and Benefits Explained," Pearse Trust, accessed 21 November, 2020, https://www.pearse-trust.ie/blog/bid/67579/uk-limited-liability-partnerships-key-features-benefits-explained.
95. Limited Liability Partnership Act 2000, s. 2(1) (b).

person, who is the only partner of the limited liability partnership during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, will be liable personally for the obligations of the limited liability partnership incurred during that period.[96] Although, such provision is absent in the United Kingdom.

In both jurisdictions, the applicable extant legislation provides for the establishment of designated partners,[97] however, section 7 (1) India Limited Liability Partnership Act 2008 stipulates that every LLP in India must have at least two designated partners who are individuals and at least one of them must be a resident in India: provided that in case of an LLP in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominees of such bodies corporate must act as designated partners. Furthermore, subject to the provisions of the Limited Liability Partnership Act 2008 a designated partner is mandated to be responsible for the doing of all acts, matters, and things as are required to be done by the limited liability partnership in respect of compliance with the provisions of the Act including filing of any document, return, statement and the like report as may be specified in the limited liability partnership agreement; and liable to all penalties imposed on the limited liability partnership for any contravention of the Limited Liability Partnership Act 2008.[98]

Conversely, in the UK, there is no limitation in the number of designated members however, if there would otherwise be no designated members, or only one, every member is deemed to be a designated member.[99] Again, where the incorporation document states that every person who from time to time is a member of the limited liability partnership is a designated member, every member is a designated member.[100]

In tandem with the position in most jurisdictions including Nigeria,[101] in India, every limited liability partnership must have either the words "limited liability partnership" or the acronym "LLP" as the last words of its name. Also, no limited liability partnership can be registered by a name which, in the opinion of the Central Government is undesirable; or identical or too nearly resembles that of any other partnership firm or limited liability partnership or body corporate or a registered trademark, or a trademark which is the subject matter of an application for registration of any other person under the Trade Marks Act, 1999.[102] By section 20 of the Limited Liability Partnership Act 2008, where any person or persons carry on business under any name or title of which the words "Limited Liability Partnership" or "LLP" or any contraction or imitation thereof is or are the last word or words, that person or each of those persons must unless duly incorporated as

[96]. Limited Liability Act 2008, s. 6(2).
[97]. Limited Liability Partnership Act 2000, s. 8 (1); Limited Liability Act 2008, s. 7(1).
[98]. Limited Liability Act 2008, s. 8(a) (b).
[99]. Limited Liability Partnership Act 2000, s. 8 (2).
[100]. Limited Liability Partnership Act 2000, s. 8 (3).
[101]. CAMA 2020, ss. 757 (1); 759.
[102]. Limited Liability Act 2008, s. 15(1)-(2); 20.

limited liability partnership, be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

Additionally, concerning the extent of liability of an LLP in India and the UK, it must be stated that a limited liability partnership is not bound by anything done by a partner in dealing with a person if the partner has no authority to act for the limited liability partnership in doing a particular act; and the person knows that he has no authority or does not know or believe him to be a partner of the limited liability partnership.[103]

However, a limited liability partnership domiciled in India is liable if a partner of a limited liability partnership is liable to any person as a result of a wrongful act or omission on his part in the course of the business of the limited liability partnership or with its authority.[104] Also, an obligation of the limited liability partnership whether arising in contract or otherwise will be solely the obligation of the limited liability partnership.[105] Nonetheless, in event of an act carried out by a limited liability partnership, or any of its partners, with intent to defraud creditors of the limited liability partnership or any other person, or for any fraudulent purpose, the liability of the limited liability partnership and partners who acted with intent to defraud creditors or for any fraudulent purpose will be unlimited for all or any of the debts or other liabilities of the limited liability partnership; provided that in case any such act is carried out by a partner, the LLP is liable to the same extent as the partner unless it is established by the limited liability partnership that such act was without the knowledge or the authority of the limited liability partnership.[106]

In a similar vein, to improve the viability of LLPs in India, a firm, private companies, and unlisted public company is permitted to convert into limited liability partnerships.[107] Whereas the Central Government is empowered to make rules for the establishment of place of business by foreign limited liability partnerships within India and carrying on their business therein by applying or incorporating, with such modifications, as appear appropriate.[108] Also, the Limited Liability Act of 2008 provides for some sort of reconstruction between LLPs in India. Accordingly, by section 60 of the Act, where a compromise or arrangement is proposed between a limited liability partnership and its creditors; or between a limited liability partnership and its partners, the National Company Law Tribunal may, on the application of the limited liability partnership or any creditor or partner of the limited liability partnership, or, in the case of a limited liability partnership which is being wound up, of the liquidator, order a meeting of the creditors or the partners, as the case may be, to be called, held and conducted in such manner as may be prescribed or as the National Company Law Tribunal directs.[109]

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[103]. Limited Liability Act 2008, s. 27(1); Limited Liability Partnership Act 2000, s. 6 (2); "All About Limited Liability Partnership (LLP)- A Complete Guide," Legalraasta, accessed 21 November, 2020, https://www.goggle.com/amp/s/www.legalraasta.com/limited-liability-partnership/amp/.
[104]. Limited Liability Act 2008, s. 27(2).
[105]. Limited Liability Act 2008, s. 27(3).
[106]. Limited Liability Act 2008, s. 30(1).
[107]. Chapter X, Second- Fourth Schedule of the Limited Liability Act 2008.
[108]. Limited Liability Act 2008, s. 59.
[109]. Limited Liability Act 2008, ss. 2 and 60.

In sum, it is pertinent to state that the UK LLPs combine the benefits of corporate status and unlimited capacity with the protection of limited liability for members and the ability to operate and be taxed as a partnership. As a result of the LLP's separate legal personality, it may contract and hold assets in its name where required, similar to a limited company.[110] The LLP structure in the UK is commonly used by accountants to retain the tax structure of traditional partnerships whilst adding some limited liability protection. Hence, the Limited Liability Partnership Act of 2000 is widely applicable in the UK, unlike Australia where partnerships are governed on a state-by-state basis.[111]

V. CHALLENGE AND PROSPECTS OF LLP UNDER THE PARTNERSHIP (AMENDMENT) LAW OF LAGOS STATE, 2009 AND THE CAMA 2020

In 2009, the limited liability partnership became the newest type of business organization introduced in Lagos.[112] Accordingly, Lagos state followed suit with developed countries such as the US and UK in incorporating the limited liability partnership model;[113] although, the CAMA 2020 now provides holistic legislation for the practice and procedure of LLPs and Limited partnerships in Nigeria.[114] Most importantly, an LLP is an alternative corporate vehicle that combines the flexible structure of a partnership with the benefits for its partners or members. An LLP is a corporate business vehicle that enables professional expertise and entrepreneurial initiative to combine and operate in a flexible, innovative, and efficient manner, providing benefits of limited liability while allowing its members the flexibility for organizing their internal structure as a partnership.[115] The partners of a limited liability partnership shall be liable to contribute in event of it being wound up or dissolved. A limited liability partnership can sue and be sued in its registered name nonetheless a limited liability partner can be sued in his personal capacity for acts of the partnership in some restricted circumstances.[116] These include in cases of fraud, misrepresentation, and other alleged improper conduct by the limited partner; where the written consent of the Commission is obtained having established that it is in the reasonable interest of the public to take action against an individual or a limited liability partner. A judgment made against the limited liability partnership cannot be executed on the asset of a partner except a judgment is also made against the partner. Execution may not be levied on the assets of a limited liability partnership by a judgment creditor if the claim is against a partner except a judgment relating to the same claim has been obtained against the partnership.[117]

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110. "UK Limited Liability Partnerships,".
111. "CAMA 2020 and the Introduction of Limited Liability Partnership,".
112. Amadike, "The Introduction of Limited Liability Partnership Law in Lagos State of Nigeria as an Alternative to the Existing Forms of Business Organization," 82.
113. Partnership (amendment) Law 2009, s. 59(1).
114. CAMA 2020, ss. 746-810.
115. "CAMA and the New Face of Partnership Structure: An Overview of Limited Liability Partnership (LLPs) in Nigeria,".
116. Amadike, "The Introduction of Limited Liability Partnership Law in Lagos State of Nigeria as an Alternative to the Existing Forms of Business Organization," 83.
117. Partnership (amendment) Law 2009, ss. 59 (2) (4)-(6).

It is a general proposition that the death of a partner or bankruptcy of a partner in the case of artificial persons brings a partnership to an end by operation of law.[118] Hence, in the *locus classicus* case of *Gillespie v Hamilton,*[119] it was held that a partnership for a fixed term is dissolved by the death of either partner before the term has expired; in the same vein, the English Court in *Re Agriculturist Cattle Insce Co, Baird's Case*[120] held *inter alia*: "…in an ordinary partnership, the presumption is that the interest and the liability of a partner are terminated by a partner's death...". Flowing from the tenor of the above decision, section 34 of the Lagos State Partnership Law of 2003, had provided as follows: *"*subject to the provisions of Part 3 hereof and any agreement between the partners- every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner…" Nonetheless, it is pertinent to state that under section 69 (2) of the Lagos State Partnership (amendment) Law 2009, the death of a partner of a Limited Liability Partnership does not bring the partnership to an end by operation of law, although, the personal representative, trustees in bankruptcy, assignees, trustees under a trust deed may however not interfere or participate in the management or administration of any business or affairs of the Limited Liability Partnership or represent to members of the public that he is still a partner.[121]

Presently, in Nigeria upon the incorporation of a limited liability partnership, the persons who subscribed their names to the incorporation documents are mandated to be its partners and any other person may become a partner of the limited liability partnership by the limited liability partnership agreement.[122] More so, the mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners, shall be governed by the limited liability partnership agreement between the partners, or between the limited liability partnership and its partners. Thus, the limited liability partnership agreement and any changes, made in it must be filed with the Corporate Affairs Commission in the form and manner; and accompanied by the fees as may be prescribed by the Corporate Affairs Commission.[123] Similarly, an agreement in writing made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation documents may impose obligations on the limited liability partnership where such agreement is ratified by all the partners after the incorporation of the limited liability partnership.[124] However, it is pertinent to state categorically that in the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and the partners must be determined by the provisions relating to that matter as are set out in the Fifteenth Schedule of the CAMA 2020.[125]

Additionally, under section 770(1) CAMA 2020, a partner's contribution may consist of tangible, intangible, movable, immovable or property or other benefits to the limited liability partnership, including money, promissory notes, other

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[118]. "Limited Partnership."
[119]. [1818] 3 QB, 705.
[120]. [1870] Ch App, 753.
[121]. CAMA 2020, s.763; Partnership (amendment) Law 2009, s. 69(2).
[122]. CAMA 2020, s.761.
[123]. CAMA 2020, ss. 762(1)-(2).
[124]. CAMA 2020, s. 762(3).
[125]. CAMA 2020, s. 762(4).

agreements to contribute cash or property, and contracts for services performed or to be performed. Fundamentally, it is trite that the monetary value of the contribution of each partner must be accounted for and disclosed in the accounts of the limited liability partnership in the manner as may be prescribed.[126] It is against this backdrop that an obligation of a partner to contribute money, property, or other benefit or to perform services for a limited liability partnership must be in accordance with the limited liability partnership agreement.[127] Thus, a creditor of a limited liability partnership, which extends credit or otherwise acts in reliance on an obligation described in that agreement, without notice of any compromise between partners, may enforce the original obligation against such partner.[128]

Accordingly, where a court, by order, declare that the affairs of a limited liability partnership ought to be investigated, the Corporate Affairs Commission is statutorily mandated to appoint one or more competent persons as inspectors to investigate the affairs of a limited liability partnership and to report thereon in such manner as it may direct. However, it is not in doubt that the Corporate Affairs Commission is empowered to appoint one or more competent persons as inspectors to investigate the affairs of a limited liability partnership and to report on them in such a manner as it may direct.[129] In the same strength, the appointment of inspectors may be made in happenstances where: at least one-fifth of the total number of partners of the limited liability partnership make an application along with supporting evidence and security amount as may be prescribed; the limited liability partnership makes an application that the affairs of the limited liability partnership ought to be investigated; or in the opinion of the Corporate Affairs Commission, there are instances which suggest that: the business of the limited liability partnership is being or has been conducted with an intent to defraud its creditors, partners or any other person, or otherwise for a fraudulent or unlawful purpose; the business of the limited liability partnership is being or has been conducted in a manner oppressive or unfairly prejudicial to some or any of its partners, or that the limited liability partnership was formed for any fraudulent or unlawful purpose; the affairs of the limited liability partnership are not being conducted in line with the provisions of the CAMA 2020, or that, on receipt of a report of the Corporate Affairs Commission or any other investigating or regulatory agency, there are sufficient reasons to show that the affairs of the limited liability partnership ought to be investigated.[130]

It is trite law that any matter that relates to the *administration* of the Companies and Allied Matters Act 2020 is a matter that falls within the exclusive jurisdiction of the Federal High Court. Imperatively, section 251(1)(e) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides as follows:

> *Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from the operation of the Companies and Allied Matters*

[126]. CAMA 2020, s. 770(2).
[127]. CAMA 2020, s. 771 (1).
[128]. CAMA 2020, s. 771(2).
[129]. CAMA 2020, ss. 775(1)-(2).
[130]. CAMA, s. 775 (3).

> *Act or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act.*

In *Babington-Ashaye v EAMG Ent. (Nig) Ltd,*[131] the Court of Appeal while considering this provision held among others that:

> *There is no doubt under provisions of the Constitution as amended that the exclusive jurisdiction conferred on the Federal High Court is limited to the operation of any Act or Decree relating to companies and allied matters and any other Common law regulating the operation of companies…The simple fact that a company or a body is registered under the Companies and Allied Matters Act does not qualify every action brought by or against it as "matters arising from the operations of that act or regulating the operations of that act or regulating the operation of Companies incorporated under the Companies and Allied Matters Act" as contemplated by the provisions of section 251(1)(e) of the 1999 Constitution. Neither is it the law that a consideration of the parties is required before vesting the Federal High Court with jurisdiction.*

Thus, ordinarily, the Federal High Court has exclusive jurisdiction concerning matters relating to the administration of the Companies and Allied Matters Act. However, it would not have jurisdiction merely because the party involved is a company. Lagos State High Court has exclusive jurisdiction in relation to the administration of the Law establishing the Limited Liability Partnerships. Section 83 provides in this light that "the High Court of Lagos State shall exercise jurisdiction with respect to the interpretation and application of the provisions of this Law relating to registered Limited Liability Partnerships and all matters arising from this Law".

Flowing from the decision in *Babington-Ashaye v EAMG Ent. (Nig) Ltd*, it can be logically inferred that there exist certain jurisdictional challenges with respect to the practice and procedure of LLPs in Lagos State. With the enactment of the CAMA 2020, it is abundantly clear that there is now umbrella legislation that governs the practice and procedure of LLPs and LPs in Nigeria. However, a conscientious glean of section 83 of the Lagos State Partnership (amendment) Law 2009 gives rise to the poser of determining what court is empowered with the jurisdiction of entertaining matters arising from LLPs and LPs in Lagos State. Simply put differently, with the provision of LLPs and LPs under the CAMA 2020, is the Lagos State High Court still empowered with the jurisdiction of determining matters relating to LLPs and LPs domiciled in Lagos State?

It is elementary law that the Constitution of the Federal Republic of Nigeria 1999 (as amended) is supreme, thus any law that is inconsistent with the provision of the constitution must abate to the extent of its inconsistency.[132] Unequivocally, by section 251 (1)(e) of the CFRN, the Federal High Court is empowered to have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from the operation of the Companies and Allied Matters Act or any other

[131]. [2011] 10 NWLR (Pt. 1256) 108, 521-522.
[132]. CFRN, s. 1(1)(3); *Chief Olabode George* v *FRN* [2013] LCN/4063 (SC).

enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act, which explicitly refers to CAMA 2020. Similarly, by section 868 (1) CAMA 2020 which stands as the interpretation section to the CAMA 2020, it is clear that the phrase "Court" or "the Court" used concerning a company, means the Federal High Court, and to the extent to which application may be made to it as; court includes the Court of Appeal and the Supreme Court of Nigeria. Accordingly, it is the view of this paper that by juxtaposing the tenor of section 83 of the Lagos State Partnership (amendment) Law 2009 with a community reading of sections 251 (1)(e) of the CFRN and 868 (1) CAMA 2020; without any scintilla of doubt, there exist some jurisdictional challenge with respect to the determination of matters arising from LLPs and LPs domiciled in Lagos State and this by extension has the proclivity of thwarting the commercial relevance of establishing a limited liability partnership.

VI. CONCLUSION

Globally, the need for a more dynamic form of partnership to address the increase in litigation resulting in personal liability by partners and the consequent threat to partnership firms and their partners has necessitated the introduction of a form of partnership that would provide a limitation of liability analogous to that enjoyed by directors of a limited liability company. This is timely and important especially for individuals and groups providing professional services. In the same vein, the desire to protect investors and keep the trend of LLPs in growing economies around the globe encouraged the government of Lagos State to push for the creation of limited liability partnerships. Similarly, with the enactment of the Companies and Allied Matters Act 2020, by virtue of sections 746-810 of the CAMA 2020, limited liability partnerships and limited partnerships are now veritable vehicles for business in Nigeria, which is suited to a group of professionals with lots of experience and clients between them, as it allows them to pool resources together, thereby lowering the cost of doing business.

In summary, with the introduction of the CAMA 2020, local and foreign companies are at liberty to adopt LLPs and LPs as vehicles for running businesses in Nigeria. However, despite the great prospects of LLPs and LPs in Nigeria, this paper identified the jurisdictional challenge of determining matters about LLPs domiciled in Lagos State owing to the purports of section 83 of the Lagos State Partnership (amendment) Law 2009 and sections 251 (1)(e) of the CFRN and 868 (1) CAMA 2020. It is the light of the above stated that this paper recommends that to strengthen the commercial relevance of establishing LLPs and LPs in Lagos State, the provisions of section 83 of the Lagos State Partnership (amendment) Law 2009 should be amended in tandem with the unequivocal provisions of sections 1(1) (3); 251 (1) (e) of the CFRN and 868 (1) CAMA 2020 owing to the attendant provisions for the practice and procedure of LLPs and LPs in Nigeria under the CAMA 2020.

9

An Examination of The Functions of The Securities and Exchange Commission Under the Investments and Securities Act Of 2007

*Olukayode Olatunji

ABSTRACT

The Investments and Securities Act of 2007 is the current legislation enacted to regulate capital market activities. Section 313 repealed the Investments and Securities Act of 1999, which, hitherto was the law that regulates the market. Section13 replaces Section 9 of the Investments and Securities Act 1999 as it relates to the general functions of the Commission while the whole Act now made elaborate provisions on how the Commission will carry out these functions. Section 13 is the fulcrum of the whole Act. It is the fon enstorigo of the Act and very fundamental to the other provisions. Clearly, without Section.13 it will be difficult for the other sections to stand. A few years down the line this paper examined the potency of Section 13 and aligned it with other legislation that has been passed after the Act which affects or strengthens the provisions of Section 13. The paper thus recommended the amendment of some provisions of the Act, and those to be repealed, in line with global standards. It concluded that Section 13 in its present state cannot achieve the aim of making the Securities and Exchange Commission regulate Capital Market effectively, except when the proffered recommendations are strictly followed.

ESSAY CONTENTS

I. INTRODUCTION

The Capital Market is a market for shopping for long-term funds. The Capital Market is a market that lends for medium to long term and sometimes perpetually. In the case of medium-term, this is often a duration of two to five years while it provides long-term funds (usually 5 years and above) to corporations, industries, and governments including their agencies whose activities require a long period to mature hence cannot be appropriately assisted by the money-market. It is a market where securities like corporate stocks, shares, debentures, and bonds are traded.[133]

The economic strength of any nation is measured by the value of its accumulated wealth and by the rate at which it grows through savings and investment. It is the capital market that finances gross investment and the rate at which such investment is financed and accumulated is dependent on the capital market resiliency.[134] The primary market provides the avenue through which governments and corporate bodies raise fresh funds through the issuance of securities. It is otherwise known as the new issues market. Fresh funds can be raised in a combination of ways. These include public offers, right issues, private placements, etc.[135] The secondary market provides investors the opportunity to buy or sell securities that were earlier issued in the primary market. The secondary market can be organized or unorganized. An organized market is a stock market with a physical location, trading in designated (quoted) securities. An example of this is the Nigerian Stock Exchange[136].

An unorganized market has no physical trading location but transactions are conducted mainly through telephone calls and the computer. It is otherwise called an Over-the-Counter Market (OTC). The OTC trades in unquoted securities. The distinguishing factor between the two segments is that in the primary market, the funds raised from investors go to the issuing entity, while in the secondary market, the proceeds from the transactions go to investors.[137]

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[133] Akingbohungbe S.S, *The Role of the Financial System in the Development of the Nigerian Economy*, Securities Market Journal Volume 9 Special Edition, The Research and Market Development Division, Securities and Exchange Commission at pg. 28. The primary market is that segment of the capital market where new securities are traded or any prospectus offer of already issued securities is made. At the secondary market level, a market is created for trading on already issued securities of government, government corporations and other public companies to help in meeting the liquidity requirement of investors. Trading in already issued securities could be informal or formal either by floor trading on a stock exchange or through an Over-The-Counter (OTC) arrangement by an association of securities dealers. Secondary market activities in any new securities can only begin after allotment of the securities in the primary market.

[134] Phillips Toyin, *The Capital Market in Nigeria, Central Bank of Nigeria*, Bullion Vol.8 No.2 April-June 1983.

[135] The Market for New Issues (Generally referred to as the Primary market which involves Initial Public Offering (IPO) or raising additional capital by companies for their expansion, modernization and probably restructuring of their business to meet the challenges of the environment).

[136] The stock exchange presently has 13 floors located in Lagos, Abuja, Kaduna, Benin, Kano, Port Harcourt, Yola, Ibadan, Ilorin, Onitsha, Uyo, Abeokuta and Owerri. All these trading floors are linked to the trade server in Lagos. The objective is to ensure that trading in all the floors of the Nigerian Stock Exchange are online real time. The secondary market also has the organized stock market and the over the counter market.

[137] Securities and Exchange Commission, *Annual Report and Accounts* (2005) at pg. 57

The Market for existing securities is generally referred to as the Secondary market in that it follows the Primary market where shares are quoted or listed on the Stock Exchange. The Secondary market is generally regarded as providing an avenue for funds (called Liquidity) in that the investor who buys shares during the public issues of shares at the primary market is allowed to sell to another person (when he so desires) who is looking for these shares or securities to buy[138]. The Securities and Exchange Commission as the apex regulatory authority statutorily created is saddled with the dual responsibilities of developing and regulating the Nigerian capital market in line with the Investments and Securities Act (ISA) No.105 of 2007, with the broad objective of creating a stable, orderly, transparent, fair and efficient market which protect investors, encourages participation and fosters economic development.[139]

With the above background of the capital market, this paper focuses on the functions of the Securities and Exchange Commission as clearly articulated by S.13, it analyses the subsections in respect of their potency or weakness to enable a better production of the functions and powers of the Securities and Exchange Commission as the review of the Act is in the offing by Parliament. This essentially is the focus of this paper with the concluding part reflecting the state of the Securities and Exchange Commission itself. The paper will therefore be clearly articulated under the following headings

II. CONCEPTUAL CLARIFICATION

The Investments and Securities Act of 2007 which is under consideration by this paper with the focus on her S.13, repeals the Investments and Securities Act 1999. The Investments and Securities Act of 1999 itself repealed and replaced the Securities and Exchange Commission Act.[140] The question to ponder about here in defining concepts is whether the title of the Act is apt. The essence of the Act is to engage in matters relating specifically to capital or stock markets instruments, and that was what was experienced throughout the whole gamut of the Act. It, therefore, stands to reason that with the gathering together of all the laws relating to capital market matters usually described as "Securities Regulation" under one umbrella (i.e., I.S.A 1999), it became clear that the title of the Act had to change. In effect, it can no longer be referred to as the Securities and Exchange Commission Act anymore a name it has borne before 1999.

Hence the two keywords that need to be clarified here are 'Investments and Securities'. First, the term investments connote the application of money in the

[138] There is also another classification in respect of Public Issues:
a. Those that are quoted in the Stock Exchange.
b. Those that are not quoted in the Stock Exchange.

[139] Securities and Exchange Commission, e-allotment in The Nigerian Capital Market, What You Need to Know.at pg.14.

[140] Formerly Securities and Exchange Commission Decree 29 of 1988 which later became Securities and Exchange Commission Act CAP 406 LFN 1990. By S. 263 (1) (C) of Investments and Securities Act of 1999, the Act was expected to promote a more efficient and virile capital market, which would be pivotal in meeting the nation's economic and developmental aspirations. The Commission, thus stepped into the millennium on a renewed note to deepen and broaden the market for enhanced socio-economic development, Securities and Exchange Commission (SEC) and its functions, SEC Quarterly. January -March (2006), Volume 1 at Pg. 1.

purchase of some property or asset from which interest or profit is expected and which property is purchased to be held for the sake of the income it will yield.[141] It is not every time that predictions or forecast hits the target. Hence investments involve the taking of risks. It is the art of putting in something in form of property/resources in the hope that it would yield more property/resources at a future date. Investments, therefore, are any form of employment of capital in anticipation of yields or profits. Investment may be one or more of diverse kinds, ranging from the purchase of real assets, agriculture, manufacturing, merchandise to for instance purchase of financial assets that are intangibles such as bonds, treasury bills, treasury certificates, treasury stock, commercial papers, bankers' note, shares of equity stock in companies, shares of stock in insurance annuities, shares of loan stock, debentures and so on.

The second keyword is securities. The question that arises here is what are securities? The basic means by which funds are transferred in the Capital market is through the means of what is termed securities. By purchasing the securities issued by a company, a buyer acquires some interest in the company either as a part-owner if he is investing in what is referred to as equities or a lender if he is investing in the company's bonds or debentures. The basic characteristic of securities is the fact that they are intangible. This characteristic has brought to the front burner the need for investors to be protected which promoted the establishment of various institutions like the Securities and Exchanges Commission (S.E.C), the Stock Exchanges (S.E.), The Central Securities and Clearing System (C.S.C.S.), Investments and Securities Tribunal (IST), and also the setting up of various rules and regulations governing the operations of the capital market from time to time. The objective is to give adequate information to the Investors through the issue of a "prospectus" or placement document" depending on whether the issue is to the general public or private placement respectively.

The significance of the Capital Market cannot be overstated. They allow the efficient transfer of funds between borrowers and lenders. Individuals who have insufficient wealth to take advantage of all their investment opportunities which yield rates of return higher than the market rate can borrow funds and invest more than they would without Capital Markets. In this way, funds can be effectively allocated from individuals with few productive opportunities and great wealth to individuals with many opportunities and insufficient wealth. As a result, all (borrowers and lenders) are better off than they would have been without Capital Markets.[142] Securities represent intricate merchandise in a system of private capital. They are different from most of the merchandise familiar to the average person. A consumer who wants to pick a loaf of bread in the supermarket can touch

[141] *Re Wragg.Wragg v Palmer* (1919) 2 Cd.D 58 See Omidire Kolapo, *Regulation of Investments in Banking Business and Operations in Nigeria*, Current Developments in Nigerian Commercial Law, Essays in Honour of Chief Samuel Igbayilola Adegbite Edited by Sagay I..E. and Oliyide Olusesan. Throne of Grace Publishers, Lagos, (1999) at pg.36.

[142] Copeland I.T.E. and Weston Fred, *Financial Theory and Corporate Policy* (1913) 2nd Edition at Page 12. See also *The Final Report of the Panel on the Review of the Nigerian Capital Market*, Federal Ministry of Finance (1996) at Pg. 26. The submission effectively summoned up the whole basis for the establishment and operation of the Capital Market in any financial system.

and smell it. He can evaluate its worth by comparing it with other brands on the shelf. This is not the case with securities.[143]

Commenting on the nature of securities within the American legal system, Ratner submitted that[144] Securities occupy a unique and important place in American life. They are the instruments that evidence the financial rights and in some cases the power to control the corporations which own the great bulk of the nation's productive facilities. They are the instruments through which business enterprises and governmental entities raise a substantial part of the funds with which to finance new capital construction. They are the instruments in which many millions of Americans invest their savings to provide for their retirement income, or education for their children, or in hopes of achieving a higher standard of living. And, inevitably, they are the instruments by which unscrupulous promoters and salesman prey on those hopes and desires and sell the worthless paper to many thousands of people every year.

The above statement is properly scrutinized and applied to capture the nature of securities not only in America but is applicable globally. Hence, it is humbly submitted that the title of the Act should have been modified to be Investments in Securities Act as the word Investments is wider in scope than that envisioned by the Investments and Securities Act which only relates to matters arising from the running and operation of the Securities available at the stock market. This may probably be a good starting point for an excursion into the appropriate title to be given to this legislation in respect of future amendments and consideration of the law[145]

III. EXAMINATION OF SECTION 13 OF THE INVESTMENTS AND SECURITIES ACT

The opening words of S.13 of the Act in stating the functions and powers of the Securities and Exchange Commission clearly articulated that the Commission shall be the apex regulatory organization for the Nigeria capital market and shall carry out the functions and exercise all the powers prescribed in the Act.
What this means in effect is that the Securities and Exchange Commission is a regulatory agency with developmental responsibilities. Its prime objective is to protect investors in the capital market by ensuring fairness, orderliness, transparency, integrity, and efficiency in securities dealing. Securities and Exchange Commission therefore through its functions is to promote inter alia a developed market and stable environment for securities transactions, and thus indirectly fosters capital formation and economic development.[146]

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[143]Yagba T.A.T- *The New Regime against Insider Trading and the Internationalization of the Nigerian Capital Market* - Ahmadu Bello University Law Journal Vols. 11-16 (1993-1998).
[144] Ratner, *Basic Materials, Securities Regulation, Materials for a Basic Course,* (West Publishing Co.1975).PP.1-25.
[145] In the United States from where our Securities laws appear to lean upon (notwithstanding the historical origin from United Kingdom) their Act is referred to at different times as: Securities Act of 1933, Securities Exchange Act of 1934, Investment Companies Act of 1940. (as amended) Investments Advisory Act 1940.
[146] The capital market is a highly specialized market which trades in intangible instruments not

The Securities and Exchange Commission in respect of this provision has among others performed some acts the most remarkable one being the reduction in capital market fees,[147] which is a continuous process as the market temperature dictates. While the increasing importance of the capital market as a source of long-term funds for Nigeria's sustainable development is no longer in dispute, the issue of the cost of raising funds from the market has continued to generate concern especially among those who consider the cost to be very high. This belief, albeit generally unsubstantiated, is often cited by some commentators to be the major disincentive for many potential users of the Nigerian capital market and the market not to realize its full potentials.[148] Ultimately, the cost of reduction is the culmination of industry-wide efforts at ensuring that the domestic capital market is made more competitive to attract both local and foreign investments into the industry. It was observed that the transaction costs (structure) in the nation's capital market is one of the highest in the world, hence a committee was set up to review it. Transaction costs in both the primary and secondary markets would affect the attractiveness of the capital market and the pace of its development. Expectedly, high transaction costs discourage investment and fundraising activities and could shift funds to other more competitive investments in other sectors of the financial market.[149]

Another one is a new capital base for capital market operators which was muted but later suspended.[150] Also, the underwriting of all offers has now been made

amenable to physical examination. In traditional markets, which most households are familiar with, commodities traded can be seen and examined which makes for easy assessment. The capital market is different, as its instruments are intangible and complex, making quality assessment not as easy as with commodities. Investors could, as a result, be susceptible to sharp practices, if unprotected by the law. The market is built on integrity and confidence and activities which undermine these would hinder its development, the financial market and indeed, the economy. Therefore, regulation becomes necessary to build and maintain confidence in the integrity of the capital market.

Regulation of the capital market popularly takes the form of establishment of effective framework of legislation, and institutions to administer such legislation. Most countries practice two-layer (dual) regulation of the capital market, that is, self-regulation by self-regulatory organizations (SROs) and statutory regulation, administered by a government agency established by statute to undertake such functions. The extent of statutory regulation vis-a-vis self- regulation varies among countries. A Primer on the Capital Market, *A publication by the Securities and Exchange Commission*, Capital Market Education Series.

[147] *Report of Survey on cost of raising funds from the Nigerian Capital Market* (2000, 2004) SEC News, Journal of The Nigerian Securities and Exchange Commission, Volume 2 Number 6, December, 2005. The capital market has been globally recognized as important source of funding development projects by both private and public sectors. In Nigeria, governments at various levels have over the years accessed the market to finance such projects as housing development, water and roads. Corporate bodies have also purchased machineries and expanded their operations from funds obtained from the market.

[148] *Report of Survey on cost of raising funds from The Nigerian Capital Market* (2000,2004) SEC News; Journal of The Nigerian Securities and Exchange Commission. Volume 2 Number 6, December, 2005.(Supra footnote 16)

[149] Ekineh Daisey**,** *Building Blocks for the Development of an efficient Bond and Equity Markets*, SEC Quarterly, April-June,(2009) at pgs.3-9**.**

[150] This may be argued as policy somersault or inconsistency and likely to result in sending a wrong signal to investors. However, the suspension might not be unconnected with the Global Financial Crisis which has contributed to the crash of share prices thereby leading to its suspension to that extent it can be seen as the regulator been realistic and responding to the vagaries of the market forces.

mandatory. All offers must at least be 80% underwritten. The essence is to reduce the incidence of under-subscription and ensure that the issuing houses and stockbrokers have higher stakes in the issues they bring to the market. Furthermore, A Code of Conduct for Shareholders Associations in Nigeria was published to regulate their activities. In her efforts at reviving the Capital Market the Securities and Exchange Commission also garnered some ideas and visions on these. Some of the measures suggested to stem the slide in the capital market are: introduction of Market Makers, Constitution of a Presidential Advisory Team on Nigerian Capital Market, Attorney General of the Federation was directed to issue an exemption to the provisions of the relevant sections of the CAMA 1990 on share buyback to permit quoted companies to buy back up to 20% of their shares,[151] and the Nigerian Stock Exchange (NSE) to delist all the moribund companies earlier advertised[152].

In *Unilever Nigeria PLC v International Standard Securities Ltd*[153] the word 'shall' was interpreted by the court as follows[154]-

We shall now consider the use of the word ''shall" in section 236 (5) of ISA. A critical examination and interpretation of the word "shall" in this subsection to determine whether the Act intended that it be mandatory or directory is necessary. Several judicial authorities have held that whether "shall" is mandatory or directory is a question of interpretation which depends on the context of the statutory provision under construction. In *Amokedo v. IGP, 1999, 6 NWLR, part 607, 467* the Supreme Court held that the principle governing the use of "shall" in a legislature sentence is that it is generally imperative or mandatory. Ogwuegu JSC (at pages 485 – 486) stated that "in its ordinary meaning "shall" is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. "shall", however, is sometimes intended to be directory only

[151] A company may not normally own shares in itself. Trevor v Whitworth (1887)12 A. C. 409 which has been statutorily stated under S. 160(1) CAMA '90 but S. 160(2) admits exceptions. Under English Company Law, the Companies (Acquisition of own shares) Clearing Shares Regulations SI 2003/1116 came into force on the 1st December 2003. It allows public companies to buy back up to 10 percent of its issued shares and retain them to reissue at a later date. A company may also buy back more than 10 percent but it must cancel those excess Shares. Dignam A and Lowry J, *Corporate finance and management issues in company law, recent developments*, (2006) Section A, Capital 1 at pg. 1.

[152] The Nigerian Stock Exchange as a self-regulatory organization also placed suspension on the trading of 28 companies that have been inactive or partially active on September 12, 2008.

[153] 2007 NSLIR at pg.275.

[154] In the concluding parts of the opening paragraph it states "… and in particular shall" which means the word shall was repeated 3 times under this section which leaves no one in doubt about the importance or the obligatory nature of the statute in not only making the SEC the 'police' of the capital market but makes it clear that its functions and powers are compulsory i.e. it is a must that they be carried out. Hence, the 'word' shall in a statute generally conveys a peremptory meaning *Amadi v Essien* (1994) 7 NWLR at 90. *Mokelu v Federal Commission of Works* (1976) 3 S.C. 35, *National Bank of Nigeria v Alakija* (1978) 9-10 S.C. 59 *Achineka v Ishagba* (1988) 4 NWLR (Pt 89) 411. The word "obligation" was also defined in Amadi's case as being derived from the Latin phrase "obligatio". It generally means that which a person is bound to do or forbear. Any duty imposed by law, promise, contract or relations.

and in that case, it is equivalent to "may" and will be constructed as being merely permissive.[155]

In *Securities and Exchange Commission v Osindero Oni and Lasebikan*[156] the court affirms that the Securities and Exchange Commission was established by the Investments and Securities Act No. 45 of 1999[157] Under the Act, the Commission is given the power to regulate investments and securities business in Nigeria under sections 8(u)[158] S.8(w)[159] and S.8(y)[160] of the Act, the Commission is endowed with the power to prevent fraudulent and unfair trade practices relating to the securities industry, to disqualify unfit individuals from being employed anywhere in the securities industry, and to perform such other function and exercise such other powers not inconsistent with the Acts as are necessary or expedient for giving full effect to the provisions of the Act. These powers are given to the Commission by the Act to ensure the integrity of the Securities market in Nigeria.

A. regulation of investments and securities business

By S. 3(a) the SEC is empowered to regulate investments and securities business in Nigeria as defined in the Act. Regulation can simply be described as a systematic control by which an individual or a corporate body or organization is made to obey laws, rules, and regulations of a particular body or authority, or institution. It usually sets out the conduct, place, and time for carrying out certain operations specified by law.[161] The following tools of regulation are applied by the Commission in exercising its regulatory power. They are Registration,[162]

[155] In *Amadi v NNPC* (2000) 10 NWLR, Part 674 page 76 at 97 the Supreme Court held that if the word shall is used in directory sense then the action to be taken is to obey or fulfill the directive substantially.

[156] (2009) 5 NWLR 377.

[157] Now Investments and Securities Act 2007.

[158] Now S.13 (aa) ISA 2007.

[159] Now S.13 (bb) ISA 2007.

[160] Now S.13 (dd) ISA 2007.

[161] Securities and Exchange Commission, *Issues in Capital Market Development*, Volume 2 December 1993- June1997, at pg.12 Regulation suggests the direct intervention or control by government or its agencies in the economy or financial system. More often than not, a legal framework is employed to institute regulatory measures.

[162] Registration is regarded as the hallmark of regulation. It is the entry point to the capital market. With Registration, the fitness or otherwise of operators is measured. It is therefore the most powerful tool of regulation. Akele Sylvester, *The Role of SEC in Capital Market Regulation*, SEC News Journal of the Nigerian Securities and Exchange Commission, October 2002 at page 9. Akamiokhor George, *The Role of Regulatory Bodies in Capital Market Development, The Nigerian Experience*, Being text of a paper presented at the International Conference on Promoting Capital Markets in Africa organized by the Securities and Exchange Commission, Nigeria in collaboration with the African Development Bank. 11th - 13th November, 1992, Abuja, Nigeria.

Surveillance,[163] Investigation,[164] Enforcement,[165] Inspection[166] , and Rule Making.[167] More importantly and a major step in the regulation of the market was the Publication by the SEC of the Code of Corporate Governance for Public Companies 2011.[168] In *Union Bank of Nigeria (UBN) Plc Registrar's Department v Securities and Exchange Commission (SEC)*[169] it was noted that in law, the Codes, Rules, and Regulations made by the SEC and the Self-Regulatory Organizations as authorized by SEC and its enabling law (ISA1999) are not some inferior forms of legislation. Legally, the Rules and Codes of practice guiding the professionals' conduct carry out the maker's commands, as does an Act of the National Assembly. This is collectively known as delegated legislation[170]

B. Registration and Regulation of securities exchanges

Section 13 (b) allows SEC to register and regulate securities exchanges[171], capital trade points, futures, options and derivatives exchanges, commodity exchanges, and any other recognized investment exchange[172]

Securities as noted above have some characteristics which make them vulnerable and make regulation of it more compelling[173] This also ensures the need for the

[163] Surveillance is important in the capital market. It ensures that rules, regulations and the securities laws are complied with by all participants. Primary market surveillance focuses on activities of issuing houses, trustees and other professionals. Secondary market surveillance focuses on the stock exchange and brokers\dealers. Securities and Exchange Commission, Annual Report and Accounts, The Nigerian Capital Market (2000) at pg. 22

[164] The Commission investigates all reports of violations of securities laws, rules and regulations. Information leading to investigations can emanate from surveillance activities, complaints by investors and operators and members of the public or through newspaper reports. Udora C.A, *Investors Protection in the Capital Market*, Being the Text of a Paper presented at the Workshop on Introduction to Capital Market on March 12, 2003 at the Lagos Zonal Office of the Securities and Exchange Commission.

[165] The Commission ensures that market operators comply with Securities Laws and the Rules and Regulations of SEC.

[166] The Commission often embarks upon routine inspection of the books of operators.

[167] The ISA gives the Commission powers to make rules and regulations for the market. This is in section 262 now S. 313 of ISA 2007 which states that the Commission may, from time to time, make rules and regulations for the purpose of giving effect to the provisions of the Act without prejudice to the foregoing provisions.

[168] In order to improve corporate governance, the Securities and Exchange Commission in September 2008 inaugurated a National Committee chaired by MR. M.B Mahmoud for the Review of 2003 code of Corporate Governance for Licensed Pension Operations June 2008. See also 2) Central Bank of Nigeria-Code of Corporate Governance for Banks and Discount Houses in Nigeria May 2014 and lately 3) The National Code of Corporate Governance 2018.

[169] In Re: *Securities and Exchange Commission (SEC) v Bonkolans Investments Limited and others*. Appeal No. IST/APP/03/2003. Case No. APC/21/2003.

[170] Pearce D.C, *Statutory Interpretation in Australia*, Butterworth, (1974) at pages 1-2 See also Igwe J.U.K. , *Pensions Fund In Nigeria, Comparative Law* Yearbook of International Business, Kluwer Law International Netherlands,2003 pgs. 257-283, at pg. 273.

[171] There is no transitional provision in respect of existing exchanges. This gives the impression that there is nothing in existence. The inclusion of the words "including existing ones" if put in bracket in the first line of the subsection after securities exchanges would have cured this lacuna.

[172] The need for regulation by the SEC is borne out of the defined and indeed the necessity of protecting the investing public from fraud, instill confidence in the system and ensure the emergence of financial markets that will enhance economic growth and development. Anthony Idigbe, *Capital Market Laws and Professional Ethics, The Nigerian Solicitor's Perspective*, Being paper delivered at the 3 day Workshop on Understanding Capital Market Laws and Ethics for Business Executives organized by SEC, held at the SEC Lagos Zonal Office on the 4th of April 2006.

[173] Ratner, *Basic Materials, Securities Regulation, Materials for a Basic Course*, (West Publishing Co.1975).PP.1-25. 2.Akanle Oluwole, *A Decade of Securities Regulations in Nigeria* 1980-1990 (3)

institutions created as a medium to market these securities inevitably to also be registered and regulated hence this subsection.

Regulation of the Capital Market is crucial to the effective regulation of the entire market and is necessary to ensure a clean and efficient market that the public can have confidence in as a result of its integrity and sincerity both in practical terms and equal applications of laws to all participants in the market.[174] It, therefore, aids professionalism and thus minimizes the oversight and regulatory activities of the organizations. There is a greater need to not only monitor trading in the market but also to prohibit misrepresentation, deceit, and other fraudulent acts and practices. It is also imperative that price manipulation should be prevented as well as the application by "corporate insiders" or "control persons" of non-public information to secure financial advantage (usually referred to as Insider Trading).[175] Regulation is necessary because of the complexity of the securities industry which can give undue advantage to operators to use their expertise and access to information to over-reach their amateur clients. The primary goal of market regulation is the protection of investors in other to gain their confidence. This is understandable against the background that, although they are the livewire of the market, they are highly vulnerable to manipulation, hence they are the major forms of protection under capital market regulation because anything that detracts from investors' confidence can spell doom for the capital market. To penalize violation of the law and in the process provide remedies to those injured because of such violations hence strengthening the confidence of the investors in the system. It is humbly submitted that this subsection is potent enough for the Securities and Exchange Commission to utilize in regulating the capital market.

C. Regulation of all powers of public companies and entities

By S.13 (c) SEC is empowered to regulate all offers of securities by public companies and entities. Although this is a new provision, it is clear that it is wider in scope than the repealed one as it has brought within the regulatory purview of the SEC 'public entities, which are hitherto statutory corporations that have been converted to public companies and privatized or commercialized for effective and

Loss, *Fundamentals of Securities Regulations* (Little Brown & Co. 1983) The need for regulations of the Capital Market is informed by the peculiar nature of the market, the type of commodities traded in the market, the preclusion of owner/seller and consumer/buyer of securities from the market, the engagement /employment of intermediaries, the need to protect the investor and the market and the need to enforce the laws, rules and regulations.

[174] The need for regulation of the Capital Market is motivated by the desire to protect the Investing Public from malpractices, instill confidence in the system and ensure financial and economic stability, which are pivotal to economic growth and development. History has shown that inadequate and absence of regulation is detrimental to the Capital Market as it encourages sharp practices by participants (e.g. investors, operators and issuers). Public confidence is a necessary tonic for attraction of savings from the citizens for investment. 'Corporate Insiders' are top management and policy-making personnel (or their close associates) of company-issuers who could take undue advantage of their positions to use privileged information, in their companies. Such transactions are geared towards maximizing profit or minimizing losses to the detriment of not only the company but also other investors in the company. Securities and Exchange Commission Quarterly, *A magazine of the Securities and Exchange Commission*, Nigeria, January – March, 2008.

[175] Capital Market globally thrives on trust, confidence, transparency and integrity. The level of investment in the Capital Market is likely to be high where the confidence of the investor is assured. The contrary of course will be the result where the level of confidence the investors have in the market is low. In effect the quantum of investment will nose-dive.

efficient performance. The approach enhances one of the essence or philosophy of the capital market which is to redistribute wealth amongst the citizens[176].

D. Registration of securities of public companies

Section 13 (d) allows SEC to register securities of public companies. This section has been reworded to give actual effect to the intention of the legislature. The public company is a vehicle designed specifically to raise a large amount of capital from the general public, it must as a matter of necessity be regulated. The emphasis on public companies, confirms the fact that private companies cannot raise capital from the general public under S.22 of Companies and Allied Matters Bill 2016**.** Private companies capitalize and run the company with the founder's personal savings, friends, relatives, or bank loans. Section 24 defines a public company as a company other than a private company. Section 27 (2) prescribes the minimum share capital as N2, 000, 000.00 for such public companies.

This subsection has replaced the old S. 8 (c) of the Investments and Securities Act of 1999 which provides that the Securities and Exchange Commission shall register securities to be offered for subscription or sale to the public which was too restrictive as it excludes Bonus Issues, Rights Offers and Private placements from registration. It is however humbly submitted that S. 13(c) and (d) should have been drafted together to read as follows, Register and regulate all offers of Securities by public companies and entities as defined under the Act. In effect, S. 13 (d) is superfluous as it has already been taken care of by the first part of S. 13 (c) offer of securities is not different from other types of securities.

E. Rendition of assistance to promoters of securities exchanges

Section 13 (e) empowers SEC to render assistance as may be deemed necessary to promoters and investors wishing to establish securities exchanges and capital trade points.[177] This provision has replaced the old S.8 (d), which hitherto included 'funding' as part of the presumed necessary assistance to be rendered by the Securities and Exchange Commission to such institutions. It has been argued elsewhere that the whole of S.8 (d) should be removed in its totality because it is unnecessary, as the Commission does not believe that her funds should be used in

[176] There is no doubt that the word "entities" is wide enough to include Partnership and Private Companies at least when it relates to Mergers and Acquisition only. Such entities are for now regulated in respect of such other matters by the Corporate Affairs Commission.

[177] This is one of the developmental functions of the SEC and in carrying out this mandate, the Commission uses the following tools among others-

a. Public/investor education through workshops, seminars, conferences.
b. Publications which focus on different categories of market participants.
c. Research/survey
d. Promotion of new products and processes
e. Promotion of capital market studies in secondary and tertiary institutions
f. Building capacity of regulators and operators
g. Promotion of good corporate governance in public companies
h. Strengthening shareholder's associations for more focused activism etc.

Securities and Exchange Commission Publication, e-Allotment in the Nigerian Capital Market, What You Need to Know.

funding or promoting such institutions being purely private sector organizations.[178] It is humbly submitted that with or without the inclusion of the word funding there is still no material difference between the two provisions as to suggest a radical departure from the previous provision. The question to ponder about therefore is why the retention of this provision? The answer is not far-fetched and can be based on the fact that the two existing exchanges i.e. The Nigerian Stock Exchange and The Abuja Commodities Exchange enjoyed tremendous government support[179] (despite the private sector syndrome) right from inception and in the course of their existence. To turn the other way therefore on the part of the government now it seems, would not augur well for the growth of the capital market, and by extension the Commodities Market.

F. Registration and regulation of capital market operators

Section 13 (g) empowers SEC to register and regulate corporate and individual capital market operators as defined in the Act[180] The implication is that S. 13 (g) is now wider in scope in respect of ascertaining who is or who is not a capital market operator as it has deleted SS. 29 and 30 of Investments and Securities Act of 1999 and clearly defined who a capital market operator is under S. 315 of the Act, the definition section.[181] Registration is essential as it enables the Securities and Exchange Commission to keep in check capital market operators and reduce any potential infractions in the Capital Market operations by such operators[182].

G. Registration and Regulation of venture capital funds and collective investments schemes

By S. 13 (h) it is the responsibility of the SEC to register and regulate the working of venture capital funds and collective investments schemes in whatever form. The effect of S. 13 (h) is that apart from being wider and better than the old S. 8 (g) which was restrictive, it also allows the inclusion of the word in "whatever form" for the Securities and Exchange Commission to regulate investments scheme. This has led to the graduation of schemes like Esusu, Adashi, Ajo from mere 'Statistical' purpose only to 'Regulation' and 'Registration' by the Securities and Exchange Commission.[183]

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[178] Securities and Exchange Commission, Proposed Amendments to the Investments and Securities Act (I.S.A) No 45, 1999, Exposure Draft, at pg.13.

[179] *Report of the Panel on the Review of the Nigerian Capital Market*, Final Report, Federal Ministry of Finance, September, 1996.

[180] Earlier, by S. 13 (f) SEC is empowered to prepare adequate guidelines and organize training programs and disseminate information necessary for the establishment of securities exchanges and capital trade points.

[181] It has perhaps succeeded in avoiding the thorny issue of who is or who is not a capital market operator as a Capital Market Operator has been defined as any person that performs a specific function in the capital market. See Professor *A.B. Kasunmu (SAN) v Securities and Exchange Commission and Anor*. (Suit No. FHC/L/CS/70/2001 confirmed by the Court of Appeal in *Securities and Exchange Commission v Professor A.B. Kasunmu. S.A.N. and Anor*. (2009) 10 NWLR (Pt.1150) 509; (2012)1BFLR 617. See also *Chief Afe Babalola (SAN) v Securities and Exchange Commission and anor*. Suit No. FHC/ABJ/CS/416/2002.

[182] S. 13 (i) facilitate the establishment of a nationwide system for securities trading in the Nigeria capital market in order to protect investors and maintain fair and orderly markets.

[183] In the past twenty years, more markets and instruments have evolved providing investors new opportunities to enlarge or better diversify their portfolio, and issues more choice of instruments to hedge or finance projects. Unit Trust (mutual funds) are now the principal vehicles for public participation in the capital market. In some countries over 50 percent of households invest in mutual

H. Promotion of information and communication technology facilities

Section 13 (j) empowers SEC to facilitate the linking of all markets in securities with information and communication technology facilities. Information communication technology aids globalization (with the world turning into a village through effective use of modern communication networks i.e. Internet, computer; phone, etc.)[184]. It would foster efficiency, enhance competition and increase the information available to brokers, dealers, and investors**.** This provision it is opined ensures that SEC is in tune with modern technology and the implications are far-reaching as is it likely to eliminate sharp practices like insider trading and ultimately makes the Nigerian Investment Market an ultimate destination for global investors.

I. Protection of investors in the market through fair and orderly market and nationwide trust scheme

Section 13 (k) empowers SEC to act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets and to this end establish a nationwide trust scheme to compensate investors whose losses are not covered under the investor's protection funds administered by securities exchanges and capital trade points.[185] This subsection as potent as it is has not been implemented more than 13 years after the ISA 2007 and it is difficult to fathom why this is so. It is submitted that it is time for SEC to look at this subsection and carry out its implementation to fulfill her developmental responsibility and make the Capital Market more attractive. Perhaps, if it had been implemented the effect of a global financial crisis would not have been as devastating as it was on the Nigerian Capital Market.

J. Power of SEC to keep and maintain a register of foreign portfolio investments

Section 13 (l) empowers the SEC to keep and maintain a register of foreign portfolio investments[186]. In truth, S. 13 (1) has taken the regulatory function of foreign direct investment in respect of keeping and maintaining register outside the purview of the Securities and Exchange Commission as they do not have

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funds. The rapid growth in private pension funds and mutual funds has provided considerable pool of funds to the financial market. Today, securities are structured to meet issuer's peculiar needs and investors' objectives. Straight equities and bonds now have 'rivals' in derivatives and hybrid products. Securities and Exchange Commission, Quarterly, .January-March 2006. .

[184] The Stock Market is information driven. The Stock Exchange Market is a specialized market and therefore, technical. Only those that are knowledgeable on its operations are in a position to take rational and informed decisions to invest in the market.

[185]This sub-section is directed at protection of Investors and therefore compensatory in outlook. It is different from the National Unit Trust Scheme which must be promoted to hold shares in quoted companies particularly in the context of Nigeria's privatization programme. This is aimed at redistribution of wealth. Securities and Exchange Commission, *Annual Report and Accounts* (2005), at pg.67. It was noted that a nationwide compensation scheme apply to all operators except for cases of defalcation arising from stock broking business which is covered by the investors protection fund. It is not meant to assuage the shortfalls of losses under the investors protection fund.

[186] This should have been aligned with S. 13 (q) which empowered SEC to authorize and regulate cross- border securities transactions. It is a new provision which provides legal basis for the regulation of cross border securities transactions by the Commission. *Securities and Exchange Commission's Proposed Amendments to the Investments and Securities Act* (ISA) No. 45, 1999, Exposure Draft, 2003.

jurisdiction on this matter in the first place. This is within the jurisdiction of the Nigerian Investment Promotion Council established under the Nigerian Investment Promotion Commission Act of 1995. [187] Foreign investment flow can be attracted into an economy in various ways. Among the various methods are floatation of a sovereign bond, domestic companies directly accessing the global capital markets for funds through the issuance of Global Depository Receipts (GDRs), investment by foreign institutional investors and individuals, the commitment of new funds by existing foreign investors, and foreign firms establishing subsidiaries or entering into joint venture arrangements with the locals[188].

The distinction between the two i.e. Foreign Direct Investment and Foreign Portfolio Equity Investment has been succinctly clarified to the effect that, FPEI is a short term capital inflow into an economy by investors whose objective is to buy and trade in quoted securities without participation in management or residence in the recipient country. On the other hand, FDI is "bricks and mortar" whose owners are not looking for immediate or short-term capital gains. Apart from venture capital which usually, first starts as FDI and then ends up as FPEI, the distinction between FPEI and FDI is fairly perceptible from the characteristics of the investments and the investors. In terms of access to the Nigeria market and exit therefrom, both the NIPC Decree and the Foreign Exchange Decree give equal treatment to both FDI and FPEI, however, there is no question that in terms of real value to a nation's social and economic development, FDI has more roles to play than FPEI. Thus, if a nation were to choose between FDI and FPEI, it is almost automatic that FDI will rank ahead of FPEI. This, therefore, appears to be the justification for the obvious importance, which the Nigerian government attaches to FDI over FPEI, demonstrated by the fact that while the whole of the NIPC Decree is dedicated to FDI, a section only of the Foreign Exchange Decree is devoted to FPEI[189]

K. Power to register agencies and intermediaries

By S. 13 (m) the SEC is empowered to register and regulate securities depository companies, clearing and settlement companies, custodian of assets and securities, credit rating agencies, and such other agencies and intermediaries. This section has changed "central depository companies" to "Securities depository companies" which gives room for liberalization of the depository process. This provision gives implicit recognition to the Central Securities Clearing System (C. S . C .S) The Report of the Panel on the Review of the Nigerian Capital Market noted that the

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[187] S. 2(l) See also S.26 of the Foreign Exchange (Monitoring & Miscellaneous Provisions) Act 1995.
[188] Securities & Exchange Commission, *Annual Report & Accounts* (2005).op.cit. footnote, 53 supra.
[189] Obayomi Oluwole *Foreign Portfolio Equity Investments and Securities Regulation in Nigeria,* Current Developments in Nigerian Commercial Law, Essays in Honor of Chief Samuel Igbayilola Adegbite, Edited by Sagay I.E.and Oliyide Olusesan, Throne of Grace Publishers, Lagos, (1999). S. 13(l) should be read along with S .26 of the Foreign Exchange Act No. 17 of 1995 which provides that:

1. A person, whether -
a) Resident in or outside Nigeria; or
b) A citizen of Nigeria or not, may deal in, invest in, acquire or dispose of, create or transfer any interest in securities and other money market instruments whether denominated in foreign currencies or not.
2. A person may invest in securities traded on the Nigeria capital market or by private placements in Nigeria.

recent initiatives of the Stock Exchange Regarding the adoption of screen-based trading and Central Clearing System are ill-conceived and are not likely to succeed in moving the capital market forward[190].

The above statement has been overtaken by events as the Central Securities Clearing System has shown resilience by rising to the challenge of providing a depository and clearing system intended to move the market forward. E-Commerce, E-dividend, E-IPO, E-Bonus are the positive outcomes of the innovation created by the Central Securities Clearing System and the Automated Trading System. Indeed, there is hardly any transaction in the Capital Market that is buying and selling that will not pass through the Central Securities Clearing System.

L. Prevention of Insider Trading

Section 13 (n) empowers the SEC to protect the integrity of the securities market against all forms of abuses including insider dealing. This has been redrafted and by virtue of this subsection (n) the Securities and Exchange Commission (SEC) henceforth is not only to protect the integrity of the securities market against abuses arising from the practice of insider trading (old S. 8 m) but the scope has been widened to cover all forms of abuses in the capital market as abuse is not restricted to insider trading only.[191] This it is opined, is a right step in the right direction at it allows SEC to probe any form of infraction in whatever form as Insider Trading relates only to trading in securities and is not wide enough to cover other infractions in the capital market. In effect, S.13 (n) is all-encompassing.

M. Power to promote and register a self-regulatory organization

By Section 13 (o) SEC must promote and register self-regulatory organizations including securities exchanges, capital trade points, and capital market trade associations to which it may delegate its powers. This is a re-enactment of Section 8 (n) of the ISA. 1999 which has removed the words "act as a regulatory apex organization for the Nigeria Capital Market" as it was not supposed to be there in the first place and has been appropriately expressed at the beginning of Section 13 where it properly belongs. Although mentioned under Section 13 b, the question to ponder here is why was Commodities Exchange was hitherto part of Section 8 (n) omitted under the new Section 13 (o)[192]. This subsection has the legal effect of

[190] See The Panel's Report at pg. 117 *op.cit.* footnote 10 and 47 *supra*.

[191] *Proposed Amendments to the Investments and Securities Act* (I.S.A) No. 45 1999). Insider Dealing clearly is wider in scope than Insider Trading.

[192] It is either it was inadvertently omitted as the Implementation Steering Committee (ISC) which was inaugurated in August 2004, to implement the recommendations of the Inter-Ministerial Committee (ITC) resolved that the Abuja Securities and Commodities Exchange (ASCE) shall be regulated by the Securities and Exchange Commission. Hence with the use of the word 'include' it may not be unreasonable to conclude that Commodities Exchange can come under the ambit of the provision. Another plausible explanation is to assume that it was deliberately omitted to fall in line with the thinking of the committee that a FMC may be established in future to regulate Commodities Exchange's operations. After all, the regulation of ASCE is under the Ministry of Commerce and Industry. The latter argument appears stronger since the self-regulatory organizations were clearly separated under the new sub section unlike the former sub-section that couched them together by referring to them in generic terms.

making such exchanges the agent of the Securities and Exchange Commission in such circumstances with attendant legal consequences.[193]

However, in the proposed amendment of the Investments and Securities Act, it was clearly emphasized that Section 13 (o) be carefully drafted to empower the Commission to encourage promoters of self-regulatory organizations and capital market trade associations to create a more focused and decentralized regulatory regime in which all market participants will play a part. The word 'promote' does not entail financial assistance or involvement in the establishment of the organization by the Commission. How the word promotes in this subsection will be interpreted in practice will be a subject of serious debate in view of the position of the SEC as stated above. It is submitted therefore that there is no way financial implication will not be involved as hitherto such organizations have always been aided financially by the government. Indeed, one of the reasons why commodities exchange had not effectively taken off in Nigeria despite our abundant resources in terms of Gold, Iron, Bauxite, Cash Crops, etc. is because of the extra financial implication. The Abuja commodities exchange is not that effective because it is located where it will be difficult for farmers to bring their products for trading when the cost implications are considered it is opined that this is the time for the government to take the initiative by locating six commodities exchanges in the six regions of Nigeria.

N. Removal from SEC the power to regulate and approve mergers and acquisitions

Hitherto Section 13 (p) empowers SEC to review, approve and regulate mergers, acquisitions, takeovers, and all forms of business combinations and affected transactions of all companies as defined in the Act.[194] Takeovers were included in the provision. Significantly the words "and affected transactions of all companies as defined in this Act" were added to accommodate partnerships, private companies, and public entities as envisaged under S. 118. This has put to rest the controversy as to whether a private company can come under the regulatory purview of the Securities and Exchange Commission or not as the Securities and Exchange Commission only regulates public companies[195]. How this would be interpreted in practice remains to be seen more essentially viewed from the background of the features of a private company and partnership within our climes. The starting point may be to restrict the involvement of the Securities and Exchange Commission to only situations where a private company or partnership is interested in merging. This is the position of the Act at least for now.[196] A

[193] In effect, it makes such self -regulatory organizations the "agent" of the Securities and Exchange Commission. *Olufosoye v Fakorede* (1993)1NWLR 747

[194] This confirms the repeal of PART XVII of CAMA (Later SS. 99-122 of ISA 1999) Now PART XII SS. 117 -151 of the ISA 2007 All the powers of the Commission are restricted to the Act. .

[195] The anomaly in this assertion however has been clearly and forcefully argued by a learned writer that "…..with the advent of the Investments and Securities Act…… the CAMA's reach has become necessarily curtailed in key respects, such that several issues currently viewed as aspects of corporate law under the CAMA ought properly be viewed as aspects of securities regulation." Nnnona Chukwuemeka George, *The province of Securities Law Defined*, Streamlining the Interface of the Companies and Allied Matters Act with the Investments and Securities Act, Nigerian Law Reform Journal (2011) NLRJ at pgs. 45 -78.

[196] For the legal roadblocks that would be encountered in the process of implementing this novel provision, see Obiuwevbi D.A. and Guobadia Osahon O, *The Partnership as a party to Merger*

consistent progression of recognition of other forms of business association into securities regulation would be a welcome development.

The opinion of the court in the case of *Beta Consortium Limited v Securities and Exchange Commission*[197] is relevant in this respect. The court in defining a holding company relied on Section 388 of CAMA which states that for the purposes of this Act, A company shall be deemed to be the holding company of another if the other is its subsidiary. The Webster Dictionary also defines a holding company as a company that holds stock in one or more companies for investment or operating purposes or both.[198] However, the Federal Competition and Consumer Protection Act 2019 under S.165 has repealed S.118- 128 of the Investments and Securities Act 2007[199] which renders nugatory this sub-section as it relates to mergers and acquisition[200]. Part XII S.92 – 103 of the FCCPA 2019 are the new Provisions on Mergers and Acquisitions. The ultimate of this submission is to the effect that future amendments of the Investments and Securities Act 2007 will delete S. 13 (p) of this Act since Mergers and Acquisitions are no longer within the regulatory purview of the Securities and Exchange Commission but within the competence of the Consumer Protection Council established under the FCCPA 2019.

Transactions under Nigerian law: Problems of Implementing a Statutory Reality, The Justice Journal Volume,4 (2012) at pgs. 114-134. Justifying, the need for this landmark provision, more importantly in this present dispensation of securities development and growth, they stated clearly at Pgs. 123-124 that "the advantages which this new status of the partnership introduces are clearly evident. To begin with, partnerships and other businesses which are conducted under business names constitute a large chunk of our investible and productive capital. The logic is that if such vital portion of our productive capacity would no doubt be denigrated. It is clear that the Investments and Securities Act provisions has demolished, as it were, a huge economic wall and will enable many new entrants into the market. The limited company, which has been traditionally favored by capital market measures and legislations, actually represents, in Nigeria, less than a majority of our capital market resources. The opening up, for now, of the partnership and perhaps in the near future of other forms of entrepreneurships would further boost the operation of this market. It is evident from the provisions that the Investments and Securities Act has adopted volume of investments not corporateness or legal status, as the basis for determining participation in the merger control process. See especially S. 120(1)"

S. 315 defines Partnership to mean a business association owned by two or more persons that is not organized as a company or corporation. It also defines company to have the same meanings assigned to it or as defined by the Companies and Allied Matters Act 1990. Whilst under the provision of Mergers, Take-Overs & Acquisitions – S. 117 defines a company (without prejudice to CAMA '90) to mean anybody corporate and includes a firm or association of individuals.

[197] (2007) 2 NISLR The legislative history of the Investments and Securities Act 1999 indicates that the main concern of the lawmakers was to provide full and fair disclosure in securities transactions. However, the legislature recognized that there were certain situations in which the protections afforded by the Act were not necessary. The exemptions provided under Investments and Securities Act 1999 therefore are essential to the viability of the Act's regulatory scheme. For this reason, the Act carefully exempts from its application certain types of securities where there is no practical need for its application or where the public benefits are too remote. Section 99 (3) and (4) are examples of such exemptions. (Now S.118 (3) of ISA 2007) (P.50 paras C-D) (2007) 2 NISLR.

[198] *The New International Webster's Comprehensive Dictionary of the English Language,* Trident Press International, 2004 Edition, at pg. 602.

[199] Although, incorrectly cited, it is clear that the reference there was the Investments and Securities Act 2007 and should not have been Investments and Securities Act 2004, which was just a carbon copy of the Investments and Securities Act 1999 and S. 118 – 128 relates to partly takeovers and partly collective investment schemes.

[200] This Act establishes the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal for the promotion of competition in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market position and penalizing other restrictive trade and business practices.

O. Harmonization of information by SEC

By S. 13 (r) SEC has the responsibility to call for information from and inspect, conduct inquiries, and audit securities exchanges, capital market operators, collective investments schemes, and all other regulated entities. This new provision is a re-enactment of S. 8 (q) in which the word "undertake" has been removed, but more importantly, the provision has been deliberately amended and couched in such a way as to generalize the provision to include all regulated entities rather than listing them as done under the old provision. Whilst admitting that this sub-section is wider in scope it is submitted that the interpretation should be exercised with caution and not be treated as open-ended. The observation under S.13 (p) should be taken into consideration viewed from the background that the entities envisaged here are still under the regulation and control of other government agencies and Institutions. This sub-section should not be taken as usurping the functions of such Agencies. In effect, it should be treated "*ejus dem generis*" and the scope limited to when capital market matters or securities matters are involved. Support for this view can be seen under S.312 (3) which has succeeded in limiting it to capital market matters only. S. 312 (3) is to the effect that, apart from the Constitution of the Federal Republic of Nigeria, if the provisions of any other law, concerning capital market matters including the enactments specified in subsection (1) of this section, are inconsistent with the provisions of the Act, the provisions of the Act shall prevail and the provisions of that other law shall, to the extent of the inconsistency, be void.

P. Promotion of investors' education by SEC

By S. 13 (s) SEC has the clear responsibility of promoting investors' education and the training of all categories of intermediaries in the securities industry. The knowledge and capacity of intermediaries and regulators could impact the quality and development of the bond and equity markets. The evolution of market associations can, therefore, be very vital in fostering capacity in the bond and equity markets.[201] Securities and Exchange Commission (SEC) has since established the Capital Market Institute which is an upgrade of Securities and Exchange Commission's Training School that was established in line with S. 8 (p) of Investments and Securities Act 1999 to achieve the above function. They have also over the years collaborated with some Universities to train students in capital market matters. They also organize seminars/workshops from time to time. This is an ongoing process[202].

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[201] A well-informed investing public will be better placed to protect itself, forming the layer of investor protection. For instance, an investor who understands his right is most likely to assert his right and seek redress when such rights are infringed. Similarly, an investor who understands the workings of the market is less likely to be taken advantage of by scrupulous market participants than one who has a low knowledge of the market. When investors are knowledgeable about the workings of the capital market, they are also better equipped to assess the risks and rewards of investment opportunities…. A vibrant media, particularly its financial segment, would be invaluable in disseminating and analyzing market information. Ekineh Daisey**,** *Building Blocks for the Development of an efficient Bond and Equity Markets*, SEC Quarterly, April-June 2009 at pgs.3-9 (supra footnote 17)**.**

[202] In the same vein, by S. 13 (t) SEC can call for, or furnish to any person such information as may be considered necessary, by it for the efficient discharge of its functions.
This brings to fore the Freedom of Information Act 2011 (FOI) which allows information asked for by any person from a government agency to which SEC is one to be provided.

Q. Power of SEC to levy fees, penalties, and administrative cost of proceedings

The most contentious provision is likely to be S. 13 (u) which permits SEC to levy fees, penalties, and administrative costs of proceeding or other charges on any person about investments and securities business in Nigeria following the provisions of this Act. To put it in proper perspective S.13 (u) is the former S.8 (s) in which "penalties and administrative costs of proceedings" have been included. This is connected with the decision of the Investments and Securities Tribunal in the case of *Central Securities Clearing System (C.S.C.S) Limited v Securities and Exchange Commission (SEC)*[203] where the court in interpreting S.8(s) of Investments and Securities Act 1999 ruled that cost is not for the adjudicating body but the parties. In *FIRS Securities Ltd v SEC*[204], the Court was very clear that it was not the intent of the Act that costs be awarded to Securities and Exchange Commission, as the Commission is a statutory body carrying out its statutory functions. Cost is not for the adjudicating body but the parties. It, therefore, remains to be seen how this sub-section would be interpreted by the courts when the need arises. [205] The consistency of the courts in affirming that it is not proper for SEC to award costs to herself it is humbly submitted makes the new inclusion to be dead on arrival. Indeed, a Man cannot be a judge in his cause. It would therefore not be out of place if this provision is deleted in future amendments of these laws as it serves no useful purpose.[206]

R. Power of intervention in management by SEC

Section 13 (v) empowers SEC to intervene in the management and control of capital market operators which it considers has failed, is failing or in crisis including entering into the premises and doing whatever the Commission deems necessary for the protection of investors. S.13 (v) is a new provision. Here the Securities and Exchange Commission is acting as a receiver/manager. This power it is humbly submitted appears too wide and may have been borne out of the frustrations experienced in recent times by the regulatory authorities in discovering their helplessness in assisting investors to recover their money after the operators may have gone under. The essence of this provision is to nip it in the bud. It is

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S. 13 (t) is the old S. 8 (r) and the word "from" (after 'for') has been removed while "agency" was replaced with "person". "Person" includes 'Bodies', 'Corporate Agencies' et al. hence, more appropriate. S. 37 (1) of Companies and Allied Matters Bill 2016 which gives a company the power of a natural person of full capacity is therefore relevant. It provides that, except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorized business or objects, have all the powers of a natural person of full capacity.

[203] (2004) 1 NISLR 39 In re: *SEC vs. Bonkolans Investments Limited and others*. Appeal No. IST/APP/01/2003, Case No. APC/21/2003

[204] (2004) 1 NISLR 165

[205] *Union Bank of Nigeria (UBN) PLC (Registrars' department) v Securities and Exchange Commission* In *RE: Securities and Exchange Commission v Bonkolans Investments Limited and Others* (2004) INSLR 115-164. The Court again emphasized that administrative body performing a statutory function cannot award cost to itself. A Committee set up by the Commission is part of the Commission. The Administrative Proceeding Committee (APC) is not an ad hoc committee and therefore not different from the Commission. The words "other charges" in the subsection does not include award of cost to the Commission.

[206] "In accordance with the provisions of this Act" has also been included to show or indicate that such business transactions must relate to capital market matters, hence it must be construed *ejus dem generis.*

suggested that this provision be exercised with caution. It gives the Commission a very wide latitude to operate.

This position has been confirmed by the court in the case of *Adebisi Jacob Olawepo v Securities and Exchange Commission.*[207] The court emphatically stated that it is indisputable that from the provisions of the ISA, the cross-appellant has the powers as a regulatory organization for the Nigerian capital market to intervene in the management of the capital market operators. This power conferred under S.13 (v), (bb), and (dd) of ISA 2007 must never be exercised arbitrarily. The cross-appellant can only exercise the right to disqualify persons considered unfit from being employed in any arm of the securities industry; when there is credible evidence that the person is unfit. Disqualification of a director on the grounds of his not being fit must be based on conducts or acts of the director in the management of the company that is substantial to be considered as unfit.

By S. 13 (w) SEC can enter and seal up the premises of persons illegally carrying on capital market operations and under S.13 (x) in furtherance of its role of protecting the integrity of the securities market, SEC is empowered to seek judicial order to freeze the assets including bank accounts of any person which assets were derived from the violation of the Act, or any securities law or regulation in Nigeria or other jurisdictions. Section 13 (w) and (x) are new provisions that have the combined effect of enhancing the Commission's statutory powers to protect the interest of investors whose funds are held by the capital market operators and prevent distress in the market. The Central Bank of Nigeria, Nigeria Postal Services, The National Insurance Commission, and the Nigeria Deposit Insurance Corporation have similar powers. This will assist in curtailing the rate at which investors are defrauded.[208] An interesting scenario can however be gleaned from these two subsections in that, while S.13(w) appears to give the impression that SEC does not need any judicial order, S.13(x) allows for SEC to seek judicial order before it can act. It is hereby suggested that both subsections should be couched together in the future to allow the SEC to first seek a judicial order before complying with S.13 (w). This will align with the rule of law and be seen to be democratic.

By S. 13 (y) the SEC is allowed to relate effectively with domestic and foreign regulators and supervisors of other financial institutions including entering into a co-operative agreement on matters of common interest.[209] It has been carefully re-drafted and the words including entering into a co-operative agreement on matters of common interest have been included. In this connection, the Securities and Exchange Commission in promoting International Co-operation signed a Memorandum of Understanding (M.O.U) with the Securities Commission (SC)

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[207] (2011) 16 NWLR (Pt. 1272) 122

[208] *Securities and Exchange Commission's Proposed Amendments to the Investments and Securities Act* No. 45 of 1999 Exposure Draft 2003 at pg.16

See S. 34 of the Banks and Other Financial Institutions Act No. 25 of 1991(as amended)

The Central Bank of Nigeria (C.B.N) 1991 Act (as amended)

The Nigeria Postal Services (N.P.S) Act (as amended)

The National Insurance Commission (NAICOM) Act 1997 (as amended) and S.4 (g) (h) of the Nigeria Deposit Insurance Corporation (NDIC) Act had similar provisions.

[209] S. 13 (y) is the old S .8x in which the opening word 'relate' has replaced 'liaise'.

Malaysia on Nov 15, 2007.[210] A memorandum of understanding is an agreement between two or more institutions or jurisdictions, intended to provide reciprocal assistance particularly in obtaining information or market oversight, Prevention of fraud and enforcement, Capacity Building.[211] Securities and Exchange Commission (SEC) is a member of the International Organization of Securities Commission (I.O.S.C.O) with which it has and continues to forge co-operation with.

Securities and Exchange Commission's D.G was at some point made the Chairman of the African & Middle East Regional Committee of International Organization of Securities Commission (I.O.S.C.O).[212] International Organization of Securities Commission is the International Standard setter for Securities market regulators worldwide/globally[213]. It promotes mutual assistance and exchange of information and enables them effectively perform their respective regulatory duties. It also develops and maintains open fair, orderly, and sound capital markets that should

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[210] This brings to seven the number of such MOU signed by the apex capital market regulator in Nigeria.

The other six jurisdictions which the Commission had earlier signed memoranda with are-

1. Financial Services Board of South Africa (2002)
2. The Securities and Exchange Commission of Ghana (2003)
3. Capital Markets Authority of Uganda (2005)
4. China Securities and Regulatory Commission (CSRC) (2005)
5. Capital Markets Securities Authority of Tanzania (2005)
6. Securities and Exchange Board of India (SEBI) (2007)

[211] It does not however impose legally binding obligations on the signatories and it does not have any powers to supersede domestic laws and regulations.

[212] SEC had also in 2006 qualified as Appendix, A signatory to the Multilateral Memorandum of Understanding (MMOU) of the International Organization of Securities Commission.

[213] It has been established that a strong correlation exists between investor confidence and investor participation in the capital market. Confidence is simply trust in a system. It is the certainty that the capital market possesses positive characteristics and as such safe place to invest. Confidence develops when the public perceives a capital market as disciplined, fair, transparent and efficient. Confidence is similarly built when investors believe that regulatory system can effectively protect them and the problem or failure of a registered entity would not affect other firms. In other words, investors and indeed issuers would participate in a market when they have confidence in its integrity. This has been well buttressed by the International Organization of Securities Commissions (IOSCO), which in setting standards for securities market regulation in 1998, laid the three objectives of securities market regulation as-investor protection, ensuring that markets are fair, efficient and transparent; and reduction of systemic risk. In addition to these three objectives, IOSCO released 30 Principles of securities market regulation. These principles have become benchmarks for assessing the regulatory landscape of countries. The World Bank, the International Finance Corporation (IFC), the International Monetary Fund (IMF), and the OECD, which are all members of IOSCO as well as other multilateral agencies, have adopted these principles in assessing the quality of securities regulation. Both IOSCO and IMF have conducted implementation assessment of countries. The 30 principles are generally regarded as essential ingredients in developing sound, efficient and effective regulation of securities market.

As a responsible and active member of IOSCO, and to strengthen the regulatory environment, which is pivotal to capital market development, Nigeria is striving to fully implement the principles and is said to have substantially (75 percent) done so. Nigeria has a comprehensive securities law and regulatory practices, which are basically of international standard. Ekineh Daisy, *Deepening the Nigerian Capital Market Regulatory, Supervisory and Operational Imperatives in a Global Financial Environment,* Paper delivered on Tuesday 13th August, 2002 Sheraton Lagos Hotel & Towers, Ikeja and published by SEC in the Nigerian Capital Market and the Globalization Challenges. Proceedings of the First Annual National Capital Market Conference Edited by Ndanusa Suleyman and, Ezenwa Uka at pgs. 11-12.

attract and protect local and foreign investors. The SEC has closer ties with the African Capital Market Forum (ACMF**).** In truth, the Securities and Exchange Commission (SEC) was instrumental to its establishment. SEC also has affiliations with United Nations Economic Commission for Africa (U.N.E.C.A). SEC enjoys a warm relationship with International Finance Corporation (IFC) and has been supplying the Corporation with information in respect of the Nigerian Capital Market.

On the domestic scene, the Securities and Exchange Commission relates with Agencies like the Corporate Affairs Commission[214] National Pension Commission[215] Nigerian Investment Promotion Commission (NIPC) Act No. 16 of 1995[216]. Foreign Exchange (Monitoring and Miscellaneous) Provision Act No 17 of 1995[217] Economic and Financial Crimes Commission (Establishment Act 2004).[218] The provisions of this sub-section are also relevant to Universal Banking, which came into existence in 2000[219]. Share verification exercise is another instance where the Securities and Exchange Commission relates with other regulatory agencies in the financial sector[220]. SEC relates with the National Financial Intelligence Unit, which has been carved out of the Economic and

[214] In respect of the composition of the Board of the Corporate Affairs Commission, a representative of the Securities and Exchange Commission not below the grade of Director or its equivalent must be a member of the Board.S.2 (g) of CAMB, 2016.

[215] National Pension Commission (NPC) established under the Pension Reforms, Act No 2 2004. Now the Pension Reform Act of 2014. By virtue of S. 16 (1) (d)(vii) The Securities and Exchange Commission is one of the part-time members of the Commission which is saddled with the responsibility of regulating supervising and ensuring the effective administration of pension matters in Nigeria.

[216] There is no Securities and Exchange Commission representation in the Council established under this Act. It is suggested that this should be looked into, it may not be unconnected with the historical fact that its predecessor the Nigerian Enterprises Promotion Board (N.E.P.B) did not have SEC on board, but in truth the SEC has not been established then. N.E.P.B. was formed in 1977, but SEC came into existence in 1979 when it replaced the Capital Issues Commission of 1973.

[217] This essentially deals with money market matters and does not require the constitution of any board as it is within the prerogative of the Central Bank of Nigeria (C. B. N) but SEC remains relevant by virtue of S. 26 of the Act.

[218] This Act repeals the EFCC (Establishment Act 2002). By S.2 (g) of the Act the Director General, Securities and Exchange Commission or his representative is one of the members of the Commission.

[219] See CBN guidelines on the establishment of Universal Banking. It seems with the recent stratification of Banks; it is just a question of time that Universal Banking will become obsolete.

[220] SEC is also a member of the Financial Services Regulation Coordinating Committee (FSRCC) S.43 (2) (c) of the Central Bank of Nigeria (Establishment) Act establishes the Financial Services Regulation Co-ordinating Committee for the purpose of coordinating the financial institutions, commenting on this Committee, The SEC Committee on the Nigerian Capital Market, February 2009 (The Report) stated at Pg. 23 that Co-ordination of Financial Market Regulators. Current levels of co-operation, interaction, information exchange, collaboration, and policy initiation and implementation between the various financial market regulators and government agencies/regulators: (SEC, CBN**,** PenCom, DMO and NAICOM) are considered inadequate to encourage the coherent formulation of policies. Frequent inconsistent policy initiatives from these regulators/agencies create significant uncertainty and market confusion. It would appear that the Financial Services Regulatory Coordination Committee has slipped into inactivity. It seems that even the ongoing global financial crisis has not provided a strong enough stimulus to revive it. As an antidote to this, it was recommended that – The Financial Services Regulation Coordinating Committee or any other standing committee of the executive leadership (at least Executive Directors – i.e. Board level) of the regulators should meet monthly. Such committees should ensure that the policy making process of each regulator involved takes into account the impact of draft policies on other market segments. When called for draft policies should be shared.

Financial Crimes Commission (EFCC), and the SEC is recognized as part of the regulatory authority that the Consumer Council must relate with under the Federal Competition and Consumer Protection Act 2019. This subsection is unique and potent enough for the SEC to carry out her liaison activities with any agency or institutions that are set up to protect investors and develop capital market generally.

Section 13 (z) permits the SEC to research all or any aspect of the securities industry. An area of research that is being delved into now is the Derivatives market which is the market that trades, not in the issued securities, but on the right to title on the underlying security or based on the future title to the security. The prominent one in the capital market now is trading in rights. It is suggested that this is an area that should be studied carefully and the operators in the market be well trained in the art of derivative instruments before it is implemented because little knowledge of this instrument was a contributory factor to the Global financial crisis experienced from 2008.

Section 13 (aa) empowers the SEC to prevent fraudulent and unfair trade practices relating to the securities industry. Towards this end, the Commission in 2008 ordered the suspension of trading in the shares of Afroil PLC and Capital Oil PLC on the floors of the Nigerian Stock Exchange for what it described as an observed astronomical rise in the share prices and the fact that they were not rendering necessary statutory reports. The suspension according to the Securities and Exchange Commission was done to protect the investing public. The actions of the management of Afroil PLC according to the SEC amount therefore to a breach of Rule 110 of the Commission's Rules and Regulations[221]. Although, the suspension is one of the regulatory tools that the SEC uses to checkmate infractions in the capital market the SEC it is opined is enjoined to use it sparingly as not to open a floodgate of litigation.

Section 13 (bb) allows SEC to disqualify persons considered unfit from being employed in any arm of the securities industry.[222] The new provision gives the impression that the Securities and Exchange Commission has the discretion to declare persons unfit. This is possible at the point of registration with the SEC. A careful reading of this sub-section may mean that this could also be carried out by any other institutions like self-regulatory organizations. It is however submitted that the Investments and Securities Tribunal or The National Industrial Court[223] may have a say if this is challenged by the person declared unfit once the issue of jurisdiction is resolved[224]. The word unfit would need to be clearly defined for this section to be potent enough.

[221] In addition, the manner of the sale of the company warehoused shares was a total breach of the provisions of Rule 70(2) of the Commissions' Rules and Regulations, which states that warehoused shares be sold en-bloc while the broker renders periodic reports on it. Other forms of market infractions had also been addressed by the Commission from time to time.
[222] S. 13 (bb) is the old S .8 (w).
[223] *Munir Gwarzo v Securities and Exchange Commission*, *Minister of Finance, Attorney General of the Federation's* case at the National Industrial Court. Federal High Court Abuja June 20th 2018.
[224] *Bonkolans Investment Ltd. & Ors. v Central Securities Clearing System Ltd. & Ors* NSILR (2007) 79

Section 13 (cc) empowers SEC to advise the Minister on all matters relating to the securities industry and S. 13 (dd) allows her to perform such other functions and exercise such other powers not inconsistent with the Act as are necessary or expedient for giving full effect to the provisions of the Act. This is an omnibus provision intended to take care of matters that may arise in the course of regulating the market and which was not contemplated at the time of making the law e.g. unclaimed dividends, submitting to oversight functions of the National Assembly. It has been suggested above that the Securities and Exchange Commission should tread carefully in respect of this so that such actions would not be effectively challenged more so when it is another agency that is responsible for such.

IV. CONCLUSION

This paper has examined the provisions of S. 13 of the Investments and Securities Act and aligned it with the new developments in the Capital Market, most especially the legislations and interpretations given by the courts to this section to give it a meaningful approach as to enable the Securities and Exchange Commission to perform its function of regulation and development of the capital market efficiently and effectively. It is hoped that the future amendment of S. 13 and indeed the whole of Investments and Securities Act 2007 will take into consideration these observations[225].

There is no better way to end this paper than to reflect on the often-quoted statement of a learned writer of old when he declared that, Regulatory bodies like the people that comprise them, have a marked life cycle. In youth, they are vigorous, aggressive, evangelistic, and even intolerant. Later they mellow, and in old age, after a matter of ten or fifteen years, they become, with some exceptions, either an arm of the industry they are regulating or senile.[226] It is humbly submitted that S.13 needs to be adequately reformed by parliament to prevent this assertion by the learned author.

[225] It is clear that businesses all over the world are regulated by government or its agencies depending on the type of economy being fashioned out by that particular government in question. No government can completely surrender its economies to the vagaries of market forces. The monetary and fiscal policies are always in the hands of government. Whether a command economy or deregulated economy, the need to provide the regulatory framework inevitably falls squarely at the doorsteps of government.

[226] Galbraith, John K, *The Great Crash*, 1929, (1955) Case Western Reserve Law Review, Vol.7 Issue 2 available at https://scholarycommons.law.case.edu/caselrev accessed on May 31st, 2020.

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Enforceability Of Collective Agreements in Nigeria and The Challenges of Ministerial Interference

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ABSTRACT

Over the years, trade dispute resolution has been the fulcrum of labor relations and labor law. As a result, several dispute resolution methods are usually employed as a means of settlement of labor issues. Collective bargaining is a level playing ground for both parties in labor and employment relations for them to negotiate a fair employment relationship and prevent costly labor disputes. This research primarily interrogated the statutory power of the Minister of Labor and Productivity in conferring toga of enforceability on collective agreements in Nigeria. It ascertained whether such statutory power is an intrusion on the notion of voluntarism or is anchored on public interest exigencies. The research also chronicled the chequered evolution of collective agreements against the backdrop of the quest for dispelling inequality in bargaining power in the workplace. As to whether unfairness arises from the inherent inequality in bargaining power, this research found in the affirmative and argued that the enforceability of collective agreements is critical for the attainment of some sort of pseudo equilibrium as well as in the acceptance of collective bargaining as a tool for conflict containment. It further argued that stripping collective agreements of enforceability is in discordance with the doctrine of pacta sunt servanda. It recommended, inter alia, that collective agreements once concluded by parties should be accorded enforceability without extraneous considerations.

ESSAY CONTENTS

I. INTRODUCTION

Workplace relation is quite fascinating. As a relation characterized by both cooperation and conflict,[1] the relationship starting with cooperation soon changes into conflict and after its resolution again changes into cooperation.[2] The sequence is dependent on the particular conflict at hand, strategies adopted by contending parties, among other considerations. Unceasing struggle and power-play driven by all sorts of interests underscore the inevitability of conflicts which in the cognizable form are understood as "trade disputes".[3] Trade disputes resolution is a major preoccupation for labor law.[4] As such, the outlined mechanisms for settlement of trade disputes are the agreed means for settlement, mediation, conciliation, arbitration, inquiry, and adjudication.[5] Although not expressly captured as one of the mechanisms for settlement of trade disputes, collective agreements are an offshoot of successful collective bargaining process[6] which in itself derives basis from the provision of extant labor regulation which gives parties the leverage to resolve trade disputes by the "agreed means for settlement."[7] This gives impetus to social dialogue.[8]

Collective bargaining allows both sides to negotiate a fair employment relationship and prevents costly labor disputes.[9] To this end, the Organize and Collective Bargaining Convention 1949 outline measure appropriate for necessary national conditions to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations to regulate terms and conditions of employment through collective agreements.[10] This prescriptive obligation has been taken cognizance of by domestic labor regulations. For the purposes of collective

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[1] SC Srivastava, *Industrial Relations and Labor Laws* (5th edn, Vikas Publishing House PVT Ltd), 3.
[2] *Ibid.*.
[3] Section 54 Trade Unions Act 2004; section 48(1)(b) Trade Disputes Act 2004.
[4] Clara C. Obi-Ochiabutor "Trade Disputes Resolution under Nigerian Law," *Nigerian Juridical Review* (2002-2010) (9): 71.
[5] Sections 4 to 34 Trade Disputes Act 2004.
[6] Section 91(1) Labor Act 2004; ANN Nwazuoke, "Introduction to Nigerian Labor Law" (LL.B diss., Department of Public Law & Jurisdiction, Faculty of Law, Olabisi Onabanjo University, 2001), 110.
[7] Section 4(1) Trade Disputes Act 2004.
[8] Richard Anker, *et al.,* "Measuring Decent Work with Statistical Indicators" *International Labor Review 14*, no. 2 (2003): 166.
[9] International Labor Organization, "International Labor Standards on Collective Bargaining" accessed October 7, 2020 https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/collective-bargaining/lang--en/index.htm.
[10] Article 4 of the Right to Organize and Collective Bargaining Convention 1949. Shortly after independence, Nigeria ratified this treaty on 17th October 1960.

bargaining, all registered trade unions in the employment of an employer shall constitute an electoral college to elect members who will represent them in negotiations with the employer.[11]

Collective agreements are underpinned by the ideals of voluntarism and industrial democracy. Under voluntarism, employers and the representatives of workers are free to enter into negotiations based on acceptable conditions and within the regulatory framework established by the state.[12] Industrial democracy engenders workers' participation in management leading to a greater appreciation of the problems of management by workers, and therefore, less friction between labor and management.[13] Industrial democracy gives workers a sense of pride, sharpens dedication, and gives hope for the future in the workplace.[14] Historically, collective agreements have undergone judicial hostility. The hostility of judges toward collective agreements stems from the nineteenth-century preference for individualism.[15] This concern is deepened by prescription by extant labor regulations for ministerial endorsement as a prerequisite for enforceability of collective agreements which further creates an adverse climate for enforceability of collective agreements.

II. CONCEPTUALIZATION OF COLLECTIVE AGREEMENT

Section 48 Trade Disputes Act 2004 defines collective agreement as to any agreement in writing for the settlement of disputes and relating to the terms of employment and physical conditions of work concluded between an employer, a group of employers or organizations representing workers, or the duly appointed representative of any body of workers, on the one hand; and one or more of trade unions or organizations representing workers, or the duly appointed representatives of any body of workers, on the other hand. Similarly, section 54(1) National Industrial Court Act 2006 defines collective agreement as to any agreement in writing regarding working conditions and terms of employment concluded between an organization of employers or an organization representing employers (or an association of such organization) of the one part and an organization of employees or an organization representing employees (or an association of such organization) of the other part.[16] These statutory definitions are analogous. Collective agreements are similar to private-law contracts.[17] However,

[11] Section 25(1) Trade Unions Act 2004 (as amended).
[12] Richard Idubor, *Textbook on Employment and Trade Dispute Law in Nigeria* (1st edn, Sylva Publishers Ltd 1999), 147.
[13] David Tarh-Akong Eyongndi, "Workers Participation in Management as A Panacea to Industrial Disputes in Nigeria: The Case for Industrial Democracy," *Afe Babalola University Ado-Ekiti Law Journal,* 1 no. 3 (2015): 121.
[14] Idubor, "Employment and Trade Dispute Law," 195.
[15] Emeka Chianu, *Employment Law* (Bemicov Publishers Nigeria Ltd 2004), 81.
[16] This definition is in *pari materia* with the definitions proffered in section 91(1) Labor Act 2004 and article 2(1) Collective Agreements Recommendation 1951 (No. 91).
[17] Arturo Bronstein, *International and Comparative Labor Law: Current Challenges* (Palgrave Macmillan 2009), 5.

the requirement for collective agreements to be written is a major departure between collective agreements and contracts of employment.

Collective agreements are of two forms viz., procedural collective agreement and substantive collective agreement.[18] While the procedural collective agreement provides for the framework and guidelines for collective bargaining, the result or product is the substantive collective agreement.[19] Regardless of form, collective agreements have gained increased relevance in the 21st-century workplace.[20] The compelling nature of the collective agreement is tied to the fact that contracts of employment cannot possibly reduce its terms in one document or envisage all the terms that should form part of the contract in the future.[21] This provides collective agreements with a veritable basis in augmenting gaps and deficits arising from contracts of employment.

In Nigeria, there are more collective agreements in the private sector than in the public sector.[22] This is occasioned by the stripping of wide categories of workers in the public sector of the right to form or join a trade union.[23] Organized labor still represents an infinitesimal segment of Nigerian society.[24] In addition, the superiority complex of state officials hinders the readiness to engage in collective bargaining.[25] Even at this, there has been an increasing utility of collective agreements which is in any way undermined by the fact that the relationship between an employer and employee derives largely from statute and the contract of employment.[26] The importance of collective agreement is further buttressed by the fact that it affords labor protection,[27] advances decent work agenda, and allows for inclusive growth. The best solution to common problems can be found in mutual agreement.[28] Settlement of disputes reached by mutual discussion, debate,

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[18] On the one hand, procedural collective agreement deals with the procedure for negotiation in order to reach the substantive agreement.[18] This form of collective agreement deals with issues such as structure of negotiations, constitution of the bodies for collective bargaining purposes, procedures on re-negotiation of collective agreement and so on. On the other hand, substantive collective agreement is concerned with the substantive subject matters for bargaining and pertain to terms and conditions of employment. Please, see Sam Erugo, *Introduction to Nigerian Labor Law: Contract of Employment and Labor Practice* (Princeton & Associates Publishing Co Ltd 2019), 336.

[19] KC Nwogu, *Collective Agreement in the Settlement of Trade Disputes in Nigeria: Implications for Industrial and Labor Relations* (Enugu Nolix Educational Publications 2010), 146.

[20] EE Uvieghara, *Labor Law in Nigeria* (Malthouse Press Limited 2001), 29.

[21] Matthias Zechariah, "New Frontiers on Legal Enforceability of Collective Agreements in Nigeria" *Current Jos Law Journal, 6* no. 1 (2013): 294.

[22] Uvieghara, "Labor Law in Nigeria," 389.

[23] Section 11(1) Trade Unions Act 2004.

[24] Tayo Fashoyin, *Industrial Relations in Nigeria: Development and Practice* (2nd edn, Learn Africa Plc 1992), 25.

[25] Ndukaeze Nwabueze "The Paradox of Warning Strike in State-Sector Industrial Relations in Nigeria," *International Journal of Social Sciences and Humanities Review* 4, no. 1 (2013): 140.

[26] Uvieghara, "Labor Law in Nigeria," 21.

[27] Susan Hayter, *et al.,* "The Application and Extension of Collective Agreements: Enhancing the Inclusiveness of Labor Protection" in Susan Hayter and Jelle Visser (eds), *Collective Agreements: Extending Labor Protection* (International Labor Organization 2018) 1.

[28] Srivastava, *Industrial Relations and Labor Law*, 138.

and negotiation leaves no rancor behind and helps create an atmosphere of harmony and co-operation.[29] Notwithstanding, the implementation of collective agreements remains a continuing source of conflict.[30] The legal status of collective agreements is chequered and keenly knotted to the question of enforceability which had fluctuated through judicial history.

III. ENFORCEABILITY OF COLLECTIVE AGREEMENT

At common law, collective agreements are unenforceable at any court or tribunal unless they are transposed into an individual contract of employment.[31] This classical common law position was expounded in *Ford Motor Co. Ltd v Amalgamated Union of Engineering and Foundry Workers*,[32] and subsequently gained statutory backing in section 179(1) Trade Union and Labor Relations (Consolidation) Act 1992. Common law's prime reason for refusing to enforce collective agreements is that there is no intention to create legal relations by parties.[33] The displacement of intention to create legal relations is predicated on the fact that collective agreements are products of trade unionist pressure.[34] As such, collective agreements have variously been construed as "gentlemen's agreement,"[35] "extra-legal document totally devoid of sanctions,"[36] "agreements binding in honor,"[37] "contracts of imperfect obligations,"[38] and "manifesto for labor relations."[39]

In Nigeria, domestic labor laws are largely a reflection of our colonial heritage and many principles of the British labor law have infiltrated domestic labor legislation.[40] As such, the traditional attitude to the enforceability of collective agreement in Nigeria remains the same as under common law. Hitherto, domestic courts had treated collective agreements as unenforceable contracts only capable of becoming enforceable once incorporated or embodied into the terms or

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[29] OD Amucheazi and Lizzy Ama-Oji, "Resolution of Labour Disputes in Nigeria' *Nigerian Journal of Labor Law & Industrial Relations, 3, no. 3* (2009): 17.
[30] Fashoyin, Industrial Relations in Nigeria, 189.
[31] Bronstein, International and Comparative Labor Law, 6.
[32] (1969) 1 WLR 339; (1969) 2 All ER 481; (1969) 2 QB 303.
[33] EA Oji and OD Amucheazi, *Employment & Labor Law in Nigeria* (Mbeyi & Associates Nig. Ltd 2015), 222; Chianu *Employment Law*, 75; Nwogu, Collective Agreements, 182; MI Anushiem, "Strike, An Instrument for Compelling Enforcement of Agreed Terms in Nigeria Industrial Relations: A Right or A privilege?" *UNIZIK Law Journal,* 10, (2014): 210; OVC Okene, "Collective Bargaining, Strike and the Quest for Industrial Peace in Nigeria," *Nigerian Journal of Labor and Industrial Relations* 2, no. 2 (2008): 53.
[34] *Nigeria-Arab Bank Ltd v Shuaibu* (1991) 4 NWLR (Pt 186) 450, 469.
[35] *African Continental Bank Plc v Benedict Nbisike* (1995) 8 NWLR (Pt 416) 725 CA; *Nigerian Arab Bank Ltd v Shuaibu* (1991) 4 NWLR (Pt 186) 186, 480.
[36] *Anaja v United Bank of Africa Plc* (2011) 15 NWLR (Pt 1270) 377; Chianu (n 18) 75.
[37] Joseph Chitty, *Chitty on Contracts* (23rd edn, Sweet & Maxwell 1968), 337-338.
[38] *Ritchie v Cowan & Kinghorn* (1901) SLR 38 @ 788.
[39] *Union Bank of Nigeria Ltd. v Edet* (1993) 4 NWLR (Pt. 287) 299.
[40] Akintunde Emiola, *Nigerian Labor Law* (4th edn Emiola Publishers Limited 2008), 5; Oladosu Ogunniyi, *Nigerian Labor and Employment Law in Perspective* (2nd edn, Folio Publishers Limited 2004), 5.

conditions of service.[41] Incorporation represents validation. As between employees and employers, collective agreements were treated as incapable of affording individual employees the right to litigate over an alleged breach of terms.[42] In *Union Bank Plc. v Edet*,[43] the Court of Appeal, per *Uwaifo JCA.,* reiterated the law thus:

> *Collective agreements, except where they have been adopted as forming part of the terms of employment, are not intended to give or capable of giving, individual employees a right to litigate over an alleged breach of their terms as may be conceived by them to have affected their interest nor are meant to supplant or even supplement their contract of service.*

This judicial decision provides two clear implications. The first implication is that it makes the linkage between collective agreement and contract of employment a necessary requirement for enforceability of collective agreements. The absence of privity of the contract renders an individual employee seeking to enforce collective agreement a stranger to the collective agreement itself as well as the collective bargaining process. Incorporation of a collective agreement into a contract of employment may be express or implied.[44] It suffices that the requirement for incorporation has its challenges. The major challenge lies in the fact that it is near impossible for a collective agreement to be incorporated into a contract of employment since most collective agreements are made posterior to the commencement of the employee-employer relationship.[45]

The second implication is that it renders the contract of employment as the bedrock on which an aggrieved employee's case must be predicated.[46] As to whether such an intention can be imputed to parties, domestic courts have relied on factors such as the state of the pleadings, the evidence before the court, and the conduct of the

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[41] *African Continental Bank Plc v Nwodika* (1996) 4 NWLR (Pt 443) 470 at 473-474; *Anaja v United Bank for Africa Plc.* (2011) 15 NWLR (Pt 1270) 377; *Chukwumah v Shell Petroleum Nig Ltd* (1993) 4 NWLR (Pt 289) 512; 543-544; *Abalogu v Shell Petroleum Nig Ltd* (1999) 8 NWLR (Pt 613) 12; *New Nigeria Bank Plc v Osoh* (2001) 13 NWLR (Pt 729) 224 (CA); *Abalogu v SPDC Ltd* (2003) 13 NWLR (Pt 837) 308; *New Nigeria Bank Plc v Osoh* (2001) 13 NWLR (Pt 729) 232 (CA); *Chukwumah v Shell Petroleum Nig Ltd* (1993) 4 NWLR (Pt 289) 512, 543-544; *Union Bank of Nigeria v Edet* (1993) 4 NWLR (Pt 287) 288, 291, 304. *African Continental Bank Plc v Nwodika* (1996) 4 NWLR (Pt 443) 470 at 473-474; *Anaja v United Bank for Africa Plc* (2011) 15 NWLR (Pt 1270) 377.

[42] *Makwe v Nwukor* (2001) 14 NWLR (Pt 733) 356.

[43] (2001) 6 NWLR (Pt 708) 224.

[44] Express incorporation occurs when a contract of employment contains a provision expressly subjecting it to the terms of a collective agreement. Implied incorporation arises where both parties have at various times placed reliance on the collective agreement. Failure to expressly incorporate collective agreement does not rule out the possibility of its being so incorporated in an implied manner. Please, see *Rector Kwara State Polytechnic v Adefila* (2007) 15 NWLR (Pt 1056) 42; *Cooperative and Commerce Bank (Nigeria) Ltd v Okonkwo* (2001) 15 NWLR (Pt 735) 114; *Batisen v John Holt & Co Ltd* (1973) 8 CCHCJ/61.

[45] Chianu (n 15) 75; Texaco (Nig) Plc v Kehinde (2001) 6 NWLR (Pt 708) 224 (CA).

[46] *Daodu v UBA Plc* (2004) 9 NWLR (Pt 878) 276 at 293.

parties in unveiling the real intention of the parties.[47] From the perspective of the doctrine of agency, where the intention to make collective agreement applicable to current and future members of a trade union can readily be garnered from the collective agreement, the right of an individual member of the trade union to litigate on such collective agreement remains irrefutable. This is hinged on the fact an agent can only act for a principal that is identifiable at the time the agreement is made.[48] As a rule, collective agreement binds only the signatory organizations (employers' associations and trade unions) and their members.[49] Where the interest of future members of a signatory trade union is not expressly catered for, the right of an individual member of a trade union to enforce or litigate on a collective agreement concluded by a trade union to which membership inures seemed dependent on whether at the point of concluding a collective agreement the trade union merely acts in its name or acts as agent for and on behalf of its members or acts with the intention that the terms and conditions are to be made applicable to current and future members of the trade union. Analyzing collective agreements based on the doctrine of the agency is a complex task that presents lesser prospects for enforceability. Where for want of privity of contract, incorporation or inapplicability of doctrine of agency collective agreements are deliberately breached, this will lead to distrust, hostility, and pessimism in future rounds of negotiation.[50]

IV. CURRENT TREND ON LEGAL STATUS OF COLLECTIVE AGREEMENT

As the traditional common law position losses support and become less acceptable, most jurisdictions across the globe have begun treating collective agreements as binding and enforceable contracts. Enforceability of collective agreements aligns with international labor standards as well as global best practices on the subject matter. The Collective Agreements Recommendation 1951 (No. 91) stipulates that collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded.[51] In addition, employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.[52] Stipulations in contracts of employment that are contrary to a collective agreement should be regarded as null and void, and automatically replaced by the corresponding stipulations of the collective agreement.[53] Conversely, stipulations in contracts of employment that are more favorable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective

[47] *ACB v Nwodika* (1996) 4 NWLR (Pt 443) 470.
[48] Patrick Elias, *et al., Labour Law, Cases and Material* (Butterworths 1980), 406-408; *Anaja v United Bank of Africa Plc* (2011) 15 NWLR (Pt 1270) 377.
[49] Hayter and Visser, "Collective Agreements*,"* 2.
[50] Fashoyin, "Industrial Relations," 207.
[51] Article 3(1) Collective Agreements Recommendation 1951 (No. 91).
[52] *Ibid.*.
[53] *Ibid.* article 3(2).

agreement.[54] Given the exposure of domestic labor markets of various nation-states to international scrutiny on account of globalization reflecting in increased membership of the International Labor Organization and compliance with prescriptions of the International Labor Organization, there have been proactive efforts in aligning and re-aligning domestic affairs with the current global trend on collective agreements.

In Britain, collective agreements are now presumed binding on parties unless a contrary provision is inserted.[55] In addition, a collective agreement must be in writing and must contain explicit or express provisions asserting that the agreement should be legally enforceable.[79] In Nigeria, the National Industrial Court of Nigeria is enjoined to recognize and act on international labor standards in reaching its decisions.[56] In addition, section 254C(1)(j)(i) Constitution of the Federal Republic of Nigeria 1999 (as amended) confers exclusive jurisdiction on the National Industrial Court of Nigeria in civil causes and matters relating to the determination of any question as to the interpretation and application of any collective agreement.[57] The implication of these statutory provisions is that collective agreements are justiciable, binding, and enforceable by the National Industrial Court of Nigeria.[58] Section 54 Trade Unions Act 2004 defines trade dispute as "any dispute between employers and workers or between workers and workers, which is connected with the employment or non-employment or the terms of employment and physical conditions of work of any person."[59] Section 54(1) National Industrial Court Act 2006 expands the definition of trade dispute thus:

> *Trade dispute means any dispute between employers and employees, including disputes between their respective organizations and federation which is connected with the employment or non-employment of any person, terms of employment and physical conditions of work of any person, the conclusion or variation of a collective agreement and an alleged dispute.* (emphasis mine)

To the extent that disputes over enforceability, interpretation, violation, conclusion, or variation of collective agreements qualify as a trade dispute, there

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[54] *Ibid.* article 3(3).
[55] Sections 34 and 35 Industrial Relations Act 1971.
[79] Section 179(1) and (2) Trade Unions and Labor Relations (Consolidation) Act 1992.
[56] *Okeke v Union Bank of Nigeria* (2011) 22 NLLR (Pt 42) 161.
[57] Section 7(1)(c)(i) National Industrial Court Act 2006. Under section 16 Trade Disputes Act 2004, either the Minister of Labor or a party to the collective agreement that can activate the interpretation clause by an application to the National Industrial Court, for the interpretation of any term or provision of the collective agreement. Under section 54 National Industrial Court Act 2006, disputes connected with the conclusion or variation of a collective agreement qualify as trade disputes which the court can exercise jurisdiction on.
[58] *National Union of Civil Engineering Construction, Furniture and Wood Workers v Beten Bau Nigeria Ltd and Anor* (2008) 11 NLLR 1 at 18-19; *Petroleum and Natural Gas Senior Staff Association of Nigeria v Schlumberger Anadrill Nigeria Limited* Suit No: NIC/9/2004 (Judgment delivered 18th September 2007).
[59] This definition of trade dispute is also reinstated by section 48(1)(b) Trade Disputes Act 2004.

is a clear indication of the veneration of collective agreements by extant labor regulations. This is more so that disputes arising from the application, interpretation, and violation of collective agreements fall within the spectrum of "disputes of right" which create rights enforceable by parties through cognizable legal avenues.[60] This operates in rendering the violation of a no-strike clause in collective agreements, through declaration or engagement in a strike, as no violation of the law. This is more so that the right to strike is not a mere legal right. It is a legal right created, sanctioned, and recognized by law. Collective agreements can be concluded at the firm level, industry/sectoral level, or national level. Each of these levels has distinct requirement(s) for enforceability. While collective agreements conclude at the firm level and industry level present lesser difficulties, the enforceability of those concluded at the industry level and national level could be intricate. In any case, a domestic court has always insisted that there must be proof that the beneficiary is a member of the signatory trade union to the collective agreement.[61] In other words, there must be sufficient nexus between the applicant and the collective agreement sought to be enforced.[62] A party against whom the interpretation is sought must also be a party to the collective agreement.[63]

In nearly all countries, employers bound by a collective agreement apply similar terms to nonunionized employees.[64] However, in Switzerland, non-organized employees must sign an "opt-in" statement to be entitled to the benefits of a collective agreement to which they are not signatories.[65] Before the constitutional amendment paving way for the enforceability of collective agreements, there were exceptional instances where domestic courts in Nigeria had sanctioned the enforceability of collective agreements in the pre-historic era. The collective agreement that is pleaded by a party and admitted by another party to litigation is treated as binding on parties.[66] Where parties had worked based on a collective agreement, the court would not deny a worker of a remedy necessary to enforce

[60] Section 31(9)(a) Trade Unions Act 2004 (as amended) defines dispute of right to mean any labor dispute arising from the negotiation, application, interpretation of a contract of employment or collective agreement or any other enactment or law governing matters relating to terms and conditions of employment.
[61] *Itodo & Ors v Chevron Texaco Nigeria* (2005) 2 NLLR (Pt 5) 200.
[62] *National Union of Hotels and Personal Service Workers v Whassan Eurest Nigeria Ltd* (2005) 2 NLLR (Pt 4) 145 at 154; *Gbadegesin v Wema Bank Plc* (2009) 15 NLLR (Pt 40) 1; PENSASSIN v Schlumberger (2008) 11 NLLR (Pt 29) 164.
[63] *Joy Maskew & Ors v Tidex Nigeria Limited* Unreported suit No. NIC/1M/98 (Judgment delivered on 25th November 2008).
[64] Hayter and Visser, Collective Agreements, 2.
[65] Jelle Visserin, 'Extension Policies Compared: How the Extension of Collective Agreements Works in the Netherlands, Switzerland, Finland and Norway' in Susan Hayter and Jelle Visser (eds), *Collective Agreements: Extending Labor Protection* (International Labor Organization 2018) 35.
[66] *Mrs. Risi Shuaibu v Union Bank of Nigeria Plc* (1995) 14 NWLR (Pt 388) 173.

such a collective agreement.[67] A universal principle of law and common sense is that benefits and burdens go hand in hand.[68]

In *Nwajagu v BAICO Nig. Ltd*.,[69] the court acknowledged the reliance on industrial and political pressure in the enforceability of the collective agreement. In *Cooperative and Commerce Bank (Nig.) Ltd. v Okonkwo,*[70] Akintan JCA., relied on the equitable principle of estoppel in holding that an employer who had relied on a collective agreement in dismissing an employee cannot turn around to argue that the aggrieved employee cannot rely on the provision of the same collective agreement.[71] Such an employer is estopped from objecting to the enforceability of such a collective agreement.[72] The law abhors approbation and reprobation in the same issue. Domestic courts are currently more inclined to the enforceability of collective agreements. More so, stripping collective agreements of enforceability has been identified as the causation of strikes in the workplace.[73]

While it appears this provision of section 23(1) Trade Unions Act 2004 divests courts of the jurisdiction to entertain any legal proceedings instituted to directly enforce any collective agreement,[74] it has been submitted that the import of the provision does not relate to the bindingness or otherwise of collective agreements *per se*.[75] Instead, it refers to a situation where the purpose of a trade union is in restraint of trade.[76] Section 23(1) Trade Unions Act 2004 is not a generic provision. Rather, it specifically deals with an agreement between the members of a trade union, agreement for the payment by any person of any subscription or penalty to a trade union, agreement for the application of the funds of a trade union in certain situations, and agreement where every party thereto is a trade union or Federation of Trade Unions.[77] With the range of statutory provisions on the enforceability of collective agreements, the question that follows is whether a court can validly withhold enforcement of a collective agreement merely because the Minister of Labor and Productivity is yet to declare it enforceable.

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[67] *Cooperative and Commerce Bank (Nigeria) Ltd v Okonkwo* (2001) 15 NWLR (Pt 735) 114; Chianu, *Employment Law,* 76-77; *Batisen v John Holt & Co Ltd* (1973) 8 CCHCJ/61.
[68] Chianu, *Employment Law,* 77.
[69] (2000) 14 NWLR (Pt 687) 356.
[70] (2001) 15 NWLR (Pt 735) 114,
[71] *Cooperative and Commerce Bank (Nig) Ltd v* Okonkwo (2001) 15 NWLR (Pt 735) 114.
[72] *Ibid.*.
[73] Chianu, *Employment Law*, 82; Mathias Zechariah 'Possible Solutions to Intractable Strikes in Nigeria' *The Calabar Law Journal* 18, (2017): 85; Matthias Zechariah and Grace Dalong-Opadotun 'Laws Regulating Strikes in Nigeria and the Desirability of Compliance with International Best Practices' *Journal of Public Law & Constitutional Practice* 9 (2016): 34.
[74] Section 23(1) Trade Unions Act 2004 provides, inter alia, that nothing shall enable any court to entertain any legal proceedings instituted for the purpose of directly enforcing any agreement.
[75] Zechariah, "Enforceability of Collective Agreements in Nigeria," 310.
[76] *Ibid.*.
[77] Section 23(2) Trade Unions Act 2004 (as amended).

V. MINISTERIAL INTERFERENCE IN ENFORCEABILITY OF COLLECTIVE AGREEMENTS

Extant labor regulation makes a prescription for ministerial interference in the collective bargaining process by imposing an obligation on parties to deposit copies of executed collective agreements with the Minister of Labor and Productivity. Section 3(1) Trade Disputes Act 2004 stipulates that where there exists any collective agreement for the settlement of a trade dispute, at least three copies of the agreement shall be deposited by the parties with the Minister of Labor and Productivity within fourteen days of execution. Parties are under legal compulsion to do so and failure to comply with this obligation is an offense punishable with a fine of ₦100.[78] The Minister of Labor and Productivity may, upon receipt of copies of the collective agreement deposited, make an order specifying that the entire provisions of the collective agreement or any part thereof as binding on the parties to whom they relate.[79] Failure to comply with such ministerial order is an offense punishable on conviction to a fine of ₦100 or imprisonment for a term of six months.[80] This portrays the Minister of Labor and Productivity as a meddlesome interloper in the outcome of painstaking deliberations, and also suggests inherent or obscured weaknesses in the collective bargaining process which undermines the credibility and dependability of outcomes.

Ministerial interference in the enforceability of collective agreements is a build-up on the role of the state in the settlement of trade disputes which had since 1968 become more interventionist in both principle and practice.[81] The state's responsibility for promoting industrial peace and harmony in the workplace is a condition necessary for sustained growth and development.[82] While it is admitted that the role of the state forms part of its broader responsibility for the commitment to social order,[83] in an era where labor policies across the globe are becoming disposed to allowing parties to resolve trade disputes without the intervention of a third party (usually the state), ministerial interference in the collective bargaining process raises a fundamental question on the utility as well as the basis for such regulatory requirement.

Although inequality in bargaining power has never been accepted as the basis for ministerial interference in the outcome of the collective bargaining process, the idea cannot be ignored. Bargaining power is the ability to influence the other side to make a decision that it would not have made.[84] Even though employers and

[78] Section 3(1) Trade Disputes Act 2004.
[79] *Ibid.* section 3(3).
[80] *Ibid.* section 3(4).
[81] Fashoyin, *Industrial Relations,* 198.
[82] *Ibid.* 86.
[83] *Ibid.*.
[84] Ugbomhe O Ugbomhe and NG Osagie, "Collective Bargaining in Nigeria: Issues, Challenges and Hopes" *Journal of Human Resources Management and Labor Studies,* 7, no. 1(2019): 22.

employees are treated by law as equals to a legally enforceable agreement,[85] equality in bargaining power is a sheer utopia and erroneous postulate. This postulation remains a myth or legal fiction.[86] The reality is that the employer enjoys superior bargaining power[87] and the employee is a certainly weak contracting party and an underdog.[88] The disparity in bargaining power between employer and employee is accentuated by the greater extremes of wealth and poverty and by the institution of slavery which rendered labor to the level of ignominy. This state of affairs gives employers an undue advantage in negotiations at the workplace. Therefore, unless imbibed with a high sense of fairness and scrupulous regard to the rights and interests of others, the superior bargaining power of the employer is a source of autocracy, dominance, and oppression. This play-out out in the asymmetric contents of collective agreements and the lopsided and unconscionable nature of a wide range of negotiated terms imposed by a stronger contracting party.

In Nigeria, workplace indicators support inequality in bargaining power. As of the second quarter of 2020, the domestic unemployment rate stands at 27.1%.[89] This translates to 21,764,614 million Nigerians being unemployed.[90] This terrifying statistic is occasioned, *inter alia*, by increased reliance on computers and machines in reducing labor cost and improving productivity. Robots are now being used to execute and perform boring, unsafe, and undesirable tasks. These dynamisms have resulted in mop-up of jobs traditionally performed by humans. The drive on jobs creation has not match-up with the demand for jobs and inexplicable population explosion. With more prospective workers chasing after fewer jobs, jobs are bound to be competitive and prospective workers are most likely to embrace jobs with unfair, horrendous, and abysmal terms and conditions. This is more so that surplus labor affects the bargaining power of employees.[91]

Already, the International Labor Organization has admitted that a large proportion of those in employment does not have quality jobs.[92] This concern is deeply entrenched in most emerging labor markets where efforts geared toward the

[85] Chianu, *Employment Law,* 10.
[86] Ogunniyi, *Nigerian Labor and Employment Law,* 31.
[87] Aditi Bagchi, "The Myth of Equality in the Employment Relation" *Michigan State Law Review* (2009), 580; Dafe Otobo, *Industrial Relations: Theory and Controversies* (Malthouse Press Limited 2013), 58; Oji and Amucheazi, *Employment and Labor Law in Nigeria,* 13; Emiola, *Nigerian Labor Law,* 3.
[88] Chianu, *Employment Law,* 1.
[89]Nwafor Sunday, "Nigeria records 27.1% unemployment rate, says NBS," Vanguard News, August 14, 2020, https://www.vanguardngr.com/2020/08/breaking-nigeria-records-27-1-unemployment-rate-says-nbs/
[90] Obinna Emelike and Victoria Nnakaike, "#EndSARS: How high unemployment rate, poverty fuel youths' outrage" accessed October 18, 2020 https://businessday.ng/lead-story/article/endsars-how-high-unemployment-rate-poverty-fuel-youths-outrage/.
[91] Srivastava, *Industrial Relations and Labor Law,* 141.
[92] International Labor Organization, *World Employment and Social Outlook: Trends 2020* (International Labor Organization 2020) 34.

reduction of working poverty,[93] decent work deficits[94] , and unfair labor practices are slow and sometimes non-existent. The colossal, disruptive, and unprecedented impact of the COVID-19 pandemic creates a problem within the problem for most emerging labor markets which had to contend with recondite labor issues arising from pay cuts arising from changing work patterns, loss of incomes, and dwindling demand for goods and services. The shrinking job space is a symptom of inequality of bargaining power which undeniably distorts relational arrangements in the workplace (collective agreements inclusive). Since inequality in the bargaining power of parties is factual and capable of undermining relations in the workplace, the law owes the weak party a duty of protection.[95] This is necessary to prevent the undue dominance of the weaker party by the stronger party.[96] As such, linking ministerial interference in the outcome of the collective bargaining process to inequality in the bargaining power of parties may not be an evocative argument incapable of scaling through a normative periscope.

From a remote perspective, ministerial interference in the outcome of the collective bargaining process may also be linked to the exigency for the state's intervention in industrial relations through the formulation of labor policies. There has been inconsistency in the nature of the state's intervention in industrial relations in Nigeria. Before independence, labor policy favors voluntarism.[97] The colonial labor policy of voluntarism bequeathed by the colonialists aligns with the fact that both management and labor are opposed to legal intervention in industrial relations in Britain.[98] Legal intervention is considered as an intrusion into "prerogative right." Sequel to the promulgation of the Trade Disputes (Emergency Provisions) Decree 1968 (No. 21), the role of the state in the settlement of disputes become interventionist in nature.[99] Under the National Labor Policy of 1975 introduced by the Mohammed/Obasanjo-led administration, the labor policy became that of "limited intervention and guided democracy." Although the concept of "limited intervention and guided democracy" is fraught with definitional imprecision,[100] it

[93] The concept of "working poverty" was developed by the International Labor Organization (ILO) to refer to situation where workers have so low an income that they are unable to escape poverty despite being in employment. The category of workers affected by working poverty (i.e. working poor) usually have incomes that fall below a given poverty line or threshold due to lack of work hours and/or low wages. Working poverty may assume the nature of extreme poverty (where a worker lives in households with a daily per capita income below US$1.90 in purchasing power parity terms) or moderate poverty (where a worker lives in households with a daily per capita income between US$1.90 and US$3.20 in purchasing power parity terms). Please, see International Labor Organization (n 92) 20.

[94] Goal 8 Sustainable Development Goals (SDGs) adopted in 2015 by member states of the United Nations represents a global mandate to promote decent work for all.

[95] Chianu, *Employment Law,* 1.

[96] AA Adeogun, "The legal Framework of Industrial Relations in Nigeria" *Nigerian Law Journal* 3 no. 1 (1969); Otto Kahn-Freund, *Labor and the Law* (24th Series, The Hamlyn Lectures, Stevens for Hamlyn Trust 1972), 7.

[97] Idubor, *Employment and Trade Dispute Law,* 147.

[98] Emiola, *Nigerian Labor Law,* 11.

[99] Fashoyin, *Industrial Relations,* 198.

[100] Srivastava, *Industrial Relations and Labor Laws,* 93.

is akin to the Anglo-Saxon model of tripartism.[101] The admixture of parties' latitude in management of their affairs with the state retaining some forms of control over parties to enforce compliance remains the labor policy in vogue under the current dispensation.[102] Core labor legislations were fashioned and decreed under military rule.[103] With civilian experimentation of military labor law, not so much has changed under the current democratic dispensation.

The government which formulates labor policies is the highest employer of labor.[104] The government possesses the power to dominate decisions honoring or dishonoring any agreement depending on the interest government has for it.[105] The government may decide to honor any agreement if it deems it necessary and may decide to disregard it if it is not in her favor.[106] In the education sector, the Academic Staff of Universities Union (ASUU) has gained notoriety for engaging in strikes since the inception of democracy in 1999.[107] These strikes are predicated on a wide gamut of vital, unresolved, and contentious issues of which non-implementation of previously concluded collective agreements by the federal government remains cardinal.[108] It seems compelling to argue that the government's retention of significant control and influence over collective agreements is largely designed to facilitate the protect government against liability that may arise from non-observance or violation of collective agreements. While ministerial interference in the enforceability of collective agreements may not necessarily be a problem, the absence of safeguards for regulating the exercise of such power may give room for abuse for any government with little regard for rule of law and propensity for recklessness.

The law on ministerial interference in the outcome of the collective bargaining process does not contemplate a situation where the Minister of Labor and Productivity fails or neglects to exercise the power on the ministerial endorsement of collective agreements. The use of the term "may" in section 3(3) Trade Disputes

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[101] Tripartism is a system of industrial relations involving interaction among the three key actors in industrial relations (employers, employees and government).

[102] Okonkwo Obi Peter, "Implementation of International Labor Standards," *Labor Law Review,* 3 no. 4 (2009): 93-94.

[103] Joseph Abugu "Nearly Always, A Strike or Lock Out is Unlawful in Nigeria," *The Gravitas Review of Business & Property Law,* 6 no. 1 (2015): 28.

[104] DC John and Ibrahim Abdulkarim, "Review of Labor Dispute Resolution Mechanism Under the Trade Dispute Legislation in Nigeria" *Journal of Private & Comparative Law,* 8 (2015): 118; Oginni B. Yemi and Adesanya A. Segun, "The Workers' Rights in Nigeria: Myth or Reality?" *International Journal of Business and Management Invention,* no. 2 (2013): 100; Emiola, *Nigerian Labor Law,* 461; Otobo, *Industrial Relations,* 227.

[105] Ugbomhe and Osagie, "Collective Bargaining in Nigeria," 28.

[106] *Ibid.*.

[107] The Academic Staff of Universities Union (ASUU) was formed in 1978 as the successor to the Nigerian Association of University Teachers formed in 1965. This trade union covers academic staff in all of the Federal and State Universities in Nigeria.

[108] Other issues include poor funding of universities, low budgetary allocations to the education sector, abysmal working conditions, wanton sack of lecturers, disparity in salary, retirement age for professors, among other.

Act 2004 in qualifying the mode of the exercise of the ministerial power is suggestive of the discretion enjoyed. Vesting absolute, unguided, and unrestrained discretionary powers on the Minister of Labor and Employment, a political appointee, to determine the fate of a collective agreement without putting in place mechanisms for check and balance render the exercise of such powers susceptible to abuse of all sorts particularly in a situation where the government has vested interest in a trade dispute.[109] This is more so that the Minister of Labor and Productivity is a member of the Federal Executive Council whose duties are assigned and circumscribed by the President of the Federal of Nigeria.[110] Again, allowing the Minister of Labor and Productivity to sanction a collective agreement to which government is a party contravenes the cardinal principle of natural justice embedded in the maxim *nemo judex in causa sua*.[111]

Without any of the above arguments in sight, ministerial interference in the outcome of the collective bargaining process may not be a legal necessity at all instances where collective agreements are executed by parties. The provisions of section 3(1)-(4) Trade Disputes Act 2004 relate to collective agreements for the settlement of trade disputes as opposed to those concluded by parties without any trade dispute in sight.[112] Most collective agreements that have appeared before the courts are not "for the settlement of a trade dispute" and as such do not need the endorsement of the Minister of Labor and Productivity to become enforceable.[113] In addition, it is incongruous for the enforceability of voluntarily concluded agreement to be hinged on an extraneous endorsement. Subjecting freely bargained outcome of disputants to the whims and caprices of a non-disputant less of a judicial institution is an affront on the doctrine of *pacta sunt servanda*[114] which inure in favor of voluntarily concluded agreement of any sort. Ministerial endorsement of collective agreements, not forming part and parcel of international labor standards, can be dispensed with by the National Industrial Court in the enforceability of collective agreements.

VI. CONCLUSION AND RECOMMENDATIONS

It has been shown that the enforceability of collective agreements need not be subjected to extraneous consideration of any sort. This is necessary for safeguarding the notions of voluntarism and industrial democracy which provide a strong basis for collective bargaining and collective agreements which are the

[109] Dr. Chris Nwabueze Ngige, the current Minister of Labor and Employment in Nigeria is a Medical Doctor by profession with no technical background in management of industrial relations.
[110] Section 148(1) Constitution of the Federal Republic of Nigeria 1999 (as amended).
[111] This principle has been upheld in the following cases: *Oluwagbemiga v Ajani* (2007) All FWLR (Pt 343) 183 at 198, paras. G-H; *Yusuf v Union Bank of Nigeria Plc* (1996) 6 NWLR (Pt 400) 630 at 646, para. F; *Maliki v Michael Imoudu Institute for Labor Studies* (2009) All FWLR (Pt 491) 979 at 1019, paras. A-D; *Cross River State v Young* [2010] All FWLR (Pt 714) 44 at 59, paras. E-H.
[112] Vincent Iwunze, "The General Unenforceability of Collective Agreements under Nigerian Labor Jurisprudence: The Paradox of Agreement without Agreement" *International Journal of Advanced Legal Studies and Governance,* 4 no. 3 (2013): 6.
[113] Chianu, *Employment Law,* 74.
[114] *Pacta sunt servanda* implies that parties are bound by their agreements.

finest evidence of social dialogue in the workplace. The underlying motivation for engaging in collective bargaining and arriving at collective agreements lies in the positive expectations of recognition and enforceability. Without enforceability, collective agreements and the process through which they are attained (collective bargaining) are a mockery of voluntarism as a mechanism for the resolution of trade disputes. Therefore, the enforceability of collective agreements is a key policy tool in promoting collective bargaining and enhancing its role in facilitating voluntary negotiations and inclusiveness in the workplace. As such, labor market regulations must be designed and re-designed to expressly guarantee the enforceability of collective agreements without any hindrance. Even in the absence of such reform, trade unions should upscale the enforceability of collective agreements through a lawful strike.

Furthermore, collective agreements should be treated as self-executory workplace pacts except where the contrary intention is expressed. Government has a key role in promoting collective bargaining through providing a dedicated legislative framework, establishing supportive institutions, and executing capacity-building programs on collective bargaining for trade unions by the Ministry of labor and Productivity in collaboration with other relevant stakeholders. Laws and regulations should make it obligatory for employers and employees alike to be bound by collective agreements. It should also be obligatory for employers to take appropriate steps in bringing to the notice of workers concerned the contents of every collective agreement applicable to their undertakings. In safeguarding the sanctity of collective agreements, third-party intervention or intervention by state authorities should be allowed only voluntarily as agreed by the parties and only where the outcome is manifestly unfair, lopsided, or contrary to public policy. Violation of collective agreements should be considered as an unfair labor practice with attendant consequences. The future workplace is intrinsically linked to social dialogue. Once these proposals for reforms are imbibed, there is no doubt that the utility of collective agreements in the workplace will be enhanced and a large chunk of disputes stand to be resolved in the most gregarious manner.