A CRITICAL ANALYSIS OF THE NORMATIVE PRINCIPLES IN THE ALTERNATIVE DISPUTE RESOLUTION THEORY

Dr. Favour Onoriode Ebbah*
Dr. Ernest Ogwashi Ugbejeh**

Abstract

The idea of using Alternative Dispute Resolution (ADR) mechanisms in the settlement of disputes has grown tremendously, especially, in Nigeria where the use of the court in the resolution of disputes is fraught with many anomalies, which include case congestion and delay, astronomical cost, technicalities, unfriendly nature of litigation and actual and perceived cases of corruption among judicial officeholders. This embrace of ADR has resulted in many States in Nigeria establishing multi-door courthouses where ADR mechanisms like arbitration, conciliation, mediation, early neutral evaluation and negotiation are employed in the settlement of disputes. However, certain normative principles are inherent in the theory of ADR. These normative principles help to explain the philosophy behind the theory of ADR. The aim of this article, therefore, is to critically analyse these normative principles inherent in the theory of ADR to determine whether there are weaknesses in the ADR theory. This article employs the doctrinal methodology of research. This article concludes by recommending that the study of ADR should be made compulsory at the faculties of law in Nigerian universities for the theory of ADR to be deepened and enlarged to make it more effective in the resolution of disputes in Nigeria.

* LLB, BL, LLM, PhD, MBA, FHNR, MNIM, ACArb, pnm. Managing Partner of Lexpoint Solicitors, a law firm based in Asaba, Delta State. Email-favorism4u@yahoo.com.

** LLB (AAU), BL (NLS), LLM (UNIBEN), PhD (UK). HoD, Commercial Law, National Open University of Nigeria, ADR and Anti-Corruption expert and partner of Emled Consult, a legal consulting firm based at Abuja and Asaba.

Keywords: ADR, Alternative Dispute Resolution, Dispute, Normative Principl

INTRODUCTION

Alternative Dispute Resolution (ADR) refers to all those methods of settling disputes aside from courtroom litigation.[1] According to Bennet,[2] ADR is a loose term, which encompasses different forms and procedures that are all generally private dispute resolution mechanisms which parties may select from as an alternative to the conventional court system to fit their particular needs.

ADR has also been seen as "any method of resolving an issue susceptible to a normal legal process by agreement rather than by imposed binding decision".[3] The basic features of ADR are speed, less cost, flexibility, party autonomy, confidence, familiarity and confidentiality. According to Akanbi, ADR is comprised of a wide variety of processes that can be used singly or in combination with others; and which can be tailored to meet the needs of disputants in the resolution of disputes through the help of an impartial third party with each process being an alternative to litigation.[4]

There are several mechanisms of ADR. They include: arbitration, mediation, conciliation, negotiation, mini-trial, early neutral evaluation, private judging, mediation-arbitration (med-arb), arbitration-mediation (arb-med) and settlement conferences.[5] The

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1 Steven Bennett, *Arbitration: Essential Concepts* (New York: ALM Publishers, 2002), 190.

2 ibid, 4.

3 Otto De Witt Wijnen, "Adr, the Civil Law Approach" *Arbitration* 61(1) (1995): 39.

4 M. M. Akanbi, "Kwara Multi-Door Courthouse: An Idea Whose Time has Come" a Paper presented during the Inauguration of the Committee on the Proposed Kwara State Multi-Door Court House on Tuesday, 29th July 2008.

5 Ekene Odum, "Application of Arbitration and ADR for Resolving Election Petition Cases and Political Parties Disputes" *Chartered Institute of Arbitrators Nigeria Journal of Arbitration* 5, no. 1 (2010): 33-43. This list is by no means exhaustive. Since ADR is any form of dispute resolution outside the conventional courtroom,

ADR theory envisages and promotes a faster and friendly process in the settlement of disputes. This has made ADR to be embraced by disputants as an alternative to litigation, which is usually time-consuming and acrimonious.

However, the knowledge of the theory underlying ADR is low amongst many lawyers in Nigeria. This has resulted in many lawyers lacking a proper understanding of the concept of ADR and becoming antagonistic towards ADR. The reason for this uncooperative posture by some lawyers may not be unconnected with the traditional law school training that lawyers receive, which focuses on the presumptions that disputants are in a battle and there can only be one winner and such a winner can only be confirmed by a third party applying the instrumentality of the law. These presumptions by lawyers have affected their views and perception of ADR.[6]

Furthermore, the negative attitude of many lawyers towards ADR is may basically because many law faculties in Nigerian universities are not teaching ADR as a compulsory course. This has created a situation where the normative conceptions inherent in the ADR theory are not known by many lawyers thereby making it difficult for them to appreciate the role ADR plays in the dispute resolution arena. This has the effect of many lawyers finding it difficult to advise their clients about ADR. In this respect, this article strives to examine the normative conceptions that are underlying the ADR theory in order to provide an understanding of the ADR concept, thereby creating and increasing ADR consciousness amongst lawyers and other critical stakeholders in the dispute resolution arena.

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such other processes for the resolution of disputes aside litigation that the author is not aware of can be included in this list.

6 Mary Mullarkey, "ADR in Colorado: A Vision for Restoring Community," *Colorado Lawyer* 28, (1999): 18.

There are different normative principles or conceptions which are inherent in the ADR theory. The ADR theory is generally based on three normative principles or conceptions[7] which are:

1. A vision of "Just Harmony" that can serve as a goal against which the dispute resolution procedures can be measured;
2. A vision of "Authentic Participation" that can distinguish legitimate involvement and engagement in a process from its strategic manipulation; and
3. A vision of "Appropriate Fit" that can provide an evaluating framework for determining what types of dispute resolution procedures are best merged to resolving different types of conflicts.

We shall now examine these three normative conceptions.

The Normative Conception of "Just Harmony"

The normative conception of "just harmony" in the ADR theory seeks cordial relationships amongst disputants rather than "the truth" which is the concern of using the courts in the settlement of disputes. This normative conception of just harmony postulates that the legal system should be concerned with "problem-solving" rather than "truth-finding".[8] In other words, the theory of ADR is not concerned with who is right or wrong between the disputants in a dispute. That is why ADR has been referred to as a win-win process, unlike litigation which is a win-lose situation.[9]

However, because the ADR theory is concerned mainly with the harmonious co-existence of the disputants, this normative conception or principle of just harmony in the ADR theory has been

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7 Katherine R. Kruse, "Learning from Practice: What ADR Needs from a Theory of Justice," Nevada Law Journal 5, (2004-2005): 392.

8 Ibid.

9 Dennis Oricho, "Understanding the Benefits of Alternative Dispute Resolution (ADR) in the Work Place Mediation," *Journal of Law and Conflict Resolution* 2, no. 1 (2010): 11.

heavily criticised by Nader who sees the ADR theory as a movement which trades justice for harmony.[10] ADR has also been condemned in this regard by its over-reliance on seeking harmony among disputants.[11] In this vein and according to Sanchez, in seeking to harmonise disputants, ADR often superficially dampen deeper conflicts among disputants that is difficult to process in order to create a semblance of superficial order that is achievable.[12] Commenting further, Sanchez states thus:

> ADR is a wolf in sheep's clothing ready to eat up the unwary disputants by suppressing the symptoms of conflicts through settlements that avert litigation without liberating the individual from the underline cause of the conflict by resolving it in a manner that serves justice and human needs.[13]

Furthermore, Sanchez views the growth of ADR as an attempt to suppress conflict in society. She views conflict as a natural phenomenon that should be handled in a manner that serves the society progressively. She argues that the suppression of conflicts would be harmful to society and may produce escalating problems by depriving individuals in society the opportunity to release energies that are both creative and destructive.[14] However, Coker is of the view that justice is not alien to the concept of ADR and it is vital to it.[15]

Laura Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Re-Form Dispute Ideology," *Ohio State Journal on Dispute Resolution* 9, no. 1 (1993): 1.

11 Valerie Sanchez, "Back to the Future of ADR: Negotiating Justice and Human Needs", *Ohio State Journal on Dispute Resolution 18*, (2003): 722.

12 Ibid, 722.

13 Ibid, 722-723.

14 Ibid, 723.

15 Adesina Coker, "Disputes, Conflicts and Alternative Dispute Resolution: Perspectives and Reflections," *Bowen Law Journal* 1, (2017): 199.

From the above, it is apparent that disputes can be quickly resolved where the harmonious relationship between the disputing parties is made the focal point of any dispute resolution process. In this regard, the seeking of harmony rather than justice is justifiable when one looks at ADR from the prism of a dispute resolution process that strives to promote a peaceful society. Therefore, one is of the view that in spite of the criticisms of the ADR theory in seeking harmony over justice, the normative conception of ADR helps to preserve peace and reduce conflict in the society, which in turn promotes cohesion and development in the society.

The Normative Conception of "Authentic Participation"

Even with the presence of the just harmony conception in ADR, there is still the need to differentiate the authentic use of the ADR process from its strategic manipulation. The normative conception of authentic participation is based on the assumption that disputants to an ADR process "participate in good faith with a common desire to resolve their dispute".[16] However, to Coker, this assumption might not necessarily be the case.[17] In this sense, the ADR processes and proceedings should be designed in such a way that the result of the bargaining power of the parties to the dispute can be minimised in order to reduce the ability of the parties to manipulate the process. The purpose of this is to guard against the situation where the ADR process will be greatly influenced by the party with superior bargaining power and resources.

However, in reality, there can be no guarantee that the parties to an ADR process will have equal strength, resources and bargaining power. Just as it is prevalent in litigation, where the more resourceful and wealthier litigant can hire the best lawyers to represent him/her to have an edge in the litigation process, the same can be said to be

16 Ibid, 201.
17 Ibid.

true where a party to an ADR process has more bargaining powers than the other.

Fiss identifies three different ways in which the unevenness in resources can affect the settlement process in ADR. Firstly, the poorer party may be less able to scrutinise the information required to correctly predict the result of the litigation process; and this is a disadvantage in the negotiation process. Secondly, the poorer party may be eager to get the damages he seeks immediately and this may induce him to settle as a way of quickly getting the money even though he may probably get more if he waits for the court judgment. Thirdly, the poorer party might be forced to accept a settlement because he does not have the resources to finance the litigation, including his lawyer's fees, which may increase as the case prolongs.[18]

In this respect, it could be argued therefore that the vision of just harmony or fair participation, which is highly celebrated by ADR proponents in the ADR process, may just be a mirage after all since the "justness" or "fairness" in any process can be questioned where the parties to that process have unequal bargaining powers in the first place. As rightly contended by Kruse, "to evaluate whether a procedure is being used authentically or strategically, it must be measured against some normative ideal of what full, true or fair participation would look like".[19]

However, since the decisions reached in ADR processes are products of consensus by the participants in the ADR process, authentic participation will enhance and promote consensus building in the resolution of disputes as noted by Menkel-Meadow thus:

> Consensus building, which is both principled as well as based on bargaining models (when bargaining does not necessarily

[18] Owen Fiss, "Against Settlement, *"Yale Law Journal 93*, (1984): 1076.
[19] Kruse, 393.

entail compromise), may provide useful models for democratic participation and political decision making.[20]

[20] Carrie Menkel-Meadow, "The Lawyer's Role in Deliberative Democracy," http://ssrn.com/abstract=784530 (accessed 30th November 2015).

The Normative Conception of "Appropriate Fit"

ADR requires a theory of appropriate fit between types of disputes and processes needed to resolve them for it to be effective.[21] The concern has always been that it is very difficult to refer disputes to the appropriate ADR mechanism[22] and referral of a dispute to an inappropriate ADR mechanism might leave the dispute unresolved. According to Kruse,[23] "to properly put different kinds of disputes to their appropriate berths, alternative dispute resolution needs a normative theory of what circumstances make particular kinds of dispute resolution procedures appropriate".

The theory of ADR denotes a system where disputes are referred to particular ADR mechanisms like mediation, arbitration, negotiation, etc. for resolution. One of the most potent challenges facing ADR enthusiasts and practitioners is the ability to determine the most appropriate ADR mechanism that can best resolve a particular dispute.[24] Expressing his concern in this regard, Sander states thus:

> The idea is to look at different forms of dispute resolution – mediation, arbitration, negotiation, and med-arb (a blend of mediation and arbitration). I tried to look at each of the different processes and see whether we could work out some kind of taxonomy of which dispute ought to go where, and which doors are appropriate for which dispute.[25]

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21 Kruse, 393.

22 Sander and Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centred Approach," *Harvard Negotiation Law Review* 11, (2006): 1-2.

23 Kruse, 394.

24 Steven Goldberg, "Wait A Minute. This is Where I Came In. A Trial Lawyer's Search for Alternative Dispute Resolution" *Brigham Young University Law Review* (1997): 678-679.

25 Transcript of a Dialogue between Professors Frank Sander and Mariana Hernandez Crespo, "Exploring the Evolution of the Multi-Door Courthouse" http://ssrn.com/abstract=1265221 (accessed 20th 0ctober 2014).

This problem has been further elucidated by McCormack *et al* who questions the discretion of the judicial system to unilaterally assign disputes to any of the ADR mechanisms.[26] According to them, even though there is a proliferation of court-connected ADR programmes, the challenge of deciding which cases ought to go to a particular ADR mechanism has largely been ignored.[27] They state further that this has resulted in a situation where the judicial system has used its discretion in determining which ADR mechanism might best fit a case and this has given birth to practice in most cases where a court practice or rule automatically refers cases to mediation.[28]

Commenting on the problem of identifying the most appropriate ADR mechanism for settling disputes, Shestowsky is of the view that the disputants must be allowed to select the ADR mechanism they want for their disputes instead of the court doing it for them.[29] She argues that disputants' preferences in selecting the appropriate ADR mechanism should overcome institutional goals which are presently being pursued by the court.[30] The rationale behind Shestowsky's views in this regard is that disputes in the first place belong to disputants and disputants should be allowed to control how their disputes are to be resolved.[31]

Furthermore, since self-determination is a primary goal of ADR, disputants' subjective preferences for ADR methods should be key in the resolution of their disputes.[32] It is also the view of Shestowsky that the lawyers to the disputants should not be consulted in

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26 McCormack *et al*, "Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators and Lawyers," *St. Mary's Journal on Legal Malpractice & Ethics* 1, (2011): 177. 152.

27 Ibid.

28 Ibid.

29 Donna Shestowsky, "Disputant's Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little", *Ohio State Journal on Dispute Resolution* 23, (2008): 549.

30 Ibid.

31 Ibid, 557.

32 Ibid, 552.

identifying disputants' preferences. Rather, the disputants should be considered directly in determining the appropriate dispute resolution method.[33] Shestowsky also opines that there are some expected benefits inherent in the implementation of disputants' preferences in this regard. According to Shestowsky, firstly, disputants' preferences can enhance party self-determination. Secondly, it can promote procedural justice by facilitating the shaping of procedures by disputants on a case by case basis which may improve voluntary compliance with settlement outcomes. Thirdly, disputants' preferences may increase participation in the ADR process which can help in advancing the institutional goals of the courts which relate to the de-congestion of cases in court.[34]

Much as the views expressed above by Shestowsky are commendable, practically, however, allowing disputants' preferences in selecting the appropriate ADR mechanism for their disputes in the ADR process may pose some serious challenges. Firstly, most disputants are not knowledgeable about ADR and the different ADR mechanisms. In this respect, it could be a difficult task in allowing disputants to choose from an array of ADR mechanisms which they are not aware of. Secondly, even if the disputants are allowed to select the ADR mechanism they want in the name of "self-determination" as espoused by Shestowsky above, sticking to that ADR mechanism will become a problem if any of the disputants foresees that the ADR mechanism might not give him the desired outcome. This might lead to the disillusioned disputants opting for another ADR mechanism in the middle of the process in the name of self-determination.

Thus, while the views expressed by Shestowsky on allowing disputant's preferences in the selection of the appropriate ADR mechanism during the ADR process appears ideally desirable, the position remains that allowing disputants' preferences in this

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33 Ibid, 551.

34 Ibid, 565-583.

circumstances is practically difficult especially in a country like Nigeria where the knowledge of ADR amongst disputants is generally low.

Hedeen offered some useful tips in identifying the appropriate ADR mechanism for a particular dispute. According to him, there are five criteria in determining the appropriate ADR mechanism for disputes and these are the nature of the dispute; the relationship of the parties; the amount in dispute; the cost of each process; and the speed of each process."[35] In this regard, McGregor is of the view that there is a need to equate the dispute resolution process with the cost, nature and importance of the dispute in identifying the appropriate dispute resolution mechanism.[36]

Solum formulated some options in identifying the appropriate ADR mechanism in resolving disputes and the role expected of the participants in the ADR process. The options are as follows:[37]

1. Plaintiff's option: The plaintiff could act as the gatekeeper in the process. In doing so, the plaintiff chooses from a list of available options such as the traditional trial process, arbitration and mediation.
2. Defendant's option: Same as plaintiff's option, but the selection is done by the defendant.
3. Unanimous consent: All the parties to the dispute would act as a gatekeeper and any failure to agree upon any of the options would result in default, for example, arbitration followed by mediation if no settlement is reached.

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35 Timothy Hedeen, "Remodelling the Multi-Door Courthouse 'To Fit the Forum to the Folks': How Screening and Preparation Will Enhance ADR," *Marquette Law Review* 95, issue 3 2012):942.

36 Lorna McGregor, "Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach Through the ECHR," *European Journal of International Law* 26, no. 3 (2015): 608.

37 Lawrence Solum, "Alternative Court Structures in the Future of the California Judiciary: 2020 Vision," *Southern California Law Review* 66, (1993): 2148-2149.

4. Mechanical criteria administered by clerks: Under this, a clerk or other court staff applies mechanical criteria to sort cases by relying on the type of dispute, the status of the parties and the number of damages as the screening factors.
5. Judgmental criteria administered by screening experts: under this, the screening process involves experts and it may involve conducting interviews with the parties or their lawyers.
6. Judgmental criteria administered by judges: Under this, judges do the screening. Although this method may provide the maximum expertise and experience, the disadvantage is that it may be the most expensive per screening decision.

However, to Sander and Rozdeiczer, one of the basic steps in identifying the appropriate ADR mechanism for the dispute is to assess the goals of the parties and to see how those goals can best be achieved from the array of available ADR mechanisms.[38] Furthermore, Sander and Rozdeiczer believe that in trying to find the appropriate ADR mechanism, the features of the case[39] and the features of the parties[40] should be analysed. Similarly, the features of the different ADR mechanisms should be recognised as well to give the disputants the maximum benefit from the use of the selected ADR process.[41]

CONCLUSION

This article has identified and critically analysed the normative principles underlying the ADR theory. These normative principles which are just harmony, authentic participation and appropriate fit have helped to provide an understanding of the philosophy underlying the theory of ADR. These normative principles have also helped to explain and conceptualise ADR. The above analysis of the

38 Sander and Rozdeiczer, 11-19.
39 Ibid, 24-25.
40 Ibid, 25-27.
41 Ibid, 20.

normative principles that are inherent in the ADR theory has also exposed the defects in the ADR theory, especially, in practical terms. To this end, policymakers and relevant stakeholders in the ADR process should find a solution to some of these defects in order to make ADR more potent in the dispute resolution arena.

It is hoped that this article has provided an understanding of the ADR concept and has broadened the scope of ADR. To this end, modalities should be put in place by the relevant stakeholders, especially in the legal education environment, for the ADR theory and its normative conceptions to be studied in order to continue to fine-tune the ADR process to make it a more effective means of settling disputes. In this regard, one is recommending that the study of ADR should be made compulsory at the faculties of law in Nigerian universities in order for the theory of ADR to be deepened and enlarged to make it more acceptable by lawyers and to be more effective in the resolution of disputes in Nigeria.

PROTECTION AND VULNERABILITY OF THE INTERNALY DISPLACED PERSONS (IDPs) IN ACCESSING SOCIO-ECONOMIC RIGHTS IN NIGERIA.

LEONARD C. OPARA*

Abstract

Millions of people, including children, women and men have suffered in the explosion of ethnic, religious, terrorist, civil and international conflicts since the end of the cold war in 1989. The issue of internally displaced persons (IDPs) has been globalised and there is need for the international community to give protection and assistance to IDPs and leave the issue of whether there is an international border to be crossed. The Kampala Convention 2009 specifically states that it is the duty and responsibility of the state governments to provide protection and assistance to IDPs in their territory or country. In internal displacement, IDPs are vulnerable, and without the assistance of humanitarian services. IDPs are at higher risk than those who are still remaining at their places of abode to suffer malnutrition. This paper applies the vulnerability theory and concept where the state is held accountable and responsible for the socio-economic traits associated with internal displacement. It addresses policy types for extending the social protection coverage to the IDPs. The paper examined the vulnerability of the displaced persons and to see how the socio-economic applicability of the policy in Nigeria and other member States of African Union to their social changes. The paper critically analysis the inequalities that are meted to IDPs in Nigeria. Finally, the paper recommends a broad socio-economic policy framework that goes beyond protection and assistance of IDPs which is needed to improve their lives and reduce inequality within the society and to promote social justice.

Keywords: Internally Displaced Persons, Vulnerability, Socio-economic Policy, Kampala Convention, Nigeria

1.0 INTRODUCTION

Internally Displaced Persons (IDPs) is a global phenomenon which often refers to displaced people who are still within the confines of their territorial jurisdiction. There are other group of people who may be vulnerable in terms of conflicts or armed conflicts. Women and children are also vulnerable due to their nature. IDPs suffer economic, psychological and emotional problems of food, water and insecurity, including social dislocation.[1] The children of IDPs are also affected to the extent that some of them are recruited into armed groups as soldiers or armed forces by the state actors. Poverty contributes to vulnerability. Thus, social and economic protection are the index of livelihood, which deal with economic growth and consumption of goods and services transfer to scarce public resources from production, investment, which may affect economic growth as a result of poverty.[2]

In states like Afghanistan, Colombia, Ivory Coast, Nigeria and other countries where the displacement of IDPs has occurred, the individuals become poor after being displaced from their original place or rural area where they live before displacement. IDPs are excluded from basic education, they suffer more health-related problems especially in the tents or shelters provided for them as camps, than people who are not displaced. They remain in serious

***Leonard C. Opara** LLM (OAU Ife) BL (Nigeria) LLB (Lagos)Doctoral Candidate (Public Law), Nelson Mandela University, Port Elizabeth, South Campus, South Africa. Email: s218189923@mandela.ac.za Tel: +27812175467. Also, Lecturer & Notary Public, Nigeria Police Academy, Wudil, Kano or chinardslaw@gmail.com

[1]Nwanna and Oparaoha, "The Role of Social Workers in ameliorating the plight of internally displaced persons in Nigeria, (2018) 1 (1) *Nigerian Journal of Social Psychology*, 63-75.

[2]Okon, "Poverty in Nigeria: A Social Protection Framework for the most Vulnerable Groups of Internally Displaced Persons", (2018) 2(1) *American International Journal of Social Science Research*, 66-80.

poverty without any access to economic livelihood.[3] There are social economic consequences of developmentally induced internally displaced people. The most affected are mainly women.[4] This is due to lack of means of livelihood, unemployment and lack of access to economic resources, which could be as a result of demolition of their houses, shops and different places of business by the government. This paper examines the extent of state obligation and responsibility to the protection and assistance of IDPs under the Kampala Convention 2009 with a view of ensuring its vulnerability in accessing social economic activities. It further explores the possibility of the State Parties of the African Union (AU) to propose a social policy as a legal framework to reduce IDPs plight to vulnerability, especially, the IDPs caused by insurgency in Nigeria. Internal displacement changes the status of persons affected and make them vulnerable due to lack of shelter and healthcare services, resulting from living in inhabitable places, lack of social amenities, separation from the love ones and lack of family bond.

2.0 CONCEPTUALISING VULNERABILITY OF IDPS

Majority of IDPs are found in Africa while their vulnerability is caused by armed non-state actors or armed group.[5] The IDPs are vulnerable due to the life style they live in their various camps and places of displacement. They are vulnerable to physical and mental abuse, political, socio-economic and human rights violations as well as other social vices. Internal displacement changes the status of individual land make them vulnerable due to lack of shelter and health care, which are the outcome of living in uninhabitable places

[3]Kalin, "Internal Displacement", in *the Oxford handbook of Refugee and Forced Migration Studies*, (ed) Elena Fiddian-Qasmiyeh, et al, (2014) 173.

[4] Oyefara and Alabi, "Socio-economic Consequences of Development Induced Internal Displacement and the coping strategies of female victims in Lagos-Nigeria: An ethno-demographic Study", (2016) 30 (2) *African Population Studies*, 2520-2532.

[5] Lwabukuna, Oliva Kokushubila, "*Reflections on the Possibility of a Comprehensive Framework for the Protection of IDPs in Africa's Great Lakes Regions*, Published LLD Thesis, University of Pretoria, South Africa, 2012. Accessed 2019-03-09.

with no social amenity, separation from loved ones and family bonds which are no more in existence.

Fineman argues that vulnerability is inherent in human being and it is universal and constant. That it is post identity not only focused on discrimination against a particular group, but concerned with the less privilege in the society. Fineman observed that the vulnerability theory will make the state more responsible towards individuals and institutions by making it a social policy and law (legislation)[6]. Similarly, he said that it is the obligation of the state to respond to individual vulnerability and provide equal access to basic social amenities such as healthcare services, food and security.[7] The state is the decision-making body for the entire society which everybody obeys its legal order. It is sovereign and its authority is legitimate and compulsory for the regulation of its jurisdiction within the territory. The state has the sole authority to exercise power or use of force for the people to obey its decision.[8] The state government has the social will and power to assist people who are in distress and in their need of socio-economic protection as human beings who are vulnerable due to displacement. Failure by the government to protect and assist the IDPs is an act of injustice. Poverty contributes to vulnerability. Thus, socio-economic protection is the index of livelihood which deals with economic growth and consumption of transfers to scare public resources from production, investment,

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6 Fineman," Vulnerability Theory and the Role of Government, Yale Journal of Law & Feminism, (2014) 26, (1).

7 Fineman, "The vulnerable Subjects and the Responsive State." (2010) *Law Journal*, 251,257; see also Kohn" Vulnerability Theory and the Role of Government, Yale Journal of Law & Feminism, (2014) 26, (1)., 1:5.

8 Itumo and Nwefuru, "Nigeria State and Responses to Plights of Persons Internally Displaced by Boko Haram Insurgents: Implications for Socio-Economic and Political Development", (2016) 6 (15), *Research on Humanities and Social Sciences*, 2224-5766.

which may hinder economic growth as a result of poverty which is a tool for a reduction.[9]

From Fineman position, which I agree since the state government is the custodian of law and policy, its application should be for the benefit of the vulnerable people such as the IDPs who are the subjects of governance by making the state more responsive and responsible. The limitation of this theory, which the study aligns to, is that using the Fineman's concept, the state government is responsible to its citizens, which the IDPs are part of.

2.1 What is Vulnerability?

There are different meanings of vulnerability due to the method or approach one adopts. This varies from one field to another. Vulnerability may refer to those who are less privileged and are more affected by lack of socio-economic resources like the IDPs due to displacement. In the sociological perspective, vulnerability can be used as a tool for characterising a community or society in the face of adversity.[10] Vulnerability is also a factor of loss of security where a person moves from one place to another to find protection or safety, especially, in the situation of displacement. Here, vulnerability is a form of insecurity or an abuse of rights or its infringement where the state is responsible for the citizen's protection.[11] The state must find the vulnerable and give them their basic rights. However, to an economist, vulnerability may be

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9 Okon, "Poverty in Nigeria: A Social Protection Framework for the most Vulnerable Groups of Internally Displaced Persons", (2018)2 (1) *American International Journal of Social Research*, 66-80.

10 Downing, "Vulnerability to Hunger and coping with Climatic Change in Africa", (1991), 1 Global Environmental Change 365; see also Laurence, "The Narrative of Vulnerability and Deprivation in Protection Regimes for the Internally Displaced persons (IDPs) in Africa: An Appraisal of the Kampala Convention", 16 Law Democracy and Development (2012), 219:223 (Accessed 2019-03-05).

11 Laurence, "The Narrative of Vulnerability and Deprivation in Protection Regimes for the Internally Displaced persons (IDPs) in Africa: An Appraisal of the Kampala Convention", 16 Law Democracy and Development (2012), 219:223 (Accessed 2019-03-05).

measured at the level of poverty and the risk the person is exposed to or the ability to manage hazard.[12]

Oxford[13] defines ‘’vulnerability as the quality or state of being exposed to the possibility of being attacked or harmed, either physically or emotionally’’ Some scholars define vulnerability in terms of people who has lesser or have low income or live below the poverty line. Vulnerability includes the non-income aspects like political insecurity as well as social exclusion and marginalisation (Devereux, et al, 2006). Vulnerabilities vary from one individual to another so that the state responsibility will also differ from one person to another, depending on the situation. Indeed, children and women are more vulnerable, especially in conflicts or armed conflicts as exemplified in Nigeria, Liberia, Sierra Leone and Burundi due to insurgencies, civil wars and other forms of displacement. In this context we are limiting our concept of vulnerability to the IDPs due to their suffering and displacement experiences.

However, Bulter observed that we may evaluate critically the conditions under which certain human beings are more vulnerable than others, and why certain human beings are more vulnerable than others.’’[14]Fineman’s theory of vulnerability requires an active engagement of institutions to see that human beings are vulnerable while Bulter does not challenge the methods in which the formal equality model and anti-discrimination framework perpetuate inequality and mask vulnerability under the guise of autonomy.

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12 Okon, “Poverty in Nigeria: A Social Protection Framework for the most Vulnerable Groups of Internally Displaced Persons”, (2018) 2(1) *American International Journal of Social Research*, 66-80.

13 Oxford Dictionaries (n.d), Vulnerability, https://en.oxforddictionaries.com/definition/vulnerability.

14 Bulter, “Precarious Life: The Powers of Mourning and Violence (2004); see also Kohn, “Vulnerability Theory and the role of Government, (2014) 26 (1), *Yale Journal of Law & Feminism*,12-13.

From Fineman perspective therefore, the state should be responsive and accountable to the individual vulnerability of its citizens in providing governance that is legitimate. The institution of state is the collective form of system that plays the role of ameliorating, lessening and compensating the vulnerable group.[15]

2.2 Vulnerability Thesis and the Subjects

This term vulnerability is used to describe a certain group of people as victims. For example, in public health issues, the people infected with HIV-AIDS are regarded as vulnerable, certain people who confined or detained in prison or those people living at low poverty level are also vulnerable as well as other state institutions are often termed vulnerable populations. The children, women and sometimes elderly people or aged group are categorised as vulnerable citizens. In IDPs, the children and women as well as elderly people are more vulnerable in armed conflicts during internal displacement. The 1999 Constitution of the Federal Republic of Nigeria recognises the vulnerabilities of women and children and gives them special guarantees against being displaced in line with the AU Convention for the Protection and Assistance of IDPs in Africa.[16] Section 12 of the 1999 Constitution provides as follows:

(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the exclusive legislative list for the purpose of implementing a treaty.
(3) A bill for an Act of the National Assembly passed pursuant to the provisions of sub-section (2) of this section shall not be presented to

[15] Turner, "Vulnerability and Human Rights", (2006); see also Kohn, 2014) 26 (1), *Yale Journal of Law & Feminism*,13.

[16] Kampala Convention 2009; see Akobo and Obaji, "Internal Displacement in Nigeria and the case for Human Rights protection of Displaced Persons, (2017) Journal of Law Policy and Globalisation, 26:32.

the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

In Nigeria, therefore, by virtue of the above provision of section 12, courts do not have the power to implement the provision of a treaty unless it is domesticated into law by the National Assembly. Before the Convention on the Protection and Assistance of IDPs in Africa could have effect, the Kampala Convention has to be domesticated as part of our local legislation and not mere ratification. There is the need for the legal status for IDPs and the domestication of this convention into the Nigerian legislation in order to provide social economic and legal assistance to safeguard the rights of those that are displaced.

3.0 ENHANCING SOCIO-ECONOMIC RIGHTS

The Nigerian constitution gives special protection to the basic fundamental rights as human rights. It also recognises international treaties and domesticated it into its constitution[17] such as International Convention of Economic and Social Cultural Rights (ICESCR). Article 4 of Kampala Convention provides that state parties are responsible for human rights abuses of IDPs in their territory or country of origin ICCPR, which deals with civil and political rights of the citizens. It also recognises the rights on socio-economic and environmental rights. The state has a duty to protect the right as enshrined in the constitution. Therefore, in relation to ICESCR obligations, the state is expected to adopt legislative measures in conjunction with financial, administrative, educational and social measures with a view to achieving progressively the full satisfaction of right to social security.

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[17] S. 12 of the Constitution of Federal Republic of Nigeria 1999 as amended 2011.It also applauds the 3rd Alteration Act 2010 to the constitution and recommends the same should be extended to human rights treaties especially those providing for socio-economic rights.; see also Onomrehinor, "Re-Examination of the Requirement of Domestication of Treaties in Nigeria", (2016) *NnamadiAzikiwe University Journal of International Law and Jurisprudence* (NAUJILJ)19-20.

In the South African case of Grootboom[18], the court held that in realising a particular socioeconomic right, such as the right of access to housing, would require other elements, which form the basis of other socio-economic rights, such as access to land, clean water, and basic services. The provision of the socio-economic rights in the Nigerian constitution and the ratification of the African Charter on Human and Peoples' Rights and other international instruments that deals with the socio-economic rights, the state is liable and responsible to protect and provide adequate social security for the IDPs and other citizens. It is the obligation of the state to take legislative measures to ensure that these resources are achieved as a right to be enjoyed by the IDPs in its legislation.

There are socio-economic consequences of developmental induced internally displaced persons. The worst affected are mainly women.[19] Here, women are unemployed and lack of access to economic resources, which is as a result of the demolition of their houses, shops and different places of business by the government. It is the duty of the government to provide another alternative place of shelter since they were evicted by the agents of government.[20] IDPs suffer economic, psychological and emotional problems, lack of food, water and insecurity plus social dislocation.[21] We submit that the state government, through its National Policy on IDPs, has an

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18 See Government of South Africa v Grootboom 2000 (11) BCLR 1169 (CC).

19 Oyefara and Alabi, "Socio-economic consequences of Development-induced internal displacement and the coping strategies of female victims in Lagos-Nigeria: An ethno-demographic study", (2016) 30 (2) African Population Studies, 2520-2532.

20 Emecheta and Onyejelem, "Confronting the Challenge of Internal Displacement in Nigeria: A Social Protection Policy Approach," (2015) 6 (1/2) International Journal of Afro-Asian Studies, 10-20.

21 Nwanna and Oparaoha, "The Role of Social Workers in ameliorating the plight of internally displaced persons (IDPs) in Nigeria", (2018) 1(1) *Nigerian Journal of Social Psychology*, 63-75.

obligation to protect the rights of the internally displaced persons, especially children and the elderly.[22]

In view of the above, the measures to be adopted by the state must make sure that all IDPs are covered and the state takes responsibility for displaced persons to have access to social grant as a relief.[23] In ICESCR obligations, the state is expected to adopt legislative measures in conjunction with finance, administrative, educational and other social measures with a view to achieving progressively the full satisfaction of rights to social security. The measures to be adopted must make sure that all IDPs are covered and the state takes responsibilities for displaced persons to have access to social grant.[24]

3.1 Justifiability and Applicability of Socio-Economic Rights.

The social rights are rights which the state has a duty to act upon. It can be compared with rights that protect an individual against undue influence by the state. For instance, the right to life, which is seen as human life is the first right in the 1999 constitution of Nigeria as amended. And, I think that it is the same with modern constitutions all over the world. A social security right is the same as socio-economic rights, which the courts have said cannot be enforced without making legislation and the executive arm of government implementing it.[25]

From the above legal authority, it can serve as a precedent for the Nigerian courts to take a leave to hold the state government

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[22] See Nigeria National Policy on IDPs 2012, Ch. 3:1:4, Ch. 3:1:7 which was adopted by the Presidency in Ch:5:6.

[23] Social security as a human right available at www.umn.edu/humarts. Accessed 2019-02-09.

[24] Social security as a human right available at www.umu.edu/humarts. Accessed 2019-02-29.

[25] See the case of *Government of Republic of South Africa and Others v Grootboom andOthers, 2001 (1) SA (CC)* where the court mandated the government of South Africa to provide people who have been evicted from their informal homes with adequate basic shelter until they obtained permanent accommodation.

accountable and responsible for the provision of basic shelter to the IDPs when displaced. Also, the Kampala Convention has mandated state parties who have signed and ratified this convention as being under a duty to comply.

Similarly, although Nigeria has ratified and domesticated economic, social and cultural (ESC) rights to the African Charter, it still consider socio-economic rights as non-justiciable directive principle of state policy.[26] In Registered Trustees of The Socio-Economic Rights & Accountability Project (SERAP) v The Federal Republic of Nigeria and Universal Basic Education Commission[27], the Economic Community of West Africa States (ECOWAS) Community Court of justice held that the right to education was recognised as a non-justiciable "directive principles" of the state policy under section 6 (6) (c) of the Nigeria Constitution 1999 as amended. The ECOWAS Court of Justice ruled that since Nigeria is a State Party to the African Charter and ICESCR, it then means that the court was obliged to apply the rights recognised in the African Charter, including Article 17, which gives right to education. It further upholds that the rights, which are guaranteed by the African Charter are justiciable under the ECOWAS court.[28]

From the above SERAP case, it is provided in Article 3 (b) of Kampala Convention that Member states are required to prevent

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[26] S 6 (6) © and S.18 of the Constitution of Federal Republic of Nigeria 1999 as amended 2011; see *SERAP v UBEC*, ECW/CCJ/APP/12/07, ECW/CCJ/JUD/07/10 (ECOWAS Community Court, 30 November 2010); Socio-economic Rights & Accountability Projects v Nigeria, Communication No.300/2005, 25th Activity Report, (2008) AHRLR 108 (ACHPR 2008), Para, 28, 29, 62-69.

[27] ECW/CCJ/APP/0808(ECOWAS Community Court, 27 October 209) Para 19. Under Article 4 (g) of the Revised Treaty of ECOWAS, http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf, Member States of ECOWAS, affirmed and declared their adherence to the 'recognition, promotion and promotion of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

[28] Ssenyonjo, "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa", *Netherlands International Law Review*, (2017) 64 (2), 259-289 Accessed 2019-03-09.

political, social, cultural and economic exclusion and marginalisation that are likely to cause displacement of population or persons by virtue of their social identity, religion or political opinion.[29]

4.0 IDPS ARE MOST VULNERABLE GROUPS

Every person affected by armed conflict or conflict whose human rights are violated suffer from displacement from one place of residence to another place of habitation makes the IDPs especially vulnerable. IDPs are at risk of transit or temporary place for safety or hiding due to forced eviction, and lack of health care services within the camps, which make them even more vulnerable. They are exposed to sun and rain as well as robbery or theft of their little belongings for lack of security in the camp nor is there any family bond/ties since they are scattered.

African government have recognised that IDPs are vulnerable. It is a known fact that women and children are the most vulnerable IDPs. They face sexual and gender related violence such as assault, rape, sexual harassment, forced and infant marriages. Sometimes, these women and the girl child become pregnant, which may lead to high maternal mortality rate in the temporary shelter provided for them at the IDP camps in Nigeria.

In internal displacement, IDPs are vulnerable, and without the assistance of humanitarian services, IDPs are at high risk than those who are still remaining at their places of abode to suffer malnutrition. The children of IDPs are also affected to the extent that some of them are recruited into armed groups as soldiers or armed

[29] http://www.au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa; see also Ssenyonjo, *Netherlands International Law Review*, (2017), 64 (2) 259-289.

forces by the state actors.[30] Oftentimes, the children are separated from their parents and loved ones, especially, during battle. IDPs are excluded from schooling; they suffer more health-related problems, especially in the shelters provided for them as camps, than people who are not displaced. They remain in serious poverty without any access to economic livelihood or activities[31].

4.1 Vulnerability and Kampala Convention

The provision of social security to the Nigeria IDPs shall serve as compensation, which the Convention stipulated. The government of Nigeria has failed to provide compensation as stated in article 12 (2), which states that state parties should establish an effective legal framework to provide just and fair compensation and other forms of reparation to IDPs for damages incurred as a result of displacement in accordance with international standards. The government of Nigeria in complying with the principles of the Kampala Convention should provide adequate basic services such as schools (for the displaced children) and health care facilities for the women and the elderly in the camps. Fineman's theory of vulnerability proposed that states are responsible for the social inequality of its citizens especially IDPs when they are vulnerable to certain human conditions, which are beyond their control. Applying the vulnerable theory to the Kampala convention, the vulnerable groups such as IDPs should be provided with a special protection, as their human rights are at a particular risk of being violated. This may lead to the eradication of societal practices and structures that maintain disadvantages or indirect discrimination, which is seen as especially important.

Furthermore, in applying vulnerability theory to the elderly and aged people who have been displaced, the state government should take

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30 Kalin, "Internal Displacement" in the Oxford Handbook of Refugee and Forced Migration Studies (ed) Elena Fiddian-Qasmiyeh, Et al, Oxford University Press (2014) Accessed 2019-03-06.

31 Ibid.

responsibility in caring for them or providing an aged social policy for those elderly and young displaced persons. The state government has the apparatus to provide for their safety and security while in the IDP camps. Thus, applying this theory to the Nigerian situations where the elderly, young and aged persons who are displaced due to one form of conflict or violence are more vulnerable and could not run or look for safety in case of an attack by insurgents or armed groups. It could be argued that elderly persons may not have the necessary capacity to enter into a legal contact, especially during trauma caused by displacement.[32] In view of this, the state government should negotiate or bargain effectively in a contract and protect the interest of the elderly and young persons too.

4.2 The Nature and Scope of the State Obligations on IDP Protection:

Public international law makes the protection of individual rights the minimum standard of human development**.** It is the primary responsibility of the state to protect IDPs within their country of jurisdiction.[33] International Humanitarian Law (IHL) and International Human Rights Law (IHRL) enjoin States to guarantee the same human rights to IDPs as individuals or persons or citizens in their country of residence. For instance, the UN Guiding Principles recognised by State Parties as an international instrument for the protection of IDPs[34], which recognises economic, social, cultural, civil and political rights[35] to IDPs, including the right to

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[32] Kohn, "Vulnerability Theory and the Role of Government", (2014) 26 (1), Yale Journal of Law and Feminism,8-10.; see also Fineman," Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility in the Autonomy Myth: A Theory of Dependency, 20-30 (2004).

[33] UN Guiding Principles, 'Introduction'.

[34] GA Resolution 60/L.1, para 132, UN Doc. A/60/L.1, adopted by the heads of state and government at its World Summit, New York, September 2005.

[35] UN Guiding Principles, Principles 10-23.

basic humanitarian assistance at inception of displacement, towards their rehabilitation, resettlement and safe return to their homes.[36]
The Nigerian constitution made it obligatory for the state to be responsible for the welfare and security of its citizens. This the government has failed to do over the years in discharging its constitutional duties of providing protection and insecurity, which led to people being internally displaced.[37] Section 14 (2) (b) of the constitution of the Federal Republic of Nigeria 1999 as amended gives right to social security, which stipulates that the security and welfare of the citizens shall be the responsibility of the government. Nigeria has ratified some international treaties which requires state parties to protect and promote the right of social security. For instance, ICESCR which Nigeria ratified on 27th July 1993 under article 9 (1) provides that state parties have legal obligation to recognise the right of everyone to social security and social insurance. The provision of socio-economic policy for the vulnerable IDPs is the responsibility of the state government since IDPs are all citizens of Nigeria. The constitutional proviso of "people" in S. 14(2) (b) of the 1999 constitution of the Federal Republic of Nigeria did not limit the world "people" to those who are not displaced or people working in the formal sector of government, rather it applies to all citizens of the country. Furthermore, Section 16 (1) (b) of the Nigeria constitution 1999 provides that the state shall control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity, while section 16 (2) (d) directs the State to ensure the provision of all citizens with suitable and adequate shelter, suitable food, reasonable wage, old age care and pensions, and unemployment as well as the welfare of the disabled. The above provisions give the primary function of

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36 Assistance (such as food, medicine, shelter) and to compensation or just reparation must be given when restitution is not possible (Principles 28-30). Displacement ends when a durable and sustainable solution is found to displacement.

37 Ejiofor, Oni and Sejoro, "An Assessment of the Impact of Internal Displacement on Human Security in Northern Nigeria 2009-2016 (2017) 10 (1), *ActaUniversitatisDanubiusRelationesInternationale,* 19-42.

government to be the welfare and security of its citizens. However, they are not justiciable. Although, these provisions imply care to IDPs, such is not specifically mentioned.[38]

At the micro-economic level, the right to social security has been enshrined in the constitution of many nations, either directly as a justifiable right in the Bill of Rights[39], or indirectly as a in the Directive Principles of State Policy[40]. Despite the argument of the directive principle and its being justiciable by state government on the issue of availability of funds, the international instruments and the Kampala convention, which Nigeria has ratified could be applicable to IDPs for having a social policy to reduce their plight.

The level of state responsibility in allocating scarce resources through the funds generated from taxpayer's money for the purpose of establishing social security and welfare policies may be objected to by the citizens. However, it is the duty of the state to protect individuals or displaced persons from any form of discrimination before the law since everybody is equal and justice is seen to be protective of all citizens.[41]

Fineman observed that the state has a responsibility to protect and provide social institutions for the vulnerable, using the family and the market as part of the primary duty of the state in relation to

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38 Salau, "Internal Displacement in the Age of Boko Haram: A Sociological Appraisal", Nnamdi Azikiwe University 2017 NALT Conference, 450-451.

39 See for e.g. Article 20 (1) of the Basic law of Germany; Section 27 of the South Africa Constitution 1996; Article 17 of Constitution of Egypt 2014; It is also of note that in these states, social security is no long regarded as a policy option but an enforceable fundamental right of the citizens; Anifalaje, "Implementation of the Right to Social Security in Nigeria", (2017) 17, *African Human Rights Law Journal*, 413-435.

40 See for e.g. the 1999 constitution of the federal Republic of Nigeria as amended 2011 and the 1991 constitution of Sierra Leone.

41 Kohn, " Vulnerability Theory and the Role of Government, *Yale Journal of Law & Feminism*, (2014) 26 (1) 1:2.

socio-economic activities.[42] Fineman theory is an alternative method of ensuring that state government role is justified for providing social security. In view of this, the Nigeria government should be responsive to its citizens who are displaced or IDPs should use Fineman theory on vulnerability to make a policy where individuals and IDPs alike should receive a social security grant during the period of their displacement.

Furthermore, Fineman stated that the vulnerability concept can be used to replace identity of groups as an approach to social policy. In other words, the vulnerability theory can provide a framework for the state to understand its role in social responsibility. It is an approach in which the state government can apply as a social policy to assist the IDPs in their plight as vulnerable groups.

Article 3 (2) of the Kampala Convention talks about the responsibility of the state parties in providing protection and assistance to the IDPs. Here, the Nigeria government in fulfilling its obligation can make a policy or review its existing IDPs policy to incorporate social security, using the vulnerability theory as part of social justice for its citizens who are displaced due to one form of conflict or violence. Moreover, the AU Kampala Convention makes use of "special protection" and "special need" in its Act. Therefore, IDPs are special set of people who are in need of protection by the Nigeria government for equality and economic participation like other citizens who are not vulnerable or disadvantaged in the socio-economic activities of the state.[43]

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[42] Ibid, 3; see also Fineman, "Gender and Law: Feminist Legal Theory's Role in New Legal Realism," 2005; Fineman, Contract and Cares, 76, *Chiago-Kent Law Review*, (2001) 103:1412.

[43]Kohn, "Vulnerability Theory and the Role of Government," (2014) 26 (1), *Yale Journal of Law & Feminism*,6; see Fineman, "Vulnerability; Equality and the Human Condition, in Gender, Sexualities and Law, 52, 52-53.

4.3 State Responsibility and Vulnerability Policy

The social security in the Nigeria laws are not adequate on social protection since there is no legislation; this do not give the citizens the right to enforce it. There is the need for policy makers to demonstrate a sense of commitment by enacting a legislation on social security. The essence of social security is to reduce the poverty rate and vulnerability of the IDPs in our society. Social security is a relief or benefit as well as entitlement made available or accessible to the citizens in any given society which are controlled by the state and backed by legislation.[44]

The Nigeria National Policy dealing with IDPs need to be changed so as to apply the vulnerability theory and concept where the state is held accountable and responsible for the socio-economic traits associated with internal displacement.[45] The government should make an amendment to 2012 National Policy on IDPs to incorporate the provision of social security for the IDPs during the time that IDPs are camped and a statistics and registration of them to be kept in a data form.

The federal government of Nigeria to provide a financial grant and technical know-how at both state and local government level, to monitor the performance of its agencies through policy formulation and possibly make a legislation so that IDPs can receive social security grant of certain subject till when they are resettled or return to their original homes or inhabitants.

Also, the IDPs should have a social protection and assistance from the state government and not only depend on aids or donor agencies of international community and NGOs. We submit that since the IDPs are vulnerable, lese privileged people due to their situation and

[44]Anifalaje, "Implementation of the Right to Social Security in Nigeria", (2017) 17, *African Human Rights Law Journal*, 413-435.

[45]Adewale, "Internally Displaced persons the Challenges of Survival in Abuja,' (2016) 25 (2), *Journal of African Security Review*, 176-192.

at high risk of poverty, the state government should use this concept and implement social security as their own obligation to their plight.

5.0 AFRICAN REGIONAL INSTITUTIONAL PROTECTION OF SOCIO- ECONOMIC RIGHTS

The socio-economic rights are contained in the African Charter.[46] In its preamble it confirms the adherence to the basic fundamental rights as enacted in UDHR by the African States who are Members of the AU Charter. Article 15 of the African Charter states that every individual shall have the right to work under the equitable and satisfactory conditions and shall receive equal pay for equal work. In Article 16(1) the African Charter states further that every individual shall have the right to enjoy physical and mental health. While section 16 (2) stipulates that it is the duty of the state to take necessary measures to protect the health of its citizens and to ensure that they receive adequate medical attention when they are sick. Furthermore, article 17 provides for the right to education of every individual in the Charter while right to life is provided under article 4 of the same Africa Charter. From the provisions of the African Charter stated therein, the IDPs are part and parcel of the citizens and they equally need right to education, health care services and right to work even more when displaced because in the place of displacement and loss of personal property makes life to become unbearable. Thus, the state should provide and protect their socio-economic rights.

The African Charter places the responsibility on the African Commission on Human and People Rights to oversee the violations of these rights and has the powers to equally hear matters pertaining to the abuses of the socio-economic rights on IDPs.[47]

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[46] NwobiIkechukwu Samart, "The Role of the Judiciary towards Enforcement of Socio-economic rights in Africa: Lessons from South Africa," Published Master's degree Mini-Dissertation in LLM in Socio-Economic Rights: Theory and Practice, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa, 2015:45

[47] See the African Charter on Human and people's Rights.

The Kampala Convention made provisions for compensation on the infringement of these rights to IDPs, but there is no political will by State parties, individuals or civil society groups to bring an action against members to the African Court of Justice and Human Rights and Peoples court to prosecute and claim damages on behalf of the displaced persons. The problem here is the implementation by the actors so that IDPs can claim compensations as parts of their socio-economic rights to being a new life upon return or the places they are camped or decided to live the rest of their lives. IDPs are the worst in socio economic rights that are not adequately protected, unlike refugees.

5.1 Nigerian Constitutional Amendment Approach

The vulnerability of the IDPs and its plights requires an urgent amendment to the Nigeria Constitution. This is to ensure that their rights are adequately protected in socio-economic activities. Section 14 (2) of the Nigeria constitution states that it is the duty of the government to provide for the welfare and well-being of all its citizens.[48] There is the need for the constitution to protect the displaced persons.

In Nigeria, the constitution is the legal supreme order. The constitution set out the basic objectives and policy of the state and provides for the basic fundamental human rights, which is inalienable.[49] In chapter II of the Nigerian constitution, which highlights the Directives Principles and State Policy of government, IDPs are to be given protection by the constitution, especially during displacement and humanitarian services.

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[48] 1999 Constitution as amended 2011.

[49] Sanni, "*Introduction to Nigerian Legal Method"* (2000); see also Abegunde and Joshua, "Humanitarian Law and Internal Displacement in Nigeria: An Urgent Need for Legal Framework", (2017) 4 (3) *International Journal of Law and Legal Jurisprudence Studies,* 53:55.

Looking at the vulnerability concept and its applicability to the IDPs, the Nigerian constitution should be amended to recognise them in relation to chapter II on Directive Principles and its justifiability. If it is done, various agencies of state government will protect the IDPs as part of state policy. For instance, the Chapter II of the constitution on fundamental objectives and directive principles of state policy.[50] It is the state strategic policy for the protection of its citizen by the government.

In order for the vulnerability theory of the state being responsible for its citizens to be achieved and implemented upon on IDPs in the section 6(6) (2) of the Nigerian constitution, notwithstanding should be included in the Chapter for IDPs to have a right of socio-economic policy of the government on them during displacement. This can assist the IDPs if their rights are enshrined in chapter II as part of the constitution.

Furthermore, the state directive principles enabled the state to make policies in relation to social, economic, political and environmental concerns. Section 17 of the 1999 constitution mandates the state to direct its policy on the citizens of Nigeria. Thus, IDPs are also citizens of the country who can benefit from a socio-economic policy of government as a social grant. The Nigeria government has had series of policies for its citizens. For example, in 2001 the government had a National Youth Policy developed for children and young persons, which was revised in 2009. The objective of the policy was to ensure youth active participation and to foster their development.[51] It will not be out of place if the government will develop an IDP policy which will mitigate their sufferings through socio-economic security in form of social grant. The judiciary can also enforce the rights of IDPs constitutionally through their role of enforcement in the country[52]. This can be implemented by enforcing

[50] Sections 13 -24 of the Nigerian Constitution 1999 as amended 2011.

[51] Abegunde and Joshua, (2017) 4 (3) *International Journal of Law and Legal Jurisprudence Studies* 53:67.

[52] S.6 of the Constitution of Nigeria, 1999 as amended.

the international instrument of ICESCR, which the Nigerian government has domesticated and ratified as well as the Kampala Convention on protection and assistance of displaced persons through judicial radicalism and advancement of the UN Guiding Principles on internal displacement.

6.0 CONCLUSION

IDPs are part and parcel of the state. The fact that they are displaced by natural disasters or conflict should not be left alone to translate to abject poverty. The government should set up a fund that will cater for them to lessen their burden when disasters happen.

In contrast, the Kampala Convention requires state parties to enact a national legislation which will create a legal framework for the institutionalisation of the IDPs related activities. Also, to allocate funds in order to ensure a smooth implementation.

From the provision above, it is the responsibility of the state to make a legislation in the form of social security grant for the vulnerability of IDPs as part of state responsiveness to their plight under the Act. The legal reforms and the need to make social security as part of Nigeria legislation for the displaced persons and IDPs will make the government of Nigeria responsive to its obligation as stated in the Convention for Protection and Assistance of IDPs in Africa 2009 and Nigeria in particular. Thus, the denial of socioeconomic rights to IDPs is some accomplices to political tools which can be effectively confronted through legal rights and entitlements.

AN APPRAISAL OF THE EXTANT LAWS IDETERMINING UNIFORM PRICES OF PETROLEUM PRODUCTS IN NIGERIA

John Angibi Ajegena*

Abstract

The study focuses on factors responsible for variation in prices of petroleum products in filling stations in the different parts of the country despite the adoption of Uniform Price Law. Empirical analysis of data collected from the report produced by National Bureau of Statistics and other independent reports covering the six Geo-Political Zones were analysed based on existing extant laws on uniform price policy. The analysis revealed variation in prices of petroleum products at the filling stations nation-wide caused by high cost of bringing products to different parts of the country and the inefficient administration of the Uniform Price Law by the Petroleum Equalization Fund. This paper recommends that the Federal legislature review some provisions of the Petroleum Equalization Fund Act, Petroleum Act and that of Petroleum Products Pricing Regulatory Agency (PPPRA) Act to avoid conflicts that might arise in relation to price fixing of petroleum products and enforcement of Uniform Price Law in Nigeria.

Key words: Petroleum products, uniform price, equalization and enforcement.

1.0 INTRODUCTION

Interest in Nigerian oil originated in 1914[1] and regulated by the Colonial Administration by adopting the Mineral Oil Ordinance

* PhD (Zaria) School of Postgraduate Studies, Ahmadu Bello University, Zaria, Nigeria. Tel. +2347063202291 e-mail: johnangibiajegena@gmail.com

1914[2] and Mineral Ordinance of 1946[3] legislations.[4] This laid down the basic framework for most of the legislations relating to the petroleum industry today.[5] After the discovery of oil in commercial quantity at Oloibiri in 1956, the Petroleum Act[6] and the Nigerian National Petroleum Corporation Act[7] were later enacted by the Federal Government of Nigeria, which provide the legal framework for marketing of petroleum and its by-products. Other legislations that formed the bedrock of the oil industry are the Constitution of the Federal Republic of Nigeria[8] and the Land Use Act.[9] The Constitution vests ownership of mineral resources, including oil and gas, exclusively in the federal government and further confers on the federal government the exclusive power to make laws and regulations for the governance of the industry. The upstream sector of the oil industry, therefore, became the most active of the Nigerian petroleum industry, and is largely export-focused and dominated exclusively by multinational oil companies.

Prior to 1960s the downstream sector, like its upstream counterpart was controlled by the multinational oil companies[10] and the first

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***PhD, School of Postgraduate Studies, Ahmadu Bello University, Zaria, Nigeria. Tel. +2347063202291**

e-mail: johnangibiajegena@gmail.com

[1] Adamu Usman, Nigerian Oil and Gas Industry Laws: Policies, and Institutions (Malthouse Press, 2017).

[2] No. 17 of 1914

[3] Cap. 121 LFN 2004

[4] Brief History of Oil and Gas in Nigeria <https://isochukwu.com/2018/07/09/brief-histor-of-oil-and-gas-in-nigeria/#espond> accessed 9 July 2018.

[5] F.O. Ayodele-Akaakar, Appraising the Oil and Gas Laws: A Search for Enduring Legislation for the Niger Delta Region (2001)(1)(7-8). *Journal of Sustainable Development in Africa* <https://jsd-africa.com/Jsda/Fallwinter2001/articlespdf/ARC%20-%20APPRAISING%20THE%20OIL%20and%20Gas.pdf> accessed 9 July 2021.

[6] Cap. P.10 LFN 2004

[7] Cap. P.123, Vol.12 LFN, 2004

[8] Cap. C23, LFN 2004.

[9] Cap. 202, LFN 2004.

[10] Benefits of Deregulation of Downstream Oil and Gas, Economics Essay',< https://www.uniassignment.com/essay-samples/economics/benefits-of-deregulation-of-downstream-oil-and-gas-economics-essay.php.> Accessed 29 Mar. 2017.

refinery was built in 1965 by Shell/BP.[11] The control of the marketing and distribution of petroleum products by the multinational oil companies raised issues of even distribution and pricing of products throughout the country.[12] To take a grip of the downstream oil sector and with the intention of harmonizing petroleum products by way of uniform pricing, the Federal Government established the Petroleum Equalization Management Fund Act[13] in 1973. This brought the participation of government into the downstream sector, which resulted in a regulated regime with a modified pricing policy.[14] Unfortunately this change was not responsive enough to the continuously changing business environment. It brought in its wake acute product scarcity, characteristic bottlenecks of government agencies, smuggling due to unfavourable border prices with neighbouring countries, inappropriate pricing, vandalization of facilities, insufficient funding and monopolistic practices. The inherent nature of the downstream oil sector took a centre stage where the issue of pricing of petroleum products dominated public discourse by policy makers in Nigeria. Most of these discussions are focused on subsidy removal, deregulation or appropriate pricing of petroleum products.[15] At the main stream of these discussion is pricing, cost of products to consumers and producers.

The bold steps taken by the Federal Government in order to dominate the oil industry was the establishment of Nigerian National Oil Company (NNOC) in 1971 to supervise oil extraction and

[11] F. Kupolokun, 'Liberalization: The Experience of the Nigerian Petroleum Sector' <http://www.gasandoil.com/news/2005/01/cna50438.> Accessed 29 Mar. 2017.

[12] E. Collins and H. Braide, Petroleum Business and Marketing in Nigeria: Episodes Account (2018)(3)(2). *International Journal of Marketing and Communication Studies*, *<https://iiardpub.org/get/IJMCS/VOL.%203%2ONO.%202%202019/PETROLEUM%20BUSINESS.pdf> accessed 8 July 2021*

[13] Cap. P.11, LFN 2004.

[14] Op. cit., F. Kupolokun, note 11.

[15] P.I. Ozo-Eson, Pricing of Petroleum Products in Nigeria. Research Report by African Centre for Leadership, Strategy and Development, OSIWA, Centre LSD Book Series No. 7, 2016

provide guidelines to the multinational oil companies that carried out oil production. The NNOC was later merged with the Ministry of Mines and Power in 1976 to form the Nigerian National Petroleum Corporation (NNPC), which was established by an Act.[16] In 1975, the Federal Government increased the share in oil sector to 80%, with only 20% going to states.[17] One of the most important steps taken by the Federal Government in 1978 was the enactment of the Land Use Act,[18] which vested the control over states land on the government. The enactment of the Petroleum Products Pricing Regulatory Agency Act[19] in 2000 was aimed at regulating the distribution and pricing of petroleum products by adopting deregulation as a policy framework for the downstream oil sector.

The Federal Government of Nigeria, having taken a firm grip of the oil industry through the various laws put in place, regulates the pricing, supply and distribution of petroleum products. Nigeria, as a developing country, maintain a market structure through price regulation of petroleum products to protect consumers against monopolistic exploitation by oil marketers. Because petroleum products play an important role in the economy and the lives of citizens, an unregulated price regime could lead to very high prices, which the economy and particularly the poor may not be able to bear. The Federal Government therefore set the cost price of a litre of petrol well below the free market level[20] by adopting in 1973 a uniform pricing policy and began to subsidize private consumption

[16] NNPC Act, Cap. N.123, Vol. 12, LFN 2004.

[17] C.U. Alexander and J.O. Obinna, A Historigraphic Assessment of the Petroleum Industry and its Impact on the Nigerian Economy (2016)(36). *Historical Research Letter* <https://core.ac.uk/download/pdf/234668715.pdf> accessed 8 July 2021.

[18] Cap. 202, LFN 2004.

[19] Cap. P.43, Vol.14, LFN, 2004

[20] E. Obumneke and O.J. Beida, Nigeria's Downstream Oil Sector Deregulation and Efficient Petroleum Pricing (2014) (4)(4), *International Journal of Social Sciences and Humanities Reviews*, 84-93.

of imported petroleum products to maintain a stable consumer price throughout the country.[21]

Three factors that influenced government position to adopt a uniform pricing policy in 1973 were the desire to protect the interest of the poor who could be hurt as a result of higher petroleum products price. The second is the need to reduce industrial cost as petroleum products are seen as critical inputs in the production process. The third factor relates to the potential inflationary impact of higher petroleum products price.[22] Petroleum products play a significant role in the development of Nigeria economy, therefore, any break in its chain of availability and price rationality automatically creates a negative effect on the living standards of the citizens as their economic life shifts downwards.[23]

Despite government control of both upstream and the downstream sectors through the various laws and policy implementations, it could not meet consumers' demand because of the inability of the four refineries to locally refine petroleum products to meet consumers' demand.[24] This has not helped either in addressing the increase in the amount it spends yearly in subsidizing petroleum products[25] as government continued to rely on imported refined products from the international market. In effect, petroleum subsidy has moved from being an implicit subsidy to explicit cost. The shift from uniform price policy to deregulation was the failure of

[21] Khalid Siddiq and others, Impacts of Removing Fuel Import Subsidies in Nigeria on Poverty (2014) (9). *Energy Policy, Elsevier;* 165-178.
[22] M. Adegunodo, Petroleum Products Pricing Reform in Nigeria: Welfare Analysis from Household Budget Survey (2013)(3(4). *International Journal of Energy Economics and Policy;* 459-472.
[23] S.O. Uhunmwuangbo and S. Aibieyi, Policy of Deregulation and Liberalization of the Downstream Oil Sector in Nigeria: The Implication on the Nigerian Economy in the 21st Century (2012)(4)(4). *Current Research Journal of Economics Theory;* 112-119.
[24] E.O. Ogwo and A.O. Onuoha, The Imperative of Marketing in the Management of Deregulation: A Study of the Nigerian Downstream Oil Sector (2013)(2)(3). *Asian Journal of Management Sciences and Education; 1-10.*
[25] Op. cit., E. Obumneke and O.J. Beida, (2014), note 20.

government to address the perennial shortages and variation in prices of petroleum products in the country, which has caused untold hardship to the citizens.[26]

This study, it is believed, will provide answers to some of the lingering problems of pricing of petroleum products and its determinants with the extant laws put in place by the government. Comparative analysis of products' pricing among some countries of the world was undertaken and evaluated with existing and historical Nigerian pricing templates based on import regime and with the templates on domestic refining.

2.0 LITERATURE REVIEW

Large, rich and available literature exists on the petroleum industry in Nigeria. This is not surprising as the industry is the power hub of the nation's economy as such always generates several agitations, reactions and issues arising from the independent sector. Previous studies conducted regarding pricing, demand and removal of subsidies on petroleum products all have contributed to the immense knowledge and vibrant issues happening in the downstream industry. This is good as it has thrown much light on the happening and developments in the sector as a whole. A critical appraisal of the extant laws regarding pricing, demand and removal of subsidies on petroleum products will truly contribute to a deeper and meaningful understanding of the issues at stake.

In his article, Okechukwu[27] examined the issue of petroleum product prices in Nigeria and was of the view that allowing the price to be dictated by the Petroleum Minister under Section 6(1) of the

[26] B.E.A. Oghojafor, F.C. Anyim, and J.O. Ekwoaba, The Aftermath of the Conflict on Fuel Subsidy in Nigeria (20147) (1). *Journal of Politics and Law;* 64-76.

[27] Iloba-Aninye Okechukwu, Petroleum Products Pricing: A Critique of the Legal Framework and the Fallacy of Subsidy in the Oil and Gas Sector (2006) (24-25). *Ahmadu Bello University Law Journal;* 156-170.

Petroleum Act[28] may not be beneficial to consumers in Nigeria. Flowing from the currency of this judicious and egalitarian provision led the Federal Government to establish the Petroleum Products Pricing Regulatory Agency Act (PPPRA)[29] to operate side by side with the Petroleum Act, which may lead to conflict as it is not clear which of the two statutory bodies take precedence over the other. Amagoh, et. al.[30] examined the modelling of petroleum product prices and the Nigerian Economy. From his point of view, premium motor spirit (PMS) revealed significant impact on all economic variables than other products, such as automotive gas oil (AGO) and dual purpose kerosene (DPK). This is evident because all economic activities such as transportation, electricity and some light machineries solely depends on PMS for optimal production.

Agbonifo,[31] in examining the management and regulatory failure in the oil and gas industry noted that most regulatory agencies have their weaknesses and shortcomings. Despite the various Acts and Agencies established in this regard, some of these laws and agencies have either failed or become docile due to poor administration, inadequate funding and corruption.[32]

Ogunbodede and Olurankinse[33] investigated the incessant hike in prices of petroleum products and the hardship caused in the movement of goods and passengers' transportation in Nigeria. The

[28] Cap. P.10, LFN 2004
[29] Cap. P.43, LFN 2004
[30] M.N. Amagoh,C.M. Odoh and B.A.Okuh, (2014) Modeling Petroleum Product Prices and the Nigerian Economy (2014) (10) (1). *Journal of Mathematics (IOSR-JM)*; 72-79.
[31] P. E. Agbonifo, Risk Management and Regulatory Failure in the Oil and Gas Industry in Nigeria: Reflections on the impact of Environmental Degradation in the Niger Delta Region (2016)(9)(4). *Journal of Sustainable Development;1-10.* <https://www.researchgate.net/publication/303872979_Risk_Management_and_Regulatory_Failure_in_the_Oil_and_Gas_Industry_in_Nigeria_Reflections_on_the_Impact15_of_Environmental_Degradation_in_the_Niger_Delta_Region> accessed 9 July 2021
[32] Op. cit., Brief History of Oil and Gas in Nigeria, note 4.
[33] E. F. Ogunbodede, A.O. Illesanmi and F. Olurankinse, Petroleum Motor Spirit (PMS) Pricing Crisis and the Nigerian public Passenger Transportation System (2010)(5)(2). *Medwell Journals. Scientific Research Publishing Company, The Social Science*s; 1-16.

study suggested measures that could be put in place by the government to address and ensure constant supply of PMS to the filling stations in the country. Sanni[34] examined the implications of price changes on petroleum products distribution in Gwgwalada Area Council from 2000-2012. The result shows that price increase significantly led to increase in cost of distribution of other commodities. On the effect of the Mineral Oils Act[35] of 1914, Ayodele-Akaakar[36] posited that the colonial legislation encouraged Government's interest in petroleum activities and enactment of laws for the regulation of prices of petroleum products.

Bello[37] examined the policy of the Federal Government total deregulation of the downstream sector from the law and economic perspective. The result suggests that the argument for and against deregulation is whether such an economic policy reform is efficient and ripe for implementation in Nigeria. Adenikinju and Falobi[38] examined the causes and shortages of petroleum product supply in the country, which has negative effect on the poor households than the rich. However, Isfahani[39] compared subsidies regime and the demand for petroleum products in Iran and Nigeria. The study revealed that price increases can reduce demand and consumption of petroleum products.

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[34] Isyaku Mohammed Sani, The Implication of Price Changes on Petroleum Products Distribution in Gwagwalada Abuja, Nigeria (2014) (4) (7). *Journal of Energy Technology and Policy*; 1-15.

[35] Op. cit. LFN 2004, note 2.

[36] Op. cit., F.O. Ayodele-Akaakar, note.

[37] A. T. Bello, Law and Economics of Deregulation in Downstream Sector of the Nigerian Oil and Gas (2019) <https://ssrn.com/abstract=3474477> or <http://dx.doi.org/10.2139/ssrn.3474477> accessed 9 July 2021

[38] A. F. Adenkikinju and N. Falobi, Macroeconomic and Distributional Consequences of Energy Supply Shocks in Nigeria (2006). AERC Research Paper 162. Published by the African Economic Research Consortium, 1-48.

[39] D. S. Isfahani, Government Subsidies and Demand for Petroleum Products in Iran (1996). *Oxford Institute for Energy Studies, WPM* No. 22.

3.0 THEORIES UNDERPINNING PETROLEUM PRODUCTS PRICING IN NIGERIA

The distribution of wealth policy: This theory was put forward by Clarke (1899) and Markowitz (1952). According to the authors, the wealth and income of a nation are divided among its population for its maximum benefits. The most important thing that is included in this policy is progress. It posits that the aim of price and output decisions was the maximization of the present value of oil assets. This explanation appealed to the Nigerian Government when oil was discovered in commercial quantities in 1956. This period represents a complete absence of Federal Government control over price of petroleum products in the country.

The Target Revenue Policy: This policy was developed by Robert Lucas, Jr. (1976) and was adopted by OPEC member states. The major focus of this policy is the incorporation of the reaction of the public and market to the policy maker's actions. When Nigeria joined OPEC in 1971, it established the present NNPC as a revenue generating agency for the Government. It was in 1973 that the Federal Government decided to take over the control of the downstream oil sector from the Multinational Oil Companies and started the uniform price policy in regulating petroleum products price.

The Market Policy Model: This policy emphasized that OPEC pricing decisions largely depend on the spot market price at the international level. The fluctuating price of crude oil at the international market affects Nigeria pricing policy at the domestic level so much that the amount the Federal Government pays in terms of subsidies to maintain the uniform pricing policy became so difficult and unsustainable.

The Deregulation Policy Model: Deregulation simply means to remove Government control in order to allow the market forces of demand and supply determine the price of petroleum products. It is

an era where Government decided to deregulate instead of regulate. This was due to so many factors. These include: poor utilization of the four refineries to refine petroleum products in full capacity to meet domestic demand, the rising cost of subsidies on imported products as a result of increase in the price of international crude oil.

The review of these policy models is useful in arriving at an appropriate pricing of petroleum products in the downstream sector.

4.0 THE EXTANT LAWS OF UNIFORM PRICING OF PETROLEUM PRODUCTS IN NIGERIA

The contributions of the downstream petroleum industry to growth and development of the Nigerian economy can be enumerated in terms of the industry's impacts on the economic variables responsible for economic growth. Given the overall expansion of economic activities and the unprecedented increase in the demand for petroleum products from 1970s, the Federal Government stepped up efforts in petroleum products distribution and marketing[40] through legal regimes established for this purpose.[41]

To exploit the downstream sector efficiently and align it to the economic and political ideologies enshrined in Chapter Two of the 1999 Constitution (as amended),[42] the government introduced laws to regulate price of petroleum products. Since then, it continued to maintain a stronghold on the downstream oil sector.
The extant laws for regulation of prices of petroleum products include the following:

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[40] G.C. Nwaobi, and F.C. Territory, (2005) Oil Policy in Nigeria: A Critical Assessment (1956-1992)(2005) <http:www.core.ac.uk/download/pdt/9312754> accessed 28 October 2012.

[41] C.O. Mgbame, P.A. Donwa and E.O. Osunbor, Nigerian Oil and Gas Sector Background, Reform Efforts and Implication for Economic Growth (2015)(2)(9). *International Journal of Multidisciplinary Research and Development*; 508-515.

[42] CFRN Cap. C.23, LFN 2004 – also see E.E. Enebeli, J. Cheng and Wang Xiao-Lin, Petroleum Exploration and the Oil Price Dynamics: A case Study of Nigerian Petroleum Industry (2012)(6)(9). *African Journal of Business Management*, 3342-3348.

(a) The Petroleum Act (PA).
(b) The Petroleum Products Pricing Regulatory Agency Act (PPPRA).
(c) The Petroleum Equalization Management Fund Act.
(d) The Price Control Act
(e) The Constitution of the Federal Republic of Nigeria (CFRN).

5.0 THE PETROLEUM ACT

The exploration of mineral oil by the British Colonial administration led to the enactment of the Mineral Oil Ordinance No. 17 of 1914 to regulate the right to search for, win and work mineral oils. The 1914 Ordinance and its amendment in 1925 conferred powers on the Colonial Administration to grant prospecting rights. Section 6(1)(a) of the Ordinance provided that:

> *No lease or license shall be granted except to a British subject or to a British company registered in Great Britain or in a British colony its principal place of business within Her Majesty's dominion, the Chairman and the Managing Director (if any) and the majority of the other directors of which are British subjects.*

When crude oil was discovered in commercial quantity in 1956 at Oloibiri near Port-Harcourt in the present day Bayelsa State, the multinational oil companies continued to regulate the price per a litre of petroleum products sold in the downstream oil sector in Nigeria. During this period, petroleum products were not sold at a uniform price throughout the country. The price per litre of fuel used to vary in the Southern part of the country and other parts of the country.[43] As result of movement of these products from the production to consumption points, prices were deregulated where demand and

[43] Op. cit., Ayodele-Akaakar, note, 5.

supply was the dominant factor that determined the price of the commodity. The price ranged from 6 kobo upward, depending on the location where the product was sold.[44] The competitive pricing system adversely affected the distribution and even development of the country[45] and free access to petroleum products. It was more profitable to market petroleum products in some areas around the seaports than other parts of the country.

Attempt to produce a detailed and comprehensive law for the grant of rights to search for and win oil in Nigeria and the conditions connected therewith was made in the promulgation of the Petroleum Act.[46] Some of the provisions of the Mineral Oil Ordinance were incorporated into the Petroleum Act.[47] To ameliorate hardship of the consumers, the Federal Government took over the full control of the downstream sector in pricing and distribution of petroleum products from the Multinational Oil Companies and introduced the Uniform Pricing Order[48] by the military regime of General Yakubu Gowon in 1973.

Section 15(1) of the Petroleum Act defined petroleum products to include "premium motor spirit, gas oil, diesel oil, automotive gas oil, fuel oil, aviation fuel, kerosene, liquefied petroleum gases and any lubrication oil or grease or other lubricant." Out of these, premium motor spirit (PMS) or petrol and automotive gas oil (AGO) are the most regulated because of its importance in driving the economic activities in the country.

The power to regulate the pump price of petroleum product was exercised by the Minister of Petroleum Resources under Section 6(1) of the Petroleum Act,[49] which provides that: "The Minister may by

[44] Op. cit., M. Adagunodo, note 22.
[45] Op.cit., G.C. Nwaobi, note 40.
[46] Op.cit., LFN 2004, note 28.
[47] Op. cit., Iloba-Aninye Okechukwu, note 27.
[48] Decree No.51 of 1969, now Cap. P.10 LFN 2004.
[49] Op. cit., Cap.P.10, note 6

order published in the Federal Gazette fix the prices at which petroleum products or any particular class or classes thereof may be sold in Nigeria or in any particular part or parts thereof." The Minister, in 1973, introduced the first Uniform Price Order where petroleum products were fixed and sold at 8½ kobo per litre all over the Federation of Nigeria. The Minister again introduced another regulation called the Uniform Price Order of 1986 where petroleum products were further reviewed upward and sold at uniform price throughout the country at 39½ Kobo, 29½ Kobo and 10½ Kobo per litre, respectively for premium motor spirit (PMS), automotive gas oil (AGO) and dual-purpose kerosene (DPK).[50] The implementation of uniform pricing order then led to a remarkable improvement in the consumption patterns throughout the country.[51]

The daily demand and consumption of petroleum products in 1981 was 11.6 million litres and rose to 12.3 million litres in 1982[52] and in 2006 it was 8.31 million litres and increased to 8.9 million litres in 2007. The bulk of the consumption came from PMS, AGO and DPK.[53] The sharp increase in demand and consumption of petroleum products came in 2010 when it was 30 million litres for PMS, 10 million litres for DPK and 1.8 million litres for AGO.[54] The demand and consumption of petroleum products cut across various sectors of the economy and is widely utilized. The elasticity of substitution of the products varies across all sectors; it is low in transportation and very high in other sectors. The low elasticity of substitution in transportation makes the impact of pricing policies very extensive.[55]

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[50] Y.O. Lawal, Subsidy Removal or Deregulation: Investment Challenge in Nigeria's Petroleum Industry (2014)(5)(1). *American Journal of Social and Management Sciences; 1-10*.

[51] Op. cit., M. Adagunodo, note 22.

[52] Op. cit., A.F. Adenikinju and N. Falobi, note 38.

[53] J.O. Onyemaechi, Economic Implication of Petroleum Policies in Nigeria: An Overview (2012)(2)(5). *American International Journal of Contemporary Research;* 60-71.

[54] A.H. Isa, H.Hamisu & Others, The Perspective of Nigeria's Projected Demand for Petroleum Products (2013)(4)(7). *Journal of Petroleum and Gas Engineering*; 184-187.

[55] Op. cit., M. Adagunodo, note 22.

Table 1 below presents prices of petroleum products from inception of the Uniform Price Policy under the Petroleum Act, which was fixed by the Minister of Petroleum Resources from 1973 to date.

Table 1: History of price increase of petroleum products from 1973 to date

Year	Price per litre	Fluctuation	Regime	% Increase	% Decrease
1973	8½k	Increase	Yakubu Gowon	35.50	
1976	9k	Increase	Murtala Mohammed	0.50	
1978	15k	Increase	Gen. Obasanjo	41.44	
1979	15k	Stable	Gen. Obasanjo	-	
1980	15k	Stable	Shagari	-	
1981	15k	Stable	Shagari	-	
1982	20k	Increase	Shagari	23.15	
1983	30k	Increase	Gen. Buhari	50.00	
1985	39½k	Increase	Gen. Babangida	31.67	
1987	42k/60k	Increase	Gen. Babangida	6.33/51.89	
1988	60k	Increase/Stable	Gen. Babangida	42.86/0.00	
199	70k	Increase	Gen.	16.67	

0			Babangida		
1992	N5.00	Increase	Gen. Babangida	614.29	
1993	N3.25	Decrease	Mr Shonekan	-	35.00
1994	N11.00	Increase	Gen. Abacha	238.46	
1996	N11.00	Stable	Gen. Abacha	0.00	
1997	N15.00	Increase	Gen. Abacha	36.36	
1998	N15.00	Stable	Gen. Abubakar	0.00	
1999	N20.00	Increase	Gen. Abubakar	33.33	
2000	N22.00	Increase	Obasanjo	10.00	
2001	N26.00	Increase	Obasanjo	18.18	
2002	N30.00	Increase	Obasanjo	15.39	
2003	N40.00	Increase	Obasanjo	33.33	
2004	N49.00	Increase	Obasanjo	22.50	
2005	N52.00	Increase	Obasanjo	6.12	
2006	N64.00	Increase	Obasanjo	24.04	
2007	N75.00	Increase	Obasanjo	16.28	
2008	N65.00	Decrease	Yar'Adua	-	13.33
2012	N141.00	Increase	Jonathan	53.90	

2012	N97.00	Decrease	Jonathan	-	45.36
2015	N86.50	Decrease	Buhari*	-	11.62
2016	N145.00	Increase	Buhari*	33.45	
2020	N123.00	Decrease	Buhari**	23.00	15.17
2020	N108.00	Decrease	Buhari**	15.00	13.89
2021	N165.00	Increase	Buhari	57.00	34.55

Source: M. Adagunodo, Petroleum Products Reform in Nigeria: Welfare Analysis from Household Budget Survey (2013)(3)(4). *International Journal of Energy Economics and Policy*, Y.O. Lawal, Subsidy Removal or Deregulation: Investment Challenge in Nigeria's Petroleum Industry (2014)(5)(1). *American Journal of Social and Management Sciences;* 1-10.

* Price adjustment was made immediately Buhari took over as President of Nigeria due to rising fuel subsidies in Nigeria

** The price adjustment was necessitated by Coronavirus (COVID-19) outbreak and falling oil prices in the international market.

In 1975 the Federal Government established the Pipelines Products Marketing Company (PPMC) as a subsidiary of the Nigerian National Petroleum Corporation (NNPC), to transport and market petroleum products all over the country. The Nigerian National Petroleum Corporation (NNPC) and the Petroleum Products Marketing Company (PPMC) were mandated to charge tariffs[56] for

[56] G.U. Nwokeji, The Nigerian National Petroleum Corporation and the Development of the Nigerian Oil and Gas Industry: History, Strategies and Current Directions (2007). *A Report prepared in Conjunction with an Energy Study Sponsored by the James A. Baker III Institute for Public Policy, Rice University*.

transportation of oil through its pipelines network to all the distribution outlets in the country. In addition, the Department of Petroleum Resources (DPR) and the Nigerian National Petroleum Corporation (NNPC) were given the statutory powers to regulate the supply and distribution of petroleum products in the downstream sector. [57] Section 4(1) of the Petroleum Act[58] stipulates that: "subject to this section, no person shall import, store, sell or distribute any petroleum products in Nigeria without a licence granted by the Minister."

To ensure compliance to the Uniform Price Law, the Minister relied mostly on Sections 6(1)(2) and 13(3) of the Petroleum Act. Section 6(2) of the Act stipulates that:

> *The Minister may by notice in writing require any person appearing to him to have or to be likely to have access to information which is relevant to the fixing of any prices of the kind mentioned in subsection (1) of this section to supply that information to the Minister, and any person so required shall be legally bound to use his best endeavours to supply the information accordingly.*

Furthermore, Section 13(3) of the Petroleum Act provides that; "any person who contravenes any provision of an order made under Section 6 of this Act shall be guilty of an offence and on conviction shall be liable to a fine not exceeding two thousand naira." This penalty is not stiff enough and the court in its discretionary power may choose that the criminal pays a fine of N500.00 for an economic crime. This is not an efficient legislation to curtail serious offence relating to distribution of petroleum product in the country, which is capable of derailing the policy of government in its objective in

[57] I. Ken and A. Raymon, The Department of Petroleum Resources (DPR) and Enforcement of Environmental Regulations in the Nigerian Oil Industry, 2008-2013 (2014)(1)(1). *Journal of Advances of Political Science;* 1-10.
[58] Op. cit., LFN 2004) note 6.

making petroleum product easily accessible to consumers in the country. To ensure adequate, reliable and affordable petroleum product to consumers in the downstream sector, there is need to amend the provisions of this Petroleum Act.

The introduction of uniform prices on petroleum products worked well when the international oil prices were relatively stable and low, and close to production costs. However, the international price of crude oil increased dramatically in 2003 from $28.77 a barrel and peaked at $100.60 in August, 2010 and declined to $81.07 a barrel in December, 2010 the Federal Government spent a whopping sum of ₦673 billion on fuel subsidies.[59] In addition, high domestic inflation[60] and exchange rate deregulation impacted negatively on domestic petroleum products prices.[61]

Following this unfortunate situation the Federal Government finds it difficult to subsidize the price of petroleum products below the market prices[62] because it was contributing to the fiscal deficit in its yearly budgets, which stood at 3.0% of gross domestic product (GDP). The cost for subsidy in 2012 budget was 888 billion Naira ($5.61 billion),[63] which is drying up finances for other developmental projects. The argument for its removal became so strong and government began to provide justifications and other alternatives why it should be removed. That the price of petroleum

[59] 'A Citizens' Guide to Energy Subsidies in Nigeria,' A Publication of International Institute for Sustainable Development, Global Subsidies Initiative, Geneva, Switzerland (2012). <https://www.iisd.org/gsi/sites/default/files/ffs_nigeria_czguide.pdf> accessed October 2019.

[60] J.O. Isaac, 'Impact of Change in Petroleum Product Prices on Inflation in Nigeria (2019).' An MSc Project submitted to Covenant University, Otta. <https://www.researchgate.net/publication/331589779_IMPACT_OF_CHANGE_IN_PETROLEUM_PRODUCTS_PRICES_ON_INFLATION_IN_NIGERIA> accessed 10 March 2020.

[61] Op. cit., M. Adagunodo, Petroleum Products Reform in Nigeria: Welfare Analysis from Household Budget Survey (2013), note 22.

[62] M.U. Habibu and S.U Musa, An Assessment of the Direct Welfare Impact of Fuel Subsidy Reform in Nigeria (2013)(3)(1). *American Journal of Economics*, 23-26.

[63] Ibid.

products at the filling station should reflect the international crude oil prices since the marginal supply (litre) comes from import.

6.0 THE PETROLEUM PRODUCT PRICING REGULATORY AGENCY ACT (PPPRA)

Attempt to deregulate prices of petroleum products in Nigeria was the establishment of the Petroleum Products Pricing Regulatory Agency (Establishment) Act.[64] Section 1(1), established an agency known as the Petroleum Products Pricing Regulatory Agency (PPPRA). By establishing the Agency, the road was opened to the Federal Government to champion the full deregulation and liberalization of the downstream sector and directed all the stakeholders in the sector to abide by the rules and guidelines provided by PPPRA. Section 1(2) of the Act made the Agency a body corporate with perpetual succession and to be sued in its corporate name. Whereas, Section 1(3) provides that it "*shall not be subject to the direction, control or supervision of any other authority in the performance of its functions under this Act*." The major functions of the Agency are set down in Part II Sections 7(a) - (d), which provides that it shall:

(a) Determine the pricing policy of petroleum products and regulate the supply and distribution of petroleum products.
(b) Regulate the supply and distribution of petroleum products;
(c) Establish an information and data bank through liaison with all relevant agencies to facilitate the making of informed and realistic decisions on pricing policies;
(d) Moderate volatility in petroleum products prices, while ensuring reasonable returns to operators;

The Petroleum Product Pricing and Regulatory Agency (PPPRA) continued the publication of figures of financial sacrifices government has provided in maintaining uniform price of petroleum

[64] Op cit., LFN 2004 note 29.

products in the country, which formed the basis of upward review of the pump price of petroleum products. Such information is contained in the pricing template of imported petroleum products released by PPPRA every month, which detailed the various components used in deriving the daily and monthly guiding products prices.[65]

In arriving at the price structure for a litre of fuel sold at the filling station, the Federal Government employ import parity principles of various costs and charges, which includes the landing cost, the cost margin for transporters, dealers and marketers, Jetty-Depot Through-Put cost and other charges, such as taxes. The difference between the cost of importation of refined products and the market price to consumers is what gives the subsidy payment by the Federal Government.[66]

In December 2019 the Expected Open Market Price (EOMP) disclosed by PPPRA was N169.68 per litre and government approved price per litre was N145.00, the N18.68 was the subsidy paid to enable fuel to be sold at a fixed price of N145.00 at the filling station. In March 2020 the EOMP disclosed by PPPRA was N134.89, which showed a decline from the previous price of N169.68 at the international market because of COVID-19. The subsidy paid by the Federal Government in March, 2020 and March, 2021 as shown in Tables 2 and 3 was N11.89.

Table 2: PPPRA Product Pricing Template (PMS) for the Month of March, 2020

S/N	Description of components	Imported Parity Based Cost	
		$/MT	Naira/Litre
A	Cost Element		

[65] 'Petroleum Product Pricing Regulatory Agency (PPPRA) Bulletin – Monitor, 2006.' <*https://*www.pppranigeria.org.ng/template.price> – accessed October 2012.
[66] Op. cit., 'A Citizens' Guide to Energy Subsidies in Nigeria,' note 59.

1.	C+F	466.43	106.78
2.	Lightering Expenses		2.75
3.	NPA		0.84
4.	NIMASA Charge		0.22
5.	Jetty Depot Thru'Put Charge		0.60
6.	Storage Charge		2.00
7.	Financing		2.33
8.	Landing Cost		115.52
B	**Total Distribution Margins**		19.37
C	Expected Open Market Price		134.89
D	Ex-Depot		125.63
E	Ex-Depot for collection		133.28
F	Approved Retail Price Band		135.00-145.00

Source: Petroleum Product Pricing Regulatory Agency (PPPRA) Bulletin – Monitor March, 2020

Note: Conversion Rate (MT to Litres): 1341
Average Exchange Rate (₦ to $): 307.00

Ex-Depot Price: Approved Retail Price Less Total Distribution Margins
Ex-Depot for Collection: Ex-Depot Price, Inclusive of Bridging Allowance, Marine Transportation Allowance (MTA) and Administrative Charge.

Table 3: PPPRA Product Pricing Template (PMS) for the Month of March, 2021

S/N	Description of components	Imported Parity Based Cost	
		$/MT	Naira/Litre
	Cost Element		
1.	Average Gasoline Price (FOB Rotterdam Barge)	561.96	169.22
2.	Average Freight Rate (Northwest Europe – West Africa)	21/63	6/51
3.	Expected Ex-Coastal Price		175.73
4.	Lightering Expenses		4.82
5.	NPA		2.49
6.	NIMASA Charge		0.23
7.	Jetty Depot Thru'Put Charge		1.61
8.	Storage Charge		2.58
9.	Financing Cost		2.17
10.	Landing Cost		189.61
11	Wholesalers Margin		4.03
12	Admin. Charge		1.23
13.	Transportation Allowance (NTA)		3.89
14.	Bridging Fund		7.51
15.	Marine Transport Average (MTA)		0.15
16.	Expected Ex-Depot		
17.	Retailers Margin		6.19
18.	Expected Retail Price (lower band)		209.61
19.	Expected Retail Price (upper band)		212.61

Source: Petroleum Product Pricing Regulatory Agency (PPPRA) Pricing of Product Template (2021) https://businesspost.ng/wp-content/uploads/2021/03/Guiding-Price-for-March-2021.pdf - accessed 3 May 2021

Note:
Conversion Rate (MT to Litres): 1341
Average Exchange Rate (₦ to $): 403.80
Ex-Depot Price: Approved Retail Price Less Total Distribution Margins
Ex-Depot for Collection: Ex-Depot Price, Inclusive of Bridging Allowance, Marine Transportation Allowance (MTA) and Administrative Charge.

The First step taken by the PPPR Board in February 2004 was to announce increase in the price of petroleum product from ₦39.50 to ₦45.00, which was further increased to ₦49.00 in November of the same year. The price was subsequently increased to ₦65.00 in 2006.[67] Despite the clear mandate given to the Petroleum Products Pricing Regulatory Agency (PPPRA) to implement deregulation, it still retains regulation. Government attempt to break the monopoly enjoyed by the Nigerian National Petroleum Corporation (NNPC) and allow full participation of independent marketers in the supply and distribution of petroleum products through deregulation could not work effectively because of conflict with extant constitutional provision and stiff opposition by the Nigerian Labour Congress. The PPPRA as a Board, therefore, operate the law relating to petroleum products marketing instead of deregulation. Section 44(3) of the 1999 Constitution (as amended) provides that;

> *Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the*

[67] N.O. Godfrey and O. Oritsematosan, Deregulation of the Downstream Sector of the Nigerian Petroleum Industry: The Role of Leadership (2015)(7)(8). *European Journal of Business and Management;* 35-46.

> *Federation and shall be managed in such manner as may be prescribed by the National Assembly.*

In an attempt to implement deregulation instead of fixing the prices of petroleum products as prescribed by Section 6 of the Petroleum Act[68] was the judicial interpretation in the case of ***Bamidele Aturu v The Federal Government of Nigeria*.**[69] In this case, the court held that Section 6 of the Petroleum Act clearly confers an obligation on the Minister of Petroleum Resources to fix the price of petroleum products, and Section 4 of the Price Control Act[70] provides that "price control shall continue to be imposed in accordance with the provision of the Price Control Act on any goods which are of the kind specified in the First Schedule of the Price Control Act," and petroleum product is specified as item 7 in the said Schedule.[71] By the combined effect of Section 7(a) and (b) of the Petroleum Products Pricing Regulatory Agency (PPPRA) Act and Section 6 of Petroleum Act there is no deregulation, but regulation. Even in the near future, there will not be deregulation of petroleum products because of its conflict with the provision of Section 16(1)(b) and (c) of the 1999 Constitution of the Federal Republic of Nigeria (as amended),[72] which provides that the State shall control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status. Therefore, incorporating deregulation into the mandate of PPPRA by the Federal Government is not in tandem with the vision establishing the Act.

The problem with the PPPRA Act is that it still operates the provision of Section 6 of the Petroleum Act without expressly repealing the Petroleum Act. This is in view of the fact that there is no express provision provided under the PPPRA Act as to whether

[68] Op. cit., LFN 2004, note 28.
[69] FHC/ABJ/CS/591/2009
[70] Cap. P.28, LFN 2004
[71] Ibid.
[72] Op. cit., CFRN, LFN 2004, note 8.

the power of the Minister is now transferred to the PPPRA Act. This may be an oversight by the Legislature. To cure the deficiency, recourse may be heard from the principle established in the case of ***Vauxhall Estates Ltd v Liverpool Corporation***[73] and ***Ellen Street Estates Ltd. v Minister of Health,***[74] which may be assumed that the later introduction of Petroleum Product Pricing Regulatory Agency Act has expressly repealed the provision of Section 6(1) of the Petroleum Act because in Ellen case the Court of Appeal held that Section 4 of the Housing Act 1925 so far as its provisions are inconsistent with those of the case of 1919, is repealed by implication of the provisions of the earlier Act.[75]

Deregulation envisages that some of the existing laws need to be repealed or harmonize into a single legislation to avoid issue of interpretation or conflict. Both the Price Control Act and the Petroleum Act are existing laws because they pre-date the 1999 Constitution. Section 315(1) of the 1999 Constitution stipulates that: "nothing in the Constitution shall be construed as affecting the power of a court of law to declare invalid an existing law on the ground of inconsistency with any provision of the Constitution. Therefore, Section 4 (Schedule 1) of the Price Control Act and Section 6 of the Petroleum Act are inconsistent with item 62(e) of the Exclusive Legislative List of the 1999 Constitution.

7.0 THE PETROLEUM EQUALIZATION FUND (PEF) ACT

To reduce the problems associated with the application of uniform prices on petroleum products in the country, the Petroleum Equalization Fund Act[76] was enacted to principally reimburse marketers the cost of transporting petroleum products such as

[73] (1932)1 KB 733
[74] (1934)1 KB 590
[75] I. Loveland, Constitutional Law: A Critical Introduction (London, Butterworths 1996); .42-43.
[76] Op. cit., LFN 2004 note 13.

premium motor spirit (PMS), automotive gas oil (AGO) and dual-purpose kerosene (DPK) from the supply point to the retail outlets throughout the country. The Petroleum Equalization Fund Act created a Board, which operates as a parastatal under the Ministry of Petroleum Resources.

The objective of the Petroleum Equalization Fund was meant to ensure stability and uniformity in the prices of petroleum products that is consumed in the country, regardless of the cost differential in transportation of the product from the refineries to the various depots and filling stations. This is what is technically referred as "bridging." The introduction in bridging petroleum products is one of the best things that have happened in the downstream oil sector, as far as making petroleum product available to the consumers in Nigeria is concerned. Through this method, it was possible for products to be delivered to all parts of the country at uniform price as approved by the Federal Government, which prevented marketers from adding additional cost to consumers as a result of delivering the products to the hinterland, where there are no refineries. Even with the bad facilities of the refineries and the vandalization of oil pipelines, bridging of petroleum products through road transportation seems the better option.

Section 2 of the Petroleum Equalization Fund Act stipulates that: "The Fund shall be utilized for the reimbursement of oil marketing companies for any loss sustained by them solely and exclusively as a result of the sale by them of petroleum products at uniform prices throughout the country being prices fixed by the Minister pursuant to Section 6(1) of the Petroleum Act." Similarly, Section 1 of the Petroleum Equalization Act stipulates that the Board shall pay any net surplus revenue recovered from oil marketing companies pursuant to the implementation of the Act and such sums as may be provided for that purpose by the Federal Government as stipulated in Section 1(a) and (b) of the Act.[77] Going by the provisions of

[77] Ibid.

Sections 1 and 2 of the Act, the administration of the fund is made possible by surplus revenue recovered from oil marketing companies and grants provided by the Federal Government to finance the equalization scheme.

Section 4(2)(a)-(e) confers delegated power to the Secretary of the Board to:

(a) Determine at such intervals as the Board may direct, the net surplus revenue recoverable from any oil marketing company and accruing to that company from the sale by it of petroleum products as such uniform prices as may be fixed by the Minister pursuant to Section 6(1) of the Petroleum Act.

(b) Determine the amount of reimbursement due to any oil marketing company which has suffered loss as a result of the operation of the enactment as aforesaid.

(c) Payment of all disbursements authorized under or by virtue of this Act.

(d) Accounting for all moneys collected, paid or otherwise expended under the Act.

(e) Carrying out such other duties as may from time to time be specified by the Board.

The Federal Government introduced the bridging scheme initially as a temporary measure during turn-around maintenance (TAM) wherein government sought to encourage and support marketers in transporting petroleum products nationwide. Although this was meant to be a temporary solution until the refineries were producing at full capacity, the state of the refineries has continued to worsen over the years. In addition, pipelines vandalization by militant and economic saboteurs has forced oil marketers to a point where trucking have become the major source of distributing petroleum

products in recent times.[78] This has helped in bridging products from Lagos to the South East and South-South areas of the country to address products unavailability from the refineries in Port-Harcourt, Warri and all parts of the country.

The Petroleum Equalization Fund (PEF) is very essential in ensuring that every petroleum transaction is done according to policy, with strong emphasis on the transparency needed in the sector.[79] The intent of PEF is to ensure that, regardless of geographical location or distance from the refinery, consumers can access petroleum products at a standard government approved price. That is the mandate of the Board, to ensure that the uniform pricing mechanism works effectively throughout the country. Though this appears to be simple, the Board puts into consideration the location of retail outlets all over the country, how and who transports the products to the outlets and the volume that arrives there. All these involve a lot of data gathering. Therefore, collection of data is important to the work of the Fund.

The ability of Petroleum Equalization Fund Management Board to reimburse marketers promptly at the initial take off greatly helped in the movement of products as required and this ensures availability, which results in stability of prices. The sustainability of the Fund was made possible from the revenue obtained from an in-built transportation cost that is included in the pump price, irrespective of where the product is sold.

The equalization payment is divided into two categories: "Transport Differential Zone" (TDZ) model and Inter-District Scheme. The Transport Differential Zone model divided the country into 22 districts delineated along the 22 Pipeline Product Marketing

[78] F.C. Onuoha, Oil Pipeline Sabotage in Nigeria: Dimensions, Actors and Implications for National Security (2008). *African Security Review*, 17:3.

[79]S.A. Kasali, Bringing efficiency and equality to Nigerian petroleum (2013). <***http://www.theworldfolio.com/interviews/sharon-adefunke-kasali-executive-secretary-petroleum*>- *accessed 1 May 2015.***

Company (PPMC) depots. A Depot District is a geographical area of the country served by a particular depot. The Depot Districts are further sub-divided into Transport Differential Zones (TDZ), which are progressive concentric bands of 50km radius, with the depot as the centre point. A district has a maximum of 9 zones to which zonal rates apply.[80] The Inter-District Scheme was adopted upon realizing that some petroleum products movement to certain parts of the country did not qualify for re-imbursement under the bridging scheme despite the additional transportation costs incurred by marketers. Therefore, the Inter-District Scheme was also introduced to reimburse marketers to move their products across depot districts under 450 kilometres but without full bridging support.

The introduction of e-payment system improved the regular payment of equalization cost to marketers thereby removing the bureaucratic nature in settling marketers their payments. The introduction of "Project Aquila" also strengthens the efficient performance of the Board in service delivery to stake holders in the downstream sector.

Sections 11(1)-(3)[81] provides that:

Any person who fails to comply with any requirement made by the Secretary under section 10 of this Act, shall be guilty of an offence and liable on conviction to a fine of N50,000.00.

(1) Any person who-
   (a) knowingly or recklessly furnishes in pursuance of any requirement made under Section 10 of this Act, any return or other information which is false in any material; or

[80] S.A. Kasali, 'The Executive Secretary Brief on the Activities of PEF (2007). *The Equalizer*, a Quarterly Magazine Publication of Petroleum Equalization Fund Management Board;.9.
[81] Op. cit., LFN 2004, note 13.

(b) Willfully makes a false entry in any record required to be produced under that section with intent to deceive, or makes use of any such entry which he knows to be false, shall be guilty of an offence and liable on conviction to a fine of N50,000 or to imprisonment for five years.

(2) Where an offence under this Act by a body corporate is proven to have been committed with the consent or connivance of, or to be attributed to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate (or any person purporting to act in any such capacity) he as well as the body corporate shall be deemed to be guilty of the offence and may be proceeded against and punished accordingly.

Empirical reports from the Nigeria Bureau of Statistics[82] and other independent sources indicate a high level of unethical pricing of petroleum products in the country. Despite threat and warnings by the Department of Petroleum Resources in clamping defaulters of the Uniform Price Order, some filling stations still engage in selling above the fixed price. In 2012, 2014 and 2015 periods the Department of Petroleum Resources sealed several filling stations across the six geo-political zones from Lagos, Plateau, Borno, Cross River, Kwara, Sokoto and Akwa Ibom States sold petroleum products above government control price.[83]

Table 4 below shows that petrol prices in 2017 to 2020 were unequal across the country. In February 2017 consumers in some states paid as high as N200 for a litre of petrol, even when official price

[82] Ifeoluwa Adeyemo, Petrol, diesel prices decreased in August – NBS, 2017 https://www.premiumtimesng.com/business/243587-petrol-diesel-prices-decreased-august-nbs.html accessed 18 September, 2017

[83] Op. Cit., A.F.Adenkikinju and N. Falobi, note 38.

remained N145. Data from NBS showed that the highest average price of petrol purchased were from; Plateau (N206.82), Osun (N201.29) and Edo (N200.83) while the lowest average price of PMS (petrol) from Katsina (N145.00), Abuja (N145.00) and Kogi (N147.06). The figures for March shows that consumers from Yobe, Bayelsa and Enugu paid N161.7, N161.3 and N154.5 for petrol, respectively; and Oyo, Osun, Kwara, Kano, Gombe, Ekiti, Delta and others paid between N144 and N145 on the same petrol product. The month of November 2020 was the highest average price from Bayelsa (N150.5), Akwa Ibom, (N150.33) and Ebonyi (N148.57) while Plateau (N143.6), Nasarawa (N144) and Katsina (N144.08) against the official fixed price of N123 per litre.[84]

Despite the huge amount spent by the Petroleum Equalization Fund (PEF) to bridge the gap in the price of petroleum product, it failed to achieve the aim of the Uniform Price Order. PEF inability to monitor the activities of oil marketers allowed the diversion of product to the black markets and the pricing are dictated by them instead of the Board.[85] Moreover, the Board could not implement its activities according to the aspiration and policy objective establishing the Act for lack of funding the three schemes run by the organization. The constant vandalization of pipelines had increased the volume of bridging and the huge resource gap in funding the scheme. The national supply of PMS for 2017, which includes local production and imports were put at 18.86 billion litres. Out of this, local production accounted for 1.02 billion litres, representing about 8.2 per cent. The total PMS produced for the same year was 51.7 million litres, representing an average of 50.17 million litres of petrol each day, which mean Nigerians consumed 18,312 billion

[84] **Oladeinde Olawoyin 'Special Report: Nigerians pay billions as equalization yet fail to buy petrol at equal prices; 2019** <https://www.premiumtimesng.com/news/headlines/308240-special-report-nigerians-pay-billions-as-equalization-yet-fail-to-buy-petrol-at-equal-prices.html> accessed 27 January 2019.

[85] R. Okere, 'Government's N21 billion fails to deliver uniform petrol price.' *The Guardian Newspaper* (16 February, 2017) <https://guardian.ng/news/governments-n21-billion-fails-to-deliver-uniform-petrol-price/> - accessed 24 April 2020.

litres in 2017. This mean a total of N183 billion (183,120,000,000 at N10 per litre) was paid by consumers who bought petrol across the country to ensure that prices were equal in 2017.[86]

Table 4: Variation in Prices of Petroleum Products in Selected Areas of the country from 2017 to 2020

S/N	State	Official price set by PPPRA	Price sold in Filling Station	Extra Charge per litre
1.	Port-Harcourt	2017 – N145.00	N146.00	N1.00
2.	Lagos	2017 – N145.00	N150.00	N5.00
3.	Kano	2017 – N145.00	N150.00	N5.00
4.	Yobe	2017 – N145.00	N150.00	N5.00
5.	Delta	2017 – N145.00	N145.00	N00
6.	Kogi	2017 – N145.00	N147.00	N2.00
7.	Benin – Edo	2017 – N145.00	N200.83	N45.83
8.	Ibadan – Oyo	2017 – N145.00	N144.00	N-1.00
9.	Oshogbo	2017 – N145.00	N145.00	N00
10.	Umuahia	2017 – N145.00	N145.00	N00
11.	Jos – Plateau	2017 – N145.00	N206.82	N61.82

[86] A.H. Isa, S. Hamisu, H.S. Lamin & Others, The Perspective of Nigeria's Projected Demand for Petroleum Products (2013)(4)(7). *Journal of Petroleum and Gas Engineering*, 184-187.

12.	Gombe	2017 – N145.00	N145.00	N00
13.	Abuja	2017 – N145.00	N145.00	N00
14.	Maiduguri	2017 – N145.00	N150.00	N5.00
15.	Sokoto	2018 – N145.00	N150.00	N5.00
16.	Kebbi	2018 – N145.00	N150.00	N5.00
17.	Kwara	2018 – N145.00	N150.20	N5.00
18.	Akwa-Ibom	2018 – N145.00	N145.00	N00
19.	Adamawa	2018 – N145.00	N150.00	N5.00
20.	Taraba	2018 – N145.00	N150.00	N5.00
21.	Enugu	2018 – N145.00	N145.00	N00
22.	Kaduna	2018 – N145.00	N160.00	N15.00
23.	Ondo – Akure	2018 – N145.00	N150.00	N5.00
24.	Maiduguri	2018 – N145.00	N190.00	N45.00
25.	Gombe	2018 – N145.00	N150.00	N5.00
26..	Bayelsa	2018 – N145.00	N152.00	N7.00
27.	Katsina	2018 – N145.00	N145.00	N00
28.	Ebonyi	2018 – N145.00	N148.00	N3.00
29.	Osun	2020 –	N150.29	N27.29

		N123.00		
30.	Yobe	2020 – N123.00	N145.00	N22.00
31.	Enugu	2020 – N123.00	N154.50	N31.50
32	Jigawa	2020 – N123.00	N144.00	N21.00
33.	Sokoto	2020 - N123.00	N144.00	N21.00
34.	Kebbi	2020 – N123.00	N158.00	N35.00
35.	Kaduna	2020 – N123.00	N157.00	N34.00
36.	Taraba	2020 – N123.00	N156.00	N33.00
37.	Lafia – Nasarawa	2020 – N108.00	N113.28	N5.28
38	Akwa-Ibom	2020 – N108.00	N123.50	N15.50

Source: Nigeria Bureau of Statistics (NBS) report, 2017.
Other data compiled by the author from various Newspaper Reports

8.0 COMPARATIVE ANALYSIS OF PRICES OF PETROLEUM PRODUCTS IN NIGERIA WITH OTHER COUNTRIES OF THE WORLD

In some countries of the world, a range of petroleum pricing policies exists, which may be ad-hoc pricing, formula-based automatic price adjustment or liberalized markets. In a developed economy, prices of petroleum products are market determined, while in developing economies that are net importers of oil, prices are in some cases fixed by the government or state-owned enterprises. In net oil-exporting countries, governments maintain petroleum prices well

below the free market level.[87] Table 5 compares the retail prices of fuel in Nigeria and some countries in Africa, Europe and USA in 2020. For instance, in Africa petrol prices per litre in 2020 was low at 0.139 Dollar per litre in Sudan, 0.279 Dollar in Angola and 0.316 Dollar per litre in Nigeria, while it was high at 1.049 Dollar per litre in Cameroon and 1.015 Dollar per litre in Burkina Faso. Other African countries whose fuel prices are high are; Morocco, Togo, Kenya, Liberia, Ghana and Tunisia.[88]

Nigeria, being an oil producing country incorporates a subsidy regime into its pricing policy since 1973 where the price of fuel sold to consumers in the market is lower than the imported price. Petrol in Nigeria costs less than half of what it costs in all of the neighbouring West African countries. Because of the lower price of the product in Nigeria, it provides an economic incentive for smuggling Nigerian petrol to other neighbouring countries in the region. In December 2017, the daily supply of petroleum products by the Nigerian National Petroleum Corporation for domestic consumption was 55 million litres across the country against the 35million litres per day.[89] The extra 20 million litres from the daily supply was smuggled out to neighbouring countries.

Since the emergence of the Coronavirus in China in December 2019 the price of crude oil in the international market was unstable. In Nigeria, the landing cost of imported Premium Motor Spirit (PMS) dropped from N115.52 to N96.85 against what it was in November 2019, which dropped from N150.11 to N147.07 in the PPPRA

[87] O. Ezie and O.J. Beida, Nigerian Downstream oil Sector Deregulation and Efficient Petroleum Pricing (2014)(4)(4). *International Journal of Social Sciences and Humanities Review;* .84-93.

[88] S.A. Olumide, Deregulating the Downstream Sector of the Nigerian Petroleum Industry (2013)(8)(2). *British Journal of Economics, Finance and Management Sciences*, 1-22.

[89] A. Oluwaseyi 'Report: Nigeria sells the cheapest petrol in West Africa — recipe for smuggling' Vanguard Newspaper (2017) <https://www.vanguardngr.com/2017/12/customs-discovers-new-method-smuggling-rice/> accessed 25 May, 2020).

template. The crash became worse after Saudi Arabia reacted aggressively with plans to unilaterally increase oil output and also slash the price it sells crude oil in foreign markets. Since the epidemic, the price on PPPRA template has been heading downwards, forcing the Federal Government reduce the price of PMS from ₦145, ₦123.00 and ₦108.00 a litre for second time within one month.[90]

Table 5: Comparative Fuel Prices for Selected Countries in Africa, Europe and USA in 2020

S/N	Countries	Price ($/litre) Fuel(PMS)	Price ($/litre) of Gasoline (AGO)
1.	Iran	0.088	0.338
2.	USA	0.591	2.237
3.	Qatar	0.288	1.090
4.	Algeria	0.350	1.325
5.	Saudi Arabia	0.218	0.825
6.	Angola	0.279	1.056
7.	Malaysia	0.301	1.139
8.	Nigeria	0.316	1.196
9.	Zimbabwe	0.420	1.590
10.	Lesotho	0.454	1.719
11.	Kuwait	0.340	1.287
12.	Egypt	0.538	2.037
13.	Ethiopia	0.645	2.442
14.	South Africa	0.645	2.442
15.	Namibia	0.695	2.631
16.	Tunisia	0.703	2,661
17.	Sierra Leone	0.688	2.604
18.	Ghana	0.726	2.748

[90] Olisah Chike, <https://nairametrics.com/2020/09/02/petrol-pump-price-increased-to-n151-56-per-litre/> (posted 7 May and accessed 26 May 2020); Erezi Dennis, 'Guardian Newspaper' <https://guardian.ng/news/confusion-as-petrol-marketers-fix-price-at-n162-a-litre/ posted 1 April, 2020 and accessed on 26 May 2020.

19.	Sudan	0.139	0.526
20	Morocco	0.904	3.422
21.	Liberia	0.748	2.831
22.	India	0.978	3.702
23.	Kenya	0.802	3.036
24.	Argentina	0.844	3.195
25.	Burkina Faso	1.015	3.842
26.	Togo	0.846	3.202
27.	Cameroon	1.049	3.971
28.	Switzerland	1.368	5.178

Source: 'Global Petrol Prices' <https://www.statista.com/statistics/221368/gas-prices-around-the-world/> accessed 25 May 2020.

From Table 5 above, the average price of petrol around the world differs from what is obtainable in Nigeria, depending on the region of that country. In the United States of America the price per litre was 0.591 U.S Dollar. However, there is substantial difference in these prices among other countries, where richer countries have higher prices while poorer countries and the countries that produce and export crude oil have significantly lower prices. One notable exception is the U.S. which is an economically advanced country but has low gas prices. The differences in prices across countries are due to the various taxes and subsidies provided for petroleum products.

In India, the government adopts a dynamic pricing system that reflects fluctuations in global oil market, where prices of petrol and diesel are determined by various factors. First the cost of crude oil, second the taxes the Central and States governments impose. There is also VAT that is added before it is sold to the consumer. Petrol and diesel are expensive, primarily, because of the central and state government taxes; otherwise, it would be much cheaper.[91]

[91] K. Vatsal, 'Petroleum Planning and Analysis Cell, Ministry of Petroleum and Natural Gas' <https://economictimes.indiatimes.com/topic/Petroleum-Planning-and-Analysis-Cell> accessed 25 September 2020.

9.0 CONCLUSION

Petroleum products play a critical role in the economic development of Nigeria and the bulk of its consumption come from the premium motor spirit (PMS) commonly known as petrol and automotive gas oil (AGO), which are used mainly for transportation business and generating plants. The rapid increase in demand of petroleum products reflects the rapid growth rate in the number of automobiles, industries, economic and political development.[92] This explains why most Nigerian consumers exhibit dislike and apathy towards increase in prices of petroleum products. This, perhaps, is due to the economic problem faced by majority of consumers and the failure of government to explain the reason behind the continuing increase in prices of petroleum products.

The current uniform pricing policy regulating the downstream oil sector is judged as inefficient. Restructuring of the current pricing system will enhance sustainability that will have impact on all sectors of the economy. This notwithstanding, such reforms or restructuring must not only focus on enhancing effectiveness and efficiency; it must be mindful of equity issues with respect to ensuring optimal pricing of petroleum products.

Therefore, this study revealed that:

1. There is no express provision provided in the Petroleum Products Pricing Regulatory Agency Act that repeals Section 6(1) of the Petroleum Act, which is capable of conflict with Section 7(a) and (b) of the PPPRA Act if allowed to stand as an existing law.

[92] A.O. Umeanozie, E.K. Nduka and J.O. Chukwu, Subsidies and the Demand for Petroleum Products in Nigeria (2014).(3)(2). *International Journal of Sustainable Energy and Environmental Research*; 100-109.

2. The administration of the Petroleum Equalization Fund (PEF) to bridge the gap in the price of petrol (PMS) and other products is inefficient and failed to deliver the uniform price policy on petroleum products as there is a wide disparity in the prices of petroleum products purchased by consumers all over the country.

3. The penalty provided for non-compliance in the sale of petroleum products at uniform price under Section 13(3) of the Petroleum Act is too small to deter offenders, while the powers contained in Section 4(2)(a)-(e) of Petroleum Equalization Act are more discretionary in nature.

10.0 RECOMMENDATIONS

In view of these findings, the study recommends that:

i) The National Assembly should amend the Petroleum Products Pricing Regulatory Agency Act by inserting a provision repealing Section 6(1) of the Petroleum Act and transfer all the functions hitherto performed by the Minister of Petroleum Resources relating to price fixing of Petroleum products to the PPPRA Act.

ii) The National Assembly should reform and strengthen some of the provisions of the Petroleum Equalization Fund Act in order to make the operation of the Fund more efficient in the administration of Uniform Price Law that will improve the distribution of petroleum products to all parts of the country.

iii) The penalty provided under Sections 6 and 13(3) of the Petroleum Act and Section 4(2)(a)-(e) of Petroleum Equalization Fund Act should be reviewed by the National Assembly by providing stringent measures that will deter offenders of the Uniform Price Law.

STATUTORY DERIVATIVE ACTION UNDER COMPANIES AND ALLIED MATTERS ACT 2020: UNTANGLING THE MYTH

Friday Okafor ONAMSON*

Abstract

The company is reified by reason of which it is likened to a person of natural contractual capacity. If it suffers wrong or its rights are invaded, it is for the company to fight its battles by taking steps to remedy the wrong (s 341 Companies and Allied Matters Act (CAMA) 2020). Ironically, the organ set up purposely to protect the company, fight its battle and remedy the wrong against the company may be complicit in the wrong to, or the fraud on the company. In such case the law offers a leeway, providing that if the company becomes disabled as such, the foisted disability (as it were) is not without remedy; hence, the device of statutory derivative action (SDA) under CAMA 2020. Due to the myths generated by the unwieldy interaction between the common law proper plaintiff rule and SDA, doubts have been created regarding the efficacy of the latter in arresting incidences of corporate maladministration. Using statutory, judicial as well as textual authorities, the paper critically reviewed the common law shareholder suit against statutory derivative action as a corporate governance mechanism, identified and clarified areas of myths around the application of the mechanism and pointed out areas where further reforms are needed.

Keywords: Company control, derivative action, fraud, maladministration, minority, shareholder, statutory derivative action, wrongdoer

1.0 INTRODUCTION

Although, as an entity, the company has no mind or will of its own,[1] the typical company[2] is a structural system for ventilating the objects for which it was established. Under the Nigerian corporate law,[3] the structure is made up of the shareholders (members) in general meeting and corporate management.[4] These constitute the governance units within any company, with clearly delineated lines of authority and power under the law. Thus, the members in general meeting as an organ within the structure is fashioned to play interventionist, watchdog, and remedial roles,[5]with reference to the activities of corporate management. For example, available to members in the general meeting is the restricted exercise of corporate managerial power, like where the directors are disqualified or deadlocked.[6] Of course, if the board is deadlocked, its meetings are expectedly going to be inquorate, so that it is impracticable to conduct the company's business.[7] Restrictively, the members in

*ONAMSON, F.O. LLB (Hons) (Zaria), LL.M(Zaria), PhD(Zaria) Department of Commercial Law, Faculty of Law, National Open University of Nigeria.

[1]Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd (1915) AC 705; HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd (1957) 1 QB 159. Its directing mind and will is the corporate management team (i.e., the board of directors and managing director) On this see the case of Bolton (Engineering) Co Ltd v Graham & Sons Ltd (1957) 1 QB 159

[2] Or corporation.

[3] Principally and in the context of this paper, the Companies and Allied Matters Act (CAMA) 2020. Unless specifically stated, a reference to CAMA means Companies and Allied Matters Act 2020.

[4] The corporate management is the board of directors. Usually, the directors appoint one of their members to the office of the managing director (section 88 (b) CAMA 2020). The managing director supported by other directors in executive capacity and other officers is the head of the executive management team.

[5] It is submitted that members in general meeting is one of the remedies available under CAMA for resolving corporate maladministration. For convenience and coherence, the role of members in general meeting as a remedy for corporate maladministration under CAMA 2020 shall be critically examined here.

[6]See section 87(5)(a) CAMA; See Alexander Ward & Co Ltd v Samyang Navigation Co Ltd (1975) 1 WLR 673

[7] Foster v Foster (1916) Bolton (Engineering) Co Ltd v Graham & Sons Ltd (1957) 1 QB 159; 1 Ch 532; Barron v Potter (1914) 1 Ch 895

general meeting can exercise corporate managerial powers. An example is where the members in general a meeting dismisses the board by the instrument of ordinary resolution.[8]

Despite the law, the members in a general meeting in a Berle and Means corporation have no significant role to play in the management of companies because, in this form of corporatism, the law and the company's constitutional documents, especially the articles, ceded corporate managerial powers to the corporate management. By reason of this statutory and constitutional mandate, the directors while in the usual course of their duties of managing the business of the company are not bound to obey or carry out the instructions of the members in general meeting, to the extent that the articles did not otherwise provide.[9]When it is said that the directors are not bound to obey or carry out the instructions of members in general meeting, it does not mean the directors are put beyond challenge. One, corporate management must exercise their managerial powers within the powers conferred upon them by the law (that is, Companies and Allied Matters Act (CAMA) 2020) or the articles. Two, the general power of management must be exercised in good faith and must reflect the degree of care that a prudent person would take in the circumstances. In other words, it is submitted that the corporate management has a right to "disobey" the members if the board is acting in good faith and with due diligence.[10]

[8]See section 288 (1) CAMA. As a remedial device for corporate maladministration, the shareholders can remove an erring director(s) by ordinary resolution. Yet, it has been rightly pointed out that "once shareholding become very dispersed it may be difficult for the shareholders to co-ordinate sufficiently to make this mechanism very valuable": Guliffer, L., and Payne, J., Corporate Finance Law: Principles and Policy, Oxford: Hart Publishing, 2011, p. 72.

[9]Section 87 (3) and (4) CAMA. The expansive powers of management can be limited by the articles. Thus, where the articles provide that the board must have regard to approval of the members in general meeting before taking any decision when acting in a particular matter, the board must respect and act in accordance with such a provision created in the articles: Hughes, King (Nigeria) Ltd v Ronald George Harris (1972) 2 UILR 63

[10]ibid

It is submitted that the 'unrestrained' power donated to corporate management under CAMA is situated or based on 'the trust proposition founded on stewardship model.'[11] The proposition holds that man is trustworthy, able to act in good faith in the interest of others[12] with integrity and honesty.[13] On this basis, CAMA appears only to be reinforcing the trust proposition to the effect that the corporate management, composed of (wo)men of integrity occupying responsible positions, should be given the benefit of trust 'until there is reason to distrust them.'[14] Speaking on this proposition, Lord Halsbury LC insightfully reminded us that "the business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management."[15] Conversely, the board of directors cannot usurp any powers retained by members, either generally by CAMA[16] or specifically under the articles. As (wo)men, and not saints, the temptation for the corporate management members to overreach themselves and act opportunistically and engage in egregious acts of corporate maladministration appear to be inevitable.

Hence, when opportunism and malfeasance are present, it manifests in wrong to or fraud on the company or under what is generally known as 'fraud on the minority.' Depending on the nature of the

[11] See generally, Muth M. and Donaldson L., Stewardship Theory and Board Structure – A Contingency Approach, Corporate Governance, Blackwells, 1998, vol. 6, No. 1, pp. 5-28.

[12]For example, the shareholders.

[13] Chambers, A., Corporate Governance Handbook, 4th edition, London: Tottel Publishing, p. 200. Compare the proposition with McGregor's Theory X and Theory Y management. For instance, Theory X holds, among others, that people are self-centred and therefore must be closely controlled and often coerced to achieve organizational objectives.

[14] Once the reason to distrust them arises, as when they exceed their powers or act mala fide and without regard to due diligence, the members can assert their residual powers: In Re Continental Ass Co of London Plc (2001) BPIR 733.

[15]Dovey v Cory (1901) AC 477

[16] For example, the power to alter the memorandum and articles is retained for the members (see sections 49 and 53 CAMA).

wrong, the members in general meeting, willy-nilly, have residual powers of preventatively[17] remedying such acts of corporate maladministration. This they can do by curtailing the exercise of managerial power through the articles or stopping further commission of the acts complained of by amending the articles, or by removing the offending or erring directors, or by injunction (or declaration) restraining the directors from further acts of ultra vires.[18] Where the act resulting in the wrong to or fraud on the company is completed, different considerations apply. For instance, is the wrong one affecting the interest of a shareholder or a class of them? Or does it border on questions of unfairly prejudicial, oppressive, and discriminatory conduct with reference to the management of the company? Or is the wrong one done to the company in its juristic character? Where it is the latter, only the company can, based on the proper plaintiff rule (otherwise called ***the rule in Foss v Harbottle***), take steps to remedy the wrong, either way. Expectedly, if the wrongdoers are in control and elect a blind eye attitude towards the wrong, the company, though disabled, is not without remedy. To cure the wrong to or fraud on the company in the face of foisted corporate disability or incapability, an applicant[19] can petition for leave to commence derivative suit to pursue justice for the company.[20]

Derivative action is said to be the "the chief regulator of corporate management"[21] and the "earliest and principal constraint" on the use and exercise of corporate powers by those in authority[22]. Yet, its

[17] "Preventatively" because once an act has been committed, whether ultra vires the board or the company, the company is bound to perform the obligations flowing from such an unlawful act. Subsequent and further commission of the complained act can be remedied by passing a resolution to that effect in general meeting.
[18] Sections 44 (4), 45 (1)(d) and 343 CAMA.
[19] See section 352 CAMA for the meaning of an applicant. Considered further below.
[20] See section 346 CAMA, providing for commencement of derivative action.
[21] Cohen v Beneficial Industrial Loan Corporation (1949) 337 U.S. 541
[22] That is corporate management, earlier identified as board of directors, including the managing director as the head of the executive management different from the board of directors that appointed them.

present and continued status as a critical and efficient mechanism for corporate governance appear to be in doubt. Writing from the U.S. perspective Thompson and Thomas submitted that derivative action has:

> receded from such a lofty position… *as a result of* several dramatic changes from the environment described by Berle and Means. The development of the market for corporate control… provided a real alternative to litigation as a method of constraining managers. In addition, private ordering took on a much larger role with the advent of incentive-based compensation and CEO employment contracts, among other things. Since the time of Berle and Means, the board has gradually become more of a monitoring body made up mostly of outside directors. At the same time, in most large American companies, ownership has shifted away from dispersed individual shareholders toward large institutional investors. Law, private ordering, and norms all have strengthened the roles of various gatekeepers who affect corporate governance *with the result that the place of derivative action in the scheme of things has been largely whittled or watered down*. (Emphasis added)[23]

The above might be the state of shareholder derivative suit in the US. However, in the UK following the transmogrification of the common law rule in Foss v Harbottle to statutory derivative claim, the question is not, it is submitted, whether derivative claim is still relevant. Save that its ancestor, the common law derivative action, was characterised as "obscure, complex, rigid, old-fashioned and

[23]Thompson, R.B., and Thomas, R.S., "The Public and Private Faces of Derivative Lawsuits". Vanderbilt Law Review, 2004, Vol. 57:5, 1747-1793, pp. 1756-1757. Also available online at http://ssrn.com/abstract=555813. Accessed 1/3/2020

unwieldy."[24] This criticism must have facilitated the birth of statutory derivative claim in the UK, which is said to be marked by a new procedure embedded with "more flexible and accessible criteria for determining whether a shareholder can pursue the action."[25] Whether the UK statutory derivative claim[26] supplanted the common law proper plaintiff rule[27]so that the former led to "abolition and a new beginning" with reference to the latter or as between the two it is "a relationship of continuity and codification" has become a major source of debate.[28] For example, Kershaw arguing that the statutory derivative claim did not abolish "the threshold requirement of having to show wrongdoer control" in a petition for bringing a derivative claim and decrying the "uncertainty surrounding the status of proper plaintiff rule and wrongdoer control… in post-Act derivative claim judgments" stated that:

> the proper plaintiff rule as set forth in Foss v Harbottle and its progeny is a substantive rule of law that is umbilically connected to the wrongdoer control rule, which is merely one example of a circumstance in which the company is not capable of acting. (This implies that) the wrongdoer control requirement is not… a procedural appendage to the proper plaintiff rule. It is a product of this elemental

[24]Tang, J., "Shareholder Remedies: Demise of the Derivative Claim?" UCL Journal of Law and Jurisprudence, 2012, Vol 1:2, pp. 178-210, p. 178. Available online at http://ojs.lib.ucl.ac.uk/index.php/LaJ/article/view/581. Accessed 12/3/2020

[25] Thompson and Thomas, ibid

[26]See sections 260-264 UK Companies Act 2006

[27] See section 236(3) Australian Corporations Act 2001, which, in less equivocal terms, states that "the right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished"; and section 165(1) South African Companies Act 2008 providing that "any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right." It may be argued that these provisions intend to overreach, and actually displaced, the common law proper plaintiff rule.

[28] Kershaw, D., "The Rule in Foss v Harbottle is Dead; Long Live the Rule in Foss v Harbottle". LSE Law Society and Economy Working Papers 5/2013, London School of Economics and Political Science Law Department. Available online at http://ssrn.com/abstract=2209061. Accessed 12/4/2020.

> rule (for) if one were to allow derivative actions in the absence of either wrongdoer control or some other form of general meeting incapability then the common law proper plaintiff rule would no longer be applicable.[29] (Emphasis added)

In support of a relationship of continuity and codification and agreeing with the position of Lord Glennie[30] but disagreeing with the conclusion of Roth J[31], he insists that Stage 1 requiring a prima facie case to be made out for giving permission means no more than that to move to Stage 2, there must be:

> (i) a prima facie case on the merits; (ii) *a prima facie case of wrongdoer control or another form of corporate incapability*; and (iii)a prima facie case that pursuant to the section 263 criteria permission would be granted. (…) As the Companies Act 2006 makes no express statement about the status of the common law rules, if the common law proper plaintiff rule and wrongdoer control requirement have been abolished then we must identify such a change in the law by 'necessary implication'. (Since) based on the Act[32] alone, as our rules of statutory interpretation require, there is not a compellingly clear implication that the proper plaintiff rule[33] as a substantive rule of law has been replaced. (Emphasis added).[34]

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[29] Kershaw, ibid

[30]Wishart v Castlecroft Securities (2009) CSIH 6 (Inner House)

[31]Bamford v Harvey (2012) EWHC 2858

[32] That is, the UK Companies Act 2006

[33]Which requires as a prerequisite wrongdoer control or another form of corporate incapability

[34] The phrase "necessary implication" is said to connote "an implication which is compellingly clear": per Lord Nicholls in B (a minor) v DPP (2000) 2 AC 238 at page 464

Although the statutory derivative action in Nigeria predates the UK statutory derivative claim, there seems to be an apparent misunderstanding in the use of the mechanism and, expectedly, misuse of this efficient corporate governance device. As a result, this has resulted in situations where litigants are shut out of justice. In one of such instances, a claimant with a good ground[35] for invoking statutory derivative action commenced the action in his personal capacity as a shareholder. Striking out the matter for being incompetent, the Nigerian Court of Appeal agreeing with the lower court recounted:

> Now to the main issue: was the lower Court in error to have struck out the suit on the ground that the plaintiffs lacked the capacity to bring it? The lower Court in its ruling at page 33 of the record of proceedings said: "Moreover, I am of the view that the allegation of fraud is part of the corporate rights of the company and not part of the individual rights of members of the company. It is not therefore open to the plaintiff respondent herein to claim it as his own. To do so he must have sued in the name of the company which he did not do in the instant case. See Yalaju-Amaye v. A.R.E.C Ltd... (supra), S.E. limited v. Ponmile (supra) and Tanimola v. S. & Mapping Geodata Ltd. (1995) 6 NWLR (pt. 403) 617.[36]

In other words, the Court appears to be saying that the plaintiff did not understand the appropriate mechanism with which to remedy for an apparent wrong. Due to the prevailing lack of understanding, fruitless attempts had been made to strike down the statutory derivative action on grounds of inconsistency with the Nigerian

[35]The case involved fraud on the minority, which the defendant neither traversed nor denied.

[36] Per Oguntade, JCA in Erebor v. Major & Co. (Nig) Ltd &Anor (2000) LPELR-9129(CA)

Constitution,[37] including instance where a claimant absurdly tried to import the company law concept into the realm of constitutional law. Nonplussed by such absurdity, the Supreme Court was constrained to clear up misunderstanding:

> What is notoriously referred to as the Rule in Foss v. Harbottle is in the following terms: The company or association is the proper plaintiff in all actions in respect of injuries done to it. No individual will be allowed to bring actions in respect of acts done to the company which could be ratified by a simple majority of its members. Certainly, the above Rule cannot apply in this case which deals with the breach of a section of the Constitution. The House of Assembly cannot, in any sense or imagination, be equated to a company. One is a constitutional body; the other is a corporation in business or commerce. The minority element (the) learned Senior Advocate introduced in the issue is, with the greatest respect, neither here nor there. Counsel cannot talk about majority to win over minority in context of Section 188 in order to make the action of the minority unconstitutional. That is company or commercial law practice, and it is wrong to import that to the determination of locus standi under the Constitution.[38]

On its part, the Nigerian Supreme Court misreading, it is submitted with respect, the provision requiring the applicant to serve notice on the company of his intention to commence, or intervene in, an action

[37]In Elufioye&Ors v. Halilu&Ors (1993) LPELR-1120, the Supreme Court was unequivocal when it stated that "to the extent therefore that the rule in Foss v. Harbottle preserves the right of the individual members of a body corporate or association to sue where their personal or individual rights, as opposed to those of the corporation or association, have been infringed, it is not in conflict with Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria 1979"

[38]Per Tobi, JSC in Inakoju&Ors v. Adeleke&Ors (2007) LPELR-1510(SC)

in the name of the company stated that the requirement implies that *the company be put on notice through service of originating summons on notice. Thus ex parte application has no place thereunder as the other party would have been denied the opportunity of being heard*.[39] This position, it is submitted, created a myth as to the nature of notice envisaged by the law[40] when it says that *reasonable notice must be served on the company* of the applicant's intention to derivatively sue. As shall be seen the position of the apex court, with due respect, is a forceful onslaught against the spirit of the law.

As noted above, in the US derivative suit is claimed to have lost its metier; and in the UK the issue is whether statutory derivative claim is, for example, a case of old wine in a new bottle.[41] In Nigeria, it is a case of misunderstanding (myth) of the regime of statutory derivative action. Surprisingly, this was not the case under the common law proper plaintiff rule.[42] In the light of this, this paper, is conceived to critically examine the statutory derivative action, with a view to untangling the myth around this all-important statutory corporate governance mechanism. As seen above, litigants have improperly invoked the rule in seemingly incongruous situations. Expectedly, the courts wasted no time in striking out such suits. Due to the situation, this substantive rule of law appears to have lost its fervour with reference to its metier or role as an efficient statutory tool for remedying corporate maladministration. Further to the foregoing, the objective of this paper is to carry out a critical examination of the law in this area, untangle any myth that may be lurking around the device of statutory derivative action, stimulate

[39]Agip (Nigeria) Ltd v. AgipPetroli Int. &Ors. & 7 Ors (2010) 1 CLRN 1; (2010) All FWLR (pt. 520) SC 1198

[40]Section 346 (2)(b) CAMA

[41] That is, "a relationship of continuity and codification": see, n. 27. For opposing view see, Tang, J., "Shareholder Remedies: Demise of the Derivative Claim?" (2012) UCL Journal of Law and Jurisprudence Vol 1 No 2, pp. 178-210. Available online at http://ojs.lib.ucl.ac.uk/index.php/LaJ/article/view/581. Accessed 12/2/2020

[42] The Nigerian courts had decided so many cases based on the common law proper plaintiff rule.

interest among corporate actors in this veritable instrument of corporate governance and similarly provide a reliable reference and guide to its efficient use for maximum effects.

In consequence of the foregoing, the paper is divided into four parts. Part one briefly explored the concept of proper plaintiff rule under the common law, the forebear of the statutory derivative action. The philosophy behind the rule, which largely remained unchanged in the statutory environment, was brought out. Part two examined statutory derivative action under the Nigerian CAMA 2020.[43] In doing this, the paper adopted comparative approach, placing the provisions of the law with that of other jurisdictions where the common law rule has been displaced by statutory jurisdiction. Part three offers conclusion by pointing out how the statutory derivative action can be made functionally relevant within the sphere of corporate governance.

2.0 THE COMMON LAW PROPER PLAINTIFF RULE

The Nigerian company law envisages a Berle-Means corporation,[44] when it donated the powers of management to the board of directors. It is no wonder that entrenching good corporate governance, primarily directed at facilitating "effective, entrepreneurial and prudent management that can deliver the long-term success of the company,"[45] is a core mandate or responsibility of the board. However, managerial evolution has its implications. For example, it is possible that the managers would focus on self-interest goals and

[43]Initially, the paper was prepared with reference to CAMA 2004 CAP C20 LFN 2004. The enactment of CAMA 2020 meant that the paper must reflect the current state of the law in the area. Importantly, it must be noted that the change in law did not affect the topicality of the subject matter of the paper.

[44]This is where ownership is separate from control, otherwise called managerial evolution. See, Berle, A. and Means, G., The Modern Corporation and Private Property, London: Macmillan (2932)

[45] The UK Corporate Governance Code April 2016. The Financial Reporting Council. Available online at https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf

thereby make, and invest in, decisions which will yield benefits to the directors at shareholders' expense. The tendency for such agency problems festering is high because in a Berle-Means corporation ownership is said to be passive and devoid of spiritual values, because the owners do not directly employ their wealth; and the value of the wealth was dependent on outside forces, which were entirely out of their control.[46] To check managerial abuse it has been suggested that the fiduciary duties of the directors should be reasserted[47] and more discretion should be allowed to the directors, even if it thereby curtailed shareholder powers.[48] Considered against the reification of the company,[49] either of the suggestions, it is submitted, cannot be efficient. For example, in trying to implement the suggestions, section 87 (4) CAMA 2020 provides that save as the articles may provide otherwise and as far as the directors are acting in good faith and with due diligence, the board of directors shall not be bound to obey the directions or instructions of the members in general meeting. The only limitation is that the directors must be acting within their powers.

Following its reification, the company must learn to fight and be adept at fighting its battles, so the law ordains. This implies that where the company suffers wrong, it is the company, to the exclusion of all others, that must set in motion the machinery for stopping, preventing, or correcting the breach. It has been emphasized that an individual shareholder could not bring an action to the courts to complain about an irregularity in the way in which the company's affairs were being conducted if there was a constitutional facility by which it can be ratified.[50] Otherwise called the common law proper plaintiff rule, this is known as the rule in **Foss v Harbottle.** Thus, if a wrong is done to a company the proper

[46]Berle and Means, p. 79 in: Talbot, L.E., Critical Company Law, Oxford: Routledge-Cavendish (2008), p. 191
[47]Berle, A.A., "Corporate Powers as Powers in Trust", (1930-31) 44 Harv L Rev 1049
[48]Dodds, M., "For Whom are Managers Trustees", (1931-1932) 45 Harv L Rev 1162
[49] Section 43 (1) CAMA.
[50] Foss v Harbottle (1843) 2 Hare 401

plaintiff to take steps and remedy the wrong is the company and not the shareholder.[51] The company, in this sense, is the managers', who, as the alter ego, are the directing mind and will of the company.[52] Until and when the alter ego initiates, and takes, such action, in pursuance of a wrong done to the company, no right is available to any member to seek to remedy the wrong.

However, since one or all of the parties to the contracts, the source of the wrong or fraud on the minority,[53] might inextricably be linked to, including taking benefit from, the wrong done to the firm,[54] it makes sense that the power of censorship or calling into question the act of such a party should not be left in the party.[55] The law recognises that where profusion and opportunism are implicated in the wrong done to the company, it is possible that the company can be disabled and cannot take action to remedy the wrong.[56] Thus,

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[51] Talbot at page 199 argues that the proper plaintiff rule was "grafted onto the rule in Foss v Harbottle" because, on the facts, the judgment in the case should be of restricted application. The rule seeped into mainstream company law for the first time in the case of Mozley v Alston (1847) 16 L.J. Ch. 217

[52] Bolton (Engineering) Co Ltd v Graham & Sons Ltd (1957) 1 QB 159

[53]Section 343 (d) CAMA. This should not introduce any ambiguity. If a wrong done to, or a fraud is committed against, the company, and the company is unwilling to remedy, or is disabled from remedying, chances are that the consequence of the wrong or fraud will most disproportionately affect the minority. The laudable novel provision in section 342 CAMA relating to **"major asset transaction"** is a good example of a wrong or fraud on the company capable, it is submitted, of being equated with fraud on the minority. Thus, it is submitted that a major asset transaction by a company that failed to follow the procedure laid down in the section is a good case for commencing statutory derivative action under CAMA. This observation sits well with the position of Lord Davey who in Burland v Earle (infra), agreed that derivative action can be pursued "where he stated that where "the majority are endeavourng directly or indirectly to appropriate to themselves money, property or advantages which belongs to the company."

[54] This is because he is the wrongdoer in control and must have appropriated to himself benefits out of the wrong.

[55] F. Guelpa "Corporate Governance and Contractual Governance: A Model" RivistaInternazionale di ScienzeSociali, Anno 106, No. 1 (Gennaio-Marzo 1998, pp- 49-66, p. 49. Available online at https://www.jstor.org/stable/41623972. Accessed 29/01/2020

[56] No wonder section 343 (d) CAMA talks of committing fraud on the company and the **"directors fail to take appropriate action."** It is submitted that the word "fail" presupposes intentional refusal to act, or deliberate blind eye attitude, by the directors,

where the wrongdoer is in control and profited or benefited from the wrong or is likely to do so,[57] the rule in Foss v Harbottle will be sidestepped to allow a minority shareholder to commence derivative action in the name and on behalf of the company.

Subject to fulfilling the threshold for permitting departure from the proper plaintiff rule, a shareholder can bring action to enforce what is properly the duty of the company. Where this happens, the shareholder is said "to derive" his authority from the company to commence the action. Shareholder derivative suit is "representative," -"preclusive," and "self-funding."

On the foregoing indicia of derivative action, Geis[58] writes that:

> (Derivative action is) representative because a single shareholder can assert claims on behalf of the entire body of shareholders; preclusive because any given resolution to a claim cannot easily be revisited and will typically bind other shareholders; and self-funding because the primary actors in these cases, the plaintiffs' lawyers, are entitled to receive payment for their services through contingency fee arrangements or payments from the corporation itself (Words in bracket mine).

Of the above features, "preclusive" stood out, because it is the crux of the common law proper plaintiff rule. Goulding[59] writes that the preclusion index of derivative action stands on "two strands":

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who, obviously, are in control. Section 346 (1) (c) CAMA is a reinforcement of the fact of deliberate inaction by the directors.

[57] Section 343 (f) CAMA.

[58]Geis, G.S., "Shareholder Derivative Litigation and the Preclusion Problem'. Virginaia Law Review Vol 100:2 (Spring 2014), 261-313, pp. 262-263. Available online at https://www.jstor.org/stable/24362690. Accessed 29/1/2020

[59]Goulding, S., Company Law, 2nd Edition, London: Cavendish Publishing (1999), p. 342

> First, the directors have been appointed to manage the company's affairs and they owe their duties to the company; any misfeasance, appropriation of corporate property or breach of duty on their part is a wrong done to the company and, as a separate legal person, the company is the property plaintiff in any subsequent legal proceedings. Secondly, where there are irregularities in the way the company is run and, also, in many cases where directors are in breach of their duties to the company, the majority of shareholders in general meeting may, by ordinary resolution, ratify and adopt what has been done.[60]

It is submitted that the second strand aptly mirrors the principle of majority rule that "a shareholder who buys shares in a company must accept that the majority will prevail."[61] Nevertheless, the principle of majority rule will not apply in all circumstances of the case. For example, the proper plaintiff rule will not operate where the company proposes to undertake an illegal act or an ultra vires,[62] albeit this will not relieve the company of liability to third parties.[63]Also, the principle has no application "where what is done or proposed to be done can only be a special majority or special resolution,"[64] among other situations.[65]Furthermore, the rule in Foss v Harbottle will be displaced where the wrong, amounting to fraud on the minority,[66] is done to the company;[67]the wrongdoer, being in

[60] Ibid,Burland v Earle (1902) AC 83
[61] Mozley v Alston (supra)
[62] Section 343 (a) CAMA
[63] Section 44 (3) CAMA
[64]Section 343 (b) CAMA; Edwards v Halliwell (1950) 2 All ER 1064
[65] For such other situations where the principle of majority rule may be suspended, see section 343 (a)-(g) CAMA
[66] Cook v Deeks (1916) 1 AC 554.Burland v Earle (supra).
[67] Kershaw (ibid) rightly observes that "at common law derivative actions can only be brought in relation to certain wrongs, which, disloyally, serve the directors' personal

control or having benefited from the wrong, would not act;[68]and where with reference to "any other act or omission, the justice of the case demands or, as recently captured by the Supreme Court, "the interest of justice demands."[69]

As to the feature of self-funding, this means that the costs of the action is absorbed, not by the plaintiff but the company. Otherwise called Wallersteiner order,[70] the law recognised that the minority shareholder in a properly founded derivative action should be indemnified against the costs and expenses in bringing the action which, ab initio, is that of the company. Lord Denning, justifying the 'Wallersteiner order', noted that where the plaintiff succeeds in his action:

> the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf. If the action succeeds, the wrongdoing director will be ordered to pay the costs: but if they are not recovered from him, they should be paid by the company. ... But what if the action fails? (If) the minority shareholder had reasonable grounds for bringing the action – that it was a reasonable and prudent course to take in the interests of the company – he shall not himself be liable to pay the

interests, and "often referred to as 'fraud' encompasses breaches of duty which result in loss for the company and gain for the breaching directors."

[68] Edwards v Halliwell (supra); Prudential Assurance v Newman (1982) 1 All ER

[69] Section 343 (g) CAMA. Prudential Assurance v Newman (supra); Edokpolo & Co Ltd v Semo-Edo Industries Ltd (1984) 7 SC 119. Criticized as being inexact in scope and imprecise as to situations where it becomes operative: Osunbor, A., *"A Critical Appraisal of the Interests of Justice as an Exception to the Rule in Foss v Harbottle"* (1987) 36 ICLQ 1; but praised as an affirmative and unequivocal commitment that the court would be prepared to intervene and outwit the powerful majority to give reprieve to the helplessly weak minority: Barnes, K.D., Cases and Materials on Nigerian Company Law, Ile-Ife: OAU Press Ltd (2007 reprint), p. 381

[70] Coined after the case of Wallersteiner v Moir [No 2] (1975) QB 373

> costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails.[71]

It is submitted that the characteristics of derivative action commend it as an efficient mechanism for remedying (or preventing) wrongs to, or fraud on, the company. Thus, a critical analysis of the cases which allow departure from the rule in Foss v Harbottle reveals that the main thrust of shareholder derivative suit is to arrest and sanction every act of corporate malfeasance, which, but for the exception to the rule, would have gone unremedied. Putting the matter in perspective, Ferris, et al compares that:

> (With respect to unfair prejudice) shareholders can bring direct suits to remedy a wrong to a particular share holder or subset of shareholders. For example, an allegation that management wrongfully froze out some shareholders from a share of corporate profits would be a wrong that could be pursued in a direct action (class action). Any monetary recovery will flow directly to the shareholders involved. In contrast, derivative suits remedy a wrong to all of the shareholders. For example, an allegation that directors mismanaged the company and caused a general decline in the company's value is a wrong that could be pursued in a derivative action. The suit is called derivative because the law treats the shareholder as suing on behalf of the firm. In other words, the shareholder

[71]Cited in: Goulding, ibid, p. 354

> is said to be asserting his rights derivatively"[72] (Words in bracket mine)

Basically, the common law proper plaintiff rule is hard law corporate governance mechanism. It aims to procure that the managers are committed to their duty to the company. Its availability is an assurance to the shareholders that the likely (adverse) consequences of managerial control can be efficiently mitigated. In Nigeria, the common law proper plaintiff rule transmogrified into a statutory provision with its incorporation and retention in CAMA 2020. As will be seen, the same common law principles were what have been uploaded into the statute. Thus, the state of the law did not change markedly.

The myth resulting in practitioners invoking the rule in seemingly incongruent situations is most unfortunate. One could postulate on the likely cause of the misunderstanding. First, practitioners appear to see the statutory derivative action as reinventing the wheel of the common law proper plaintiff rule, including expanding the scope of its application. By this view, the statutory derivative action is unrelated to its common law ancestor proper plaintiff rule. Second and just like the UK, practitioners appear uncertain about the relationship between the common law proper plaintiff rule and statutory derivative action under CAMA 2020. As we turn to the statutory derivative action under CAMA 2020, it is hoped that the misunderstanding that led to the erroneous characterisation and unsuccessful attempt to apply statutory derivative action in incongruent circumstances would be dissolved.[73]

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[72] Ferris, S.P., Jandik, T., Lawless R.M., and Makhija, A., "Derivative Lawsuits as a Corporate Governance Mechanism: Empirical Evidence on Board Changes Surrounding Filings". Journal of Financial and Quantitative Analysis, (Mar 2007) Vol. 42, No. 1, pp. 143-166, p.146. Available online at https://www.jstor.org/stable/27647289. Accessed 29/1/2020

[73] For example, the characterization and misuse could discourage genuine cases from being ventilated, which is a self-inflicted injury; the myth is also capable of casting doubts on the efficiency of the rule.

3.0 THE STATUTORY DERIVATIVE ACTION UNDER CAMA

Statutory derivative action is a codification of the common law shareholder suit. In line with the common law principle, only the company can remedy a wrong or ratify an irregular conduct.[74] Functionally, the statutory derivative action should be able to dissolve any myths surrounding the application of the exceptions to the proper plaintiff principle and thereby introduce clarity in this area of the law. Where this function is achieved, it will not be an issue discovering, for instance, whether to fight for control, the directors must own shares of (or in) the company. An analysis of the conditions for the application of statutory derivative action under CAMA will clear this proposition.

CONDITIONS FOR APPLICATION OF STATUTORY DERIVATIVE ACTION

1) **Leave.** The remedy of derivative action is an invention of equity that, subject to the discretion (or leave) of the court, allows the applicant to enforce the company's rights.[75] Accordingly, any applicant wishing to sue derivatively must seek and obtain leave of the court. The CAMA 2020 reckons with the position of holding the company structure by making it possible for the minority to bring the action, not just in the name of the parent but also in the name of "the company's subsidiary" in respect of an action which the parent or the subsidiary has interest.[76] The novel provision is obtainable in the UK regime. Recently, Briggs J noted that "it is unsurprising to find the court extending locus standi to

[74] Section 341 CAMA

[75] Davies, P.L., Gower and Davies' Principles of Modern Company Law, 7thed, London: Sweet & Maxwell, 2003, p. 457

[76] See section 346 (1) CAMA. A case where the shareholder of a parent company brings a derivative action on behalf of a subsidiary or associated company within a group of companies is known as "**double derivative action**".

members of the wronged company's holding company, where the holding company is itself in the same wrongdoer control."[77]

2) **Wrongdoer control.** The law lays the condition for grant of leave to bring derivative action. Under the common law and the repealed law,[78] the wrongdoers must be the directors who are in control and have refused or failed to act. This requirement is also a threshold requirement under the common law proper plaintiff rule. Wrongdoer control not defined under CAMA 2004 was construed with reference to the prior common law rule in Foss v Harbottle. This approach was informed by the canons of statutory interpretation which presumes "that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question."[79]

Thus, there is need to understand what constitutes 'wrongdoer,' 'control' and 'wrong.' The wrongdoers in view "are the directors who are in control." Wrongdoer control is said to exist "if the wrongdoer has a majority of the votes or the majority has actually approved a fraud on minority, or the company (having been disabled by the majority) has otherwise shown that it is not willing to sue."[80] Overruling the resolution of the majority that voted to stay action against a wrong which obviously amounted to a fraud on minority, Page VC remarked that:

[77]Universal Project Management Services v Fort Gilkicker (2013) EWHC 348
[78]Section 303(2)(a) CAMA.
[79]Langan, P.St.J. (ed.), Maxwell on The Interpretation of Statutes, 12th edition, Bombay: N.M. Tripathi Ltd (1976), p. 116. Greene v Associated Newspapers Ltd (2004) EWCA 162
[80]Thorne, J. and Prentice, D., (Eds), Butterworths Company Law Guide, 4th ed., London: LexisNexis, (2002), p. 260

> If I were to hold that no bill could be filed by shareholders to get rid of the transaction on the ground of the doctrine of Foss v. Harbottle, it would be simply impossible to set aside a fraud committed by a director under such circumstances, as the director obtaining so many shares by fraud would always be able to outvote everybody else.[81]

Since CAMA 2004 did not mandate share qualification as a condition for appointment to directorship,[82] will this provision apply to directors who do not hold or own any shares or, holding shares, are not shareholders with significant voting power?[83] Under the repealed CAMA 2004 and the common law, it is submitted that de facto, as well as de jure, control will meet the control test. This is because the directors, who have enormous managerial, as against voting, powers donated to them under CAMA are placed in a position where they can disable the company from acting to remedy a wrong done to it. This they can achieve, whether as shareholding directors or not.

Gratifyingly, the requirement of wrongdoer control has been abolished under CAMA 2020. All that the applicant is expected to show, among others, is that "a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director or a former director of the company."**[84]** This provision is substantially the same with a similar provision under the UK Companies Act 2006, save that it is qualified that "the cause of action may be against the director or another person (or both).[85]

[81] Atwood v Merryweather (1867) 37 L.J. Ch 35

[82] See section 251 CAMA 2004. Compare section 277 (1) CAMA 2020

[83] See section 119 CAMA for the introduction of "person with significant control"

[84]Section 344(2)(a) CAMA. It is important to note that unlike under CAMA 2004 which was silent on this, a former director can now be called to answer for his actions. Previously, this requirement was driven by the common law principle.

[85] Section 260(3) Companies Act 2006 (hereafter CA 2006).

What this means is that no wrong done to the company, whether by insiders or outsiders, can go without remedy.

With respect to the nature of wrong(s), whether an act is ratified, or it is incapable of being ratified shall not constitute a bar to commencing a derivative action.[86] However, the fact that the act complained of has been ratified (approved) may be taken into consideration by the court when making an order. Under common law, where the wrongful act is capable of being ratified, the court may direct the company to ratify the act. Construed from the point of section 347 CAMA, it is doubtful if the court has such a power. It is submitted that even if such power is absent under the law, the court can draw from the reservoir of its equitable powers to make it. Consequently, based on these provisions, it is submitted that the courts, in making its orders, will have regard to the common law principle of internal management[87] and irregularity.[88] On the one hand, if the alleged wrong is one which a simple majority can cure by ratification, the petition for derivative action will fail. On the other hand, all non-ratifiable wrongs are subjects of derivative action. Hence, if the company commits an illegality, no purported ratification can cure the illegality.

CAMA provides that the minority may, by way of injunction or declaration, restrain the company from embarking upon a course where the directors who are in control "are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty".[89] This requirement, obtainable under the common law proper plaintiff rule, still applies under CAMA with equal force. Impliedly, where the

[86] Section 348 CAMA

[87] Okoya v Santili (1990) 2 NWLR (Pt 131) 172

[88] ElufioyevHalilu (1993) LPELR-1120 (SC), where, approving the irregularity principle the court observed that rectification of irregularity or procedural informality is always intra vires the company.

[89] Section 343 (f) CAMA

directors are negligent but did not appropriate any benefit from their negligence, it will not be sufficient to permit derivative action.[90] In other words, there is a difference between *malumprohibitum* and *malum in se.*[91] Thus, "where the directors are in breach of their duties but do not themselves benefit from that breach," the rule in Foss v Harbottle will apply because the bona fides of the directors are intact.[92] On the other hand, "where (the) directors are in breach of their duties and, even though no fraud is alleged or proven, they do benefit," the rule in Foss v Harbottle would not be used to overshadow the directors' mala fides for the very reason that their act amounted to *malaprohibitum*.[93]

Albeit the common law shareholder suit rests on the footing that where directors use their powers, intentionally or unintentionally, fraudulently or negligently in a way which benefits themselves at the expense of the company, the minority will be allowed to derivatively sue if he or she has no other remedy.[94] This position has been modified under the statute. Thus, under CAMA 2020 as well as the UK Companies Act 2006, negligence simpliciter, whether tainted with fraud or not, is a sufficient ground for commencing derivative claim.[95] This, it

[90] Thus, the principle applies which ordains that *nulluscommodumcaperepotest de injuriasuapropria* (no one can gain advantage by his own wrong)

[91]Malumprohibitum (mala prohibita, plural) is an act or conduct that constitutes a statutory offence.

[92]Pavlides v Jensen (1956) Ch 565. Compare Daniels v Daniels (1978) Ch 406, involving a case of disposition of corporate property to one of the directors of the company at an undervalue. The director, in turn, resold the property to the company and raked in substantial profit. The court allowed the claim, albeit no fraud was disclosed. To prevent the Daniels v Daniels cases in Nigerian corporate environment, section 342 CAMA provided a procedure for **major asset transactions**.

[93] For a reading on the difference between malumprohibitum and mala in se see, Greenfield, A.D., *"MalumProhbitum."* American Bar Association Journal (September 1921) Vol 7, No. 9, pp. 493-495 available at https://jstor.org/stable/2571063

[94]Estmanco (Kilner House) Co Ltd v Greater London Council (1982) 1 WLR 2

[95] Section 346 (2) (a) CAMA and Section 260(5) (a) CA 2006. Both laws permit derivative claim (action) for any actual or proposed act or omission involving negligence,

is submitted, reinforces the director's duty of care and skill. Like its UK counterpart, the Nigerian law extends to acts or omissions of former directors.[96] It is submitted that it will also include the acts or omissions of a shadow director.

3) **Notice to the company.** CAMA 2020 retained the requirement of a reasonable notice to the directors of the company.[97] What is the nature of the reasonable notice required by CAMA? Does it suppose a pre-action notice or notice by way of application (process) already filed (or to be filed) in court? To hold that the notice operates by way of originating summons in which the company is put on notice cannot, with respect, be the case. The originating summons does not equate the notice envisaged by the law. Instead, the required notice is a formally written notice by the applicant to the company of the applicant's intention to bring or commence an action in the name or on behalf of the company or to intervene in an action[98] in which the company is a party for the purpose of prosecuting, defending, or discontinuing the action on behalf of the company.

It is submitted that such a notice operates like a pre-action notice to the company. This is not novel in our legal system.[99] The idea is for the company to use the occasion of the notice to take a second but dispassionate look at the wrong done to the company,

default, breach of duty or breach of trust by a director or a former director, of the company.

[96] See, Equitable Life Assurance Society v Bowley & Ors (2003) EWHC 2263, Broz v Cellular Information Systems Inc.

[97]Section 346 (2)(b) CAMA

[98] To intervene in an ongoing matter presupposes that the company is not diligent, with and matter likely to be compromised.

[99] For example, see section 16 Federal Road Safety Commission (Establishment) Act NO. 22 2007; section 21A Abubakar Tafawa Balewa University Bauchi Act, CAP 1A LFN 2004; and section 162(1) Federal Competition and Consumer Protection Act, 2018 albeit requires no notice expects the applicant to show that the Commission acted without reasonable care or in bad faith before any civil or criminal proceeding can be commenced.

attend to it and close it out satisfactorily in the best interest of the company, not necessarily of the shareholder. Therefore, on receipt of such a notice, the company should expectedly respond, stating what it intends to do, how and when. The formal notice can be a shield or an armour. For the company, it can be a shield to protest the grant of leave; for the applicant it can be an armour. Thus, the formal notice, or response to it, is annexed to the applicant's originating process or the company's defence.

Seeing and treating the requirement of notice in this way means that the court will have sufficient facts or evidence on which to consider and determine (a) the factual basis for the claim and the actual or potential damage to the company,[100] (b) the "good faith" of the applicant,[101] and (c) the "in the interest of the company"[102] threshold requirements. It is submitted that the "factual basis" requirement is a supplantation of the requirement of "a prima facie case" under the UK CA 2006.

Considering the above, what length of notice is reasonable since it is not defined under CAMA? It is submitted that statutory derivative action is a special matter. It will fall under the category of issues for which special notice of twenty-eight days would be required. Deductively, a minimum of 28 days notice should be served on the directors (the company). Unlike CAMA 2020, the UK CA 2006 replaced the concept of reasonable notice with a two-stage process.[103] The first stage is ex-parte application stage in which the evidence filed by the applicant is expected to disclose a prima facie case for giving permission.[104] At the second stage, the court considers evidence from the

[100] Section 346 (2) (d) CAMA
[101] Ibid, (e) CAMA
[102] Ibid, (f) CAMA
[103]Section 261(2) CA 2006. It is submitted that this supports the position expressed above that the notice required is mere formal notice operating by way of a pre-action notice to the company.
[104] CAMA 2020, on the other hand, at section 346 (2) (d) provides that the notice must contain "a factual basis for the claim and the actual or potential damage to the company".

company.[105] To address the myth generated by the requirement of "reasonable notice", it is submitted that the provision should be specific with respect to the length of notice required. This will blunt chances for any conjectures or misunderstanding.

4) **Good faith and interest of the company requirements.** Except the court is satisfied that the applicant is acting in good faith[106] and it is in the interest of the company that the action should be brought[107], the leave to sue in the name of the company for the purpose of redressing the wrong done to the company would be denied.[108] In a South African case[109] the court clarified that the fiduciary duty entails, on the part of every director, the same duty as required of an applicant under s 165(5)(b),[110] namely, to act in good faith and in the best interests of the company. In other words, the same fiduciary obligations which, under CAMA, require a director to act "bona fide (good faith) in the interest of the company"[111] is compulsorily required as the basis for the court's favourable consideration of an applicant's application for leave.

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[105]For further critical analysis of the two-stage process, see Kershaw, n. 27; Tang, n. 23; Wooldridge, F., and Davies, L., "Derivative Claims under UK Company Law and Some Related Provisions of German Law", available online at https://core.ac.uk/download/pdf/19919319.pdf. Accessed 12/3/2020; Jailani, Q., "Derivative Claims under the Companies Act 2006: in Need of Reform?". Available online at https://discovery.ucl.ac.uk/id/eprint/10061333/1/4%20-%20Jailani%20-%20DERIVATIVE%20CLAIMS%20UNDER%20THE%20COMPANIES%20ACT%202006.pdf. Accessed 15/4/2020

[106] Section 346 (2)(e) CAMA.

[107] Section 346 (2)(f) CAMA

[108] The companies' laws of most jurisdictions have the good faith provision as a criterion to be satisfied before leave is granted. For example, see section 165(5)(b)(i) South African Companies Act 2008; section 237(2)(b) Australian Corporations Act 2001; section 239(2)(b) Canada Business Corporations Act 1985; and section 263(3)(a) CA 2006

[109]Mouritzen v Greystone Enterprises (Pty) Ltd 2012 (5) SA 74 (KZD

[110]South African Companies Act 2008

[111]Section 305 (3) and (4) CAMA

Expounding on the good faith cum interests of the company requirement, Cassim[112] stated that the test of bona fide in the interests of the company is subjective, not objective, and relates to the applicant's state of mind.[113] Kershaw added that "whether it is in the company's interests to bring derivative litigation have gravitated from a subjective approach to both and a subjective and an objective approach." These are common law approaches of determining whether the applicant is acting bona fide in the company's interests. What approach should CAMA maintain or adopt as a basis or touchstone for determining the good faith of an applicant? Gravitating between subjective and objective approaches will not be efficient. It is submitted that the good faith index should be construed in line with an objective test only. Hence, the test, an objective one, is and should be whether an intelligent and honest person in the position of the minority or applicant could, in the whole of the circumstances, have reasonably believed that he was acting in the interest of the company.[114] In line with this, the Australian court states that:

> whether the applicant honestly holds such a belief (subjective test) would not simply be a matter of bald assertion; the applicant may be disbelieved if no reasonable person in the circumstances (objective test) could hold that belief (Emphasis added).[115]

Discovering the basis for the "good faith criterion" Cassim rightly states that:

[112]Cassim, M.F., The Statutory Derivative Action under the Companies Act 2008: Guidelines for the Exercise of the Judicial Discretion. PhD Thesis. Department of Commercial Law, Faculty of Law, University of Cape Town, 2014, p.31
[113]Ibid, p. 31
[114]Charterbridge Corporation Ltd v Lloyds Bank Ltd (1970) Ch 62; ibid
[115]Swanson v RA Pratt Properties Pty Ltd (2002) 42 ACSR 313

> (it) is to protect the company against frivolous, vexatious and unmeritorious claims, and to foster the litigation of genuine grievances that are in the interests of the company. The good faith requirement will serve to filter out the abuse of derivative actions to pursue the personal purposes of the applicant himself, rather than the interests of the company as a whole (Emphasis added).[116]

In other words, the statutory derivative action is not available to the minority shareholder as of right;[117] and it is not an occasion for raising false alarms. Thus, the application will fail (a) if the applicant is complicit or participated in the wrongdoing;[118] (b) where the applicant is actuated by personal vendetta or malice[119] in bringing the application;[120] and (c) where the application fails to pass the test of "clean hands doctrine." The clean hands doctrine, which aims "to prevent individuals profiting personally from their own misbehaviour,"[121] reinforces the doctrine of equity that he who comes to equity must come with clean hands.

Generally, the bona fide in the interest of the company requirement, if left to the discretion of the court, is bound to

[116]Cassim, ibid, p. 34

[117]Goulding, ibid, p. 355

[118]In Towers v African Tug Co (1904) 1 Ch 558 it was held that the plaintiffs were disentitled from bringing action having participated in the wrong by receiving and keeping the dividends.

[119]In Barrett v Duckett (1995) 1 BCLC 243 Although the actions themselves fell within the wrongdoer control exception, the application failed nevertheless failed because the applicant was motivated by personal grudge against the director.

[120] Note however that there is a world of difference between self-interest in the outcome of the derivative action and an ulterior purpose or personal vendetta. In the former, its presence does not constitute bad faith; in the latter its presence automatically negates good faith, capable of defeating the application: Barrett v Duckett (supra). This means, that where an applicant is motivated by a collateral purpose (as against perverse or ulterior motive in pursuit of personal vendetta), the application should succeed if the action is in the company's interests.

[121]Payne, J., ""Clean Hands" in Derivative Actions" (2002) 61 Cambridge Law Journal 76, 77.

contribute to the myth that has already enveloped the statutory derivative action. For example, the applicant will be unsure if his application would be subjected to subjective or objective or both standards in assessing the merit of his application. The court, on its part, would be tossing between the standards according to the promptings of equity's conscience.[122] Since statutory derivative action appears to retain the toga of its common law ancestor, it is bound to generate misunderstanding. The statutory derivative action failed in this area; it is submitted to address the mischief which characterise the common law proper plaintiff rule.

5) **Standing and costs of the action.**[123]An applicant for leave to bring derivative action must be a registered holder or beneficial owner, whether present or former, of a security in the company; a director or an officer, whether present or former, of the company; the commission; or any other person who in the discretion of the court is a proper person to make an application for derivative action. An officer includes a director, manager or secretary.[124] In the light of this, it is submitted that the company secretary is a qualified applicant for derivative action, either as an officer or an interested person, subject to the discretion of the court, to bring a derivative action.

With respect to the exercise of discretion to permit a proper person to make an application, it is submitted that persons, even though not members, to whom shares in the company have been transferred or transmitted by operation of law, will fit this category.[125] This position is fortified by the fact that the category of persons are potential contributories who can apply for a

[122]The English jurist, John Selden, sarcastically jibed that "equity varied with the length of the Chancellor's foot."
[123]Section 352 CAMA
[124]Section 868 CAMA
[125]For example, personal representatives or trustees in bankruptcy who are not on the register of members.

company to be wound up on just and equitable grounds.[126] Furthermore, a person who derives his/her power under section 46 (3) CAMA 2020 can also qualify as a proper person that can, subject to the court's discretion, bring the application for permission to bring or continue an action in the name of the company.

As to costs, the plaintiff can be indemnified against costs of the action pursuant to Wallersteiner order under the common law rule. Commendably, CAMA provided a facility to encourage the relevant applicants to pursue justice for the company in the face of a wrong or fraud. Thus, the court can order the company to pay reasonable legal fees incurred by the applicant in pursuing the proceeding. Critically, CAMA voided the requirement for an applicant to give security for costs in any statutory derivative action.[127] Hence there is no clog in the way of a good faith applicant.

6) **Powers of the court.** The powers of the court include directing the company to ratify the wrong, where the wrong is one capable of ratification; authorising the applicant or any other person to control the conduct of the action, in the case where the application is for leave to intervene giving directions for the conduct of the action; directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former or present security holders of the company instead of to the company;[128]

[126]Sections 566, 405, 568 and 573 (1)(d)-(e) CAMA.

[127] Section 350 CAMA. In fact, under section 351 the application can apply for interim costs to support the pursuing the action.

[128]While this provision does not mean an endorsement of reflective losses sustained by reason of the wrong done to the company, it implies that the device of derivative action is capable of being used, ingeniously, to ventilate actions which can naturally fall within the domain of the unfair prejudice provision in section 353 CAMA.

or requiring the company to pay legal fees incurred by the appellant in connection with the proceedings.[129]

7) **Issues of procedure.** Goulding notes that the rule in Foss v Harbottle is a rule of procedure, not a rule of substantive law. This does not presuppose that where an action is disallowed, there has been no wrong. Rather it means that the shareholder is not the proper plaintiff to pursue the wrong or it is a wrong which the company, in general meeting, might choose not to pursue anyway. The rule operates to preserve the right of the majority.[130] The shareholder in a derivative suit is the plaintiff and the writ he issues will so indicate. The defendants are the wrongdoing officers and the company, albeit the company will receive the benefit of any award. The suit will be incompetent and likely to be struck out if the company is named as the plaintiff. As a party in the suit the company can have a representation and take the benefit of or be bound by any order which the court may make.[131]

In addition, exclusive original jurisdiction resides in the Federal High Court (FHC).[132] Agreeably, Lawal placed in a proper perspective, the jurisdiction of FHC when he posited that:

> the exclusive jurisdiction of the Federal High Court on company's cause of action that is predicated on the administration of the provisions of CAMA should not be conflated with the cause of action that is predicated on the administration of the provisions of CAMA but relating or connected with the company's employer and

[129]See section 351 CAMA which empowers the court to make order as to interim costs in favour of the applicant.
[130]Goulding, p. 352.
[131] Ibid. Danish Mercantile Co Ltd v Beaumont (1951) Ch 680; Atwood v Merryweather (supra); Agip (Nig) v AgipPetroli Intl (supra)
[132] See section 251 (1) (e) Constitution of the Federal Republic of Nigeria 1999 (as amended)

> employee relationship. In the latter circumstance, the National Industrial Court[133] is vested with the exclusive jurisdiction.[134]

The vexatious issue has to do with process of commencing the derivative action. For the avoidance of doubt, the current state of the law in the area is to be found in the Supreme Court decision in **Agip (Nig) Ltd v AgipPetroli International** (supra) where the Court stated that an applicant (whether as a shareholder, director, officer, etc.) that:

> intends to bring a derivative action in the name of the company must first and foremost apply for leave of court by way of originating summons on notice to the company. (…) The hearing of the shareholder's application will therefore proceed in the manner of an ordinary interim application with both sides being afforded the opportunity to submit evidence and submission. The company must be given notice of such hearing so that the company or the directors may be able to appear to present their view of the shareholder's case.[135]

With great respect, it is contended that the position of the FHC in favour application ex parte but subsequently overruled by the appellate courts represent what should be the intendment of the law. Assuming but conceding that the position of the apex courts were sustainable under the repealed CAMA 2004, can it be said to still hold under CAMA 2020? Section 346 (4) CAMA 2020

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[133] Section 254C Constitution of the Federal Republic of Nigeria 1999 (as amended). (Section 6 of the Third Alteration Act 2010)

[134]Lawal, O.S., "Derivative Action in Company Proceedings: A Caveat Against Wrong Procedure" (April 2020). Available at https://thenigerialawyer.com/derivative-action-in-company-proceedings-a-caveat-against-wrong-procedure-by-lawal-olanrewaju-sulaiman/ Accessed 2/9/2021.

[135] Per Adekeye, JSC at pages 1231-1232.

removed any pretension to the contrary and dissolved any misunderstanding in this area. Minded that the decision of the Supreme Court remains the law in this area and despite the position of Companies Proceedings Rule 1992,[136] it is submitted that application for leave to commence derivative action under the current law (CAMA 2020) is by way ex parte originating summons.

One, by requiring the applicant for leave to give "reasonable notice to the directors of the company of his intention to apply to the Court for leave" it is submitted that the law clearly indicates an implication of ex parte application. Two, to reinforce this position, the (pre-action) notice to directors must contain "a factual basis for the claim and the actual or potential damage caused to the company." The purpose of the pre-action notice to the directors is to afford them opportunity to purge themselves of the wrongful act or omission complained of. If they do so, the applicant will not have any need to approach the court. If they choose a blind eye attitude or trivialise it, the applicant should apply ex parte for leave to sidestep the proper plaintiff rule and pursue an action which is ordinarily that of the company. At the point of ex parte application, the applicant by affidavit evidence, will show that (a) a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty; (b) he gave to the directors a notice of reasonable length (at least 28 days) containing a factual basis for the claim and the actual or potential damage caused to the company; and (c) with reference to the cause of action, his good faith is intact. Finally, it must be stated that based on the evidence by the applicant, the proposed derivative suit is in the interest of the company.

[136] See Rule 2 (1 provides that "except in the case of the application mentioned in rules 5 and 6 of these Rules and applications made in proceedings relating to the winding up of companies, every application under the Act shall be made by originating summons." Rule 2 (3) talks of ex parte originating summons for applications under section 317 of the repealed CAMA 2004.

4.0 CONCLUSION

Statute law[137] largely guides through relatively clear *rules*, while equity guides through relatively unreliable principles or standards.[138] Where the expressions of the law becomes amenable to inconsistent and often conflicting constructions, it loses its character of clarity. Once lost, misunderstanding is inevitable. This is the case with statutory derivative action, albeit CAMA 2020 introduced laudable innovations that helped to demystify some of the areas of misunderstanding surrounding statutory derivative action. For instance, it enacted the principle of multi derivative action that allows derivative action to be pursued against third parties and gives right to the plaintiff to discover and inspect documents.[139] Moreover, the provision requiring service of reasonable notice to directors is meant to remove the misunderstanding whether application for leave is ex parte or on notice. However, there are still areas which remain unaddressed and may continue to perpetuate the myth resulting in the misuse of the statutory derivative action. For example, unlike other jurisdictions where the proper plaintiff rule has been legislated, CAMA 2020 fails to show the relationship between the common law rule and the statutory derivative action. It neither expressly abolished the former nor showed whether the latter should continue to be applied along the lines of the former. Also, it failed to solve the issue of proof of good faith of the applicant. On this, the law could be amended to place the burden of proving absence of good faith on the defendant. In that way, the law will presume that the applicant acts in good faith and in the interests of the company, until the burden is

[137]The qualification of law here is intentional and directed at separating it from common law, since the thesis of this paper has been on dissolving the myth created by legislating common law (fused with equity) into statute.

[138]Samet, I., Equity: Conscience Goes to Market (2018), pp 62-76 in: Miller, P.B., Conscience and Justice in Equity (Apr 24, 2019). Jerusalem Review of Legal Studies 2019, Forthcoming. University of Notre Dame Law School Legal Studies Research Paper No. 1938. Available online at http://ssrn.com/abstract=3377434. Accessed 12/4/2020

[139]This reinforces Order 20 Rules 30 and 31 Federal High Court (Civil Procedure) Rules 2019.

discharged by the defendant showing the presence of bad faith or other collateral purpose on the part of the applicant.

THE ENGAGEMENT OF CORPORATE SOCIAL RESPONSIBILITY POLICIES UNDER THE COMPANIES AND ALLIED MATTERS ACT (CAMA) 2020

Richards U. Ekeh*
Ifiok Uwah**

Abstract

The Companies and Allied Matters Act is the foremost statutory instrument regulating the activities of corporate bodies in Nigeria. Corporate Social Responsibility (CRS) is a business approach used by corporate organizations to ensure phenomenal economic growth as well as the investment of social and environmental concerns to host communities. The engagement and participation of cooperate social responsibility should be the priority of the legislation. The Companies and Allied Matters Act has no direct and profound policy provisions towards the engagement of companies to the noble concept of corporate social responsibility neither is there any ethical code of conduct for the engagement and participation of companies to advance the public's interests as well as their economic performance. The paper examines the provisions of the Companies Act and other instruments with a view to determining the level of engagement expected from corporate organizations doing business in Nigeria. It posits that the new roles and responsibilities of businesses are globally pursued under the purview of corporate social responsibility. The paper adopts the doctrinal method and utilizes both the primary and secondary sources to highlight the importance of the subject matter of the discourse.

Keywords: Engagement, Participation, Corporate Social Responsibility, Corporate Organizations, CAMA2020, Nigeria

INTRODUCTION

Corporate Social Responsibility emphasizes the need and importance to advance public interest as well as the interest of the company. The concept of corporate social responsibility rests on the plank that companies' businesses can be profitable, while at the same time, make contributions to the growth and advancement of the public and society. Unfortunately, the opponents of the concept of corporate social responsibility have viewed corporate business as primarily designed for profit-making and maximization.[1] This paper therefore shall appraise the extent of available legal framework and the engagement of corporate social responsibility initiatives in Nigeria. The paper emphasizes that corporate social responsibility is a strategic business initiative for achieving competitive advantage and sustainable growth if properly harnessed or institutionalized. It considers suitable legal options that could be adopted, with a view to strengthening the existing legal instruments. Nigeria, having been bedevilled with corruption and underdevelopment requires strong and compulsive legal instruments to drive its social and environmental concerns through the effective engagement of corporate social responsibility. It is by the instrumentality of effective legal enactments, rule of law and strong institutions that business corporations can carry out their corporate obligations in appropriate situations and, particularly, to the host communities, who are directly affected by the negative impacts of companies.

The Legal Instruments for the Engagement of Corporate Social Responsibility

*LLB (Jos), BL (Nigeria), LLM (Jos), PhD (Jos), Associate Professor, Department of Private Law, Faculty of Law, University of Uyo.
**LLB (Hons) (Uyo), BL (Nigeria), LLM (Uyo), Lecturer, Department of Jurisprudence, Faculty of Law, University of Uyo.
[1]Ekeh, R U, "An Appraisal of the challenges of the Tenets of Corporate Social Responsibility", (2010) *University of Jos Law Journal*, vol.9, No. 1, p.208.

Companies in the pursuit of its economic policies are to make those decisions and to follow those lines of actions that are desirable to actualize those objectives and values for the good of the company and the society. To facilitate the attainment of the constitutional provisions on the Fundamental Objectives and Directive Principles of State Policy,[2] companies should be legislatively equipped with such positive laws in order to draw down the social, economic and the environmental needs of the society.

a. The Constitution of the Federal Republic of Nigeria 1999

The Constitution is the supreme law of Nigeria whose provisions have binding effect on all authorities, persons and corporations doing business in Nigeria. The legislative powers of the Federal Government is rested in the National Assembly, which consist of Senate and House of Representatives.[3] In the same vein, the National Assembly is given the powers to make laws with respect to matters under the Exclusive Legislative List.[4] There are sixty eight matters under the Exclusive Legislative List. The primary concern of this paper is to find out the provisions of the constitution towards the engagement of corporate social responsibility in Nigeria by companies. Furthermore, Items 32, 39 and 62(d) in the exclusive legislative list are of utmost concern to this work, which borders on Incorporation, Regulation and Winding up of companies.[5] Again, the regulation of companies in attaining social justice, welfare and security of the Nigerian people provides thus:

> *The Federal Republic of Nigeria shall be a state based*

[2]Social objectives of the Nigerian State is contained in Chapter II of the Nigerian Constitution under the Fundamental Objectives and Directive Principles of State Policy, which are mere persuasive and advisory provisions on the social rights of the Nigerian people and are non-justifiable.
[3]Section 4(1) of the Constitution of Federal Republic of Nigeria 1999.
[4]Section 4(2) of the Constitution of Federal Republic of Nigeria 1999.
[5]Item 32, Exclusive Legislative List on the Schedule to the Constitution.

> *on the principles of democracy and social justice.*[6]

It further provides that the security and welfare of the people shall be the primary purpose of government.[7] Corporate Social Responsibility as a concept is holistically devoted to social justice, security and welfare of the citizens to which the 1999 Nigerian Constitution has given a nod to.

Item 32 of the Exclusive Legislative List on the other hand borders on the exploration of mining minerals, which include oil fields, oil mining, geological surveys and natural gas. No doubt, these are major areas of concerns to which corporate activities have great bearings on, with unimaginable negative impacts on the society.

Another important area is Item 62(d). It provides for the establishment of a body to prescribe and enforce standards of goods and commodities offered for sale to the Nigerian Public that relates to product safety, which Corporate Social Responsibility embraces. In addition to the foregoing, it is provided that, in the pursuit of its social objectives, the sanctity of the human persons and dignity shall be recognized while exploitation of human or natural resources in any form whatsoever, other than the good of the community, shall be prevented.[8]

The Constitution in its environmental objectives further provides thus:

> *The state shall protect and improve the environment and safeguard the water, air and*

[6]Section 14(2) (b), Constitution of Federal Republic of Nigeria 1999.
[7]Section 17(1) Constitution of Federal Republic of Nigeria 1999.
[8]Section 17(2) (b) and (e), Constitution of Federal Republic of Nigeria 1999.

> *land, forest and wildlife of Nigeria.*[9]

All companies doing business in Nigeria are enjoined to observe a high level of corporate responsibility for welfare and security of the populace, with a view to achieving both their economic ends and social justice.

It is observed from the foregoing that constitutional provisions on social objectives and concerns of the Nigerian State are contained in Chapter II of the Constitution under the Fundamental Objectives and Directive Principles of State Policy, which are the non-justifiable provisions of the Constitution. The violation of such provisions by corporate bodies or any other person may not be successfully challenged in the court of law. They fall within the advisory provisions of the Constitution within the economic, social and cultural rights that are merely persuasive and non-justifiable. It is the view of the author that matters respecting Nigerian society and the environment are of a weightier and grave concerns to be consigned under the non-justifiable chapter of the Constitution. It is absurd to believe that the Nigerian Constitution did not make a strong, or take an unequivocal stand in Nigeria's social and environmental concerns.

It is submitted that the competence to engage in corporate activities that are socially responsible is a serious matter that should not be based on advisory and persuasive constitutional provisions. The paper advocates for the constitutional amendment of the section with a view to lifting social and environmental issues to the fundamental rights of chapter (iv) of the Constitution.

b. The Companies and Allied Matters Act (CAMA)

[9]Section 20 Constitution of Federal Republic of Nigeria 1999.

The Companies and Allied Matters Act is the principal legislative enactment regulating the activities of companies doing business in Nigeria. The interest of this work is to examine such provisions that empower companies to engage in corporate social responsibility initiatives for the socio-economic growth and development of Nigeria.

Section 43(1) provides that a company shall have all the powers of a natural person of full capacity for the furtherance of its authorized business or objects, unless its memorandum or any other enactment otherwise provides. Succinctly put, it provides thus:

> *Expect 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.*[10]

The Companies Act has, by the above provision, given an opportunity to companies' directors, being natural persons of full capacity, to take such steps as the alter ego of the company to engage in activities that would be beneficial to both the company and the society, provided there are no inhibitions to do so by either the company's memorandum or other enactments. In other words, the company as a natural person of full capacity is clothed with powers to engage in those meaningful ventures it desires. Judging from the philosophy of setting up a company, which is essentially for profit generation and maximization, one sees the reluctance on the part of corporate bodies to engage in corporate social responsibility initiatives. Again, companies unlike the natural

[10]Companies and Allied Matters Act, 2020.

persons do not always possess the flexibility to amend their ways to suit particular circumstances. For example, the powers of companies having been circumscribed within their object clause as contained in the memorandum of association may find it very difficult to engage in the principles of corporate social responsibility without amending their constitution.[11] It then follows that where the engagement of corporate social responsibility is outside the company's object as provided for in the memorandum, it becomes difficult for the directors to sanction the performance.

The above provision could create an ample opportunity for directors who have the willingness to address social issues beyond the objects of the company to do so. Proponents of corporate social responsibility are assertive in their views that the companies Act has vested the companies, to a greater extent, with the power to engage in corporate social responsibility in order to cater for interests, other than those of the shareholders and profit maximization.

Furthermore, it is their contention that, whilst it may be correct that no Nigerian company has the legal obligation to assume social responsibility, it may be inaccurate to assert that the company is not vested with the power to do so.[12] Nigerian companies, wearing the dual apron of corporate citizens and natural persons of full capacity, may give donations towards cushioning the negative effects of their corporate activities on the society and the environment. It is against such backdrop a learned author further emphasized that:

> *Companies and Allied Matters Act has now created the opportunity which if utilized by the directors, may put companies in a position of performing their corporate social*

[11]Napier, T, The History of Joint-Stock Company and Limited Liability, (London: Sweet and Maxwell) P.6 Print.
[12]Okon E, Cooperate Social Responsibility: The Liberal Perspective (2000) MPJFIL, Vol. 4, No. 2, P. 257.

> *responsibilities in a more liberal perspective.*[13]

There is therefore no disputing the fact that the question of the competence of corporate bodies to act through the instrumentality of the general meeting and the Board of Directors has been somehow statutorily settled where the willingness to act is present. By virtue of section 87(3) CAMA 2020, directors who act on behalf of the company pursuant to section 43(1) of the company Act are at liberty to engage on corporate social responsibility activities. It provides thus:

> *Except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Act or the activities required to be exercised by the members in general meeting.*[14]

The subsequent subsection to the above section further fortified section 87(3) by providing thus:

> *Unless the articles shall otherwise provide, the Board of Directors, when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in general meeting.*[15]

[13]Ibid.
[14]Section 87(3), Companies and Allied Matters Act, 2020.
[15]Ibid, CAMA 2020.

In addition, section 87(5)(c) makes the actions taken by the Board of Directors in want of authority ratifiable, as the case may be, by the members in general meeting. Proponents of corporate social responsibility in Nigeria have hinged their arguments and rightly so, that companies in Nigeria have the statutory backing to engage on corporate social responsibility initiatives.[16]

One of the most inhibiting provisions in CAMA being examined in this paper is section 305(3), which appears to be antithetical to the engagement of in corporate social responsibility practices by corporate organisations. It provides thus:

> *A director shall act at all times in what he believes to be in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances.*[17]

Subsection (4) of the section under review further narrows down the matters to which a director of a company is to have regard to in the performance of his functions to include the interests of the company's employees as well as the interests of the members of the company.

With due respect, the above provisions are statutory inhibitions easily cashed upon by company directors to deny the engagement and participation of corporate social responsibility to their operating

[16]Ekeh, R. U., An Appraisal of the Legal and Institutional Framework for Corporate Social Responsibility in Nigeria, Being a Doctorate Thesis in the Department of Commercial Law, University of Jos, 2013.
[17]Section 305, CAMA 2020.

environments, host communities and the society at large. The provisions are limited in outlook and foreclose the chances of company directors to engage in corporate social responsibility practices.[18]

It is submitted that the corporate competence of companies to engage in corporate social responsibility policies should not be tied to conjectural deductions but should be direct and unequivocally provided with legislative intentions. Further submitted is that the present ambivalent position of CAMA on the engagement of corporate social responsibility of companies does not confer statutory legitimacy on company directors to engage in social responsibility initiatives on behalf of their companies. The mere equation of a corporate body with the powers of a natural person of full capacity in line with section 43(1) CAMA 2020 does not confer sufficient and adequate empowerment for directors to engage in social services. Besides, natural persons with powers of full capacity are subject to the regulation of the law and do not operate in the frolic of their own to do whatever pleases them.

It is therefore submitted that company directors should be statutorily empowered by CAMA to positively engage in corporate social responsibility practices by amending the inhibiting provisions of section 305(3) on the duty of directors. It is suggested that an amendment of the section couched in this manner, may cure the inhibition:

> *A director shall act at all times in what he believes to be the best interest of the company* ***and the society*** *as a whole so as to*

[18]Ekeh R. U., An Appraisal of the Legal and Institutional Framework for Corporate Social Responsibility in Nigeria, being a PhD Thesis in the Department of Commercial Law, University of Jos, 2013.

> *preserve its assets, further its business, and* ***the welfare of society*** *and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilled director would act in the circumstances.*[19]

The inclusion of the words "and the society" and "the welfare" in the amendment of section 305(3) would no doubt properly incorporate the principles of corporate social responsibility in the companies Act, thereby giving the company directors the required powers and legitimacy to engage in corporate social responsibility policies.
Summarily, one other provision which appears to contradict the equation of a corporate body with that of a natural person of full capacity is section 43(2) CAMA 2020, which provides thus:

> *A company shall not have or exercise power directly or indirectly to make a donation or gift of any of its property or funds to a political party or association, or for any political purpose; and if any company in breach of this subsection makes any donation of its property to any political party, or political association or for any political purpose, the officers in default and any member who voted for the breach shall be jointly and severally liable to refund to the company the sum or value of the donation or gift and in addition, the company and every such officer or member shall be guilty of an offence and liable to a fine equal to the amount or value of the donation.*[20]

[19]The authors proposed amendment to Section 305 CAMA, 2020.
[20]Companies and Allied Matters Act, 2020.

It is the view of the proponents of corporate social responsibility that the above provision has, to a greater extent, given the directors some level of powers to engage in corporate social responsibility to make donations of their property and funds to stakeholders or the society, provided such gifts have no political colourations.

On the reverse, it is submitted that section 43(2) appears to have contradicted subsection 43(1), having conferred on companies with the powers of a natural person of a full capacity. The question that arises is, could a natural man of full capacity be barred from giving his property or funds to a political party or association being a political animal himself? It is submitted that the natural man is a judicial person who possesses the powers to give his property or funds to whosoever he wishes in the advancement of his own wellbeing. Nevertheless, even where it is conceded that the Act has given the company a clean bill of health to engage in corporate donations, it is contended that the limitation of corporate social responsibility to corporate donations is unacceptable. Corporate social responsibility is a much wider concept than corporate donations.

Corporate social responsibility is a business approach that seeks that companies should be more accountable to their operating environment with their resources and to the community at large.

The core concerns of corporate social responsibility include social empowerment of the community, environmental conservation, poverty alleviation, healthcare, education, improving labour conditions of employees and economic sustainability among others. It seeks to optimize the economic value of a business by means of delivering social values to the society. Apart from the social perspective, it has the propensity of being a marketing and public relations strategy for brand recognition and acceptance. In other words, corporate donations is the lowest form of corporate social responsibility and should not be allowed to dominate the core values

of the concept, which are the pursuits of the economic, social and environmental issues.

Impediments of Corporate Social Responsibility

The call for companies to advance the public interest and as well pursue their economic performance through the engagement of corporate social responsibility policies has its limitations. Social responsibility of companies implies a public posture toward society's economic and human resources welfare and as well, the willingness to see that those resources are used for the broad social ends.[21] The impediments include:

1. **Improper Understanding of the Concept:** One of the serious impediments of Cooperate Social Responsibility (CRS) is the improper understanding of the concept. The concept of CSR has been wrongly understood in Nigeria to mean philanthropy or charity and nothing more. Philanthropy is the lowest form of CSR while the core concept is about the company's responsiveness to the economic, social and environmental management of its business operations. Most often, it is referred as meeting the Triple Bottom Line of Profit, People and Planet.[22]
2. **Illiteracy:** Mass illiteracy has led to the absence of consumer and media pressure as important corporate stakeholder groups. Consumers are the end-users of the company's products and should be vocal in demanding from companies the integration of social and environmental concerns in their business operations as it affects the society. The companies on the other hand are mindful that their sustainability largely depends on the consumers' perception on the company's image and reputation. The Nigerian media on the other hand

[21]Fredrick W. G., (1960). The Growing Concern Over Business Responsibility, California Management Review, Vol. 2, Pp. 54-61.
[22]Elkington, J. Cannibals with Forks: The Triple Bottom Line of 21st Century Business, Capstone Publishing (1999).

are docile and have not mounted enough pressure on corporations to be socially responsible in their business activities to the society.[23]

3. **Statutory Inhibitions:** It has been argued that directors of companies occupy positions of trust in the company's property and fund by virtue of their managerial responsibilities.[24] The company's potent force is on the directors to be executed.[25] The duty and loyalty of directors has been said to be a tradition that is unbending, inveterate and uncompromising[26] while a corporate body can only act through his directors.[27] The issue of statutory inhibition is further supported in Nigeria's companies Act.[28]
4. **Absence of Stakeholder Groups:** Stakeholders of a company include the employees, consumers, suppliers, shareholders, host communities and government amongst others. There is no synergy amongst the stakeholders to form an alliance to demand for the proper scope of social responsibility concerns. The stakeholders' interests are fragmented thereby making it difficult for companies to engage in corporate social responsibility in the face of multiple social demands.
5. **Insecurity:** Apart from the above, other factors such as insecurity in Nigeria has led to irreconcilable level of criminal activities. The spate of kidnapping and banditry have militated against the engagement of corporate social responsibility by companies in Nigeria.

[23]Kaefer, F., CSR in Nigeria: More than Philanthropy? http://www.sustainabilityforum.com

[24]Engelen, U. and Hagemann, S, A West German Governance Companies? Stakeholder Relations from the "Wirtschaftwunder" to the Industrial Structural Crisis, 1950s to the 1980, Bielefeld University H-302-U-Kult-H-net Reviews (2010).

[25]Ekeh, R. U. An Appraisal of the Challenges of Corporate Social Responsibility in Nigeria (2010), University of Jos Law Journal, Vol. 9, No 1, P208-222.

[26]Meinhard V. Salmon 249 N.Y. 456 at 414 per Cardozo, C. J.

[27]Section 87(4) CAMA, 2020.

[28]See Section 305(3), Companies and Allied Matters Act, 2020.

6. **Multiple Taxation of Government:** The multiple tax system as experienced in Nigeria had been a huge burden on Nigerian companies who see the engagement of corporate social responsibility as an additional burden to implement instead of a business strategy that caters for both the welfare of the society and advance the economic performance of the company.
7. **Religious and Political Crises:** The predominance of religious and political crises has been one of major drawbacks to the engagement of corporate social responsibility in Nigeria. The predicament of violent conflicts of herders and farmers, indigenes and settlers crises in several states of Nigeria has had a great toll on Nigerian corporation. The required social peace and harmony needed for corporate organizations to embrace the engagement of corporate social responsibility policies in Nigeria becomes difficult.
8. **Weak Institutional Bodies:** Due to the absence of institutional bodies charged with reporting the level of engagement and participation of corporate social responsibility initiatives, the observation of environmental preservation, product safety and public welfare have been unsatisfactory. The Nigerian society is still experiencing pollution from gas flaring from the exploitation of mineral oil of oil companies. Oil spills, ecological degradation, human rights violations and factory pollution are evident responsibility policies in Nigeria.[29]

OBSERVATIONS

It has been observed that the Companies and Allied Matter Act 2020, the foremost statute book regulating corporate activities in Nigeria, has not provided profound and articulated policy provisions

[29]Ekeh, R. U; An Appraisal of the Challenges of the Tenets of Corporate Social Responsibility in Nigeria, (2020) University of Jos Law Journal.

for the engagement of corporate social responsibility in Nigerian corporations.

There is no ethical code of conduct for corporate social responsibility in Nigeria. The engagement of corporate social responsibility principles is optional and not regulated. The individual companies choose and pick whatever it deemed proper to be corporate social responsibility.

The "Triple Bottom Line" corporate social responsibility practice, which addresses simultaneously the planet, people and profit or the environment, society and economy as a core function of business is strange to Nigerian companies and hardly practiced in Nigeria.

Corporate performance is constantly viewed in Nigeria from the three-layer concept of profit, shareholder value and philanthropy. This view stands tops and act as the vanguard to which corporate social responsibility practices in Nigeria is operationalized.

In Nigeria, corporate social responsibility is not integrated as a core requirement of business. It is left to the discretion of individual directors and shareholders to draw and determine the boundaries of participation.
Again, companies purported to be socially responsible in Nigeria end up throwing money at the society's problems in the form of corporate philanthropy as against meaningful stakeholder partnerships to get the desired results.

Another observation is that, in the face of multifaceted institutional bodies examined, none is charged with the responsibility and assessment of social behavioural impacts of corporations and appropriate reporting for policy guidelines to be made to protect the society of business negative impacts.
There is no consumer and stakeholders' co-ordination for the purposes of forming a front in redressing the negative social impacts of companies doing business in Nigeria. Rather, there are

fragmentations of stakeholder interests who are easily bought over for peanuts in the form of corporate philanthropy and menial assistances.

Again, product safety and standardization is not considered as part of corporate social responsibility in Nigeria. Thus, companies in Nigeria produce anything and sell anything, unchallenged.
It is observed that corporate reputation has no place in Nigeria's business landscape. Consumers which are considered the most important stakeholders and watchdog to corporations are not conscious of their rights as to force or compel companies to be socially responsible since their position could make or mar a company if product boycott is eventually embarked upon by them.

It is further observed that corporations in Nigeria are more concerned with the host community involvement projects as against issues of environment, product safety and human rights.

There is no uniformity in corporate social responsibility policies in Nigeria as corporate managers prefer to unilaterally decide the percentage of what to give back in line with return on investment as profit. Companies not posting profits can still engage in impactful corporate social responsibility practices by embracing socially responsible production processes and paying attention to the environment, human and employee rights. These aspects are neglected by Nigerian corporations while focusing only on corporate philanthropy.

In Nigeria, it is observed that when business corporations come under intense public criticisms and glare, their usual response is to increase their corporate philanthropy through media publicities and print advertorials in order to douse tension and possibly deflect the attention of institutional watchdogs.

Again, corporations in Nigeria are involved in "stand alone" corporate social responsibility engagements. This is a situation

where firms may pick a particular need which it considers a burning issue purely to enhance corporate reputation and image as against a holistic and diverse corporate social responsibility concerns. This approach is not usually deeply rooted to the stakeholders' consciences and lacks the long lasting effect on the society. A corporate social responsibility strategy embedded in the company's entire business model is the only way of giving corporate social responsibility a strong foothold in Nigeria.

The absence of formidable stakeholder groups and alliances forming a common front to demand for the proper scope, nature of business and society relations with corporate bodies doing business in Nigeria is observed.

Again, corporate social responsibility is perceived in Nigeria as a business model solely designed for the benefit of the society and a detraction to the company's profits. On the reverse, socially responsible production processes and paying attention to the environment, human rights and employee welfare will in turn earn the company good reputation, increased returns and profits in the long run for sustainable growth. It is rather a marketing and profit strategy of companies who embrace corporate social responsibility principle as their business model.

We observe that the conservative attitude of the Nigerian courts in favouring the shareholders' supremacy has limited the proper engagement of corporate social responsibility practices in Nigeria.

Again, the contemporary legal and institutional regime has shown that they are scattered in so many enactments and in some cases duplicated. This is not a healthy development. If the activities of corporations in their host communities must be properly regulated and monitored, there is need for "one-stop-shop" enactment on corporate social responsibility in Nigeria.

CONCLUSION

The paper has shown from the foregoing discussion that the Companies and Allied Matters Act 2004, the foremost statute book regulating corporate activities in Nigeria, has failed to make profound, direct and articulated policy provisions towards the engagement of corporate social responsibility by Nigerian corporations. Furthermore, there is no ethical code of conduct for corporate social responsibility in Nigeria. Worse still, the Constitution of the Federal Republic of Nigeria 1999 has consigned the weightier issues of society and environment to the non-justifiable provisions of Chapter II, being the Fundamental Objectives and Directive Principles of State Policy whereby companies who refuse to engage in corporate social responsibility policies would not be brought to book through the court. It is then left to the companies to choose and pick whatever they deem proper to be corporate social responsibility in Nigeria. The Triple Bottom Line of corporate social responsibility practice, which simultaneously addresses the Planet, People and Profit, that translates to the environment, the society and the economy as the core function of businesses become a mirage and hardly practised in Nigeria. The Nigerian corporations are yet to integrate corporate social responsibility as a core function of their business activities, thereby leaving the noble concept to the discretion of directors and shareholders. This is absurd.

COVID-19 LOCKDOWN IN NIGERIA: EXAMINATION OF HUMAN RIGHTS AND ABUSE OF OFFICE ISSUES

Dr. Ernest Ogwashi Ugbejeh*
IHENYEN, Odion Ehizogie**

Abstract

Corona virus also known as Covid-19 is a major challenge confronting this generation. It has ravaged all spheres of life. As at 30 May 2020, Covid-19 had affected 215 countries around the world with over 368,863 reported deaths. Lockdown is one of the measures adopted to tame the ravaging impact of Covid-19 globally. However, the implementation of the measure has thrown up issues of human rights and abuse of office. This paper critically examines the Covid-19 lockdown and the issues of human rights and abuse of office. The cases examined brought to light the abundant human rights violations as well as existence of abuse of office arising from the implementation of the lockdown measure in Nigeria. This paper identifies and categorizes the different types of human rights violations, their impact in Nigeria and on the anti-Covid-19 efforts. It found that lockdown is a legally established and inevitable measure that can be adopted during an emergency. The paper found that the implementation of lockdown led to abuse of human rights and office and recommends that in implementing lockdown, law enforcement officers must eschew inhuman treatment, resort to extra judicial killings, abuse of office and guarantee respect for the fundamental rights of all citizens, including the offenders.

Keywords: Covid-19, Human rights, Abuse of office, Lockdown

* LL.B (AAU), BL (Nigerian Law School), LL.M (UNIBEN), Ph.D (Buckingham, United Kingdom), is a Lecturer, Faculty of Law, National Open University of Nigeria, Anti-Corruption Consultant and Partner of Lex.Point Solicitors
** Lecturer in the Faculty of Law, Ambrose Alli University, Ekpoma. Edo State.

1. INTRODUCTION

Corona virus 2019, also known as Covid-19, is a major challenge confronting mankind today; it is wreaking a lot of havoc across the globe. In the acronym COVID-19, 'CO' stands for corona, 'VI' for virus, and 'D' for disease.[1] It has negatively affected all sectors of life, including political, social, cultural, academic, economic, sport and religious spheres. On 30 January, 2020, the World Health Organisation (WHO) declared COVID-19 a public health emergency of international concern (PHEIC). The virus was first discovered in China and had spread rapidly cross the globe; on the 11th March, 2020, it was declared a pandemic by the WHO.[2] As at 30 May 2020, Covid-19 had affected 215 countries around the world with over 368,863 reported deaths.[3] African countries were among the last nations to confirm Covid-19 cases. Nigeria in sub-Sahara Africa was the first to record a case on the 27th February, 2020.[4]

The real cost is unquantifiable. The International Monetary Fund (IMF) at the early stage placed the economic loss at US$2 trillion.[5] Kozul-Wright of the United Nations Conference on Trade and Development (UNCTAD) stated that aside from the tragic human consequences of the Covid-19 epidemic, the economic uncertainty is

[1] Lisa Blender, *Key Messages and Actions for COVID-19 Prevention and Control in Schools,* UNICEF (2020) 2 available at <https://www.who.int/docs/default-source/coronaviruse/key-messages-and-actions-for-covid-19-prevention-and-control-in-schools-march-2020.pdf?sfvrsn=baf81d52_4> accessed 2 August, 2020.

[2] Worldometers, 'Coronavirus Cases' available at <https://www.worldometers.info/coronavirus/coronavirus-cases/> accessed 30 May 2020.

[3] Available at <https://www.worldometers.info/coronavirus/country/ghana/> accessed 10 August 2020

[4] BBC News 'Nigeria Confirms First Coronavirus Case' BBC News, 28 February 2020 available at <https://www.bbc.com/news/world-africa-51671834> accessed 24 March 2020.

[5] World Economic Forum (WEF), 'This is How Much the Coronavirus will Cost the World's Economy, According to the UN' available at <https://www.weforum.org/agenda/2020/03/coronavirus-covid-19-cost-economy-2020-un-trade-economics-pandemic/> accessed 10 May 2020.

likely to cost the global economy $1 trillion in 2020.[6] UNCTAC further reported that 'with two-thirds of the world's population living in developing countries, aside China, the UN is calling for a US$2.5 trillion package for these countries to face the challenge that the will likely arise from it.[7] Furthermore, in July 2020, the Asian Development Bank estimated between $5.8tn and $8.8tn (£4.7tn-£7.1tn) as the cost that Covid-19 could impose on the global economy.[8] For Africa, in the area of job loss, the African Union (AU) study estimates that 20 million jobs are at risk in the continent in the aftermath of the Covid-19 pandemic while Nigeria, the biggest oil producer on the continent, may be losing $65 billion in income.[9] This will complicate the already existing high unemployment rate in Nigeria.

The devastating effects of Covid-19 globally has led to the adoption of various measures to prevent transmission and treat infected persons. Lockdown was one of the preventive measures adopted in many countries, Nigeria inclusive. This measure, regarded as hard measure, was adopted because of the inability to enforce social distancing. Other preventive strategies and non-pharmaceutical measures adopted include hand washing, use of hand-sanitizer, physical and social distancing, travel restrictions, flight cancellations, event cancellations,[10]school closures, restriction on

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[6] UNTAD, 'Coronavirus (COVID-19) : News, Analysis and Resources' https://unctad.org/en/Pages/Home.aspx, 'Coronavirus update: COVID-19 likely to cost economy $1 trillion during 2020, says UN trade agency' available at <https://news.un.org/en/story/2020/03/1059011> accessed 2 May 2020

[7]UNCTAC, 'UN calls for $2.5 trillion coronavirus crisis package for developing countries' available at <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2315>accessed 2 May 2020

[8] BBC News, 'Coronavirus 'could cost global economy $8.8tn' says ADB' available at <https://www.bbc.com/news/business-52671992> accessed 9 August 2020.

[9] Chuka Uroko, 'Covid-19: Lessons from Ghana on How to Cushion Effect on People, Business' Business Day 9 April 2020.

[10] Aljazeera News 'Here are the African Countries with Confirmed Coronavirus Case' <https://www.aljazeera.com/news/2020/01/countries-confirmed-cases-coronavirus-200125070959786.html> 24 March 2020.

religious gathering, and border closures.[11] The implementation of these measures in Africa many feared will be impracticable. Moeti was of the view that hand washing and physical distancing could be challenging in some places in Africa because of lack of access to water supply; lockdowns may not be possible because the economy is based more on the informal sector. The challenges may be exacerbated by the prevalence of diseases such as malaria, HIV, tuberculosis, and cholera.[12] Undoubtedly, the informal nature of Nigerian economy implies that lockdown will inflict enormous hardship on those who depend on income earned on a daily basis to be able to feed themselves and their families.

Thus, it is unsurprising that many criticized the lockdown measure in Nigeria, as elsewhere, as a violation of constitutional guaranteed rights and the enforcement, many argued, amounts to abuse of office. This paper is aimed at contributing to this debate by critically examining the concept of lockdown and the human rights and abuse of office issues. To achieve this overarching objective, the paper undertakes conceptual clarification of relevant concepts and there after examine the existence or otherwise of violation of human right and abuse of office resulting from the implementation of the lockdown measure in Nigeria.

2. LOCKDOWN AND THE LEGAL INSTRUMENTS

A lockdown has been defined as the confining of prisoners to their cells, following a riot or other disturbance, and a security measure taken during an emergency to prevent people from leaving or

[11] Jason Beaubien 'African Countries Respond Quickly to Spread of COVID-19' available at <https://www.npr.org/sections/goatsandsoda/2020/03/21/818894991/african-countries-respond-quickly-to-spread-of-covid-19>10thAugust, 2020.

[12] Jason Beaubien, 'African Countries Respond Quickly To Spread Of COVID-19' NPR, 21 March 2020 available at<https://www.npr.org/sections/goatsandsoda/2020/03/21/818894991/african-countries-respond-quickly-to-spread-of-covid-19> 9th November, 2020.

entering a building or any other location.[13] This definition implies that lockdown is used for security purposes. The lockdown in Nigeria came in the form of government executive order. Executive orders are government directives. An executive order is 'a regulation issued by a member of the executive branch of government. It has the same authority as a law.'[14] Thus, it is a mandatory order by the government for people to stay where they are, usually due to the presence of certain risk or to curtail certain risks to themselves or to others if they are allowed to move freely. The term "stay at home order" is then used for lockdown that affects an area, rather than specific locations.[15] The term can also be used for a prison protocol that usually prevents people, information or objects from leaving an area. However, in the context of this paper, the term refers to the confinement of persons or a group of persons within a defined geographical space, by most especially agents of the executive. The question that arises is whether there exists a legal justification for such measure or such is an outright violation of citizens' fundamental human rights. How can this measure be juxtaposed with the protection of the individual against the excesses of the government and its agents?

The Nigerian government adopted the lockdown measure in 2020 and relied heavily on the Constitution and the Quarantine Act. The 1999 Constitution (as amended) permits a proclamation of a State of Emergency to run for a period of 10 days without the approval of the National Assembly when the parliament is not in session and where the National assembly is in session, to seek and obtain its approval before imposing such an emergency.[16] The president addressed the citizens in 2020 on a public emergency occasioned by a dangerous and infectious coronavirus disease on the heels of the advice

[13]Thesaurus.com, <https://www.dictionary.com/browse/lockdown> accessed 10th November,2020.
[14] Collins Dictionary.
[15] Oxford Learner's Dictionary.
[16] Section 305 (6)(b) of the 1999 CFRN (as amended).

received by the President from the Federal Ministry of Health and the NCDC, the two focal agencies in the fight against COVID-19.[17]

Another law relied on by the Nigerian government is the Quarantine Act[18] which has as the long title: "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".[19] The Quarantine Act also empowers the President to declare any part of Nigeria as an infected area[20] and to make regulations to prevent the introduction, spread and transmission of any dangerous infectious disease. On the strength of the Quarantine Act, the President Buhari declared Covid-19 an infectious disease of a contagious nature.[21]
The Act vest the power on the Governors of the state to declare the imposition of quarantine and imposition of movement [22] and spells out the penalty for contravening the regulations of the Act with a fine of two hundred naira or imprisonment for a term of 6 months or both.[23] Lagos State Infection Disease (Emergency Researcher) Regulations 2020, 1 to 7 of the Act is sacrosanct as it deals with restriction of persons in public. The Nigerian government also relied on the constitutional provisions on the power of the executive and its duties to ensure that the security and welfare of the people shall be the primary purpose of government.[24]

It can be deduced that the issuance of this declaration or order enables law enforcement agents to dutifully carry out their functions

[17] Halimah Yahaya 'Coronavirus: AGF Malami Provides Legal Justification for Buhari's Lockdown Order' https://www.premiumtimesng.com/news/headlines/384993-coronavirus-agf-malami-provides-legal-justification-for-buharis-lockdown-order.html>31 March, 2020.
[18] 1990 CAP 384 LFN.
[19] Ibid.
[20] Sections 2 and 4.
[21] Section 2 of the Quarantine Act.
[22] Section 8 of Quarantine Act.
[23] Section 5 of the Quarantine Act.
[24] See sections 5(1) and 14(2)(b) of the 1999 CFRN (as amended).

should there be a breach. Hence, such agents or persons carrying out such executive orders within the confines of the law are in order. The exercise of this power has been challenged in Nigeria. The Socio Economic Rights and Accountability Project (SERAP) launched a Legal action against Governor Nyesome Wike of Rivers State and the Federal Government at the ECOWAS Court of Justice in Abuja over the "brutal crackdown, repression and grave violations and abuses of the human rights of the people of Rivers State."[25] The argument of SERAP is that "Governor Wike is using Covid-19 as at present to lap up repression and systematic abuses against the people of Rivers State, including carrying out mass arbitrary detention, mistreatment, forced evictions and imposing pervasive controls in daily life. SERAP further said that Governor Wike is using Executive Order 1 and 6, 2020 as instrument to violate and abuse the rights to liberty and freedom arbitrary arrest and detention without a fair trial, contrary to Nigeria's International Human Rights obligations including under the African Charter on Human and People's Right and the International Covenant on Civil and Political Rights.

Ultimately, the Federal Government being a signatory to ECOWAS treaties and protocols on human rights is obligated to ensure the enforcement of human rights to which Nigeria, as a state party, are fully and effectively realized throughout Nigeria, including Rivers State. The joint suit against the Federal Government and Governor Wike is consistent with Article 27 of the Vienna Convention on the Law of Treaties which provides that a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Thus, the SERAP approached the court, asking for an order of injunction to refrain and stop Governor Wike from further using, applying and enforcing executive orders to harass, arbitrarily arrest, detain and demolish property of the people of Rivers State.

[25] SERAP in its suit number ECW/CCJ/APP/20/20.

The actions taken by the Rivers State Governor and the Federal Government during the COVID-19 lockdown were seen by many as excessive, due to the inhuman approach by their agents. Borrowing a leaf from their counterparts in the United Kingdom where verbal warning and fines were applicable,[26] Robert Buckland, who heads the Ministry of Justice, told the parliamentary select committee for human rights that the very nature of the measures needed to stop coronavirus was curtailing rights, but argued that in doing so they upheld the right to life.[27]

The UK government enacted a new law that gives the government powers to close businesses and prevent people from leaving their homes. Buckland had stated that "we have to readily acknowledge that in times of emergency, the legislation does represent a change, a diminution, an infringement, if you like, with regard to human rights as we know them". The Lord Chancellor, rightly raised a fundamental point thus: after accepting a curtailment of rights, the next question should be what measures were "absolutely necessary and proportionate to preserve life, while respecting the rule of law".[28] This question is to be addressed in the context of human rights.

[26] ALMOST 1,000 Corona Virus Police Warnings in Cornwall and Devon by Emma Ferguson, The Packet Online News 15th April 2020 accessed on May 30th,2020 and the Financial Times Online 26th March which reports 'Police to issue on the spot fines for breaches of COVID-19 Lockdown accessed on 30th May, 2020.

[27]Bethan Staton, 'Lockdown Measures Infringe Human Rights, Says UK justice secretary'<https://www.ft.com/content/1524a77a-bb55-456a-b0c6-9c24c597c86f> 20th April, 2020.

[28]Bethan Staton, 'Lockdown measures infringe human rights, says UK justice secretary'<https://www.ft.com/content/1524a77a-bb55-456a-b0c6-9c24c597c86f> 20th April, 2020.

3.0 HUMAN RIGHTS

Human rights have been defined as 'standards that recognize and protect the dignity of all human beings. Human rights govern how individual human beings live in society and with each other, as well as their relationship with the State and the obligations that the State have towards them'.[29] The definition places obligations on the government and also restrains it from doing things that will violate human rights. It places responsibility on individuals in exercising their human rights as well as requiring them to respect the rights of others in exercising their rights. Therefore, no government, group or individual person has the right to do anything that violates another's rights. The basic features of human rights are that it is universal and inalienable. The typologies and classes include civil, political, economic, social or cultural, environmental. Rights are now in generations. The Universal Declaration of Human Rights (UDHR) remains a milestone document in the history of human rights. It was drafted by representatives with different legal and cultural backgrounds from all regions of the world. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations.[30]

The right to personal liberty is essentially a first-generation right which emanated from the fact of everyone is entitled to it for the fact of being a human being; and no government is to curtail or interfere with. This right can be traced back to the English Magna Carta of 1215.[31] Many nations have incorporated these rights into the constitution. The Constitution of the Federal Republic of Nigeria

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UNICEF, What are Human Rights? <https://www.unicef.org/child-rights-convention/what-are-human-rights>10th November, 2020.

[30] United Nations,' Universal Declaration of Human Rights'<https://www.un.org/en/about-us/universal-declaration-of-human-rights>10th November, 2020.

[31]Magna Carta Liberatatum (Medieval Latin for Great Charter of Freedoms) commonly called Magna Carta is a charter of rights agreed upon by King John of England.

(CFRN) 1999 (as amended) guarantees the protection of the fundamental rights of all Nigerians. Section 33(1) of the CFRN provides that: "every person has a right to life and no one shall be deprived intentionally of his life save, in the execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria".[32] It was also well espoused that the essence of law is the preservation of life, property and the creation of a conducive environment upon which human beings can live a dignified and contented life. It therefore brings to the fore that, in the absence of a criminal proceedings upon which a competent court of law can pronounce a death sentence, such loss of life can be said to be unjust or an unwarranted execution. The question is whether the lockdown measure is an acceptable measure which the government should adopt to protect the lives of citizens or it is a further derogation of the fundamental human rights by those saddled with the duties to protect them.

It is pertinent to note that that the rights to life in a sense is linked to acts or conduct in matters of personal liberty and false imprisonment. False imprisonment here connotes "the unlawful imposition of containment on another's freedom of movement from a particular place. Imprisonment is the sense of incarceration or forceful containment of movement".[33] The right to personal liberty cannot be over-emphasised as it is one of the most vital rudiments of an individual's physical freedom.

Therefore, in spite of the expressed good intention of government imposition of lockdown in Nigeria, it has been argued that the lockdown measure did not attain the aim of protecting the citizens. The following alleged reported cases of human rights violation during the lockdown seems to drive home the point.

[32] *Esabunor v. Faweya* (2009) Pt 478 All FWLR 200 – 398.
[33] *Duruaku v. Nwoke* (2016) Part 815 201 – 404.

3.1 Human Rights and Violation by Security Forces during Lockdown

The Nigerian Human Rights Commission reported that law enforcers have killed at least 18 people in Nigeria since the lockdown began on 30th of March, and as at that date Corona Virus had killed 12 people hence it can be deduced from that data, that the security forces had killed more people than the virus itself. The Nigerian security forces, which comprise the Military, Policemen, National Security and Civil Defense Corp, have a common reputation for brutality. During the Nigeria's corona virus lockdown period, the National Human Rights Commission, a government agency investigated and researched separate incidents of extra judicial killings leading to 18 deaths us in Nigeria.[34] The data the Commission had received across states encompasses about 24 of the states with major cases reported in Lagos, Osun and Abia States. Another clear case of police brutality and Human rights abuse incident is the high handedness of police officers willfully destroying trader's soft drings for sale in Lagos.

Secondly, the incident of two police officers who assaulted with whips a woman who was going to buy drugs in a pharmacy store.[35] The horrifying act of the two officers, which went viral on social media, sparked outrage, which led to their conduct being investigated and subsequent dismissal from the police force.[36] In Akwa Ibom, an officer was demoted for assaulting a medical doctor

[34]Extra judicial killing is the willful death of a person caused by government authorities, agents, or individuals without the sanction of any judicial proceedings or legal process. Extra judicial killing often target leading political, trade union or dissident religious and social figures.

[35]Sodiq Adewale Chocomilo, Withinnigeria.com,' VIDEO: Police Officers Flog Mother of Two for Allegedly Violating Lockdown to Buy Drugs in Osun'https://www.withinnigeria.com/2020/04/18/video-police-officers-flog-mother-of-two-for-allegedly-violating-lockdown-to-buy-drugs-in-osun/ Accessed 13th November, 2020.

[36]Ibid.

during the restriction order; same incident of assault was reported in Delta State.

The high level of abuse meted out to medical workers during this period led to the branch head of the Nigerian Medical Association writing petitions and calling on its members to stay at home as exhibited in Lagos State in mid-May.[37] It was reported that another medical doctor was assaulted by the Air force officers in Rivers State.[38] These alleged violations have far-reaching impacts in Nigeria.

3.2. The Impacts of Lockdown Violations in Nigeria

The impact of lockdown violation are discussed below.

a) Limitation of Access to Health Care: This is the maintenance or improvement of health via the prevention, diagnosis, treatment, recovery or cure of diseases, illness, injury and other physical and mental impairments in people. Health care is delivered by health professionals in allied health fields and encompasses, medical doctors, nurses, laboratory workers, and pharmacists. The provision of adequate health care and sensitization are basic human rights. The corona virus pandemic, which necessitated the lockdown has however manifested serious shortfall or challenges in our health care system.

[37] Vanguard 19th May 2020 Online,
The Lagos Branch of the NMA has directed all doctors in the State to proceed on an indefinite sit at home order due to protest in what has been described as conflicting directives by the government and incessant police harassment on medical doctors and health workers in the State. In a Press Statement the Chairman of the NMA and his Secretary jointly signed ordered all doctors to sit at home due to the Police harassment of doctors following directives from the C.O.P. in the State in regards to movement as he failed to recognize them as essential workers.

[38] The Punch, 'How Air Force Officers Assaulted and Pointed Gun at Me - Dr Avwebo Ochuko Otoide, Rivers State Teaching Hospital Medical Doctor' Sunday Punch, May 24, 2020.VOL.24

In Nigeria, persons suspected to be victims of corona virus and other patients suffering other ailment cannot access medical doctors due to some factors such as restriction of movement and lack of personal protective equipment (PPE). Hence, the reluctance of medical doctors to risk their lives to treat patients. This is exacerbated by the fact that that the hazard allowance, apart from being low, does not come as and when due; and there is practically the non-existence of insurance cover for them.

b) Abuse of Labour Rights: Labour means work, toil, service, mental or physical exertion. The term is synonymous with employment, jobs or positions. The health care workers in this lock down, and unfortunately the vast majority, are exposed to risk due to lack of personal protective equipment. Thereby, the government and the employer failed to provide a safe working environment for workers in the health sector. Many prominent doctors and nurses have had their lives cut short prematurely or infected by this disease.[39] This impacts on their right to life. Other workers outside the medical sector are equally affected as many workers in various establishments are being laid off, while some are paid half salary and some others are made to go without pay for months, thus affecting their livelihood. In *Ogbe v. Attorney General Enugu*,[40] the court held that 'the interpretation of the right to life as provided for in S. 33(1) of the Constitution of the Federal Republic of Nigeria can be expanded to include the right to the means of livelihood'. Therefore, the effect is that in Nigeria, if the means of livelihood is deprived a person, it amounts to depriving that person his fundamental right to life. This was given further credence to by Ewang[41]

[39] Dr Emeka Chugbo Died from the Corona Virus in Lagos University Teaching Hospital. Prior to this death in Lagos, Aliyu Yakubu was the first medical doctor to die of the virus in Nigeria. BBC NEWS Online reported April 16th, 2020 accessed on 30th May, 2020.
[40]*State* (2016) All FWLR Pt 819 1009 – 1200,
[41]A Nigerian researcher at Human Rights Watch.

> when he stated that "millions of Nigerians observing the Covid-19 lockdown lack the food and income that the families need to survive, 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".[42]

The most impacted are workers in the informal sector that are prevented from going to work. They include local food vendors, mechanic, artisans, tailors, motor mechanics, barbers and traders who depend on their daily earnings as their only source of income. The impact on this class of workers was unquantifiable as they were grossly affected. Similarly, Morka[43] stated that "the vast majority of the people outside of the informal system are hard hit by the lockdown and that any disruption to their daily livelihood has a huge and significant impact on their ability to meet their most basic needs.[44]

c) Abuse by Security Forces: These are statutory organization with internal security mandates. In the legal context of several nations, the term has variously denoted police and military units working in cohesion on the role of military and paramilitary forces, tasked with the internal provision of public security. In Nigeria, the enforcement of lock down measures by security agents has been accompanied by gross abuse of the basic human rights of these individuals and communities. The principal actors that violate human rights are the security agents who commit abuses such as physical assault, torture, illegal seizure and extortions. There has been outright destruction of properties by security agents thus inflicting hardship and pains on the vulnerable people. There

[42]Nigeria: Protect Most Vulnerable in COVID-19 Response Extended Lockdown Threatens Livelihoods of Millions. https://www.hrw.org/news/2020/04/14/nigeria-protect-most-vulnerable-covid-19-response16/4/2020.
[43]Ibid.
[44]Ibid.

were brutalities in Abia, Anambra, Delta, Kaduna, Niger, Ebonyi, Lagos, Osun and Rivers States.

Regrettably, this occurrence is not limited to Nigeria. In other countries,[45] like South Africa, for instance, the human rights complaints were made in the first week of the lock down, including one suspected case of murder. In Rwanda, five soldiers were arrested for allegedly raping women. In Kenya, the president, Uhuru Kenyatta, apologized for police excesses on the public.[46] In Conakry, Guinea, there are numerous cases of police attacks on protesters against the lockdown in the city's central. The enforcement in Nigeria has triggered claim and allegations of religious bias by the Covid-19 task force.[47]

d). Gender Based Violence: Gender based violence or gender violence is the term used to denote harm inflicted upon individuals and groups that is connected to normative understanding of their gender. While it is used synonymously with violence against women, gender violence can and does occur for people of all gender, including men, women, male and female, children. However, taking into cognisance the coronavirus pandemic, there has been an upward surge in gender based violence due to the lockdown as the measure resulted to many victims being placed in the arms of the oppressor due to no visible escape routes or relations brought about by close proximity. Many women and girls have been compelled to undergo lockdown at home or in the same communities as their abusers at a time when services to support survivors have been disrupted or made inaccessible.

[45] The Covid-19 pandemic is not an excuse to trample on human rights by wed star accessed online May 3oth, 2020

[46]Aljazeera, News/Nigeria. Nigeria Security Forces During Curfew Enforcement 16/4/2020.

[47] Sunday Punch, May 24, 2020. Vol. 24, Covid-19 task force show bias against Pastors violation, lockdown directives. Bishop Enumah Isong, National Publicity Secretary of Pentecostal Fellowship of Nigeria.

This is not just in Nigeria; this scourge has reached a global level.[48]

3.3 Balancing the Enforcement of Covid-19 Lockdown and Respect for Human Rights

Given the inevitability of lockdown, the existing legal backing and the violation of human rights arising therefrom, it is imperative to strike a balance between the enforcement of law and respect for human rights. The constitution[49] and the Police Act[50] provide that the Nigerian Police shall have such powers and duties as may be conferred upon it by the law. These laws saddled the police with the power for the prevention and detection of a crime, the apprehension of offenders, the preservation/protection of property and the enforcement of all laws and regulations.[51] However, in discharging the responsibilities, the police are permitted to take whatever steps that are desirable to achieve its goal. Yet, these steps must not be seen to be high handed or in contravention of the rights of others, even in the course of enforcing an executive order. It must be in line with the provisions of the law, including the African Charter on Human and People Rights[52] and ensure that human rights are protected. Unfortunately, reports suggest that the Nigeria Police Force committed more extra judicial killings and other human rights violations during the period of the lockdown period, accounting for more than 59.6 percent of the sum total of case violations.[53]

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[48] UN Secretary General, Antonio Genfferress, called for among other measures a global cease-fire in the face of exacerbated human rights abuse? of vulnerable groups.

[49] Section 214(2)(b) of the 1999.

[50] Section 4 of the Police Ac.t

[51] Supra see footnote 1

[52]Article 26 of the African Charter on Human and people rights, which provides that State parties to the present charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedom guaranteed by the present charter.

[53] Peter Uzoho, 'Nigeria: Report - Police Lead in Human Rights Violation during Lockdown Extension' <https://allafrica.com/stories/202005120349.html> accessed 10 November, 2020.

The police was followed by non-state actors, mostly private individuals in sexual and gender-based violations (SGBV) related cases, which accounted for 18.3 percent of the total cases; this was revealed by National Human Rights Commission (NHRC).[54] To attain a balance, the law enforcement must work within the confines of the law by respecting the fundamental human rights of all, including the offenders, by not resorting to the inhuman treatment of alleged offender or extra judicial killings.

4. ABUSE OF OFFICE AND ITS MANIFESTATION DURING THE LOCKDOWN IN NIGERIA

4.1. Abuse of Office

Abuse of office, also known as abuse of position or function, arises where 'a person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his or her conduct is illegal'.[55] Instances of abuse of office include subjecting another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or denying or impeding on another in the exercise or enjoyment of any right, privilege, power or immunity arising from occupation of office or discharge of official function.[56] The United Nations Convention against Corruption (UNCAC) without defining abuse of office, requires each State Party to:

[54]Ibid.

[55] Legal Information Institute, 'Abuse of office' available at <https://www.law.cornell.edu/cfr/text/25/11.448> accessed 8 May, 2020.

[56] ibid; Gerson Michael, 'Opposing Trump's Corrupt Abuse of Power is Today's Form of Patriotism' available athttps://www.washingtonpost.com/opinions/opposing-trumps-corrupt-abuse-of-power-is-todays-form-of-patriotism/2019/09/23/72a0f95a-de3d-11e9-be96-6adb81821e90_story.html accessed 20 May 2020.

> consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.[57]

Also, African Union Convention on Preventing and Combatting Corruption (AUCPCC) requires State Parties to establish as a criminal offence 'any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party'.[58]

The objective of criminalising this conduct is to provide 'quality control' in addressing, either breach of duty or functions, and is used to cover a wide range of improper conduct.[59] The elements of this offence are a breach of duty or the abuse of function arising either by performance or non-performance of official duties in violation of laws, aimed at obtaining an undue advantage for the official, another person or entity and must be done intentionally.

The Criminal Code provides that:

[57]Article 19 of UNCAC.
[58] Article 4(1)(c) of AUCPCC.
[59] Colin Nicholls, Tim Daniel, Alan Bacarese and John Hatchard, *Corruption and Misuse of Public Office*, 2nd edn, Oxford University Press (2011) 522; John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa*, Edward Elgar Publishing Limited (2014)163.

> Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour, and is liable to imprisonment for two years.
> If the act is done or directed to be done for purposes of gain, he is guilty of a felony, and is liable to imprisonment for three years.[60]

The criminal code expressly extends the offence of abuse of office to a felony and act done by the direction of such officer. Furthermore, section 19 of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act provides for the offence of use of office or position for gratification. It provides that:

> Any public officer who uses his office or position to gratify or confer any corrupt or unfair advantage upon himself or any relation or associate of the public officer or any other public officer shall be guilty of an offence and shall on conviction be liable to imprisonment for five (5) years without option of fine.

The Code of Conduct Bureau was established to regulate abuse of office by public officials in Nigeria.[61] The Code of Conduct for Public Officers provides that 'a public officer shall not do or direct to be done, in abuse of his office, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful or

[60]Section 104 of the
[61] Part 1 of Third Schedule to the CFRN 1999 (as amended).

contrary to any government policy'.[62] Similarly, in Lagos State, section 73 of the Criminal Law 2011 imposes criminal liability on any public officer who does or directs to be done in abuse of his or her office any arbitrary act prejudicial to the rights of another.

[62] Paragraph 9 Part 1of Fifth Schedule to the Constitution of Federal Republic of Nigeria 1999 (as amended).

4.2 Manifestation or Cases of Abuse of Office in Covid-19 Era in Nigeria

The manifestations of these cases are discernible from cases under the following heads.

a) Corruption and Extortion: The lockdown imposed by the government was seen by some nefarious law enforcement officers as another opportunity, as always, to extort money, valuables and bribe from the public.[63] The social media is awash with reported cases of demand for bribes and extortion by some police officers and payment of same by motorists for access through various road blocks mounted by the officers to ensure full compliance with the restriction of movement order. In Nigeria, there have been reports of police extortion and bribery in the wake of the lockdown occasioned by Covid-19. Certainly, the lockdown came with little or no preparation by many citizens, so they needed little explanation and enforcement by the police to adjust to the novel way of life. On the contrary, the police seem to be motivating citizens to break the order. Citizens are motivated to move about against the government order by the Police upon payment of money at checkpoints. Naturally, businesspersons and commuters that depend on daily earnings and are already accustomed to such extortion and payment of bribe went about their normal businesses. Moreover, with the lockdown and the scarcity it engendered, it becomes easy for the businesspersons and transporters in Nigeria to transfer any additional cost incurred to the final customers. Thus, many are going on and about their businesses unhindered, defeating the most potent preventive measure in the anti-Covid-19 efforts. The chief culprit is the abuse of office is the police,

[63] Cletus Ukpong Lockdown: Police officer caught on camera extorting N40,000 from motorist' 11 April 2020 available at <https://www.premiumtimesng.com/news/top-news/387378-lockdown-police-officer-caught-on-camera-extorting-n40000-from-motorist.html> accessed 29 May, 2020.

followed by the army and the Nigerian Correctional Services in Nigeria.[64] According to Odita, police extortion was our biggest challenge during five weeks of the lockdown.[65] It was reported that during the lockdown, the police in Lagos arrested an officer who was seen in a video extorting about $110 (£90) from a motorist.[66] Another video shows an officer taking money from a driver and returning change to him.[67] A policeman in Port-Harcourt was accused of raping a widow for nose mask violation.[68]

b) Brutality: The scale and severity of the Covid-19 pandemic clearly has risen to the level of a public health threat, which easily justifies restrictions on certain rights, such as those that result from the imposition of lockdown, quarantine or isolation of infected persons. At the same time, careful attention to human rights and principles such as non-discrimination, transparency and respect for human dignity can foster an effective response amidst the pandemic.[69] The reality is that the rate of brutality by the police and the army

[64] National Human Right Commission Press Release, 'National Human Rights Commission Press Release on Covid-19 Enforcement so Far Report on Incidents of Violation of Human Rights' Press Release 15 April, 2020 available at <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.html> accessed 10 May 2020.

[65]Odita Sunday, 'Police Extortion was our Biggest Challenge during Five Weeks of lockdown, Nigerians Lament.' Guardian Newspaper, 04 May 2020 available at <https://guardian.ng/news/police-extortion-was-our-biggest-challenge-during-five-weeks-of-lockdown-nigerians-lament/> accessed 10 May, 2020.

[66] By Ishaq Khalid, 'Mixed Message from the President' available at <https://www.bbc.com/news/world-africa-52317196> accessed 25 May 2020.

[67]Youtube, 'Police Officer Caught on Tape Returning Change After Collecting Bribe from Drivers On Highway' available at <https://www.youtube.com/watch?v=qiBNKpRJ2do> accessed 27 May 2020.

[68] Sampson Itode, 'Policeman raped me after arrest for face mask violation –Rivers widow'(Nigeria: Punch Newspaper 30 July 2020)

[69] Human Right Watch, 'Human Rights Dimensions of COVID-19 Response' available at <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> accessed 26 May 2020.

> in enforcing the lockdown measure has increased. There are reported cases of human right abuses, including extra judicial killings of innocent citizens in the enforcement of lockdown.

In Nigeria security operatives, while enforcing the coronavirus lockdown across the country, some police officers were caught on camera assaulting and brutalising citizens. National Human Rights Commission (NHRC) reported that within two weeks of the lockdown, it received 105 complaints across 24 States of Nigeria[70] and thereafter found that law enforcement officers had killed more people than the pandemic in Nigeria as at 16 April 2020.[71] Law enforcement officers had killed 18 and lockdown had killed 12 people since lockdown began on 30 March.[72] Furthermore, it reported that 'there were 8 documented incidents of extra-judicial killing leading to 18 deaths. Out of this number, 12 deaths were recorded in Kaduna State. Abia State also recorded 2 deaths arising from 2 incidents; while Delta, Niger, Ebonyi and Katsina States recorded 1 death each'.[73] Another case of brutality and excessive use of force is the case of two officers that flogged a woman, Tola Azeez, in Odo Ori Market in Iwo, Osun State while she was trying to buy drugs for her relatives at a pharmacy.[74]

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[70] These State are Abia, Adamawa; Akwa Ibom; Bayelsa, Benue; Cross Rivers; FCT, Ebonyi State; Edo; Enugu State; Ekiti State; Delta State; Gombe State; Imo State; Kaduna; Katsina; Kogi; Kwara State; Lagos; Nasarawa; Niger State; Ogun; Osun; Plateau and Rivers States

[71] National Human Right Commission Press Release, 'National Human Rights Commission Press Release on Covid-19 Enforcement so Far Report on Incidents of Violation of Human Rights' Press Release 15 April, 2020 available at <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.html> accessed 10 May 2020; CNN, Coronavirus: Security forces kill more Nigerians than Covid-19' https://www.bbc.com/news/world-africa-52317196 accessed 28 May 2020

[72]See Youtube <18 dead in enforcement of Nigeria COVID-19 lockdown – report <https://www.youtube.com/watch?v=ALQpEazBVq4> accessed 26 May, 2020.

[73]NHRC, (supra n 56) Paragraph 3.2.

[74]Adejumo Kabir, 'Lockdown: Police Officers Caught on Camera Assaulting Woman' https://www.premiumtimesng.com/news/more-news/388697-lockdown-police-officers-

caught-on-camera-assaulting-woman.html>
;<https://www.youtube.com/watch?v=UeLYvCEnXUg> accessed May 2020.

b) Abuse of Rule of Law

The rule of law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials, and judges.[75] The rule of law is primarily aimed at the restriction of arbitrary exercise of power by subjecting it to well-defined and established laws, upholding the supremacy of the law and protecting equality before the law. Every abuse of office is an abuse of the rule of law. The highlights of selected cases of abuse of the rule law in Covid-19 era are discussed below.

In Nigeria, the efforts by the NCDC, the Presidential Task Force and the Lagos State government on Covid-19 have not been devoid of abuse of rule of law. There have been breaches of the core components of the rule of law in the enforcement and prosecution of defaulters of Covid-19 Orders and Regulations. In *Abdul Rasheed Bello and Akindele Bello's case*,[76] Akindele Bello, a popular actress known as 'Jenifa', threw a party bash for her husband birthday in their family house in Lagos. The video of the birthday bash consisting, by their explanation, of those staying with him and a few neigbours was posted online by the husband, Abdul Rasheed, known as JJC Skillz. The post was widely condemned for setting the wrong example. Akindele Bello explained what transpired and issued an apology on her Instagram page: 'I am sorry if I have misled you. I

[75]John Locke wrote that freedom in society means being subject only to laws made by a legislature that apply to everyone, with a person being otherwise free from both governmental and private restrictions upon liberty. In 19th century, the concept of 'the rule of law' was further popularized by British jurist A. V. Dicey. Although, the principle and the phrase itself, was recognized by ancient thinkers; Aristotle wrote that 'it is more proper that law should govern than any one of the citizens': Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law,* University Press of Kansas (1996) 57.

[76] BBC News 'Coronavirus: Nigerian actress Funke Akindele fined over Lagos Party Amid Lockdown' available at <https://www.bbc.com/news/world-africa-52174832> accessed 28 May 2020; Youtube, 'Why Funke Akindele, Husband Sentenced To 14 Days Community Service, Fined N100,000 Each ' available at <https://www.youtube.com/watch?v=jNl76XElXI4> accessed 28 May 2020.

appreciate your concerns and I promise to always practice what I preach.
… I promise to always support the government in creating more awareness to eradicate this pandemic'.[77] In what seems like speed of light, the defendants were arrested, investigated and charged to court by the Lagos State government. They both pleaded guilty to violating the lockdown restrictions as charged. In spite of the plea for leniency by their counsel, the accused persons were convicted, fined one hundred thousand naira, and ordered to do 14 days of community service by visiting 10 important public places within Lagos State to educate the public on the consequences of not complying with restriction orders imposed by the government. They were asked to submit the names and contact details of everyone else who attended the event.

The case was a test case for the government and meant to serve as a deterrent to others. But the breach of the same restriction and social distancing by the government and government failure to apply same measure in terms of speedy arrest, investigation and prosecution of similar cases ridiculed the whole process and objective. From the court premises, the government, the Attorney-General of Lagos State was granting interview to over 25 persons in breach of the same social distancing for which the defendants were charged and convicted.[78] As a result, majority of Nigerians regarded the prosecution of the defendants as a witch-hurt and politically motivated. Others call on the government to apologise to the defendants and overturn their convictions. Yielding to the public pressure, the government dropped intended charges against two

[77]See <https://www.instagram.com/accounts/login/?next=/funkejenifaakindele/%3Futm_source%3Dig_embed> accessed 10 August 2020.
[78]Youtube, 'Court Convicts Funke Akindele-Bello, Husband, JJC To 14 Days Community Service, Fine of N100, 000' https://www.youtube.com/watch?v=CLKTYgO4yBA accessed 11 May 2020.

other attendees of the parties.[79] Thus, the primary aim of the prosecution was ridiculed and defeated.

The most recent is the *Naira Marley Case*. The Lagos magistrate Court and the Abuja Mobile Court convicted Azeez Fashola, popularly known as Naira Marley, on the 5th and 7th August 2020 respectively for breach of cessation of movement and interstate travel order made by the President of the Federal Republic of Nigeria, under Regulation 4(i) of the Lagos State Infectious Disease Emergency Prevention) Regulation No 2 of 2020 and punishable by section 58 Public Health Law, Cap. P16, Laws of Lagos State 2015.[80] This conviction has also been criticised as being selective amidst political rally in breach of social distancing protocol.[81]

The non-prosecution of other cases remains a gross abuse of rule of law and abuse of office. The case in which the government has failed to arrest, investigate and prosecute the offenders championed by high public officers is the video of burial of the late Chief of Staff to the President, Abba Kyari.[82] The report showcases flagrant disregard to the extant social distancing order and standard protocol for the burying of a Covid-19 corpse. The abuse of rule of law actually spanned through the treatment period to the internment of the deceased Chief of Staff to the President Buhari. The NCDC and Lagos State government could not account for the treatment and

[79] Jayne Augoye, 'Lagos govt drops charges against Naira Marley, Gbadamosi' Premium Times, April 8 2020.

[80] Jayne Augoye, 'COVID-19 Violation: Another court fines Naira Marley N200,000' available at https://www.premiumtimesng.com/news/headlines/407371-covid-19-violation-another-court-fines-naira-marley-n200000.html> accessed 10 August 2020.

[81] Dev Joe 'Where Is Justice If Naira Marley Can Be Arrested For Flouting COVID-19 Protocol – Senator Shehu Sani Reacts To APC Campaign Rally' <https://www.ghgossip.com/where-is-justice-if-naira-marley-can-be-arrested-for-flouting-covid-19-protocol-senator-shehu-sani-reacts-to-apc-campaign-rally/> accessed 10 August 2020.

[82] Ripples Nigeria 'NBA Chairman, 3 Others Sue Buhari, SGF over Abba Kyari's Burial' available at <https://www.ripplesnigeria.com/nba-chairman-3-others-sue-buhari-sgf-over-abba-kyaris-burial/> accessed 16 May 2020.

where about of Abba Kyari.[83] While the NCDC, the Health Ministry and the Presidential Task Force on Covid-19 kept telling Nigerians that no private hospital is accredited or adequately equipped to treat Covid-19 patients, it was announced that he died at a private hospital in Lagos.[84] The corpse was released to the family against the standard protocol and government stand that no corpse will be handed over to any family.[85]

The climax of the abuse of rule of law and office was during the internment; social distancing order was set aside, personal protective equipment was improperly used and carelessly disposed of and family members and supporters were allowed to conduct the burial putting, the general public at risk.[86] The display of impunity by the presidency and refusal by law enforcement agencies present at the burial to enforce social distance order quickly strengthened the position of many Nigerians that government is lying about the pandemic in Nigeria as a means to embezzle more public money.

4.3 Absence of Accountability and Transparency

One of the ways the government and public officers over time have abuse their office is their inability to transparently account to the public how national resources had been managed by them. In Nigeria, the palliative distribution was characterised by the absence of accountability and transparency by the government. Government

[83]Eniola Akinkuotu, 'Minister Denies Knowledge of Abba Kyari's Whereabouts in Lagos' Punch Newspaper 2 April 2020 available at <https://punchng.com/minister-denies-knowledge-of-abba-kyaris-whereabouts-in-lagos/> accessed 12 May, 2020.

[84] Sahara Report, 'Private Hospital Where Abba Kyari Died Locked By Lagos Government For Fumigation' <http://saharareporters.com/2020/04/18/revealed-abba-kyari-died-lagos-hospital-first-cardiology-consultants>acceesed 12 May, 2020.

[85]Tofe Ayeni, 'Coronavirus: death of Nigeria's Chief of Staff sheds Light on Conflicting Rules' available at <https://www.theafricareport.com/26588/coronavirus-death-of-nigerias-chief-of-staff-sheds-light-on-conflicting-rules/> accessed 17 May, 2020.

[86] Samuel Ogundipe, 'Abba Kyari buried in Abuja' Premium Times News April 18, 2020 available at <https://www.premiumtimesng.com/news/headlines/388564-breaking-abba-kyari-buried-in-abuja.html>accessed 2 May 2020.

openly admitted to not having a record of those that have received the palliative but stated the amount already spent. Many citizens, both in the urban and rural areas, were not reached.[87] This denial of palliative pushed many Nigeria to say that aside the present corona virus, there is a ravaging hunger virus in Nigeria. The Minority Caucus in the House of Representatives in Nigeria has warned that the current selective approach adopted by the Federal Government in allotting palliatives to States in Nigeria in the wake of the coronavirus pandemic was unacceptable and counter-productive to the overall national efforts to mitigate the economic impact of the pandemic.[88] There are conflicting reports from the NCDC and States on the number of infections and deaths.[89] The House of Representative worried about the lopsided manner the ministry of humanitarian affairs has handled the distribution of the palliatives, summoned the minister who could not defend what the ministry has done.

4.4 Impact of Abuse of Office on the Anti-Covid-19 Efforts

The combined effect of the past and present abuse of office by public officers in Nigeria has the following adverse impacts and consequences on the Anti-Covid-19 effort.

The first major consequence of abuse of office is that it has engendered and enhanced the trust deficit between the government and the governed. It has succeeded in eroding the fragile trust of many citizens in government. In Nigeria, some citizens believe that the government is lying about the existence of Covid-19 in Nigeria.

[87]Abdulkareem Haruna, Nigeria: Coronavirus - Senator Accuses Federal Aid Committee of Fraud, Calls for Disbandment' Premium Times 16 April 2020 available at <https://allafrica.com/stories/202004170085.html> accessed 12 May 2020

[88] James Kwen, 'Coronavirus: Reps warn FG against Selective Distribution of Palliatives to States' Business Day, 8 April 2020

[89] Murtala Adewale and Kehinde Olatunji, 'Confusion as NCDC, Kano present conflicting COVID-19 results' Guardian News 17 April 2020 available at <https://guardian.ng/news/confusion-as-ncdc-kano-present-conflicting-covid-19-results/> accessed 30 May, 2020.

Others believe that the number of confirmed cases are exaggerated to enable the government siphon the common wealth of the nation.[90] Nigerians are calling on the government to display pictures of victims undergoing treatment. The situation is made worse against the government as videos of those in isolation centres are online showing themselves playing around and saying that they are well and healthy. Benue State index case claims to be well but isolated since 27 March 2020 on mistaken medical report and refused further test as she claims that results of her three earlier tests have not been given to her in spite her request for them.[91]

The second is cynicism of the existence of the virus. This is occasioned, for instance, by the way and manner the burial of the Chief of Staff to the President and others was conducted and reports from persons inside or out from the isolation centre. Another factor is illiteracy. However, this point is debatable because there are many enlightened and educated persons strongly holding this belief.
The third is disobedience to measures in place to prevent the spread of the virus. The two consequences above motivate citizens to disregard the stay at home and lockdown orders.

The fourth consequence is the eventual spread of the virus and the increased fatality rate arising from the disregard of preventive and safety measures by the citizens.

5.0 CONCLUSION AND RECOMMENDATIONS

The paper examined the concept of lockdown and the issues of human rights and abuse of office and the impact of abuse of office on Anti-Covid-19 efforts in Nigeria. To curtail the spread of Covid-

[90]Abiola Odutola, 'Kano: Nigerians pick on NCDC over reported COVID-19 new cases in the State' available at <https://nairametrics.com/2020/04/26/kano-nigerians-pick-on-ncdc-over-reported-covid-19-new-cases-in-the-state/> accessed 8 May 2020.

[91] The Nation Newspaper 'Benue Index Case Controversy: 'We'll Release Complainant's Medical Report' available at<https://thenationonlineng.net/benue-index-case-controversy-well-release-complainants-medical-report/> accessed 21 May 2020.

19, practical steps taken include enactment and enforcement of laws bothering on public health emergency, restriction on rights of citizens such as lockdowns, movement, quarantine, etc. The measure threw up issues of human rights and abuse of office. The curtailment of rights during emergencies such as the Covid-19 experience seems justified but the enforcement led to the violation of human rights and abuse of office by the government and law enforcement agents.

Every violation of human rights is an abuse of office. Abuse of office is a major constraint to the effectiveness of the anti-Covid-19 efforts in place. The offence of abuse of office has been codified but remains a challenge in the Covid-19 era, attenuating the government efforts. The abuse of office manifests in the form of corruption and extortion, brutality, abuse of the rule of law and lack of transparency in the handling of palliatives.

In view of the discussion above, the following are recommended:
First, Nigeria should observe and protect fundamental human rights of all its citizens, including the rights of defaulters, in effecting arrest, where necessary. This will require educating and reorienting the law enforcement officers that part of their work during emergency is to persuade citizens to adjust to the new way of life as well as explain the danger of non-compliance to the laid down measures instead of the excessive use of force and brutality.

Secondly, law enforcement officers should be made to respect human rights at all cost when enforcing any law or order and not to result to inhuman treatment or extra judicial killings. Any law enforcement officer found culpable should be disciplined appropriately to serve as a deterrent to others. Furthermore, there is also the need to improve the welfare package of the law enforcement officers so that they will be motivated to carry out their work in a dignified manner.

Thirdly, public officers found to have abuse their offices should be investigated, arrested and prosecuted transparently without shielding any person. The principle of equality before the law should be upheld and applied. The practice of selective prosecution of offenders should be jettisoned.

Fourthly, the government should be transparent and accountable to the citizens in order to earn their trust and confidence. The Nigerian government should adopt the Ghanaian model of providing palliatives that will make essential amenities available to the average Nigerians. Spending of the donations and allocation for palliatives should be made public.

fifthly, the government should make public the list of those that have received the palliatives for scrutiny and verification to douse the rumour that the funds for palliatives are being embezzled by public officers.

The Nigerian National Assembly should amend the law to extend the offence of abuse of office to the private sector.

The last but not the least is that government should observe and ensure the observance and protection of the rule of law at all times to guarantee a just and fair society devoid of injustice and anarchy. This is the only way to secure the obedience of the law or measure.