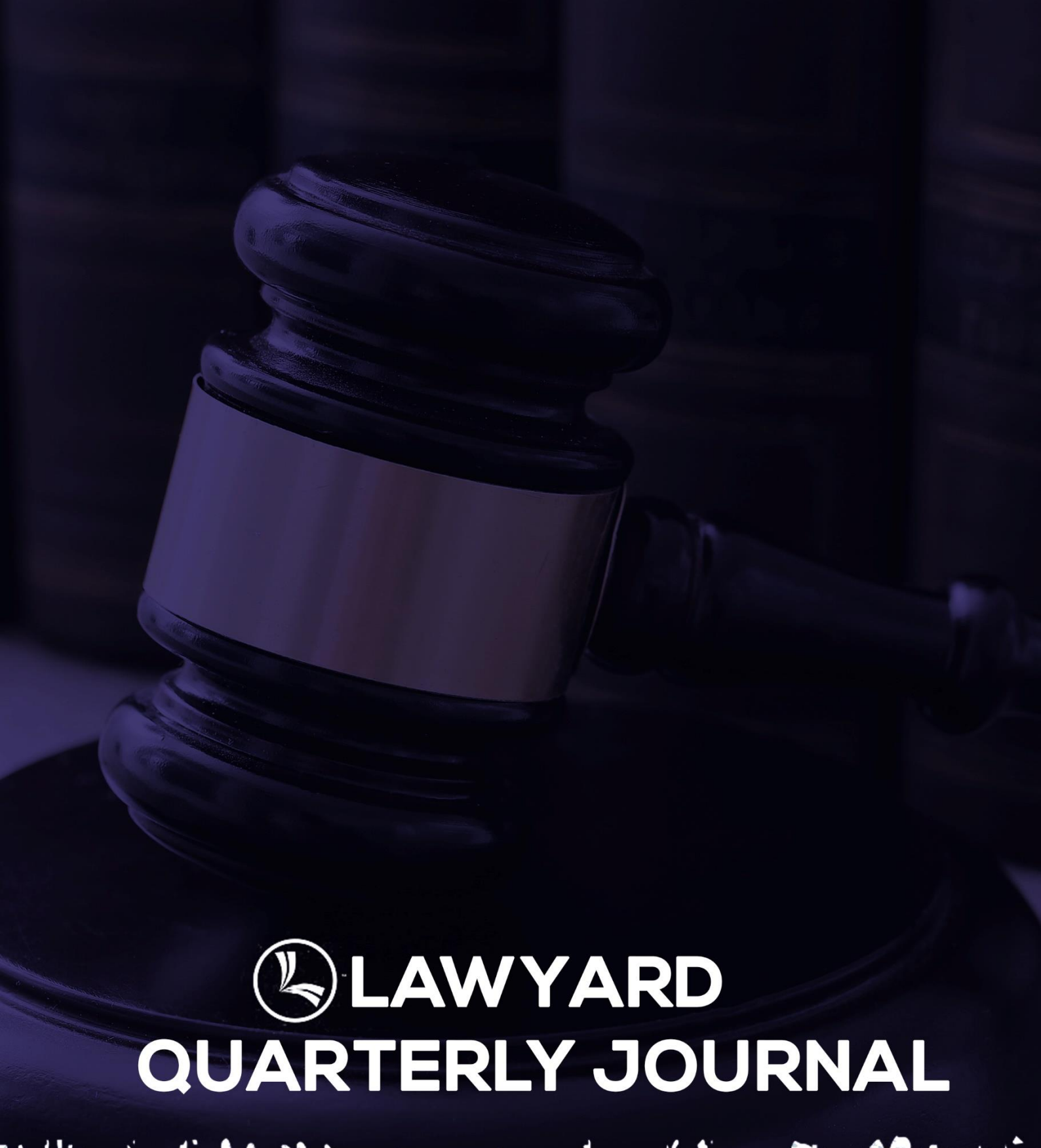


LAWYARD QUARTERLY JOURNAL

Volume 2 Issue 1

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FOREWORD

The human society shares a dynamic relationship with the Law, each influencing the other. It is common knowledge that Law addresses a wide range of issues and it is not often that a reader is privileged to access a careful and meticulous appraisal of diverse legal issues in one singular document; a purpose for which the Lawyard Journal exists.

The Lawyard Journal reflects many years of research, hard-work and scholarship, in keeping with the promise of the Lawyard brand, as Nigeria's premium legal media platform. Lawyard continues to promote access to enlightenment around fundamental and critical legal issues, for the benefit of lawyers and other members of the society, thereby invariably promoting access to justice through the use of technology.

In this edition of the Lawyard Journal, our contributors address various topics in the Maritime and Alternative Dispute Resolution practice areas (with emphasis on mediation); and Nigeria's relationship with her African neighbors such as Guinea, in her quest to indeed maintain the standard as the giant of Africa. This edition also examines other novel areas such as data retention and protection and concludes with an analysis of the somewhat controversial Social Media Bill.

Our heartfelt appreciation goes to the individuals, and organizations, who have contributed their time, resources and energy to the success of this work. I must also thank all contributors and the Lawyard Journal Editor, Gbolahan Badmus, for the dedication to high standards of research and analysis.

I have no doubt that all readers will find this edition of the Lawyard Journal a great addition to their virtual libraries and I enjoin all who come across it to keep sharing with others.

Thank you.

Tobi Adebowale

Team Lead, Lawyard

EDITOR'S LETTER

We are pleased to welcome you to another issue of the Lawyard Journal. The year, in barely seven months, has been packed with events that could easily wear out a three-year period. COVID-19, the blind spot of this 2020, has been the key disruption witnessed so far. As the effects of this virus continue to unfold, we write on as a means of adaptation or perhaps, as a means of hanging on to normalcy.

Three articles in this Issue focus on maritime. Prince Nwafuru expertly discusses vital issues regarding the sui generis nature of admiralty action *in rem* in Nigeria. Emmanuel Ikwuakolam and Oludayo Olufowobi, in their individual pieces, approach the issue of maritime security through different routes.

Victoria Oloni, the winner of our Inaugural Adavize Alao Essay Competition on Privacy and Data Protection, Ridwan Oloyede and Yomi Ajibade continue to deepen the discourse on data protection in Nigeria. While Victoria, among other things, warns us of the possibility of illegally processing data in a post COVID era; Ridwan and Yomi briefly explore the world of data retention practices.

Moses Olunlade in his cerebral piece causes us to rethink our definition of *res* in chieftaincy appeals and perchance appeals in general. Titilope Sinmi-Adetona takes us on a tour of the nascent Singapore Convention and the possible implications it holds for mediation within and outside Nigeria. Finally, Sola Odunsi walks us through both sides of the Social Media Bill, an attempt to deviate from the "flat dimensioning" narrative the bill has mostly witnessed.

In all, I hope you appreciate these articles as a valuable contribution to legal education and as a springboard towards legal awareness.

Do not hesitate to contact us on submissions@lawyard.ng or any of our social media handles should you have any comments/inquiries.

With my best wishes

Gbolahan Badmus

Editor, Lawyard Journal



The Singapore Convention: Mediation's Next Best Thing or a Development Facade

By Titilope Sinmi-Adetona LL.M, ACIArb

LAWYARD QUARTERLY JOURNAL

THE SINGAPORE CONVENTION: MEDIATION'S NEXT BEST THING OR A DEVELOPMENT FAÇADE? -

Titilope Sinmi-Adetona *LL.M, ACIArb*

1. Introduction

In August 2019, the dispute resolution community was awash with excitement at the new development – the signing of the United Nations Commission on International Trade Law ("**UNCITRAL**") Convention on the Enforcement of International Mediated Settlement Agreements (the "**Convention**" or "**Singapore Convention**") – and the anticipation of its effect. A large part of dispute resolution practitioners believe that the Convention ushered in a new era for mediation, more particularly, as a preferred mechanism in cross-border disputes.

The enthusiasm that characterised the coming into force of the Convention is expected, as it is the result of a three-year deliberation by the UNCITRAL Working Group II (Arbitration and Conciliation / Dispute Settlement). The Convention, as its full name implies, provides for the enforcement of agreements arising from mediation. However, considering that there is inadequate evidence indicating that there have been difficulties enforcing settlement agreements, one may wonder if there is any urgency or necessity for the Convention. There are also concerns that the Convention may impede the informal and flexible nature of mediation. Notwithstanding the possible negative impacts, it is anticipated that the Convention would have the same effect on mediation as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**NYC**") had on international arbitration. This article therefore provides a brief analysis of the rationale for the Convention, its possible impacts on the global use of mediation in cross-border disputes and the next steps to be taken by Nigeria in order to fully benefit from the Convention.

2. Identifying the Gap

Despite its long term existence, the mediation process is a phenomenon that encompasses diverse definitions and concepts depending on the individual involved.[1] However, it is generally accepted that mediation is an informal, voluntary dispute resolution process in which parties are encouraged to discuss issues openly by a mutually acceptable third party (with no authority to make binding decisions for disputants) who intervenes to assist parties to improve their relationships, enhance communications, and use effective problem-solving and negotiation procedures to reach mutually acceptable understandings or agreements on contested issues.[2]

Its informal process coupled with its overall success rate, cost and time effectiveness are features that are said to make mediation attractive and more suited for cross-border disputes. Despite this and its growing use over the years, it is believed that the absence of a uniform international system for the enforcement of international mediated settlement agreements ("**IMSAs**") is a factor that hindered the widespread use of mediation in the international commercial sector.[3] It is believed that a convention will provide certainty and finality by ensuring a harmonised global enforcement of

[1] Debbie De-Girolamo, *The Fugitive Identity of Mediation* (Routledge Ltd 2013)

[2] Christopher Moore, *The Mediation Process : Practical Strategies for Resolving Conflict* (4th ed, John Wiley & Sons, Incorporated 2014)

[3] Nadja Alexander, 'International and Comparative Mediation; Global Trends in Dispute Resolution' (2009) 4 Kluwer Law International 1

IMSAs and thereby, make mediation more attractive.[4]

Previously, enforcement of IMSAs could only be achieved through three means:

a. Under contract law: this envisages the commencement of a court action where there has been a breach of the IMSA. The main criticism of this process is that it is burdensome and time-consuming. The mere status of a contractual agreement might make the parties feel insecure about the outcome of mediation, even if during the process they actually manage to reach a consensus. The uncertainty brought about by this process is well captured in the following example:

> (…) assume the parties agree to settlement terms which are thereafter formalized in a written agreement executed by the parties … However, following the mediation you wish to enforce the settlement agreement in a foreign jurisdiction. Unfortunately, the agreement is a contract, and therefore its enforceability may depend upon the predilections, whims, and caprices of the national court system where enforcement is sought.[5]

Although, it may be argued that if parties willingly reached a consensus, there is a low probability that any of the parties would choose to disregard their obligations under the IMSA. There is also no proof of an alarming rate of non-compliance with IMSAs. However, the mere existence of the possibility (irrespective of how low) that a party may refuse to implement its terms does not encourage the use of mediation in cross-border disputes.

b. Conversion to a Consent judgment: The major issue with converting an IMSA to a consent judgment is that judgments can only be ***easily*** enforced within the jurisdiction of origin and in other nations that have entered a bilateral enforcement treaty or convention with the jurisdiction of origin. In the absence of this, the enforcement procedure for foreign judgments differs in different jurisdictions, and may be considered another burdensome process.

c. Conversion to arbitral award: Some jurisdictions also permit parties to appoint an arbitrator to issue an award based on their settlement agreement. While in other jurisdictions, for example, Germany, parties may adopt this approach where arbitration proceedings have already commenced but are suspended for parties to attempt mediation. The parties can resume the suspended (arbitration) proceedings where a settlement agreement is reached for it to be converted into an arbitral award which can be enforced under the NYC.

This method appears to be effective but it is not without its limitations. For example, where the settlement agreement includes issues not covered by the arbitration agreement, this would affect the jurisdiction of the arbitral tribunal and subsequently any related award, except the parties have extended the arbitration agreement to cover the issues in question.[6] Also, the conversion of the IMSA to an arbitral award may only be effective where arbitral proceedings commenced prior to the mediation that gave rise to the settlement agreement. This is because under majority of local arbitration laws, an arbitrator can only be appointed where there is a dispute in existence between the parties. Aside this requirement, the NYC applies to the recognition and enforcement

[4] Stacie Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45(1) Wash.U.J.L. & Pol'y 11

[5] David Weiss, 'A Pathway to Enforcement Mechanisms of International Settlement Agreements' (2015) 70(3) Dispute Resolution Journal 25

[6] Alexander (n 3)

of awards that arise out of disputes/differences between persons. Where the mediation has succeeded in settling the dispute between parties prior to the commencement, there is no longer any difference or dispute that the arbitrator is being appointed to resolve and the award may be challenged on this ground. Although, one may argue that the language of Article 1(1) of the NYC does not specify whether the dispute must still be in existence at the time of the appointment of the arbitrator, this uncertainty makes this approach quite unsuitable. Furthermore, where an IMSA is converted into an arbitral award or judgment one may lose the opportunity of addressing potential issues of fraud and duress, which may have occurred during the mediation process.[7]

The uncertainty and dissatisfaction with these methods of enforcement pose a drawback to the utilisation of mediation in global markets and formed the basis for the proposal by the United States of America ("**US**") to the UNCITRAL for a convention on the enforcement of settlement agreements arising from international mediation.

3. Possible Impacts

So far, there has been a large support for the Convention from private practitioners, and general confidence that the Convention would be widely endorsed. However, there are some existing doubts about the impact of the Convention. For instance, will it truly meet its objective of promoting the use of mediation in resolving cross-border disputes? This is dependent on certain factors.

Time is an essential factor in the overall impact of the Convention – considering that the NYC had about ten (10) signatories at its signing ceremony, and it took a few decades before it had an effect on the use of international arbitration, it may take a while before there are visible impacts. Again, it may be argued that at the time of signing the NYC, alternative dispute resolution was just gaining momentum and there may have been no such convention of its kind. This does not change the fact that time would play an important role in the impact of the Convention – more so, considering that the Convention would only come into force six (6) months after a third signatory deposits an instrument of ratification, acceptance, approval or accession. It is believed that the number of countries that ratify the Convention and the urgency with which they will do so, will hugely affect its impact. At present, five countries – Belarus, Singapore, Fiji, Saudi Arabia and Qatar – have submitted their instruments of ratification/acceptance and it is expected that the Convention will come into force on 12 September 2020. It may be assumed that since the Convention will come into force within a year after it became open for signature, its effect will be evident earlier than expected.

Another major concern raised by critics is that the Convention may lead to a negative impact on party autonomy and flexibility of the mediation process. This is however completely unfounded as there is extensive regulation of domestic mediation[8] and these have not in any way impeded the flexibility of the mediation process. Although, having an international framework differs from domestic legislation, as the latter caters for the understanding of mediation practice within each jurisdiction. However, the Convention has retained a significant amount of flexibility and aimed at upholding party control while considering cultural differences in use of terms.[9] In addition, the grounds for refusal as indicated in Article 5 emphasise the need for

[7] Alexander (n 3), 205

[8] The European Union has the EU Mediation Directive 2008/52/EC which has been implemented by Austria, Estonia, France, Greece, Italy and Portugal. The United States also has the Uniform Mediation Act.

[9] Article 2

consensus and party autonomy during the mediation process.

In addition, the impact of the Convention may be dependent on the subsequent interpretation of Article 5. This Article allows a State to refuse the recognition and enforcement of an IMSA on certain grounds, among which includes the occurrence of a "serious breach by the mediator of standards applicable to the mediator or the mediation" without which a party would not have entered into the IMSA.[10] This provision, alongside Article 5(1)(f) which allows refusal on grounds of absence of impartiality and independence, have been criticised as being too general[11] and leaving room to resist enforcement just for the sole reason of re-litigating a dispute[12]. This is because there are generally no uniform standards applicable to mediators, and mediators are not like arbitrators who require a higher threshold to prove independence and impartiality. Consequently, it is believed that where there is a strict interpretation and application of these provisions the Convention is expected to have a greater impact.[13]

The Convention's general impact may also be dependent on how many States would exercise the right to adopt a reservation under Article 8 of the Convention. This Article allows a party to the Convention to declare that it would not apply to agreements to which its government agencies or any person acting on behalf of its government agency is a party. This provision also extends to allow a party to the Convention to declare that the Convention will only apply to the extent that parties to an IMSA have agreed to its application. This is what is described as the "opt-in" option. It is believed that if this reservation is widely adopted, it would have a negative effect on the application of the Convention.[14]

In general, the Convention is expected to redefine the alternative dispute resolution industry and promote the use of mediation as an effective dispute resolution mechanism. It is believed that the Convention will create an equal footing among parties in a commercial relationship from different countries and dissimilar national regulations; increase the compliance rate with IMSAs; and promote the use of efficient and cost-effective dispute resolution by providing for direct enforcement of IMSAs. Finally, it will be an instrument for the promotion of trade and ease of doing business in countries that sign and ratify the Convention.

4. Next Steps: Nigeria's Arbitration and Conciliation Act

The signing of the Convention was held on 7 August 2019. About 70 countries were present at the ceremony and the Convention was signed by 46 countries including Nigeria. At present, 53 countries have signed the Convention and only two have adopted reservations according to Article 8[15]. This number supports the belief that the Convention will indeed promote international mediation. However, these countries are still required to ratify the Convention in order for it to have the force of law in their countries.

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[10] Article 5(1)(e)

[11] Hassan Faraj Mehrabi and Hosna Sheikhattar, "The Singapore Mediation Convention: A Promising Start, An Uncertain Future" <https://leidenlawblog.nl/articles/the-singapore-mediation-convention-a-promising-start-an-uncertain-future> accessed 29 January 2020

[12] Freshfields Bruckhaus Deringer LLP, "46 States sign the Singapore Convention on Mediation" <https://www.lexology.com/library/detail.aspx?g=e8938259-add5-4cd9-99c7-eaeb8fd2df52> accessed 29 January 2020

[13] ibid

[14] https://www.lexology.com/library/detail.aspx?g=e8938259-add5-4cd9-99c7-eaeb8fd2df52> accessed 23 January 2020

[15] Both Belarus and Iran declared reservations upon signing the Convention. See <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 29 January 2020

For a country like Nigeria whose legislative provisions on mediation are not quite extensive, more work still needs to be done. The Arbitration and Conciliation Act[16] ("**ACA**" or the "**Act**") governs the practice of conciliation in Nigeria.[17] It is pertinent to mention that the Arbitration and Conciliation Act is currently undergoing amendment. The Arbitration and Conciliation (Repeal and Enactment) Bill 2019 (the "Bill") was introduced to the Nigerian House of Senate in March 2017 and was passed in 2018. It is currently at the House of Representatives where the Bill is expected to be passed and subsequently submitted to the President for assent, before it comes into force.

A quick perusal of the current Act will reveal that there are only a few provisions that cover domestic conciliation, and barely any in relation to international commercial conciliation. The Act does not provide for the enforcement of settlement agreements (both domestic and international). Although, it provides for rules that parties may apply in international commercial conciliation[18], the Rules do not sufficiently promote the use of conciliation (both at a domestic and international level) as its provisions are inadequate and parties are not bound except, they agree to it. In order to benefit from the Convention and truly promote the use of mediation in Nigeria, it is not enough for Nigeria to only include a provision ratifying the Convention, the legislature may be required to carry out a major upheaval and reform of the legislation regulating conciliation. Below are some recommendations that should be considered in amending the current legislation and creating a suitable atmosphere for the Convention to thrive in Nigeria.

4.1. Mediation/Conciliation Act

As noted above, the ACA makes provisions for the practice of both conciliation and arbitration in Nigeria. However, a great step would be to have two separate laws for these dispute resolution mechanisms. This would ensure that the provisions guiding conciliation are adequately provided and are not overshadowed by provisions on arbitration as it currently is under the ACA. Additionally, it would also ensure that there are adequate provisions for domestic mediation as it is not enough that there are provisions regulating international commercial conciliation and the enforcement of IMSAs. There has to be an equivalent domestic framework which would support the implementation of the Convention.

4.2. Definition and Replacement of "conciliation"

A major provision that should be considered is the definition and replacement of the word "conciliation". As earlier noted, The ACA does not provide any definition on conciliation nor does it indicate whether conciliation as used under the Act includes mediation as widely practised in the country. Going by general definition, conciliation is a dispute resolution process where a neutral third party attempts to assist parties settle their differences by facilitating the communication between them.[19] "Mediation" and "conciliation" are often

[16] Chapter 19, Laws of the Federation of Nigeria 1990

[17] It is important to note that under Article 2 of the Convention, Mediation is defined as a "process ***irrespective of the expression used*** or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute. In practice as well, mediation is often used interchangeably with conciliation. Therefore, the use of conciliation under the Act refers to mediation as defined in the Convention.

[18] Third Schedule to the Act

[19] Black's Law Dictionary (11th ed, 2019). See also Uchenna Jerome Orji, "Law and Practice of Conciliation in Nigeria." *Journal of African Law*, 56(1), 2012 87–108 <www.jstor.org/stable/41709953> accessed 27 January 2020.

used interchangeably, although, there are differing opinions on whether they are inherently the same process.[20] However, mediation is defined under the Convention as all processes, irrespective of the term used, "whereby parties attempt to reach an amicable settlement of their dispute with the assistance" of a third person(s) who lacks the authority to impose a solution on the disputants.[21] At the beginning of its deliberations on the Convention, the initial term used was "conciliation" and it was switched to "mediation" following an agreement that it was more widely used and would provide more visibility.[22] Bearing in mind that "mediation" is the term used under the Convention (regardless of the definition), and is the term often employed in Nigeria, it would be a good step to use the term "mediation" and include a provision that defines this term to avoid any confusion.

4.3. Initiation of Arbitral or Judicial Proceedings

The Act does not address whether parties are free to initiate arbitral or judicial proceedings while conciliation is ongoing. Although, this is addressed under the Conciliation Rules in the third schedule to the Act, for the same reasons mentioned earlier, it is important to include it in the Act for it to have the force of law and extend to all conciliation proceedings, both domestic and international.

4.4. Recognition and Enforcement of Agreement to Mediate

Another important provision that should be included is the recognition and enforcement of agreements to mediate. Although, this was considered during the deliberations on the Convention, it is not included in the Convention. This is because the Working Group was of the belief that the Convention should focus on the outcome of the mediation procedure as there are diverse bases on which mediation may be carried out and this is not restricted to the agreement between the parties.[23] It would be useful to include such provisions in an amended legislation providing for mediation/conciliation in Nigeria as it would further help give mediation the force of law it needs to be promoted as a preferred mechanism.

4.5. Mediator's Conduct

To avoid the complexities that may be caused by Article 5(1)(e) and (f), it is necessary that there are provisions and guidelines that regulate the mediator's conduct during the mediation proceedings, particularly as it relates to their independence and impartiality.

4.6. Public Awareness and Trainings

Beyond ratification, in order to experience the full positive impact of the Singapore Convention, it may also be necessary to:

a. Enlighten current and prospective users of mediation on the provisions of Convention and its advantages. This can done by organising trainings and workshops, particularly, for those within the legal profession who are well poised to advise potential users of mediation.

b. Conduct trainings for mediators and a more uniform guideline for mediators may also be advisable.

[20] Ibid
[21] Article 2(3). This definition includes conciliation
[22] Report of Working Group II on the work of its sixty-seventh session <https://undocs.org/en/A/CN.9/929> accessed 29 Janury 2020 (A/CN.9/929), para 102-105
[23] A/CN.9/861, para 68

It is safe to say that, at present, Nigeria is not lagging behind with respect to ratification of the Convention as only a few countries have actually begun to take steps in this direction.[24] However, considering that the ACA Amendment Bill has taken a significant period going through both houses and is yet to be at the final stage, the most appropriate time to take steps towards ratifying the Convention and amending the Act to make more elaborate provisions on mediation would be this very moment. As a matter of fact, the House of Representatives may introduce more amendments in the Bill[25] to reflect the required changes and consider same. If this is done, and the Amendment Bill eventually passed by the House of Representatives includes additional amendments incorporating the Convention and other provisions on mediation, the House of Senate will be required to reconsider the new amendments before it can be passed to the President for his assent.

5. Conclusion

The Convention proposes to be an essential tool to promote the use of mediation as the preferred mechanism for the cross-border commercial disputes, and to facilitate international trade. However, the Convention can only be a transformative instrument and fulfil its objectives where the right systems are in place for it to thrive. This can be achieved where there are further discussions and steps taken to determine what measures can be implemented in order for the Convention to fulfil its positive impacts. Most importantly, like any other instrument, the major positive impacts of the Convention may not be seen immediately. However, over time, it is expected that it would be one of the greatest agents of global change in respect of international commercial mediation.

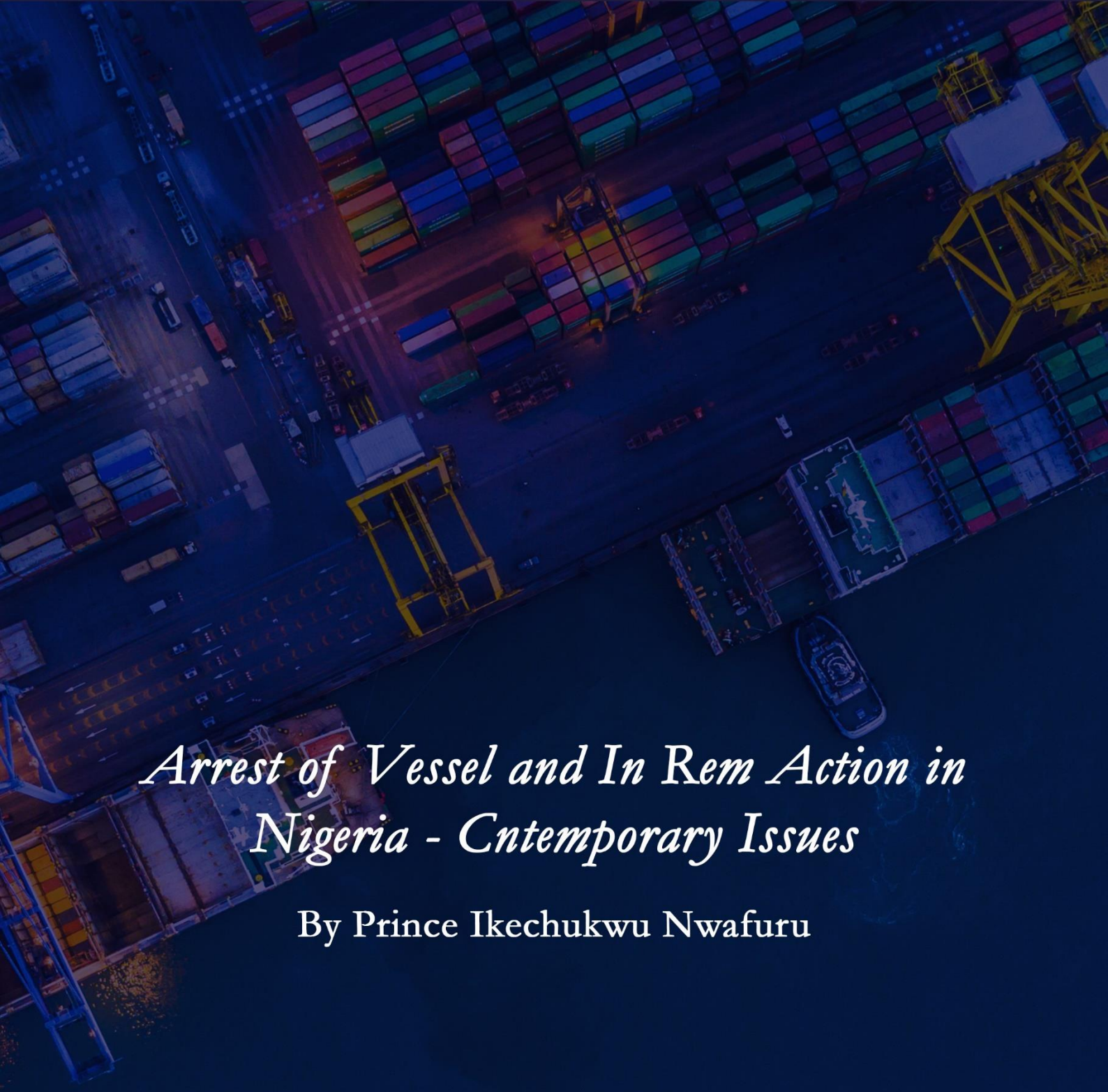


TITILOPE SINMI-ADETONA *is a young professional with an avid interest in effective dispute resolution and conflict management, particularly, arbitration and mediation. She is a graduate of the Comparative and International Dispute Resolution LLM at Queen Mary University of London and is a qualified barrister and solicitor in Nigeria. Generally, her experience (prior to her postgraduate degree), stems from working as an Associate in both the Advocacy and Transactions Departments of Paul Usoro & Co, where she had the opportunity to work on general corporate transactions and provide legal advisory services to companies in different sectors. She also recently participated at the International Chamber of Commerce Mediation week as Mediation Session Supervisor for the 15th International Commercial Mediation Competition.*

[24] As expected, Singapore has taken steps towards ratifying the Convention; its parliament recently passed the Singapore Convention on Mediation Bill which seeks to implement the provisions of the Convention - <https://www.mlaw.gov.sg/news/press-releases/singapore-prepares-to-be-among-the-first-countries-to-ratify-the-singapore-convention-on-mediation> accessed 29 January 2020. See also <https://www.linkedin.com/posts/singapore-international-mediation-centre_sgmediates-singaporeconvention-mediation-activity-6630413446867447808-pAq2> accessed 16 February 2020

[25] That is, if the provisions on both dispute resolution mechanisms will continue to be merged in one document

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Arrest of Vessel and In Rem Action in Nigeria - Cntemporary Issues

By Prince Ikechukwu Nwafuru

LAWYARD QUARTERLY JOURNAL

ARREST OF VESSEL AND *IN REM* ACTION IN NIGERIA – CONTEMPORARY ISSUES -

Prince Ikechukwu Nwafuru

1. Introduction

With over 180 million import-dependent population, huge water resources, and its status as the greatest oil-producing country in Africa, Nigeria's role as the maritime hub of West Africa has never been in doubt. The country controls over 70 per cent of the cargo traffic in the West African region[26] with some of the landlocked countries like Niger and Burkina Faso depending on Nigeria for their importation needs.

These heightened maritime activities make the jurisdiction no stranger to maritime disputes and litigation, and an admiralty action *in rem* is a key feature thereof. An admiralty action *in rem* is a piece of legal machinery directed against a vessel in cases where an aggrieved party seeks to enforce, inter alia, a maritime claim or lien. This does not necessarily mean that the vessel is the wrongdoer, but sometimes it could be the means through which the wrongdoer (its owner) is brought before the court as a defendant.[27]

Generally, an action *in rem* is the very essence of admiralty actions, as it is a unique feature that makes it attractive to litigants and underlies the *sui generis* nature of the action.[28] Some of the recent issues in admiralty action *in rem* are discussed below with suggestions on ways to address the ensuing challenges.

2. Key Issues

2.1. Ex-parte Order of Arrest of Vessel: Is it Granted as a Matter of Course in Every Action *in rem*?

There is a distinction between the right of a claimant to arrest a vessel as a security for a claim and the procedure for obtaining the arrest warrant. The former is in the realm of substantive laws particularly the Admiralty Jurisdiction Act, 1991 ("**AJA**"), while the procedure for exercising that right falls under the realm of adjectival/procedural laws i.e. Admiralty Jurisdiction Procedure Rules, 2011 ("**AJPR**"). Instructively, before a court can make an arrest order, it must have jurisdiction to "hear and determine" the substantive issue in dispute. In other words, an action for security without more does not by itself constitute a cause of action, as it is not one of the heads of claim identified as a maritime claim under section 2 of the AJA[29].

To invoke the jurisdiction of the court to hear and grant an ex parte application for the arrest of a vessel, the law requires

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[26] See Premium Times Online Report - https://www.premiumtimesng.com/news/more-news/280650-nigeria-controls-70-cargo-traffic-of-west-central-africa-official.html Retrieved on 20 January 2020

[27] See *Rhein Mass Und See & Ors v. Rivway Lines Ltd (1998) LPELR-2948(SC)*. See also *Pacers Multi-Dynamics Ltd v. The M.V. Dancing Sister & Anor (2012) LPELR-7848(SC)*.

[28] Chukwuechefu Ukattah, PhD and Maryam Oyebode, "*Admiralty Action In Rem: The Value Of Security To Be Furnished For The Release Of An Arrested Vessel Or Other Property In Nigerian Admiralty Law*" Gravitas Review June 2017, Vol 8 No. 2.

[29] A reference in the AJA to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim. Examples of proprietary maritime claims include claims relating to possession or ownership of a ship, ship mortgage and claims for enforcement of foreign judgment against a ship; Instances of general maritime claims include claims for damages or injury received or caused by a ship, or for personal injuries or loss of life caused by a ship, claims for carriage of goods and persons and for breach of charter-party, claims relating to salvage, general average and bottomry and also claims for enforcement of arbitral awards in respect of proprietary maritime claims.

the plaintiff to show a cause of action rooted in maritime claim or lien. Sequel to the arrest, the parties will proceed to litigate the substantive issues unless the dispute is settled at the interlocutory stage, subject to the power of the Court to stay proceedings under section 10 of the AJA.

In practice, there are times when the claimant is only interested in commencing an *in rem* action just to obtain an order of arrest which will serve as a security for a claim or arbitration in a foreign Court or foreign arbitral Tribunal.[30]

Furthermore, section 10 of the AJA empowers the Court to stay proceedings where it appears to it that the claim should be determined by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country. Unlike the stay application under section 4 or 5 of the Arbitration and Conciliation Act[31], which is usually made by the Defendant, the stay envisaged under section 10 of AJA is sui generis such that either party can make the application. Even the Court may *suo motu* stay proceedings to allow parties litigate or arbitrate the dispute in foreign forum.

That said, it is instructive to note that the arrest application is not granted as a matter of course. Instances abound where the courts have refused to grant arrest order even though the cause of action supports action *in rem*. This could be as a result of procedural irregularities such as the failure of the Claimant/Applicant to satisfy the requirements of AJPR or other conditions precedent. For instance, in the case of ***Anchor Limited v. The Owners of the Ship Eleni***[32], the Federal Supreme Court of Nigeria (as it then was), refused an Application for the arrest of the ship "***Eleni***" on the ground that the action had proceeded *in personam* and judgment was obtained against the Defendant personally and this was despite the fact that the cause of action supported an action *in rem*. Similarly, if an application for arrest of a ship is refused in an *in rem* action or granted but the ship was released after the arrest, the action can proceed as an action *in personam* regardless of the form of the writ.[33] Thus, whilst arrest of ship is a major feature of *in rem* action, it is not in all cases that such application is granted.

2.2. Value of Security to be provided upon Arrest – Is it the amount Claimed or the Value of the Ship?

The value of security offered by ship owners or demised charterers following arrest has been a subject of arguments in recent times. Order 10 Rule 5(1) of the AJPR, provides that where a ship or other property is arrested, the security to be provided shall be "an amount equal to the amount claimed or the value of the ship whichever is less."

In ***Mobil Nigeria Producing Unlimited v The Monarch & Ors.***34, following the arrest of the 1st Defendant, the Owners applied for the variation of the order of arrest pursuant to the afore-referenced provision of AJPR. In opposing the

[30] *Messrs NV. Scheep v The MV "S. Araz" (2000) 15 NWLR (pt 691) 622, S.C (MV Araz) and Angara v Chrismatel Shipping Co. Ltd (2001) 8 NWLR (pt.716) 685*
[31] Cap A18, Laws of the Federation of Nigeria, 2004
[32] (1956) 1 NSC 42 (FSC)
[33] See the case of "The Deichland" (1989) 2 Lloyd's Rep. 113 at 125 cited in "*In Rem or In Personam: Mode of Exercise of Admiralty Jurisdiction*" being a Paper presented by Mike Igbokwe SAN at the Admiralty Resource Services' Nigerian Maritime Masterclass held in Surulere Lagos on 21 to 22 April 2010.
[34] (Unreported) Suit No FHC/UY/CS/43/2016

application, it was argued that the value of the security to be provided for the release of the vessel is sufficient security to cover the amount of the plaintiff's claim with interest and cost on the basis of its reasonably arguable best case, relying on the English case of ***The Moschanthy***[35]**.** In agreeing with the Owners of the Vessel, the Federal High Court held that the Court has the discretion to vary the arrest order and that by the provision of Order 10 Rule 5(1) of AJPR, the value of security to be provided by the Owners of the 1st Defendant for her release is the value of the Plaintiff's claim or the value of the vessel whichever is less. Consequently, the Court varied the order of arrest and ordered the valuation of the vessel by a ship valuer.36 It has been argued that the ruling is apposite as it reiterates the view earlier espoused by the Supreme Court in the ***Anchor Ltd v The Owners of the Ship Eleni***[37] and ***Rhein Mass Und See GMBH v Rivway Lines Ltd***[38].

Another view is that the decision in Mobil's case being a decision of a Court of first instance, may not be taken as a settled law on the point. See for instance, the decision in ***MV "Nozomi" & Anor v. Seabridge Bunkering Pte Ltd***[39]**,** where the Court of Appeal held that the security to be covered would include the (1) The principal claim; (2) Interest on the principal claim; (3) Cost of action. Interestingly, the Court of Appeal in coming to the above conclusion relied on the case of ***Finunion Ltd. V. M.V. Briz***[40] which was referred to by the ship owners but rejected by the Learned Judge in Mobil's case.

Clearly, the last has not been heard on the position of the Nigerian Court on the value of security to be provided upon arrest given the divergent views reflected in the afore-referenced cases. Even the Supreme Court decisions referenced above may not be taken as the settled law on the point as the value of security provided upon arrest was not directly in issue in those cases. Nonetheless, it is this writer's view that the position taken by the Federal High Court in ***Mobil Nigeria Producing Unlimited v The Monarch & Ors*** accords with commercial commonsense and reflects the preponderance of judicial decisions on this point.

2.3. Form of Security for the Release of a Vessel: Bank Guarantee or Something Else?

After an arrest, the ship owners may take several steps, which include challenging the arrest or providing a security for the release of the ship. Even when the latter step is taken, it does not preclude the ship owner or demise charterer from challenging the arrest or making a claim for wrongful arrest. Similarly, the fact that an arrest is being challenged does not bar the provision of a security, pending determination of the application. The importance of providing security is to minimize costs associated with the arrest and detention of the vessel such as

[35] (1971) 1 Lloyd's Rep 37.
[36] Chukwuechefu Ukattah, op. cit.
[37] [1956) 1 NSC 42, 43.
[38] [1998] 5 NWLR (Pt 549) 265, 277
[39] (2016) LPELR-41449(CA).
[40] 1997) 10 NWLR page 141. Also *M.V. Araz v. L.P.G. Shipping S.A.* (1966) 6 NWLR Pt. 457 page 720

demurrage, port charges and damages for breach of terms of charterparty, etc.

The order of arrest usually provides for the nature of security to be provided. In Nigeria, it is common to ask for a Bank Guarantee from one of the first class or tier-one Banks or even from a reputable foreign Bank with a good credit rating. In practice, the vessel owners may negotiate with the arrestor for an alternative security outside the one stipulated in the arrest order. For example, a Letter of Undertaking from Protection & Indemnity (P&I) Club ("**LOU**") or Insurance Bond from a reputable Insurance company or even a deposit of the sum in an interesting yielding account in the name of Admiralty Marshal could serve as alternative security.

In ***MV "Nozomi" & Anor V. Seabridge Bunkering Pte Ltd***[41] the Court of Appeal listed three forms of security generally accepted, viz: (1) LOU; (2) Bank Guarantee and (3) Insurance Bond from a reputable Insurance company. In this case, the Appellant relying on the Arrest Convention of 1956 which Nigeria ratified in 1966 and the AJPR had argued that any of the three options may be acceptable subject to the circumstances of each case. It was further submitted that the North of England LOU having been universally recognized as a good security both by the Statute and judicial precedents, and the trial Judge ought to have accepted it. To show the reliability of the Letter of Undertaking, the Appellant referred to its affidavit wherein it was deposed that the North of England P&I Club is a member of the International Group of Protection & Indemnity Associations which are still a going concern. Thus, this decision recognizes the security options available to the parties in an *in rem* action and also the discretion of the Court to decide which security option is appropriate in a given case.

Notwithstanding the above decision, in Nigeria, there is a preference for Bank Guarantees, because of the difficulty in the enforcement of an LOU. This preference has been attributed to the ease of enforcement in Nigeria, particularly given that an LOU often contains a foreign jurisdiction clause mandating the arrestor to submit to the jurisdiction and laws of foreign courts in the event of dispute. This to some extent may support the arguments by some that the enforcement of LOUs presents some difficulties in Nigeria. However, whether the arrestor is a foreign or local entity, parties can negotiate and agree on the terms of the LOU including the applicable choice of law and forum.

2.4. Incursion into admiralty matters by the State High Court and the National Industry Court

Some recent decisions of the Courts appear to have paved way for the State High Courts and National Industrial Court to venture into admiralty disputes. Whilst some of these decisions have shown the need to amend the existing laws, others are borne out of the failure of the Court to apply the purposive approach in the interpretation of our maritime laws. Two of those cases will be considered here:

[41] *(2016) LPELR-41449(CA).*

a) *Claim for wages of members of the crew and ship masters*

A claim by a master, or a member of the crew of a ship for wages or any amount that the ship owner is under obligation to pay (whether arising out of contract or by operation of the local law or foreign law) is a maritime claim under section 2(3)(r) of AJA and entitles the claimant to institute an action *in rem* for the arrest of the vessel of the owner or a demise charterer for the purpose of securing the claim. It also confers a maritime lien by virtue of section 5(3)(c) of the AJA. Being a maritime lien, it hovers, attaches to, and remains with the vessel irrespective of who is in actual possession thereof at any given time. However, section 254C of Constitution of the Federal Republic of Nigeria, 1999 (as amended by the 3rd alteration) (the "**Constitution**"), has vested exclusive jurisdiction on the National Industrial Court over disputes relating to labour, employment, payment of salaries, wages, pensions, gratuities, allowances, benefits and any other entitlement of any employee.

This apparent conflict came to bear in the recent case of ***Assuranceforeningen Skuld v. MT "Clover Pride***[42] which involved the claim by the plaintiff for the sum of $293,702.68 from the demise charterer/defendant for losses suffered due to the defendant's breaches of its various employment agreements with the crew. The vessel was subsequently arrested to secure the applicant's claim. Following the application by the owner of the vessel (who was joined as an intervener in the Suit) for the discharge of the order of arrest and striking out of the Suit for want of jurisdiction, the Federal High Court agreeing with the owner, discharged the arrest order and transferred the Suit to the National Industrial Court. In coming to this conclusion, the Federal High Court considered the provisions of sections 254C, 251, 257 and 272 of the Constitution vis-à-vis section 2(3)(r) of AJA and opined that the afore-referenced provision of AJA is void to the extent of its inconsistency with the Constitution.

It may be difficult to fault this decision in principle due to the express provision of 254C of the Constitution. However, this decision has thrown up a significant challenge in admiralty action *in rem* as it has taken away the security afforded to the crew members who would prefer to secure their claims against ship owners or demise charterers through an *in rem* action. Therefore, the challenge with approaching the National Industrial Court by an unpaid member of crew or a ship master is that the National Industrial Court will not be in a position to order the arrest of a ship. The decision has been criticized as it portends significant implications for Nigeria's maritime jurisprudence as crew members and masters will face the uphill task of enforcing a favourable judgment against an employer that, in many cases, will be resident in a foreign country with no fixtures or assets within the court's jurisdiction. Thus, the claimant will likely encounter grave

[42] (Unreported) Suit FHC/L/CS/1807/2017

procedural difficulties in not only initiating its claim, but also enforcing it in the event of a successful judgment.[43] What then is the way forward for the crew members, with the over-arching provisions of section 254C of the Constitution standing on their way? It is either the Constitution is amended to exclude the claim by crew members from the purview of the National Industrial Court or the Court should adopt a purposive approach in its interpretation of the provision.

b) *Stevedoring*

The Court of Appeal in the case of ***M.R.S Oil & Gas Company Ltd. v. Dock Management Ltd.***[44], recently upheld the jurisdiction of the Lagos State High Court in the Suit seeking to recover the cost of stevedoring services rendered by the Respondent to the Appellant. The appellate Court reasoned that the services rendered even though stevedoring (which involves handling of goods onto and off a ship), are simple contract and recovery of debt action simpliciter since the services have been rendered and it is the outstanding payment that was being claimed. It is difficult to reconcile the above decision with the reasoning of the Supreme Court in ***Tugbobo v. Adelagun***[45] where it was held that stevedoring is a special kind of labour contract. Being a maritime claim, it entitles the stevedore to institute an *in rem* action to secure his claim.

The decision in ***M.R.S Oil & Gas Company Ltd*** that admiralty jurisdiction arises only when the goods and services are still on a ship is with respect a set back to the development of maritime jurisprudence. Interestingly, when the arguments of the Respondent in ***M.R.S Oil & Gas Company Ltd*** case are closely considered, one will find it more difficult to agree with the conclusion of the Court. The Respondent had conceded that the claim arose from stevedoring services but went ahead to argue that the suit is a recovery of simple debt which falls with jurisdiction of the State High Court. The Court of Appeal relied on ***Petro Jessica & Anor v. Leventis Technical Co. Ltd***[46] where it was held that once cargo has been discharged from a vessel, admiralty jurisdiction ends. With respect, the Petro Jessica's principle should not be extended to a claim arising from stevedoring services. Stevedoring is a maritime claim under section 2(3)(k) of AJA being a claim in respect of services supplied to a ship for its operation or maintenance. A closer consideration of the section will reveal that "stevedoring" refers to either a service already supplied to the ship or a contemplated or agreed service to be supplied to the ship. In other words, it refers to a claim in respect of completed stevedoring service or stevedoring service yet to be offered. This restricted interpretative approach

[43] Enare Erim, "Claims for unpaid crew wages unenforceable in Federal High Court" contributed by Akabogu & Associates https://www.internationallawoffice.com/Newsletters/Shipping-Transport/Nigeria/Akabogu-Associates/Claims-for-unpaid-crew-wages-unenforceable-in-Federal-High-Court visited on 02 August 2018.

[44] *(2017) 4 CLRN; (2016) LPELR-42251(CA).*

[45] ***(1974) LPELR-3271(SC),***

[46] (1992) NWLR (Pt. 244) 675.

to maritime cases is capable of denying maritime claimants the benefits that are available only in admiralty action in rem.

2.5. Maritime Lien - the need for expansion

The desirability of the action founded under maritime lien is that the claimant can proceed against the vessel irrespective of who is in control or in possession. Maritime lien is a right that hovers, attaches to and remains with the vessel irrespective of who is in actual possession thereof at any given time.[47] The recognition of claims falling under maritime liens differs from jurisdiction to jurisdiction. In Nigeria, just like in England, maritime lien is confined to a small cluster of maritime claims. This contrasts with the United States where a wide range of maritime claims falls within maritime liens. Section 5(3)(a)-(d) of AJA confines a maritime lien to (a) salvage (b) damage caused by a ship; (c) wages of the master or of a member of the crew of a ship; (d) master's disbursements.[48] As noted earlier, the Court has held that claims for wages of crew members and master of a ship are now employment matters and by virtue of the 3rd alteration to the Constitution are within the exclusive jurisdiction of the National Industrial Court..

Another advantage of a maritime lien over other maritime claims is that it allows the claimant to go against the vessel without necessarily showing that the relevant person is the owner or demise charterer.[49] Thus, the limited scope of maritime lien under the AJA poses a conflict of law challenge to a claimant in Nigeria whose maritime lien is recognized in foreign jurisdiction but not accommodated under the narrow precincts of the AJA.

Recently, the Federal High Court, Lagos was faced with the conflict of law situation and had to apply the USA maritime law in a claim premised on a maritime lien over a bunker supply claim.[50] My role and involvement in the said case exposed me to the need for expansion of maritime lien under AJA. The AJPR also needs to be amended to address the procedural bottleneck of requiring a claimant whose claim is premised on maritime lien, to establish that the defendant either has legal or equitable ownership of the ship. Thus, having agreed that maritime lien hovers, attaches to and remains with the vessel irrespective of who is in actual possession, it becomes a contradiction for AJPR to expect the claimant seeking to enforce his maritime lien by arrest application, to establish legal or equitable ownership of the ship.

3. CONCLUSION

Granted that there have been conscious efforts both in terms of legislations and judicial decisions to reflect the practices and principles applicable in other maritime jurisdictions in our maritime jurisprudence, it is however, suggested that some amendments of the laws are still required to address some of the issues discussed here particularly on the incursion of

[47] See L. Chidi Ilogu, "**Essay on Maritime Law and Practice**" (ELCAM integrated Services Ltd, Lagos), 2006

[48] See also section 67 of the Merchant Shipping Act, 2007.

[49] Tawa Petroleum Products Co Ltd & Anor v. The Owners of M.V. Sea Winner & Ors NSC (1980-1986) Vol. II, page 25,

[50] Suit No. FHC/L/CS/223/2019: OceanConnect Marine Pte Limited v. EM RUBY and Nordia Bulk A/S Limited

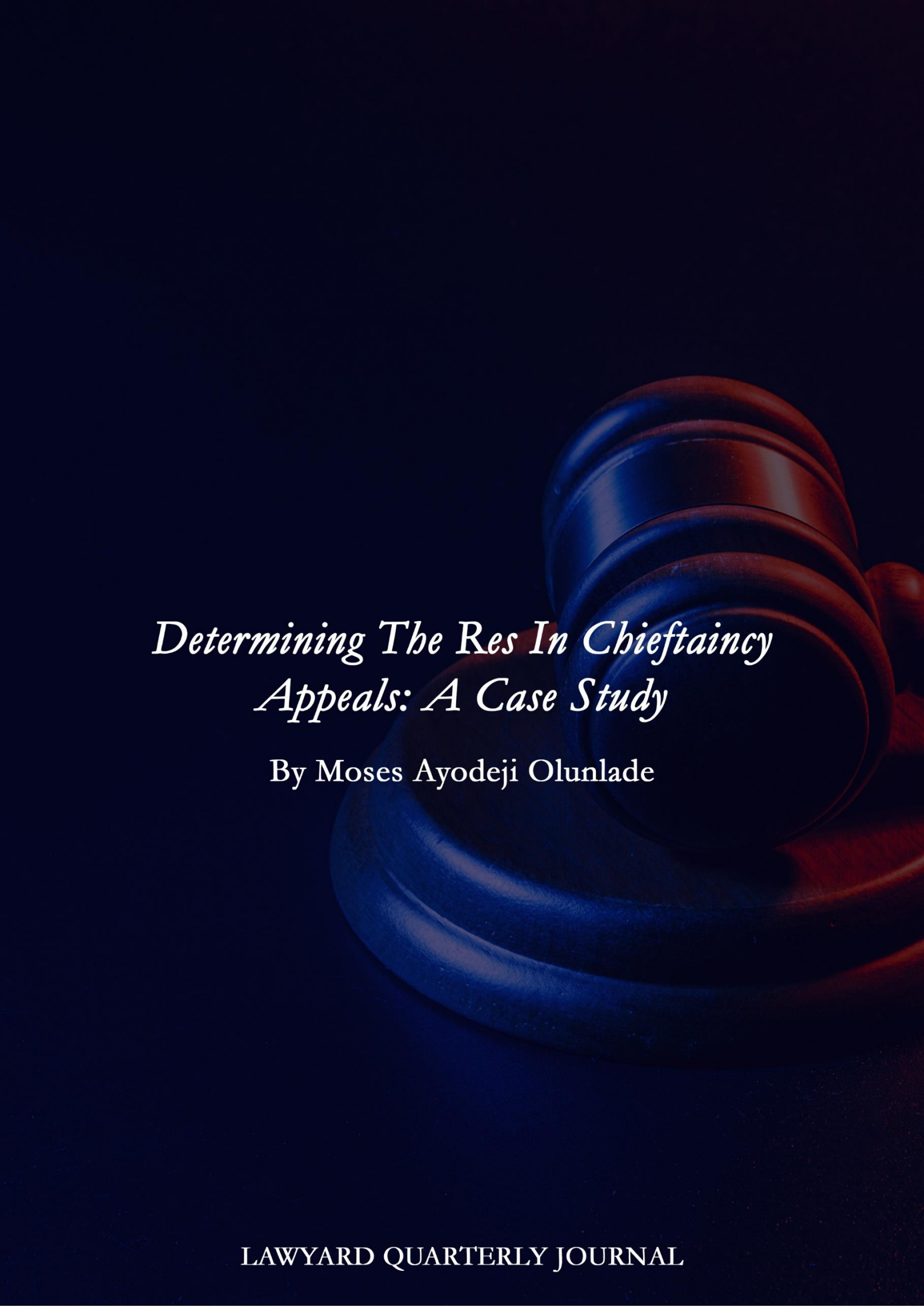
other courts of coordinate jurisdiction into admiralty matters. Additionally, the scope of maritime lien and the enforcement procedural requirements under the AJPR should be rejigged to reflect the developments in maritime nations particularly the 1999 Arrest Convention. It is also hoped that judges would approach admiralty matters with a purposive binocular, having in mind the sui generis nature of *in rem* action and the security it offers claimant which is not available in other civil courts. Lastly, Nigeria should accede to the International Convention on Arrest of Ships, 1999[51] as the Convention has addressed some of the challenges often encountered during ship arrest such as the issues of relevant person and the requirement under the AJA that the right of arrest can only be exercised against owners and demise charterers.[52]



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[51] Nigeria has only acceded to the 1952 Arrest Convention which has been replaced by the 1999 Convention. The 1999 Arrest Convention came into force in September, 2011

[52] The 1999 Arrest Convention amongst other things has expanded the right of arrest to include the owner, demise charterer, manager or operator in cases where there is a maritime lien under the law of the State where the arrest is applied for.



Determining The Res In Chieftaincy Appeals: A Case Study

By Moses Ayodeji Olunlade

LAWYARD QUARTERLY JOURNAL

DETERMINING THE RES IN CHIEFTAINCY APPEALS: A CASE STUDY -

By Moses Ayodeji Olunlade

1. Introduction

By the rules of the legal profession[53], every lawyer is duty bound to show a considerable degree of devotion and dedication to the cause of his/her client. From a personal perspective, it is observed that most lawyers in Nigeria have made it a habit to abide by this rule and sometimes go beyond the vision of the lawmaker. It is not uncommon to encounter legal practitioners who use their expertise to delay the timeous hearing of a suit, or engage in other shenanigans, where they stand little chance of succeeding.[54]

The trend of impassioned dedication by lawyers has brought about a scenario in our jurisprudence where the first step to be taken by a defeated litigant is, by default, the filing of an application for stay of execution or injunction pending appeal. Ideally, lawyers ought to weigh the merits of their case, use their knowledge of the law to make a calculated projection, that is, whether there is a good chance of the case succeeding and advise the client accordingly. Unfortunately, it is not uncommon for the applications for stay of execution or injunction pending appeal to be used chaotically to further impose hardship on a successful litigant and deny him the rewards of his victory.

The courts have come up with rules to guide the granting or refusal of these applications, but these rules are incapable of preventing the *mala fide* use of these applications pending appeal.

2. Guiding Principles on Stay of Execution and Injunction pending Appeal

The factors which the courts will consider in any such application are:[55]

a) The judgment must be appealed against.[56]
b) Notice of appeal must contain substantial grounds of appeal to warrant the evaluation that there is a *prima facie* likelihood for the appeal to succeed.
c) The nature of the subject matter or *res*.
d) Probability of reaping the fruit of judgment if the application is refused but appeal succeeds.
e) In money judgments, ability to pay back.
f) Poverty.

It is important to emphasise at this point that the only condition that determines which application would be proper is the nature of the judgment appealed. If it relates to an executory judgment, a stay of execution is proper, while injunction pending appeal is used to arrest the effect of a declaratory order.

The focus of this paper is the res since it is often the factor relied upon by applicants appealing against judgments containing declaratory orders. This is so because, depending on perspective, it can be argued that the res in such instances cannot perish.

3. A Case Study

The following hypothetical scenario is put up for consideration and examined vis-à-vis the desire to protect the res when granting or refusing an application for stay or injunction pending appeal –

X is installed to a chieftaincy stool by the prescribed authority for that chieftaincy. Y is

[53] Rule 14 Rules of Professional Conduct for Legal Practitioners 2007 (RPC)
[54] The adoption of such methods is in conflict with the provisions of Rule 15 RPC which stipulates that legal practitioners are to represent clients within the ambits of the law
[55] See Vaswani Trading Company Limited v Savalakh (1972) 7 NSCC 692
[56] A copy of such judgment must be attached to the application in order for such an application to be competent. See Sheshe v Ibrahim (2012) All FWLR (Pt. 655) 328 CA

aggrieved and institutes a suit challenging the installation of X. At the conclusion of trial, the court rules in favour of Y having found a patent anomaly in the events or process building up to X's installation. Y is therefore declared as the rightful owner of the chieftaincy stool and the court orders that he is installed in the place of X. X appeals and applies for stay of execution in order to retain his status as the holder of the chieftaincy pending the determination of the appeal.

4. Case Study Examined

The first consideration is the reason why an application for stay of execution may be sufficient in this scenario. By nature, declaratory orders are abstract but are capable of grounding substantive claims. In other words, a declaratory judgment is an embodiment of the recognition of a particular right which may be the basis for subsequent proceedings to enforce such right, where such right is threatened or is being violated.57 As earlier stated, a stay would only be applicable to a judgment that is executory in nature and inapplicable to declaratory ones.58

It is not the attitude of the courts however, to dismiss an application for stay of execution on the basis that the judgment appealed against contains declaratory orders. As it may be deduced from the case study, most declaratory orders are accompanied by injunctive orders calculated to bring the declaratory order into concrete existence (as opposed to its otherwise abstract existence). Hence, more often than not, the judgment appealed is executory and is capable of being stayed. As noted in Aondoakaa v Obot59, the Court of Appeal on the premise of the Supreme Court decision in Okoya v Santili60 held as follows:

> *An executory judgment or order has coercive force and declares the respective rights of the parties and proceeds to order the defendant to act in a particular way, namely to pay damages, or refrain from interfering with plaintiff's rights and such order being enforceable by execution if disobeyed.*

The Court of Appeal streamlined the reasoning of the apex court by concluding that a judgment is executory, where even the declaration contained therein is a complete and binding order.61

5. What then is the *res*?

The res is that thing, whether property, interest or status that is the object of rights especially that is the subject matter of litigation.62 It is an undisputable fact that the res at the beginning of the suit at the trial court is, per se, the chieftaincy stool itself. Thus, the court would encourage, and sometimes order the parties to maintain status quo. That is, the court may restrain the plaintiff Y from touting himself as the holder of the chieftaincy stool during the pendency of the suit. However, once judgment has been entered in favour of plaintiff Y, it is certain that the rights of the parties have been determined and any appeal is then based on the assertion that plaintiff Y is the rightful holder of the chieftaincy stool.

It is hereby maintained that while the appeal may visit and vary the verdict regarding the chieftaincy stool, the parties ought not to be viewed as though they are on equal standing as it was the case at the trial court. Therefore, it is proposed that the res in such appeals ought not to be the chieftaincy itself. Rather, the time within which the successful litigant may enjoy the fruit of his victory is the res.

It is trite that the court will not make an order in vain.63 Further, as it is most often stressed by the courts, it is not the practice of the court

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57 Ilobi v Uzoegwu (2005) All FWLR (Pt. 285) 595 CA
58 Aondoakaa v Obot (2013) All FWLR (Pt. 673) 1967 CA
59 Supra
60 1 NSCC 21 (PT. 1) 367
61 Aondoakaa v Obot Supra at 1985-1986
62 <https://www.merriam-webster.com/dictionary/res> accessed 31 January, 2020; Black's Law Dictionary (9th edn.)
63 Oke v Mimiko (2013) All FWLR (Pt. 693) 1853 SC

to take with one hand that which the court has given a successful litigant with the other hand. Bearing these principles in mind, there ought to exist an advantage, a metaphoric pedestal, which accrues to Y prior to the determination of X's appeal. Does this mean that X's application should be rejected? No. Every case is determined by the court based on its peculiarities and this dissertation only focuses on the facts as portrayed in the case study above. Nonetheless, if the court concurs with such reasoning that the res of the appeal is the time afforded the successful litigant to enjoy the fruit of victory, the application for stay may not be granted as often as is currently by the court.

Indeed, it is on the foundation that the res is the chieftaincy stool itself that the court has held on multiple occasions that order of stay of execution should be granted while the dismissed occupier is desirous of exercising his right of appeal. In the often cited Oyeyemi v Irewole Local Government64, it was held that:

Once installed, the occupier of a chieftaincy office must be preserved until he exhausts his right of appeal (to the Supreme Court) before he can be removed, except he refused to appeal.65

The premise of what the res is, which this paper argues is flawed, i.e. the chieftaincy plays a major role in the birth of this principle.

Put simply, while the chieftaincy position is viewed as the subject matter, there is a presumption that the res is indestructible, prompting the court to assume the cautious position that the status quo should be maintained since the res cannot be extinguished. To hold a contrary view that the subject matter of the appeal is no longer the position itself but that the time to be used in the position is suddenly, but surely, defeats the ruse that the res cannot be extinguished. Human life is finite and the right to hold a chieftaincy is a personal right enjoyed by a person by virtue of his genealogy or other conditions regulating that chieftaincy.

In the event of the death of Y (now respondent) to the appeal of X, could it not be said that the order of the trial court was made in vain? How could the justice of the case be met when a successful litigant is denied the fruit of his labour? Is it fair in law to hold a person's right in abeyance even when there is a presumption of that party having a superior right? Ultimately, the decision lies with the court to determine when such situation arises. The nature of chieftaincy as a personal right accruing to a litigant differentiates the declaratory order thereby obtained from other transactions such as land disputes. Death will not exhaust the res in a land matter as the suit can survive the death of the litigant and taken over by the deceased litigant's estate or person(s) claiming through him. Yet, this is not the same in a chieftaincy dispute as the suit cannot survive the death of either litigant. Hence it is submitted that the res is time.

6. Conclusion

Legal practitioners are urged not to discountenance the basis of the argument canvassed in this article merely because it is a departure from the known and established principles. As stated by foremost Professor of Jurisprudence Festus Emiri66:

> *While it is true that disagreements between lawyers on the content of law, whether a legal decision is right or wrong on objective terms may turn on their preferences, it would certainly be preposterous to suggest that all such disagreements are and they cannot be located on distinctive legal grounds.*

The arguments canvassed in this paper have not been put forth to the courts for adjudication. Hence, it is unknown what the

64 (1993) 1 NWLR (Pt. 270) 462

65 See also Governor of Imo State v Anosike (1987) 4 NWLR (Pt. 66) 663

66 Festus Emiri, *Law, Objectivity And Truth: A Cathedral View* Nigerian Law and Practice Journal (Vol. 10) at p. 25

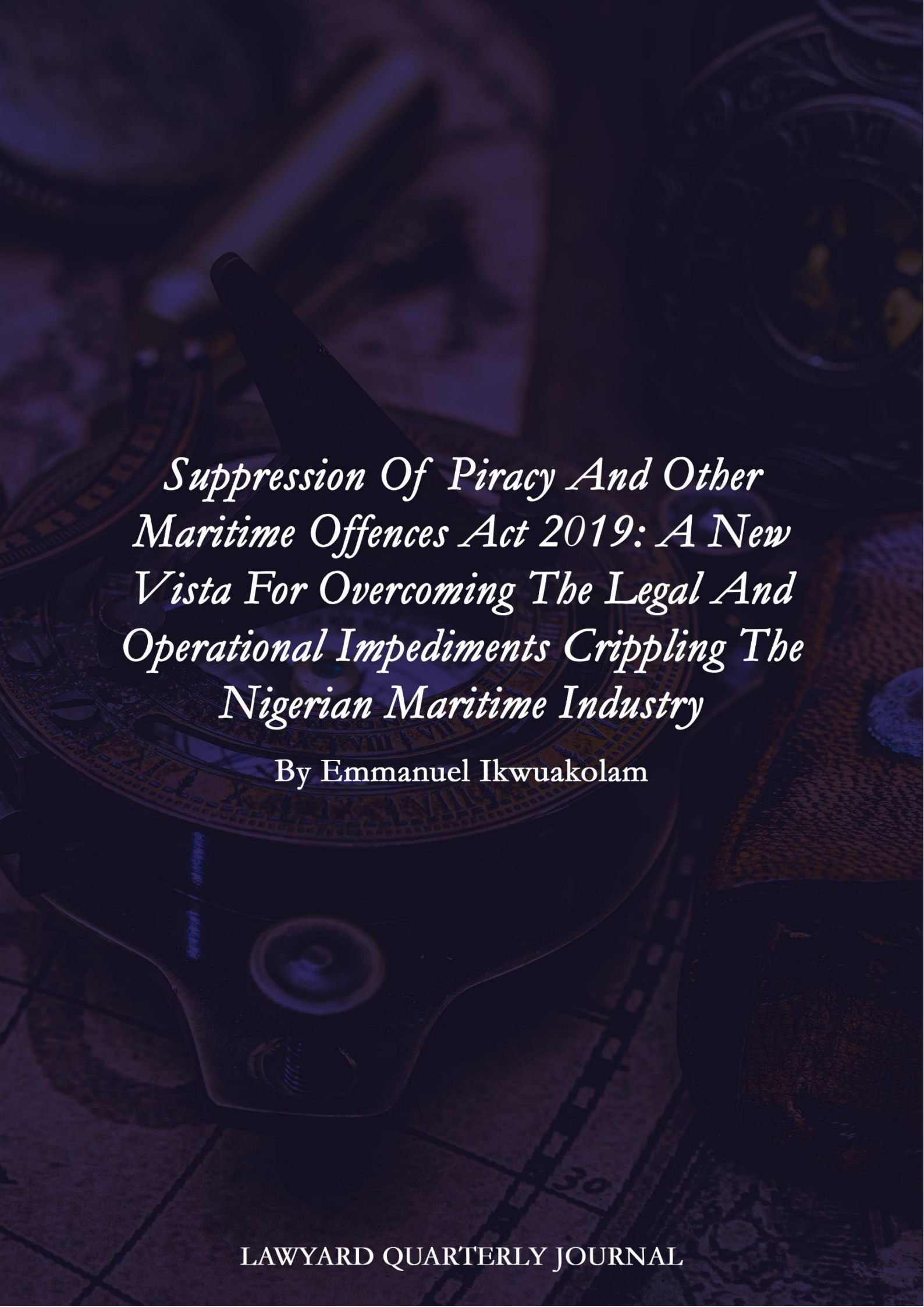
courts will decide when such arguments are made. The position is clear, that the court loathes an academic suit and will not entertain an academic question.[67] Therefore, until such a time as the court will determine a case based on this argument or a similar one, its validity rests on the opinion of the jurists, legal practitioners and other stakeholders in the legal profession.

Finally, it is submitted that the time afforded the successful litigant to reap the fruit of litigation is the res in a chieftaincy appeal.



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[67] Oke v Mimiko Supra



Suppression Of Piracy And Other Maritime Offences Act 2019: A New Vista For Overcoming The Legal And Operational Impediments Crippling The Nigerian Maritime Industry

By Emmanuel Ikwuakolam

LAWYARD QUARTERLY JOURNAL

SUPPRESSION OF PIRACY AND OTHER MARITIME OFFENCES ACT 2019: A NEW VISTA FOR OVERCOMING THE LEGAL AND OPERATIONAL IMPEDIMENTS CRIPPLING THE NIGERIAN MARITIME INDUSTRY -

By Emmanuel Ikwuakolam

1. Introduction

Piracy and armed attacks against shipping represent an enduring threat to maritime trade in Nigeria. In the past, the deployment of multinational forces around the horn of Africa, particularly off the east coast of Somalia, made it seem like piracy was a Somali problem.[68] However, with recent developments and statistics, there is no gainsaying the fact that piracy is indeed a major problem for Nigeria to grapple with, in order to enhance development of her maritime sector. In Nigeria, the growth of piracy has been on the upward trend, causing the nation huge economic loss and insecurity. The country has however, been severely hampered in her attempts to tame maritime security challenges due to the absence of an effective legal and institutional frameworks to halt the malaise of piracy and armed robbery at sea. The problems often encountered in this regard range from issues of judicial application of ratified international treaties to other problems such as the lack of an effective domestic legislation and policy which for many years held Nigeria's maritime sector moribund. In the succeeding parts of this paper, we shall therefore, critically examine these shortcomings and the impact of the Suppression of Piracy and Other Maritime Offences Act 2019.

2. The Extant Legal Framework Prior to the Enactment of the Suppression of Piracy and Other Maritime Offences Act 2019

Prior to the enactment of the **Suppression of Piracy and Other Maritime Offences Act 2019**, security in the Nigerian maritime industry was enhanced through various international treaties and Conventions ratified by Nigeria. Of particular moment are the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) 1988. Articles 100 to 107 of the UNCLOS set out the legal framework applicable to countering piracy and armed robbery at sea. However, whereas UNCLOS contained clear provisions on piracy, it had nothing to say about armed robbery at sea and many other forms of illegality perpetrated at seas and was therefore found wanting on issues pertaining to the enforcement of offences which were not 'piracy' *stricto sensu*[69]. The UNCLOS also problematically defined piracy as:

(a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers

[68] Omovigho Cynthia Brume-Eruagbere, 'Maritime law enforcement in Nigeria: The challenges of combating piracy and armed robbery at sea' (World Maritime University Dissertations 2017) 5.

[69] It is imperative to note that the distinction between piracy and armed robbery at sea is a subtle one. An act is deemed a piracy where any illegal acts of violence or detention, or any act of depredation that occur (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State. On the other hand, illegal acts committed for private ends by the crew or the passengers of a private ship or a private aircraft against persons or property in the territorial waters, internal waters, ports and Anchorages of a country. For a detailed explanation of this distinction, see; Mike Igbokwe, 'Piracy and Armed Robbery at Sea: Issues of Legal Interpretation and Judicial Application By Kamal-Deen Ali (A Commentary delivered at the 15th International Maritime Seminar for Judges organised by the Nigerian Shippers Council in conjunction with the National Judicial Institute, at Sheraton Hotel & Towers, Abuja 3-5 July 2018) 7.

of a private ship or a private aircraft, and directed:

(i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

An essential feature of this definition contained in Article 101(a) (i),is that it restricts the offence of piracy to illegal acts committed on the 'high seas'.[70] In a similar vein, the definition requires that the act of piracy must have been committed solely for private ends. Consequently, Brume-Eruagbere[71] maintains that politically motivated acts could not be said to come within the purview of 'private ends' as contemplated by the UNCLOS provisions.[72] Another ingredient of the definition under Article 101(a)(i) and (ii) is what may be described as the 'ship to ship rule-- an ingredient which proved problematic in many ways, first, a literal interpretation of the provision would reveal that it demands acts constituting piracy be committed by the crew or passengers of a private ship (or aircraft) against another ship or aircraft. Secondly, the definition fails to envisage situations where the offence of piracy is committed by the crew or passengers of a ship.

These shortcomings, amongst many others bedeviling the Convention led to the adoption of the **Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) 1988** and its Protocols. Unlike the UNCLOS, which limits piracy to the high seas, the SUA convention allows state parties the right to prosecute acts of piracy carried out on a ship navigating or scheduled to navigate to or from the territorial waters of a state.[73] It was adopted together with the **Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988 (1988 SUA Protocol).**[74]

In addition to the foregoing shortcomings militating against the law on piracy and armed robbery at sea, these international legal frameworks also suffered from difficulties of enforceability in Nigeria.[75] Consequently, a question that has boggled the minds of legal scholars and jurists pertain to the issue of to the proper court for prosecution of offenders.

70. A critical appraisal of the provisions of articles 55, 58 and 88- 115 of the UNCLOS would reveal that high seas in this context include all waters beyond the territorial sea of a state, that is, 12 nautical miles beyond the territorial sea of a state. See: Kamal-Deen Ali, 'Piracy and Armed Robbery at Sea: Economic Application' retrieved from<http://mmsplusng.com/blog/piracy-and-armed-robbery-at-sea-economic-application/. Accessed 13 October 2019.

71 'Maritime law enforcement in Nigeria: The challenges of combating piracy and armed robbery at sea' (*World Maritime University Dissertations* 2017) 27

72 The requirement that the act of piracy be committed for private ends is indeed a very knotty issue, for instance, it is not clear whether the use of the plural "ends" rather than "end" in Art 101(a) means that there must be more than one private end. A further complication encountered with this definitional requirement pertains to what "private ends" actually means. There is the tendency to equate the phrase to economic or pecuniary benefit. Those who take this view are thus inclined to argue that piracy is undertaken for economic gain and therefore does not include or extend to politically motivated acts.

73 SUA Convention 1988, Art. 4.

74Brume-Eruagbere, Omovigho Cynthia, "Maritime law enforcement in Nigeria: The challenges of combating piracy and armed robbery at sea" (*World Maritime University Dissertations*2017)18.

75This arises from the fact that its provisions could hardly be relied upon for the prosecution of pirate s and armed robbers at sea, since it is required to be first domesticated by section12 of the 1999 Constitution of the Federal Republic of Nigeria.

Could such prosecution be done under the Robbery and Fire Arms (Special Provisions) Act[76] or other laws containing crimes bothering on unlawful acts or armed robbery at sea?[77] If it is prosecuted under the **Robbery and Fire Arms (Special Provisions) Act**, which court should exercise jurisdiction on such sea robbery?: would it be the State High Court vested with jurisdiction under Section 9 of the Robbery and Fire Arms (Special Provisions) Act or the Federal High Court granted exclusive jurisdiction by the Constitution over admiralty and matters connected thereto.[78] The issue would have been settled through Section 15 of the **Money Laundering (Prohibition) Act**, 2011 but the section, although with a penalty stipulation of 5 to 10 years imprisonment for the offence of piracy, failed to define or state what it meant by 'piracy'.[79]Furthermore, Although Section 215(h) of the **Merchant Shipping Act 2007 (MSA)** provided that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 and the protocols thereto shall apply from the commencement of the MSA, there were doubts among maritime stakeholders as to whether Section 215(h) thereof sufficiently domesticated the SUA Convention as required by the Constitution. This quagmire clearly represents the confused state of Nigerian maritime law, hence the need for a domestic standalone maritime legislation to curb the problems encountered by prosecuting agencies in bringing offenders before the law.

3. General Overview of the New Act Vis-à-vis its Implications for the Nigerian Maritime Sector

The Suppression of Piracy and Other Maritime Offences Act 2019 comes at a crucial period in our nation's politico-legal history. It is significant in several respects: first, it dispels the controversial issue of whether the crime of sea piracy is defined in any local legislation as required by section 12 of the 1999 Constitution of Nigeria. Secondly, it settles the mind-boggling question of the appropriate court for prosecution of suspected pirates. The Act is also very remarkable for domesticating provisions of the SUA Protocols, thereby expanding the offence of piracy to include attacks against platforms other than ships and in effect creating room for the prosecution of offences committed against platforms other than ships[80]

By Section 5(2) of the Act, the Federal High Court has exclusive jurisdiction to hear and determine issues of piracy, armed robbery at sea and other maritime offences under the Act. Section 5(3) resolves some of the most fundamental problems which have crippled the prosecution of pirates and armed robbers at sea by Nigerian courts, as it now empowers the courts to try offenders whether or not it is committed against or onboard a ship or against a fixed or floating platform on the Nigerian Continental Shelf.[81] The court is further empowered by section 6 to exercise jurisdiction where the alleged offence was committed on board a ship engaged in voyage in the international sea or internal waters of a foreign country and where the offence had a Nigerian element or an UNCLOS or SUA Convention element. Section 4 of the Act lists 18 maritime

[76] Cap R11 LFN 2004.

[77] Such other laws include the Terrorism (Prevention) Act, 2011and the Miscellaneous Offences Act.

[78] Constitution of the Federal Republic of Nigeria 1999, S 251(g)

[79] It is important to recall that Section 36(12) of the Constitution stipulates that no person shall be convicted of a criminal offence, unless the offence is contained in a written law which defines and states the penalty for its breach. This situation is further compounded by the fact that the definition of piracy under Art. 101 of UNCLOS excludes offences committed within the territorial waters of any particular country.

[80] See generally: section 4 of the Act.

[81] Section 5(3).

offences and unlawful acts at sea, which include armed robbery at sea and acts other than piracy committed within Nigeria or its maritime zone. This section is particularly important because it is a 'catch all' approach to criminalization of various illegalities perpetrated at seas. By section 12 of the Act, any person who commits an act of piracy, armed robbery at sea or any other unlawful act whether or not he was armed with a firearm or other weapon during the commission of the offence shall be liable upon conviction to a life imprisonment and a fine of not more than N50,000,000 in addition to the restitution to the owner or forfeiture to the Federal Government of Nigeria of whatever the person has gained or obtained from the commission of the crime.[82] In a similar vein, the Act makes elaborate provisions to punish attempted piracy, as well as other ancillary maritime offences and armed robbery at sea.[83]

A very important provision of the Act is the establishment of the Piracy and Maritime Offences Fund[84] The fund with its clear-cut mechanism for realizing monies necessary for its continuous operation would play a critical role in the effective implementation of the provisions of the Act, thereby enhancing security in the Nigerian maritime sector. The Nigerian Maritime Administration and Safety Agency (NIMASA) is the agency primarily saddled with the duty of coordinating activities under the Act.[85] By Section 17(3) of the Act, the law enforcement and security agencies are responsible for intelligence gathering, water patrol and investigation of offences under the Act. These agencies would by implication include the Nigerian Navy[86], the Federal Ministry of Justice and the Nigeria Police Force

4. Recommendations and Conclusion

Undoubtedly, the Suppression of Piracy and Other Maritime Offences Act 2019 represent better days ahead for the Nigerian maritime industry; however, in order for its objectives to be fully realized, we recommend the following measures. Firstly, we recommend that NIMASA should enhance its operational capacity by relying on section 18 of the new Act to collaborate with other regional bodies such as the Maritime Organization for West and Central Africa (MOWCA) and Economic Community of Central African States (ECCAS). This collaboration becomes important because maritime security is a complex transnational issue that no nation may effectively handle in the absence of a robust regional corporation.

In a similar vein, we summit that section 3 of the Act be amended to remove the requirement of 'private ends' in the definition of piracy. This is so because of its exclusion of piratical acts not done for personal purposes, such as those often perpetrated by the Movement for the Emancipation of the Niger Delta (MEND) which have political undertone and have caused Nigerians massive economic loss. Furthermore, we recommend that the requirement under section 5(1) for NIMASA to obtain the Attorney-General's consent to prosecute offences be jettisoned as it occasions unnecessary bureaucracy that may hinder the efficiency of NIMASA in administering the provisions of the Act. The Suppression of Piracy and Other Maritime Offences Act 2019 undoubtedly, represents a new prospect for ship owners, victims of piracy and prosecuting agencies in the quest to tame the conundrum of piracy, armed robbery at sea and other illegalities on Nigerian territorial waters which

[82] See generally section 12 for other ancillary penalties stipulated by the Act.
[83] Section 13(a)-(e).
[84] See Section 19.
[85] Section 17(2). The agency also has powers under section 18 of the Act to enter into arrangements and partnership with any national or international agency for the purpose of facilitating its duties under the Act.
[86] The Nigerian Navy is the agency empowered to protect the territorial waters of Nigeria. See: section 4 of the Armed Forces Act, Cap A20 LFN 2004.

have hampered the development of the Nigerian maritime sector over the years.



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Data Retention In Nigeria: Developing An Effective Framework

By Yomi Ajibade and Ridwan Oloyede

LAWYARD QUARTERLY JOURNAL

DATA RETENTION IN NIGERIA: DEVELOPING AN EFFECTIVE FRAMEWORK -
By Yomi Ajibade and Ridwan Oloyede

1. Introduction

Since we live in a data-driven world, many organizations rely on data that aid their daily operations. As a result of this reliance, they must ascertain the data to keep and the ones to delete. This obligation necessitates the concept of storage limitation. Storage limitation is one of the principles of data protection provided under the Nigeria Data Protection Regulation (NDPR) 2019. The principle provides that personal data should not be kept in an identifiable form for no longer than it is necessary for the purposes for which the personal data was processed. The continuous storage of data is contingent on implementation of appropriate technical and organisational measures provided under the NDPR.

2. Understanding Data Retention

Personal data must be deleted or anonymised as soon as they are no longer needed for purposes for which they were collected. Consequently, it becomes the duty of the controller to find out, from various national legislations, the retention periods applicable to each type of data it processes, in order to formulate retention schedule(s). When the retention period has elapsed, such data should no longer be stored or preserved for business or any other purposes; such data should be destroyed[87], or anonymised or archived.

3. Data Retention for Businesses

Data retention is one of the biggest headaches for businesses; resolving the basis to keep certain data longer or dispose of them could be a niggling question. There is another extra layer of complexity for businesses operating in various jurisdictions, as they have a legal obligation to comply with the laws of their operating countries. Balancing a business' operational need to retain data and the legal requirement not to retain data could be a complex challenge.

Efficient data retention practice assists businesses to reduce the burden of record management, enables efficient management of records, controls unrestrained growth of record volume, reduces storage costs, improves the ability to locate and retrieve record when required, limits exposure to liabilities, improves utilisation of resources, and also aids legal compliance.

Improper data retention practice could lead to an organisational risk, such as litigation and sanction from the data protection authority.[88] It could also lead to difficulty in locating and identifying records, among other things.

[87] The destruction should be done in a manner that the data is incapable of being recreated.

88 In 2019, the Berlin and Danish Data Protection Authorities issued fines to organisations for not complying with storage limitation principle. Found at Germany: Berlin Data Protection Authority Imposes Euro 14.5 Million Fine For "Data Cemetery". Found at https://blogs.dlapiper.com/privacymatters/german y-berlin-data-protection-authority-imposes-eur-14-5-million-fine-for-data-cemetery/; and Danish DPA issues its first GDPR fine for late deletion of customer telephone numbers. Found at https://www.technologylawdispatch.com/2019/04/privacy-data-protection/danish-dpa-issues-its-first-gdpr-fine-for-late-deletion-of-customer-telephone-numbers/

4. Data Retention Policy & Schedule

A Data Retention Policy is an organization's system of rules for holding, storing, and deleting the information it generates and otherwise handles[89]. Retention schedules[90] usually form part of the Data Retention Policy and particularly captures all types of records created and used by a company in the course of its business, the business reason or decision for retaining the data and the retention period[91]. The International Standards Organisation's International Standards on Record Management (ISO 15489:2016)[92] is a good instrument that could guide organisations in retaining data.

5. Establishing Retention Period - Factors to Consider

Data retention is an essential part of an organisation's records management strategy. The content of an organisation's Data Retention Policy is determined by the types and categories of data, business and operational value of the data, best practice, and legal obligation as imposed by legislation. In addition, the organization must also appoint a responsible party for ensuring compliance with the Data Retention Policy and conduct periodic review of the policy. This could be overseen by the. Chief Executive Officer, Chief Compliance Officer, or Chief Privacy Officer etc. Most importantly, the organisation must determine what deletion actually means in such a way that the data deleted cannot not be reconstructed. Storage of data beyond the requisite time frame is a breach of the data protection law and other extant law establishing storage time limit.

Aside the express provision of law on retention period, NITDA Data Protection Implementation Framework[93] also provides other factors to consider when determining storage limitation. They are:

a) The contract term agreed by parties;
b) Whether the transaction has statutory implication;
c) Whether there is an express request for deletion by the Data Subject, where such Subject is not under an investigation which may require the data; and
d) The cost implication of storage of such data by the Data Controller.

Subject to the relevant laws, data could be retained if they are necessary and proportionate for pursuing legitimate interests such as protecting national security, prosecution of criminal offences, investigation of criminal activities, protecting the data subject and the rights and freedoms of others. In some cases, data could also be retained for archiving purposes, especially to engender scientific or statistical purposes and historical research.

89 The Data Retention Dilemma: Are You Storing Too Much Information? Found at https://www.horizontechnology.com/news/the-data-retention-dilemma-are-you-storing-too-much-information/

90 Retention schedules establish guidelines regarding how long important information must remain accessible for future use or reference, as well as when and how the data can be destroyed when it is no longer needed.

91 Record Retention Schedule. Found at https://searchcompliance.techtarget.com/definition/Records-retention-schedule

92 ISO 15489-1:2016. Information and documentation – Records management. Found at https://www.iso.org/standard/62542.html

93 Draft Data Protection Implementation Framework. Found at https://nitda.gov.ng/data-protection-implementation-framework/

Examples of Data Retention Laws in Nigeria and Duration	
Law	**Duration**
Money Laundering (Prohibition) **Act** 2011	5 years
Cybercrimes Act (Prohibition, Prevention, ETC) Act 2015	2 years
General **Consumer** Code of Practice Regulation[94] **– Nigeria Communication Commission**	12 months
Guidelines for the Provision of Internet Service by Nigeria Communication Commission	12 months
Regulatory **Framework for Mobile Payments** Services in Nigeria - **C**entral **B**ank of Nigeria (CBN)	5 years
Regulatory Framework for Mobile Payments Services in Nigeria 2009 (CBN)	3 months[95] /7 years[96]
Regulation for Direct Debit Scheme in Nigeria **(2018) - CBN**	6 years
Guideline on International Money Transfer Services in Nigeria (2014) - CBN	Throughout the life of the Agent + 7 years
Guideline on Point of Sale (POS) Card Acceptance Services (2011) **- CBN**	10 years
Medical Laboratory Science Council of Nigeria Guideline on Documents and Records Retention	Comprehensive retention schedule for different health records
Labour Act[97]	3 years
Credit Reporting Act	6 years
Minimum Wage Act	3 years
Section 26 Drugs Regulations (DDR)[98]	2 years

[94] Schedule to the Consumer Code of Practice Regulations 2007
[95] Period for the data to be maintained online.
[96] Period for the data to be archived after the expiration of the aforementioned three-month period. However, if a complaint arises before the expiration of seven (7) years, the log in respect of such pending complaints shall be maintained until the case is completely resolved or discharged.
[97] CL1, Laws of the Federation of Nigeria 2004
[98] Pursuant to the Dangerous Drugs Act 1935

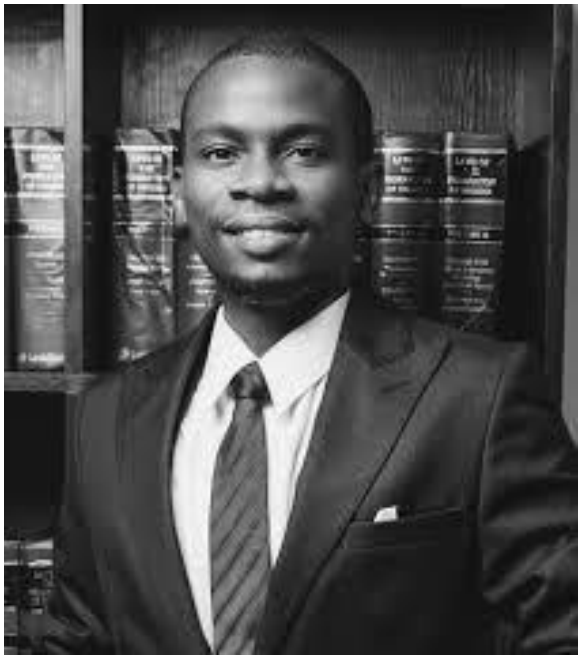
Foreign Exchange (Monitoring and Miscellaneous Provisions) Act	**7 years**
Companies and Allied matters Act 1990 **(CAMA)**	6 years
The Police Act	Permanently

6. Conclusion

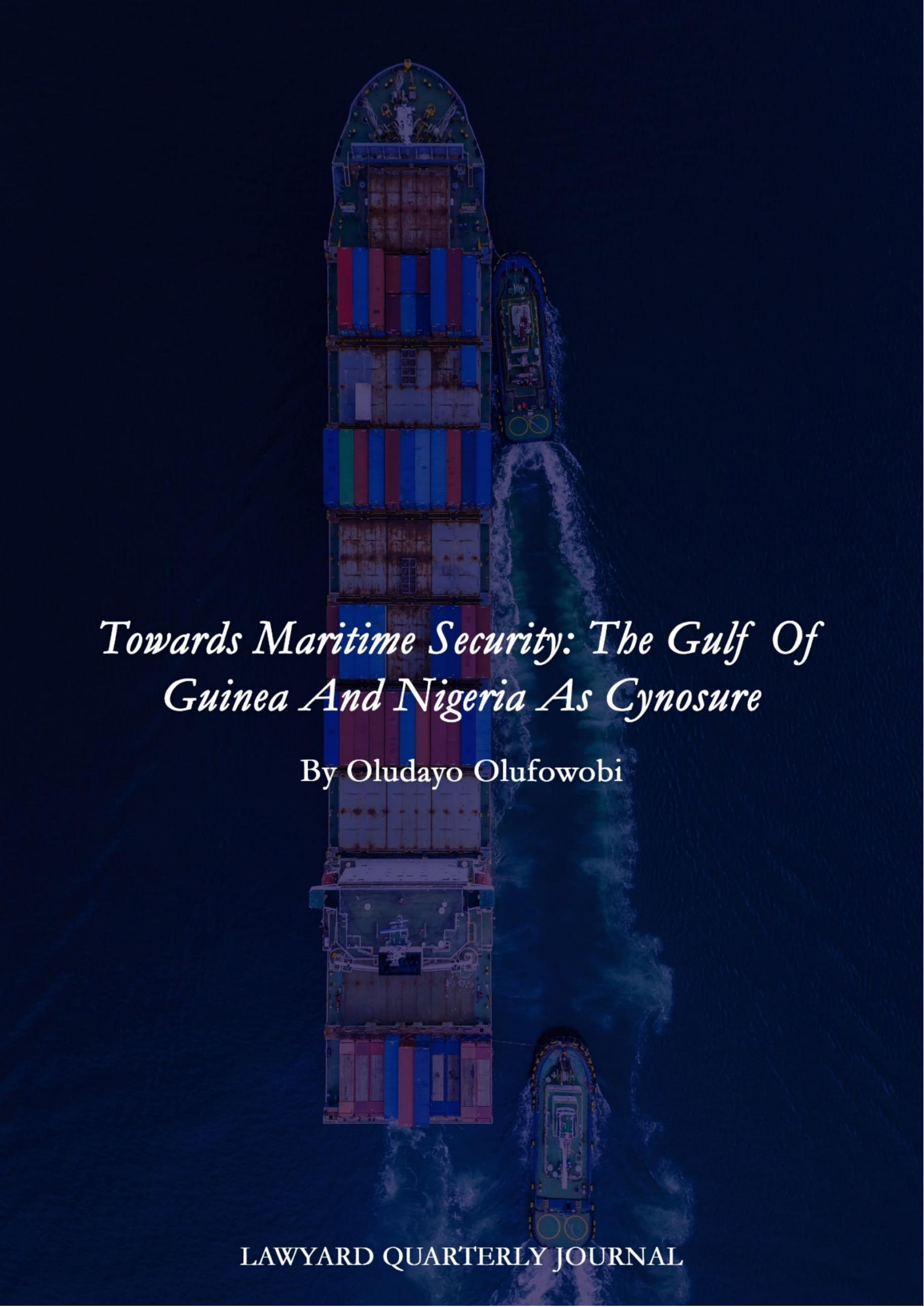
Creating an effective data retention schedule and policy is a cardinal aspect of data processing for any organisation. Organisations will need to conduct periodic audit to have a clearer picture of the personal data they currently process and apply the appropriate retention period as provided by the relevant regulations to avoid sanctions. Finally, in the absence of any law expressly prescribing a storage limit, the draft implementation framework establishes a decent template to consider when defining retention period.



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Towards Maritime Security: The Gulf Of Guinea And Nigeria As Cynosure

By Oludayo Olufowobi

LAWYARD QUARTERLY JOURNAL

TOWARDS MARITIME SECURITY: THE GULF OF GUINEA AND NIGERIA AS CYNOSURE - By Oludayo Olufowobi

1. Introduction

The GoG is a vast area: 6000 kilometers of coastline stretching from Senegal in the north to Angola in the south, with 16 sovereign coastal states and islands including several landlocked states. This area spans two regions, namely West and Central Africa; comprising Sierra Leone, Senegal, Liberia, Cote D'Ivoire, Ghana, Togo, Benin, Nigeria, Cameroon, Equatorial Guinea, Gabon, Sao Tome and Principe, and Central African Republic of Congo, Democratic Republic of Congo and Angola[99].

The GoG region currently accounts for 10% of oil and 4% of natural gas imports to the European Union (EU)[100]. The discovery of offshore hydrocarbon fields also underlies the region's geostrategic significance—it produces about 5.4 million barrels of crude oil per day[101]. The attacks in the GoG, consisting of both piracy at sea and armed robbery, including the frequent target of oil drillings and tankers for oil and cargo theft, have incurred significant financial costs to both coastal states and foreign investors amounting to an excess of USD 818 million in 2017 alone[102]. Transport lines are increasingly vulnerable to disruption, thus, having a massive impact on economic interactions between the region and foreign partners. Recent figures from the International Maritime Bureau show a 70% increase annually in actual and attempted attacks in the region between 2017 and 2018, while in 2019 there have already been double-digit incident reports[103]. Indeed, the region is replete with weak states, high circulation of small arms and light weapons (SALWs), oil theft, sea piracy and insurgency[104].

Without doubt, the GoG is a major hub of commercial exports of hydrocarbon and imports of manufactured goods, food items and huge equipment. Hence, its huge economic prospects which if not curtailed may derail the economic growth of GoG countries, their global trade partners and other parties with strategic interests in the potentials of the region[105].

Undoubtedly, maritime security is sacrosanct for exploiting maritime resources, securing livelihoods and sustainable development. Yet, persistent challenges faced in the region, such as maritime boundary disputes, smuggling and trafficking of illicit goods equally pose threats to the work of regional economic communities (RECs) in addressing maritime security challenges; render negative impacts on work towards achieving a Blue Economy in the region and hamper maritime regime building. Hence, it behooves Member States to frame within national and regional policies, strategies that go beyond immediate needs and reactive engagement.

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99 C. Ukeje and W.M Ela, "African Approaches to Maritime Security- The Gulf of Guinea", (Friedrech, Ebert and Stifting, Abuja, 2013) p. 9.

100 Jamestown Foundation, "Maritime Insecurity in the Gulf of Guinea: A Greater Role for China?",9 January 2015, China Brief Volume:15 Issue: 1 https://www.refworld.org/docid/4b641484.html accessed 15 October 2019.

101 "Maritime Security in the Gulf of Guinea" March 2013 Report of the Conference held at Chatham House, London , 6 December 2012.

102 *Ibid.*

103 *Ibid.*

104 Onuoha, F.C (2012) "Piracy and Maritime Security in the Gulf of Guinea: Nigeria as microcosm". *Aljazeera Center for Security Studies* https://www.studeies.aljazeera.net. Accessed 15 October 2019.

105 *Ibid.*

2. Scope of Maritime Insecurity in the GoG

The thriving of a global maritime economy has inevitably led to a corresponding rise in maritime insecurity. This is owing to the fact that since 2008, maritime areas have become easy channel for the inflow of activities of criminals exacerbated by the vulnerability of many states that have been unable to impose controls on their territory due to sea blindness, aggravated by the fact that oceans are by nature grey areas with the immensity of their stretch making them elusive to state control[106]. Such ungoverned zones become production sites or transit routes for different criminal activities particularly the trafficking of drugs and arms.[107]

Not to forget that this insecurity is equally fueled by poor policy implementation, economic factors, weak law enforcement and facilitated by abysmal security occasioned by poor governance and high corruption[108], with its ripple effect on hike in maritime insurance cost, cost to food price inflation, potential environmental impact, foreign revenue and the global economy. Despite the persistent trend to prioritize piracy, it is imperative to understand the extent of these threats which were mapped according to a 2013 study by Friedrich Ebert Stiftung, as inclusive of acts of violence at sea, trafficking in drugs and illegal substances, organized transnational crime, and illegal fishing alongside ecological risks[109]. West Africa loses as much as USD 1.3 billion to Illegal, Unreported and Unregulated (IUU) fishing annually[110].

Topping piracy charts in 2018 with 31 attacks[111], Nigeria remains the hub of illegal marine activities, particularly from the activities of quasi activist-political groups cum rebel entities such as Niger Delta Avengers to the illegal fishing industry. Nigeria's oil production and exports has become a gravitating force that is now the measure of insecurity in the Gulf of Guinea region.[112]

3. Actions Thus Far

3.1. The Domestic Level - Nigeria

Nigeria's operational efforts are focused along two lines:

- Cooperative Efforts (with regional and international partners): Working with neighboring states in joint patrols (Operation Prosperity to tackle piracy in Benin Republic), Maritime information sharing mechanisms, Embarked Officers, and Joint Exercises.
- Nigerian interagency efforts which are focused on the "Deep Blue Project"- which includes expanded navy, aviation and land assets, satellite surveillance systems and an advanced command and control center.

Nigeria has blazed the trail in the maritime security efforts in the GoG: Regionally, Nigeria's intervention led to the

106 *Ibid.*
107 *Ibid.*
108 Tepp, E. "The Gulf of Guinea: Military and Non-Military Ways of Combatting Piracy" 2012 http://mercury.ethz.ch/serviceengine/Files/ISN/146424/...a7f1.../7.pdf> accessed 16 October 2019.
109 Francois Very, "Maritime Insecurity in the Gulf of Guinea: Threats, Vulnerabilities and Opportunities" https://www.howwemadeitinafrica.com/maritime-insecurity-guf-guinea-threats-vulnerabilities-opportunites/56080/ accessed 16 October 2019.
110 Lisa Otto "Maritime Security in the Gulf: moving towards actionable outcomes " August 2019 https://www.africaportal.org/features/maritime-security-gulf-moving-towards-actionable-outcomes/ accessed 17 October 2019.
111 Loic Bisson "Nigeria signs first standalone anti-piracy law in the Gulf of Guinea" 11 July 2019 https://criticalmaritimeroutes.eu/2019/07/11/nigeria-signs-first-standalone-anti-piracy-law-in-the-gulf-of-guinea/#_msocom_4 accessed 16 October 2019.
112 *Ibid.*

establishment of the ECOWAS Integrated Maritime Security Strategy (EIMS), Inter-Regional Coordination Center (ICC) in Yaoundé and the African Integrated Maritime Security (AIMS)[113]. Also, in promulgating a standalone law to fight piracy, when President Buhari on 24 June 2019 assented to the "Suppression of Piracy and Maritime Offences Bill" aimed at ensuring safe shipping at sea, prosecuting infractions and criminalizing piracy; fulfilled IMO requirement for a separate legislation against piracy to promote global shipping.

The Nigerian Navy (NN) has remained at the forefront of efforts to build synergy necessary for strengthening maritime security and law enforcement within Nigeria and the GoG, through bilateral and multilateral efforts. Subsequently, there has been the promulgation of the Harmonized Standard Operating Procedure (HSOP) which seeks to resolve the lack of common understanding and limited synergy among MLEAs while providing guidelines for collaboration against sea crimes. Further, through the signing of a MoU between Chiefs of Naval Staff of Benin, Togo, Niger and Nigeria under the auspices of the Multi-National Maritime Coordination Center in Benin Republic for Zone E Member States, there has been continuous joint multilateral patrol by member countries through joint maritime and air patrol and active collection and dissemination of information. Increased NN presence at sea has led to a 50 percent reduction of acts of piracy between Q1 2018 and Q1 2019.[114]

3.2. Regional Efforts

Several regional associations have been effectively involved in countering piracy in the region, amongst which are:

- The Gulf of Guinea Commission (GGC) created in 2001 but became operational in March 2007, when its Executive Secretariat was set up in Luanda.
- The Economic Community of West African States (ECOWAS).
- The Economic Community of Central African States(ECCAS).
- The Maritime Organization of West Central Africa (MOWCA) established to ensure a cost-effective shipping service for sub-regional countries focusing on safety and combatting pollution.

The GGC has the mandate of ensuring peace, security and stability needed for economic development within the region. It postulates among others that in response to increasing maritime insecurity, GGC States need to establish regional cooperation and interstate dialogue with issues such as arms proliferation, crude oil theft, terrorism and migration; with a permanent mechanism for enforcing and maintaining peace within the region.

There has been a visible regional dichotomy between actions and progress

[113] Isichie Osamgbi "Nigeria Committed to Leading War against Maritime Crime in Africa" 9 June 2019 https://nimasa.gov.ng/press-cener-post/nigeria-committed-to-leading-war-against-maritime-crime-in-africa accessed 16 October 2019.

[114] "Tackling Maritime Threats and Challenges in the Gulf of Guinea: Contributions of the Nigerian Navy" 23 May 2019 https://www.google.com/amp/s/www.defenceweb.co.za/security/maritime-security/tackling-maritime-threats-and-challenges-in-the-gulf-of-guinea-contributions-of-the-nigerian-navy/amp/ accessed 16 October 2019.

yet in the West and Central Africa; with the former under ECCAS having a more advanced and robust maritime security agenda than the latter. The ECCAS promotes information sharing and management, joint patrol and surveillance of maritime space, the harmonization of actions at sea, the introduction of a regional maritime tax regime, the acquisition of equipment for joint use and the institutionalization of a periodic maritime conference. The ECOWAS has adopted much of the ECCAS Model, in principle and signified the urgency of the need for greater commitment towards information sharing, asset coordination and integration. However, in response to UNSC Resolution 2018 (2011) and 2039 (2012) on the need for an anti-piracy and regional cooperation, ECOWAS and ECCAS during their meeting in Benin from 26-29 March 2012 signed a MoU to combat piracy, robbery at sea and other illicit activities in the region. This culminated in the Yaoundé declaration of June 2013 in which heads of government from ECOWAS and ECCAS agreed to establish a Maritime Inter-Regional Coordination Center (MICC) in Yaoundé, Cameroon. These efforts are supported by the G7 Friends of the GoG Group (G7++FOGG) comprised of Germany, Canada, USA, Italy, Japan, UK, France, Belgium, Brazil (observer),South Korea, Denmark, Spain, Norway, Netherlands, Portugal, Switzerland and the European Union, UNODC and INTERPOL.

Furthermore, there is the Maritime Trade Information Sharing Unit for the Gulf of Guinea (MTISC-GOG) which was tested in 2013 and 2014 during the regional maritime exercise- Obangame Express[115] and provides participating vessels with 24-hour-per-day security reportage, and information to national maritime operational centers in the region and INTERPOL.

3.2.1. *The Yaoundé Declaration on the Gulf of Guinea*

The Declaration aims to increase regional counter-piracy cooperation[116] and contains two key resolutions which are the creation of an inter-regional Cooperation Center on Maritime Safety with its headquarters in Yaoundé, and the implementation of a new Code of Conduct Concerning the Prevention and Repression of Piracy, Armed Robbery against Ships, and Illegal Maritime Activities in West and Central Africa. It recognizes the principles of sovereign equality and territorial integrity of states and of non-intervention in other states' domestic affairs.[117]

The Center was inaugurated in September 2014 to enhance the activities geared towards cooperation, coordination and systems inoperability as well as the implementation of the regional strategy on safety and security within the Central and West African

115 A. A Osinowo, "Combatting Piracy in the Gulf of Guinea",http://www.dryadmaritime.com/combatting-piracy-gulf-guinea/ accessed 17 October 2019.

116 A. Holmegren, "Piracy's Persistence in the Gulf of Guinea" https://www.africandefence.net/piracy-persistence-in-the-gulf-of-guinea/ accessed 17 October 2019.

117 See DECLARATION OF THE HEADS OF STATE AND GOVERNMENT OF CENTRAL AND WEST AFRICAN STATES ON MARITIME SECURITY AND SECURITY IN THEIR COMMON MARITIME DOMAINhttp://www.imo.org/en/OurWork/Security/WestAfrica/Documents/Declaration%20of%20the%20Heads%20State%20and%Government%20on%20Maritime%20Safety%20Security.pdf accessed 17 October 2019.

common maritime space[118]; through a unique strategy framework to deal with criminality at sea, of safety, security, development and governance dimensions.[119] It is also responsible for training and coordination of activities as well as capacity building of various bodies charged with ensuring maritime safety and security in Member States.

The Code of Conduct was formally inaugurated by the Heads of State and Government in Yaoundé in 2013. It consolidates the existing MoU on the integrated coastguard function network in west and central Africa and incorporates a number of elements of the Djibouti Code of Conduct (counter-piracy agreement for East African States) but is much wider in scope as it addresses a range of illicit activities at sea such as illegal fishing, drug smuggling and piracy.

4. Loopholes/Recommendations

Many provisions of the Yaoundé Declaration are still merely declaratory – with deadlocks in obtaining necessary equipment and personnel, funding problems, and inoperability across communication systems. Many Member States are yet to implement the Code of Conduct in establishing National Maritime Security Strategies, National Maritime Security Committees and designating National Focal Points. Hence, it is recommended that steps are taken towards making the Code binding. In addition, the Yaoundé Maritime Architecture should be reinforced to assist the region in reaching its full operational capacity through sharing with centers and other actors, education and training communication and documentation of harmonized legislation. Also, without prejudice to the need for G7++ to act as a forum in which stakeholders have a clear-cut agenda for implementing agreed objectives and tackling issues of operational nature; there should be a wider membership base to enhance inclusiveness and stronger multilateral partnership geared towards sustainable capacity development.

It is imperative to establish multilateral legal disposition to foster expedited capture, investigation, prosecution, seizure and confiscation of piracy proceeds. Further, there is currently no clear structure for the coordination of regional and international responses. Member States should be expanded to include interaction with deployed forces to effectively utilize the Maritime Domain Awareness for Trade- GoG (MDAT-GoG) for information-sharing; concurrently with higher Voluntary Reporting Areas (VRA) registration and incident reporting, as participation by industry remains below 40%120.

Using the Niger Delta Avengers as case-study, there is a strong correlation between maritime security and onshore economic growth - the necessity for infrastructural development, provision of job opportunities and coastal environmental preservation. Hence, it is imperative that Member-State government across the region formulate maritime-related policy issues that directly affect coastal citizens. Furthermore, oil companies and stakeholders in the petroleum industries should adopt policies and practices that promote responsible exploitation, community participation and benefit host communities socioeconomically.

5. Conclusion

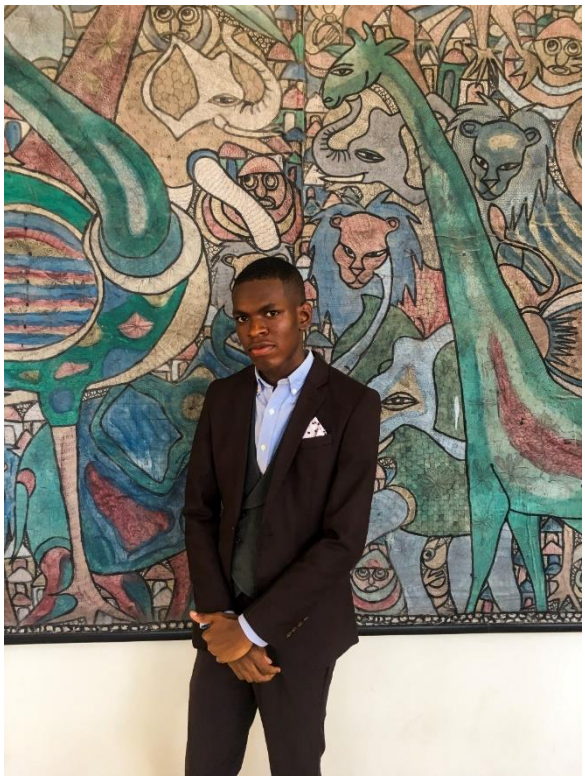
Member States should enhance their coordination of maritime security architecture,

[118] Interregional Coordination Centre(ICC) "About the Centre" http://cicyaounde.org/ accessed 17 October 2019.

[119] *Ibid.*

[120] IMO Headquarters, "Symposium on Maritime Security in the Gulf of Guinea" 4 June 2019.

bolstered by cooperation efforts regionally and internationally although this alone would not suffice. It is imperative that GoG States equally develop their maritime sectors and even exploit its potential as a viable instrument for foreign policy. Converse to the methodology employed in the Gulf of Aden, there should be improvement in the quality of governance across States; and accountable, responsible and transparent governments to tackle agitations of marginalized groups manifested in piracy and other crimes if indeed countries are to fully reap the short and long-term benefits of the GoG.



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Data Protection In The Covid-19 Era

By Victoria Oloni

LAWYARD QUARTERLY JOURNAL

DATA PROTECTION IN THE COVID-19 ERA -
By Victoria Oloni

1. Introduction

In the past few weeks, the world has witnessed various innovations and government policies developed and deployed to fight the COVID-19 pandemic. The President of France, Emmanuel Macron, once declared that his country is at "war" against the disease.[121] This approach is not unusual by government when dealing with a crisis, and in some instances, it may lead to the restriction of fundamental rights in an effort to save lives. For example, the right to freedom of movement and freedom of association have suffered restrictions all for this "greater good".[122] Privacy rights have also not been spared and this has been done in various ways:

- Tracking Mobile location data which provides governments with advanced tracking capabilities to help authorities enforce quarantines;[123]
- Linking Facial recognition technology with biometric databases which are integrated with digital thermometers to help capture the images of persons with a fever[124];
- Sharing of medical records for research and monitoring purposes;[125] and
- Massive sensitization projects done through various telecommunication networks.[126]

The COVID-19 world is a rather sensitive one, and using the disease as a rationale to restrict fundamental rights, particularly data protection rights, could lead to a very slippery slope if poorly managed. As a result, this article focuses on how the present pandemic is impacting on data protection rights, and the fate of data protection when the pandemic ends.

2. Lawful Basis for Data Processing

Under the General Data Protection Regulation 2018 of the European Union ("**GDPR**").[127], there are six (6) different bases for the lawful processing of personal information. They are:

- Consent
- Contractual necessity
- Legal obligations
- Vital interests

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121 Silvia Amaro, "Macron warns 'we are at war' as France unveils $50 billion in coronavirus measures" 17 March 2020 https://www.cnbc.com/2020/03/17/coronavirus-france-president-macron-warns-we-are-at-war.html

122 Various nations including, the United Kingdom, Italy, Spain and even Nigeria have been on total or partial lockdown for weeks or even months and public gatherings have been clamped down discouraged or outrightly banned or reduced to the barest minimum.

123 Arjun Kharpal, "Use of surveillance to fight coronavirus raises concerns about government power after pandemic ends" 26 March 2020 https://www.cnbc.com/2020/03/27/coronavirus-surveillance-used-by-governments-to-fight-pandemic-privacy-concerns.html

124 Fever detection technology added to biometric hardware by Dermalog, Telpo, DFI, Hikvision and Kogniz, 02 April 2020 https://www.biometricupdate.com/202004/fever-detection-technology-added-to-biometric-hardware-by-dermalog-telpo-dfi-hikvision-and-kogniz

125 The World Health Organisation (WHO) released a bulletin on Data sharing for novel coronavirus (COVID-19) accessible at https://www.who.int/bulletin/volumes/98/3/20-251561/en/

126 Priyadarshini Patwa "Coronavirus: Aarogya Setu and 10 Other Apps Deployed by the Government to Track the Pandemic", https://www.entrepreneur.com/slideshow/348641 The Indian government launched a COVID-19 tracking app, Aarogya Setu, for both Android and iOS users. The app has been developed by the National Informatics Centre. The aim of the app is "augmenting" efforts to "proactively" inform the citizens about the "best practices and relevant advisories pertaining to the containment of COVID-19".

127 The Lawful bases for processing data are contained in Article 6 of the GDPR.

- Public interest
- Legitimate interests

Similarly, Regulation 2.2 of the Nigerian Data Protection Regulation 2019 ("**NDPR**"), provides that processing shall be lawful if at least one of the following applies:

a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

c) processing is necessary for compliance with a legal obligation to which the controller is subject;

d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; and

e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official public mandate vested in the controller.[128]

Consent is by far the most popular basis for data processing. In fact, the NDPR sets a high standard for consent defining it as: "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"[129]

Notwithstanding its popularity, it is instructive to note that the other five bases for processing data are equally as lawful as consent. Also, since each of the lawful basis for processing data are disjunctive, you often will not require consent to lawfully process data.

During this pandemic, it might be impractical to obtain consent from each data subject, particularly due to the exigency of each situation, hence other lawful bases might come in handy. One lawful basis that has been useful in this regard is the principle of Public Interest. Since the NDPR only expatiates on the lawful basis of consent, the GDPR will also serve as our guide on lawfully processing data in the absence of consent.

3. Public Interest as A Lawful Basis for Processing Data

This condition allows for processing of data by public authorities and other bodies that exercise "official authority". The activity requiring data processing must have a clear basis in Nigerian law. The processing must also be absolutely necessary for performing the task or in the exercise of an official authority vested in the Controller.[130]

Controllers that can show they are exercising official authority, including use of discretionary powers, are not required to perform an additional public interest test. However, they must be able to demonstrate that the processing is 'necessary' for that purpose.[131] 'Necessary', in this instance, means that the processing must be a targeted and proportionate way of achieving the purpose. If there is an alternative and less intrusive way to achieve the same purpose, this basis will not apply.

Furthermore, Article 6(3) of the GDPR stipulates that the relevant task or authority must be laid down by Member State or EU law

[128] Interestingly, the NDPR omits the Legitimate Interest principle
[129] Regulation 1.3 NDPR
[130] Rec.45; Art.6(1)(e) GDPR 2018

[131] Lydia F de la Torre "What is "public interest" under EU data protection law?" 05 February 2019 https://medium.com/golden-data/what-is-public-interest-under-eu-data-protection-law-a8ef4637724a

(Nigerian Law in this context).[132] Recital 41 of the GDPR points out that this does not have to be an explicit statutory provision, as long as the application of the law is clear and foreseeable. This means that it includes clear common law tasks, functions or powers as well as those set out in statute or statutory guidance.

For example, the mission of the Nigeria Centre for Disease Control ("**NCDC**") (2017-2021) is: *'To protect the health of Nigerians through evidence-based prevention, integrated disease surveillance and response activities, using a one health approach, guided by research and led by a skilled workforce'.*[133]

Also, one of its core functions is to "*Coordinate surveillance systems to collect, analyse and interpret data on diseases of public health importance*". Flowing from our analysis above, processing data to perform this function falls directly under the lawful basis of Public interest. Therefore, in a quest to fulfil its mandate and statutory obligations, the NCDC can process data on the basis of public interest. In contrast, private organisations providing real time solutions to fight the pandemic have to establish another legal basis for data processing.

It is however important to note that public interest is not only subjective as there is no mathematical scale for determining public interest, it is also dynamic as it changes from time to time.

4. A Post Covid 19 World

In these uncertain times, as our governments explore data-driven solutions to curb a global health pandemic, we must consider how our data will be handled in the aftermath of the coronavirus. The crisis will eventually pass, and new data challenges will emerge. The elastic limits of the laws have been stretched to fit the unprecedented challenges that accompany a worldwide panic. One of the problems we may encounter in a Post COVID-19 era is the unwillingness of the government to relinquish the power it has accrued to itself and exercised in a bid to fight the virus. Will the present data protection realities remain the norm or will things revert to the "old normal"?

What happens to the current surveillance schemes put in place by the Government?

Civil society groups have urged governments not to use the global coronavirus pandemic as a cover for future pervasive electronic snooping but instead make sure the processed data is erased once the health crisis is over."[134] Privacy experts raised concerns about how governments were using the data, how it was being stored, and the potential for authorities to maintain heightened levels of surveillance — even after the coronavirus pandemic is over.[135]

Concerns have been raised about China's blanket "health code" tracing in Wuhan and the Virtually uninterrupted surveillance in China, the plan to ask mobile phone operators to hand over data of 46 million customers in Germany, HaMagen App in Israel that alerts you if you have come across any corona virus patient, the Stopp Corona App in Austria and many others.[136] European and Asian nations had over a month head start in the spread of the virus but as the numbers of infections continue to grow daily, Nigeria may resort to adopting some of these measures to monitor the spread of the disease. However, Nigeria must put the

[132] Article 6 (3) GDPR
[133] https://ncdc.gov.ng/ncdc
[134] World risks permanent surveillance with coronavirus controls https://www.dw.com/en/world-risks-permanent-surveillance-with-coronavirus-controls/a-53000886
[135] Arjun Kharpal, "Use of surveillance to fight coronavirus raises concerns about government power after pandemic ends" 26 March 2020 https://www.cnbc.com/2020/03/27/coronavirus-surveillance-used-by-governments-to-fight-pandemic-privacy-concerns.html
[136] Ibid

protection of the rights of her citizens into consideration before adopting these measures.

How long will data collection go on and when will it be deleted, if ever?

With the high rate of collection of personal data and even sensitive personal data like Medical data, attention has to be paid to the data retention period and if Government can still keep processing and using the data even after the pandemic is over. Israel for example is rechannelling the data collected during the public health efforts to combat terrorism as the Prime Minister Benjamin Netanyahu has authorized the country's internal security agency to tap into a vast and previously undisclosed trove of cell phone data to retrace the movements of people who have contracted the coronavirus and identify others who should be quarantined because their paths crossed.[137] This is channelling data collected for one purpose into another one. It therefore begs the following questions: Should data collected during this pandemic be retained? If yes, for how long? Or should it be deleted, or anonymised?

5. Recommendations and Conclusion

Fundamental rights are sacrosanct in every democratic society and even in the face of a pandemic, it is important to tailor solutions and initiatives to ensure that Fundamental rights will not be eroded or trampled or infringed. In coming up with solutions to fight the pandemic, the one size fits all approach to privacy should be avoided. Privacy by design should be embedded in these solutions from the scratch to suit the problems they are designed to solve.

Therefore, although Public interest is a legal basis for processing data, such processing should be done in line with the data protection principles. The data should be processed lawfully, fairly and transparently. It should be processed for only the purpose it was collected and if re-purposed, data subjects should be kept in the loop and a lawful basis for the new purpose should also be established. Also, data collected should suit the purpose for which it was collected. Security of this data should be given utmost priority and should be protected from unauthorised and unlawful processing.

With regards to data retention, in the absence of a statutory provision for the time frame for retention of data collected and processed in this period, the test of "Necessity" should be applied to determine what is retained and what is deleted. The data collected should not be kept in an identifiable form longer than necessary for its intended purpose. When kept for longer, the data retained should be anonymised and de-identified as much as possible to stay within the confines of lawful processing.

Furthermore, using this pandemic as a guide, data privacy instruments should be expanded to provide for circumstances like this which may come up in future. If this is done, we would not have to rely purely on ad-hoc measures, but rather on approved sets of standards.

Inevitably, the world is positioning itself to be a different place once this pandemic ends. It could be a privacy dystopia, where both tech companies and governments are capable of using data to strengthen their control over the average person, in ways that are difficult even to imagine today.[138] If we want to stop this

[137] David M. Halbfinger, Isabel Kershner and Ronen Bergman, "To Track Coronavirus, Israel Moves to Tap Secret Trove of Cellphone Data" Published March 16, 2020Updated March 18, 2020 https://www.nytimes.com/2020/03/16/world/middleeast/israel-coronavirus-cellphone-tracking.html

[138] Faine Greenwood, "Google Wants Your Data in Exchange for a Coronavirus Test", 30 March 2020 https://foreignpolicy.com/2020/03/30/google-

from happening, we need to stay vigilant, and start taking proactive steps towards protecting the sanctity of privacy.

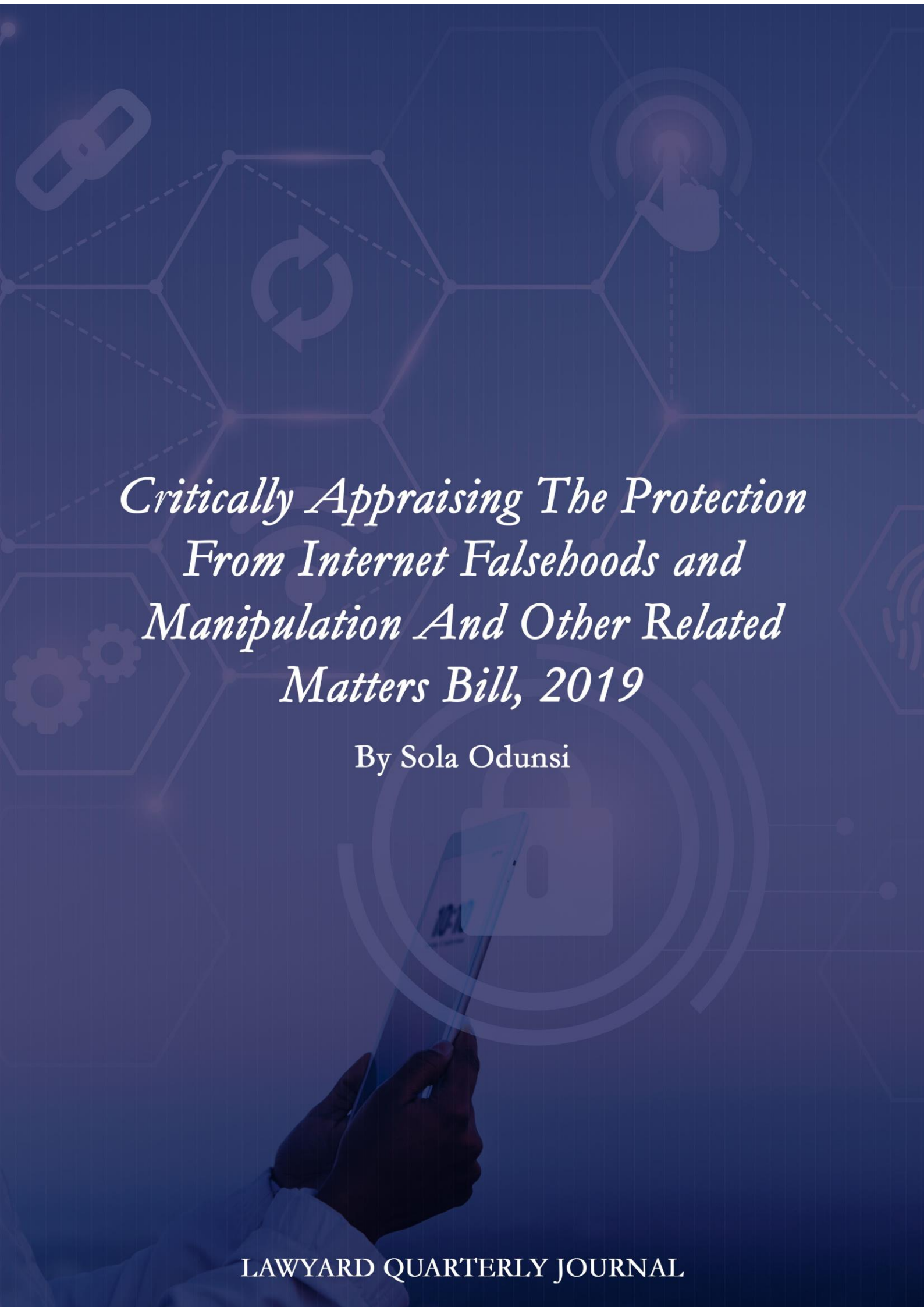


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personal-health-data-coronavirus-test-privacy-surveillance-silicon-valley/

Critically Appraising The Protection From Internet Falsehoods and Manipulation And Other Related Matters Bill, 2019

By Sola Odunsi



LAWYARD QUARTERLY JOURNAL

CRITICALLY APPRAISING THE PROTECTION FROM INTERNET FALSEHOODS AND MANIPULATION AND OTHER RELATED MATTERS BILL, 2019

By Sola Odunsi

1. Introduction

There is little doubt that there can be no democracy without the freedom of speech and expression. Such a case is like fire without heat. From the dawn of modern democracy, it was recognized that the right of the people to criticise government, laws, and social conditions was inherent in the very rule by the people.[139] As has long been accepted in constitutional law, the people and not the government possess the absolute sovereignty. It, therefore, follows that the censorial power is in the people over the government and not in the government over the people.[140]

In current times, social media has, on the other hand, become a principal tool by which citizens express themselves without territorial limits. Interestingly, even governments and their agencies have joined in the use of this inevitable tool. In fact, governments have been applauded and criticized on social media. Social media is, no doubt, becoming a critical tool for sustaining democracy across the world, building a well-informed society, knowledge-based/digital economy, as well as in achieving the Sustainable Development Goals.[141]

In 2019, the Senate of the Federal Republic of Nigeria introduced the Protection from Internet Falsehoods and Manipulation and Other Related Matters Bill 2019 **(the "Social Media Bill" / the "Bill").**[142] The Bill criminalizes a number of actions that relate to the transmission of false information on social media. The Bill is championed on the bases that it is in the interests of security, peace, and unity. However, a thorough review of the Bill reveals that the Bill could be used as a tool to gag the citizens, particularly as it relates to the criticism of the Nigerian government. The Bill has consequently generated strong reactions from both its advocates and critics. While those in support of the Bill consider it a necessity to mitigate the damages caused by fake news transmitted through social media, the critics see it as nothing, but an attempt to gag the fundamental right of freedom of speech and expression.

Whilst the Bill is, at the time of writing this article, still in the process of being passed into law, it is imperative for all stakeholders to consider the propriety or otherwise of the Bill. This will help in determining whether the Bill should indeed metamorphose into law or be laid to rest as it is. This paper aims to provide an overview of the Bill and consider its constitutionality and expediency in the present-day Nigerian society. Following this introductory section, Section 2 provides an overview of the Social Media Bill, Section 3 considers the constitutionality and expediency of the Bill, Section 4 considers alternative and existing causes of action, and Section 5 concludes the paper.

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[139] James Weinstein and Ivan Hare, Extreme Speech and Democracy (Oxford University Press, Oxford, 2009) 1.

[140] Ibid.

[141] National Information Technology Development Agency, Framework and Guidelines for the Use of Social Media Platforms in Public Institutions (2019) accessible at https://nitda.gov.ng/wp-content/uploads/2019/01/Framework%20and%20Guidelines%20for%20the%20Use%20of%20Social%20Media%20Platforms%20in%20Public%20Institutions.pdf

[142] Henry Umoru, Again, Senate introduces bill to regulate social media use, Vanguard Newspaper dated 6 November 2019, accessible at https://www.vanguardngr.com/2019/11/again-senate-introduces-bill-to-regulate-social-media-use/

2. Brief Overview of The Social Media Bill

The Social Media Bill aims at regulating the dissemination of information via social media, throughout the Federal Republic of Nigeria[143]. Particularly, the Bill, amongst others, aims to:

a. prevent the transmission of false statements/declaration of facts in Nigeria and to enable measures to be taken to counter the effects of such transmissions;

b. suppress the financing, promotion and other support of online locations that repeatedly transmit false statements/declaration of facts in Nigeria;

c. enable measures to be taken to detect, control and safeguard against coordinated inauthentic behaviour and other misuses of online accounts and bots;

d. enable measures to be taken to enhance disclosure of information concerning paid content directed towards a political end; and

e. sanction offenders.

The Bill criminalises the dissemination of false statements of facts which are prejudicial to the security of Nigeria, public safety or friendly relations of Nigeria with other countries. It also prohibits the dissemination of false statement of facts which are likely to incite enmity, influence the outcome of an election to any office in a general election or a referendum or diminish public confidence in the performance of any duty or function, or in the exercise of any power by the government.

The Bill further prohibits the provision of services for the transmission of false statements of facts in Nigeria[144], and provides regulations for dealing with the transmission of false declarations of facts within Nigeria.[145]

According to the Bill, a Law Enforcement Department[146] may issue regulations if a false declaration of fact has been transmitted in Nigeria or the Law Enforcement Department is of the opinion that it is in the public interest to issue the regulation.[147] Under the Bill, these regulations may be issued to a person whether within or outside of Nigeria and it may require the person to whom it is issued to, to carry out an act to correct or stop transmission of false declaration within Nigeria. The Bill also confers powers on the Law Enforcement Department to make other subsidiary regulations as the need arises.

3. Constitutionality and Expediency of The Social Media Bill

One principal provision of the Bill is Section 3, which appears to set the tone for the entire Bill. Section 3 of the Bill provides that:

(1) A person must not do any act in or outside Nigeria in order to transmit in Nigeria a statement [sic] knowing or having reason to believe that:

(a) it is a false statement of fact; and

(b) the transmission of the statements in Nigeria is likely to:

(i) be prejudicial to the security of Nigeria or any part of Nigeria;

(ii) be prejudicial to public health, public safety, public tranquility or public finances;

(iii) be prejudicial to the friendly relations of Nigeria with other countries;

(iv) influence the outcome of an election to any office in a general election or a referendum;

(v) incite feelings of enmity, hatred directed to a person or ill-will between different groups of persons; or

143 Section 1 and 2 of the Bill.
144 Section 5 of the Bill.
145 Part 3 of the Bill.
146 Law Enforcement Department is interpreted as The Nigerian Police Force in the clause for General Interpretation
147 Section 6 of the Bill.

(vi) diminish public confidence in the performance of any duty or function of, or in the exercise of any power by the Government.

On the other hand, Section 39(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) **(the "Constitution")** guarantees that *"[e]very person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference".*

Notwithstanding this guaranteed right to freedom of expression, the Constitution allows for laws which, though derogate from the constitutionally guaranteed rights, *"are enacted in the interest of defence, public safety, public order, public morality* ***or*** *public health; or for the purpose of protecting the rights and freedom of other persons."*[148] It would appear that the constitutionality of the Social Media Bill is hinged on this constitutional exception.

The pertinent question remains, *"is the Social Media Bill in the interest of defence, public safety, public order or public morality, as required by the Constitution?"* In the author's view, it may be necessary to consider some practical scenarios in responding to this question.

Instance A - the unfortunate COVID-19 pandemic came with a rushing wave of false information causing panic to the public. Particularly, there was a WhatsApp voice note which made the rounds on social media. It was purportedly created by the speaker in the voice note who claimed to be a former United Nations volunteer, with access to privileged World Health Organisation information. The voice note alleged, amongst other things, that about 45 million people in Nigeria were going to die if the virus spreads the way it should (in light of how it was spreading in Italy and other countries at the time); and that Nigeria is unable to afford the purchase of new protective gears and is resorting to buying cheaper ones from China.[149] The voice note appears to have caused a lot of panic and unrest in the country. The relevant authorities including the Nigeria Centre for Disease Control (NCDC) had to issue statements labelling the voice note as false.[150] It is possible that the maker of the voice note knew same to be false.

In such an instance, it could be appreciated that the Social Media Bill, when passed into law, may go a long way in curbing the spread of such false information which are no doubt prejudicial to public safety and order.

Instance B - it is no news that Nigerians, as in any other democratic society, criticize their government where they take the view that the government has failed in the discharge of its duties. Citizens have criticized the actions and policies taken by the government. Very recently, the private sector donated sums worth over several billions of Naira to the Federal Government, in support of the Nigerian Government's fight against COVID-19.[151] In this regard, there have been several allegations of corruption and mismanagement of these funds and relief materials received. Would the case be, that a person who expresses these allegations and concerns, as matters of facts, will be at risk of prosecution under the Social Media Bill. Such a statement could be taken by the authorities as one made to *"diminish public*

[148] Section 45(1) of the Constitution.

[149] Mayowa Tijani, **Viral WhatsApp voice note in Nigeria makes misleading claims about COVID-19 fatalities projections, AFP Fact Check, accessible at** https://factcheck.afp.com/viral-whatsapp-voice-note-nigeria-makes-misleading-claims-about-covid-19-fatalities-projections

[150] https://twitter.com/ncdcgov/status/1242061429789909001?lang=en

[151] Tolu Ogunlesi, A #Thread about what the private sector is doing to support Governments across Nigeria in the #Covid19 response, available at https://threader.app/thread/1242850989998313476.

confidence in the performance of any duty or function of, or in the exercise of any power by the Government."[152]

Another scenario will be criticisms made against political parties and political aspirants in the months leading to general elections in Nigeria. Will persons be arrested because of statements of facts made which turn out to be false on the ground that such statements were made to *"influence the outcome of an election to any office in a general election or a referendum?"*[153]

How about the reservations Nigerians have expressed against Nigeria's relations with the People's Republic of China? Statement of facts made in this regard may be taken to be "*prejudicial to the friendly relations of Nigeria with other countries".*[154]

Furthermore, it would appear that the Bill aims to provide some form of protection to the government, against 'defamation'. In this light, it is imperative to consider the position of the Nigerian Courts as was stated in ***Omega Bank Plc v Government of Ekiti State*** on whether the government can sue for defamation:

> *"An organ of government, that is the State or a governmental department which has corporate status, may not sue for defamation. This is based on the premise that it would be a serious interference with the freedom of expression of opinion as guaranteed under section 39 of 1999 Constitution if the wealth of the State derived from the State's subjects could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. If a right of action is granted to the government/public officer to maintain an action in libel, the constitutionally guaranteed freedom of expression will be curtailed. Thus, in the instant case, the respondents lacked the locus standi to maintain an action in the tort of defamation."*[155]

It is thus clear that it is not democratic for a government to shield itself from criticism - much less at the expense of the citizen's right to freedom of expression.

Conversely and in support of the Bill, one may argue that what the Constitution protects is the expression of opinions and not false statements of facts. However, one must remember that the constitution also protects the rights of citizens to "*receive and impart ideas and* ***information*** *without interference".* "Information" there is arguably broad enough to cover statement of facts.

One may also argue that the Bill does not stand to gag the citizens against criticizing the government as the Bill is specifically aimed at statements of facts expressed, *knowing or having reason to believe that it is a false statement of fact.* It may, therefore, be argued that before a person will be found guilty of an offence under the Bill, there must be proof that the person making the statement of fact knew or had reason to believe that the statement was, in fact, false. In response to this argument, it could be argued that firstly, this prohibition no doubt creates a level of hesitation in citizen's criticism against the government. It places on the citizen, some added obligation to investigate before criticizing the government. Secondly, there are other alternative causes of action available to the government and other citizens to explore as regards false statements (discussed in Fourth Section). Accordingly, the Social Media Bill which appears to specifically target the use of social media may be seen as nothing but a desire to reduce the public's criticism of government on social media - which appears to be on a great rise. Several actions of government have been called out on social media, particularly on Twitter and has led to some form of action or reaction by the

[152] Section 3(1)(b)(vi) of the Bill.
[153] Section 3(1)(b)(iv) of the Bill.
[154] Section 3(1)(b)(iii) of the Bill.
[155] [2007] 16 NWLR (pt 1061) 547

government or those in power. For instance, sometime in May 2019, there was a public outrage against a Senator who appeared to have assaulted a woman at a toy shop in Abuja.[156] Following the outrage on Social Media, in July 2019, the said Senator tendered his unreserved apology to Nigerians, women and the assault victim.[157] One may admonish that the use of social media for such causes should be rather cheered and not discouraged.

We will in the succeeding part of this paper, consider some of the alternative causes of action available to both the governments and the citizens with the present legal corpus.

4. ALTERNATIVE AND EXISTING CAUSES OF ACTION AGAINST THE SPREAD OF FALSE INFORMATION

As stated above, it is clear that the Bill is intended to curb the spread of false information. Presently, there are a number of laws in Nigeria which provide remedies in such instances. It should be noted that for this article, the author in considering these alternative causes of action, will not be considering the constitutionality or otherwise of the provisions but merely noting their existence.

These alternative causes of action include:

The Criminal Code Act and Penal Code Act

Firstly, The Criminal Code Act and the Penal Code Act contain provisions which criminalise the publication of false news with intent to cause fear and alarm to the public.[158] Specifically, Section 59 of the Criminal Code Act provides that:[159]

> *(1) Any person who publishes or reproduces any statement, rumour or report which is likely to cause* ***fear and alarm to the public or to disturb the public peace****, knowing or having reason to believe that such statement, rumour or report is false, is guilty of a misdemeanour and liable on conviction to imprisonment for three years.*
>
> *(2) It shall be no defence to a charge under subsection (1) of this section that he did not know or did not have reason to believe that the statement, rumour or report was false unless he proves that, prior to publication, he took reasonable measures to verify the accuracy of such statement, rumour or report.*

This provision of the Criminal Code may be said to cover the same field as that of the Social Media Bill which prohibits the transmission of false information which will be prejudicial to public health, public safety, public tranquillity, and the security of Nigeria.

Secondly, Section 51 of the Criminal Code Act also criminalises the publication of seditious words which are words with seditious intention. The Criminal Code Act goes further to define a "seditious intention" as an intention[160]-

(a) to bring into hatred or contempt or excite disaffection against the person of the President

156 Sahara Reporters New York, Video of Senator Assaulting Woman in Sex Toy Shop in Nigeria Sparks Outrage, accessible at http://saharareporters.com/2019/07/03/video-senator-assaulting-woman-sex-toy-shop-nigeria-sparks-outrage

157 Channels Television, Senator Abbo Apologises, Begs for Forgiveness accessible at https://www.channelstv.com/2019/07/03/breaking-senator-abbo-apologises-to-nigerians /

158 Section 59 of the Criminal Code Act and 51 of the Penal Code Act

159 Section 418 of the Penal Code provides thus: "Whoever circulates, publishes or reproduces any statement, rumour or report which he knows or has reason to believe to be false with intent to cause or which is likely to cause fear or alarm to the public whereby any person may be induced to commit an offence against the public peace, shall be punished with imprisonment which may extend to three years or with fine or with both.

160 Section 50(2) of the Criminal Code Act.

or of the Governor of a State or the Government of the Federation; or

(b) to excite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established; or

(c) to raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or

(d) to promote feelings of ill-will and hostility between different classes of the population of Nigeria.

This provision of the Criminal Code may be said to cover the same fields as that of the Social Media Bill which prohibits the transmission of false facts which will be prejudicial to the friendly relations of Nigeria with other countries; incite feelings of enmity, hatred directed to a person or ill-will between different groups of persons;[161] or diminish public confidence in the performance of any duty or function, or in the exercise of any power by the Government.[162]

The Cybercrimes (Prohibition, Prevention, Etc) Act 2015

The Cybercrimes Act was enacted to provide for the prohibition, prevention, detection, response, investigation and prosecution of cybercrimes; and other related matters. In this light, the Act prohibits the use of false information to perpetuate cybercrimes. For instance, Section 24 (1) (b) of the Act criminalises the intentional sharing of message known to be false, for the purpose of causing annoyance, inconvenience danger, obstruction insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another - which is in the interest of public security.

The Tort of Defamation

Nigerian law protects the reputation of individuals. As was stated by the English Courts in ***Reynold v Times Newspapers***[163]:

> *"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."*

Under Nigerian law, the tort of defamation generally consists of the following elements:[164]

i. false statement of fact;

ii. capable of a defamatory meaning or by reason of an innuendo;[165]

iii. of and concerning another living person;

iv. publication to a third party;

v. some degree of fault on the part of the person making the statement; and

vi. harm to the reputation of the person defamed.

[161] Section 3(1)(b)(v) of the Bill.
[162] Section 3(1)(b)(vi) of the Bill.
[163] [2001] 2 AC 127, 201 per Lord Nicholls.
[164] Akahie v. Ochulor (2015) LPELR-24552(CA) per Oho, J.C.A. (P. 34, paras. A-D)
[165] A defamatory statement has the following effects: (i) To lower the plaintiff in the estimation of right-thinking members of the society generally, or (ii) to expose him to hatred, contempt or ridicule; or (iii) to cause other persons to shun or avoid him; or (iv) to discredit him in his office, trade or profession; or (v) to injure his financial credit. See Olaniyi v Elero (2007) Vol. 34 WRN 32 at 41 - 42 lines 30 - 5, (SC)

Accordingly, a person (asides the government) who is of the view that some false statements of fact have been made against him is not without recourse. Such a person could make a claim under the tort of defamation.

When one considers these alternative causes of action, one begins to question again, the expediency of the Social Media Bill - when it appears that the ills it seeks to deal with, have been covered by existing laws.

5. CONCLUSION

Social media is no doubt a great tool for the exercise of the citizens' right to freedom of expression which must be protected at all legal costs. There is indeed no true democracy when the citizen's right to freedom of expression appears to be infringed upon. Nonetheless, there is so much harm and damage that could be caused by the spread of false information. It is therefore pertinent that the relevant stakeholders holistically consider all issues that have been discussed above in deciding to pass the Bill into law or not.



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