IN THE FEDERAL HIGH COURT
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS
ON THURSDAY THE 7TH DAY OF DECEMBER, 2017
BEFORE THE HONOURABLE
JUSTICE I. N. BUBA
JUDGE

SUIT NO: FHC/L/CS/937/2017

BETWEEN:
SOLOMON OKEDARA } **APPLICANT**

AND

THE ATTORNEY GENERAL OF THE FEDERATION } **RESPONDENT**

JUDGMENT

In the instant Originating Summons, the Plaintiff is a Legal Practitioner; he is a Professional who is interested not only in the contents of the law. He is also interested in having laws that are meaningful and constitutional.

Therefore, his locus can easily be found in the process; in any, a case, a citizen is at liberty to approach the court for interpretation of the law and ask for declaratory relief, whether the reliefs will confer benefit to him or not. See **DANTATA VS. MOHAMMED (2007) 7 NWLR PT 664 176 @196-197**, on the purposes of declaratory reliefs, Consequently the Plaintiff submits that:

In 2015, the President of the Federal Republic of Nigeria, Dr Goodluck Jonathan assented to the Cybercrimes (Prohibition, Prevention, e.t.c) Bill 2015 by which it became a law of the Federal Republic of Nigeria after it has been duly passed by the National Assembly. The objectives of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015 or Cybercrimes Act, 2015 as contained in its Section 1 are : To

> "(a) **Provide an effective and unified legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria;**

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(b) **Ensure the protection of critical national information infrastructure; and**

(c) **Promote cyber security and the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property and privacy rights"**

Since passage of the Cybercrimes Act, 2015, Nigerians have been arrested, detained and charged to court based on alleged contraventions of the Cybercrimes (Prohibition, Prevention. Etc) Act, 2015 particularly Section 24 (1) of the said Act. The applicant believes that Section 24 (1) of the said Cybercrimes Act, 2015 is unconstitutional and constitutes infringement of his fundamental human rights and those of several other Nigerians and by this Originating Summons the following issues were raised:

Whether in view of the provision of Section 36 (12) of the 1999 Constitution of the Federal Republic of Nigeria, Section 24 (1) of the Cybercrime Act, 2015 meets the requirement of definition of criminal offence.

Whether the lack of requirement of **"definition"** of criminal offence by section 24 (1) of the Cybercrime Act, 2015 renders the section inconsistent with the provision of section 36 (12) of the 1999 Constitution (as amended).

Whether the words used in Section 24 (1) of the Cybercrime Act, 2015 are vague, ambiguous and overbroad and do not meet the requirements of legality of a criminal offence.

Whether the vague and overbroad wording of Section 24 (1) of the Cybercrime Act, 2015 constitutes an interference to Section 39 of the 1999 constitution (as amended) and is inconsistent thereto.

Whether Section 24 (1) of the Cybercrime Act, 2015 is likely going to infringe upon the Right to Freedom of Expression and Fair Hearing of the applicant and other Nigerians as provided in sections 39 and 36 (12) of the 1999 Constitution (as amended) respectively.

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Whether the provisions of section 24 (1) of the Cybercrime Act, 2015 are within the permissible restrictions stipulated in Section 45 of the 1999 Constitution or ***ALTERNATIVELY*** Whether Section 45 of the 1999 Constitution (as amended)can save section 24 (1) of the Cybercrime Act, 2015.

Whether Section 24 (1) of the Cybercrime Act should be declared unconstitutional and null and void if it is held to be inconsistent with the provisions of the 1999 Constitution (as amended).

And the following reliefs were sought:

1. A declaration that Section 24 (1) of the Cybercrime Act, 2015 is inconsistent with Sections 36 (12) and Section 39 of the 1999 Constitution (as amended).

2. A Declaration that Section 24 (1) of the Cybercrime Act, 2015 is likely going to infringe upon the right to fair hearing and right to freedom of expression of the applicant as provided in Sections 36 and 39 of the 1999 Constitution(as amended) respectively.

3. A Declaration that in view of the inconsistency of Section 24 (1) of the Cybercrime Act with Section 36 (12), Section 39 of the 1999 Constitution and the application of the provision of Section 1 (3) of the 1999 Constitution (as amended), Section 24 of the Cybercrime Act is unconstitutional, null and void.

The Originating Summons is supported by a 21 paragraph Affidavit deposed to by the Applicant himself. The Applicant relied on all the paragraphs in the said Affidavit.

On issues for determination;

1. Whether in view of the provision of Section 36 (12) of the 1999 Constitution of the Federal Republic of Nigeria, Section 24 (1) of the Cybercrime Act, 2015 meets the requirement of definition of criminal offence.

2. Whether the lack of requirement of "**definition**" of criminal offence by section 24 (1) of the Cybercrime Act, 2015 renders the Section inconsistent with the provision of section 36 (12) of the

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1999 Constitution.

3. Whether the words used in Section 24 (1) of the Cybercrime Act, 2015 are vague, ambiguous and overbroad and do not meet the requirements of legality of a criminal offence.

4. Whether the vague and overbroad wording of Section 24 (1) of the Cybercrime Act, 2015 constitutes an interference to Section 39 of the 1999 constitution and is inconsistent thereto.

5. Whether section 24 (1) of the Cybercrime Act, 2015 is likely going to infringe upon the Right to Freedom of Expression and Fair Hearing of the applicant and other Nigerians as provided in Sections 39 and 36 (12) of the 1999 Constitution (as amended) respectively.

6. Whether the provisions of Section 24 (1) of the Cybercrime Act, 2015 are within the permissible restrictions stipulated in Section 45 of the 1999 Constitution or ALTERNATIVELY WHETHER Section 45 of the 1999 Constitution can save section 24 (1) of the Cybercrime Act, 2015.

7. Whether section 24 (1) of the Cybercrime Act should be declared unconstitutional and null and void if it is held to be inconsistent with the provisions of the 1999 Constitution (as amended).

On issue no. 1, whether in view of the provision of Section 36 (12) of the 1999 Constitution of the Federal Republic of Nigeria, Section 24 (1) of the Cybercrimes Act, 2015 meets the requirement of definition of criminal offence.

By dint Section 36 (12) of the 1999 Constitution identifies **tripartite mandatory requirement** of fair hearing as **written law** with **defined offence** and **prescribed penalty**. The said Section 36 (12) provides as follows:

> **"Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law,**

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and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law."

The position in this Section 36 (12) of the 1999 Constitution is that for a person to be arrested, detained or prosecuted for a criminal offence:

(i) There must be a written law,

(ii) The offence must be defined in the written law and;

(iii) A penalty therefore must **be prescribed** and they must all co-exist. It is also clear that the use of the word "**unless**" makes the said tripartite requirement mandatory. In **AOKO V FAGBEMI (1961) 1 All NLR 400**, where the first and basic constituent of the tripartite requirement (**written law**) was not present, the conviction was quashed. It is upon satisfaction of the first and basic constituent of "**written law**" that the court can proceed to investigate the second constituent which is determining whether a criminal offence is defined therein or not. Unfortunately, **AOKO V FAGBEMI (SUPRA)** could not pass the hurdle of even the first constituent.

On the second constituent of the tripartite requirement, it must be emphasized that a **written law** and a **defined criminal offence** are **NOT** same or interchangeable. The wording of the provision of Section 36 (12) that "**unless that *offence is defined*..... *in a written law***"(which can be paraphrased as "***a defined offence contained in a written law***")shows that meeting the requirement of Section 36 (12) of the 1999 Constitution must start from the **first, basic and general constituent** of a "**written law**", to a **second constituent** of a "**defined offence**" which is rather **specific** as opposed to the first constituent which is general. That there is a written law does not necessarily mean an offence is defined in it. **While there can be a written law without a clear offence, defining an offence therefore means writing an offence down in a clear and precise manner**. According to the **BLACK'S LAW DICTIONARY (EIGHT EDITION)** the word "**Define**" means:

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1. To state or explain explicitly
2. To fix or establish (boundaries or limits)
3. To set forth the meaning (of a word or phrase)

To define a crime therefore means to **state or explain the offence clearly and fix or establish limits of actions and (or) omissions** that constitute a crime. For instance, when a criminal offence is provided as follows:

> **"Anyone who enters and extensively relaxes in a public place in the night without authorization has committed an offence under this Act":**

It leaves the citizens and the court to wonder as to what constitutes "**extensive relaxation**", what time frame is "**night**" according to the law and will verbal approval of "**entry and relaxation**" amount to authorization or it has to be in writing? It is therefore trite that for a provision of a criminal offence to be valid it must **be defined**(being made explicit or precise with limits)to give a citizen direction on knowing what conducts or omissions constitute offences and which ones do not. See the case of **GRAYNED V CITY OF ROCKFORD (1972) 408 US 104** and **BLACK-CLAWSON INTERNATIONAL LTD V PAPIERWERE WALDHOF ASCHAFFENBERG AG (1975) 2 WLR 513, (1975) 1 ALL ER 810, UKHL 2, 638.**

The **third constituent** of the tripartite requirement is that there must be a **prescribed penalty**. A penalty is sufficiently prescribed when it is stated by a written law with a definite nature, type and quantum (**A.A.ADEYEMI: ADMINISTRATION OF JUSTICE IN NIGERIA: SENTENCING, IN YEMIOSINBAJO AND AWA KALU (EDS.)** See the case of **ATTORNEY-GENERAL (FEDERATION V ISONG (1986) 1 Q.L.R.N p. 75**

By dint of Section **24 (1) of the Cybercrimes Act, 2015** in providing for a criminal offence is worded as follows:

> **"Any person who, knowingly or intentionally sends a message or other matter by means of computer systems or network that**

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(a) **Is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or**

(b) **He knows 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 or causes such a message to be sent: commits an offence under this Act and shall be liable on conviction to a fine of not more than N7,000, 000.00 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment"**

By dint of Section 24 (1) of the Cybercrimes Act, 2015 as stated above meets the requirement of a **written law**, that of a **prescribed penalty** but **NOT of a defined offence**. A careful look at the wording of section 24 (1) of the Cybercrime Act 2015 shows **that no offence is explained clearly nor any limits of actions or omissions are set** in the subsection above. For an instance, at what degree does a message or matter become "**grossly offensive**"? What is the yardstick for what is "**Menacing character**"? What type of message or matter would amount to **"insult"**? What constitutes "**needless anxiety**"? **What impact must have the messages or matters that allegedly led to "needless anxiety" made and on whom must the impact be made?** These questions and many more stand unanswered by this sub-section or any other part of the said Cybercrime Act, 2015 at that.

The **Interpretation or Definition Section** of the Act that would have helped in the definition of this sub-section does **NOT** in any manner howsoever define the words used in Section 24 (1). It must be emphasized that mere usage or "**dumping**" of words in an enactment does not and cannot amount to definition. Anything short of complying with a mandatory constitutional requirement of "**definition**" renders any law invalid. It is therefore humbly submitted that Section **24 (1) of the Cybercrimes Act, 2015** does not meet the constitutional mandatory requirement of "**definition**" as required by Section 36 (12) of the 1999 Constitution. In **P.D.P V C.P.C. (2011)17 NWLR (Pt.1277) 485**, the Supreme Court **Perk. M. O. KEKERE-EKUN, J.S.C** held that:

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> **"The Constitution is the supreme law of the land. It is the grundnorm i.e. it is the basic law from which all other laws of the society derive their validity. Section 1 (1) of the 1999 Constitution (as amended) provides: 1(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria"**

It is therefore submitted that Section 24 (1) of the Cybercrime Act, 2015 does not meet the requirement of "**definition**" of criminal offence as required in Section 36 (12) of the 1999 Constitution (as amended).

Learned Counsel therefore urges the court to resolve Issue No. 1 in favour of the Applicant.

On issue No. 2; whether the lack of requirement of "**definition**" of criminal offence by Section 24 (1) of the Cybercrime Act, 2015 renders the section inconsistent with the provision of Section 36 (12) of the 1999 Constitution (as amended).

The word "**inconsistent**" as used in Section 1 (3) of the 1999 Constitution could mean any of the following phrases:

> **"Incompatible with, conflicting with, in conflict with, at odds with, at variance with, differing from, different to, in disagreement with, disagreeing with, not in accord with, contrary to, in opposition to, opposed to, irreconcilable with, not in keeping with, out of keeping with, out of place with, out of step with, not in harmony with, incongruous with, discordant with, discrepant with; antithetical to, diametrically opposed to; rarediscconsonant with, inconsonant with, repugnant to, oppugnant to"**

Having submitted earlier that Section 24 (1) of the Cybercrimes Act, 2015 does not meet the mandatory requirement of "**definition**" in Section 36 (12) of the 1999 Constitution (as amended), it is therefore settled that the relationship between Section 24 (1) of the Cybercrimes Act, 2015 and that of Section 36 (12) of the 1999 Constitution can be described with any of the aforementioned synonyms of the word "**inconsistent**". In view of the holding of the Supreme Court in **P.D.P V C.P.C. (SUPRA)** that all other laws of the

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society derive their validity from the constitution and given that the provision of Section 24 (1) of the Cybercrime Act, 2015 is incompatible with provision of Section 36 (12) of the 1999 Constitution, It is submitted that Section 24 (1) of the Cybercrimes Act, 2015 is inconsistent with Section 36 (12) of the 1999 Constitution.

Learned Counsel urged the court to resolve **Issue No. 2** in favour of the Applicant.

On issue No.3; whether the words used in Section 24 of the Cybercrime Act, 2015 are vague, ambiguous and overbroad and do not meet the requirements of legality of a criminal offence.

By dint of Section 24 (1) of the Cybercrimes Act, 2015 in provides as follows:

> **"Any person who, knowingly or intentionally sends a message or other matter by means of computer systems or network that**
>
> **(a) Is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or**
>
> **(b) He knows 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 or causes such a message to be sent: commits an offence under this Act and shall be liable on conviction to a fine of not more than N7,000, 000.00 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment"**

A basic principle of legality is that law, particularly one that limits fundamental rights and freedoms, must be precise and clear enough to cover only activities connected to the law. **When the wording of enactment is vague and ambiguous, such an enactment is not only capable of subjective interpretation but also misinterpretation**. In the **American case of FEDERAL COMMUNICATIONS COMMISSION V. FOX TELEVISION STATIONS, 132 S.CT. 2307**, it was held that:

> **"A fundamental principle in our legal system is that laws which**

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regulate persons or entities must give fair notice of conduct that is forbidden or required. See CONNALLY V. GENERAL CONSTR. CO., 269 U. S. 385, 391 (1926) ("[A] statute which either forbids requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); PAPACHRISTOU V. JACKSONVILLE, 405 U. S. 156, 16 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" (quoting LANZETTA V. NEW JERSEY, 306 U. S. 451, 453 (1939) (alteration in original). This requirement of clarity in regulation is essential to essential to the protections provided by the Due Process Clause of the Fifth Amendment. See UNITED STATES V. WILLIAMS, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard less that it authorizes or encourages seriously discriminatory enforcement." Ibid. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306. Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See GRAYNED V. CITY OF ROCKFORD, 408 U. S. 104, 108–109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."(at page 2317).

See the case of **BURSTYN V. WILSON, 96 L. ED. 1098**, sacrilegious writings and utterances were outlawed. In this case, the U.S. Supreme Court stepped in to strike down the offending Section stating:

"It is not a sufficient answer to say that 'sacrilegious' is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York. To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process

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> of literature and art—for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious.' And if we cannot tell, how are those to be governed by the statute to tell? (at page 1121)

In the recent **Indian case** of **SHREYA SINGHAL V UNION OF INDIA (2013) 12 S.C.C. 73**, the Supreme Court of India declared as vague, unconstitutional, null and void, a statutory provision similar to Section 24 (1) of Nigeria's Cybercrime Act, 2015 in the nation's Information Technology Act. **Section 66A** of the said **Information Technology Act** provides as follows:

> **66A. Any person who sends, by means of a computer resource or a communication device,—**
>
> **(a) Any information that is grossly offensive or has menacing character; or**
>
> **(b) Any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or**
>
> **(c) Any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.**

The court in the 123 page judgment queried amongst others, "**Does a message have to be sent 3 times or 8 times to be accepted as persistently sent?** Apparently, this is one of such several queries that establish the vagueness of the provision.

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A **Kenyan High Court judge, Ngugi J.** on 19th April, 2016 also demonstrated commendable courage when he declared Section **29 of the Kenya Information and Communications Act** that is in ***pari materia*** with Section 24 of Nigeria's Cybercrime Act as making **vague provisions** and of course, unconstitutional. See the case of **GEOFFREY ANDARE V ATTORNEY GENERAL & OTHERS (PETITION NO 149 OF 2015)**, the constitutionality of Section **29** of the **Kenya Information and Communications Act** was considered and decided. The section provides that:

> **"29. A person who by means of a licensed telecommunication system-**
>
> **(a) Sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character;**
>
> **(b) Sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both"**

In his words, ***Ngugi J*** held that

> **"Section 29 imposes penal consequences in terms which I have found to be vague and broad, and in my view, unconstitutional for that reason"**

In the **United Kingdom**, in **CHAMBERS V. DIRECTOR OF PUBLIC PROSECUTIONS, [2013] 1 W.L.R. 1833**, the Queen's Bench was faced with the following facts: "Following an alert on the Internet social network, Twitter, the Defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several **"tweets"** on Twitter in his own name, including the following: **"Crap1 Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high"** None of the defendant's **"followers"** who read the posting was alarmed by it at the time.

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Some five days after its posting the Defendant's tweet was read by the duty manager responsible for security at the airport on a general Internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the Defendant asserted that the tweet was a joke and not intended to be menacing. The Defendant was charged with sending by a Public Electronic Communications network a message of a menacing character contrary to Section 127(1)(a) of the Communications Act 2003. He was convicted in a magistrates' court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was "**menacing per se**" and that the Defendant was, at the very least, aware that his message was of a menacing character." The Crown Court was satisfied that the message in question was "**menacing**" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "**menacing**".

The Queen's Bench Division reversed the Crown Court stating: Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent. The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on "**Twitter**" for widespread reading, a conversation piece for the defendant's followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address "**you**", meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the

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airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or it to be taken as a serious warning. Moreover, as Mr. Armson noted, it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did.

The above English case illustrates how two judicially trained minds can come to two different findings. If judicially trained minds can therefore come to diametrically opposite conclusions on the same set of facts, it is obvious that expressions such as "**grossly offensive**" or "**menacing**" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence.

By dint, **Section 24 (1) of the Cybercrime Act, 2015** casts its net too wide that any discussion, opinion or advocacy on governmental, literary, scientific or artistic subjects that are ordinarily constitutionally protected can be covered in it. For an instance, a discussion or opinion on politics or art may be considered to be "**grossly offensive**" by someone or may cause "annoyance" to some persons. In condemning overbroad provisions of legislations, in the case of **UNITED STATES V REESE (1875), 92 US 214 AT 221**, the court held that constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the court to step in and say who could be rightfully detained and who should be set at liberty. It was emphasized that a broad sweep of the Ordinance violated the requirement that legislation needs to meet to establish minimum guidelines to govern law enforcement. See also see the case of **UNITED STATES V. L. COHEN GROCERY CO., 255 U.S. 81 (1921)**

Learned counsel thus respectfully submitted that Section 24 (1) of the Cybercrime Act, 2015 is vague, ambiguous and overbroad and do not meet the requirements of legality of a criminal offence.

Learned Counsel urged the court to resolve Issue No. 3 in favour of the Applicant.

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On Issue No. 4; whether the vague and overbroad wording of Section 24 (1) of the Cybercrimes Act, 2015 Constitutes an interference to Freedom of Expression guaranteed in Section 39 of the 1999 Constitution (as amended)and is inconsistent thereto.

Section 39 of the 1999 Constitution provides for Freedom of Expression as follows:

> **39 (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.**

Freedom of Expression is one of the most important fundamental human rights to every human being irrespective of tribe, sex, color, creed, education or even nationality. It is for this reason that Freedom of Expression and some other fundamental rights are provided for in local and international bills of rights like national Constitutions, African Charter on Human and People's Rights, Universal Declaration on Human Rights, International Covenant on Civil and Political Rights. See the case of **ABDULKAREEM V LSG (2016) ALL FWLR (PT.850), PG.101**, the Court of Appeal held that:

> **"Fundamental Human rights are not ordinary rights. They are elevated rights, some of them have their origin in international conventions or treaties. They are a special class of rights and no person shall be deprived of the enjoyment of any such rights except by the proper observance of the due process of law" (p.1175)**

Emphasizing the importance of Freedom of Expression to an individual and to the society, the Supreme Court of Nigeria in **DIM V AFRICAN NEWSPAPER LTD (1990) 3NWLR (PT.139), PG. 392 per Karibi-Whyte JSC at pages 408-409**, held that:

> **"The right to comment freely on matters of public interest is one of the fundamental rights of free speech guaranteed to the individual in our constitution. It is so dear to the Nigerian and of vital importance and relevance to the rule of law which we so dearly treasure for our personal freedom"**

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Does Freedom of Expression guaranteed in Section 39 of the 1999 Constitution (as amended) cover speeches or expressions made via computer systems or networks including social media? In answering this question, a critical look at Section 39 of the 1999 Constitution (as amended)helps resolve the issue. Subsection (2) of section 39 of the 1999 Constitution (as amended) provides that:

> **"Without prejudice to the generality of subsection (1) of this Section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions"**

See the case of **OKOGIE V AG LAGOS STATE (1981) 2 NCLR p.337**,the Supreme Court held that the word "**medium**" used in Section 36 of the 1979 Constitution of the Federal Republic of Nigeria which is in *pari materia* with Section 39 of the 1999 Constitution is not limited to the orthodox mass communication but could reasonably include schools. It is clear that the reasoning of the apex court in arriving at this position is premised on the fact that a school is a "***medium***" used in "***imparting ideas and information***". What the court really needed to determine in **Okogie's** case was the "**imparting of ideas and information**" by the school **as a medium**. Therefore, if any or all of "***holding of opinions***" "***receiving of ideas and information***" and "***imparting of ideas and information***" would take place on any **medium** including **computer systems or networks like social media**, Section 39 of the 1999 Constitution (as amended) would apply for its protection. It is therefore submitted that Freedom of Expression guaranteed under section 39 of the 1999 Constitution (as amended) covers speeches or expressions made via computer systems or networks including social media.

Going forward, governments in Nigeria have at one time or the other promulgated laws to limit or restrict freedom of expression. Some of these laws include Criminal Defamation, Sedition Law, and even the recently aborted Frivolous Petition Bill, 2015 amongst others. Sedition Law has been put to test of constitutionality in the court room and could not survive the fatal judicial blows in the case of **NWANKWO V THE STATE 48.(1985) 6 NCLR 228.**

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Section 24 (1) of the Cybercrime Act 2015 is believed to be another "**statutory cancer**" to Freedom of Expression.

It is further submitted that, owing to its vague and overbroad wording, Section 24 (1) of the Cybercrime Act, 2015 interferes with constitutionally protected speeches and expressions guaranteed in Section 39 of the 1999 Constitution (as amended). In **NPP V GBC (2000) 20 WRN 163 (Ghana)**, Supreme Court of Ghana in a flowery style and graphic form presented how the government uses the instrumentality of law like Section 24 (1) of the Cybercrime Act, 2015 to silence the citizens by prosecutions. The Court per **Anua-Sekyi JSC** (pp. 180-181) held that:

> **"The democratic tradition that divergent views and dissenting opinions be given free expression may be summed up in the words Tallentyre used to describe the attitude of Voltaire on the burning of Helvetius' De L'espirit in 1759. "I disapprove of what you say, but I will defend to the death your right to say it" History abounds with examples where those in authority were so sure they were right that they regarded dissent as subversive. The Reformation was preceded by hertelics and followed by the prosecution of papists. The temptation to ride roughshod over the opinions of others must be resisted, for it is only by the free flow of ideas and discussion that error is exposed, truth vindicated and liberty preserved"**

Other than the fact that some Nigerians have been arrested, detained and currently being prosecuted on **Section 24 (1) of the Cybercrimes Act, 2015**, the law has chilling effect on Freedom of Expression as millions of Nigerians who own and operate social media accounts for the holding, dissemination and receiving of information, ideas and opinions would now be (some are already being)forced to resort to self-censorship or totally avoid expressing themselves on the computer systems or networks including social media networks or platforms-a totally undemocratic development.

As stated earlier, that the wording of Section 24 (1) of the Cybercrime Act, 2015 is overbroad and can rope in constitutionally protected speeches that may be **ordinarily offensive or annoying** to some persons or some sections of

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the society without more, Constitutes an interference to Freedom of expression guaranteed in Section 39 of the 1999 Constitution and is humbly submitted to be inconsistent thereto.

Learned Counsel thus urged the court to resolve Issue No. **4** in favour of the Applicant.

On Issue No. 5; whether Section 24 (1) of the Cybercrime Act, 2015 is likely going to infringe upon the Right to Freedom of Expression and Fair Hearing of the Applicant and other Nigerians as provided in Sections 39 and 36 (12) of the 1999 Constitution (as amended) respectively.

By dint Section 46 (1) of the 1999 Constitution provides that:

> **"Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that state for redress"**

As deposed to in paragraph 9 of the Affidavit in support of the Originating Summons, it was argued that the applicant exercises his right to freedom of expression as provided in Section 39 of the 1999 Constitution (as amended)via computer systems or networks-based platforms and social media including Face book, Twitter, Linked in and Blogs. With overbroad wording of Section of 24 (1) of the Cybercrime Act, 2015 as elucidated earlier and how it applies to the use of computer systems or networks, it is clear that the **Right to Freedom of Expression** of the applicant as provided in Section 39 of the 1999 Constitution (as amended) is likely going to be infringed upon as a user of computer systems or networks.

As to **Right to Fair Hearing** as contained in Section 36 of the 1999 Constitution, specifically in subsection 12 that:

> **"Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation**

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or instrument under the provisions of a law"

No offence is defined in Section 24 (1) of the Cybercrime Act, 2015, yet continued retention of this Section would empower the Police, State Security Service and other law enforcement agencies to arrest, detain and prosecute the applicant in their usual arbitrary manner. Likelihood of infringement of the applicant's right to fair hearing as provided in Section 36 (12) is established by the existence of Section 24 (1) of the Cybercrime Act, 2015 alone. As long as the section is still retained in our laws, the applicant is likely to be arrested, detained or arraigned based on Section 24 (1) of the Cybercrime Act, 2015 contrary to his **right to fair hearing** as contained in Section 36 (12) of the 1999 Constitution even while expressing his fundamental **right to freedom of expression** owing to overbroad wording of Section 24 (1) of the Cybercrimes Act, 2015. According to **Professor Nwabueze (1982)** enforcement provision puts it beyond doubt that the mere likelihood of contravention of a guaranteed right confers a right of access to court.

It is submitted that Section 24 (1) of the Cybercrime Act, 2015 is likely going to infringe upon the Right to Freedom of Expression and Fair Hearing of the applicant and other Nigerians as provided in Sections 39 and 36 (12) of the 1999 Constitution (as amended) respectively

Learned Counsel urged the court to resolve Issue No. **5** in favour of the Applicant.

On Issue No. 6; whether the provisions of Section 24 (1) of the Cybercrime Act, 2015 are within the permissible restrictions stipulated in Section 45 of the 1999 Constitution (as amended)or ***ALTERNATIVELY*** **WHETHER** Section 45 of the 1999 Constitution (as amended)can save Section 24 (1) of the Cybercrimes Act, 2015.

Freedom of Expression is guaranteed by Section 39 of the 1999 Constitution (as amended) and is exercisable by every person within Nigeria including the applicant. See the case of **DIM V AFRICAN NEWSPAPER LTD (Supra)** the

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importance of Freedom of Expression was clearly declared by the Apex Court in Nigeria per **Karibi-Whyte JSC** at pages 408-409 that:

> **"The right to comment freely on matters of public interest is one of the fundamental rights of free speech guaranteed to the individual in our constitution. It is so dear to the Nigerian and of vital importance and relevance to the rule of law which we so dearly treasure for our personal freedom" (underlining supplied)**

In the Indian case of **BENNETT COLEMAN & CO. & ORS. V. UNION OF INDIA & ORS., [1973] 2 S.C.R. 757 AT 829** the Supreme Court of India held that freedom of speech and of the press is the *Ark of the Covenant of Democracy* because public criticism is essential to the working of its institutions. See the case of **SAKAL PAPERS (P) LTD. & ORS. V. UNION OF INDIA, [1962] 3 S.C.R. 842 AT 866**, a Constitution Bench of the Indian Supreme Court held that freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved.

As important as presented above, freedom of expression is still being gagged by spirited efforts of government by broadly criminalizing it. **Andy Levy** thus couldn't have been less right when he expressed that

> **"Criminalizing offensive speech is a far greater and essential danger to freedom than terrorism is. Anybody who wants to criminalize speech that they find offensive differs from the terrorists only in degree, not in kind".**

It is however a known fact that Freedom of expression is not absolute but subject to some permissible constitutional restrictions. **Section 45 of the 1999 Constitution**(as amended) that stipulates the said permissible restrictions provides that:

> **"Nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-**

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(a) **In the interest of defence, public safety, public order, public morality or public health**

(b) **For the purpose of protecting the rights and freedom of other persons"**

The foregoing statutory provisions constitute the hurdles a restriction that tends to limit Freedom of Expression must pass. Clearly, it is for the court to declare if a restriction passes these hurdles. See the case of **CHIKE OBI V DIRECTOR OF PUBLIC PROSECUTION (No.2) (1961) All NLR 458**, the Federal Supreme Court held that its role was not merely to rubberstamp the acts of the Legislature and the Executive, that the court must be the arbiter of whether or not any particular law is reasonably justifiable.

In interpreting the restrictions listed above, the court in **OLAWOYIN V ATTORNEY GENERAL OF NORTHERN NIGERIA [1961] 1 All NR**, held that a restriction upon a fundamental right before it may be considered justifiable must

(a) Be necessary in the interest of public morality and

(b) Not to be excessive or out of proportion to the object which it is sought to achieve.

See the case of **CHINTAMAN RAO V. THE STATE OF MADHYA PRADESH, [1950] S.C.R. 759**, the Supreme Court of India held that the phrase "**reasonable restriction"** connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word **"reasonable"** implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality." (at page 763). Such a restriction must therefore have the following characteristics:

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Defined by a law: The restriction must be defined by a law. See the case of **ABDULKAREEM V LSG (SUPRA).** To satisfy the first requirement, the law or regulation, which should be formally adopted by law-making authorities, must be sufficiently clear and precise; vague or unclear provisions will not suffice. See also the case of **THE SUNDAY TIMES V. UNITED KINGDOM, 26 APRIL 1979, APPLICATION NO. 6538/74, PARA. 49**

Pursue a constitutionally recognized objective: The restriction must be in pursuit of **ONLY** any of the itemized objectives in the constitution which are

(i) The interest of defence,
(ii) Public safety,
(iii) Public order,
(iv) Public morality or
(v) Public health,
(vi) Right and
(vii) Freedom of other persons.

A restriction will therefore be impermissible if it is solely critical of government or political ideology of a government or party. See the case of **THE PUNCH NIGERIA LTD. V. ATTORNEY-GENERAL OF THE FEDERATION. (1998) 1 HRLRA 488), SAKAL PAPERS (P) LTD V UNION OF INDIA AIR 1962 SC 305.**

Be necessary and Proportionate: It must be shown that the restriction is one necessary or required and be the least restrictive means to protect constitutionally recognized objectives. See the case of **ABACHA V FAWEHINMI (2001) 51 WRN 29,** the Supreme Court per **Achike JSC** held that:

> **"I agree with learned cross-appellant's view that where a statute tends to encroach on, curtail or abridge the freedom or the liberty of an individual, that statute is generally construed very strictly and narrowly against anyone claiming benefit therefrom " (Page 113. Paras. F-G)In OLAWOYIN V ATTORNEY GENERAL OF NORTHERN NIGERIA (Supra) the court held that the restriction must not be excessive or out of proportion to the object which it is sought to achieve."**

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Bringing Section 24 (1) of the Cybercrime Act, 2015 on the legislative cum judicial barometer as presented above, there is no doubt that Section 24 (1) of the Cybercrime Act, 2015 is a law within the definition of Section 45 of the 1999 Constitution (as amended). However the restriction in Section 24 (1) of the Cybercrime Act, 2015 leaves a number of vital questions unanswered:

(i) What particular itemized objective or objectives in Section 45 of the 1999 Constitution, does section 24 (1) of the Cybercrime Act, 2015 seek to protect or pursue?

(ii) What is the relationship between the itemized objective and the restriction

(iii) Is the restriction proportional to the itemized objective? If not are there less restrictive means to achieve the purpose of the itemized objective

It is clear that Section 24 (1) of the Cybercrime Act, 2015 does not specify any particular itemized objective or objectives it seeks to protect or pursue. Does it seek to pursue or protect ANY or ALL of .

(i) The interest of defence,

(ii) Public safety,

(iii) Public order,

(iv) Public morality or

(v) Public health,

(vi) Right and

(vii) Freedom of other persons, when it provides that:

"24 (1) Any person who, knowingly or intentionally sends a message or other matter by means of computer systems or network that

(a) Is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or

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(b) He knows 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 or causes such a message to be sent: commits an offence under this Act and shall be liable on conviction to a fine of not more than ₦7,000,000.00 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment"?

The social need the restriction seeks to pursue or protect must be **one itemized in the constitution** and clearly **stated or identified in the restriction**. In **ACHIMU V HON. MINISTER FOR INTERNAL AFFAIRS (2005) 2 F.H.C.L.R 401** per ***Mustapha J.*** held that:

> "The right conferred by Section 37 of the 1999 Constitution is not absolute as it is circumscribed by the provision of Section of 45 (1) of the same constitution which provides that the right to family life can be interfered with the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons....The Respondents have not to my mind, established the interest of defence, public safety, public order, public morality or public health that the directive is serving or intended to serve. Whose right and freedom is it intended to serve? " See the case of THE PUNCH NIGERIA LTD. V. ATTORNEY-GENERAL OF THE FEDERATION (Supra), THE GUARDIAN NEWSPAPER LTD V ATTORNEY-GENERAL OF THE FEDERATION (1999) 9NWLR (PT.618) 187"

> Even if it is held that Section 24 (1) of the Cybercrime Act, 2015 specifies the itemized object it seeks to protect or pursue (which is denied), no proximate relationship between the restriction and itemized objective to the extent, nature and impact or gravity is stated or described. It is very important for the restriction to state the extent, nature and impact or gravity of the relationship between the restriction and the itemized objective. In THE SUPERINTENDENT, CENTRAL PRISON, FATEHGARH V.RAM MANOHAR LOHIA, [1960] 2 S.C.R. 821, the Supreme Court of India, the court held that "The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause."
> (at page 835)

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In the case of Section 24 (1) of the Cybercrime Act, 2015, this proximate relationship would have been described if the section was for an instance worded like:

"Any person who, knowingly or intentionally sends a message or other matter by means of computer systems or network that;

Is offensive to a reasonable man and constitutes threat to public safety of a section of the society or the whole society or that is indecent either in graphic, photographic or video formand is calculated to impair public morality"

Can we say that the restriction in Section 24 (1) of the Cybercrime Act, 2015 is proportional to any itemized objective in Section 45 of the 1999 Constitution (as amended)?

If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test. They must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations. Secondly, they must limit the right or freedom **as little as possible**, and their effects on the limitation of rights and freedoms are proportional to the objectives. See the case of **R V BIG DRUG MART LTD (1985) ISCR 295**. In the Kenyan case of **GEOFREY ANDARE V THE ATTORNEY GENERAL & ORS (Supra)** where the Petitioner was earlier charged with an offence under a similar law to Section 24 (1) of the Cybercrime Act ***Ngugi J*** held that:

"The respondents were under a duty to demonstrate the relationship between the limitation and its purpose, and to show that there were no less restrictive means to achieve the purpose intended. They have not done this"

The court went further to hold that libel laws provide for less restrictive means of achieving the constitutionally recognized objective."

It cannot be said that Section 24 (1) of the Cybercrime Act, 2015 is proportional to any of the itemized objectives in Section 45 of the 1999 Constitution. Since Section 24 (1) of the Cybercrime Act is even vaguely

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worded in a way that can rope in innocent message or matter in a discussion or advocacy thereby criminalizing such message or matter, shows that the restriction is not proportional. In establishing the need to keep control of media within proportion, the Supreme Court of Ghana in **NPP V GBC (SUPRA)** held that:

> **"Indiscriminate control of the mass media by the government of the day may contribute a serious obstacle in the full realization of the objective of the media in achieving its freedom and independence..."**

It is submitted that the provisions of Section 24 (1) of the Cybercrime Act, 2015 are neither within the permissible restrictions stipulated in Section 45 of the 1999 Constitution or nor can Section 45 of the 1999 Constitution save section 24 (1) of the Cybercrime Act, 2015

Learned Counsel urge the court to resolve issue no. 6 in favour of the Applicant.

On Issue No. 7; whether Section 24 (1) of the Cybercrime Act should be declared unconstitutional and null and void if it is held to be inconsistent with the provisions of the 1999 Constitution (as amended).

Section 1 (1) of the 1999 Constitution provides that

> **"This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria" and Section 1 (3) provides that "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."**

See the case of **ABACHA V FAWEHINMI (Supra)**, it was held that

> **"The constitution is the Supreme Law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstances" In NPP V GBC (SUPRA) it was held that "An attempt to abrogate or suspend the constitution in whole or in part would be visited with the sanction for higher treason"**

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Having submitted earlier under **Issue No.2** that Section 24 (1) of the Cybercrime Act, 2015 is inconsistent with Section 36 (12) of the 1999 Constitution and inconsistent with Section 39 of the 1999 Constitution as submitted under **Issue No. 4**, Section 24 (1) of the Cybercrime Act, 2015 should therefore be declared null and void. See also the case of **SANI V PRESIDENT, FEDERAL REPUBLIC OF NIGERIA (2016) ALL FWLR (PT. 860), PG. 1172 AT PAGE 1197**, the court held that Section 1 of the Students' Union Activities (Control and Regulation) Act to the extent that it restricts students' union activities in Nigerian Universities/higher institutions is inconsistent with Section 40 of the 1999 Constitution (as amended) and held expressly that

> **"The constitution of the Federal Republic of Nigeria, 1999 is superior to other legislations in the country and any legislation which is inconsistent with the constitution is rendered inoperative to the extent of such inconsistency. Section 1 (1) is in conflict with the constitution. It is null and void to the extent of its inconsistency".**

Learned counsel commend the court to see the cases of **OSHO V PHILIPS (1972) 4 SC 259, ATTORNEY-GENERAL, ABIA STATE V ATTORNEY GENERAL, FEDERATION (2002) FWLR (PT.101) 1419, (2002) 17 WRN 1, IGP VANPP & 11 ORS (2008) ALL FWLR (PT.441) 870, (2008) 2 CCRLS 48, INEC & ANOR V MUSA & ORS (2008) 1SC (PT.1) 106** and **FAWEHINMI V NBA (NO.2) 1989 2 NWLR (PT.105).**

In upholding the sanctity of constitution and its provisions, the Supreme Court of Ghana per **Francois JSC** in the case of **NPP V GBC (SUPRA)** in page 177 held that:

> **"It is clear that the dictates of experience have compelled the constitution makers to draw on the amplitude of our past history, to lay down strictures that would arrest the slightest deviations from constitutionalism.**
> **Manifestation that would have the potential burgeoning into intractable evils which would ultimately undermine the constitution and toll the knell of the fourth brave democratic effort, must be placed under the judicial microscope....this court must view with the gravest suspicion if our duty as defenders of the constitution to be honourably discharged"**

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See also the case of **LAFIA LG V EXECUTIVE GOVERNMENT OF NASARAWA STATE (2013) ALL FWLR (PT.668),** in quashing the Policy statement against the appellants, Supreme Court **per Rhodes-Vivour JSC** held that:

> **"I am in full agreement with the Court of Appeal which held that the Policy does infringe the constitutional rights of the appellants (3rd -6th Respondents) against discrimination based on ethnicity or place of origin. Courts should assume an activist role on issues that touch or concern the rights of individuals and rise as the occasion demands to review with dispatch acts of government or its agencies and ensure that the rights of the individual guaranteed by the fundamental rights provided in the constitution are never trampled upon"**
>
> **It must also be noted that since provision of Section 24 (1) of the Cybercrimes Act, 2015 is vague as the offence is not defined contrary to section 36 (12) of the 1999 Constitution, the sub-section must be void for vagueness. See THE SUNDAY TIMES V UNITED KINGDOM, 26 APRIL 1979 APPLICATION NO. 6538/74, PARA. 49, SHREYA SINGHAL V UNION OF INDIA (2013) 12 S.C.C 73, BURSTYN V WILSON, 96 L. ED. 1098, MUSSER V UTTAH, 92 L. ED. 562, 17. GEOFREY ANDARE V THE ATTORNEY GENERAL & ORS (SUPRA)**

It was thus submitted that Section 24 (1) is inconsistent with the provisions of the 1999 constitution (as amended) particularly Section 36 (12) and 39 and therefore the said Section 24 (1) of the Cybercrime Act, 2015 should be declared unconstitutional, null and void.

Learned Counsel urged the court to resolve Issue No. 7 in favour of the Applicant. From the foregoing, Learned Counsel then urged this Court to declare as follows:

(1) A Declaration that Section 24 (1) of the Cybercrime Act, 2015 is inconsistent with sections 36 (12) and section 39 of the 1999 Constitution (as amended).

(2) A Declaration that Section 24 (1) of the Cybercrime Act, 2015 is likely going to infringe upon the right to fair hearing and right to freedom of expression of the applicant as provided in Sections 36 (12) and 39 of the 1999 Constitution respectively.

(3) A Declaration that in view of the inconsistency of Section 24

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(1) of the Cybercrime Act with section 36 (12), Section 39 of the 1999 constitution and the application of the provision of Section 1 (3) of the 1999 Constitution, Section 24 of the Cybercrime Act is unconstitutional, null and void.

The court read all the process and has virtually reproduced verbatim the submissions of Learned Counsel. Let me quickly say without much ado that the court read the cases - **A.G. ONDO V. A.G. FEDERATION (2002) 9 NWLR (PT.772) 222 AT 418 PARAS D-F., ABACHA V FAWEHINMI (2001) 51 WRN 29, ABDULKAREEM V LSG (2016) ALL FWLR (PT.850), PG.101, ACHIMU V HON. MINISTER FOR INTERNAL AFFAIRS (2005) 2 F.H.C.L.R 401, AOKO V FAGBEMI (1961) 1 All NLR 400, ATTORNEY-GENERAL (FEDERATION V ISONG (1986) 1 Q.L.R.N p. 75, ATTORNEY-GENERAL, ABIA STATE V ATTORNEY GENERAL, FEDERATION (2002) FWLR (PT.101) 1419, (2002) 17 WRN 1, BENNETT COLEMAN & CO. & ORS. V. UNION OF INDIA & ORS., [1973] 2 S.C.R. 757 AT 829, BLACK-CLAWSON INTERNATIONAL LTD V PAPIERWERE WALDHOF ASCHAFFENBERG AG (1975) 2 WLR 513, (1975) 1 ALL ER 810, UKHL 2, 638, BURSTYN V. WILSON, 96 L. ED. 1098, CHAMBERS V. DIRECTOR OF PUBLIC PROSECUTIONS, [2013] 1 W.L.R. 1833, CHIKE OBI V DIRECTOR OF PUBLIC PROSECUTION (No.2) (1961) All NLR 458, CHINTAMAN RAO V. THE STATE OF MADHYA PRADESH, [1950] S.C.R. 759, DIM V AFRICAN NEWSPAPER LTD (1990) 3NWLR (PT.139), PG. 392, FAWEHINMI V NBA (NO.2) 1989 2 NWLR (PT.105), FEDERAL COMMUNICATIONS COMMISSION V. FOX TELEVISION STATIONS, 132 S.CT. 2307, GEOFREY ANDARE V THE ATTORNEY GENERAL & ORS (PETITON NO. 149 OF 2015), GRAYNED V CITY OF ROCKFORD (1972) 408 US 104, IGP VANPP & 11 ORS (2008) ALL FWLR (PT.441) 870, (2008) 2 CCRLS 48, INEC & ANOR V MUSA & ORS (2008) 1SC (PT.1) 106, LAFIA LG V EXECUTIVE GOVERNMENT OF NASARAWA STATE (2013) ALL FWLR (PT.668), MUSSER V UTAH, 92 L.ED. 562, NWANKWO V THE STATE 48. (1985) 6 NIGERIAN COMMERICAL LAW REPORT (NCLR) 228, OLAWOYIN V ATTORNEY GENERAL OF NORTHERN NIGERIA [1961] 1 All NR, OSHO V PHILIPS (1972) 4 SC 25, P.D.P V C.P.C. (2011)17 NWLR (Pt.1277) 485, R V BIG DRUG MART LTD (1985) ISCR 295, SAKAL PAPERS (P) LTD. & ORS. V. UNION OF INDIA, [1962] 3 S.C.R. 842 AT 866, SANI V PRESIDENT, FRN (2016) ALL FWLR (PT. 860), PG. 1172 AT PAGE**

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1197, SHREYA SINGHAL V UNION OF INDIA (2013) 12 S.C.C. 73, THE GUARDIAN NEWSPAPER LTD V ATTORNEY-GENERAL OF THE FEDERATION (1999) 9 NWLR (PT.618) 187, THE PUNCH NIGERIA LTD. V. ATTORNEY-GENERAL OF THE FEDERATION. (1998) 1 HRLRA 488) , THE SUPERINTENDENT, CENTRAL PRISON, FATEHGARH V.RAM MANOHAR LOHIA, [1960] 2 S.C.R. 821, UNITED STATES V REESE (1875), 92 US 214 AT 221, UNITED STATES V. L. COHEN GROCERY CO., 255 U.S. 81 (1921), ADELEKE V OYO STATE HOUSE OF ASSEMBLY (2006) 16 NWLR (PT. 1006) 608, AG BENDEL STATE V AG FEDERATION (1981) 10 SC 1, ATTORNEY GENERAL OF FEDERATION V ATTORNEY GENERAL, ABIA STATE (2001) 11 NWLR (PT. 725) 689 AT 730, PARA C-G, ATTORNEY GENERAL OGUN STATE V ATTORNEY GENERAL OF THE FEDERATION (2002) 14 SCM 1, ATTORNEY GENERAL OF ONDO STATE V ATTORNEY GENERAL OF THE FEDERATION (2002) 9 NWLR (PT. 772) 222, ATTORNEY GENERAL, ABIA STATE V ATTORNEY GENERAL OF THE FEDERATION (2001) 6 NWLR (PT. 763) 264, ATTORNEY GENERAL, KANO STATE V ATTORNEY GENERAL OF THE FEDERATION (2007) 18 WRN 1, (PT. 1029) 164 AT 192, DIRECTOR-GENERAL, STATE SECURITY SERVICE V OJUKWU (2006) 13 NWLR (PT.998) 575, GEOFREY ANDARE V THE ATTORNEY GENERAL & ORS (PETITION NO 149 OF 2015), GLOBE PISHING INDUSTRIES LTD V COKER (1990) 7, NWLR (PT. 162) 265, INDEPENDENT ELECTORAL COMMISSION & 2 ORS. V. CHIEF ONWUKA KALU (2004) ALL F.W.L.R. PART 199 P. 1383, NDOMA EGBA V. GOVERNMENT OF CROSS RIVER STATE (1991) 4 N.W.L.R. (PART 188) P. 773 AT 788, NIGERIAN NAVY VS GARRICK (2006) ALL FWLR (PT.315) 45 AT 79, NWANKWO V THE STATE (1985) 6 NIGERIAN COMMERICAL LAW REPORT (NCLR) 228, NWANNA V ATTORNEY GENERAL OF THE FEDERATION (2010) VOL 15 WRN 178, NWOSU V IMO STATE ENVIRONMENTAL SANITATION AUTHORITY (1990) 2 NWLR (PT. 135) 688 REFERRED TO) PARAS. F-G,47J,PARAS B-C), ODUTOLA VS NITEL (2006) ALL FWLR (PT.335) 73 AT 87, OKEREKE V EJIOJOR (1996) 3, NWLR (PT.434) 90, OKOYA V SANTILLI [1990]2 NWLR (PART 131) AT P.228. 269, SHONE JASON LTD V OMEGA AIR LTD V OMEGA AIR LTD (2006) 1 NWLR (PT.960) A AT 33, UNIHI NIG. LTD V COMMERCIAL BANK (CREDIT LYONNAIS NIGERIA) LTD (2005) 14 NWLR (PT. 944) 47 and UTIH V. ONOYIVWE (1991) 1 NWLR (PT.166).

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The court equally read the Applicant's Originating Summons together with the Affidavit in support deposed to by Learned Counsel, Solomon Okedara, dated 14th June, 2017 together with the written address containing Counsel's argument thereof are quite clear.

The court also read the Counter Affidavit deposed to by Respondent Counsel, Ibrahim, Shitta-Bey Esq. together with the written address dated 22nd June, 2017, and the Applicant's reply on point of law dated 7th July, 2017. All arguments having been adopted in open court on Monday the 9th day of October, 2017.

After a careful perusal of the documents filed this court cannot but distill the following points:

This matter bothers on the Constitutionality of Section 24 (1) of the Cybercrime Act 2015 which is reproduced hereunder - Section 24 provides:

> **"(1) A person who knowingly or intentionally sends a message or other matter by means of computer systems or network that-**
>
> **(a) Is grossly offensive, Pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or**
>
> **(b) He knows to be false, for the purpose of casing annoyance, inconvenience danger, obstruction insult, injury criminal intimidation, enmity, hatred ill will a needless anxiety to another or causes such a message to be sent commits an offence under this act and shall be liable on conviction to a fire of not more than ₦7, 000,000 or imprisonment for a term of not more than 3 years or both.**

This provision is to be taken vis-a-vis the Applicants Fundamental Rights as guaranteed under Section 36 (12) and Section 39 of the Constitution of Federal Republic of Nigeria 1999 (as amended) reproduced hereunder, for emphasis:

SECTION 36 (12)

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"subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly,..."

SECTION 39

(1) "every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
(2) ...
(3) nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society- ..."

Moreso, the Applicant raised 7 issues for determination by this court, and the Respondent in his Counter Affidavit raised 3 issues for determination. This court would take the issues as raised by the Respondent as it covers those as raised by the Applicant as well.

Issue one of the Respondents; whether the action as constituted is competent to warrant the exercise of jurisdiction of this court. In his argument, Learned Counsel to the Respondent argued that this court lacks the jurisdiction to entertain this suit as the Originating Summons was not instituted against the proper party.

Respondent raised and relied on Section 174 (1) Constitution of Federal Republic of Nigeria 1999 and submitted that the Attorney General of Federation is not the proper party to be sued in the instant case.

It is settled law that where the issue of jurisdiction is raised, the court has the responsibility of looking into such claims before taking up other issues. See **NNADI V NJOKU (2005) 15 NWLR PT 1110 PAGE 283 and ANSA V RTPCN (2008) 7 NWLR (PT 1086) PAGE 421.**

The submission of Learned Counsel to the Respondent with all due respect, is conceived. Section 174 (1) as relied upon by Respondent Counsel is clearly paragraphed/headed as public Prosecutions, as it is in respect of Criminal Proceedings by or against any person.

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The Attorney General of Federation is the Primary custodian of the laws of Nigeria as enacted by the National Assembly, Section 150 (1) 1999 Constitution of Federal Republic of Nigeria quite plainly, clearly refers to the Attorney General of Federation as the Chief Law Officer of the Federation.

Applicant Counsel in his Reply on Point of Law dated 7/7/2017 rightly argued that the proper party to be sued in actions challenging the Constitutionality of Acts of the National Assembly is the Attorney General of the Federation, by virtue of this Constitutional duties as Chief Law Officer and particularly his statutory responsibility vis a vis the Cyber Crime Act 2015. See Section 41 (2) 47 and Section 57. See also **ATTORNEY GENERAL OF BENDEL STATE V ATTORNEY GENERAL OF FEDERATION (1981) 10 SC, ATTORNEY GENEAL OF ABIA V ATTORNEY GENERAL OF FEDERATION (2001) 6 NWLR PT 763 PAGE 264 and ATTORNEY GENERAL OF ANAMBRA STATE V ATTORNEY GENERAL OF FEDERATION (2007) 12 NWLR PT 1047 PAGE 4.**

On issue two whether the action presently instituted is justiciable. **ATTORNEY GENERAL OF FEDERATION V ATTORNEY GENERAL OF ABIA (2007) 11 NWLR PT 725 PAGE 689 @ 730** as cited by Respondent Counsel is clear that for an action to be justiciable it must of necessity be hinged or predicated on a valid and ascertainable law.

The instant suit is predicated on relevant Sections of the Constitution of Federal Republic of Nigeria and the Cybercrime Act both valid and ascertainable laws of the Federal Republic of Nigeria Respondent Counsel then went on in paragraph 5.04 of his written address to argue that the crux of the matter is for an order to direct the Respondent to redraft the said Sections of the law.

I am at a loss as to how Learned Counsel made this over reaching leap. It is trite that when deciding a matter the court ought to look at the reliefs sought

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by the Plaintiff/Applicant. The reliefs sought by the Applicant in this suit are clear and unambiguous. (They have been reproduced above).

The reliefs sought by the Applicant are clearly declaratory, so much so that the language used is visible to the blind and audible to the deaf. The reliefs are in no way executory in nature. See **OKOYA V SANTILI (1990) 2 NWLR (PT 131 PAGE 228 @ 269.** This court hereby resolves issue two in favour of the Applicant.

On issue three; whether Section 24 (1) of the Cybercrime Act 2015 is inconsistent with Section 36 (12) and Section 39 of the 1999 Constitution. Applicant Counsel argued that Section 24 (1) of the Cybercrime Act does not in any way violate Section 26 (12) and Section 39 of the 1999 Constitution of Federal Republic of Nigeria based on the position of Section 45 (1) 1999 Constitution of Federal Republic of Nigeria which is reproduced hereunder:

> **"(1) Nothing in this Section 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society.**
>
> **a) In the interest of defence, public safety, public order, public morality or public health; or**
>
> **(c) For the purpose of protecting the rights and freedom of other persons."**

Applicant's Counsel in his reply on point of law canvassed that Section 24 (1) of the Cybercrime Act is a cancer to the right of fair hearing and freedom of expression. He relied once again on Section 36 (12) and 39 Constitution of Federal Republic of Nigeria and a number of foreign case law in his Originating Summons all of which are of a persuasive element and not of a binding nature. Counsel relied heavily on American, Indian, Kenyan and British case law to buttress his point.

This court has carefully studied the case laws cited and cannot but come to the following conclusion. Section 24 (1) Cybercrime Act does not in any way

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conflict with Section 36 (12) 1999 Constitution of Federal Republic of Nigeria. The offences as contained in Section 24 (1) Cybercrime Act is quite clear and defined and penalty prescribed in the law creating same.

Moreso, Section 39 must be read in conjunction with Section 45:

> **"(1) Nothing in this Section 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society.**
>
> **(b) In the interest of defence, public safety, public order, public morality or public health; or**
>
> **(d) For the purpose of protecting the rights and freedom of other persons."**

The objectives of the Cybercrime Act as stated in Section 1 of the Cybercrime Act are as follows:

> **"(a) Provide an effective and unified legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria;**
>
> **(b) Ensure the protection of critical national information infrastructure; and**
>
> **(c) Promote cyber security and the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property and privacy rights"**

Taken together with other Sections of the Cybercrime Act, it is in the interest of defence, Public safety, public order, public morality and public health. Thus in the instant case, Section 24 (1) is in the best interest of the generality of the public. As such this court resolves issue 3 in favour of the Respondent.

The Applicant has to come to terms with the realities of life in the 21st Century and the use of Cyber Space to commit offences. Indeed Cybercrime itself has not or has never had a single acceptable definition.

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Indeed in the book titled Terrorism, kidnapping and Cybercrime by Joshua E. Alobo in honour of **Hon. Justice I. Ituwande C.J. Benue** 2013 at PP 211-212. The Learned Author's view is that:

> **"The challenges of cybercrime before judicial officers are traceable to the state of our laws and the ever evolving complexity of cyber crimes from mere scam mails to cyber terrorism. The need for change in approach is dictated by the fact that cybercrimes and the styles of criminals keep on changing and e must change to keep up. Judicial officers also have to update themselves on cybercrimes to effectively discharge their obligations. To start with the methodology of crimes committed on the internet poses technological challenges to the investigator. The judicial officer must therefore also be abreast of the changes in technology to property adjudicate on the issues.**
>
> **The ever challenging world of cyber space is fairly complex and has brought many legal issues to the fore front. The traditional legal systems have had great difficulty in adapting with the legal implications of effects of dynamic pace of Internet, anonymity of users online, e-commerce and its impact on business world-wide.**
>
> **While some cyber laws and regulations have been framed and few cases have been decided in context of Internet. Besides, there are many complex legal issues that the law enforcement agencies of nations have witnesses from time to time and still remain unresolved. The distinctive feature of the internet is that it knows no jurisdictional boundaries and hence, application of the territorial laws become complex and indeed, incomprehensible at times. Many legal issues have arisen out of increased use of the Internet and computers. While some are contractual, the others are non-contractual."**

Indeed, even before the enactment of the Cybercrime Act 2015; this court per **Honourable Justice I. N. Buba J.** dealt with Cybercrime cases in the nature of advanced fee fraud in the cases of **FEDERAL REPUBLIC OF NIGERIA V ITURU PETER INVIOSA ALIAS GEORGE GORDON AKA OKWUNES AUGUSTINE AKA CHARLES BROUNT SUIT NO:FHC/PH/65C/2007 unreported of 25/6/2008 per Honourable Justice I. N Buba J.**

> **".....All computer generated documents by way of either print out or E-mails. Those generated or obtained by way**

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> **of E-mail is a sphere of Modem Crime termed Cybercrime or Cybercrime Café. It is now beyond argument that the world is indeed a Gobal Village with the advent of information technology business and correspondence are transacted by way of computer and internet facilities."**

Therefore, even before the advent of the Cybercrime Act of 2015, this court and indeed the Nigerian courts have been able to move with the rest of the world.

Having said that, a reading of the authorities cited from foreign jurisdictions which are persuasive vis-à-vis our Section 24 of the Cybercrime Act, It will be dangerous to say that Section 24 did not define the offence; Cybercrime is incapable of direct definition.

It is a collection of activities used in Cyberspace from one country to the other. To begin, to define it with mathematical exactitude is to underscore the nature of Cyberspace crime and to exhibit a regrettable knowledge of the subject.

The court take solace in the fact that generally, Cybercrime is better described than defined. No doubt our courts will be equal to the responsibility within the meaning of Section 24. This court refuse to accede to the argument that Section 24 is in violation of the Constitutional provision.

The Section is not generic; it is not nebulous or imprecise. Accordingly, the court refuses to answer any of the questions in favour of the argument advanced by the Plaintiff.

Accordingly, the Originating Summons lacks merit same be and is hereby dismissed.

HON. JUSTICE I. N. BUBA
JUDGE
7/12/2017

Judgment read and delivered in open court

APPEARANCES

Plaintiff in person

Defendant absent

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