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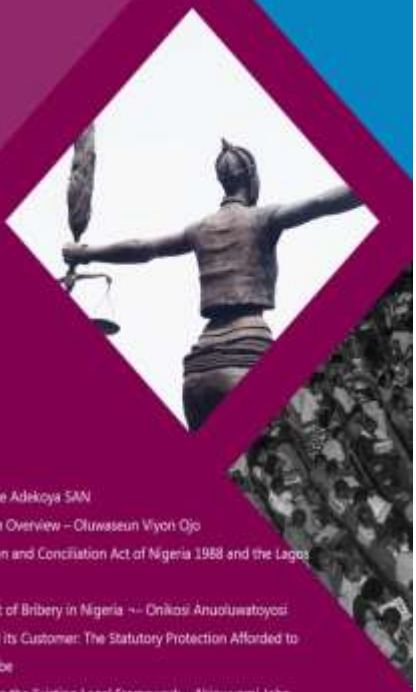

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EDITOR'S NOTE

The Unilag Law Review, with the publication of this edition; has definitely come to stay. I must say that the task of leading the first set of editors has not been easy; we have met every form of obstacle imaginable and a lot of sacrifices have been made to see to the realization of this dream. I won't be giving the full version of the story if I do not also state that we have conquered all of our fears and obstacles, in one way or the other; on all fronts. In this light, our dream of becoming our profession's finest legal publication has never been clearer and our resolve to achieve this dream has never been firmer.

I must appreciate the hardwork and commitment of all members of the Editorial Board for a job amazingly done. The world is not ready for what I know you all will do. I must also appreciate the efforts of our Staff Adviser – Professor I.O. Bolodeoku - we look forward to doing more with you in the coming years. To our sponsors for helping out with the most important resource we need to do this; *daalu!* To all my friends who have been supportive throughout this process, and the President of the Law Students' Society 2017 – Mr Supreme Unukegwo - who reposed so much trust in me to do this; thank you and may all your dreams come true. To members of Staff of the Faculty of Law, University of Lagos, headed by our phenomenal Dean – Professor Ayo Atsenuwa; thank you and God bless you!

The publication you are holding is simply a thing of beauty. I must intimate you that some of the finest legal minds and potential phenomenal legal minds have contributed to it and I trust that you will find it enthralling. Have a wonderful read!

Daniel Godson Olika

Editor-in-Chief, Unilag Law Review 2016/2017

GUIDELINES FOR CONTRIBUTORS

The Unilag Law Review accepts submissions from all stakeholders in the legal profession within and outside Nigeria. Authors can either submit to the print journal or the online forum of the Unilag Law Review. All references in the work must comply with the Unilag LCM. Submissions should be sent in word documents to; editor@unilaglawreview.org.

For more details on how to submit and the various categories, please visit; www.unilaglawreview.org

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The Integrity of Law*

Professor Akin Oyebode**

1.0 INTRODUCTION

Let me begin by paying homage to the personality in whose honour these lectures have been dedicated, Professor Alfred Bamidele Kasunmu, SAN, *quondam* Professor and Dean of Law in this University as well as Attorney-General of Lagos State, an inimitable lawyer and jurist who has left his imprint on legal education and human capital development so much so that the present generation can only marvel at the way and manner he has been able to make a success of practically every endeavour that Providence had thrust on his shoulders.

On a personal note, I wish to acknowledge and appreciate the courage he evinced forty-three years ago by deeming it fit to give a young graduate of law from the Kiev State University the honour and privilege of joining the ranks of arguably Nigeria's pre-eminent Law Faculty as a teacher and researcher. I should not forget to acknowledge the fact that it was through his good offices that I was admitted to the Harvard Law School in 1974 and, through his international connections and goodwill, I was able to secure funding for my sustenance throughout my sojourn in that citadel of learning.

It was Professor Kasunmu's insightful intervention in my life that enabled me to embark on a most challenging and pioneering career that led me to where I am today. Prof, words fail me to salute you for the faith and confidence you had in me which, I believe, I have today been able to more than justify.

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* Sixth Professor Alfred Bamidele Kasunmu Annual Lecture, delivered on September 15, 2016 at the Main Auditorium, University of Lagos.

** Professor of International Law and Jurisprudence, University of Lagos.

When Prof Kasunmu first got in touch with me with a request to deliver this year's lecture, I was still in hospital, recovering from surgery and was, therefore, not sure I could oblige. Besides, I was given a broad canvas as to the topic which further complicated things for me. In the event, I settled for today's topic in the hope that such a recondite theme would facilitate exploration of novel insights and nuances of law. This is especially so in contemporary times when the poignancy and relevance of law are being called into question almost on a daily basis. However, we might, perhaps, begin with the basics.

2.0 THE CONCEPT OF LAW

As ubiquitous and critical as the law is in the scheme of things, it is somewhat paradoxical that there does not exist a universally acceptable definition of law. Answers to the simple question, "what is law?" are as varied as jurists who have striven to address the issue. Definitions of law are apt to be coloured by the ideological or value preferences of whoever is attempting to define it. Little wonder, therefore, that Professor Hart's highly acclaimed book on law[1] does not contain a definition of law. Instead, it only set out to describe the functioning of law, leaving the reader to visualize the nature of law.

The divide between naturalists and positivists permeates every discussion on the nature and role of law, be it that of perception or the relevance and functioning of law. Accordingly, the attitudinal chemistry of a scholar would need to be factored into the evaluation of his approach towards the vexed issue of law and its role in society. The Russian saying that two lawyers, three opinions, rings true regarding the multiplicity of views and attitudes of jurists on the vexed question of the meaning of law.

[1] Concept of Law, Oxford, (1961), *passim*.

Whereas the trilogy of sovereign, command and sanction which constitutes the apotheosis of Austinian positivism[2] can hardly be faulted despite its limitations as adumbrated by jurists such as Ronald Dworkin[3] and others who consider the notion of law as merely a model of rules does not sufficiently take into account the role of principles, policies and standards in a well-functioning legal order. Nevertheless, it would be a sheer flight to fantasy to ignore the reality of law being essentially a complex of rules regulating human conduct. While the arguments continue regarding the meaning of meaning and the meaning of law, it is hardly disputable that law is a coercive apparatus under the control of a sovereign who wields it in order to ensure order, justice, regularity, certainty and other desiderata in the society.

In other words, while some scholars might continue to take delight in debating, like their medieval predecessors, how many angels can dance on the tip of a needle, a more rewarding and useful inquisition would be an interrogation of the teleological or purposeful role of law as an instrument of social control and regulator of social order. Inevitably, such discourse would impinge on the social utility and integrity of law as an epi-phenomenon.

3.0 THE AUTONOMY OF LAW

Closely tied to the question of the nature or meaning of law is that of the autonomy of law as a discipline and legitimate subject of study. In the heydays of natural law, law was conceived as a part of theology or philosophy so much so that England's first professor of jurisprudence, John Austin emerged only in the 18th century. In fact, England had to rely on jurists such as the Italian, Gentili to teach at Oxford in the 16th century. In continental Europe, however, law was a well-developed discipline in the oldest universities like Bologna and Paris, where it was deemed to belong

[2] See his Lectures on Jurisprudence, (1885); The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, (1954).

[3] See *e.g.,* R. M. Dworkin, Is Law a System of Rules in Essays in Legal Philosophy (R.S. Summers, ed. 25).

to and was seen as being very much part of the social sciences despite the overarching role and impact of Roman law on developments across the continent.

The need to coalesce the law as an instrument of empire-building and colonization went a long way to assist the evolution of law and its recognition as an autonomous body of knowledge worthy of study. Accordingly, the French *Code Civile* promulgated by Napoleon Bonaparte as well as Otto von Bismarke's *BGB* can, quite frankly, be considered as important landmarks in the evolution, consolidation and autonomy of law in Europe.

In Africa, Asia and Latin America, where Europe had tried assiduously to create colonized areas after its image, law became a veritable tool of expansion, domination and cultural hegemony. Law was imbued with race supremacist tendencies which denied the cultural authenticity of so-called natives whose laws became relegated to "native laws and customs" in an unholy co-habitation with imposed "superior" European laws under the theory of repugnancy which was accorded pride of place *vis-à-vis* the laws of the indigenous population. The primacy of the so-called "received law" over the authentic law of the African people cast a pall on the cultural authenticity of the people in the face of imposed European language, food, religion, mode of dressing, social mores and other features of civilization.

Thus, the notion of law as an autonomous category formed part and parcel of the colonial bequest which the newly independent States had gobbled down without questioning. Not only did our universities imbibe the legal culture of the Conquistadores, it was not considered necessary or desirable to interrogate the assumptions underlying the legal concepts we had been compelled to accept without regurgitation which became a notable hurdle along the path of the autonomy of African law. Africans that had trooped to Europe to study law became what Ayandele called "deluded hybrids" or "Afro-saxons" who became neither

Europeans nor truly Africans[4] and were essentially casualties of what Olayide Adigun once characterized as the tyranny of imposed paradigms.[5]

The necessity to reflect on and re-consider legal ideas which have shaped our consciousness becomes paramount in light of the theme of this presentation since we need to wash with cynical acid the underlying assumptions of the ideological apparatus of the domination and hegemony of our erstwhile colonizers in a bid to ensure the authenticity and legitimacy of our existence and role as veritable members of the human race. For, it is a tragedy of monumental proportions that we have continued to mimic the values, nuances and even the paraphernalia of English lawyers many years after their purported exit from these shores.

4.0 THE USE AND ABUSE OF LAW

Going by Fuller's position that law is the enterprise of subjecting human conduct to the governance of rules,[6] it stands to reason that the instrumentalist or purposive dimensions of law need to be fully apprehended in order to have a thorough grasp of law. In the eyes of the ruling class, law is only a means of attaining goals it has set for the society, be it order, control or security of expectations. Yet, it would be myopic to view law only through the eye glass of the ruling class.

Thus, while appeals are frequently made by the lawmaker to such values as the good of society, happiness of the majority and similar utilitarian ends, the fact of the matter is that law, more often than not, mirrors the will and interests of identifiable societal forces masquerading as the common will. While the law embodies technical and value-neutral rules such as traffic laws and safety regulations, majority of rules on matters like property and criminality bear the imprint of class and ideology. Accordingly, it is

[4] See his The Educated Elite in Nigerian Society (1977), *passim*.
[5] Law and Language in Nigeria: The Tyranny of Imposed Values in Law and Development (Omotola and Adeogun, eds.188, 1987).
[6] *Cf.* his The Morality of Law 5, (1964).

most hypocritical to pass off law as a conglomeration of objective, ideology-neutral rules aimed at serving the needs and interests of all members of society.

In the Nigerian context, it needs be pointed out that Dr T. O. Elias was able to analyse the Nigerian legal system such as to extrapolate the country's jural postulates as adumbrated in his 1970 inaugural lecture titled, "Law in a Developing Society."[7] According to him, the broad tasks confronting Nigerian law were:

1. To promote economic growth and social well-being;
2. To elevate man's moral nature;
3. To unify the several ethnic communities into a Nigerian society; and
4. To evolve a common law for the country out of the existing bodies of law.

Although the views of the jurist might appear somewhat dated, they are as insightful and relevant as when they were articulated since the problems of Nigerian law have essentially remained the same even if some of their ramifications have only become accentuated or nuanced.

Few would dispute the thesis that law has played (and continues to play) a veritable role in the task of Nigeria's socio-economic and political development. The numerous ministries, departments and agencies created by law, pursuant to the country's development attest to a definitive and active role of law in the scheme of things. In addition, the constitutional requirement to reflect the federal character of the country in public office appointments constitutes a definitive recognition of existing fault lines within the Nigerian federation and a resolve to "carry everyone along" in the gigantic task of administering a diverse multi-ethnic, multi-cultural and multi-lingual country such as Nigeria.

More significantly, ample use has been made of law as the harbinger of state regulation and formulation of both fiscal and

[7] For more on this, see also his Law in a Developing Society (1973), *passim.*

monetary policies through the Federal and State Ministries of Finance and Budget, creation and role of the Central Bank as well as numerous agencies such as the Nigerian Industrial Development Bank, succeeded by the Bank of Industry, Agriculture Credit Bank, the EXIM Bank, National Investment Promotion Commission, Company Affairs Commission, Security and Exchange Commission, National Insurance Commission, Nigeria Deposit Insurance Corporation, Assets Management Corporation of Nigeria, Nigeria Export Promotion Commission, National Communications Commission, etc.

Mention should also be made of criminalization of different acts of misconduct, especially corruption and sundry acts deemed counter-productive and inimical to the economic health of the nation. This is evidenced by the Code of Conduct provisions of the Constitution, the Corrupt Practices and other Related Offences Act, Economic and Financial Crimes Commission Act, the Procurement Act, Money Laundering Act, Fiscal Responsibility Act, Banking and other Financial Institutions Act, aside from the anti-corruption provisions contained in the Criminal Code and Penal Code.

Furthermore, there has been an active role by the Nigerian state in the social and cultural sectors. Numerous legislation had been enacted setting up federal universities and agencies created to oversee different levels of education in the country, not forgetting preliminary actions taken toward establishing a social security network such as the National Pension Commission and National Social Insurance Fund and National Health Insurance Scheme, aimed at providing pension as well as social and health insurance benefits for various categories of employees within the national economy.

However, it needs be admitted that Nigeria is still a far cry from being an industrialized or developed country, with majority of the population living at the subsistent level. Being very much a deformed capitalist state, Nigeria remains very much at the fringes

of socio-economic development in spite of the country's well-known rich endowment in terms of human and material resources.

What is more discomfiting is the extent of manipulation and abuse of law by the political elite, lawyers and the highly heeled whose attitudes and proclivities can quite justifiably be considered as constituting a clear and present danger to the integrity of law. Whereas in what can be described as advanced jurisdictions, there exists a general consensus among the population regarding the role of the law as a problem-solver and the recognition and acceptance of its conflict resolution capabilities, law in Nigeria is still fighting a rear guard battle for general acceptance and recognition of the inevitability of its role as the last line of defence against anarchy and chaos in the society.

Beginning with Decree No 24 of 1999 which is paraded as the Constitution of the Federal Republic of Nigeria and is inherently illegitimate having been dictatorially foisted on the country, many of Nigeria's laws fail the test of acceptability by the population as well as the other *desiderata* of King Rex as outlined by Lon Fuller[8] and thereby end up being honoured more by their breach than observance. Unlike in many countries where the doctrine of separation of powers and checks and balances is alive and well and the adjudicative role of the judicial branch is well defined and appreciated by the population, the situation in Nigeria is not that clear-cut so much so that the question can rightly be posed as to how well the Nigerian judiciary has performed.[9]

Our judicial officers do not seem to have apprehended their role as the sentinel of democratic praxis. Their penchant for looking elsewhere when litigants engage in forum-shopping and the frivolous issuance by some of them of *ex parte* interim and interlocutory orders as well as conflicting decisions by courts of coordinate jurisdictions have gone a long way to cast a pall on the

[8] *Cf.* The Morality of Law, Ch. 2.

[9] *Cf.* Oyebode, Is the Judiciary Still the Last Hope of the Common Man? In *id.,* Law and Nation-Building in Nigeria 128 *et seq,* (2005).

judicial process and erode the integrity of the law and confidence of the generality of the population in the judicial process. A situation where opportunistic and self-serving behaviour by lawyers and increasingly rife incidents of judicial rascality are, undoubtedly, dysfunctional to the integrity of the legal process which is premised on certainty and predictability of rules. The recent admonition by the Chief Justice to paralegals to ensure probity and decorum in the discharge of their duties bespeaks the odium and malfeasance embraced by some servants in Nigeria's temple of justice.

Accordingly, one cannot dismiss, in its entirety, the suspicion entertained in many quarters that the pervasive odour of corruption can now be smelt in the precincts of the judiciary. Admittedly the National Judicial Council has been doing what it can to sanitize the nation's court houses, but the rise in the incidence of what is popularly termed "midnight" or "black market" court orders would seem to have called into question the integrity of both the Bar and Bench.

Furthermore, the palpable instances of self-help and police-assisted impunity across the country belie the notion of equality before the law and exclusive or tone of finality of the courts in the resolution of conflicts and controversies in the society. Whereas in other climes all and sundry surrender their disputes to the courts for determination, in Nigeria, there does not seem to be a unanimity of views regarding the prerogative and sanctity of judicial pronouncements and the obligation to respect and uphold same. The existing situation of ignoring court orders or seeking ways and means of undermining same has done incalculable damage to the integrity of law.

5.0 RE-DISCOVERING THE INTEGRITY OF LAW

Law, we are told, is the glue that holds society together.[10] Put differently, law and society are two sides of one coin, a situation

[10] *Cf.* R. M. Unger, Law in Modern Society 47 (1976).

captured in the motto of our Law Society: *Ubi societas, ibi jus*. If maintenance of law and order and the necessity to uphold the tenets of law are to be considered as the categorical imperatives of a well-functioning society, it stands to reason that members of society are joint stakeholders in ensuring that the integrity of law is not compromised.

However, it has to be conceded that Nigeria is still very much a transitional society where the pillars of society and fundamental issues are yet to be fully decided or implanted in the popular consciousness. To the extent that the Nigerian nation remains a work-in-progress, to that extent would it be illusory to seek here all the pre-requisites that make law possible in the advanced, industrialized world. A developing society *qua* one lacking in capacity to fully harness its natural resources or engage optimally its human resources cannot ensure or widen the role of law as an enhancer of values and ultimate instrument of social engineering.

The entrenchment of the integrity of law warrants inevitably jettisoning the infelicities and distortions in the legal order manifested in the malaise of today. Accordingly, there is a felt need to re-configure both the form and content of our legal education in order to inculcate proper values and orientation in coming lawyers and judges. Our law syllabus would need to be refurbished and modernized such that the deleterious aspects are done away with in order to adequately prepare future lawyers to cope with the demands of the 21st century. The disclosure recently of some lawyers hiring out their knowledge and expertise to lazy and unworthy students at the Nigerian Law School should sound alarm bells in the ears of concerned Nigerians regarding the necessity to salvage the legal profession from disrepute.

As priests in the temple of justice, our legal practitioners should live above board and no longer feel comfortable that some of the less than virtuous among them occupy critical and sensitive positions dealing with sanctions and preferments within the Bar. After all, as people observe, what would iron do if gold rusts! It is

a matter of dire necessity that the Rules of Professional Conduct should be strengthened and rigorously enforced in order to sanitize the ranks of legal practitioners.

Specifically, there is an urgent need to reappraise the imposed English law, especially adjectival law so as to limit the capacity of legal practitioners to extract the loopholes therein to the benefit and advantage of litigants. The record of trials of politically exposed persons and the highly heeled for corruption and stealing of humongous monies from the public treasury leaves a lot to be desired. The adversary system copied from England regarding matters such as the presumption of innocence and proof beyond reasonable doubt now need to be reconsidered in favour of social and distributive justice.

The integrity of law demands a social consensus regarding the preeminent role of law in the ordering of the human destiny. Accordingly, Nigerians, as a people, must make a commitment to place law at the helm of human affairs. Without general acceptance of the pivotal role of law, Nigeria can only continue to wobble and, ultimately, face the odium of instability and catastrophe. To parody Joseph de Maistre, it can be stated that a people get the law they deserve.

In the final analysis, therefore, all who wish the country well must enlist in the ranks of forces struggling to re-discover the integrity of law in Nigeria. Accepting the morass of confusion, drift and lack of cohesion that afflict the law is, quite frankly, an untenable proposition. The current situation is dire and a drastic situation warrants a drastic remedy.

Restructuring Nigeria: Pros, Cons and Matters Arising

Mrs 'Funke Adekoya SAN*

1.0 BACKGROUND

'Restructuring Nigeria' seems to be the latest 'hot topic' in Nigerian discourse. The recent so-called "Kaduna Declaration" by a coalition of Northern Nigeria youth groups in Kaduna in which they demanded that all Igbos residing in the North should leave the area within three months has brought the topic, already a simmering issue, back onto the front burner. The youth groups declared that the North is tired of the 1914 amalgamation arrangement that brought the country into one entity, "hence the need for restructuring as being pronounced by many notable Nigerian leaders like former Vice President Atiku Abubakar and Senator Shehu Sani and others." The youths said they would "take definite steps to end the partnership by pulling out of the current federal arrangement".[1] Perhaps to ensure the homogeneity of each area, in the same statement they also asked all Northerners to leave the South-Eastern states by the 1st of October; the date on which 'visible actions' to prove that the 'North' is no longer part of a federal union that includes the Igbos. In response, a coalition

* Mrs 'Funke Adekoya SAN is a Partner at Aelex, Legal Practitioners and Arbitrators. She is a Senior Advocate of Nigeria and an expert in; Commercial Litigation, Corporate Dispute Resolution; Business Turnaround and Corporate Insolvency and Competition Law and Policy. This paper was presented at the 7th Edition of the Prof. A. B. Kasunmu SAN Annual Lecture which held at the University of Lagos Auditorium, Akoka, Lagos State on 19th July 2017

[1] 'Northern Youths Give Igbos Oct 1 Deadline to Quit Region' http://independent.ng/northern-youths-give-igbos-oct-1-deadline-quit-region/ (accessed 16 June 2017).

of Niger-Delta youth groups were quick to issue a similar 'quit notice' to all Northerners residing in the Niger-Delta, expiring on the same date. The clamour for 'restructuring' is a response to the feeling that the current arrangement is either deficient in some form, or does not work for all. In spite of 'the need to restructure Nigeria' becoming the latest topic for discussion, it is not clear whether all contributors to the debate mean the same thing when they talk about the need to 'restructure' Nigeria. After all, as seen from the calls above, ensuring that each geo-political zone is ethnically homogenous is one way of restructuring the country. Let us start by interrogating 'what' we are to restructure, before we move to 'how' we can do it. The words of a former Vice President of the Federal Republic of Nigeria, Alhaji Atiku Abubakar - "the current structure which concentrates too much power and resources in the centre, makes us economically unproductive, uncompetitive, indolent, politically weak, disunited and unstable"[2] focuses on the interplay between the political and the economic imperatives.

However, before a case for restructuring can be validly made, we must first identify why the need to restructure arises, and what it is that requires a restructuring exercise. For any restructuring exercise to be successful, we must focus on two areas, our governance structure and our economic policies.

[2] http://atiku.org/aa/2017/03/07/the-political-and-economic-imperatives-of-restructuring-the-Nigeria-federation/ (accessed 29 May, 2017)

1.1 Nigeria's Federal System

Nigeria was granted full independence on October 1, 1960 under a federal system of government with a constitution that provided for a parliamentary government and a substantial measure of self-government for the country's then three regions. The 1960 Constitution shared legislative power between the Federal and Regional governments and the Regional governments had a substantial amount of autonomy and financial independence. There is a consensus however that federalism as currently practiced in Nigeria does not provide the opportunity for optimal development of all parts of the country.

1.1.1 So how did we get to where we are today?

The legislative lists in the country's Constitution allocate legislative power between the federal, state and local governments. Each executive arm of government then exercises political power in respect of matters on the list allocated to it. The exclusive legislative list contains items over which only the federal government can exercise legislative powers; while items in the concurrent legislative list fall within the powers of both federal and state governments (note however that under the doctrine of 'covering the field', if the Federal government has enacted a law in respect of any matter on the concurrent list, then a state law on the same matter takes a back seat).

A review of our constitutions from independence to date highlights the increasing concentration of legislative power at the centre. In the 1960 Constitution, 44 items were on the exclusive

list, while 28 were on the concurrent list. In the 1963 Republican constitution, the items on the exclusive list had increased to 45, while 29 were on the concurrent list – an increase of one each. The 1979 exemplifies the shift towards the centre as the number of items on the exclusive list had increased to 67, while only 12 were on the concurrent list. This increased in the 1999 constitution, with 68 items reserved for federal legislative power on the exclusive list, while only 12 items remained on the concurrent legislative list. The amendments to the 1999 Constitution to date have not affected the legislative lists.

The trend towards a unitary system of government with a concentration of power at the centre is the result of the advent of the military in Nigerian governance, as nearly all of our constitutions were midwifed by a military government. Revenue was dispensed to the States by the Federal government, and nearly all development projects and initiatives were federally instituted and promoted. Today, so many state governments cannot pay salaries or embark on any development projects without support from the Federal government. The gravity of the situation is highlighted by the fact that despite the bailout recently provided to 33 state governments, 12 states still currently owe salaries.[3]

Unequal development of a country where nearly all the States depend on the Federal purse for sustenance has resulted in claims of 'marginalisation'. Specifically, a large number of Nigerians from

[3]'12 States owe salaries despite bailout' http://www.vanguardngr.com/2017/04/12-states-owe-salaries-despite-bailout/ (accessed 19 May, 2017)

the oil-producing areas of the South-South believe that their part of the country has contributed far more to the Federal purse than they have received in return. They point to the environmental degradation and neglect of the Niger-Delta area as compared with the expansive and continuous construction works in Abuja, the Federal Capital Territory. Another belief is that due to underdevelopment, certain parts of the country that have contributed relatively little to the Federal purse by way of trade, commerce or natural resources are receiving what other parts of the country perceive as "more than a fair share" of Federal revenue and attention, by way of Federal appointments based on the Federal Character principle. These parts of the country believe that the development and contribution of their ethnic groups at the federal level is hindered by the federal character principle, where merit often takes a back seat in order to ensure the inclusion of all other parts of the country, irrespective of the rate of development that exists in those specific areas.

Political commentators assert that it was the unequal access to political power with its attendant economic advantages by the country's major and minor ethnic groups and the ensuing agitation for restructuring Nigeria which led to the civil war of 1967-1970. To bring the point home, I would like to draw your attention to an article in *The Vanguard* on the 1st of October 2016 titled 'Nigeria @ 56: Unending attempts to restructure Nigeria'.[4] The article was based on the premise that Nigeria was founded on a

[4]"Nigeria @56: Unending attempts to restructure Nigeria" http://www.vanguardngr.com/2016/10/nigeria-56-unending-attempts-to-restructure-nigeria/ (accessed 22 June 2017).

'false' tripod of three major tribes: Hausa, Yoruba and Igbo, whereas there are between 250-500 ethnic nationalities in Nigeria. The Vanguard article refers to this as a "faulty foundation" since the three regions were dominated by the three major ethnic groups, to the detriment of the other ethnic minorities within the regions. It would seem that efforts to address this perceived imbalance is what has restructured Nigeria from a three to a four Region structure, then changed to a 12 State structure, which has since increased to 36 States.

States were created in the expectation that by carving up the country into smaller units, the issues that led to the Biafran secession crisis and the civil war of 1967-70 will not reoccur, and that the centre will have firmer control of the constituent units. However as the Kaduna Declaration has shown, the change in political structure does not seem to have solved the perceived problems of firstly 'equity' and 'equality' between the majority ethnic groups; secondly the alleged domination of the minority ethnic groups by the majority ethnic groups has not been resolved either, as there are still calls by certain groups for the creation of even more States[5], even when the vast majority of States created are not financially viable in the absence of financial support from the federal government.

[5] The National Conference in its final report recommended the creation of 18 additional states to bring the number of states in the country to 54.

The current civil unrest in the North-East, the South-East and the South-South are further examples of the unresolved tensions between the centre and the subnational units.

It is the same underlying complaints (unequal access to political power and to economic/resource control) and the expressed need for restructuring that has resulted in the many rounds of national conferences which have been convened in the past[6]. These conferences have made several recommendations over the years, including 'true' federalism (whatever that means), confederation or regional government, and a change of the governance structure by reverting to the initial parliamentary system of government, rather than the current presidential system which is seen as too expensive for our current state of development.

Those who argue for restructuring propose a form of political and financial restructuring that would result in resources being owned and managed at the state, regional or zonal level and revenue contributions be made by the subnational units to the Federal Government for the maintenance of federal structures and the carrying out of federally assumed responsibilities at an agreed ratio. The result will be that the focus of development will shift to the geo-political zones and communities. Government will be decentralized with each subnational government bearing the responsibility for the welfare of the people within its territorial jurisdiction.

[6] Constitutional Conference of 1977/78, Constitutional Conference of 1988/89, National Constitutional Conference of 1994, National Political Reforms Conference of 2005, National Conference of 2014.

A senior colleague, Chief Guy Ikokwu[7] has recently advocated that the National Assembly should urgently usher in a restructured system of governance for more viable economic challenges via a reduction of the legislative list for the centre to as it was in the 1963 republican constitution or thereabouts, so that Nigeria will evolve into a true federation with such fiscal federalism as will make the economy to grow at no less than nine per cent per annum. In his view, this will enable Nigeria recover lost economic development grounds and assume a leadership position not only in West Africa but also in Africa as a whole.

A campaign group known as "Restructure Nigeria" has suggested that states should be allowed autonomous control over their resources, education, electricity and their security system. They argued that these areas in the hands of the central government have been highly mismanaged. They believe that the solution they proffer is to ensure the development of communities in this area.[8]

Primarily, the calls for restructuring have focused on the need for devolution of more political and economic powers to the States, with an emphasis on fiscal federalism and state police, among others. The expectation is that when subnational regions take responsibility for revenue generation and expenditure, they will take into consideration the peculiar differences that exist between various regions and localities under their control, lower

[7] A lawyer, Second Republic Politician and Pioneer member of the People's Democratic Party (PDP) 'We must restructure to save Nigeria' http://www.vanguardngr.com/2017/01/must-restructure-save-nigeria/ (accessed 26 June 2017).

[8] http://www.restructurenigeria.ng/#sthash.OJLc5Gf2.wh9hmeWu.dpbs (accessed 23 May 2017)

administrative costs will result, and increased competition among regions to reach development goals will generate more revenue within the subnational units.

Proponents of re-structuring are also agitating for the implementation of the reports of the National Conference of 2014 in the Constitutional amendment.[9] The National Assembly is currently working on the Fourth Alteration Bill to the Constitution of the Federal Republic of Nigeria 1999 (As Amended) which proposes the following amendments:

(a) Amendment of the Constitution[10] to protect the local governments from undue interferences from the state government and to provide for direct payment of local government funds to the Local Government Councils.[11]

(b) Pensions, Prisons, Railways, Stamp duties and Wages is to be removed from the exclusive legislative list to the Concurrent Legislative List. Also, the concurrent legislative list would be amended to include; Arbitration, Environment, Healthcare, Housing, Road Safety, Land and Agriculture, Youth and Public Complaints.

While the current proposed amendment of the Constitution by the National Assembly is laudable, the current proposals do not seem to have been taken into consideration the solutions proposed by most advocates of restructuring. The provision of State police is not represented in the Alteration Bill. Only a

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[9] The News Nigeria "Restructuring Nigeria" http://thenewsnigeria.com.ng/2017/05/restructuring-nigeria/ (accessed 31 May 2017).

[10] Section 7 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23, LFN, 2004

[11] Proposed amendment to Section 162 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23, LFN, 2004

skeletal form of fiscal federalism is represented in the Bill i.e. payment of allocated revenue to the local governments and not to their States. The legislative powers in relation to taxes remains substantially the same. In simple terms, the Fourth Alteration Bill provides no solution that the proponents of restructuring have proposed. The agitation for a restructured and viable Nigeria still goes on.

1.2 The Concept of Federalism as Practiced In Other Countries

Advocates of restructuring speak of it in the context of the political makeup of Nigeria, advocating a change to the current political governance structure. Nigeria is a federal republic. Federalism generally means a political system where the mode of government comprises of a central government and provincial and sub-units of government, with the latter being subordinate to the former. It goes beyond the mere division of a country into provinces for administrative convenience, and ideally, the provincial governments have and exercise a certain extent of political, financial and administrative autonomy.

While the general concept of federalism remains the same, it can be implemented in different ways. For instance, the United States of America has a federal government that holds and exercises executive, judicial and legislative powers for the entire country. However, these powers are limited by the US Constitution, which bars it from exercising powers or having authority on any issue not specifically delegated to the federal government by the

states[12]. The exclusive powers of the US Federal Government are enumerated in section 8 of Article 1 of the US Constitution, and they include sovereign debts, regulating commerce with foreign nations, to levy taxes for payment of sovereign debt and common defence of the United States, to establish the armed forces, and to declare war. Each state in the US has its own constitution, a legislature, an executive government and a hierarchal court system with a State Supreme Court. States have the power to make laws concerning taxes, property, education, estate and inheritance law, banking and credit laws, labour, insurance, family, public health and quarantine, corporations, land use, judiciary and criminal procedure, civil service and electoral laws. Local and municipal governments are not expressly created by the US Constitution, and consequently, by virtue of the 10th Amendment, they are considered to be matters for the states. Most local and municipal governments in the United States (also referred to as 'counties', 'boroughs', or 'cities',) are created either in the states' constitutions or by state laws.[13] While the legislative and administrative powers of the local governments in the US differ from state according their enabling laws, they often include oversight on public works, licensing of public accommodations, and basic public services.

[12] 10th Amendment to the US Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." http://constitution.laws.com/americanhistory/constitution/constitutional-amendments/10th-amendment (accessed 24 June 2017).

[13] National Association of Counties. Available on http://www.naco.org/counties-matter#diversity (accessed 24 June 2017).

India is another federation called the Union of States which divides executive, legislative and judicial powers between the central government and provincial governments. Unlike in the United States, the powers devolved to the provincial governments are not the same, with some having less power than the others. Schedule 7 of the Indian Constitution provides a list of 97 items on which the Federal parliament has exclusive powers, and a list of 62 items for the provincial governments. However, the laws made by the provincial parliaments will be void if is inconsistent with a law made by the federal parliament. There is also a concurrent list of 47 items for which both federal and provincial parliaments have powers.

Canada also operates a federal parliamentary system of government, with the federal parliament having exclusive powers to make laws and regulations on issues such as public debt, prisons, postal services, military and defence, navigation and shipping, currency and coinage, banking and bills of exchange, and criminal law. The Canadian Constitution also creates powers for the provincial parliaments in other areas such as exploration and development of natural resources, education, forestry etc. Both federal and provincial parliaments have power over other areas such as immigration, agriculture, pensions, and crown property. In areas where both levels of parliament have power, one parliament may prevail over the other.

Russia operates an asymmetric federalism where the different federal subjects have different powers and levels of autonomy[14]. The Russian federal system consists of a central government and 85 federal subjects made up of regions, cities, and provinces with all having an executive head of government, a legislature, constitutional court and equal representation in the upper house of the Federal Assembly. The federal subjects are classified as republics, oblasts, *krais*, *okrugs* and federal cities, and the autonomous power they have depends on their classification.

So we can clearly see that the basis of Federalism is the sharing of political and economic power among the federating units in such a manner that the federating units have sufficient autonomy to enable them meet the peculiar needs and specific aspirations of their respective constituents. When one notes the aggregation of power and control in the federal government each time the Nigerian Constitution was amended, one sees why the calls for restructuring have become more strident over time.

2.0 THE ISSUES RAISED BY RESTRUCTURING ADVOCATES

Agitators for Nigeria's restructuring have highlighted various aspects of the country's current political and economic problems, which any restructuring exercise should address. Let us look more closely at some of the major ones.

[14] Articles 65 – 79 of the Constitution of the Russian Federation

2.1 A Change in Political Structure [Restructuring the Executive Arm of Government]

Proponents point to the high administrative overheads, the cost of governance and the economic unviability of many of the 36 States and advocate a return to a regional or 'zonal' structure, comprising the 6 geo-political zones. No-one has stated what incentives would induce a State to give up its retinue of executive / political officer holders (Governor, Deputy Governor, House of Assembly and support staff). When one notes that the constitutional amendment required to return to a regional or adopt a zonal structure means the State Houses of Assembly would be asked to pass resolutions that would extinguish their existence, political restructuring seems a tall order. Unless the regional or zonal subnational units proposed will in some way accommodate this group of political office holders in their administrative structure, I do not see this this aspect restructuring gaining any momentum.

Another argument is that reverting to the Parliamentary system of government will decrease governance costs and ensure party loyalty and thereby accountability to the electorate. In a Parliamentary system of government the Head of State is different from the Head of Government. Parliamentary systems around the world differ, ranging from 'constitutional monarchies' (as in the United Kingdom) where a monarch is the head of state and the head of government is a member of the legislature; to 'parliamentary republics' where the President is the head of state while the head of government is from the legislature.

In a parliamentary system, at a general election called for that purpose, the public will vote for members of political parties representing their constituencies, who if elected will become members of Parliament. At this point, there is no difference between the two systems. The leader of the largest party in Parliament will be appointed by the Head of State as the Head of Government (Prime Minister). The Head of Government may be removed from office by losing his seat in the Parliament or if a vote of no confidence is passed against him by the Parliament, making him accountable to Parliament. Those arguing for a return to this system have not indicated how the Head of State would be selected.

The United States on the other hand, practises a Presidential system of government similar to Nigeria, where the Head of Government is also the Head of State. Unlike the Parliamentary system of government, the executive branch exists separately from the legislative branch, to which it is generally not accountable. Members of the public directly elect the President into power after voting has taken place at general elections. The President's accountability is supposedly to the electorate, which makes for a clearer separation of powers between the Executive and the Legislative arms of government. The President however is elected as representing his political party, and with a mandate to implement its policies and programmes. He cannot be removed by the legislature, except by impeachment, which in Nigeria is enshrined under section 143 of the 1999 Constitution (as amended).

As is the case in South Africa and Botswana, it is possible to have a parliamentary system in which the same person is head of state and head of government, and usually filled by a vote in parliament. This system allows for the Parliament to put in a vote of no confidence in the President and remove him, making him accountable to Parliament. In Botswana, the Prime Minister derives and shares its executive powers with Parliament. The Botswana Constitution recognises the President as a member of parliament, and is so elected by Parliament rather than the people. Like a presidential system, the President is head of both state and government.

The Parliamentary system has proven to be advantageous for the following reasons. First, the executive has a majority of the votes in the legislature, which would enable legislation to be passed faster and easier. Second, this system has attractive features for nations that are multicultural and ethnically divided. Executive power is not centralised in one person, as in a presidential system of government. Therefore, different ethnicities will be represented in the legislature, which ought to then act in the best interest of the nation as a whole. The disadvantage of the Presidential system is that it supports the 'cult of the personality' which most African countries have engaged in, thereby focusing too much political power in the hands of a single individual.

The National Conference however recommended a "Modified Presidential System," which would merge the Separation of Powers principle in the Presidential System of government with the promotion of co-operation and harmony between the

executive and legislature in the Parliamentary System of government.[15]

It is not the 'personality cult' issues but the cost of running a Presidential system with its multitude of aides and assistants that has been touted as the major reason for advocating a reversion to the parliamentary system. This may not however be correct, as nothing stops the Presidential and legislative offices from being staffed in the same manner as is currently the case. It is my humble opinion that in deciding what political governance structure is in the best interests of Nigeria as a sovereign state, the system of government plays little or no role. As Professor Wole Soyinka rightly said: "any system is only as good as the quality of the humanity that runs it."[16]

The burden is on the President to work collaboratively with his cabinet and other arms of government, in order to provide policies and measures that will help in restructuring Nigeria for development. All it takes is the powerful vision of one person to take Nigeria to the next level. Singapore, often known as the "Monaco of the East", became what it is today not as a result of its Parliamentary system of government, but the vison of one man- Lee Kuan Yew, Singapore's first prime minister. Under his leadership, Singapore grew from an impoverished third-world

[15] Page 285 of the National Conference Report 2014

[16] 'S. Anyaoku, others want Nigeria to switch back to parliamentary democracy' http://www.premiumtimesng.com/news/157515-soyinka-anyaoku-others-want-nigeria-switch-back-parliamentary-democracy.html (accessed 26 June 2017).

nation into a financial powerhouse and one of the region's tiger economies[17].

2.2 Full Time Legislators vs Part Time Legislators

The shift to a part-time legislature has also been part of the recent restructuring debate among lawmakers and lawyers in Nigeria. This is primarily premised on the significant amount of money expended on overhead costs and salaries of the legislature. The argument is that the cost of governance is too high and Nigeria should consider a part-time legislative system. Part-time legislators will have other jobs besides being lawmakers and will not be expected to conduct legislative business for more than a stated period of time each year and are paid less than what full time legislators would be paid.

In the United States of America, the state of Florida runs a part-time legislature. In support of this system, California's former governor, Wilson stated: "when you have a part-time legislature, they are by necessity required to concentrate on the most important issues. I think we would see many fewer bills. We would see far less spending.[18] In his book[19], Miller also observed that legislators in full-time law making were more interested in advancing their careers in politics, while lawyers in part-time law

[17] http://www.bbc.com/news/business-32028693;%20%20%20 (accessed 26 June 2017)

[18] 'Is the Grass Greener for Part-Time Legislatures?' http://www.pewtrusts.org/en/researchandanalysis/blogs/stateline/2004/05/14/is-the-grass-greener-for-parttime-legislatures (accessed 14 August 2017)

[19] Miller, Mark C., *The High Priests of American Politics: The Role of Lawyers in American Political Institutions*, (1st Edition, The University of Tennessee Press 1995)

making were interested in making new law. In other words, a full-time legislator will be interested solely in advancing his political career rather than advancing reforms in the law or the country. It could also be argued that full-time legislators who make their income solely from salaries and other benefits from making laws, are seldom in touch with the realities that the average business man encounters trading both in and outside Nigeria. But, should they become part-time lawmakers they will come face-to-face with the issues a businessman might face and fully appreciate and identify with business realities.

Notwithstanding, since the underlying problem identified by advocates for a part-time legislature is the overhead cost and not necessarily the amount of days spent by the legislature sitting, the solution is to cut down the amount of money allocated to members of the legislature and utilise the excess for development in areas that are currently underfunded.

2.3 A Change in the Judicial System (Restructuring the Judicial Arm of Government)

Judicial and legislative systems must exist within whatever political governance structure exists. Proponents of restructuring have called for a restructuring of the present Nigerian court system. They have argued that restructuring would cure the current challenges facing the judicial system, which includes trial delays, large volume of cases, lack of an independent judiciary, corruption and lack of capacity of Judicial Officers.

Hon. Joseph Nwobike SAN is also of the opinion that judicial power is centralized and should be re-distributed. He said that the concentration of the judicial power is antithetical and overbearing and advocated for a regional Supreme Court and Court of Appeal. He said it is improper for the National Judicial Council to be responsible for the appointment of judges of the states. The states he said should be responsible for the appointment of their judges and should be empowered to create specialized courts.[20]

In providing a solution to the challenges facing the judiciary, the National Conference 2014 gave the following recommendations, which they believed would result in a most effective judiciary system. Part of their recommendations were;

(i) Establishment of a State Court of Appeal for each State to serve as the terminal Court for States on State matters except in cases of weighty Constitutional issues, civil liberties and matters of overriding public interest with the leave of the Supreme Court.
(ii) The President of the State Court of Appeal should be the Head of the State Judiciary;
(iii) The Court of Appeal should revert to Federal Court of Appeal to hear appeals from Federal Courts and Tribunals and general Court Marshals and shall be terminal Courts except in cases of weighty Constitutional matters, civil liberties and matters of overriding public interest with the leave of the Supreme Court.
(iv) All appeals from the Court of Appeal to the Supreme Court should only be by leave

[20]"The Nigerian Lawyer "How to Restructure Nigeria, by Lawyers" http://thenigerialawyer.com/how-to-restructure-nigeria-by-lawyers/ (accessed 14 August 2017)

(v) All cases from inferior Courts should terminate at the State Court of Appeal except in cases where issues of constitutional significance, civil liberty and matters of public interest are involved;

Some have suggested that each State should have its own Supreme Court as the terminal appellate court and the apex of its judicial system. If adopted, this will create separate and parallel court systems; one for the Federation and one for the States. Unfortunately the Fourth Alteration Bill[21] did not incorporate the Recommendations of the National Conference 2014.

2.4 A Change in Legislative Structure (Restructuring the Legislative Lists / Arm of Government)

2.4.1 Economic Restructuring

The fact that all the previous political restructuring initiatives to date (creation of more states) have not resulted in enhanced development in the country is evidence that political restructuring alone will not solve the nation's problems. A system that enables each subnational unit to concentrate on the aspects of development that are most relevant to its citizens is what will bring stability to Nigeria. The Center for Global Development citing Armartya Sen[22] said that:

[21] Bill sponsored by Hon. Aminu Shehu Shagari

[22] Amartya Sen is Lamont University Professor, and Professor of Economics and Philosophy, at Harvard University and was until recently the Master of Trinity College, Cambridge. He has served as President of the Econometric Society, the Indian Economic Association, the American Economic Association and the International Economic Association. He was formerly Honorary President of OXFAM and is now its Honorary Advisor.

> development must be judged by its impact on people, not only by changes in their income but more generally in terms of their choices, capabilities and freedoms; and we should be concerned about the distribution of these improvements, not just the simple average for a society.[23]

Currently Nigeria ranks 152 out of 188 on the UNDP 2015 Human Development Index.

I would like to highlight some items on the Exclusive Legislative List which are currently the sole responsibility of the Federal Government, and which directly impact upon the lives of Nigerian citizens at the subnational unit level. Proponents of restructuring argue, and I agree with them, that these are items over which the subnational units (whether States or Regions) need to have more authority and more autonomy.

2.4.2 Power

The Federal government is responsible for and through its agencies regulates power generation and distribution. In the eyes of the World Bank - *"An economy's production and consumption of electricity are basic indicators of its size and level of development."*[24]

Where we are:

- 1896 - Electricity was first produced in Lagos, fifteen years after its introduction in England.

[23] O. Frank 'Why Nigeria's State Governments must Re-Think their Development Models' https://www.linkedin.com/pulse/why-nigerias-state-governments-must-rethink-models-onuoha-eleanya. (accessed 26 June 2017)
[24] World Bank - Electric power transmission and distribution losses fact sheet.

- 3500-5000 MW – present electricity generation in Nigeria.
- 339 TW – present electricity generation in Britain (339TW = 339,000,000MW according to UK.gov)
- $100 billion – is what Nigeria is estimated to lose yearly due to lost output and high costs for local businesses; according to the Commonwealth Business Council, reported by Vanguard March 7, 2011.

Country	**Population (2015 World Bank estimates)**	**Size of Economy (2015 World Bank figures)**	**Power Generation (USAID Power-Africa estimates)**
Nigeria	182.2Million	481.07 B USD	3500-5000 MW
South-Africa	55.01Million	312.7B USD	34,000 MW according to ESKOM - South-Africa's state-owned power generation company
DR Congo	67.51 Million	35.24B USD	2,500MW
Ethiopia	99.39 Million	61.54B USD	2,300 MW
Tanzania	53.47 Million	44.90B USD	1,500 MW
Kenya	46.05Million	63.40B USD	2,294 MW

Comparison with 5 of the Most Populous African Countries

South Africa with a third of Nigeria's population produces 10 times the power that Nigeria produces.

2.4.3 Infrastructure

The Federal and state governments are respectively responsible for infrastructure projects in their domains.

Where we are:

- 36,183kilometre Federal network of roads in Nigeria.[25]
- $300bn is the cost of Nigeria's Infrastructure deficit, an estimation of the Lagos Chamber of Commerce and Industry, according to a report in The Punch newspaper. [26]
- $1billion is what Aliko Dangote estimates is lost from bad roads around Nigeria's ECOWAS corridor[27]

2.4.4 Education

The Federal government is responsible for education in Nigeria. It regulates and makes policy for education through the National Council on Education. This council comprises state commissioners

[25] http://frsc.gov.ng/NRSSSeries1.pdf (accessed 22 May, 2017)
[26]'Punch Nigeria "Nigeria has N5.91tn infrastructure deficit – LCCI" http://punchng.com/nigeria-n5-91tn-infrastructure-deficit-lcci/ (accessed 24 June 2017)
[27]'Punch Nigeria "Nigeria loses N197bn annually to bad roads– Dangote" http://punchng.com/nigeria-loses-n197bn-annually-bad-roads-dangote/ (accessed 24 June 2017)

of education. State government or privately owned education institutions operate under the supervision of Federal government agencies such as National Universities Commission or Council of Legal Education.

Where we are:

- Nigeria has the highest number of children out of school[28], 8,290,000 – Number quoted as at 2008 by the Education Policy Data Centre
- This is more than the population of Israel, which is 8,192,463 (2016 estimates)

2.4.5 The Ownership of Natural Resources

Any economic restructuring of the entity called Nigeria must address the issue of ownership of and/or control over our natural resources. Many historians have noted that during the 1960s when Nigeria was structured on a regional basis, with each region having its own Constitution, Nigeria saw optimal economic growth. That was the period when the groundnut pyramids in the north of the country competed with the cocoa and rubber plantations in the West and the Mid-West and the oil palms of the East for dominance in the Nigerian economy.

The United Nations General Assembly Resolution 1803 (XVII) titled, '*The Declaration on Permanent Sovereignty over Natural Resources*' of December 1962 recognised the rights of states to

[28] Forty per cent of Nigerian children aged 6-11 do not attend any primary school with the Northern region recording the lowest school attendance rate in the country, particularly for girls. See http://www.unicef.org/nigeria/children_1937.html (accessed 28 June 2017).

have and exercise sovereignty over natural resources, and the right of states to make legislation for the exploration, development and disposal of these natural resources. This has formed the legal basis for most countries around the world (with the notable exception of the United States and Canada) to vest ownership of all natural resources in the national governments of those states.

Different countries have adopted differing approaches in the sharing or distribution of revenues from natural resources. In the United Arab Emirates, natural resources revenues are collected by the Dubai and Abu Dhabi provinces and shared with the central government and the five other provinces.

In the United States, states such as Alaska, Wyoming and California, which have vast natural resource deposits, collect and retain for their own use a large portion of the royalties and taxes from these resources. Similar practices are found in UAE, India and Australia where large portions of the revenue accruing from natural resources are collected directly by the regional and subnational governments.

Federal systems such as Iraq, Venezuela, Brazil, Russia and Malaysia operate a derivation-based system similar to that of Nigeria when allocating revenues from natural resources. Revenues are collected by the federal government from which a certain percentage is remitted to the subnational government in whose territories these natural resources are produced. Law 33/2004 of Indonesia provides that 15% of oil revenues and 30% of gas

revenues shall be given back to the originating regions from where they were produced.[29] In Venezuela, the derivation system requires a transfer of between 15% to 20% of the federal budget shall go to states, and special financial assignments shall be made to states from where natural resources are produced.[30]

Other federal systems such as Mexico treat both resource producing regions and non-resource producing regimes on the same footing, and revenues from natural resources are transferred from the national government to the states based on a number of indicators such as population and poverty levels, irrespective of where the resource was produced.

2.5 The Concept of Fiscal Federalism

Fiscal federalism (also known as fiscal decentralization or financial autonomy) is where fiscal powers are assumed by or devolved to subnational governments who have the responsibility for generating revenue, undertaking public expenditure and the transfer of revenue to the national government. In other words, it is decentralisation of monetary responsibilities from the centre to the subnational units. Prof. Itsey Sagay gave an interesting explanation of the concept. He states that it involves three major components:

i. The power and right of a Community or State to raise funds by way of tax on persons, matters, services and materials within its territory.

[29] EI Sourcebook: www.eisourcebook.org
[30] Article 156(16) of the Constitution of the Bolivarian Republic of Venezuela

ii. The exclusive right to the ownership and control of resources, both natural and created within its territory.
iii. The right to customs duties on goods destined for its territory and excise duties on goods manufactured in its territory.[31]

In ideal terms, fiscal federalism means that rather than a subnational government receiving monetary allocations or grants from the national government, it will have and assume complete responsibility for revenue generation through taxation and royalties and for public expenditures in the region, subject to making remittances to the national government to cover the costs of the countrywide services to be provided by the national government.

In an article titled 'Nigeria Must Restructure To Make Progress' published in Business Day of 1st October 2016[32] Chief Ukaegbu, a politician and political party leader highlighted the concept of fiscal federalism when he stated that

> There is no reason why Abia State should be getting subsidy or oil windfall from Bayelsa, when we can produce palm oil, cassava and other inputs and contribute to the national economy' and suggested that 'Nigeria must go back to fiscal federalism, which was the practice that was bequeathed to us by Britain.

[31] 'Resource Control http://www.restructurenigeria.ng/issue/resourcecontrol/#sthash.gVNHLBLI.dpbs (accessed 23 August 2017)
[32] Business Day "Nigeria must restructure to make progress – Ukaegbu" http://www.businessdayonline.com/en/nigeria-must-restructure-to-make-progress-ukaegbu/ (accessed 2 October 2016)

The National Conference of 2014 however only proposed the review of the sharing formula of funds accruing to the Federation Account among the tiers of government. Its report seeks to replace the existing formula of 52.68%, 26.72% and 20.60% among the federal, state and local governments respectively to 42.5%, 35% and 22.5%.[33].

The Conference also proposed that the Revenue allocation formula of population, land mass, equality of states, internal generated revenue, terrain as well as population density should be made to also include; Inverse Primary School Enrolment, Federal Presence and Unemployment. The inclusion is to enhance economic, infrastructural and human development in the country.[34]

In order to ensure transparency and accountability in the management of the federation account as distinct from the federal government, the Conference recommended that the power of the federal government to prescribe the manner of sharing national revenue should be exercised only by the Revenue Mobilization Allocation and Fiscal Commission. Although the National Assembly in its Fourth Alteration Bill did not include the review of the revenue allocation formula or percentages. However, it sought to remove the power to prescribe the manner of sharing national

[33] Page 153 of the National Conference Report 2014
[34] Page 154 of the National Conference Report 2014

revenue from the President and place it on the Revenue Mobilization Allocation and Fiscal Commission (RMAFC). [35]

If this implementation is implemented, would this reduce or erase the agitation for restructuring? The answer is surely in the negative. Advocates of restructuring have required that States should be given autonomy over their revenue and not have to remit it to the federal government. The cry is not for percentages but autonomy.

2.6 Nigeria's Current Tax Regime

Revenue, whether that of the Federal or State government, accrues from taxes, levies, penalties and fines. The taxation of incomes, profits and capital gains are listed under the exclusive legislative list of the Constitution, which means that the Federal Government of Nigeria has exclusive powers to make laws regarding taxation in Nigeria. However, the constitution provides that the National Assembly may by an Act provide that the collection or administration of a particular tax shall be done by the states.

Presently the Federal Government assesses and collects the following taxes – Companies Income Tax; Withholding Tax on companies, Petroleum Profits Tax; Education Tax; Capital Gains tax on residents of the FCT corporate bodies, and non-residents; personal income tax on residents of the FCT and non-resident individuals; personal income tax in respect of the armed forces,

[35] Sponsored by Hon. Lady Nkeiruka Onyejeocha

police, resident of the FCT and staff of the Ministry of Foreign Affairs and Value Added Tax. A percentage of the Value Added Tax collected by the Federal Government is distributed to the states and local governments.[36]

In addition to collection powers devolved to them by the centre, the States' Houses of Assembly can make provisions for the collection of taxes, rates, fees and levies by the local governments, subject to certain conditions. Presently State Governments collect Personal income tax in respect of PAYE and self-assessment; withholding tax and capital gains tax for individuals; stamp duties on instruments executed by individuals; pools betting, lotteries and casinos; road taxes; business premises registration; development levy; naming of street registration fees; Right of Occupancy fees; and market taxes and levies.

In addition to federal allocations, local governments collect taxes, rates and levies as follows: shops and kiosks rate; tenement rates; liquor licences; slaughter slab fees; marriage, birth and death registration fees; naming of street registration fees in non-capital cities; Right of Occupancy fees in rural areas; market taxes and levies not administered by the state; motor park levies; domestic animal licence; bicycle, truck, wheelbarrow, canoe and cart fees; cattle tax; merriment and road closure levy; radio and television licence fee, vehicle radio licence fee; wrong parking charges, public convenience, sewage and refuse disposal fees; customary burial

[36] Section 40, Value Added Tax Act, Cap V1 LFN 2004

ground fees; religious places establishment fees; and signboard and advertisement permit fees.

For any restructuring exercise to be sustainable, the subnational units must be able to sustain their administrative overheads and also have the financial wherewithal to implement any development objectives that they embark upon, without recourse to the centre. The above review shows that the tax structure needs to be changed, to enable the subnational units have greater access to fiscal resources, either by way of taxes generated from activities within their domain, or from natural resources exploited within their geographical locations.

The National Assembly has since January 2016 been working on the Fourth Alteration Bill to the Constitution of the Federal Republic of Nigeria 1999 (as amended). In providing a solution to the need for restructuring in the tax system, the Bill sought to vest the law-making powers of only stamp duties on the state.[37] This proposed amendment has no far-reaching effect whatsoever. States currently have the power to collect stamp duties on documents and transactions. The reform required is not only the vesting of legislative powers but also the power to retain and utilize most of the proceeds generated from stamp duties.

[37]The Senate Committee on the Review of the 1999 Constitution available at: http://placng.org/wp/wp-content/uploads/2016/12/Remarks-by-DeputyPresident-of-the-SenateChairman-of-the-Committee-on-Thursday-8th-December-2016.pdf (accessed 19 May, 2017)

3.0 MATTERS ARISING

Having decided on the issues in the restructuring debate, we now need to look at the legal framework for putting this restructuring in place. Any change to either the political structure, whether by way of creation of more states, the collapse of states into regions or changes to the current fiscal allocations between the Federal government and the federating units, will require an amendment of the Constitution. The procedure for amending the Nigerian constitution is laid down in section 9 of the CFRN 1999 (as amended).

> A two-third majority of all members of each House must vote in support for each clause to be deemed as passed, except where the proposal relates to the creation of new states, boundary adjustments, new local government areas, fundamental rights and mode for altering the Constitution (where four-fifth majority is needed).

Is there anything that can be done at the state level, while negotiations are ongoing between the ethnic nationalities reaching agreements that will permit smooth Constitutional amendments? I venture to suggest that adjacent states and/or geo-political zones can negotiate economic agreements or create cross-border economic zones that will enhance development on a joint basis. The recently revived Olokula Free Trade Zone[38], a joint project between Ondo and Ogun States is a case in point. The recent agreement between Lagos and Kebbi States which resulted in the

[38]"This Day Online "Kupolokun Heads Committee on Olokola Free Trade Zone" http://www.thisdaylive.com/index.php/2017/04/28/kupolokun-heads-committee-on-olokola-free-trade-zone/ (accessed 26 June 2017).

joint production of LAKE Rice is another example of how non-contiguous states can come together to become economically independent of the Federal Government.

4.0 CONCLUSION

Before concluding on the issues that revolve around any discussion of restructuring the Nigerian Federation, I would like us to compare Nigeria's current state of development with that of Indonesia. Like Nigeria, Indonesia is a multi-ethnic/religious country with 300 ethnic groups and 650 local languages. At 257 million its population is larger than that of Nigeria and it is the largest economy in Southeast Asia. Where are the differences? Malaysia has a 20-year development plan, spanning from 2005 to 2025 plus five-year medium-term plans that focus on specific sectors. Unlike Nigeria however, Malaysia put in place the following strategy for managing post-independence inter-ethnic conflicts:

- Mass media and public education program that emphasised national unity.
- National campaigns that emphasised "moral development," - the Pancasila. Outlined by President Sukarno in 1945, the Pancasila (meaning "Five Principles" in Sanskrit) are: belief in a supreme God, humanitarianism, national unity, democracy, and social justice[39]

It is therefore clear that the solution to solving our structural political and economic problems is dependent on putting in place a strategy and structures that ensure that ethnic tensions and

[39] Multiculturalism: Some Lessons from Indonesia by Cultural Survival, Inc.

rivalries are doused. This can only happen if the subnational units have sufficient autonomy and financial independence to enable them implement plans and programmes specific to their constituents' development needs.

Some have argued that the current six geo-political zones should be reconstituted into the federating units of the country. I find attractive the thinking that Nigeria should devolve more power and responsibilities from the centre to the subnational units. These units can be organized on a zonal basis, to reflect the existing six geopolitical zones, with each zone having its own government, and responsible for its own development, very much after the pattern of the regional system of the First Republic. In that sense, there will be six zones, each developing at its own pace, and making contributions to a central government whose functions will be limited to defence, foreign affairs, national security, management of national youth service, national currency, and whatever other functions are assigned to it under the new constitution. Internal fiscal autonomy within the geo-political zone will ensure that each area will reap the economic benefits of the resources in its area, such that "domination" and "minority" issues will be minimized, if not totally done away with.

In proposing an economic restructuring of Nigeria, the Lagos State Commissioner for Energy and Mineral Resources Mr. Olawale Oluwo, in an article published in *This Day Newspaper* on 31st August 2016, he proposed the following for consideration by the Federal Government:

- Prune the existing structure and divest itself of some unwarranted administrative responsibilities.
- Reduce ministries, merge functions and devolve more responsibilities to states.
- Hand over intra-state roads to states while keeping only inter-state highways to itself to connect the vast and scattered communities in Nigeria.
- Give more autonomy to states with respect to control of inland water ways.
- Hands off control of lottery business in states.
- Limit the responsibilities of the Ministry of Solid Minerals at the federal level to regulation and cede control of solid minerals to states.
- Divest itself from involvement in distribution of VAT (sales taxes).
- Abolish the law that vests all mineral resources under the soil of Nigeria in the federal government. This will allow states to partner with the private sector to exploit mineral resources and pay agreed derivation to the federal government.
- Review mechanism for administration of PAYEE, to give the states more control.
- Reduce taxes for companies and entrepreneurs.
- Allow more private sector involvement in the economy.
- Divest from the natural gas infrastructure of Nigeria (including removal of subsidies) in order to create a competitive gas sector that will attract private investments and support the economy.
- Divest from the Transmission Company of Nigeria and break the national grid to regional grids. This will allow private sector investments and eliminate the subsidy distortions.
- Fully deregulate the downstream oil sector.
- Abolish all forms of subsidy intervention in the foreign exchange market so the market can operate competitively and allocate resources appropriately.
- Diversify earning capacity of the federal government to increase revenue. Access to increase in revenue may lead to increased government spending, which may alter the recession narratives, provided the right policies prevail

without the usual leakages.[40]

In a nutshell, the Commissioner is advocating for fiscal federalism – the power to control the financial returns from the resources within the subnational unit. If his suggestions are implemented (and I agree with all of them), the subnational units will have the financial autonomy that will enable them sustain whatever economic programmes they put forward for the citizens in their domain. The sustainability of any political restructuring depends on the economic restructuring that must go hand in hand with it. If the 36 states are collapsed into a lesser number on the grounds that most states are currently economically unsustainable in the absence of federal largesse, without economic power being devolved at the same time, the problem though it may be alleviated, will still remain. The excess executive and legislative overheads may be reduced, but funds for development will still be dependent on federal allocations, leaving room for ethnic tensions and rivalries.

The current downturn in federally generated revenue coupled with the renewed agitation from various ethnic 'youth groups' makes this an ideal time for the country to take the bull by the horns and commence both political and economic restructuring.

[40]'This Day Online "A Case for Political and Economic Restructuring of Nigeria" http://www.thisdaylive.com/index.php/2016/08/31/a-case-for-political-and-economic-restructuring-of-nigeria/ (accessed 13 June 2017)

Share Buyback Scheme and Contemporary Tax Treatment: An Overview

Oluwaseun Viyon Ojo*

ABSTRACT

This paper briefly examines the concept of sharebuy back scheme in Nigeria and the extant position of the Nigerian Law as regards the transaction. The present writer essentially places emphasis on an in depth analysis and examination of the tax implications of the transaction from the perspectives of the tax treatment models in other jurisdictions, particularly the United States, United Kingdom and Canada. From the comparative analysis from the above mentioned jurisdictions, the writer further analyses the present position of the extant Nigerian tax statutes on the possible tax treatment of share buyback in Nigeria. It then finally recommended the possible incorporation and adoption of the tax treatment models from other similar jurisdictions examined to the Nigerian tax environment.

1.0 INTRODUCTION

Share buyback[1] has, over the years, been recognised as a viable and legitimate corporate management tool adopted by the directors and managers of a company to return substantial value to its shareholders. In this light, the essence of the share buyback scheme is succintly exemplified by Warren Buffet in the following words;

* LL.B(Hons), B.L. Legal Practitioner, Hoick and Duke. He can be reached at ojoviyon2010@yahoo.com

[1] otherwise referred to as Share repurchase or Stock buyback

> When companies with outstanding businesses and comfortable financial positions find their shares selling far below intrinsic value in the market place, no alternative action can benefit shareholders as surely as repurchases[2]

Thus, it is increasingly adopted by companies as a standard means of returning value to its shareholders in the stead of making direct payment of dividends to its shareholders.[3] Though the practice of share repurchase appears novel in the Nigerian capital market, it has been widely practised in more advanced economies[4]. The first reported share buyback programme in Nigeria was that undertaken by the Custodian and Allied Insurance Plc.[5]

Essentially, corporate managers and directors are usually confronted with the vexed question of what they should use an excess cash that accrues to the company in an accounting year to

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[2] Barkshire Hartworth 1984 Annual Report cited in Anthony Idigbe " Legal Implications of Share Buyback" *Being a Paper prepared jointly with Okorie Kalu Esq., Senior Associate PUNUKA Attorneys & Solicitors and delivered at CAMCAN 2008 Training Programme, Conference Hotel, Ijebu-Ode, Ogun State on the 16th November, 2008*

[3] The usual method adopted by firms to pay cash to its shareholders is to declare a cash dividend to its shareholders. However, an alternative and increasingly popular mehod is to repurchase its own stock or shares. In the United States, during the period of 1973-1974, the government imposed a limit on dividends but it forgot to impose a limit on share repurchase. Thus, many firms discovered share repurhase for the first time and the total value of repurchases swelled to about a fifth of the value of dividend payments. See Richard A. Brealey and Stewart C. Myers "*Principles of Corporate Finance*" 5th ed., (The MacGraw Hill Compani Inc).,p.419.

[4] In some countries, including the United States and the United Kingdom, corporations can buy back their own stock in a share repurchase or share buyback. There has been a meteoric rise in the use of share repurchases in the U.S in the past twenty years, from $5b in 1980 to approximately $349b in 2005.See also Proshare, "Sharebuyback! Is it a viable option for companies?" available at https://www.proshareng.com/articles/Archives/share-buyback!-is-it-a-viable-option-for-companies/1805, (accessed 11 December 2016).

[5] See Proshare "Custodian Announces Nigeria's first sharebuy buy-back", https://www.proshareng.com/Custodian-announces-Nigeria-s-first-share-buy-back/9279, (accessed 11 December 2016)

do. Faced with this situation, there are basically two capital allocation or deployment options open to them, namely capital budgeting or invesment decision,[6] on the one hand, and return of cash to their investors on the other.[7] Share Buyback thus represents one of the many viable options of returning cash and valueto the shareholders by the company.

In light of the above background fact that share buyback is a viable profit-distribution scheme and the increasing preference for the programme by many a company, this paper focuses onthe analysisof the concept in light of the exisiting position of the Nigerian law; specifically reviewing tax treatment models of such transactions by way of a comparative analysis withother jurisdictions particularly the United States and United Kingdom. Understanding the tax treatment models in these jurisdictions will greatly assist in proposing a model to be adopted in the Nigerian tax environment.

Therefore, Part I of this paper introduces the concept, Part II analyses the different arguments for and against the concept. In Part III, the writer examines the various methods of share buyback, while Part IV looks into the position of the Nigerian Law on Share buyback under both the Companies and Allied Matters

[6] The capital budgeting or investment decision involves investment via capital spending, working capital, mergers and acquisitions (i.e. re-injection of capital into the business for further growth);

[7] Return of cash to stakeholders includes equity capital providers (dividends or share buyback), debt capital providers (secured and unsecured creditors through debt repayment) and other stakeholders such as management & employees (executive compensation, stock options or "golden parachutes", employees' stock options).

Act(CAMA)[8] and the Consolidated Rules of the Securities and Exchange Commission 2013. Part V considers the tax treatment and implications of share buyback within the jurisdiction of United States, United Kingdom and Canada whilst Part VI examines the taxability of the Share buyback under the exisiting fiscal regime in Nigeria as well as incorporating the lessons from the tax treatment approaches in the jurisdicitions examined. This paper concludes with the suggestionthat the fiscal regime be amended to incorporate and align with the existing tax treatment models from the jurisdictions analysed

2.0 THE CONCEPT OF SHARE BUYBACK

The concept of share buyback is simply the acquisition by a company of its own shares from its shareholders.[9] In other words, a share buyback refers to the repurchasing of shares by the company that issued them. Essentially, a buyback occurs when the issuing company pays a shareholder the market value per share and re-absorbs that portion of its ownership that was previously distributed among public and private investors.[10]

[8] Cap 59 Laws of the Federation of Nigeria(LFN) 2004

[9] Further to the above, A buyback evokes the idea of a company using its cash to buy its own shares, in other words, investing in itself. See Anthony Idigbe " Legal Implications of Share Buyback" *Being a Paper prepared jointly with Okorie Kalu Esq., Senior Associate PUNUKA Attorneys & Solicitors and delivered at CAMCAN 2008 Training Programme, Conference Hotel, Ijebu-Ode, Ogun State on the 16th November, 2008*,

[10] In specific terms,The Head,Investment Banking, Sub-saharan Africa and Financial Institutions- Africa for Merrill Lynch, Mr Michael Larbie, defined share buy-back as the repurchase by a company of its own shares in the market. The bought shares are either cancelled or retained as treasury shares in order to be able to re-sell them or allocate them to fulfill stock options or to otherwise avoid issuing new shares. See Omoh Gabriel and Peter Egwuatu " Share

Generally, where a company buys back its own shares, it effectively shrinks its issued share capital[11] by reducing the number of shares held by the public, such that even if the profits of such company were to remain the same, the company's earnings per share would increase.

3.0 ARGUMENTS FOR AND AGAINST SHARE BUYBACK SCHEME

Several arguments and postulations have been proposed in favour of and against the sharebuyback scheme,by its proponents and antagonists, respectively.

Proponents of share buybacks have argued that there is a need for quoted companies to reduce their shares and create scarcity, revive the stock market and ensure that value is given to investors. Further to this, it has been argued that buy back of shares allows a company to return to shareholders surplus cash that the company itself is unable to invest efficiently in profitable investment projects

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reconstructon and the shareholder- What next?" Proshare ,June 30, 2008, available at <https://www.proshareng.com/news/investors%20NewsBeat/Share-reconstruction-and-the-shareholder---What-next-/4447>, (accessed 12 December 2016).see also "Why would a company buy back its own shares" available at http://investopoedia.com/ask/answers/042015/why-would-company-buyback-its-own-shares.asp , (accessed 7 December 2016)

[11]Issued Share Capital is the portion of the authorised share capital which has been subscribed or issued to shareholders and the expression "issued share capital" when used in relation to a reduction of share capital includes the share premium account and any capital redemption reserve account of a company; See Section 105(2) of CAMA. The issued share capital must not be less than twenty five percent of the authorised share capital see section 99 of CAMA; See generally, Hon. Dr. J. Olakunle Orojo "*Company Law and Practice in Nigeria*", LexisNexis, Fifth Edition, Pg.116.

and also assists a company to bolster or stabilise the market price of its shares.[12]

In addition, Vice President, Financial Markets International Incorporated, United States, Mr Peter Levine noted that share repurchase can be used to increase financial leverage in particular by underleveraged companies. He further stated that companies buy back their shares to eliminate an undesirable major shareholder, to defend against an actual or threatened take-over proposal[13], inhibit potential corporate raiders from accumulating shares in the open market, remove market overhang and increase the percentage of ownership of the remaining shareholders.[14]

On the other hand, the antagonists to the scheme have equally and vehemently argued thatthe scheme gives room for unscrupulous managers and promoters of companies to perpetrate fraud by creating an artificial buoyancy of the shares of companies, and ultimately fuels dangerous speculative trading of

[12] See Ellis Ferran & Look Chan Ho, *Corporate Finance Law*, 2nd ed., (Oxford University Press, Great Britian 2014), pp.179-183, Joseph Onele "What is Illegal about share buybacks in Nigeria", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731858, (accessed 12 December 2016).

[13] This works in instances of greenmail transactions in which the target of a takeover attempt to buys off the hostile bidder by repurchasing shares that it has acquired. "Greenmail" means that these shares are repurchased by the target at a price which makes the bidder happy to agree to leave the target alone.This price does not always make the target's shareholders happy; See generally Richard A. Brealey and Stewart C. Myers "*Principles of Corporate Finance*" 5th ed., (The MacGraw Hill Compani Inc). p.420.

[14] See Omoh Gabriel and Peter Egwuatu " Share reconstructon and the shareholder- What next?" June 30 2008, Proshare, available at https://www.proshareng.com/news/investors%20NewsBeat/Share-reconstruction-and-the-shareholder---What-next-/4447, (accessed 12 December 2016)

shares by repurchasing those shares with loans.[15] It is further argued that share buyback may result in a company becominghighly geared (a situation where amount of debt is much higher than equity), the immediate effects being insolvency risk and financial distress costs, which collectively undermine the shareholders value and interest in the company.[16]

In spite of the arguments for and against the share buyback scheme, it appears that the sharebuyback will enhance wealth creation and, in practical effect, broaden the Nigerian capital market. It is therefore worth adopting as a principal method of distributing excess cash back to the shareholders of the company.

4.0 METHODS OF SHAREBUYBACK TRANSACTION

Share buyback can be effectuated through the various methods accepted by clear economic standards and sanctioned by the provisions of the law over a long period of time. In this respect, the various methods of share buyback particularly adopted in the United States, include the following;

4.1 Open Market Programme:

This is the prominent method. It is a form of share buyback which is carried out on the open floor of the stock exchange at the prevailing or current price. The implementation of this form of share buybacks is subject to various rules and regulations of the

[15] see Thisday "Endless Wait for Share Buy-back", available at <http://www.thisdaylive.com/endless-wait-for-sharebuyback>", (accessed 12 December 2016)
[16] Supra note 14.

Securities and Exchange Commission which set limits on the time, price, volume and number of brokers on a daily basis.

4.2 Self Tender offer:

Self-tender offer is done with either fixed price or Dutch auction. In a self-tender, a company specifies a number of shares it is prepared to buy-back and specifies either a fixed price or a range of prices in Dutch auction that it is prepared to pay for the shares.In this case, the company usually engages the service of investment bankers or stockbrokers to manage the tender and pays a special commission to brokers who persuade shareholders to purchase them.

4.3 Private Transaction:

This method takes the form of a direct negotiation with a major shareholder of the company. Thus, the company buys back shares directly from a shareholder away from the Open Market at a negotiated fixed or formula price.

4.4 Exchange Offer:

Here, a company offers shares its ownshares in another public company or offers another class of its own securities in exchange for common shares of company.[17]

It is noteworthy to state at this juncture that the Consolidated Rules and Regulations of the Securities and Exchange Commission (SEC) 2013 applicable in Nigeria only recognise two methods of a

[17] Supra note 13, and Supra note 3, p.420

sharebuyback transaction which are Self-tender Offer and Open-market Programme.[18]

5.0 SHARE BUYBACK AND THE NIGERIAN LAW

5.1 Position Under the Companies and Allied Matters Act

There is popular misconception that share repurchase is absolutely prohibited by the Nigerian law. The popular misconception arose from the wordings of the provisions of *s. 160(1) of the Companies and Allied Matters Act*[19] which states that "*subject to the provisions of subsection (2) of this section and its articles, a company may not purchase or otherwise acquire shares issued by it."*[20]

An analysis of the entire provisions of the Companies and Allied Matters Actwould suggest otherwise. As it stands today, the Nigerian law is quite liberal on repurchase of its own shares by a company. This is borne out of the expediency of modern business practices which dictates that absolute prohibition of share buy-

[18] See Rule 398(3) of the SEC rules 2013

[19] Cap C21, Laws of the Federation of Nigeria, 2004. It is the current operative corporation law legislation in Nigeria which regulate the formation, incorporation, management, administration, winding-up and dissolution of companies in Nigeria. For ease of reference, (Hereinafter referred to as CAMA).

[20] This statutory position is a direct directive of the common law position as laid down in the celebrated case of *Trevor and Anor* v. *Whitworth and Anor(1887*) 12 App Cas 409. Here, a limited liability company was incorporated with the objects of acquiring and carrying on a manufacturing business, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorised the company for the balance of the price of his shares sold by him to the company befor the liquidation and not wholly paid for. The House of Lords, in reversing the decision of the Court of Appeal held that such a company had no power under the Companies Act to purchase its own shares and that the claim must fail.

back by companies will do more harm than good. Hence, government intervened through the enactment of comprehensive rules and regulations. As a result, section 160(2) of CAMA provides for the exceptional circumstances in which a buyback by a company will be permissible. Under this section, a company whose articles of Association allow it to buyback its own shares, shall only execute such buyback under any one of the following prescribed situations;

a) Settling or compromising a debt or claim asserted by or against the company
b) Eliminating fractional shares[21]
c) Fulfilling the terms of a non-assignable agreement under which the company has an option or is obliged to purchase shares owned by an officer or an employee of the company
d) Satisfying the claim of a dissenting shareholder
e) Complying with a court order

In the same vein**, S.158** of **CAMA** provides that a company shall buy back its own shares for the purpose of redemption of redeemable preference shares.[22]

The Act specifically set outs conditions to be fulfilled by the company before it can purchase its own shares. S.161 of CAMA accordingly provides that, nothwitstanding any provision in the

[21] Fractional shares are shares of equity that is less than one full share. Fractional shares usually come about from stock splits, dividend reinvestment plans(DRIPS) and similar corporate actions. Normally, fractional shares cannot be acquired from the market, and while they have value to the investor, they can be difficult to sell.

[22] Redeemable preference shares are shares which can be redeemed at the option of the company either at a fixed rate on a specified date or over a certain period of time

articles, a company shall not purchase any of its own shares, except on compliance with the following conditions, that is:

a) Shares shall only be purchased out of the profits of the company which would otherwise be available for dividends or the proceeds of a fresh issue of shares made for the purpose of the purchase.
b) Redeemable shares shall not be purchased at a price greater than the lowest price at which they are redeemable or shall be redeemable at the next date thereafter at which they are due or liable to be redeemed;
c) No purchase shall be made in breach of section 162 of this Act.[23]

Furthermore, the Act set limits on the number of shares that can be acquired. Thus, no transaction shall be entered into by or on behalf of a company whereby the total number of its shares ofany one class, held by persons other than the company or its nominees becomes less than eighty-five percent (85%) of the total number of shares, or of shares of that class which have been issued provided that:

a) Redeemable shares shall be disregarded for the purpose of this section; and
b) Where, after shares of any class have been issued, the number of such shares has been reduced, this section shall apply as if the number originally issued (including share of that class cancelled before the reduction took effect) had been the number as so reduced.[24]

[23] S.161 of the Companies and Allied Matters Act LFN ,CAP 21, Laws of the Federation of Nigeria ,2004
[24] S.162 of the CAMA, *ibid*.

Any contract with a company providing for the acquisition by the company of shares in the company is specifically enforceable against the company, except to the extent that the company cannot perform the contract without thereby being a breach of the provisions of section 160 of this Act.[25] In any action brought on a contract referred to above, the company shall have the burden of proving that performance of the contract is prevented by the provisions of section 160 of this Act.[26]

5.2 Position Under the Consolidated Rules of the Securities and Exchange Commission 2013

As a necessary supplement to the provisions of CAMA and in vew of its overall regulatory and oversight functions inthe Nigerian Capital market, the Securities and Exchange Commision (SEC) has enacted comprehensive provisions detailing the various rules guiding share buyback in the Nigerian Capital Market.

Thus, every public quoted company acquiring its own shares is required to file an application with SEC for the approval of such acquisition accompanied with detailed information about the transaction including the company's latest audited financial statements.[27]

Pursuant to Rule 398(3) SEC Rules 2013, every publicly quoted company acquiring its own shares is expected to comply with the following –

[25] S.163(1) of the CAMA
[26] S163(2) of the CAMA
[27] Rule 398(1) and (2) of the Consolidated Rules of the Securities and Exchange Commission 2013

a) The aggregate number of shares to be bought back shall not exceed 15% of its exisiting issued and paid-up equity capital in any given financial year
b) An undertaking that no voting rights shall be exercised by the company or its nominee or trustee in respect of the acquired shares
c) The Company and/or directors shall file details of the director's shareholding before and after the acquisition
d) The resolution of the company authorising the share buy-back shall be special resolution as provided in the CAMA
e) The notice of the general meeting to authorise the share buy-back shall be published in at least two national daily newspapers and evidence of publication shall be filed with SEC
f) Shares shall only be purchased out of the profit of the company which would otherwise be available for dividends or the proceeds of a fresh issue of shares made for the purpose of the purchase. These shall be reflected in the latest audited accounts which shall not be more than nine(9) months old.
g) The buy-back shall be either through the Open Market or through Self-Tender Offer
h) The residual debt equity ratio shall not exceed 2:1 after the buy-back, the equity for this purpose is the shareholder's fund
i) The buyback shall be a direct purchase made only by the company and the beneficiary shall be the company.
j) The shares bought back shall be canacelled in accordance with the procedures set out in CAMA
k) The maximum time allowed for the completion of the buy-back process shall not be more than twelve months from the date of the shareholder's resolution
l) A declaration of solvency shall be filed with SEC by the Board of Directors of the company that they believe that the company would remain solvent in the forseeable future.
m) The buy-back shall not be made if the company is illiquid, that is, a company defaulting in payments of its obligations including dividend payment. A letter from

the Auditors on the going concern status of the company shall be filed with SEC.

n) For open market buy-back, the price of the shares to be bought back shall be at the current market price and for self-tenders offer, the price shall be determined by the Board of Directors and shall not be more than 5% above the average calculated market price over the last five(5) days.
o) The company shall make a public annoucement in at least two national daily newspapers, at least five days to the commencement of the program, disclosing relevant information to the public, such as proposed size,nature, duration and the potential impact on the company's financial position. A similar announcement shall also be made at the conclusion of the exercise.
p) The company and the financial adviser shal file a monthly report not later than five(5) working days after the end of each month indicating the number of shares bought, the total amount paid,minimum and maximum price, and the number of shares cancelled
q) Redeemable shares shall not be purchased gretaer than the lowest price at which they are redeemable or shall be redeemable at the next date thereafter at which they are due or liable to be redeemed.
r) Any two buy-back programs shall be separated by a minimum of 365 days after the end of the preceding buy-back even where they are of different classes.
s) The source of funding the buyback shall be disclosed
t) After any buyback, the shareholders' funds of the company shall not fall below any legally prescribed minimum for the line of business
u) For the purpose of the buy-back through open market, the company shall not use more than two stockbroking companies for each programme. The stock broking firm shall not be a subsidiary of the company
v) The company shall file quarterly returns in respect of the acquisition and the disposal of same. Where the shares are held by nominees or trustees of the

> company, the particulars of the nominees or trustees shall be provided.[28]

From the above reproduced provisions, it is crystal clear that only publicly quoted companies can buy back its own shares in the legitimate circumstances sanctioned by CAMA and in full compliance with all the conditions appropriately laid down therein. Once the above outlined conditions are complied with by the company, then it can engage in the repurchase of its own shares from its shareholders. It therefore goes to show that private companies can not engage in a share repurchase transactions.

6.0 SHARE BUYBACK TRANSACTION AND TAX TREATMENT

Generally, where there are buyback of shares by the company, there are specific tax consequences for shareholders but generally not so much for the company. On the part of the company, it is so because the company would neither realise gain nor loss, since the share buyback would not amount to either a sale or exchange but rather be very similar to a partial liquidation of the company.[29]

Ideally, companies are only liable to pay corporation tax at the effective rate of 30% on any profits accruing to them in a particular accounting year. But it does not pay any tax where it merely

[28] Rule 398(3) SEC Rules 2013

[29] Olumide K. Obayemi " Contemporary Tax Treatment of Redemption of Preference Shares" *This Day Lawyer* (2015), Page 6

distrubutes cash to the shareholders by way of share buyback otherwise than by dividends distribution.[30]

Here, I examine the various tax treatment approach for share buyback from other jurisdicitions, particularly the United States, United Kingdom and Canada.

6.1 The American Approach on the Tax Treatment of Share Buyback

As part of the Tax Treatment approach for share buyback in the United States from the shareholder's standpoint, the shareholder may be liable to pay capital gains tax on any profits accruing to himin situations where he sells the shares back to the company at a profit.Such profit is usually the difference between the cost of reselling the shares back to the company and the original issue price of the shares.Further, the amount of the tax payable and the applicable tax ratedepends on the shareholders income tax bracket and the length of time the shares were held. If less than 12 months, the short-term capital gains tax applies, and the shareholder will be taxed on any profits at ordinary income tax

[30] Noteworthy to state here that the issue of excess dividend tax rule still continues to rage on after the decision of the Tax Appeal Tribunal in the case of *Oando Plc* v *FIRS (Oando IV)* (2014) 16 TLRN 99 which overall implications amounts effectively to a taxation of the corporate income at the rate of 60%. This is due to the fact that the company pays tax of any dividend paid out of its retained earnings which has been previously taxed. For detailed analysis of the EDT rule, see generally, Dr Olumide K Obayemi "A Critical Analysis of the Excess Dividend Rule in Nigeria:Oando Plc v Firs(Oando IV) Revisited, *Gravitas Review of Business and Property Law,* March 2015, Vol 6 No. 1.

rates. If more than 12 months, the favourable long term rates would apply.[31]

From the company's perspective, share buyback is generally not a taxable event. Thus, the corporation pays no tax on any gains nor may it deduct any losses.[32] This general rule is however subject to exceptions. Thus, if the company buys back shares with appreciated non-cash property (such as securities, real estate inventory, livestocks), the Internal Revenue Service (IRS) may assess capital gains taxes on the transaction. The tax applies to any profits on the property or assets sold. From the service perspective, such transaction is equivalent to the company selling their assets for cash and then using the cash to buy back the shares. However, if the assets have declined in value, rather than appreciated, the company is not generally entitled to claim a capital loss on assets other than cash used to buy back the shares.[33]

6.2 The United Kingdom Approach on the Tax Treatment of Share Buyback

Though slightly similar to the position in the United States, the default position in the United Kingdom is that a buyback is taxed as a distribution to the extent that the price exceeds the original share subscription amount. If the shareholder is not the original

[31] As of July 2012, the maximum long-term gains rate is 15 percent, though the top rate was increased to 20 percent as of 2013 in the United States See Zacks Finance "How to treat Income from a Stock Buyback", available online at http://finance.zacks.com/treat-income-stock-buyback-1460.html (accessed 8 July 2017).
[32] Section C032, Internal Revenue Service Code, United States, *ibid.* 30
[33] *Ibid*. 30

owner of the shares, the distribution is still calculated by reference to the subscription price not the amount the current shareholder paid for the shares.[34]

However, the buyback will automatically be taxed as a CGT event not an income distribution if a number of conditions are fulfilled. The conditions, in brief, are

a) The company is an unquoted trading company or holding company of a trading group
b) The shareholder is UK tax resident
c) They have held their shares for at least 5 years
d) They are not connected with the company after the buyback(more than a 30% interest)
e) They reduce their interest in the company by at least 25% as a result of the buyback and
f) The buyback is to benefit the trade. The test is subjective.[35]

The tax treatment of sharebuyback in the United Kingdom is rather complicated and has been changed at various points in time. The complication arises from the fact that the United Kingdom has an imputation system, which is meant to reduce the double taxation of dividend. Under this system, shareholders receive credit for taxes paid by the company on earnings distributed as dividends and on the "distribution element" of share buybacks. The distribution element is defined as the difference between the

[34] Holly Bedford "Share Buybacks-Income Tax or Capital Gain?, available at http://share-buybacks-income-tax-or-capital-gain/ (accessed 22 July 2017).
[35] *Ibid.* 34

market value of the repurchased shares and the book value of the corresponding paid-in capital.[36]

Considering the fact that there are more tax implications for individual shareholders in instances of share repurchases, the calculation of the taxes is thus dependent on the distinction between between an off-market repurchase (such as a repurchase tender offer or a private repurchase) and an on-market repurchase (or open market repurchase). The difference between the repurchase price and the original subscription price is defined as the distribution element. Thus, where the shareholder purchases the shares above the original subscription price, he would be subject to capital gains taxes.[37]

In the case of on-market repurchase wherein the shareholder knows that the ultimate purchaser of the shares is the company itself. As he is selling to a market maker, his profit will be taxed as a capital gain, as no tax credit can be claimed.[38]

6.3 The Canadian Tax Treatment Model

In Canada, the tax implications of sharebuyback scheme are quite similar to that of the United states. Thus, where a shareholder has his or her shares repurchased by the corporation in which such shares are held, the shareholder is deemed to have received a dividend equal to the amount by which the amount paid by the corporation to repurchase the shares exceeds the paid-up capital

[36] P. Raghavendra Rau,"Regulation,Taxes and Share Repurchases in the United Kingdom" *Journal Of Business*, p. 253
[37] *Ibid*. 36
[38] P. Raghavendra Rau, *ibid*, page 255 and 256.

of the shares repurchased. If the shareholder is a connected corporation, as that term defined in the ITA, the dividend may be received by the shareholder tax-free.

In certain circumstances, in particular in the context of a sale transaction, a repurchase of shares that would otherwise have resulted in a tax-free intercorporate dividend, as described above, may be recharacterised as a taxable capital gain.[39]

7.0 EXISITING FISCAL REGIME IN NIGERIA: ANY NEW LESSONS .

As has been seen from the comparative analysis, it is crystal clear that the company may generally not be subject to tax in the event of a share buyback transaction except in certain exceptional circumstances. However, the tax consequences for the shareholders are always interpersed between the capital gains tax and the income tax (i.e., Personal Income Tax or Companies' Income Tax).

As pointed out in the United States tax treatment approach, the writer hereby suggests that the company should be ordinarily made subject to capital gains tax treament under the Nigerian tax environment in instances where the company buys back the shares from the shareholders by an appreciated non-cash property.

[39] William Fowlis, Ilam Braude, Brendo Ho, Regan O'Neil, Graham Purse nd Stephen Rukavian, Miller Thompson "Tax on corporate transactions in Canada: Overview" Practical Law,A Thomson Reuters Lega Solution 2015, available at <http://ca.practicallaw.com/5-503-2395?source=relatedcontent> , (accessed 16 December 2016)

The United Kingdom often treat sharebuyback as a distribution and thus subject the distribution to income tax except upon fulfillment of certain conditions wherein the tax treatment is assessed under the Capital Gains Tax. Thus, the Nigerian Fiscal environment can also take a cue from this position by treating any share buyback as a distribution provided that the amount of the repurchase exceeds the original subscription price notwithstanding the fact that the selling shareholder was not the original purchaser of the shares.

The tax consequences of share buyback can also be assessed from the perspective of the transaction structure adopted. Share buyback could be effectuated through self-tender offer, open market programme, private transaction or exchange offer. However, Rule 398(3) of the SEC rules 2013 recognises just self-tender offer and open-market programme. In the case of the self-tender offer, it is carried out as an off-market repurchase and the shareholder is aware that he is selling to the company. On the other hand, the open market programme is a form of an on-market repurchase and the shareholder is not aware that he is selling to the company as he would be selling to an intermediary who is acting as a principal.

In the case of an off-market repurchase, individuals may likely not be liable to capital gains tax as long as the individual's cost base is significantly below the paid-in capital per share. Where the shareholder sells on market-it is deemed that he does not know he is selling to the company itself-to the market maker, his profit will be taxed as a capital gain, and no tax credit can be claimed.

This position can also be made applicable to the Nigerian tax environment considering the two acceptable methods of effectuating the share buyback transaction and should be taxed accordingly in the manner stated above.

As stated above in Part V of this paper, a share buyback could also be effectuated through redemption of redeemable preference shares by the company under the provisions of CAMA in so far as the applicable conditions are accordingly complied with. Where such redemption has been consummated by the company, it would ordinarily be subject to Income tax, Value Added Tax and withholding tax at the applicable tax rates under the Nigerian Tax system.

Further, every consumer is mandatorily obliged to pay Value Added Tax (VAT) on services rendered to it.[40] Thus, fees paid to professionals for services rendered in connection with the share buyback (most especially in connection with the open-market repurchase) will be subject to value added tax and withholding tax at the rate of 5% and 10% respectively under the applicable extant laws.

In also determining whether to subject the buyback of the shares to tax, it is vital to consider the location of the shares. The test for

[40] Section 2 of the Value Added Tax Act states that "The Tax shall be charged and payable on the supply of all goods and services (In this Act referred to as "taxable goods and services") other than goods and services listed in the First Schedule to this Act" .S.3 of the Value Added Tax Act Cap VI LFN 2004 further states that "There shall be exempt from the tax the goods and services listed listed in the First Schedule to this Act". A careful read of the first schedule does not include fees paid for professional services as exempt from the chargeability to the Value Added Tax in Nigeria.

determining the location of the shares is set out in section 24(e) of the Capital Gains Tax Act[41] which is to the effect that, in the case of shares, registered shares or securities are situated where they are registered and, if registered in more than one register, where the principal register is situated; the shares would be said to be situate in Nigeria if the shares are registered in Nigeria or the principal register in which the shares are registered is situate in Nigeria. In this sense, if it is accepted that the shares are situate in Nigeria, then any such share buyback would be subject to taxes under the Nigerian tax laws

In computing the appropriate tax payable on any share buyback transaction, it is apt to consider the exemption applicable to the securities to be disposed by the shareholder. Where the shares to be re-acquired by the company are tax-exempt, then they would ordinarily not be subject to capital gains tax. For instance, section 30 of the Capital Gains Tax Act provides that gains accruing from a disposal by him of Nigerian government securities shall not be chargeable to capital gains under this Act. Thus, where the shares to be acquired are that of government securities, they may likely not be subject to capital gains tax.

8.0 CONCLUSION

We must note that share buyback transaction is not a frequent business activity in Nigeria. It has become a subject of intense debate on whether it is illegal or not, whether it is permitted or prohibited by our laws or not, it is nevertheless important to

[41] Cap C1, LFN 2004

examine,in clear terms,the various existing rules for its tax treatment or implications to provide a relevant and practical guide for companies and professionals interested in exploring the concept as a viable corporate management tool to deliver more value to their shareholders with a view to planning adequately for the tax consequences. It is also evident that there have not been clear guidelines by the relevant tax authority on the tax treatment in its various circulars for the contemporary tax treatment of a share buyback transaction. The comparative analysis undertaken in this paper should provide a reliable guide in formulating the right tax treatment principles. It is expected that relevant guidelines and rules would be issued and published by the relevant tax authorities in the near future.

On a final note, it is hereby proposed that the tax treatment models analysed from other jursidictions be adopted and aligned alongside the exisiting fiscal regime for share buyback in Nigeria.

The Battle for Legislative Competence between the Arbitration and Conciliation Act of Nigeria 1988 and the Lagos State Arbitration Law 2009

Gboremioluwa Ogundipe*

ABSTRACT

An efficient system of dispute resolution is highly necessary for economic viability and sustainability of national economies. However, despite the rising profile of arbitration as an alternative means of commercial disputes resolution, Nigeria still continues to contend with the issues arising with respect to the proper construction of the provisions of the 1999 Constitution in respect of legislative competence to make laws on the subject matter of arbitration; the various perspectives that exist as to perceived divisions between international and interstate commercial arbitration and intrastate domestic arbitration with respect to the Constitutional Law principle of "the doctrine of covering the field"; and the uncertainty that continues to remain as a result of the absence of any definitive pronouncement by the Nigerian Supreme Court. All these issues continue to have the unwanted effect of portraying arbitration as a less attractive option for settlement of disputes in Nigeria.

1.0 INTRODUCTION

It is well settled that owing to the nature of human beings and the number of activities engaged into, dispute and conflicts are

* Final year student of the Faculty of Law, University of Lagos and Deputy Editor-in-Chief of the Unilag Law Review

inevitable[1]. Different commercial and legal expectations, cultural approaches, political ramifications and geographical situations are all sources of disagreement and dispute between contracting parties[2]. The diversity and complexity with which commercial transactions are conducted, coupled with the high demand for commodities and services in an extremely populated and fast-paced country like Nigeria translates into disputes being considered a norm and a part and parcel of everyday commercial dealings. This has therefore brought about an obvious need for an adequate, efficient and reliable mechanism for the resolution of these disputes whenever they arise; and as a result, concerted efforts have over time been made by the commercial community to model a dispute resolution mechanism to meet the demands of individuals, firms and companies doing business on the shores of Nigeria and the world at large.

Ordinarily, the first point of call for nearly every disputant in Nigeria is the traditional court system of litigation. However, concerns over cost and delays in litigation procedures, together with increasing globalization have led to more flexible means of resolving disputes which provide alternatives to court-based litigation governed by the law and procedure of a particular state or country. This is because the quick and fair resolution of commercial disputes is an indispensable requirement for stability and growth in any economy.

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[1] A. T. Bello, "Why Arbitration Triumphs Litigation: Pros Of Arbitration" *Singaporean Journal of Business Economics, And Management Studies* (2014) Vol.3, NO.2, p. 1

[2] J. D. M. Lew, L. A. Mistelis, S. M. Kroll, *Comparative International Commercial Arbitration*; (Kluwer Law International: 2003), p. 1 (para 1-2)

Apart from the fact that businessmen and women prefer private resolution of their disputes to exposure to the machinery available in the glare of the regular courts, there is the advantage that settlement through ADR tries to achieve an expeditious resolution of the conflict between the parties by reducing hostility and antagonism while saving business relationships and encouraging a continued cordiality between the parties. These are made largely possible because the procedure provides greater room for compromise than litigation.[3]

Arbitration is therefore a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.[4] It is the reference of a dispute by parties thereto for settlement by a person or tribunal of their own choice, rather than a court.[5] The Arbitration process is relatively informal when compared to what obtains in the traditional court process and the parties have more control over the process.

One of the primary reasons for parties' agreement to resolve their dispute by arbitration is to avoid delay and reach a very

[3] E. R. Oddiri, Paper on Alternative Dispute Resolution; Presented at The Annual Delegates Conference of the Nigerian Bar Association (August 2004) http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.html (accessed 12 May 2017)

[4] J. O. Orojo & M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria,* (Mbeyi & Associates (Nig.) Ltd: Nigeria: 1999), p. 3

[5] F. Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice, 2nd Edition,* (Center for Commercial Law Development (CCLD), Lagos, Nigeria: 2013), p. 5

expeditious conclusion of their discord.[6] Hence, the most important features and advantages of arbitration include: the speedy and swift determination of disputes, party autonomy, confidentiality and privacy, flexibility and simplicity of procedure, and the fact that it in many cases results in preservation of good business and personal relations.

However, certain situations of complexities may be seen to arise in certain instances with respect to the importance of the ingrained and essential feature of party autonomy in arbitration on the one hand; and the issue of the doctrine of covering the field in federal legal systems (which Nigeria practices) on the other.

This article highlights the major issue of the doctrine of covering the field that arises with respect to the federal system of government practiced in Nigeria as is linkable to the laws which govern arbitration, and the resultant issues that have arisen in settlement of such disputes; concluding that the position that arbitration is a matter for state legislature, is the more preferred view; and imploring that the uncertainty on this issue be resolved along those lines as soon as possible.

[6] Around the world with Bola Ajibola; Produced on behalf of Magna Curia Chambers, Faculty of Law, Obafemi Awolowo University, (National Institute for Planning and Administration (NIEPA): 2007) p. 207

2.0 THE BATTLE BETWEEN THE ACA AND THE LSAL ARISING FROM THE DOCTRINE OF COVERING THE FIELD

2.1 OVERVIEW

Nigeria is a Federation comprising the Federal Government, 36 states and the Federal Capital Territory;[7] and as is the case with all other countries that adopt the Federalist structure of governance, there is typically an allocation of legislative power and competence between the federal government and the component states that form such Federation.

The structural allocation of legislative competence in Nigeria's federal system of governance requires the National Assembly to make laws for the entire Federation while the component states have State Houses of Assembly that make laws for each state.[8]

The doctrine of covering the field is peculiar to constitutional democracies that practice Federalism as a form of governance where legislative competence are typically shared between federal or central governments and the federating states or provinces.[9]

In the Constitution, the Lists typify the separation of legislative competence in a Federal structure of governance. The Exclusive Legislative List is the List of subject matters in which the federal

[7] See 1999 Constitution of the Federal Republic of Nigeria, Cap. C23, LFN 2004; Act No. 24, 5 May 1999 (as amended), s. 2 (hereinafter 1999 CFRN)
[8] See 1999 CFRN, s. 4
[9] A. A. Olawoyin, "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective", *International Arbitration Law Review,* page 40

legislature has exclusive reserve to enact laws; the Residual Legislative List is with respect to the exclusive reserve of the state legislature to enact laws; while the Concurrent Legislative List contains the subject matter areas in which the federal and the constituent states have concurrent legislative competence to enact laws.

This doctrine applies in respect of areas of legislative competence in the Concurrent List and only "arises where the issue is whether a State Law on a concurrent subject matter can co-exist with a federal law on the same subject matter where the latter expressly or impliedly evinces an intention to cover the whole field, or to provide a complete statement of the law governing the matter."[10]

As opined by the Nigerian Supreme Court in *Attorney General of Abia State* v. *Attorney General of the Federation,*[11] where the doctrine of covering the field applies, it is not necessary that there should be inconsistency between the Act of the National Assembly and a law passed by a House of Assembly. The fact that the National Assembly has enacted a law on the subject is enough reason for such law to prevail over the law passed by a State House of Assembly, but where there happens to be an inconsistency, the state law is void to the extent of the inconsistency.

Four clear elements have been highlighted as being easily distilled from the Nigerian (and even foreign) authorities on the doctrine:

[10] See Ogwuegbu JSC in *Attorney General of Abia State* v *Attorney General of the Federation* (2002) 6 NWLR (Pt.763) 264, 463 who drew extensively from US and Australian authorities

[11] Ogwuegbu JSC in *Attorney General of Abia State* v. *Attorney General of the Federation* (2002) 6 NWLR (Pt.763) 264, 389

First, the subject matter in question should be one in which both the federal legislature and the state legislature have concurrent legislative competence.[12] Secondly, a clear intention on the part of the federal legislature to express by its enactment, completely, exhaustively or exclusively what the governing law should be on the particular subject matter.[13] Third, where the state law is *in pari materia* with the federal law, the state law is merely invalid or inoperative while the federal law is in existence.[14] The state law is not void.[15] Fourth, where the state law, however contains provisions, which are inconsistent with the federal law, those provisions will be void to the extent of such inconsistency.[16]

2.2 THE TWO PRINCIPAL ARBITRATION LAWS AND THE IMPORTANCE OF DETERMINING THE QUESTION OF VALIDITY OF THE LAWS

Although certain other states have enacted their own arbitration laws, The Arbitration and Conciliation Act (ACA)[17] and the Lagos State Arbitration Law (LSAL)[18] are currently the two principal arbitration laws in Nigeria. The LSAL is a significant enactment because of the huge volume of trade and commerce that take place in Lagos as the economic nerve centre of Nigeria and its leading commercial hub; and the Law applies to all arbitral

[12] Olawoyin, supra note 9, page 40
[13] *Ibid*
[14] Olawoyin, supra note 9, page 41
[15] *Ibid*
[16] *Ibid*
[17] *Arbitration and Conciliation Act* (ACA), 1988 Cap. A18, Laws of the Federation of Nigeria (LFN), 2004 (hereinafter: ACA)
[18] *Lagos State Arbitration Law* (LSAL) No. 10, Laws of Lagos State 2009 [Hereinafter: LSAL]

proceedings within Lagos, except where parties have expressly agreed that another Arbitration Law will apply.

While the innovations introduced in the LSAL are very laudable, the success of the Law is however subject to its being legally valid under Nigerian law, as invalidity of the law under which arbitration is undertaken is a ground for an appropriate Nigerian court to set aside a resultant arbitral award, refuse to recognise it or to invalidate the arbitration agreement.

There have been varied opinions on the issue of validity or otherwise of Arbitration Laws in the statute books of the federating states of Nigeria. The opinions are essentially based on the interpretation and application of the provisions of the 1999 Constitution on which authority as between the federal government and the federating states has the power to legislate on arbitration; and also bringing to fore a dichotomy of jurisdiction based on international, interstate and intrastate criteria.

As stated earlier, in the Constitution, both the federal government and the states are authorised to legislate on matters in the Concurrent List. The question that lawyers have therefore sought to answer is whether, by enacting the ACA, the federal government has covered the field of arbitration and the LSAL is thereby void.

The Exclusive and Concurrent Legislative Lists, through which the Constitution primarily sets out the respective legislative competences of the legislatures, do not expressly mention arbitration. This raises the question of whether legislative

competence over arbitration is addressed in the Constitution at all or whether it is addressed as part of or incidental to another heading mentioned expressly. With respect to this issue, the necessary provisions as regards legislative competence over arbitration are contained in items 62, 62(a) and 68 of the 1999 CFRN:

- Item 62 of Pt I of Sch.2 to the 1999 Constitution (the Exclusive Legislative List) makes provision for the subject matter of "trade and commerce, and in particular trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, trade and commerce between the States."
- Item 68 contains a broad provision for "Any matter incidental or supplementary to any matter mentioned elsewhere in this List."

As arbitration is not listed in any of the Legislative Lists; opinions on whether these provisions cover legislative competence over arbitration remain polarised.[19] The prevalent interpretation holds that in light of item 68, arbitration is incidental or supplementary to trade and commerce in item 62; accordingly, the federal legislature has exclusive competence over interstate and international commercial arbitration; however, states' have legislative competence over "intra-state arbitration" – as a residual

[19] G. Bamodu, "*A Field Not Covered: Arbitration and the Nigerian Constitution (1)" available at* https://www.businessdayonline.com/a-field-not-covered-arbitration-and-the-nigerian-constitution-1/ (accessed 12 May 2017)

matter falling within their exclusive competence.[20] An opposing argument is that items 62 and 68 of the Exclusive List of the 1999 Constitution cannot be invoked to determine legislative competence over arbitration as they do not clearly address the matter.[21]

Numerous views are held by writers[22] on this topic. On the one hand, Fidelis Nwadialo has, in his book, stated that the ACA applies throughout the Federation and lays down both the law of and procedure for arbitration proceedings and that accordingly, it has, by implication repealed the provisions relating to arbitration in the High Court Laws and the rules on arbitration proceedings contained in the various sets of the High Courts' Rules.[23]

In the opinion of Mr. Paul Obo Idornigie, in enacting the ACA, the federal government of Nigeria has not covered the field of arbitration "completely, exhaustively and exclusively", because the Act legislates on only commercial arbitration, and that state laws

[20] In a similar vein, the National Committee, constituted in 2005 by the Attorney-General of the Federation to make recommendations on the reform of arbitration and ADR laws of Nigeria, stated that the federal government has legislative competence over international and interstate arbitration while arbitration outside the two areas is within the legislative authority of the federating states.

[21] Bamodu, *supra* note 19

[22] See P.O. Idornigie, "The Doctrine of Covering the Field and Arbitration in Nigeria" (August 2000) *66 Arbitration 193*; M.M. Akanbi "The Nigerian Arbitration Act 1988 s.58 and the Doctrine of Covering the Field: *C G de Geophysique* v. *Etuk*" (August 2006) *72 Arbitration 3*; F. Nwadialo, *Civil Procedure In Nigeria* (MIJ Professional Publishers Ltd.: Lagos,1990) pp. 871-872; Chukwuemerie "Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector" (2003) *A journal of World Investment* 834.

[23] U.H. Azikiwe and F. Onyia - Udo Udoma & Belo-Osagie, *The European, Middle Eastern and African Arbitration Review 2013: Nigeria* (31 October 2012) http://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2013/1036748/nigeria (accessed 12 May 2017)

dealing with non-commercial arbitration are valid.[24] This is also the view held by Orojo and Ajomo.[25] Muhammed Mustapha Akanbi, also categorically stated that as between the Arbitration Act and the arbitration laws of the states, the doctrine of covering the field can only be invoked with respect to disputes arising from commercial transactions.

In apparently rejecting the opinions that wholly or partially favour the ACA, the Committee of the Lagos State, set up in 2007, opined that the power to legislate on arbitration is residual having not been listed in the Legislative Lists in the Constitution and reserved, therefore, for the federating states.[26]

Olawoyin is however of the view that the doctrine of covering the field, strictly speaking, has no role to play in resolving any argument about legislative competence to enact laws on the subject matter of arbitration or the validity of such laws";[27] stating categorically also that this position applies to either side of the jurisprudential divide in Nigeria on legislative competence in respect of the subject matter of arbitration.

He is of the firm opinion that the intention in *Item 62* suggests a primary reference to "trade and commerce between Nigeria and other countries" and this should not, without more, be read to mean "trade and commerce between the residents or citizens of Nigeria and residents or citizens of other countries" especially

[24] *Ibid.* at 25
[25] Supra note 4, p. 27
[26] Supra note 25
[27] Olawoyin, supra note 9, p. 41

when Nigeria is defined in s.2 of the 1999 Constitution as "one indivisible and indissoluble Sovereign State";[28] stating that the same applies to the inter-state argument as reference is made to "trade and commerce between the States" and not "trade and commerce between the residents and citizens of the component states of the Federation."

As things stand at present, all the divergent issues on ground have not been laid to rest, as the position of the courts in relation to the ongoing constitutional debate about legislative competence over arbitration is not entirely clear.

In the case of *Stabilini Visinoni Limited* v. *Mallinson & Partners Limited,*[29] the Court of Appeal appears to have favoured a middle course. Whilst it decided the particular case on the basis that the circumstances dictated that the ACA should be applied, the court seemed to recognise that it was open to arbitration parties (in Lagos) to choose to invoke the Lagos Law instead.

This clearly sits uneasily with the earlier decision in *Compagnie Generale de Geophysique v. Etuk,*[30] *per Ekpe JCA,* in which the same court held that by the ACA the federal legislature has "covered the field" of arbitration and that 'inconsistent' provisions of state legislation on arbitration are null and void.

It has been stated that, the leading judgment regrettably simply applied the doctrine of covering the field without any thorough

[28] Ibid, p. 37
[29] [2014] 12 NWLR (part 1420) 134, 175.
[30] [2004] 1 NWLR (part 853) 20

analysis and justification for the application of the doctrine. It would seem that there was an assumption that the doctrine simply applied when a Federal Act and a state law on the same subject matter are in existence;[31] while in fact the Arbitration Act ought to be declared invalid under the current constitutional dispensation and be struck down under s. 315(2) of the 1999 Constitution;[32] as it is the states that have legislative competence to enact laws on all facets of arbitration (international, interstate or intrastate).[33]

The *Stabilini* court, on the other hand, rather commended the Lagos legislation for making it possible for parties to choose either that law itself or another law – including the ACA. The court said this *"makes sense because arbitration is a subject area that can be said to be 'without borders'"*. No exact pronouncement was made by the Supreme Court in that case with respect to the matter; and it is as a result of this that there is therefore currently a need for a judicial pronouncement in this regard by the Supreme Court to put the matter to rest.

The uncertainty stemming from the dual regimes of laws will not augur well for the advancement of arbitration practice as a viable alternative to litigation, as the entire process may be bogged down with the genre of jurisdictional challenges witnessed in *Compagnie Generale De Geophysique*.[34]

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[31] Olawoyin, supra note 9, p. 42
[32] *Ibid*, p. 43
[33] *Ibid*
[34] *Ibid*, p. 12

3.0 CONCLUSION AND RECOMMENDATIONS

According to the *International Court of Arbitration (ICC) Bulletin,* it was recorded that Nigeria rose from an average of 2 arbitrations per year between the years 1991 – 1999 to 23 in 2000.[35] This goes to show that significant progress has been made in the growth and development of ADR in Nigeria, and that Nigeria definitely possesses the hallmarks for an international centre for commercial arbitration.

However, a lot still needs to be done as regards the improvement of arbitration practice in Nigeria. Despite Nigeria's acknowledged economic endowment in terms of natural resources, and the infrastructure currently being put in place to encourage international arbitration, the country has thus far failed to attract the sort of attention and recognition accorded to famous western seats such as London, New York, and Paris,[36] as a result of certain questionable situations (such as this issue) that still obtain with respect to the practice of arbitration in Nigeria.

The English courts in the case of *IPCO (Nigeria) Ltd* v. *Nigerian National Petroleum Corporation (2005)*[37], stated as follows:

[35] According to the report, Nigeria and South Africa were the African countries with the most number of involvements in international arbitration proceedings in the ICC between 1999 and 2009, however Egypt was the most frequently chosen venue for arbitration proceedings conducted in Africa.

[36] D. Ufot, "The challenges of arbitrating in Africa: the Nigerian experience" 2012, available at http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Nigeria/Dorothy-Ufot-Co/The-challenges-of-arbitrating-in-Africa-the-Nigerian-experience (accessed 12 May 2017)

[37] *IPCO (Nigeria) Ltd*. v. *Nigerian National Petroleum Corporation* (2005) EWHC 726

> *…the mill of justice can grind very slowly in Nigeria. In particular, Nigeria is not yet geared towards arbitration in the manner which meets the international standards it agreed to when adopting the New York Convention.*

Disputes are incidents of trade and commerce; Society therefore benefits if disputes are properly analysed, categorized and processed. The truth however is that if arbitration is not well-handled, it may lose its hall-mark of speedy resolution of disputes.[38]

The law regulating arbitration in Nigeria needs to be motivated by the need to ensure that the legal framework for the conduct of arbitral proceedings remains responsive to the needs and requirements of the users, and is modern, suitable and relevant to the socio-economic circumstances of the state, and meets contemporary international standards.

An emerging economy such as Nigeria must therefore ensure that to attract investment to attain the desired level of infrastructural development, an effective dispute resolution framework must be put in place such that investors will be sufficiently comfortable to invest in the country with the knowledge that in the event of a dispute, these will be 'fairly' resolved according to their agreements.[39]

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[38] E.O.I. Akpata ; West African Book Publishers Ltd, The Nigerian Arbitration Law in Focus, 1997, p. 13

[39] T. Aderemi, Perchstone & Graeys, "Nigeria: Arbitration In Emerging Markets: Current Challenges" available at http://www.mondaq.com/Nigeria/x/233848/Arbitration+Dispute+Resolution/Arbitration+In+Emerging+Markets+Current+Challenges (accessed 12 May 2017)

As proposals for new arbitration legislation are still going through parliamentary processes, it is considered that a future federal arbitration legislation should not repeal or jeopardise state arbitration legislation. Rather, it should follow the approach of the Lagos State legislation which was commended by the Court of Appeal in providing that parties to arbitration arising out of an interstate or international transaction have the choice to select as between the federal legislation and an appropriate state arbitration legislation. This approach is most suitable for advancing the causes of attracting trade and investment to Nigeria generally, of attracting arbitration business to Nigeria and specific Nigerian states, and for advancing the long pursued goal of presenting Nigeria as an arbitration friendly jurisdiction and viable arbitration centre.

Worthy of note is the fact that a key doctrine underlying and running through arbitration is the doctrine of party autonomy. One aspect of this is that the parties are free to choose the law(s) governing the various aspects of the arbitration including especially the *lex arbitri.*[40] In order to make Lagos and Nigeria an attractive arbitration venue, it is necessary to therefore demonstrate that if parties to arbitration wish to invoke the Lagos State Arbitration Law as the *lex arbitri*, the Nigerian legal system will respect that choice.[41]

Candide-Johnson and Shasore have said that: "the Constitution of Nigeria does not allow any legislature to remove this right to

[40] Bamodu, supra note 19
[41] *Ibid.*

contract and therefore, just as two Nigerian may choose to arbitrate in New York under Argentinean law, so can a Canadian and Argentinean doing business in Abuja agree that any dispute between them will be referred to arbitration in Lagos under the regime for arbitration in AL [Arbitration Law] 2009. The motive for their choice will not be constitutional lists but the efficacy of the dispute resolution mechanism within the territory for which Lagos has legislated.[42]"

Until clear judicial pronouncements are made by the courts or decisive action taken by the National Assembly along the lines suggested above, there will continue to be a duality of arbitration regimes with the Arbitration Act covering areas of domestic arbitration that older and new Arbitration Laws of the states also cover.[43]

Therefore, pending such a time where the Constitution is amended to the effect of an explicit provision for arbitration in one of the lists (the residual list being the better and more advantageous option); the Nigerian Court needs to address this very pressing issue on ground, by making a definite pronouncement on what should obtain; as at this particular point in time, the jurisprudential "American Realist" perspective of the law being what the judges say it to be is highly necessary to ensure a certain level of certainty of the law.

[42] C.A. Candide-Johnson & O. Shasore, *Commercial Arbitration Law and International Practice in Nigeria*, (Lexis Nexis Publishers: 2012), p.21
[43] Olawoyin, supra note 9, p. 40

An Assessment of the Viability and Practical Utility of the Tort of Bribery in Nigeria

Onikosi Anuoluwatoyosi*

ABSTRACT

Bribery is no doubt a cankerworm that has eaten deep into the Nigerian economy, especially with regards to governments and even in interpersonal relationships between individuals. The situation of the Nigerian economy is dire as bribery now cuts through almost every area of national life. Despite the fact that bribery constitutes a breach of fiduciary duties, especially in principal/agent relationships, it remains solely and majorly a crime in Nigeria. In other more progressive jurisdictions however, such as the UK and Canada, bribery is classified as both a civil wrong, and an offence. The civil wrong of bribery is entirely different from the offence of bribery. It relates to a principal/agent relationship, especially where such agent has received a bribe as some sort of inducement to act. This paper seeks to examine the civil wrong of bribery under English Law and to suggest its practical utility in Nigeria.

1.0 INTRODUCTION

Bribery and corruption have become a critical component in the life of every Nigerian citizen and as such has become more of the norm than the exception. It cuts through every institution and this can be said to be a part of the overall effect of poor governance in the country. Corruption is generally described as any dishonest action or inaction,

* Onikosi Toyosi is a final year student of the faculty of law, University of Lagos. She has a keen interest in corporate law, energy law, international human rights law and all areas of public law. Acknowledgements: for Mr D. O Onikosi, Dr. O. Adejonwo-Osho, Barrister Chinedum Umeche, D.G Olika and my dearest I. A Ade-Ademilua.

by any person, in any form of authority, to derive any form of illegitimate, illicit, immoral, incompatible or unethical advantage.[1] Vices such as bribery, corruption, economic and financial crimes remain a deterrent to human capital advancement.[2] This has inspired various global bodies and countries to enact anti-corruption, bribery, economic and financial crimes legislations such as, *the United Nations Convention against Corruption, African Convention on Preventing and Combating Corruption, OECD Convention On Combating Bribery, US Foreign Corrupt Practices Act* and *the UK Bribery Act* amongst others.[3] Bribery is viewed as improper conduct; therefore, it attracts both civil and criminal penalties in many jurisdictions. Bribery is solely a crime in Nigeria and is provided for by several Nigerian Legislations such as, *the Corrupt Practices and Other Related Offences Act, the Economic Financial Crimes Commission Act* etc. Under the offence of bribery in Nigeria, *the ICPC Act* provides for the prohibition of bribery and other corrupt practices, the essential elements of which includes giving or receiving a thing of value to influence an official act. It provides four categories of offences, which includes; giving and receiving of bribes to influence public duty, fraudulent acquisition and receipt of properties, failure to report bribery transactions and the concealment of information and frustration of investigation.[4] More importantly, *the ICPC Act* also

[1] Oserogho Associates "Bribery, Corruption, Economic and Financial Crimes" available at http://www.oseroghoassociates.com/articles/162-bribery-corruption-economic-and-financial-crimes?print=0&download=1 (accessed 2 June 2017)
[2] *Ibid*
[3] Supra note 1
[4] SPA Ajibade "Executive summary of anti-corrupt legislations with a view to advising foreign investors in Nigeria on anti-corruption programmes" available at http://www.spaajibade.com/resources/executive-summary-of-anti-corrupt-legislations-with-a-view-to-advising-foreign-investors-in-nigeria-on-anti-corruption-programmes/ (accessed 5 June 2017)

governs corrupt practices involving both government officials and private individuals. In other jurisdictions however, bribery constitutes both a crime and a civil wrong. The common law has long recognised criminal offences of, and related to, bribery and, in 2011, *the UK Bribery Act* was enacted. The meaning of bribery as a civil wrong is very different from the criminal law equivalent. The concept of bribery as a civil wrong involves an agent/principal relationship where such agent and the bribe payer would be personally liable for such wrong. The civil wrong of bribery has been described as a commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal.[5] The law of England, and that of other common law jurisdictions allow states to pursue claims against the bribe-payer and recipient.[6] The bribe payer and the agent are jointly and severally liable for either the loss caused by the tainted agreement or the amount of the bribe.[7] A principal is also entitled, if he wishes, to rescind or terminate a contract that has been obtained as a result of bribery. In Nigeria, for instance, where most of the contracts awarded either to companies by government agents or between agents and other individuals, are based on various benefits conferred on such agent whether or not they are qualified, the tort of bribery would serve as a viable tool in providing an option on whether such contractual relationships with bribe-paying companies should be

[5] J. Maton, J. Humphreys "Civil claims for bribery: an overview of the English and common law position" available at http://www.lexology.com/library/detail.aspx?g=8f53df2e-1816-4100-b2d4-00a3c0b4382a (accessed 5 June 2017)

[6] J. Maton, J. Humphreys "What states should know about the civil tort of bribery" available at https://cc.cooley.com/tag/tort-of-bribery/ (accessed at 5 June 2017)

[7] Supra note 5

terminated, rescinded or maintained and if so, on what re-negotiated terms. This is in addition to other liabilities incurred. In addition, the principal, who may be the state, could seek for equitable compensation for any financial loss and an account of profits since bribery constitutes a clear breach of fiduciary duties.[8] These fundamental elements and remedies available therefore makes the civil wrong of bribery a desirable tool in curbing bribery in cases of principal and agent and third party bribe-payers, in instances where the offence of bribery would still not suffice. This paper attempts to analyse the civil wrong of bribery under the English law, whilst examining the scope of the offence of bribery in Nigeria.

2.0 THE TORT OF BRIBERY

The legal definition of bribery as a civil wrong is wide. According to Lord Templeman, in *A-G for Hong Kong* v *Reid*[9], bribery is an evil practice, which threatens the foundations of any civilized society. Briggs J, in *Ross River Ltd* v *Cambridge City FC*[10] also stated that bribery is committed where one person makes, or agrees to make, a payment to the agent of another person with whom he is dealing without the knowledge and consent of the agent's principal. In the case of *Industries & General Motors Co*. v *Lewis*[11], Justice Slade, in defining a bribe, stated as follows;

For the purposes of the civil law a bribe means the payment of a secret commission, which only means: (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii)

[8] Supra note 5
[9] [1994] 1 AC 324 at p. 330H
[10] [2008] 1 All ER 1004 at p. 203
[11] [1949] 2 All ER 573, 574

that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.

Steele J. affirmed this in *Petrotrade Inc* v. *Smith.*[12] It is therefore a benefit given by a legal entity or individual to an agent or public official to obtain a favourable decision from the state or from the principal, which may be, for example, the award of a contract. The tort of bribery is founded on the legal relationship of principal and agent.[13] A claim for bribery will not be available when there is no agency relationship.[14] Such agency relationship could be between a company and its directors. The recipient of the alleged bribe will in most cases be a fiduciary of the innocent party and the Court of Appeal and the House of Lords in the case of *Reading* v. *Attorney General*[15] affirmed this. In that case, Reading, who was an army sergeant of the Crown, was paid £20,000 to transport illicit spirits and drugs. Although he drove a civilian vehicle, he wore his army uniform in order to divert attention from his illegal activities. After being convicted in criminal proceedings, he sought to recover the payments he had received but was being held by the Crown via civil proceedings. The Crown in defending its action argued that an employee that receives bribes is accountable to his principal or employer for any benefit conferred on him. Reading lost on each occasion, although Denning J, in his judgment, stated that the

[12] [2000] 1 Lloyd's Rep 486..
[13] Supra note 6
[14] Supra note 6
[15] [1951] AC 507

existence of fiduciary duties was not an essential ingredient of bribery. The Court of Appeal rejected this and postulated that a fiduciary relation must be shown. The qualification however, was that the term be applied in a loose or comprehensive manner and, would particularly arise, where the agent was entrusted with property to be used for the benefit of his principal and not for purposes not authorised by him, which in this case was the uniform, and in situations where the agent was entrusted to perform a particular job for the claimant. The House of Lords upheld this decision.[16] Once a bribe is established, there is an irrefutable presumption that its purpose is to induce the agent to act in favour of the briber.[17] In *Hovenden and Sons* v. *Millhoff*[18], Romer LJ stated:

> If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive.

2.1 Elements of the Civil Wrong Of Bribery

The elements of the civil wrong of bribery include;

2.1.1 Agency Relationship

[16]Timeshare Consumer Association "Commercial fraud: Bribery" available at https://www.timeshareconsumerassociation.org.uk/2014/08/06/commercial-fraud-bribery/ (accessed 7 June 2017)
[17] *Ibid*
[18] [1949] 2 K.B 232

It is clear from the authorities that the civil wrong of bribery necessarily occurs in the context of an agency relationship. The court affirmed this in the case of *Petrotrade Inc* v. *Smith.*[19]

2.2.2 Giving of a "benefit" to the Agent

This can be an actual benefit, or a promise of a future benefit. The benefit could be given directly to an agent, public official, or to a company or other legal entity, such person is in charge of, could be paid indirectly to a third party, family, or trusted associates. The type of benefit is irrelevant, provided it is material and it need not necessarily be monetary. In *Amalgamated Industries Ltd* v *Johnson & Firth Brown Ltd*[20], it was held that a job offer could, at least potentially, amount to a bribe. There appears to be no reason in principle why the relevant benefit should be limited to any particular form, so long as it constitutes a material benefit to the agent concerned. This could arguably take the form of an indirect benefit such as a job offer to a member of an agent's family.[21] The principal must show that the agent had a role in the decision benefiting the payer. It is not necessary to show a decisive role, although that is often the case.

2.2.3 Conflict of Interest

The benefit conferred must create a real possibility of a conflict of interest for the agent. The conflict of interest is not limited to the specific transaction for which the bribe was paid. It extends to future transactions between the principal and third party.[22] Leggatt J, in *Anangel* v. *IHI*[23], established the proposition that the key to determining

[19] *Petrotrade Inc* v *Smith* [2000] 1 Lloyd's Rep 486
[20] (Unreported) 3 April 1981 Ch D
[21] Supra note 16
[22] Supra note 5
[23] [1990] 1 Lloyd's Rep 167

whether or not a payment or other inducement constitutes a bribe was whether or not the making of it gives rise to a conflict of interest".

2.2.4 Briber's Knowledge of the Official's Role

The principal must show that the entity or individual providing the benefit to the agent knew that the recipient was an agent, or public officer, in the case of a state, or was willfully blind to the possibility.[24] In *Petrotades* case, it was equally held that to establish a bribe, the claimant/principal must show that the briber knew that the payee was acting as an agent. The court in *Logicrose Ltd* v. *Southend United FC*[25], considered the degree of knowledge, which the briber must possess with regards to the existence of the agent's personal interest. It accepted the submission that nothing less than actual knowledge or willful blindness will suffice, even constructive knowledge. Parties to negotiations do not owe each other a duty to act reasonably, but only to act honestly. In addition, the briber also accepts the risk that the agent may not disclose. In the *Logicrose* case, the court in relying upon dicta of the Court of Appeal in *Grant* v. *Gold Exploration & Development Syndicate Ltd*[26], reaffirmed that a briber cannot seek to defend himself by asserting that he assumed that the agent would disclose the transaction to his principal. Hence the briber therefore bears the risk that the agent will not make disclosure. The converse equally applies as if a person transacts secretly with another's agent behind his principals back and being aware that the agent intends to conceal the transaction from his principal and intends to obtain some private advantage for

[24] Supra note 6
[25] [1988] 1 WLR 1256
[26] [1909] 1 QB 233

himself, and then he takes the risk that the agent does in fact intend to do so.[27]

2.2.5 Secrecy

The benefit must be secret from the state. It is the vice of secrecy that defines the civil wrong of bribery because a bribe is a breach of the agent's fiduciary duties, as it constitutes secret profit. Full disclosure of the benefit is, however, a defence. The person relying on the defence must prove that full and appropriate disclosure has been given to an appropriate superior official or decision-making committee.[28] The benefit must have been concealed from the state. It is the failure to disclose the payment and obtain informed consent that is the "vice". Full disclosure to the state is a defence to a claim for bribery.[29] According to the court in the *Ross River* case, the secrecy element is essential in establishing a bribe:

> The essential vice inherent in bribery is that it deprives the principal, without his knowledge or informed consent, of the disinterested advice which he is entitled to expect from his agent, free from the potentially corrupting influence of an interest of his own.[30]

An example of a case in which the court accepted that a bribe had been paid is *Constantin Medien AG* v. *Ecclestone and others*[31]. In that case, the party who had accepted the £44 million bribe (G) worked at a bank which held a substantial number of shares in the Formula One group of companies. The party who paid the bribe (E) had done so, so that G would facilitate the sale of the Formula One shares held by the

[27] Supra note 6
[28] Supra note 5
[29] *Ibid*
[30] Supra note 13 p. 204
[31] [2014] EWHC 387

bank to a purchaser of whom E approved. It is worth noting that E accepted he had paid G the sum but asserted that he had done so because G had been blackmailing him. The judge rejected that argument. He held that bribery was more probable than blackmail. Further, he accepted G's version of events as "broadly accurate, while the defendants' evidence contained inconsistencies and was "otherwise unsatisfactory".[32]

It is not necessary for the state to prove dishonesty, although it is often present. Nor must the state prove that the bribe procured the contract or favourable decision. Once a bribe is proved there is an irrebuttable presumption that the public official was influenced by the "bribe", for example, that its payment procured the contract to build and operate the toll road. And there is no need to link the payment to a particular transaction. Once a bribe is proved, any subsequent contract or favourable decision will be tainted. So, the bribes used in our example would taint subsequent contracts.[33]

2.3 Other Considerations

Other important factors the court might take into the consideration includes;

Partial disclosure: There may be circumstances in which the principal has some knowledge of matters relating to the alleged bribe but complains that he had insufficient knowledge to have given proper consent.[34] The Court of Appeal held in *Hurstanger* v. *Wilson*[35] that

[32] Supra note 16
[33] Supra note 5
[34] Supra note 16
[35] [2007] 1 WLR 2351

there exists a distinction between cases of no disclosure and that of partial or inadequate disclosure. The former is and remains illustrative of bribery cases, whilst a partial or inadequate disclosure sufficient to negate secrecy has the effect of removing an act from the realms of bribery but it would still potentially constitute a breach of fiduciary duty.

Once all the elements of bribery are established, the court will presume in favour of the principal and against the briber and the agent bribed, that the agent was influenced by the bribe. The presumption is irrebuttable. Also, the motive of the person making the bribe is irrelevant and this was held in the case of *Barry* v. *Stoney Point Canning Co*., [1917] 55 S.C.R. 51, at p. 74.[36]

3.0 THE OFFENSE OF BRIBERY IN NIGERIA

Bribery remains strictly a crime in Nigeria, even in agency relationships, despite the fact that bribery constitutes a breach of fiduciary duties. It is provided for by the *Criminal Code Cap C38 Laws of the Federation of Nigeria 2010,* the *Penal Code (Northern States) Federal Provisions Act No. 25 of 1960* and the *Corrupt Practices and Other Related Offences Act (ICPC ACT) Cap. C3 Laws of the Federation of Nigeria 2010*, as well as state laws such as the Bribery Law of Lagos state.

3.1 The Criminal Code Act

An important observation in *the Criminal Code* is that it provides only for public officials who corruptly requests or asks for a benefit. *Sections*

[36]J C Morton, "Elements of civil tort of briber" available at http://jmortonmusings.blogspot.com.ng/2012/10/elements-of-civil-tort-of-bribery.html (accessed 12 June 2017)

98, 98A and 98B of the Criminal Code, *Schedule to the Criminal Code Act*, prohibit bribery involving public officers and *section 494* prohibits corrupt acceptance of gifts by agents. *Section 98* covers the demand side of the offence involving a public official. *Section 98A* covers the supply side where any person offers a bribe to a public official. *Section 98B* covers any person soliciting or demanding a bribe on account of any action of public officers.[37]

Section 98(1)(a) provides that;

> any public official who corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or bribes, etc. or corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person, on account of anything already, done or omitted, or any favour or disfavour already shown to any person, by himself in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a Government department, public body or other organisation or institution in which he is serving as a public official, or anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by himself in the discharge of his official duties or in relation to any such matter as aforesaid, is guilty of the felony of official corruption and is liable to imprisonment for seven years.

Section 98A on the other hand provides that;

> any person who gives a bribe on account of the actions of a public official or corruptly gives, confers or procures any property or benefit of any kind to, on or for a public official, or to, on or for any other person; or promises, or offers to

[37]A O Bello "Mental Element of Bribery under Nigerian and Us (Federal) Anti-Bribery Laws: an Overview" available at http://journals.univ-danubius.ro/index.php/juridica/article/view/2368/2727#sdfootnote3sym (accessed 3 July 2017)

> give or confer or to procure or attempt to procure any property or benefit of any kind to, on or for a public official or to, on or for any other person account of any such act, omission, favour or disfavour on the part of the public official as is mentioned in section 98 is guilty of the felony of official corruption and is liable to imprisonment for seven years.

Section 98B provides that;

> any person who corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person, on account of anything already done or omitted, or any favour or disfavour already shown to any person, by a public official in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a government department, public body or other organisation or institution in which the public official is serving as such; or anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by a public official in the discharge of his official duties or in relation to any such matter as aforesaid, is guilty of the felony of official corruption and is liable to imprisonment for seven years

Section 98B(2) further provides that;

> In any proceedings for an offence under the section it shall not be necessary to prove the following;
>
> i. that any public official counselled the commission of the offence; or
> ii. that in the course of committing the offence the accused mentioned any particular public official; or
> iii. that in a case to which Section 98B(1)(ii) is relevant, the accused believed that any public official would do, make or show the act, omission, favour or disfavour in question; or
> iv. that the accused intended to give the property or benefit in question, or any part thereof, to a public official.

The *actus reus* of the demand side of bribery is established when a public officer asks for, receives or obtains any property or benefit of any kind for himself or any other person or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person, while the *actus reus* of the supply side of bribery is established when any person gives, confers or procures any property or benefit of any kind to, or for a public official…or to, on or for other person, or promises or offers to give or confer or to procure or attempt to procure any property or benefit of any kind to, on or for a public official or to, on or for any person. The physical element of the demand side of bribery can simply be explained as asking for or receiving a benefit, while that of the supply side can be summed as "giving or promising a benefit.[38]

The *mens rea* of the demand side of bribery is "corruptly" asking for or receiving a benefit on account of anything already done or omitted, or any favour or disfavor already shown to any person, by the public officer in the discharge of official duties or in relation to any matter connected with the functions, affairs or business of a Government department, public body or other organisation or institution in which the officer is serving; and for anything to be afterwards done or omitted, or any favour or disfavor to be afterwards shown to any person, by a public officer in the discharge of official duties. The *mens rea* of the supply side of bribery is corruptly giving or promising a benefit on account of any act, omission, favour or disfavour on the part of the public official as is mentioned in section 98(1)(i) or (ii).

[38] *Ibid*

A critical aspect of this offence is that it must be done corruptly as provided in the act. Bairaman J. in the case of *Biobaku* v. *Police*[39] attempted to explain what corruptly meant in the context of the act. In rejecting the suggestion that corruptly meant improperly, His lordship posited as follows, that;

> The notion behind s. 98 is this in my view: an officer in the public service is expected to carry out his duties honestly and impartially, and this he cannot do if he is affected by considerations of benefit for himself or another person; and the mischief aimed at in s. 98 is the receiving or the offering of some benefits as a reward or inducement to sway or deflect the officer from the honest and impartial discharge of his duties- in other words as a bribe for corruption or its price.

3.2 The Penal Code

The Penal Code also provides solely for bribery by public officials in *Section 115*. It provides that;

> whoever being or expecting to be a public officer accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise, other than lawful remuneration, as a motive or reward for doing or forbearing to do an official act, or for showing or forbearing to show in the exercise of his official functions favour or disfavour to a person; or for rendering or attempting to render any service or disservice to any person with any department of the public service or with a public officer as such, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both; if such public officer is a public officer in the service of the Government of the Federation acting in a judicial capacity or carrying out the duties of a police officer, with imprisonment

[39] (1951) 20 NLR 30

> for a term which may extend to fourteen years or with fine or with both.

3.3 The ICPC Act

The Corrupt Practices and Other Related Offences Act unlike *the Criminal Code* and *Penal Code* provides for both public officials and private individuals in *Sections 9 and section 10*. Bribery, nevertheless, remains an offence under this Act and the provision of *Section 9* and Section 10 of the Act are very similar to that of the Criminal Code. *Section 9* provides that;

> any person who corruptly gives, confers or procures any property or benefit of any kind to, on or for a public officer or to, on or for any other person; or promises or offers to give, confer, procure or attempt to procure any property or benefit of any kind to, on or for a public officer or any other person, on account of any such act, omission, favour or disfavour or to be done or shown by the public officer, is guilty of an offence of official corruption and shall on conviction be liable to imprisonment for seven years.

Section 10 on the other hand provides that;

> any person who asks for, receives or obtains property or benefits of any kind for himself or any other person; or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person, on account of anything already done or omitted to be done, or any favour or disfavour already shown to any person, by a public officer in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a Government department, public body or other organisation or institution in which the public officer is serving as such; or anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by a public officer in the discharge of his official duties or in relation to any

> such matter as aforesaid, is guilty of an offence of official corruption and shall on conviction be liable to imprisonment for seven years.

4.0 THE PRACTICAL UTILITY OF THE CIVIL WRONG OF BRIBERY IN NIGERIA

The provisions of *the Criminal Code*, *the Penal Code* and *the ICPC Act* provide a well-structured legal framework for the offence of bribery in Nigeria. However, as has been stated, the civil wrong of bribery and the offence of bribery are two different concepts, although a person can be guilty of both. In Nigeria today where the principal/agent relationship cuts through the social and commercial fabric of the economy, it only makes sense that there should be a remedy for aggrieved principals whose agents have taken bribes and made secret profit. The offence of bribery as provided for in Nigeria would not adequately address the issues of where an agent takes a bribe and pursuing a criminal matter in bribery would require more time, resources and efforts as criminal offenses must be proved beyond reasonable doubt. In addition, the remedies available under the civil wrong of bribery to principals are not provided for by any offence or civil wrong as it relates to principal-agent relationship. A principal has the right to rescind or terminate a contract that has been obtained because of bribery. The reason for this is that the civil wrong of bribery recognises the existence of a contractual relationship between the agent and the principal and the fact that the agent receiving a bribe to award a contract in performance of his agency duties would constitute a bribe and a breach of his fiduciary duties. As it stands in Nigeria today, there is no doubt that a lot of contracts are awarded both between private citizens and in government based on various

benefits conferred on the agent charged with the duties of awarding such contracts. In most cases, the persons to whom these contracts are awarded are usually not the most qualified or the most expedient for the job. For instance, many of the contracts for road construction and repairs done in Nigeria have resulted in more roads being dilapidated even faster because of the poor quality of work done on the roads by the so-called contractors. Another example can be glimpsed from the educational system where contracts for the supply of learning materials, such as desks and chairs in most public schools break down easily not only attributed to the poor maintenance culture but the poor quality of the materials in themselves. All these happen because such contracts are not usually awarded on merit but majorly due to other considerations, bribes included on the parts of the agents or public officials who are in themselves agents of the government. The principal also has the right to claim for any further losses he has suffered. For example, if the principal can demonstrate in a specific way that the agreement negotiated by his bribed agent is less advantageous to him than an agreement negotiated at arm's length by an honest and prudent agent then the principal can claim damages to the extent he has been so disadvantaged.[40] Another remedy available to the principal would be equitable compensation for any financial loss and accounts of profits since bribery constitutes a clear breach of fiduciary duties. In addition, the principal may request a recoupment of the bribe from the bribed agent. The money derived from the bribe may also be recoverable from the bribed agent as money had and received to the

[40] J Richmond "A brief overview of the Civil Law of Bribery" available at http://st-phillips.com/v7/nmsruntime/saveasdialog1f83.pdf?lID=2307&sID=3344 (accessed 16 May 2017)

use of his principal. Such remedy is personal and does not require the principal to show that there was a fiduciary duty owing from the bribed agent to him.[41] It also does not require the claimant to show that he has suffered loss by reason of the bribe. These vital elements and remedies available for the civil wrong of bribery therefore makes it an easier, cost effective and expedient means of curbing bribery in Nigeria, both in cases of public official and that of private individual agents and principals. It affords more useful and practical remedies for the principal and would help in the overall curbing of bribery in Nigeria, encouraging more principals, and even the state to seek more expedient civil redress in cases where the offense of bribery would not even cover.

5.0 CONCLUSION

This paper has examined the civil wrong of bribery as it applies in the UK as well as bribery as an offence in Nigeria. Although the concept of bribery is different as an offence and as a civil wrong, it is evident that the civil wrong of bribery is a practical tool in curbing bribery especially by public officials and offers remedy for the principal, rather than imposing punishments on the agents or public officials. The practical utility of the civil wrong of bribery in Nigeria can therefore not be overemphasized hence, there is no doubt that if the Nigerian courts adopt the civil wrong of bribery in Nigeria; it would be of immense benefit to the State as a principal, and private individuals and contribute to gradually curbing the menace of bribery in Nigeria.

[41] *Ibid*

An Appraisal of the Legal Relationship between a Banker and its Customer: The Statutory Protection Afforded to Bankers in Nigeria in Paying Cheques

Olamide Benedicta Abe*

ABSTRACT

The article is divided into three parts. The first part of this article seeks to explain and shed more light on banker customer relationship, the legal position as to who a banker is, who a customer is, the incidents of a banker customer relationship and the position of the law especially judicial decisions in the aspect of banker customer relationship. The second part of the article, takes a look at, the meaning of cheque under the Bill of Exchange Act 1917, the legal barriers to payment of cheques on demand and finally the protection afforded to the paying and collecting banker under the Bill of Exchange Act and exceptions to the protection. The concluding part of the article gives recommendations as to how this area of the law of banking can be improved.

1.0 INTRODUCTION

The banking industry has almost become an indispensable part of everyday commercial transaction both locally and internationally. Almost everyone owns and operates a bank account including children and illiterate persons. However, little or nothing is known outside the world of legal practice about the nature of relationship that exists between these banks and their customers. A lot of people just 'go with the flow' and keep on transacting with banks.

* Author is a final year student at the Faculty of Law, University of Lagos.

As a part of the transaction between bankers and customer comes the use of cheques; a negotiable instrument as a medium of transaction. There are statutory provisions attached to the use of cheques to protect the paying and collecting banker. From this introduction, a lot of questions might have arisen such as 'who exactly is a banker?', 'who is really a customer?', what kind of relationship exists between them?', 'what are the legal implications of this relationship?', 'does the statute also protect the customer who signs the cheque?' This article will shed some light on these and many more questions that may pop up in the mind of the reader.

2.0 BANKER CUSTOMER RELATIONSHIP

2.1 Who is a banker?

There is no universal or completely satisfactory definition of who a 'banker' is just as the scope of what constitutes banking business is very elastic.

In general usage, people see anybody working in a bank as a 'banker'. Although, this might be correct for the purpose of the profession, this paper does not deal with banking as a profession. The general usage will therefore be disregarded just as the Supreme Court rejected this general usage in the case of *Akwule and 10 Ors* v. *Reginam*[1] and held that the word banker does not refer to any individual employee of a bank. The court held that the word 'banker' referred to any company licensed to carry out

[1] (1963) All NLR 193

banking business and not the employee of the bank or a director or shareholder of the bank.

Section 2 of The Bill of Exchange Act 1882(as amended in 1990) defines a banker as "including a body of persons whether incorporated or not, who carry on the business of banking" According to Layi Afolabi, unless we know what business of banking is and the act is silent on this, it will be difficult, if not impossible, to understand this definition.[2]

According to H.L.A Hart, "a banker is a company carrying on the business of receiving money and collecting drafts for customers subject to the obligation of honouring cheque drawn upon them from time to time by the customer to the extent of the amounts available in their account" Hart's definition and what the Supreme Court held are both in line with literary usage of the word banker i.e. The question, "who are your bankers?" means "which bank do you bank with?" and does not in any way refer to any individual employee or bank official, director or shareholder. It must also be understood that a bank is only one entity and has only one legal existence no matter how many branches it has. This was noted in *Bank of Ireland* v *Hussy*[3]

Arguments may be raised as to whether banking is a trade or a profession. In *Regina* v. *Industrial Disputes Tribunal*, Lord Goddard concluded that banking is, ordinarily speaking a trade because

[2]A. Layi, *Law and practice of banking in Nigeria*, 1st ed. Pg. 1 (Ibadan Heinemann (1999)

[3][1965] IR 46

bankers refer to those who patronize them as 'customers' and not as 'clients' as is usually employed by professionals.

Banking business is no doubt a trade, not only because they employ the word customer but also because of the buying and selling involved in banking which is central to all trading activities whether the objects of trade be goods, services or a combination of both.

2.2 Who is a customer?

In the course of its daily transactions, a banker will come in contact with quite a number of people who have different motives for coming to the bank. Some come to cash cheques, some to deposit money, some to buy bank drafts and some just to make enquiries. Some of these people have a subsisting relationship with the bank while in some cases; it is a "one-off" affair, perhaps never to be repeated[4].

Almost invariably, anybody who has anything to do in the bank, no matter the nature, sees himself, as a bank customer at least as much as he is within the banking premises. Commercial prudence also dictates that the bank affords its best attention to all and sundry, whatever relationship they may seem to be having with the bank. The question then is 'Who amongst all these people are customers of the bank?'

[4]Supra note 2 p. 13

It has been decided that the fact that one is seen to be transacting one form of business or the other in the bank almost every day or even everyday does not make one a customer of the bank. In *Great Western Railway Company ltd.* L*ondon and County bank*[5], it was held that a person who has been cashing cheques from the defendant bank on his employer's behalf over many years was not a customer of the bank by his mere cashing of cheques. To be a customer of a bank, one has to have an account with the bank. This trend was followed in the Nigerian case of *Ekpeyong* **v** *The State*[6] where the court also noted that in order to be a customer; a person must have an account with the bank or less certainly agreed to open one.

Can one hold an account on a third party's behalf? In the case of *Ademiluyi and Lamuye* v. *African Continental Bank ltd.*[7] The court held that if a person's name appeared in the bank's book, even when the bank believes that the account is to be held in trust for another party, the person whose name appears in the bank's book will be held as the customer of the bank and not the other party unless the title of the account clearly indicates 'Agency' or 'Trusteeship' Therefore, a customer is a person who has an account with the bank and who is registered in the bank's book as being a customer of the bank.

2.3 The relationship

[5] [1900] AC 414
[6] [1967] 1 All NLR 285
[7][1964] NCLR 10.

For a long time, court decisions were in conflict as to what the nature of a banker-customer relationship was. Some were of the opinion that when a customer deposited money, a contract of bailment was created. In *Hall* v *Fuller*[8] for example a bank was described as "a depository of customer's money." Opinion changed slightly over the years when it was decided in *Marzetti* v *Williams*[9] that money deposited with the bank belonged to the customer. The plea that the money deposited was for 'care and custody' was rejected. The court noted that:

> Such a situation will be exposed to problems which would make the banking business a practical impossibility.

The modern notion of the nature of the relationship between banker and customer started with the case of *Carr* v *Carr*[10] where a testator made a bequeath of "whatever debt might be due to him at the time of his death" and the court held that the credit on his bank account should be included.

The decision that bank deposit is a debt on the bank was applied in *Devaynes* v *Nobles*[11] where it was held that money deposited with the bank belongs immediately to the bank and in *Sims* v *Bond*[12]where it was confirmed that bank deposits are actually loans to the bank to be used as the bank pleases subject to repayment on demand by the customer. But as that was not the main contention in those cases, it was not emphasized.

[8]352 SW 2D 559
[9] (1830) 1 B & AD 415
[10] (1811)1 Mer. 541, n
[11] (1816) 35 ER 781
[12] (1833) 5 B & AD 389

The case of *Foley* v *Hill*[13] was the first case to give detailed legal consideration to what the nature of a banker-customer relationship was and where the final confirmation of the British House of Lords was received. In *Foley* v *Hill*[14], an account was opened in1829 in the name of the plaintiff with the defendant banker, the initial credit being for 6,117 pounds. It was agreed that 3 percent per annum interest should be allowed. There were later two debits on the account for 1700 pounds and 200 pounds. Interest entries were shown in a separate column and interest was not credited to the main account. In 1838, the plaintiff sought to recover the money outstanding by an action in chancery for an account. The account being so simple was held not to be ex facie a matter for a court of equity and the plaintiff thereupon claimed that the relationship of a banker to a customer was analogous to that of an agent and his principal and that he was entitled to an account on that basis. The House of Lords held that the relationship was that of debtor and creditor. Lord Cottenham said

> Money when paid into a bank ceases all together to be the money of the principal; it is then the money of the banker who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of under the control of the banker; it is then the banker's money, he is known to deal with it as his own, he makes what profit of it he can…the banker is not an agent or factor but he is a debtor.

Lord Brougham added in the same case

[13](1848) 2 HL CAS. 28
[14]*Ibid*

> The trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own.

It is understood however that the formulation of the relationship does not sufficiently account for the wide spectrum of functions which a banker may undertake on the instruction of its customers.[15] Banks do perform a number of ancillary services which create room for special relationships other that the general relationship described above. These special relationships are governed largely by special or specific laws.

Examples of such special relationships are as follows:

1. Agency

The most common way a bank performs this agency function is the collection of cheques for and on behalf of its customers. In that wise, the banker should do everything that an agent should do. For example, he should use all his skill and aptitude in the collection of cheques in that if there are alternative procedures for collection all being equally safe, the quickest one should be applied. He should not delay unduly. Another example of a bank acting as agent is where it buys shares on behalf of its customer.

2. Bailment

[15]J.E.O Abugu, "The Law of Banking" E.O Akanki (ed), Commercial law in Nigeria, rev. ed. 2007, (University of Lagos press, Lagos). P. 549

A contract of bailment is created between a banker and its customer when a customer delivers to the bank an item for safe custody and the bank accepts it. Here, the bank is not a debtor but a bailee[16].

3. Trusteeship/ Executorship

Banks can act as executors of a will and if the exercise is prolonged, the banker becomes a trustee. In some instances, a bank may be asked to administer trust property. In that situation, the bank also becomes a trustee to the beneficiaries of the trust property.

Having established who a banker is, who a customer is and the nature of the relationship between a banker and a customer, it is pertinent to state that as a general rule a banker will only be liable to its customer and not to any third party. However, as with all general rules, there are exceptions. There are situations where a banker will not be liable to its customer and also situations where a banker will be liable to persons who are not its customer.

1. Vicarious Liability

Under the law of torts, a master will be vicariously liable for the acts and omissions of its servants which are carried out during the course of employment. This rule also applies to bankers and their employees. A bank will therefore be liable for acts and omissions of its employee carried out during the course of employment.

[16]Supra note 3 p. 29

Lord Morris in *Hedley Byrne co. limited* v *Hellers and co*[17] held that a bank will be liable to persons to whom advice was given even if such persons had no account with the bank. In that case, the second defendant Johnson was a manager of a branch of Martins bank. Mr. Wood, though not having an account with Martins Bank approached Johnson for advice about investing in a company and he was wrongly advised, Mr. Wood, relying on this wrong advice invested his money in the company and he lost. The bank was held to be vicariously liable for the negligence of Martins who being an agent for the bank incurred such liability.

2. Fraud

Where an account is opened by fraud e.g. in company's name by forging the signature of the company's chairman and/or secretary, such bank will not be liable to the fraudulent customer. In *Stoney Stanton supplies Coventry* v *Midland bank*[18] the court held that where an account is opened by fraud, there will be no banker customer relationship because no relationship can be established by fraud.

Having noted these, it should also be noted that duration is not of essence in banker-customer relationship. If a bank has accepted money from a person on the understanding that his cheque will be honoured at least up to his credit balance, that person is a customer of the bank irrespective of whether his connection with the bank is of short or long duration. *In* Commissioner of taxation

[17][1964] AC 465
[18] [1966] 2 Lloyd's Rep. 373

v English, Scottish and Australian bank[19] the court affirmed the view that the word 'customer' signifies a relationship of which duration is not of essence.

3.0 INCIDENTS OF BANKER-CUSTOMER RELATIONSHIP

An incident has been defined as "related to something; accompanying something or occurring as a consequence of it"[20]an incident of customer banker-relationship is therefore an event related to it or occurring as a consequence of it. The following are incidents of banker-customer relationship.

1. Seeking out of customers

In normal commercial transactions, the debtor can seek out the creditor for the purpose of offsetting debt owed by him. Though the bank is a debtor to the customer, it is under no obligation to seek out the customer to effect payment. The bank pays only when the customer demands or directs and there are sufficient funds in the customer's account.[21]

The nature of a banker-customer relationship was put to test in *Osawaye v National Bank of Nigeria Limited*[22] at the High Court of Mid-Western state where the trial judge Ogbonna J**.** drawing from the decision in *Joachimson v Swiss bank*[23] concluded that though the banker is a debtor to its customer, there is no obligation on the

[19](1920) AC 683
[20]Microsoft Encarta® 2009. © 1993-2008 Microsoft Corporation.
[21]Supra at note 16
[22][1974] NCLR 474
[23][1921] 3 KB 110

part of the bank to seek out its customer. The banker's only obligation is to pay when the customer demands or directs him to pay some other person or apply whatever may be due to him or part thereof in another manner.

It was also held in *Chief Festus Yusuf v Co-operative bank Nig. ltd*[24]that a customer cannot, bring a cause of action for recovery of money if he did not make a demand for its payment.

> Provided there is a credit balance in the customer's account, the bank is under a legal obligation to honour a cheque drawn on the account by the customer.[25]This view was given cognizance in *Woodland v Fear*[26]where the court noted that the amount to be drawn must be within the credit limit of the customer's account else the bank owed no duty to honour the cheque.[27]. The customer is to present the cheque duly and regularly signed by him at the branch where the account is kept and during normal banking hours as stipulated by the bank.

It was held in *Enyi* v *African Continental bank*[28] that where a bank wrongfully dishonours a customer's cheque, the bank will be liable for a breach of the implied contract to pay the customer on demand.

2. Will the bank be liable where there is delay in payment?

It was held in *Ejimofor* v *Union Bank of Nigeria*[29] that delay in payment itself without more cannot amount to a wrongful

[24] [1994] 7 NWLR (PT 359) 676
[25]Supra at note 16
[26] (1857) 7 E& B 519
[27]R.S. T Chorley, Leading cases in banking law 1965
[28] [1981] IMSLR 352
[29][1981] 1 FNR 5

dishonour. In that case, the payee of a cheque went to the bank and his cheque was marked for payment but after waiting for several hours, the payee got impatient and left. At the suit of the banker, it was held that delay does not amount to dishonour.

Therefore, as long as the bank does not out rightly deny the payment of the cheque, but merely delays in paying it, it will not be held liable.

3. Can the bank postpone payment?

It has been held in *Babalola* v *Union Bank of Nigeria ltd*.[30]that where the circumstances make it prudent so to do, such as where the cheque is not regular on the face of it or is ambiguous, the banker will be justified in postponing the honouring of the cheque until further investigation.[31]

The duty and right to postpone payment pending investigation derives from the right and duty of the bank as agent to exercise care in relation to its own and its customer's banking business.

A banker is certainly not obliged to honour a cheque even if drawn by the customer where the signature of the customer as contained in the cheque differs from the specimen held by the bank; even if both signatures were signed by the same person. But where there is no basis whatsoever for the doubt of the bank as to the authenticity or regularity of the customer's signature, the

[30] [1980] NCLR 201
[31]Supra at note 16

banker cannot exonerate itself from liability for the wrongful dishonour of the customer's cheque.

4. Can a bank be excused of its obligation to honour customer's cheque?

a. A bank may only be excused of the obligation to pay where; The cheque is stale: In normal banking practice, a cheque will be considered stale six months after the due date. Thereafter, the bank is not obliged to honour it.
b. The drawer's death comes to the notice of the bank: The customer's death effectively terminates the continuity of the banker-customer relationship and hence the mandate to dishonour cheques drawn by the deceased.
c. There is an effective countermand: The order to "pay on demand" on a cheque may be retracted any time before the encashment of the cheque. This is called a countermand. For a countermand to be effective, it must reach the banker within a reasonable time before encashment. For example, in *Woodland* v *Fear*[32], the countermand came after the cheque had already been cashed and the drawer could not recover.

   Also, the bank must have actual knowledge of the notice of countermand. The notice must be in writing and duly signed by the customer, clear and unambiguous. It was held in *Westminster Bank ltd. v Hilton*[33] that the countermand

[32] (1857) 7 E & B 519
[33][1926] TLR 124

signed by the customer was not clear and the bank was therefore not held liable. In that case, the customer had given out two different cheques on the same day to the same person and he later on sent a countermand to the bank to dishonour one of the cheques. The only certain identification in this cheque would have been the cheque number which he failed to include in the countermand. The bank paid both cheques since the countermand was not clear and they were not held liable.

d. The cheque is postdated and has not matured for payment: A cheque under this circumstance can be dishonored by the bank until it is mature for payment.
e. There is a court order or an act freezing the account of the drawer or an ongoing police investigation on the account: A *mareva* order also known as a freezing order is usually issued by courts pending investigations over an account within its jurisdiction.
f. There is notice of winding up or receivership proceeding or where the customer is declared bankrupt: A declaration of bankruptcy automatically divests the customer of contractual capacity to operate an account, as his estate becomes vested without more, on his trustee in bankruptcy.

5. Does the bank owe any duty to the customer and vice versa?

Both the bank and the customer simultaneously owe some duties to each other. Therefore, another incident of customer-banker

relationship is where either the bank or its customer breaches any of the duties they simultaneously owe to each other. These duties shall now be examined.

3.1 Duties of Bank

1. Duty to exercise care and skill

   A bank has a duty under its contract with the customer to exercise reasonable care and skill in carrying out its part with regards to operations within its contracts with its customer. The duty extends over the whole range of banking business within the contract with the customer.[34] Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer. The court held in Selangor United Rubber Estates Ltd. V Cradock (a bankrupt) and others[35]that the paying banker owes a duty to his customer to exercise reasonable care and skill in carrying out his part of the contract. He may also be liable as a constructive trustee if funds on the account are misapplied.
2. Duy to treat customer's affairs as private and strictly confidential.

This aspect of the relationship is underlined in the case of Tournier v National provincial bank[36] where the court held that it is a further term of the implied contract that the bank enters into a qualified obligation not to disclose information concerning

[34]Supra note 15 p. 552
[35] [1968] 2 All ER 1073
[36][1924] 1 KB 461

the customer's affairs without his consent. In that case, the plaintiff banked with the defendant at their Moorgate street branch. His account became overdrawn and he agreed to pay off the overdraft by weekly installments and the manager of the defendant's branch telephoned his employers to ask for his private address. In the course of the conversation, the manager informed the employers that the plaintiff's account was overdrawn, that he had failed to keep his promise to put in funds, and that he was suspected of betting as cheques drawn on him had been paid to bookmakers. As a result of this information, the plaintiff got into difficulties with his employers, who refused to renew his employment and he sued the defendants for damages. It was held that the defendants were liable as they had failed in their duty to the plaintiff to treat his account and affairs as confidential. It was further held that the obligation extends to information from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of banking relation of the bank in conducting the customer's business or in coming to decisions as to its treatment of its customers.

There are exceptional cases where this duty will not operate. Bankes L. J attempted to summarise these in Tournier's case[37]

1. Compulsion of law e.g. where the bank has to give evidence in legal proceeding

[37] ibid

2. Public duty to disclose e.g. when a customer is transacting business with the enemy during a war in the country.
3. Where it is in the interest of the bank to disclose.
4. Express or Implied consent of the customer.

Section 37 of the 1999 Constitution of the Federal Republic of Nigeria guarantees the right to privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. A breach of this by a banker may therefore also give rise to an action for enforcement of fundamental human rights. Section 45 of the 1999 Constitution of the Federal Republic of Nigeria **however** provides for derogations from the fundamental human right. Section 45(1) provides that "nothing in sections 37, 38, 39, 40 and 41 of the constitution shall invalidate any law that is reasonably justifiable in a democratic society."

One of such laws may be found in section 7 of the Banker's Books Evidence Act 1879 a statute of general application. It provides that;

On the application of any party to a legal proceeding, a court or judge may order that such party be at liberty to inspect, take copies of any entries in a banker's book for any of the purpose of such proceedings. An order under this section may be made with or without summoning the bank or any other party and shall be served on the bank three clear days before the same is to be obeyed unless the court or judge otherwise directs.

Where a banker finds itself caught within the provisions of this section, he may therefore allow for the examination of its books

and allow copies to be taken even if this would lead to it disclosing its customer's affairs.

3.2 Duties of the customer

The customer is obligated to

1. Give written instructions to the bank if he seeks to withdraw his money.
   Such instruction usually includes cheques, standing orders, direct debit instruction, request for payment instrument like bank draft or bank cheques, foreign payments etc.
2. To inform the bank without delay of any suspicious dealings on his account as may come to his knowledge. Failure to do this in Brown v National Westminster bank ltd.[38] was held as an estoppel against the customer.
3. To draw his cheque with care and diligence and in a manner that will not facilitate fraud, forgery or unauthorized alteration. It was held in London Joint Stock bank ltd. v Macmillan & Arthur[39] that in drawing a cheque, the customer owes a duty to the bank to take reasonable precautions against possible alteration of the cheque.
4. To pay reasonable commission and interest on borrowed funds as agreed. However, in carrying out this obligation, it has been held in *Union bank plc* v .*Ozigi*[40] that the bank cannot after an agreed amount of interest increase it beyond the agreed interest.

[38] (1964) 2 Lloyd rep. 187
[39](1918) AC 777
[40] (1994) 3 SCNJ 42

Conclusively, a breach of any of these duties either by the bank or by the customer can give rise to an action for damages in court.

The incidents of banker-customer relationship cannot fully be known as the categories are never closed. New actions arise every day in the commercial world as a result of the relationship between the banker and the customer. Although it is now established that the major relationship between a banker and a customer is that of debtor and creditor.

4.0 CHEQUES

The Bill of Exchange Act of 1917[41] is the applicable statute relating to cheques in Nigeria. Section 73 of the Bill of Exchange Act defines a cheque as "a bill of exchange drawn on a banker and payable on demand"

Against this background, a full definition of a cheque can only be given when it is read in conjunction with section 3(1) of the Bill of Exchange Act which defines a bill of exchange thus

> A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer

Reading section 73 of the Bill of Exchange Act in conjunction with **section 3(1) of the Bill of Exchange Act**, a cheque may therefore be fully defined as

[41]The Bills of exchange Act Cap. B8 Laws of the Federation of Nigeria 2004

> an unconditional order in writing drawn by one person upon another who must be a banker, signed by the person giving it (the drawer), requiring the banker upon whom it is drawn; to pay a sum certain in money to the person to whom it is drawn; or to order of a specified person or bearer

Although a type of bill of exchange, the cheque differs from an ordinary bill in some acknowledged respect.[42]

1. Unlike an ordinary bill, the drawee of a cheque must be a bank and the instrument itself payable on demand.
2. A cheque unlike an ordinary bill is payable on demand and for this reason does not require acceptance.
3. Unlike the drawer of an ordinary bill, the drawer of a cheque is under a duty to the bank to take reasonable care in drawing so as not to facilitate alteration.
4. The bank unlike the drawee of an ordinary bill is protected against a forged or an unauthorized endorsement.
5. The drawer of a cheque unlike that of an ordinary bill is not fully discharged by failure of the holder to present the instrument for payment within a reasonable time.
6. Unlike in the case of an ordinary bill, notice of dishonour to the drawer of a cheque is rarely necessary to make him liable on the instrument.
7. The rules relating to crossing of cheques do not apply to ordinary bills.

[42]K.I. Igweike, *Law of Banking & Negotiable instruments* (Africana-fep publishers limited Onitsha, 1990) pg.157

4.1 Payment of Cheques

As earlier noted, the relationship between a banker and his customer is that of debtor and creditor. In that relationship, the banker borrows money from the customer on the term that he will repay the loan in accordance with the mandate of the customer. This mandate is formally actualized in drawing of the cheques by the customer on the bank. The obligation of the banker to pay cheques thus drawn by the customer depends firstly on three main general considerations.

1. The relationship of banker and customer subsists at the particular time
2. There is obligation on the banker to honour the particular cheque; and
3. The particular cheque is in order[43]

There are however some condition precedent for payment

1. Demand is necessary
2. Account must be in credit
3. Availability and sufficiency of funds
4. The demand must be made at the branch of the bank where the account is kept, unless the contrary is expressed.

Where all these conditions are met, there are six (6) legal barriers to payment of cheques.

1. Death of the customer
2. Mental incapacity of the customer

[43]Ibid

3. Notice of bankruptcy of the bank
4. Winding up order
5. A Garnishee order[44]
6. Court injunctions especially over dispute of funds in the account.

4.2 Protection for the Paying Banker

A paying banker has been defined as a bank on which a cheque or draft is drawn; the bank who cashes it. Also called accepting bank, drawee bank or payer bank[45]

The banker may be confronted with great perils when paying its customer's cheque. Such perils are basically of 3 kinds and the Bill of Exchange Act has given limited protection in each case.

(a) Forged or unauthorised signature

Generally, a forgery denotes the making of a false document or writing with intent that it may be used or acted upon as genuine to the prejudice of any other person, or with intent that any person may in the belief that it is genuine be induced to do or refrain from doing any act. Forgery of cheques would therefore include the printing of a dud cheque, altering the amount on a cheque, falsifying the due date and the signature thereon[46]. Forgery is a criminal offence and the onus of proof is on the person alleging it.[47]

The legal effect of forgery on a cheque is dealt with in section 24 of the Bill of Exchange Act which provides that Subject to the

[44] An order of a court attaching debt owing or accruing from a third party to a judgment debtor in satisfaction of the judgment creditor
[45] The business dictionary Businessdictionary.com
[46]Supra note 15 p.586
[47]African Continental Bank Plc V Victor Ndoma Egba [2000] 8 NWLR (PT 669), 389

provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

> Provided that nothing in this section shall affect the ratification of an authorized signature not amounting to a forgery.

It is worthy of note that this section, applies to forgeries of signature on a cheque only.

This section draws a distinction between a forged cheque and cheques drawn without authority. A forged cheque is one written without the knowledge or consent of the person whose signature it purports to be. A cheque drawn without authority is one written without the knowledge or consent of the person whose signature it purports to be but lacking in authority to issue the cheque. Whilst the authority in the latter case is capable of ratification, a forged signature cannot be ratified.

By the provisions of this section, a forged or unauthorized signature is a nullity and no right can be acquired through or under it, a banker who pays a cheque with such signature, does so to its detriment. However, a limited protection has been given under the section

1. Estoppel: section 24 provides that the party against whom it is sought to retain or enforce payment of the bill may be

precluded from setting up the forgery for want of authority.

In *London and Riverplate Bank* v *Bank of Liverpool*[48]Martin J. expressed this principle of estoppel as follows " if the plaintiff…so conducted himself as to lead the holder of the bill to believe that he considered the signature as genuine, he could not afterwards withdraw from that position."

In *Greenwood* v *Martins Bank Ltd*.,[49] the plaintiff became aware of the forgeries of his signature by his wife and kept silent for eight months. In his judgment, Lord Tomlin observed that "the deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged signature was in fact in order." The applicant's breach of duty to disclose gave rise to estoppel.

This decision was followed and applied in *Brown* v *Westminster Bank Ltd*[50] and also in the Nigerian case of *Umaigba* v *New Nigeria Bank Ltd*.[51]

2. Negligence by the customer: Where the true owner of the cheque has been negligent in taking custody of the cheque and informing the bank of irregularities, it may be precluded from recovering or at best be contributorily liable.[52] The authority for this proposition is the judgment

[48] [1896] 1 QB 7
[49][1932] 1 KB 371.
[50] [1964] 2 Lloyd Rep. 187
[51] [1979] NCLR 472
[52]Supra note 15 p.591

of Scruton L.J. in *Greenwood* v *Martins bank ltd.*[53] He said "the customer is held bound to use reasonable care in drawing his cheques so that the banker may not be misled" and also in the Nigerian case of *Nigerian Advertising Service ltd*. v *U.B.A ltd*[54], the defendant bank's case that the plaintiff was grossly negligent in the keeping of the cheque books failed only for lack of evidence to substantiate the defence. Whereas in *Adama* v *Bank of the North*[55]**,** the bank was found to have been negligent and the plaintiff/customer was able to recover the amount deducted from his account on six forged cheques.

(b) Forged or Unauthorised endorsement

The law governing this head is contained in **section 60 of the Bill of Exchange Act** it provides

> When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority.

To gain this protection, the banker must not only have paid the cheque but must have done so in good faith.

1. The meaning of payment: This is not defined under the act. In *Bissell & co* v *Fox brothers & co*[56] it was held that the term payment does not necessarily mean payment

[53]Ibid
[54] [1965] NCLR 6
[55][1981-82] BNLR 72
[56] (1884) 51 LT 663

in cash but includes payment crediting the account of a customer with the amount of a cheque

2. Meaning of good faith**: section 92** states that a thing is deemed to be done in good faith within the meaning of the act where it is in fact done honestly, whether it be done negligently or not.
3. Ordinary course of business: The Act must have been done during the ordinary course of business i.e. banking hours stipulated by the banker.

(c) Unendorsement and irregular endorsement

An unendorsed cheque is one signed without sanction or approval. An irregular endorsement is one which does not conform or follow the usual or prescribed procedure. The statutory protection granted under section 60 does not cover payment of a cheque with an irregular endorsement. In *Agbafe* v *View point Nigeria ltd*[57] the court held that without proper endorsement, the paying banker fails to enjoy the protection afforded by **section 60**.

4.3 Protection of the Collecting Banker

The phrase "collecting banker" is used to describe the functions of banks when they receive cheques crossed or uncrossed on behalf of their customers for clearing and collection before placing the value to the credit of the customer's account. It entails the receipt of the cheque from a customer; presenting it to the banker on whom it is drawn; receiving the money for the customer and placing it to the customer's credit.

[57] (1977) NCLR 93

Just as the **Bill of Exchange Act** in appropriate cases provides protection for the paying banker, so also does it do the same to the collecting banker. As already noted, a banker is under an obligation to act as a collecting banker to his customer for the cheques drawn on other bankers in favour of the customer.

At common law, the principal risk which the collecting banker runs in the performance of function is that of liability for the tort of conversion. An action for conversion will lie against the bank when it happens that the customer in whose account it has given for value is not the true owner of the cheque as a result of a defective title or fraudulent endorsement. The bank is treated as having converted the piece of paper, the cheque being a chattel by which the money was collected and is accountable for the value. The enormity of the risk necessitated statutory protection for the collecting bankers. This protection is to be found in **section 77 of the Bill of Exchange Act 1882** which provides:

> (1) A banker who gives value for, or has a lien on, a cheque payable to order which the payee delivers to him for collection either without endorsing it regularly had such rights, if any, as he would have had if upon delivery the payee had endorsed it regularly in blank.
> (2) Where a banker, in good faith and without negligence
> a) receives payment for a customer of a prescribed instrument to which the customer has no title or a defective title
> b) having credited the customer's account with the amount of such a prescribed instrument, receives payment of the instrument for himself, the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purpose of this subsection as having been negligent by reason only of his failure to concern himself with the absence of, or irregularity in, endorsement

of a prescribed instrument of which the customer in question appears to be the payee.

For this section to be operative, certain requirements have to be met.

- **The Requirement of Good Faith**

The protection under **section77 (2)** avails only a banker who in good faith and without negligence receives payment for a customer for a customer. At common law, there is a presumption of good faith on the part of the banker. It is important to note that it is only the receipt of payment which has to be in good faith and without negligence. Statutorily**, section 92** states that a thing is deemed to be done in good faith within the meaning of the act where it is in fact done honestly, whether it be done negligently or not. The whole transaction from the taking of the cheque to the receipt and disposition of the money must be in good faith and without negligence.

- **The Duty of Care**

The duty of care under this section is a purely statutory duty. Strictly, there is no duty of care between the banker and the true owner of the cheque. There is no contractual relation between them. The only contractual obligation is to the customer. Denman J in *Bissell & co*. v *Fox brothers & co*[58] noted that conduct beneficial to the customer at the expense of the true owner is no breach of that duty.

The Act did not define negligence and the test to be applied has therefore fallen in the arena of judicial interpretation. In *Lloyds*

[58] (1884) 51 LT 663

Bank Ltd. v *Chartered Bank of India, Australia and China*[59], Sankey L.J said "the banker must exercise the same care and forethought in the interest of the true owner, with regard to cheques paid in by the customer, as a reasonable businessman would bring to bear on similar business of his own"

Lord Dunedin put it differently in *Taxation Commissioners* v *English, Scottish and Australian Bank*[60] "the bank's action must be in accordance with ordinary practice of bankers…a banker cannot be held to be liable merely because they have not subjected an account to microscopic examination"

Where a plaintiff seeks to find a claim on banker's negligence, he must, as a matter of law, state or give the particulars of the negligence alleged. The burden of proof however rests with the bank to prove that it has discharged the duty owed to the true owner in its handling and collection of the cheque to the credit of his customer. This is not an easy burden. While the bank is not expected to offend its customers by a manifest suspicion of fraud, a neglect to make inquiry carries the risk of liability. The task of drawing the line between reasonable inquiry and liability for conversion has been that of the court.

- **Duty to obtain reference.**

The law imposes a duty on the bank to obtain reference as an act of diligent inquiry. Failure to obtain a reference in such circumstance will readily ground a finding of negligence. The need to obtain a reference readily manifests in those cases where a customer seeks to open a new account with a cheque endorsed to

[59][1929] 1 KB. 42 at 69
[60] [1920] AC 694 at 689

him of crossed "account payee" or "not negotiable". In *House property co. of London ltd.* v *London county & Westminster bank ltd.,* [61] a cheque drawn in favour of "F. S. Hanson & others or bearer" crossed "account payee" was collected by a banker and credited to a customer's account, the bearer of the cheque. It was subsequently found that the bearer was not the payee. The court held the banker negligent in not making inquiries as to the circumstances in which the customer was the bearer of the cheque.

In this vein, it was held in *Marfani & co. ltd.* v *Midland bank ltd.*,[62] that for the purpose of establishing the identity of a prospective customer, it might be desirable that some document such as a passport is asked for or reliance be had on the identification of an apparently respectable referee known to the bank.

- **Duty to Verify Endorsement**

In *Bravins, Jnr & Sims* v *London & Southwestern Bank*[63], the English Court of Appeal held the collecting banker guilty of negligence in not detecting that an endorsement did not correspond with the name of the payee.

In *Turner* v *London & Provincial Bank ltd.*,[64] the fact that endorsement on two cheques payable to different persons were in the same handwriting was held to be negligence in the collecting banker. These authorities will however not stand in the presence of section 77 of The Act as "a banker is not to be treated for the purpose of this subsection as having been negligent by reason only

[61] (1915) 113 LT 817
[62] [1968] 1 WLR 956
[63] [1900] 1 QB 270
[64] (1903] *Journal of Institute of Bankers* vol. xxiv p. 220

of his failure to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee."

- **Cheques collected on behalf of Fiduciaries**

A bank should not collect for private account any cheque which on the face of it or by endorsement bears the evidence of being the property or intended for the benefit of a company, firm or other entity and which is tendered for collection by a person holding or purporting to hold a fiduciary, official or subordinate capacity in such company firm or entity, whether endorsed by him or not, and whether crossed or not.

On the same principle, it is negligence to take a cheque made payable to a partnership to the private account of one of the partners. In *Baker* v *Barclays Bank Ltd*.,[65] one of two partners in a firm, rather than pay partnership cheques into the partnership account, paid them to Mr. J who cleared them through his bankers. It was held that both the erring partners and the collecting bank were liable for conversion. The collecting banks were denied statutory protection as they were negligent in not making adequate enquiries.

It is also negligent for a bank to collect, cheques made payable to a person in official capacity for a man's private account.

4.4 Receipt of Payment

In order to come within the regulation and control of the provision and actually be protected, the banker must have either received payment of the cheque either for a customer or for itself.

[65][1955] 2 ALL ER 571

The position of the law as regards protection of bankers in relation to cheques has been well stated and explained, and even backed up by judicial decisions and statute.

5.0 RECOMMENDATIONS AND CONCLUSION

The legislature should enact laws on the making of a countermand. It might not be convenient for a customer to write and sign an effective countermand and get it delivered to the bank. Technology has advanced in a way as to make any person be able to send a message from wherever they are. The decision in *Woodland* v. *Fear*[66]that a countermand has to be in writing and duly signed by the customer should be overruled and the new position (which ought to be more convenient) should be enacted into statutory provisions. International best practices should also be adopted into the banking legislation. **The Bill of Exchange Act** was enacted in 1917 and over a century later, with all the advancements in and around the world, there should be some form of new development to the banking law. Much of the known laws on this aspect have been left to judicial decisions which may be overruled every time there is a new case. There should be some form of certainty as regards the law relating to banker customer relationship. Banking legislations should also be made to regulate new areas of banking such as the use of automated machines for withdrawing cash instead of having laws regulating just cheques. The law relating to the banker customer relationship need to be generally reviewed as times has changed and the

[66]Supra Note 26

applicable legal framework it is too outdated and will inevitably cause hardships on most bankers and customers in the *21st century*. The bodies of applicable laws are not only outdated but also inadequate and there exists too many areas of the banking profession needing legislative intervention. It is shameful that an important area of everyday life as important as the banking sector is one that lacks adequate laws to govern the incidents of banker customer relationship.

Is Access to Bail an Automatic Right in Uganda?: Reflecting on the Existing Legal Framework

Akinwumi John Ayobami*

ABSTRACT

Jurisprudentially, every accused person should have access to certain fundamental human rights such as right to bail. It is anchored on the constitutional presumption of innocence until proven guilty. Freedom of movement to be curtailed once a person is allegedly to have violated the state law, thus he or she will be arraigned to face justice and where pronounced guilty by a competent court, appropriate punishment will be meted in the interest of attaining justice. Courts of law should, and, are expected to exercise their powers as to question of law and fact which arises judicially. This paper attempts to examine the meaning of bail; is it an automatic right? Effect of refusal to grant it and to draw a clear distinction as to what extent does the court has power and whether or not to grant the accused application to bail in vis-a-vis the existing legal framework in Uganda.

1.0 INTRODUCTION

The concept of using bail bond as a means to pretrial imprisonment historically arose from a series of cases alleging abuses in the pre-trial release decision-making process. These abuses were originally often linked to the inability to adequately predict trial outcome, court appearances and the commission of

* LLB Candidate of Kampala International University, Personal Assistance and Student Research Assistance to Abdulkareem Azeez, HoD, Public and Comparative Law. School of Law, Kampala International University (KIU), Uganda. john_akinwumi@yahoo.com. +256753392698.

new crimes[1]. Thus, the constitutional right to bail is provided for under Article 23 (6) of the 1995 Constitution of Republic of Uganda, which stipulates that where a person is arrested in respect of a criminal offence;

a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions the court considers reasonable;
b) If that person has been in the custody for that offence for 60 days and the offence can be tried by the High Court or a subordinate court, that person shall be released on bail on such conditions reasonable;

Paragraph (c) of the Article 23 (6) also stipulates that, if that person has been remanded for 180 days before the case is committed to the High court, that person shall be released on bail on such conditions as the court considers reasonable.

What the court considers reasonable is a question of fact and not a question of law. Kofi Anna once stated that "in the rush for justice it is important not to lose sight of principles the country holds dear". The provisions that establish the constitutional right to bail, only gives an accused person the right to apply for same, it is at the discretion of the court to grant it, which must be exercised judicially[2]. Therefore, the right of bail is not an absolute right and is not stated among the non-derogable rights[3].

[1] T. R. Schnacke, M. R. Jones and M. B. Claire "The history of bail and pretrial release". Updated September 24, 2010.
[2] In the High Court criminal division before Justice Ogoola (as he then was), in the case of *Col.(Rtd) Dr. Kizza Besigye* v *Uganda* Misc. Criminal Application No. 228 of 2005 High Court of Kampala, that courts of justice have the duty to jealously and courageously guard and defend the rights of all the people. He added that the fundamental importance of bail is a judicial instrument for ensuring the liberty of the individual.
[3] Article 44 of the 1995 Constitution of Republic of Uganda

2.0 MEANING OF BAIL

In the Ugandan legal system, there is no Act of Parliament that defines the term "bail". However, Okello J., (as he then was), speaking at a court, defined bail as;

> an agreement between the court and an applicant, consisting of a bond, with or without a surety, for a reasonable amount, as the circumstances of the case permit, conditioned upon the applicant appearing before such a court on a date and time-as named in the bond-to start his trial.

It should be noted that this agreement can only be lawfully cancelled when it is proved to the satisfaction of a court, by when the agreement was made, that there is a breach of the same or that it is about to be breached[4]. The term "bail" in the opinion of this researcher, is a negotiation to agree between the court and the surety, stating the assurance that the accused will not cease to attend the court proceedings when he or she is summoned to do so. Thus, judicial power in Uganda is derived from the people which shall be exercised by courts of law established under the 1995 Constitution of Republic of Uganda (as amended) in the name of the people and in conformity with the law, values, norms and aspirations of people.

Originally, bail meant security given to the court by another person that the accused will attend trial on the day appointed[5]. Now it includes recognisance entered into by the accused himself, conditioning him to appear, failure of which may lead to issuance

[4] *Uganda* v *Lawrence Luzinda* (1986) HCB 33 (Cv. Rev. No. 17 of 1986)

[5] S. Musa, "Criminal Procedure and Practices in Uganda", (Law Africa, 2010). p 181

of warrant of arrest and confinement in prison till the trial of the case is heard and finalized. It may also lead to forfeiture of the recognisance by the accused/applicant and the sureties whereby they are ordered to deposit the money, they were bound to attend court and state offers[6].

Several scholars have provided useful definitions. B. J. Odoki defined bail as;

> …an agreement or recognizance between the accused and his sureties, if any, and the court that the accused will pay a certain sum of money fixed by the court should he fail to appear to attend his trial on certain date

Similarly, the Osborn's Concise Law Dictionary defines bail as; the release from the custody of officers of law or the court of an accused or convicted person, who undertakes to subsequently surrender to custody.[7]

It can be construed from the above definition that bail epitomizes a compromise between conflicting interests, the accused as given freedom on condition designed to ensure his attendances at court when required. Granting of same may be conditional or unconditional.

It should be noted that, the value that society places in protecting personal liberty[8] gives bail its primary importance. However, there

[6] In the High Court criminal division before: Hon Justice Mr. Masalu Musene in the case of *Col (Rtd) Dr. Kizza Besigye* v *Uganda*, Criminal Application No. 83 Of 2016 (Arising From Mor-Oo-Cr-Aa-016/2016 and Nak-A-No.14/2016).

[7] Osborn's Concise Law Dictionary, 8th Edition. Edited by Leslie Rutherford and Sheila Bone, at p. 39

[8] Article 23 of the 1995 Constitution of Republic of Uganda

are other tangible reasons why it is preferable to refuse to grant it. According to Ssekaana Musa,[9] if every accused were allowed to go free during criminal process there would be obvious dangers that many would not appear at court when required.[10]

Furthermore, the most important basis for the right of bail originated[11] from the presumption that the accused is innocent until proved guilty or upon he or she pleading guilty as provided for under Article 28(3)(a) and Article 23 which provides for the right to personal liberty.[12] It is stated that everyone has a right to liberty and this liberty can only be denied in exceptional circumstances including where one is suspected of committing a criminal offence.[13] It should be noted that, one of the grounds the court will consider in granting bail is in the interest of justice and the constitutional right to liberty that the applicant be granted bail

[9] He is currently a part-time Lecturer at Law Development Centre (LDC) and formerly Lecturer at both Uganda Christian University (UCU) and Islamic University in Uganda (IUIU). He is a practicing Advocate of the High Court of Uganda with Ssekaana Advocates and Consultants. He holds LL.B (Hons) Makerere University Kampala, Diploma Legal Practice from Law Development Centre and LL.M in (Legislative Drafting) from the University of the West Indies, Cave-Hill Campus-Barbados.

[10] S. Musa, *"*Criminal Procedure and Practices in Uganda*"*, *op. cit.,* p 183

[11] F.J. Ayume "Criminal Procedure and Law in Uganda*"*, (Longman publishers, 1986) p 54

[12] See Jurisprudence in the case of *Joseph Tumushabe* v *Attorney General*, Constitutional Petition No. 6 of 2004 (unreported), Twinomujuni J.A. said that the basis of the right to bail is to be found in Article 28 (3)(a) of the 1995 Constitution of Republic of Uganda. *Col (Rtd) Dr. Kizza Besigye* v *Uganda*, Criminal Application No. 83 Of 2016 (Arising From Mor-Oo-Cr-Aa-016/2016 And Nak-A-No.14/2016), it is a trite principle of criminal law that an accused person is presumed to be innocent until proved guilty by a competent court and or until such accused pleads guilty to the charge voluntarily. This presumption is enshrined in Article 28 (3)(a) of the Constitution.

[13] Article 23 (1)(a)-(h) of the 1995 Constitution of Republic of Uganda.

pending trial or appeal[14]. Logically, therefore, the universal effect of granting bail is merely to release the accused of physical custody while he remains under the jurisdiction of the law and is bound to appear at the point, place and time to answer the charges against him in the court of law[15]. Whereas there are requirements for the grant or denial of bail application, courts remain with their constitutional mandate to deliver substantive justice without undue regards to any technicalities whatsoever[16]. Therefore, granting or denying bail application is an exercise of judicial discretion.

This was deduced by the constitutional court from the usage of the word "may" which implied permissive, optimal or discretion and not mandatory[17]. However, as courts must respect the accused person's constitutional right to liberty and the presumption of his or her innocence, it is important that the rights are exercised within the confines of law, in that they are not

[14] The Court of Appeal speaking through Hon Justice *Eldad Mwangusya*, J. A. (as he then was) in the case of *Angol Micheal* v *Uganda* Misc. Application No. 45 of 2014 (Arising from Crim. Appeal No. 45 of 2014) (Appeal from the anti-corruption court criminal session case No. 0054 of 2012).

[15] *Foundation for Human Rights Initiative* v *Attorney General* Constitutional Petition No. 20 of 2006 at page 28. See also Col (Rtd) *Dr. Kizza Besigye* v *Uganda*, Criminal Application No. 83 of 2016. Supra

[16] Article 126 (2) (c) of the Constitution.

[17] In the case of *Florence Byabazaire* v *Uganda High Court* Misc. Application 284 of 2006, Akiiki Kiiza J. reiterated that the accused person has no automatic right to bail but rather the accused has the right to apply for bail and Article 23 (6) confer discretion on court to decide whether to grant bail or not to grant it. See also, *Foundation for Human Rights Initiative* v *Attorney General* Constitutional Petition No. 20 of 2006 "*the context of Article 23(6) (a) confers discretion upon the court whether to grant bail or not to grant is not automatic*". In a similar case of *Uganda* v *Dr. Kiiza Besigye*, the constitutional court automatically declared that the grant of bail is at discretion which court exercises for accordance with the law.

abused. Thus, principles of natural justice should be adhered to. However, in *Joseph Tumushabe* v *Attorney General*[18], it was strongly stated that;

> all other laws on bail in this court that are inconsistent with, or which contravene this Article 23(6)(a)(b)&(c) are null and void to the extent of inconsistency, bearing in mind that the constitution is the supreme law of the land[19]

There are two major Acts of Parliament put in place for the justification of bail and which also gives jurisdiction to courts in granting bail in Uganda. They are the Magistrate Court (Amendment) Act (MCA) and the Trial on Indictment Act (TIA)[20]. These provisions are entrenched in sections 75 and 14 of the MCA and Trials on indictment Act respectively. Therefore, a person can, under section 75 of MCA and Section 14 of TIA apply for bail in the Magistrates court or High court respectively. According to subsection (2) of section 14 of TIA;

> Notwithstanding subsection (1), in any case where a person has been released on bail, the court may, if it is of the opinion that for any reason the amount of the bail should be increased; (a) issue a warrant for the arrest of the person released on bail, directing that he or she should be brought before it to execute a new bond for an increased amount; and (b) Commit the person to prison if he or she fails to execute a new bond for an increased amount[21].

Similarly, circumstances under which bail may or may not be granted are set out under section 77 of the MCA for applicants in

[18] Constitutional Petition No. 6 of 2004
[19] Article 2 (2) of the 1995 Constitution of Republic of Uganda
[20] Cap 16 and Cap 23 respectively. Others are *Police Act* Cap 303, *Penal Code Act* Cap 120, and *Criminal Procedure Code Act*, among others.
[21] Section 14 (2) of *Trial on Indictment Act* Cap 23, Laws of Uganda

the Magistrate Courts and section 15 of the TIA for trials at the High Court. Section 77(2) MCA provides for the guidance to Magistrate Court as to what they should consider before granting or refusing to grant a bail. The following are the requirements;

i. The nature of the accusation[22];
ii. The gravity of the offence charged;
iii. The severity of the punishment which conviction might entail;
iv. The antecedents of the applicant so far as known;
v. Whether the applicant has a fixed abode within the area of court jurisdiction[23];
vi. The protracted nature of the trial; and
vii. The probability of the accused committing more offences, if released on bail.

The grounds for grant of bail by the High Court is stipulated under Section 15[24], that the accused person must prove that exceptional circumstances exist which justify his or her release on bail and also that he or she will not abscond when released on bail[25]. Under subsection (3) of the Trial on Indictment Act, it provides that in this section, "exceptional circumstances" means any of the following;

(a) Grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;
(b) A certificate of no objection signed by the Director of Public Prosecutions; or
(c) The infancy or advanced age of the accused.

[22] *Uganda* v *Mugerwa & Anor* [1975] HCB 218
[23] *Sudhir Ruparelia* v *Uganda* [1992-1993] HCB 52, Held that the fact that the accused has a Kibanja, and that he has sixteen wives and or twenty-four children, may be an indication that he is unlikely to abscond.
[24] *Trial on Indictment Act*
[25] S. 15 (1)(a)&(b)TIA, Cap 23.

Initially, justifications have been made by courts of law in Uganda to the effect that section 15 (1) is related to (3)[26]. For instance, in the case of *Wilberforce Serumkuma* v *Uganda*[27], it was held that to justify the grant of bail, the applicant has to prove to the satisfaction of the court that he was incapable of getting adequate treatment whilst in custody. Furthermore, under subsection (3) (c) of TIA, it related to what amounts to an advanced age or who an infant is. Although the term infancy is not legally defined anywhere, under the law governing grant of bail, the court has to resort to its own resources and discretion in the construction of the provisions of the section.[28] The term 'infancy' as used in the section is neither restricted to neutral infancy, which is a period of no-responsible life which ends with the seventh year, nor does it denote the state of a person under the age of 12 years which is the age of criminal responsibility.[29] On the other hand, as to what amounts to advanced age, the court observed in the case of *Dr. Alex Kamugisha* v *Uganda*[30], that any age above 50 may be considered advanced age. In as much as the onus is on the accused person to prove

[26] Supra
[27] HC Misc. Cr. App. No. 129 of 1994 [1995] 1 KALR 32
[28] Ssekaana Musa, *Criminal Procedure and Practices in Uganda*, at page 198, Supra.
[29] *Gerald Bakojja* v *Uganda* [1996] HCB 4, Section 88 of Children Act, where it was stated that the minimum age of criminal responsibility shall be 12 years.
[30] High court Kampala Misc. Cause No. 94 of 2007. See also the another case of *Mulongo Namubiru Florence* v *Uganda* high court at Nakawa Misc. Application No. 84 of 2014, where court found that exceptional circumstances are not mandatory because the court retains the overall discretion so long as the applicant will re-appear or will not abscond. In the case of *Erika Mutuba* v *Uganda* Misc Cri. App 4/92. 59 years was held to be advanced age.

exceptional circumstances, the court has to be satisfied before it can grant an application for bail[31].

Under sub-section (4) of section 15[32] in considering whether or not the accused is likely to abscond, the court may take into account the following factors;

(a) Whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;
(b) Whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;
(c) Whether the accused has, on a previous occasion when released on bail, failed to comply with the conditions of his or her bail; and
(d) Whether there are other charges pending against the accused.

However, it should be noted that, there are offences excluded from the MCA not to grant bail in the Magistrate's court. These are stipulated under section 75(2)[33] and are as follows;

(a) an offence triable only by the High Court;
(b) an offence under the Penal Code Act relating to acts of terrorism;
(c) an offence under the Penal Code Act relating to cattle rustling;
(d) an offence under the Firearms Act punishable by a sentence of imprisonment of not less than ten years;
(e) abuse of office contrary to section 87 of the Penal Code Act;

[31] *Uganda v Col. Rtd. Dr. Kizza Besigye*, Constitutional Reference No. 20 of 2008; where it was held that "where an accused is charged with an offence triable only by the High Court but has not spent the statutory period of 180 days in custody before committal, the court may refuse to grant bail where the accused fails to show to the satisfaction of the court exceptional circumstances under S.15 (3) of the Trial on Indictment Act.
[32] *Trial on Indictment Act.*
[33] *Magistrate Court Act.*

(f) rape, contrary to section 123 of the Penal Code Act and defilement contrary to sections 129 and 130 of the Penal Code Act;
(g) embezzlement, contrary to section 268 of the Penal Code Act;
(h) causing financial loss, contrary to section 269 of the Penal Code Act;
(i) corruption, contrary to section 2 of the Prevention of Corruption Act;
(j) bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and
(k) any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.

Where any person appears before a Magistrate court charged with an offence for which bail may be granted, the courts shall inform the person of his or her right to apply for bail[34]. Section 77(3) of the Magistrate Court Act stipulates that where bail is not granted under section 75, the court shall record the reasons why bail was not granted and inform the applicant of his or her right to apply for bail to the High Court or to a Chief magistrate, as the circumstances may require. The prospect of success in this circumstance is very minimal for an applicant to apply to a higher court for same, simply because if he or she does so, procedures have to be followed while the accused will still be on remand. The rational in *Uganda* v *Luzinda*[35], was that it is possible for the applicant to renew his application to the same lower court after a lapse of the time and after correcting the reason that led to the rejection of the initial application.

In a report from the just decided bail application of *Rwenzururu King Omusinga Charles Wesley Mumbere,* after spending 71 days in

[34] Section 77(1) of *Magistrate Court Act.*
[35] (1986) HCB 33

prison following the bloody attack on his palace in *Kasese* by security forces last November[36], the court, while releasing the king, held that courts in the country have adopted Alternative Dispute Resolution (ADR) in settling cases and that Article 126 (2)[37] of the Constitution shall be duly followed. The Justice added that since the king and the state had signed a Memorandum of Understanding (MOU) agreeing to certain terms in exchange for his release, the court wouldn't object to the proposal. The presiding judge ruled and declared thus;

> Courts in this country have adopted approaches that promote speedy trial. The constitution under Article 126(2)(d) specifically wants courts to ensure that reconciliation between parties is promoted. That this court is aware of the initiatives by the judiciary like plea bargain, Alternative Dispute Procedures that promote alternative and advisory approach to dispute resolutions. It's in that spirit that I shall accept the initiative of the parties' proposed bail terms. I have carefully considered and addressed my mind to those terms agreed upon.[38]

The counsel for King *Mumbere* listed 10 grounds on which the accused person (King *Mumbere*) should be granted bail, among which is presumption of innocence. His lawyers also argued that the accused does not intend to interfere with investigations of the case. The king, who was arrested on November 27 last year by

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[36] *Daily Monitor Newspaper* 7 February 2017, Available at visit www.monitor.co.ug (accessed 7 February, 2017)

[37] Clause (2) provides to the effect that, in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles, under para (a) justice shall be done to all irrespective of their social or economic status; (b) justice shall not be delayed; (c) adequate compensation shall be awarded to victims of wrongs; (d) reconciliation between parties shall be promoted; and (e) substantive justice shall be administered without undue regard to technicalities.

[38] *Daily Monitor Newspaper* 7 February 2017, Available at visit www.monitro.co.ug (accessed 7 February, 2017)

joint security forces at his palace, is facing several charges including terrorism, treason, murder, aggravated robbery, attempted murder and malicious damage to property. He is jointly charged with over 150 of his royal guards[39]. Although, King *Omusinga* Charles Wesley was re-arrested on Friday outside the *Jinja* High Court shortly after being released on bail. The High Court judge *Eva Luswata* granted *Mumbere* bail of sh100million, not cash. He presented six sureties to the court as requirements for his bail[40]. This clearly shows that the criminal justice in Uganda is advancing speedily to deliver its constitutional mandate. However, being the first of its kind, the king was restricted to Kampala, *Wakiso* and *Jinga* and he only stayed at his *Muyenda* residence[41] after being granted bail.

Under Rule 2[42], all applications to the High Court in criminal cases shall be in writing and, where evidence is necessary, be supported by affidavit. While application to the Magistrate court may be made orally or in writing and if it is in writing, it shall be supported by affidavit[43]. Notice of an application to the High court shall be given to Director of Public Prosecutions; and notice of an application to a magistrate court shall be given to the police in time as the case may be[44]. The absence of the affidavit in support of an application for bail is fatal and renders the application

[39] Available at http://matookerepublic.com/2017/01/12/jinja-high-court-to-determine-fate-of-king-mumberes-bail-case-today/ (accessed 28 February 2017)
[40] Available at http://www.newvision.co.ug/new_vision/news/1444008/mumbere-granted-bail-fears-arrest#sthash.SvMp4Shm.dpuf (accessed 20 February 2017)
[41] Available at *New Vision Newspaper*, February 7, 2017 p 4.
[42] Judicial (Criminal Procedure) (Application) Rules
[43] Rule 3 supra
[44] S. Musa, "Criminal Procedure and Practices in Uganda" op. cit.

incompetent[45]. The rational for the requirement of affidavit is to know the weight of evidence and to also do away with miscarriage of justice.

3.0 CONCLUSION

This article has briefly examined the existing legal frameworks in relation to bail application in Uganda; having looked at the existing legislations and the procedures enacted for bail related matter, court decisions in various cases and scholars' opinions. In the legislations considered, and the cases decided by courts of law, the laid down considerations for the grant and the refusal to grant bail by the courts still confers much power to the court and as well make it looks as if it is an automatic right.

What is needed in Uganda are not courts of law but courts of justice that will interpret the law the way it ought to be and not the way it is. It is therefore my humble conclusion that, a balancing Act be enacted protecting the rights of the accused and ensuring that justice is done and public confidence in the criminal justice system is maintained. Article 23 (6)(a) of the 1995 Constitution of Republic of Uganda, seems to create an entitlement for an accused person while (b) and (c) seems to be mandatory for the courts to grant the application for bail, but on the other hand, it is upon the accused to prove exceptional circumstances beyond reasonable doubt and still imposes powers upon the court to grant it or not.

[45] *In matter of bail application by Balaki Kirya* [1984] HCB 11.

Sustainable Development Law and Policy: CSR as an Independent Tool for Building the Nation

Ipinnuoluwa Ade-Ademilua*

ABSTRACT

With a large population and a rewarding economy, there has never been a limit to the opportunities available to local companies and multinational corporations in Nigeria. However, 56 years after gaining independence, Nigeria is still largely considered a developing nation with below par living conditions, environment, amenities and services. Corporations have established themselves and have sucked from the rich nectar of Nigeria's economic fruits without planting seeds on its land in show of appreciation. This paper seeks to discuss how corporations could play a significant role in developing the Nation and the adoption of international legal frameworks to enforce active participation in this role.

1.0 INTRODUCTION

After 56 years of independence, the Nigerian government still struggles with developing the nation past third world standards. In the eyes of the international community, Nigeria remains a developing a nation. Taking a look at numerous developed nations, a common player in the attainment of such status is capitalism. Capitalism has served as a driving tool for the development of nations and citizens, boosting sectors and factors such as technological advancements and innovations, employment,

* Undergraduate, Faculty of Law, University of Lagos. He can be reached at; ipinnuoluwa@gmail.com

revenue, living standards, resource utilisation and other factors. However, a nation cannot truly be said to be developing or developed, as the case may be, where its citizens and their environment are not positively affected. In modern times, and as practiced in advanced nations, it is believed that corporations have an obligation to, not just their shareholders, but the communities in which they conduct their activities.

Corporate Social Responsibility (CSR) is the continuing commitment by businesses to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.[1]

In the author's view, CSR could help in accelerating the country's development, independent of the government's already existing activities. If companies engaged in sustainable development activities in their respective communities, it could lead to an overall development of the nation as a whole.

2.0 CSR AND SUSTAINABLE DEVELOPMENT

Corporate Social Responsibility is the continuing commitment by a business to behave ethically and contribute to economic development, while improving the quality of life of the workforce their family, as well as the local community and the society at large. It is anchored on the philosophy that businesses, as artificial

[1]A. Helg, Corporate Social Responsibility from a Nigerian Perspective(2007) available at gupea.ub.gu.se/bitstream/2077/4713/1/07 23.pdf (accessed Feburary. 2010)

persons, should take decisions that are considered indeed to be in the interest and benefit of a large number of people, hence have respect for the fundamental rights of the public. CSR can be categorised as economic, legal, ethical and voluntary responsibilities respectively.[2] There are several controversies surrounding CSR as to whether it is a soft law obligation or a moral obligation to be carried out by corporations to improve their long term image in the eyes of their present and potential consumers. However, CSR should be seen more as part of the objectives of any corporation. Corporate Social Responsibility should be a tacit contract between business organisations and a hosting community, whereby the community permits the business to operate within its jurisdiction to create job opportunity for its residents[3], amongst other things. In addition, the community expects the corporation to improve their living standards. CSR is becoming more important and frameworks have been developed, but mostly in Western states, and the benefits of this can be seen in their present living conditions and development status'. Traditionally, CSR mainly focuses on how the activities of corporations do not negatively affect the community such as; reducing harm to the environment and releasing products which are up to standard, non-discriminatory employment tactics; and in modern parlance, grants, amenities, and more proactive efforts. The Bali Roundtable on developing countries in 2002 recognised

[2] O.C. Ferrell and J. Fraedrich, *Business Ethics: Ethical Decision Making* (South-Western College: 1997)

[3]C. Mordi , I.S Opeyemi, M Tonbara, S Ojo, "Corporate Social Responsibility and the Legal Regulation in Nigeria"(2012), Vol. LXIV *Economic Insights – Trends and Challenges, No.1 (1-8)*

the business sector as a primary driver of economic development and the World Summit for Sustainability identified business involvement as critical in alleviating poverty and achieving sustainable development.[4]

The Triple Bottom Line (TBL) concept, obliged by several corporations, was introduced by J. Elkington in 1994. It is a standard of responsibility for companies to take on sustainable practices. The concept is linked primarily to the stakeholder theory and also to CSR.[5] TBL is "a successful encapsulation of the vague and sloppy concept of CSR".[6] Elkington considered TBL to pay regards to the environmental and social aspects as well as the long established economic aspects of a business. According to Elkington, a business should also be measured within these three areas. The social aspect is a company's ethical conduct in regards to its labour practices and its attempt to create objectives that up hold mutually beneficial relationships with all stakeholders.[7] The environmental aspect entails a company "to do no harm to" and improve the environment. Elkington believed that pursuing the values of TBL would improve the society as well as making businesses more successful.

[4]Available at http://www.un.org

[5] J. Elkington, "Towards the Sustainable Company. Win-win-win business strategies for sustainable development", *California Management Review,*(1994) *vol. 36, no 2*: p 90-100

[6] R. Mullerat, "International Corporate Social Responsibility: The Role of Companies in the Economic Order of the 21st Century", (2010) *Kluwer Law International BV, The Netherlands*

[7] S. Hajime, "Policy and Politics of Health Risk Management in Five Countries," *Asbestos and BSE Series: Alliance for Global Sustainability Bookseries* (2010) *Vol 16* Available at; http://www.unglobalcompact.org

According to the Brundtland Report, sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it, two key concepts:

c) the concept of needs; in particular the essential needs of the world's poor, to which overriding priority should be given; and

d) the idea of limitations; imposed by the state of technology and social organization on the environment's ability to meet present and future needs."

Beyond simple philanthropy business action, CSR increasingly focuses on creating shared value or sustainability – the deliberate inclusion of public interest in corporate decision making and honouring of a "triple bottom line" to advance people, planet and profit. After all, as the World Business Council for Sustainable Development (WBCSD) memorably stated, "businesses cannot succeed in societies that fail."

3.0 INTERNATIONAL CSR STANDARDS AND INSTRUMENTS

3.1 Aspirational Statements and Standards

3.1.1 The United Nations Global Compact

Former United Nations Secretary-General, Kofi Annan proposed the Global Compact at the World Economic Forum on January 31, 1999. He challenged world business leaders to help build the social

and environmental pillars required to sustain the new global economy and make globalisation work for all of the world's people. The Global Compact is a network that is working to bring companies together with UN agencies, labour and civil society to support nine principles in the areas of human rights, labour and the environment. Through the power of collective action, the Global Compact seeks to advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalisation. In this way, the private sector - in partnership with other social actors - can help realize the vision of a more sustainable and inclusive global economy. Today, hundreds of companies from all regions of the world, international labour and civil society organizations, are engaged in the Global Compact.

3.1.2 International Labour Organisation (ILO) Declaration of Fundamental Principles and Rights at Work

One of the aims of this declaration is the creation of a climate for economic and social development. The Declaration seeks to stimulate national efforts to ensure that social progress goes hand in hand with economic progress while respecting the diversity of circumstances, possibilities and preferences of individual countries. The Declaration's follow-up contains promotional reporting tools; The Annual Review is composed of reports from governments describing their efforts. These reports provide a baseline against which countries can measure their own progress. The Global Report, submitted by the ILO to the International Labour Conference, paints a dynamic global picture of the situation with regard to one of the categories of principles and

rights each year. It serves as a basis for determining future priorities so that the Organisation through its technical cooperation activities can assist its members.[8]

3.1.3 The International Labour Organisations' Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

Although voluntary, it advocates, in developing countries, that Multinational Enterprises (MNE) should provide the best possible wages, conditions of work (including health and safety), and benefits, adequate to satisfy basic needs and within the framework of government policies. Governments should adopt policies ensuring that lower income groups and less developed areas benefit as much as possible from MNE activities. MNE's should provide, upon request, information concerning health and safety standards observed in other countries which are relevant to local operations.

3.1.4 The Social Venture Network Standards of Corporate Social Responsibility

The Social Venture Network (SVN) was created in 1987 to develop an association of business and social entrepreneurs dedicated to the idea that business can be a potent force for solving social problems. It advocates that corporations should not only protect the community's environment but must also foster an open relationship with the community in which it operates and

[8] Available at http://www.ilo.org/public/english/standards/decl/declaration/text/ (Accessed June 2017)

plays a proactive, cooperative, and where appropriate, collaborative role in making the community a better place to live in and conduct business. Taken as a whole, the Standards are analogous to the Caux Round Table Self-Assessment and Improvement Process; another tool designed to help organizations improve their performance.[9]

3.1.5 Corporate Responsibility Principles for Global Corporate Responsibility

In view of the wider community, one of its core principles is that the company strives to contribute to the long-term environmental, social, cultural, and economic sustainability of the local communities in which it operates and that the company's corporate governance policies balance the interests of managers, employees, shareholders, and other interested and affected parties (such as the community in which they operate in). These principles are mainly seen as aspirations.[10]

3.2 International Institutions

3.2.1 World Business Council for Sustainable Development (WBCSD)

The World Business Council for Sustainable Development[11] is a major driving force on the concept of CSR, established in January 1995, its reports on corporate (social) responsibility have helped

[9]Available at http://www.cauxroundtable.org/view_file.cfm?fileid=79
[10]Available at http://www.web.net/~tccr/benchmarks/index.html
[11] Two major international organizations – the-Business Council for Sustainable Development (BCSD) and the World Industry Council for the Environment (WBCE) – merged to form the WBCSD.

to focus global attention on the necessity for governments and companies to demonstrate a degree of responsibility towards the society. WBCSD formulated three conceptual frameworks on CSR: the generation of economic wealth, environmental improvement, and social responsibility. On the third pillar, WBCSD defines what a company has to do in order for it to win and enjoy the confidence of the community as it generates economic wealth and responds to the dynamics of environmental improvement. WBCSD identified the core values of CSR as human rights, employee rights, environmental protection, community development, and stakeholder rights as the values that define the responsibility of companies and governments to the society. Under the WBCSD template, the community is respected as a stakeholder in the project. Thus, the company is compelled to construct a base for close collaboration and consultation with the community, as well as assist the community in capacity building in all aspects of social and economic development.[12] Shell Petroleum Development Company is a member of the WBCSD.

3.2.2 The Organisation for Economic Cooperation and Development (OECD)

The Organisation for Economic Cooperation and Development (OECD) stressed the need for both companies and governments to demonstrate their corporate responsibility by pursuing sound environmental and socially based policies. OECD, at its ministerial

[12] H.H. Ijaiya, "Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria*", Afe Babalola University: Journal Of Sustainable Development Law And Policy (2014)* 3:1 at p. 63

meeting on June 27, 2000, approved a guideline to ensure that the operations of enterprises are in harmony with government policies.[13]

3.2.3 The Dow Jones Sustainable Indexes (DJSGI)

The Dow Jones Sustainable Indexes (DJSGI) was launched in 1999.[14] The DJSGI defines CSR as social well-being which companies must satisfy in order to be listed in the DJSGI. The DJSGI sustainable principles include technology, governance, shareholders, industry, and society. It is clear that the CSR concept has been placed on the global agenda by leading international organisations. This should be seen as a critical challenge to environmental justice as it compels companies and governments to address distributional inequities of environmental risks, especially in the natural resources sector of the economy.[15]

4.0 CSR IN NIGERIA

In 1990, following the Ogoni crisis, CSR gained recognition in Nigeria. It led to corporation led projects, such as the provision of social amenity structures and the creation of scholarship and grant systems aimed at poverty alleviation and development.

Currently efforts are being made to discuss making a specific law which caters for CSR.

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[13] *Ibid* at p. 64

[14] On September 8, 1999, the Dow Jones Sustainability Group Indexes (DJSGI) was launched in Zurich, Switzerland, as the first global equity indexes that track the performance of the leading sustainability – driven companies world-wide. The DJSGI at its inception included over 200 of the top sustainability companies in 68 industries in 22 countries.

[15] Supra note 11 at p. 65

a. Indirect Regulations

It can be argued that there are several Nigerian legislations that incorporate within their provisions, certain expectations that directly or indirectly do not contradict, or in some instances, regulate the observance or practice of CSR. For instance, Section 279 (4) *Companies and Allied Matters Act 1990*, points out that; the director of a company is to have regard in the performance of his functions including the interests of the company's employees in general as well as the interests of its members.

The company's employees would most likely also be members of the society where the company operates. Note that companies in Nigeria are not in any way precluded from carrying out social responsibilities towards the environment, what they will be expected to do is to ensure that such intended social friendly policies are embedded in their Article and Memorandum of Association.[16] There are various laws which relate to CSR and the environment such as; *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act* 2007; *Harmful Waste (Special Criminal Provisions Act)*. In addition, Sections 234 to 248 of the Nigerian Criminal Code provides for offences against public health. However, these laws do not directly address CSR.

b. Proposed CSR Bill and Regulations

In 2008, the late Senator Uche Chukwumerije sponsored a bill entitled; A Bill for an Act to provide for the establishment of the

[16] Supra note 4

Corporate Social Responsibility Commission– popularly referred to as the "CSR Bill." The bill sought to establish the Corporate Social Responsibility Commission, a supervisory body that would be responsible for the control and regulation of the CSR activities of businesses in Nigeria. The Commission was to see to the formulation, implementation, supervision and provision of policies and reliefs to host communities for the physical, material, environmental or other forms of degradation suffered as a result of the activities of companies and organisations operating in these communities. The Bill proposed five main divisions which respectively provide for the establishment of the CSR. Considering the provisions of this Bill, its successful passage in the house will be welcome development and indeed a great reformation of the practice of CSR in Nigeria and will help in firmly establishing corporate ethics among the firms in Nigeria.[17]

The CSR bill also proposed that all businesses undertake CSR activities utilizing not less than 3.5% of their Gross Annual Profit. While urging the accountability of corporate organisations to their labour force, investors, consumers and host communities, the bill proposed sanctions for defaulting companies and incentives for companies who complied with the regulations. Response to the bill has been less than welcoming. The Nigerian Employers Consultative Association (NECA) and Organized Private Sector (OPS) groups out rightly rejected the bill. While CSR is an ostensibly worthy cause, stakeholders argue that the bill is fraught with challenges. Some suggest that the bill goes against the

[17] Supra note 4

voluntary essence of CSR. Further, that the pursuit of CSR through the regulatory-bureaucratic apparatus means, both forceful and punitive, would impose additional costs on doing business in Nigeria.[18] The CSR Bill has been described as a reactive legislation as opposed to a proactive law and therefore needs to be subjected to an amendment. It was also argued that CSR contributory charge could be a disincentive to investments in Nigeria in the light of the already existing high and multiple taxes at various strata of the federal, state and local governments. It was therefore recommended that the proposed charge of 3½% could be reduced to a basic minimum charge for all companies and organisations, whilst the penalty charge for none compliance with the statutory requirements of the law could be increased by the same margins of the CSR charge itself.[19] . It has also been pointed out that the CSR Bill has failed to follow recent legislative practices which impose criminal liability on both the corporation and all the directors and managers of any corporation or company who are aware of the breach of an existing law and this therefore should be subjected to the necessary amendment.

4.1 CSR Challenges and Implementation

a. CSR Challenges

A legal attempt to ensure that companies are accountable not only to employees and their trade unions but to investors, consumers, host communities and the wider environment seems to be

[18] 'CSR Bill and doing business in Nigeria' *Business Day* March 24 2016
[19]Oserogho Associates 'Corporate Social Responsibility Bill' (2008). available at www.oseroghoassociates.com/pdf/2008_10.pdf (accessed June 2016)

contrary to Sections 41 and Sections 279 of the principal statute on companies in Nigeria, the *Companies and Allied Matters Act* (CAMA) of 1990, which only recognises the traditional stakeholders; shareholders. However, annual social and environment impact reporting does not alter CAMA's financial reporting scheme.

b. CSR Implementation

In 2014, India became the first country in the world to mandate Corporate Social Responsibility, requiring companies to spend 2% of their net profit on social development. These social development activities include hunger eradication, education, environmental consciousness, and sports.

The Corporate Responsibility Bill was first introduced in the House of Commons by Linda Perham on June 2002, and was subsequently withdrawn. Afterwards, the Corporate Responsibility (Environmental, Social and Financial Reporting) Bill (CORE Bill) was tabled on 15 October 2002. Another Corporate Responsibility Bill followed this but none of these bills became law. Nonetheless, the failure of these integrated legislative initiatives should not suggest that CSR regulation is neither a credible nor a conceivable alternative for the control of corporate behaviour that may adversely affect the civil liberties of communities in host countries. The fact that such laws were and continue to be

drafted, read, and debated, indicates an increasing support of regulation of corporate conduct.[20]

5.0 CONCLUSION AND RECOMMENDATION

Since the emergence of CSR in Nigeria, there is no law put in place by the Nigerian government in the area of Corporate Social Responsibility. CSR is still a voluntary course of action. International law recognises the important soft law instruments, such as non-binding declarations, normative recommendations, action and declarations of principles to societal development and growth.[21] Consequently, most declarations and instruments that emphasise the CSR principle are not legally binding and do not carry hard law status in international law.[22] Traditionally, the government is responsible for developing the state and improving the welfare of the citizens. This does not however, negate the social responsibility of corporations. These instruments undoubtedly provide the best practice that could shape how companies in Nigeria can better contribute positively to the local communities where they operate and to the nation at large.

[20] Supra note 20

[21] Soft law has been described as legal instruments that are not directly enforceable in courts and tribunals but that nonetheless have an impact on international relations and, international law. They include quasi-legal instruments which are not legally binding, or whose binding force is somewhat "weaker" than the binding force of hard law or legally binding instruments. Professor Kiss noted: The first are binding as they create hard law for member states concerned, if they have no binding character, they are generally called recommendations and constitute soft law principles. However they can contribute to the development of customary international law so that their importance should not be under estimated. See Alexandre Kiss, *Introduction to International Environmental Law*, 2nd Edition (Geneva: UNITAR, 2005) 6-7

[22] Supra note 14

International Trade and an Emergent Nigeria

Abidemi Paramole*

ABSTRACT

Very recently, Nigeria has experienced possibly the worst kind of financial meltdown since its independence as a sovereign nation. Many factors contributed to this happening however, it is widely believed that the country's sole dependence on only the oil sector as a means of generating its revenue, contributed largely to this. Hence, this paper seeks to examine how international trade has become the only reasonable and viable option for Nigeria to undertake in order to not only slip out of the grasp of recession, but to also ensure and maintain a system where development is achieved swiftly and with ease.

1.0 INTRODUCTION

In 2014, Nigeria was declared as the largest economy in Africa placing the country at the fore front of African business and making it a focal point for investors seeking to do business in Africa[1]. Quite shockingly, a few years after this discovery and declaration, the country slipped into a state of recession[2]. Nigeria is currently experiencing possibly its worst economic crisis in its independent history[3]. Many have attributed this calamity to the over-dependence of the country on the oil sector as its only

* Bar II Candidate at the Nigerian Law School with interests in International Trade. He can be reached at; abidemiparamole@gmail.com

[1] Available at http://www.atlanticcouncil.org/blogs/africasource/africa-s-economic-prospects-in-2017-ten-countries-to-watch (accessed 4 July 2017)

[2] Available at http://www.nigerianstat.gov.ng/report/434; the official website for the National Bureau of Statistics; (accessed 4 July 2017)

[3] *Ibid*

source of major revenue and as a result, sequel to the attacks preponderant in the South-South region of the country (particularly the Niger-Delta) her revenue experienced a massive decline.[4] The attendant consequence of this state of recession[5] is that Nigeria began to witness a spiral increase in her foreign exchange rates .This is largely so because the Nigerian economy depends heavily on the importation of goods thereby resulting in the high rate of currency exchange experienced in the country which is leading and causing inflation in the prices of commodities, transportation and many more.

Although the content of the above may reflect the current position of the country, it does not necessarily uphold the realities of the country nor does it serve as a testament of the true condition the country should ideally find itself in.

This paper seeks to explain why exploring diverse sectors of the economy would reveal that Nigeria is undeniably one of the few potentially powerful countries in the world that could decide to diversify its economy to generate revenue and do so even successfully. This paper also seeks to explore the very crucial, yet pivotal role international trade has to play in the development of Nigeria, particularly in this current state of recession she is slowly slipping out of.

2.0 INTERNATIONAL TRADE

[4] Available at http://www.newsweek.com/nigeria-no-longer-africas-top-oil-producer-militants-cut-production-460676 (accessed 4 July 2017)

[5] The author notes, however, that at the time of delivering this paper, there has been some sort of development in the situation of the country.

Simply put, international trade may be defined as the act of trading on an international scale. Hence, international trade involves the act of buying and selling of goods and services between countries around the world.

In addition, international trade does not only cover the selling and buying of goods, it extends even to areas such as Foreign Direct Investment (FDI) as well as Foreign Portfolio Investment (FPI). With particular reference to the latter, international trading is also reflected in the investment of foreigners (corporate body or individuals) in the assets or capital of local establishments in the country. Beyond this, it also involves the trading of knowledge, labour, expertise and technical-know-how.

International trade has been a defining factor for the degree of influence many countries across the world possess today. As an example, according to the International Monetary Fund[6], China is the biggest trading country in the world; a ranking stemming from the records of the GDPs of countries published worldwide. These statistics are as a result of China's purchase power parity[7]. China is the world's largest trading nation[8], thereby making it a world force in the sphere of international trade. It is important to note at this juncture that it is highly imperative that a country understands its

[6] Available at https://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP) (accessed 19 June 2017)

[7] Available at https://en.wikipedia.org/wiki/Economy_of_China (accessed 19 June 2017)

[8] Fergus Green and Nicholas Stern 'An Innovative and Sustainable Growth Path for China: A Critical Decade' being a policy paper delivered to the Centre for Climate Change Economics and Policy. Available at http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2014/05/Green-and-Stern-policy-paper-May-20141.pdf (accessed 4 July 2017)

strengths, and primarily focuses on this while trying to achieve development at home as well as become a force at the world stage. This, China understood and slowly, though vigorously, pursued upon joining the World Trade Organisation in 2001[9] until she became a game changer internationally. Other notable formidable forces in the field of international trade market are Canada, The United States of America, The United Kingdom as well as Japan.

2.1 Benefits of International Trade

The benefits of international trade are as explained below:

1. **It encourages effective use of natural resources**: International trade encourages many countries to invest in their natural resources. This encourages optimal use of natural resources thereby avoiding wastage of natural resources.
2. **It fosters healthier relationships amongst countries**: Countries create and establish healthy and promising relationships when they trade with one another. It allows for countries, although each independent and sovereign, to co-exist peacefully as a result of trading activities.
3. **Availability of goods**: International Trade promotes the availability of goods as countries through trade agreements make available products that are not readily available in other countries to them and in turn open the gates to receive goods that are not readily available to them as well.

[9] *ibid*

4. **It allows for technology transfer**: By allowing international presence into local production activities by way of investment, many countries exploit the arrangement as an opportunity to receive knowledge, expertise and technical knowhow in those fields.

3.0 NIGERIA AND HER NATURAL RESOURCES

Quite frankly, there is a conscious realization amongst the citizens of Nigeria that there is a need to have a paradigm shift from the already concentrated oil and gas sector which although has pooled in major revenue for the country, is still one of the leading causes of many of the atrocities being perpetuated in the country, ranging from environmental crisis to the famous militant crisis preponderant in the Niger-Delta, as well as several deaths resulting from the exploration activities of oil and gas companies in these regions.

A thorough research into the country's strength and potential would reveal that Nigeria happens to be one of the very few countries that have almost all of the world's natural resources. It is therefore baffling that despite this seemingly common knowledge, the country still relies heavily on the revenue generated from the oil sector. A potent factor for not investing in other areas of the economy might be because of the heavy presence of corruption. As cliché as that may sound, it has posed a dangerous threat to the development of the seemingly singular sector the country relies heavily on. This is further underscored by the fact that it was only recently that the Petroleum Industry Governance Bill was

passed into law after being laid before the legislative houses for consideration seventeen years ago[10] . One may argue that despite the lateness of its passage, the act of passing it into law is quite commendable. The writer does not see how that development can be holistically realised when only a portion of the proposed bill was passed into law and some part still left for consideration. Judging from lengthy duration of time involved in the passage of the Petroleum Industry Governance Act, one wonders how long it would then take for the approval of the other parts of the bill which have not yet been passed. Another viable reason why it is not advisable to depend solely on the oil sector, is the obvious hilarious reality that a major oil producing country does not have any functional oil refinery where it produces its own oil; rather it processes its oil outside of its soils and then gets it ready to be traded in the world.

It has therefore become apparent that for Nigeria to develop and become a formidable force in the international market, it needs to encourage diversification by investing in other profitable sectors of the economy.

4.0 THE MANY SECTORS OF THE ECONOMY

Having examined the various advantages of international trade, this part of the paper seeks to look into other promising sectors of the Nigerian economy that can help her realize her dream of development.

[10]Available at http://dailypost.ng/2017/05/25/petroleum-industry-bill-passed-law-17-yearsupdated/ (accessed 4 July 2017)

4.1 Mining

Bearing the afore-mentioned in mind, one sector which has not received much investment from the Nigerian government is that of mining. In fact, a report states that it only accounts to 0.3% of the country's GDP due to large dependence on the oil sector. This situation is evidently more deplorable when one discovers that the country has to import what it ordinarily could produce; an example of such mineral being iron ore[11].While the government understands that Nigeria is blessed with heavy natural resources[12], the government also recognises that it has not in recent past, done anything to improve that sector.[13] Records reveal that almost every state in Nigeria has some degree of a particular mineral deposit in them[14]. It is therefore a bother why the Nigerian government has not invested heavily in this sector. Perhaps an interesting point might be that although this poses itself as a viable source of income, it may not be a present need for the people at the helm of the Nigerian government considering the fact that even her major source of revenue, which is oil, does not have a refinery to deal with the production of oil. If this is the case for a sector that the country largely depends on for income, what then lies for a sector that does not demonstrate as much prospect as the oil sector?

[11]Available at https://en.wikipedia.org/wiki/Mining_industry_of_Nigeria (accessed 4 July 2017)
[12] Nigeria is one of the very few countries in the world that have almost all of the world's natural resources particularly the ore and mineral resources.
[13]Available at http://www.youthdevelopment.gov.ng/index.php/nigeria/2013-12-19-03-40-31/natural-resources (accessed 4 July 2017)
[14] *Ibid*

Notwithstanding the point raised above, the author believes that there are two solid ways to boost this sector. Firstly, the government of Nigeria may seek to have bilateral or multilateral trade agreements either with established and renowned companies in this regard or with the governments of such companies. With a properly drafted agreement where issues such as profit generation are addressed, it would encourage investment in this sector whilst satisfying the interest of both parties with respect to this arrangement. Remarkably, according to a report[15] , Canada happens to host about 75% of mining companies in the world[16]. Perhaps, more inclusive and conscious developmental discussions with Canada might cause a visible growth in this sector in the nearest future. This would further assist in the area of technology transfer. It affords Nigeria the opportunity to discover why and how exactly the most profitable mining companies are headquartered in Canada.

Another means by which investment can be realized is by allowing what the government is trying to encourage presently; which is privatisation of government owned entities. This idea was initiated under the dispensation of the Obasanjo led administration. By this, the government or its body saddled with the responsibility of mining activities would allow for the purchase of its assets (usually by issuing bonds) by private individuals or private companies so it would be acquired majorly by a private entity. This is submitted to

[15]Travis Lupick Africa: How Canada dominates African Mining;; available at http://allafrica.com/stories/201304181336.html (accessed 4 July 2017)

[16] Available at https://www.vice.com/en_ca/article/wdb4j5/75-of-the-worlds-mining-companies-are-based-in-canada (accessed 4 July 2017)

be the most viable and quickest solution. A point to note here is that there may need to be adjustment to the regulations involved in the mining sector so as to attract investors. This may be achieved either by reducing taxes[17] involved in mining or by further adjusting the process or requirement for purchasing equity in the government body in charge of mining. This can be achieved by modelling the Mineral Exploration Tax Credit which is designed to help raise equity for exploration companies in Canada[18]. Canada employs this initiative as a way of encouraging exploration activities in the mining sector. Canada attracts a lot of mining companies as a result of its favourable laws and conducive environment which welcomes investors in the mining sector. If there is any lesson to be learnt from Canada in this regard, it should be the softening of laws and regulations in the mining sector to attract investors.

4.2 Commodities

It is amazing that a country brimming with resources; natural and human, has found it practically impossible to produce her own products and where produced locally, is not appreciated by its people.

Nigeria imports almost every commodity sold in her market even down to matchsticks. As much as this may bring some sort of income for those involved in that line of business, in the long run,

[17] The author understands that there are tax incentives available to foreign companies. However, the author proposes more specific tax regulations geared solely towards the mining sector.

[18] Available at http://www.nrcan.gc.ca/mining-materials/taxation/8874 (accessed 4 July 2017)

it is not profitable for the country at large. It is by far one of the major reasons for the increment in the exchange rate plaguing the nation currently.

While attention may be directed towards discouraging importation of goods into the country[19], the writer believes that this should not be the focus of the government. Rather than focus on placing high import duties on luxury goods, the writer believes the government should focus more on how it can produce these goods locally. When the government pays more attention on how local manufacturing can be improved, the country would be looking to regulate its export activities and not have to bother about importation. The writer also believes that import competition is necessary as it has its way of reducing the heavy exchange rate being experienced by the country. When a country promotes its own, there would not only be competition locally, but other nations would be looking to penetrate into the market with their product thereby causing competition, wherein the demand for the goods are low but the supply is high. This would affect the exchange rate currently determined by importers. Allowing for import competition also ensures that domestic firms are on their toes and producing their best as they understand that if they produce anything shallow or sub-standard, people would opt for imported goods into the country.

[19] The government through the Nigerian Custom Service recently released a list of products banned from being imported into the country. Available at https://www.customs.gov.ng/ProhibitionList/import.php the government also increased the import duties on luxury and consumable goods. Available at; https://guardian.ng/news/government-raises-import-duties-on-consumable-luxury-goods/ (accessed

The writer has always wondered why attention has never been paid to local traders by the Nigerian government. We hear of the famous 'Aba Products', yet the government has not taken ample time to find means of investing in the makers of this so called 'Aba Products'. Understandably, Nigerians may not want to purchase these goods owing to the substandard nature of these goods as opposed to the quality of those imported into the country [20], however if the government invests in these brimming industrious set of people, they should and would be able to source qualitative materials to produce 'buyable' products.

Encouraging local content also serves the best interest of the Nigerian populace because it would be cheaper and more accessible to purchase. The government can sensitize its citizens by promoting awareness through conventional media (television, radio, advertisements) and modern day social media platforms. A simple hash tag can start a trend and inculcate in Nigerians, the readiness to purchase local content. However, the government must show effort already invested in that regard for the people to believe and run with it. Also, it would increase the availability of goods to consumers and it would give consumers a variety of options of what to purchase as there is the presence of competition in the economy. Again, it would attract investment locally and internationally if the commodities produced are

[20] The author also questions whether it is the quality that makes people not to buy these products. The reason for this is because, most times, Nigerians buy these products thinking they are purchasing popular brands and wear them with so much passion. These traders have to put the label of renowned designers because they could already foresee that Nigerians would not purchase their products ordinarily.

qualitative. This approach is currently being looked into in Canada. It would not be a bad approach if Nigeria adopts same.

4.3 Start-Ups

Nigeria being the largest economy in Africa[21] stemmed from its actively industrious people. Many Nigerians are entrepreneurs with amazing business ideas. If the government could invest and promote the creation and establishments of start-ups in the country, there would be an increase in the rate of businesses legally established in the country. The writer believes there are two ways to achieve this.

Firstly, the government could create a peculiar structure for start-ups when it comes to their establishment[22]. This is proposed primarily because many of the start-ups in Nigeria lack adequate funding though they possess great business ideas. Encouraging their placement on the Nigerian Stock Exchange, though they may not have 500,000 naira in compliance with the law[23] for establishing a public company, would be an easy avenue to attract investors both locally and internationally to expand the vision of the business. It is therefore proposed that the Nigerian

[21] http://www.weforum.com/

[22] The Nigerian government presently does not have a peculiar legal arrangement for the setup of start-ups in the economy, what many lawyers do is to circumvent the provisions of the Company and Allied Mattes Act to make it work for start-ups

[23] Sec 27 of the Company and Allied Matters (CAMA), 1990 Cap. C20, Laws of the Federation of Nigeria, 2004, s. 38(1) (at first mention), prescribes that any company starting up as a public company must have a minimum share capital of 500,000 naira.

Government provide a unique approach in our laws for the establishment of start-ups in the country.

Secondly, another means of attracting the continuous growth of start-ups in the country is by having special tax regulations towards them. It has already been established that start-ups in Nigeria lack adequate funding, because of this, it would be highly unfair of the government to place high tax regulations on these start-ups as this would not only discourage their establishment, it may even deter many from ever considering the option of starting up their businesses.

4.4 Agriculture

Before the discovery of oil, this used to be the main source of income for Nigeria. With variety of food products being harvested in many parts of the country, the Nigerian government should start to actively invest in the agricultural sector particularly in the area of technology. The same method prescribed for increase in mining activities may also be adopted here. The Nigerian government could attract foreign investors to invest in the agricultural sector or could create trade agreements with countries renowned in this regard.

5.0 OTHER ISSUES

5.1 Regional Relationships

One of the factors that can boost Nigeria's international presence with respect to trade, is its relationship with other African countries. Several times, Nigeria has professed herself as the giant of Africa; it's about time she lives up to the profession. Beyond Nigeria, it is a problem that affects all African countries. Most often than not, before many of the inter-continental countries[24] decide to invest or partake in any trade dealings with African countries, they do their feasibility and due diligence searches. Although this is highly crucial in making investment decisions or trade agreements, many African countries do not operate with this understanding. A western country would only be willing to transact with a continent that has shown its prospect even from the way it deals with itself. Take for example, the European Schegehen arrangement. With this arrangement, it becomes easy for most members of the European Union to travel and trade freely amongst themselves. However, in Africa, fellow Africans have to obtain visas to enter into their sister countries. An incident occurred where the once richest man in Africa, Aliko Dangote was turned away at the immigration port in South Africa as he was trying to locate his passport while his official, an American, scaled through the borders easily because of his nationality. It is quite ironic that Americans and several nations of the West can have easy access into many African countries and a fellow African would have to obtain a visa to gain access into the country.

[24] That is, countries that do not belong to the African continent

This has prompted the African Union to set a 2020[25] vision where the African continent would be one with seamless borders; that is, where its members would not need visas to travel through. This, if achieved, has a serious impact on how trade would be conducted in Africa. Anabel Gonzalez, a senior director on World Bank Group on Trade and Global Competitiveness has stated that intra-African trade costs more than any other region, using East Asia as an example for comparison; it costs 50% higher to transact with fellow African countries than the cost in dealing there. A truck serving supermarket in Southern Africa needs to carry as many as 1,600 documents including permits and licences in order to cross borders[26]. These facts and figures are quite disturbing. If Africa is to be taken seriously, we must be able to demonstrate a collective will to grow and develop and since Nigeria professes herself to be the giant of Africa, it is submitted that she blazes the trail in this area. Establishing the Economic Community of Western States (ECOWAS) and other similar bodies will not demonstrate collective growth as they are geared only to some regions in the continent, although the efforts of this body with respect to West African States are quite commendable.

Consequent upon the above, the author believes that embarking on major infrastructural establishments with respect to

[25] The author notes that as laudable as this effort is, it is tainted with elitism and bureaucracy as the plan is only to be realized for Heads of States and Government and few prominent people in the African continent, such including Aliko Dangote.

[26] The African Union is introducing a single passport to make travel on the continent easier for Africans Lily Kuo Available at; https://qz.com/710334/africa-is-introducing-a-single-passport-to-make-travel-on-the-continent-easier-for-africans/ (accessed)

transportation would also help to mitigate the problem of conveying goods from country to country. It is however worthy to note that this can only happen if all states concede to this agreement.

5.2 Centralised Government

This is another factor stunting the growth of international trade in Nigeria. Unlike other countries such as the United States of America, Nigeria runs a centralized government where all the powers are concentrated in the federal government and save in some circumstances, in the state government. This poses a problem because it places an embargo on how state governments can handle and run their resources as most of the control of these resources is wielded to the federal government. The IGR of Lagos State alone is higher than that of all the other 35 states combined. If states were permitted to run their businesses by themselves and only report a certain amount of quota back to the government, we would have a much more fast-paced economy and the increase in competition would not permit other states to stay idle when they see others thriving. It is submitted that sectors such as tourism should not be in the exclusive control of the federal government but rather in the state governments as the states would be able to appreciate better its tourist attractions and also invest in them accordingly[27].

[27] See Item 60 (d) of the Second Schedule, Part I of the 1999 Constitution of the Federal Republic of Nigeria (as amended). See also *Attorney General of the Federation* v *Attorney General of the State* where the issue of who has the power of exclusivity with respect to tourism and tourist activities was extensively

6.0 CONCLUSION

It is imperative that the Nigerian government begins to look into these areas as it would boost our trade presence internationally.

The writer understands that under the interim government led by Professor Yemi Osibajo SAN, the government has trade as a major agenda in its administration[28]. However, the writer notes that a vast majority of its propositions are largely related to research to be conducted in these areas. It is submitted that it is not research the present state of Nigeria needs to accommodate but rather action. Many of the issues discussed above, have been existing for years and one does not need to do so much of extensive research to discover the facts contained in here. The research conducted would only waste more time rather than change the situation of the economy.

Consequent upon the above, actions such as that taken by the government with respect to ease of doing business in Nigeria by making the CAC forms more compact are laudable. These actions are what are encouraged to give Nigeria the power and honour it deserves on the international scene.

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discussed, available at; http://www.babalakinandco.com/ATTORNEY%20GENERAL%20OF%20THE%20FEDERATION%20vs.%20ATTORNEY%20GENERAL%20OF%20LAGOS%20(RE-HOTEL).pdf.

[28]Available at http://www.nationalplanning.gov.ng/index.php/78-featured/74-article-c. This link shows the Government's agenda which is called the Transformation Agenda

Judicial Exercise of Personal Jurisdiction in the Online Fora: The Gordian Knott Unravelled

Ibrahim Ismail Muhammed*

ABSTRACT

From across the ocean a drummer in the clouds beats his drums and its melody reaches the shores of a distant land that forbids music, melody and sounds. On what basis can the drummer's action in the clouds be challenged by the foreign land? This is the analogy that explains best the war raging over who can exercise jurisdiction over activities in the clouds and a borderless internet as seen in a plethora of cases such as Yahoo! v. LICRA & UEJF. This war reached a crescendo in Google v. Equustek, where a worldwide civil injunction granted on Google by a regional court was affirmed. This paper seeks to explain, analyze and criticize the basis for the exercise of jurisdiction over online based activities by courts.

1.0 INTRODUCTION

One of the essential roles of the state is safeguarding the collective values and aspirations of the populace, at least when viewed from the social contract lens. For as Hegel argued, the state embodies and expresses the Volksgeist; which is the vehicle for the fulfilment of the collective will (and thereby of the individual will).[1] The duty of protecting such local values lies at the heart of the conception of political sovereignty as seen from the works of early western writers such as Bodin,[2] Hobbs[3] and Machiavelli[4].[5] Historically and

* Final Year Student at the Faculty of Law, University of Lagos.

[1] G.W.F. Hegel, *Elements of the Philosophy of Right*(ed. A.W. Wood, 1991 [1821]), at 275

[2] J. Bodin, *Les six livres de la République*(ed. C. Frémont, M.-D. Couzinet, and H. Rochais, 1986 [1576]);

theoretically territorial sovereignty has been ascribed two attributes: one internal, the founding the state's increasing power and prominence over local communities, whilst the other is external, which is establishing all states' equality and independence. To reconcile these two imperatives–to protect local values without encroaching on the territory of other states is the fundamental problem of state intervention on the Internet.[6] Since the exercise of jurisdiction must avoid the encroachment on other territories sovereignty and jurisdiction, as 'a state is, as a general matter, *prima facie* free to legislate or regulate with respect to persons or events beyond its territory, as long as doing so does not interfere with the same right of states that may have a closer connection to those persons or events.[7]

In the traditional analogue world, it is relatively easy for courts to determine the geographical locations of the persons, objects, and activities relevant to a particular case. The geography of the digital world of the Internet, however, is not as easily charted. Content providers may physically reside, conduct their business, and locate their servers in a particular location, yet their content is readily accessible from anywhere in the world. Furthermore, attempts to identify the location of a particular user over the Internet have

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[3] T. Hobbes, *Leviathan*(2005 [1651])

[4] N. Machiavelli, *The Prince*(transl. G. Bull, 1999 [1513])

[5] For commentaries on these authors and on modern conceptions of sovereignty see M.N. Shaw, *International Law*(5th edn, 2003), at 21-25; L. von Bar, *The Theory and Practice of Private International Law*(2nd edn, 1892), at 29; Yntema, "*The Historic Bases of Private International Law*", 2 Am J Comp L (1953) 297, at 305

[6] Thomas Schultz, "Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface" EJIL (2008), Vol. 19 No. 4, pp.799–839

[7] J.H. Currie, *Public International Law*(2001), at p.299

proven extremely difficult, and many Internet users compound this problem by intentionally hiding their location. Traditional principles of international jurisdiction, particularly territoriality, are poorly suited for this sort of environment of geographic anonymity. Courts have struggled to develop a satisfactory solution, yet no progress has been made toward a uniform global standard of Internet jurisdiction.[8]

Therefore, this work shall examine the possible means in which courts have validly exercised jurisdiction over internet based actions. They are the minimum contact test, the sliding scale test, the effects test and the targeting approach. Each shall be analysed in turn before the case analysis of *LICRA & UEJF* v *Yahoo* and *Equustek* v *Google*[9] shall be made.

2.0 TESTS FOR DETERMINING PERSONAL JURISDICTION ON THE INTERNET

2.1 Minimum Contact Test

Although a precursor to the age of the Internet, the establishment of the Minimum Contact Test by the United States Supreme Court is the first recognisable attempt at shifting away from the traditional means of exercise of personal jurisdiction, where personal jurisdiction was only available against parties that were either present or were consented to the court's jurisdiction.[10]

[8] Kevin Meehan, *The Continuing Conundrum of International Internet Jurisdiction* (2008) 31 BC Int'l & Comp L Rev 345 at p.349
[9] *Equustek Solutions Inc. v Jack*, 2014 BCSC 1063
[10] *Pennoyer v. Neff* 95 U.S. 714 (1878)

This test was formulated in the celebrated case of *International Shoe* v. *Washington.*[11]

The Supreme Court adopted a new test that focuses on whether a defendant's activities constitute "minimum contacts" with a forum state so that exercise of personal jurisdiction would be consistent with "traditional notions of fair play and substantial justice."[12] In Canada the language of choice is "real and substantial connection".[13] A minimum contact is determined if the defendant has been found to have purposefully availed itself of the benefits and protection of the law of the state and if the exercise of jurisdiction is fundamentally fair after considering some salient variables such the forum state's interest in adjudicating the dispute[14] the general burden on the defendant,[15] the plaintiff's interest in obtaining convenient and effective relief,[16] and the availability of an alternative forum.[17]

Whilst it is acknowledged that the Minimum Contact Test as formulated in *International Shoe* which involved a corporate defendant, it is important to note that later decisions have espoused and applied to cases involving individual defendants.[18] Thus, the Minimum Contact Test applies to all juristic personalities.

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[11]326 U.S. 310 (1945)
[12]Int'l Shoe Co., 326 U.S. at 316.
[13]*MorguardInvs. Ltd. v. De Savoye* [1990] 3 S.C.R. 1077
[14]*McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957)
[15]*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)
[16]*Kulko v Super. Ct. of Cal.*, 436 U.S. 84, 92 (1978)
[17]*Burger King Corp. v. Rudzewicz,* 471 U.S.at 477 (1985)
[18]*Kulko Case*, Supra at 18

In *Asahi Metal Indus. Co. v Super. Ct. of Cal*,[19]The majority of the justices agreed that the court could not exercise personal jurisdiction over a Japanese corporation merely because it was aware that its products would end up in the forum, this was as a result of the forum being unreasonable.[20]However, there existed no consensus as to the standard to determine what constituted sufficient contact for the court to have reasonably exercised jurisdiction. In a court requiring 5 votes for a majority, there were four in support of Justice Brennan, four for Justice O'Connor and a single stand-alone vote by Justice John Paul Stevens.

The Court's split decision produced distinct approaches to what has come to be known as "stream of commerce" jurisdiction.[21] For Justice Brennan, it was *sine qua non* for the defendant to be aware that his product is being marketed in a forum and "As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise." However, for Justice O'Connor something more than awareness was required to constitute sufficient minimum contact.[22]

> Whether or not [the defendant's] conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances i would be inclined to conclude that a regular course of dealing that result in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item

[19] 480 U.S. 102 (1987)
[20] *Ibid* at 114
[21] *Ibid*
[22] Asahi Metal Indus. Co., 480 U.S. at 121–22

> delivered to the Forum State was a standard product marketed throughout the world.

Thus, she concluded by stating proper exercise of jurisdiction depends on whether a defendant purposefully established "minimum contacts" with a forum.[23].

Therefore, the targeting of the forum by the defendant is a necessary precondition for the exercise of jurisdiction by the forum state and examples of such deliberate actions were:

> …designing the product for the market in the State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.[24]

Several courts after Asahi have adopted the targeting analysis suggested by Justice O'Connor's plurality opinion,[25]whilst some other courts have adopted the opinion of Justice Brennan.[26]

It is submitted that irrespective of the divergence in opinions, the most suitable judgment for the purpose of determining jurisdiction over internet related activities and entities is that of Justice O'Connor. Reason being that the targeting framework modelled on Justice O'Connor in Asahi is not only workable but also essential in the E-commerce context.[27]

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[23]*Ibid* at 108–09

[24]*Ibid* at 112

[25]See *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682–83 (1st Cir. 1992) (mere awareness that the product of a hot air gun manufacturer might end up in the forum state is insufficient for the exercise of personal jurisdiction); see also *Falkirk Mining Co.* v *Japan Steel Works, Ltd.*, 906 F.2d 369, 375–76 (8th Cir.1990) (finding the case "factually analogous" to Asahi, the court refused to exercise jurisdiction over defendant solely on the basis of selling parts into the stream of commerce)

[26]See *Dehmlow* v *Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Irving* v *Owens-orning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989).

[27] Brian d. Boone, Bullseye!: Why a "targeting" approach to personal jurisdiction in the e-commerce context makes sense internationally. (2003)

This is as a result of the internet being global in nature and should a party be subjected to a forums jurisdiction because they are aware that the content that they provide is accessible in the forum? Or would it still be fair to exercise jurisdiction over an entity after determining minimum contact when they exit another forum that has even more sufficient contact?

If the answer is to be in the affirmative then there is indeed a problem for such companies that seek to trade internationally and ISPs, such as Google and Yahoo, that are aware that their service is been accessed on a global scale. Thus, the use of the internet would be at its nadir.

Furthermore, courts and policy makers are likely to be biased when determining jurisdiction where harm has been experienced locally. For example a California Court held in a dispute between AOL and one of its customers that it had jurisdiction despite the existence of a forum selection clause between the parties that provided that all disputes are to be brought to Virginia courts.[28]

Another limitation of the minimum contact test is that all countries face the same concern of protecting its own citizens. Accordingly, while a country may wish to protect its own consumers by asserting jurisdiction over out-of-country entities, it would prefer that other countries not exert the same authority over its citizens and companies. Thus, Lawrence Lessig argues these competing policy priorities encourage countries to engage in a *quid pro quo* approach to jurisdictional cooperation.[29]

[28] *Mendoza* v *AOL* (Cal. Super. Ct.) (unreported)

[29]Lawrence Lessig, "Code and Other Laws Of Cyberspace" (1999) p.55

2.2 Sliding Scale Test

In *Inset Systems, Inc.* v *Instruction Set, Inc*[30], a Connecticut Federal District Court held that the mere posting of a website by itself constituted "minimum contacts" for the court to properly exercise jurisdiction.[31] Did Instruction Set's activity, the establishment of a website, properly bring it within the jurisdiction of Connecticut under that state's long-arm statute? From the court position, the website was a continuous form of advertising and advertising in traditional print ads was usually enough to confer jurisdiction. This court did not assess Instruction Set's actual activity on the Internet and the mere use of the Internet was sufficient for this court to establish jurisdiction.

Firstly, the analogising of website posting to print advertising has been criticized because, unlike the print media advertisers who can target a geographic audience by "simply making a website available on the Internet does not without more direct it to any particular locale."[32]

Thus, the Internet clouds matters provide an "all or nothing" environment in which either every jurisdiction is foreseeable or none is foreseeable.[33] If the court was correct, every court, everywhere, could assert jurisdiction where a website was directed toward its forum.

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[30] 937 F. Supp. 161, 163 (D. Conn. 1996)

[31] *Ibid*, at p. 166

[32] Michael Traynor & Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 PLI/PAT 93, p.106 (2002).

[33] Michael A. Geist, "Is There a There There - Toward Greater Certainty for Internet Jurisdiction", 16 Berkeley Tech. L.J. 1345 (2001) at p. 13. Available at: http://scholarship.law.berkeley.edu/btlj/vol16/iss3/6 (accessed at January 2017)

Secondly, this was a negation of the principle that random or attenuated contacts do not confer sufficient jurisdiction to a forum[34]

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[35]

Furthermore, the decision would have stifled future Internet growth, as would-be Internet participants would be forced to weigh the advantages vis-à-vis the potential of being subjected to legal jurisdiction of every court where their content was accessible via the internet throughout the world. Other reasons to decide a wrong holding by the court stems for the court's own submission that Instruction Set, the defendant, did not maintain an office in Connecticut nor did it have a sales force or employees in the state.[36] Such erroneous rulings, in hindsight, were applied in multiple of cases within the United States and even in Canada due to the lack of alternative for an exercise of jurisdiction and a dearth of understanding of the Internet.[37]

In *Maritz, Inc.* v *Cybergold*, *Inc*,[38] the court noted the difference between online activities and physical activity[39] but still went on to follow the Inset Systems ruling.

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[34]*Burger King Corp. v Rudzewicz*, 471 U.S. 462, 475 (1985)
[35]*Ibid*
[36] 937 F. Supp. 161, 163 (D. Conn. 1996) at 162-163
[37]*Maritz, Inc. v. Cybergold, Inc,* 947 F. Supp. 1328 (E.D. Mo. 1996), *Alteen v. Informix Corp*[1998] N.J. No. 122 (Newf.)
[38] 947 F. Supp. 1328 (E.D. Mo. 1996)
[39] "…the nature and quality of contacts provided by the maintenance of a website on the Internet are clearly of a different nature and quality than other means of contact with a forum such as the mass mailing of solicitations into a forum ....or that of advertising an 800 number in a national publication."

In the wake of this difficulty and wrongful application of the minimum contact test, the test known as the "Sliding scale test", or the "active versus passive test" or the "Zippo test" was developed. This test was engineered to cater for the particularities of the internet and online related activities.

This test was formulated in the case of *Zippo Manufacturing Co.* v *Zippo Dot Com, Inc.*[40]This was a trademark infringement suit where Zippo Manufacturing, makers of tobacco lighters, sued Zippo Dot Com for obtaining registrations for several domain names such as "zippo.com," "zippo.net," and "zipponews.com." The plaintiff was based in Pennsylvania whilst the respondent was a California based news service. The Court based in Pennsylvania held that it had jurisdiction even though the respondent had no physical presence within its jurisdiction.[41] In getting to this conclusion the court distinguished between three broad categories of websites based on the level of their interactive and commercial characteristics. Thus, there exists on one end of the scale, websites categorised as being passive, whilst on the other end are websites that are declared to be active. A passive website does:

> ...little more than make information available to those who are interested, which [are] not grounds for the exercise of personal jurisdiction.

Whereas an active website is declared to be one which has high level of interactivity between the users and the website and actively targets the forum court's jurisdiction through means such as advertisement and information collection. Thus, a website that merely provided information as to the content of its calendar and

[40] 952 F. Supp. 1119 (W.D. Pa. 1997)
[41] *Ibid* at pp. 1119–21

pricing has been held to be a passive website by nature several affirmative steps by residents would be necessary to bring any potentially infringing product into the state.[42] In *Benusan Restaurant* v *King*,[43] the court held that:

> ...the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York.

Whilst EBay or Jumia are websites that would be classified as active websites based on the Zippo test for they not only carry on business over the internet but also actively target a forum state and its individuals through tailored adverts.

Moreover, there exists the possibility of being classified as an interactive website on the sliding scale spectrum. Interactive websites are websites that are a mixture of passivity and activity and are websites that freely exchange information with the user regardless of the user's forum state but also do not reach the user's forum state through directed advertising or agreements with forum specific ISPs or network servers.[44]

Such interactive websites are to be analysed on a case by case basis by the court in order to determine the "level of interactivity and commercial nature of the exchange of information."[45] Only after an analysis of the websites nature would the court then rule on whether or not there exist sufficient grounds for the exercise of personal jurisdiction.

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[42]*Benusan Restaurant Corp.* v *King*, 12 F 3d 2 (2d Cir. 1997)
[43]*Ibid*
[44]*Ibid* at pp. 1121-1123
[45]*Ibid* at p. 1124

The Sliding Scale test, like an Abraham Tank used by the Army, appears to be invulnerable and a master stroke in solving the issue of jurisdiction over online based activities. For unlike any of the previous attempts or mediums for exercising jurisdiction, the sliding scale test focuses on the websites themselves. Thus, the intention of the parties and the borderless nature of the internet are given considerable cognisance.

However, a closer examination would prove that this judicial attempt at solving the jurisdiction dilemma though not without merits is not also without faults. For the Zippo test is easily applicable whenever a website is classifiable as either passive or active but the test falls short and runs quickly into trouble when a website is not on any of the extreme ends of the spectrum. In *Mink* v. *AAAA Development, L.L.C*,[46] the U.S. Court of Appeals for the Fifth Circuit readily adopted the Zippo test and held that the defendant's website, which contained information about both its products and services, was a passive website despite the fact that the site provided users with a printable mail-in order form, email addresses, and a toll-free number. Thus, the website was passive under the sliding scale test.

However, when it comes to handling websites categorized in the middle ground, the test fails and it too runs into the short comings experienced by traditional methods of applying jurisdiction vis-à-vis the internet. Reason being that the test runs into the problem of definitional ambiguity as to what is the "level of interactivity and commercial nature of the exchange of information" needed to

[46] 190 F.3d 333 (5th Cir. 1999)

determine that a website on the middle spectrum of the test can have jurisdiction properly exercised over it. In *Winfield Collection Ltd.* v. *McCauley*,[47] the court noted that;

> The distinction drawn by the Zippo court between actively managed, telephone-like use of the Internet and less active but 'interactive' websites is not entirely clear to this court. Further, the proper means to measure the site's 'level of interactivity' as a guide to personal jurisdiction remains unexplained.

Likewise in *ESAB Group, Inc.* v *Centricut, L.L.C.,*[48] the court categorically stated that

> ...merely categorizing a website as interactive or passive is not conclusive of the jurisdictional issue.

Other criticism lies in the fact that none of the cases that *Zippo* court cited to establish its sliding scale fail to make the rubric of interactivity any more intelligible because none of them relied on it in resolving personal jurisdiction.[49] Similarly, it has been argued that the sliding scale test rather than promoting the utility of the internet is actually "discouraging the adoption of interactive websites."[50] Furthermore, the increase in complexity of the internet since the ruling in the *Zippo* case has resulted in the fact that almost all websites now are "at least highly interactive, if not integral to the marketing of the website owners".[51]

Thus, it has been suggested that with all these shortcomings the sliding scale test may be only marginally useful given the lack of

[47] 105 F. Supp. 2d 746, 750 (2000)
[48] 34 F. Supp. 2d 323, 330 (D.S.C. 1999)
[49] Michael Traynor& Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 PLI/PAT 93, 114 (2002)
[50] Michael Geist, supra note 48, at 1378.
[51] Denis T. Rice, *Problems in Running a Global Internet Business: Complying with the Laws of Other Countries*, 797 PLI/PAT 11, 52 (2004);

physical boundaries on the Internet).[52] It is this Author's opinion that the sliding scale test, whilst adding to the judicial approaches to determining jurisdiction, is not without flaws but should not be dispensed with, as it provides a certain and clear approach to determine the issue of personal jurisdiction when a website is at either ends of the sliding scale spectrum. Moreover, the ingenuity of the court should be applauded for the ruling came at a time when, prior to 1996, the majority of Internet-related decisions evidenced little genuine understanding of activity on the Internet as most courts were unconcerned with the jurisdictional implications of their rulings and instead favoured an analogy-based approach in which the Internet was categorized en masse just like real world transactions.[53]

2.3 Effects Test

The effect doctrine, as a means of obtaining personal jurisdiction over online parties in extraterritorial circumstances, is utilised by a number of countries.[54] The effect test was formulated and applied around the same time as the sliding scale test was applied in *Zippo Manufacturing* v *Zippo Dot Com*.[55]

In *Calder* v *Jones*,[56] a California resident brought a suit to the California Superior Court against a Florida based defendant for

[52]Richard Freer & Wendy Collins Perdue, *CIVILPROCEDURE* 143 (3d ed. 2001)
[53]Michael Geist, *The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REv.521, 538 (1998)
[54] Harold HongjuKoh, *International Business Transactions in U.S. Courts*, 261 RECUEIL DES COURS 1, 59 (1996), "According to commentators, the effects doctrine is now considered a valid basis of jurisdiction in countries ranging from Argentina, China, Cuba, Denmark, France, Germany, Italy, Japan, Mexico, Sweden and Switzerland"
[55] Supra at p. 54
[56] 465 U.S. 783 (1984)

alleged libellous publications. In deciding that the court had jurisdiction, the court relied on the fact that: "...the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California."[57] Moreover, the court distinguished from an action of "mere untargeted negligence," by the defendant and "intentional . . . actions . . . expressly aimed at California."[58]

Therefore, jurisdiction was proper and exercisable in the view of the court since the "effects" of the defendants conduct, although in Florida, was felt in California.[59]

The effects test unlike the Zippo sliding scale test puts primacy on the place of injury and not on the nature of the website to determine the level of contact the site actually has had with the forum state. This is evident in the decision of the Illinois Federal District Court in *Bunn-O-Matic Corp.* v. *Bunn Coffee Service Inc*,[60]where *Calder* v *Jones* was relied upon to assert jurisdiction over a defendant for a web posting in a trademark infringement case. This was despite the fact that the website would have fallen under a passive classification due to the fact that it was purely informational and did not sell any products or services directly.

Thus, the effects test can be seen to be more parochial in application than the Zippo sliding scale test as it focuses on the injury within the locality of the forum as against giving cognisance to the global nature of the internet.

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[57] *Ibid* at p. 789
[58] *Ibid*
[59] *Ibid*
[60] 46 U.S.P.Q.2d (BNA) 1375 (C.D. Ill. 1998)

Conclusively, the effects test, though suitable for individual and tortuous cases,[61] suffers a major flaw when it is to be applied when the defendant is a large corporation based in multiple forums, as determining where a larger, multi-forum corporation is "harmed" is a difficult prospect[62].

2.4 From Effects and Zippo, to a Targeting Approach

In *Cybersell, Inc* v. *Cybersell Inc*,[63] The court noted that the "effects" test does not "apply with the same force" to a corporation as it does to an individual because a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does.[64]

Since *Cybersell* was decided, several courts have adopted this targeting approach in E-commerce legal disputes. In *Millennium Enterprises, Inc.* v. *Millennium Music, L.P*,[65] the Oregon District Court in a trademark dispute refused to assert jurisdiction over a defendant based in South Carolina. The main ratio was that the website at issue was not aimed at consumers in the forum.[66] Furthermore, the court held that the middle ground of the Zippo scale, where fact-finding is necessary to determine the level of commercial interactivity, requires "deliberate action" aimed at the forum state consisting of "transactions between the defendant and

[61] *Zumbro, Inc. v. Cal. Natural Prods.*, 861 F. Supp. 773, 782 (D. Minn. 1994)
[62] *Rice & Gladstone* (2003), pp.601, 629
[63] 130 F. 3d 414, 420 (9th Cir. 1997)
[64] *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414, p. 420 (9th Cir. 1997)
[65] 33 F. Supp. 2d 907 (D. Or. 1999)
[66] *Ibid* at p. 924

residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."[67]

The court further stated that this "deliberate action" was the "something more" spoken of by Justice O'Connor in Asahi.[68]

The "something more" was discovered in *Rio Properties, Inc.* v *Rio International Interlink*,[69]where a Las Vegas casino sued a Costa Rican gambling operator for violating its trademark rights by posting a passive website using the marks that could be accessed by Nevada residents. The court found personal jurisdiction as a result of the defendants targeting of the forum of Nevada by running radio and print ads in the Las Vegas area.[70]

Thus in *Bancroft& Masters, Inc* v *Augustus Nat'l Inc*,[71] the US 9th Circuit elucidated further and went on to hold that the defendant must have:

1) Committed an intentional act; which was
2) Expressly aimed at the forum state; and
3) Caused harm that was largely suffered and which the defendant knows is likely to be suffered in the forum state.

Moreover, the Supreme Court of the United States has also had the opportunity to place the strict requirement that the defendant must have specifically targeted the forum.[72]

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[67] Brian d. Boone, Bullseye!: Why a "targeting" approach to personal jurisdiction in the e-commerce context makes sense internationally at 23

[68] Supra note 77 at p. 915

[69] *Rio Properties, Inc v Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002)

[70] *Ibid* at p. 1020

[71] *Bancroft & Masters v Augustus National Inc* 223 F.3d 1082, 1087 (9th Cir.2000)

[72] *J. McIntyre Machinery Ltd v Nicastro* no. 09-1343 (U.S June 27, 2011)

Significantly unlike the Zippo approach, "a targeting analysis [seeks] to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction."[73]

Similarly whilst the effects test focuses on whether the defendant could have foreseen the online activities impact on a forum state, the targeting analysis requires that a defendant actually and specifically aim online content into the forum.[74]

The targeting approach is best illustrated in the case of *Gutnick* v *Dow Jones*,[75] where Joseph Gutnick, a well-known Australian businessman/rabbi/philanthropist/politician sued the defendant for publication of an alleged defamatory portrait. Dow Jones was an American publisher of the online magazine BarronsOnline. Although the magazine was primarily addressed to U.S. citizens, a fair amount of subscriptions were made by Australians. Thus, they were aware that their publications would have an impact and be read by Australians, especially since it had a well-known Australian as portrait. Jurisdiction was held to be exercisable. Had Down Jones refused to sell subscriptions of BarronsOnline in Australia, the court may have concluded otherwise.[76]

Conclusively, the targeting approach reduces the number of possible jurisdiction and therefore makes the likely venue of litigation predictable whilst protecting the international standard of

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[73] Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 389–91 (2002), at p. 418

[74] Carole Aciman & Diane Vo-Verde, *Refining The Zippo Test: New Trends On Personal Jurisdiction For Internet Activities*, Computer & Internet Law., Jan. 2002, at pp.16-19

[75] *Gutnick v. Dow Jones & Co. Inc.*[2001] VSC 305

[76] Thomas Schultz, "Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface", EJIL 19 (2008), 799–839 p. 19

non-interference. However, the term targeting is vague and each case must be examined individually.

3.0 AN ANALYSIS OF THE *L'UNION DES ETUDIANTS JUIFS DE FRANCE ET LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME* V *YAHOO!* AND *YAHOO! FRANCE* V *LICRA & UEJF* CASE DECISIONS

3.1 Background

The First Amendment to the Constitution of the United States provides for the protection of free speech: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."

This provision is highly valued on the premise that freedom of expression is the cornerstone and is necessary to preserve a free society.[77] Thus, minimal limitations are prescribed.

Unlike the First Amendment, Article eleven of the Declaration of the Rights of Man and of the Citizen of 1789 states:

> [t]he free communication of thoughts and opinions is one of the most precious rights of man. Every citizen may, accordingly, speak, write and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

Furthermore, Article Five[78] gives French public authorities the right to limit free speech by outlawing certain actions in the public interest, in order to avoid injury to society.

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[77] James E. Leahy, *The First Amendment, 1791-1991 Two Hundred Years Of Freedom* 108 (1991)

[78]See Declaration Of The Rights Of Man And Of The Citizen Art. 5 (Fr.1789), Available At Http://Www.Hrcr.Org/Docs/Frenchdec.Html

Thus, an active role is conferred in France on the government in limiting unlawful speech.

Yahoo! is a corporation with its principal place of business in Santa Clara, California. Yahoo! operates and provides services such as its search engine, an automated auction site, personal web page hosting services, and chat rooms.

It is Yahoo!'s auction site, which offers for sale many different types of items, that caused the corporation to be hurled into the Paris court. The site had on sale Nazi-related propaganda and memorabilia, the display and sale of which are illegal in France by virtue of French Penal Code R. 645-1.[79] The intent of the law is to protect French citizens, especially those of Jewish faith, from the memories of suffering endured by their nation and their people at the hands of Nazi criminals.[80]

The plaintiffs were The League against Racism and Anti-Semitism and The Union of French Jewish Students and together they brought a suit against the Corporations as a result of its failure to stop the display and sales of the offensive articles. The defendant, Yahoo, whilst admitting that the articles violated French laws challenged the court's jurisdiction on the basis that they were offered for sale within the United States. Reasons being that it was available on the US targeted site which was protected by the First Amendment and was not available on the Yahoo France regional

[79] Similar provisions are in Germany and Netherlands. See *Section 130(3) of the Federal Criminal Code of Germany*

[80]Okoniewski, Elissa A. "Yahoo!, Inc. v. LICRA: The French Challenge to Free Expression on the Internet." American University International Law Review 18, no. 1 (2002): 295-339 at pg 13, Calvin Peeler, The Politics of Memory: Reconstructing Vichy and the Past the French Chose to Forget, 19 WHITTIER L. REV. 353, 353 (1997).

site. Thus, French citizens would have had to access the US domain through their own volition to be able to access the offending auction articles.

3.1.1 Analysis of the French Decision

On May 22, 2000, in deciding whether the court had jurisdiction over Yahoo, specifically Yahoo in Delaware and not Yahoo France, the court employed an approach that was analogous and identical to the "effects test". The court considered evidence of the harmful effects of the auction site in France and held that it was clear that users from the French territory may have access to pages containing auction of Nazi objects on Yahoo.com (U.S. site). The court, presided over by Judge Gomez, went on to recite the provisions of Article R.645-2 of the Criminal Code. Judge Gomez concluded that jurisdiction may be imposed by virtue of the harm being occasioned in France even though Yahoo's actions were probably unintentional.

Whereas while permitting these objects to be viewed in France and allowing surferes located in France to participate in such a display of items for sale, the Company YAHOO! Inc. is therefore committing a wrong in the territory of France, a wrong whose unintentional character is averred but which has caused damage to be suffered by LICRA and UEJF…Whereas, the damage being suffered in France, our jurisdiction is therefore competent to rule on the present dispute under Section 46 of the New Code of Civil Procedure ...."[81]

[81] Pl.'s Compl. for Decl. Relief, ex. A, at 5, Yahoo! II (No. 00-21275)

Having determined that it had jurisdiction on the basis of the effects test, the court then went on to order a takedown order of all Nazi related items being sold on auction sites owned by Yahoo. This order was to apply to both Yahoo France and Yahoo in the United States.[82]

Moreover, the court on November 20, whilst delivering an interim order, appeared to have added a targeting analysis to its earlier use of the effects test by stating that Yahoo! was targeting French jurisdiction through advertisements. The court stated:

> Whereas YAHOO [sic] is aware that it is addressing French parties because upon making a connection to its auctions site from a terminal located in France it responds by transmitting advertising banners written in the French language ….[83]

However, the effects test was still the primary means the court utilised to determine jurisdiction but the use of the targeting method was employed more as an afterthought.

3.2 Critique of the French Decision

As noted above, an application of the effects test can lead to provincial results and this is was the result in the case. A provincial result is undesirable as courts would fail to take cognisance of the global and extraterritorial nature suits relating to internet activities. Thus, whilst focusing on the harm and effects of the visibility of the Nazi memorabilia on the auction site in France, the court refused to recognise the fact that it was on Yahoos U.S web site.

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[82] *Ibid*, at pp. 6-7

[83] Pl.'s Compl. for Decl. Relief, ex. B at 4, *Yahoo!, Inc. v. La LigueContre Le Racisme et L'Antisdmitisme*, 169 F.Supp. 2d. 1 181(N.D. Cal. 2001) (No. 00-21275), available at http://www.cdt.org/speech/intemational/001221yahoocomplaint.pdf accessed 2 December 2016)

Philippe Guillanton[84] stated:

> The point is whether we want to condemn the Internet to be closed in the same way that the media have traditionally been closed by frontiers ....This case could set a potentially dangerous precedent. . . .It is the first case where a judge in one country feels he is competent to decide over what actions he thinks an actor (in another country) should be taking…[85]

Lastly, the court did not consider the issue of enforceability.[86] Whilst this was not the issue for determination, it is important to note that in extra territorial suits the issue of enforcement may not be ignored for the courts orders would be fruitless if unenforceable in a foreign domain.

3.3 Analysis of the United States Decisions

After losing in the French court, Yahoo filed a complaint on December 21, 2000 in the Northern District Court of California, seeking a declaration that the French court's orders of May 22 and November 20 were not recognisable and enforceable.

The issue of jurisdiction now turned around as the question was how to assert jurisdiction over the two defendants, who admittedly were citizens of France, with no offices, assets or agents in the United States. Thus, no basis for general jurisdiction exists because LICRA and UEJF do not have the kind of continuous and systematic contacts with the forum state sufficient to support a finding of general personal jurisdiction.

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[84] Director General of Yahoo France, (as he then was)

[85] Reuters, Yahoo Says French Ruling May Set Precedent, CNET NEWS.COM, available at http://news.cnet.com/news/0-1007-200-1930850.html (accessed December 5 2016)

[86] Pl.'s Compl. for Decl. Relief, ex. B at 4, Yahoo! II (No. 00-21275).

The first court to hear the matter in the U.S. was the District Court in California which utilised the targeting approach and found that LICRA and UEJF had purposely availed themselves of the benefits of California by:

1. Sending a cease-and-desist letter to Yahoo;
2. Making use of the United States Marshals Service to serve court process from France; and
3. LICRA and UEJF's request to the French court that Yahoo! perform certain acts on its server and remove certain Nazi items from its website in California

All of this in the courts opinion constituted "express aiming" as provided in *Calder* v *Jones*[87] and *Bancroft & Masters, Inc*v *Augustus Nat'l Inc.*[88]

However, upon appeal to the 9th Circuit Court, the finding of personal jurisdiction over the defendants was upturned and reversed. The court interpreted the requirement of express aiming to be: "...satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."

Furthermore, the court cited a number of its past judgments and authorities.[89] Thus, for LICRA's and UEJF's litigation efforts against

[87] Supra at p. 70
[88] Supra at p. 84
[89] *Rio Props, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002), *Metro. Life Ins.Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990), *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989)

Yahoo! to amount to "express aiming," those efforts must qualify as wrongful conduct targeted at Yahoo.[90]

Consequently, the court held: "...we cannot say here that the parties did anything wrongful, sufficient for a finding of "express aiming," in bringing this suit against Yahoo"

3.4 Critique of the United States Decision

The litigation in the U.S., like that of the French court showed the difficulty and importance of jurisdiction in a situation of extraterritorial dimension.

Yahoo, after losing in France, attempted to hurry the litigation by suing in the U.S. rather than waiting for LICRA & UEJF to sue for enforcement. This decision was unarguably premised on two factors. The first being that there was a running penalty that was time calculated, running against Yahoo and the other being that there was a need for Yahoo to protect its corporate name. Thus, even though the defendants had not sought an order of enforcement, it can be seen that fairness and equity necessitated the pre-emption suit by Yahoo.

Unfortunately, as stated by the 9th Circuit, there was no basis for the exercise of jurisdiction over the defendants by any American court since neither LICRA nor UEJF could have been said to have purposefully availed themselves of any benefit or conducted any wrong within the U.S.

3.5 Conclusion

Yahoo v *LICRA & UEJF*, both the French and US decisions, serve as a sad illustration of the inability of the litigation process, either in

[90]*YAHOO INC. v. LA LIGUE CONTRE LE RACISME*, No. 01-17424 CV-00-21275-JF at 10

France or in the United States, to deal with the complex cultural and legal issues that arise when material posted lawfully on servers in one country violates the law when viewed by web surfers in another country.[91]

It is submitted that if the effects test is to be utilised as done in the Yahoo case globally, it would lead to the slowest ship in the convoy problem.[92]As information made available on the Internet would have to comply with the laws of the entire world, and the most restrictive law in the world – the 'slowest ship' – would thus be able to set the tone.[93]

Consequently, since effects can occur in several jurisdictions, an acceptance of the Yahoo decision would lead to uncertainty of enforcement, unpredictability of venues an entity can be hurled into court[94] and a general attack on the principle of non-intervention of another state's sovereignty.

4.0 AN ANALYSIS OF THE *EQUUSTEK SOLUTIONS INC* V *JACK & ORS*[95]DECISION

4.1 Background

[91] Marc H. Greenberg, "A Return to Lilliput: The LICRA v. Yahoo - Case and the Regulation of Online Content in the World Market", 18 Berkeley Tech. L.J. 1191 (2003), available at: http://scholarship.law.berkeley.edu/btlj/vol18/iss4/6 (accessed May 2017)

[92]Zittrain, ' Be Careful What You Ask For: Reconciling a Global Internet and Local Law', in A. Thierer and
C.W. Crews (eds), Who Rules the Net? Internet Governance and Jurisdiction (2003), at 20

[93] Thomas Schultz, "Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface", EJIL 19 (2008), 799–839 page 15

[94] Kohl, "The Rule of Law, Jurisdiction and the Internet", 12 IJL &IT (2004) 365

[95]*Equustek Solutions Inc. v Jack*, 2014 BCSC 1063

The Plaintiff, Equustek, manufactures networking devices that enable communication between complex industrial equipment from different manufacturers. The Plaintiff claimed that a former employee conspired with some individuals to manufacture a competing product with their own designs and trade secrets at the core. Furthermore, the claim of trademark infringement was levelled against the respondents for passing off the Plaintiff's logo and product name in the sale of the competing product.

Originally, the respondents conducted business in Vancouver but after losing the initial legal suit in June 2012, they now operate virtually and operate through a myriad of websites. These websites serve as an avenue for the advertisement and sale of the product and have been the subject of numerous court orders. However, the respondents still continue to create new websites and transact businesses.

The plaintiff sought an interim injunction against Google Inc. and Google Canada, a non-party respondent, from including websites owned by the respondents in the trademark suit in search results generated through Google's search engines. Additionally, the injunction sought was not to primarily apply to Google Canada's servers but Google worldwide, as evidence showed Google Inc's servers and not Google Canada's servers to be involved in the services that the plaintiff sought to cease.

4.2 Analysis of the Supreme Court of British Columbia Decision

On the issue of jurisdiction, Google submitted that the court does not have jurisdiction over either Google Inc or Google Canada as neither is present in British Columbia and because the application

for an injunction does not relate to Google doing or having to refrain from doing any act within British Canada or Canada as a country.[96]

Whilst the Plaintiff submitted that the court has jurisdiction and that an injunction should be granted because Google's services are being used as tools to breach court orders.[97]

The court relied heavily on the Court Jurisdiction and Proceedings Transfer Act,[98]hereinafter CJPTA, in determining whether it had jurisdiction. The CJPTA provides for jurisdiction to be exercisable when there is "a real and substantial connection."[99] This is essentially a codification of the minimum contact test. Furthermore, section 10 of the CJPTA goes on to delimit and explain what a real and substantial connection means.

Moreover, the court concurred with Google that since the servers were not located within the forum section 10 (i) was inapplicable. However, section 10 (a) was held to be applicable. Section 10 (a) asserts that a real and substantial connection is established when an action: is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property.

The court found the provision to be applicable since this connecting factor establishes presumptive substantial connection and that "the plaintiffs (Equustek) seek to enjoin Google in order to enforce their proprietary rights."[100] Thus, the court disregarded

[96]*Ibid* at p. 3
[97] *Ibid*
[98] S.B.C. 2003, c.28
[99]*Ibid*, Section 3 (e)
[100] Supra, note 106 at p. 6

the fact that majority of sales occurred outside of Canada since the application was for the protection of intellectual property rights that was protected in British Columbia.

Additionally, the court found section 10 (h), which provides that substantial connection to be satisfied when the suit "concerns a business carried on in British Columbia," to be an additional connecting factor.[101]

Thus, the subsidiary Google Canada, which markets Google Inc's services, was utilised to assert that Google Inc was a business within British Columbia and as such could not deny the court's jurisdiction.[102] In response Google cited the case of *Club Resorts Ltd v Van Breda*,[103] in submitting that the fact that a search is initiated in British Columbia does not equate to Google carrying on business in British Columbia. Furthermore, Google submitted that "some form of actual not virtual presence is required and cited LeBel J in Van Breda, who stated:

> Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the

[101] *Ibid*
[102] *Ibid*, p.6 Para 29
[103] 2012 SCC 1, (2012) 1 S.C.R. 572

> jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction[104]

However, the court disagreed since the case at hand was distinguishable from Van Breda in the sense that it pertains to e-commerce and quoted LeBel J. to have additionally stated that: "...but the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction"

Furthermore, Google submitted to being a passive website that merely offered a platform for residents of British Columbia to search the internet. The explanation given was that the services were automatic in nature and Google was not active in the process.[105]

Nevertheless, the court disagreed and held that the websites were not passive information sites.[106]The websites were not passive since they anticipated requests and suggest potential searches. Additionally, the selling of advertisement to forum residents by Google was held to mean that Google was carrying on business in the forum. Finally, the court disagreed with Google's submission that its advertising services are separate from its search engine services since it is a veritable income source as the search services are free, the search results are intrinsically tied to the adverts and the paid adverts are geared to particular users.[107]

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[104]*Ibid*, Para 87
[105] Written submission of Google, Para 23
[106] Supra note 106, p. 10
[107]*Ibid*, pp. 11-12

4.3 Critique of the British Columbia Decision

In determining Jurisdiction, the court appropriately applied section 10 (a) CJPTA to hold that there was a need to protect the Intellectual Property rights of the Plaintiff protected within the forum.

However, on the application of 10(h), it must be stated that there exists the principle of separate corporate existence when activities of a parent company and its subsidiaries are to be examined. Thus, it has long been established that the activities of a subsidiary in a forum does not confer jurisdiction over the parent company.[108]Likewise, the existence of this separate corporate existence may only be pierced when the subsidiary is being utilised to perpetuate fraud or to hide away from contractual obligations.[109]

Therefore, the utilisation of Google Canada to subject the parent company, Google Inc, though appropriate based on the particular facts may be of doubtful rationale in another case. Based on the facts Google Inc could be said to have purposefully availed itself of a benefit from the forum jurisdiction through the marketing of paid advertisement services by the subsidiary Google Canada and the consummation of the contract between individuals of the forum and Google Inc.

Had the contracts been concluded between Google Canada and purchasers of the advertisement slots, the argument of separate existence should be appropriate.

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[108] *Cannon Mfg Co v Cudahy Packing Co.* (1925) 69 L.Ed. Adv. Ops 308, 45 Sup. Ct. Rep. 250; See 20 Illinois Law Review, 281 Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 Cal. L. Rev. 12 (1925)

[109]*Adams v Cape Industries*, 2010 UKHL (check citation)

Lastly, on the holding of the court that the business of paid advertisement and that of operating a search engine is intrinsically tied together, it is submitted that this is a concise holding especially when regard is given to the European Court of Justices holding in another case involving Google, *Google Spain SL & Google Inc* v *Agencia Espanola de Proteccion de Datos (AEDP) & Mario Costeja Gonzalez*.[110] The ECHJ stated:

> the activities of the operator of the search engine [Google] and those of its establishment situated in the Member State [Google Spain] concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.[111]

This conclusion is appropriate when consideration is given to the practice of tailored adverts been sent to users, the fact that the rate of users and success of the search engine dictates the cost of advert slots and adverts are linked to the searches.

4.4 Subsequent Appeals by Google

In 2015, the appeal by Google was heard in *Equustek Solutions Inc.* v. *Google Inc.*[112]

The Court of Appeal for British Columbia affirmed the decision by the Supreme Court of British Columbia and added its own reasons.

In upholding the ruling that Google does undertake business within the forum, the court upheld the targeted advertisement argument

[110] C-131/12
[111] *Ibid*, Para 56
[111] *Ibid*, Para 56
[112] 2015 BCCA 265

of the lower court and included the fact that Google gathers user information through "Googlebot" within the forum.[113]

Likewise, the Court of Appeal held that the business of being a search engine provider is tied to the advertisement and data gathering aspect of the business.[114]

Finally, the court did not agree with Google's submission that the lower court's ruling would lead to floodgate litigation. Firstly, this threat arises as a result of the nature of Googles business and not a fault in the law and that courts in exercising power of subjecting Google, must consider many factors aside that of territorial competence.[115]

Still dissatisfied with these rulings Google appealed to the Canadian Supreme Court, who on February 18, 2016 granted leave to appeal[116] and on June 28, 2017 affirmed the lower court's decision. For the purpose of the appeal, Google did not contest the issue of personal jurisdiction but its equitableness in light of the requirements of the principles of comity.

4.5 Conclusion

In summary, though not referred to in clear cut terms, the courts have employed various means of determining jurisdiction over online entities to hold Google liable to jurisdiction. This was made all the more possible by virtue of the local CJPTA statute.

Therefore, it is expected that the Supreme Court of Canada would uphold the rulings of the lower court.

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[113] *Ibid* p. 21, Para 54
[114] *Ibid*, p. 21, Para 55
[115] *Ibid*, Para 56
[116] *Google Inc. v. Equustek Solutions Inc.*, et al., 2016 CanLII 7602 (SCC)

The Lotus Flower Bomb: A Look at Jurisdiction and the Evolution of Extraterritorial Jurisdiction

Oluwatobi Olowokure*

ABSTRACT

The rapid spread of globalization in the world today is undeniable. The advent of the internet, great advances in technology and social media, have fostered interplay of the world's cultures and greatly boosted the world's status as a global village. Apart from these overt phenomena, there is economic policy, foreign policy and the protective principle policies of the various countries in the world which play all too important roles in the formulation of the legislative and judicial framework of these states. All these and more have greatly contributed to blur the lines of jurisdiction, which although prima facie is only exercisable territorially, has now burst from that cocoon to be exercisable beyond its borders or on non-residents. This article seeks to analyse the evolution of jurisdiction and extraterritorial jurisdiction internationally, taking cognizance of the decision in the case of the S.S Lotus[1].

1.0 JURISDICTION

Jurisdiction is the backbone and essence to any exercise of judicial power. It is the *sine qua non* for the raising of an issue or the

* Final Year Student, Faculty of Law, University of Lagos. Thank you Ms. Motunrayo Ope-Ogunseitan for your unending love and support. God bless your soul. Also, thank you to Mr Thiago Pinto Alves of the University of Oxford, for sparking my interest in this subject

[1] *S.S. Lotus (France v Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

exercise of power by a court.[2]It can be said to be the proverbial key for the almighty court to hear disputes between parties before it. It is the power to speak the law.[3]In many respects, it is entirely correct to say that jurisdiction is one of the most important tools within the judicial process, as without it, any exercise of power is null and void.[4]What is important to note is the fact that jurisdiction as a concept is of extreme importance to all three arms of government in a democratic state.

Being a vital and enigmatic principle of law, it may in fact be seen in different forms;–

- Prescriptive Jurisdiction: - This refers to a sovereign state's ability to prescribe laws that apply to certain categories of people or personalities.[5] This would, of course, be more applicable to the legislature, but may also relate to the judiciary, in some instances.
- Adjudicative Jurisdiction: - This refers to the court's root power to adjudicate[6]i.e. to hear matters or disputes and to pronounce on them or make judicial orders or decisions in respect of them.
- Enforcement Jurisdiction: - This, in simple terms, is the power to enforce the law, i.e. to deploy the coercive

[2] *Madukolu* v. *Nkedilim* (1962) LPELR - 24023 (SC)
[3] Costas Douzinas, "The Metaphysics of Jurisdiction" *Jurisprudence of Jurisdiction,* (London, 2007)
[4] *Funduk Engineering* v *McArthur* (1993) 4 NWLR (Pt. 392)640 at 651
[5]Restatement (Third) of Foreign Relations Law of the United States § 401(a) (1987).
[6]Howard M. Wasserman "Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption" (2011)

> powers of the state to arrest, confiscate, prosecute or punish offenders or defaulters of the law within the state. This can be said to relate more to the Executive arm of government.

The focus of this research would be centred on adjudicative jurisdiction, and would then speak about its peculiarities and then extraterritoriality. It is important; to first understand what jurisdiction truly is, and what its ramifications are. In the case of *Nigeria National Petroleum Corporation (NNPC)* v. *Clifco Nig. Ltd* per Rhodes-Vivour JSC[7], jurisdiction was described as "the heart and soul of a case". It commonly has two connotations. Thus, whenever jurisdiction is mentioned or brought up, what is being referred to is either the applicability or inapplicability of judicial power or pronouncement as to the substance of the law governing a dispute; or the geographical limits to which the powers exercised by the courts can apply[8]

1.1 Substantial Exercise of Judicial Powers

Jurisdiction has been defined in the case of *Board of Trustees Firemen's Relief and Pension Fund of City of Marietta* v *Brooks*[9] as being the authority by which judicial officers take cognisance of and decide cases.[10]This precise connotation as to what the jurisdiction means or describes can also be seen in some of the definitions which can be found in judicial decisions. In the case of

[7]*National Petroleum Corporation (NNPC)* v *Clifco Nig Ltd* LPELR-SC 233/2003
[8] *Ifepe* v *Obi* (1967) F.N.L.R 329 at 330
[9] *Board of Trustees Firemen's Releif and Pension Fund of City of Marietta* v *Brooks* 179 Old. 600, 67 P.2d 4,6
[10]Oxford Dictionary of Law Sixth Edition

Co-operative Bank of Eastern Nigeria Ltd v. *Megwa,*[11] jurisdiction has been taken to mean "the authority which a court has, to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision."[12]

This view of jurisdiction is now commonplace and has seen adoption in a variety of other cases.[13] As stated earlier, the importance of jurisdiction as a pre-condition to the exercise of judicial power cannot be over emphasised, thus, in the case of *Senate of National Assembly* v. *Momoh*[14] it was held that when it can be said that a person or body no longer has the power to declare law (jurisdiction), then the only function remaining to the court is that of announcing that fact.

Once a dispute is brought before a court, the very first call of duty is to see whether or not it is competent to hear that dispute being brought before it.

1.2 Geographical Limits

The usual exercise of jurisdiction is limited to the geographical boundaries within which the laws sought to be applied are concerned or have been promulgated. Thus, jurisdiction also refers to the territorial limits of the reach of the powers of the court in legal proceedings or adjudication.[15]Thus, in usual

[11]*Co-operative Bank of Eastern Nigeria Ltd* v *Megwa* (1977) 1 I.M.S.L.R. 11
[12]A.P.A Ogefere "Definitions In Law: Nigerian Law Through The Cases" Vol. 14 (1997) 14NLTC
[13] *Gwaram* v *Superintendent of Prison, Kano* (1960) N.R.N.L.R 5 at 6; *Denedo* v *Ikie* (1968) M.N.A.L.R 17 at 20; *Ndaeyo* v *Ogunnaya* (1977) 1 S.C. 11 at 24
[14] *Senate of National Assembly* v *Momoh* (1982) 2 F.N.R. 307 at 333
[15] Ifepe v Obi (1967) F.N.L.R 329 at 330

circumstances, the jurisdiction of a court would be linked with the geographical contiguity of the court to the citizen and the law that governs that subject matter.

It is from the questions or controversies surrounding the territorial limits of jurisdiction that the importance of the grasp of the knowledge of the exercise of extraterritorial jurisdiction arises. There are instances where a court or state may wish to exercise jurisdiction beyond its borders, this may either be in form of enforcing its own laws or judicial decisions, or by subjecting citizens or persons outside of its borders to its own adjudicative process. It is accepted domestically and in international law that all sovereign states command a monopoly over the laws and enforcement of such laws within their own borders.[16] The implication of this principle is that any exercise of adjudicative or enforcement jurisdiction beyond the borders of the state would prima facie constitute a derogation or infraction on the foreign state's sovereignty.

In the ever evolving contemporary world which exists today, the different instances in which the law or courts may seek to act extraterritorially increases every day, and in reply the law has also been changing to catch up with the times, and produce a good enough response to these issues as they arise.

[16] Art. 2(1) Charter of the United Nations Charter of the United Nations and Statute of the International Court of Justice, UK: Cambridge Press, 2003); Holmes v Bangladesh Biman Corporation (1989) 1 AC 1112, 1126; 87 ILR, pp. 365, 369, per Lord Bridge

2.0 EXTRATERRITORIAL JURISDICTION

In a variety of instances, especially in modern times, various states have tried to enforce their laws or seek to extend their judicial pronouncements beyond the confines of their territories. There is of course the international principle of "*comity*", which in a judicial context, refers to the deference or respect that states give to the laws and decisions of other states.[17]This means that the decisions of the sovereign courts are to be seen as being of the same hierarchical rank and that in the absence of disparaging views as regards the correctness of the decisions, or if it infringes on other rights within the foreign territory, it should be entitled to enforcement. It should be noted that there exists a presumption against the extraterritorial application of legislation[18].This presumption is even further enshrined impliedly by virtue of the principles of sovereignty. In the Supreme Court of Canada decision in *R* v *Hape*[19]it was stated that "despite the rise of competing values in international law, the sovereignty principle remains one of the organizing principles of the relationships between independent states".

Also, in the case of *American Banana Company* v. *United Fruit Company*[20], Justice Oliver Wendell Holmes stated that *"*...the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done*"*

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[19] *R* v *Hape* (2007) SCC 26, [2007] 2 S.C.R. 292
[20] *American Banana Company* v *United Fruit Company*, 213 US 347, 370 (1909)

There are many instances in which a state may seek to exercise extraterritorial jurisdiction, and in instances when this jurisdiction is exercised on the basis of territoriality or on the basis of the nationality of the individual concerned, there is usually no controversy.[21]Competition law is the realm in which extraterritorial jurisdiction has arisen the most.[22] However, as regards instances where the basis on which jurisdiction is being exercised is predicated on the harmful effects[23] which an act has caused within a state, then in that instance, where jurisdiction is being exercised a variety of questions then arise. A good example is the adoption of the *Helms-Burton Legislation (1996)* which provided an avenue for US courts to hear matters against foreigners who were accused of "trafficking" in property expropriated by Cuba from Americans. This has caused a plethora of protests around the world which are forcefully against this. In a letter to the US Congressional Committee:

> US Claims to jurisdiction over European subsidiaries of US companies and over goods and technology of US origin located outside the US are contrary to the principles of international law and can only lead to clashes of both a political and legal nature. These subsidiaries, goods, and technology must be subject to the laws of the country where they located.

[21] op. cit
[22] *Standard Oil Co. of New Jersey* v. *United States* 221 U.S. 1 (1911)
[23] *US* v. *Aluminum Co. of America* 148F.2d 416

Raustiala calls this relationship between law and territory "legal spatiality".[24] The evolution of this principle evolved from strict territoriality, this of course has been greatly loosened over the years, as phenomena such as globalisation, the advent of technology and even international trade have all become mainstays in the contemporary world. More functional concepts such as "interest analysis" and "minimum contacts"[25] have taken over and are increasingly favoured over the usual rules of jurisdiction in determining the existence or non-existence of jurisdiction.

2.1 Rules of Extraterritorial Jurisdiction at Private International Law

Private International law seeks to mitigate the controversies of extraterritorial jurisdiction, by providing a rubric for determining what courts would decide or preside over a matter. Thus, in a hypothetical situation where a transaction, or in fact, a cross-border crime has occurred, private international law would look into the species of the occurrence and choose what part of it would be isolated in order to bring down an issue into the realm of the jurisdiction of a court. Thus, a situation where an archer in State A shoots an arrow into State B, which hits a septic tank and causes spillage which affects the livelihood of people via the pollution of water in State C. The answer as to who may exercise the prescriptive jurisdiction boils down to the part of the

[24]Kal Raustiala, *The Evolution of Territoriality: International Relations &American Law*(2005) University of California, Los Angeles School of Law Public Law & Legal Theory Research Paper Series
[25]*Ibid.*

transaction that we choose to focus. Whether it is where the act originated (State A), whether it is where the causation occurred (State B), or where the harmful effect took place(State C).[26]Thus, private international law rules would resolve the conundrum by selecting one element of the multijurisdictional transaction and then localizing the entire transaction based on that element.[27]The problem may be amplified in a situation where the varying states have different conflict of laws rules. Thus, depending on the laws or approach of the domestic court, the judge may exercise extraterritorial jurisdiction.

2.2 Rules of Extraterritorial Jurisdiction at Public International Law

Territorial jurisdiction is a ground for the exercise of jurisdiction which is based upon a confluence between the territory of the sovereign and the right of the state to legislate or regulate all persons within its territory.[28]At public international law, there are two primarily recognised bases for exercising territorial jurisdiction over acts or citizens. They are:-

- Subjective Territoriality Principle: - This principle basically authorises that a state may exercise jurisdiction over any act which occurs within its own borders. It would also give the state the liberty to prosecute a crime or act which

[26] Anthony J. Colangelo, "*What Is Extraterritorial Jurisdiction?*" (2014) 99 Cornell Law Review
[27]Ibid.
[28]Vaughan Lowe, International Law 171 (2007).

started in the state even though it was consummated or completed abroad.[29]

- Objective Territoriality Principle:- Under this principle, a state may exercise jurisdiction or power to adopt a law that applies to acts which take "effect" within its borders regardless of the fact that the act was performed outside of its borders.[30]It is on this principle that the importance of this exercise, especially in light of the emergence of the Internet and the various activities which it hosts have made, that this has become very important.

In *S.S. Lotus (France v Turkey,)* [31]a French steamer collided with another vessel of Turkish origin. The collision occurred in international waters in a region north of Mytilene. Eight Turkish nationals died as a result of the accident. Turkey sought to try the French officer on watch at the time of the accident for involuntary manslaughter under Turkish law. The issue of whether the prosecution violated international law was submitted by the governments of both France and Turkey to the Permanent Court of International Justice, and the court held that a state could exercise jurisdiction over conduct that affects its nationals. The case established the "Lotus principle" which now stipulates that sovereign states may act in anyway that they wish as long as they do not contravene an explicit prohibition. It was reasoned by the

[29] Jurisdiction with Respect to Crime, 29 AM J. INT'L L. 435, 484–87 (Supp. 1935)

[30]www.kentlaw.edu/faculty/rwarner/classes/carter/tutorials/jurisdiction/Crim_Juris_16_Text.htm(Accessed on 6 March 2017)

[31]*S.S. Lotus (France v Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

courts that a specific rule as to the exercise of jurisdiction could not be laid internationally. The court stated:

> It would....in many cases result in paralysing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their States' jurisdiction[32]

In *United States v. Al Kassar*, [33]it was held by the court that

> Fair warning does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.

Notwithstanding the various exercises of extraterritorial jurisdiction and its emerging importance in the world, especially in light of phenomena such as globalisation and the internet, it does have its limitations.

3.0 LIMITATIONS TO EXTRATERRITORIALITY

3.1 Comity

Comity is a nearly ancient principle which has subsisted and has become trite under international law. It refers to the cohabitation and relations between all sovereign states as they show and accord one another the mutual respect expected at international law. It is "a practice among different political entities (as countries, states or courts of different jurisdictions)" involving the mutual

[32]Ibid (para 48)
[33] 660 F.3d 108, 119 (2d Cir. 2011)

recognition of legislative, executive, and judicial acts."[34] It also extends to mean "an obligation to apply foreign law."[35]From available case law, it can be seen that the courts, especially US would recognise and enforce the judgements of a foreign court, especially if that decision was decided on its merits, and no violation of rights occurred in the process.[36]

What is very important to note though, is the fact that this principle is inherently and in fact immutably a discretionary decision and not in any way a legal obligation. The U.N. General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation states that "no state or Group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state."[37] Thus, comity is "ill-defined and entrenched" in international law.[38] In the case of *American Banana Co.* v. *United Fruit Co*[39], it was held that the application of US antitrust laws to wholly foreign conduct would be a violation of the principle of comity.

[34]Black's Law Dictionary (10th ed. 2014), p. 324
[35]Joel R. Paul, "*The Transformation of International Comity*,"(2008) 71 Law &Contemporary Problems pp. 19- 38
[36]Hilton v. Guyot, 159 U.S. 113, 163-64 (1895**)**
[37]Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., U.N. Doc A/8082, at 121 (Oct. 24, 1970).
[38]Dan E. Stigall, "International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law," (2012) 35 Hastings International & Comparative Law Review 323-382
[39]American Banana Co. v United Fruit Co. 213 US 347 (1909)

3.2 The Rule of Reasonableness

The rule of reasonableness as limitation on the exercise of extraterritorial jurisdiction was tersely couched by the American Law Institute, when it stated that:

> A state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable

Thus a court, before exercising extraterritorial jurisdiction over a dispute, would look at whether it would be fair or expedient in the circumstances to do so. Though it must be pointed out that hardly ever is an exercise of jurisdiction avoided on this point, and that the courts would usually refuse or refrain from exercising extraterritorial jurisdiction on the basis of comity.

4.0 CONCLUSION

The utilisation of territorial boundaries to define the limits of the legislative and judicial authority of a state has never been sustainable. With the advent of the internet which traverses geographical borders, this old concept of territoriality is no longer suitable. Also, with other ills such as transnational criminal activity, cross border terrorism, propagation of hate speech, infringement on intellectual property rights, and other forms of legal issues which bring forth pertinent questions on jurisdiction, the absence of a defining line in its exercise may not be the most envisaged circumstance.

The internet especially produces a new dimension to the entire situation. With cross-border transactions and communications occurring on a daily basis, the exercise of extraterritorial jurisdiction becomes more apparent and imminent. A certain and decisive solution which has the assent of the greater majority of countries in the world is the best way to tackle this problem. It is submitted that the internet is of a highly technical nature. By virtue of this fact, it is hoped that the courts would endeavour to permit more frequently, the submissions of experts in the field. This becomes of even greater importance where what is sought is the nature of the online entity in question or the type of transactions. The opinion of experts may also come in handy in assisting the court in localizing a transaction i.e. determining what country an online activity is originated or perpetuated from.

Also, technological aids such as the geo-location filtering ordered by Judge Gomez in the *Yahoo! Case*[40] may also come in handy. This way, reprehensible content may simply filtered from being able to appear within a jurisdiction. This could go a long way to resolving conflict, and avoiding the back and forth that may arise as a result of the divergent policies and laws various jurisdictions.

It behoves on the international community and the comity of nations to produce a document that would do away with the confusion that sometimes occurs. It is submitted that a uniform internationally recognised document would be the perfect

[40] Yahoo! Inc. v. La Ligue Contre Le Racismeet L'Antisemitisme (LICRA) 433 F.3d 1199 (9th Cir. 2006)

panacea towards solving some of the controversies which arise in the exercise of extraterritorial jurisdiction.

Is the Presence of a Petitioner in Court to give Evidence in Matrimonial Causes Mandatory? Olaniyan v. Olaniyan

James Okoh Esq*

A review of the unreported Decision of the High Court of Lagos State in Suit Number WD/297/12 –Joy Obiageli Oti Olaniyan v. Olufemi Clement Olaniyan - Pedro, J, delivered on Monday, 5th day of June 2017

1.0 INTRODUCTION:

Nigerian laws recognize the sanctity of marriage and usually tilt towards preserving it. This can be seen in the reluctance of the Court to grant a decree of dissolution of marriage unless the petitioner can prove to the satisfaction of the Court that one of the grounds set out in Section 15(2) Matrimonial Causes Act exists as to warrant the court finding that the marriage has broken down irretrievably and making such decree.

Thus, matrimonial proceedings are sui generis and in fact have its own set of rules governing its procedure; the Matrimonial Causes Act (MCA) and the Matrimonial Causes Rules (MCR).

Despite this fact, Matrimonial Proceedings (though sui generis) are not removed from the ambit of Civil Proceedings as Order XV (3) MCR provides that the law of evidence applying to Civil proceedings in Court should apply to Matrimonial Proceedings except the MCA or MCR provides otherwise.

* James Okoh Esq. Senior Counsel at Fidelis Oditah & Co, Lagos
He was called to the Nigerian Bar in 1993. He holds the LLB and LLM degrees. He has been working as a Dispute Resolution Lawyer since he was called .His email is Jokoh@oditah.com . Views expressed herein are essentially mine, not that of the Firm of Fidelis Oditah & Co.

Typically, the Evidence Act 2011, Rules of Court and other specialized rules (including Matrimonial Causes Act and Rules, Companies Winding-Up Rules, Companies Proceedings Rules, Judgment Enforcement Rules, etc.) guide the taking of evidence in courts in Nigeria.

Only recently, Pedro J of the Lagos State High Court was faced with what appeared to be a recondite question in Matrimonial proceedings- whether it is mandatory under the Matrimonial Causes Act for the petitioner attend proceedings personally and come forward to give oral evidence before a marriage can be dissolved on the ground that the parties have lived apart for at least three years?

In a considered Judgment, Pedro J, (in my view), opted for a purely sentimental approach to the issue as opposed to the strict legal position. We acted as counsel for the Petitioner in the matter.

In this review, I will examine the facts of the case and the evidence led at trial with a view to criticizing identifiable deficiencies in the decision of the trial court in the light of the rules of law, judicial decisions as well as procedural rules with respect to matrimonial proceedings.

2.0 BRIEF FACTS OF THE CASE

In this case, a very fundamental issue arose for the determination by the High Court of Lagos State on whether; a petitioner must of necessity come forward to give oral evidence at the hearing of a petition for the dissolution of marriage. The petition in this case

was struck out on the ground that the petitioner was not physically present in court at the hearing to testify.

The Petitioner, Obiageli Oti Olaniyan and The Respondent, Olufemi Clement Olaniyan were married on 23 December 1993 at the Marriage Registry, Lagos and lived together in peaceful marriage bliss until 2006 when the petitioner moved to the United Kingdom and the parties have lived apart since then. The marriage produced no issue.

In September 2012 the petitioner brought a petition before the High Court of Lagos State for the dissolution of her marriage to the Respondent, on the ground that the marriage had broken down irretrievably in that the parties had been separated for a period of over 6 years immediately preceding the presentation of the petition. The only relief sought in the petition was dissolution of the marriage contracted on 23 December 1993. No other relief was sought. There was no cross petition either.

The Respondent in his answer to the petition admitted that the parties have lived apart for a continuous period of six(6) years and that the marriage had broken down irretrievably.

During the trial, the Petitioner who was still away in England was not present in Court but testified through one witness – PW1(her nephew) who testified and tendered two documents: (i) Certified True Copy of the Marriage Certificate and (ii) Notarized affidavit of particular facts sworn by the Petitioner dated 21 February 2014 where the Petitioner stated that she was lawfully married to the Respondent on 23 December 1993 and that she has been living

apart from the Respondent since March 2006. Both documents were admitted in evidence. PWI's testimony was unchallenged and uncontradicted during cross-examination.

The Respondent testified and under cross examination, gave evidence that the Petitioner and himself have been separated **since 2006**. It was also revealed that the Respondent has since had **two issues with another woman.** At the conclusion of trial, the trial court delivered a 29-page judgment striking out the petition.

In the Judgment, in relation to the issue of attendance, which was the fulcrum upon which the Judgment and orders were based, the court said:

> From the totality of evidence I find that although the petitioner led evidence through her relative, Samuel Esemonu who tendered exhibits P1&P2 a marriage certificate and affidavit of particular facts. **She has failed to give oral testimony as to why this court should hold that her marriage to the Respondent has broken down irretrievably…**
>
> It is my humble view that while the argument of the learned counsel for the petitioner is right that in civil cases, a claimant need not appear in court to testify, in the instant case, where the petitioner is asking the court to hold that her marriage to the respondent has broken down irretrievably on the ground that both parties have lived apart. She must be ready to step into her matrimonial shoes to lead credible evidence to the satisfaction of the Court that her marriage to the respondent has broken down irretrievably.

The trial court further held that merely filing a petition without the petitioner coming forward to testify personally that the parties have lived apart for a continuous period of three years

cannot confer automatic right on the petitioner for the decree of dissolution of marriage to be granted.

The petition was struck out on that ground.

In our view, this is purely sentimental! The Judgment was not based on any sound legal or judicial reason still less any procedural reason for the court's decision. The decision was based solely on the subjective interpretation of the trial judge instead of a more objective and purposive approach to discover the intention of the legislature.

This decision, though intriguing, raises a very fundamental issue of (a) the nature of evidence required to satisfy the Court in a Petition brought under S15(2) *(f)* of the MCA which provides that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition and (b) more importantly whether a Petitioner must step "into her matrimonial shoes to lead credible evidence to the satisfaction of the Court as to why the court should hold that her marriage to the Respondent has broken down irretrievably"

3.0 ANALYSIS

The major question is **whether the presence of a petitioner in matrimonial proceedings is mandatory under MCA. MCR the Evidence Act or any other applicable law on this subject.**

It is our view that a Petitioner need not appear at the trial to testify. It is not mandatory under the Act. This is because, Parties

need not attend proceedings to give evidence at trial if they are represented by counsel so long as the evidence is sufficient to prove or sustain their case[1]. The meaning of proof extends beyond oral evidence: see the Supreme Court cases of *Kehinde* v *Ogunbunmi*[2] and *Lawal* v *Union Bank of Nigeria*[3]. In Lawal's case, (at 422C-D) Ogwuegbu JSC emphasised that:

> it is not in every case that a party must adduce oral evidence to establish a claim or disprove a claim against him since that can be done in other ways short of going into the witness box. Indeed, he need not be physically present in court if he is represented by a legal practitioner

4.0 HOW FACTS ARE PROVED IN MATRIMONIAL PROCEEDINGS

We maintain the view that the burden on the Petitioner to satisfy the Court under section 15(2) (f) (MCA) can only be discharged by adducing credible evidence to the reasonable satisfaction of the court. This is clear from the provisions of Order XV of the Matrimonial Causes Rules provides:

> (1)Subject to this part, testimony at the trial of proceedings shall be given orally. (2) Nothing in this part shall be taken to prevent the proof of facts, in accordance with the practice of the court and the relevant law of evidence, by the proof by the production of documents other than affidavits (3) In sub-rule (2) of this rule," relevant law of evidence mean the law of evidence applying to civil proceedings in the court (other than proceedings under the Acts) so far as it is not inconsistent with this rule.

[1] Adeniyi v. Akinyede (2010) ALL FWLR (pt.503) 1257 C.A
[2] [1967] All NLR 326
[3] [1995] 2 NWLR (Pt 378) 407 at 422C-D

We agree that it is clear that evidence in Matrimonial proceedings should be oral, but the rules also make provision where circumstances permit for facts to be proved in accordance with the practice of the Court of trial and the relevant law of evidence.

The Court of Appeal in *Amah* v *Amah*,[4] answered the question on whether rules of Evidence applies to Matrimonial Causes. Making reference to Order XV Rule 1 (1), (2) and (3) of the MCA, the Court of Appeal said:

> What emerges from the above provisions of the Matrimonial Causes Act and Rules, is that generally, evidence in matrimonial causes proceedings shall be given orally but the Rules also make provisions or allowances where the circumstances of the case permit, for facts to be proved in accordance with the practice of the Court of trial and the relevant Law of Evidence, by the production of documents other than affidavits. The law of evidence as envisaged by the Act/Rules means the law of evidence applicable **to civil proceedings** in **the Court other than proceedings under the Act** so far as it is not inconsistent with the Act and Rules.

Facts are proved according to the rules of evidence. The law in Nigeria is that evidence may be given by oral testimony or production of documents[5]

By the rules of Evidence, facts can even be proven by documentary evidence alone without the need for personal attendance of the Petitioner and in appropriate cases judgment may be entered in a suit on the pleadings only, with or without the presence of the parties so long as they are duly represented.

[4] (2016) LPELR-41087(CA)
[5] Order XV Rule 1(1) and (2) of the Matrimonial Causes Rules

See the cases of *Newspaper Corporation* v *Oni*[6] and *Nigerian Agricultural and Co-operative Bank* v *Adeagbo.*[7] In NACB's case, Sanusi JCA[8] restated the law as follows:

> The suit before the trial court is a civil one. There is no rule of law or practice as far I know, which insists that a plaintiff in a civil suit must be physically present in court to testify in as much he can prove his case either through oral or documentary evidence. In the same token, there is also no law that a defendant in a civil suit must appear personally to defend a suit against him. A plaintiff or defendant can prove or defend his case without presenting himself or testifying before a court. In fact judgment in an appropriate case may be entered in a suit on mere pleadings only even with or without the presence of the parties provided they are duly represented or in case of default judgment, it is proved that parties in default of appearance were duly served.

In any event, in this case Mr. Esemonu gave oral evidence in support of the Evidence but for sheer sentiments expressed by the Respondent that the Petitioner ought to appear in court personally.

It was also clear that there were no contentious issues arising from the Petition which would require documentary evidence tendered show clearly that parties were married on 23 December 1993 and have lived apart since March 2006 and this was admitted by the Respondent in his Answer to the Petition.

In spite of overwhelming evidence before the court, the court refused to dissolve the marriage by holding that although the petitioner led evidence through her relative, who tendered two

[6] (1995) 1 NWLR (Pt. 371) 270 at 293D-E
[7] (2004) 14 NWLR (Pt 894) 551 at 573G.
[8] at page 573 F- H

exhibits, she failed to give oral testimony as to why her marriage should be dissolved.

There was no impediment either in law or in evidence why the court could not grant the prayers of the Petitioner. This is because Order XV of the Matrimonial Causes Rules allows both oral and documentary evidence in matrimonial proceedings and both were proffered by the Petitioner in this case and in any event the essential ingredients required, which is the evidence of living apart for over 3 years was also present. If for any reason, the court did not want to act on documentary evidence provided by the Petitioner, then the admission of the Respondent in his Answer and his oral admission were sufficient. It was never in contention that the parties were living apart at the time of the presentation of the petition as the respondent admitted this in his pleadings and gave evidence on this fact under cross examination.

It is submitted further that under s.123 of the Evidence Act 2011 facts which are admitted in pleadings need not be proved at the hearing. Judicial admissions are conclusive; see the Supreme Court decision in *Taiwo* v *Adegbenro*[9].

We are of the view that personal attendance of the Petitioner though desirable, is not a requirement of our Matrimonial Causes Act as in other Jurisdictions. For example, in the English case of *Black* v *Black*[10], Div, a case which is similar to this instant case ,the wife, a Petitioner in a cross-prayer did not attend the proceedings and was not called to give evidence either in person or otherwise

[9] (2011) 11 NWLR (Pt 1259) 562 at 584B-C
[10] [1960] 1 All ER 251

in support of her Petition. It was contended that the court had no jurisdiction to entertain her cross-prayer. Sachs J, at 251G, held that the court had jurisdiction to hear the petition and grant a decree in the petitioner's absence. Sachs J held as follows:

> The first point taken was that the court ought not to or could not … give relief where the wife had not appeared in person or given evidence on commission or tendered her evidence in some such way. I will merely say that in my view the court had jurisdiction to hear and determine any petition of whomsoever seeks a decree, in a cause in which that person is not called as a witness or tenders evidence on commission or otherwise…

Section 44(3) of the MCA, the only portion of the MCA which requires the personal involvement of the petitioner in a petition for dissolution deals with instances where the petition is based on judicial separation. The MCA and MCR have elaborate rules as regards matrimonial proceedings, thus if the law makers intended the personal involvement of the petitioner in section 15, a similar provision would have been made in that section. This is clearly not a case of a lacuna in the Act

5.0 STANDARD OF PROOF

The standard of proof in a petition for dissolution of marriage is proof to the reasonable satisfaction of the court[11] and Section 82(2) of the Act provides that where a provision of this Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or that other matter.

[11] Section 15(1) MCA

It does appear that the MCA requires a court to become satisfied once there are reasons to believe that the relevant facts sought to be established are in existence. A fact is "proved when, after considering the matters before it, the court either believes that it exists or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the belief that it does exist."[12]

In *Towoeni* v *Towoeni*[13], the Court of Appeal held that evidence in a matrimonial proceeding may be oral or documentary. We are of the view that the witnesses who give this oral or documentary evidence need not be the parties themselves; they can be any persons who have opportunities of knowing the facts. *Nkiru Joy Oduche* v *Obiefuna Ndubuisi Oduche*[14] is quite similar to the present case, here the Petitioner refused to testify or subject himself to paternity test as to whether he was the biological father of the children of the marriage. Both parties agreed that the parties have lived apart for more than three years. Consequently, the court dissolved the marriage and awarded custody of the children to the Petitioner/Respondent despite his refusal to testify or subject himself to a paternity test. On appeal, the Court of appeal agreed that in view of the presumption in section 148 of the Evidence Act, the Petitioner cannot be compelled to testify as to his paternity of the children born during his marriage with the Respondent/Cross Petitioner. The effect of this case is that courts take useful presumptions into consideration in deciding whether

[12] See Evidence Act 2011, Section 121(a).
[13] (2001) 12 NWLR (Pt 727) 445 at 457F
[14] (2005) LPELR-5976 (CA)

petitioners have proven their case or not and it does not matter that the Petitioner did not testify specifically on this point.

6.0 CONCLUSION

It is important to emphasize that the case at hand raises a very novel issue in Matrimonial proceedings in Nigeria. Its novelty lies in the absence of Nigerian reported cases on the subject and not in the absence of the law in that regard. Matrimonial proceedings as a special procedure have its own set of rules regulating its procedure. The court is not expected to go an extra mile to make the proceedings onerous for the parties by departing from the express provisions of the MCA.

I believe that the important question to be asked at the conclusion of evidence is this "have the parties been living apart for three years?" and not "whether the petitioner has testified that the parties have been living apart for three years?"

If the first question is answered in the affirmative, then the court is duty bound to dissolve the marriage.

I see no reason why the court did not decide in favour of the petitioner in this case. There was uncontradicted evidence that the parties have lived apart for 8 years[15]

A Petition for dissolution, on the ground that parties have lived apart for a period not less than 3 years is the most liberal ground and does not depend on fault on the part of the parties. Section

[15] The evidence of the petitioner in a Notarized affidavit of particular facts; The evidence of the petitioner's witness was not discredited on cross examination; respondent in his answer to the petition and under cross examination also admitted this fact

15(3) of the MCA which provides for the presumption that parties are of living apart further "reduces" the burden of proof on the petitioner. The onus was thus on the respondent to prove that parties were not living apart. The respondent in this case did not dispute this in anyway and in fact admitted it, the court was therefore bound to decide in favour of the petitioner.

There is no requirement in the Matrimonial Causes Act ("MCA") and the rules made thereunder requiring that the Petitioner must give evidence personally before the court can be satisfied under Section 15 (2)(f) of the MCA. Rather the MCA. Rather the Matrimonial Causes Rules, the Evidence Act, the Civil Procedure Rules etc. apply to Matrimonial Causes.

The decision of Pedro J. was based on the premise that the petitioner cannot satisfy the court that the parties have lived apart for three years without the oral testimony of the Petitioner. It certainly would not have been the intention of the lawmakers that a petitioner must enter the witness box in order to satisfy the court. No authority was cited by the Judge as the basis for this decision.

We hope that this decision would be reversed on Appeal as it would certainly create onerous conditions not envisaged by the law maker at the time of enactment of the Matrimonial Causes Act. Luckily this matter is on appeal. We patiently await the decision of the Appeal Court on this subject as it will shape the future of matrimonial proceedings in Nigeria and indeed the attitude of the Court to other novel subjects yet to be discovered. In the meantime, the waiting game continues!

The NCC and a Price Floor for Internet Access in Nigeria: Competition Law Matters Arising

Stephen Oluwaseun Oke*

ABSTRACT

This essay seeks to evaluate the propriety of the relatively recent attempt by the Nigerian Communications Commission (NCC) to introduce a price floor in the market for internet access in Nigeria. It examines the NCC's decision through the lenses of competition law by providing insight into the legal framework forming the regulatory basis on which NCC issued the Directive and describing the NCC's approach to regulating competition in the communications industry. It further illuminates on the antitrust rationale that may have informed the decision and advances arguments, founded on competition law doctrines, as to why the Directive was flawed, beyond the harsh economic conditions under which the ill-timed Directive was issued.

1.0 BACKGROUND

When the Nigerian Communications Commission ("NCC") announced its decision to establish a price floor for the provision of internet access by all operators in the Nigerian telecommunications industry (the "Directive"), this author, like many other subscribers in Nigeria, did not welcome the announcement with open arms. According to NCC, the Directive

* Stephen Oluwaseun Oke is a legal practitioner based in Lagos. He is currently an Associate at the Law Firm of Banwo & Ighodalo. Stephen holds a LL.B from Babcock University, and a LL.M from the University of Cambridge where he fell in love with Competition Law. Stephen can be contacted through; Stephen.oke@yahoo.com or soke@banwo-ighodalo.com

was aimed at promoting a level playing field for all operators in the industry, and to encourage small operators and new entrants.[1]

A price floor is a minimum price placed on the provision of goods or services, typically by a regulator.[2] Unlike a price ceiling (stipulation of a maximum price) which has the effect of lowering market prices, a price floor tends to increase the prices offered by supplier(s) in a market. Consumers, therefore, have the propensity to antagonize any suggestion of a price floor, for the obvious reason that, as a general rule, consumers want to pay the lowest price possible for any given product or service. This principle applies to consumers in Nigeria as with consumers all over the world, and it is expressed in the law of demand which says that the quantity of a good or service demanded falls as the price rises, and vice versa.

In addition to its inconsistency with the age-long economic principle highlighted above, the Directive could not come at a worse time, having been announced in the middle of Nigeria's economic recession. It, therefore, came as no surprise when, NCC issued a new directive (the "Suspension Directive") that suspended any further action in that direction following the

[1] The Nigerian Communications Commission "NCC Suspends Directive on Data Segment Price Floor" available online at http://www.ncc.gov.ng/stakeholder/media-public/public-notices/121-ncc-suspends-directive-on-data-segment-price-floor (accessed on 4 July 2017).

[2] A price floor is quite distinguishable from a "fixed price" or "price increase" in that the regulator does not stipulate a fixed price to be charged by suppliers in a market, rather it stipulates a minimum prices below which no supplier may offer its goods or services. Suppliers are, therefore, free to sell at different prices above the price floor.

outcry of consumers and concerns expressed by the Nigerian Senate.[3]

This essay provides insight into the legal framework forming the regulatory basis on which NCC issued the Directive; and points out why (beyond the laws of demand and harsh economic climes), the Directive was flawed from a competition law perspective. Although the Directive has since been suspended, this perspective remains relevant, not for NCC, other market regulators, and consumers, especially in light of the impending *Federal Competition and Consumer Protection 2017* legislation.[4]

2.0 ASSUMPTIONS OF COMPETITION LAW

No meaningful evaluation of the Directive on a competition law pedestal can be achieved without proper understanding of the meaning and objective of competition law and market regulation premised thereon. Therefore, for the benefit of readers who are less conversant with competition law, it is imperative to begin with a brief primer on some basic assumptions of competition law that will serve as premises for evaluating the propriety of the NCC Directive.

[3]Supra note 1.

[4] Two bills, SB 257 and HB 60/01, each titled, "**Federal Competition and Consumer Protection Bill**", have been passed by the Senate and the House of Representatives and now await harmonization by both houses of the National Assembly before their transmission to the President for assent. Amongst other objectives, these bills seek to promote fair, efficient and competitive markets in the Nigerian economy, protect the interest of consumers and facilitate access by all citizens to safe products.

Consumer welfare is the primary and long-term goal of competition law or antitrust policy. Indicators of consumer welfare include, without limitation: (i) low prices; (ii) improved quality of goods/services; (iii) innovation; and (iv) choice, that is, the ability and ease of switching from one supplier to the other. It is generally assumed that consumer welfare thrives best in a market that operates on the principles of *fair competition*.

There is fair competition in a *free market*, that is, a market where there are many sellers and buyers, homogenous product/service, price determination by forces of demand and supply, free flow of information, etc. Although a free market is not attainable in "real life", competition law policy assumes that market regulation should aim to bring the market as close as practicable to a free market.

As a general rule, a market regulator should not interfere with price in the market. Ideally (and consistent with a free market), price should be determined by *market forces***,** that is**,** the interaction between demand and supply. If a market regulator must regulate price at all, such interference (i) must be based on sound economic analysis in the market; and (ii) can only be justified if it aims to preserve fair competition **(**where "fair competition is not an end in itself, but a means to achieving "consumer welfare").

Finally, and perhaps most important for the purpose of this discourse, competition law assumes that, in a free market, sellers

are in business to make profit – this is a legitimate goal, and one that incentivises supply/investment and innovation. Accordingly, there cannot be "fair competition" if one seller sells *below cost*, that is, selling for a price at which other sellers cannot make 1 kobo of profit (or sufficient profit to replenish supply) even if they were to operate efficiently.[5]

2.1 Illustration of selling "below cost"

If, for instance, in Nigeria:

- There are two different markets: a market for (i) *Widgets* and (ii**)** *Blodgets*;
- X, Y and Z are sellers in the market for Widgets*,* but X also sells in the market for Blodgets; and
- The minimum cost (e.g. cost of raw materials[6]) of producing a Widget is ₦5, with the implication that the sellers in the market for Widget cannot sell at a profit unless they sell above ₦5 to allow for a profit margin.

[5] Understandably, competition law should not aim to encourage inefficient operation. For this reason, the approach adopted by market regulators in advanced competition law regimes, such as the European Commission, is to intervene only where a pricing practice has been, or is capable of, hindering competition from undertakings that are 'as efficient' as the dominant undertaking. This is an economics-oriented approach. See paras 23 – 27 of the *Guidance on the Commission's Enforcement Priorities in Applying Article (102 TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings* (2009/C 45/02). This approach was adopted by the Court of Justice of the European Union in C-209/10 *Post Danmark A/S* v *Konkurrenceradet*[2013] All ER (EC).

[6] Note that above example is simplistic. In reality, the cost analysis to be carried out by a market regulator involves more complex cost variables. Also, "cost" would typically include a fair return on investment

If X decides to sell each Widget for ₦4, he is not competing fairly because Y and Z cannot match that price**.** Typically, X would only be selling at a loss with the aim of frustrating its competitors out of the Widgets market. This strategy is called "*predatory pricing*". X would only be able to sustain his sale of Widgets at ₦4 (thereby incurring a loss of ₦1 on each Widget sold) by offsetting his loss in the Widgets market from the profits he is making in the market for Blodgets, or in some other market where he is selling above cost / at a profit. This anti-competitive practice, of channelling profits in one market to fund a predatory pricing strategy in a different market, is called "cross-subsidization".

In the short run**,** consumers will naturally be happy to buy Widgets from X (rather than from Y or Z) because, like the law of demand predicts, demand increases as price falls. However, in the long run, Y and Z will be forced out of the Widgets market, leaving only X who, at this point, becomes a monopolist. In the absence of constraints by now non-existent competitors, X can increase his price to ₦15 per Widget. It gets worse, however, because X may go a step further by leveraging his dominance in the Widgets market to mount pressure, through anti-competitive practices, on his rivals in the market for Blodgets. By this time, it is too late for the market regulator to salvage the Widgets market. This is one of the consequences that NCC had in mind when it made the Directive.

Having provided illumination on the basic principles of competition which are pertinent to this discourse, we shall now

consider what legal basis, if any, the competition regulator had to attempt to regulate price in the market for internet data.

3.0 LEGAL FRAMEWORK AND BASIS FOR THE DIRECTIVE

3.1 Is NCC a Competition Regulator?

NCC, like other sector regulators, is a regulator of competition in the telecommunication market. *Nigerian Communications Act, 2003*[7] (the "NCA"), s. 90 gives NCC the exclusive competence to administer and enforce compliance with competition laws, and to sanction anticompetitive practices in the telecoms market. The *Competition Practices Regulations 2007* ("Competition Regulations") were made by NCC pursuant to its powers under the NCA.[8]

3.2 Does NCC have the Powers to Regulate Price?

NCC has statutory powers to regulate price. Section 108 gives NCC powers to regulate and approve tariff rates in the communications industry. Section 108(4) (d) requires NCC to structure tariff rates and set tariff levels to attract investments into the communications industry.

3.3 Must Tariffs Have any Correlation to "Costs"?

Section 108(4)(b) of the NCA provides that tariff rates "shall be cost-oriented and, in general, cross-subsidies shall be eliminated."

[7]Cap. N97 Laws of the Federation of Nigeria 2004.
[8]NCA, ss. 70 and 90 generally, and ss. 91, 92 and 95, in particular.

Further, *s. 108(4)(b)(c) of the NCA* provides that tariff rates shall not contain discounts that unreasonably prejudice the competitive opportunities of other providers. *Regulation 8(f) of the Competition Regulations* also precludes operators from "supplying communication services, at prices below long run average incremental costs or such other cost standard, as is adopted by the Commission."

4.0 ANALYSIS OF THE DIRECTIVE

4.1 Description of NCC's Approach

According to NCC, the Directive was aimed at promoting a level playing field for all operators in the industry, and to encourage small operators and new entrants**.** Consistent with the goal of competition law identified earlier, the NCC also stated that the decision was taken in order to protect the consumers who are at the receiving end, and save the smaller operators from predatory services that are likely to suffocate them and push them into extinction. For this reason, small operators were exempted from the new price regime. NCC considered "small operators" to be operators with less than 7.5% market share, and "new entrants" as operators who have operated in the data market for less than 3 years.

For the purpose of the Directive, NCC identified two distinct markets, for **(i)** GSM/voice call services; and **(ii)** internet access (data) services. The Directive aimed at imposing a price floor (minimum price) of *₦0.90k/MB* for data services. According to NCC, industry average market price for big operators such as

MTN, Etisalat, Airtel and Glo was ~~₦~~*0.53k/MB* (with Glo charging as low as ~~₦~~0.21k/MB), while the average market price for smaller operators[9] was ~~₦~~*0.71k/MB*.[10]

In identifying markets (e.g. market for voice calls as distinct from market for data services), NCC generally considers the services that make up a specific market, the geographical scope of the market, and demand-side and supply-side substitutability.[11]

In identifying market share, NCC considers the revenues, numbers of subscribers or volume of sales.

4.2 What Anticompetitive Practices was the Directive Targeting Specifically?

The Suspension Directive identifies predatory pricing as one of the anticompetitive practices which the Directive was aimed at curbing. Other relevant abuses include exclusionary pricing (typically by selling below cost) and cross-subsidization.

4.3 What is the Theory of Harm?

A candidate justification for the Directive would appear to be based on the assumption that bigger operators such as MTN and Globacom are pricing and supplying data below the cost of

[9]Smile Communications - ~~₦~~0.84k/MB, Spectranet - ~~₦~~0.58k/MB and NATCOMS (NTEL) - ~~₦~~0.72k/MB.
[10]supra note 1.
[11]Nigerian Communications Commission "Determination of Dominance in Selected Communications Markets in Nigeria"Available at: <http://www.ncc.gov.ng/docman-main/legal-regulatory/legaldeterminations/365 determination-of-dominance-in-selected-communications-markets-in nigeria/file> (Accessed 4 July 2017).

supplying data service at acceptable quality levels and that, by so doing, they are implementing a predatory pricing strategy with the aim of frustrating smaller operators until they are eventually forced to exit the data market and impede potential suppliers from entering the market.

The theory would further be that big operators are sustaining their below-cost pricing in the data market ("secondary Market") by using profits from the market for voice calls ("primary Market") to offset the losses they may be incurring in the secondary market, making them culpable for cross-subsidisation. Smaller players are not present in the primary market, and they are generally new entrants in the telecommunications industry. For this reason, they will be at a disadvantage as they have no alternative market from which to cross-subsidize in order to match the price offered by big operators for data. Big operators would therefore not be competing "fairly"

Although consumers in the secondary market would in the short run enjoy low prices, in the long run customer welfare will be jeopardized because (i) under-pricing will inevitably lead to low quality of service; and (ii) big operators are likely to increase data price after they succeed in squeezing out smaller competitors from the data market and creating a price barrier to impede the ingress of "new entrants" to the market.

4.4 Why was the Directive Flawed?

In this author's opinion, the Directive was flawed for two major reasons: (i) speculative market regulation; and (ii) the seeming assumption that there cannot be fair competition in the data market without smaller operators.

4.4.1 Speculative market regulation:

Best practices in market regulation dictate that price regulation should be a last resort and must be justified, typically by concrete information on the cost-basis for pricing in the relevant market or evidence of anticompetitive pricing**.** By the Directive, NCC attempted to introduce the price floor "pending the finalisation of the study on the determination of cost-based pricing for retail broadband and data services in Nigeria."[12] Therefore, NCC admits that it had not determined the cost basis for pricing in the data market at the time it issued the Directive. In other words, the low prices charged by big players like MTN and Globacom may very well be above costs (like NCC, we do not know), in which event big operators might very well be competing fairly.

In the absence of information providing the cost bases for pricing, there can hardly be any justification for interfering with price competition, more so where this amounts to the imposition of higher prices on consumers. Any such move would amount to jumping the gun.

[12]'Exclusive: NCC directs mobile operators to increase data tariffs' *The Cable* 28 November 2016. Available at: https://www.thecable.ng/exclusive-ncc-directs-mobile-operators-increase-data-tariffs (accessed 4 July 2017).

4.4.2 There can be Fair Competition without Smaller Players, provided there are Capable Contenders

It would appear from NCC's move that, should the prevailing market price be technically above cost (including a fair return on investment), NCC would still think it necessary to impose a price floor if it does not consider the above-cost margin for return "attractive" enough to (i) keep smaller operators in the market; or (ii) attract new entrants. Such a regulatory disposition would, in this author's opinion, be based on the flawed assumption that there cannot be fair competition or a healthy level of consumer welfare if the only operators left to compete in the market are big operators, leaving a highly concentrated data market.

While it is ideal to have a market with low concentration, this state of affairs should not be "forced" on the market because to do so will risk (i) encouraging inefficiency on the part of smaller operators; (ii) making the consumers "subsidize" the operating cost (and possible inefficiency) of smaller operators, which will be inimical to the ultimate goal of market regulation - consumer welfare.

Nigerian consumers enjoy low prices for data. This is prima facie (although not conclusively) an indicator of consumer welfare. This state of affairs can be preserved even if only big operators are left to compete in the market, as long as NCC keeps a close eye on them to prevent a further concentration of the market (e.g. by a merger) or any collusive behaviour (such as price fixing agreements, agreements to fix conditions of sale, and other cartel

behaviour). The Big Four (MTN, Etisalat, Airtel and Globacom) are near-equal contenders in terms of market share. Therefore, unless (i) two or more of them later collude to fix high prices or (ii) one or more of them leaves the market, there is no reason why consumers will not continue to enjoy low prices resulting from price competition by the big contenders.

5.0 CONCLUSION

NCC took the right step in suspending the Directive. Its responsiveness should be commended. Although, NCC has powers to regulate tariffs under the NCA, nothing short of empirically-determined information regarding costs for broadband and data services should justify any further attempt at price regulation in the data market. In summary, the Directive exemplified the need for a coherent and consistent competition law / market regulation Policy.

Further, and beyond the telecoms industry, there is need for objective mechanisms for information gathering in the Nigerian market regulatory sphere. It is only on the basis of credible information that a market regulator can rightly discharge its regulatory obligations, especially with regard to sensitive market elements such as price regulation and the determination of market share. Hopefully, these warnings will be heeded by the new multi-sector competition regulator which the Federal Competition and Consumer Protection Bill seeks to establish.

The Women of Nigeria: Problems, Panacea and Prospects

Olabode Akindele*

1.0 INTRODUCTION

Historically, the role and status of women in Nigeria have continuously evolved.[1] In the pre-colonial period, women played quite paramount roles in the trade, social, political arena, they largely contributed to the household income via engaging in many economic activities like food processing, mat-weaving, pottery-making especially in Afikpo now Abia State, weaving, fish-drying (especially in the coastal areas of Calabar, Oron and the Niger Delta). Women increasing success in trade, availed them chieftaincy titles such as the *iyalode* titled amongst the Yoruba clan connoting being in the position of greatness, privilege and power,[2] but that is not to state that they didn't have challenges, even during colonialism, the active roles they played began to whittle down. Apart losing their economic status, political and administrative relevance; civilization amongst Nigerian people, indicated several unconsidered issues, which has been at the forefront of national and international affairs. Some of these issues includes violence against women, child marriage, the role of women in Politics, Education of the Girl Child amongst others.

* Third Year Student at the Faculty of Law, University of Lagos

[1] T. Falola, 'The role of Nigerian women Encyclopedia Britannica' *Encyclopedia Britannica, Inc*. November 20, 2007<https://www.britannica.com/topic/role-of-Nigerian-women-1360615> (accessed 27th December 2016)

[2] S.E. Attoe, 'Women in the Development of Nigeria Since pre-colonial Times' <http://www.onlinenigeria.com/links/adv.asp?blurb=150#ixzz4U3ObefGv> accessed 27th December 2016

It is based on this premise that this paper seeks to examine these issues faced by women in Nigeria, with an appraisal of the Panacea and Prospects.

2.O VIOLENCE AGAINST WOMEN

Violence against women is defined as any act of "gender-based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of acts such as coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[3] Reports reveal "shockingly high" level of violence against women, Project Alert (2001), in a survey on violence against women conducted interviews with women working in the markets and other places of work and girls and young women in secondary schools and universities, in Lagos State, Nigeria. 64.4% of 45 women interviewed in the work place said they had been beaten by a partner (boyfriend or husband), 56.6% of 48 interviewed market woman admitted experiencing such violence,[4] caused by the Patriarchy nature of the Nigerian society which allows the domination of women by men and therefore puts the men as the head of the family with the authority of determining the roles women play. The culture of silence amongst women remains a contributory factor, inadequate implementation of laws on gender violence.

[3] United Nations General Assembly, 1993. A/RES/48/104 85th plenary meeting 20 December 1993
[4] Ibid

3.0 CHILD MARRIAGE AND EDUCATION OF THE GIRL CHILD

This is basically marriage before the age of 18 years which is recurrent amongst women. In Nigeria, 43% of girls are married off before their 18th birthday. 17% are married before they turn 15. The prevalence of child marriage varies widely from one region to another, with figures as high as 76% in the North West region and as low as 10% in the South East.[5] Poverty, poor educational attainment and strong social and religious, traditions are drivers of child marriage in Nigeria. For many poor families, marrying off their daughter at an early age essentially is a strategy for economic survival; it means one less person to feed, clothe and educate.[6] Early Education is a strong indicator of whether a girl will marry as a child. 82% of women with no education were married before 18, as opposed to 13% of women who had at least finished secondary education.[7]. Educating the girl child only tool with which a girl or a woman can empower herself and eventually her family and the immediate society. This can be achieved by ensuring that the education of women is a constitutional right in Nigeria like the practice adopted in India.

[5] Child marriage around the world, <http://www.girlsnotbrides.org/child-marriage/nigeria/>accessed 22nd January 2017

[6] Addressing Child Marriage, <http://www.wharc-online.org/publications/wharcs-montly-update/addressing-child-marriage/>accessed 22nd January 2017

[7] Child marriage around the world, n5

4.0 WOMEN AND THE ECONOMY

In today's world where various countries strive for globalization, paying attention to the opportunities offered by the global market is very paramount. To do this, there is the need for countries to fight the ills of gender inequality which remains a cause. Where gender inequalities constitute barriers to women entering or participating fully in markets, economic growth and private sector development will be constrained with less investment, less competition, and lower productivity. Gender inequalities can also adversely affect the outcomes of trade and macroeconomic policy reforms and their ability to translate incentives into economic development.[8] Nigeria still falls short of the desired result of giving males and females' equal opportunities and equal access to opportunities to advance socially, economically and politically,[9] largely because of the lack of Investment in the human capital, health and education, of women and girls. The issue of job discrimination still exists, some employers assume that female employees are less dependable than male employees.[10] It happens during the hiring process when men are hired instead of women with equal abilities and experience, can be in form of sexual harassment when a woman or man is not taken seriously and is regarded as a sex object, or in form of employment benefits such

[8] Okoyeuzu, Chinwe, Obiamaka, Egbo, Onwumere, J.U.J, 'Shaping the Nigerian Economy: The Role of Women' AUDOE, Vol8, no4, pp.15-24 accessed 24th January 2017

[9] Ibid

[10] L. Iberiyenari, 'Gender discrimination in the workplace: are women sufficiently protected?' <http://www.thelawyerschronicle.com/gender-discrimination-in-the-workplace-are-women-sufficiently-protected/>

as the amount of training or vacation a male or female employee receives.[11]

5.0 WOMEN AND POLITICS

Over the years, the role of women in politics has been on the rise, before independence, a couple of women were political activists such as, Mrs. Margaret Ekpo, Mrs. Janet Mokelu and Ms.Young who were members of the Eastern House of Assembly. The late Mrs. Funmilayo Ransome-Kuti, though not a full-fledged politician, was a very strong force to reckon with in the politics of the Western Region. And Hajia Gambo Sawaba waged a fierce battle for the political and cultural emancipation of women in the North. One can say that women have always played viable political roles in Nigeria, yet there is inherently a pronounced level of under representation of women in politics when compared with their male counterparts.[12] This is often met with challenges they face like bias against women candidacy, highly competitive environment, inadequate funding for electioneering. For there to be meaningful development, a vantage position should still be accorded the women, as they constitute larger proportion of the population. In this regard, they should not be left out in the issues of decision making that bothers even on their lives as a people.[13] It can be ensured that granting greater support to women to hold political positions.

[11] Ibid
[12] R.K. Gonyok
[13] Ibid

6.0 WOMEN'S RIGHTS AND GENDER EQUALITY

The gender inequality has brought about uneven development within the country. Reports show that "Nigerian women have about the worst representation of 5.9% in the national legislature when compared to most other African countries example Uganda (34.6%), South Africa (43.2%), Ethiopia (27.7%), Cameroon (20%), Niger (12.3%) and DR Congo (8.0%)". The issue being that women in Nigeria face a lot of odds when they contest against men.[14] These shortcomings had made the country strive to establish policies that will reduce gender inequality. Nigeria took a bold step in the year 2000 when it adopted and passed into Law National Policy on women guided by the Global Instrument on the Convention of all forms of Discrimination against Women (CEDAW).

7.0 PANACEA AND PROSPECTS

As established that the rate of violence on women is still very high, it is imperative that the state make the laws on women violence stiffer and ensure that there should be proper implementations of these laws. In doing this here is need to take into consideration the peculiar circumstances of women living under different economic, religious and cultural backgrounds.

[14] Olurode L (2011). In the paper titled: State and political participation. Gender Analysis of Nigeria, 2011 Elections

Without such consideration, new laws and policies may not enhance access to justice and enforcement of rights of women. [15]

In addition, ensuring equal access of woman and man to important resources and reduce extreme poverty among women including ensuring gender equitable access to capital and medium large scale investment opportunities; Eliminate all discriminatory practices against the employment of women in the public and private sectors of the economy. The implementation of policies which allow women reconcile their private and professional life will go a long way in reducing the gender parity between men and women in the labour force. Policies and developments affecting the informal sector must have a gendered effect.[16]

To forestall this obnoxious practice of child marriage, there is a need for the government to codify provisions to protect girls against forced marriage in customary and Sharia law and to sensitize community judges in those systems, because of continued resistance to provisions against forced marriage in penal law. This will help women ad girl attain a considerable educational feat. Every girl that receives an education is more likely to make education a priority for her children. It's a ripple effect of positive change in the community and country.

[15] Itoro Eze-Anaba, 'Domestic Violence And Legal Reforms In Nigeria: Prospects And Challenges' <http://law.bepress.com/cgi/viewcontent.cgi?article=6857&context=expresso>
[16] A. Rahman, 'Nigeria In Focus; Women's Empowerment and The Link to Sustainable Development' JMSUL. Accessed January 26, 2017

8.0 CONCLUSION

Just from the inception of this focus on the Nigerian women, some very factors keep reoccurring as the challenge that women and girls face in the country. The most reoccurring includes low levels of education, inadequate governmental policy and legislation on women's rights, discriminatory practice against women. Having identified the problems, it becomes sacrosanct that all stakeholders within the country strive to ensure that the highlighted challenges are tackled by employing institutional frameworks, policy framework, paying attention to the potentials in the Nigerian women.