UNILAG LAW REVIEW

Vol. 3 No. 2 December 2019

UNILAG LAW REVIEW

VOLUME 3, NO. 2 (2019)

Published by:

The University of Lagos Law Review (UNILAG Law Review).

The UNILAG Law Review is a flagship publication of the University of Lagos, Law Students' Society. It is the foremost platform for legal discussion and scholarship for all stakeholders in the legal profession. The UNILAG Law Review is published online and in print - in two issues every year.

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EDITOR'S NOTE

It is with profound joy and a sense of fulfillment that I present the third edition of volume two of the Unilag Law Review. Since its inception, the Unilag Law Review has thrived to promote top-notch scholarly writings and improved access to knowledge for all and sundry; and this publication is a testament to this fact.

We are particularly thrilled with the diversity in the brilliant perspectives in the different articles on a plethora of subject-areas, which cut across legislations, jurisdictional issues and constitutional concepts from the finest minds in the legal profession. This suitably captures the miscellany of academic backgrounds and experiences on which the Unilag Law Review operates, as these articles reflect the extent to which the Unilag Law Review embraces a multidisciplinary outlook in its modus operandi.

I would therefore use this medium to thank the Editorial Board which worked tirelessly in reviewing manuscripts towards ensuring that the finest articles are contributed to legal scholarship; the faculty for its support and its guidance, most especially through our staff adviser-Professor I.O Bolodeku who refined us to first-rate editors with his constant teachings. I also thank all the authors for their contributions to this volume; we sincerely cannot wait for others to find their work as riveting as we did.

The diversity and brilliance in this issue is a pointer that the future of our legal profession is in safe hands. To this end, our readers should avail themselves the firsthand opportunity of adding to their arsenal of legal knowledge the finest artillery there is

Ayotunde Kayode-Dada
Editor-in-Chief '19

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AN ENQUIRY INTO THE APPROPRIATENESS OF A GENERIC APPROACH TO THE CONCEPTS OF DEMOCRACY, FEDERALISM AND NATIONAL UNITY*

Professor Fabian Ajowu, SAN, FCIArb*

ABSTRACT

The success of every state is inseparably linked to the method adopted by such state to govern its affairs. Democracy in its ideal form no doubt offers the best method of governmental system for the management of national resources, human capital and economic growth. Likewise, Federalism has been appreciated as a suitable system of government designed to influence holistic rapid growth among the federating units as well as the central authority. It is also undisputable that National Unity is essential for the success of any nation. However, the supposed existence of the principles of Democracy, Federalism and national unity in a country is by itself insufficient to birth good governance. This paper seeks to analyse the concepts of Democracy, Federalism and National Unity and to make a case for the establishment and implementation of tailor-made principles adopted to fit the peculiarities and complexities of the Nigerian system.

1.0. INTRODUCTION

The concepts of Democracy, Federalism and National Unity are key concepts of national integration and the foundation of progressive policies and any country operating outside of any of these concepts is often regarded by the rest of the world as primitive, uncivilized and inept. The popular definitions of Democracy suggest that such a regime has at least universal adult suffrage; recurring, free, competitive and fair elections; more than one political party; more than one political party; and more than one source of information.[1] Federalism

* The paper "An Enquiry into the Appropriateness of a Generic Approach to the Concepts of Democracy, Federalism and National Unity" was delivered at the Professor A. B. Kasunmu (SAN) 9th Annual Lecture, Faculty of Law, University of Lagos, 11 July 2019.

* Professor Fabian Ajogwu SAN FCIArb (with the assistance of Associate Counsel at Kenna Partners: Gboyega Oyewole, Chinonye Nnaji and Sotonye Belowu).

[1] Learnado M., "'Good' and 'Bad' Democracies: How to Conduct Research into the quality of Democracy", Journal of Community Studies and Transition Politic, (Online Journal), 2006, available at:

on its part is a pillar of Democracy that propagates a system that embraces the idea of policy implementation based on negotiation between component units of a whole, whilst[2] National Unity is clearly a national aspiration yet to be attained in Nigeria.

There is a tendency to adopt a generic or a graded approach to Democracy by developing polities aimed at managing the implementation of the concept or for purposes of maintaining control, however, according to Schmitter,[3] the assumption that all or most neo–democracies are of inferior quality is wrong. A generic approach to Democracy is an adoption of the concept hook, line and sinker, without a consideration of the people to which it is meant to apply, and their peculiarities which leads to a state of affairs so strange that it cannot be regarded a Democracy. It is for this reason that the practice of Democracy in some countries is not the same with the practice in other countries.[4]

1.1. Democracy

Following its independence in 1960, Nigerians became the fourth biggest democratic country in the word. The idea of Democracy (a word that comes from the Greek "Demos Kratos", meaning "people's power") already existed in ancient Greece.[5] In the polis, the Greek citystate, male citizens had the right to participate in decision-making processes from the age of 30.[6]

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http://www.rsa.tandofonline.com/doi/full/10.1080/13523270410016870 82?scroll=top&needAccess=true#.XLUUHUago-w5 (accessed 15 April 2019).

[2] Encyclopedia Britannica, "Federalism", Encyclopedia Britannica (Online Encyclopedia) 2019, available at: http://www.britannica.com/topic/Federalism (accessed 15 April 2019).

[3] P.C. Schmitter, "The quality of Democracy: The Ambiguous Virtues of Accountability", available at: https://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/Accountability.pdf (accessed 15 April 2019).

[4] D. Coller and R. Addock, "Democracy and Dichotomies: A Pragmatic Approach to Choices and Concepts" 2 (1999) *Annual Review of Political Science*, pp. 537-565.

[5] S. Baurer, "Democracy on the Edge", Opinion, available at: https://www.thenewfederalist.eu/Democracy-on-the-edge (accessed 15 April 2019).

[6] *Ibid.*

Since then, Democracy has evolved to become perhaps the most effective form of government in offering power to the people and involving them in decision-making. Perhaps the most pivotal point in the development of Democracy in history was the French revolution of 1789, which was sparked by concepts that can be regarded as the foundations of the principle of Democracy that is, "Freedom, Equality and Fraternity". The revolution brought an entire nation to a halt and resulted in needed political and social changes in France and in the whole of Europe.[7]

The revolution ended in 1799 and the French people approved the first democratic constitution in Europe.[8] It should be noted that the revolution was birthed by a perceived need by the French people to free the nation from the "illegitimate" control of the aristocracy and the clergy. Modern Democracy as we know it especially as practiced in France was conceived through hundreds of years of civil unrest and bloodshed, and perhaps the conception of the French Democracy through this bloody process accounts for the wide acceptance of the concept and its applicability to the French people. It is a system that has been developed by them to suit their peculiar needs. Today there are several versions of Democracy some of which betray the foundational principles that made the concept acceptable to the early practitioners.[9] A good illustration of this point is seen in several "democratic" dispensations in States that fail to ensure free and fair elections, or fail to ensure a minimum level of civil rights and the actions of the States that fall into this category are usually undemocratic.[10] An ideal Democracy is first and foremost a broadly legitimated regime that completely satisfies citizens.[11] As an ideal

[7] *Ibid.*

[8] There are divergent opinions as to the First Constitution in Europe with a number of scholars holding the opinion that the Polish Constitution of 1791 was indeed the First Democratic Constitution in Europe.

[9] *Supra* n 1.

[10] See for instance the Restriction of the freedom of expression and media if the people in Uganda. See Freedom of Expression, "Time is up: Uganda in Court over Internet Shutdown that Violate Human Rights" (2018) *Freedom of Expression* (Website), available at: http://www.acessnow.org/uganda-in-court-over-internet-shutdowns/ (accessed 3 March 2019).

[11] *Ibid.*

practice, the political authority and power in any democratic dispensation must be vested in the people who either directly or indirectly organize themselves to form the government of the day. The decisions of a true democratic state must reflect the views of the majority while still allowing for minority expressions. Accountability and transparency of the activities of government, respect for the rule of law, the independence of the Judiciary, the existence of a multi-party system and civil tolerance for opposition all constitute the true hallmarks of a proper Democracy. It must be noted that all other attributes that constitute a good practice of Democracy would automatically come into play when the idea of popular representation, which is the most important hallmark of Democracy, is manifest.

1.2. Federalism

Federalism is a constitutional mechanism for dividing power between different levels of government so that the federated units can enjoy autonomy over certain policy areas while sharing power in accordance with agreed rules over other areas.[12] In a Federal state, power is shared between the central government and the governments of the constituent units (at least two) which have specific powers/competencies (legislative, executive and judicial) to be granted by the Federal Constitution.[13] Federalism is primarily intended to prevent centralization of powers in a single central government, which may ultimately lead to tyranny. An ideal practice of Federalism is intended to bring the government closer to the people, thereby making the government responsible and accountable to the citizens. Federalism undoubtedly paves way for rapid growth and development among component states and the nation as a whole. The idea of granting autonomy to component states fosters healthy innovations and development in each of these states. Federal systems are usually associated with culturally diverse or territorially larger countries.[14]

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[12] E. Bulmer, "Federalism and International IDEA Constitution – Building Primer 12" (International Idea: Stockholm Sweden) 2015, p. 3.

[13] K. M. Erato, "Understanding Federalism" (2015) (Online), available at: http://www.europarl.europa.eu/cyprus/resource/static/files/understanding-federalism--advantages-and-disadvantages.pdf (accessed 23 April 2019).

[14] *Supra* n 1.

Notable examples of federal countries include Argentina, Belgium, Brazil, Canada, Germany, Malaysia, Nigeria[15] and Pakistan.

The idea of federalism appears to have been a common pattern of British administration of peoples who though are occupying areas geographically contiguous, have so many other things in diversity that only separate governments could have been the answer. Among the several necessities for a true federalism are – the desire to have a common national defence, and the hope of economic advantage from the union. The federating regions all had their respective strengths in particular produce, and effectively competed with one another, and in the process of competition, they created wealth. Economic activities were at the pace of the peoples of the regions. Eastern Nigeria had its strengths in palm produce, the North produced groundnuts, the West, mainly cocoa, and the Delta areas produced rubber.

The origin of the federal system in Nigeria can be traced to the amalgamation of the Northern and Southern Protectorates in 1914. The federal structure began to form in 1939 under Sir Bernard Bourdillon who divided the Southern Protectorates into two. The Richards and Macpherson constitutions of 1946 and 1951 respectively only created a decentralized unitary system. The practice of federalism in Nigeria was officially adopted through the Lyttleton Constitution of 1954 as it was the first genuine federal constitution of the country. The constitution was introduced due to the crises generated by the Macpherson constitution, especially the motion of self-government, and the Kano riots of 1953. These events convinced the colonial administration that considerable regional autonomy must be granted to the regional governments and that only federalism could hold the Nigerian peoples together.

Nigerian federalism became consolidated at independence, and since then, it has been operating in both political and fiscal contexts, a far cry from the ideal practiced in other countries. Historically, Nigeria's federal system has swung between the excessive regionalism that

[15] *Ibid*, here the author also mentioned that some countries operate systems of government having characteristics of Federalism or a quasi-Federalism but not full Federalism.

marked the First Republic (1960 – 1966) and the excessive centralization of the military, and relatively, the post-military era. Nigerian federalism overtime has also undergone structural changes by which the federation moved from its initial three-region structure at independence to a four-region structure by 1964, and to its current thirty-six states structure including seven hundred and seventy - four local governments. These changes have been necessitated by the agitation of the minority regions for a system of government which would give them a sense of belonging. However, these changes have increased imbalances in the Nigerian federation as exemplified in continued centralization and concentration of power at the centre with its attendant consequences. State and local government creation exercises have helped to spread development across the country to some extent.

The Federal system of government was adopted in Nigeria as a mechanism for managing the plural ethnic groups and regions where each region ought to optimize its richness without the fear of being marginalized, have a sense of belonging in the nation to which it owes its allegiance. The benefits of such competition among the regions were to be found in the industrial development that followed shortly after independence. The Ikeja Industrial Estate in the West, the Kaduna Textile industry in the North, and the Aba factories, are apt examples. The Nigerian economy between 1957 and the outbreak of the civil war experienced an annual growth rate of over 3%.

1.3. National Unity

National Unity denotes solidarity amongst the citizens of a nation, with minimum sectorial practices and close adherence to law and order. National unity, however, does not imply homogeneity, rather, it advocates a "community of communities" which respects diversity in values, experiences and beliefs among the different sects that make up a nation. National Unity is essential in maintaining a harmonious and functional society which leads to economic development and ultimately to an elevated standard of living; decreased poverty rates and income disparity, benefiting the populace as a whole.

In considering national unity, one must consider that attachment and allegiance to ethnic and cultural groups are universal phenomenon of civil societies. In Nigeria, these appear to have so undermined national consciousness and solidarity that it had in the past been difficult to replace the negative aspects of these feelings with a positive feeling of common identity, a shared community sentiment and a common sense of patriotism and nationalism. Many have suggested that what is needed is a rising above these parochial bases of allegiance to integrate on the basis of common interests for the better good of the society, and which unites them against executive excesses that threaten that common good.

2.0. STATE OF PLAY; NIGERIA – A GENERIC APPROACH TO THE CONCEPTS IN ISSUE

The Nigerian Federation has always had peculiar features; the most evident being that it was not created by the coming together of separate states but was the subdivision of a country which was in theory being ruled as a single unit. The amalgamation of the Northern and Southern protectorate into one single entity called Nigeria was merely created by the colonial masters to bring under a single control the diverse nationalities and ethnic groups for administrative convenience. Bearing in mind the ultimate motive for the creation of the Nigerian state, the amalgamation invariably ushered in a state comprising of parallel entities having fundamentally divergent ideologies.

Following Nigeria's independence, problems with our governmental structure were made manifest. It was as if colonialism was the glue that stuck the various ethnic groups together into a shape recognisable in an atlas. When the glue dissolved and gave way to independence, many of the units started to fall apart. How to transform these groups/regions into a nation in the strict sense of the word seemed to be a problem. It is the problem that in the past provided the "excuse" for the disturbing phenomena of coups and secessions, which had at some point characterised the government of Nigeria. Coups and secessions are no doubt manifestations of assault on federalism and the civil society as they inflict serious problems on the values and ethos

of society by debasing institutions that are meant to strengthen leadership and accountability to the people.

Like every other Federal state, Nigeria has a vast land mass inhabited by several ethnic groups, within several regions all "united" as a nation. It is without doubt that the heterogeneity of the beliefs, norms, culture and value system of the people poses as a thorn upon which federalism thrives. Nevertheless, there is the need to focus on the "common good" which in effect is the bedrock of federalism. With these fundamental peculiarities that surround the existence of Nigeria as a sovereign state in mind, the attendant problems that accompany the adoption and subsequent application of several principles of governance (Democracy and Federalism) in their pristine form without adjusting such principles to fit the peculiarity of the Nigerian existence are laid bare, and these have undermined and counteracted the very intendment of these principles of governance. In relation to our democracy; in 1999, the last Nigerian Military government was replaced by a representative Democracy, and Nigeria has since enjoyed about twenty years of uninterrupted democratic practice.

Notwithstanding this feat, the challenges that have threatened Nigeria's Democracy have remained recurrent and have grown over the years. The practice of Democracy in Nigeria has been largely criticized as being fraught with corruption, illiteracy, lack of awareness, bad and unaccountable leadership etc. The existence of these challenges notwithstanding, it is argued that the foundational premise upon which the Nigerian existence is structured poses the major and ultimate reason for Nigeria's anti-democratic disposition. Nigeria is a multicultural state characterized by a wide variety of religious, ethnic and cultural beliefs. The division of the country into various regions with each region possessing some unique peculiarities account for the fundamental complexity of the Nigerian system. The different regions and tribes contained the Nigerian nation differ distinctly in values and culture including religion, perceptions on leadership, education, marriage, etc. and these differences are glaring.

The question of whether a generic approach to the examined concepts of Democracy, Federalism and National Unity must therefore be asked

as it is becoming clear all that the generic adoption of these concepts and its application to the Nigerian state has not brought about the desired effects. In other words, the generic approach to these concepts as far as Nigeria is concerned is a flawed approach.

The generic approach to Democracy for example simply requires that a candidate in an election secures the majority of lawful votes cast by the electorate to be declared the winner of the election. Having already established the differences in values of the various regions, common sense would dictate the regions averse to polygamy and with the lower population would always be at a disadvantage and have limited participation in the decision-making process which is the hallmark of a constitutional Democracy. Furthermore, the Federalism practiced in Nigeria today is a far cry from the true concept of Federalism. The states of the Nigerian federation have little autonomy and the constitution clearly enthrones the federal government with exclusive legislative powers in all the more important areas of legislation while appropriating all the natural resources to the Federal Government.[16]

National unity denotes a sense of oneness and harmony amongst the tribes and nations of Nigeria. It is a concept that tries to solve the multicultural differences of the Nigerian people by emphasizing their common patriotism and citizenship. The Nigerian National unity is a precious thing that when protected could increase national progress, reduce friction and increase growth. A great challenge today in Nigeria, however, is the threat to national unity, as centrifugal tensions, resource control and self-determination, ethnicity based identity politics and religious cleavages have enveloped national consciousness. Since Nigeria's independence in 1960, national integration has been a top priority of governments in Nigeria. The National Youth Service Corps (NYSC) scheme, the Unity Schools, the Federal Character Principle, and State Creation are examples of state

[16] See Section 44(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The Land Use Act Cap L5 LFN 2004, which confers all powers with respect to land allocation and distribution to the state, may be the only legislative document in Nigeria that recognizes a complete federal structure.

policies intended to achieve this goal. Despite these policies, the outcome of National Unity in Nigerian has become a Utopian concept.

3.0. A CASE FOR THE DEVELOPMENT OF TAILOR MADE INSTITUTIONS AND SYSTEMS: DEMOCRACY AND FEDERALISM IN THE UNITED STATES OF AMERICA

If systems that take into consideration our peculiarities as a people are not put in place, then National unity would continue to be an unrealized dream. Particularly as regards Democracy and Federalism, we must analyse our similarities and differences, and create a system that is unique to Nigeria and that meets our needs as a diverse nation. The United States of America is a prime example of a nation that recognized and identified that its people were a diverse group like Nigeria is, and as such have developed systems over the years that take into consideration the diversity and differences of the American people.

3.1. Democracy in the United States of America

The birth of Democracy in the United States of America can be traced to the American Revolution that took place between 1765 and 1783 when the nation's independence was won from Great Britain. Many scholars postulate that the essence of the American Revolution was never the creation of Democracy, but the protection of the rights and liberties of the American people, however, Democracy was born.[17] Others believe that the true birth of American Democracy was upon the first peaceful transfer of power in from George Washington to George Adams in 1797.[18] Whichever the case, over several years,

[17] G. S. Wood, "The Origins of American Democracy, or How the People Became Judges in Their Own Causes" (1999) The Sixty-Ninth Cleveland-Marshall Fund Lecture (Online), available at: https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1487&context=clevstlrev (accessed 22 April 2019).

[18] J. Stromberg, "The Real Birth of American Democracy" (2011) (Online), available at https://www.smithsonianmag.com/smithsonian-institution/the-real-birth-of-american-democracy-83232825/ (accessed 22 April 2019).

Democracy in America has developed in leaps and bounds into what it is today.

Perhaps the most important feature of any democratic dispensation is the electioneering process. The electioneering process determines how the electorate choose their leaders; the ultimate exercise of legitimate political power enshrined in the people by the Constitution. The present electioneering system in the United States of America is a product of design and experience. Recognizing the diversity of the American people in the component states that make up the American Federation and identifying the need to afford all peoples (Majority and Minority groups) the opportunity to participate in self-governance, the Electoral College system was created. The Electoral College system is a process created by the American constitution whereby the people choose "electors", and these electors in turn elect the President of the United States of America. There are very minimal restrictions as to who can be chosen as an elector, suffices to say that by virtue of the American Constitution, an elector should not be a Senator or Representative or person holding an office of trust or profit in the United States.[19] Each state of the federation has the mandate of selecting its own electors.

The political parties first choose their electors prior the election, and on election day, when the voters in each state cast votes for the Presidential candidate of their choice they are voting to select their state's Electors. The electors for the political party that wins the majority of votes in the Presidential election are appointed as the state's Electors.[20]

Each state is allocated a number of electors equal to the number of its U.S. Senators (always 2) plus the number of its U.S. Representatives which changes each decade according to the size of each State's population as determined in the Census. The Electoral College system as described above has stood the test of time ensuring that self-

[19] Article II, Section 1, Clause 2 of the US Constitution.

[20] US, GOV. About the Electors (2018) (Online), available at: https://www.archives.gov/federal-register/electoral-college/electors.html#selection (accessed 22 April 2019).

governance is truly actualized and that all persons can participate in governance. Although the adoption of the exact same system in Nigeria is not advised, the learning point here is that it is possible to develop a system that affords equal participation to all groups (minority and majority) in the Nigerian Democracy.

Using the American electioneering system as a prototype, a Nigerian system that affords for representative balloting as the essential factor in the election of the President is a viable alternative to what is presently obtainable. Presently, each state of the federation has 3 senators in the Senate, which could be the same number of electors for each state, coupled with a number of electors depending on the population of the states. A system along these lines would result in a total of about 468 electors across the federation spread evenly across the states and regions. Not only would such a system ensure that there is equal participation not to the disadvantage or detriment of any group, but this will also make for more efficient elections and less controversy.

3.2. Federalism in the United States of America

The adoption of the 1787 Constitution the United States of America established the concept of Federalism into the country's system of governance. While modern Federalism's roots are referenced to the United States, the practice of Federalism has significantly evolved over the years to suit the peculiarities of the American system at any given time. Federalism in America is hinged on the doctrine of shared sovereignty, which is a constitutional division of powers between the U.S state governments and the Federal Government. The constitution of U.S is structured to give more legislative powers to the States than the Central Government.

The advantage of this type of Federalism is to allow for more participation of the citizenry in governance as opposed to having an all- powerful centre which can only accommodate a few persons and in the long run becomes closely associated to tyranny. The system of Federalism practiced in the United States of America is one that significantly allows for unity without uniformity given the practice that allows states to develop their codes of governance largely premised

on the peculiarities and resident concerns of the individual states. States are thus allowed to develop independently within the prescribed constitutional boundaries National politicians and parties do not have to iron out every difference on every issue dividing the country, significant issues relating to abortion, same-sex marriage, gun control, capital punishment, welfare financing, or assisted suicide are debated in state legislatures, county courthouses, and city halls.

Georgia, for example, was the first state to permit 18-year-olds to vote; Massachusetts created one of the first state programs to provide health insurance to all its citizens. Similarly, on the issue of legalization of abortion, despite the revered decision of the U.S Supreme Court legalizing same, by the instrumentality of the practice of proper Federalism, states such as Kentucky and Mississippi have over the years gone further to restrict access to abortion by placing a ban on abortion after a six-weeks period known as the "heart-beat" ban. This development has been made possible through the adoption a system of Federalism allowing for independent development of states in order to enact policies suited to fi t their peculiarities.

The American Federalism is perhaps the closest prototype for true Federalism. Nigeria has to follow suit by decentralizing power by giving the component units more freedom to legislate on issues of importance, thereby allowing these component units to address their individual needs.

4.0. CONCLUSION

The success of every state is inseparably linked to the method adopted by such state to govern its affairs. Democracy in its ideal form no doubt offers the best method of governmental system for the management of national resources, human capital and economic growth. Likewise, Federalism has been appreciated as a suitable system of government designed to influence holistic rapid growth among the federating units as well as the central authority. The above is largely due to the pristine intendment of these concepts as they were originally designed and developed to ensure visible, practical and inclusive governing. A proper and efficient practice of these systems in line with state peculiarities undoubtedly would foster national

development, thereby making national unity inevitable. Nigeria being a country which is fundamentally shaped by unique peculiarities dating back from her amalgamation must rise above the mere practice of principles of governance in their generic form but rather be inclined towards developing principles which would best fit into its peculiarities if the inevitable and recurrent challenges that threaten Democracy, Federalism and National Unity must cease.

TORTS IN THE CONFLICT OF LAWS OF A FEDERATION: A COMPARATIVE ANALYSIS OF NIGERIA AND THE USA

Abdurrazaq Abbas*

ABSTRACT

This work focuses on a dimension of conflicts of laws that is tort in interstate conflicts of laws. The inability of Nigerian courts to properly apply the double actionability rule has led to a number of erroneous decisions, which has left a dark cloud over Nigerian decisions in this area of law. Some popular cases have been given a close look to point out the fallibility of Nigerian courts in determining the dichotomy between choice of law rules and choice of jurisdiction rules. This paper then turns to examine the rules applied in the United States of America, to draw from their experience and not just bring about better decisions in this area of conflict of laws, but also suggest reforms in future legislations.

1.0. INTRODUCTION

The *raison d'etre* of this paper is to examine the problems of torts in interstate conflict of laws in Nigeria and juxtapose our legal system with what holds sway with the United States of America, and pick out lessons from the progress the U.S.A. has made in that area of conflicts of laws. This article will study the scope of Private International law, delineate the differences between choice of jurisdiction and choice of law rules, which seems to be the area Nigerian courts keep making flawed decision, and have a look at the trends in both Nigerian and the American legal systems to see where our laws could advance.

2.0. SCOPE OF CONFLICTS OF LAWS

Frederic Harrison[1] observed the all-pervading nature of private international law to be able to cut across all branches of law without necessarily being contemplated during commencement of a suit. In deciding a case with a foreign element despite the branch of law it may

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[1] F. Harrison, *Jurisprudence and Conflicts of Laws* (Clarendon Press: Oxford, 1919).

fall under, such as bankruptcy, divorce, shipping, etc., a court has to consider three questions:

i. Whether the forum court has jurisdiction to hear the case;
ii. What system of law, be it foreign or local, should apply?
iii. Whether the local court will recognize or enforce the foreign judgment?

2.1. Jurisdiction

The question of whether a court can entertain a case is at the nerve centre of adjudication. The issue of jurisdiction determines whether a forum can conveniently adjudicate over a matter. The basic rule at common law is that a court has jurisdiction over a matter where the defendant was served with a writ of summons or originating process in a place where the court has territorial jurisdiction. In Nigeria, the nationality, domicile and residence of the parties remain immaterial by virtue of Order 8 rule (e) of the High Court of Lagos State (Civil Procedure) Rules 1994, which is *in pari materia* with Order 10 rule 1 (f) of the High Court of Lagos State (Civil Procedure) Rules 2019. Service out of Nigeria of a writ of summons or a notice of a writ of summons may be allowed by the court, or a judge in chambers, where the action is one brought against the defendant to enforce, rescind, dissolve, annul or otherwise effect a contract, or to recover damages or other reliefs for or in respect of a breach of contract made within the jurisdiction.

2.2. Choice of Law

Upon deciding that the court has jurisdiction to hear the matter, it then has to determine which law would govern the case. It is one of the major purposes for the study of private international law to direct the court to the applicable internal law. This is not however to say that such law maybe applicable throughout the entire hearing, as cases may arise where different aspects of the case may be governed by different internal laws. When this has been settled, an expert may then be needed to prove such foreign law to the court.

Generally, it may be said that the court "applies" or "enforces" the foreign law. This is not strictly accurate, as the only law applied or enforced by the forum court is the forum law. However, due to the existence of the foreign element, the forum court has to consider the foreign law. What the forum court tries to do is to create a situation where the right conferred is nearly as similar to what the foreign court would have done.[2]

2.3. Recognition of Foreign Judgment

The Common law rules of England provide that in a situation where the judgement of a foreign court is sought to be enforced in England and assets of the defendant can be ascertained in England, if the foreign court has jurisdiction over the matter then court in England would enforce such judgement. In Nigeria currently, this rule is still followed, only with more qualifications as provided for by the Foreign Judgments (Reciprocal Enforcements) Act. The Act provides that there must be reciprocity of enforcement of judgments with such country, some grounds which foreign judgment may not be enforced under the Act include:

That the judgment is not one to which Part I applies or was registered in contravention of any of the provisions of the Act; or

The foreign court which gave the judgment had no jurisdiction to give it; or

The defendant did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear; or

The judgment was obtained by fraud; or

The enforcement of the judgment would be contrary to public policy in Nigeria; or

The rights under the judgment are not vested in the person by whom the application for registration was made.[3]

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[2] Cheshire and North, *Private International Law: Nature and Scope of the Conflict of Law*, 10th edn, (University of Oxford Press: Oxford), pp. 7-9.
[3] *Supra* n 2.

3.0. THE RULE IN *PHILLIP* v *EYRE*

The difference between choice of law and choice of jurisdiction is an issue this paper seeks to clearly define. This is not to say that Nigerian courts do not grasp what either concept means on their own, but their application of the rules related to the two concepts shows that rules being applied are not fully understood. This situation is clear in the application of the double actionability rules, i.e. the rule in *Phillip* v. *Eyre*,[4] which happens to be a choice of law rule, but has been applied severally in Nigerian cases as if it is a jurisdictional rule. In *Phillip* v. *Eyre*, Edward John Eyre was the governor of the island of Jamaica. Several persons in the island of Jamaica had conspired by force to overthrow the constitution and government in the island. In pursuance of the conspiracy, great numbers of the inhabitants of the island had broken out into open rebellion, and had committed many burglaries, robberies, arsons, murders, and other felonies, and the rebels had overpowered the civil power of the island. Because of this anarchy, the defendant, with the assistance and co-operation of the military and naval forces of the Queen had, by force of arms, arrested the progress of the rebellion. After the rebellion, the government passed the Indemnity Act for indemnifying the defendant and all other officers and persons concerned in arresting the rebellion in the island and legalizing all their actions. Soon after the expiration of the term of the defendant, he relocated to England. The plaintiff was among those imprisoned, and he sued the defendant in England for the assault and false imprisonment committed against him by the defendant in Jamaica.

The defendant objected to the claims of the plaintiff and raised a defence that his actions were justified under the Jamaican law. On the other hand, the plaintiff asked the court to nullify the Act, as it amounted to an *ex post facto* law, and prayed the court not to allow it deprive the plaintiff of a cause of action in England. The court affirmed the defence of the defendant and affirmed the validity of the Act based on reasonability and public policy. The court justified the position as follows:

[4] (1870) LR 6 QB 1.

> …an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, super adding a liability other than and besides that incident to the act itself. It means therefore, that once an action is justified under the law of the place of the action, such an action continues to carry same character everywhere except where a forum law specifically intended otherwise.[5]

In stating the position of the English court on the nature of foreign cause of actions particularly with respect to torts, Wills J. puts it succinctly as follows:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; therefore, in *The Halley*,[6] the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore, in *Blad's Case*,[7] and *Blad* v. *Bamfield*,[8] Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark - a matter proper for remonstrance, not litigation.[9]

[5] *Ibid*.
[6] (1868) LR 2 PC. 193.
[7] 3 Swan. 603 (1673).
[8] 3 Swans. 604, 36 Eng. Rep. 992 (1674).
[9] (1870) LR 6 QB 1, at p. 28.

From the above, it is not difficult to take cognizance of the fact that the court did not make mention of the issue of jurisdiction. What it clearly had to deal with was whether the action brought was a wrong in both the *lexfori* and *lexdeliciti,* a test that the suit eventually failed at.

4.0. AN ANALYSIS OF NIGERIAN AND AMERICAN CONFLICTS OF LAW TORT CASES

4.1. Nigerian Legal System

From the previous discourse in this article, the choice of law rules Nigerian courts should be following has been elucidated. It will however not be sufficient to fail to properly discuss the position of the Nigerian legal system on jurisdiction rules, as this, at the end of the day, is what Nigerian courts seem to confuse. Nigeria still applies the writ rule, along with other common law rules of jurisdiction, and the Nigerian constitution provides that:

Subject to the provisions of Section 251 and other provisions of the Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.[10]

Likewise, Section 10 of the High Court of Lagos State Law[11] provides that;

> The High Court shall, in addition to any other jurisdiction conferred by the Constitution of the Federation or by this or any other enactment, possess and exercise, within the limits mentioned in, and subject to the provisions of, the Constitution of the Federation and this enactment, all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High court of Justice in England.

[10] Section 272 (1), 1999 Constitution (as amended).
[11] Cap H3, Laws of Lagos State.

Also, the Sheriff and Civil Processes Act permits a person to be able to serve a writ to any person that is within Nigeria so far as the foreign element is one existing within the federating units.[12] The Act goes on to further specify that in issue of torts, as far as the liability occurred within the state, such a state will always have jurisdiction.[13] A number of court decisions have seen courts decline jurisdiction or ask a plaintiff to seek leave before serving a writ, which is simply misconstruing the provisions of the above statutes.[14] A number of cases highlight this position, such as *First Bank* v. *Abraham*,[15] in which the Court of Appeal held that a Lagos High Court had no jurisdiction over a loan agreement that was negotiated in London despite the fact that both parties were in Lagos. Invariably, the court was asking them to go to London, which is the proper venue.

Also, in *Ogunde* v. *Gateway Transit Ltd*,[16] the appellant was injured in an accident along Oworonsoki - Apapa Express way in Lagos, which was caused by the first respondent's coaster commercial bus. The appellant sustained injuries as a result of the accident. She was taken to the National Orthopaedic Hospital, Igbobi, Lagos, where she was admitted for about 15 months. After her discharge from Hospital, her legs were noticeably deformed. Thereafter, the appellant commenced a civil action against the respondent at the Ogun State High Court, Abeokuta. The court of appeal held as follows:

No doubt, the High Court Ogun State has the legal capacity to adjudicate on torts such as negligence as alleged in the present case but it lacks the geographical jurisdiction to entertain this matter because the cause of action arose in Lagos State.

Where it gets more confusing is where the courts then begin to use the double actionability rule as a choice of jurisdiction rule instead of as a choice of law rule in the original intendment of the makers of the

[12] Sections 96 and 103 of the Sheriff and Civil Processes Act, Cap 407 LFN 1990; Cap S6 LFN 2004.
[13] Section 101 of the Sheriff and Civil Processes Act.
[14] A.O. Yekini, "Choice of Jurisdiction in Inter-State Matters in Nigeria: A Need for Judicial Rethink" 6(2) (2012) *Journal of Jurisprudence and Contemporary Issues*.
[15] (2003) 2 NWLR (pt. 803)31.
[16] (2010) 8 NWLR (PT. 1196) 207.

rule. A number of cases below highlight how local courts have misused this rule for what it is not.

In *Amanambu* v. *Okafor*,[17] the plaintiff was the widow of one Stephen Amanambu, who died as a result of injuries he received in a motor accident in March 1960, at a location between Lokoja and Okene in Northern Nigeria. The action was brought to recover damages under the Fatal Accidents Laws of Northern Nigeria, 1956, at the High Court in Onitsha, Eastern Nigeria. The defendants, who were the driver and the owner of the offending vehicle, were residing in Asaba, in Mid-Western Nigeria and Onitsha, in Eastern Nigeria respectively. The defendants objected to the jurisdiction of the Onitsha High Court on the basis that the plaintiff had sued under the Northern Region Law and that the deceased died in northern Nigeria. The plaintiff then sought to amend the processes to read Fatal Accident Law of Eastern Nigeria and same was granted. The amendment was challenged. The Court held that an action could not have been maintained in Onitsha for a tort that occurred in Northern Nigeria. It should however be stated that no mention was made of *Phillips* v. *Eyre* in this case.

In *Benson v Ashiru*,[18] the plaintiff sued in the High Court of Lagos on behalf of himself and dependant relatives of Adetutu Ashiru deceased, under the English Fatal Accidents Act of 1846. He claimed damages representing the pecuniary loss sustained by Adetutu's death. The accident which resulted in the death of the plaintiff's wife occurred in Ijebu Remo, Western Nigeria. The judge found that the plaintiff had proven negligence against the defendant and also that the Fatal Accident Act 1846 applied. This finding of the court on the applicable law was contested by the defendant. It should be noted that the Fatal Accidents Act 1846 applied in Lagos as an English Statute of General Application, while the Torts Law applied in the Western Nigeria. The trial court found that both laws applied to the death in Ijebu Remo concurrently. The defendant contended the Supreme Court should dismiss the action as it had earlier decided in *Amanambu* v. *Okafor* that the laws applicable in a region could not apply in another region.

[17](1966) 1 ALL NRL 205.
[18](1967) NMLR 363.

Counsel to the defendant argued that by the Law of England (Application) Law, English statutes of general application ceased to apply as such in Western Nigeria from 1 July 1959. The Supreme Court turned down the damages granted to the defendant (not plaintiff) by the trial court, holding that since the plaintiff had no interest in the matter, he could not sue on behalf of those that had interests.

In Nigerian *Tobacco Company Ltd.* v. *Agunanne*,[19] the respondent sued his employer, Nigerian Tobacco Company Ltd. at the High Court of Anambra State in Enugu in the Eastern part of Nigeria, in respect of injuries he sustained in an accident that occurred in Plateau State, Northern Nigeria. The accident occurred as a result of the negligent act of the driver of the company. The trial court eventually found negligence proved against the Company and awarded damages against it accordingly. The Company's defence of the common law doctrine of common employment, which has been expressly abolished by statutes in Western and Eastern but not Northern Nigerian States, was rejected by the court. The court was prepared to accept and apply it because the doctrine had not been abolished in northern Nigeria; nevertheless, it was rejected, as the driver and the plaintiff were not in the same category of employment. The Supreme Court approved the trial court's ratio where the trial judge stated that:

> Upon a careful consideration of all the relevant authorities on this matter, it appears clear to me that where as in this case, an accident happened in a foreign state and an action is properly instituted in another state in respect of the said accident, the proper law that must be applicable for the determination of the suit will be the *lex loci*, that is to say, the law of the foreign state and not the law of the state in which the suit is institute… I therefore hold that it is the law applicable in the Benue State of Nigeria that must be applicable in the determination of this action.[20]

[19] (1995) 5 NWLR (Pt. 397) 571.

[20] See *Olayiwola Benson & Anor.* v. *Joseph Ashim* (1967) 1 All N.L.R. 184; *Grace Amanambu* v. *Alexander Okafor & Anor.* (1966) 1 All N.L.R. 205; *A.O. Ubanwa & 4*

In *Herb & Ors* v. *Devimco*,[21] Eko Hotels Limited is co-owned by the Lagos State Government and the appellants. The respondent, Devimco International B.V was engaged to manage the hotels. After some time, there was a change in the ownership structure and the appellants became the majority shareholder of the Company. This necessitated the review of the management contract between Eko Hotels Limited and the respondent company. When the renegotiation of the contract was not successful, Eko Hotels Limited terminated the contract between it and Devimco International BV. The respondent claimed at the lower court that the appellants had induced the termination of the agreement between it and the Hotel based on the letters written by the first appellant in London and received by the respondent in Cedex, France. The appellants were not resident in Nigeria and hence were served the writ outside Nigeria. In addressing the issues of exercise of personal jurisdiction over non-resident defendants by a Lagos High court, the court reasoned that the rule in Phillip v Eyre permits a forum court to exercise such jurisdiction in tortious case over non-resident defendant once the criterion of double actionability is met.

In *Zabusky & Ors.* v. *Isreali Aircraft Industry*,[22] although technically not an interstate conflict of law case, the reasoning of the court was flawed. In this case, the plaintiffs sued the defendant over libellous publication published in the Israeli Embassy in Lagos. The trial court declined jurisdiction on the ground that the alleged tort was committed in a foreign land. The Court of Appeal set aside the decision of the lower court and held that the court had jurisdiction. In the opinion of the court:

> By virtue of Sections 10 and 11(1)(a) of the High Court Law, Cap. 60, Laws of Lagos State, 1994, the High Court of Lagos State has co-ordinate jurisdiction with the High Court of England. In other words, the High Court of Lagos State, like the High Court of England, is

Ors. v. *C. Afocha & Anor.* (1974) 4 E.C.S.L.R, 308; *Morocco Bound Syndicate Limited* v. Harris (1895)1 Ch. 534, at 537.

[21] (2001) 52 WRN 19.

[22] (2008) 2 NWLR (pt. 1070), 109.

> entitled to enforce principles of private international law. Thus, the rules of the common law of England on questions of private international law apply in the High Court of Lagos State. Under those rules, an action in tort will lie in Lagos, Nigeria, for a wrong alleged to have been committed in another part of Nigeria or outside of Nigeria if two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos State; and secondly, it must not have been justifiable by the law of the part of Nigeria, or the place outside Nigeria where it was done. Accordingly, in every action brought in Nigeria upon a foreign tort, the plaintiff must prove that the defendant offended the law of both *lex loci delicticommissi* and of Nigeria.

Some court decisions discussed have shown the reasoning of the court in deciding some of the cases which is not based on the proper application of the double actionability rule.

4.2. American Legal System

The United States of America exemplifies the most independence for federating units and as such, each state has a right to enact statutes on what its conflicts of laws should be. As a result, when it comes to the issue torts in their conflicts of laws, different states practise different rules which include; the lex loci, lexfori, the Restatement (Second) etc. The most dominant of these rules, however, is the Restatement (Second) as 24 states practise it.[23]

The Restatement's (Second) most pertinent provision on the subject matter of interstate conflicts is in Sections 6 and 145. Section 6 provides:

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

[23] Chilenye Nwapi, "Tort Choice of Law and International Fundamental Norms: A Case Study of Canada and the United States", (2013) *1(1) Afe Babalola University Journal of Sustainable Development Law and Policy,* pp. 54-72.

a. the needs of the interstate and international systems
b. the relevant policies of the forum,
c. the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue,
d. the protection of justified expectations,
e. the basic policies underlying the particular field of law,
f. certainty, predictability, uniformity of results, and
g. ease in the determination and application of the law to be applied.

Section 145 sets out the relevant contacts:

1. The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Section 6.
2. Contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:
   a. the place where the injury occurred,
   b. the place where the conduct causing the injury occurred,
   c. the domicile, residence, nationality, place of incorporation and place of business of the parties,
   d. the place where the relationship, if any, between the parties concerned.

It is important to note that the interpretation of the most significant relationships has been interpreted differently by the states. Following the adoption of the Restatement (Second), there have been landmark cases such as *Babcock* v. *Jackson*[24] and *Lowe's North Wilkesboro Hardware, Inc.* v. *Fidelity Mutual Life Ins. Co*.[25]

In *Babcock* v. *Jackson*, a husband and wife from New York went on a car trip with a friend, Babcock, to Ontario. While in Ontario, they had a motor vehicle accident. Babcock sued Jackson, the driver, claiming

[24] 12 NY 2d 473, 481-482 (1963).
[25] 319 F.2d 469 (4th Cir.1963).

his negligence caused the car crash. This case brought up a question of "choice of law"; if the law of the place of residence of the accident victims (New York) was to be applied, or, if the law of the place of the tort (Ontario) was to be applied. Under the old conflict rules, the law of the place of the accident should apply. However, Ontario had a law that prohibited passengers from suing the driver.

The court rejected a traditional fixed method of determining which law should apply, and instead, a process of weighing factors such as relationship between the parties, decision to take the trip, connections to the locality, amongst others. Thus, the Court held that the parties did not have substantial connection with Ontario, and so it would be unfair to apply the law as the location was largely fortuitous. The Court found that the jurisdiction with the most connections was New York, and so New York law should apply.

Lowe's North Wilkesboro Hardware, Inc. v. *Fidelity Mutual Life Ins. Co*, decided by the United States Court of Appeals for the Fourth Circuit is another important consideration. There, the plaintiff, a North Carolinian, in order to qualify for a business expansion loan, sought insurance on the life of its president. Application was made to the defendant, a Pennsylvania insurance company, for a $200,000 policy. Approximately three weeks later, the defendant advised the plaintiff that only $50,000 could be issued and this was accepted with the request that the defendant consider the matter further. The Plaintiff's company president died two days later and suit was brought for defendant's allegedly negligent delay in acting on the application. Relying upon the "most significant relationship" approach, the Court concluded that Pennsylvania law was applicable since "the important events upon which liability, if any, would rest occurred in Pennsylvania", the state in which "the alleged delay, the foundation of the cause of action, took place". Another case that follows the decision in *Babcock is Dym* v. *Gordon*.[26]

In that case, a New York passenger brought suit against a New York host, both of whom were temporarily residing in Colorado, for

[26] 16 N.Y.2d 120, 262 N.YS.2d 463, 209 N.E.2d 792 (1965).

injuries sustained during a trip that began and ended in Colorado. Colorado has a guest statute requiring the showing that the accident was intentional on the host's part or was caused by the host's intoxication. A divided New York Court of Appeal concluded that the Colorado Statute controlled the matter. The majority applied what they conceive to be the *Babcock* rule, but ironically, Mr. Justice Fuld, the author of the Babcock opinion, dissented, saying:

> In the light of this court's decision in *Babcock* v. *Jackson*, I cannot understand how an affirmance may here be justified. The view expressed by the majority is inconsistent not only with the rationale underlying Babcock but with the rule there explicitly stated, that the law to be applied to resolve a particular issue in a tort case with multi-jurisdictional contracts is "the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern" with the matter in issue and the strongest interest in its resolution.

The opinion of Mr. Justice Fuld shows, there might still be underlying differences in the way courts in the American jurisdiction interpret the principles of the second restatement.

Another interesting concept that could be learnt from American legal system is their application of false conflicts of laws. This is a situation where there is a conflict of applicable laws but it is not true conflict because the laws are consistent in their effect or objective, or because only one of the laws applies to the matter. This concept has been exemplified in the case of *Leonard's* v. *Southern Farm Bureau Cas. Ins. Co.*,[27] where the court opined that;

> We believe, however, that this case presents what has come to be called a false conflict because we conclude that the relevant legal principles are the same in both states with respect to the issue that we find dispositive.

[27] 279 F.3d 611, 612 (8th Cir. 2002).

Also, in the case of *Berg Chilling Systems, Inc. v Hull Corp*.,[28] where the court was of the view that;

> Initially, we must determine whether a true conflict exists between the application of New Jersey law and Pennsylvania law. According to conflicts of laws principles, where the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a false conflict, and the Court should avoid the choice-of-law question.

The rules of jurisdiction discussed above are different from the "rules" jurisdiction relied upon by court decision previously mentioned. Muddling up the double actionability rule with rules of jurisdiction could have a more dangerous effect than envisaged ordinarily as would be discussed further. A foray into the American legal system may however provide a road map progress, especially as regards current legislation in this area of conflict of laws.

5.0. RECOMMENDATIONS

Private international law is one area of law that is full of intricacies, and one cannot be faulted for not grasping the intricate rules this area of law possesses. It is however the duty of the courts to guide not just litigants, but the whole legal system, as to what should be understood from this based on the existing statutes and received law. The crux of this work is to point to failings of the courts in this area and pick lessons from the other aforementioned jurisdiction. The scope of conflict of laws which forms the nucleus of the course which are: choice of law, choice of jurisdiction and enforcement of foreign judgments, is clearly where Nigerian courts get it wrong. Some of the erroneous decisions that have been given by courts in this field could be reduced to a number of points. First, as mentioned for the umpteenth time, the courts do not fully grasp double actionability rule. They also do not have a full comprehension of the basis for which they could have jurisdiction. Another thing that is also not clear is that a lot of choices of law issues in Nigeria are false or no conflict situations, as

[28] 435 F.3d 455, 462 (2006).

a lot of state laws on similar issues are usually *in pari materia,* and in most cases, application of either law might lead to the same result.

The effects of the misconstruing of some of these rules have far reaching effects that might not even be felt at the interstate level where it is made, but instead at the international level,as courts could assume jurisdiction on cases based on the double actionability rule which is not even a choice of jurisdiction rule, thereby giving the courts an exorbitant basis of jurisdiction.[29] This was the nature of the case in *Zabuisky & Ors.* v. *Israeli Aircraft Industry Ind.* This could lead to problems of enforcement of a judgment in the international dimension of conflicts of laws.

The American legal system in its application of choice law rules, seems to show a substantive approach towards selecting applicable law and the dominant statute amongst states of their federation, i.e. the Restatement (Second) goes further to give an issue by issue analytical methodology. It contains not just general policy considerations, but also detailed contact consideration that seek to broaden upon the general policy considerations.[30] In this statute, emphasis is placed on "the most significant relationship" or "contact", as opposed to the *lexfori* and *lex loci* rules. There is however, a disagreement amongst scholars on whether the statute is inclusive of *lexfori* and *lex loci* rules.

What could be drawn from most of the discussions in this project work is that certain rules of conflicts of laws are not well grasped by the courts. What could be done here is that the courts consider the applicable rules better before applying them in their decisions. One thing to note, however, is that the United Kingdom, from which we received most of our laws, and especially on the choice of law rules, has moved on from the positions they once held, as seen the case of *Boys v Chaplin*.[31] This is to say that more could be done by Nigerian courts concerning the current laws they follow.

[29] *Supra* n 14.
[30] *Supra* n 23.
[31] (1968) 2 QB 1 (HL).

The analysis of what holds in the United States has shown how statutes can go a long way in effectively harmonizing choice of law rules in a country. Legislative efforts could effectively evolve Nigeria's choice of law rules and could make our legal system also adopt a more substantive approach as in the Restatement (Second). Nigerian courts would also make progress if the no conflict or false conflict scenarios are better considered.

6.0. CONCLUSION

The world is changing, and Nigerian courts do not seem to take cognizance of the current trends of private international law. The consequences of wrongly made decisions are however not too late to avert, as the court can take action and put our legal system back on the right track. Prof. Olaniyan H.A. has proposed in his work that Nigerian law faculties consider making conflict laws a compulsory course, due to its all-pervading nature. Such an action might yield better decisions of courts in this field of study.

TOWARDS ENHANCING ELECTRICITY GENERATION FROM RENEWABLE ENERGY SOURCES IN NIGERIA: THE ROLE OF LAW

Oghenero Ajantana*

ABSTRACT

Nigeria is blessed with enormous renewable sources of energy. However, Nigeria appears to be incapable of generating sufficient electricity to cater for the electricity needs of its citizens. This has obviously affected Nigeria's economic growth. Although successive Nigerian governments have, over the years, devised different policies to promote the development of renewable energy such as National Energy Policy 2003; Renewable Energy Master Plan 2005; Renewable Electricity Policy Guidelines 2006; and National Renewable Energy and Energy Efficiency Policy 2015, the absence of a viable legal framework inter alia has hindered the full implementation of these policies. This article explores the role of law in promoting the development of renewable electric energy and shall, where applicable, refer to the EU's approach, which is supported by a viable legal framework especially through Directive 2009/28/EC that has been instrumental in promoting the development of renewable energy as it contains, inter alia legally binding targets.

1.0. INTRODUCTION

Globally, there has been an incremental drive for the integration of renewable energy into the energy mix of various countries with the aim of enhancing energy security, especially in the electricity sector.[1] Nigeria as a country has continuously suffered from irregular electricity supply. This has obviously affected the economic development of Nigeria. The population of Nigeria is estimated to be about 170 million, with about 60% of its population lacking access

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[1] Peter K. Oniemola, "Integrating Renewable Energy into Nigeria's Energy Mix through the Law: Lessons from Germany", (2011) 2(1) *Renewable Energy Law and Policy Review*, p. 29.

to electricity supply.[2] This unfortunate electricity challenge affects most Nigerians especially the rural dwellers who have no access to the national grid.[3] It is regrettably sad that despite the abundance of energy resources prevalent in Nigeria, the electricity currently generated is incapable of guaranteeing stable and reliable electricity supply to the "fortunate" 40% who have access to the national grid.[4] The generation of electricity from renewable sources to augment the current electricity generation is, therefore, a developmental imperative for Nigeria.

While Nigeria is blessed with a tremendous amount of petroleum resources, the deleterious impacts of greenhouse gases arising from electricity generated from fossil fuels on the natural environment ordinarily should be a sufficient incentive for Nigeria to strive towards generating its electricity from cleaner sources. Fossil fuels currently account for about 80 per cent of the electricity produced in Nigeria with only about 20 per cent sourced from hydro.[5] Global warming and pollution as a result of reliance on fossil fuels have made governments, utility companies and other stakeholders in recent times lean towards renewable energy as alternative to energy produced from conventional sources.[6] Indeed, transition to a low carbon economy is now a global trend for economic development. However, law has a pivotal role to play in that renewable energy transition requires legal backing to succeed.[7]

Essentially, lack of access to energy to about two billion of the world's population is responsible for the non-attainment of the poverty, gender and health objectives of the United Nations

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[2] National Renewable Energy and Energy Efficiency Policy (NREEEP) 2015, available at: http://www.power.gov.ng/download/NREEE%20POLICY%202015-%20FEC%20APPROVED%20COPY.pdf (accessed 30 March 2018).
[3] *Ibid*, at IV.
[4] *Ibid*.
[5] Adrea A. Ajibade, "National Strategies to Promote Renewable Energy Development: Whither Nigeria?" (2019) 10(1) *Journal of Sustainable Development Law and Policy*, p. 79.
[6] Z. Salameh, *Renewable Energy System Design* (Academic Press, 2014), p. 1.
[7] Philip Andrew-Speed, "Energy Law in Support of the Low-Carbon Transition: Lessons from the United Kingdom and China", (2015) 10 *Frontiers of Law in China*, p. 299.

Millennium Development Goals as well as the plan for implementation of the World Summit on Sustainable Development (WSSD).[8] Although Nigeria is blessed with abundant resources to wit; crude oil and renewable energy, its economic and developmental prospects will likely remain unattained unless steps are taken to explore and develop Nigeria's huge renewable potentials.[9]

This article argues that law has a prominent role to play in promoting renewable energy development in Nigeria in ensuring energy security in its electricity sector. Regrettably, there is no specific Renewable Energy Law currently in force in Nigeria for the development of renewable energy in Nigeria's electricity sector. To tackle the problem of energy shortages and disruption of supplies in Nigeria's electricity sector, a proper legal framework is required to promote the development of renewable energy.

This article shall give a brief overview of Nigeria's electricity sector, as well as examine Nigeria's renewable energy policies. This will comprise of an appraisal of Nigeria's Electric Power Sector Reform Act 2005. While this work aims to discuss Nigeria's key renewable energy policies, more emphasis will be placed on the National Renewable Energy and Energy Efficiency Policy (NREEEP) 2015 as it is the most comprehensive policy on renewable energy in Nigeria. This work shall highlight the need for the enactment of renewable energy law in Nigeria and occasionally refer to the role of law in promoting renewable energy electricity in the European Union (EU). This article shall *inter alia* be calling the Nigerian government, the National Assembly and all stakeholders to enact a statute-based, law supported policy framework for Nigeria.

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[8] M. T. Ladan, "Promoting Efficient and Renewable Energy for Sustainable Development and Climate Change Mitigation in Nigeria: Policy, Legislative and Regulatory Challenges", available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336130 (accessed 1 February 2018).

[9] K. Amaewhule, "What are the Constraints Facing the Development and Implementation of an Energy Efficiency Policy in Nigeria and how can these be overcome?" (2002) *OGEL Archive Issue*, p. 1, available at: www.ogel.org/article.asp?=857 (accessed 10 October 2018).

2.0. AN OVERVIEW OF NIGERIA'S ELECTRICITY SECTOR

2.1. Nigeria's Electricity Sector

The history of Nigeria's electricity sector can be traced to 1886 following the installations of two small generating sets that catered for the electricity need of the then colony of Lagos.[10] Although the first generating plant was subsequently established in 1898 in Lagos Nigeria, it is worthy of note that as at 1950, the system of electricity generation "was in the form of individual electricity power undertaking scattered all over the towns".[11]

As a result of an Act of Parliament, the defunct Electricity Corporation of Nigeria was created in 1951. Furthermore, the Niger Dams Authority was established in 1962 with the aim of developing hydro-electricity and was later merged with Electricity Corporation of Nigeria.[12] The outcome of this merger was the emergence of the defunct National Electric Power Authority (NEPA) in 1972.[13] This merger did not, however, result to the resolution of Nigeria's electricity challenges especially as NEPA's monopoly of Nigeria's electricity sector arguably hampered its ability to meet Nigeria's rising electricity demand in the 1990s.[14] The subsequent unbundling of Nigeria's electricity sector in 2005 changed NEPA into Power Holding Company of Nigeria (PHCN). The emergence of PHCN did not change the epileptic nature of electricity supply in Nigeria. The emergence of PHCN from NEPA, therefore, connotes a mere change of name.

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[10] O. Aigbovo and E. Ogboka, "Electricity Power Sector Reform Act 2005 and the Development of Renewable Energy in Nigeria" (2016) 7(1) *Renewable Energy Law and Policy Review*, p. 21.
[11] *Ibid.*
[12] N. V. Emodi, "Integrating Renewable Energy and Smart Grid Technology into the Nigerian Electricity Grid system" (2014) 5(5) *Smart Grid and Renewable Energy*, p. 221.
[13] *Ibid.*
[14] *Ibid.*

Furthermore, the reforms introduced by the Nigerian government in its energy market which entails the unbundling of the National Electric Power Authority (NEPA) which led to the privatisation and liberalisation of Nigeria's power sector and the establishment of an Independent Regulatory Commission i.e. Nigerian Electricity Regulatory Commission (NERC) did not make much impact in terms of generation of electricity as Nigeria's electricity problem remains unsolved.[15] Oseni laments that notwithstanding the purported substantial investment in Nigeria's electricity sector, Nigerians continue to experience power outage, which has hindered its economic growth.[16] It is, therefore, important for the Nigerian government to explore its vast renewable energy sources as a means of tackling its electricity problem.

2.2. The Electric Power Sector Reform Act (EPSRA) 2005

The inauguration of Electric Power Reform Implementation Committee (EPRIC) by Nigeria's Bureau of Public Enterprise (BPE) in 2001 resulted in EPRIC introducing the National Electric Power Policy (NEPP) in 2001, which contained recommendations for the privatisation of Nigeria's electricity sector.[17] The Electric Power Sector Reform Bill sponsored by the BPE was enacted in 2005 and it incorporated the recommendations of NEPP.[18] This gave rise to the enactment of the EPSRA in 2005.[19] The EPSRA established the Nigerian Electricity Regulatory Commission (NERC) as the principal regulatory body of the reformed electricity sector.[20] The EPSRA repealed and replaced the NEPA and Electricity Act; it also removed the operational and regulatory responsibilities of the electric power sector from the Federal Government of Nigeria and provided a legal

[15] M. Oseni, "An Analysis of the Power Sector Performance in Nigeria" (2011) 15(9) *Renewable and Sustainable Energy Reviews*, p. 4766.
[16] *Ibid*.
[17] *Supra* n 10, at 22.
[18] *Ibid*.
[19] No. 6 of 2005.
[20] Section 31, Electric Power Sector Reform Act, 2005.

basis for restructuring NEPA and establishing new regulatory structures.[21]

It should be noted that although the EPSRA was enacted to introduce changes for the purpose of solving Nigeria's recurrent electricity energy challenges, the changes introduced appear to be superficial and bereft of any implementation strategy.[22] The perpetual reduction in electricity generation in Nigeria, occasioned by continuous economic regression, inadequate funding, poor maintenance strategies amongst others, depict the failure of the EPSRA to transform Nigeria's ailing electricity sector.[23]

It is also worthy of note that EPSRA did not make concrete provisions for the deployment of renewable electricity in Nigeria's energy mix. Although the EPSRA made provisions for the Minister of power to submit quarterly reports containing updates on renewable energy power generation in consultation with the Rural Electrification Agency,[24] the EPSRA did not spell out a pragmatic approach for incorporating renewable electricity into the energy mix of Nigeria. Its emphasis was on rural electrification. Although this focus is quite useful in the sense that renewable electricity sources are known for promoting rural electricity access and enhancing decentralised electricity governance,[25] however, Section 88(9), EPSRA, 2005 is of little significance to the integration of renewables into Nigeria's electricity sector as the EPSRA only acknowledged the existence of renewable energy, without an accompanying plan for the integration of renewable energy into Nigeria's electricity sector or the connection of renewable electricity into the national grid.[26] In effect, the EPSRA lacks the requisite legal framework for the development of renewable energy in Nigeria, unlike the EU's

[21] *Supra* n 10, at 23.
[22] Y. S. Mohammed and 3 others, "Renewable Energy Resources for Distributed Power Generation in Nigeria: A Review of the Potential" (2013) 22 *Renewable and Sustainable Energy Reviews*, pp. 257-268.
[23] *Ibid*, at 259.
[24] Section 88(9), EPSRA, 2005.
[25] *Supra* n 10, at 26.
[26] *Supra* n 1, at 34.

Treaty on the Functioning of the European Union (TEFU)[27] and Directive 2009/28/EC[28] that both provides solid legal basis for renewable energy development in the EU. The EPSRA lacks the requisite legal framework for the development of renewable energy in Nigeria's electricity sector. Consequently, there is need for Nigeria to enact a renewable energy law as the EPSRA, which is regarded as the principal legislation governing Nigeria's electricity sector appears to be incapable of providing the legal support needed to develop renewable energy electricity in Nigeria.

3.0. AN APPRAISAL OF NIGERIA'S ENERGY POLICIES

3.1. National Energy Policy (NEP) 2003 and Renewable Energy Master Plan (REMP) 2005

Prior to 2005, the defunct NEPA was saddled with the responsibility of electricity generation, transmission and distribution.[29] However, NEPA was unable to meet the electricity demands of Nigerians.[30] This prompted Nigeria's government to introduce reforms in 2000 in an attempt to salvage the unfortunate situation. In 2003, the government drafted NEP with the overall theme of optimal utilization of the nation's energy resources; fossil fuels and renewable sources, for sustainable development with the active participation of the private sector.[31]

It is worthy of note that NEP incorporated the government's policy of utilization of solar energy in Nigeria. The solar intensity in Nigeria is between 4kWh/M2/ per day and 6.5kWh/M2 depending on the location, and this far exceeds that of Germany by 1.6 times and is

[27] Consolidated version of the Treaty on the Functioning of the European Union, 2012 O. J. C 326/47 [hereinafter TFEU], Article 194.
[28] R. Leal-Arcas and S. Minas, "Mapping the International and European Governance of Renewable Energy" (2016) 35(1) *Yearbook of European Law*, p. 657.
[29] Z. G. Usman and 3 others, "Transforming the Nigerian Power Sector for Sustainable Development" (2015) 87 *Energy Policy*, p. 432.
[30] *Ibid.*
[31] *Ibid.*

similar to that of Spain; the two leading countries in the deployment of solar energy in the EU.[32] However, NEP is not supported by any definite legal framework in Nigeria for its actualization. It will be difficult for the Nigerian government to implement NEP in diversifying its energy mix to include solar photovoltaic[33] without a legal framework, as the countries that are excelling in this regard have statute-based policy frameworks. For example, Germany's renewable electricity prospects were enhanced pursuant to the enactment of the Electricity Feed-in Law in 1991.[34]

It is further worthy of note that the strategy adopted for the implementation of the renewable aspects of NEP is the Renewable Energy Master Plan, which was drafted by the Energy Commission of Nigeria (ECN) in collaboration with the United Nations Development Programme (UNDP) in 2005, which was subsequently reviewed in 2012.[35] REMP was introduced with the aim of:[36]

> developing and implementing strategies that will achieve clean reliable energy supply and establish a mechanism to develop the sector based on international best practices to showcase viability for private sector participation.

The REMP also emphasized the importance of integrating renewable energy into electricity grids and off-grid electrical systems as well as the integration of solar power into Nigeria's energy mix.[37]

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[32] E. J. Bala, "Nigeria's Power Sector Reform: What Next after Privatization" (Power and Electricity World Africa Conference, Johannesburg, March 2014) 7, available at: http://energy.gov.ng/papers/What%20Next%20After%20Power%20Sector%20Privatization,%20Jo'Burg%20March%202014.pdf (accessed 27 March 2018).

[33] *Ibid*, at 29.

[34] *Supra* n 1, at 37.

[35] K. Ley and others, "The Nigerian Energy Sector: An Overview with a Special Emphasis on Renewable Energy, Energy Efficiency and Rural Electrification", p. 75, available at: https://www.giz.de/en/downloads/giz2015-en-nigerian-energy-sector.pdf (accessed 28 March 2018).

[36] *Supra* n 10, at 24.

[37] N. V. Emodi, *Energy Policies for Sustainable Development Strategies: The Case of Nigeria* (Springer, 2016), p. 58.

The REMP contained specific targets to increase the total electricity supply from renewable energy resources from 42% in 2005 to 60% in 2015 and 75% by 2025.[38] The REMP's target for Nigeria's overall electricity consumption is to attain up to 10% by 2025 of the total electricity consumed in Nigeria from renewable energy sources.[39] Notwithstanding the support for generation of renewable electricity contained in REMP, the lack of a viable legal framework is arguably responsible for its non-implementation. This is not unconnected to the fact that policy implementation is a major challenge in Nigeria.[40] Law is therefore needed to make the implementation of REMP mandatory.

Furthermore, Sambo, a former Director General of ECN, opined that NEP and REMP should be enacted into law to ensure their implementation by successive Nigerian governments.[41] Arguably, Sambo's view stems from the repeated tendency of successive Nigerian governments of discontinuing the policies of previous governments while introducing their own often dissimilar policies. This again demonstrates the importance of having in place a definite legal framework for the development of renewable energy. This is what will give investors' confidence to take advantage of the financial incentives contained in REMP to wit pioneer status (tax exemption) and custom duty waivers.[42]

It is also worthy of note that the ECN which was set up pursuant to the ECN Act of 1979[43] with the mandate of carrying out "overall energy sector planning and policy implementation, promoting the

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[38] *Supra* n 35, at 75.
[39] *Supra* n 37, at 58.
[40] T. Makinde, "Problems of Policy Implementation in Developing Nations: The Nigerian Experience" (2005) 11 *Journal of Social Science*, pp. 63-69.
[41] A. Sambo, "The Place of Renewable Energy in the Nigerian Energy Sector" (World Future Council Workshop on Renewable Energy Policies, Addis Ababa, Ethiopia, October 2009), p. 18, available at: https://www.africanpowerplatform.org/resources/reports/west-africa/nigeria/406-the-place-of-renewable-energy-in-the-nigerian-energy-sector.html (accessed 14 November 2019).
[42] *Supra* n 35, at 75.
[43] ECN Act No. 62 of 1979, as amended by Act No. 32 of 1988 and Act No. 19 of 1989.

diversification of the energy resources through the development and optimal utilization of all, including the introduction of new and alternative energy resources like Solar, Wind, Biomass and Nuclear Energy"[44] failed to equip ECN with the necessary legal capacity to promote the generation of renewable electricity from renewable sources. This approach again falls short of the European methodology as the EU through Directive 2009/28/EC created a common framework for the enhancement of renewable energy by encouraging Member States to put in place measures specifically designed towards meeting their targets by adopting necessary support schemes needed to actualize their targets.[45] This is obviously lacking in the ECN Act of 1979; limiting its utility as a renewable energy development instrument.

3.2. Renewable Electricity Policy Guidelines 2006

Nigeria's Federal Government in 2006 introduced Policy Guidelines on Renewable Energy. The policy guidelines imposed an obligation on the government to ensure that electricity generation from renewable sources is up to 5% of the overall electricity generated and a minimum off 5 TWh of electricity generated in Nigeria.[46] It further recognised:[47]

> the advantages renewable energy can bring to the system such as adding additional generation to the constrained system, enhancing the stability by mitigating local disruptions in supply and reduction of emissions.

[44] ECN, available at: http://energy.gov.ng/index.php?option=com_content&iview=article&id=79&Itemid=90 (accessed 29 March 2018); Section 5, ECN Act 1979.
[45] Directive 2009/28/EC, Art. 3.
[46] N. V. Emodi and N. E. Ebele, "Policies Enhancing Renewable Energy Development and Implications for Nigeria" (2016) 4(1) *Sustainable Energy*, p. 8.
[47] *Supra* n 35, at 69.

It also *inter alia* recognised the importance of instituting Rural Electrification Trust Funds (RETF) for financing renewable electricity through the support of public and private sector participation.[48]

Furthermore, the policy guidelines identified policy and regulatory barriers, financing and investment barriers, technology barrier, lack of public awareness, inadequate resource assessment etc. as the challenges hindering the production of electricity from renewable energy sources in Nigeria.[49] In a bid to proffer solutions to the challenges to renewable energy electricity in Nigeria, the policy document recommended market expansion through the provision of incentives for qualified or eligible renewable electricity producers.[50] Also, tax exemptions up to a period of 5 years for local manufacturers of renewable electricity, subsidies to minimize initial costs for consumers of renewable energy and public awareness on the advantages of renewable electricity as solutions to the challenges to renewable energy development.[51]

Upon further scrutiny of the provisions of the policy guidelines, the impression of this writer is that it does not provide a practical, logical approach on how this policy can be achieved. Also, it is not backed by a legal framework that will facilitate its successful implementation. Juxtaposing the foregoing with the EU's approach, the Directive 2009/28/EC contains binding targets and fixes mandatory targets for Member States. These mandatory targets attract investment as it has the tendency to instil confidence on prospective investors.[52] Thus, the RETF which intends to promote public and private sector participation in renewable electricity generation in Nigeria will likely not be successful without a legal framework that will give investors' confidence to invest in renewable electricity in Nigeria. Again, the need for a substantive renewable energy law is brought to fore.

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[48] Federal Ministry of Power and Steel, "Renewable Electricity Policy Guidelines 2006", 17, available at: http://iceednigeria.org/backup/workspace/uploads/dec.-2006.pdf (accessed 28 April 2018).
[49] *Ibid*, at 14.
[50] *Ibid*.
[51] *Ibid*.
[52] P. Park, *International Law for Energy and the Environment*, 2nd ed. (Taylor and Francis, 2013), p. 180.

3.3. National Renewable Energy and Energy Efficiency Policy (NREEEP) 2015

NREEEP was introduced in 2015 and is generally regarded as the first nationally recognised policy on renewable energy and energy efficiency in Nigeria.[53] Although some government agencies and ministries had, prior to NREEEP, put in place policies to promote renewable energy, some of which have been discussed in the earlier part of this work, NREEEP is the most detailed and most recognised renewable energy policy in Nigeria. The overall objectives of NREEEP include *inter alia* development of Nigeria's renewable energy resources to diversify Nigeria's energy mix while promoting investment to enhance energy security and to collaborate with ECOWAS and other international organisations with the aim of making electricity available to a majority of Nigerians who do not have access to electricity.[54]

NREEEP was introduced to remove the challenges that have been hindering the development of renewable energy in Nigeria. It sets out what has been described as the global thrust of the policies and measures for the promotion of renewable energy and energy efficiency,[55] by taking cognisance of some of the successful approaches that have been adopted in some countries in promoting the development of renewable energy and making provisions for the adoption of the FITs, Public Benefits Funds (PBF), Generation Disclosure Requirements (GDR), provision of tax grants and exemptions, net metering amongst others;[56] for the purpose of promoting renewable energy electricity.

The NREEEP also took cognisance of the importance of putting in place a yearly plan for the implementation of this policy. In this regard, it made provisions for National Renewable Energy Action Plan (NREAP)[57]which is to be designed in line with the Economic

[53] *Supra* n 2, at IV.
[54] *Ibid*, at XI.
[55] *Supra* n 35, at 75.
[56] *Supra* n 2, at para. 1.6
[57] NREEEP also made provisions for National Energy Efficiency Action Plan (NEEAP).

Community of West Africa States (ECOWAS) policies on renewable energy. At this juncture, it is important to note that Nigeria is a member of the Economic Community of West African States (ECOWAS). In 2013, ECOWAS during its 43rd Ordinary Session of the ECOWAS Authority of Head of States and Government held in Abuja, Nigeria, adopted a policy framework known as ECOWAS Renewable Energy Policy (EREP).[58] EREP places obligations on Member countries including Nigeria to develop a National Renewable Energy Action Plan (NREAP) and to create a legal and institutional regulatory framework that will aid the implementation of NREAP.[59] The ECOWAS Renewable Energy Policy is geared towards integrating renewable energy into the energy mix of member countries in order to promote "universal access to electricity by 2030" and "a more sustainable and safe provision of domestic energy services for cooking thus achieving the objectives of the white paper for access to modern energy services by 2020".[60] ECOWAS believes that EREP will help in translating its vision into reality. It should be noted that ECOWAS member countries just like the EU Member States have the right to device the strategy of their choice in meeting the renewable energy targets set by ECOWAS[61] and although Nigeria has put in place NREAP pursuant to its obligations under EREP, it is yet to put in place a legal framework for its implementation.

It is the intention of Nigeria's policy makers that the NREAP prescribed in NREEEP and designed in accordance to EREP should contain "rearticulated objectives, policies and strategies and an Integrated Resource Plan for Electricity (IRP)" that "will serve as the basis for a Revised National Policy on Renewable Energy and Energy Efficiency to be completed within a year from approval".[62] Pursuant

[58] ECREEE, "ECOWAS Renewable Energy Policy", p. 5, report available at: http://www.ecreee.org/sites/default/files/documents/ecowas_renewable_energy_policy.pdf (accessed 30 April 2018).
[59] *Ibid*, at 22.
[60] "ECOWAS Centre for Renewable Energy and Energy Efficiency", available at: http://www.ecreee.org/page/ecowas-renewable-energy-policy-erep (accessed 31 March 2018).
[61] *Supra* n 58, at 41.
[62] *Supra* n 2, at para. 5.5.

to the foregoing, Nigeria's Minister of Power is required to develop a NREAP, which is to be completed within 6 to 12 months of the adoption of NREEEP. Also, the Minister of Power is expected to prepare a 15 to 20 years integrated energy resource plan containing NREAP as well as National Renewable Energy Efficiency Plan (NREEP)[63] and a host of other items that will give effect to NREEEP.

It is also the intention of the policy makers, as can be deduced from NREEEP, that NREAP should be structured to be a comprehensive document with a systematic strategy on how best Nigeria can achieve the development of its renewable energy potentials and integration of same into its energy mix.[64] While this approach is similar to the EU's approach in terms the national action plans, the EU's approach appears to be more effective as it contains legally binding targets and as such binding on Member States.

Sequel to Nigeria's commitment to EREP and the provisions of the NREEEP, the NREAP was adopted by Inter-Ministerial Committee on Renewable Energy and Energy Efficiency (ICREEE) and subsequently approved by National Council on Power (NACOP) on 14 July 2016. The NREAP was prepared pursuant to Nigeria's commitment to EREP and contains plans for the development of Nigeria's renewable resources to enable Nigeria meet its national targets of 23% and 31% contribution to the total ECOWAS targets of renewable energy by 2020 and 2030 respectively.[65] NREAP was put in place to demonstrate Nigeria's Federal Government's commitment in enhancing renewable energy as well as support its policy objectives of security of supply, climate protection, competitiveness, promotion of technology and innovation, and securing and providing electricity access to Nigerians.[66] Although, NREAP contains good initiatives that will enhance renewable energy development in Nigeria's electricity sector which is expected to promote energy security, the absence of a legal framework for its

[63] *Ibid*, at para. 5.5.1.
[64] *Ibid*.
[65] National Renewable Energy Action Plan 2016, p. 5, PDF available at: http://power.gov.ng/Press%20Release/NATIONAL%20RENEWABLE%20ENERGY%20ACTION%20PLANS%20(NREAP).pdf (accessed 2 April 2018).
[66] *Ibid*, at 5.

implementation is highly regrettable. This is because policy implementation is a serious problem in Nigeria.[67] Undoubtedly, a legal framework will make the implementation of NREEEP compulsory just like the EU, where its Member States are working hard to meet their legally binding targets as provided for in Directive 2009/28/EC.

Moving on to a consideration of the EU's framework, a comparison of the EU's approach to that of Nigeria shows that the EU, through its Directive 2009/28/EC, makes it mandatory for Member States to adopt national renewable energy action plans that spell out how individual Member State intends to meet their binding targets.[68] Member States are expected to submit a report on their progress detailing the status of their targets every two years.[69] In the same vein, the European Commission (EC) is expected to publish a Renewable Energy Progress Report to appraise EU's Member States progress towards meeting their legal binding targets.[70] This type of periodic reporting is absent in the Nigerian approach.

Furthermore, the mandatory targets contained in the EU's Directive 2009/28/EC has continuously propelled Member States to work assiduously towards achieving their binding targets. The lack of binding targets and the absence of a legal framework deprive the Nigerian approach of the needed driving force required to accelerate renewable energy electricity generation as obtainable in the EU. This is because the rationale for setting binding targets is to "…encourage new investment in renewable technologies by creating a demand for green energy supplies".[71] This is what is needed *inter alia* in Nigeria to attract investors.

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[67] *Supra* n 40.
[68] Directive 2009/28/EC, Art. 4.
[69] EC, "Progress Reports", available at: https://ec.europa.eu/energy/en/topics/renewable-energy/progress-reports (accessed 28 April 2018).
[70] H. Vedder and others, "EU Energy Law" in M. M. Roggenkamp and others (eds.), *Energy Law in Europe: National, EU and International Regulation*, 3rd ed. (Oxford University Press, 2016), p. 321.
[71] *Ibid.*

From the foregoing exposition, it is obvious that Nigeria has policies that are designed to promote the generation of electricity from renewable energy sources, which has the potential to enhance energy security in the electricity sector and by implication lead to economic growth. However, policy alone is not enough without a corresponding law for its implementation. This view is strongly supported by Omorogbe who opines as follows:

> Policy and law are the essential frameworks upon which a society or a system within a society rest. Both are essential to the enabling and structuring of that society… Law should follow policy, and should be the instruments that promote the realization of a particular policy. Indeed, law is fundamental to the success or failure of any policy and may stimulate or impede growth in any area.[72]

Pursuant to the foregoing, it will be difficult to fully implement NREEEP and the plans contained in NREAP to achieve the desired results without the enactment of a renewable energy law in Nigeria. It is worthy of mention that the Nigerian Electricity Regulatory Commission (NERC) pursuant to NREEEP introduced or approved three windows for grid-connected renewable energy projects to wit;

1. Net-metering for very small capacities (typically below 1MW);
2. Feed-in tariff for capacities upto:
   a. 5MW of solar
   b. 10MW of wind
   c. 10MW of biomass and
   d. 30MW of small hydro;
3. Competitive tender for capacities above these thresholds to be procured through Nigerian Bank Electricity Trading Company (NBET)[73]

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[72] Y. Omorogbe, "Promoting Sustainable Development through the Use of Renewable Energy: The Role of Law" in Donald N. Zillman and others (eds.), *Beyond the Carbon Economy* (Oxford University Press, 2008) p. 45.

[73] NERC, "Renewable Sourced Electricity", available at: http://www.nercng.org/index.php/home/operators/renewable-energy (accessed 2 April 2018).

The implementation of these grid-connected renewable energy projects approved by NERC may have been accelerated with the existence of a renewable energy law. For example, the Chinese electricity sector recorded huge successes after the enactment of the Renewable Energy Law in 2005 (amended 2009). Prior to its enactment, China's installed wind power capacity, as at 2004, was 760.2 MW, which increased to 41,827.3 MW in 2010 amounting to an annual growth rate of about 100%.[74] This demonstrates the importance of law.

To end the recurring problems of electricity disruptions and shortages of supply in Nigeria, "the formulation of right policies, right laws, and activities that promote its realization, are necessary foundations for present strategies aimed at ending energy poverty"[75] in Nigeria's electricity sector.

To further build on the foregoing, the NREEEP, since its introduction, has not achieved much; perhaps due to the absence of renewable energy law in Nigeria. In the EU, the Renewable Energy Directive imposes binding targets for the integration of renewable energy up to 20% of the overall energy consumption in the EU by 2020.[76] These targets which are binding are essential as they instil confidence in investors of the seriousness of relevant government regarding renewable energy policy, thereby cushioning the risks associated with long-term investments.[77] It is, therefore, necessary for Nigeria to enact a renewable energy law as policy alone is not enough to promote energy security in Nigeria's electricity sector through renewable energy. More so, "transition towards renewable

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[74] E. B. Hills and Z. Wang, "Institutional Barriers to China's Renewable Energy Strategy" in Shujie Yao and Maria Jesus Herrerias (eds.), *Energy Security and Sustainable Economic Growth in China* (Palgrave Macmillan, London, 2014), p. 277.

[75] Y. Omorogbe, "Policy, Law and the Actualization of the Right of Access to Energy Services" in Kim Talus (ed.), *Research Handbook on International Energy Law* (Edward Elgar, 2014), p. 382.

[76] EC, "Renewable Energy: Moving towards a Low Carbon Economy", available at: https://ec.europa.eu/energy/en/topics/renewable-energy (accessed 2 March 2018).

[77] M. Lee, *EU Environmental Law, Governance and Decision-Making*, 2nd ed. (Hart Publishing, 2014), p. 147.

energy concerns a major transformation of society, which cannot be done on a voluntary basis, and for which law, with all its complexities has a crucial role".[78]

4.0. CONCLUSION

It is beyond argument that electric energy is essential for economic growth, being a fundamental catalyst for the advancement and enhancement of the standard of living of the citizens of any nation, as it is what drives other sectors such as agriculture; health; education; commerce; industries; transportation, etc.[79] The lack of reliable and secure sources of electricity supply *inter alia* is responsible for Nigeria's underdevelopment as "access to modern energy is assumed to be a precondition for poverty alleviation, sustainable development and the attainment of millennium development targets".[80] Development of Nigeria's renewable energy resources is therefore germane to solving Nigeria's electricity energy challenges. Hence, Nigeria must fully embrace renewable energy which is essential in attaining electricity energy security considering Nigeria's vast renewable energy resources.[81]

This article shows that Nigerian governments, past and present, are not oblivious of the benefits of renewable energy in its electricity sector. This has led the Nigerian government to introduce different policies to promote renewable energy development in Nigeria, to wit; National Energy Policy 2003, Renewable Energy Master Plan 2005, Renewable Electricity Policy Guidelines 2006 and National Renewable Energy and Energy Efficiency Policy 2015.[82] Although

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[78] M. Peeters, "Governing Towards Renewable Energy in the EU: Competences, Instruments, and Procedures" (2014) 21 *Maastricht Journal of European and Comparative Law*, p. 39.

[79] S. Yusuf, "Energy Sector is Critical to Nigeria Growth and Development: Perspective to Electricity Subsector-sector in Nigeria" (2014) *Munich Personal RePEcArchive, Paper No. 6*, p. 3, available at: http://mpra.ub.uni-muenchen.de/55689/ (accessed 3 February 2018).

[80] *Ibid*, at 3.

[81] P. K. Oniemola, "Why Should Oil Rich Nigeria Make a Law for the Promotion of Renewable Energy in the Power Sector" (2016) 60 *Journal of Africa Law*, pp. 29-55.

[82] *Supra* n 10, at 27.

these policies were designed to promote renewable energy in Nigeria, there is no clearly defined legal framework for the actualization of these policies. It is therefore imperative that "laws should follow policy, and should be the instruments that promote the realization of a particular policy".[83] This will facilitate the smooth and effective implementation of these policies and attract the needed investment that will hopefully give life to Nigeria's energy policies. This article recommends that the Nigerian government and the legislature should put in place the necessary machinery for the enactment of a definite renewable energy law. Hopefully, this will enable Nigeria to take advantage of its enormous renewable resources in enhancing energy security in its electricity sector.

[83] *Supra* n 72, at 45.

CRIMINAL JURISDICTION IMPOTENCE OF SECURITIES COURT IN NIGERIA

Bolarinwa Levi Pius and K.O. Fayokun Ph. D.*

ABSTRACT

The Investment and Securities Tribunal (IST) lacks criminal jurisdiction over securities crimes as it is the constitutional mandate of the Federal High Court. Hence, due to overloaded genre of cases, securities crimes files litter the High Court docket for years with lethal consequences. Hence, this research paper analysed lacunae in the provisions of Investment and Securities Act 2007 touching criminal jurisdiction of IST over securities crimes. The paper focused on the identified problems responsible for lacunae as distilled: legislative inertia of the National Assembly, conspiracy of the prosecutorial institutions with politicians to foil criminal jurisdiction status of the IST, conservatism of criminal justice system in the grundnorm and the quasi autonomy of the IST. Conclusively, the paper suggests urgent re-enactment of IST law with constitutional imprimatur to remedy the problems.

1.0. INTRODUCTION

A near-utopian adjudicatory architecture is an eminent pillar for assessing enforcement of contract in any jurisdiction as captured by the World Bank Index of Ease of Enforcing Contract. Nigeria is one of the climes with securities court for adjudicating capital market disputes[1] even though it is clogged with adjudicatory forum controversy with the Federal High Court. The essence of establishing the Investment and Securities Tribunal (IST) is to

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[1] There are other advanced jurisdictions with similar operations such as the United Kingdom, which has Financial Services and Market Tribunal (FSMT), and in Indian there is Securities Appellate Tribunal (SAT). These jurisdictions are advancing with modern ways of resolving securities disputes considering volumes of securities trading they patronize; hence Nigeria Court needs to learn a lot from them

quicken dispensation of securities disputes to enhance pool of investment opportunities into the Nigerian market. However, criminal adjudicatory system in Nigeria is far from speedy dispensation of justice following the overloaded jurisdictions of the high court in nearly all genres of subject matters.[2] The Constitution has invested the court with unlimited forum for items listed in its Second Schedule, which includes securities and corporate matters.

However, the IST can only adjudicate on securities torts: it does not have jurisdiction on genre of securities crimes, which fall within the exclusive judicial forum of the High Court. It has been keenly observed that securities investors are lamenting delays in adjudication of securities crimes that litter the High Court dockets and this is seriously declining investors' confidence and the growth of securities market in Nigeria.

The criminal justice system has been plagued with a lot of problems namely: trial delay owing to technicalities of criminal procedure inherited from the United Kingdom; lack of specialized criminal courts and judges; the adversarial system and seaming rules of evidence; inadequate case preparation by lawyers; and the penchant for incessant adjournments by litigants and their lawyers. The net effect of all these among others is that justice is often delayed. It is said justice delayed is justice denied. These problems result in frustration and apathy of litigants to the judicial system and hinder the development of the law. Commercial cases particularly genre of securities crimes suffer the worst impact as the pillar of the nation's economy, capital market collapsed due to delayed justice occasioned at the regular courts. The wheels of commerce demand quick examination of legal disputes and prompt resolution. It is not uncommon to see cases linger on for three or more years under the regular court system. This research will show the jurisdiction narratives of both the Federal High Court and IST and examine the criminal jurisdiction of the High Court over the genre of securities crimes.

[2] R. J. Martineau, *Modern Appellate Practice, Federal and State, Civil Appeals* (1983) pp. 209-211.

Securities scholars and pundits have lamented lack of criminal jurisdiction of the IST as fundamental flaw of its enabling Act and the1999 Constitution. This background evidences that it does not require any gift of clairvoyance to perceive the perpetual vulnerabilities of the securities crimes adjudication, despite the supposed sophisticated regulations aimed at dealing with market malpractices *ex ante.* It is sad that hiatus in criminal adjudication of IST has not been addressed in its twenty years of existence despite tinkering with 1999 Constitution of the Federal Republic of Nigeria three times. Hence, investors' stimuli continue to decline while investment pool goes bearish. A number of problems has been deduced by this research paper as fundamental to the criminal jurisdiction impotence/hiatus of the IST. They are: legislative inertia of the National Assembly to craft a new legislation to guarantee criminal jurisdiction for the Tribunal, conspiracy of the prosecutorial institutions with politicians to foil criminal jurisdiction status of the IST, conservatism of criminal justice system in the grundnorm, and quasi autonomy of the IST.

This research paper will interrogate the problems and will finally front the advocacy for a new legislation that accommodates exclusive criminal jurisdiction and jurisprudence of IST over securities crimes and that same receive constitutional imprimatur to advance World Bank Ease of Enforcing Contract, and attract pool of investors' portfolios into the Nigerian market.

1.1. Statement of Research Problem

Criminal jurisdiction hiatus/impotence of the IST is fanning ember of interrogation stimuli among scholars and stakeholders amidst consequence of continuous drop of Nigeria from the rank of enforcement of contract in the comity of nations. This research paper has identified problems responsible for criminal jurisdiction impotence of the IST as: legislative inertia of the National Assembly to craft a new legislation to guarantee criminal jurisdiction for the Tribunal, conspiracy of the prosecutorial institutions with politicians to foil criminal jurisdiction status of the IST, conservatism of criminal

justice system in the grundnorm, and the quasi autonomy of the IST. This paper has set out to interrogate them.

1.2. Specific Objectives of the Paper

The specific objectives of this research are to:

a. examine the legislative apathy /inertia of the Parliament in criminal jurisdiction hiatus of the IST;
b. interrogate the conspiracy between the prosecutorial institutions and political oligarchs in foiling criminal jurisdiction status of the IST;
c. analyze how constitutional conservatism denies IST criminal jurisdiction; and
d. canvass statutory severance of the IST from being a parastatals/protégé of the executive other than judiciary.

1.3. Research Questions of the Paper

The research questions distilled from the problems identified are:

i. Whether the legislative inertia of the Parliament does not amount to continued denial of IST criminal jurisdiction and beacon to securities anarchy;
ii. Whether the conspiracy between the prosecutorial agencies and political oligarchs to stifle IST of its criminal *vires* is not worsening enforcement of contract in the Nigerian market;
iii. Whether executive control over the Tribunal would allow growth of criminal jurisprudence and jurisdiction of the IST, even if clothed with criminal jurisdiction;
iv. Whether constitutional conservatism against special court/tribunal is not over protecting the Federal High Court, thereby making criminal jurisdiction status of IST a charade or mockery?

1.4. Research Methodology

The study will rely on primary and secondary sources of information. The primary source will include the legislation such as the Investment and Securities Act 2007, the Federal High Court Act,[3] the Companies and Allied Matters Act (CAMA),[4] Administration of Criminal Justice Act 2015 and 1999 Constitution of the Federal Republic of Nigeria all relating to the subject matter. The secondary source will include textbooks, journal articles, newspapers, periodicals, conference proceedings and internet.

1.5. Justification of the Paper

Criminal jurisdiction lacuna of the IST is monumentally declining the growth of the Nigerian securities market as investors both local and foreign are reluctant in committing their investment pool into the Nigerian capital market. This lacuna is seriously frustrating the economic blueprint, Economic Recovery and Growth Plan (ERGP) of the government. Nigeria is just recovering from recession and advocating for massive investments from investors, but for albatross in criminal status of the Tribunal and decline of Nigeria from enforcement of contract index. The research paper therefore set to interrogate the problems responsible for the criminal jurisdiction impotence of the IST and suggest constitutional and statutory imprimaturs ways to attract investors back to Nigeria.

2.0. CLARIFICATION AND DEFINITION OF TERMS

In the interest of thematic appreciation of the research, the words: "criminal jurisdiction", "impotence" and "securities court" are described to shed foundational light on the subject matter. "Criminal jurisdiction" is an art or power of courts to hear a case brought by a state accusing a defendant of the commission of a crime.[5] In the light of this paper, a well-researched analysis of the hiatus in the criminal jurisdiction of the IST becomes a fundamental *hubris* to securities adjudication and enforcement of contract in Nigeria.

[3] Federal High Court Act, Cap F12 LFN 2004.
[4] Companies and Allied Matters Act, Cap C20, LFN 2010
[5] "Criminal jurisdiction", available at www.en.m.wikipedia.org/wiki/Criminal_jurisdiction (accessed 8 June, 2019).

"Impotence" is defined as powerless, lacking the necessary strength to carry out an act.[6] In the context of this research, the Tribunal is statutorily and constitutionally lacking in power and strength to entertain subject matter securities crimes.

"Securities court" is a specialized court that adjudicates on securities or capital market matters or cases. Like in Nigeria where the nomenclature given to the court is IST,[7] in UK, there is the Financial Services and Market Tribunals (FSMT), and in India, the Securities Appellate Tribunal (SAT). However, there are few jurisdictions in the world that have securities courts of which Nigeria is one, but can only adjudicate on securities torts.

2.1. Literature Review

It became so hard to assemble literature on area of securities tribunal. Looking at advanced jurisdiction of the world, criminal jurisdiction of securities cases is within the province of their high court. The pioneer chairman of the IST, Mrs Ngozi Chianakwalam touched on the exigency of criminal jurisdiction for the Tribunal:[8]

> Right now, the position of the law is that after judgment, the person who wants to enforce the law has to go to the Federal High Court and register the judgment there. This is part of what the new Work Group would look at and part of what would be in the amended Act. This means that IST should be able to enforce its judgment. If someone commits contempt of Court before us, there is not much we can do. You cannot really try the person but in a regular Court, if anyone commits contempt of Court, you should be able to summarily try the person. Some people were even talking about having criminal as well as civil jurisdictions but I do not know how that would work out now. However, these

[6] Chambers 21st Century Dictionary (4th ed, 2002, Harrap Publishers Ltd) at 678.

[7] Investment and Securities Act 2007(CAP 124, LFN, 2004), s. 274.

[8] See an interview she granted to the Channel TV when she resumed the Chairmanship of the Tribunal, available at: www.channel.com/2013/03/12/ngozi-chianakwalam-resumes-as-chair-of-investment-and-securities-tribunal/ (accessed on 14 April 2018).

> are part of the things that we are looking at and we would look at everything holistically.

This research aims at deepening the argument for the IST through a radical advocacy for legislative piece and constitutional amendment investing/clothing the tribunal with criminal jurisdiction.

3.0. BRIEF EPISTEMOLOGY OF THE FEDERAL HIGH COURT

Appointments of the Nigerian federal judges are constitutionally provided for under Section 250 (1)-(5) of the 1999 Constitution. The person for the office of the chief judge of the Federal High Court (FHC) is recommended from the National Judicial Council (NJC), being the regulatory body for the nation's judiciary, to the president for appointment subject to the confirmation of the National Assembly. The executive wisely provides for this procedure to avoid abuse of powers and stifling of the nation's judiciary. All other judges of the Federal High Court are recommended by the National Judicial Council (NJC) for appointment by the president without the confirmation of the National Assembly.

4.0. JURISDICTION OF THE FEDERAL HIGH COURT ON SECURITIES MATTERS

The court has been captured in detail under the genres of courts as established and alluded to under Section 6 of the 1999 Constitution. Generally, the FHC has exclusive trial jurisdiction over any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Central Bank of Nigeria, Corporate Affairs Commission, and Securities and Exchange Commission as federal agencies.[9] Specifically, the FHC has exclusive jurisdiction in civil and criminal causes and matters arising from the operation of Bank and Other Financial Institution Act and (or) connected with or pertaining to banking, including a banker customer dispute.[10]

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[9] 1999 Constitution of the Federal Republic of Nigeria, Cap C23, Laws of the Federation of Nigeria 2004 (Fourth Alteration), s. 251(1) (r).

[10] *Ibid* at s. 251(1) (d).

The court also has exclusive jurisdiction in civil and criminal causes and matters arising from the operation of Companies and Allied Matters Act[11] or any other enactment regulating the operations of companies incorporated under CAMA.[12]

In effect, the FHC has a disjunctive exclusive criminal and civil jurisdictions over matters arising from CAMA on the one hand, and (or) matters arising from other laws such as the Investment and Securities Act that regulate the operations of companies.[13] The court in *Skenconsult (Nig.) Ltd* v. *Ukey*[14] supports this interpretation. It is a Nigerian authority for the proposition that the FHC has exclusive jurisdiction on matters arising from CAMA. Then position of the constitution has not changed, even though, the case was decided when CAMA, then known as the Companies Act of 1968, was the only law regulating incorporation of companies and dealings in companies' shares. The *grundnorm* retains its touchstone of validity today as far as the appropriate judicial forum for securities disputes is the Federal High Court.

This is supported by the Court of Appeal in the case of *SEC* v. *Prof. A.B Kasunmu (SAN) & Ano*r[15] where the Court quoted with approval and support to the judgment of the trial court (the Federal High Court):

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[11] Companies and Allied Matters Act Cap C20, LFN 2010.

[12] Section 251 (1) (e); Federal High Court Act 1973, s. 7(1) (c)(ii), above.

[13] This interpretation of Section 251 (1) (e) of the CFRN, 1999, is consistent with Section 18 (3) of the Nigerian Interpretation Act, which provides to the effect that "the word 'or' and the word 'other' shall in any enactment, be construed disjunctively and not as implying similarity".

[14] (1981) NSCC 1. This is a leading authority on this point. On the facts, the respondent, a director of the appellant company litigated a boardroom dispute over the management of the appellant company, before the defunct Bendel State High Court (with the creation of the Edo and Delta states from the old Bendel State, now Delta state and Edo state High Courts). On a final appeal to the Supreme Court of Nigeria, Nnamani JSC, applying Section 7 (1)(c)(1), of the Federal Revenue Court Act No. 13 of 1973, (the predecessor provision to Section 251(1)(e) of the CFRN 1999 and Section 7(1) (c)(ii) of the FHC Act) held that (at page 13 – 14) that the Federal High Court, the predecessor to the FHC, was the competent forum for the trial of the case.

[15] (2009) 10 NWLR (pt.1150) 509.

> It is pertinent to say that the Federal High Court is a creature of the constitution. Section 249 of the Constitution established this court. The scope and extent of the court's jurisdiction and powers are spelt out in Section 251 and 252 of the Constitution. It is therefore the same constitution that can oust or limit its jurisdiction and curtail it powers… it is my view that Section 242 of the Act which is now deemed to be an Act of the National Assembly and not a constitutional provision and in so far as it has provided that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the tribunal constituted under the Decree is empowered to determine is inconsistent with the provision of S.6(6) (b) of the aforesaid constitution which provision has conferred on this court judicial powers on all matters between persons or between governments or authority and to any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to civil rights and obligations of that person. That section to the extent that it purports to oust the jurisdiction of this court is invalid.

The above judicial imprimatur identifies the Federal High Court as the right judicial forum to initiate securities matter

5.0. EPISTEMOLOGY OF INVESTMENTS AND SECURITIES TRIBUNAL

The Investment and Securities Tribunal (IST), the current adjudicatory successor in the Nigerian capital market, is an independent specialized judicial body and a creature of Section 224 of the Investments and Securities Act 1999. The essence of the IST is hinged on the technical and specialized nature of the capital market as well as the nature of the transactions and participants[16] It has jurisdiction, original and appellate, to interpret and adjudicate on all capital market and investments civil disputes. By legislative amendments, Section 224 of the earlier Act has now been replaced

[16] Joseph Abugu, "Special Jurisdiction: Relevance in the Nigerian Capital Market". Discussion Paper at 2009 Work Relationship Day (WRD) IST, Lagos Zonal Office, 8.

by the extant Section 274 of the Investments and Securities Act 2007.[17] It reads:

> There is established a body to be known as the Investments and Securities Tribunal to exercise the jurisdiction, powers and authority conferred on it by or under this Act.

5.1. Legal Architecture of the IST

The legal infrastructure administering the IST is Investment and Securities Act and it has no provision, intervention or regulation or supervision of judiciary over the IST. In fact, the Nigerian Constitution which establishes superior courts with their functions, structures, powers and regulations does not list the IST among genre of courts in Nigeria. Even the character, spirit and letter of the Tribunal establishment Act places the Tribunal under full control of the Executive in terms of appointments of panel Members, structures of the Tribunal, powers and salaries of the Tribunal members.

The fact that the National Judicial Council (NJC), a constitutional body that superintends over the judiciary in Nigeria has nothing to do with the IST is justified by the requirements of the Act; the membership of the IST consists of ten (10) persons to be appointed by the Minister as follows:[18]

a. Full time Chairman who shall be a legal practitioner of not less than fifteen years with cognate experience in capital market matters;
b. Four other full time Members, three of whom shall be Legal Practitioners of not less than 10 years' experience and one person who shall be knowledgeable in capital market matters, who shall devote themselves to issues relating to adjudication and shall not exercise any administrative functions;
c. Five other part time members who shall be persons of proven ability and expertise in corporate and capital market matters

[17] Act No. 29 of 2007.
[18] *Supra* n 3 at S. 275.

Although the IST has been performing its statutory functions, it is not without jurisdictional controversy with the Federal High Court. Hence, stakeholders have been radically campaigning for constitutional imprimatur and urgent legislative activism to recognize the IST among the superior courts in Nigeria and establish Investment and Securities Tribunal Act in the very similitude of the Federal High Court and National Industrial Court which differently exercise both civil and criminal jurisdictions in their various genres of cases they are constitutionally empowered.

6.0. JURISDICTION IMPOTENCE OF THE INVESTMENT AND SECURITIES TRIBUNAL OVER SECURITIES CRIMES

The spirit, letter or operational principle of the Investment and Securities Tribunal is that it shall adjudicate over civil matters. It has no capacity or jurisdiction to entertain genre of securities crimes. As it stands today in Nigeria, securities crimes cases are remitted to the Federal High Court being the only court constitutionally recognized and statutorily empowered to decide on them. There is no constitutional support or imprimatur for the creation, powers or functions of the IST; rather the 1999 Constitution only recognizes the exclusive jurisdiction of the Federal High Court to adjudicate on all the civil disputes conferred on the IST by its established Act.

The 1999 Constitution expressly provides in Section 251 (1) that the Federal High Court shall have exclusive jurisdiction in all civil matters in respect of which jurisdiction is conferred on the court by Section 251 (1) of the Constitution. Furthermore, in Section 251 (2)-(3) of the Constitution confers criminal jurisdiction on the Federal High Court in respect of:

1. treason;
2. treasonable felonies and allied offences; and
3. exclusive jurisdiction in all criminal causes and matters arising from matters over which Section

> 251 (1) of the Constitution confers exclusive civil jurisdiction on the court.

It is evident that the Federal High Court exercises criminal jurisdiction. By virtue of Section 7 (3) of the Federal High Court Act, the court has been conferred with criminal jurisdiction in respect of matters within its civil jurisdiction. Under Section 7(2)(3) of the Federal High Court Act, the Federal High Court has jurisdiction to try offences under the Second Schedule of the Exclusive Legislative List of the 1999 Constitution of which capital market is among. The Federal High Court also has jurisdiction to try offences under the Criminal, Penal Codes and Administration of Criminal Justice Act 2015 provided the offences are "in relation to offences to which proceedings may be initiated at the instance of the Attorney General of the Federation".

The offences captured in the current Administration of Criminal Justice Act passed in 2015 are within the jurisdiction of the Federal High Court. The constitutional logic and flow is that "capital/securities market disputes" is among civil causes over which Section 251 (1) of the Constitution confers exclusive civil jurisdiction on the (Federal High) court. Therefore, by constitutional interpretation or equivalence, the Federal High Court shall exclusively exercise criminal jurisdiction over "capital/securities market disputes". Since 1999 when the current Constitution came into force, the Federal High Court has been exercising criminal jurisdiction over capital/securities market crimes. The 1999 Constitution uses the same qualifying words/clause in conferring both civil and criminal jurisdiction over securities matters on the Federal High Court. The danger is that securities crime cases continue to litter the docket of the High Court due to so many factors such as shortfall in cognate securities litigation judges, judiciary strikes. This has continued to erode investors' confidence considering the exigencies of the market.

It is sad from the foregoing to note that the Investment and Securities Tribunal has been a shadow of itself as it is impotent to exercise jurisdiction on matters of securities crime, even its civil

jurisdiction over the subject matter is fraught with jurisdiction controversies with the Federal High Court. The argument of the apologists that the law which establishes the Investment and Securities Tribunal was a document hurriedly prepared by the Military Government of Abdulsalaam Abubakar at the twilight of its exit could not stand the reality of time and space between 1999 and now. The securities pundits, legal scholars and cognate experts in securities market have continued to beg the question of why the democratic economy as Nigeria continues to refuse addressing a legislative Bill to amend the Constitution by removing capital market/securities matters, both civil and criminal in nature, from the adjudicatory superintendence of the Federal High Court and remitting same in the Investment and Securities Tribunal.

Similarly, the question has been raised as to why the Tribunal has not been independently established as a specialized court under the constitutional and regulatory supervision of the Nigerian Judicial Council (NJC), the apex judicial regulatory body. Hence, the research problems responsible for criminal impotence are serially interrogated.

6.1. Whether the Legislative Inertia of the Parliament does not amount to continued Denial of IST Criminal Jurisdiction and Beacon to Securities Anarchy?

Legislative inertia/apathy is the failure of legislators to make laws, exercise parliamentary action, or oversight functions by the legislators over its constitutional roles. The failure of the National Assembly to legislate or exercise oversight functions on matters that will promote business growth and investment policies of government is dangerous to Nigerian economy. This inaction has worsened securities crimes adjudication in Nigeria.

The Investment and Securities Act 1999 was one of the rushed legislative pieces passed into law at the twilight of the regime of General Abdulsalam Abubarkar. The ovation that greeted the legislation then has far dwindled amidst its criticism. The inelegancy,

coercive tones and material lacunae evidenced in the legislation particularly on criminal adjudicatory hiatus in the Nigerian capital market are apparently identified defects. Although some amendments were made to the 1999 Act now Investment and Securities Act 2007, but criminal jurisdiction architecture of the Investment and Securities Tribunal was not considered and no viable alternative forum has been proffered till date. The complaint of investors has reached its peak as investment litigations hang for years in the docket of high court and has created negative impact on the capital market and the nation's economic growth; hence, corporate investors are living on uncertainties.

No sooner had the Investment and Securities Act been passed into law than controversy surrounding the status, civil and criminal jurisdiction, funding and independence of Investment and Securities Tribunal became evident. Ring of securities felons perpetrate all manner of crimes spanning from insider abuses, terrorism financing, money laundering, currency riggings, and corporate criminal reciprocity. It is worrisome that IST does not have the *vires* to determine them. Hence, the UK parliament has warned its citizens from considering Nigeria as viable clime for investment. A member of UK parliament said the courts have been playing its critical role in applying the relevant laws and rules in order to foster effective regulation of the capital market, achieve investor protection and legal certainty.

However, judicial activism could not cure this defect because it is foundational in the 1999 Constitution and its statutory piece. It is shocking that the 1999 Constitution of Nigeria has undergone three (3) different amendments, yet the National Assembly never bulged to tinker with Section 6 of the 1999 Constitution to enlist the Investment and Securities Tribunal among the superior courts mentioned therein with forum to hear criminal matters. The National Assembly is quite informed of litany of securities crimes on the docket of the high court and lamentation of investors and securities stakeholders that IST be empowered with criminal

jurisdiction over securities crimes, yet nothing is done to remedy the situation.

However, some securities scholars have come up with another legal logic and advocated for the doctrine of judicial deference, yet the controversy is getting fiercer every day. The promoters of the doctrine of judicial deference observed that across the judicial board, there is an unmistakable failure to appreciate the fact:

> that IST panel members, being mixture of lawyers and non-lawyers, only specialize on deciding civil facts/securities torts and apply same to subject matter before them; and (2) that there is utilitarian value in limiting them to thrive within their cognate areas which is civil.

They believe their voices must be constantly raised for the effectiveness of the itemized mechanisms, that there was every reason to be concerned. Anthony Idigbe, an advocate of the doctrine said:

> In relation to judicial review in Nigeria, therefore, I think there are some important lessons that can be learnt from Canada. The survival and effectiveness of administrative tribunals is impossible without some healthy degree of deferential attitude by the courts, particularly on issues of facts or where the tribunal is interpreting its own statute. Administrative tribunals relied on to resolve capital market dispute must be allowed to operate with limited interference. Judicial intervention should be justifiable only in extreme cases, not in ordinary ones. Administrative autonomy must be respected, even if it means jettisoning judicial tradition. I therefore call on all those who believe that our administrative bodies deserve a measure of deference to join and make their intellectual voices heard in order "to provide antidotes to the propensity of courts to see themselves as experts on many issues of regulatory law

> and to downplay the capacities of tribunals in relation to those same questions.[19]

The learned scholar opined that the Nigerian courts particularly the Federal High Court could continue to dangle judicial Sword of Damocles constantly over the heads of securities recidivists. However, Chief Anthony Idigbe is silent on inertia of legislators to amend the 1999 Constitution and re-enact a new law clothing the IST with criminal jurisdiction on areas of its civil jurisdiction. Legislators continue to rape the IST of criminal jurisdiction having no real space carved out for the Tribunal, whose autonomy ultimately depends on the good grace of the perennially overenthusiastic judicial interventionist high court judges.[20] This research understands the position of the above scholars' reasoning and advocacy that legislative intervention is not urgently needed, but that judicial deference should be allowed for the systemic growth of the Tribunal.

However, this research sees legislative inertia of the National Assembly as a continued rape of the IST of its criminal jurisdiction. It seems the legislature is filibustering their constitutional responsibility from doing the needful. There is no spirit of bi partisanship as the case of advanced economies, in rescuing Nigeria out of harsh economic recession. Investment apathy due to lack of sound administration of criminal justice system on securities crimes resonates in the market. Apart from the fact that investors are reluctant in committing their portfolios into the Nigerian securities market, anarchy and self-help remains the options in the hands of vindictive investors who have suffered long in the hands of warped justice system.

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[19] David J Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 CJALP 59, 72.

[20] Paul Daly, "A Brief History of (Recent) Time: the Struggle for Deference in Canada," available at: http://www.administrativelawmatters.com/blog/2014/05/30/a-brief-history-of-recent-time-the-struggle-for-deference-in-canada/ (accessed 14 April 2018).

6.2. Whether the Conspiracy between the Prosecutorial Fiat of Attorney General and Political Oligarchs is not aimed at Stifling IST of its Criminal *Vires*?

The attorney general is the chief law officer of the federation. Attorney-General's authority is enshrined in the constitution of the Federal Republic of Nigeria, 1999. Sections 174 and 211 empower the Federal and States attorneys general respectively to institute, take over or discontinue criminal proceedings against any person in any court of law in Nigeria. The authority of the attorney general respectively to institute, take over or discontinue criminal proceedings is subject to overriding constitutional powers of the attorney general.

The enforcement and compliance department of the Securities and Exchange Commission is responsible for detecting and investigating a variety of potential violations and enforcing compliance with the Investment and Securities Act 2007 and the regulations made thereunder.[21] The enforcement department on the directive of the director general of SEC, remits the criminal files and material findings to the office of attorney general to institute, take over or discontinue criminal proceedings subject to overriding constitutional powers given to him.

However, Nigerian securities market is the most hit of the shenanigans, shady actions being perpetrated by the prosecutorial agencies particularly the office of the attorney general. The office determines by fiat which case files go to court at the mercy of political interest of powerful oligarchs. The office and the occupier are protégé of the lechers at the corridor of power who insulate their cronies from securities crime trials. Attorney general gives directive to other prosecution agencies through fraudulent legal notice to drop trials of high-profile felons. Sometimes, the attorney

[21] Section 313 (1) (c) (n) empowers the Commission to make rules and regulations prescribing the procedure for obtaining any information required under the Decree and to make regulations generally for carrying out the principles and objectives of the Act.

general may decide to take over high profile securities cases which escaped his knowledge and "immolate" them. He could go to court in person or send legal instrument to court to withdraw high profile securities cases from continuing.

This narrative attests to the reason that attorney general has never supported criminal jurisdiction of the Investment and Securities Tribunal (IST). The attorney general knows that once the IST is granted criminal jurisdiction, there is a strong tendency that it will be a court under direct supervision of the National Judicial Council. As it is today, the IST is a parastatal of the executive arm of government. Statutorily, the panel members are at the mercy of Ministry of Finance and Ministry of Justice who hire and fire the members of the Tribunal. Investors have severally expected the office of attorney general in conjunction with Law Reform Commission to craft executive bill (Investment and Securities Tribunal Bill) guaranteeing criminal jurisdiction of the Tribunal and foreword same to the National Assembly for enactment, but for political annexation of the Tribunal to carry on fraudulent dictate of the attorney general.

Hence, enforcement of securities contract in Nigeria is poor and creates uncertainty in the minds of investors. It has become sadder that the IST does not have criminal jurisdiction; in fact lacks constitutional recognition; even its enabling Act lacks judicial tones and characteristics. The World Bank Ease of Enforcing Contract continues to see Nigeria as one of the dangerous and insecure jurisdictions for securities investors to commit their investments. This is because securities (crime) cases take longer time in the High Court docket and that the specialized court on the subject matter. Investment and Securities Tribunal does not have criminal jurisdiction to decide genre of securities crimes while the prosecutorial fiat of attorney general is often compromised on the altar of political escapades. It is a business norm/axiom that investors, even countries rely on the World Bank Index to choose where to commit their portfolios. As it is, Nigeria is a doubt.

6.3. Whether the Executive Control over would IST allow Growth of Criminal Jurisprudence and Jurisdiction of the IST, even if clothed with Criminal Jurisdiction?

The statutory subornation of the IST under the supervisory activism of the Executive is unconstitutional and usurpation of judicial powers conferred on the Judiciary by Section 6 (5) of the 1999 Constitution. The inconsistency cannot stand because, in the dictum of Chief Justice Griffith, "any attempt to vest any part of the judicial power … in anybody other than a court is entirely ineffective and nugatory", and particularly in securities clime such executive meddlesomeness is set to destroy the market and that must not be allowed in a democratized securities market.

Clearly the conflict is in the sense that the IST has been vested with jurisdiction over administrative or executive decisions arising from the actions or decisions of the SEC (the SEC being a federal government agency), while Section 251 (1) (r) of the Constitution, vested the Federal High Court with exclusive jurisdiction over all administrative or executive actions. The IST, *stricto senso***,** is not a court: it is an administrative body. It is clear from the statute creating it that it is an administrative body in the sense that the presiding officers of the IST are appointed by the Ministry of Finance and not the procedural way the judicial officers are appointed being without the recommendation of the National Judicial Council (NJC).

It is appalling in the characterization of the IST having the character of a court with some of its judges being legal practitioners, to be under the control of the Executive rather than the National Judicial Council (NJC). It is administrative going by the appointment provisions of the Tribunal members in the Investment and Securities Act particularly Section 275 (1) and (2) that:

> 275 (1) The Tribunal shall consist of ten (10) persons to be appointed by the Minister as follows:
>
> a. a full time Chairman who shall be a legal practitioner of not less than fifteen years with cognate experience in capital market matters;

b. four other full time Members, three of whom shall be Legal Practitioners of not less than 10 years' experience and one person who shall be knowledgeable in Capital Market matters who shall devote themselves to issues relating to adjudication and shall not exercise any administrative function;
c. five other part time members who shall be persons of proven ability and expertise in corporate and capital market matters.

(2) The Chairman shall be the Chief Executive and Accounting Officer and shall be responsible for the overall control, supervision and administration of the Tribunal.

The appointments of members of the Investment and Securities Tribunal (IST) does not follow judicial trait and procedure for appointing judges in Nigeria as provided for in the 1999 Constitution. The intendment of the National Assembly is to create an adjudicatory body exercising judicial functions, but rather than remitting it under the regulatory forum of the Nigerian judiciary particularly the National Judicial Council as provided for all courts in Nigeria, the Investment and Securities Tribunal is subsumed under the executive control of the Federal Ministry of Finance. It is a moral and legal antithesis for the executive to carry out the judicial function, and this does not and cannot receive constitutional and universal imprimatur anywhere in the world.

The universal principle of separation of power in a democratized securities market is breached and statutorily flawed by the Nigerian clime. There is no gainsaying the fact that the famous doctrine or principle of separation of powers is as old as man, what we are saying in essence is that, separation of powers has been in existence since man came to the society. Montesquieu[22] postulated that,

> Political Liberty is to be found only when there is no abuse of power. But constant experience shows every man invested with power is liable to abuse it, and carry it as far as it will go. To prevent this abuse, it is

[22] *Baron de Montesquieu, The Spirit of Laws: A Compendium of the First English Edition*. Berkeley: U California P. published by David Wallace Carrithers (ed.).

> necessary from the nature of things that one power should be a check on another…when the legislative and Executive powers are united in the same person or body there can be no liberty
> Again, there is no liberty if the judicial power is not separated from the legislative and executive. There would be an end of everything if the same person or body, whether of the nobles or the people, were to exercise all the three powers.

It is sad to note that the principle of separation of powers is not in operation in the Nigerian securities market regarding adjudication of disputes where the executive (administrative) and judicial functions are concentrated in the hands of the Securities and Exchange Commission, the SEC vide the Investment and Securities Tribunal, an administrative appendage of the Securities and Exchange Commission . Where there is a concentration of functions of all the arms of government in one arm, political anarchy and administrative anomie like the case in the Nigerian securities market become the trend.

The narrative of the Executive bedlam perpetrated by the Investment and Securities Act became evidenced when it appointed new members on the Board (Panel) of the Investment and Securities Tribunal (IST) dated 16 October 2015, few anomaly in the Nigerian securities market as viewed by legal writers and securities experts, as narrated:

A Relieved Letter to the Tribunal Panel came some months into the Buhari Presidency. The Executive action practically demonstrates adjudicatory anomie and stalemate in the statutory roles of the Tribunal.

The Letter with Reference Number: SGF. 19/S.18/XIX/968 dated 16 October 2015 emanated from the Office of the Secretary to the Government of the Federation to the Board of the Investment and Securities Tribunal in form of a bureaucratic circular disengaging all the nine (9) Panel Members of the IST with immediate effect; and the same Letter contained the names replacing those relieved. The

reason cited was **"**to reposition the IST for better performance to enhance investors' confidence". The legal premise for their sack was hinged on the fact that the IST is a parastatal of the Federal Government; hence the Civil Service Rules under the Executive control applied.

Following the above, eight (8) of the sacked Panel Members (Judges) wrote a Petition with the Ref No: IST/OHC/320/001 to the Office of the President dated 5 November 2015 and received by the Acting President, Yemi Osinbajo, asking the President to reverse the sack because, quoting from the content of the Petition:

> The Tribunal is a civil court for all purpose; its existence is in perpetuity unlike other tribunals that are ad-hoc in nature. Court sittings since have been suspended and cases at judgment stage may have to start afresh whereas this is costly to the Nigerian tax payers and interesting public.

Further, the content of the Relieved Letter would surprise the legal writers, securities lawyers and experts who have consistently argued for the sustenance of the IST as it is in its enabling Act as a coordinate jurisdiction with the Federal High Court despite its constitutional inconsistency. This research quotes further to show that the Nigerian federal government sees the IST as its appendage, that is, a parastatal responsible to the Federal Government's Agency, the SEC; and by consequence, it is administered by the Civil Service Rules. The Petition is further reproduced as follows:

> The Letter referred us to Federal Government Circular Reference No: SGF. 19/S.18/XIX/968 on the dissolution of the Boards of Federal Government parastatals, agencies, institutions and Government owned companies and accompanying Letter from the Office of the Secretary to the Government of the Federation dated 16 October 2015 to the effect that the dissolution did not exempt the IST. We were therefore advised to ensure compliance with the directive by staying away from court sittings and work

The nine (9) judges claimed that their sack violated Section 6 (5) of the 1999 Constitution where the Tribunal draws its powers. The judges further claimed that the Office of the Secretary to the Government of the Federation wrongly, illegally and unlawfully categorized them as Board of the Federal Government, owned parastatal contrary to the Act that established the Tribunal. The aggrieved judges explained that the IST is a specialized court set up in 2002 to adjudicate on disputes arising from the capital market in Nigeria. They claimed that they have four-year term of Office in line with Section 277 of the Investments and Securities Act 2007, and that a judge can only be removed if he becomes of unsound mind, bankrupt or makes a compromise in the discharge of his duties. The Judges warned that their sack like boards members of parastatals would not only set a dangerous precedent but would wane the confidence of investors in the country's capital market.

From the above narratives, Section 6 (5) of the Constitution upon which they hinged their Petition does not recognize the Tribunal as among the superior courts of record. The Executive sees and treats the Tribunal as its stooge to achieve their whims and caprices. It has the powers to hire and fire to settle political scores and harvest jobs for political jobbers of the same political parties with them. However, this is very dangerous to the sustenance of the confidence of investors in securities market. Any securities market where law is impotent to wrest adjudicatory powers from the influence and manipulative ring of politicians, cannot grow.

It follows that the Investment and Securities Act 2007 was inelegantly and weakly enacted by making the IST a clown and caricature in dispute resolution in the Nigerian securities market. The IST as it stands today is not autonomous from the influence of the Executive and cannot independently guarantee justice to investors whenever such dispute is against the Executive and its agency such as the SEC. Hence, the Investments and Securities Tribunal is a bad law that needs urgent reforms regarding the powers, functions, privileges and status of the Tribunal.

Another puzzle raised by the status of the Investment and Securities Tribunal (IST) is the qualification and constitution of Members and

Chairman of the Tribunal. For the avoidance of doubts, Section 275 remits that the Chairman shall be a legal practitioner of fifteen (15) years having cognate experience in securities matters.[23] The main issue is the membership of the non-lawyers as members of the Panel harnessing legal instruments such as the Investment and Securities Act, Constitution, decided cases, practice directions to dispense cases. The question is how sound and effective such decisions made by them would be. How can an individual who is not a lawyer, without a legal background, comprehend submissions of a lawyer appearing before him as a judge? There cannot be sound and rich legal proceedings and procedural flavour because of lack of requisite expertise: the decisions will be full of errors; and that will erode the confidence of investors. Also constituting those individuals without legal foundation as members of the IST is a disaster and decisions evolving from them are better described as caricature, a mockery of justice.

The question on whether the IST would guarantee integrity of criminal justice system even if clothed with criminal jurisdiction has been inherently answered in the negative. It becomes obviously impossible as members of IST are treated as administrative bureaucrats to implement policies and programs of the executive. It follows that entire Investment and Securities Act is flawed regarding IST and the only cure is complete jettisoning of the Act, and re-enactment of a new statute that represents IST as a court of competent jurisdiction on securities market matters.

6.4. Whether Constitutional Conservatism against Special Court/Tribunal is not over protecting the Federal High Court, thereby making Criminal Jurisdiction Status of IST a Charade or Mockery?

Nigerian constitution is the grundnorm from where all instruments and policies of government are guaranteed. The judiciary is captured in the document as an adjudicatory arm. Particularly, Section 6 of the constitution lists courts recognized as having superior status of

[23] *Supra* n 3, Section 275 (1) (a).

which the Federal High Court is among. Constitutional conservatism is an archaic, non-shifting system of holding onto certain principles in the constitution as too sacred to relax in allowing recognition of instruments of national importance to find a position.

It has been keenly observed that the 1999 Constitution is reluctant in recognizing specialized court as superior court. Hence, the custom of non-recognition of Investment and Securities Tribunal among the list of superior courts has continued to insulate and over protecting the Federal High Court against specialized courts which have cognate experience on subject matters jurisdiction.

It seems the Nigerian Constitution inherently has the history of non-recognition of paradigm shift in protest against scheme and speed of modernization. Various jurisdictions of the world are striving to accommodate specialized courts with superior capacity on special matters of national importance to enhance speedy dispensation of justice, Nigerian constitution should be relaxed to accommodate specialize courts that will enhance speedy dispensation of justice.

It is shocking to note that the 1999 Constitution has been amended not less than three times, yet overloaded jurisdictions of the Federal High Court virtually with all subject matters has not been addressed. The High Court is slow in administration of justice system due to over bloated cases it has to deal with. Whereas some items contained in the exclusive legislative list could be divested from adjudicatory forum of the FHC and give them to specialize courts to determine. Being specialized means they have requisite and cognate knowledge to address them with speed highly required of justice. It would amount to jurisdiction inanity if a new statute is crafted to confer criminal jurisdiction on the IST without equivalence and consequential constitutional recognition of IST as superior court with specialized roles on securities matters.

The Investment and Securities Tribunal in Nigeria has lost its utopian vision of impartiality and independence; and in fact, statutorily it has no criminal jurisdiction on securities matters and its civil jurisdiction superficially captured in the light of the Constitution and the Federal

High Court Act. The implications of the crisis are captured: loss of hard-earned securities investments by investors, lack of synchronized criminal securities jurisprudence in Nigeria, further decline in World Bank ease of enforcing contract in Nigeria, increase in securities crimes and felons, repatriation/capital flight of investment portfolios from Nigeria

7.0. SUMMARY OF FINDINGS

This research has found out the following from the interrogation that:

a. the legislative inertia of the National Assembly has continued to deny the IST criminal jurisdiction and could begin to amount to securities anarchy as frustrated securities litigants' resort to self-help;
b. the conspiracy between the prosecutorial fiat of attorney general of federation and political oligarchs will continue to stifle the IST of criminal jurisdiction with its attendant grave consequences;
c. that the inelegant drafting of Investment and Securities Act 2007 placing regulation of the IST under Executive Control would not allow securities market growth, deny entire economy lucrative investments and demean comprehensive culture of Criminal Jurisprudence; and
d. that Nigeria is replete of constitutional conservatism by over protecting and insulating the Federal High Court against specialized court like IST by denying the Tribunal a superior status having no provision for the Tribunal in the 1999 Constitution.

8.0. RECOMMENDATIONS

8.1. Advocacy for Criminal Jurisdiction and Jurisprudence for the Investment and Securities Tribunal

Looking at the implications simplified above caused by the dangers of leaving securities crime cases to judicial forum of the Federal High Court, if criminal jurisdiction, is given to the IST, it will attract inflow of investors' portfolios and double the current benefits to the Nigerian economy. Similarly, securities jurisprudence in Nigeria will witness robust outlook among the comity of nations. There will be open window for criminal securities research, critical analyses of decided securities cases among the academics to appreciate the merits and demerits of such judgment and this will rob on the entire securities market. Synchronized securities law reports will galvanize investors' confidence in the Nigerian securities market.

8.2. Constitutional and Statutory Imprimaturs of the Court

The supremacy and sovereign province of the Constitution is the fundamental safety of any nation, institution and territory. This is a universal principle of any democratized nation and advanced securities economies. This becomes a mandatory submission in the clarity of the 1999 Nigerian Constitution particularly Section 1[24] affirms:

> This constitution is supreme and if any other law is inconsistent with the provisions of the constitution, the constitution shall prevail and that other law shall to the extent of its inconsistency be void.

In taking the IST from the crisis of superficial and quixotic exclusive jurisdiction solely conferred on it by the Investments and Securities Act without constitutional imprimatur, there is a need for constitutional amendment particularly of Sections 6 (5) and 81 of the 1999 Constitution as amended to include the Investments and Securities Tribunal (IST) as among the superior courts having both criminal and civil jurisdictions and being conferred all the rights, functions, privileges and benefits enjoyed by the Federal High Court outlined in Section 81 of the 1999 Constitution and be regulated by the National Judicial Council, the apex judicial regulatory body

[24] *Supra* n 5, Section 1 (1) and (3).

8.3. Powers of the Investment and Securities Tribunal

The powers of the Investments and Securities Tribunal (IST) have been a subject of crisis between the Tribunal and the Federal High Court (FHC) as exhaustively canvassed above. The crisis was as a result of lacuna created in the 1999 Nigerian Constitution; that is the Constitution does not recognize the Investments and Securities Tribunal but the Federal High Court in exercising those powers on matters relating to securities market. Hence the proposed constitutional amendments in resolving the adjudicatory powers on securities matters in favour of the Investments and Securities Tribunal are captured thus:

> S. 254J (1) For the purpose of exercising any jurisdiction conferred upon it by this Constitution or as may be conferred by an Act of the National Assembly, the Investments and Securities Tribunal shall have all the powers of a Federal High Court;
> (2) Notwithstanding subsection (1) of this Section, the National Assembly may make provisions conferring upon the Investments and Securities Tribunal, powers additional to those conferred by Section as may appear necessary or desirable for enabling the Tribunal to be more effective in exercising its jurisdiction.

9.0. CRIMINAL JURISDICTION OF THE INVESTMENT AND SECURITIES TRIBUNAL AND ITS APPEAL

Section 243 of the 1999 Constitution (as amended) provides for both criminal and civil appeal and the genre of courts from which they can proceed to the Court of Appeal. It is the desire of this research to equally advocate for the constitutional empowerment of the Investments and Securities Tribunal (IST) to adjudicate on genre of criminal activities bordering on securities matters. It should be couched as follows:

> S. 243 any right of appeal to the Court should of Appeal from the decisions of the Federal High Court, the

> National Industrial Court, the Investments and Securities Tribunal or a High Court in civil or criminal matter.

Similarly, from Section 243, new subsections should also by way procedural architecture should be provided after subsection (4) as subsections (5)-(7) thus:

Sub. 5	An appeal shall lie from the final decisions of the Investments and Securities Tribunal as of right to the Court of Appeal on capital market disputes as it relates to matters upon which the Investments and Securities Tribunal has jurisdiction;
Sub 6	An appeal shall only lie from the decisions of the Investments and Securities Tribunal to the Court of Appeal as may be prescribed by an Act of the National Assembly Provided that where an Act or law prescribes that an appeal shall lie from the decisions of the Investments and Securities Tribunal to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal
Sub 7	Without prejudice to the provisions of 254 (c) of this Constitution, the decision of the Court of Appeal in respect of an appeal arising from any civil jurisdiction of the Investments and Securities Tribunal shall be final.

It follows from the proposed amendment that there is a need to consequentially confer on the Act establishing the Investments and Securities Tribunal (IST) criminal jurisdiction on issues covering genre of crimes bordering on securities matters. The implication is that, the IST being a securities court, can painstakingly consider the issues because of the laurel of expertise; and that will further boost the confidence of investors given the innovation to our criminal jurisprudence in securities matters.

9.1. Statutory Re-enactment

Similarly, there is a need for comprehensive repeal and re-enactment of the Statute establishing the Investment and Securities Tribunal.

The current IST is made a stooge and a board/parastatal of the Executive without any judicial input. The panel members of the Tribunal are "hire and fire" by the political class, and may not necessarily be lawyers. They are only constituted based on technical expertise in securities market; even, there are no criteria for such expertise. The current Investment and Securities Act does not comprehensively capture the activities of the IST.

However, this article advocates for urgent sponsor of a Bill that will transmute into law establishing the Investment and Securities Tribunal Act like the Federal High Court Act, and specially clothed with exclusive criminal and civil jurisdictions on securities matters. Also, the powers, functions, rights and privileges of its judges must be succinctly captured.

9.2. Substantial and Tenacious Application of the 2015 Administration of Criminal Justice Act to Securities Matters

Nigerian is currently operating new criminal law with substantial justice guaranteed that if faithfully complied with, quick administration of securities crime cases will be secured. For purpose of clarity, this article examines some salient provisions in the Act that will enhance Securities Court and all the prosecutorial institutions dispense justice within time frame. The objective of the Act is explained,[25]

> The purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim.

9.3. Transparency in Dispensation of the Administration of Securities Crime Justice

[25] Section 1 of Administration of Criminal Justice Act 2015.

Investors who are suspects of alleged securities crimes are equally guaranteed justice throughout the trial at the securities court. In order to encourage accountability and transparency, the Act introduced in Section 10, a provision which mandates a law enforcement officer to take inventory of all items or properties recovered from a suspect. The inventory must be signed by the police officer and the suspect.

9.4. Jurisprudence of Police Criminal Registry on Securities Crime Activities

Section 16 of the Act makes provision for the establishment, within Nigeria Police, a Central Criminal Record Registry of all arrest made by the police. The registry is to be located at the Police Headquarters and at every state police command. The Act further states that every state including the Federal Capital Territory is to ensure that the decisions of the court, like this subject, securities court, in all criminal trials are transmitted to the Central Criminal Records Registry within thirty-days after delivery of judgment.

This will enhance transparency and effective policing in the market. The object is to reveal the character and integrity of all the players in securities market as criminal data of bad eggs can easily be assessed at the Police and that this article also suggests that such data relating to securities market be captured in the central website of the regulatory agency of the Nigerian capital market, the Securities and Exchange Commission (SEC).

Another benefit of this to the Nigerian securities market is that it grows the organic evolution of securities jurisprudence as various stakeholders such as academics, legal minds, technocrats and investors themselves can assess legal information, judgment and criminal data, and process them to get their needed results. Even agencies of government such as Nigerian Bureau of Statistic (NBS), Securities and Exchange Commission, Central Bank of Nigeria, Ministry of Finance and Nigerian Stock Exchange can accurately process securities market information and project their result.

9.5. Plea Bargain Option in Securities Crime Proceedings

By virtue of Section 270 of the Act, the prosecutor before the Nigerian securities court, Investment and Securities Tribunal, may with the consent of the victim or his representatives consider, offer or accept a plea bargain from a defendant. The prosecutor must ensure that the acceptance of such plea bargain is in the interest of justice, the public interest, public policy and the need to prevent abuse of legal process.

In determining whether it is in the public interest to enter into a plea bargain, the prosecution must weigh all relevant factors, including: (i) the defendant's willingness to cooperate in the investigation or prosecution of others; (ii) the defendant's history with respect to criminal activity; (iii) the defendant's remorse or contrition and his willingness to assume responsibility for his conduct; (iv) the desirability of prompt and certain disposition of the case; (v) the likelihood of obtaining a conviction at trial, the probable effect on witnesses; (vi) the probable sentence or other consequences if the defendant is convicted; (vii) the need to avoid delay in the disposition of other pending cases; and (viii) the expense of trial and appeal; and (ix) The defendant's willingness to make restitution or pay compensation to the victim where appropriate.

9.6. Speedy trial of Securities Crime Cases before the Securities Court

The Act in Section 396 makes provision for day-to-day trial of criminal cases. Where day-to-day trial is impracticable after arraignment, parties shall only be entitled to five adjournments from arraignment to final. The interval between each adjournment must not exceed fourteen days. Where it is impracticable to conclude a criminal proceeding after the parties have exhausted their five adjournments each, the interval between one adjournment to another shall not exceed seven days.

The court may award costs in order to discourage frivolous adjournments because of the peculiarity and exigency of the market.

The provision further states that a Judge of the High Court/Investment and Securities Tribunal, Nigerian Securities Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge/Investment and Securities Tribunal's Judge for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation and shall conclude same within a reasonable time. This provision is intended to address the problem of trial *de novo*.

The ACJ Act in Sections 306 and 396 abolished stay of proceeding and interlocutory appeals by merging all preliminary objections with the substantive case in respect of criminal cases instituted in federal courts. This revolutionary intervention of the Act is occasioned by unending trial of politically exposed persons in corruption cases such as the case of 2007/8 capital market recession. Section 109(5) mandates Courts to make quarterly returns of the particulars of all criminal cases, including charges, remand and other proceedings dealt with in a Court to the Chief Judge. In reviewing the returns, the Chief Judge shall have regard to the need to ensure that securities justice is speedily disposed.

9.7. Time Limit for Issuance of Legal Advice

Section 376 makes provision for time limit for the issuance of Department of Public Prosecution's legal advice. The Attorney-General of the Federation shall, within fourteen days of receipt of police case file, issue and serve a legal advice indicating whether or not there is a *prima facie* case against a defendant. Where no *prima facie* case exists, the Attorney-General of the Federation shall serve a copy of the legal advice on the police, court and the suspect and the suspect shall be released if he is custody.

9.8. Witness Protection

The peculiarity of the securities market makes it expedient, like the practice in the advanced democratic economies, to protect the securities informants who have voluntarily chosen to offer necessary information to the government security enforcement agencies in order to proscribe the activities of capital market felons/fraudsters.

Therefore, Section 232 of the Act permits the trial of some offences in camera. One of the items listed relates to the one within the jurisdiction of the Investment and Securities Tribunal/Securities Court, particularly sub-section C which says: "(c) Offences relating to economic and financial crimes… shall be conducted in camera"

9.9. Powers, Functions, Rights and Privileges of the Court and its Judges

The 1999 Constitution of the Federal Republic of Nigeria has enough provisions to cater for the needs of the Judges to enhance their independence and impartiality. The protection ranges from non-persecution for any judgment delivered in the capacity of their functions, financial autonomy, regular and substantial/attractive salaries, adequate promotion in consonance with the judicial guidelines, and above all the principle of separation of power is embossed in the 1999 Constitution. Upon inclusion of the Nigerian securities court among the superior courts in Nigeria under the regulatory surveillance of the National Judicial Council, rights, powers, privileges of its judges are fully guaranteed and investors' confidence is also secured.

9.10. Leading Examples to other Jurisdiction

From the above, this article sincerely advocates for the advanced jurisdictions' creation of securities court with both civil and criminal jurisdictions to enhance speedy trial of securities matters and development of their securities jurisprudence.

10.0. CONCLUSION

This research has detailed the essence and benefits of establishing securities court with civil and criminal jurisdictions in Nigeria. The major benefits are that investors' confidence is secured, our criminal jurisprudence becomes synchronized and accessible; ease of doing business in Nigeria becomes guaranteed to the investors. Nigeria can then have comprehensive Criminal Securities Law Reports. The essence of subject matter law reports aids easy citation of decided cases to aid evidence. Also, subject matter law reports enhance

academic ratiocination, analyses, debates and practical discourse to grow securities crime jurisprudence.

EFFECTIVE IMPLEMENTATION OF THE CODE OF CORPORATE GOVERNANCE IN NIGERIA

Busayo Oladapo*

ABSTRACT

The sole purpose of the Code of Corporate Governance in any country is to set out guidelines, policies and processes which a company should adhere to for efficient and successful management of the company. Good corporate governance ensures that the Board is accountable and transparent in handling the affairs of the company, taking into account the interest of other stakeholders, whilst acting in the overall best interest of the Company. To this end, various Corporate Governance Codes have been formulated to serve as a guide for the effective governance of corporate entities in Nigeria. These Codes have over the years introduced worthy provisions capable of improving and promoting good corporate governance in Nigeria. This paper will highlight the innovations in the 2018 Nigerian Code of Corporate Governance; compare the provisions of this Code with the previous codes; examine the existing mechanisms for the implementation of the Code of Corporate Governance and propose recommendations for effective implementation of the Code.

1.0. INTRODUCTION

Corporate Governance refers to the system of rules, processes and policies by which a company is controlled and managed.[1] These rules and policies dictate the corporate behaviour of all entities in the company and ensures that the company achieves its objectives.[2] Good corporate governance aims at protecting and balancing the interest of all stakeholders in a company. A good corporate governance structure sets out the rights and responsibilities of all the participants in corporate governance including the Board of Directors, company secretary, shareholders, auditors and other

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[1] Investopedia "Corporate, Finance and Accounting" available at https://www.investopedia.com/terms/c/corporategovernance.asp (accessed on 11 February 2019).

[2] *Ibid.*

stakeholders.[3] Corporate Governance provides a mechanism for monitoring the activities of these participants to ensure that they are in conformity with the laid down procedures and that they act in the best interest of the company.[4]

A Code of Corporate Governance is a set of best practices which recommends the behaviour and structure of the board of directors of a company. It is designed to address deficiencies in the corporate governance system by recommending a comprehensive set of norms on the role and composition of the board of directors, relationship with shareholders and top management, auditing and information disclosure, selection, remuneration, dismissal of directors and top management among others.[5]

2.0. HISTORY OF THE CODE OF CORPORATE GOVERNANCE IN NIGERIA

The evolution of the principle of corporate governance in Nigeria can be traced to the Companies and Allied Matters Act (CAMA), 1990.[6] Although at the time, corporate governance had not emerged as a distinct concept, the 1990 CAMA contained certain provisions essential for good corporate governance which include: rights of shareholders and protection of minority shareholders, auditing and accounting standards, private equity disclosure, codification of duties of directors etc.[7] The Act also empowered the Corporate Affairs Commission (CAC) to regulate the activities and affairs of companies to ensure that they act in conformity with the provisions of the Act.

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[3] L.C. Opara, A.J. Alade "The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis" (2014) 26 *Journal of Law, Policy and Globalization* available at https://www.iiste.org/Journals/index.php/JLPG/article/viewFile/13785/14157 (accessed on 11 February 2019).

[4] *Ibid.*

[5] B.J. Inyang, "Nurturing Corporate Governance System: The Emerging Trends in Nigeria" (2009) 4(2) *Journal of Business Systems, Governance and Ethics*, 1-13.

[6] Cap. C20, Laws of the Federation of Nigeria, 2004 which repealed the Companies Act of 1968.

[7] *Ibid.*

Formal Corporate Governance Code came into Nigeria through the Code of Corporate Governance for Banks and Other Financial Institutions in Nigeria, issued by the Bankers' Committee in August 2003.[8] The code was applicable to all banks and financial institutions that were in operation at the time. Although the Code made provisions on good corporate governance principles, it was not popular because it was issued by a voluntary organisation and not a regulator.[9]

Subsequently, the various corporate scandals and abuse of power by management of companies in Nigeria propelled regulators to enact several sectoral codes of corporate governance to ensure transparency, accountability and necessary disclosure in the corporate sector.[10] These Codes include: the Code of Corporate Governance for Public Companies, 2003 issued by Securities and Exchange Commission (SEC); Code of Corporate Governance for Banks Post Consolidation, 2006 issued by Central Bank of Nigeria (CBN); Code of Corporate Governance for Licensed Pension Operators, 2008 issued by Pension Commission (PENCOM); Code of Good Corporate Governance for Insurance Industry, 2009 issued by (National Insurance Commission) NAICOM, Code of Corporate Governance for Public Companies, 2011 issued by SEC and its recent amendment in 2014,The Code of Corporate Governance for Banks and Discounts Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry 2014 and the National Code of Corporate Governance for the Private sector in 2016. The most recent is the 2018 Code of Corporate Governance issued by the Financial Reporting Council of Nigeria (FRCN).

3.0. COMPARISON BETWEEN THE 2016 AND 2018 CODE OF CORPORATE GOVERNANCE

[8] *Ibid.*
[9] *Ibid.*
[10] J.B. Marshall, "Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria" (2015) 3(3) *International Journal of Business & Law Research* available at http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf (accessed on 11 February 2019).

Some of the major differences and similarities in the 2016 and 2018 Codes, as well as the innovations introduced in the 2018 Code are;

- On the role of the Board, both codes agree that the Board is to be responsible for providing entrepreneurial and strategic leadership for the company and to ensure that management acts in the best interest of stakeholders of the company
- With regard to the composition of the Board, the 2018 code empowers the Board to be solely responsible for its composition and further set outs certain factors which the Board is to consider in determining the number of its members.[11] These factors are not provided for in the 2016 code
- A major innovation in the 2018 code with regard to the composition of the Board is that there is now no limit on the membership of the Board. In contrast, the 2016 code states that the membership of the Board shall not be less than eight.[12] The 2018 code gives the Board the discretion to determine the number of its members having regard to the factors listed in the code
- The 2018 code permits concurrent directorship just like the 2016 code. However, by way of addition, the code stipulates that directors should not be members of Boards of competing companies to avoid conflict of interest, breach of confidentiality, diversion of corporate opportunity and divulgence of corporate information[13]
- The 2018 code reiterates the position of the previous code that the MD/CEO should not go on to be the chairman of the same company. It however states that if in very exceptional circumstances the Board decides that a former MD/CEO becomes chairman, the "cool-off" period of three years should be adopted as opposed to the seven years

[11] Code of Corporate Governance 2018, s. 2.1 (a)-(e).
[12] Code of Corporate Governance 2016, s. 5.4.
[13] Code of Corporate Governance 2018, s. 2.8.3.

"cool-off" period provided for in the 2016 code.[14] This position also applies to Executive Directors

- Another worthy innovation in the 2018 code relates to shadow directors. The 2018 Code precludes non-serving Directors of the company, otherwise called shadow directors from exercising any influence or dominance over the Board and/or management of the company[15]
- The 2018 code provides that the authority of the MD/CEO and the relationship between him and the Board should be clearly set out in a contract of employment as opposed to a mere letter of appointment which the 2016 code required[16]
- The 2018 code prevents the MD/CEO from being a member of the committees responsible for remuneration, audit, or nomination and governance.[17] There is however no such provision in the 2016 code
- The 2018 code allows the MD/CEO to be appointed as Non-Executive Director in any other company, provided such appointment is not detrimental to his responsibilities and it is in accordance with the Board's approved policy.[18] There is however no such provision under the 2016 code
- By way of an addition to the provision of the 2016 code, the 2018 code in defining an Independent Non-Executive Director (INED) defines an INED as one who has not served at the directorate level or above at the Company's regulator within the last three years[19]
- With regard to attendance of Board meetings by directors, the 2018 code requires that every Director should endeavour to attend all Board meetings.[20] This is in contrast

[14] Code of Corporate Governance 2016, s. 6.1.4; Code of Corporate Governance 2018, s. 3.3.
[15] Code of Corporate Governance 2018, s. 2.7.
[16] Code of Corporate Governance 2018, s. 4.5; Code of Corporate Governance 2016, s. 6.3.6.
[17] Code of Corporate Governance 2018, s. 4.7.
[18] Code of Corporate Governance 2018, s. 4.8.
[19] Code of Corporate Governance 2018, s. 7.2.6.
[20] Code of Corporate Governance 2018, s. 10.2.

with the 2016 code which requires that every Director attend at least two-thirds of all Board meetings[21]

- The 2018 code provides that the membership of Board Committees should be reviewed and refreshed periodically[22] as opposed to the 2016 code which requires that the membership of Board committees be reviewed at most every three years[23]
- On the composition of Board committees, the new code provides that each committee should consist of at least three members.[24] There is no such provision in the 2016 code.
- With respect to Board committee, the new code provides that it is desirable for every company (private or public) to have a Board committee responsible for audit[25]. This is in contrast with the 2016 code which requires only public companies should to have a Statutory Audit committee[26]
- The 2018 code does not stipulate a specific period for the tenure of the MD/CEO unlike the 2016 code which provides that the tenure of the office of the MD/CEO shall not exceed two terms of five years each. The 2018 code merely states that the tenure for the MD/CEO and Executive Directors (ED) should be determined by the Board and encourages the Board to take into consideration the Director's performance, the existing succession planning mechanism, continuity of the Board and the need for continuous refreshing of the Board[27]
- The new code stipulates that the tenure for Independent Non-Executive Directors (INED) should not exceed three terms of three years each.[28] The 2016 code does not provide for the tenure of the INED

[21] Code of Corporate Governance, 2016, s. 7.2.
[22] Code of Corporate Governance, 2018, s. 11.1.4.
[23] Code of Corporate Governance, 2016, s. 8.3.
[24] Code of Corporate Governance, 2018, s. 11.1.5.
[25] Code of Corporate Governance, 2018, s. 11.4.1.
[26] Code of Corporate Governance, 2016, s. 8.14.1.
[27] Code of Corporate Governance, 2018, s. 12.9.
[28] Code of Corporate Governance, 2018, s. 12.10.

4.0. CONFLICTS BETWEEN THE CODE OF CORPORATE GOVERNANCE AND THE COMPANIES AND ALLIED MATTERS ACT (CAMA)

Despite the worthy provisions of the Code of Corporate Governance, there remains an inconsistency of the Code with the Companies and Allied Matters Act. Some of the obvious contradictions are;

4.1. Number of Directors

By the provision of CAMA,[29] every company is to have at least two directors. Meanwhile the 2016 code of corporate Governance requires that membership of the Board should not be less than eight. The 2018 code in contrast has removed the limit on the membership of the Board, leaving it to the discretion of the Board to determine what is best suitable for the company.

4.2. Tenure of Directors

Both the 2016 and 2018 Codes of Corporate Governance clearly stipulates the tenure for directors.[30] However, CAMA does not provide specifically for the tenure of directors and only provides for the retirement of directors and a life director. The law[31] provides that at every annual general meeting of the company, one third of the directors for the time being, or if their number is not three or a multiple of three, then the number nearest one third shall retire from office. The law[32] also states that a person may be appointed a director for life subject to removal under the Act.

4.3. Independent Directors

Both the 2016 and the 2018 Code of Corporate Governance recognises the importance of Independent Directors on the Board

[29] Companies and Allied Matters Act Cap C20, LFN 2010, s. 246.
[30] Code of Corporate Governance, 2016, Section 14.6: Code of Corporate Governance 2018, s. 12.9, 12.10
[31] Companies and Allied Matters Act, Cap C20, LFN 2010, s. 259
[32] Companies and Allied Matters Act, Cap C20 LFN 2010, s. 255.

and thus makes provision for them.[33] However, the Companies and Allied Matters Act does not make express provision for Independent Directors.

4.4. Audit Committee

The 2016 Code and the Companies and Allied Matters Act allows only public companies to have an Audit Committee.[34] However, the 2018 code states that it is desirable for every company (public or private) to have a Board Committee responsible for Audit.[35]

4.5. Board Committees

The Companies and Allied Matters Act does not expressly state the Board committees that a company must have.[36] However, the 2018 Code sets out some of the committees which the Board should set up to facilitate oversight.[37] The Code also sets out the composition, functions and meeting time of these committees.

It is important to note that the Companies and Allied Matters Act, 1990 (CAP C20, LFN 2004) Repeal and Re-enactment Bill, 2018 passed on May 15, 2018 by the 8th Senate of the Federal Republic of Nigeria does not respond to any of the issues raised above. Therefore, if the Bill is eventually passed into law as it is, it will not address any of the pertinent issues raised with regard to good corporate governance in Nigeria.

5.0. MECHANISMS FOR THE IMPLEMENTATION OF THE CODE OF CORPORATE GOVERNANCE IN NIGERIA

For the proper implementation of the Code of Corporate Governance in any country, there has to be a real owner and steward, responsible for monitoring the Code's implementation,

[33] Code of Corporate Governance 2018, s. 7.1; Code of Corporate Governance 2016, s. 6.7.
[34] Companies and Allied Matters Act Cap C20 LFN 2010, s. 359(3); Code of Corporate Governance 2016, s. 8.14.1.
[35] Code of Corporate Governance 2018, s. 11.4.1.
[36] Companies and Allied Matters Act, Cap C20 LFN 2010, s. 263(5)-(7).
[37] Code of Corporate Governance 2018, s. 11.1.6.

regularly reporting on it and proposing changes based on lessons drawn from its use.[38]

In Nigeria, the Financial Reporting Council of Nigeria (FRCN) is saddled with the responsibility of implementing the Code of Corporate Governance. The Council is a regulatory agency of the Federal Government of Nigeria, supervised by the Federal Ministry of Industry, Trade and Investment.[39] The Council was created for the establishment of and enforcement of compliance with standards in financial reporting and corporate governance to enhance the investment climate in Nigeria and promote economic growth.[40]

The 2018 and the 2016 code stipulates that the implementation of the Code will be monitored by the FRCN through the sectoral regulators and registered exchanges who are empowered to impose appropriate sanctions where necessary but fails to state the sanctions for non-compliance with the provisions of the code. In reporting on compliance with the code, the 2018 code stipulates that companies are to adopt the "Apply and Explain" approach. This approach assumes the application of the provisions of the code by the companies and requires companies to explain how they have applied the principles to promote good governance. The code also empowers sectors to issue guidelines that set out corporate governance practices in line with the provisions of the Code.

Essentially, the implementation of the Code is left to the various sectors under the supervision of the FRCN. The implication of this is that where a company does not fall under any of the sectors with self-regulatory codes, the FRCN will be responsible for ensuring the compliance of such companies with the Code. Some of the sectors

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[38] Global Corporate Governance Forum, Private Sector Opinion: "Developing and Implementing Corporate Governance Codes" Issue 10; A Global Corporate Governance Forum Publication, available at: https://www.ifc.org/wps/wcm/connect/4ad21b0048a7e717aa0fef6060ad5911/GCGF%2BPSO%2Bissue%2B10%2B12-8-08.pdf?MOD=AJPERES (accessed on 11 March 2019).

[39] Financial Reporting Council of Nigeria; Annual Report 2017 available at: https://www.financialreportingcouncil.gov.ng/board-activities/annual-report-2017 (accessed on 11 March 2019).

[40] *Ibid.*

with self-regulatory codes for corporate governance in Nigeria include the Telecommunication Industry, Banks and Discount Houses, Insurance Industry, Pension Fund operators and public companies all of which already have existing sectoral codes. These sectors are empowered to monitor compliance with the code and impose sanctions where there is non-compliance with the Code.[41] In monitoring compliance with the Code, companies in these sectors are required to indicate their level of compliance with the code in their annual report.[42] However, a perusal of the various sectoral codes shows that the sanctions for non-compliance are not explicitly provided for and where provided, the sanctions are inadequate. For instance, the Code of Corporate Governance for the Telecommunications Industry provides that non-compliance with the Code shall attract appropriate sanctions in accordance with the Enforcement Processes Regulations, and/or as may be specified in any applicable legislation or regulation.[43] The Code of Corporate Governance for Banks and Discount Houses also provides that failure to comply with the code will attract appropriate sanctions in accordance with Section 60 of the Banking and other Financial Institutions Act[44] (which imposes a fine not exceeding five thousand naira or term of imprisonment not exceeding three years) or may be specified in any applicable legislation or regulation.[45] Furthermore, The Code of Corporate Governance for Licensed Pension Operators provides that noncompliance with the code will attract sanctions.[46]

[41] Code of Corporate Governance for the Telecommunications Industry, 2016, s. 1.3 (a), (d).
[42] Code of Corporate Governance for the Telecommunications Industry, 2016, s. 1.3(c).
[43] Code of Corporate Governance for the Telecommunications Industry, 2016, s. 1.3(d).
[44] Cap B3, Vol. 2 Laws of the Federation of Nigeria 2004.
[45] Code of Corporate Governance for Banks and Discount Houses in Nigeria, s. 8.1.3.
[46] Code of Corporate Governance for Licensed Pension Operators 2008, s.5.5.1.

6.0. IMPLEMENTATION OF THE CODE OF CORPORATE GOVERNANCE IN THE UNITED KINGDOM

In the United Kingdom (UK), several codes have been enacted over the years which have enhanced good corporate governance. The most recent is the 2018 UK Corporate Governance code issued by the Financial Reporting Council on 16 July 2018.[47] The Financial Reporting Council is the body responsible for ensuring good corporate governance in the UK. Some of the factors that have contributed to the effective implementation of the code of Corporate Governance in the UK are;[48]

- The tradition of self-regulation and consensus on the utility of the code
- Clearly defined corporate standards and behaviours
- Availability of information to the stakeholders and shareholders regarding code compliance
- Interested and informed shareholders and other constituencies
- Supportive legal framework

Fundamentally, a major factor which has contributed to the effective implementation of the Code of Corporate Governance in the UK is the adequate disclosure of code compliance by companies to the public through the mechanism of "comply or explain". This was an innovation of the Cadbury committee.[49] In its report, the Cadbury

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[47] 2018 UK Corporate Governance Code and new legislation; Latest governance developments impacting UK premium listed companies July 2018 , Published by EY, available at: https://www.ey.com/Publication/vwLUAssets/EY-2018-UK-Corporate-Governance-Code-and-new-legislation/$FILE/EY-2018-UK-Corporate-Governance-Code-and-new-legislation.pdf (accessed on 13 March 2019).

[48] Global Corporate Governance Forum, Private Sector Opinion: "Developing and Implementing Corporate Governance Codes" Issue 10; A Global Corporate Governance Forum Publication, available at: https://www.ifc.org/wps/wcm/connect/4ad21b0048a7e717aa0fef6060ad5911/GCGF%2BPSO%2Bissue%2B10%2B12-8-08.pdf?MOD=AJPERES (accessed on 11 March 2019).

[49] *Ibid.*

committee asked the London Stock Exchange to require listed companies to reveal in their annual reports whether they are complying with the code of corporate governance or not. Where they fail to comply with the code of corporate governance, then they should explain the reason in their annual reports.[50] This rule of mandatory disclosure called "comply or explain" has made the corporate governance practices of British companies much more transparent and made them more thoughtful and meticulous about adherence to the code since any departure from the provisions of the code must be justified.[51] As a step further, the FRC emphasizes in the 2018 UK Corporate Governance Code that companies must report how they have applied the principles of the Code in a manner that will enable shareholders to evaluate compliance rather than just focusing on the comply or explain approach.[52] Therefore, companies will not only be required to give explanations when they fail to comply with the code but also give explanation on how their compliance with the code has improved corporate governance. This principle of "comply or explain" is similar to the "apply and explain" approach adopted in Nigeria's 2018 Code of Corporate Governance which requires that companies apply the principles of the code and explain how the application of the principles best suit the peculiar context of their organisation and how same has improved the company's corporate governance.

7.0. RECOMMENDATIONS FOR EFFECTIVE IMPLEMENTATION OF THE CODE OF CORPORATE GOVERNANCE IN NIGERIA

[50] *Ibid.*
[51] *Ibid.*
[52] 2018 UK Corporate Governance Code and new legislation; Latest governance developments impacting UK premium listed companies July 2018, Published by EY, available at: https://www.ey.com/Publication/vwLUAssets/EY-2018-UK-Corporate-Governance-Code-and-new-legislation/$FILE/EY-2018-UK-Corporate-Governance-Code-and-new-legislation.pdf (accessed 13 March 2019).

7.1. Strengthening the role of the Financial Reporting Council of Nigeria (FRCN) and Sectoral regulators in the implementation of the Code

The FRCN and the sectoral regulators should be more intentional and thorough in their supervision of the implementation of the Code of Corporate Governance. The FRCN must indeed become stewards of the Code of Corporate Governance and must be painstaking in seeing to its implementation in the country. The FRCN should periodically request for detailed reports on the compliance with the Code from companies and sectoral regulators. Reports received on non-compliance and compliance with the Code will assist the FRCN in making periodic review of the Code to better suit the corporate sphere in Nigeria. In monitoring compliance with the Code of Corporate Governance in Nigeria, the FRCN should work with corporate governance institutions that conduct independent Board evaluation for companies to get feedback on the rate of compliance with the Code. The FRCN should also issue periodic guidelines to regulate the activities of the Board and other corporate governance issues. Furthermore, the FRCN and sectoral regulators must understand the peculiar circumstances of respective companies and give room for those exceptional circumstances where non-compliance with some principles of the code is most beneficial to the corporate welfare of the company. In such instances, flexibility should be allowed and the reasons for such non-compliance should be explained to the stakeholders and sectoral regulators stating how the non-compliance is most beneficial to the company at the time. With respect to sanctions for non-compliance, the Code of Corporate Governance as well as the sectoral codes should contain explicit sanctions to be imposed on companies and Board members where they fail to comply with the Code. This will serve as a check on the companies and their directors and keep shareholders and other stakeholders informed and interested in ensuring good corporate governance.

7.2. Improving the capacity of Company Secretaries and Senior Managers of Companies through

trainings on principles of good corporate governance

Company secretaries play a pivotal role in promoting good corporate governance in any company as they are saddled with the responsibility of advising the Board on the appropriate provisions of the law and best corporate governance practices. It is therefore imperative for company secretaries to improve their capacity and expand their knowledge in the rules of corporate governance by attending trainings, seminars and conferences in this regard. In addition, senior managers and Chief Executive officers (CEO) of companies are responsible for the leadership of the company. Therefore, it is also important for companies to invest in trainings for these officers to provide them with more insight on the corporate governance principles needed to advance the growth of their respective companies.

7.3. Amendment of the Companies and Allied Matters Act (CAMA) to incorporate salient provisions of the Code which are essential to good corporate governance

Whilst it is understood that not all provisions of the Code can be reflected in the law because certain issues need to be addressed to fit the peculiarity of a particular company or sector and give room for flexibility. However, there are certain corporate governance matters that require uniformity and goes to the root of ensuring accountability and transparency in corporate governance. It is submitted that such issues which are already addressed in the Code of Corporate Governance 2018 and most of the sectoral codes should be reflected in the Companies and Allied Matters Act (CAMA)[53], being the principal legislation regulating corporate affairs in Nigeria. For instance, the requirement of a whistle-blowing framework should be mandatory for all companies, thus included in the CAMA. This is necessary to provide a platform for reporting illegal or unethical conduct of Board members or management. Furthermore, it is submitted that CAMA should incorporate the

[53] Cap C20, Laws of the Federation of Nigeria 2010.

provision of the code which requires that companies include in their annual reports, a corporate governance evaluation report which shall provide details of the extent of the application of the Code and give reasons for any non-compliance with the provision of the Code.

7.4. Increased judicial pronouncements on the importance of good corporate governance

It is commonly said that the judiciary is the last hope of the common man. In this context, it will be right to say that the judiciary is the final and ultimate phase in ensuring the effective implementation of the code of corporate governance in Nigeria. The Courts have a vital role to play in ensuring and promoting good governance in Nigeria. Particularly, where actions are brought before the Court against the Board of Directors for unfairly prejudicial or discriminatory conducts and fraudulent actions which affect the company, the Courts are to uphold the rule of law and hear such matters fairly thereby upholding and ensuring good corporate governance in Nigeria.

8.0. CONCLUSION

Undoubtedly, corporate governance in Nigeria has improved over the years and the efforts of the Financial Reporting Council of Nigeria and the sectoral regulators in striving to achieve good corporate governance practices in Nigeria are worthy of commendation. However, more can be done still to ensure that companies in Nigeria thrive under better management and administration. It is therefore submitted that the recommendations in this paper should be considered and implemented as we forge ahead in the pursuit of good corporate governance in Nigeria.

AN ANALYSIS OF THE LEGAL FRAMEWORK REGULATING ELECTRONIC SIGNATURES IN NIGERIA

Belonwu Sotonye Cynthia*

ABSTRACT

Globalisation has continuously knitted the world into a single time and place irrespective of location. Of its plethora effects, the emergence of E-commerce has wielded an unprecedented popularity almost rivalling the historic Egyptian transition from Clay tablets to Papyrus and Gutenberg's invention of the moveable printing press. The advent of E-commerce has exerted significant impact on the economies of countries, owing to its ability to create a much higher value for businesses and consumers across the globe than the traditional styled contracts. The convenience afforded consumers via this platform remains an unparalleled advantage over the traditional manual styled contracts. Notwithstanding the obvious benefits of this platform, the emergence of E-commerce has equally ignited a myriad of legal and socio-economic issues across the globe, especially in developing nations. The validity and legal status of E-contracts entered into by parties have in recent times remained a burning issue within the legal sphere.

1.0. INTRODUCTION

The underlying essence of any contractual transaction is to ultimately create a voluntary contractual relationship between the contracting parties who via such contract are aware of their rights and obligations arising from same. Before such contract can be valid, the rudiments comprising of an offer, acceptance, consideration, intention to create legal relations and capacity to contract must be fulfilled to assume a legal status.[1] In an age witnessing unprecedented increase in internet dealings, more and more transactions are turning seamless. Contractual transactions of all kinds, which hitherto were only entered into between parties in the most manual style and making physical presence inevitable have transcended to an online

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[1] This has been stated in a plethora of judicial authorities. *Orient Bank of Nigeria Plc* v. *Bilante International Ltd* (1997) 8 NWLR (pt. 515) p. 37 at 76.

platform having the same effect and dispensing the need for physical presence. The E-contract connotes any kind of contract formed in the course of online commercial transactions. This is usually effected by interaction of two or more individuals using electronic means, such as e-mail, or the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognise the existence of a contract.[2] Unlike traditional styled contracts in which the contracting parties' intention to be bound by the terms of the contract is evidenced by a "wet-ink" signature,[3] in E-contracts, the parties evidence their intention to be bound by means of an Electronic signature "E-signature".

With the emergence of E-commerce and its allies, the basic concept of a signature is fast being redefined and expanded to accommodate new cyber trends.[4] A signature is generally understood as evidence that the signatory approves of a document's contents.[5] A signature is defined as "a mark (as initials, stamp, or printed name) made on a document and intended to serve as an indication of the party's execution or authentication of the document and intent to be bound by it".[6] The Court in *Challenger Navegante SA* v. *Metalexportimport SA*[7] have further held that a typed name on a telex was a signature.

An E-signature in any electronic document signifies that a person accepted the contents of an electronic message. It can be effected with a finger, mouse or stylus or it can be simply typing the name of

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[2] "E-contact and Legal Definition" available at: https://definitions.uslegal.com/e/e-contract/ (accessed 27 September 2019).

[3] A "wet ink" signature is where the parties to the document write (sign) their names with their own hands upon a paper document by ink pen.

[4] O. Ridwan, "Understanding the Legal Framework for Digital/Electronic Signature in Nigeria" available at: https://www.lawyard.ng/understanding-the-legal-framework-for-digitalelectronic-signature-in-nigeria/ (accessed 27 September 2019).

[5] N. Laver "What is an Electronic Contract" available at: https://www.inbrief.co.uk/contract-law/electronic-contracts/ (accessed 27 September 2019).

[6] *Ibid.*

[7] (2003) EWCA Civ. 1668.

the supposed contracting party.[8] An E-signature is on the same plane with a handwritten signature. An E-contract can also take the form a "click to agree" contract, in which the other contracting party becomes bound by merely clicking on the "I agree" button, which represents an E-signature.[9]

Instead of the conventional use of a pen and paper, a digital signature uses digital keys called Public Key Infrastructure (PKI).[10] The signature ascribes the identity of the signer to the document and acknowledges an obligation to the document. Generally, a signature appended to a document can express the intent of the signer to accept and be bound by its content. Digital signatures are like electronic "fingerprints" in the form of a coded message, the digital signature securely associates a signer with a document in a recorded transaction.[11] A signature that has been prepared and reproduced by mechanical or photographic means or a signature on a document transmitted by a facsimile machine is not classified as digital signature.[12]

The risk and possibility of fraud and forgery inherent with the use of ordinary ink and paper signature would have been more disastrous with the use of internet bearing in mind the anonymity and borderlessness of the internet.[13] The sophistication of cyber fraud, identity theft, and other related cybercrimes requires an encoded security for signatures to prevent a major breach. Digital/E-signature has been described as the best practice for providing digital verification of electronic transaction. Digital signatures powered by public-key infrastructure (PKI) technology, are widely recognized as best practice for ensuring digital accountability for electronic transactions. Digital signatures are the most effective, secure, and easy to implement method of providing accountability while enabling

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[8] M.A. Saulawa and J. B. Marshal "The Relevance of Electronic Signatures in Electronic Transactions: An Analysis of Legal Framework" 34 (2015) *Journal of Law, Policy and Globalization*, p. 6.
[9] *Supra* n 5.
[10] *Supra* n 4.
[11] *Ibid.*
[12] See *Black's Law Dictionary*, 6th ed. at p. 1387.
[13] *Supra* n 4.

electronic transactions. Digital signatures facilitate the transition to paperless, low-cost, fully automated and secure model for the everyday transaction. For the environmental activists, it means using less paper.[14] It makes workflow faster by reducing the time expended and helps to reduce the cost of sending documents over for signature. E-signatures provide the added assurances of evidence to the origin, identity, and status of an electronic document, transaction or message, as well as acknowledge informed consent by the signer.[15]

2.0. LEGAL FRAMEWORK REGULATING ELECTRONIC SIGNATURES

It is not in doubt hat the legal framework governing E-signatures is premised on the presumption of the recognised legality of E-contracts. Prior to the advent of the use of the internet, contracts were normally concluded either in writing or by oral agreement. The United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)[16] adopted in 1980 provided for the recognition of contracts in International sale of goods.[17] While it made no express mention for E-Commerce, Article 13 provided a description of what writing meant in the context of contracting. Article 13 provided that for the purposes of the convention, writing include telegram and telex.[18]

The United Nations Commission on International Trade Law (UNCITRAL) soon realised that the unprecedented growth of electronic commerce required it to take proactive steps to recognise that contracts can be validly concluded by using the

[14] *Ibid.*
[15] *Ibid.*
[16] UN Convention on Contracts for the International Sale of Goods (CISG): [Commentary]. München: Oxford, UK; Portland, OR: Verlag C.H. Beck; Hart Pub., 2011.
[17] "Potential Problems using Electronic Contracts" available at: https://www.lawteacher.net/free-law-essays/commercial-law/potential-problems-using-electronic-contracts-commercial-law-essay.php#ftn3. (accessed 27 September 2019).
[18] It can be argued that this provision could be intended to include E-contracts.

internet.[19] The steps taken by the UNCITRAL had to ensure that users of E-Commerce should be able to electronically sign the contracts to ensure their enforceability. The UNCITRAL therefore adopted the Model Law on Electronic Commerce.[20] Article 16 of the UNCITRAL Model Law on Electronic Commerce formally recognised the legality of an online electronic contract. The UNCITRAL Model Law on Electronic Commerce requires that States ensure that such contracts are legally binding on the parties. Article 7 of the UNCITRAL Model Law on Electronic Commerce expressly provided for the legality of further electronic signatures. The United States adopted the UNCITRAL Model Law by the adoption of the Uniform Electronic Transactions Act[21] and the Electronic Signatures in Global and National Commerce Act[22] (E-Sign Act). The U.S Electronic Signatures in Global and National Commerce Act defines an e-signature as "an electronic sound, symbol, or process attached to, or associated with, a contract or other record and adopted by a person with the intent to sign a record". The E-Sign act remarkably provides that a signature, contract or other record relating to a transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form.[23] In *Joseph DeNunzio Fruit Co.* v. *Crane*[24] a federal court in Los Angeles held that an exchange of teletype messages satisfied the California Statute of Frauds, which at that time provided that a contract for the sale of goods or choses in action valued at $500 or more "shall not be enforceable by action unless…some note or memorandum in writing of the contract, or sale be signed by the party to be charged, or his agent in that behalf." The court acknowledged that the teletype messages did not bear the signature in writing of the party to be charged "in the sense that they were

[19] *Ibid.*
[20] United Nations Commission on International Trade Law. UNCITRAL Model Law on Electronic Commerce, with Guide to Enactment, 1996: with Additional Article 5 Bis as Adopted in 1998. New York: United Nations, 1999.
[21] Uniform Electronic Transaction Act 1999.
[22] Electronic Signatures in Global and National Commerce Act 2000.
[23] J. P. Cunard, J. B. Coplan and G. Vradenburg, "Selected Topics in Internet and E-Commerce Law", (2000) 627 P.L.I/PAT 381, p. 464-465; *Lorraine* v. *Markel Inc. Co.* (2007) 241 F.R.D; *Forcelli* v. *Gelco* (2013) 109 AD 3d 244.
[24] 117 (S.D. Cal. 1948); 342 U.S. 820 (1951).

not literarily signed with pen and ink in the ordinary signature of the sender." Nevertheless, the court considered that: (i) each of the parties had teletype machines in their respective offices that "would type the message or memorandum simultaneously in the other office…" (ii) each party was readily identifiable and known to the other by the symbols or code letters used. (iii) there was no contention that the messages did not originate in the office of the other.

Similarly, in *Hillstrom* v. *Gosnay*[25] the Montana Supreme Court held that the typewritten name: "JEREMI VILLANO M" at the bottom of a telegram satisfied the requirements of the Montana Statute of Frauds and the requirement for authentication by signature. The European Union also adopted the UNCITRAL Model Law. The adoption took place by way of the adoption of the Directive on Electronic Signatures and the Ecommerce Directive in 2000.

3.0. THE LEGAL FRAMEWORK REGULATING ELECTRONIC SIGNATURE IN NIGERIA

In Nigerian jurisprudence of evidence, an unsigned document upon which a claim or defence is founded is taken as a worthless and inadmissible evidence of such a claim.[26] Even if admitted in evidence, the court would not attach any probative value to it. This is because an unsigned document has no origin in terms of its maker.[27] It is thus incontrovertible that for a contract to be legally binding on parties and consequently enforceable, the contracting parties must have signified their intention to be bound in a manner accepted and recognised by the law. This manner, usually almost evidenced by means of a wet-ink signature. This notwithstanding, the imperative need to embrace the global trend was aptly expressed by the court

[25] 188 Mont. 388, 614 P.2d 466 (1980).

[26] A. Esan, "E-Commerce: Formation, Validity and Enforcement of Online and Electronic Contracts in Nigeria" available at https://akintundeesan.blogspot.com/2015/09/formation-validity-and-enforcement-of.html, (accessed 27 September 2019).

[27] *Omega Bank (Nig.) Plc* v. *O.B.C. Ltd* (2005) 8 NWLR (Pt.928) 547 at 581, para. D, per Tobi JSC. However, the recent decision of the court in …is to the effect that where the facts of the case suggest that the parties intend to be bound by such contract, an unsigned document may still be enforceable.

per Esso West in *Africa Inc.* v. *T. Oyegbola*[28] *viz* "The Law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mysteries of computer". The further development of the law to accommodate E-contracts was made notable in the case of *U.B.N. Plc.* v. *Ogunsiji*[29] wherein the court expressly affirmed that a contract might be entered into either orally, in writing or indeed by conduct and by extension; a contract may be brought into existence electronically by online communications.

Section 93(2) of the Evidence Act 2011[30] acknowledges that an electronic signature satisfies the rule of law as to signature. It states that:

> Where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law or avoids those consequences.

Section 93(3) goes further:

> a signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

The provision covers the procedure for authentication, proving the execution and verifying the authenticity, which is more apposite in the context of Digital Signature. Section 258 of the Act expands the traditional meaning of documents to include "any device by means of which information is stored, recorded or retrievable including computer output" A community reading of these provisions can safely be regarded as the premise upon which E-signature derives its legal backing within the Nigerian legal sphere.

[28] (1969) NMLR 19.
[29] (2013) 1 NWLR (Pt. 1334) 1 at p. 13.
[30] Evidence Act 2011.

The Cybercrimes Act 2015[31] similarly provides effective legal recognition of Digital and Electronic signature. Section 17 of the Cybercrimes Act, expressly provides that "electronic signature in respect of purchases of goods, and any other transactions shall be binding". Section 17(1)(c) of the Cybercrimes Act provides a term of imprisonment not more than 7 years or a fine of not more than ten million naira only or to both fine and imprisonment as a legal sanction for forgery, misrepresentation, and falsification of E-signatures.

Section 17(2) (a)-(h) of the Cybercrimes Act provides certain transactions to be excluded from contractual transactions that are valid by virtue of electronic signatures, such as: creation and execution of wills, codicils, and or other testamentary documents; death certificate; birth certificate; matters of family law such as marriage, divorce, adoption and other related issues; Issuance of court orders, notices, official court documents such as affidavit, pleadings, motions and other related judicial documents and instruments; Any cancellation or termination of utility services; and others listed in the Act.

It is noteworthy to credit the relevant provisions of the Electronic Transaction Bill 2017.[32] The Bill recently passed by the National Assembly. The Bill seeks to facilitate the formation and execution of contracts by electronic means but excludes the application of the provisions of the Bill where any law requires writing or signature in relation to (i) the execution of negotiable instruments, (ii) contracts for sale or disposition of immovable property or any interest in such property.

From the foregoing, it goes without much ado that E-signatures are not alien to the Nigerian commercial and legal sphere. Just like the traditional styled contracts characterised by wet-ink signatures, the courts will similarly enforce the terms of an E-contract where the parties have evidenced their intention to be bound via their E-

[31] The Cybercrimes (Prohibition, Prevention, etc.) Act 2015.

[32] Electronic Transaction Bill 2017. The Senate at its plenary session of Thursday, May 18th 2017 passed the Electronic Transaction Bill.

signatures provided these E-documents evidencing the contract and signature pass the admissibility test set out under Section 84 of the Evidence Act. The court in *MTN (N) Ltd*. v. *C. C. Inv. ltd*[33] held that where the validity of an electronic record is established, the general rule relating to executed documents will apply; hence a party is bound by the contents of an E-contract signed by him electronically, regardless of whether he read it or not, unless it is procured by fraud or misrepresentation.

4.0. POSSIBLE CHALLENGES FACING THE EFFECTIVE RELIANCE ON E-CONTRACTS

Despite the substantial advantages the E-platform presents, uncertainties abound. One of such weighty issues beclouding the flawlessness of E-contracts is Mistake. Mistake in electronic transmission can occur because of; (a) Physical problems in networks and other communication systems; (b) Programming errors; or (c) Human errors.[34] Thus, a flaw in a computer program, or environmental or faulty condition in a network can result in the recipient receiving information that is different from the information sent.[35] On the human side, the person entering information may make a typographical error or may unintentionally click on the wrong button. Because of the speed of electronic communications, it may be more difficult to catch such errors than it is in traditional paper transactions.[36] A notable example of an electronic contract that went horribly wrong occurred in 2002 when Eastman Kodak placed a camera for sale on its United Kingdom website for £100 instead of £329. Before Kodak could rectify the error, thousands of orders had already been placed by simply clicking the "accept" button signifying an e-signature. The company was faced with an option of honouring the contracts or face a lawsuit by the disgruntled customers. Initially, Kodak said that it was a mistake and they would not fill the orders. One of their arguments was that the

[33] (2015) NWLR (Pt. 1459) at p.444.
[34] E. O. Ezike, "Mistaken Identity in the Law of Contract: Whither the Position of the Law?" (2012) 4 *Law and Policy Review*, pp.154 – 171 at 163.
[35] *Ibid.*
[36] *Ibid.*

orders were simply bids to accept its offer for sale but it was not a cogent argument as the company accepted the orders via an automated platform and thereby formed an online contract. In the end, Kodak was left with no choice but to honour the contracts.[37]

The challenge of determining the true legal capacity of the contracting party in a bid to ensure that such party is legally capable of entering into a contract has posed a problem owing to the fact that contracting parties in most cases are only in-know of the information provided by each party. In instances where a minor having no legal capacity to enter into a contract misrepresents this and goes ahead to contract outside necessaries, such contract cannot be enforced.

5.0. CONCLUSION AND RECOMMENDATIONS

Globalisation has no doubt had tremendous effect on commercial lifestyle. The era of digitalisation of commercial activities gradually paving the final exit of traditional styled commercial activities has made it imperative for countries to be legally abreast with the ever-evolving trends. In Nigeria, the concept of E-contracts has gradually taken a definite shape within the legal framework. While the E-signature is recognised, it is currently not defined under the Nigerian Law and no market practice on its usage has taken root. The existing legal framework is currently inadequate and will be derisory in the future in an age driven by advancement in the internet of things, artificial intelligence, cognitive computing and other smart innovations.[38] It is expedient that more defined and comprehensive legal framework be put in place to gloss the existing skeletal framework.

In a bid to facilitate effective and flawless E-contracts, the American Bar Association developed the Digital Signature Guidelines and PKI Assessment Guidelines to ease usability and applicability. The recommendation contained therein are summarised below:

1. All actions taken should be documented;

[37] *Supra* n 16.
[38] *Supra* n 4.

2. All contracting parties should have access to the document;
3. The document must be properly secure;
4. Any signatory must be authenticated;
5. The signatory must know the signature is legally binding; and
6. There must be disclosure and consent.[39]

[39] *Supra* n 4.

REGULATION AND LICENCING OF CERAMIC LAND USE IN NIGERIA

Nneoma Iroaganachi Ph.D.*

ABSTRACT

Issues relating to land form an integral part of every nation and is of immeasurable interest since it could affect economic, social and other aspects of that nation's building. The Ceramic profession harnesses raw materials from land and since some of these raw materials are toxic to man, proper care in form of appropriate and effectively enforced legal framework becomes imperative. This paper focuses on the land use needs and practices of the Ceramic professionals in Nigeria, showing the need for a legislative rebirth to bring these practices abreast with the requirements of safe standards and by licencing, control unscrupulous, unsafe and unprofessional practices. This paper reveals a need for regulation and licencing as a way forward to safeguarding the land use and showcasing an effective Ceramic profession with high reaching positive impact upon the nation's economy. It recommends a review of the present laws regulating the practice of Ceramic profession.

1.0. INTRODUCTION

Human society cannot exist without land, as land forms the basis of most human activities and is of tremendous relevance to man. Land is the very foundation and framework upon which social, political and economic activities of a nation to function.[1] The pertinence of land in any society cannot be over-emphasized and that land in

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[1] A.I. Sule, "Communal Land Acquisition and Valuation for Compensation" (2014) 4 *International Journal of Scientific and Research Publications* ISSN 2250-3153, p. 4.

contemporary society is second only to children.[2] Section 2 of the Property and Conveyancing Law[3] states unequivocally that:

> Land consist of not just the soil, building or part of buildings, no matter how it was built but other intangible things such as rent, privilege, benefit, easement and profit that may be obtained from land.

The definition of land is indeed very extensive and wide. While quoting the definition of "Land" by Sir Edward Coke[4] in a Law Dictionary, Alubo[5] noted that:

> Land in its restrained sense mean soil, but in its legal application, it is a generic term comprehending every species of ground, soil or earth whatsoever as meadows, pastures, woods Moors, waters, marshes, furze and health; it includes also houses, mills, castles and other buildings for which the conveyance of land, the structures upon it pass also. And besides an indefinite extent upwards, it extends downwards to the globe's centre, hence the maxim: *cujus est solum ejes est usque*.

Since land is an essential commodity both for individual, groups and government, great care must be taken in its usage due to the consequential ripple effects of such actions or omissions.

The Ceramic profession relate intimately and extensively with land, especially as most of their raw materials originate from land. The above notwithstanding, like most other things which are said to be in abundance, an abuse is inevitable where no strict regulation exist or are enforced. It can be truly asserted that land is in abundance in Nigeria, but since no strict compliance to regulation is required or enforced in the area of the mining of ceramic raw materials which are found in several states, urgent legal intervention is needed.

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[2] A.O. Alubo, *Contemporary Nigerian Land Law* (Jos: Innovative Communications, 2012), p. 1.
[3] Section 2 of the Property and Conveyancing Law, Cap. 100, Laws of Western Nigeria, 1959.
[4] *Jowitt's Dictionary of English Law*, 2nd ed., vol. 2 (London:1977), p. 1558.
[5] *Supra* n 3, p. 3.

To ensure compliance to safety guidelines and proper conduct, a befitting regulation and licencing procedure must be put in place. It is pertinent to state that the land in Nigeria is uncontrolled presently by the Government. The Land Use Act[6] expressly provided both in its preamble and in Section 1 that all the land comprised in a state is vested on the Governor of that State who in turn will administer and hold such land in trust and for the benefit of the Nigerians living there.

Although the Land Use Act made elaborate provision regarding an unhindered access to land for all, in practice this is far from the true state of affairs. There is a continuous abuse of such privileges by some people by illegal occupation, mining, building etc. Legal actions relating to land seem to be the order of the day in our courts and due to their nature; it lingers beyond a reasonable time. It becomes necessary in a good land administration to insist by licencing and other forms of control to have a safe and equitable land use.

The mining, exploitation, exploration and harnessing of land based raw materials as is done by the Ceramic profession must come under a proper legislation and licencing.

Licensing refers to the granting of an official licence which in turn relate but not limited to authorization, giving leave, certification, validation, recognition, qualification and giving a stamp of approval. The Cambridge English Dictionary[7] defined licensing as the process or act of giving or getting official permission to do a thing.

The history of ceramic practices in Nigeria dates back to time immemorial and antiquity. It suffixes to state that the practice has always been with us in one form or another. It has been used to produce earthen wares of diverse nature. Although it may have been practiced in an unorthodox and primitive manner, the term ceramics is said to have been derived from a word in the Greek language

[6] Section 1 of the Land Use Act of 1978, Cap. 202, Laws of the Federation of Nigeria, 1990; Cap. L5, Laws of Federation of Nigeria 2004.
[7] *Cambridge International Dictionary of English*, 18th ed. (Cambridge University Press: 1995).

"Keramos" which mean "the potter's earth or clay".[8] However, in today's world ceramics can be safely defined as the employment of inorganic and non-metallic crystalline materials with diverse pressure and heat to obtain a desired result.

2.0. THE BEAUTY OF CERAMICS

The beauty of ceramics is that its usage seems to cut across several disciplines and spheres of human existence. For instance, women and the entire households in Nigeria come directly in touch with products of ceramics in form of household gadgets kitchen utensils, pharmaceutical products etc. Apart from ensuring the safety of the household users, there is a need to ensure their standards and usefulness. For instance, no one would want an accidental electrocution due to electric leakages or the mess that substandard products would likely cause.

The manufacturers and the Building Industry, the Agricultural sector the Pharmaceutical. Dental and Medical sector, the Oil and Gas, the Engineers, the Architects and indeed the general public in one way or another relate closely with ceramic inputs and such relationship must be made efficient and safe by way of control and licensing of practitioners in the ceramic industry.

Though ceramics are sued in the seemingly simple production of cylindrical cops and jugs to mention a few they are also used for complex and highly technical productions like for Nuclear weapons, Aeronautics, Space Technology etc. Its ability to be refractory and to be used to conserve, conduct or insulate heat, thereby withstanding great levels of heat and also prevent or control the heat from leaving is amazing.

Therefore, plastics, metals, stones and other materials are first made pliable or flexible using heat before being shaped usually in a kiln. The overwhelming presence and usefulness of ceramics in the

[8] N.E. Idenyi, *Non-metallic Materials Technology* (Strategic Communications, Enugu: 2002).

society must be acknowledged and the need for a form of regulation and control cannot be overemphasized.

In view of the fact that the present work is that of a lawyer, it is worthy to note that the work relies heavily on the authenticity of materials provided by ceramic professionals' chief.[9] Their work exhaustively explored the location and application or uses of ceramic raw materials particularly those of clay minerals in Nigeria.

The aforementioned work[10] listed some of the application of ceramic raw materials in the modern day Nigeria to include:

- Grinding wheel/disc that puts the fine finish on ground steel shafting;
- Drilling bits (Abrasives) used for drilling operations.
- Piezo electrical crystal that reads the pressure in an engine cylinder.
- Micro spacer in a vacuum radio tube
- Titanium oxides in paints
- Talc in baby and other powder formulations
- Ball Clay in refractories, porcelain and paper
- Calcium carbonate in toothpaste
- Ferrites in the memory of large digital computer.
- Vehicle ceramic brake discs which are resistant to abrasion at high temperature.

Some of the ceramic raw materials identified and discussed by the aforementioned Authors include;

Kaolin in Abia, Akwa Ibom, Bauchi, Ekiti, Yobe etc.
Feldsper found in Adamawa, Borno, Katsina, Niger, Plateau etc.
Limestone deposits in Abia, Anambra, Adamawa, Borno, Gombe, Imo, Yobe etc.
Quartz in Ebonyi, Ekiti, Katsina, Kebbi and Plateau.

[9]Adindu Iyasara, Moses Joseph, Thaddeus Azubuike & Tse Daniel, "Exploring Ceramic Raw Materials in Nigeria and their Contribution to Nation's Development" (2014) 3(9) *American Journal of Engineering Research*, pp 127-134.
[10] *Ibid*., at p. 129.

Talc in cross river, Ekiti, Kogi, Niger, Osun and Oyo.
Silica Sand Deposits in many States including Abia, Benue, Borno, Cross River, Kaduna, Kano Niger etc.
Ball clay deposits in Abia, Benue, Cross River, Kaduna, Kano, Kogi, Plateau etc.
Bentonite in Abia, Adamawa, Akwa Ibom, Borno, Yobe, Gombe and Ebonyi.

Kaolin is used in the production of Refractory Bricks, ceramic wares (Tiles, Sewage pipes, Drain pipes etc). Kaolin when added in concrete production adds improved strength. In the production of paints, plastics and Rubber, also in pharmaceutical and cosmetic products (Skin care product).
Talc is used in the production of paints and coating, production of Cosmetics, chewing gum, insecticides etc.
Silica Sand is often used in the production of Concrete and Mortar in the construction industry.
Quartz Silica is used in the production of Abrasives and Adhesives found in sandpaper, cutting glass, stone and metal. It is used as a water repelling coating, Silicon carbides and Silicon metal to mention a few.
Ball Clay on the other hand, is employed in the production of sanitary ware, Table ware, Wall and Floor Tiles, Refractory Clays, Bricks Roof Tiles, Electrical Porcelain Insulators protecting from high voltage. Ball Clay can also be used as fillers in construction generally and in the production of Plastic Sealants, Fertilizers and Insecticides.
Bentonite a ceramic mineral can be used as Drilling Mud to lubricate and cool the tools for drilling thereby preventing blow outs. It is used also in ceramic glazes as absorbents of odours, oils and grease. In medicine it is used in the making of drugs like laxatives.

3.0. NEED FOR CONTROL

The ceramic profession and practice have greatly influenced the economy by being part of essential products as have been earlier stated in this work. It is imperative to advocate for licensing and regulation in the practice of this very essentials profession.

The need for control and licensing is heightened when regard is had to the fact that some ceramic raw materials can be toxic when improperly handled or inhaled. Therefore, adequate knowledge must be wielded by persons handling them. Both the Local Porters under the Crap Porters Association of Nigeria who share and possess the skills and conduct exhibitions must be well informed as well as the other Ceramic Handlers and miners. This will go a long way to avoid the repetition of the toxic contamination that occurred in Zamfara state some years ago resulting in birth defects, and even by deaths.

The pricing of these ceramic raw materials should come under regulation as well as their quality. This will enhance the duties being carried out generally by the Standard Organization of Nigeria.

Ceramic Industries must be required by regulation to seek and employ the services of qualified ceramic personnel. These qualified personnel must be involved in the standardization process irrespective of the presence other technologist in the board.
In the same vein adequate regulation will ensure that qualified ceramic personnel participate in the relevant arms of Ministries and Agencies that deal with ceramic raw or finished materials these would ordinarily include the Ministry of Science and Technology; Ministry of Mines and Solid Mineral Resources, The Standard Organization of Nigeria and the Raw Material Research and Development Council.

Other important areas that would require licensing and regulation include the importation of ceramic raw materials the safe and proper conduct of ceramic professionals; the control of the quality and standard of education for intending professional; continuing education of professionals and the maintenance of proper register of ceramic professionals.

3.1. A Clue from other professions

A consideration of some professions like the Estate Management and Valuation, the Architecture, the Legal Profession and the Computer Profession would be apt at this juncture with a view to show that

the ceramics profession should forthwith speed up her licensing and regulation to enhance and match their existing usefulness in the society at large. This will enable the profession to be taken seriously as an economic force to reckon with in the 21st Century Nigeria.

3.2. The Estate Surveyor

Estate surveying and valuation profession in Nigeria is regulated by the Nigeria Institution of Estate Surveyors and Valuers (NIESV) and Estate Surveyors and Valuers Registration Board of Nigeria (ESVARBON) by virtue of promulgation of the Estate Surveyors and Valuers Registration Board Act.[11] The establishment of ESVARBON and NIESV (a parallel and complementary non-governmental society of valuers) gave rise to a two-pronged valuation practice control in Nigeria which is different from the unilateral control of the RICS in the UK. The NIESV is a professional association which conduct examination leading to admittance into professional membership of the association and also organizes Annual Conferences and Mandatory Continuing Professional Development (MCPD) trainings for its members. Member can either obtain an Associate (ANIVS) or fellow (FNIVS) designate of the NIESV once they have met the educational requirement (minimum of a HND in Estate Management), fulfilled practical experience requirements in all property disciplines, (usually a minimum of two years after National Youth Service), submitted a critical analysis report, and passed a rigorous and comprehensive oral examination.[12]

In *NBA* v. *Ibebunjo*,[13] the court on whether the business of selling land is incompatible with the practice of Law, held that;

> By virtue of Rule 7(3) of the Rules of Professional Conduct, the business of selling land is a trade or business incompatible with the practice of law. In the instant case, the respondent was clearly doing illegal

[11] (Decree) No. 24 of 1975; Cap E13 LFN 2007.
[12] A. O. Agboola, O. Ojo &A. Amadu, "Investigating Influences on Real Estate Agents Ethical Values; Case of Real Estate Agents in Nigeria" (2012) *International Journal of strategic property Management.*
[13] (2013) 18 NWLR (P 4 1386) 413, 428 paras A-C.

> business to sell land Rule 7(3) clearly provides the category of business that are compatible with the practice of law. The respondent was clearly playing with fire when he was using the platform of his legal practice to sell land. The justice of this case demands that we allow him go full time into his main business of selling of land and to leave the business of practicing law to those who are bona fide legal practitioners.

The lawyer from the Rules of Professional Conduct can engage of in:

1. Advising or giving legal opinion to clients on land title documents and tenancy agreements.
2. Drafting of land title documents and tenancy agreements for clients.
3. Filing and handling of cases in court for clients.

3.3. The Architects

Architects (Registration etc.) Act[14] is an Act that provide for the registration of the profession of architects by the Architects Registration Council of Nigeria and for all other matters connected with the profession.

Section 1 of the Act provides that;

> Subject to the provisions of this Act, a person shall not prepare or take full responsibility for the erection or commissioning of architectural building plans or practice or carry on business (other than that having relevance to ship construction, or title containing the word "architect" unless he is a Nigerian, citizen and registered under the Act.

Section 2(2) established the Architects Registration Council of Nigeria empowered among other things to carry out the duty of;

a. Determining what standards of knowledge and skill are to be trained by persons seeking to become members of the architectural profession and raising those

[14] No. 10, of 1969; Cap A19 LFN 2004

standards from time to time as circumstances may permit;

b. Securing in accordance with the provisions of this Act, the establishment and maintenance of a register of persons entitled to practice the profession and the publication from time to time of lists of those persons.

To avoid repetition, it is imperative to state that Section 11 of the Architects Act provides for the certification of professional competence while a Disciplinary Tribunal and Investigating Panel is established by Section 12.

Furthermore, offences that qualify for unprofessional conduct were listed in Section 14 which shall be triable in the Federal High Court while penalties for unprofessional conduct etc. were listed in Section 13 thereof.

3.4. The National Judicial Council

In the case of *Nganjiwa* v. *F.R.N.*[15] the Court of Appeal held *inter-alia* regarding the exclusive power of the National Judicial Council to discipline judicial officers for official misconduct that;

> Whenever a breach of judicial oath occurs, it is a misconduct itself, then the NJC is the appropriate body to investigate such breaches by the judicial officer and if found to be so, such judicial officer shall face disciplinary action and the NJC may recommend the removal of such a judicial officer to the appropriate authority which is either the president in the case of Federal Judicial Officer or the Governor of the state, in the case of a State Judicial Officer, and/or take other actions appropriately. When this is done and accepted by the appropriate authority in compliance with the provisions of the constitution, then the relevant law enforcement Agent or Agency is at liberty to make the said judicial officer face the wrath of the law. Any act done by the law enforcement Agent or Agency in violation of the above is tantamount to denying the NJC its powers to discipline Judges in accordance with

[15] (2018) 4 NWLR (Pt. 1609) 308-309.

> the provisions of Section 153(1) and Paragraph 21 Part I (a) and (b) of the Third Schedule, of the 1999 Constitution (as amended).

Whenever there is an allegation of official misconduct against a judicial officer and the above stated process is not adhered to, it amounts to jumping the gun and *ipso facto* a direct violation of the constitution. Recourse to the National Judicial Council is a condition precedent as clearly set out by the Constitution, and any attempt by any Agency of Government to by-pass the Council will amount to failure to observe condition precedent thereby leading to flagrant violation of the Constitution.

In the instant case, the appellant was charged with offences ranging from unlawful enrichment by a public officer to making false information contrary to Section 82 (a) of the Criminal Law of Lagos State, No. 11, 2011 and Section 39 (2) (a) of the EFCC (Establishment) Act.[16] However, the appellant objected upon being served by the EFCC on grounds that the condition precedent had not been satisfied.

In resolving the appeal, the Court of Appeal considered at great length, the provision of Section158 (1) of the 1999 Constitution (as amended) and Rules 1, 2, 3 and 10 of the Revised Code of Conduct for Judicial Officers of February 2016.

Section 158 (1) of the 1999 Constitution states that;

> In exercising its power to make or exercise disciplinary control over persons, the Code of Conduct Bureau, the National Judicial Council, the Federal Civil Service Commission, the Revenue Mobilization and Fiscal Commission, the Federal Character Commission and the Independent National Electoral Commission, shall not be subject to the direction or control of any other authority or person.

Paragraph 21 of the Third Schedule states that;

[16] Cap E1 LFN 2004.

> The National Judicial Council shall have power to; Recommend to the President the removal from office of the Judicial Officers and to exercise disciplinary control over such officers.

The Revised Code of Conduct for Judicial Officers of February 2016, Rules 1, 2, 3 provides that;

1. The code applies to all categories of Judicial Officers throughout the Federation as defined in this Code.
2. Violation of any Rules contained in this code shall constitute judicial misconduct and or, misbehaviour and shall attract disciplinary action.
3. A Judicial Officer should be true and faithful to the Constitution and Law, uphold the course of justice by abiding with the provisions of the constitution and the Law and should acquire and maintain professional competence.

Rule 10 states that;

> A judge shall not give or take and shall not encourage or condone the giving or taking of any benefit, advantage, bribe however disguised for anything done or to be done in the discharge of judicial duty.

3.5. The Legal Practitioner

In *Emechebe* v. *Ceto Int'l (Nig.) Ltd*[17] the respondent by a writ of summons commenced a suit against the appellant at the Federal High Court, Lagos. With the writ of summons was a motion *ex-parte* seeking for interim order of injunction restraining the appellant from dealing with goods branded with the trade mark *Alize* registered as RTM 53599 in the Trade Mark Registry. The respondent also filed a motion for interlocutory injunction for an order for search and seizure of all the alcoholic products branded *Alize* in possession of the appellant. At the conclusion of hearing and rulings the appellant was dissatisfied and brought an appeal to the Court of Appeal contending among other things that the trial court did not have

[17] (2018) 11 N.W.L.R (Pt.1631) 520 at 525.

jurisdiction and that the failure of a legal practitioner to affix the Nigerian Bar Association Stamp is detrimental to the motions filled. The Court of Appeal held *inter alia* that;

> The purpose of the Nigerian Bar Association Stamp and seal is to ensure that legal practitioners who file processes in court have their names on the role of legal practitioners in Nigeria and that quacks, imposters and meddlesome interlopers do not infiltrate the legal profession and present themselves to litigants as legal practitioners. In the instant case, the originating processes were duly signed and stamped by the counsel for the respondent and his stamp affixed even through the said stamp was expired.

The failure to affix the approved seal and stamp of the NBA on a process does not render the process null and void. The act is at best an irregularity that can be cured by an application to affix an unexpired stamp and seal which from the court's record had been clearly fixed in the other applications filed by the same learned counsel at the trial court. Therefore, striking out the process would amount to pushing the rules of technicalities too far. The court relied on other recent cases including *Nyesom* v. *Peterside*[18] and *Gen. Bello Sarkin Yarki* v. *Senator Abubakar Atiku Bagudu*.[19]

In the suit of *Nigerian Bar Association (NBA)* v. *Lawal Ishaq*[20] the petitioner petitioned to the Nigerian Bar Association, Plateau State against the respondent for an alleged concealment of receipt and conversion of client's money. An act which is contrary to Rules 1, 15(3)(e) and 23(2) of the Rules of Professional Conduct in the Legal Profession 2007. The petitioner alleged that the respondent received the sum of ₦2,500,000.00 being a refund of a failed transaction with a third party on his behalf. The petitioner insisted that the respondent refused to disclose the recovered sum but disclosed a lesser sum of ₦1,900,000.00 only. On the other hand, the respondent claimed that they were childhood friends and what

[18] (2016) 7 NWLR (Pt 1512) 452.
[19] (2015) 18 NWLR (Pt. 1491) 288.
[20] (2017) 6 NWLR (Pt 1560) 162.

transpired between them was not a relationship between a lawyer and his client but a soft loan from one friend to another. However, he was unable to pay back the soft loan due to his dwindling financial state at present.

After a thorough investigation by the NBA Investigation Committee a *prima facie* case was made out against the respondent. The NBA thereafter referred the case to the Legal Practitioners Disciplinary Committee. It was held that the respondent was guilty of infamous conduct in the legal profession and should be suspended from legal practice in whatever manner for a period of 24 months. The respondent was also instructed to pay to the Chairman of the Nigerian Bar Association, Jos Branch, the sum of ₦600,000.00 which the Chairman shall pay over to the Petitioner.

It is worthy to note that the provisions of Rules 15 (3)(c) 23(2) of the Rules of Professional Conduct for Legal Practitioners 2007 and Sections 12(1)(c)(ii) of the Legal Practitioners Act (as amended) 2004 were relied upon heavily. In the same vein, some Nigerians cases including *NBA* v. *Monyei*;[21] *NBA* v. *Oranuba*[22] and *Ndukwe* v. *LPDC*[23] were referred to.

In *NBA* v. *Ofomata*,[24] the issue was whether or not the respondent by his conduct was guilty of infamous conduct contrary to Rules 1, 10, 21, 24, 49, 52 and 55 of the Rules of Professional Conduct of the Legal Profession.

The committee held that when the Investigation Committee of the Nigerian Bar Association forwards the finding of a *prima facie* case to the Legal Practitioners Disciplinary Committee (LPDC), the onus of proof is on the respondent to deflect or counter the finding by providing evidence to the contrary.

[21] (2013) 18 NWLR (Pt. 1386) 454.
[22] (2006) 12 NWLR (Pt. 994) 433.
[23] (2007) 5 NWLR (Pt. 1026) 1.
[24] (2017) 5 NWLR (Pt. 1557) 128.

Daudu, SAN (Chairman)[25] stated equivocally while delivering the Direction of the committee that;

> We are of the firm view and we so find that the respondent not only acted irresponsibly but fraudulently to the detriment of his client and the legal profession. Lawyers must take heed and not wish to pull a fast one on their clients and the community at large by putting their financial interests over and above the interests of the civilized society. The fabric of our community relies or is dependent on lawyer's knowledge, honesty and fiduciary dependability. If lawyers cannot be trusted, who then should the people trust. It is time that the profession rid itself of dishonest characters in their midst.

In *Brown* v. *State*[26] the 1st appellant was formerly a student of the Nigerian Law School, Bwari, Abuja. As the practice of the Nigerian Law School has been admission forms to prospective students are to be sponsored by members of the Body of Benchers who will sign the relevant portion in the said form. Usually the members of the Body of Benchers must ensure that the prospective student is a fit and proper individual without a bad character in order to ensure the credibility of the Legal Profession. To do this, there are some vital questions in the admission form that would guide the sponsoring. Some of the important questions include;

1. Has there been allegation of examination malpractice or any form of dishonesty against you during your educational career?
   Yes or No. If Yes, give details;
2. Have you ever been rusticated by any University? If Yes, give details

The 1st appellant while filling the form answered "No" to the questions which made him to be sponsored. It was later found that the 1st appellant had been rusticated while a student at the River

[25] At p. 146, paras. D-F.
[26] (2017) 4 NWLR (Pt 1556) 341.

State University of Science and Technology for examination malpractice. The 1st appellant also later got admitted into the University of Jos and graduated without the aforementioned facts of his rustication being known.

However, after being called to the Nigerian Bar, some persons decided to let the cat out of the bag which made the 1st appellant to hurriedly request for his transcript from the Law School and subsequently committed the crime of forgery and procurement of forgery of his personal file at the Law School with the connivance of the second appellant who was a staff of the Law School.

They were later arraigned before the High Court of the Federal Capital Territory, Abuja on a four-count charge of conspiracy to commit fraud and altering. They were found guilty at the trial and appealed to the Court of Appeal where the decision of the Lower Court was upheld. The appellants were dissatisfied and aggrieved with the judgment of the Court of Appeal and separately brought an appeal to the Supreme Court.

The Supreme Court in a unanimous decision dismissed the appeal and held that the appellants were guilty as charged. Per Nweze, J.S.C[27]

> There is the compelling need for the authorities of the Nigerian Law School to be ever vigilant in screening candidates who are desirous of being admitted into that elite graduate school for the practical training of Law graduates for call to the Nigerian Bar and subsequently enrolment at the Supreme Court as Legal Practitioners.

As clearly demonstrated by the instant case, where the relevant personnel of the Law school fail to winnow off candidates who parade credentials tainted with suspicion, persons of doubtful reputation could infiltrate the temple of justice as ministers thereof. That would be bad, both for the temple itself and the administration of justice, as a whole.

[27] At p. 378, paras. A-C.

4.0. SUMMARY OF FINDINGS

In this study, several findings were made.

1. That the present land practice by Ceramic professionals which is based on the Land Use Act is inadequate. A more befitting legal framework ought to be put into place to ensure a more productive and safe practice.
2. That most of the Ceramic raw materials are derived from the land.
3. That there are no proper controls in form of licencing for the handlers and miners of Ceramic raw materials especially when regard is had to the fact that some of the raw materials are toxic.
4. That several other professional bodies have a form of regulation or licencing that ensures accountability, safety of members, proper professional conduct, discipline for professional misconduct etc.

5.0. RECOMMENDATIONS

The work recommends as follows:

1. That a prompt review of the land use regulation be carried out, especially to reflect all acceptable International practices regarding the ceramic profession.
2. That the mining and handling of ceramic raw materials be regulated forthwith to safeguard both the miners, handlers and the general public from toxicity, substandard products and other negative attendance.
3. That a certified licencing body be created by law to oversee the proper practice of Ceramic profession in Nigeria.
4. That by regulation, qualified ceramic personnel be made to participate in the standardization procedures both in ceramic industries and in governmental and non-governmental agencies who deal in ceramic raw materials.

6.0. CONCLUSION

With the acknowledgement of the vast potential and importance of the ceramic practice in Nigeria, it is expected that the ceramic professionals face their biggest legal need for regulation and licensing head on. The harnessing for economic and other purposes of ceramic materials and products must not be left unregulated and unprotected if the impact of the practice would be felt in the economic advancement of the Nation as well as the quiet enjoyment of such products by the citizenry. The time for the licensing and regulation is now, for delay defeats equity.

SIFAX NIG. LTD v MIGFO NIG. LTD (2018): COULD TIME FREEZE TOO, FOR THE PURPOSE OF TIMELINES FOR HEARING ELECTION PETITIONS?

Bolaji Qudus Adeoye*

ABSTRACT

In 2018, the Supreme Court delivered a landmark decision in Sifax Nig. Ltd v. *Migfo Nig. Ltd,*[1] *which established the principle that time stops running for the purpose of a statute of limitation upon the institution of an action notwithstanding that the action was first instituted in a wrong court. That said, one of the raging issues in our current electoral jurisprudence, especially since the passing of the Electoral Act 2010*[2] *(as amended), is the increasing injustice experienced from the rigid timelines set by the Act in the hearing of election petitions and the appeals arising therefrom. The main concern here is that the current posture portends the enthronement of technicality over justice. The writer thus makes a case for the adoption of the exception created in the Migfo's case in an election petition, albeit with some qualifications.*

1.0. INTRODUCTION

Statutes of Limitation, as rules of procedure, limit the time allowed for a claimant to institute an action in court. The rationale for these rules includes the following:

a. that long dormant claims have more of cruelty than justice in them,
b. that a defendant might have lost the evidence to disprove a stale claim and;
c. that persons with good causes of action should pursue them with reasonable diligence.[3]

The rules are of an antiquated pedigree and bear evidence of the ever competing interests in the growth of our legal system – that is, the desire for quick resolution of disputes and the certainty that no

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[1] (2018) 9 NWLR (Part 1623) 138 SC.
[2] Cap E6, Laws of the Federation of Nigeria 2010.
[3] See *Aremo II* v. *Adekanye* (2004) 13 NWLR (Part 891) (p. 592, paras. F-G).

claim is left unattended.[4] The rules are products of legislative and judicial interventions which classify claims and prescribe periods within which actions are to be taken, lest such claims remain foreclosed.[5]

Perhaps, there is no stricter implementation of these rules than in an election petition where time is of the essence.[6] The strict compliance to time in an election petition is understandable on the ground that it is not desirable that matters of that nature are left to be dragged by the usual clogs in other civil matters and also to avert a situation where election petitions are still being heard well into the full term of the office being contested. It has also been argued that the timelines are not set to punish any litigant, but that interest of justice and the need to hear matters on merits have all been taken into account by the drafters of our Electoral Act.[7]

Notwithstanding these laudable intentions, the operation of statutes of limitation generally and the timelines set in the Electoral Act specifically, has been decried as being adverse to the public policy that seeks to dispose litigation on the merits rather than on procedural grounds and that it promotes the enthronement of the regime of "technicalities" which the courts have constantly frowned upon.[8] Another reason cited for the relative unpopularity of statutes

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[4] M. Heise "Statutes of Limitation", (2001) *International Encyclopedia of Social and Behavioural Sciences* available at: https://www.sciencedirect.com/science/article/pii/B0080430767028266?via%3Dihub (accessed 28 October 2019).

[5] Tyler T. Ochoa and Andrew Witstrich, "The Puzzling Purposes of Statutes of Limitation", 28 *Pacific Law Journal* 1996 – 1997 available at: https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1107&context=facpubs (accessed 27 October 2019).

[6] *Eneji & anor.* v. *Agaji & ors.* (2011) LPELR-4540(CA), per Ndukwe-Anyanwu, J.C.A. (p. 9, paras. E-G)

[7] *Ikoro* v. *Izunaso* (2009) 4 NWLR (Pt.1130) 45 @ 70.

[8] The Supreme Court, Per Oguntade, J.S.C in *Amaechi* v. *Independent National Electoral Commission & Ors* (2008) LPELR-446(SC) held that: "the sum total of the recent decisions of this court is that the court must move away from the era when adjudicatory power of the court was hindered by a constraining adherence to technicalities. This often results in the loser in a civil case taking home all the laurels while the supposed winner goes home in a worse situation than he approached the court". See also *ODEH* v. *FRN* (2008) LPELR-2205(SC) where the Supreme Court, per Onu, JSC (p. 35, para. B), held that "The

of limitations is the desire to vindicate meritorious claims[9] which is expressed in the maxim *ubi jus ibi remedium*, that is, for every wrong, the law provides a remedy.

In reaction, the courts, and most statutes of limitation of actions, have provided for various exceptions. The common ones include doctrine of continuing injury;[10]or where, in respect to the Public Officers Protection Act, the public officer fails to act in good faith, or acts in abuse of office or maliciously, or with no semblance of legal jurisdiction,[11] amongst others. Recently, the Supreme Court in *Sifax Nig. Ltd* v. *Migfo Nig. Ltd*, created the exception, which is to the effect that time stops to run for the purpose of limitation law once an action has been instituted. The relevant question which the writer seeks to address is whether the principle underlying the decision of the Supreme Court can be extended to election petitions, for instance, where the petitioner successfully appeals the striking out of his petition and the 180 day period for the hearing of a petition lapses, would time be deemed to have frozen all the while the appeal was lodged and heard?

Another scenario is where the 60 day period for the hearing of an appeal arising from an election petition elapsed while a motion to restore the appeal is pending before the Appellate Court, would the appeal become statute barred at the expiration of 60 days notwithstanding the pending application?[12] These questions become relevant as the application of the decision in *Sifax Nig. Ltd* v. *Migfo Nig. Ltd*,[13] although decided under the Limitation Law of Lagos State, is not limited to the Lagos state law only. The underlying principle

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attitude of courts has been that cases should not be decided on the basis of technicalities".

[9] *Supra* n 3.

[10] *Abiodun* v. *Attorney-General, Federation* (2007) 15 NWLR (Pt. 1057) 359.

[11] *Lagos City Council* v. *Ogunbiyi* (1969) 1 All NLR 279; *CBN* v. *Okojie* (2004) 10 NWLR (Pt. 882) 488;

[12] The Supreme Court recently answered this in the affirmative in its 28 October 2019 decision in Appeal No: SC/1110/2019 *Owuru & Anor* v. *Buhari & 2 Ors* (unreported). According to the Apex Court, the Appeal was already caught by Section 285 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[13] *Supra* n 1.

seems all-encompassing as it seeks to curb the excesses of strict observance of the statutes of limitation generally.

2.0. ANALYSIS OF *SIFAX NIG. LTD* v *MIGFO NIG. LTD* (2018)

2.1. Brief facts

The 1st Appellant and the Respondents signed a Memorandum of Understanding dated 25 July 2015 to jointly bid the concession and the joint management of Terminal "C", Tin Can Island Port, Apapa, Lagos, put up for concession by the Federal Government through the Bureau of Public Enterprise (BPE) and the Nigerian Ports Authority (NPA). It was also agreed that if the bid was successful, a joint venture company would be incorporated to manage the operation of the port. The bid was submitted and the joint venture partners emerged as the preferred bidders. However, the Respondents later discovered that the 1st, 3rd and 4th Appellants had secretly incorporated the 5th Appellant without their knowledge; and that the Port had been handed over to the 5th Appellant by the BPE and NPA.

After all efforts at resolving the issue failed, the Respondents filed Suit No: FHC/L/CS/664/2006 at the Federal High Court, Lagos where judgment was entered in the Respondents' favour. The said judgment was affirmed by the Court of Appeal on 17 December 2008. However, on further appeal, the Supreme Court, in its judgment delivered on 8 June 2012 and reported as *Ports & Cargo handling Services Co. Ltd* v. *Migfo Nig Ltd*,[14] struck out the Respondents' suit on the ground that the Federal High Court lacked jurisdiction over the suit.

Following the decision of the Supreme Court, the Respondents then commenced a fresh suit at the High Court of Lagos State via a Writ of Summons dated and filed on 18 July 2012 where they alleged fraudulent breach of trust and concealment by the Appellants. In response, the Appellants applied for the suit to be struck out for

[14] (2012) 18 NWLR (Part 1333) 553.

being statute barred, and improperly constituted because of the non-joinder of the NPA and BPE.

The trial court held that the Respondents' claim was not based on simple contract as envisaged by Section 8(1) of the Limitation Law of Lagos State, 2003, and that because of the reliefs sought by the Respondents, Section 13 of the law excluded Section 8(1) of the law from applying to the suit. Further, the trial court relied on a book, "Limitation Periods" by Andrew McGee[15] and also held that time did not run between 2006 when the Respondents' first suit was commenced and 2012 when the Supreme Court decided that suit. The trial court also held that NPA and BPE were not necessary parties to the respondents' suit.

The Appellants appealed to the Court of Appeal, which confirmed the decision of the State High Court. Consequently, the Court of Appeal dismissed the appeal. Still dissatisfied, the Appellants appealed to the Supreme Court.

2.2. Issues for determination

The Appellants, like the Respondents, formulated three issues for the determination. This review will however address only the first issue which is reproduced below, thus:

> Having regard to the clear relevant provision of Section 8(1)(a) of the Limitation Law, Lagos State[16] *vis-a-vis* the respondents' claim as per their statement of claim dated 18/7/2012, whether the lower court was not in grave error in affirming the trial court's finding that the respondents' action was not statute-barred.

2.3. Decision

In affirming the decision of the lower court, the Supreme Court relied on many principles and rightly held that the substance of the claim, that is, allegation of fraud, brought it outside the application of the Limitation Law by virtue of the Section 13 thereof. This review

[15] (8th edn, Sweet & Maxwell, 2018).
[16] Cap L67, Laws of Lagos State of Nigeria, 2003.

is particularly focused on the Apex Court's decision on the recondite issue of whether time stops running for the purpose of limitation law upon the institution of an action. The Supreme Court held on the vexed subject as follows:

> I am persuaded by the works of Professor Andrew McGee (supra) and the foreign cases cited therein by the learned author to hold (sic) that time ceased to run for the purpose of limitation period during the pendency of the respondents' action at the Federal High Court, Court of Appeal and Supreme Court between 2006 and 8 June 2012. Further, to accede to the appellants' contention that time should not stop to run during the pendency of an action in court for the purpose of limitation Law would unwittingly permit the legislature, to take over control of the time-table of litigation indirectly or by subtle means, to wrongly/technically dictate the pace cases are heard in court under the cloak of limitation enactment. This will create the alarming scenario in which pending cases caught by effluxion of time and objection to their determination on the merit on account of lapse of time so upheld would meet undeserved grief or it may create the dangerous repercussion of stampeding the court to operate on full throttle to grapple with time in the course of which justice may be sacrificed on the altar of neck-breaking speed or indecent haste which will drain the adjudication of dispute of the patience, fairness, diligence or balanced/even handed justice, which it is wont to have, which will be a sad day for the administration of justice …[17]

The decision of the Apex Court reflects the policy that matters are to be heard on the merits and is highly commendable. The relevant question here is whether the principle laid down in the *Migfo* can be extended to an election petition. Luckily, the Apex Court commented on this issue thus:

> In this case, the respondents filed the earlier suit expeditiously, and thus the issue is whether the time

[17] *Supra* n 1 per Augie JSC, p.181, paras. A – E.

> spent at the wrong court can be frozen or suspended. The appellants say it cannot be and filed additional authorities on the principle that time runs at every material time in determining statute bar… it is their contention, as argued at the hearing of the appeal, that in each one, this court sent the cases for trial *de novo,* but in between it made the order and the time the case was to start *de novo*, the statute of limitation had crept in, and there was nothing anybody could do and so, for the decision of the lower courts to be sustained, this court must depart from these decisions.[18]

The court continued:

> I have gone through the additional authorities: they are election matters…It is a very common refrain in such cases that "election matters are *sui generis*", which means that they are much unlike ordinary matters, and in an election related matter, it is said that time is of the essence – *Wambai* v. *Donatus & Ors* (2014).[19] In effect, the question of this court departing from its decisions in the above listed cases does not arise in this case that deals squarely with ordinary civil proceeding.[20]

From the foregoing excerpts, it can be gleaned that the Apex Court restricted the application of the principle to general civil matters. However, and in the opinion of the writer, the underlying principles and policies necessitating for the exception are no less applicable in election related disputes as it is in general civil matters. Thus, taking into cognizance the *sui generis* nature of election petitions, justice, which the principle in *Migfo* seeks to meet, should not be sacrificed on the altar of stringent timelines. The writer thus advocates for a principle which strikes a balance – one which respects the peculiarities of election petitions and, at the same time, ensures that justice is served.

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[18] S*upra* n 1 per Augie JSC, p.184, paras. A – D.
[19] 14 NWLR (Pt. 1427) 223 SC.
[20] S*upra* n 1 per Augie JSC, p.181, paras. D – G.

3.0. POLICIES INFORMING THE PRESENT STRICT TIMELINES IN ELECTION PETITIONS

At the inception of the fourth republic, and before 2010, election petitions in Nigeria were not subject to strict timelines for the hearing of either the petitions or appeals resulting therefrom. Admittedly, while Section 141 of the Electoral Act, 2006 states that "an election petition shall be presented within 30 days from the date the result of the election is declared, the Act does not put a ceiling on when such petitions should be concluded by the tribunals and the court."[21] What this means is that like any other civil matter, election petitions could dragged on for indefinite periods. Cases like *Ngige* v. *Obi*,[22] *Rauf Adesoji Aregbesola* & *2 Ors* v. *Olagunsoye Oyinlola* & *Ors*[23] and *Fayemi* v. *Oni*[24] bore testament to the delays often experienced in the course of hearing and determining election petitions. In particular, it took over 34 months for *Ngige* v *Obi* to be heard and concluded from the tribunal to the Court of Appeal.

Also, in both *Rauf Adesoji Aregbesola* & *2 Ors* v. *Olagunsoye Oyinlola* & *Ors* and *Fayemi* v. *Oni,* it took over three years before the matters were concluded at the Court of Appeal – which meant three years into the tenure of the incumbents. The arrangement then is partly responsible for the imbalance in the period for conducting elections across states in the country today.[25] Besides that, where the Court found that the election was marred by irregularities, as it did in *Aregbesola*'s case, it would mean that a candidate who did not have the peoples' mandate had been allowed to enjoy virtually the same privileges any legitimate candidate would. This was a daylight robbery of the peoples' mandate. It also meant that they had been forced to enter into a social contract against their will. It then

[21] Kunle Animashahun, "Regime Character, Electoral Crisis and Prospects of Electoral Reform in Nigeria" 2010 1 *Journal of Nigeria Studies*, p. 1. PDF available at http://www.unh.edu/nigerianstudies/articles/Issue1/1-3Article.pdf (accessed 31 October 2019).
[22] (2006) 14 NWLR (pt. 999), p.1.
[23] (2010) LPELR-CA/I/EPT/GOV/02/2010.
[24] (2010) 48 WRN 30.
[25] U.C. Kalu, E.O.C. Obidimma, A.O. Anazor, "Time Limitation in Election Petitions in Nigeria: The Imperative for Further Constitutional Reforms", (2016) 5 *The International Journal of Innovative Research and Development*, p. 14.

became imperative that something drastic be done to curb the menace.

The clamours[26] for review finally yielded positive result when the Electoral Act 2010 (as amended) was passed and the Constitution of the Federal Republic of Nigeria 1999[27] (as amended) was amended to reflect the timelines for the hearing of petitions and appeals arising therefrom. In 2018, by virtue of the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 21) Act, 2017, timelines were also set for pre-election matters. By inserting new subsections (9)-(14) in Section 285 of the Principal Act, the Act provides that every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event and judgment in writing is to be given within 180 days; appeal from a decision in such pre-election matter is to be filed within 14 days from the date of delivery of the judgment and same shall be heard and disposed of within 60 days from the date of filing of the appeal.[28]

However, nine years of experimenting with the strict timelines have taught us how much injustice that can work. In these years, petitions and appeals flowing from same have been struck off on crudely shocking technical grounds. This again has led to clamour for a review of the timelines set by the Electoral Act 2010 (as amended) and enforced by the Constitution. An analyst,[29] while exploring the lacuna in the 180 days rule, raised the following questions:

1. What happens where, in the course of trial, a member of the panel or the entire panel, for one reason or the other, cannot proceed with hearing after commencement of trial?

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[26] Following the Late President Yar'adua's emergence at the President in 2007, he inaugurated a committee which in its final report submitted in 12 December 2008, recommended that the election petitions should be resolved within a timeline of 4-6 months at the tribunals and 2 months at the Appeal Court.

[27] Cap. C23, LFN 2010.

[28] LawPavilion, "The Hydra-headed Fourth Alteration", available at: https://lawpavilion.com/blog/the-hydra-headed-fourth-alteration/ (accessed 31 October 2019).

[29] M.A. Oyelade, "A Lacuna in the 180 days rule" *Lawaxis 360degree*, available at: https://lawaxis360degree.com/2019/07/26/a-lacuna-in-the-180-days-rule-mohammed-a-oyelade-esq/ (accessed 31 October 2019).

2. Where the member/panel is replaced and continues from where the last panel stops, will an infringement on the principles of fair hearing not be occasioned, since trial had already commenced?[30]

The questions become relevant in the light of the probable option available in instance (1) or (2) – that is, a reconstitution of the panel or the hearing of the petition *de novo*. However, any of these options will reduce the 180-day period for the hearing of the petition, unfortunately, at no fault of the petitioner. Such is the absurdity and injustice the present strict timelines can work.[31]

4.0. STRIKING A BALANCE: BETWEEN STRICT INTERPRETATION, RIGHT TO FAIR HEARING AND MEETING THE ENDS OF JUSTICE

In the light of the present development and the apparent immutability of the timelines set by the Constitution, the writer argues that our courts should toe the path of striking a balance between adhering to the letters of the law and meeting the ends of justice in a deserving case. The writer argues that as it was done in *Amaechi* v. *INEC & Ors*[32] the Court should, when deserving, adopt the principle enunciated in *Migfo*.

Accordingly, it is the recommendation of the writer that a balance should be struck between the rigid adherence to timelines set under the Electoral Act 2010 (as amended) – which is also reinforced by Section 285 of the Constitution - and the need to serve justice. How exactly is this supposed to work? First, election petitions or the appeals resulting from them which are dismissed or struck out *in limine*, or which are to be tried *de novo* need to be considered within the peculiarities of the circumstances which led to their dismissal, or the need to try them *de novo*, the general conduct of the parties, and the justice of the matter.

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[30] See *Kunle Kalejaiye* v. *LPDC* (2019) LPELR- 47035; APPEAL NO: SC/533/2019 *Adeleke* v. *Oyetola* (unreported) delivered on 5 July 2019.
[31] See *ANPP & Ors* v. *Goni & Ors*. (2012) LPELR-SC.1/2012.
[32] (2008) LPELR-446(SC).

As done by the Learned Justices in *Migfo*, the tribunal is expected to adopt a purposive interpretation of the Electoral Act and the Constitution. The *sui generis* nature of election petition should not be a cover to enthrone sheer injustice. Cases like *ANPP& Ors* v. *Goni & Ors* where the Supreme Court held that: "a petition must be heard and determined within 180 days. Outside the 180 days, the Court of Appeal is not cloaked with statutory power to extend the period meant for the hearing of a petition for any reason either in the interest of justice or in exceptional cases. Once any petition comes before the tribunal outside the 180 days, the court is divested of jurisdiction to hear it" are unfortunate.

On the constitutionality of such a proposal, the writer argues that constitutional provisions are not meant to mete out injustice.[33] Constitutional provisions are to be applied to advance the purpose informing them. The timelines are expected to ensure that election petitions are not unduly stalled, and to avert the experiences of the *Aregbesol*a, and *Ngige*.

Evidence of the purposive interpretation of the statutes is found in *Migfo* where the Learned Justices of the Supreme Court held that apart from the fact that the subject matter – bordering on concealment of facts and fraud – was outside the scope of Section 8 of the Limitation Law of Lagos, it would be absurd to think that, as argued by the Appellant, the limitation period would continue to run even upon institution of the action. According to the Learned Justices, what the Law seeks to protect against are stale claims being made against the defendant. As such, where the claimant has shown seriousness in instituting or bringing his claims within time, it would be wrong to hold that time would continue to run in that circumstance.

It is important to review at least a case decided in third republic, which is capable of shedding further light and lending a judicial support to the instant submission: *Paul Unongo* v. *Aper Aku & Ors.*[34] The facts were that following the governorship elections held all

[33] *Marwa* v. *Nyako* (2012) 6 NWLR (Pt. 1296) 199.
[34] (1983) 2 SCNLR 232.

over the country in 13 July 1983, the Appellant lodged a petition at the High Court, challenging the return of the 1st Respondent as the Governor of Benue State. However, the High Court struck the petition out ostensibly based on technical grounds, some of which include that the joinder of the 1st Respondent, who was then the incumbent Governor, was unconstitutional because he enjoys constitutional immunity and that non-inclusion of the occupier of the address for service of the petitioner was fatal. On appeal, the Court of Appeal upturned the decision of the trial court. However, the Court of Appeal could not grant the consequential relief of "restoring the petition and ordering a resumption of hearing in the trial court" as that would be inconsistent with Sections 129(3) and 140(2) of the 1982 Electoral Act which prescribed a 30-day time frame for the determination of an election petition. Considering the said provision *vis-a-vis* the avowed principles of separation of power and fair hearing, the Supreme Court, on further appeal, held:

> I do not see how a reasonable person will have the impression that a party has had a fair hearing where his petition which has been instituted within the time stipulated by the Electoral Act cannot be concluded because the time available to the court for the petition to be heard will not be sufficient for either or both parties to present their case or will not allow the court at the close of the parties' case sufficient time to deliver its judgment. There can be no doubt that the provisions of Section 129 subsection (3) and 140 subsection (2) of the Electoral Act neither allow a petitioner or respondent reasonable time to have a fair hearing, nor give the court the maximum period of 3 months to deliver its judgment after hearing a petition as envisaged by Sections 33 subsection (1) and 258 subsection (1) of the constitution respectively. Accordingly, the provisions of Section 129 subsection (3) and 140 subsection (2) of the Electoral Act, 1982 which limit the time for disposing of election petition by the courts are in my view ultra

> vires the National Assembly and therefore null and void.[35]

This is important to point out that Sections 129 (3) and 140 (2) of the Electoral Act 1982[36] had no constitutional backing in the 1979 Constitution as we now do with Section 285 of the Constitution and the Supreme Court could easily find that the said sections offend Section 33 of the 1979 Constitution. The same cannot be easily held now when the timelines are constitutional provisions. Even at that, it the writer's opinion that the injustice experienced back then are no less inapplicable now as such the Supreme Court is implored to intervene in deserving instances.

5.0. CONCLUSION AND RECOMMENDATIONS

Election petitions are *sui generis*, and by that it means that they are not in the same class as regular civil causes. It is thus understandable that they are subject of special laws and regulations. Due to the importance of the decisions on election petition bear in overall running of our political system as well as the economy, the strict timelines within which they are to be determined also accord within reason. However, one principle remains sacrosanct – one that cannot be overshadowed by the importance and the urgency characteristic of election petitions – and that is the principle that justice must be served even though heavens may fall. This principle, which is expressed in the maxim *fīat jūstitia ruat cælum,* is foundational and goes to the root of any legal system.

While a further amendment to the Constitution may be timely in addressing the injustice and absurdity of the current timelines for the hearing of election petition and appeals arising therefrom, our courts can also intervene by interpreting the provisions of the Constitution purposively in the meantime by extending the principle

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[35] See *Unongo* v. *Aper Aku* (*supra*) a 342 – 343; see also *Collins Obih* v. *Samuel Mbakwe,* Suit No. HOW/EPI/83 both cited in C.J. Ubanyionwu, "Election Petition Cases and the Right of Fair Trial within a reasonable time in Nigeria" available at: https://www.ajol.info/index.php/naujilj/article/viewFile/136349/125840 (accessed 31 October 2019).

[36] Cap E105, Laws of the Federation of Nigeria, 1990.

such as that in *Migfo* to election petition in deserving cases. Thus, the writer strongly commends that our Courts adopt purposive interpretation as it is also capable of bolstering confidence in our electoral process.

DO AFRICAN COUNTRIES BENEFIT FROM THE INTERNATIONAL CRIMINAL COURT (ICC)

Otitoola Olufolajimi*

ABSTRACT

Africa, perhaps more than other parts of the world, is facing a peculiarly significant period of cognitive dissonance, as African States attempt to come to grips with evolving and contradictory pressures on their identities. It has experienced a significant period of democratization and improvement in human rights standards, yet many countries are still highly authoritarian States, some of which are consumed by major violent conflicts. Indeed, views on human rights and, specifically, the role of the ICC, are complex and in flux, caught between developing national and international human rights norms, the drives for international influence, deep-seated anti-imperialism, and an authoritarian old guard. Hence, the importance of answering the question on whether the ICC benefits African States is justified.

1.0. INTRODUCTION

Sixteen years into its existence, the euphoria over the establishment of the world's first international and permanent criminal court has diminished in the face of the realisation that the ICC - like its institutional predecessors - faces severe limitations in reaching its objectives as set out in the Rome Statute. Broadly, these limitations are attributable to the fact that the ICC operates within the political confines of the anarchic international order wherein the "swords of war and of justice" remain largely "…annexed to Sovereign Power".[1] The clash between the AU and the ICC serves as a prime example of the disruptive influence that power may at times exert on international criminal justice.

Although the ICC aims to promote justice and peace,[2] it has been widely criticised for doing neither, fundamentally resulting from the

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[1] G Schwarzenberger, "The problem of international criminal law" (1950) 3 *Current Legal Problems* 263-296.

[2] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, preamble, 17 July 1998, ISBN No. 92-9227-227-6.

fact that it has to contend with some severe structural and political difficulties, its limited resources, institutional restrictions, is subject to State manipulation and power politics, it lacks legitimacy, and is criticised for an alleged selectivity in the way it dispenses justice, which goes against the principle of universal justice on the ground.[3] Most African critics see the ICC's actions as an invasion of African sovereignty, undermining Africa's effort to solve its own problems, gets in the way of reconciliation and finding peaceful solutions, being a form of neo-colonialism, a tool of Western powers and a symbol of African victimhood.

With ten out of its eleven "situations" located in Africa,[4] the Court has almost exclusively focused on the prosecution of African perpetrators of African crimes. This apparent targeting of Africa by the ICC has sparked a massive regional backlash by several African leaders and the AU against the Court. The major points of ICC criticism arise from four cases: Kenya, the Congo (DRC), Sudan and Uganda centred around interference with an elected head of state, failure to solve national political issues (despite not being their primary duty), the arrest warrant for Sudan's President, which threatened regional stability, amongst others.[5]

The circumstances surrounding the AU-ICC conflict have given rise to widespread misgivings and misconceptions regarding the role of the ICC and international criminal justice in Africa. Furthermore, many have lamented that the gap of impunity in respect of

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[3] Catherine Gegout, "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace" (2013) 34:5 *Third World Quarterly*, 800-818.

[4] "Situations under Investigation," International Criminal Court, available at: https://www.icc-cpi.int/pages/situations.aspx (accessed 27 December 2018).

[5] See MJ Mbaku, "International Justice: The International Criminal Court and Africa" The Brookings Institution | Africa Growth Initiative, at 11, available at: https://www.brookings.edu/wp-content/uploads/2016/07/03-foresight-international-criminal-court-africa-mbaku-1.pdf (accessed 27 December 2018); Geraldine Mattioli and Anneke van Woudenberg, "Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo" in Nicholas Waddell and Phil Clark (ed.), *Courting Conflict*, (London: Royal African Society, 2008), 57; C. A. Odinkalu, "International Criminal Justice, Peace and Reconciliation in Africa: Re-imagining an Agenda Beyond the ICC" (2015) 40(2) *Africa Development*, 279.

international crimes in Africa remain largely peripheral concerns. However, a close look at the relationship between the ICC and Africa will help answer whether or not the ICC is of benefit to African States. States, in this sense, refer to the organised political community, rather than the government. When discussing the ICC, where impunity and state-led atrocities are so important, it is necessary to make this distinction between what is good for the ruler and what is good for the nation. Also, "Africa", rather than implying that there is a single African view of the ICC, is used in the geographical sense. In addition, "Africa" is not equated with the African Union, though the latter remains an important role player. The succeeding paragraphs will reveal that African States indeed benefit from the ICC.

2.0. DO AFRICAN STATES BENEFIT FROM THE ICC?

First, the ICC does not violate sovereignty. While battling impunity, the ICC is meant to respect national sovereignty.[6] Normally, investigation by the ICC requires consent of the national government.[7] Even if the ICC is violating sovereignty, is ensuring this sovereignty a real disadvantage? Independence, though positive for States, is hollow when the State itself commits or fails to address atrocities. Many ICC critiques are borne from an outdated view that sovereignty trumps human rights.[8] A sovereign State that does not respect human rights is not worth being sovereign, for it eliminates the very purpose of its existence, the protection of its citizens. ICC-members entered into the agreement knowing that the cost would be potential interference, but that the benefits of ensuring a peaceful and just State are even larger.

[6] C. Brighton, "Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court" (2012) 12(4) *International Criminal Law Review* 629, at 631.
[7] *Ibid* 633.
[8] Max du Plessis, *The International Criminal Court that Africa wants* (Institute of Security Studies: South Africa, 2010), p. 82.

The ICC has also been accused of undermining Africa's effort to solve its own problems.[9] Due to application of the common rhetoric, "African problems, African solutions", the ICC is seen as an interferer. African States could, hypothetically, develop their own legal infrastructure in order to solve crimes their own way. But this is unlikely. The ICC has acted to complement and aid the development of African legal infrastructure.[10] One can argue that this makes African States lax and unwilling or unable to find their own solutions, but some foreign justice is better than no justice at all. In fact, the ICC is not foreign justice. Many of the judges are African and African States accepted and even developed the principles of the ICC's justice. It is very much also African justice. "African solutions for African problems" is a misnomer. The term is a mere guise for dictators and criminals attempting to avoid prosecution.[11] The ICC is the only option for justice for many African contexts, and even if a crutch, is a very necessary crutch.

Furthermore, some argue that the retributive justice of the ICC gets in the way of reconciliation and peaceful solutions.[12] However, the role of the ICC is to prosecute perpetrators, not to reconcile people and act as a peacemaker.[13] African leaders have stated their desire for a more "harmonized" and "peace"-emphasising approach.[14] Without the ICC as a looming threat to reconciliation efforts, African States could hypothetically work towards peace-making. Yet, this is also not a compelling or severe enough disadvantage, because the ICC's actions may already be contributing to reconciliation. This can be seen in the ICC's method of "individualising guilt" to avoid collective blame,[15] allowing them eliminate troublemakers and further enable peace-making between

[9] *Supra* n 8, at 19-20.
[10] Odinkalu, *supra* n 3, at 257.
[11] J. Cilliers, S. Gumedze and T. Mbadlanyana, "Africa and the 'Responsibility to Protect': What role for the ICC?" (2009) 20 *Irish Studies in International Affairs,* 67.
[12] A. M. Mangu, "The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview" (2015) 40(2) *African Development*, 16.
[13] *Ibid* at 19.
[14] *Supra* n 8, at 51.
[15] *Supra* n 12, at 17.

two more understanding parties. Even more importantly, justice deters those who would threaten the peace. Reconciliation may not be the end-game of the ICC, but peace is.

Furthermore, a healthy State requires a healthy judiciary. Currently, African States need the ICC to provide a transnational legal infrastructure. The DRC, for example, lacks a judicial system developed enough to deal with war crimes.[16] The ICC provides African States with the opportunity to use an experienced, developed and established legal framework that has been filling the void of an underdeveloped African judicial infrastructure. The ICC has an established framework and a track record of investigations and proceedings. The ICC currently aids African States in helping them establish their own legal frameworks.[17] It contributes to states by instilling a respect for the rule of law, which contributes to a stable and more effective judiciary.[18] A good example of this is South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. It provides for a comprehensive co-operation scheme for South Africa vis-à-vis the ICC. Crucially, it also provides for the incorporation of the core crimes under international law into South African law, as well as for the establishment of universal jurisdiction over these crimes. The normative benefit of the latter was illustrated in *Southern Africa Litigation Centre* v. *National Director of Public Prosecutions*,[19] where the High Court ordered the Police and the National Prosecuting Authority in so far as it is practicable and lawful, and with regard to the domestic laws of South Africa and the principles of international law, to do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket.[20] On

[16] Mattioli and Woudenberg, s*upra* n 5, at 57.
[17] *Supra* n 12, at 19.
[18] Mattioli and Woudenberg, *supra* n 5, at 55.
[19] *Southern Africa Litigation Centre and others* v. *National Director of Public Prosecutions and others* 77150/09 (2012) ZAGPPHC 8 May 2012 (unreported).
[20] See C Gevers, "The Prosecution of International Crimes" in Gerhard Kemp et al. (ed.), *Criminal Law in South Africa* (Oxford University Press, 2012) 561-563.

appeal, the Supreme Court of Appeal confirmed[21] the basic approach taken by the High Court, thus making it clear that the relevant South African government agencies have certain duties to investigate and where appropriate, prosecute, international crimes committed extraterritorially.

Moreover, the ICC provides a very much-needed "last resort" court for cases that African States need to solve but cannot. Cases brought to the ICC have been, largely, due to an inability or unwillingness by African States to solve the issues themselves.[22] This transnational infrastructure also helps in investigating transnational crimes. In central Africa, where paramilitary groups blur borders, this is a very important feature. Leaving investigation to national courts, which are not guaranteed to work together or have no framework for working together, is highly problematic. Rather, leave the work to the ICC, which has the framework and the experience. Countries, like the DRC, do not have an adequate judicial system.[23] While the ICC is drastically undermanned and underfunded, this is no excuse to leave.[24]

Additionally, the ICC has proven to be a deterrent to human rights abuses and an enemy of impunity.[25] Justice, besides the cathartic and moral value, is a practical form of deterrence against actions that are damaging to states, society and people. Human rights abuses are detrimental to a state and war crimes negatively affect the stability of a region. Impunity spits in the face of democracy as it elevates a few capricious individuals to an untouchable level. Scholars and civil society have expressed their appreciation for the ICC as a deterrent to these negative aspects. In response to South Africa refusing to arrest al-Bashir, Mangu accused South Africa of "backpedalling on

[21] *National Commissioner of the South African Police Service* v. *Southern Africa Litigation Centre*, 485/2012 (2012) ZASCA 27 November 2013 (unreported).
[22] *Supra* n 12, at 24.
[23] Mattioli and Woudenberg, *supra* n 5, at 57.
[24] *Supra* n 12, at 19.
[25] J. Cilliers, S. Gumedze and T. Mbadlanyana, s*upra* n 11, at 64; P. Kastner, "Africa — A Fertile Soil for the International Criminal Court?" (2010) 85 *Die Friedens-Warte* 131.

human rights and the rule of law".[26] In the DRC, the ICC is threatening the impunity of previous un-prosecutable criminals.[27] Opposition to the ICC has often, accurately, been construed as support for impunity.[28] The problem with these criticisms is, if heeded, they increase the impunity of leaders guilty of crimes. A disempowered ICC will no longer be able to create precedents to deter atrocity and impunity, reducing accountability in Africa with no substantive efforts to end atrocities, as much of it is caused by leaders immune to prosecution.

Lastly, it should be emphasised that one of the major costs of withdrawal from the ICC would be the loss of the ICC as a last resort solution. The ICC is not perfect. It is undermanned and underfunded.[29] The UNSC has an undue amount of influence over its proceedings.[30] It does give preferential treatment to regimes at the expense of justice.[31] It is an imperfect court, but as Thuli Mandonsela said "better to have an imperfect court than none at all. It's like saying because we don't catch all the criminals, we should not hold trials"[32] or as put by an African proverb, an intelligent enemy is better than a stupid friend.

3.0. CONCLUSION

The track record of African states does show an inability to replace the ICC as a transnational court against human rights abuses. On a national level, nations have shown an incapability to build their own sufficient judicial infrastructure. The AU is no genuine alternative, as it has proven to be an organisation pro-impunity rather than justice.

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[26] *Supra* n 12, at 24.
[27] Mattioli and Woudenberg, *supra* n 5, at 55.
[28] *Supra* n 12, at 26.
[29] *Supra* n 12, at 19.
[30] Keppler, "Managing Setbacks for the International Criminal Court in Africa" (2012) 56(1) *Journal of African Law*, 9.
[31] S. Nouwen and W. G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2010) 21 *European Journal of International Law*, 941.
[32] Karen Allen, "Is this the end for the International Criminal Court", available at: https://www.bbc.com/news/world-africa-37750978 (accessed 28 December 2018).

If there is any development of an African court, it should rather work alongside the ICC, as suggested by Botswanan foreign minister, Pelomini Venson-Moitoi.[33] Abandoning the ICC, rather than reforming and supporting it, seems a case of throwing out the baby with the bath water. Simply, there will, in all likelihood, come a case where an African state will need the resources and expertise of the ICC and find no help from its own judiciary and the AU. Given that Africa's own domestic, regional and international judiciaries currently are being manipulated by leaders and governments; and African leaders are protected by their peers and regional and continental organisations, the ICC remains, as former UN General Secretary Kofi Annan puts it, "the continent's most credible last resort for the most serious crimes" of leaders, governments and non-governmental strongmen.

Contextually, Africa played a big part in the creation of the ICC and that this could explain its current involvement in the institution. But its initial enthusiasm has turned to ire due to an idea that they are being unfairly targeted by the court. There is justice and an aversion to justice. The ICC, though seemingly faulted, is the only option for many African contexts. Hence, going forward, it is important to keep in mind that, despite its imperfection, the ICC is a boon for Africa.

[33] E. Van Trigt, "Africa and withdrawal from the ICC", Peace Palace Library, available at https://www.peacepalacelibrary.nl/2016/10/africa-and-icc-withdrawal (accessed 15 December 2018).

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