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Cover:

Design by Omeiza
llordomeiza@gmail.com

Contact:

Ground Floor,
Faculty of Law Building,
Faculty of Law,
University of Lagos.
editor@unilaglawreview.org

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EDITOR'S NOTE

It is with utmost satisfaction that I present the first edition of volume five of the UNILAG Law Review. The UNILAG Law Review continues to establish itself as a legal and academic force to be reckoned with within and without borders, as evidenced by its receipt of the Acquisition International Best Law Student Publication (Nigeria) award in 2020. I am thrilled that we can uphold the caliber of the journal while navigating the unprecedented nature of global affairs of the past few years. Throughout its existence, the UNILAG Law Review has continually added to the scholarly conversation surrounding current legal challenges by publishing thoroughly researched papers by domestic and foreign authors, students, and legal professionals alike.

The articles in this issue offer new perspectives on many legal topics, including questions of jurisprudence like the doctrine of separation of powers, data privacy, the FinTech industry, debt recovery in Nigeria, military involvement in politics and the intricacies of company law. Without a doubt, this journal is a great asset to any legal library. I am enthusiastic about it and the insightful discussions by legal experts and seasoned academics that would proceed from it.

I appreciate our patron – Professor Fabian Ajogwu SAN and the law firm of Kenna Partners for the unwavering support and commitment to the improvement of the UNILAG Law Review. I am also grateful Mrs. Lynda Alpheaus for her motherly advice and support that has pushed the UNILAG Law Review to greater heights. I am thankful for the financial support given by Paul Obi to the publication of this edition. I appreciate every member of the Editorial Board who put in their best effort to ensure that the articles are without fault. I would also like to extend my gratitude to the Faculty of Law for its support and tutelage through our staff adviser, Professor I. O. Bolodeoku. I thank all the authors for their contribution to this volume, as it is their work that has brought the journal to life.

As the global climate grows heated by economic and political issues of varying implications, it is imperative that we remain informed of current affairs, so that we make informed decisions and contribute to ensuring sustainable change. Enjoy!

Olufolajimi Otitoola
Editor-in-Chief

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INTERROGATING THE LEGALITY OF THE MILITARY'S ROLE IN NIGERIAN ELECTIONS: REFERENCING THE POSSE COMITATUS ACT

By John Ambi [*]

By highlighting the experience of the United States in curtailing the powers of the Armed Forces in performing civil law enforcement duties through a named legal instrument, this article sought to look at whether the Armed Forces of Nigeria, which performs law enforcement duties during general elections does so in contravention of extant laws of the land. Few instances of allegations of impropriety by the military during elections in Nigeria were highlighted; and a succinct overview of the legal framework of the Armed Forces of Nigeria and the United States of America was undertaken to determine what they are empowered to do and from whom such power flows. The history and workings of the Posse Comitatus Act was highlighted, as well as judicial pronouncements on the legality of the military participation in election duties in Nigeria were spotlighted alongside relevant constitutional provisions and legislations of the National Assembly.

Key words: Armed Forces, Constitution, Election, Legality, Judicial and Military

1.0. INTRODUCTION

Shortly after the 2019 general elections, series of allegations and counter-allegations by and amongst contestants and their respective political parties pervaded the Nigerian national political space. These allegations ranged from ballot box snatching, vote buying, and collusion of electoral officials with party officials to complicity of security agents in aiding and perpetrating electoral violence and others. In Rivers State, Governor Nyesom Wike raised an alarm of an impending plan by the ruling party to use the military to secure unearned victory in the election.[1] Subsequently, the Nigerian Army was accused of partisanship and indulging in acts inimical to the smooth, safe, and fair conduct of the elections in particular local government areas in the

[*] Email: jambi0312@gmail.com.

[1] K. Ebiri and S. Olaniyi, "Wike Alleges Plot to Bomb Electoral Body's Offices in Rivers", available at https://guardian.ng/news/wike-alleges-plot-to-bomb-electoral-bodys-office-in-rivers/ (accessed 5 March 2019). While addressing Journalists at the Government House in Port Harcourt, the Governor alleged that the 6th Division of the Nigerian Army had concluded plans to disrupt the 9 March 2019 Governorship and State Assembly elections in the State.

state.[2] The out-cry over the military's alleged ignoble role in the polls, resulted in the Nigerian House of Representatives setting up an *ad hoc* committee to investigate these allegations.[3]

Before the 2015 elections in Nigeria, two divisions of the Federal High Court sitting in Sokoto and Lagos pronounced that the Nigerian military was precluded from participating in the election process, the Court of Appeal also took a similar position.[4]

In the United States of America (US) there is in force a legislation,[5] which restricts the participation of the American military in civil processes like elections. Except during certain national emergencies, the military shall not be deployed to engage in civil law enforcement duties. This article therefore seeks to examine the legal framework regulating the Nigerian military, with reference to their extra-regimental duties during elections. Using as a reference point the American legislation called the *Posse Comitatus* Act (PCA)[6] (which

[2] Some political parties in Rivers State under the platform of the Inter-Party Advisory called for the restrain of the Nigerian Army from further participation in the Governorship and House of Assembly elections held on 9 March in the State. The Advisory berated the conduct of the Army in the Presidential and National Assembly elections held on 28 February and posited that the Army's further involvement in the elections constituted a threat to the survival of democracy in Rivers State. The Advisory then stated that the police be allowed to perform its constitutional functions. The European Union's Election Observation Mission for Nigeria's 2019 General Elections in its Press Release dated 11 March 2019, indicted the Nigerian military and other security agents for obstructing election observers in Rivers State by denying them access to collation Centres.

[3] O. Ozibo, "Reps to Probe Militarization of 2019 Polls", available at https://www.pressreader.com/nigeria/daily-trust/20190320/281736975787185 (accessed 1 May 2022).

[4] A member of the House of Representative, Femi Gbajabiamila (currently the Speaker, House of Representatives) had sued the President and all Service Chiefs seeking the court to restrain them from deploying the military during elections. The Federal High Court agreed with the contention of Gbajabiamila and consequently restrained the military from participating in the 2015 elections; a Federal High Court sitting in Sokoto had earlier given a similar order. The Court of Appeal sitting over the Ekiti Governorship Election Appeal also held that the President had no powers to call on the Nigerian Armed Forces for deployment when lawful citizens were about to exercise their franchise.

[5] Posse Comitatus Act 1878.

[6] The term "Posse Comitatus" is of Latin origin, meaning "power or force of the companions" and adapted in England from the late 16th century to mean a group of citizens assembled by authorities to deal with emergencies (such as suppressing a riot or pursuing felons). The term was also used to refer to any

regulates the involvement of the military in civil law enforcement duties), the article shall establish whether the deployment of the military during general elections is in contrariety to extant laws in Nigeria.

It is imperative to state here that the participation of the military in the context of this paper denotes the provision of security for electoral officials, safeguarding electoral materials, maintaining law and order during the conduct of elections and providing logistics to the electoral body for effective delivery of electoral materials.[7] As citizens of the country, members of the Armed Forces are equally entitled to the right to exercise their franchise, however, this right is only exercisable by members who are not involved in regimental duties enumerated earlier.

1.1. An Overview of the Legal Framework of the Armed Forces of Nigeria

The Nigerian Military as presently constituted is modelled in the fashion of the British Royal Military of which the Nigerian Army is a progenitor. The Nigerian Military has a tripod structure, with the Nigerian Army having the largest membership followed by the Nigerian Navy, while the Nigerian Air Force stands at the bottom of the table with lesser numerical strength.

The three arms of the military owe their existence to the provisions of Nigeria's Constitution, which provides that:

> There shall be an armed forces for the Federation which shall consist of an Army, a Navy, an Air Force, and such other branches of the armed forces of the

force or band, especially with hostile intent. In common law, it is associated with the mobilization of a group of people by a Sherriff of a county to suppress lawlessness or defend the county.

[7] The Nigerian Air Force in a press statement issued on 11 February 2019 by its Director of Public Relations and Information, Air Commodore Ibikunle Daramola stated that it commenced day and night flights with its Hercules C-130 aircraft from the Nnamdi Azikwe International Airport, Abuja for the purpose of delivering both sensitive and non-sensitive electoral materials. Full details available at https://punchng.com>naf-airlifts-electoralmaterials-for-inec (accessed 21 March 2019).

> Federation as may be established by an Act of the National Assembly.[8]

The Constitution further provides the general functions of the Armed Forces as follows:

> The Federation shall, subject to an Act of the National Assembly made in that behalf, equip, and maintain the armed forces as may be considered adequate and effective for the purpose of-
> (a) Defending Nigeria from external aggression;
> (b) Maintaining its territorial integrity and securing its borders from violations on land, sea or air;
> (c) Suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the President, but subject to such conditions as may be prescribed by an Act of the National Assembly; and
> (d) Performing such other functions as may be prescribed by an Act of the National Assembly[9]

The Armed Forces Act[10] re-echoes the constitutional provision above, by providing that:

> (1) There is hereby established for the Federation an Armed Forces, which shall be maintained and administered as, set out in this Act, and comprise the Nigerian Army, the Nigerian Navy and the Nigerian Air Force…
> (2) The Armed Forces shall consist of such ---
> (a) Establishments and number of equipment;
> (b) Officers and non-commissioned officers; and
> (c) Soldiers, ratings, and aircraftmen, as the case may be, <u>as the President may, in consultation with the National Assembly</u>[11] determine.
> The Armed Forces shall be charged with the defence of the Federal Republic of Nigeria by land, sea, and air

[8] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), section 217(1).
[9] *Ibid*, at section (2)(a) and (d).
[10] Armed Forces Act 2004, Cap. A20, Laws of the Federation of Nigeria, 2004, section 1(1) and (3).
[11] Underline supplied for emphasis.

> and with such other duties as the National Assembly may from time to time prescribe or direct by an Act[12]

1.2. An Overview of the Legal Framework of the Armed Forces of the United States of America

The President of the US has the ultimate authority over the Armed Forces as its Commander-in-Chief. This authority is derived from Article II, section 2 of the US Constitution, while Article I, section 8 reserves in the US Congress the exclusive powers to declare war on any foe of the US. This dual medium of the exercise of power and control over the Armed Forces was enshrined in the US Constitution by its founding fathers as a means of separating power, with the main aim of subjecting the Armed Forces to civilian restrain, towards ensuring a free and democratic society.[13]

A bundle called Title 10 United States Code Armed Forces contains the organic law governing the Armed Forces of the United States of America. It equally provides for the Department of Defence, including the respective military departments and the reserve components. The Code has five sub-titles, which contain different laws: sub-title A contains provisions on general military law; sub-title B contains provisions with regards to the Army; sub-title C relates to the Navy and Marine Corps; and sub-titles D and E cover the US Air Force and Reserve Components, respectively.[14] Every fiscal year, the US Congress enacts a National Defence Authorization Act, a Federal law that provides for the annual budget and expenditures of the US Department of Defence.[15] Another very important legislation in the body of US military laws is the Uniform Code of Military Justice. The

[12] Underline supplied for emphasis.
[13] Substance Abuse and Mental Health Services Administration, "Understanding the Military: The Institution, the Culture and the People", available at https://www.samhsa.gov/sites/default/files/military_white_paper_final.pdf (accessed 28 August 2021).
[14] Office of the Law Revision Counsel, "United States Code", available at https://uscode.house.gov/browse/prelim@title10&edition=prelim (accessed 16 May 2021).
[15] H.R. 6395(116th): National Defense Authorization Act for Fiscal Year 2021, available at https://www.govtrack.us/congress/bills/116/hr6395 (accessed 16 May 2021).

Code criminalises certain acts by service personnel and prescribes punishments accordingly.[16]

The US Military currently has five branches namely: the Army, Navy, Marine Corps, Air Force, and Coast Guard. These branches are supervised by three military departments – the Department of the Army, the Department of the Navy, and the Department of the Air Force. The Marine Corps is under the supervision of the Department of the Navy, while the Coast Guard falls under the supervision of the Department of the Navy in wartime and under the Department of Homeland Security in times of peace.[17]

2.0. ORIGIN AND WORKINGS OF POSSE COMITATUS ACT (PCA)

The practice of *Posse Comitatus*, which empowers public officials to summon non-military citizens to take up arms in aid of constituted authority towards maintaining law and order (in line with their civic duties), is traceable to the reign of King Alfred, who ruled Wessex (a Saxon Kingdom in South-Western England) from 871 – 899.[18] The practice, which eventually spread in the whole of England, saw Sheriffs utilizing Posse for the suppression of riots, enforcement of civil processes like Writs of Execution, and Precepts of Restitution. Posse were also used to apprehend criminals evading justice. However, by the late 19th century, the practice was discarded in England.[19]

In the early stages of its transition from colonial rule after the war of independence, the US enacted a constitution. This Constitution was silent on the use of the US Army for civil law enforcement duties. Therefore, the US Army became a regular invitee as a Posse in aid of civil authorities.[22] As a matter of fact, the US Congress, through the Judiciary Act of 1789, empowered US Marshalls to call the US Army

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[16] "The Uniform Code of US Military Justice", available at https://militarybenefits.info/uniform-code-of-military-justice/ (accessed 16 May 2021).

[17] *Supra* n 15.

[18] Britannica, "Alfred: King of Wessex", available at https://www.britannica.com/biography/Alfred-king-of-Wessex (accessed 26 May 2021).

[19] D.B. Kopel, "The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement" (2014) 104 *Journal of Criminal Law and Criminology*.

to its aid whenever it became imperative in the exercise of its mandate. One of such renowned times was when the US Marshalls used the army to enforce civil rights laws that protected freed slaves.[20]

This practice, however, came to a climax in 1876, when the Southern States accused the US Army of meddling in the Presidential elections. To allay their fears, the US Congress passed into law the *Posse Comitatus* Act in 1878, which limited the use of the Army for domestic law enforcement purposes.[21] The Act, known as Title 18, USCS 1385, was signed on 18 June 1878 by President Rutherford B. Hayes. It was updated in 1956 and 1981. At the time of its enactment, it was only applicable to the US Army but in 1956, its application was extended to the US Air Force. Though the Act does not expressly mention the US Navy and US Marine Corp, by regulations issued by the Department of Defence, the Act is now equally applicable to the two arms.

The Army National Guard and Air Force National Guard are, however, not prevented from being called by Governors of their State of domicile or adjacent State from acting as *Posse*.[22]

Over time, the US courts have had cause to pronounce on whether certain acts of the Armed Forces violated the PCA. The courts have consequently established three perimeters that should be used in determining whether the conduct of the Armed Forces violates the PCA.[23] The first test would be to determine whether the action of the

[20] J.K. Mahon, "The Domestic Use of Armed Force: A Summary" in R. Higham (ed.), *Bayonets in the Streets: The Use of Troops in Civil Disturbances* 2nd ed. (Sunflower University Press: 1989).

[21] G. Felicetti and J. Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding before More Damage is Done" (2003) 175 *Military Law Review.*

[22] J.K. Elsea, "The Posse Comitatus Act and Related Matters: The Use of Military to Execute Civilian Law" (2018) *Congressional Research Service*.

[23] The three tests for determining whether the military violated the PCA arose out of the cases addressing the military's involvement in law enforcement activities during the 1973 Wounded Knee Uprising. See *United States* v *Jaramilo* 380. F. Supp 1375 (D.Neb.1974); *United States* v *McArthur* 419 F.Supp.186 (D.N.D 1976), all cited in L.L. Boschee, "The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal to Go Free Because the Soldier Has Blundered" [1985] 61(1) *North Dakota Law Review*. Available at https://commons.und.edu/ndlr/vol61/iss1/4 (accessed 27 May 2021).

military personnel was active or passive.[24] An act considered as passive, does not violate the PCA, but active involvement would be considered a violation.[25] The second test determines whether the use of the Armed Forces pervaded the activities of civilian law enforcement officials. This test rests on the imputation and legal presumption that the Armed Forces lack the jurisdiction to perform civilian law enforcement duties.[26]

The third test determines whether military personnel subjected citizens to the exercise of regulatory, proscriptive, or compulsory military power. It is outside the remit of the Armed Forces to carry out acts atypical of civilian law enforcement – acts like property and body search. Therefore, where the Armed Forces is found to have done so, the PCA would be said to have been violated.[27]

3.0. NIGERIAN MILITARY AND ELECTION DUTIES: ARE THESE DUTIES PREMISED ON ANY LEGAL PEDESTAL?

Without sounding repetitive, it bears great significance to reiterate the fact that, members of the Armed Forces are not precluded by any law from exercising the right to vote.

Therefore, the context of the article goes beyond expounding on their right to exercise democratic franchise. It should also be noted that, though the Nigerian Constitution specifies the main functions of the Armed Forces to include defending the country from external

[24] A. Gillman and W. Johnson, "Operational Law Handbook", (The Judge Advocate General's Legal Center and School, 2012).

[25] An instance of active involvement would be the direct use of an active duty US Air Force Helicopter and crew in hot pursuit of a fugitive on the run. However, where the active duty US Air Force Helicopter was only loaned to civilian law enforcement officials, it would be qualified as passive involvement. See *Wrynn* v *United States* (200) F. Supp.457 (EDNY) (1961) cited by Craig E. Merutka, *Use of The Armed Forces For Domestic Law Enforcement* (Being a manuscript submitted in partial fulfilment of the Master of Strategic Studies Degree of the United States Army War College 2013).

[26] The armed forces may only be involved in such engagements where a military personnel or installation is involved. C.E. Merutka and United States Army War College, *Ibid*.

[27] In *State* v *Danko* 219 Kan.490, 548, P.2d 819(1976) the court held that the Posse Comitatus Act was violated when a military policeman assisted a civilian policeman in the search of the defendant's car.

aggression, maintenance of territorial integrity, and suppression of insurrection, the Nigerian military has over time been engaged in roles which are detached from the customary military roles i.e., deployment of lethal force. For instance, the Nigerian Air Force is statutorily involved in disaster management under the auspices of the National Emergency Management Agency (NEMA).[28] Asides the provision of logistics to the electoral body for effective delivery of electoral materials, the functions of providing security to electoral officials, safeguarding electoral materials, and general maintenance of law and order during the conduct of elections, are within the statutory purview of the Nigerian Police Force as enshrined in the Police Act.[29] So this begs the question: are the law enforcement duties performed by the Nigerian military during elections backed by any legal instrument?

The relevant provision of the Nigerian Constitution earlier cited expressly stipulates the core functions of the Armed Forces. In addition, section 1(4) of the Armed Forces Act mandates the Nigerian Navy and Air Force with specific responsibilities. Neither of these extant laws sanctioned the involvement of the military in such law enforcement duties during elections.

Thus, analogizing from the perspective of the maxim *expression unius exclusio alterius*, it can be inferred that since Nigeria's grundnorm and the extant legislation on the military did not explicitly accord them the legal footing, then their involvement in such theatres is ultra vires. The appellate court's decision in *Buhari* v *Obasanjo*[30] supports this position. Here, Ayo Salami, J.C.A (as he then was) frowned at the deployment of the military during elections and held: "...It is up to the police to protect our nascent democracy and not the military, otherwise the democracy might be wittingly or unwittingly militarized"

In a related instance, the Ekiti Division of the Court of Appeal, while making its pronouncement on the gubernatorial election appeal of the

[28] Taking into cognisance the importance of the role of the military in times of natural disaster; Section 2(1) (i) of the National Emergency Management Agency (Establishment) Act mandatorily provides for a representative of the Nigerian military in the Agency's governing council.
[29] Nigeria Police Act, section 4.
[30] (2005) 18 NWLR (Part 956) 96.

All-Progressive Congress v *Peoples Democratic Party & 4 Ors*[31] equally deprecated the deployment of the military for law enforcement duties in the election in question.

The Court, per Abdu Aboki, J.C.A (as he then was), held inter alia:

> It must be stated by way of emphasis that the Armed Forces (the Military) has no role in the conduct of elections and must not be involved, except perhaps in the areas of logistic services to the agencies of Government in the preparation for elections in the name of security, as that would militarize the process and create an atmosphere of military siege, fear, and intimidation of the public... The state is obligated to confine the Military to their very demanding assignments especially in these times of insurgencies and encroachment into the country's territories, by keeping them out of elections... We think whoever unleashed soldiers on Ekiti State to disturb the peace of the elections on 21/6/2014, acted in flagrant breach of the Constitution and flouted the provisions of the Electoral Act, which requires only the Police and other civil authorities to provide the required enabling environment of law and order for the performance of the civil duties of Election.

While the pronouncement of these two divisions of the Court of Appeal were only ancillary to the main issues in the appeals cited above, the issue of the legality of the military's involvement was the main crux before the Federal High Court sitting in Sokoto. This is what the court had to say:

> Any purported engagement of the Nigerian Armed Forces in the security supervision of the Election in the Federal Republic of Nigeria by any person holding the office of the President of the Federal Republic of Nigeria without an act of the National Assembly shall be unconstitutional…in view of the combined provisions of sections 217(2) and 218(1) and (4) of the

[31] (2015) LPELR-24349 (CA).

> Constitution of the Federal Republic of Nigeria (as altered).[32]

Some opponents of the military's involvement in law enforcement duties during elections, while justifying and applauding these judicial pronouncements, argued that aside from the unconstitutionality of such functions, whenever there is the deployment of the military in election theatres, it leaves a trail of human rights violation, like the restriction on the right to freedom of movement.[33]

To cure the lacunae in the extant laws, which saw to the courts declaring the military as *personae non-grata* during elections, the National Assembly quickly amended the Electoral Act in March 2015, by inserting a provision, which purportedly permits deployment of the military during election. The Act provided as follows:

> Notwithstanding the provisions of any law and for purposes of securing the vote, the Commission shall be responsible for requesting for the deployment of relevant security personnel necessary for elections or registration of voters and shall assign them in the manner determined by the Commission in consultation with the relevant security agencies.[34] (Emphasis added)
> PROVIDED that the Commission shall only request for the deployment of the Nigerian Armed Forces only for the purposes of securing the distribution and delivery of election materials and protection of election officials.[35] (Emphasis added)

Respectfully, it is submitted that this amendment is inchoate. The proviso underlined above seeks to create a pedestal upon which such military intervention would be legally permissible. Sections 218 and 8 of the Nigerian Constitution and the Armed Forces Act respectively provide that the President as the Commander-in-Chief of the Armed

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[32] *Honourable Bello Mohammed Goronyo & Anor* v *The Attorney-General of the Federation & Anor (*FHC/S/CS/29/2014).

[33] S.A. Akanibo and N.A. Duson, "Militarization of Electoral Process in Nigeria: Changing the Increasingly Significant Quagmire" (2021) 9(1) *International Journal of Innovative Legal and Political Studies*.

[34] *Honourable Bello Mohammed Goronyo & Anor* v *The Attorney-General of the Federation & Anor (*FHC/S/CS/29/2014); *Infra* n 35.

[35] Electoral (Amendment) Act 2015, section 7. The Act added subsection (3) to section 29 of the 2010 Act, underline supplied for emphasis.

Forces shall determine the operational use of the Armed Forces. Subsection (4) of section 218, however, empowers the National Assembly to make laws for the regulation of the powers exercisable by the President of the Armed Forces. It is posited that section 7 of the Electoral (Amendment Act) rehashed above does not fit the description envisaged in subsection (4) of section 218 of the Constitution. While it allows the Electoral Commission to request for the deployment of the military to protect electoral officials and secure election materials, it is silent on the specific authority to which such a request would be made. Is it to the President and Commander-in-Chief or to any superior military officer without needing any form of authorization from the President?

The spirit and letters of the 1999 Constitution unequivocally gives the power of determining the deployment of the Armed Forces for operational purposes to the President. However, the exercise of such power shall be subject to any law, made by the National Assembly to regulate the exercise of such powers. If section 7 was enacted by an exercise of the National Assembly's powers of regulation, it is submitted that it has not cured any mischief inherent in the previous extant laws. Only an amendment of the Armed Forces Act would have cured this lacuna, since it is the extant law that states the functions and duties of the Armed Forces. In *Fidelity Bank Plc* v *Monye*,[36] the Supreme Court held that to effectively use the mischief rule, a court, in determining what mischief a law sought to cure, should trace the defect in the old law that the current law seeks to remedy.

The long title to the Electoral Act provides as follows: "An Act to repeal the Electoral Act 2006 and re-enact the Independent National Electoral Commission, regulate the conduct of federal, state and area council elections and for related matters." This title clearly reveals the legislature's intent i.e., for the legislation to cater for elections and matters ancillary to elections alone. The Armed Forces Act on the other hand provides thus: "An Act to provide for the command, maintenance, and administration of the Armed Forces of the Federation".

[36] (2012) All FWLR (Part 631) 1412.

In view of the express provisions rehashed above, it is safe to assume that the Electoral (Amendment) Act 2015 did not change the extant position of the law(s) on the legality of the Armed Forces performing law enforcement functions during elections.

Notably, there is the argument in some quarters justifying the deployment of the armed forces during elections as being legally permissible and acceptable on certain theoretical grounds. Arguing this position, Inegbedion contended thus:

> It is noteworthy that the academic and judicial views considered above, as weighty as they are did not consider the legal implication of the phrase, "operational use" as employed in Section 218(1) of the Constitution of the Federal Republic of Nigeria 1999. The Constitution failed to define the phrase and so, resort must be had to other related statutes in order to discover the meaning of the phrase. This is more so, in the light of Section 218(1) and (4). While Subsection (1) empowers the President and Commander in Chief of the Armed Forces to determine the operational use of the Armed Forces, subsection (4) subjects the exercise of that power to regulations made by the National Assembly.
>
> For example, Section 8(3) of the Armed Forces Act define "operational use of the Armed Forces" to include operational use for the purpose of securing and maintaining public safety and public order. While this provision may not expressly or directly justify the use of the Armed Forces on election duties, it does at least provide the legal setting for such deployment.
>
> In the light of the definition of "operational use of the Armed Forces" in the Armed Forces Act, which is an Act of the National Assembly as envisaged by Section 218 of the Constitution of the Federal Republic of Nigeria 1999, there are legal and theoretical grounds to support the view that the President, as Commander in Chief of the Armed Forces may deploy the Armed Forces on election security if the President perceives a threat to public safety and public order. Such deployment is acceptable if it is to secure the ballot

> against the breach of such public safety and public order.[37]

From the above excerpt that the author appears to justify the necessity of deploying of the armed forces in election theatres, if and only when, there is a threat to public safety and public order.

4.0. POSSE COMITATUS ACT AND THE NIGERIA'S INCHOATE LEGAL POSITION

The PCA clearly prevents the US Armed Forces from engaging in domestic law enforcement activities except under the express authority of the appropriate constitutional authority or an applicable statute, which serves as an exception to the PCA.[38] This 143-year-old statute continues to guide the US military in its operations and interface with civil law enforcement agencies.

In view of the evolving national security challenges the US continues to face, the Armed Forces is increasingly getting involved in engagements, which border on law enforcement.[39] However, established legal doctrines and case laws are available to guide the armed forces in such engagements, lest it strays into civil law enforcement realm contrary to the spirit and letters of the PCA. In contrast, while there is a stark divide in the constitutional functions of the military and police in Nigeria, the military continues to undertake law enforcement duties, which ought to be the exclusive preserve of the Nigerian Police. Perhaps the structural and institutional deficiency of the Nigeria Police characterized by poor training, inadequate personnel, and lack of equipment, continues to necessitate the involvement of the military in such law enforcement duties. Most

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[37] N.A. Inegbedion, "Safeguarding the Electoral Process: The Role of Security Agencies during Elections" in D.C.J. Dakas, A.S. Shaakaa, and A.O. Alubo (eds.), *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (Innovative Communications: 2015).

[38] C.E. Merutka, *supra* n 25.

[39] G. Gentile, M.E. Linick, and M. Shurkin, *The Evolution of US Military Policy from the Constitution to the Present* (Rand Corporation: 2017); N. Canestaro, "Homeland Defense: A Nail in the Coffin for Posse Comitatus" (2003) 12 *Washington University Journal of Law and Policy*. Available at http://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/7 (accessed 6 June 2021).

worrisome however, is the fact that the legal position of the military's involvement in law enforcement functions remains incoherent.

5.0. RECOMMENDATIONS

Considering the outcry that always trail the involvement of officers and men of the Nigerian Armed Forces during general elections, and drawing lessons from the existence of the PCA in the US, the following recommendations are hereby offered as solutions to the problem that come with the deployment of members of the Armed Forces for law enforcement duties during elections:

a. In exercise of its powers enshrined in section 217(2)(d) of the Constitution, the National Assembly may amend the Armed Forces Act, to empower the military to perform restricted roles during general elections. Such roles should be limited to the protection of election officials and electoral materials.
b. In the alternative, the National Assembly may enact a subsidiary legislation to the Armed Forces Act, which would provide strictly for the operational deployment of the Armed Forces for law enforcement duties during general elections in Nigeria. Such legislation would clearly set conditions precedent to the deployment of the Armed Forces in such events and limit the law enforcement powers they can exercise.
c. There should also be a Code of Conduct for officers and men of the Armed Forces deployed for law enforcement duties' during elections.

6.0. CONCLUSION

Since its enactment in 1878, the PCA has served as a lever of legal control over any attempts by members of the Armed Forces of the US to exercise civil law enforcement powers or undertake law enforcement duties. Nigeria continues to conduct general elections at quadrennial intervals since the return of civilian rule in 1999. Prior to and after the conduct of such elections, the Armed Forces always stand accused of conduct(s) antithetical to their constitutional mandate. Such accusations would have been avoidable, if the Armed Forces were not deployed in aid of the Nigerian Police Force – which is handicapped (on several fronts) to solely perform its constitutional

functions. The deployment in these theatres has equally been a subject of legal contestations in courts. However, the law remains inchoate as to the legal capacity of the Armed Forces to play policing roles in such times. Thus, we have argued that despite the hazy position of the law on this issue, the pronouncements of the Court of Appeal and the Federal High Court remain good law. The century-long existence of the PCA and its efficacy in setting boundaries for the Armed Forces of the US remains a guide adaptive to Nigeria. Consequently, amendment to extant laws or the enactment of a new law is advocated, to enable the Nigerian Armed Forces perform law enforcement during elections albeit under certain strict legal perimeters.

THE DOCTRINE OF SEPARATION OF POWERS OVER TIME AND A CASE FOR THE REVIEW OF NIGERIA'S POWER SEPARATION MODEL

By Agbede Oore*

The doctrine of separation of powers is utilised as a device against despotic utilisation of government power by any person or institution. This essay discusses the doctrine's importance, stating that its pure application is neither objective nor is it practicable. This writer discusses the doctrine's models in several polities, the absence of a universal power separation model, the historical development of the doctrine from the mere practice of power separation to the theory of mixed government, and the doctrine itself, highlighting that the doctrine constantly aims to prevent the over-concentration of powers. This writer notes that since the doctrine's past was morphable to develop to the present, the present should be morphable enough to assimilate other principles if the aim remains achievable. The writer concludes with the doctrine's challenges in Nigeria, making recommendations towards its effective application in Nigeria.

1.0. INTRODUCTION

In every democracy, the major institutions of the State are divided into three arms - the executive, the legislature, and the judiciary. However, the presence of the three arms in a democracy is not sufficient, as a democracy is not one *stricto sensu* without the independence of those in charge of running these institutions. According to French Philosopher, Baron de Montesquieu, in his book:[1]

> When the legislative and executive powers are united in the same person or body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.

The purport of the doctrine is the guarantee of liberty in any given democratic government, and it achieves this by utilising the principle of checks and balances.

* Email: agbedeoore@gmail.com.

[1] C. Louis de Secondat and Baron de Montesquieu, *The Spirit of Laws*, (Prometheus Books, New York, 2002).

2.0. DEFINING THE DOCTRINE OF SEPARATION OF POWER

An attempt to define the doctrine may appear to be one with no consequence due to its definition seemingly inherent in its nomenclature. This is not so, as there is no generally agreed definition since most writers' definitions stem from a certain angle considered of more significance to them. Ikenga K.E. Oraegbunam,[2] in defining the doctrine, compared its motive to Adam Smith's theory of division of labour in economics, further noting that the motive is not limited to efficiency but aims at guarding against abuse of authority. The courts have not been shy of discussing the doctrine. The Nigerian Court of Appeal, per Salami JCA, explained that the doctrine implies:

a. that the same person should not be part of more than one of these three arms or divisions of government;
b. that one branch should not dominate or control another arm. This is particularly important in the relationship between executive and the courts; and
c. that one branch should not attempt to exercise the function of the other. For example, a President, however powerful, ought not to make laws nor should a legislature make interpretative legislation; if it is in doubt, it should head for the court to seek interpretation.[3]

3.0. EVOLUTION OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of separation of powers has developed gradually over the course of more than a millennium, with the passing of time causing the imperative development of the doctrine. Whilst the terminology known as "Separation of Powers" can be traced to Charles Baron de Montesquieu,[4] its actual practice has been traced by Western writers to Greece during the period around 358 BC, when Aristotle (384-322 BC) mentioned the idea of a mixed government. The attitude of the

[2] I.K.E. Oraegbunam, "Separation of powers and Nigerian Constitutional democracy" (2009) 5 – 7 *Benin Journal of Public Law*, pp. 26 – 59.
[3] *Ahmad* v *Sokoto State House of Assembly* [2002] 44 WRN 52.
[4] C. Louis de Secondat, Baron de Montesquieu, *De l'Esprit des Lois,* (Garnier: Paris, 1973), pp. 1689 –1755.

Western writer in tracing the doctrine to Old Greece has been criticised by Yusuf Ali who noted that the "the famous doctrine or principle of separation of powers is as old as time".[5] The evolution of the practice of separation of powers can be discussed in the light of the old and ancient practice and the modern doctrine of separation of powers.

3.1. The Old and Ancient Practice

The ancient practice of power separation can be traced to ancient Africa. Examples include the old Oyo Empire, where there was power division between the Alaafin, the Oyomesi, and the Ogboni, indicating that power was not concentrated only on the Alaafin.[6]

It can also be traced to the practice in ancient Egypt at around 1298, where although the Pharaoh was taken to be a god, the son of Ra, all the power was not vested solely on him. In ancient Egypt, the Solistes, which consisted majorly of lawyers, exercised control over the natural law as practiced then which was used to rationalise the power of the pharaoh. There were also procedural laws to regulate the judges and the application of substantive laws. The concept of power separation can be particularly noted in ancient Egypt as the pharaoh who was seen as divine, the head of state and government, did not exercise judicial power or legislative power.

Western writers trace the historical development of the practice of separation of powers to ancient Greek philosophers like Plato (427-347 BC), Aristotle (384-322 BC), and the historian Polybius (205-123 BC) amongst others. Aristotle, in formulating his theories of government, is recorded to have studied about 158 Constitutions of Greek city states. He wrote that:

> There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; of these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements.

[5] Y.O. Ali, "The Limits of the Doctrine of Separation of Powers in the Constitution of the Federal Republic of Nigeria 1999", available at https://bit.ly/3F58jlZ (accessed 19 June 2021).
[6] *Ibid*.

> The three are, first, the deliberative, which discusses everything of common importance; second, the magisterial or official; and third, the judicial element.[7]

He observed that where there is a mixture between each institution of the mixed government, an interplay will arise that affects the distinct state functions of deliberative, magisterial, and judicature, which will be on each institution.[8] To him, the answer to the competition between factions like the rich and poor was a "mixed regime" or "polity".

The ancient theory of "mixed constitution", which was later modified into the doctrine of separation of powers, is a mixture and balance of the three forms of constitution which are each based on the number of the ruling class. They are; monarchy, which is the rule by one; aristocracy, which is the rule by few; and democracy, which is the rule by many.

To Aristotle, these three forms of constitution each degenerate into their respective negative form over time depending on the ruling class's motives being either selfless or selfish. Gradually, monarchy can deviate to tyranny, oligarchy becoming a deviant of aristocracy, and democracy degenerating into mob rule. None of these deviant forms is in the interest of the community.

To Polybius, mixed government was the ideal. He believed that the Republic of Rome carried out a mixed government[9] like that conceived by Aristotle, with each of the branches having power to check the powers of the other branches and balance the weakness of the other branches, thereby preventing absolute power from being in one branch. Polybius agreed with Aristotle in the sense that the three forms of constitutions over time degenerate into their respective deviant and negative forms as mentioned to be tyranny, oligarchy, and mob-rule. He posits that they each degenerate into their corrupt

[7] H. Barnett, *Constitutional & Administrative Law*, 12th ed. (Routledge: 2017) p. 80.
[8] These functions in modern times correlate thus: deliberative-legislative, magisterial-executive and judicature-judicial function.
[9] Polybius, W.R. Paton, F.W. Walbank, and C. Habicht, *The Histories*, Volume I-VI (Harvard University Press: 2011).

forms by a gradual decline which he calls "anacyclosis" or "political revolution".

John Calvin, like Cicero and Polybius, favoured a mixed government and was against political absolutism. It should be noted that majority of the philosophers at this time were living under governmental systems which did not feature power separation, and this made their writings normative and more of theory than practical.

Philosophers like Cicero,[10] Aquinas,[11] Aristotle, Polybius, Plato, and Machiavelli[12] are of the opinion that the mixed government is the best form of government and better than any by itself, as in Cicero's word in his De Re Publica, *quo nihil possites seprae clarius* - "Nothing can be more splendid".

3.2. The Modern Doctrine of Separation of Powers

The doctrine of separation of powers as understood now is traceable to various 17th and 18th century thinkers with credit specifically given to John Locke and Baron de Montesquieu. Montesquieu saw man as having a proclivity towards evil, manifesting itself in selfishness, uncontrollable desire, and the thirst for power. In his opinion, this proclivity can be controlled by the laws and constitution of the State. Montesquieu divided government into three types: the republican (sovereignty resides in the people), monarchical (sovereignty resides in a single person, and usually hereditary with the laws usually fixed and established), and despotic (wherein a person governs according to his whims and caprices with total absence of separation of power).[13] He subdivided Republican government into aristocracy (power residing in the upper echelons or class not in the whole people) and democracy (power residing in the people, with the people ruling either directly or indirectly through representatives). To Montesquieu, democracy is suitable to only small societies.

Montesquieu prescribed that the various forms of distribution of political power should be amongst the legislature, executive, and

[10] J.G.F. Powell and J.A. North, *Cicero's Republic* (Institute of Classical Studies, University of London: London, 2001).
[11] T. Aquinas, *The Summa Theologica* (Westminster: 1981).
[12] N. Machiavelli, N.H. Thompson, *Discourses* (BN Publishing: New York, 2005).
[13] *Ibid*.

judiciary and that they be placed in the hands of different people or entities.[14] He also provides the basis for the concept of checks and balances by stating that the executive power and legislative power should be restrained by each other.[15] To him, the restraint of the executive over the legislature is the power to reject legislations and the restraint of the legislature over the executive is the annual power of the purse for if "the executive power was to determine the raising of public money … liberty would be at an end."

The doctrine of separation of powers as prescribed by Montesquieu was impactful in the development of administrative law, constitutions of various States and discussions on government functions, such that Blackstone noted that if the legislative, the executive and the judicial functions were given to one man, there would be an end of personal liberty.[16] His approach was based on decentralisation of power as opposed to its centralisation under the despotic rule. Montesquieu also argued that each institution should only exercise its own power and should be independent of the other. He, as well as other jurists, specified that the independence and separation of the judiciary from the other two organs must be real, not merely apparent.

John Locke in his Second Treatise of Civil Government wrote against the concentration of legislative and executive powers in one institution. He proposed that the legislative and executive powers should be on two different institutions that will have a continuing existence. To him, it is ideal to separate the discontinuous legislative power from the continuous executive power and both from the federative power. This was so that the legislature can act quickly at intervals and not continuously while the executive can constantly be at work so that the legislature will not make laws beneficial to their sole interests. The "continuous executive powers" to him is a combination of all the powers presently called executive and judicial. The "federative powers" are the powers to conduct foreign affairs. To Locke, arresting a person, trying a person, and punishing a person are all part of the single function of executing the law, and he did not

[14] Charles de Secondat, Baron de Montesquieu, and Thomas Nugent, *Spirit of Laws* (The Colonial Press: New York, 1899), p. 151.
[15] *Ibid*, at p. 160.
[16] W. Blackstone, *Commentaries on the Laws of England* (Clarendon Press: Oxford, 1765).

consider it worthy of division. Locke also explains the concept of a "mixed government," in which multiple forms of governing – monarchy, oligarchy, and democracy – are simultaneously used.[17] The constitutional history of Britain influenced their development of the doctrine by John Locke and Charles Baron de Montesquieu.

The doctrine has gained universal applause and application, although the practice is rarely ever seen in its pure and strict state. The doctrine has been modified over time to reflect changes in time and place, usually to reflect the distinctiveness of the State where it is being applied. As such, the doctrine's evolution remarkable as one to have withstood time is not one close to the finish line, as the doctrine continues to evolve and adapt to other principles and doctrines for its application to fit the societal demands and social realities of each distinct state while aiding effectiveness of the government.

4.0. THE DOCTRINE OF SEPARATION OF POWERS

In protecting the societal goals, values and ideas of justice, equality, equity, liberty of persons, and sanctity of life and property, western institutional theorists are of the opinion that the exercise of governmental power should be controlled to not be a destructive force destroying values that it was intended to promote. Representative government recognises the role of government in any society and that governmental powers must be limited. The practice popular with limiting government power is the doctrine of the separation of powers.

Some of the elements of the doctrine of separation of powers include:

a. That the government should be divided into three arms, branches, or departments: the legislature, the executive, and the judiciary. This element is the assertion of the division of the functionaries, arms, or agencies of government into three: the legislature, the executive, and the judiciary. Although the earliest version of the doctrine was a twofold division of government functions, the 18th century marked the period of the springing up of the threefold division, which has gained

[17] J. Locke and P. Laslett, *Two Treatises of Government* (Mentor Books: New York, 1965).

popular acceptance as a necessity and element of a constitutional government.[18] This popularity is probably due to the recognition that the separate branches will represent varying interests. This element of the doctrine is at the centre of constitutionalism as accepted and preached in the West, forming the antithesis of totalitarianism and tyranny. Hence, to Madison "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective may justly be pronounced the very definition of tyranny."[19]

b. To each of the three branches, there should be an identifiable function of government which is carried out by them solely and the other arms are not allowed to encroach upon the functions of the any other branch. This is the assertion that there are three specific and identifiable "functions" of government. While the first element endorses the existence of three branches of government, the second element accepts the fiction that there exist three necessary functions to be performed by government. According to this element, government function as exercised can be classified into legislative, executive, or judicial. It goes beyond recognising the three functions to recommending that each of these functions should be placed solely to the appropriate branch.

c. The persons who compose of these three branches of government must be kept separate and distinct i.e., no individual should be allowed to be, at the same time, a member of more than one branch. The basis can be found in the words of James Madison being interpreted that men are not angels, and they will tend to abuse power if left unrestrained. The third element recommends the three branches of government be composed of separate, distinct, and different groups of

[18] As far as the actual institutional development is concerned, of course, the basis of the threefold structure had been laid in England by the thirteenth century. See F.W. Maitland, *The Constitutional History of England,* (Cambridge University Press: 1961), p. 20; see also E. Klimowsky, *Die englische Gewaltenteilungslehre bis zu Montesquieu* (Berlin, 1927).

[19] J. Madison wrote in the Federalist Papers No. 51, published in 1788. Available at https://billofrightsinstitute.org/primary-sources/federalist-no-51 (accessed 20 April 2022).

people, with no member of a branch overlapping to another branch. To Locke, to leave one man as both lawmaker and judge, was to invite tyranny. This element is one of the distinguishing differences between the pure and strict separation and one of the "liberal separation" models.

d. Each of the arms will act as a check on others, leading to a balance in the scale of power while preventing abuse of power since no single group of people will be able to control the machinery of the State. Finally, where the first to third elements are followed, each branch of the government will act as a check on the others to prevent the exercise of arbitrary power by the others. Furthermore, due to restricted exercise of its function, each branch will be unable to exercise undue influence over the other branches. This element signifies the aim and purpose of the doctrine.

The problems which could accompany the pure doctrine has created a need for modifications as a cure. It should be noted that these problems are not certain to arise in all polities applying the doctrine, but it is one likely to happen due to its having occurred in at least one. Some of the problems include:

a. Where one branch actively exercises checks upon another, it might provoke the other branch to see it as a witch hunt. As such, they will focus more on a power play than carrying out their part of the social contract. This will affect the effectiveness of the government in carrying out its obligations to the public and protecting the lives and properties of the citizenry. A branch can also exercise its power of checking another branch with a view to frustrate the other branch leading to the possibility of a situation of frustration ad infinitum with the citizenry being abandoned for a power play.
b. The theory does not indicate how a branch or the person(s) who wields its authority are to be restrained where they attempt to exercise power arbitrarily or improperly either by encroaching on the functions of another branch or by simply disregarding the instructions of another branch.
c. Though arguable, the doctrine in spelling out the division of functionaries was not realistic to recognise the imbalance of

power on the branches. It does not recognise the imbalance of the power of the executive compared to the legislature and the judiciary and the imbalance of the power of the legislature compared to the judiciary. This imbalance of power division has stirred writings and academic discussions on the reality of the independence of the judiciary.

d. The doctrine is linked to a negative approach to meaning and promotion of liberty and freedom, it has been observed to be too concerned with the view of freedom as absence of restraint, rather than with a more positive approach to freedom[20]. Its aim of promoting liberty by preventing the government from encroaching upon individual liberty leads to measures which weaken the government to the point where it is unable to act *proactively* to provide essentials of an above average social and economic life bringing the problem of bureaucracy and red-tapism into light.

The doctrine is committed to the restraint of governmental powers, which according to theorists can best be achieved by setting up divisions within the government to prevent the concentration of power in the hands of a single group of people. We need to consider that although restraints on government is essential to the maximisation of political liberty, a certain minimum degree of strong government is also necessary for the proactive maximisation of political liberty. It is proposed that the recognition of the need for government action to provide the necessary environment for individual growth and development is complementary to, not incompatible with, the view that restraints upon government are an essential part of a theory of political liberty.[21]

4.1. Importance of the Doctrine

The doctrine, from a simple perspective, will be to simply divide power amongst the arms or institutions of government. However, from a technical perspective, its basis is beyond the division of power. Its importance has been discussed in several case law, and by several

[20] M.J.C. Vile, "Constitutionalism and the Separation of Powers", available at https://oll.libertyfund.org/pages/doctrine-of-the-separation-of-powers (accessed 14 September 2019).
[21] *Ibid.*

jurists and legal luminaries in different ways. To Professor Ben Nwabueze, the doctrine is aimed simply to prevent the vesting of power in a single arm and ensure government is not conducted according to pre-determined rules beneficial solely to those in charge.[22] Wade & Phillips,[23] in noting the importance of the doctrine, made reference to the writing of John Locke[24] thus:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made and suit the law, both in its making and execution, to their own private advantage.

Therefore, the doctrine's importance lies in the need to curb man's innate desire for power and prevent the possibility of a person having excessive power to the extent that the power corrupts such person to the detriment of the populace.

5.0. THE PRINCIPLE OF CHECKS AND BALANCES

The most popular modification of the theory of separation of powers is the amalgamation of the doctrine with the theory of checks and balances. This theory of checks and balances was used to import the idea of checks to the exercise of power into the doctrine of the separation of powers i.e., each branch having the power to exercise a certain degree of *direct* control over the other branches. This refers to the authorisation of a branch to play a limited part in the exercise of functions of another branch. The most popular of these powers of checks are:

a. Veto power given to the executive over legislation and over the legislative arm.

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[22] "Status and Role of the Legislature in a Democratic Society". A public lecture delivered by Professor I. Sagay to mark the 47th Birthday of Michael Opeyemi Bamidele, Esq. on 27 July 2010.

[23] E.C.S. Wade, G.G. Phillips, and A.W. Bradley, *Constitutional and Administrative Law*, 9th edition (Longman: 1977).

[24] J. Locke, *The Second Treatise of Civil Government, and a Letter Concerning Toleration* (Basil Blackwell: Oxford, 1948).

b. The power of impeachment of the legislative branch over the executive arm.
c. The power of judicial review given to the judiciary over the two.

The power to "interfere" of a branch was a limited one so as not to adversely affect the idea that a division of functions remained. The pure doctrine of separation of powers was modified by this view that each of the branches could exercise some authority in the ambit and purview of any of the remaining branch(es). This power of interference is not one adverse to the independence of the branches. It does not affect their independence, instead, it only gives a branch the power to watch the others and prevent them whenever they exercise or purport to exercise their functions in a manner contrary to the aim of governance or adverse to the primary aim of the doctrine of separation of powers.

It is the combination of the doctrine of separation of powers with the theory of checks and balances which formed the basis of the United States Constitution. This combination has also been applied in line with some polities' social reality and system of governments, leading to the legislative function being shared whilst other functions are strictly kept separate.[25]

It can be rightly noted that the modifications of the pure doctrine of separation of powers has been in two important ways:

a. Combination of the doctrine of separation of powers with the principles of checks and balances: Some of the objections and criticisms against Montesquieu include the positions of some writers that he was against the pure doctrine of separation of powers because he gave each of the branches of government certain powers over each other which amounted to a participation in the exercise of the functions of another branch. As Marshall opined, this proposition will lead to the

[25] This was popular in eighteenth-century English constitutional system. It was popularly known as "the theory of balanced government"; it is a combination of the doctrine of separation of powers with the theory of mixed government to produce a theory where powers and functions were separated partially to fit their societal peculiarity. In this theory or variation, the legislative function was shared while the other functions were kept strictly separate.

unwarrantable violations of the pure theory. Contrary to the popular misconceptions, Montesquieu did not give each branch an *equal* part to play in the exercise of each function of government. He, after setting up a basic division of functions, imposed some control mechanisms upon this fundamental division. This checks and balances has been commended by E. Barendt who explained that the majority of the administrative authorities and agencies in a sense perform the functions of two or three of the branches due to complexities in government. Furthermore, one cannot claim that due to this practice to foster government carrying out its function without time wastage, there is no separation of powers, as that would be the conclusion if we were to use the strict separation logic. In his opinion, the importance of the doctrine is in the result and the aim not in the intensity of separation.

b. Modification of the doctrine of separation to assimilate the practice and system of government to achieve the aim of the doctrine: Another variation and modification of the pure doctrine is that of separation of persons. The pure doctrine demands that the persons who compose of these three branches of government must be kept separate and distinct. It demands the strict and complete separation of the personnel of the three branches of government. This has been modified to a *partial separation of persons* wherein some people may be members of more than one branch of the government, although a complete identity of personnel in the various branches will be forbidden.

   Such an approach does not necessarily mean that the idea of the separation of powers has been disposed and rejected. In this situation, questions as to the degree and intensity of separation will become important. Questions like: How many people are allowed to be members of more than one branch? Who will they be? What will be their function and authority? What is the intensity of the clash of interest between the branches wherein the personnel will be a part of? This partial separation of persons provided the basis of the parliamentary system of government with the pure doctrine acting as the height for separation of powers. The pure doctrine acting as

> the height does not mean that any modification or variation suitable to the type of society will cease to be significant simply because it is partial.

Oddly enough, it is rare to come across a state in modern times that practices the pure doctrine without its modification in any of the two ways or any ways outside of the two.

The "doctrine of the separation of powers" from its name seems to be unambiguous and easy to recognise, but this is in contradiction to the reality of the confusion encountered in its definition. The doctrine of separation of powers in its strict and pure form as a sole theory without its combination to other political ideologies and theories is inadequate and unable to provide an adequate basis for an effective, stable political system, especially one in this modern era. Hence, this has resulted in its combination with other political ideas – particularly the theory of mixed government and the theory of checks and balances – to form the complex constitutional theory that applies in different formats, providing the basis of most modern and Western political systems.

6.0. SEPARATION OF POWERS IN VARIOUS POLITIES

The doctrine of separation of powers came to be due to a long period of tinkering, modification, and alteration of various techniques and approaches aimed at achieving the desire of preventing totalitarianism or autocracy. The modification over time was made to be in touch with realities in the society and time, and the modification led to the doctrine of separation of powers which has also been modified into various sub formats which are practiced differently in different states. Different examples include:

6.1. Separation of Powers in the United Kingdom

The system as practiced in the United Kingdom is the parliamentary system wherein the arms or branches are clear, but the power separation model is not as straight forward. The doctrine reflects itself therein as power is separated between the executive, the judiciary, and the legislature, but the personnel of each branch are not as separated as the branches.

The legislature is bi-cameral with each sub arm of the legislature having distinct legislative function. The upper house, called the House of Lords, traditionally consists of earls, dukes, viscounts, barons, and bishops. The House of Lords is also part of the judiciary as the court of final appeal. The legislative function of the House of Lords is popularly regarded as close to dormant since although it has power to introduce bills, this power is dormant as majority of the important laws are introduced in the House of Commons. Also, while the House of Lords has the power to delay the passage of bills by the lower house, it does not have the power to veto the bills.

The lower house, also known as the House of Commons, is regulated by majority rule where the majority party makes all the laws and the minority has little voice, hence the general opinion that the majority party in the House of Commons holds all of the power.[26] The House of Commons is the more powerful of the two houses and their power extends to the ability to oust the executive where the executive has lost the ability to command a majority on an issue of confidence.[27] The lower house elects a speaker who acts as the referee in instances of debate between the majority and the minority. The members in the House of Commons sit for five years or until the monarch dissolves the parliament usually at the Prime Minister's behest and calls for a new election.

The Prime Minister is a member of the executive and a member of the Parliament. The Prime Minister acts in two capacities, as head of government and as the member of the majority in the powerful House of Commons, hence accountable to the house of commons through the "Prime Minister's Questions". The Prime Minister heads the cabinet, which includes the most senior ministers.

The Head of State is the monarch with power to approve all bills, though today, the process is regarded as a mere rubber stamp. Although the monarch is the sovereign, she takes little direct part in the governance of the country. Despite this, the monarch has wide powers called "Royal Prerogatives", which are sometimes delegated to ministers. Some of her powers include the appointment of the

[26] "Constitutional Topic: Separation of Powers", available at https://www.usconstitution.net/consttop_sepp.html (accessed 16 March 2021).
[27] This was done to the minority government of Mr. Callaghan on March 1979.

Prime Minister from the party with the majority, the issue or withdrawal of passports, declaration of war and deployment of armed forces overseas, the prerogative of mercy, the power to assent and enact laws by giving royal assent to the bills passed by the legislature, and the power to refuse assent, though this has not been done in the 20th and 21st century. The monarch is immune from criminal prosecution unless her permission is obtained. She is also not required to pay income taxes although, she can volunteer to do so. It should be noted that irrespective of the monarch's power, the exercise of the power is limited to the doctrine of parliamentary supremacy which was the subject in the *Case of Proclamations,*[28] where Chief Justice Coke and his fellow judges ruled that the power of the King to create new offences was outlawed and that the King could not, by proclamation, prohibit new buildings in and around London. Hence, the Royal Prerogative could not be extended into areas not previously sanctioned by law. This set out the principle that the King had no power to declare new offences by proclamation. It was however argued that the limit of the monarch's power in line with parliamentary supremacy was not applicable to the monarch's power to levy tax without parliament's consent[29]. An exception was given to the wide power of parliament in *Day* v *Savadge*[30] where it was held that an Act of Parliament would be invalid and have no force if it were made against "natural equity". However, this exception has been called to question in *British Railways Board* v *Pickin*[31] where Lord Reid held that that since the 1688 Revolution, neither the law of God nor law of nature and of natural justice could overrule an Act of Parliament.

In Britain, their power separation model which gives the legislature supreme power goes the extra mile in stating that the judiciary has no power of review over acts of parliament as held in *R* v *Jordan.*[32]

The House of Lords though functioning as both the legislative and the highest court in the judiciary has its legislative power reduced to little less than dormant in practice as the house of lords merely has delaying power over bills. It should once again be noted that the monarch,

[28] *Case of Proclamations* [1610] EWHC KB J22.
[29] *R* v *Hampden* (1637) 3 State Tr 825.
[30] *Day* v *Savadge* (1614) Hob 85; 80 ER 235.
[31] *British Railways Board* v *Pickin* [1974] AC 765.
[32] *R* v *Jordan* [1967] Crim. L.R. 483.

though having power to assent and refuse to assent bills, traditionally does not refuse assent to bills passed by the Parliament and the head of government.

This model though significantly different from pure separation model cannot be tagged as imperfect if the primary aims of the doctrine is achieved, which is commendably achieved in Britain where the principle of responsible government makes the totality of government responsible to the parliament. Their model is suitable to their demands as it bridges the gap between the executive and the legislature, making government effectiveness easier to attain and it also achieves the primary aim of the doctrine as it prevents absolute power from being vested in one person.

6.2. The French Model of Power Separation

The political system in France reflects the power separation format between the executive, legislature, and judiciary. The executive is headed by the President and the Government. The President is elected for a five-year term by the people whilst the Government is headed by the Prime Minister who is appointed by the President. Hence, both the President and Prime Minister head the executive branch.

The President does not have veto power over legislation but can ask Parliament to reconsider a bill. The government including the Prime Minister can be revoked by the National Assembly through a censure motion, hence the Prime Minister risks revocation where he does not have the support of the majority of the lower house. The President presides over the Cabinet and has vast emergency.

The legislature comprises of the National Assembly and the Senate. The Senate which is "upper house" has less power than the National Assembly which is called "the lower house". The power balance between the two branches of the legislature is such that the head of the government is appointed from the lower house. The Prime Minister, appointed by the President[33] from the majority party in the National Assembly, has wide powers including power to choose the members of the Government. Essentially, the Prime Minister is the

[33] Article 8, Constitution of the Republic of France, completed on the 26 June 1793, and submitted to the people by the National Convention (Translated from a French copy, direct from Paris.).

head of the military and the civil service.[34] The Senate consists of Senators who are elected by the various local officials from across the country for a six-year term. The National Assembly consists of Deputies who are elected by the people for a five-year period. The National Assembly has the power to vote and force the Government to resign through passing a motion of censure.[35]

The judiciary in France is independent and is not controlled by or made to answer to any of the two branches. The judiciary is divided into two sub-branches which are the judicial branch and the administrative branch. The two branches have their own independent Courts of Appeal and jurisdiction. The judicial branch deals with criminal law and civil law whilst the administrative branch deals with appeals against executive decisions.

The Constitutional Council examines laws and legislations determining whether they violate the constitution. Laws, after passage but prior to their enactment, can be reviewed by the Constitutional Council. Review which affects laws are requested while those that affect the Constitution are mandatory. The review can be requested by the President, the Prime Minister, the Senate President, the President of the National Assembly, and any of the senators or any of the members of the National Assembly. The Constitutional Council consists of nine members, with three appointed by the Government, three by the National Assembly, and three by the Senate.

From the above, it is clear that this model is distinct from that of Britain. The difference between the two models is one of formality as to their societal differences and peculiarity. Hence none of the two models can be tagged as the best model, and each can only be tagged the best for achieving the primary aim of the doctrine as well as more fitting for their respective societal demands and realities.

6.3. The Mexican Model of Power Separation

The State of Mexico's practice of the doctrine of separation of powers is one of tripartite division into the legislative, executive, and judicial.

[34] *Ibid*, Article 20.
[35] *Ibid*, Article 49.

It is a federation with a high proportion of the law being left to the Mexican states' jurisdiction.

The Mexican legislature, called the Congress, is bi-cameral. Certain items are exclusively for either house while some must be agreed by both houses. A legislation may be introduced by any member of Congress, or the President, but the appointment of the President is subject to confirmation of the Senate.[36]

The head of the Mexican executive is the President who functions as the head of state and government. The President is elected to a single six-year term directly by the people, but the Congress can designate an interim President and call for new elections in the case of disability.[37] The President is held to the will of the Congress as he cannot leave the country without the congress' permission.

The judicial system of Mexico is divided into Federal Courts and Regional Courts. The national courts are divided into four hierarchical parts: the Supreme Court of Justice, Electoral Tribunal, Circuit Courts, and District Courts. The Federal Courts act as Courts of Appeal in two senses; they act as Court of Appeal for State Courts and for themselves according to the hierarchy of national courts. The lower courts are not legally bound by the decisions of superior courts except where special rulings known as *Jurisprudencias*[38] are given.[39]

This model of separation reflects the peculiarity of the State of Mexico in the sense of their history which includes its poverty and its past of invasion by outsiders. This is probably why their Constitution has been amended at least 450 times since its enactment in 1919 and why it limits the movement of its President outside the country by requiring

[36] The composition, responsibilities, power, and requirements to be a member of the Congress are provided in The Third Title, Chapter II, Article 50 to Article 79 of the Political Constitution of the United Mexican States.

[37] The Third Title, Chapter III of the Political Constitution of the United Mexican States provides for the composition, responsibilities, and requirements of the executive arm of the State.

[38] "Jurisprudencias" are established when the Supreme Court and the Federal Collegiate Courts issue five consecutive uninterrupted and consistent decisions approved by unanimity of votes of the Magistrate who compose each collegiate court on a point of law.

[39] The Third Title, Chapter IV, Articles 94 to Article 107 of the Political Constitution of the United Mexican States provides for the composition, responsibilities, and requirements of the judicial arm in the State.

Congress' permission. Their uniqueness also reflects in the Constitution providing that the election of the 500 deputies will be on a three-year basis and that they cannot serve for more than one term in succession, probably to aid circulation of power and prevent an individual or group monopolising the legislative office. Also, the courts are given freedom and not required to follow judicial precedents. Rather, they are to decide each case according to its merit so as not to tie a court to a decision which may not be in the pursuit of justice, but this is subject to strict following of rulings called *Jurisprudencias*.

6.4. Separation of powers under the 1787 United States of America Constitution

In the United States of America, the doctrine of separation of powers is the foundation on which their Constitution is based. The history of the United States of America shows their adherence to ensuring power is not over-concentrated in one arm or individual. America was a colony of Britain until the American Revolution between 1765 and 1783, which they won partly due to the support and assistance from France. The causes of the revolution include the Stamp Act event wherein the British Empire imposed taxes in an attempt to recoup finances after the English war against France. The stamp act purported to tax transactions in the colonies to collect revenue for "protecting the colonies" during the war. Another cause was the Townshend Act event where Great Britain purported to tax goods imported from Britain and the response from the colonies was to boycott the goods which inadvertently led to the Boston massacre. What is clear from their history is that America has always had issues with any decisions or impositions not from the people or from people they see as oppressors.

The United State of America's Constitution has been amended different times and their separation of powers model subsumes their constitutional practice of federalism. Their power separation model devised by the fathers of their Constitution was designed for a primary aim: to prevent the majority from ruling with an iron fist. Hence, they shied away from giving excess power to any branch of the new government. Mr. Justice Black reiterated this in *United States* v *Lovett*[40]

[40] 328 U.S. 303 (1946).

when he noted the danger of the legislature exercising their power with no control to liberty of man, stating that it is to define the powers of the legislature that constitutions are written, and the purpose is that powers left with the legislature be limited and that the remainder be vested in the courts.

Their separation of powers model provides for and recognises a system of power sharing and checking and balancing. Accordingly, despite their articles I,[41] II,[42] and III,[43] providing for the basic and primary power of the legislature, executive, and judiciary respectively,[44] the Constitution gives a particular branch or arm limited power to check and balance the performance of the constitutional role by another arm. Some examples include:

a. The President has power to make treatise,[45] execute all laws, and grant presidential pardon,[46] which is a check on the judicial power of interpreting laws and imposing liability on basis of the laws made by the legislature. The executive also has the power to appoint judges, ambassadors, public ministers, and other officers whose appointments are not provided for in the Constitution.[47] The Vice President is the President of the Senate. The President can call a session of the legislature or one of the houses in situation of emergences.[48]

b. The Congress has the power to impeach the President and, with the cooperation of the states, can amend the Constitution. The Congress balances with the powers of the President through power of approval of appointments made by the President, power of vote on budget, and the ratification

[41] Article I, section 1 provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives".

[42] Article II provides for the executive arm, providing for the office of the President, as well as the responsibilities of and procedure for election into the Office.

[43] Article III provides for the Judicial Arm of the United States.

[44] The legislative branch makes the law, the executive branch executes the law, and the judicial branch interprets the law.

[45] Provided that two thirds of the senators around concur.

[46] Article II, section 2 of the United States Constitution.

[47] *Ibid.*

[48] *Ibid*, at section 3.

of treaties. Congress also interferes with the exercise of powers by the courts by creating special courts, approving judges' appointments, and passing procedural laws. The President must, from time-to-time, deliver a State of the Union address. Congress also has power to set courts inferior to the Supreme Court, power to set the jurisdiction of the courts, and power to alter the size of the Supreme Court. Congress has power to check itself or rules by which it must adhere to – since it is bi-cameral. Accordingly, bills must be passed by both houses of Congress, revenue bills must originate from the House, and the consent of the other house is needed where one wishes to adjourn for more than three days.

c. The judiciary has the power to interpret laws as well as the wide power to rule any law as unconstitutional, null and void and of no effect, and declare any executive act as unconstitutional. Where the legislature attempts to impeach the President, the Chief Justice sits as President of the Senate during such presidential impeachment. The exercise of the power of the judiciary is with the exception that the Supreme Court cannot decide on political questions, so that the court will not interfere with the exercise of powers of the executive branch of the Government.

The Constitution, by making the various branches accountable to others, reduces the possibility of one branch applying constitutional power in illegal ways to become dominant. The people have the final check on the government arms when they exercise their right to vote every two years, six years, and four years when they vote their Representatives, their Senators, and their President, respectively, indirectly being in control of selecting those who constitute the judiciary.

7.0. DOCTRINE OF SEPARATION OF POWERS IN NIGERIA

Nigeria's history as a colony of Britain and the struggle for independence was for many years, which eventually led to the country being a Republic and gaining independence. From the date of independence till present, Nigeria has had four republics and has

practiced more than one system of government.[49] The different systems of government practiced in Nigeria from 1960 till date has reflected different models of the doctrine of separation. The important thing to note in Nigeria's story is that despite the various models of power separation considering its peculiarities and its systems of government, the success of the models in achieving its primary aim has been not as desired.

7.1. Separation of Powers in Nigeria's First Republic

The independence Constitution of 1960 and the 1963 Republic Constitution provided for an obvious but dull separation of powers. The model of power separation under these Constitutions are not as vivid as that under the 1979 Constitution and the 1999 Constitution to be discussed in later pages. The Chapter IV of both the 1960 and 1963 Constitutions established the office of the Governor General and the President, while the Chapters V and VIII provided for the Parliament and the Judiciary, respectively. The 1960 Constitution was promulgated under the control of the colonial masters of the then Nigeria colony while the 1963 Constitution effected our independence from Great Britain effecting a change from a Monarch to a Republican State. The doctrine of separation of powers under the two Constitutions replicated that of the British system which was based on the parliamentary system which was also practiced in Nigeria. The disregard and contempt of the doctrine by the Nigerian state under the 1963 Constitution reached its highlight when the civilian government's Federal Parliament passed the Constitution of Western Nigeria (Amendment law) with intent of reversing a decision of the Privy Council where Chief Akintola was validly removed as premier of Western Nigeria. Under these two Constitutions, for a person to

[49] Nigeria is special due to it comprising of more than 250 ethnic groups, three major tribes, and various Kingdoms, Empires, Caliphates, Towns, Emirates and Civilisations which were largely autonomous and independent until eventually brought together through a forced marriage to exist in unity. This division is evident in the political practice of Rotational Presidency wherein the president at a time has to come from a part of the country while the other parts wait till their time, which results in an evident tribal spirit rather than national spirit. Chief Obafemi Awolowo also hinted on this forced marriage thus "…there are no Nigerians in the same sense as there are English, Welsh, or French. The word Nigerian is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not".

validly hold position in the executive arm, he must first be elected to any legislative house at Federal or Regional level.

7.2. Separation of Powers under Military Juntas in Nigeria[50]

Upon any successful military coup in any state, the coup plotters and performers ensure to suspend some part of the Constitution. Nigeria was no exception in the advent of the military rule in the various interruptions of civilian rule. Some of the suspended parts of the Constitution include the sections or Chapters that reflects the doctrine of separation of powers. The military government combines the legislative and executive powers, exercising it themselves with disregard for the judiciary. Professor Ben Nwabueze[51] noted that under those decrees, no court is to enquire into whether a right so guaranteed has been, is being, or will be likely contravened, leading to detention of thousands without trial, ban of political parties and trade unions, and prohibition of criticisms by any media house. The despotic and totalitarian attitude of the military during their rule is a major affront of the primary aim of the doctrine as this attitude is against the basic tenets of the doctrine.

The Military usurped the power of the legislature, exercised the power with that of the executive, and disregarded the power of the judiciary, making the judiciary a situation of "all bark, no bite" through decrees. Despite this, the judiciary repeatedly challenged the ousting of its jurisdiction, although this had little to no effect at all since these decisions were not given effect by the military. In *Attorney General of Western State & Ors.* v *Lakanmi & Ors.*,[52] the Supreme Court pronouncing on the doctrine of separation of powers held thus:

> We must here revert once again to the separation of powers, which the learned Attorney General himself did not dispute, still represents the structure of our system of government. In the absence of anything to the contrary, it has to be admitted that the structure of our constitution is based on the separation of

[50] The military juntas referred here are those of 1966 – 1979 and 1983 – 1998.
[51] B. Nwabueze, "Our Match to Constitutional democracy" (1989) *Special Edition, Law and practice: Journal of the Nigeria Bar Association*, pp. 10 – 11.
[52] (1971) U.IL.R.201 (1974) 4 ECSLR 13.

> powers, the Legislature, the Executive, and the Judiciary. Our constitution clearly follows the model of the American constitution. In the distribution of powers, the courts are vested with the exclusive right to determine justifiable controversies between citizens and between citizens and the state.

The Supreme Court in *Governor of Lagos State* v *Ojukwu*[53] expressed its displeasure with the constant flouting of its order by the executive, stating the independence and equality of the arms.

Despite the good will and fight of the judiciary, the military rule in Nigeria was characterised by an utter disregard of the doctrine or principle of separation of powers via the merger of the legislative and executive functions and powers in one person as well as the frustration of the judiciary by limiting their powers through ouster clauses.

7.3. Separation of Powers under the 1979 Constitution of Nigeria

The Second Republic and the period wherein the 1979 Constitution functioned as the grundnorm provided for a clear separation of power model. Its sections 4, 5 and 6 and Chapters V, VI, VII provided for the legislature, executive, and judicial arm, respectively, clearly stating the functions of each arm thus: the executive is to execute the law made by the legislature, the legislature should make laws while the judiciary interprets the laws, herein providing for the independence of each arm and providing against the usurpation of the functions of one arm by another arm. The Constitution integrated the principles of checks and balances into its power and function separation. The 1979 Constitution's focus was on ensuring that neither the legislature, the executive, nor the judiciary perform the whole or part of the functions or exercise the powers of the other to cause an imbalance in the power scale and over-concentrate power in one person or arm.

[53] (1986) 1 NWLR (pt 18) 621 at 633 – 634.

7.3.1. Critique of the Application of Separation of Powers under the 1979 Constitution

Objectively looking at the 1979 Constitution as a legal document, applaud is in order. Its provisions reflected an excellent will and spirit to adhere to the doctrine's primary aim as well as achieving governmental aim. The problem with the 1979 Constitution's model of separation of powers has more connection with the distance between its perfect look, its touch with our social reality, and its adherence and application in reality.

It is not unknown that one of Nigeria's peculiarities is "placing politics over law" which contrasts to some extent to the peculiarities of the USA where we copied this model from. The model lacks a true link with our factual peculiarity which would have been deciphered upon an introspective study of the polity which is almost impossible for the "Big Men" or "powerful men in politics" to do objectively. The lack of touch with our reality affected the doctrine in its effectiveness as it was not strictly followed by the politicians who replaced the doctrine with "politics power play and power tussle", the politicians utterly, in practice, disregarded the doctrine though not as obvious and clear as their military counterparts. Unsurprisingly, the legislative arm of government was not independent of the executive arm during the Second Republic. This was due to the play of politics in favour of the dominant party in the executive, who used their position to use the power of patronage to subdue party members of the legislature, and thereby influencing the appointment of boards, confirmations of appointments, award of contracts, which over time negatively affected the duty of provision of utility, leading to disregard of the citizenry's interest.

Therefore, the 1979 Constitution on paper made a laudable effort to incorporate the doctrine into the Constitution when using standard of other models. But it failed to consider our attitude towards power thus: our desire for power through any means whether it disregards the law or not, our regard of politics-play overdue process and law. The individuals that made up the governmental arms and the politicians contributed immensely to its ineffectiveness.

7.4. Separation of Powers under the 1999 Constitution of Nigeria

After the Military overthrow of the Second Republic by Major General Muhammadu Buhari, military rules were ushered in before the transition into the Fourth Republic and the coming into force of the 1999 Constitution. Despite the close similarities between the 1999 Constitution and the 1979 Constitution, there are some notable innovations, of which none relate to the principle of separation of Powers. Hence, the doctrine of separation of powers under the 1979 Constitution remain unchanged as provided under the 1979 Constitution.

The 1999 Constitution of the Federal Republic of Nigeria enunciates the doctrine of separation of powers as follows:

7.4.1. Legislative powers

The Constitution provides that the legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.[54] The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list set out in Part 1 of the Second Schedule to this Constitution[55] as well as the concurrent list.[56]

The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say:

a. Any matter not included in the Exclusive Legislative List set out in Part I of the Second schedule to the constitution.
b. Any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the

[54] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended in 2011), section 4(1). This section herein provides for a Bi-Cameral Federal legislative arm.
[55] *Ibid*, at section 4 (2).
[56] *Ibid*, at section 4(4)(a).

constitution to the extent prescribed in the second column opposite thereto; and

c. Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.[57]

It is clear that the functions or powers of law making are vested in the National Assembly and Houses of Assembly of the states for the Federation and states, respectively. The Constitution goes further to demarcate between what the National Assembly and the state Houses of Assembly can legislate on. These are contained in the Exclusive List which is solely for the National Assembly and Concurrent Legislative Lists which is for both the National and State House of Assembly subject to the principle of covering the field.[58] The state Houses of Assembly have power to legislate on matters not in either of the lists, called Residual Matters.

7.4.2. Executive Powers

The 1999 Constitution provides that the executive powers of the Federation shall be vested in the President and may, subject to other provisions of the Constitution and any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation.[59] The powers of the executive extends to the execution and maintenance of the Constitution, all laws made by the National Assembly, and to all matters with respect to which the National Assembly has, for the time being, power to make laws.[60]

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[57] *Ibid*, at section 4(7).

[58] The principle of covering the field states that where the state House of Assembly legislates on a matter in the concurrent list and the National Assembly legislates on same, where they both provide for the same thing, the Federal law shall apply and the state law shall become inchoate; but where they both provide for different things, the state law will be invalid and inapplicable to the extent of its inconsistency with the Federal law. But where the state House of Assembly legislates on a mater in the Exclusive List, it will be null and void. Note however that only the states House of Assemblies have power to legislate over matters in none of the lists, called Residual Matters. Hence, where the Federal legislature legislates on such matters, it will be held to be null and void and of no force.

[59] CFRN 1999 (as amended in 2011), section 5(1)(a).

[60] *Ibid*, at section 5(1)(b).

With respect to the states, the executive powers of each state are, subject to the provision of the Constitution, vested in the Governor of that state and may, subject to the provisions of any law made by the state's House of Assembly, be exercised by him either directly or through the Deputy Governor and Commissioners of the government of that state or officers in the public service of the state. The executive powers of the state government also extend to the execution and maintenance of the Constitution, all laws made by the House of Assembly of the state, and to all matters with respect to which the House of Assembly has for the time being power to make laws.[61]

From the above provisions, one can rightly posit that the executive powers of the Federation and the states are conferred on the President and Governor, respectively, and according to the Constitution, can be delegated to the Vice President, Ministers, or officers in the public service of the Federation and the Deputy Governor, Commissioners of that state, or officers in the public service of the state. Therefore, under the 1999 constitution, like the 1979 constitution, there are unambiguous provisions for separation of powers among the three arms of government *viz* the legislature, the executive, and the judiciary. Their distinct functions are explicitly spelt out in the Constitution and on no account should one carry out the function of another save as permitted by the Constitution itself.

7.4.3. Judicial Powers

The Constitution provides that the judicial powers of the Federation and a state within the Federation shall be vested in the courts to which the section relates, being courts established for the Federation and for the state.[62] The judicial powers vested in accordance with the foregoing provisions of this section extends to all inherent powers and sanctions of a court of law. It also extends to all matters between persons, or between the government or authorities and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[63]

[61] *Ibid*, at section 5(2).
[62] *Ibid*, at sections 6(1) and 6(2).
[63] *Ibid*, at section 6(6).

The judiciary as one of the arms of government exercises its power of adjudication and interpretation of the Constitution and laws made by the legislature through courts created by the Constitution and other courts as may be established by the National Assembly or any House of Assembly. The Constitution in spelling out judicial powers does not make it coincide with the function of any other arm of government, providing for a clear separation of powers among the legislature, the executive, and the judiciary.

Despite the obvious separation of powers provided for under the 1999 constitution as explained above, the interdependence amongst the aforementioned arms of government is desirable in order to ensure effective checks and balances. The three arms must relate with each other whilst balancing their duty to discharge their specific constitutional functions and their independence to ensure the successful execution of the provisions of the constitution.

Some of the checks and balances under the Constitution include

a. The president, though the Commander-In-Chief of the Armed Forces of the Federation, cannot declare war without the prior approval of the legislature. The legislature and the judiciary must request for security agents from the President for their protection.
b. A Bill must pass through the legislature before final assent by the executive. However, upon the situation where the President, within thirty days after the presentation of the Bill to him, fails to assent or where he withholds assent, the Bill shall be presented again to the National Assembly sitting at a joint meeting and if passed by two-third majority, the Bill shall become law and the assent of the President shall no longer be required.
c. The executive at Federal and state levels must not unilaterally withdraw moneys from the Consolidated Revenue Fund of the Federation or the states without being authorised by the National Assembly and the state Houses of Assembly, where applicable. The Constitution, however, provides that the President and Governors may authorise expenditure in event the Appropriation Bill in respect of any financial year has not been passed into law by the beginning of the financial year.

d. The legislature possesses the power to investigate the conduct and activities of the executive per its responsibility of disbursing or administering moneys appropriated or to be appropriated by the legislature.
e. The approval of the legislative arm, either Federal or state, is also required for the appointment of a Minister, Commissioners, and certain officials to take effect. Some of the nominees will be screened in accordance with the Constitution's provision or any law in force which is constitutional.

In cementing the doctrine of separation of powers, the Constitution provides that once a member of the legislature is appointed a Minister or Commissioner, such person must resign his appointment as a member of the Parliament before the appointment as a Minister or Commissioner can take effect. It is deducible from the provisions of the Constitution that the three arms must exercise a certain degree of control over the government, but this control must not interfere with the independence of any arm, and it should not amount to the arm exercising the whole or an integral part of another's power as conferred by the Constitution.

Despite the Constitution's provisions, we will discover that the reality is one of utter disregard of the doctrine of separation of powers. This disregard for the practice of the doctrine is heightened by the practice of buying of votes, rigging of votes, and election fraud, which make the elected persons believe they do not owe their political office to the populace but the political party and their godfathers. Consequently, they consider the demand of their political party and godfathers over the needs of the citizenry and the law, which includes the Constitution.

8.0. RECOMMENDATIONS

In reaching the curtain's fall of our discussion, this writer strives to make some recommendations as to the tweaking of the current power separation model into one tailored specifically for Nigeria, instead of one birthed from the copy-cat nature of our legislatures. The recommendations are not exhaustive, but its implementation will act as a forward shove in promoting the ideals of the doctrine as entrenched in the 1999 Constitution and desired by the citizenry.

1. We need to realise that the doctrine of separation of powers has no perfect model, but every state has a model fit for it when considered with the realities of the polity.
2. Upon the Constitution being amended to reflect our state of multi-ethnicity, the power sharing needs to be re-evaluated to give the Judiciary control and absolute power over their remuneration, to cement their independence and not make their remuneration be an instrument of control by the executive.
3. There should be extensive education for the practitioners of the Constitution with their limitation and powers. This, to an extent, will reduce the simmering rancour among the three arms of government.
4. The courts and the judges, in achieving their duty of both interpreting the statutes and checking and balancing the other arms, need to adopt a hybrid of judicial activism and the self-restraint approach. Whilst the judicial activist approach looks to review the activities of the other arms, the self-restraint approach looks to the judiciary to act only when clear statutory or constitutional provisions or have been clearly breached. This hybrid will ensure the judiciary carries out its classical duty of interpretation of laws, while actively checking the excesses of the politicians.
5. We might need to learn from other polities and integrate ideas that can have positive effect in our state. For example, the practice of limiting the tenure of executive members, both elected and appointed, to a single four-year term and limiting the tenure of law makers to a single four-year term, to aid the circulation of power. This will also help in mitigating the specific problem of godfatherism, hereby preventing an individual or group from staying in office for a long term, which usually results in power and office monopoly.
6. The officials of the different arms need to be educated as to their loyalty first being towards the populace, but this will not come to realisation until bribery and buying of votes is no longer possible. The populace should also be educated on how much power they have, and how elections have consequences. However, and most importantly, the living conditions of

citizens should be improved, as most of this vote buying only thrive due to the impoverishment in the country.

7. A distinction between general corruption by civil servants and special corruption by public office holders. There should be a creation of a semi-separate and truly independent anti-corruption agency that is different from the agency in charge of general financial crimes and corruption. In light of this, there should be two anti-corruption agencies, one, subject to the executive arm, taking care of general corruption of civil servants whilst the other semi-separate and completely independent agency, answerable only to the arm not constituting of politicians – i.e., the judiciary, having jurisdiction over corruption of elected and appointed political office holders.

9.0. CONCLUSION

The conclusion requires considerations of some important questions. Is there a superior model of power separation? Is the American model superior to any other State? Is there a perfect model of the doctrine's practice? The answer to these questions depends on your position. Its answer is like the riddle of 9 and 6. The French and the British might deride the idea of a President having no power to make laws, they might consider absurd the thought that judges can render and declare duly passed laws tagged "the will of the people" null and void. The Mexicans might consider as absurd, the longevity of some career American political offices.

Americans might dislike the British practice of majority rule and the absence of a written constitution. Nigerians may fear the French Presidency has the potential to turn tyrannical by the misuse of emergency powers. Nigerians may worry that the Mexican judiciary, without a solid *stare decisis* system might lead to incoherent judicial policy, leading to uncertainty in interpretations of the law.

Despite the fundamental differences between each of these and all nations, we need to realise that all the nations have distinct political and social traditions that is deeply rooted in their history. Some also have a mischief from their past they hope to cure or prevent that sometimes date back to their history. Despite the distinctions

between the practice and models of the polities in the world, some of the countries are prosperous or developing and growing despite their odd peculiarity. We need to realise that each's system and model work in the context of each nation, even if the details could not work in some others. All that is important is that in the doctrine's model as practiced in whatever nation, the primary aim of the doctrine is achieved. Hence, Nigeria needs to withdraw to the drawing board to understand the nation itself and agree with our history as a nation and our oddities and come up with a better model that absorbs our distinctiveness and realise that unlike our practice concerning legislations, we cannot afford to just apathetically copy other state's model of power separation. We need to recognise the importance of our peculiarity and history in the separation of power model for the doctrine's aims to be maximally achieved.

A COMPARATIVE ANALYSIS ON THE APPLICATION OF THE DOCTRINE OF SEPARATE LEGAL PERSONALITY TO PARENT/HOLDING COMPANIES AND ITS SUBSIDIARIES - THE UNITED KINGDOM, UNITED STATES AND NIGERIAN APPROACH

By Emeka Opara*

1.0. INTRODUCTION

The major effect of incorporation is that a company assumes a "separate legal personality" from that of its members.[1] Thus, an incorporated company, like any natural person, has rights and liabilities enforceable by and against it, with no liabilities on members beyond what the law provides for, or what its Memorandum and Articles of Association allows. Hence, members, depending on the corporate form taken, assume either limited or unlimited liability rather than an unrestricted personal liability. In simple terms, a corporate veil is used to shield members from liability arising from the company's activities.

The rule is traceable to the case of *Salomon* v *Salomon*,[2] and has been codified in various companies' legislation. The application of this rule is, however, checked by courts and the legislature. Thus, in certain instances, the corporate veil is pierced to hold members liable where such members have used the company as a stratagem for achieving unscrupulous objectives. The big issue in modern corporate law is that holding or parent companies set up subsidiaries, which they control to shield themselves from liability. This is catastrophic for the innocent stakeholders dealing with such companies and their subsidiaries.

Hence, this paper seeks to examine the suitability of the judicial decisions and statutory provisions on piercing the veil to expose the intention of parent companies who utilize subsidiaries to perpetuate fraud or impropriety or to escape liability. This analysis will be by comparatively examining the legal position in the United States of America (USA), the United Kingdom (UK) and Nigeria, under the new

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[1] R. Kabour "Revisiting the Inhibited Doctrine of Piercing the Corporate Veil in English Company Law" (2019) 9(2) *The King's Student Law Review*, pp. 59 – 73.
[2] [1897] AC 22.

Companies and Allied Matters Act 2020.[3] The company laws in these jurisdictions have all codified the rule in *Salomon* v *Salomon*.[4]

2.0. UNITED KINGDOM'S POSITION ON THE DOCTRINE OF SEPARATE LEGAL PERSONALITY

The principle of separate corporate personality in its modern form is traceable to English law. However, this rule existed before *Salomon's case*. The idea of separate legal personality is traceable to the era of the evolution of joint stock companies which already existed as separate entities from members who have put funds together to facilitate the objects of such a company. Hence, even writers such as Brice[5] and Kyd[6] acknowledged the separate personality principle in defining a "company". The judicial recognition for this principle came in the 1836 case of *R* v *Arnaud*.[7] Further recognition was given under the Companies Act 1862, which states in section 6 that a registered company is separate from its members. A writer argues that before *Salomon*, the principle that a corporation is a separate legal entity was fully developed.[8] However, the modern corporate law, especially with respect to limited liability, separate legal personality, and the importance of debentures in company capitalization are traceable to *Salomon* v *Salomon*, making the case one worthy of discussion.

In *Salomon's case*, Aron Salomon sold his businesses to a newly formed entity for 21,000 shares valued at £1 per share; £6,000 in cash and £10,000 in debentures. He was one of the shareholders and his wife and 5 children were also shareholders of a share each. He used his debenture as security for a loan of £5,000 from Broderip, who was reissued debenture worth £10,000. After Broderip sued to enforce

[3] Company and Allied Matters Act 2020.
[4] *Ibid*.
[5] S. Brice, *A Treatise on the Doctrine of Ultra Vires: Being an Investigation of the Principles Which Limit the Capacities, Powers, and Liabilities of Corporations, and More Especially of Joint Stock Companies* (Stevens and Haynes: 1874).
[6] S. Kyd, *A Treatise on the Law of Corporations* vol. 1 (London, 1793), p. 13.
[7] *R* v *Arnaud* [1846] 9 QB 806.
[8] P. Lipton, "The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective" (2014) 40(2) *Monash University Law Review*, p. 455.

the obligations under the debenture and claimed what was due to him, leaving £1,055 to Mr. Salomon, a liquidator was appointed. The Liquidator then sought to enforce the loan due to the company's creditors worth £7,733 against Mr. Salomon, arguing that the company was not separate from him and that he was to indemnify the company. In the High Court, Vaughan Williams J. found for the liquidators, holding that the company was not separate, but was an alias of Mr. Salomon and his agent. Thus, Mr. Salomon was legally obliged to indemnify his agents by personally paying for the loan. The Court of Appeal upheld this judgment, calling the company a sham, myth, fiction, device, and stratagem, amongst others, created in abuse of corporate form and legislative intent and controlled by Mr. Salomon, with dummy shareholders. The court also opined that a trust relationship existed between Mr. Salomon and the company. The House of Lords was however keen on upholding the separate personality of the company, by overturning the previous decisions. Although Mr. Salomon can be said to have controlling interests, Lord Macnaghten opined that nothing stopped him from doing so under the law. Lord Herschell further noted that the statute only requires seven shareholders and provides nothing as to volume of control. Also, no trust or agency relationship existed in the opinion of the law Lords. The rule created by the House of Lords was to uphold the sanctity of the rule of corporate personality, which had the effect of creating a "corporate veil" between members of the company and outsiders. The effect is that the company can exercise various rights, including the right to sue and be sued in its corporate name, the right to enter contracts, the right to hold property,[9] and perpetual succession.[10] Notably, the rule has received both judicial and legislative affirmation.[11]

Despite its emphasis on the sanctity of the corporate form, *Salomon* v *Salomon* also exposed the fact that the sacred corporal veil can indeed be pierced, but the House of Lords found no reason to do so in that case. However, courts in subsequent cases and even the legislature

[9] *Tate Access Floors Inc.* v *Boswell* [1991] Ch 512; *Macaura* v *Northern Assurance Co Ltd* [1925] AC 619.
[10] M. Welters, "Towards a Singular Concept of Legal Personality" (2013) 92 La Revue Du Barreau Canadien, pp. 418 and 425.
[11] UK Companies Act 2006, section 16(3); *Short* v *Treasury Commissioners* [1948] 1 KB 116 122, per Evershed LJ.

have found the need to pierce the corporate veil in certain instances, which are seen as exceptions to the rule of separate legal personality. Hence there are legislative and judicial grounds for piercing the veil. The legislative exceptions include:

1. The imposition of liability on all persons who knowingly traded fraudulently to defraud creditors in the process of winding up;[12]
2. Failure to obtain a trading certificate;[13]
3. Criminal liability for failure to use company's name on relevant documents;[14]
4. Moving the assets of an insolvent company to a new one which has wholly or partly same directors and in some cases the same name;[15] and
5. Wrongful trading.[16]

On the other hand, the judicial grounds include:

1. Where an agency exists between the company and said member(s);[17]
2. Where fraud is perpetrated, and the company exists as a mere façade;[18] abuse of corporate form;[19]
3. Where the motive or opinion of a person is material in determining enemy character;[20]
4. In tort and criminal cases, for the purpose of imposing liability on those who are the directing mind and will of the company;[21]

[12] UK Companies Act 2006, section 993; UK Insolvency Act 1986, section 213; *Re Maidstone Building Provisions Ltd.* [1971] 1 WLR 1085; *Re Augustus Barnett & Son Ltd.* [1986] BCLC 170.
[13] Companies Act 2006, section 761.
[14] *Ibid*, at section 84.
[15] UK Insolvency Act 1986, section 216
[16] *Ibid*, at section 214; *Re Continental Assurance Co of London plc* [2007] 2 BCLC 287.
[17] *Re FG (Films) Limited* [1953] 1 WLR 483; *Southern* v *Watson* [1940] 3 All ER 439.
[18] *Gilford Motor Co.* v *Horne* [1933] Ch 935; *Jones* v *Lipman* [1962] 1 WLR 832.
[19] *Re Bugle Press Ltd* [1961] Ch 270.
[20] *De Beers Consolidated Mines* v *Howe* [1907] UKHL 626; *Daimler Co. Ltd.* v *Continental Tyre & Rubber Co Ltd.* [1916] 2 AC 307.
[21] *Lennard's Carrying Co. Ltd.* v *Asiatic Petroleum Co. Ltd.* [1915] AC 705; *R* v *Kite and OLL Ltd.* [1996] 2 Cr AppR. (S).

5. To avoid injustice;[22] and
6. Where maintaining the veil will lead to evasion of tax or revenue obligations.[23]

Another ground for lifting the veil is to expose the economic realities of an enterprise. Thus, English Courts are willing to lift the veil between the parent/holding companies and outsiders[24] where the latter has been used as an instrumentality of the former. In *DHN Food Distributors Ltd* v *Tower Hamlets LBC*,[25] Lord Denning MR opined that the justification for treating a holding company and its subsidiaries as a single entity is because they are treated as one under law especially as regards general accounts, profit and loss accounts, and balance sheet. However, the Court of Appeal in *Adams* v *Cape Industries Plc*[26] refused to treat Cape and its American subsidiary, NAAC, as one entity as the law contemplates such separate existence.

As earlier noted, the English position on piercing the veil is more restrictive than that of its American counterpart. However, this restrictive approach was made even narrower in the recent cases of *Prest* v *Petrodel Resources Limited and Others*[27] and *VTB Capital plc* v *Nutritek International Corp and Others*.[28] In both cases, the English Supreme Court per Lords Sumption and Neuberger, respectively, limited the circumstances under which the veil would be pierced to where a person with an existing legal obligation, liability or subject to a legal restriction evades or frustrates such liabilities by interposing a company which such a person controls. Thus, the extension of the principle was cautioned, noting that rather than extend the principle in all cases, the courts can employ other areas of law such as tort, agency, and trust to achieve the intended aim and hold member(s) liable.[29] The Supreme Court in *Prest* approved the decision in *Adams* v

[22] *Creasey* v *Breachwood Motors* [1993] BCLC 480.
[23] *Re FG (Films) Limited*, *supra* n 17.
[24] L.C.B. Gower, *The Principles of Modern Company Law 3rd ed.* (Stevens: 1969), p. 216.
[25] *DHN Food Distributors Ltd.* v *Tower Hamlets LBC* [1976] 1 WLR 852.
[26] *Adams* v *Cape Industries Plc* [1990] Ch 433.
[27] *Prest* v *Petrodel Resources Limited and Others* [2013] UKSC 34.
[28] *VTB Capital plc* v *Nutritek International Corp. and Others* [2013] UKSC 5.
[29] W. McArdle and G. Jones, "Prest v Petrodel Resources and VTB Capital v Nutritek: a Robust Corporate Veil" (2013) 14(3) *Business Law International*, p. 295.

Cape Industries Plc,[30] thereby establishing that as the current position on the application of the doctrine of "piercing the veil" to holding companies.

3.0. UNITED STATES' (CALIFORNIA) POSITION ON THE DOCTRINE OF SEPARATE LEGAL PERSONALITY

The principles of separate legal personality and the exceptions warranting piercing the corporate veil are not novel or strange to American jurisprudence,[31] and have been the subject of litigation for years, especially before the Californian courts.[32] As explained by Murray A. Pickering, this separate legal personality has three implications.[33] First, the company has the necessary legal capacity to carry out its objects, subject to restrictions by its Memorandum and Articles of Association.[34] Secondly, the company has the same contractual and proprietary rights enjoyed by natural persons and finally the company is accorded full procedural capacity.[35]

The principle of separate legal personality is codified in section 17701.04(a) of the Californian Revised Uniform Limited Liability Company Act,[36] which provides that a limited liability company is an entity which is distinct from its members. In interpreting a similar provision, the Central District Court of California in *NFT Parcel A LLC* v *Marix*[37] held against the argument that Palm Desert, a debtor company, was only an instrumentality of the defendant and as such, the latter should be liable for the loans of the company as a guarantor.

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[30] *Supra* n 26.
[31] P. Blumberg, "The Corporate Personality in American Law: A Summary Review" (1990) *38 American Journal of Comparative Law*, p. 49.
[32] *Minton* v *Cavaney* (1961) 56 Cal 2d 576.
[33] M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31(5) *The Modern Law Review*, pp. 481 and 502.
[34] *Trustees of Dartmouth College* v *Woodward* (1819) 17 US (4 Wheat), pp. 518 and 636.
[35] *Supra* n 31.
[36] California Revised Uniform Limited Liability Company Act (2012) [17701.01 - 17713.13] Codified in the California Corporations Code (Title 2.6 added by Stats 2012, Chapter 419, section 20).
[37] *NFT Parcel A LLC* v *Marix*No EDCV 09-287-VAP (VBKX) 2009 WL 5215373 (CD Cal 2009).

The Court was of the opinion that as a limited liability company, Palm Desert was primarily liable for its debts unless the grounds on which liability will be attributed to its members is proved. Despite the sanctity of the rule, California courts were ready to disregard the corporate veil which shielded the members of a company. Professor Gower noted that despite the rule originating from England, US courts showed a greater tendency to lift the veil enunciated in *Salomon* v *Salomon*.[38] This assertion was not far-fetched. The willingness of the Californian courts to pierce the corporate veil, relying on the "alter ego" or "instrumentality doctrines", was seen in the 1921 case of *Minifie* v *Rowley*[39] where the California Supreme Court opined that corporate laws will not be misused by the formation of sham entities or the commission of fraud and other misdeeds. Hence, the court will input liability on the members of a company shown to be used for fraud, impropriety or to escape liability, by regarding the company as a collection of said individuals.[40]

As a result, Californian courts developed a two-pronged test for applying the alter ego doctrine in piercing the corporate veil,[41] which are: the existence of unity of interest and ownership between the entity and owners, to deny the former separate personalities;[42] and that an inequitable result or injustice[43] must be shown to arise if liability for the act complained of is solely borne by the company.[44] With respect to the first leg, the court in *Arnold* v *Browne*[45] provided a long list of instances where unity of interest will be presumed, including:

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[38] L.C.B. Gower, "Corporation Law in England and America" (1955) 4(3) *UCLSR*, p. 4.
[39] *Minifie* v *Rowley* (1921) 87 Cal 481, 673.
[40] *Re International CabCompany* No 98-30535-WDM Chapter 7 (Bankr ND Cal 1999).
[41] *Automotrizetc De California* v *Resnick* (1957) 47 Cal 2d 792, 796 [306 P2d 1 63 ALR 2d 1042].
[42] J.R. Cambridge, "Piercing the Veil of a Michigan Limited Liability Company" (2003) *The Michigan Business Law Journal*, pp. 18 and 20.
[43] *Mesler* v *Bragg Management Co.* (1985) 39 Cal 3d 290 Cal Rptr 443; *NEC Electronics, Inc.* v *Hurt* (1989, 6th Dist) 208 Cal App 3d 772, 256 Cal Rptr 441.
[44] *Robbins* v *Blecher* (1997) 52 Cal App 4th 886; *Supra* n 41; *Sonora Diamond Corp* v *Superior Court* (2000) 83 Cal App 4th 523, 539.
[45] *Arnold* v *Browne* (1972) 27 Cal App 3d 386, 103 Cal Rptr 775.

1. Under-capitalization;
2. Where funds and asserts are diverted;
3. Utilization of corporate structure as a mere form;
4. Blending of funds and assets;
5. Where members treat corporate assets as theirs or diversion of assets to the detriment of creditors;[46]
6. The existence of an identical equity ownership in two entities;
7. Identical officers and directors in both the controlling and controlled entities,
8. Non-maintenance of minutes;
9. Non-existence of corporate assets;
10. Same office location, same employees; abuse of, or non-compliance with corporate formalities,[47]
11. Formation of the corporation as a mere shell;
12. Existence as an instrumentality for the activities of a separate corporation; unjustifiably concealing information on management, ownership, personal business activities, and financial interests;
13. Non-maintenance of arm's length relationships with related entities;
14. Formation of company to procure labour or merchandise for another entity;
15. Formation to carry out illegal transactions; concentration of assets in a company and liabilities in another; and
16. Formation of a company to avoid liability or impose liability on it.

The Californian position is more liberal compared to that of the UK, as will be shown subsequently. This is traceable to the liberal attitude of the American courts to corporate law principles emanating from English law. Notably, the instances captured by the decision in *Arnold*[48] mirror the happenings in an important area of modern corporate law and practice requiring the veil to be pierced, that is, the relationship between parent/holding companies and subsidiaries. Most companies incorporate subsidiaries for reasons ranging from carrying out certain

[46] *Stinky Love Inc* v. *Lacy* No B163377 (Cal App 2004); WL 1803273 (Cal App 2004).
[47] *Peinado* v *Barnett* (2001) WL 1380441 (Cal App 1 Dist 2001).
[48] *Supra* n 45.

transactions to shielding itself from liabilities and even to perpetuate fraud. Regrettably, these subsidiaries are not vested with the volume of assets to satisfy obligations owed to innocent third parties. Are the courts willing to pierce the corporate veil and hold the parent companies liable in such instances?

For instance, Powell[49] argues that the veil of a subsidiary can be pierced to impose liability on its parent company if the subsidiary is a mere instrumentality, that is under the control and domination of the parent company, or if the aim of such control is to utilize the subsidiary in perpetuating wrongful, unjust act or fraud against the plaintiff and that unjust loss must be suffered by the plaintiff from the defendant's conduct.[50] Notably, Powell's postulation revolves around the same factors employed by the courts to pierce the corporate veil and the most defining word used by the courts is "control".[51] The key relationships as stated in *McLaughlin* v *L Bloom Sons Co.* include control, instrumentality, agency, conduit or one corporation being an adjunct of another.[52] In *Mesler* v *Bragg Management Co.*,[53] the Supreme Court of California addressed the issue relying on the traditional two-pronged test for accepting the alter ego argument, stating that all that is required is to substitute the word "individual" for "corporation" where there is an abuse of the separate legal personality.[54] Explaining the policy behind the "alter ego" principle, the court noted that the control, agency and instrumentality between both corporations must be examined before liability is imposed to reach an equitable result which is just. Hence, the reason for imposition of liability on the parent company for acts of its subsidiary should not be based on the fact that they are one, but that a hole will be drilled through the wall of limited liability erected by a corporate form, where the wall is used for all purposes asides that which it was erected for. This principle was

[49] F.J. Powell, *Parent and Subsidiary Corporations: Liability of a Parent Corporation for the Obligations of its Subsidiary* (Callaghan: Chicago, 1931), pp. 4 – 6.
[50] *Lowendahl* v *Baltimore & OR Co.* 287 NYS 62, 76 (NY App. Div. 1 1936).
[51] W.J. Rands, "Domination of A Subsidiary by A Parent" (1999) 32 *Indiana Law Review*, pp. 421 and 434.
[52] *McLaughlin* v *L Bloom Sons Co.* (1962) 206 Cal. App. 2d 848.
[53] *Mesler* v *Bragg Management Co, supra* n 43.
[54] The Court cited: Comment, "Corporations: Disregarding Corporate Entity: One Man Company" (1925) 13(3) *California Law Review*, pp. 235 and 237.

recently restated in *Tran* v *Farmers Group Inc.*[55] As earlier stated, the factors formerly considered apply here, especially the existence of identical or same officers, directors, ownership, employees, offices, under-capitalization, and combination of funds.[56] The Californian position is quite extensive.

4.0. NIGERIA'S POSITION ON THE DOCTRINE OF SEPARATE LEGAL PERSONALITY

The Nigerian position on corporate personality is codified in section 42 of the Companies and Allied Matters Act 2020, which also states the rights accompanying this status.[57] The implication is that companies under the Nigerian law have rights and liabilities which are separate from that of its members.[58] In *Marina Nominees Ltd.* v *FBIR*,[59] the court, relying on *Salomon*, upheld the corporate personality of the appellant company, which was incorporated to carry out secretarial duties for a company named Peat Marwick Casselton Elliott & Co., despite using the same staff as the latter and even being run by partners from the latter company.

However, the principle has similar exceptions to those under English law which warrants the piercing of the corporate veil. Like the UK position, the exceptions are legislative and judicial. The legislative exceptions include: the liability of directors for debts arising in the period which a company failed to carry on business with at least two members;[60] operating below the authorized number of directors;[61] carrying out business recklessly during winding-up procedure with intent to defraud creditors;[62] wrongful trading;[63] personal liability for

[55] *Tran* v *Farmers Group Inc.* (2002) 140 Cal. App. 4th 1202.
[56] *Shaoxing County Huayue Import & Export* v *Bhaumik* (2011) 191 Cal. App. 4th 1189; *Brooklyn Navy Yard Cogeneration Partners LP* v *Superior Court* (1997) 60 Cal. App. 4th 248.
[57] Companies and Allied Matters Act 2020, section 42.
[58] J.E.O. Abugu, *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers Limited: 2014), p. 181.
[59] *Marina Nominees Ltd.* v *FBIR* [1986] 2 NWLR (Pt. 20) 40.
[60] Companies and Allied Matters Act 2020, section 118.
[61] *Ibid*, at section 271.
[62] *Ibid*, at section 672.
[63] *Ibid*, at section 673.

failure to use the company's name in signing relevant documents;[64] liability of officers for the fraudulent application of money collected for special purposes or a project, where a fraudulent intention is shown in the collection of the money;[65] and the imposition of a duty on the directors of a holding company to prepare group financial statements to cover the individual financial statements of subsidiaries.[66] The last exception is a solid justification for the recognition of parent companies and subsidiaries as one entity.

On the other hand, the courts will be willing to pierce the corporate veil in the following instances: where there is fraud and impropriety in the formation of the said company;[67] where there is an abuse of the corporate form;[68] where the application of the doctrine of separate legal personality will lead to the evasion of taxes or other revenue obligations;[69] where an agency is in existence between two companies;[70] to ascertain the residency of a company for the purpose of taxation;[71] in the interest of justice;[72] and where the companies are one unit in reality, an exception applicable to the relationship between parent companies and their subsidiaries.[73]

Whilst noting the resemblance between the Nigerian and English positions, it will be expected that restraint will be applied by the Nigerian courts before piercing the corporate veil. However, the readiness of Nigerian courts to pierce the veil is alarming. The observation of this writer is that the Nigerian courts will be willing to pierce the veil at any instance where it seems an injustice will be done, rather than going behind this veil to hold the officers who have acted improperly liable, maintaining the sanctity of the principle of separate

[64] *Ibid*, at section 729(3)(a).
[65] *Ibid*, at section 316.
[66] *Ibid,* at section 379.
[67] *Adeyemi* v *Lan and Baker Nigeria Ltd.* (2000) 7 NWLR (Pt 663) 33; *PFS Ltd.* v *Jefia* (1998) 3 NWLR (Pt 543) 602.
[68] *Supra* n 58.
[69] *Marina Nominees Ltd.* v *FBIR, supra* n 59.
[70] *Supra* n 58.
[71] *Pan African Co. Ltd.* v *National Insurance Co. (Nig.) Ltd.* (1982) All NLR (Reprint) 229.
[72] *International Offshore Construction Ltd.* v *Shoreline Lifeboats Nigeria Ltd.* (2003) 16 NWLR (Pt. 845) 157 CA.
[73] *Supra* n 58.

legal personality. For instance, in *Mezu* v *Co-operative and Commercial Bank (Nig.) Limited*,[74] the contradictory statement by Dr. Mezu as to his ownership of the land to be sold by the respondent did not warrant the piercing of the appellant company's corporate veil as the Court should have invoked the doctrine of estoppel instead. But the court cited *Jones* v *Lipman*, assuming that the facts were similar, thus mandating the piercing of the corporate veil. This does not reflect the caution opined by Lord Sumption in *Prest*.[75]

With respect to the relationship between a parent/holding company and its subsidiary, the Nigerian courts have also shown a willingness to disregard the corporate personality of the subsidiaries and regard both the parent company and its subsidiaries as one unit. In *Union Beverages Ltd.* v *Pepsi Cola International and others*,[76] the Supreme Court of Nigeria noted that if two companies were shown to be one, for all intent and purpose, then the court will pierce the corporate veil to hold the companies liable for the actions of the other. In all, the position on corporate personality differs in the three common law jurisdictions examined.

5.0. CONCLUSION

The independence of companies is a necessity for its operations. This assertion influenced the establishment of the principle of separate legal personality. However, the excessive reliance on the principle became an instrument of fraud and impropriety, thus necessitating the need for checks by the courts and the legislature. Despite being common law jurisdictions, the approach of US (California), UK, and Nigeria to limiting the application of this principle differs. The UK courts appear to be keen on restricting the interference with a company's legal personality, a position which is understood, noting the reason why that status is conferred on corporate entities. However, such a restrictive approach is not the best, especially because group structures are being used to perpetrate fraud and impropriety. The instances where the court will pierce the veil must also evolve as

[74] *Mezu* v *Co-operative and Commercial Bank (Nig.) Limited* [2013] 3 NWLR (pt1340) 188.
[75] *Prest* v *Petrodel Resources Limited and Ors*., *supra* n 27.
[76] *Union Beverages Ltd.* v *Pepsi Cola International and others* (1994) 2 SCNJ 157.

modern devices emerge, else the veil will become an ever-growing wall which shields impunity. Furthermore, the circumstances under which the Nigerian courts will lift the veil of incorporation for the purpose of paying regards to the economic realities behind the legal facade of incorporation are well defined. They include: where the number of members fall below the statutory minimum; where the company has been carried on in a reckless manner or with intent to defraud creditors; and where the company is a sham. Although the foregoing is not exhaustive of the circumstances under which the Nigerian courts will lift the veil of incorporation, the common trend in all the circumstances is that the company involved must have been guilty of some improper conduct to warrant the lifting of the veil to see who was behind the improper conduct.

THE VIABILITY OF WINDING-UP PROCEEDINGS AS A MECHANISM FOR DEBT RECOVERY UNDER NIGERIAN LAW

By Hannah Ozieme [*]

1.0. INTRODUCTION

Debt is an inevitable offshoot of the business ecosystem. To fund day-to-day operations and long-term goals, companies typically take on some degree of debt financing, usually by way of loans. In some instances, these companies are unable to fulfil their repayment obligations to the lenders or creditors from whom the loans are obtained, which necessitates the lenders to take steps to recoup the unpaid sums.

Debt recovery encompasses the various techniques enlisted by a creditor to recoup an unpaid sum. Although there are many debt recovery mechanisms available under Nigerian law, it is not unusual for creditors to adopt winding-up proceedings as a medium of debt recovery. This paper is not exhaustive of the law on winding-up of companies in Nigeria. However, it extensively analyses the utilitarian value of employing winding-up proceedings as a technique of debt recovery under Nigerian law, highlighting its pitfalls and challenges.

This paper concludes that as an insolvency procedure, the aim of winding-up a company is to liquidate and thereafter terminate its existence and not solely to recover debt. Hence, whilst the process of winding-up a company involves settling its collective debt obligations, thus presenting a window of opportunity for individual creditors to recoup outstanding debts, it cannot *stricto sensu* be said to be a mechanism for debt recovery. Therefore, depending on the peculiarities of the creditor in question, winding-up proceedings may not be a feasible mode to recover debt in Nigeria.

[*] Email: hannahozieme@gmail.com.

2.0. WINDING-UP OF COMPANIES

2.1. Meaning of Winding-up

Winding-up refers to the process of liquidating and dissolving a company. The objective of winding up proceedings is to liquidate the assets of a company, distribute same according to the legal rules of priority, and thereafter terminate the life of the company.[1]

From the foregoing, two stages of winding up can be highlighted, namely:

a. The Liquidation stage; and
b. The Dissolution stage.

In the case of *Spring Bank Plc.* v *A.C.B. International Bank Plc.*,[2] the Court ratiocinated that the liquidation of a company and the dissolution of the company are two separate concepts. The winding-up of a company is characterized by the administration of a company's property for the benefit of all its creditors and members, which eventually leads to the dissolution of the company. On the other hand, the dissolution of the company terminates the legal existence of the company.

It is essential to understand the distinction between these two stages to appreciate the legal implications of each stage on the legal personality of the company and the propriety or otherwise of its activities.

2.1.1. The Liquidation Stage

Liquidation is the process of gathering the assets of a company for the purpose of determining its collective debt obligations and settling the debts so determined according to the legal rule of priority. A company is said to be in liquidation where a winding-up order has been made or a liquidator has been appointed over its affairs. It is pertinent to note that while a company is in liquidation, it still retains its legal personality and as such can exercise all rights which accrue to it as a legal entity, subject to restrictions imposed by law. For instance,

[1] In essence, it refers to the procedure of gathering the assets of a company, settling the outstanding debts of such company (if there are any) in the order prescribed by law, with the aim of dissolving the company.
[2] (2016) 18 NWLR (Pt. 1544) 245.

where a winding up order is made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of court.[3] This provision does not oust the right of the company to be sued; it implies that an action is maintainable against the company once the leave of court is obtained.[4] The company also retains its right to sue or proceed against others.[5] From the foregoing, it is apparent that a company in liquidation is alive, although it is said to be ill.

2.1.2. The Dissolution Stage

A dissolved company has no legal personality and consequently no rights. The law does not recognize its existence. This is because an order of dissolution effects to extinguish the life of the company. The company is said to be dead at this stage.

It is instructive to note that winding-up is not exclusive to insolvent companies. For instance, a solvent company may voluntarily wound-up its affairs, having achieved the objective for its creation.

2.2. Statutory Framework

Winding up proceedings are sui generis. The following are the key laws which regulate winding-up proceedings in Nigeria:

1. The Companies and Allied Matters Act, 2020 (the Act) is the principal legislation which regulates the operation of companies in Nigeria. It repealed the Companies and Allied Matters Act, 1990 (the Repealed Act).
2. Companies Winding-up Rules, 2001 (the Winding-up Rules).
3. The Federal High Court (Civil Procedure) Rules, 2019, which regulates the service of processes in winding-up proceedings. It also applies where there is a lacuna in the Winding-up Rules.[6]

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[3] *Companies and Allied Matters Act* (CAMA) 2020, section 580.

[4] In *Abekhe* v *NDIC* (1995) 7 NWLR (Pt.406) 228 (pp. 242-243, paras. G-D), the court, setting out some instances when a company can be proceeded against where a winding-up order has been made, held that leave to commence or proceed with an action against a company under a winding-up does not at all depend on whether the reliefs sought are such that they are within the contemplation of the winding-up which a liquidator is statutorily empowered to deal with.

[5] *AADE Ltd.* v *MV N. Reefer* (2009) 12 NWLR Pt. 1155) 255 (SC).

[6] See rules 12 and 183 of the Winding-up Rules.

In the event of a conflict between the Winding-up Rules and the Federal High Court Rules, the Winding-up Rules will prevail.

Other sector-specific laws may apply in addition to the above, depending on the industry of the company in question.

2.3. Key Terms in Winding-up Proceedings

1. Official Receiver: An Official Receiver is the Deputy Chief Registrar of the Federal High Court, or any other person designated for that purpose by the Chef Judge.[7]
2. Liquidator: A person appointed to administer the assets of a company, distribute same, and settle all debt claims against the company before bringing an end to the life of the company. He acts for the benefit of all the creditors and contributories.[8] The powers of the directors of the company cease upon his appointment.[9]
3. Provisional Liquidator: A person who acts as a liquidator pending the appointment of the main liquidator.[10] Any liquidator appointed after the presentation of a Petition to wound-up a company but before a winding-up order is made is a provisional liquidator.[11]
4. Committee of Inspection: a committee which consists of creditors and contributories or other persons to whom the creditors or contributories donate a power of attorney.[12] They assist and checkmate the activities of the liquidator(s).
5. Special Manager: A person whose expertise is employed by the Liquidator to assist in the administration of the company's estate.[13]

[7] CAMA 2020, section 582.
[8] See section 588, CAMA 2020, for the powers of the liquidator.
[9] CAMA 2020, section 585(9).
[10] Also, where a winding up order is made and no liquidator has been appointed, the official receiver may be appointed a provisional liquidator. See section 585, CAMA 2020.
[11] CAMA 2020, section 585(2).
[12] CAMA 2020, section 597.
[13] CAMA 2020, section 599.

2.4. Modes of Winding-up under Nigerian law[14]

1. Winding-up by the Court (Compulsory Winding-up): As the name implies, this mode of winding-up is essentially regulated by the Court. Certain categories of persons may invoke this form of winding-up, including a creditor[15]. This mode of winding up forms the fulcrum of this paper.
2. Voluntary Winding-up: Section 620 of the Act sets out the circumstances under which a company may be wound up voluntarily. There are two variants of voluntary winding-up:
    a. Members Voluntary Winding-Up: it is instigated and regulated by the members of the company.
    b. Creditors Voluntary Winding-up: this form of voluntary winding-up is supervised by the company's creditors.
3. Winding-up subject to the supervision of Court: This form of winding-up takes place where the company initially resolves to wind-up voluntarily before the court is approached to supervise the winding-up.

2.4.1. Winding-up by the Court (Compulsory Winding-up)

The reasons or grounds upon which a company may be wound-up compulsorily are as follows:[16]

1. Where the company has by special resolution resolved that the company be wound up by the court;
2. Where a default is made in delivering the statutory report to the Corporate Affairs Commission (the Commission) or in holding the statutory meeting;
3. The number of the members of the company is reduced below two in the case of companies with more than one shareholder;
4. The company is unable to pay its debt;[17]

[14] CAMA 2020, section 564.
[15] Section 573(1), CAMA 2020, sets out the categories of persons who may present a petition for winding-up. The petition may be presented by all or any of those persons together or separately.
[16] Section 571, CAMA 2020, sets out the various grounds upon which a company may be wound-up compulsorily.
[17] This ground is further expounded below.

5. The condition precedent to the operation of the company has ceased to exist; or
6. The court is of the opinion that it is just and equitable that the company be wound up.

2.4.2. Implications of Commencing Winding-up Proceedings

Regardless of their outcome, winding-up proceedings have a grave impact on the operations of a company as a going concern. The mode of instigating compulsory winding-up proceedings is by filing a Petition to wound-up a company at the registry of the Federal High Court.[18] Winding-up proceedings is deemed to have commenced at the time of presenting the Petition for winding up. However, where a company resolves to be wound-up voluntary before the presentation of the Petition is made, the proceedings is deemed to have commenced at the time of passing the resolution.[19]

Upon commencement of winding-up proceedings, the following attendant implications apply:

1. All other actions or proceedings instituted or pending in any court against the company may, upon the application of the company, any creditor or contributory, be stayed or referred to the court hearing the winding-up Petition.[20]
2. All dispositions of the assets of the company, including its choses in action or any transfer of its shares or alteration in the status of its members are deemed void, unless the court orders otherwise.[21]
3. All attachment, sequestration, distress, or execution put in force against the estate or effect of the company are deemed void.[22]

[18] The Federal High Court is the court with jurisdiction to hear winding up proceedings. The relevant division of the Federal High Court is that within whose area of jurisdiction the registered office or head office of the company sought to be wound-up is situate. See Sections 570, CAMA 2020.
[19] CAMA 2020, section 578(2).
[20] CAMA 2020, section 575.
[21] CAMA 2020, section 576.
[22] CAMA 2020, section 577.

2.4.3. Procedure for Compulsory Winding-Up

1. Presentation of Petition**:** The Petition is presented at the Federal High Court as in Forms 2, 3 or 4 in the Appendix to the Winding-up Rules by any of the categories of persons mentioned in section 573 of the Act, which includes a creditor. The Petition must establish the ground upon which a winding-up order is sought. For instance, where the inability of the company to pay its debt forms the ground of the Petition, the petitioner must satisfy the conditions of inability to pay debt as prescribed by the Act. The time and place of the hearing of the Petition is detailed on the Petition by the Registrar.[23]
2. Filing of Verifying Affidavit: Within 4 days after filing the Petition, the petitioner or one of the petitioners, if more than one, shall swear and file an affidavit verifying the Petition as in Forms 7 or 8 of the Appendix to the Winding-up Rules. In the case of a Petition presented by a company, the affidavit shall be sworn by a director, secretary, or other principal member of the company.[24] It is not compulsory to file the verifying affidavit on the same day as the Petition,[25] thus a verifying affidavit filed within four days after the presentation of a Petition is competent, as well as a Petition presented without an accompanying verifying affidavit. Also, the time for filing the verifying affidavit may be extended by the Court.
3. Service of Petition on the Respondent: Where the Petition is not presented by the company, it is to be served on the company at its registered address (if any), or at the principal or last known principal place of business, if any, by leaving a copy with any officer, member, or servant of the company, if any can be found. Where no such officer, member or servant can be found, by leaving it at the registered address of the company or as otherwise directed by the Court.[26] Service is evidenced by an affidavit of service filed in forms 5 or 6.[27]

[23] See rules 15 and 16 of the Winding-up Rules.
[24] See rule 18 of the Winding-up Rules.
[25] See *Gateway Holdings Ltd* v *S.A.M. & T. Ltd*. (2016) 9 NWLR (Pt. 1518) 490.
[26] See rule 17 of the Winding-up Rules.
[27] See rule 17(2) of the Winding-up Rules.

The respondent is required to file a counter-affidavit in opposition to the Petition within 10 days of service of the Petition or for other interested persons, within 15 days after the advertisement of the Petition. Notice of the filing of the said counter-affidavit must be given to the petitioner or his solicitor on the day of such filing. The petitioner is required to file a reply affidavit within 5 days of receipt of such notice.[28]

4. Filing of an Application to Advertise the Petition by the Petitioner: It is instructive to note that save the Petition, all other applications made to the court in a winding-up proceedings, including the application to advertise the Petition, must be made by motion on notice.[29] Applications which do not adversely affect the right or obligation of the counter-party may however be made *ex parte*. [30]
5. Advertisement of the Petition: Where the court grants the petitioner's application to advertise the Petition, the advertisement is done in Forms 9 or 10 in the Appendix to the Winding-up Rules and is advertised in the gazette, one national daily newspaper, and one other newspaper, once or as many times as ordered by the Court, within 15 clear days before the hearing of the Petition. The object of advertisement is to put the creditors of the company on notice of the Petition.[31] The advertisement contains the date of presentation of the Petition, the name and address of the petitioner and his solicitor, and a directive that all persons who intend to appear at the hearing of the Petition should serve on the petitioner or his solicitor, a notice of such intention.[32]

   All persons who intend to appear on the hearing of the Petition must serve on the petitioner, a notice of such intention as in Form 12. This is required to be served not later than five days before the hearing.[33]

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[28] See rule 25 of the Winding-up Rules.
[29] See rule 4 of the Winding-up Rules.
[30] See *Ecobank (Nig.) Ltd.* v *Honeywell Flour Mills Plc.* (2019) 2 NWLR (Pt. 1655) 55 (SC).
[31] *Ezenwa* v *J. C. Ltd.* (1994) 7 NWLR (Pt. 356) 292.
[32] See rule 19 of the Winding-up Rules.
[33] See rule 23 of the Winding-up Rules.

6. Service of Petition on creditors and contributories within 2 days of requesting same and upon payment of the prescribed fee.[34]
7. Filing of Memorandum of Compliance by the Petitioner and Hearing to Show Compliance with the Winding-up Rules: This is to be done at the next adjourned date after the order to advertise the Petition is made. The Petitioner is required to satisfy the Court that the order of the Court in respect of the advertisement and service of the Petition has been complied with, and that the Affidavit verifying the Petition has been duly filed.[35] This is done by means of a Memorandum of Compliance filed before the said adjourned date.
8. Appointment of a Provisional Liquidator: The Court may appoint a provisional liquidator upon the application of the company, a creditor, or a contributory. Upon the appointment of such liquidator, the powers of the directors of the company shall cease, except the Court directs otherwise.[36] Where a provisional liquidator is appointed, the Registrar is required to serve on the Official Receiver, a copy of the order of Court appointing the provisional liquidator on the same day the order is made or within five days thereof.[37]
9. Filing of List of Persons Who Intend to Appear on the Hearing of the Petition: Before the hearing of the Petition, the petitioner is required to collate and file a list of the names and addresses of persons who have indicated their interest to appear on the hearing of the Petition in Form 13 of the Appendix to the Winding-up Rules.[38]
10. Hearing of the Petition: At the hearing of the Petition, the Court may dismiss the Petition, adjourn the hearing conditionally or unconditionally, or make any interim order or any such order that it deems fit.[39] Where a winding-up order is made, the company is said to be in liquidation. A winding-up

[34] See rule 20 of the Winding-up Rules.
[35] See rule 22 of the Winding-up Rules.
[36] See rule 21 of the Winding-up Rules and section 485 (1), (2) and (9), CAMA 2020.
[37] See rule 27 of the Winding-up Rules.
[38] See rule 24 of the Winding-up Rules.
[39] CAMA 2020, section 574.

order operates for the benefit of all the creditor and contributories of the company, as if the Petition were made on the joint Petition of a creditor and a contributory.[40]The leave of court is required to sue a company in liquidation.[41]

In practice, an order appointing a liquidator is usually made alongside the winding-up order. However, where no liquidator is appointed on the making of a winding-up order, the Official Receiver becomes the liquidator.[42] The Official Receiver shall then summon separate meetings of creditors and contributories in order to determine whether an application should be made to the Court for the appointment of a liquidator in place of the Official Receiver.[43] At these meetings, a decision is made as to whether or not an application should be made to the Court for the appointment of a Committee of Inspection. Sections 596 and 597 of the Act regulate the appointment and activities of the committee of inspection respectively.

11. Appointment of Liquidator: Where a new liquidator or liquidators are appointed, they are required to give notice of their appointment to the Commission, as well as security to the Court, for such appointment to become effective.[44] Upon appointment, the liquidator is mandated to gather the assets of the company and distribute same according to the legal order of priority. The powers of the liquidator are set out in detail under section 588 of the Act. It is instructive to note that certain categories of persons are disqualified from being appointed liquidators.[45]

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[40] CAMA 2020, section 581.

[41] See section 580, CAMA 2020. The grant of leave to commence or proceed against a company in liquidation is not dependent on whether the reliefs sought relate to the winding up proceedings. The circumstances in which proceedings would be allowed to continue against a company in liquidation are;

a. Where the company is a necessary party to an action; or
b. Where an action is the most convenient method of trying a question; or
c. Where the claim is for recovery of possession. See *Abekhe* v *N.D.I.C.*, *supra* n 4.

[42] CAMA 2020, section 585(3)(b).

[43] CAMA 2020, section 585(3)(c). It is instructive to note that more than one person may be appointed liquidator.

[44] CAMA 2020, section 585(1), (3)(d).

[45] CAMA 2020, section 676.

12. Publication of Notice of Appointment of Liquidator: Within 14 days of appointment, the liquidator is required to publish in the Federal Government Gazette or two daily newspapers and deliver to the Commission for registration, a notice of appointment.[46]
13. Forwarding of the Winding-up Order of the Court to the Commission: The company is required to immediately furnish the Commission with a copy of the winding-up order.[47]
14. Service of Notice of Winding-up Order on the Official Receiver by the Registrar of the Court: The registrar is required to serve on the Official Receiver in Forms 14 or 15, a copy of the order of Court appointing the provisional liquidator on the same day the order is made or within five days thereof.[48]
15. Delivery of a Statement of Affairs and Verifying Affidavit thereof to the Official Receiver, Setting out the Assets of the Company, as well as its Debts, Liabilities, Etc.: The said statement and verifying affidavit shall be made by a director and a secretary or any other person mentioned in section 583(2) of the Act.
16. Official Receiver's Preliminary Report: As soon as practicable after the winding-up order is made or upon receipt of the above-mentioned statement of affairs, the Official Receiver is required to submit a preliminary report to the court stating:
    - The amount of capital issued, subscribed and paid up, and the estimated amount of assets and liabilities;
    - The causes of the company's failure, if the company has failed;
    - Whether, in his opinion, further investigation is desirable as to any matter pertaining the promotion, formation or failure of the company.[49]
17. Filing of Affidavit Verifying Debt Claims by Creditors in Order to Prove Debt: Creditors are required to prove their debt unless the court directs otherwise. Debt is proven by means

[46] CAMA 2020, section 654.
[47] See section 579, CAMA 2020.
[48] See rule 27 of the Winding-up Rules.
[49] CAMA 2020, section 584.

of an affidavit verifying the debt, which is delivered or sent through post to the liquidator.[50] The liquidator examines the proof of debt so delivered and may admit or reject same.[51]

18. Settlement of Debt Claims by the Liquidator: The liquidator settles the outstanding debt claims of the company according to the legal order of priority listed below.[52]
    - Secured debts under a fixed charge;
    - Costs and expenses of winding up;
    - Preferential debts;
    - Secured debts under a floating charge;
    - Unsecured debts;
    - Distribution of balance among the equity-holders.
19. Release of the Liquidator: After successfully discharging the functions of the office, a liquidator may be discharged by the Court, on the strength of a report to be prepared by the Commission on the application of the liquidator.[53]
20. Dissolution of the Company: On an application by the liquidator after the winding-up of the affairs of the company, the Court shall order the dissolution of the company and the company shall be dissolved accordingly from the date of such order.[54] An order of dissolution signifies the end of the legal existence of the company.[55]

    It is instructive to note that within 2 years of its pronouncement, the said order of dissolution may be avoided by the Court upon the application of the liquidator, or any person interested. [56]

[50] *Akahall and Sons Ltd.* v *N.D.I.C.* (2017) 7 NWLR (Pt. 1564) 194. See also the provision of section 655 CAMA 2020, as well as rules 74 - 88 of the Winding-up Rules for the form and content of the affidavit verifying the debt.

[51] See the provisions of rules 89 – 101 for the procedure for admission and rejection of proof of debt by the liquidator, as well as the reversal and varying of the liquidator's decision by the Court.

[52] The legal order of priority is discoursed extensively below.

[53] CAMA 2020, section 595.

[54] CAMA 2020, section 617 (1).

[55] See *Spring Bank Plc.* v *A.C.B. International Bank Plc.*, *supra* n 2.

[56] CAMA 2020, section 691.

21. Forwarding of order of dissolution by the liquidator to the Commission within 14 days of the pronouncement of the order.[57]

3.0. WHETHER WINDING-UP PROCEEDINGS IS A VIABLE MECHANISM FOR RECOVERING DEBT UNDER NIGERIAN LAW

By virtue of section 571(d) of the Act, a company may be wound-up compulsorily by the Court for inability to pay its debt. This provision insinuates the existence of a debtor-creditor relationship between the company and a creditor. A creditor is one of the persons who are entitled to present a Petition for winding-up.[58]

Section 572 stipulates the circumstances under which a company would be deemed to be unable to pay its debt as follows:

a. a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N200,000, then due, has served on the company, by leaving at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
b. execution or other process issued on a judgement, act or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
c. the Court, after considering any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts.

The circumstance which is most directly relevant to this discourse is paragraph (a) above – the inability of a company to pay its debt.

The elements of paragraph (a) above, which a creditor must satisfy, are set out as follows:

1. Existence of a debt in excess of N200,000;

[57] CAMA 2020, section 617(2).
[58] CAMA 2020, section 573.

2. The debt is due;
3. A formal demand (statutory demand) written personally by the creditor has been served at the company's head office or registered office;
4. The company is unable to pay the debt within three weeks.

It is apparent that the above elements paint an incident for recovery of outstanding debt by a creditor. Thus, the question arises whether a creditor to whom a company is indebted to in a sum exceeding N200,000, which is due and payable, may enlist winding-up proceedings as a mechanism to recover such debt.

It is instructive to note that the essence of winding-up proceedings is to liquidate a company and thereafter bring its life to an end and not to enforce or recover a debt. Hence, the pugnacious attitude of the Court to the use of winding up proceedings as a tool for debt recovery is no surprise. Such Petitions are liable to being struck out by the Court.

In the case of *Oriental Airlines Ltd.* v *Air Via Ltd.*,[59] the court held that the relief sought in a winding up Petition is not one for recovery of debt or for breach of contract but one for winding up of a company on account of insolvency or inability to pay debt.

In *Tate Ind. Plc.* v. *Devcom M.B. Ltd.,*[60] the court held that the procedure for the winding up of a company should not be converted to a procedure for debt collection in circumvention of the established legal procedure for instituting action in appropriate court for the collection of debt.

Debt recovery is not a relief that can be sought in a winding-up petition. However, the possibility of a creditor recovering an outstanding debt in the process of winding up a company is not extinct. This is because the process of liquidation (which is a necessary incident of the winding-up procedure) involves distributing the assets of the company in accordance with the provisions of law, thus creating a possible pathway for repayment of an outstanding debt to a creditor.

[59] (1998) 12 NWLR (Pt. 577) 271 (CA).
[60] (2004) 17 NWLR (Pt. 901) 182 (CA).

3.1. Factors that Determine the Viability of Employing Winding-up Proceedings as a Tool for Debt Recovery under Nigerian Law

Some significant factors which may frustrate the use of winding-up proceedings as a tool for debt recovery are as follows:

a. Bona fide opposition to debt;
b. The legal order of priority;
c. Time factor.

A bona fide opposition to debt may forestall the winding-up proceedings. This is because the law is trite that a winding-up order cannot be founded on a disputed debt.[61] In the case of *Onochie* v *Alan Dick Co. Ltd.*,[62] the Court of Appeal stated thus;

> In a petition for winding-up, once there is a bona fide dispute as to whether a debt is owed, it would not be the function of the trial court to determine whether there was in fact a debt. In other words, the court will not resolve the dispute, as a determination would only be necessary if the petitioner is working a claim for debt owed.

The ground of opposition to the debt must be genuine and substantial. The manner of disputing the debt should be determined by the form of allegation set forth. Where the petitioner avers to facts without supporting same with substantial documentary evidence, a mere denial would suffice. However, where the petitioner pleads documentary evidence to support his averments, the company would be required to substantiate its denial with more compelling contradictory evidence.[63] For instance, a respondent company which acknowledges a debt but alleges that same has been settled would be required to

[61] Please see the cases of *Hansa International Construction Ltd.* v *Mobil Producing Nigeria* (1994) 9 NWLR (Pt. 366) 76) and *Air Via Ltd* v *Oriental Airlines Ltd*., *supra* n 59.
[62] (2003) 11 NWLR 9 (pt. 832) 451 (CA).
[63] See K. Udofia, "An Analysis of the Judicial Approach to Disputed Debts in Winding-up Proceedings in Nigeria", available at https://www.financierworldwide.com/an-analysis-of-the-judicial-approach-to-disputed-debts-in-winding-up-proceedings-in-nigeria#.YoCbrtrMJEb (accessed 1 May 2020).

substantiate its assertion with proof of payment of such documents by way of bank draft, receipt, etc.

The probable methods of responding to an allegation of indebtedness by a petitioner are as follows:

i. Admit the debt;
ii. Dispute the debt;
iii. Counterclaim against the debt;
iv. Set-off against the debt.[64]

A company against whom a petition for winding-up is presented on the ground of inability to pay its debt may dispute such allegation of indebtedness in any of the following ways;

a. Totally denying the existence of the debt;
b. Concede that a debt had been created but same has been settled;
c. Concede that a debt had been created but same is not due and payable;
d. Contest the accuracy of the sum of its indebtedness. Where the company maintains that the sum of its indebtedness as alleged by the creditor is inaccurate, and goes further to admit the existence of a debt, a Petition for winding up may be duly founded in respect of the sum so admitted, upon satisfaction of the conditions stipulated in section 572 of the Act.[65] The law creates a burden on the company to establish that it has discharged its obligation in respect of the admitted sum.[66]

It is prudent to dispute a debt timeously, i.e. when the statutory demand was made. However, failure to dispute the debt at the time the statutory demand is made is not fatal to the respondent company's case. In *Hansa's case*[67] the court held that it is immaterial whether the debt was disputed earlier or upon the presentation of the misguided Petition. Where the debt is disputed in writing at the time the

[64] See the case of *Air Via Ltd.* v *Oriental Airlines Ltd*, *supra* n 59.
[65] However, the mere fact that a party paid part of the sum of money he is alleged to owe as a debt does not without more, establish that he is in fact owing the outstanding sum of money as a debt. See *Air Via Ltd.* v *Oriental Airlines Ltd*, *supra* n 59.
[66] *Okoli* v *Morecab Finance (Nig.) Ltd*. (2007) 14 NWLR (Pt. 1053) 37.
[67] *Supra* n 61.

statutory demand is made, such written document may be evidenced in the respondent company's counter affidavit in opposition to the Petition to give credence to the company's case.

The remedies available to a Petitioner where debt is disputed are:

1. Action in debt recovery;
2. Action to establish debt.[68]

3.2. Legal Order of Priority

The order of settlement of claims prescribed by law determines the priority rating of the claim of each creditor and by extension, the availability of funds to satisfy such claim. The legal order of priority for distribution of the assets of a company in liquidation is listed below in descending order.[69]

1. Creditors secured by a fixed charge;
2. Costs and expenses of the winding-up:
3. Preferential payments;
4. Creditors secured by a floating charge;
5. Unsecured creditors;
6. Equity holders.

1. Creditors Secured by a Fixed Charge: Section 657(6)(a) of the Act explicitly stipulates that secured creditors are to be given premier consideration in the settlement of claims in winding-up proceedings.[70] Section 868 of the Act defines a secured creditor as one who has been granted a security interest in any property, asset, or assets for the purpose of securing the performance of a debt or guarantee obligation.
   A fixed charge is a type of security created over a definite asset of the company such as land, machinery, etc. When a fixed charge is created over the assets of a company, the company

[68] See *Pharma Deko Plc.* v *F.D.C. Ltd.* (2015) 10 NWLR (Pt. 1467) 225; *Oriental Airlines Ltd.* v *Air Via Ltd*, *supra* n 59; *Tate Ind. Plc.* v *Devcom M.B. Ltd.*, *supra* n 60.
[69] See D. Sasegbon, *Nigerian Companies and Allied Matters Law and Practice* (DSc Publications: Lagos, 1990), pp. 827-831, 853.
[70] This provision is a recent innovation of the Act. As it relates to creditors secured by a fixed charge, the legal order of priority provided by the Repealed Act is retained i.e. fixed charges also enjoy primacy under the Repealed Act. The impact of the innovation of this provision is better felt in the context of floating charges and same is discussed below.

is precluded from dissipating or dealing with the assets subject to the charge during the subsistence of the charge, unless it is authorized to do so by the holder of the fixed charge. A fixed charge holder is entitled to prime consideration in the settlement of claims over all other debts including those secured by a floating charge. However, it is instructive to note that a fixed charge holder may lose such primacy to the holder of a floating charge where the fixed charge was created after the grant of a floating charge, the terms of whose grant prohibits the grant of a later charge having priority over the floating charge, and the creditor in whose favour such later fixed charge was granted had notice of that prohibition at the time the fixed charge was created in his favour. A person is deemed to have notice of such prohibition in a floating charge, where a notice indicating the existence of such prohibition is registered with the commission.[71]

Between several creditors secured by duly registered fixed charges, priority is determined by the date of registration of the charges, as opposed to the date of creation of the charges.[72]

2. Costs and Expenses of the Winding-up: These include all costs incidental to gathering of the assets of the company such as liquidators' fee, special managers' fee (if any), etc.
3. Preferential Debts: Section 657(1) enumerates the classes of debt which fall under this category as follows:
    a. All local rates and charges due from the company at the relevant date, having become due and payable within 12 months before that date, and all pay-as-you-earn tax deductions and other accessed taxes, property or income tax assessed on or due from the company up to the annual day of assessment next before the relevant date, and in the case of pay-as-you-earn tax deductions, not exceeding deductions made in one year of assessment and, in any other case, not exceeding one year's assessment;

[71] CAMA 2020, section 204

[72] This is inferred from the provision of section 222(1), CAMA 2020, which provides that the registration of a charge serves as a constructive notice of its creation.

b. Deductions made from the remunerations of employees and contributions of the company under the Pensions Reform Act;
c. Contributions and obligations of the company under the Employees' Compensation Act;
d. All wages or salaries of any clerk or servant in respect of services rendered to the company.
e. All wages of any workman or labourer, whether payable for time or for piece of work in respect of services rendered to the company; and
f. All accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding-up order or resolution.

The above debts rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.[73]

4. Creditors Secured by a Floating Charge: A floating charge is a security created over the current asset(s) of a company,[74] e.g., cash, inventory, etc. These assets cannot be made subject to a fixed charge because of their nature. Even though they form the subject of a charge, the company is entitled to make use of them in its daily operations until the charge crystallizes. Once a company goes into liquidation, a floating charge crystallizes into a fixed equitable charge and thereafter, the company is precluded from dealing with those assets without the authorization of the holder of the charge.[75]
As regards the statutory order of settlement of claims in a winding-up, typically, a preferential debt would rank ahead of a debt secured by a floating charge, especially when the assets of the company are insufficient to satisfy the claims of the general creditors.[76] However, it appears that the introduction

[73] Section 657(4)(a), CAMA 2020.
[74] CAMA 2020, section 203.
[75] CAMA 2020, section 203(2).
[76] CAMA 2020, section 657(4)(b). This position is also obtainable under the Repealed Act.

of the provision of section 657(6)(a) by the Act is an attempt to deviate from that scheme of ranking by explicitly providing for the primacy of "secured creditors" (which includes fixed and floating charge holders), so far as it relates to the settlement of claims in a winding-up. The provision is reproduced below for ease of reference:

> Section 657(6) – Notwithstanding the foregoing and any other provisions of this Act and any other law applicable in Nigeria where it relates to settlement of claims in the winding-up of a company, claims of –
> a. Secured creditor, as defined under this Act, shall rank in priority to all other claims, including any preferential payment under this Act or any other debts inclusive of expenses of the winding-up.

Section 868 defines "secured creditor" to mean "a creditor who has been granted a security interest in any property, asset, or assets for the purpose of securing the performance of a debt or guarantee obligation."

Clearly, a creditor secured by a floating charge falls within the purview of the above definition of a secured creditor. The implication of this provision is that a floating charge would rank right after a fixed charge, and ahead of preferential debts and expenses of the winding-up in the statutory scheme of settlement of claims in a winding-up. The practicability of this interpretation is however questionable, as it raises various concerns such as the source of payment of preferential debts and expenses in a case where the assets available to satisfy the claims of the general creditors are insufficient. It is hoped that the purport of this provision would be ascertained by judicial interpretation.

5. Unsecured Creditors: in contradistinction to a secured debt, an unsecured debt is one over which no security is created by the company. The claims of unsecured creditors rank *pari passu.*
6. Equity holders: this term encompasses shareholders as well as all other persons who hold ownership stake in the company. Section 657(6)(b) of the Act provides that equity holders shall

rank last in the statutory scheme of settlement of claims in a winding-up.

In essence, the legal order of prioritization of claims has a ripple effect on the availability of funds to settle the claims of the company's creditors. Thus, the feasibility of a creditor recouping an unpaid sum, whether in part or full, is dependent on its position or ranking in the legal order of priority for settlement of claims in a winding-up. As can be gleaned from the above, the likelihood of a secured creditor to recover an outstanding debt is way higher than that of an unsecured creditor.

3.3. Time Factor

The duration of winding-up proceedings before the Federal High Court at first instance, and subsequently before the appellate courts, is largely uncertain. It is not unusual for winding-up proceedings to run for over a decade at first instance before appellate proceedings are initiated.

4.0. CONCLUSION

In conclusion, it is apparent that the window of opportunity available to a creditor to recoup an unpaid sum is indeed meagre considering the onerous nature of winding-up proceedings, as well as the attendant issues discussed above. Hence, it would not be an overstatement to say that the position of the law on winding-up of companies on the ground of inability to pay its debt is designed as an insolvency procedure to facilitate settlement of the collective liabilities of the company, as opposed to a debt-recovery procedure available to individual creditors.

IN THE SHADOW OF THE GDPR: THE ROAD TOWARDS ADVANCING THE INFORMATION PRIVACY INTERESTS OF DATA SUBJECTS IN NIGERIA

By Nancy Nkechinyere Stephen*

Following the enactment of the General Data Protection Regulation (GDPR) in 2016, the Nigerian government's Information Technology Development Agency (NITDA) released the Nigeria Data Protection Regulation (NDPR) in 2019 to address data privacy issues in the country. The NDPR, although possessing many similar compliance requirements to the GDPR, presents a framework for regulating data processing that is deficient in many ways when compared to the GDPR. A year after the NDPR was released, the Data Protection Bill (2020) was introduced into the Nigerian House of Representatives, which if passed, will close many of the gaps in the NDPR, while leaving some issues outstanding. Against this backdrop, in this paper, this writer assesses potential justifications for Nigeria's choice of a less stringent regulatory framework. These justifications include: the extraterritorial effect of the GDPR, the socio-economic climate in the country, and the role of the private sector in enhancing cybersecurity protection.

1.0. INTRODUCTION

Data protection is a topic of increasing interest in countries around the world. The rise in the processing of personal data for business purposes and governmental activities raises the question of to what extent these practices encroach on data subject privacy rights, even as the right to privacy is enshrined in the Constitution of most countries around the world. In accordance with the growing regulation of the data processing space, Nigeria issued the Nigeria Data Protection Regulation (NDPR) in 2019, which is the country's

* Nancy Nkechinyere Stephen is a student at Columbia Law School (CLS), where she is a Richard Paul Richman Leadership Fellow. At CLS, she serves as a staff editor on the Columbia Journal of Transnational Law and is currently the President of the Law in Africa Students' Society. She is also a member of the Task Force for Diversity and Inclusion at the University and was recently named a Public Interest Honoree by the Law School for showing exceptional dedication to public service. After graduation, she will be working at WilmerHale, DC, United States as an associate lawyer. Email: nns2121@columbia.edu.

only comprehensive data protection regulation to date.[1] The Regulation, which was drafted with many similarities to the GDPR, has glaring substantial differences that may call into question its sufficiency. In response, commentators have rightly criticized the NDPR as providing inadequate protection for individual rights.[2] More recently, a Data Protection Bill was introduced to the House of Representatives to further tighten the data processing regulation standards and protect data subjects' rights in the country.[3] If passed, this Bill will close some of the gaps in the NDPR, but still leave some outstanding.

In Part I of this paper, this writer starts by discussing the urgency of the need for data protection in the world. Then, this writer proceeds to consider the GDPR as a cornerstone for other data protection laws in the world, including Nigeria's NDPR, and ends by focusing on the legal framework for data protection in Nigeria, which is primarily the NDPR. This writer also introduces a discussion of the Data Protection Bill, which will likely supplement the NDPR.

In Part II, this writer compares and contrasts the NDPR to the GDPR, focusing on provisions of the NDPR that substantially deviate from the GDPR. At the same time, this writer provides commentators' critiques of some of the NDPR's deviations. Next, this writer discusses the ways the Data Protection Bill closes some of the identified gaps in the NDPR through a comparison of the Bill to the Regulation.

Having determined that majority of the gaps in the NDPR will likely be closed by the Data Protection Bill (2020), in Part III this writer discusses potential justifications for the nature of Nigeria's data protection regime. To do this, this writer discusses the ways in which the GDPR's extra-territorial effect bridges some outstanding gaps in the Data Protection Bill as it relates to foreign and multinational

[1] DLA Piper, "Data Protection Laws of the World: Nigeria", available at https://www.dlapiperdataprotection.com/index.html?t=law&c=NG (accessed 3 February 2021).
[2] *See* Part II of this Paper.
[3] OneTrust DataGuidance, "Nigeria: NITDA Publishes Draft Data Protection Bill 2020 for Public Comments", available at https://www.dataguidance.com/news/nigeria-nitda-publishes-draft-data-protection-bill-2020-public-comments (accessed 3 February 2021).

Nigerian businesses. Next, with respect to local/territorial businesses and the Nigerian government – both of which are uncovered by the GDPR – this writer explains reasons why Nigeria may has chosen a looser framework to regulate their data processing activities. This includes a discussion of Nigeria's socio-economic status and ways in which the private sector has been effective in closing gaps in the NDPR that are also present in the Data Protection Bill. At each stage of the Part III discussion, this writer highlights issues with Nigeria's data protection regime that persists, despite the potential justifications for the looser framework and propose several amendments to address these lapses.

This paper brings to light important considerations for the strengthening of the Nigerian legal framework for data protection. The Data Protection Bill is currently being considered by the House of Representatives and takeaways from this discussion can be used to further equip legislative advocates with the information they need in recommending any changes to the Bill.

2.0. THE URGENCY OF DATA PROTECTION

Data is the oil of the digital era.[4] The generally accepted view is that "data is the key to unlocking customer value."[5] Data from 2019 shows the high popularity amongst businesses of use of customer data to predict trends in retail.[6] Also, PricewaterhouseCoopers'(PWC) 22nd Annual Global CEO survey shows that an overwhelming amount of CEOs consider data on customer and client preferences as critical or important.[7] There has also been a recent increase worldwide in government demands for data held by the private sector, including an expansion in government requests for direct access by the government to private-sector databases or networks; or government

[4] The Economist, "The World's Most Valuable Resource is no Longer Oil, but Data", available at https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data (accessed 3 February 2021).
[5] F. Ololuo, "Data Privacy and Protection under the Nigerian Law", available at http://www.spaajibade.com/resources/data-privacy-and-protection-under-the-nigerian-law-francis-ololuo/ (accessed 3 February 2021).
[6] *Ibid.*
[7] PwC, "23rd Annual Global CEO Survey", available at https://www.pwc.com/gx/en/ceo-agenda/ceosurvey/2019/gx.html (accessed 3 February 2021).

access to large volumes of data.[8] With the rising use of data for business strategy analytics and governmental functions, there is a growing global concern about the potential for company and government misuse or abuse of individuals' personal information, including sensitive personal data like criminal conviction records.[9] There is also concern about the potential for anonymous individuals to hack into company databases and steal sensitive information and harm consumers, i.e. through fraud and identity theft.[10] Led by the EU, governments have begun responding to these concerns with increased regulation of data collection and processing activities and data security procedures.[11]

2.1. The Role of the GDPR as a Cornerstone to Other Countries' Data Privacy Regulations

As early as the 1990s, the EU passed a Data Protection Directive (Directive 95/46/EC) to protect its citizens against possible abuses of their personal data.[12] Years later, advancements in technology changed the way data was handled and a review of the existing rules became necessary.[13] In response, the EU enacted the General Data Protection

[8] I.S. Rubinstein, G.T. Nojeim, R.D. Lee, "Systematic Government Access to Personal Data: A Comparative Analysis" (2014) 4(2) *International Data Privacy Law*, p. 96.

[9] C.D. Raab, "The Governance Of Global Issues: Protecting Privacy in Personal Information", in *New Modes of Governance in Global System*, p. 125, available at https://link.springer.com/chapter/10.1057/9780230372887_6 (accessed 11 May 2022); *see also* R. Kirpatrick, "Unpacking the Issue of Missed Use and Misuse of Data", available at https://www.unglobalpulse.org/2019/03/unpacking-the-issue-of-missed-use-and-misuse-of-data/ (accessed 3 February 2021).

[10] R. Sobers, "134 Cybersecurity Statistics and Trends for 2021", available at https://www.varonis.com/blog/cybersecurity-statistics/ (accessed 3 February 2021).

[11] Kirpatick, *supra* n 9.

[12] *See* Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31995L0046 (accessed 3 February 2021).

[13] Privacy Europe, "European Privacy Framework", available at https://www.privacy-europe.com/european-privacy-framework.html#:~:text=History,gathering%20data%20about%20their%20customers (accessed 3 February 2021).

Regulation (GDPR) in 2016 and it came into effect in 2018.[14] The GDPR "regulates the processing by an individual, a company or an organisation of personal data relating to individuals in the EU."[15] It provides data subjects with several privacy rights and requires entities processing data to abide by seven data protection and accountability principles.[16] These include: accountability; lawfulness and transparency; purpose limitation; data minimization; accuracy; storage limitation; integrity and confidentiality; and accountability.[17]

The GDPR became a cornerstone for several national laws outside of the EU, with each country enacting a modified version of the GDPR based on its attitude towards privacy. Countries with laws like the GDPR include Chile, Japan, Brazil, South Korea, India, New Zealand, Thailand, the US (particularly, California), Australia, China, Kenya, and most importantly, Nigeria.[18]

2.2. The Legal Framework of Data Privacy and Protection Laws in Nigeria

Following the enactment of the GDPR and in line with growing global concerns about data privacy, the National Information Technology Development Agency (NITDA) promulgated the Nigeria Data Protection Regulation (NDPR).[19] Like many other countries, privacy in Nigeria is a Constitutional right and there are existing statutes that contain age/industry specific privacy protections.[20] These Nigerian statutes include: The Child Rights Act 2003; The NCC Consumer

[14] GDPR.EU, "What is GDPR, the EU's New Data Protection Law?", available at https://gdpr.eu/what-is-gdpr/ (accessed 3 February 2021).
[15] European Commission, "What Does the General Data Protection Regulation (GDPR) Govern?", available athttps://ec.europa.eu/info/law/law-topic/data-protection/reform/what-does-general-data-protection-regulation-gdpr-govern_en (accessed 3 February 2021).
[16] *Supra* n 14.
[17] *Ibid.*
[18] D. Simmons, "12 Countries with GDPR-like Data Privacy Laws", available at https://insights.comforte.com/12-countries-with-gdpr-like-data-privacy-laws (accessed 3 February 2021). *See* Part II of this Paper for a discussion of Nigeria's data privacy laws.
[19] Nigeria Data Protection Regulation (2019).
[20] F. Ololuo, "Nigeria: Data Privacy and Protection under the Nigerian Law", available athttps://www.mondaq.com/nigeria/privacy-protection/895320/data-privacy-and-protection-under-the-nigerian-law (accessed 3 February 2021).

Code of Practice Regulation 2007; The National Identity Management Commission (NIMC) Act 2007; The NCC Registration of Telephone Subscribers Regulation 2011; The Freedom of Information Act 2011; The National Health Act (NHA) 2014; The Cybercrimes (Prohibition, Prevention, etc.) Act 2015; The Consumer Protection Framework 2016; and The Federal Competition and Consumer Protection Act 2019.[21] To date, the only law comprehensively regulating data privacy in Nigeria is the NDPR, which was passed in 2019. However, the Data Protection Bill (newly introduced into the House of Representatives), if passed, will augment the existing framework for data protection in Nigeria.

2.3. Understanding the NDPR

2.3.1. NITDA's Authority to Enforce

The NITDA promulgated the NDPR using power from its statutory mandate under the National Information Technology Development Agency Act (2007), which states in relevant part that NITDA shall:

> Create a framework for the…regulation of Information Technology practices, activities and systems in Nigeria and all matters related thereto and for that purpose[22]…Develop guidelines for electronic governance and monitor the use of electronic data interchange and other forms of electronic communication transactions[23]…and introduce appropriate regulatory policies and incentives to encourage private sector investment in the information technology industry.[24]

[21] *Ibid.*
[22] National Information Technology Development Agency Act (2007), Part II, section 6(a).
[23] *Ibid*, at section 6(c).
[24] *Ibid*, at section 6(i).

2.3.2. The Objectives of the NDPR

The objectives of the NDPR are as follows:

> a. to safeguard the rights of natural persons to data privacy;
> b. foster safe conduct for transactions involving the exchange of Personal Data;
> c. to prevent manipulation of Personal Data; and
> d. to ensure that Nigerian businesses remain competitive in international trade through the safeguards afforded by a just and equitable legal regulatory framework on data protection and which is in tune with best practice."[25]

In accordance with its objectives, the NDPR consists of elements that give some level of data protection to the data subjects and provides data management compliance requirements for businesses, in ways like the GDPR. Key highlights of the NDPR are as follows: (i) The Regulation requires covered entities to provide data subjects with their privacy policy and requires that the policy contain certain provisions;[26] (ii) Covered entities are required to develop security measures to protect individuals' data;[27] (iii) Data controllers are required to communicate information related to data processing to data subjects in a clear manner;[28] (iv) Data processing by a third party is to be governed by a written contract;[29] (v) Transfer of Personal Data to a foreign country may be allowed where NITDA has decided that the affected country ensures adequate data protection;[30] (vi) Processing of data is lawful in certain specified circumstances;[31] (vii) Consent is one of the lawful basis for obtaining and processing personal data and must be informed, freely given, and unambiguous;[32]

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[25] *Ibid*, at Part I, section 1.
[26] KPMG, "The Nigeria Data Protection Regulation: Journey to Compliance", available at https://assets.kpmg/content/dam/kpmg/ng/pdf/advisory/NDPR-journey-to-compliance.pdf (accessed 3 February 2021).
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*

(viii) No consent shall be sought, given or accepted in any circumstance that may engender propagation of atrocities, hate, child rights violation, criminal and antisocial acts;[33] (ix) Personal data should be adequate, accurate and without prejudice to the dignity of human person.[34] It should also be stored only for the period within which it is reasonably needed;[35] (x) Maximum penalty for breaches of data privacy rights on international transfers can be up to 10 million naira or 2% of annual gross revenue of the preceding year, whichever is higher and based on the number of Data Subjects dealt with.[36]

Despite these attributes of the NDPR, the Regulation is amiss in certain respects especially when compared to the GDPR.[37]

2.4. The Data Protection Bill (2020)

Currently, there is a draft Data Protection Bill (DPB) before the National Assembly, proposed by the NITDA.[38] If passed, it would close some of the gaps in the NDPR. The DPB was drafted in furtherance of Nigeria's Digital Identification for Development (ID4D) Project.[39] The project's goal is to establish a central digital identification system, enrolling residents and Nigerians abroad.[40] As one of the requirements for the execution of this project, Nigeria is to strengthen the legal institutional framework governing data protection.[41] The World Bank imposed this requirement on Nigeria in recognition that a central identification system can be "detrimental

[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] For a discussion, see Part II of this Paper.
[38] J. Daniel, "Nigeria Data Protection Bill Aims to Reinforce Information Security Rules", available at https://www.cio.com/article/3586844/what-you-need-to-know-about-nigerias-new-data-protection-bill.html (accessed 3 February 2021).
[39] World Bank Group, "Nigeria Digital Identification for Development (ID4D): Project Sheet", available at https://financeincommon.org/sites/default/files/2020-11/ID4D.pdf (accessed 3 February 2021).
[40] *Ibid.*
[41] The World Bank, "Nigeria Digital Identification for Development", available at https://projects.worldbank.org/en/projects-operations/project-detail/P167183 (accessed 15 February 2021).

to data privacy and protection."[42] In light of this, the DPB's objectives slightly differ from that of the NDPR and its content is more similar to the GDPR.[43]

Notably, the DPB removes the objective that Nigerian businesses remain competitive in international trade;[44] this aim was a key consideration in drafting the NDPR.[45] The DPB still serves to promote a code of practice that ensures personal data privacy without unduly undermining the legitimate interests of commercial organizations and government security agencies.[46]

3.0. A COMPARISON OF THE EU (GDPR) AND NIGERIAN DATA PROTECTION REGIMES (NDPR & DPB): ANALYSIS AND CRITIQUES

The GDPR is an effective point of comparison for Nigeria's data privacy regulations due to the *Brussels Effect*.[47] The *Brussels Effect* is a term coined by Anu Bradford in one of her written works.[48] It refers to Europe's unilateral power to regulate global markets,[49] setting the global rules across a range of areas including *the protection of privacy*.[50] In her book, Bradford explains that the EU wields this unilateral influence for various reasons. The first reason is its market power;

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[42] World Bank, "International Development Association Project Appraisal Document on a Proposed Credit in the Amount of SDR 84.4 Million to the Federal Republic of Nigeria for the Digital Identification for Development Project", available at http://documents1.worldbank.org/curated/en/250181582340455479/text/Nigeria-Digital-Identification-for-Development-Project.txt (accessed 3 February 2021).

[43] For a discussion, *see* Part II of this Paper.

[44] *See* Nigeria Data Protection Bill 2020, section 1.1.

[45] P. Ifeoma, "Issues Arising from the Nigerian Data Protection Regulation 2019 (Part 2) – Femi Daniel", available at https://dnllegalandstyle.com/2019/issues-arising-from-the-nigerian-data-protection-regulation-2019-part-2-femi-daniel/ (accessed 3 February 2021).

[46] *See* Nigeria Data Protection Bill 2020, section 1.1(a).

[47] A. Bradford, "The Brussels Effect – How the European Union Rules the World", available at https://oxford.universitypressscholarship.com/view/10.1093/oso/9780190088583.001.0001/oso-9780190088583 (accessed 11 May 2022).

[48] A. Bradford is a Professor of Law at Columbia University.

[49] *Supra* n 47, at p. 26.

[50] *Ibid*. at p. 34.

the EU has a large consumer population, with 500 million consumers.[51] The second is due to Europe's regulatory capacity to translate its market power into tangible regulatory influence.[52] The third reason for the EU's unilateral influence is because of its preference for strict rules;[53] the EU has more stringent privacy regulations.[54] The fourth is that the EU's regulations cannot be circumvented by moving the regulatory targets to another jurisdiction;[55] the EU's privacy standards already affect the business practices of many non-EU companies, including some operating in Nigeria.[56] The fifth reason is the focus of its regulations on inelastic markets like data privacy.[57] For example, the GDPR applies to all companies processing personal data of data subjects residing in the EU, regardless of where the data processing takes place or where the company processing the data is located.[58] The final reason, which Bradford discusses, is legal or technical non-divisibility.[59] In the case of data protection regulations, technical non-divisibility applies because of the difficulty of separating a company's data services across multiple markets for technological reasons.[60]

In view of the *Brussels* Effect, in this section, to shed light on some issues with Nigeria's data protection framework, this writer will be comparing the country's data protection regime – the NDPR, and the soon to be enacted DPB – to the EU's data protection regime, encapsulated in the GDPR.

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[51] *Ibid*, at pp. 26 and 34. Note that the assertion that the EU has 500 million consumers is from a 2012 data. Currently, the EU has 446 million inhabitants, which is still very large. *See* European Union, "Living in the EU", available at https://europa.eu/european-union/about-eu/figures/living_en#:~:text=The%20EU%20covers%20over%204,population%20after%20China%20and%20India (accessed 3 February 2021).

[52] *Supra* n 47, at p. 30.

[53] *Ibid*, at p. 37.

[54] M. Nadeau, "General Data Protection Regulation (GDPR): What you Need to Know to Stay Compliant", available at https://www.csoonline.com/article/3202771/general-data-protection-regulation-gdpr-requirements-deadlines-and-facts.html (accessed 3 February 2021).

[55] *Supra* n 47, at p. 16.

[56] *Ibid*. at p. 23.

[57] *Ibid*, at p. 48.

[58] *Ibid*, at p. 49

[59] *Ibid*. at p. 53.

[60] *Ibid*. at p. 57.

4.0. Differences between the GDPR and the NDPR[61]

While the NDPR and the GDPR harbour many similarities, there are some substantial differences, some of which have been criticized by Nigerian scholars. They are discussed below.

4.1. NDPR material scope

4.1.1. Scope of Data Protection

The GDPR applies to the processing of personal data by automated means or non-automated means if the data is part of a filing system.[62] Article 2 of the GDPR stipulates that the Regulation applies to "the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system."[63]

However, the NDPR only applies to the processing of personal data by automated means.[64] Section 1.3(iv) of the NDPR defines "data" as "characters, symbols, or binary on which operations are performed on a computer."[65] The NDPR's chosen definition limits the scope of its protection to personal data stored electronically. Critiques of the NDPR's approach rightfully highlight that the computer-centric nature of the definition of "data" defeats the Regulation's objective to safeguard Nigerians' privacy rights. Bisola Scott and Sandra Eke assert that it is necessary to amend the provisions of the NDPR to expressly regulate the processing of non-electronic or paper-based data.[66] They

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[61] For an overview of the differences and similarities between the GDPR and NDPR, see generally OneTrust Data Guidance, "Comparing Privacy Laws: GDPR v. Nigerian Data Protection Regulation", available at https://www.dataguidance.com/resource/comparing-privacy-laws-gdpr-v-nigerian-data-protection-regulation (accessed 3 February 2021).

[62] *Ibid*, at p. 9.

[63] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) Article 2(1).

[64] *Supra* n 3.

[65] Nigeria Data Protection Regulation 2019, section 1.3(iv).

[66] B. Scott and S. Eke, "Nigeria: NITDA's Power to Regulate Non-Electronic Data", available at http://www.spaajibade.com/resources/nitdas-power-to-

base their argument on the fact that "in Nigeria the paper shredding culture is poor and on a daily basis volumes of personal and sensitive paper documents are utilized without adequate security defences."[67] Olumide Babalola, a Technology attorney and outspoken critique of the NDPR, also argues that not only is the definition of data "narrowly technical," it is also "not comprehensive enough in light of the Regulation's expectations [to protect a wide range of personal data]."[68] He further notes that the narrow definition of "data" in the NDPR can come in handy for "mischievous data controllers" seeking to misuse customer data.[69]

4.1.2. Special requirements for the processing of sensitive data

The GDPR provides special protection for the processing of sensitive personal data, including criminal records, while the NDPR does not offer similar protections. In the GDPR, articles 9 and 10 discuss "sensitive data." Article 9 allows for the processing of sensitive data only in certain specified circumstances.[70] It describes sensitive data as information revealing:

> Racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning sex life or sexual orientation.[71]

Article 10 further provides special protections for personal data pertaining to criminal convictions or offences;[72] this provision is most

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regulate-non-electronic-data-bisola-scott-and-sandra-eke/ (accessed 3 February 2021). Scott and Eke importantly note that while the narrow definition of "data" is not ideal, NITDA, the drafters of the NDPR, do not have the power to regulate non-electronic data.

[67] *Ibid*.

[68] U. Chioma, "My Thoughts on The Nigeria Data Protection Regulation (NDPR) 2019 By Olumide Babalola", available at https://thenigerialawyer.com/my-thoughts-on-the-nigeria-data-protection-regulation-ndpr-2019-by-olumide-babalola/ (accessed 3 February 2021).

[69] *Ibid*.

[70] See Regulation (EU) 2016/679, *supra* n 63, at Article 9.

[71] *Ibid*, at Article 9(1).

[72] *Ibid*, at Article 10.

likely in recognition that criminal records checks can be "significantly intrusive, excessive and disproportionate to the (public interest) needs."[73] The EU Regulation specifically requires that the processing of personal data relating to criminal convictions and offences shall only be carried out under the control of "official authority" or where such processing has been "authorized by European law or that of any EU Member State *providing for appropriate safeguards for the rights and freedoms of data subjects*."[74] Additionally, the Regulation requires that "any comprehensive register of criminal convictions is to be kept only under the control of *official authority*."[75]

On the other hand, while the NDPR provides for a definition of sensitive data like that in the GDPR,[76] it does not provide special protections for sensitive personal data. Criminal conviction records are also not covered under the NDPR.

4.2. International Data Transfers (NDPR)

The GDPR contains more stringent requirements for personal data protection than the NDPR in cases of international transfers. Under the GDPR, if there is no decision on the adequate level of protection for personal data from the EU Commission, an international transfer is permitted when the data controller or data processor provides appropriate safeguards and on the condition that effective legal remedies that ensure data subjects' rights are obtainable.[77] Appropriate safeguards include: binding corporate rules (BCRs)[78] with specific requirements; standard contractual clauses adopted by the EU

[73] R. Finn, "Criminal Records Checks in Employment Contexts: Old and New Obligations under Data Protection Law", available at https://www.trilateralresearch.com/criminal-records-checks-in-employment-contexts-old-and-new-obligations-under-data-protection-law/ (accessed 3 February 2021).
[74] Regulation (EU) 2016/679, *supra* n 63, at Article 10.
[75] *Ibid*.
[76] *See* Nigeria Data Protection Regulation 2019, section 1.3(xxv).
[77] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 46.
[78] According to the GDPR, BCRs are "personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity." *See* Regulation (EU) 2016/679, *supra* n 63, at Article 4.

Commission[79] or by a supervisory authority; an approved code of conduct; or an approved certification mechanism.[80]

In contrast, where there is no approval on the adequate level of protection for personal data transfer by the NITDA or other regulatory bodies, the NDPR takes a less protective approach in specifying the "necessary" circumstances in which transfers would still be permissible.[81] Particularly, the Regulation permits transfers, in relevant part, "for the establishment, exercise or defence of legal claims", and "in order to protect the vital interests of the data subject *or of other persons* [for cases where a data subject is legally or physically incapable of giving consent]."[82] Without clarity on whose legal claims are to be considered for international transfers and which "other persons" interests are to be considered, the NDPR's approach in this respect is less protective of data subjects' rights.

4.3. Data Processing Records (NDPR)

The GDPR requires data controllers and data processors to maintain a record of processing activities under their responsibility and provides exceptions for small organizations.[83] It also prescribes a list of information that data controllers must record for international transfers of personal data.[84] Whereas, the NDPR does not impose any obligation to maintain a record of processing activities on data processors and controllers. The absence of such a requirement in the NDPR could make it more difficult for the NITDA to keep track of covered entities' compliance with their processing obligations. This in turn significantly diminishes the agency's ability to collect hard

[79] The EU has issued three sets of standard contractual clauses. Two for transfers from EU controllers to non-EU controllers and 1 for transfers from EU controller to non-EU processors. See generally EU Commission, "Standard Contractual Clauses for Data Transfers between EU and non-EU Countries", available at https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en (accessed 3 February 2021).
[80] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 46(2).
[81] *See* Nigeria Data Protection Regulation 2019, section 2.12.
[82] *Ibid*, at section 2.12 (d)-(f).
[83] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 30.
[84] *Ibid.*

evidence when investigating companies for violations of the Regulation.

4.4. Data Security and Breaches (NDPR)

The GDPR requires data controllers to notify the supervisory authority of a high-risk personal data breach, where feasible, no later than 72 hours after having become aware of the breach.[85] The Regulation also requires data controllers to notify data subjects of the breach without undue delay.[86] However, the NDPR does not provide any reporting requirements. Commentators have critiqued the absence of reporting requirements in the NDPR. Diyoke Michael Chika and Edeh Stanley Tochukwu, Sociology and Computer Science Professors at Nigerian universities, argue that the NDPR's failure to require data controllers to notify data subjects of breaches inhibit data subjects' ability to take necessary actions to protect themselves from possible misuse and abuse of their personal data.[87] Additionally, Oruaro Ogbo, a writer for Stears Business,[88] further argues that without reports from businesses on substantial data breaches, the NITDA would be unable to analyze trends in breaches, discover themes, and share its findings.[89] This also prevents opportunities for Nigerian companies to learn from the mistakes of their peers and fortify their data protection measures appropriately.[90]

[85] See Regulation (EU) 2016/679; *supra* n 63, at Article 33.
[86] *Ibid*, at Article 34.
[87] D.M. Chika and E.S. Tochukwu, "An Analysis of Data Protection and Compliance in Nigeria", (2020) 5(4) *International Journal of Research and Innovation in Social Science*, pp. 377 and 380.
[88] O. Ogbo, "Nigeria's Cybersecurity Problem", available at https://www.stearsng.com/article/nigerias-cybersecurity-problem#:~:text=It%20turns%20out%20that%20Nigeria,about%20%24270%20million%20on%20cybersecurity (accessed 3 February 2021).
[89] *Ibid*.
[90] *ibid*.

4.5. Accountability (NDPR)

4.5.1. Approach to Ensuring Accountability of Data Processors and Controllers

Both the GDPR[91] and the NDPR[92] recognize accountability as a core principle, but the NDPR adopts a more relaxed language in imposing the obligation of accountability on data processors and controllers.

The GDPR requires DPIAs (Data Protection Impact Assessments) to be conducted for envisaged high risk processing operations that use new technologies.[93] DPIAs are processes that help businesses identify and minimize the data protection risks of a project.[94] The GDPR particularly requires these assessments when handling sensitive data and in some other cases of systematic monitoring or evaluation of data.[95] The GDPR also stipulates baseline requirements for DPIAs – they are to include intended measures to address the risks identified and mechanisms to ensure compliance with the GDPR and ensure the protection of personal data.[96] Furthermore, the GDPR stipulates several requirements with respect to the content of processor contracts.[97]

The NDPR, on the other hand, applies a loose approach to ensuring accountability when processing high risk data with new technologies. The text of the Regulation simply states that businesses are to conduct an audit covering the "impact of technology on privacy and security policies,"[98] without imposing baseline requirements or giving any guidance to businesses on what is to be included in audits covering

[91] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 5.
[92] Nigeria Data Protection Regulation 2019, section 2.1(3).
[93] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 35.
[94] Information Commissioner's Office (ICO) "Guide to the General Data Protection Regulation (GDPR): Data Protection Impact Assessments, ICO (UK)", available at https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/data-protection-impact-assessments/#:~:text=A%20Data%20Protection%20Impact%20Assessment,some%20specified%20types%20of%20processing (accessed 3 February 2021).
[95] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 35(3).
[96] *Ibid*, at Article 35(7).
[97] *Ibid*, at Article 28(3).
[98] Nigeria Data Protection Regulation 2019, section 4.1(5)(j).

privacy impacts. It also does not expressly require that audits contain information on risks to consumer data protection. Additionally, as opposed to expressly laying out requirements for the content of processing contracts, the NDPR simply imposes the obligation of a party to any processing contract, apart from the data subject, to take measures to ensure that the other party has not violated the data subjects' rights.[99]

4.5.2. Obligation for Data Controllers to Provide Representative in Country

For accountability purposes, the GDPR requires data controllers and processors to have their designated representative within the EU, except where processing is occasional; does not largely include processing of sensitive data; or is low-risk to data subjects.[100] The representative is to be addressed to supervisory authorities and data subjects on all issues related to processing, for the purposes of ensuring compliance with the GDPR.[101] However, under the NDPR there is no obligation for covered entities to designate a representative within Nigeria. The combined absence of reporting and local-representative requirements will make it more difficult for the NITDA officials to closely monitor the processing activities of international data processors and controllers.

4.5.3. Independence of Supervisory Authority

The GDPR requires that supervisory authorities in EU member states act with "complete independence" in performing their tasks and powers in accordance with the Regulation.[102] This entails that members of each supervisory authority are to refrain from any action or occupation incompatible with their duties.[103] The word "incompatible" could be read to mean occupations that result in a conflict of interest, such as simultaneously working for the government, which handles citizens' data through its agencies and

[99] *Ibid*, at section 2.4(b).
[100] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 27(2).
[101] *Ibid,* at Article 27(4).
[102] *Ibid*, at Article 52.
[103] *Ibid*, at Article 52(4).

cabinets, and for private institutions that engage in data processing activities. On the other hand, the NDPR does not provide for an independent supervisory authority. Rather, the NITDA, an agency of the Federal Government, oversees compliance with the Regulation.[104] The NITDA's non-independence raises questions about its ability to objectively monitor and review the government's processing of personal data.

4.6. Children's Data (NDPR)

While both the NDPR[105] and GDPR[106] require that data controllers provide information addressed to children in "clear and plain language," the GDPR imposes additional requirements to ensure the security of children's data.

Recital 75 of the GDPR emphasizes that children are "vulnerable natural persons."[107] Recital 38 of the GDPR further states that children require specific protection with regard to their personal data.[108] In line with these assertions, the GDPR requires data controllers to receive the consent of a parent or guardian for the processing of data for children under the age of 16.[109] The controllers are also required to make "reasonable efforts" to verify that the consent was indeed given by the children's parent or guardian.[110]

The NDPR does not impose additional protections for the processing of children's data and in response, commentators have criticized the Regulation.[111] This is because of the problems surrounding children's data privacy in Nigeria. In 2014, a study conducted by Consumers International found that one of the primary concerns of data collection in Nigeria is that children are exposed to privacy risks online and may

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[104] National Information Technology Development Agency Act 2007, Part II, section 2.
[105] Nigeria Data Protection Regulation 2019, section 3.1(1).
[106] See Regulation (EU) 2016/679, *supra* n 63, at Article 12(1).
[107] *Ibid*, at recital 75.
[108] *Ibid*, at recital 38.
[109] *Ibid*, at Article 8.
[110] *Ibid.*
[111] A. Adeyoju, "A Quick Guide on the Data Protection Regime in Nigeria", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3522188 (accessed 3 February 2021).

unknowingly disclose personal information to online platforms due to the appealing nature of their visual content.[112]

4.7. Remedies (NDPR)

Compared to the GDPR, the NDPR offers more limited rights to data subjects attempting to access remedies for violations of their stipulated rights in three ways:

First, while both the GDPR and NDPR give data subjects the right to lodge a complaint with the supervisory authority for violations of their rights, the GDPR allows data subjects to better track the status of their complaints. Under Article 77.2 of the GDPR, the supervisory authority is required to inform the complainant, i.e. data subject, about the progress and outcome of their complaint including the possibility of a judicial remedy.[113] The NDPR, on the other hand, does not expressly provide data subjects with the right to receive information on the progress of their complaints.

Second, the GDPR provides individuals with a cause of action for violations of their rights under the Regulation. It also provides data subjects with the right to effective judicial remedy.[114] Also, in Article 82, the GDPR gives data subjects the right to receive compensation from the controller or processor for damages suffered.[115] By contrast, the NDPR only gives data subjects the right to lodge a complaint with the NITDA for any alleged violations of their rights.[116]

Third, unlike the NDPR, article 80 of the GDPR gives data subjects the right to representation by a not-for-profit organisation that advocates for the protection of data subject rights with regards to

[112] D. Igbebulem, "The Protection of Consumers' Personal Data in the Era of E-commerce in Nigeria", available at https://www.researchgate.net/publication/334837471_The_Protection_of_Consumers'_Personal_Data_in_the_Era_of_E-commerce_in_Nigeria (accessed 3 February 2021).
[113] *See* Regulation (EU) 2016/679, *supra* n 63, at Article 77(2).
[114] *Ibid*, at Article 79.
[115] *Ibid*, at Article 82.
[116] Nigeria Data Protection Regulation 2019, section 3.1(2).

their personal data.[117] The organisations can lodge a complaint on the data subject's behalf and exercise their right to receive compensation.

Commentators disapprove of the NDPR's approach to penalties for violations of data subjects' rights. For instance, Olumide Babalola argues that the penalties under the Regulation only serve to generate income for the government at the expense of the actual victims of the breaches – the data subjects.[118] He also asserts that the NDPR should follow the GDPR's lead in adopting a right to compensation receivable by any person who suffered "material or non-material loss" as a result of infringement under the Regulation.[119]

Based off the differences between the GDPR and the NDPR discussed in this sub-section, problems with the NDPR include the failure to provide greater protection for sensitive data, including criminal conviction records; provide a strong framework for accountability, especially through imposing requirements for compliance reporting and disclosure of high-risk data breaches; and provide civil remedies for data subjects. Consequently, in some respects, the Regulation falls short in meeting its fourth objective – to ensure Nigerian business remain competitive in international trade. This objective is to be achieved through providing Nigerian businesses with a local regulation comparable to the GDPR. The gaps in the NDPR are particularly an issue here as it relates to the absence of higher protections for sensitive data, including financial records, and the absence of civil remedies for data subjects in Nigeria. Recall that for international data transfers, the GDPR requires the availability of appropriate safeguards and effective legal remedies that protect data subjects' rights in the destination country. Without higher protections for sensitive data and access to civil remedies for data subjects, Nigeria-based businesses may find it difficult transmitting personal data from the EU to Nigeria.

[117] Regulation (EU) 2016/679, *supra* n 63, at Article 80.
[118] *Supra* n 68.
[119] *Ibid.*

5.0. THE DPB IN COMPARISON TO THE NDPR AND GDPR

5.1. DPB Material Scope and Handling of Sensitive Data

The DPB covers data stored, collected, and processed by non-automated means,[120] thus responding to a significant gap in the NDPR, which only covers computerized data. The Bill also provides special protections for sensitive data.[121] However, unlike the GDPR, the Bill still does not expressly provide special, or any, protections for criminal conviction records.

5.2. International Data Transfers (DPB)

The DPB is more protective of data subjects than the NDPR, keeping considerations for international transfers limited to the interests of data subjects or the public interest. According to the DPB, transfer of personal data is permissible where the data subject "has given explicit, specific and free consent, after being informed of risks arising in the absence of appropriate safeguards; or where it is in the interest of the data subjects; or if it is in line with public interest."[122]

Additionally, following the GDPR's lead, the DPB describes appropriate safeguards for the international transfer of data. These safeguards include those that are standardized and provided by legally binding and enforceable instruments adopted and implemented by the data controllers or data processors involved in the transfer and processing.[123] However, different from the GDPR, the DPB does not condition permissibility of data transfers on effective legal remedies being available to data subjects.

[120] Nigeria Data Protection Bill 2020, Part I, section 2.1(a).
[121] *Ibid*, see generally Part VI.
[122] *Ibid*, at Part X, section 43.3.
[123] *Ibid*, at Part X, section 43.2(c).

5.3. Data Processing Records (DPB)

Like the GDPR and unlike the NDPR, the DPB will require data processors and controllers to maintain records of their processing activities.[124]

5.4. Data Security and Data Breaches (DPB)

The DPB augments the NDPR in requiring data processors and controllers to notify data subjects and the Commission (set up under the Bill to regulate data processing activities)[125] of data breaches. The Bill requires data subjects to be notified of breaches within 48 hours of notifying the Commission.[126] However, unlike the GDPR, the DPB does not stipulate the timeframe for notifying the Commission of any breach.

5.5. Accountability (DPB)

5.5.1. Impact Assessment on Data Protection

Similar to the GDPR, the DPB requires DPIAs. Data controllers and processors are expected to regularly test, assess, and evaluate the effectiveness of their measures for ensuring the security of the processing.[127] Additionally, data controllers are obligated to take into consideration the risks arising from the interests, rights, and fundamental freedoms of data subjects, according to the nature, volume, scope and purpose of processing the data.[128] Data processors are also required to inform the data controller of any legal requirement that may create risks to the rights and fundamental freedoms of the data subjects, and to put into place measures to facilitate the data controller's obligations.[129]

[124] *Ibid*, at Part VII, section 32.4.
[125] *Ibid*, see generally Part III.
[126] *Ibid*, at Part V, section 17.3.
[127] *Ibid*, at Part VIII, section 34.3.
[128] *Ibid*, at Part VII, section 30.1(c).
[129] *Ibid*, at Part VII, section 31.1(d).

5.5.2. Provision of Data Controller Representative in Country

Like the NDPR, the DPB still does not require data processors and controllers to have representatives on issues related to data processing in Nigeria.

5.5.3. Independence of Supervisory Authority

Similar to the NDPR, the DBP still does not provide for an independent supervisory authority. While a newly created commission replaces the NITDA, an agency of the Federal Government, as the supervisory authority to ensure compliance with the Bill,[130] the Commission is still overrun with Federal Government officials. 11 of the 16 members of the governing board of the Commission are Federal Government representatives, who would simultaneously be occupying their Federal Government positions while serving on the Board.[131] The inclusion of government officials on the Board conflicts with the goal of strengthening Nigeria's legal institution through the DPB in order to allow for the Nigerian government to store and process citizen's data under a National ID system, without fears of data privacy violations.[132] In this respect, the DPB differs from the GDPR.[133]

5.6. Children's Data (DPB)

Compared to the NDPR, and in a similar fashion to the GDPR, the DPB provides additional requirements for the protection of children's data. The Bill expressly classifies children's personal information as sensitive data,[134] and requires data controllers to obtain the prior consent of the parent or guardian of a child before processing their data.[135]

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[130] *Ibid*, at Part III, section 9(e).
[131] *Ibid*, at Part III, section 8(1).
[132] *Supra* n 42.
[133] Recall that the GDPR prohibits members of each supervisory authority in States to refrain from occupying occupation incompatible with their duties. *See* Regulation (EU) 2016/679, *supra* n 63, at Article 52(4).
[134] Nigeria Data Protection Bill 2020, Part XIV, section 66.
[135] *Ibid*, at Part VI, section 26.2(b).

However, different from the GDPR, the DPB does not require data controllers to make reasonable efforts to verify that consent has been given or authorized by the parent or guardian.

5.7. Remedies (DPB)

In line with the GDPR, the DPB provides civil remedies for data subjects. Particularly, it allows data subjects, either individually or through the Commission, to seek compensation or restitution through civil action for violations of their rights.[136]

However, like the NDPR, the DPB does not expressly require the Commission to inform data subjects about the progress and outcome of their complaints regarding violations of their rights; or of the possibility for judicial remedy. The DPB also does not give data subjects the right to representation by a not-for-profit organisation.

In sum, if the DPB were to be enacted, it would tighten Nigeria's data protection regulatory framework, moving it closer in similarity to the GDPR. First, the DPB fixes the problems with the material scope of the NDPR, as protected personal data would include data stored in non-automated filing systems. Second, when it comes to international transfers, the Bill adopts language and safeguard requirements that are more protective of data subjects' rights. Third, the DPB requires covered entities to maintain records of their processing activities. Fourth, the Bill requires covered entities to notify the Commission and data subjects of data breaches. Fifth, the Bill will require covered entities to assess the effectiveness of their measures to ensure data security. Sixth, it classifies Children's data as sensitive data. Seventh, the Bill provides for civil remedies for data subjects and provides sensitive data with special protections. This seventh point is important, even as it would help streamline Nigerian businesses' ability to get approvals for personal data transfers from the EU to Nigeria, where there is business need.

However, the DPB still lags behind the GDPR in some respects. First, the Bill does not expressly include special protection for criminal conviction records. Second, the Bill does not require legal remedies

[136] *Ibid*, at Part XI, section 50.2.

to be available for data subjects in the destination country in the event of an international transfer. Third, the DPB does not specify a timeframe for notifying the Commission of data breaches, and consequently does not set a definite timeframe for notifying data subjects of a breach. Fourth, the Bill still does not require covered entities to have their representatives in Nigeria to promote accountability. Fifth, the Bill does not require controllers to make efforts to verify parental or guardian consent for processing of children's data. Sixth, the Bill does not provide for a completely independent supervisory authority. Lastly, the Bill does not require the supervisory authority to inform the complainant about the progress and outcome of their complaints, neither does it allow for not-for-profit representations of data subjects in cases of alleged violations.

6.0. POTENTIAL JUSTIFICATIONS FOR THE GAPS IN NIGERIA'S DATA PROTECTION REGIME

Once one takes the GDPR as a normative baseline and sees the NDPR, and soon to be enacted DPB, falling short as described, the next questions to answer are whether the Nigerian government has legitimate reasons for adopting a less stringent regulatory framework when compared to the GDPR, and what the practical implications of the chosen data protection regime are. To answer these questions, in this section, this writer assesses the ways the GDPR, through its extraterritorial effect, applies to many businesses in Nigeria. Keeping in mind that the extraterritorial effect of the GDPR does not apply to all institutions in the country, this writer examines other possible justifications for some outstanding gaps in the DPB. To do this, this writer highlights potential socio-economic justifications for Nigeria's data protection regime. This writer also explains ways in which the private sector is bridging some gaps left in the DPB.

At each stage of the discussion, despite the potential justifications offered, this writer finds that there remain persistent problems with Nigeria's regulatory framework that need to be addressed through amendments to the DPB. These issues are: the non-independence of the supervisory authority; difficulties in data subjects' access to

remedies; and the absence of regulatory restrictions for public access to criminal conviction records.

7.0. THE EXTRATERRITORIAL EFFECT OF THE GDPR AS A POSSIBLE JUSTIFICATION FOR NIGERIA'S LOOSER REGULATORY REGIME

One of the reasons that the Nigerian government may have adopted a less stringent framework compared to the GDPR is due to the EU Regulation's extraterritorial effect. The GDPR affects companies either established or processing data in the EU. This means that many international businesses active in Nigeria, including the Big 4 – Amazon, Apple, Facebook, and Microsoft – must comply with the GDPR's data privacy compliance standards due to technical non-divisibility.[137] However, the GDPR's extraterritorial effect does not completely resolve the problems with Nigeria's data protection regime. The Nigerian government and many local businesses fall outside the scope of GDPR, and thus are governed by Nigeria's local regulations – the NDPR and, if enacted, the DPB. The GDPR's extraterritorial effect also still does not resolve issues surrounding Nigerians' access to remedies for violations of their data rights within the country.

Through Article 3 of the GDPR, foreign entities (data processors and controllers) that do business in the EU are required to comply with the Regulation. The GDPR stipulates that the Regulation "applies to the processing of personal data by a controller or processor not established in the Union, but in a place where Member State law applies by virtue of public international law."[138] Covered processing activities include offering goods or services to, or monitoring, individuals located in the EU.[139] This means that businesses in non-EU states whose scope of operations fall within the provisions of Article 3 of the GDPR will have to comply with the Regulation to avoid facing penalties.

[137] For a definition of "technical non-divisibility," see *supra* n 61.
[138] See Regulation (EU) 2016/679, *supra* n 63, at Article 3(2).
[139] *Ibid*, at Article 3(2)(a)(b).

The GDPR also applies to the processing of personal data in the context of the activities of an *establishment* of a controller or a processor in the Union, whether processing activities take place in the Union.[140] According to the GDPR recitals, *establishment* "implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect." The implication being that once an organization is deemed an establishment, according to the criteria set forth in the recitals, the GDPR applies to its operations even though data processing is not taking place in the EU. The definition of establishment is consistent with Article 4(1)(a) of Directive 95/46.[141] The Court of Justice of the European Union (CJEU) has interpreted what it means to be "established" under Directive 95/46 in two landmark cases – *Weltimmo* v *NAIH* (C-230/14) and *Google Spain SL, Google Inc.* v *AEPD, Mario Costeja Gonzalez* (C- 131/12).[142] In *Weltimmo*, the court held that in order to establish whether a data controller has an establishment in an EU Member State other than a third country where the controller company is registered, both the "degree of stability of the arrangements and the effective exercise of activities in that other Member State must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned," especially for services offered exclusively over the internet.[143] The court further held that the presence of only one representative can, in some circumstances, suffice to constitute a stable arrangement if that representative acts with a sufficient degree of stability through the presence of the necessary equipment for provision of the specific services concerned in the Member State in question.[144] In this case, the court thus ruled that for the purposes of data processing that, Weltimmo, a company registered in Slovakia was established in Hungary, the EU, because Weltimmo runs one or

[140] *Ibid*, at Article 3(1).
[141] Wiley, "The GDPR's Reach: Material and Territorial Scope under Articles 2 and 3", available at https://www.wiley.law/newsletter-May_2017_PIF-The_GDPRs_Reach-Material_and_Territorial_Scope_Under_Articles_2_and_3 (accessed 3 February 2021).
[142] *Ibid*.
[143] C-230/14, *Weltimmo* v *NAIH*, CURIA 29 (2015).
[144] *Ibid*, at p. 30.

several property dealing websites concerning properties situated in Hungary, which are written in Hungarian and whose advertisements are subject to a fee after a period of one month. Similarly, in *Gonzalez*, the court ruled that Google was established in Spain, the EU, because the data processing at issue in that case was related to the search business which Google Spain's sale of online advertising helped finance.[145] The decisions in the *Weltinmo* and *Gonzalez* cases apply to the GDPR due to the similarity in language with the Directive 95/46.[146]

With globalization, the wide-spreading reach of the internet, and the size of the EU market, in the bid to increase profits, both Nigerian businesses[147] and large foreign businesses[148] operating in Nigeria have exposed themselves to advertising their businesses within the EU and catering to EU residents. This means that they can easily be deemed established in the EU for the purposes of the GDPR. Thus, most businesses opt to follow the Regulation for all their data processing activities, especially due to the non-divisibility of data.[149] In fact, an analysis by Veritas Technologies, an information management company, suggests that 86 percent of organizations worldwide are concerned that a failure to adhere to GDPR could have a major negative impact on their business.[150] Nearly 20 percent of these businesses also fear that non-compliance could put them out of business.[151] This fear is warranted especially because of the large fines associated with violations of the GDPR. The foregoing illustrates the *Brussels effect:*[152] The EU's market size has attracted many companies, which process consumer data, to do business within the Union. The

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[145] C-131/12, *Google Spain SL, Google Inc.* v *AEPD, Mario Costeja Gonzalez*, EUR-Lex 56 (2014); *see also* Wiley, *supra* n 141.
[146] *Supra* n 141.
[147] Y. Kazeem, "African Startups Are Making the Risky Bet of Expanding beyond the Continent for Growth and Profits", available at https://qz.com/africa/1732046/swvl-lidya-paga-expand-from-africa-to-europe-asia-and-americas/ (accessed 3 February 2021).
[148] *Supra* n 47, at p. 28.
[149] *Ibid*, at p. 57.
[150] A. Bridgwater, "Worldwide Climate of Fear over GDPR Data Compliance Claims Veritas Study", available at https://www.forbes.com/sites/adrianbridgwater/2017/04/25/worldwide-climate-of-fear-over-gdpr-data-compliance-claims-veritas-study/?sh=7cd027ea680c (accessed 3 February 2021).
[151] *Ibid*.
[152] See Part II of this Paper.

EU's strict data privacy regulations, which have extraterritorial effect, have caused many businesses to choose to adhere to the EU's regulations, especially due to the difficulty of separating their data services across multiple markets for technological reasons.

With most private data processors and controllers covered by the GDPR through the extra-territorial effect, the entities not affected by the GDPR's overhang tend to be smaller or more territorial (e.g., the Nigerian government). However, their data processing operations, especially that of the government, are large enough to pose real privacy risks to Nigerian citizens.

When it comes to the government, what becomes most worrisome is (i) the lack of complete independence of the supervisory authority (NITDA, in the case of the NDPR, or the Commission, in the case of the DPB) from the Nigerian government; and (ii) assuming the DPB is enacted, complainants' ability to track their claims and attain not-for-profit representation. Without complete independence, there remains uncertainty about whether rights of data subjects will be fairly upheld when complaints against the government's data processing activities arise. This issue is particularly important due to the Nigerian government's history of oppressive acts against its citizens, including unlawful infringement on privacy rights.[153] There is no dispute that the NDPR should be supplemented with the DPB. However, given the

[153] According to the United States' Department of State in 2019, "significant human rights issues [in Nigeria] included unlawful and arbitrary killings, including extrajudicial killings, forced disappearances, torture, and arbitrary detention, all the above by both government and nonstate actors; harsh and life-threatening prison conditions; unlawful infringement on citizens' privacy rights; criminal libel; violence against and unjustified arrests of journalists; substantial interference with the rights of peaceful assembly and freedom of association in particular for lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons and religious minorities; widespread and pervasive corruption; crimes involving violence targeting LGBTI persons; criminalization of same-sex sexual conduct between adults; and forced and bonded labor." *See* United States Department of State, Bureau of Democracy, H.R. and Lab., *2019 Country Reports on Human Rights Practices: Nigeria* 1 (2019); The government also recently tracked and clamped down on protesters against the Nigerian police brutality, even though they were exercising their constitutional right. *See* Vanguard, "#EndSARS Advocates Clamp Down: Descent into Tyranny – NAS", available at https://www.vanguardngr.com/2020/11/endsars-advocates-clamp-down-descent-into-tyranny-nas/ (accessed 3 February 2021).

limitations to the GDPR's extraterritorial effect, some amendments to the DPB are needed to enhance government accountability in data processing. First, like the GDPR, the Commission should be granted *complete independence* from the Federal Government and members of the Commission should not be permitted to hold positions within the government during their tenure. Also, it should be expressly stated that any decision by the President to oust the Data Protection Commissioner prior to completion of the Commissioner's tenure should be subject to review by the House of Representatives.[154] These changes to the DPB should be made in order to make the Commission less partial or fearful in conducting government-facing investigations. Another set of amendments that need to be made to the DPB involve expressly providing data subjects with the right to track the progress of complaints filed with the Commission. This will help data subjects ensure that their cases are being reviewed and investigated. Additionally, in the case of direct civil actions that data subjects bring, it would be prudent to follow the lead of the GDPR and allow for data-subject representation by non-profits. This is important because with the high poverty rate[155] and broken education system[156] in the country, many Nigerians cannot afford good lawyers and have limited knowledges of their rights.[157] They would thus benefit from external support from seasoned data protection NGOs.

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[154] This amendment is necessary because of the Presidency's tendency to abuse its discretion in making such decisions. For instance, *see* The Associated Press, "Nigeria's Leader Suspends Chief Justice 3 Weeks before Vote", available at https://www.nytimes.com/2019/01/25/world/nigerias-leader-suspends-chief-justice-3-weeks-before-vote.html (accessed 3 February 2021).

[155] According to the World Bank, 83 million people in Nigeria live in abject poverty. *See* World Bank, "The World Bank in Nigeria", available at https://www.worldbank.org/en/country/nigeria/overview (accessed 3 February 2021).

[156] S. Kehinde, "Nigeria's Public School System, A Blow", available at https://guardian.ng/opinion/nigerias-public-school-system-a-blow/ (accessed 3 February 2021).

[157] According to the United Nations Office on Drugs and Crime (UNODC), "[t]he financial limitation for qualification for legal aid is set at . . .5,000 naira per month (or US$ 43) in Nigeria, which still leaves quite a sizeable proportion of the population who earn more than 5,000 naira but are still unable to pay for private counsel uncovered." *See* UNODC, "Access to Legal Aid in Criminal Justice Systems in Africa Survey Report" 20 (2011), available at https://www.un.org/ruleoflaw/files/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf (accessed 3 February 2021).

7.1. Potential Socio-Economic Justifications for Nigeria's Data Protection Regime

As discussed, more territorial and smaller businesses tend to fall outside the GDPR's extraterritorial scope. Yet, the DPB leaves some substantial gaps in the NDPR unresolved. A look at Nigeria's socio-economic health and developing country status may justify the NITDA's decision to reduce some compliance burdens for businesses and, to a lesser extent, may justify placing criminal conviction records outside the scope of the DPB's protection.

7.1.1. Nigeria's Framework may be an Attempt to Foster Economic Development.

Wealthier developed countries can better afford pursuing consumer protection at the expense of the profitability of their firms. However, for Nigeria, a developing economy, having less stringent regulatory standards for consumer data protection may be necessary to promote domestic enterprise development. In the world today, the ability of companies to collect, analyse, sell, and monetise user data with minimal restrictions is the basis for innovation and business growth; consumers are drawn by services targeted to benefit them and companies profit from the personal data collected from consumers.[158] Imposing stringent regulations on local businesses in a developing country restricts firms' ability to profit from analysing consumer data. Also, each additional obligation for businesses to comply with is likely to increase their cost of production. For instance, mandating that business find ways to confirm parental consent for children's data and setting hard deadlines for breach notifications, as in the DPB, will require more financial resources from local businesses that they may not have. Requiring data processors to have representatives within the country may also disincentivise foreign direct investment due to the increased cost of doing business. Furthermore, from the government's standpoint, enforcing a stringent regulatory regime will increase its

[158] B. Chakravorti, "Why the Rest of the World Can't Free Ride on Europe's GDPR Rules", available at https://hbr.org/2018/04/why-the-rest-of-world-cant-free-ride-on-europes-gdpr-rules (accessed 3 February 2021).

financial costs.[159] Given that Nigeria is currently undergoing a recession, the country is unlikely to effectively manage a costly regime.[160]

Thus, Nigeria, a developing country pursuing economic growth, must strike the right balance between protecting consumer data and promoting domestic enterprise development. Femi Daniels, one of the drafters of the NDPR, also makes this argument in brief.[161] In defending the looser regulations in the NDPR compared to the GDPR, Daniels points to the need to seek balance between "a strict data protection regulatory regime and economic opportunities emanating from relaxed data protection regimes."[162] He says, "it is . . . unrealistic and inhibitive of desperately needed foreign investment and opportunities, for Nigeria to aim too high with respect to their regulations."

7.1.2. Nigeria's Framework may be an Attempt to Lower Crime Rates

The decision not to place criminal conviction records under the protection of either the NDPR or the DPB may be a purposeful move amidst the impending enactment of the Crime and Criminal Tracking System Bill (2019).[163] This Bill will require the design, development, installation, and management of a crime and criminal tracking database for the Nigerian police with the purpose of enhancing national security.[164] It will require all available criminal history for a person to

[159] *See* United Nations Conference on Trade and Development (UNCTAD), "Data Protection Regulations and International Data Flows: Implications for Trade and Development" (2016), available at https://unctad.org/system/files/official-document/dtlstict2016d1_en.pdf (accessed 3 February 2021).
[160] N. Munshi, "Nigeria Slumps Back into Recession as COVID Bites", available at https://www.ft.com/content/ea70f0b4-5f13-423b-b1ed-6d6c424d1b91 (accessed 3 February 2021).
[161] Kirpatrick, *supra* n 9.
[162] *Supra* n 45.
[163] U. Chiefe, "Nigeria is Planning a Digital Criminal Registry; You Should Probably Be Worried", available at https://techpoint.africa/2019/10/09/criminal-bill-nigeria-trust-privacy-corruption/(accessed 3 February 2021).
[164] *Ibid*.

be available online, and this information will be available to the general public.

The need to clamp down on crime rates in Nigeria is indeed urgent.[165] However, this need should not completely overrun the need for some forms of restrictions to the public in accessing individuals' criminal conviction history. This is especially due to the broken police[166] and judiciary[167] systems in Nigeria, as well as the high rate of wrongful convictions for crimes.[168] Additionally, with the life-shattering consequences of criminal records to a person's employability and social standing, there needs to be some privacy restrictions on access to these records. Perhaps to account for the higher crime rates in Nigeria compared to the EU, legislators should adopt a less stringent variation of the GDPR's standards for the protection of criminal conviction records. In any case, this issue of striking the right balance between data protection and national security ought to remain in sharp focus with appropriate deliberation by legislators and civil society at large.

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[165] According to the United States Department of State, "Crime is prevalent throughout Nigeria. Most crime directed toward U.S. travellers and private-sector entities in southern Nigeria seeks financial gain. U.S. visitors and residents have been victims of a wide range of violent crime, including armed robbery, assault, burglary, carjacking, rape, kidnapping, and extortion. The mostly commonly reported crimes are armed robbery, kidnap for ransom, and fraud. In addition, mainland portion of Lagos has experienced periodic outbreaks of violence, resulting from clashes among localized street gangs known as 'Area Boys.'" *See* United States Department of State, "Nigeria 2019 Crime & Safety Report: Lagos", available at https://www.osac.gov/Content/Report/4a5eaf52-3655-43e6-b540-1684bcb6f3de (accessed 3 February 2021).

[166] J. Campbell, "Nigerian Police are in Desperate Need of Reform", available at https://www.cfr.org/blog/nigerian-police-are-desperate-need-reform (accessed 3 February 2021).

[167] T. Osasona, "Time to Mend Nigeria's Broken Criminal Justice System", available at https://guardian.ng/features/youthspeak/time-to-mend-nigerias-broken-criminal-justice-system-1/ (accessed 3 February 2021); *see also* Y. Kazeem, "Up to Three-Quarters of Nigeria's Prison Population is Serving Time Without Being Sentenced", available at https://qz.com/africa/892498/up-to-three-quarters-of-nigerias-prison-population-is-serving-time-without-being-sentenced/ (accessed 3 February 2021).

[168] D. Ehighalua, "Nigerian Issues in Wrongful Convictions" (2013) 80(4) *University of Cincinnati Law Review*, p. 1131.

7.2. The Role of the Private Sector in Addressing Some of the Limitations to Nigeria's Looser Regulatory Framework

The GDPR's extraterritorial effect does not also resolve issues concerning the accountability of all data processing entities in Nigeria to the NITDA or the Commission, particularly as it relates to data breach reporting. As already discussed, while the DPB augments the NDPR in requiring data breach reporting, unlike the GDPR the Bill does not give a timeframe for making these reports. A potential reason for leaving this issue unaddressed in the DPB may be due to the role of the private sector in improving cybersecurity. Note that cybersecurity is a necessary complement to data processing regulations because the latter limits opportunities for institutional misuse or abuse of personal data, and the former prevents external hackers from fraudulently accessing personal data.

The underlying challenge with the absence of a reporting timeframe in Nigeria's data protection regime is that the Commission may be slower or unable to review and process data breach reports. As previously discussed, reporting breaches to the supervisory authority may play an important role in enhancing cybersecurity.[169] This is because information from data breach reports can be analysed and disseminated in the bid to fortify companies' security protocols.

For the Nigerian government, allowing the private sector to combat data breaches may be more effective than putting its limited resources towards tightly tracking, analysing, and disseminating data breach reports to improve cybersecurity. This is because the private sector in Nigeria possesses larger technological and budget capacities than the public sector, making it a more efficient provider of cybersecurity services.[170] A look at recent developments amongst Nigeria-based

[169] *See* Part II of this Paper.

[170] The public sector works with a tighter budget and possesses limited technological capacities. *See* A. Estache and L. Wren-Lewis, "Toward a Theory of Regulation for Developing Countries: Following Jean-Jacques Laffon's Lead" (2009) 47(3) *Journal of Economic Literature*, pp. 729 and 733 (discussing the limited regulatory capacity of developing countries: "Regulators are generally short of resources, usually because of a shortage of government revenue and sometimes because funding is deliberately withheld by the

businesses confirms this theory: With the assistance of private security companies, businesses in Nigeria are gearing up to defend themselves against cybersecurity breaches.

Assisted by privately owned security operation centres, companies are implementing protective and security monitoring mechanisms and increasingly subscribing to cyber insurance to defend against breaches. Knowledge of the modes through which data breach occur is also spreading across businesses not just in the financial sector – Nigeria's tightest regulated sector – and they are already taking action and expected to take more action to ensure security of data. The Deloitte Nigeria Cyber Security Outlook 2020 reports that in 2019, organizations in Nigeria took strategic decisions by implementing or subscribing to Security Operation Centres to monitor and defend their firms from existing and emerging threats.[171] Consequently, there was a rise in cyber threat monitoring services which has helped many organizations secure their most priced data. The increases in cybersecurity consciousness across organizations in Nigeria has also led to increased success in detecting and responding to cyber-attacks and breaches within the shortest possible times.[172] Cyberthreat monitoring and intelligence services in Nigeria have also been projected to transition from manual monitoring techniques to reliance on AI and machine learning monitoring to help uncover attacks before they happen, and ultimately gain an advantage against fraudsters and hackers.[173] There is also projected to be an increase in organizations in Nigeria exploring cyber insurance as against focusing efforts solely on preventive measures for detecting and blocking potential attacks as

government as a means of undermining the agency. The lack of resources prevents regulators from employing suitably skilled staff, a task that is made even harder by the scarcity of highly educated professionals and the widespread requirement to use civil service pay scales. Beyond the regulator itself, an underdeveloped auditing system and inexperienced judiciary further limits implementation".

[171] T. Aladenusi, "Nigeria Cyber Security Outlook 2020", available at https://www2.deloitte.com/ng/en/pages/risk/articles/nigeria-cyber-security-outlook-2020.html (accessed 3 February 2021).

[172] *Ibid*.

[173] *Ibid*.

well as practices around disaster recovery to enable an appropriate response.[174]

The GDPR's extraterritorial effect, Nigeria's socio-economic climate, and private sector cybersecurity activities may justify the looser regulatory regime in Nigeria. However, they are not full-proof vindications for certain persistent gaps in the NDPR and DPB, namely; the non-independence of the supervisory authority; difficulties in data subjects' access to remedies; and the absence of regulatory restrictions for public access to criminal conviction records. Changes must be made to the DPB, to correct for these deficiencies.

8.0. CONCLUSION

The enactment of the NDPR in 2019, which followed the passage of the GDPR into law in 2016, represented a glimmer of hope for the proper protection of data subjects' rights in Nigeria. However, with its deviations from the GDPR in areas that importantly protect individual's constitutional privacy rights and hold businesses properly accountable for their data processing actions, the DPB needed to be introduced to strengthen the legal institutional framework for data protection in Nigeria. This is especially true as Nigeria seeks to execute a Data Identification for Development Project that will leave most Nigerian's personal data at the mercy of the government. While the Data Protection Bill provides more protection for personal data than the NDPR, it still has certain gaps that need to be addressed. Yes, the GDPR and private sector are a good supplement to Nigeria's regulatory system, and yes, Nigeria's status as a developing economy warrants a looser regulatory framework. However, certain aspects of the DPB remain problematic. These include: the non-independence of the supervisory authority, difficulties associated with data subjects' access to remedies, and the absence of regulatory protections for criminal conviction records. Legislative advocates must seek to have these issues with the DPB corrected to make it a viable supplement to the NDPR. Most importantly, from a broader perspective, it should be emphasized that there needs to be an institutional commitment to

[174] *Ibid*.

the enforcement of the NDPR and DPB, if enacted, if not the data privacy regulations in the country will have no teeth.

BASIC LEGAL CONTRACTUAL GUIDE FOR PLAYERS IN THE FINTECH INDUSTRY

By Timilehin Ojo [*]

With the increase in active players within the FinTech industry, it has become necessary to shed light in the simplest and clearest terms on how best the relationship established under such arrangements can be regulated. The introduction of technology to the financial service space is unique and accompanied by positives; however, this should not amount to a neglect of important establishing agreements to prevent exploitation in any form. So many attempted partnerships, though unofficially on record, especially by start-ups and individual experts of various specialties have failed as a result of absence of clear terms governing their relationship. Particularly, some of the established companies have acquired start-ups without according them the economic value they deserve. This paper attempts to touch on some of the important contracts to be executed in such relationships and some clauses that are considered of great importance to protect parties to such an arrangement.

1.0. INTRODUCTION

With the impact of technology, certain systems have changed in form. These unending innovations hit the financial institution and the nomenclature 'FinTech' emerged, coined from Financial Technology. The FinTech companies emerged to change the age-long means of dealing with regulated financial services/transactions. New methods and means have been introduced because of the emergence of FinTech companies. In the same light, new legal complications have. It is therefore important that FinTech companies go in line with these new legal trends to avoid being caught in the web of legal battles.

Some persons have described dealing in the FinTech industry as complicated and complex; however, this may not be totally correct. FinTech companies offer different services, therefore no strict rule applies to all FinTech companies. There are certain points of convergence unique to the FinTech industry, but no two FinTech companies possess the same legal requirement in most cases. This is further buttressed with the understanding that some of these companies are well established while some are simply start-ups; the services to be provided in each case are also not always the same.

[*] Email: timilehinojo76@yahoo.com.

Regardless of all that has been stated above, law plays an undisputable role in the establishment, growth, success, and continuous existence of any FinTech company. Largely, most jurisdictions do not possess full-fledged regulatory books for operation, therefore, a lot is left for the parties to agree on. Even where full regulations are in existence, the law always allows for parties' right to agree on specific terms. This introduces the importance of contractual agreements reduced into writing.

Flowing from the above, this paper highlights certain types of agreements which are regularly required in the FinTech industry and close attention must be accorded to them. The paper goes further to identify some important clauses that must be adequately considered when drafting or reviewing any contract of such nature.

2.0. THE FINTECH NETWORK

This cutting-edge entrant is attracting attention in the business sphere. The players of the sector include the established companies, financial institutions, and technology companies, as well as start-ups, affecting the society in all spheres using technology to impact the economy. The business models are either Business-to-Customers (B2C) or Business-to-Business (B2B).

FinTech can be broken down to payments, investment, lending, analytics, blockchain, banking infrastructure, etc. All of these can further be divided into smaller units; it tells how wide-ranging the term FinTech is. Some of these activities are fully regulated while others are either partially regulated or not regulated at all.

This paper is focused on the foundational relationship within this complex structure, as most of the contracts of concern within this paper are used to establish primary relationships between the parties. These contracts will become appreciated when the relationship gets to an enhanced stage, as this will provide a clear direction to all parties on the direction to go and therefore will prevent friction.

3.0. COMMON FINTECH CONTRACTS

The following contracts are most likely to be considered by a FinTech company or start-up. It is important to state that the best stage to

execute contractual agreements is before the commencement of the act and not upon completion. As a result of the uniqueness of the industry and the requirements, which include funds to expertise, collaboration, approvals, information gathering, and risk, etc., the importance of these contracts cannot be over-emphasized. This paper is by no means ruling out the existence of other essential contracts, as the type of contract to be drafted is largely based on the need and legal purpose the agreement is to achieve. In addition, some of the agreements mentioned below may be best put as a clause in another full-fledged agreement. Furthermore, the agreements listed below may apply in the same level of importance to other industries, nevertheless, the FinTech industry is the focus of this paper.

The agreements stated herein, in no particular order of importance, are in some cases to be executed by business partners; in some cases, between the company and professionals or other third parties engaged to perform specific roles; or between the company and its clients; in other cases between the company and financiers/investors.

3.1. Privacy Policies and Terms of Use Agreements

Technology is data driven. This understanding must resonate in the mind of players of the industry and therefore propel necessary actions along this line. The use, collection, gathering and application of data in tech products makes it extremely important to enter into agreements to set out in clear terms whose responsibility it is for the handling of such data at each point and who bears responsibility for the occurrence of a breach of data.

The collection of individual and collective data over the years has risen exponentially, thereby requiring more caution when dealing with the same. The European Union's General Data Protection Regulation (GDPR); the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA); the California Consumer Privacy Act (CCPA); Japan's Act on Protection of Personal Information (APPI); Brazil's General Data Protection Law ("Lei Geral de Proteção de Dados" or "LGPD"); Thailand's Personal Data Protection Act (PDPA); India's Personal Data Protection Bill (PDPB); and China's Data Security Administrative Measures (the "Measures") and Cybersecurity Law of

China, are all examples of international legislations/regulations[1] requiring compliance for the protection of personal information/data of individuals. In Nigeria, the Nigeria Data Protection Regulation (NDPR) 2019 in its Part III provides for a list of rights data subjects are entitled to. This is in addition to the rights provided for under the 1999 Constitution of the Federal Republic of Nigeria (as amended), the Freedom of Information Act 2011, and the Cybercrime (Prohibition, Prevention, Etc) Act 2015, amongst others.

Privacy policy is more concerned with informing clients and those who engage with the product of the collection and use of the information that may be requested. A review of most of the regulations stated above will prove that the inclusion of a Privacy Policy will serve as a compliance with the regulations. A Terms of Use also referred to as Terms of Conditions or Terms of Service is more of a protection for the Company, it is one of the contracts referred to as a consumer contract. A trained mind would be helpful in ensuring enforceable agreements in this regard are incorporated into your legal arrangement when contracting. Spotify's terms of use[2] is an example of a detailed Terms and Condition. However, it is important that such agreements are tailored to a company's specific needs.

3.2. Service Level Agreements (SLAs)

The nature of the FinTech industry makes the use of milestones to be of immense value since a product may take months to be fully delivered. The time spent at every stage of the production of the product is of high value and should be compensated for. It is by virtue of such agreements that parties are clear on the input made and the value delivered even before the actual value can be enjoyed from the final product.

The necessity of putting metrics and measurement units in place to determine and appraise the performance level of service providers by consumers must be acknowledged. The importance of being able to

[1] B Berecki, "10 Data Protection Regulations You Need to Know About", available at https://www.endpointprotector.com/blog/10-data-protection-regulations-you-need-to-know-about/ (accessed 22 September 2021).

[2] Spotify, "Spotify Terms of Use", available at https://www.spotify.com/us/legal/end-user-agreement/ (accessed 30 September 2021).

gauge FinTech service delivery factually rather than instinctively is very important in preventing disputes and keeping business relationships alive. The ability to analyse and evaluate the rate and level of service delivered based on determinable terms is an important tool for both sides to the primary contract, and any third-party who may be engaged.

SLAs usually serve as the legal architectural framework for the technical engagement between parties. It is important that SLAs are drafted in a way that business expectations are met and not in the strict means of simply ensuring that service providers meet set expectations with little or no room for creativity or enhanced delivery. It is in the drafting of this agreement that modern trends must be taken into consideration for the efficient delivery of service and accomplishment for both the customer and service provider.

3.3. Confidentiality Agreement (also known as Non-Disclosure Agreements)

The exact nature of FinTech companies requires a high level of confidentiality. The information to be covered by a Confidentiality Agreement ranges according to what is defined in the agreement. It is therefore advised that information to be included as confidential should be made wide and encompassing to capture all that is required to protect the interest of the parties to the agreement. Certain information is considered essential by participants in the creation of a product, and it is appropriate to ensure that such information is covered by the definition of 'confidential' in the agreement. This writer will be quick to state that there are, however, general exceptions to when the Confidentiality Agreements would not be allowed to be relied on.

Confidential agreements are also like, and are sometimes referred to as, Non-disclosure Agreements (NDAs). In some instances, confidential agreements may simply be required to be included as a clause in another agreement. This agreement is mostly required to be signed by a Service provider to a FinTech contract, employees, contractors, and other third parties.

3.4. Joint Venture Agreements (JVA)

It has become popular practice for financial institutions, specifically, to enter into Joint Venture Agreements (JVAs) with FinTech companies or start-ups for the purpose of payment and financial solutions. FinTech companies are relevant in providing solutions to financial payment services, serving governments, local banks, and telecommunication companies, amongst others, and have therefore changed the face of the provision of financial services through these innovations.

Several financial institutions and institutions in other sectors that view FinTech as a threat to their orthodox means of carrying out their activities, have fully embraced this innovation. This has resulted in multiple engagements between such institutions and the FinTech companies. The requirement of these partnerships is now a compulsory one as it is no longer optional, to stay in business and this is where a JVA becomes of necessity.

By a JVA, certain points of concern would be discussed and agreed upon, such as the aim of the collaboration, what the business objective is for each party, what the preferred lifespan of the relationship should be, the ownership interest in the product, and value for work to be done, amongst others.

3.5. Partnership Deed/Agreement

While JVAs are usually formed to meet a specific goal or purpose, a Partnership Agreement is wider than that in scope. A Partnership Agreement is one of the underrated agreements in many sectors, including the tech space. As a result of the regular changes that occur in the FinTech space, a Partnership Agreement is highly recommended to exist between developers, and other experts who have decided to work as a team on different projects. Such agreement can provide for adequate remuneration for each partner if a partner decides to exit the team mid-way into the project. It will address issues of profit and loss, ownership rights over products, procedure(s) to step out of the partnership, percentage of control over the partnership, and how decisions can be reached, amongst others.

The absence of an agreement of this nature accounts for the biggest disagreements that can break such companies after breaking even.

3.6. Financing Agreements

Agreements of this nature are of high importance, especially with the knowledge that tech is not cheap and most often than not, external funding is required to bring products to conclusion. Agreements which are likely to be required for funding would be, Peer-to-Peer (P2P) service operator and lender agreements, P2P lender and borrower agreements, loan agreements, and so on.

3.7. Product Development Agreements

This is an agreement which is likely to be requested by clients who engage a FinTech company. The agreement is to ensure that the instruction or intended product to be developed is clear and the outcome meets expectation. This is also of advantage to the company since it will ensure the client is confined to the initial agreement on the product to be produced.

3.8. Outsourcing Contracts

On certain occasions, FinTech companies may require certain aspects of the development of a product to be outsourced for various reasons. It is important to have a clear understanding of the instruction and stay on the same page for both the outsourcing party and the party to whom the service is outsourced to. Therefore, such an agreement is required.

3.9. Licensing and Collaborative Agreements

An agreement of this nature is used to assign rights, specifically intellectual property rights, in products which are made by joint inputs. Several intellectual property rights, such as patent, copyright, etc. exits from the creation of FinTech products which are best discussed and assigned at the earliest opportunity.

Other agreements which may be executed include Corporation Agreements, Vendor Agreements, Investor Agreements, Shareholders Agreements, Co-founder Agreements, etc.

4.0. IMPORTANT CLAUSES OF A FINTECH CONTRACT

Depending on the type of agreement required to be executed in each case, the following clauses must be included to ensure full protection of the parties to the agreement. The novelty of the industry does not give room for certain omissions, as there are no hard and fast rules to certain legal questions, no custom of trade to be followed, therefore failure to include the position of parties to such agreements may lead to endless and avoidable legal disputes.

The following clauses are identified as clauses of high importance which parties must agree to, and which are essential in the agreement to be executed. Take note that the following clauses are not stated to be the most important clauses of any agreement, but compulsory clauses to be included in certain types of FinTech agreements by virtue of the interconnection between what the clauses are to capture and what a FinTech agreement requires.

These clauses include, but not limited to;

4.1. Indemnity Clause

This is a clause used to limit or redirect consequences of legal, regulatory, or contractual violations which may occur. A major reason why an indemnity clause may be handy is the inadvertent or careless breach of regulatory laws which can occur as a result of new laws or amendments to existing laws. As a result, FinTech companies may also need to ensure that indemnity clauses are included in their agreements to protect them from fines and punishments for which they are unaware.

4.2. Intellectual Property Clause

This is a very important clause to determine whose side the ownership of the rights in the products would reside. This is necessary to avoid claims of infringements and settle matters pertaining to copyright, design, trademarks, and patents.

4.3. Limitation of Liability Clause

This clause is used to reduce the responsibilities of parties if damage has been occasioned as a result of the act of any of the parties to the agreement. Parties fix liability to the extent of their involvement and accept to take responsibility to the extent that their decisions and choices occasioned. Absence of this clause may result in a party bearing liability beyond that envisaged when contracting. Matters that may be specifically covered under this clause include breach of data and confidentiality, identity theft, technology failure, amongst others.

4.4. Business Terms

Clauses under this heading are included to ensure business continuity in the event of unexpected disruptions. Such clauses will address what should be done in the event of such huge errors and whose responsibility it is to fix the same, the time frame to get such resolved, cost implication and other necessary factors.

4.5. Confidentiality Clause

As already addressed above, this can take the form of a full contract or may be included as a clause in a contract. By virtue of the nature of FinTech, this is a necessary clause to be included to prevent huge economic and other related losses as a result of spilling out information that should have remained classified. The absence of this clause is also capable of resulting in extended and prolonged disputes where not properly managed. A breach of this clause can occur in various forms, and any party to a FinTech arrangement may become guilty of such breach. For this reason, it is advised that terms are clearly spelt out and professional advice is obtained before actions are taken.

4.6. Internal Controls

It is suggested that contracts to govern FinTech relationships possess clauses that will require audit to ensure activities are carried out within the best standard procedure as required to ensure efficiency, professionalism, and optimum service delivery. Such internal control clauses will serve as a check to all parties to such arrangement and

ensure they serve with the best professional attitude as can be obtained.

5.0. CONCLUSION

No error should be made; the importance of law and legal practitioners to FinTech goes far beyond contract/agreement drafting, review, or negotiation. There are other roles legal practitioners play in the FinTech industry. However, the focus of this paper is on agreements.

While the importance of a binding and enforceable contract is emphasized across industries, another point that must not be neglected is ensuring the appropriate agreements are executed and the appropriate clauses are contained in such agreements to ensure full legal protection for the parties to the agreement. An agreement which lacks the relevant clauses when called up is as good as no agreement. In all, the need to engage a professional with the requisite skill is of top priority before any engagement, as this is the only means to prevent avoidable liabilities.

AN ANALYSIS OF THE LEGAL EFFECT OF AN UNSIGNED DOCUMENT (CONTRACT) IN CONTRACT THE LIGHT OF THE SUPREME COURT DECISION IN MTN V CORPORATE COMMUNICATION INVESTMENT LTD (2019) LPELR – 47042 (SC)

By Onyemauche Ibezim and Johnchryso Eze[*]

The apex court on 5 March 2019 created an exception to the general principle on the effect of an unsigned document in the landmark case of MTN v Corporate Communication Investment Ltd.[1] Here, it departed from the traditional principle that every unsigned document is a worthless document and held that the unexecuted Agreement was binding on parties. The above decision has been misconstrued by some critics as changing the traditional rule on the effect of an unsigned document as a worthless document that cannot be relied on to prove the existence of its contents. This paper analyses the effect of executing a document and the likely consequences of not executing a document. Using MTN v Corporate Communication Investment Ltd. as a case study, the paper concludes that the effect of an unsigned document depends on the peculiar circumstances of each case vis–a– vis the conduct of the parties.

1.0. INTRODUCTION

A contract simply is a legally binding promise.[2] It is a promise or set of promises, the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty. In the case of *BPS Construction & Engineering Co. Ltd.* v *FCDA*[3] the Supreme Court held that:

> A contract is a formal agreement between two or more parties who by so entering into such agreement, they resolve to create obligation or commitment between them to do or not to do a particular thing…if parties sign the agreement, they make themselves bound by it and thereby becoming enforceable on them depending on the terms agreed upon.

The various definitions of contract all refer to enforceability under the law. An agreement that the law will enforce presupposes that there

[*] Associates at Kenna Partners. Email: articles@kennapartners.com.

[1] *MTN* v *Corporate Communication Investment Ltd.* (2019) LPELR-47042(SC).

[2] J. Beatson, A. Burrows and J. Cartwright, *Anson's Law of Contract*, 29th ed. (Oxford University Press: London, 2010).

[3] *BPS Construction & Engineering Co. Ltd.* v *FCDA* (2017) LPELR-42516(SC).

are conditions that the agreement must meet for it to be recognized as enforceable under the law. These conditions are referred to as the essential elements of a valid contract.

For a valid contract or agreement to exist, there must be a concurrence of a definite offer by one party and a definite acceptance by the other. There must also be consideration and the parties must have intended a relationship in law.[4]

Execution of a contract is the offshoot of one of the essential elements of a valid contract. It has earlier been discussed that for a contract to be valid, the parties must have the intention to be bound or have a legal relation. Execution of a contract is a means of communicating this intention to be bound by contracts in writing. The mode of execution of a contract depends on the nature of the party executing the contract, whether it is a natural person, incorporated company, business name, or incorporated trustee.

For all the executing parties listed above, execution can either be by thumbprint, signature or seal depending on the party and the law regulating the execution of the relevant document by such party.[5] When an agreement is duly executed by a party, it communicates its intention to be bound and that is why in the absence of a date of commencement, a contract is deemed to commence on the date on which the last party executes the contract and the terms of the contract immediately bind the parties.

In *Enemchukwu* v *Okoye & Anor.*,[6] the Court of Appeal held that;

> In the absence of fraud, duress, or plea of *non-est factum*, the signature of a person on a document is evidence of the fact that he is either the author of contents of the document that are above his signature or that the contents have been brought to his

[4] *Oscar & Anor.* v *Isah* (2014) LPELR-23620(CA).

[5] See *Melwani* v *Chanlira Corp* (1995) 6 NWLR (pt. 402) p. 438, where the court held that "when the policy of an Act is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions and a penalty is imposed on the party omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal and cannot be sued upon by the person liable to the penalties." (p. 460 paras. E-F).

[6] *Enemchukwu* v *Okoye & Anor.* (2016) LPELR-40027 (CA).

> attention. It does not matter that he did not read the contents of the documents before signing it. The general rule is that a party is estopped by his deed and a party of full age and understanding is bound by his signature to a document, whether he reads or understands it or not.

As a general rule, a party cannot benefit from a contract he did not execute. In line with the above position, a contract binds only those signatories to it or on whose behalf it has been duly executed. In *Gbadamosi & Anor.* v *Biala & Ors.*,[7] the Court of Appeal in espousing the effect of an unsigned document held that "the law is trite that an unsigned document is a worthless piece of paper and therefore cannot confer any legal right or benefit on any party or the party who seeks to rely on it". Also, in *Osadare & Ors.* v *Liquidator, Nigeria Paper Mills Ltd. & Anor.*,[8] the court held that "the law is quite settled on the fact that an unsigned document carries no probative value and is useless as means of proving the claims of its content(s)".[9]

In these cases, and a plethora of other decided cases, the notion that an unsigned document is a worthless document were not subjected to any qualification except few silent and unpopular judgments where the courts looked beyond the general opinion that an unsigned document is a worthless document. The Supreme Court in the case of *Awolaja & Ors.* v *Seatrade G.B.V.*[10] held that:

> A signed document though valuable as putting it beyond peradventure what terms the parties have agreed to is not essential to the existence of a contract of affreightment. Where the immediate parties to the agreement do not deny their agreement or the existence of the contract of affreightment and there is no doubt about their intention that they should be bound, barring statutory provision to the contrary, (and none has been cited by the defendants) the

[7] *Gbadamosi & Anor.* v *Biala & Ors.* (2014) LPELR-24389(CA).

[8] *Osadare & Ors.* v *Liquidator, Nigeria Paper Mills Ltd. & Anor.* (2011) LPELR-9269(CA).

[9] See *Dantiye & Anor.* v *Kanya & Ors.* (2008) LPELR-4021(CA), where the court held that an unsigned or irregularly signed document is worthless and entitled to ascription of no weight at all in law. What is more, such a document binds no one.

[10] *Awolaja & Ors.* v *Seatrade G.B.V* (2002) LPELR-651(SC).

> existence of the contract cannot be impugned on the ground that the document embodying the terms they have agreed to was unsigned, unless the parties have made such a condition of their being bound.

The above principle was restated and adopted in the recent decision of the Supreme Court in *Ashakacem Plc.* v *Asharatul Mubashshurun Investment Ltd.*[11] where the court considered the content in an unsigned mail which the witness had earlier admitted to the making of the mail.

As has been established in a plethora of cases, the general principle of law is that an unsigned document is a worthless document, which implies that in no circumstance will one benefit from a document that is not duly executed. Over the years the law has neglected the non-execution of a contract which is attributed to either:

a. fraud perpetrated by one party to overreach and outsmart the other party; or
b. an unintentional omission which does not alter the intention of the parties to enter legal relations.

It then raises the question of whether there could be any circumstance under which a contract, not duly executed by the parties, would be held binding on them. The Supreme Court had the opportunity of deciding on this novel principle of law in the landmark case of *MTN Nigeria Communication Limited* v *Corporate Communication Investment Limited*,[12] where the court, in consideration of the peculiar circumstances of the case, begged to depart a bit from the general principle that an unsigned document is a worthless document. Thus, the court went ahead to give effect to the validity and binding nature of the irregularly executed contract between the parties in the above suit.

2.0. BRIEF FACTS OF THE CASE

The business relationship of the parties started sometime in 2005 as trade partners and over the years has been governed by various agreements entered between them. In January 2011, the appellant

[11] *Ashakacem Plc.* v *Asharatul Mubashshurun Investment Ltd.* (2019) LPELR-46541(SC).
[12] *Supra* n 1.

issued fresh terms of the Agreement and it was specifically stated that the 2011 Agreement, identified as No. 381730 (Exhibit A), supersedes previous agreements. It was a term of the Agreement that the claimant/respondent had the right to terminate the Agreement upon giving the defendant/appellant three (3) months' notice in writing while the defendant/appellant had the right to terminate the Agreement upon giving the claimant/respondent a 60-day written notice. Another term provided that the Agreement would take effect upon execution by the last party. The claimant/respondent executed the Agreement and sent the same to the defendant/appellant, who did not execute the Agreement without the knowledge of the claimant/respondent. By its Writ of Summons and Statement of Claim, the claimant contended that the letter purportedly terminating the Agreement vide a letter dated 18 March 2011 (Exhibit B) was not in compliance with the terms of Exhibit A. At the trial of the case, the issue of whether the irregularly executed Trade Partner Agreement created an implied, binding, and enforceable contract between the parties was raised and determined by the trial court, and the same was subsequently appealed to the Supreme Court.

2.1. Arguments of Counsel at the Supreme Court

The defendant/appellant's Counsel, in arguing that Exhibit A is invalid, submitted that the claimant/respondent having placed reliance on Exhibit A as a binding contract cannot pick and choose which of its clauses are binding. He submitted that where a contract is subject to certain terms and conditions, the contract is not formed and not binding until those conditions are fulfilled. He cited the case of *Best (Nig) Ltd.* v *B.H. Nig. Ltd***.**[13] to submit that Exhibit A was only expected to come into effect on the date when the last party signing signs. He stated that at the time Exhibit A was handed over to the respondent, it had no signature and, at that stage, was a worthless document.

He further submitted that Exhibit A does not have a commencement date since the date that would have been its commencement date never occurred relying on *Amizu* v *Nzeribe*[14] and *Harry* v

[13] *Best (Nig) Ltd.* v. *B.H. Nig Ltd.* (2011) 5 NWLR (Pt. 1239) 95 126 C-D at 116-117 G-A.
[14] *Amizu* v *Nzeribe* (1989) 4 NWLR (Pt.118) 755.

Pratt,[15] where the court held that an Agreement which does not show its date of execution and the date of its coming into force, is invalid and unenforceable.

He concluded by referring the court to the case of *BPS Construction & Engr. Co. Ltd.* v *FCDA*[16] and submitted that the lower court was wrong to rely on the case of *PTA Electrical Pty Ltd.* v *Perseverance Exploration Pty Ltd. & Anor*.[17] in holding that there was a binding contract between the parties notwithstanding the non-execution by the appellant, as the facts are distinguishable from the facts of the case under review.

The claimant/respondent's Counsel submitted that the basis for the judgment of the lower court was that the appellant not only made an offer but indeed drew up the agreement, articulated the terms and dispatched it to the respondent for its signature, without any input from the respondent. He stated that since the parties had transacted their business based on Exhibit A, the fact that the appellant did not append its signature was of no moment and that in the light of the above the court below was correct in holding that Exhibit A created an implied, binding, and enforceable contract between the parties.

2.2. Decision of the Court

In settling this issue in favour of the respondent, the Supreme Court held that the appellant could not be allowed, by deliberately withholding its signature, to take advantage of its wrongdoing and use it as a weapon against the respondent.

That apex court in affirming the decision of the lower court stated that the appellant challenged the findings of the two courts with regard to Exhibit A, on the ground that it was one of the terms of Agreement that it would take effect from the date the last person signs, and that since it did not sign the document after it was signed by the respondent, the document was inadmissible and could not be relied upon as a valid contract between the parties.

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[15] *Harvey* v *Pratt* (1965) 1 W.L.R. 1025 at 1026-1027.
[16] *BPS Construction & Engr. Co. Ltd.* v *FCDA* (2017) 10 NWLR (Pt. 1572).
[17] *PRA Electrical Pty Ltd.* v *Perseverance Exploration Pty Ltd. & Anor.* (2007) VSCA 310.

The Supreme Court held that in the instant case, the offer was being made by the appellant and the respondent accepted the offer by appending its signature thereto. The apex court stated that the appellant did not deny the fact that it continued trading and carrying on business with the respondent in accordance with Exhibit A and that the appellant could not be allowed, by deliberately withholding its signature, to take advantage of its wrongdoing and use it as a weapon against the respondent. The court relied on *Section 169 of the Evidence Act 2011* which provides that:

> When one person has either by virtue of an existing court judgment, deed, or agreement or by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing.

Citing the case of *Adedeji* v *N.B.N Ltd*.,[18] the Supreme Court concluded *inter alia* that it is morally despicable for a person who has benefited from an agreement to turn around and say that the agreement is null and void, or unenforceable, as contended in the present case. The judgment on this issue summarizes that the Trade Partner Agreement (Exhibit A) though not executed by the appellant still constitutes a binding contract between the appellant and the respondent. This is contrary to the general principle that a document binds only the signatories and that an unsigned or irregularly signed document is a worthless document.

3.0. COMMENTS ON THE JUDGEMENT

The traditional effect of an unsigned document remains that it is a worthless document. Generally, an action cannot be successfully maintained in reliance on an unsigned document. In the case of *Uzokwelu* v *PDP & Ors*.,[19] the Court of Appeal held that:

> The law is settled that an unsigned document is a worthless paper. It is inadmissible and where admitted,

[18] *Adedeji* v *N.B.N Ltd.* (1989) 1 NWLR (Pt. 96) 212 at 226-227 E-A.
[19] *Uzokwelu* v *PDP & Ors.* (2018) LPELR-43767(CA).

> it cannot be relied upon by the court to resolve any controversy between the parties as no weight or probative value can be attached to an unsigned document.

The above decision remains good law as the new judgment of the Supreme Court did not overrule that position. The effect of the new judgment on the above principle is that of modification and qualification of the popular/general position. The new principle has introduced subjectivity in consideration of the legal effect of an unsigned document as opposed to the objective position that it is a worthless document.

Acting on the above principle, the Courts are now inclined to decline the dismissal of an unsigned document as a worthless document on sight without first considering the peculiar circumstances under which the document was made and the conduct of the parties after the making of the document. This principle tends to promote substantial justice as opposed to technical justice.

The peculiar circumstances of this case that justify the deviation from the general rule that an unsigned document is a worthless document are as follows:

a. The document was solely prepared by the appellant without any input from the respondent. The document was sent to the respondent for its signature, signifying its acceptance.
b. The respondent executed the document which signifies its acceptance without any alteration. This means that there is nothing left for the appellant to accept since the parties are already *ad idem* and its signature was just a mere formality.
c. The appellant, without the knowledge of the respondent, didn't execute the Agreement which the respondent sent back to it. However, both parties acted on the terms of the part signed Agreement.
d. The appellant did not deny the making of the document and that they did not trade on the terms of the Agreement.

Considering the above peculiar circumstances, it is right and justifiable to deviate from the general principle that an unsigned document is a

worthless document and that an agreement only binds a person who is a signatory to it.

In the case of *Brossette Manufacturing Nig. Ltd.* v *M/S Ola Ilemobola Limited & Ors.*,[20] the Supreme Court held that "The Court will not allow any person or party or body to benefit from his own wrong". The Supreme Court also restated this position in *The Admin. & Exec. of the Estate of Abacha* v *Eke-Spiff & Ors*.[21]

It is also worthy to note that the Supreme Court upheld the Court of Appeal's reliance on foreign decisions in the cases of *PRA Electrical Pty Ltd.* v *Perseverance Exploration Pty Ltd. & Anor*.[22] *and Wayne Edward John Street* v *Fantastic Holdings Ltd*.[23] in reaching their decision. In the case of *Olafisoye* v *FRN*,[24] the Supreme Court held, per Tobi JSC as he then was, that:

> Decisions of foreign countries are merely of persuasive authority. This court will certainly allow itself to be persuaded in appropriate cases, but this court will not stray away from its course of interpreting the Nigerian Constitution by resorting to foreign decisions which were decided strictly in the context of their constitutions, and which are not similar to ours.

In the instant case, the Supreme Court reiterated that the foreign authorities relied upon by the Court of Appeal although of persuasive authority only, they were appropriately relied upon in this case.

4.0. CONCLUSION

It is commendable how the various courts that adjudicated on this matter appreciated the peculiar facts of this case and married it with the Latin maxim *Ex turpicausa non orituractio*[25] and the provision of *Section 169 of the Evidence Act 2011* on estoppel. This tripartite marriage saw the birth of the new principle that in determining the

[20] *Brossette Manufacturing Nig. Ltd.* v *M/S Ola Ilemobola Limited & Ors.* (2007) LPELR-809(SC).
[21] *The Admin. & Exec. of the Estate of Abacha* v *Eke-Spiff & Ors.* (2009) LPELR-3152(SC).
[22] *Supra* n 17.
[23] *Wayne Edward John Street* v *Fantastic Holdings Ltd. (*2011) NSWSC 1097.
[24] *Olafisoye* v *FRN* (2004) LPELR-2553(SC).
[25] Meaning "no action can arise from an illegal act".

effect of an unsigned document, the circumstances surrounding the making of the agreement and the actions of the parties post the making must be considered. Thus, not all unsigned documents are worthless documents. The decisions in *Awolaja & Ors.* v *Seatrade G.B.V.*,[26] *Ashakacem Plc.* v *Asharatl Mubashshurun Investment Ltd.*,[27] and most importantly *MTN* v *Corporate Communication Investment Ltd.*[28] are instructive in this regard.

However, it is worthy to note that the general rule that an unsigned document is a worthless document is still valid law. The only thing is that the principle has been qualified and made flexible to admit few exceptions. Thus, in any case in which a document is unsigned, and there are no one or more circumstances to unequivocally show that the parties are *ad idem* and had mutually acted on the document, the document will maintain its status as a worthless document.

[26] *Supra* n 10.
[27] *Supra* n 11.
[28] *Supra* n 1.

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