CONSTITUTIONALITY OF THE PUBLIC OFFICERS PROTECTION ACT: A FRESH LOOK AT THE PRINCIPLES OF REASONABLENESS AND PROPORTIONALITY

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Abstract

In May, 1999, Nigeria commenced a journey in constitutional governance, founded on the rule of law. Some of the important, universally validated elements of the system are an independent judiciary; and the right of all persons to approach the courts to ventilate their grievance. However, when a grievance is provoked by an act or omission of the government or a government agency, such a person is confronted with the Public Officers Protection Act (POPA) which mandates that the action must be commenced within a specific period. Obviously, the onerous task of governance demands some level of protection for government officers in the course of performance of public duty. However, POPA does not provide that actions commenced against public bodies or officers should be brought within a reasonable time. Rather, it requires such actions to be brought within the shortest possible time; namely, within three months. Using doctrinal/analytical methodology, this paper argues that POPA is unconstitutional, as it constitutes an unreasonable and disproportionate interference with the right of access to court; a right of fundamental constitutional importance.

Keywords: *Constitutionality; Public Officers Protection Act; Reasonableness; Proportionality; Access to Court.*

INTRODUCTION

Of all the ideological precepts that underpin the study and practice of the law, perhaps the most important is the idea that the law is the last and best hope of the common man. The Courts are thus the bastions of justice, where the governed can access justice notwithstanding the strength and power of the government. This ideal finds expression in the Latin maxim *ubi jus ibi remedium* which translates to mean where there is a right, there is a remedy.[1] As a result of the fundamental importance of the Courts as a bulwark between the government and the governed; the right to gain access to the Courts takes on the role of a fundamental Constitutional right.

However, the Public Officers Protection Act Cap. P41, LFN 2004 (and the other similar legislations) limits the timeframe within which a citizen can

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1. See *Saleh v Monguno* [2006] 15 NWLR (Pt 1001) 26 at 60 Paras D – Eand *Amaechi v INEC*[2008] 5 NWLR (Pt 1080) 227 at 334 Paras. D – G.

bring an action against the government, governmental officers, and governmental agencies to a period of just three months from the date that a cause of action accrues.

In view of the crucial importance of the right of access to Court, it postulated that the timeframe of three months stipulated by POPA constitutes a disproportionate and unreasonable regulation of a Constitutional right. In essence, POPA has the practical effect of limiting and subverting a right expressly conferred by the Constitution. It is in this context that this article examines the provisions of POPA with the aim of deciphering its constitutionality.

Dissecting the Right of Access to Court

As stated above, the right of access to Court is a Constitutional right. This right finds expression in the combined reading of **Sections 6(1)**, **6(2)**, **6(6)(b)** and **36(1)** of the 1999 Constitution of the Federal Republic of Nigeria (as altered) ["the Constitution"].[2]A detailed reading of **Sections 6(1)**, **6(2)**, and **6(6)(b)** of the Constitution would reveal that the words "judicial power" is a reoccurring phrase. Interpretation was given to the phrase "judicial power" in *Anakwenze v Aneke*[3]wherein the Supreme Court held that it means *"the power that a sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subject*".

Thus, all of the sovereign powers that the Federal Republic of Nigeria and its constituent states possess in order to determine controversies among its citizens or between its citizens and the government are vested in the Courts. This immutably sovereign power to determine controversies extends to all disputes between or among the governments, citizens, and persons in Nigeria. The exercise of this sovereign power comes with the mandatory requirement that the Courts must guarantee fair hearing.

It is submitted that this is the truest meaning of the right of access to court as provided by the Constitution. All persons, governments, and/or authority shall have access to the Courts in order to determine questions (i.e. controversies) as

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2. See *Fidelity Bank Plc v Monye* [2012] 10 NWLR (Pt 1307) 1 at 32 Para. E and *Dagazau v Borkir Int'l Co Ltd* [1999] 7 NWLR (Pt 610) 293 at 305 Paras. F – G.
3. [1985] 1 NWLR (Pt 4) 771 at 781 Paras A – C.

regards their civil rights and obligations. In this vein, in *Ugwu v Ararume*[4] Niki Tobi, JSC stated that the "*right of access to court is a constitutional right which is guaranteed in the Constitution and no law… can substrate from or derogate from it or deny any person of it. Such law will be declared a nullity by virtue of section 1(3) of the Constitution*."[5]

Tobi, JSC could not have said it any better. The right of access to Court is Constitutional, and no law can "derogate" (i.e. deviate or detract) or "subtract" (i.e. take away) from the right of access to Court. However, the Courts have held that even though the right of access to Court cannot be derogated from; a law that simply *regulates* the right of access to Court would not be *ipso facto* unconstitutional. This position of the law was succinctly articulated by Karibi-Whyte, JSC in *Amadi v NNPC*[6] when he stated: "*Regulations of the right of access to the court abound in the rules of procedure and are legitimate*."[7]

Indeed a number of provisions that regulated the right of access to court are found in the rules of Court and in statute. For example, it is legally impossible to commence an action in the High Court without a competent originating process[8] or to commence an appeal without a competent Notice of Appeal.[9]Therefore, though a party may approach the Court to seek redress, in

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4. [2007] 12 NWLR (Pt 1048) 367 at 450 Paras G – H.
5. See also *Global Excellence Comm. Ltd. v. Duke* [2007] 16 NWLR (Pt 1059) 22 at 48 Paras. E – F.
6. [2000] 10 NWLR (Pt 674) 76 at 110.
7. Also see*: Nigercare D Co Ltd v Adamawa S W B* [2008] 20 W R N 166 at 189.
8. Such as a Writ of Summons, Originating Summons or Motion and/or a Petition. See Order 3 Rule 1 High Court of Delta State (Civil Procedure) Rules, 2009; Order 3 Rule 1 High Court of Edo State (Civil Procedure) Rules, 2012 and Order 1 Rule 1 High Court of the F C T Abuja (Civil Procedure) Rules, 2004. Also, see: *Kida v Ogunmola* [2006] 13 NWLR (Pt 997) 377 at 394 Paras E – G and *Braithwaite v. Skye Bank Plc* [2013] 5 NWLR (Pt. 1346) 1 at 15 Paras C – E.
9. See Section 24(1) of the Court of Appeal Act Cap C36, LFN 2004 and Section 27(1) Supreme Court Act Cap S15, LFN 2004.

order to activate the jurisdiction of the Court to entertain the claim, there must be a competent originating process before the Court.[10]

In the same manner, various statutes of limitation also regulate the right of access to Court. These are statutes that put a clock on the length of time that a citizen has to approach the Courts for remedy. The Public Officers Protection Act is one of such statutes. It puts a limit on the period within which persons in Nigeria can bring an action against people or institutions entitled to the protection of the Public Officers Protection Act ("POPA").

Scrutinizing the Public Officers Protection Act

Before delving into an analysis of POPA, it is important to state that POPA is not the only Federal enactment of its kind. Several other Acts of the National Assembly, especially those creating Federal Government agencies have provisions similar in scope and import to the provisions of POPA. A non-exhaustive list includes:

a. Niger-Delta Development Commission (Establishment, etc.) Act Cap. N86, LFN 2004; which pursuant to Section 24(2)(a) & (b) limits the time within which an action can be brought against the Niger-Delta Development Commission to three months or six months for continuing damage;
b. Nigerian Communications Act Cap N97, LFN 2004; which pursuant to Section 142(2)(a) & (b) limits the time within which an action can be brought against the Nigerian Communications Commission to three months or six months for continuing damage.
c. National Examination Council (NECO) Establishment Act Cap. N37, LFN 2004; which pursuant to Section 19(2)(a) & (b) limits the time within which an action can be brought against the National Examination Council to three months or six months for continuing damage.[11]

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[10]. See the *locus classicus* i.e. *Madukolum v Nkemdilim* [1962] All NLR (Part 2) 581 at 589. Also see *Obaro v Hassan*[2013] 8 NWLR (Pt. 1375) 425 at 449 Paras F – G.

[11]. cf. Section 20(1) of the Federal Airport Authority of Nigeria Act Cap. F5, LFN 2004 and Section 12(1) Nigeria National Petroleum Corporation Act Cap N123, LFN 2004 which both limit the time within which actions can be brought against the Federal Airport Authority of Nigeria and the Nigeria National Petroleum Corporation respectively to twelve (12) months.

Apart from Federal enactments, most (if not all)[12] of the States of the Federation have domesticated the provisions of POPA into State law. For example, we have the Public Officers Protection Law Cap. 137, Laws of Bendel State of Nigeria, 1976 (as applicable in Edo State) which domesticates the provisions of POPA in Edo State and the Public Officers Protection Law Cap P26, the Laws of Lagos State of Nigeria, 2003 which achieves domestication in Lagos State. Accordingly, all points, arguments or positions contained in this article apply perforce to other statutes that are *impari materia* with POPA.

The relevant provision of the Public Officers Protection Act is Section 2(a) of the Act, which provides

Where any action, prosecution, or other proceeding is commenced against *any person* for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect – (a) *the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of,* or in case of a continuance of damage or injury, within three months next after the ceasing thereof.

It is clear that Section 2(a) of POPA stipulates that an action against "any person" that falls within the ambit of POPA must be commenced within three months. This three month period commences the day after the cause of action must have accrued.[13] In *INEC v Ogbadibo L G*[14] the Supreme Court enunciated that once the period of three months provided by Section 2(a) has elapsed, the right to approach the Court and commence an action becomes

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12. This is an expression of the writers opinion as access to the compendium of the laws of all of the 36 States that make up the Federal Republic of Nigeria proved impossible.
13. See *Osun State Govt v Dalami (Nig.) Ltd.*[2007] 9 NWLR (Pt 1038) 66 at 81 – 82 Paras H – C.
14. [2015] 48 W R N 35 at 73 Lines 20 – 35.

extinguished, leaving an aggrieved person with and bare and empty cause of action.

This is the radical effect of POPA. Though a citizen might have been wronged by an act or omission of the persons who enjoy the protection of the Act, after a period of three months, such a citizen can no longer seek or obtain redress. The citizen is left with a bare cause of action that cannot be enforced in any Court. The question then is who are the persons that enjoy the protection of POPA? Historically, it was the law that POPA applied only to natural persons. The rationale behind this position was that the Act referred to "Officers" and not "Offices" and as such the Act was intended to protect natural persons who work in the government and not the governmental agencies themselves.[15]

However, this position of the law was completely altered in the seminal case of *Ibrahim v JSC*[16] wherein Iguh, JSC held the word '*any person*' as used in POPA connotes both natural and artificial persons i.e. human beings and juridical persons. The Supreme Court accordingly held that the protection afforded by POPA "*clearly admits and includes artificial persons such as corporation sole, company or anybody of persons corporate or incorporate*." Accordingly, the decision in *Ibrahim v JSC* did not just expand POPA's protection to include all governmental staff and agencies; the decision also extends the protection of POPA to include "*persons holding Government positions such as Attorney-General, Permanent Secretary or Inspector General of Police*"[17] as well as "*artificial persons sued by their official names or titles*".[18] This interpretation of the expression "any person" as contained in Section 2(a) of POPA has been affirmed in a plethora of subsequent decisions of the Supreme Court.[19]

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15. See *Rufus Momoh v Afolabi Okewale & Anor* [1977] NSCC 365 at 368 – 369; *Yare v Nuuku* [1995] 5 NWLR (Pt 394) 129 at 148 and *Chief Onyia v Governor-in-Council* (1962) WNLR 89.
16. [1998] 14 NWLR (Pt 584) 1 at 35 – 36.
17. *AG Rivers v AG Bayelsa State & Anor* (2012) LPELR-9336 (SC).
18. *Ajayi v Adebiyi* [2012] 11 NWLR (Pt. 1310) 137 at 171 Para H.
19. See *Ajayi v Adebiyi* [2012] 11 NWLR (Pt 1310) 137*; Osun State Govt v Dalami (Nig) Ltd* [2007] 9 NWLR (Pt 1038) 66; *INEC v Ogbadibo L G* [2015] 48 W R N 35; *F G N v Zebra Energy Ltd* [2002] 18 NWLR (Pt 798) 162.

The practical effect of the decision in *Ibrahim v. JSC* is that every facet of the governmental structure or operation is protected POPA. Put differently, whenever government, in any of its manifestations, acts or omits to act, the protection of POPA provides a shield. Such a broad interpretation of the law has expectedly met criticism with E A Taiwo arguing that "it is a public officers protection Act, not a public Authorities Protection Act and therefore the person to be protected must be natural public officer and not otherwise*"*.[20] It is, however, pertinent to state that the protection afforded by POPA is not without exception. There are two classes of exceptions to POPA: (1) the exception contained in the statute itself; and (2) the exceptions upheld by the Courts. The intra-statutory exception is to the effect that in the case of a continuing injury or damage "*a fresh cause of action arises from time to time, as often as the damage or injury is caused*".[21] Therefore, the three-month time bar would not apply in the event of continuing damage or injury as it would only commence after the final act or omission occurs.

The extra-statutory exceptions have generally arisen from the interpretative decisions of the Courts. These exceptions were brilliantly outlined in *Podo v Gombe State Govt & Ors*[22] per George will, JCA wherein he held

My Lords without attempting to set down any exhaustive list of all situations and circumstances that could stop the three months limitation period prescribed in Section 2(a) of the Public Officers (Protection) Law, either from running or completely rendering it devoid of any legal consequences against the suit of a Plaintiff are the following, namely; (a) cases of continuance of damage or injury; (b) A public officer acting outside the colour of his statutory or constitutional duty;[23] (c) cases of recovery of land;[24] (d) Breaches of

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20. E A Taiwo 'The Supreme Court and the True Ambit of Public Officers Protection Act: A Critique', [2003] (1) (4) Nigerian *Bar Journal*, 567.
21. *INEC v Ogbadibo L G* **[**2015] 48 W R N 35 at 55.
22. [2016] LPELR-40815 (CA) 29 – 31.
23. See *Anozie v A G, Fed.* [2008] 10 NWLR (Pt. 1095) 278 at 290 – 291.
24. See *F G N v Zebra Energy Ltd.* [2002] 18 NWLR (Pt 798) 162 at 197.

Contract;[25] (e) Claims for work done;[26] (f) Lack of good faith;[27] (g) Revival of cause of action by admission of liability during negotiation and (h) Application for enforcement of fundamental rights.[28]

Justice Georgewill's list suffices as a detailed representation of the established exceptions to the protection of POPA on the current state of the law. The only other exception is that POPA would also not apply to criminal actions.[29]

The Policy Underpinning the Public Officers Protection Act

Even though there are a number of exceptions to POPA, what is clear is that relatively few interactions between the government and the citizenry would fall within the ambit of these exceptions. A significant proportion of the populace would never have contractual dealings with the government and even actions involving the contracts of employment of civil servants are covered by the protection of POPA.[30]Furthermore, with the very wide discretion usually conferred on governmental functionaries by legislation, establishing bad faith or that a person acted outside the colouration of his duty is indeed a high hurdle. Importantly, the rights that can be enforced by fundamental rights actions are rights contained in Chapter IV of the Constitution[31] and a citizen has many more rights that the "*fundamental rights*" contained in Chapter IV.

Thus, even taking into accounts the intra and extra-statutory exceptions to POPA, there still remains a wide range of actions that are caught by the very

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25. See *N P A v Construzioni Generali Farsura Cogefar* **SPA** (1974) All NLR 945 at 957. It should however be noted that though contracts have been held to be outside the purview of the Public Officers Protection Act, contracts of employment have however been held to be within its purview. In the cases of *F R I N v Gold* [2007] 11 NWLR (Pt 1044) 1 and *Yare v N S I W C* [2006] 2 NWLR (Pt 965) 546, the Supreme Court and Court of Appeal respectively, while dealing with actions that involved contracts of employment, upheld the contention that the suits of the plaintiffs were statute barred as the said suits were not commenced with the three month period stipulated by POPA. Therefore, there is an exception to the exception; though suits involving contracts would generally not be affected by POPA, suits involving contracts of employment of governmental staff would still be affected by the protection afforded by POPA.
26. See *F G N v Zebra Energy Ltd note 24.*
27. See *Offoboche v Ogoja L G* [2001] 16 NWLR (Pt 739) 458 at 485.
28. See Order 3 of the Fundamental Rights (Enforcement Procedure) Rules, 2009.
29. See *Yabugbe v C O P* [1992] 4 NWLR (Pt 234) 152 at 170 – 171.
30. Note 25
31. See *WAEC v Adeyanju* [2008] 9 NWLR (Pt 1092) 274 at 298.

wide net that is POPA. Essentially, in just about every tortious action involving the government, a citizen's right of access to Court is curtailed to a very limited period of three months. There is no gainsaying the fact that the provisions of POPA are rather onerous. The question then is: what is the policy that underpins POPA? Simply put, what is the mischief that POPA seeks to cure? In *A-G. Rivers State v A-G Bayelsa State*[32] the Supreme Court held that POPA is intended to "*protect a public officer from detraction and unnecessary litigation*".[33]

Thus, the *A-G. Rivers State case* articulates that the policy underpinning POPA is to offer protection to public officers in respect of their acts or omissions while undertaking public duties so as to avoid detraction (or better still distraction) and unnecessary litigation. There is no doubt that this ideal is highly utilitarian. Since, the government and its officers are charged with the duty of managing the polity for the betterment of all persons, limiting or eliminating frivolous lawsuits against the government is encouraged. However, it is submitted that taking into consideration the nature of the protection afforded by POPA vis-à-vis the timeframe within which actions become statute-barred, the mischief of distraction is not proportionately sufficient to justify the constitutionality of POPA. The basis for this submission shall be discussed below.

Constitutional Proportionality and Reasonableness: The Origin and its Application in Nigerian Common Law

In commencing this sub-heading it pertinent to state that POPA is simply an Act of the National Assembly that purports to regulate the exercise of a Constitutional right! This point is made poignant by the fact that the only Constitutional limitations placed on the right of access to Court are the those contained in Section 6(6)(c) & (d)of the Constitution pertaining to (i) the justiciability of Chapter II of the Constitution; and (ii) questions arising from the competence of the defunct military governments to promulgate laws.

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32. [2013] 3 NWLR (Pt 1340) 123 at 148 Paras F –G.
33. Also see *Yabugbe v C O P* [1992] 4 NWLR (Pt 234) 152 at 176 Paras A – B.

However, since POPA is in the *genus* of statutes of limitation, the Courts have been consistent that statutes of limitation do not *ipso facto* offend the Constitution so as to be described as void. The jurisprudential basis of this position was summarised by Agube, JCA in *Chairman, Moro L.-G v Lawal*[34] wherein he held that:

> *the philosophy behind statutes of limitation is that long-dormant claims have more of cruelty than justice in them … a defendant might have lost evidence to disprove a stale claim and that persons with genuine claims should pursue them with due and reasonable diligence*

What is clear from this *dictum* of Justice Agube is that statutes of limitation are policy statutes generally aimed at: (1) ensuring a fair adjudicatory process by guaranteeing that the defendant would be in as good a position as the claimant to defend an action; and (2) ensuring that indolent claimants are not allowed to use the Courts as a mechanism to work cruelty. Thus, in Nigerian jurisprudence, judicial endorsement of the legitimacy of statutes of limitation as a tool to regulate the right of access to Court is hinged on a balancing of competing interests i.e. the interest of the claimant in pursuing his/her claim; the interest of the defendant in not being exposed to liability indefinitely; and the interest of the Court/society in bringing an end to litigation.

In English and European jurisprudence, in the consideration of fundamental convention rights, this 'balancing act' is what is now popularly referred to as the doctrine of proportionality. Proportionality finds its origin in the European Convention on Human Rights (ECHR) and involves a two-stage test:

a. Any interference with an ECHR right must be provided for by law so as not to be arbitrary; and

b. An interference with an ECHR right must be necessary in a democratic state.

It is the second limb of this test that has given rise to the doctrine of proportionality which itself has been interpreted to portend two major

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[34]. [2008] 19 W R N 13 at 81.

questions which are: (1) is this interference necessary in a democratic society?; and (2) is the interference proportionate to the objective being pursued? Giving meaning and effect to the doctrine of proportionality, the European Court of Human Rights[35] in the case of *Smith and Grady v. United Kingdom*[36]stated that interference with an ECHR right would be proportionate if "*it answers a pressing social need and … is proportionate to the legitimate aim pursued*".

Expatiating on the above, the House of Lords in the case of *R v. Secretary of State for the Home Department, ex parte Daly*[37]provided guidance on how legislation and decisions of governmental bodies should be reviewed in the light of the doctrine of proportionality. Lord Steyn advocated the twin requirements that: (a) an interference must be necessary in a democratic society, and (b) the interference must proportionately achieve the legitimate aim being pursued. Julian Rivers[38] brilliantly explains the import of Lord Steyn's twin requirements and will form the basis of subsequent analysis in this article. The learned author writes that:

> The doctrine of proportionality structures the answer by way of a fourfold test: (1) Legitimacy: does the act (decision, rule, policy, etc.) under review pursue a legitimate general aim in the context of the right in question? (2) Suitability: is the act capable of achieving that aim? (3) Necessity: is the act the least intrusive means of achieving the desired level of realization of the aim? (4) Fair balance, or proportionality in the narrow sense: does the act represent a net gain, when the reduction in

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35. Articles 19 – 51 of the European Convention on Human Rights set up the European Court of Human Rights (aka Strasbourg) as the continental Court permanently charged with the duty of interpreting the provisions of the ECHR and by the provision of Article 46(1), its decisions are binding on the Contracting States.
36. (2000) 29 E H R R 493 at 529.
37. [2001] 2 A C 532 at 548.
38. Julian Rivers 'Proportionality and Variable Intensity of Review', [2006] (65)(1), *Cambridge Law Journal*, 181.

> the enjoyment of the right is weighed against the level of realization of the aim?[39]

It is submitted that the doctrine of proportionality which finds its root in Strasbourg's jurisprudence provides a very useful guide as to the principles of law to be applied in the Nigerian situation.[40]This is because the Supreme Court has not been coy in applying the decisions of the European Court of Human Rights in interpreting the Nigerian Constitution and determining cases before the Court. In the recent decision in *Kalu v State*[41] Nweze, JSC stated that Chapter IV fundamental rights contained in the Constitution were greatly influenced the ECHR.[42] Thus, Nigerian constitutional rights having been "greatly influenced" by the ECHR, it would thus be appropriate to suggest that the constitutionality of the Public Officers Protection Act can be reviewed and tested by our Courts with due regard to the jurisprudence on the doctrine of proportionality as articulated by the European Court of Human Rights. The call for the judicial review of the constitutionality of POPA stems from two major premises. Firstly, as stated above, POPA is an '*ordinary*' Act of the National Assembly which effectively limits the Constitutional right of access to Court; a right that forms the bedrock of a democratic society governed by the rule of law.

Secondly, in *Amadi v NNPC,*[43] the Supreme Court opened a vista through which the doctrine of proportionality can be imported and applied. Therein, Karibi-Whyte, JSC held as follows:

> It is, however, not consistent with the exercise of the right of access to court to make regulations which subvert the exercise of the right or render the right nugatory … It seems to be accepted that where an enactment regulates the right of access

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39. Also see: Rhodri Thompson 'Community Law and the Limits of Deference', [2005] (3) *European Human Rights Law Review*, 244
40. See *Araka v Egbue* [2003] 17 NWLR (Pt.848) 1 at 20 – 22 Paras C – H.
41. [2017] 14 NWLR (Pt 1586) 522 at 544 – 545
42. See also *Nweke v State* [2017] 15 NWLR (Pt 1587) 120 at 144 - 147 where Honourable Justice Nweze, JSC restated this principle, endorsing "*extraterritorial interpretation of fundamental rights provisions*" and seeking "*guidance from the decisions of the European Court of Human Rights*" in arriving at a decision as to the import of "facilities" in the context of Section 36(6) of the 1999 Constitution.
43. [2000] 10 NWLR (Pt 674) 76.

> to the court in a manner to constitute an improper obstacle to access to court, such enactment could properly be appropriately regarded as an infringement of section 36(1) rather than an infringement of section 6 of the Constitution … This and other decisions of this court … should not be taken to mean that in certain circumstances the particular requirement can never constitute infringement of the exercise of judicial powers by the courts or abridge the citizen's right of access to court. Such last-mentioned situations will definitely be inconsistent with the Constitution.

In his usual poetic phrasing, Justice Karibi-Whyte laid down the rule as regards the relationship between statutory regulations and the right of access to Court. He articulated the following far-reaching principles:

1. Regulations which constitute an improper obstacle of the right of access to Court with the effect of subverting or rendering nugatory the said right would be unconstitutional;

2. The fact that the Supreme Court had previously upheld statutory regulations of the right of access to Court does not preclude the possibility that certain regulations might "*constitute infringement of the exercise of judicial powers by the courts or abridge the citizen's right of access to court*".

It is accordingly submitted that POPA would be illegitimate (i.e. unreasonable) if it constitutes an improper (i.e. disproportionate) interference with the right of access to Court on the basis that it subverts the right of access to Court so much so that it renders the right nugatory.

Considering the Proportionality and Reasonableness of the Public Officers Protection Act

The Constitution is the *grundnorm* and constitutes the bedrock upon which all other laws derive their validity and any law which, conflicts with the dictates

of the Constitution would be declared unconstitutional and be rendered void.[44] Thus, the essential question that this sub-heading seeks to answer is: does the Public Officers Protection Act constitute an improper i.e. an unreasonable and/or disproportionate obstacle to the Constitutional right of access to Court? In considering the proportionality/reasonableness of POPA, as stated above, the fourfold test delineated by Julian Rivers[45] would be applied sequentially. It is, however, necessary to state that for POPA to be proportionate and/or reasonable, all of the four tests must contemporaneously be answered in the affirmative.

Legitimacy: does the act (decision, rule, policy, etc.) under review pursue a legitimate general aim in the context of the right in question?

There is no doubt that POPA pursues a legitimate aim. It is a utilitarian aim of achieving the betterment of the many as against the few. In *A-G. Rivers State*[46] the Supreme Court held that the aim of POPA is to guarantee that the government is not distracted by unnecessary and frivolous lawsuit so as to ensure that it is able to perform its primary duty which is governance. However, it is important to state that even in the *AG Rivers State case* where the Supreme Court delineated the policy underpinning POPA, it was not explained in absolute terms. Galadima, JSC placed a rider when he said that POPA was "*never intended to deprive a party of legal capacity to ventilate his grievance (in) the face of stark injustice*".

Suitability: is the act capable of achieving that aim?

As stated above, POPA is designed to protect the government from unnecessary and frivolous suits. This stage of the test inquires: is POPA capable of actually preventing the institution of frivolous suits? This writer submits that the answer is strongly in the negative. While the aim of POPA might be to forestall the institution of frivolous suits, the wordings and structure of the Act cannot attain the aim being pursued because POPA is a statute of limitation. As was explained by Justice Agube,[47]statutes of limitation are not targeted at preventing frivolous suits; they are rather targeted at preventing "*long-dormant claims (which) have more of cruelty than justice in them*".

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44. See Section 1(3) Constitution of the Federal Republic of Nigeria, 1999 (as amended).
45. *Note 38.*
46. [2013] 3 NWLR (Pt 1340) 123 at 148 Paras F –G.
47. In *Chairman, Moro L-G v Lawal* [2008] 19 W R N 13 at 81.

A sample system that is aimed at and achieves the purpose of preventing frivolous actions is the disciplinary structure for legal practitioners. When a complaint is received by the state branch of the Nigerian Bar Association (NBA), its merit or otherwise is considered first before it is sent to the national body. At the national level, the NBA has a committee referred to as the NBA Investigation Committee which is a "*clearinghouse to ensure that frivolous cases do not slip through the net to the detriment of the legal community*".[48] Thus, before the Legal Practitioners Disciplinary Committee of the Body of Benchers sits in disciplinary proceedings over a legal practitioner, the state branch of the NBA and then the NBA Investigative Committee must certify that the petition is not frivolous and that there is a *prima facie* case to be answered. This is an appropriate system for the prevention of frivolous actions.

However, being a statute of limitation, the very *nature* of POPA is at cross-purposes with its *aim*. This position is predicated on the following:

a. The *practical effect* of Section 2(a) of POPA is not the barring of only '*frivolous actions*'. This is because POPA bars '*all actions*' commenced after three months irrespective of the objective merit or frivolousness of such suits.
b. Leading on from the above, frivolous suits which are commenced within the statutory period of three months would still be competent as against the government despite the policy of POPA. A person knowledgeable of the limitation statute would simply bring his/her action within the stipulated three months, and irrespective of the provisions of Section 2(a) of POPA, the government or public officer would be compelled by law to be '*distracted*' by the frivolous action.
c. Furthermore and very importantly, POPA does not prevent the institution of an action against the government; *it only affords the government a defence by challenging the jurisdiction of the court*. Put differently, the Court's registry would not reject an originating process on the premise that the limitation provided in POPA has expired.

[48]. *N B A v. Suleiman* [2016] 6 NWLR (Pt1508) 356 at 377 – 378.

Rather, after the suit has already been instituted, the government officials would simply raise the defence that the action is statute-barred. In effect, POPA does not stave off a distraction by preventing the institution of frivolous suits; it at best provides a defence to potentially meritorious suits.

d. Finally, the entire reason for the existence of government is to guarantee the welfare and security of the people. This ideal is best explained using the Hobbesian principle of social contract with the effect that the mutually agreed rights and obligations of both the government and the governed finds expression in the Constitution. It would thus be inimical to this state of affairs if a disproportionate and unreasonable limitation is placed on the right of the governed to obtain redress if any of the rights conferred by this social contract is breached, or if any of the governmental obligations are not fulfilled.

The points discussed above are not exhaustive; however, they show that the rationale for the enactment of POPA is riddled with lacunas. A cursory perusal of the various decisions of the Courts cited in this article would reveal that the suits struck out by the Courts for being statute barred presented germane and triable issues that were simply jettisoned because the Court's jurisdiction had been ousted. Thus, POPA fails woefully as a system for effectively preventing unnecessary suits. It is thus submitted that being a statute of limitation, POPA is not suitable for preventing the institution of frivolous actions.

Necessity: is the Act the Least Intrusive Means of Achieving the Desired Level of Realization of the Aim?

The question which this stage of the test seeks to ascertain is whether in achieving the desired aim of POPA, Section 2(a) which provides a time bar of three months is the least intrusive means via which the attainment of the prevention of unnecessary and distracting lawsuits can be realized? Put differently, in the context of the Constitutional right of access to Court, is Section 2(a) of POPA necessary? It is submitted that Section 2(a) is not necessary as it does not '*in fact*' achieve the aim of preventing frivolous lawsuits and more importantly, it is not the least intrusive method of achieving the aim. POPA simply bars actions against the government after the lapse of three months, irrespective of the merit or otherwise of the action. Thus, if the Supreme Court's decision in the *AG Rivers State case* is correct as to the fact that the aim of POPA is to protect the government "*from detraction and*

unnecessary litigation" then Section 2(a) would rightly be described as overkill! It is not the least intrusive means of achieving the purpose of the legislation, as it does not discriminate between unnecessary and meritorious actions. It strips the Court of jurisdiction in respect of *all* actions.

More importantly, the three-month time bar as provided for by Section 2(a) is a disproportionate and unreasonable limitation on the Constitutional right of access to Court. There is no gainsaying the fact that three months places an overbearing and unnecessary burden on a potential litigant to commence an action within the shortest possible time. In this regard, can it objectively be said that a potential claimant who does not commence an action within three months has been indolent? Can it objectively be said that within a period of three months, the government would have lost access to the evidence required to defend an action? Can it be said that an action commenced against the government after a period of three months is somehow innately or objectively cruel, detractory or unnecessary? It is submitted that the answers to these questions are in the negative.

It is pertinent to state that the notion that POPA has an innate utilitarian value that puts the needs of the many ahead of the few would not suffice to render it either reasonable or proportionate. The rights conferred by the Constitution are mostly the rights of the individual, especially the right of access to Court. This is rightly so because, in a democratic society that has committed itself to the rule of law, no one individual, or collection of individuals can be considered as having any greater importance. More importantly, the government is not and cannot be considered superior or deserving of protection or rights that far exceed that of the governed.[49] Such a situation, it is submitted would fundamentally negate the principles of a liberal democracy. Therefore, it is unreasonable to compel a citizen to commence an action against the government '*within the shortest possible time'*, when the test as it pertains to all other members of society is that the action should be commenced '*within a reasonable time*'.

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[49]. See generally *Military Governor, Lagos State & Ors v Chief Emeka Odumegwo Ojukwu* (1986) All NLR 233.

Finally, the onerous intrusiveness of POPA on the right of access to Court is manifest when it is considered that a great majority of the statutes that set up governmental agencies contain provisions that make the service of one-month pre-action notices a mandatory condition precedent to the institution of any action.[50] These pre-action notices have been held to touch upon the jurisdiction of the Court i.e. they are conditions precedent which must be fulfilled before a Court would be competent to entertain a matter.[51]Accordingly, with the requirement of a one-month pre-action notice, the period of three months as stipulated in Section 2(a) of POPA is effectively reduced to an *actual period* of two months. Not only is the government guaranteed the protection of an absolute defence after a period of three months, but the government is also further granted the protection of demanding and receiving a pre-action notice which serves only to further limit the already short period within which a citizen must commence an action.[52]

It is thus the opinion of this writer that all of the above taken together would lead to the unassailable conclusion that POPA constitutes an onerous intrusion on the Constitutional right of access to Court. The very fact that Section 2(a) provides an absolute bar against all actions, which inadvertently defeats the very aim of avoiding only frivolous action leads to the conclusion that Section 2(a) of POPA is not the least intrusive means of achieving the aim of POPA.

Fair balance or proportionality in the narrow sense: does the act represent a net gain, when the reduction in the enjoyment of the right is weighed against the level of realization of the aim?

This stage of the test requires the Court to perform the balancing act. The question is: if the intrusion into the Constitutional right of access to Court is

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50. For example: Section 92(1) Nigerian Port Authority Act Cap N126, LFN 2004; Section 142(3) Nigerian Communication Act Cap N97, LFN 2004; Section 51(1) National Insurance Commission Act Cap. N53, LFN 2004; Section 19(3) National Examination Council (NECO) Establishment Act Cap. N37, LFN 2004.

51. See *Amadi v. NNPC*, note 43 and *Nigercare Dev Co Ltd v A S W B* **[**2008] 9 NWLR (Pt 1093) 498.

52. For a fuller discussion see: Abiodun Odusote, 'The Nigerian Public Officers Protection Act: An Anachronistic Legislation Yearning for Reforms', [2019] (9)(1) *Journal of Public Administration and Governance*, 227 – 229 <http://www.macrothink.org/journal/index.php/jpag/article/view/14404/pdf> accessed 3 November, 2019.

weighed against the level to which POPA achieves the aim of preventing frivolous lawsuits, does the scale tilt more towards POPA?

The fact that POPA is not effective at achieving its aim as articulated in the *A.-G. Rivers State case* has been discussed at length above. However, if for the sake of argument it is conceded that the Supreme Court got it wrong in the *AG Rivers State case* and that the *aim* (not effect) of POPA is to protect the government by simply barring all actions commenced after three months, irrespective of their merit, would this still constitute a net gain? It is submitted yet again that the answer is in the negative. Though the regulation of the right of access to Court is not inherently unconstitutional, such regulation must as a matter of law not stray into the realm of *limiting* the Constitutional right. In *Global Excellence Comm. Ltd v Duke*[53] Tobi, JSC opined that being a Constitutional right, the right of access to Court can only be limited or taken away by the Constitution itself.

Thus, the *regulation* which POPA seeks to place on the Constitutional right of access to Court must be reasonable as a matter of law so that it does not amount to an indirect *limitation* or abrogation of this foundational right.[54] As Karibi-Whyte, JSC stated in *Amadi v NNPC*,[55] a purported regulation of a Constitutional right must not subvert the exercise of the right or render the right nugatory by placing improper obstacles on the path to the actualization of the right. It is accordingly not in doubt that an improper (i.e. unreasonable) regulation of the right of access to Court would be unconstitutional, especially if the purported regulation has the effect of taking away, limiting, subverting or rendering ineffectual this important right. The test of reasonableness is objective in nature i.e. what is "*fair, proper, just, moderate, suitable under the circumstances*",[56] the question to be asked is: does POPA reasonably regulate the right of access to Court?

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53. [2007] 16 NWLR (Pt 1059) 22 at 48 Paras E – F;
54. *Aqua Limited v O S S C* [1988] 10 – 11 S C 31 at 67.
55. [2000] 10 NWLR (Pt 674) 76.
56. *Rinco Const Co v Veepee Ind Ltd* [2005] 9 NWLR (Pt 929) 85 at 99 Para G See also *Obiorah v FRN* [2016] LPELR-40965 (CA).

In answering this question it is pertinent to articulate one foundational principle. Section 14(2)(a) of the Constitution provides "*it is hereby, accordingly, declared that – (a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority*". Therefore, if the government "*derives all of its powers and authority*" from the Nigerian people, there is no legal or moral basis upon which the government becomes entitled to rights or protections that *far exceed* that accruable to the ordinary citizen. By the same token, there is no basis upon which the right of the ordinary Nigerian citizen as against the government should be unreasonably curtailed. With this principle in mind, it is submitted that since POPA is a statute of limitation, the best way to gauge its reasonableness is to juxtapose it with other statutes that place a time bar for instituting actions. The most popular of such statutes are the Limitation Laws of the various States. Generally, the Limitation Laws provide that in tortious actions, the right of action would be extinguished after the expiration of a period of six years.[57] It is also necessary to state that since POPA applies to contracts of employment, the limitation period for contract matters is likewise six years.[58]

In essence, the average limitation period placed on tortious and contract actions by the Limitation Laws of the various States is a period of six years. Therefore, if the government was to commence a tortious action against a citizen to obtain a remedy for an acts or omission committed by the citizen, *the government would have a period of six years (i.e. 72 months)* within which to commence such an action before it can be said that the action is barred by statute. However, when the reverse is the case, *the citizen has just three months, which is effectively two months as a result of pre-action notices*. *A fortiori*, the balancing test is this: the citizen is provided an absolute defence after 72 months while the government is provided an absolute defence after just 3 months. With due regard to the principles enunciated above, it is submitted that three months as against seventy-two months is not reasonable i.e. it neither moderate nor suitable in the circumstances.

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57. See generally Section 8(1) (a) of the Limitation Law Cap L67, Laws of Lagos State of Nigeria, 2003 and Section 4(1) (a) Limitation Law Cap. 89, Laws of the defunct Bendel State of Nigeria, 1976 (as applicable in Edo State).
58. See generally Section 8(4) of the Limitation Law Cap. L67, Laws of Lagos State of Nigeria, 2003 and Section 4(1) (a) Limitation Law Cap. 89, Laws of the defunct Bendel State of Nigeria, 1976 (as applicable in Edo State).

To further illustrate this point, it is a trite principle of statutory interpretation that a special provision would take precedence over a general provision.[59]

Accordingly, the Public Officers Protection Act does not apply to the Nigerian National Petroleum Corporation (NNPC). This is because though a government agency, by the specific provisions of Section 12(1) of the Nigerian National Petroleum Corporation Act[60] actions against the NNPC would be barred after a period of 12 months and not the 3 months provided in POPA. Therefore, NNPC enjoys protection against suits instituted after a period of 12 months as against 3 months. Yet, this governmental agency has not collapsed under the sheer weight of frivolous and dectractory suits instituted against it. In fact, NNPC remains the most viable source of national income. It is accordingly submitted that POPA constitutes an unreasonable intrusion into the Constitutional right of access to Court. POPA does not regulate the right of access to Court; rather POPA constitutes a subversive obstacle that effectively and unconstitutionally limits the right to approach the Courts. Accordingly, it would be legally impossible for the limitation wrought by POPA to be a net gain when weighed against the chilling effect it has on the Constitutional right of access to Court.

Conclusion and Recommendations

Having applied the four-stage test articulated by Julian Rivers, POPA falls on three of the four stages. It is thus apparent that in taking into consideration the critical importance of the right of access to Court, POPA is both objectively unreasonable and clearly disproportionate. The effect is that contrary to settled law, an Act of the National Assembly has unlawfully subverted a Constitutional right. By providing a period of just three months within which to seek redress in respect of governmental misdeeds (*which in practical terms is two months*); POPA constitutes an improper obstacle that limits the actualization of a Constitutional right. In *Kenya Bus Service Ltd. & Anor. v. Minister for Transport & Ors.*[61] Majanja, J of the High Court of Kenya held:

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59. See *A G Lagos v A G Fed* [2014] 9 NWLR (Pt. 1412) 217 at 259 – 260.
60. Cap N123, LFN 2004.
61. [2012] FWLR at 9.

> The general worldwide consensus is that a shorter limitation period for the state cannot be justified. The reach of the Government is far and wide and in an era of accountability or transparency ushered in by the Constitution, the State must abide by the same standards required of mere mortals.

The words of Justice Majanja bear out the clear and urgent need to revisit POPA and pronounce upon its disproportionality, unreasonableness and unconstitutionality. Accordingly, it is submitted that at the earliest opportunity, the Courts should declare Section 2(a) of the Public Officers Protection Act (and all similar statutes) as unconstitutional.[62]It has been earlier stated that the policy of preventing frivolous lawsuits against governmental officers and bodies has utilitarian value. Therefore, the thrust of this article has not been to canvass that the Public Officers Protection Act (and all similar statutes) has no value, but rather that the time bar of three months presently stipulated by Section 2(a) is unreasonable, disproportionate and unconstitutional.

Accordingly, the following are recommended:

a. Section 2(a) of POPA be amended to significantly increase the time bar presently provided. It is important to state that the provision of the Public Officers Protection Laws of Abia, Ebonyi and Rivers States have removed the three month period provided by POPA and replaced it with the same period applicable to regular citizens[63] thus bringing equilibrium between the governed and the government. The legislative action of Abia, Ebonyi and Rivers States is indeed highly commendable, but it is acknowledged that other States are unlikely to follow their example.

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62. See: *Mohlomi v Minister of Defence [1996] ZACC 20* where applying the test of reasonableness and justifiability, the Constitutional Court of South Africa struck down Section 113(1) of the Defence Act (No 44 of 1957) which provided "No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, *if a period of six months* ... has elapsed since the date on which the cause of action arose."

63. Oyelowo Oyewo, 'Sounding the Death Knell of the Public Officer Protection Act/Law In Nigeria', [2016] (4)(1) *International Journal of Liberal Arts and Social Science*, 97–98 <https://ijlass.org/data/frontImages/gallery/Vol._4_No._1/10._92-106.pdf> accessed 3 November, 2019.

Thus, this writer is of the opinion that a time frame of 3 years (i.e. thirty-six months) would best serve the justice of the competing interests. This recommendation arises from the need to strike a reasonable balance between the governed and the government. Since the citizen would usually obtain an absolute defence after a period of 6 years, it is only reasonable, fair and equitable that the government obtains an absolute defence after half that period. Anything to the contrary is likely to fail the four-stage test discussed above.

b. Alternatively, POPA should be wholly repealed. In 2015, the Nigerian Law Reform Commission submitted a report to the House of Representatives wherein it recommended the repeal of POPA. The report was accompanied by a proposed draft Bill for the repeal of POPA.[64] The recommendation of the Nigerian Law Reform Commission clearly evidences the pervasive discontent with the onerous provisions of POPA.

c. Finally, the Courts are the custodians of the Constitution and have a sacrosanct duty to uphold and defend the Constitution. It has been shown above that as presently constituted, POPA is a disproportionate and unreasonable obstacle to the right of access to Court and is thus unconstitutional. Thus, by Section 1(3) of the Constitution, the Courts have bounden duty to strike down Section 2(a) of POPA on the basis of its unconstitutionality.

64. Abiodun Odusote, note 52