NILDS
National Institute For Legislative and Democratic Studies

JOURNAL OF LAW REVIEW
NATIONAL INSTITUTE FOR LEGISLATIVE AND DEMOCRATIC STUDIES
NATIONAL ASSEMBLY, ABUJA
MAIDEN EDITION: VOLUME 1, NUMBER 1, AUGUST, 2018

TABLE OF CONTENTS:

A Publication of the Department of Legislative Support Services, National Institute for Legislative and Democratic Studies, 2018.
To be cited as JLR-DLSS-NILDS (JLR Vol.1, No. 1, 2018)

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National Institute for Legislative and Democratic Studies

Published 2018
By
Department of Legislative Support Services,
National Institute for Legislative and Democratic Studies
Abuja

ISSN: 2659 -0565

EDITORIAL COMMENTS

This is the maiden issue of the *NILDS-Journal of Law Review*, comprising a total of thirteen (13) dealing specifically with the three (3) broad thematic areas of legal scholarship and legal practice namely, constitutionalism, law-making, and legislative drafting. Apart from the three core areas of focus of the journal, there are sections dedicated to review of legislation, case law review and book review.

Olufemi Abifarin, N.A.O Ijaiya and J.O. Olatoke, writing on control of public funds by the legislature, examine the power of the National Assembly (NASS) to control the purse in Nigeria. The paper discusses constitutional establishment of the NASS and the relevant constitutional powers to control public funds generally. Consequently, the paper interrogates the extent, scope and limit of these powers, including a comparative view from other jurisdictions. The conclusion of this paper is that the National Economic Council (NEC) is not an alternative to the NASS as the Constitution confers on the latter limitless power with regard to ensuring transparency, probity and accountability in the administration of public funds in Nigeria.

On his part, Obinne Oguejiofor's paper focuses on strengthening relations between the executive and legislative arms of government, using the relevant provisions of the Constitution of the Federal Republic of Nigeria, 1999. Against the backdrop of the fact that the nature of presidentialism makes tensions between the legislature and the executive inevitable, the paper advocates good relations between these two arms of government in order to ward off disastrous consequences for the country's nascent democracy. Consequently, the paper advocates both legal and policy measures in crafting improved relations between the two arms of government.

Writing on human security under Nigerian Constitution, Chukwudi Odoeme argues that by placing the all-important positive rights with human security potentials and reciprocal citizens' duties to the state in Chapter II of the 1999 Constitution that is not justiciable, the Nigerian state has robbed itself of the recipe for survival and risks failing as a state. He advocates the integration of diplomacy, military force, intelligence, law enforcement, internal security, education, health and human services into a single system that can respond to basic threats to human security of citizens.

The paper authored by Tony Anene-Maidoh discusses the challenges of enforcement of judgments of the ECOWAS Court of Justice. The paper examines the basis of the binding nature of the judgments of the Court on Member States as being rooted in the principle of Pacta Sunt Servanda. It identifies challenges faced by Member States and the Court in the implementation of the judgments of the Court and recommended a review of the method of enforcement of the judgments of the ECCJ to incorporate international best practices from other regional Courts.

Usman Ibrahim undertakes a critique of Constitution alteration processes in the 7th and 8th Assemblies and unveils problems that the Assemblies encountered. It identifies involvement of the public in the alteration exercise as a major challenge and delves into comparative analyses with South Africa and Switzerland. It makes recommendations on the best options for achieving constitution alteration without much bottlenecks.

Chinedu Anita Ikpeazu, in a review of legislation, undertakes an analysis of the Compulsory Treatment and care for Victims of Gunshots Act, 2017. The paper traces the background of the Act and interrogates the implication for the Nigerian populace and the Nigerian legal system, making comparative analysis with international legal frameworks and the provisions in other jurisdictions and recommends that effective implementation is crucial for the success of the Act by taking a holistic approach.

Samuel Oguche, while writing on the role of the National Assembly in Appropriation, discloses the allegation of 'padding' in the appropriation process is a major challenge that has brought the legislature to ridicule in

public domain. Using both constitutional and judicial authorities, the paper completely dismisses the notion of 'padding, affirms unfettered powers of the National Assembly in appropriation and, among others, recommends passage of a budget process law, as well as pre-budget consultations between the legislature and the executive to reduce disagreements in the process of passage.

Tonye Clinton Jaja writes on improving quality of legislative drafting in Nigeria. The paper recommends that key actors and stakeholders within Nigeria's legislative process to adopt a holistic strategy for the improvement of the quality of Bills and legislation in Nigeria through legislative drafting and other related strategies for promotion of economic development is applicable to Nigeria and other countries whose primary national goal is to achieve development as enshrined in section 16(2) (a) (b) of the Constitution of the Federal Republic of Nigeria, (CFRN), 1999.

Augustine Osigwe, Chukwuemeka Onyimadu, Chinedu Ikpeazu, Adaobi Ofordeme probe the problem of electricity theft and express the concern that if electricity theft is not controlled urgently, it will contribute immensely to a continued cycle of mountain debts and inefficiencies for not just the Distribution Companies but also for the Generation Companies. Following cross country considerations, the paper makes recommendations targeted at curbing electricity theft in Nigeria.

Writing on Bethel Ihugba and Doris examine issues of exclusion by electoral laws in Nigeria and probe the impact of electoral laws on political inclusion and exclusion in Nigeria's democratic process. Restating the centrality of participatory governance to sustainable democracy, particularly in representative government, the paper examines the existing electoral legal framework in Nigeria and finds that the electoral regime is structured in a way that perpetuates electoral exclusion of the poor and young people via the imposition of divisive financial and age requirements, and recommends an alteration of constitutional provisions on age qualifications to contest elections.

Edoba Omoregie's paper is a review of 'A Century of Lawmaking in Nigeria', a publication of the National Institute for Legislative Studies, 2014. The eleven-chapter book covers issues of lawmaking and constitutional development in Nigeria. The paper identifies significant developments since the publication of the book, and recommends a review to bring it up-to-date with recent developments.

Ebele Gloria Ogwuda, in a case review, probes the issue of defection under the Constitution and interrogates the decision of the Supreme Court in Abegunde v. Ondo State House of Assembly & Ors where the Court had to interpret and apply the provisions of sections 68(1) (a) & (b) and 222 (a), (e) and (f) of the 1999 Constitution and recommends, amongst others, that section 68(1)(g) of the Constitution should be amended to include automatic loss of seat for defectors.

The last paper, which is also a case review, is an analysis of judicial attitude to restriction of access to court through constitutional and statutory provisions, Uwakwe Abugu and Ndukauba Nwagbo**,** call on both the National and Houses of Assembly of States to quit inserting clauses in the Constitution and Statutes that make right of access to court dependent on non-existent or futuristic legislation or insert the causes of action and the procedure in subsidiary legislation at the same time and pass it. This is in view of the unfavourable judicial disposition to such provisions which have the tendency of putting citizens' right of access to court in abeyance.

Professor M.T. Ladan,
Editor-In-Chief,
NILDS Journal of Law Review

ISSN: 2659 -0565

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CONTROL OF PUBLIC FUND BY THE LEGISLATURE: A COMPARATIVE ANALYSIS OF NIGERIAN NATIONAL ASSEMBLY, AMERICAN CONGRESS AND BRITISH PARLIAMENT

Olufemi Abifarin*, N.A.O Ijaiya** and J.O. Olatoke*

Abstract

This paper looks at the power of the National Assembly (NASS) to control the purse in Nigeria. We look at the constitutional establishment of the NASS and the powers conceded to it in the Constitution on appropriation and public funds generally with a view to probing or interrogating the extent, scope and limit of these powers. We looked at other jurisdictions like Britain and America and we concluded that the NASS has limitless power with regard to ensuring transparency, probity and accountability in the administration of public funds in Nigeria. The National Economic Council (NEC) is neither an alternative to the NASS nor a rival body to the National Assembly by the tenor of the constitution.

Keywords: Congress, Control, Legislature, Parliament, Public fund.

INTRODUCTION

It is necessary to interrogate the powers of the NASS on control of public funds in Nigeria because of the ragging controversy on whether the NEC can approve spending of money by the federal government without passing through the National Assembly which is the proper institution vested with power of Appropriation and power to control public spending in Nigeria.[1]

Since the beginning of this fourth Republic, the executive arm of government as represented by the federal government has been making extra-budgetary spending, from Excess crude account, which is itself illegal by virtue of the fact that there is no law made by the National Assembly to create the Account.[2] Granted bailout, including sharing of Paris club refund without recourse to the National Assembly which is the institution vested with power by the constitution to appropriate, control public fund, revenue and contingency fund.[3] In this paper we are going to look at the establishment of the National Assembly, its powers as specified by the constitution to make law generally, its power on money bills or appropriation bill, control of public fund, contingency fund, public revenue and its power to approve remuneration for public office holders in Nigeria,

* Ph.D Professor & Former Dean of Law, Joseph Ayo Babalola University Ikeji and now Head, Dept. of Public and International Law Edo University Iyamho
** Ph.D Faculty of Law University of Ilorin
*** SAN, Ph.D, Faculty of Law University of Ilorin

[1] S.M. Abdulmalik, 'The 1999 Constitution and the law making organ of the Government in Nigeria, Topical Issues in Nigerian Law' J.A.M. Agbonika (eds.) Ilorin 2016, p. 715

[2] 'The Excess Crude Account and its Controversies', Available at www.tribuneonline.com>politics

[3] Section 80-83 of the 1999 Constitution of Federal Republic of Nigeria 1999

vis-à-vis the power of the National Economic Council which is also a creation of the Constitution but a mere advisory body.

The National Economic Council

The NEC is an executive body set up by the constitution of the Federal Republic of Nigeria.[4] The body comprised of the Vice President as the Chairman, the Governor of each state of the federation and the Governor of Central Bank of Nigeria. The Council shall have power to advise the President concerning the economic affairs of the Federation and in particular on measure necessary for the coordination of the economic planning efforts or economic programmes of the various Government of the federation.[5]

From the above provision of the Constitution, the NEC is a mere advisory body to the President on economic matters and not an alternative body to the National Assembly on approval of public finance, budget, or supplementary budget therefore, its approval of withdrawal from Excess Crude Account is illegal and unconstitutional and therefore null and void.[6]

The Excess Crude Account is itself illegal in so far as that account is not approved by the NASS in accordance with the provision of the Constitution.[7] Any money in the excess crude account ought to be in the federation account subject to the approval of the National Assembly to create an account to be named Excess Crude Account.[8] The NASS is given wide and sweeping powers on government Revenue and Expenditure in Nigeria. The power cannot be taken away by anybody. The power given to the NASS to control public funds is to ensure transparency and probity in governance.

Establishment of National Assembly

The National Assembly is the highest law making and representative body in Nigeria.[9] It is the constitutional institution vested with power to make law for peace, order and good government of Nigeria.

According to the provisions of the constitution there shall be a National Assembly for the Federation, which shall consist of a Senate, and a House of Representatives.[10] This provision shows the National Assembly shall be a bicameral legislature. A bicameral legislature is a

[4] Section 153
[5] Third Schedule part I (H) of the 1999 Constitution of the FRN as amended.
[6] Section 153 & Third Schedule part I (H) read together
[7] Section 59, 80, 81, 82 & 83 of the 1999 Constitution of Federal Republic of Nigeria
[8] Section 162
[9] Section 47 (1) & 92 of the Constitution of Federal Republic of Nigeria 1999
[10] Section 47 (1)

Representative Assembly that has two chambers usually referred to as lower and upper Houses as in Britain.[11]

The constitution went further to describe the composition of the National Assembly by stating that the senate shall consist of three senators from each state and one from the Federal Capital Territory, Abuja.[12] This provision informs the present composition of the senate which stands at one hundred and nine members (109).

The senate shall be led by a Senate President and assisted by a Deputy Senate President both of who shall be elected by members of that House from among themselves.[13] However, there are other officers of the senate such as senate majority leader or senate leader who is the leader of the members of the party that has the highest number of senators. There is also senate whip e.t.c, which are offices created by the senate itself under its implied powers and the constitution.[14]

The House of Representatives shall consist of three hundred and sixty members representing constituencies of nearly equal population as far as possible, provided that no constituency shall fall within more than one states.[15]

The House of Representatives shall be led by a speaker and assisted by a Deputy speaker both of who shall be elected by the members from among themselves. The House of Representatives also has some other officers like House leader and his deputy, House whip etc. These positions are not creations of the constitution but are created by the House for its internal organisation under its implied powers and section 60 of the constitution.

It is noteworthy that the National Assembly in Nigeria is completely detached from the executive unlike in America where the Vice President who is a member of the executive is the Senate President who has a right to sit in the senate or preside over the senate even though a president of senate pro tempore is usually elected to preside over the senate in the absence of the Vice Presidents. The Nigeria situation is also in contrast with that of Britain where the Prime Minister and, other ministers of government are chosen from the House of Common.[16] Whereas any member of the National Assembly who is chosen as a minister by the president shall cease to be a member of the National Assembly as from the date of his appointment.[17]

House of Assembly of a State

[11] Olufemi Abifarin & D.F. Atidoga A Critical Analysis of the Scope and Limits of Legislative power of National Assembly in Nigeria, Confluence Law Journal vol 1 No. 1 (2006) p. 12
[12] Section 48
[13] Section 50
[14] Section 49
[15] Section 49
[16] S.G. Richards Introduction to British Government Macmillian Press London p. 67
[17] Section 90

There shall be a House of Assembly for each of the states of the Federation[18], Unlike the National Assembly, this is a unicameral legislature i.e. (a single chamber legislature). The House of Assembly of a state shall consist of three or four times the number of seats which the state has in the House of Representatives divided in a way to reflect, as far as possible, nearly equal population, provided that a House of Assembly shall consist of not less than twenty four and not more than forty members[19].

There shall be a Speaker and Deputy Speaker of a House of Assembly who shall be elected by the members of the House from among themselves[20]. There are other Officers of the House such as House Leader and his Deputy, chief whip and his deputy, minority leader, minority whip e.t.c. These positions are not creations of the constitution but are created by the House under its implied power under section 101 of the constitution.

Legislative Power of National Assembly

The power of the National Assembly to make law in Nigeria is spelt out in section 4(1) and (2) and section 4(4), while section 4(1) & 2 confers exclusive power on the National Assembly to make law on items or matters contained in the Exclusive Legislative List. Section 4(4) further confer power on the National Assembly to make law concurrently with the State Houses of Assembly on matters in the Concurrent Legislative List as spelt out in part II of the second schedule to the constitution. By the tenor of sections 4 (1) & 2 and 4 (4) the National Assembly) has wider legislative, powers than the State Houses of Assembly. But that does not mean that the National Assembly has absolute or arbitrary legislative power. The legislative power of the National Assembly is still circumscribed by the provisions of the constitution and the National Assembly cannot confer more legislative power on itself than that contained in the constitution[21].

The National Assembly cannot extend or expand its legislative power to include legislating for a State or Local Government. It does not have broad, vague or unlimited powers but the National Assembly may exercise such powers that was neither expressly granted nor prohibited just as it was held by the Supreme Court[22], of the congress of America. "This congress is not confined to the powers named in the constitution. Congress may also exercise powers, which may be reasonably implied from the enumerated powers".

It is also arguable that the concept of enumerated power as limitation to the legislative power of the National Assembly could be excused on issues of foreign relations on ground of inherent powers. The power to wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties if they had never been mentioned in the constitution, would have

[18] Section 91
[19] Section 91
[20] Section 92 *INEC v. Musa* 2003 3 NWLR (Part 806) 72
[21] Ibid
[22] *U.S. v. Curtiss Wright Export Corporation* 1939 229 us 304 *Marryland v. McCullock* 4 Wheaton

vested in federal government via the National Assembly as necessary concomitants of Nationality thus in the field of foreign relation, the powers of National Assembly are inherent and therefore not limited"[23]

General Mode of exercising Federal Legislative Power

The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and shall be assented to by the president[24] and a bill may originate from either the Senate or House of Representatives. Where the House where it originated has passed a bill, it shall be sent to other house for passage after which it shall be sent to the president for assent[25] where a bill is presented to the president for assents he shall within 30 days thereof signify that he assents or that he withholds his assent.[26] That means he has vetoed the bill. The president's veto will be overridden by passage of the bill by two-thirds majority of each of the Houses of National Assembly.[27]

Mode of Passage of Appropriation Bill

However, the procedure for exercising federal legislative power on money bill differs and it is governed by section 59 of the constitution under this section[28] appropriation bill will be presented to the National Assembly sitting jointly but each house will consider the bill and pass it separately but where a house refuses to pass the bill within 2 months from the commencement of a financial year, the president of senate shall within 14 days thereafter arrange for and convene a meeting of joint finance committee to examine the bill with view to resolving the differences between the two houses.[29]

Where joint finance committee fails to resolve differences, then the bill shall be presented to the National Assembly sitting at a joint session and if the bill is passed at a joint session it shall be presented to the president for ascent.[30]

Where the president within thirty days after the presentation of the bill to him, fails to signify his assent or where he withholds assent, then the bill shall again be presented to the National Assembly sitting at a joint meeting and if passed by two-thirds majority of members of both houses at such joint meeting the bill becomes law and the assent of the president shall not be required.[31] When

[23] *Attorney General of the federation v. ANPP & Others* 2003 1 EPRI
[24] Section 58 (1) CFRN
[25] Section 58(2)
[26] Section 58 (4)
[27] Section 58 (5)
[28] Section 59 (1),
[29] Section 59 (2)
[30] Section 59 (3)
[31] Section 59 (4)

this procedure is not strictly adhered to in 1981, the Supreme Court nullified the appropriation Act 1981.[32] The National Assembly of Nigeria has unrestricted power on the finance of the Nation.[33]

POWERS TO CONTROL PUBLIC FUNDS BY THE NATIONAL ASSEMBLY

Meaning of Public fund

Money that is generated by the government to provide goods and services to the general public.[34]

It also refers to the funds of every political division of a state wherein taxes are levied for public purposes. The term public fund also covers the revenue or money of a government, state or municipal corporation. The funds are generated and distributed on different levels such as the federal level, state level and even local level.[35]

The legislature is also vested with power to control public funds. This exercise of power is exhibited by the legislature through the establishment of Consolidated Revenue Fund; authorization of expenditure from Consolidated Revenue Fund; authorization of expenditure in default of appropriation; contingencies fund; remuneration of the president and certain other officers and audit of public accounts respectively.[36] Be that as it may be, there are some instances where expenditure can be undertaken by the executive arm of government without prior authorization by the National Assembly. For instance the Constitution[37] allows for government spending as authorized by the President, for the purpose of meeting expenditure necessary to carry on the services of the government for a period not exceeding six months or until the coming in to operation of the Appropriation Act whichever is earlier.[38]

Reacting to the above constitutional power of the executive President and Governor, it is submitted that even though the said provisions are aimed at ensuring that every government spending is wise and accounted for, it is still subject to criticism simply because it appears to leave much discretion

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[32] *Attorney General of Bendel State v Attorney General of the Federation* 1981 3 NCLR 1

[33] M.A. Mainoma, 'Can the Legislature alter the provisions of the Budget as presented by the Executive?' The Guardian 20 June 2017 p. 42; U. Uwaleke: 'Closing the gaps in the Budget Process' the Guardian 31 August 2016 p. 26

[34] www.businessdictionary.com

[35] http://study.com>academy>publicfund...

[36] See Section 80, 81, 83, 84, and 85, CFRN

[37] See Section 82 Ibid

[38] Ibid. This section contain a proviso that the withdrawal in respect of any such period shall not exceed the amount authorized to be withdraw from the Consolidated Revenue Fund of the Federation under the provisions of the Appropriation Act passed by the National Assembly for the corresponding period in the immediately preceding financial year, being an amount proportionate to the total amount so authorized for the immediately preceding year. Similarly, this is also provided for under section 122 Ibid for the State Houses of Assemblies. See Olubayo Oluduro 'The Role of Legislature in Combating the Spread of HIV/AIDS in Nigeria', (2009), Igbinedion University Law Journal, Vol. 8, a publication of College of Law, Igbinedion University, Okada, Edo-State at p. 92

on the part of the Chief executive (President or Governor) to determine when there has arisen an urgent and unforeseen need for such expenditure.[39]

Furthermore, as part of the exercise of its power of control of public fund, the legislature plays an important role in auditing of public accounts as captured under section 85 (2) of the Constitution. This is with a view to ensuring that public expenditures are justly incurred and discovering any irregularity in public finance. Thus, by the provisions of the above section, the public accounts of the Federation and of all offices and courts of the Federation shall be audited and reported on by the Auditor-General who shall submit his reports to the National Assembly.[40]

By subsection (3) thereof the Auditor General is precluded from auditing the accounts or appointing auditors for government statutory corporations, commissions, authorities, agencies, including all persons and bodies established by an Act of the National Assembly, but the Auditor-General shall under (a) (i) of section 85 provide a list of auditors qualified to be appointed by them as external auditors and from which the bodies shall appoint their external auditors, and (ii) guidelines on the level of fees to be paid to external auditors, and (b) comment on their annual accounts and auditor's report thereon. This is a radical departure from the 1979 Constitution which empowered the Auditor-General to audit public accounts of the Federation… "Including all persons and bodies established by law entrusted with the collection and administration of public moneys and assets...."[41] Undoubtedly, the latter provision allows for greater probity and transparency in public finance.

Establishment of Consolidated Revenue Fund

Consolidated fund or Consolidated Revenue Fund is a term used in many countries with political system derived from Westminster system to describe the main bank account of the government.[42]

All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.[43]

No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorised by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.[44]

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[39] See Olubayo, ibid at note 33. See also I.A. Ayua, D.A. Guobadia & D. Adekunle D. (eds.) 'Issue in the 1999 Constitution' quoted by Olubayo at p. 92

[40] Ibid

[41] See Section 79 (2) 1979 Constitution

[42] https://en.m.wikipedia.org>wiki>coms... Accessed on 6th June 2018

[43] Section 80 (1)

[44] Section 80 (2)

No moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorised by an Act of the National Assembly.[45]

No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.[46]

The term Consolidated Revenue Fund is intended to cover the totality of all public moneys, which maybe, raised or collected or paid into the coffers of the Federal Government (which have not been otherwise provided for in any other sections of the Constitution). It is a special fund in the sense that the Constitution itself specifies what expenses are to be drawn on the fund, but since it represents the largest bulk of all moneys available to the Federation, virtually all expenditure are drawn on it.

However, no expenditure may be drawn on the Consolidated Fund unless:

(a) the Constitution specifically authorises it, for example, the salaries and emoluments of judges are charged on the Fund-
(b) the National Assembly authorises it by passing an Appropriation or Supplementary Appropriation Act –
(c) the National Assembly authorises it by passing an Act for that purpose.

Indeed, no public money of the Federation can be spent without authorisation by the National Assembly. It is this power to control expenditure of public fund, more than any other, that gives the legislature control over the acts of the other branches of Government, since they all, even the judiciary because only the salaries of the judges are charged directly on the Consolidated Revenue Fund, depend on the Legislature for money to carry out their functions. Indeed, subsection (4) states this in very clear terms and the enforcement of this section is a legislative responsibility.

Authorisation of Expenditure from Consolidated Revenue Fund

The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year.[47]

The heads of expenditure contained in the estimates (other than expenditure charged upon the Consolidated Revenue Fund of the Federation by this Constitution) shall be included in a bill to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund

[45] Section 80 (3)
[46] Section 80 (4)
[47] Section 81 (1)

of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.[48]

The amount standing to the credit of the-

(a) Independent National Electoral Commission,

(b) National Assembly, and

(c) Judiciary,

In the Consolidated Revenue Fund of the Federation shall be paid directly to the said bodies respectively; in the case of the Judiciary, such amount shall be paid to the National Judicial Council for disbursement to the heads of the courts established for the Federation and the states under section 6 of this Constitution.[49]

If in respect of any financial year it is found that -

(a) the amount appropriated by the Appropriation Act for any purpose is insufficient; or

(b) a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act,

A supplementary estimate showing the sums required shall be laid before each House of the National Assembly and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.[50]

Any Bill may originate from either Chamber of the National Assembly section 58(2)- and the provision of this section confirms that the Appropriation Bill may "originate" from either House.[51] Although the provision indicates a simultaneous laying of the Bill before each House by the President, in actual practice, the Bill is presented to a joint sitting of the National Assembly. It is, thereafter, left to each House to decide when to start debate and discussion on the Bill. There is actually no provision against each House considering the Bill at the same time. The duty to present the Bill is mandatory and therefore the President cannot refuse to present his budget for the year.[52]

The Appropriation Bill is the annual estimated budget. That is the expenditure of the Government and must specify the exact amounts required for specific purposes. This Executive estimate is subject to reduction or addition as the National Assembly thinks fit. According to Akande, it is

[48] Section 81 (2)
[49] Section 81 (3)
[50] Section 81 (4)
[51] In the UK all financial bills had to be introduced in the House of Commons. See Art 1. S.7, Ch. 2 of the Constitution of the U.S.A. which provides that all Bills for raising revenue must originate from the House of Representatives.
[52] See *Alhaji Abubarkar Umar v. Governor of Kaduna State* (1981) 2 NCLR 696

unusual to have an overall increase of the total amount estimated but it is not unusual for some heads to be reduced and others increased.[53] The practice in the 8th National Assembly is to increase various heads of account and decrease some which the president complained about. He was infact reluctant to sign the 2018 budget.[54]

The Executive is allowed to present a supplementary bill at any time during the financial year, if there are any shortfalls in any area. But the National Assembly still has the power to refuse to approve such a supplementary budget.

The power of the National Assembly to control public expenditure is absolute and even the courts cannot challenge the decision of the legislature.[55] The Nigerian Senate has refused to approve an external loan for Nigeria because the details of how the loan will be expanded were not attached to the request.

An attempt to ensure the financial independence of the judiciary has been made. The budget for the Judiciary is normally charged on the Consolidated Revenue Fund but it is now provided that the money shall be paid directly to the National Judicial Council. The same goes for National Assembly, State Houses of Assembly and…

Authorisation of expenditure in default of appropriations

If the Appropriation Bill in respect of any financial year has not been passed into law by the beginning of the financial year, the President may authorise the withdrawal of moneys from the Consolidated Revenue Fund of the Federation for the purpose of meeting expenditure necessary to carry on the services of the Government of the Federation for a period not exceeding six months or until the coming into operation of the Appropriation Act, whichever is the earlier;

Provided that the withdrawal in respect of any such period shall not exceed the amount authorised to be withdrawn from the Consolidated Revenue Fund of the Federation under the provisions of the Appropriation Act passed by the National Assembly for the corresponding period in the immediately preceding financial year, being an amount proportionate to the total amount so authorised for the immediately preceding financial year.[56]

The National Assembly is expected to have passed the Appropriation Act by the beginning of the financial year.[57] This presupposes that the Executive presents its budget in sufficient time to allow the Legislature to do a thorough scrutiny within the time limit. It is possible for the Executive to

[53] Jadesola Akande, 'Introduction to Nigerian Constitution of 1999', (MIJ Professional Publishers Ltd 2000)
[54] 'Buhari relunctantly signed 2018 Budget', the Nation online.net>breaking-buhari
[55] See, for example, *US v. O. Brien* 391 US 367 (1968) where a taxpayer was denied the right to challenge before the courts the constitutionality of Congress that permits the C.I.A. to account for its expenditures "solely on the certificate of the Director."
[56] Section 82
[57] The financial year has been changed from the old period of April 1-March 31 to a new period of January 1-December 31 by the Financial Year Act 1980. The Commencement date is April 1, 1980

delay the presentation with the intention either of attempting to prevent a thorough legislative scrutiny or to bring into operation this section.

If the latter is the case, then the proviso to the section will not allow the Executive to spend money from the Fund for more than six months and then the authorised expenditure must not exceed the amount given for the same period in the previous year's budget Although this is the legal position, in practice the chief Executive would normally have some form of understanding with a group of parties in the Legislature which will ensure that deadlock is avoided.

If in fact as is usually the case, the Executive is asking for more money than the previous year, it is in its interest to get the Appropriation Bill passed as quickly as possible. It is the executive that has been presenting the Appropriation Bill date to the National Assembly in Nigeria, while the National Assembly not being a rubber stamp is expected to go through the budget before approval.

On the other hand, the Legislature may use the delay in passing the Appropriation Bill as a weapon of control on the Executive. But while the passing of the Bill is pending, and remains pending into the new financial year, the President has absolute discretion to determine which "expenditure are necessary to carry on services."

Contingencies Fund

Contingency fund is created as an imprest account to some urgent or unforeseen expenditure of government. A contingencies fund or contingency fund is a fund for emergencies or unexpected outflows, mainly economic crises.[58]

The National Assembly may by law make provisions for the establishment of a Contingencies Fund for the Federation and for authorising the President, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from the Fund to meet the need.[59]

Where any advance is made in accordance with the provisions of this section, a Supplementary Estimate shall be presented and a Supplementary Appropriation Bill shall be introduced as soon as possible for the purpose of replacing the amount so advanced.[60]

The idea of a contingency is primarily to offset the effect of emergencies or natural disasters. For example, One million naira was given to the Oyo State to help in the rehabilitation of the victims of the Ogunpa flood disaster in 1980.[61] The amount to be taken for any particular contingency is at the absolute discretion of the President. The efficacy of the legislative control is questionable because the National Assembly is not given the power to refuse to approve the supplementary

[58] https://m.economictimes.com>…budget
[59] Section 83 (1)
[60] Section 83 (2)
[61] Other beneficiaries of the President's contingency spending are the Rivers State Oil Spillage (1981) Kano State for religious – (Maitasine) riots (November 1981). There other flood cases in Kogi, Benue, etc in 2012

estimate which will be presented to it for the purpose of replacing the amount already disbursed, though it may refuse to approve an increase.

Remuneration, etc. of the President and certain other officers

Remuneration is an amount of money that is paid to somebody for the work they have done.[62]

The constitution provides that- There shall be paid to the holders of the offices mentioned in this section such remuneration, salaries and allowances as may be prescribed by the National Assembly, but not exceeding the amount as shall have been determined by the Revenue Mobilisation Allocation and Fiscal Commission.[63]

The remuneration, salaries and allowances payable to the holders of the offices so mentioned shall be a charge upon the Consolidated Revenue Fund of the Federation.[64]

The remuneration and salaries payable to the holders of the said offices and their conditions of service, other than allowances, shall not be altered to their disadvantage after the appointment.[65]

(4) The offices aforesaid are the offices of President, Vice-President, Chief Justice of Nigeria, Justice to the Supreme Court, President of the Court of Appeal, Justice of the Court of Appeal, Chief Judge of the Federal High Court, Judge of the Federal High Court, President of the National Industrial Court, Judge of the National Industrial Court. Chief Judge and Judge of the High Court of the Federal Capital Territory, Abuja, Chief Judge of a State, Judge of the High Court of a State, Grand Kadi and kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, President and Judge of at the Customary Court of Appeal of the Federal Capital Territory, Abuja, Grand Kadi and Kadi of the Sharia Court of Appeal of a State, President and Judge of the Customary Court of Appeal of a State, the Auditor-General for the Federation and the Chairmen and members of the following executive bodies, namely, the Code to Conduct Bureau, the Federal Civil Service Commission, the Independent National Electoral Commission, the National Judicial Council, the Federal Judicial Service Commission, the Judicial Service Committee of the Federal Capital Territory, Abuja, the Federal Character Commission, the Code of Conduct Tribunal, the National Population Commission, the Revenue Mobilisation Allocation and Fiscal Commission, the Nigeria Police Council and the Police Service Commission.[66]

Any person who has held office as President or Vice-President shall be entitled to pension for life at a rate equivalent to the annual salary of the incumbent President or Vice-President:[67]

[62] Oxford Advanced learners dictionary International Student Edition 2010. Oxford University Press.
[63] Section 84 (1)
[64] Section 84 (2)
[65] Section 84 (3)
[66] Section 84 (4)
[67] Section 84 (5)

Provided that such a person was not removed from office by the process of impeachment or for breach of any provisions of this Constitution.

Any pension granted by virtue of subsection (5) of this section shall be a charge upon the Consolidated Revenue Fund of the Federation.[68]

The recurrent expenditure of judicial offices in the Federation (in addition to salaries and allowances of the judicial officers mentioned in subsection (4) of this section) shall be a charge upon the Consolidated Revenue Fund of the Federation.[69]

This is one of the instances that the Constitution charges directly the expenditure of money fiom the Consolidated Revenue Fund. All money charged directly on the Fund are not subject to annual debate in the National Assembly because once fixed, they do not appear on the annual budget estimate presented in the Appropriation Bill because they are not subject to changes during the term of office of the incumbent office holder.

The office holders to which the provision applies are specifically mentioned and the list does not include members of the Legislature. Indeed, it is provided that the members of the Legislature shall be entitled to remuneration or emolument as legislator as determined by the Revenue Mobilisation and Allocation Committee. In the American Constitution it is also specifically provided that members of Congress shall be paid,[70] although under the British system it is an accepted convention which has been legalised.[71]

It is now provided that Presidents and Vice-Presidents are paid their salaries and other emoluments for life.[72] Subsection (7)-charging the recurrent expenditure of judicial offices in the Federation upon the Consolidated Revenue Fund is to ensure the enhancement of the Independence of the judiciary.

For members of the Legislature to be paid some emoluments, therefore, a member of the National Assembly who has sworn to the Oath and taken, his seat is prima facie entitled to salary and other allowances, even though the House subsequently declares his seat vacant. The one who is subsequently chosen to fill the vacancy is entitled to a salary only from the time the seat was

[68] Section 84 (6)
[69] Section 84 (7)
[70] Art 1, s. 6 provides "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by law, and paid out of the Treasury of the United States,
[71] Since the National Assembly has the sole power to authorise the expenditure of public funds, there is no doubt they will be the ultimate arbiters of their own fortunes whatever may be recommended and/or estimated by the Executive in the Appropriation Bill. If they fix a salary higher than that estimated by the President, then they will also approve a supplementary Appropriation Bill when it is presented.
[72] The Remuneration of the President Act 1965 and the Remuneration of President (Amendment) Decree 1966-National Consolidated in Revenue Mobilization Allocation and Fiscal Commission Act.

declared vacant. This trend has been reversed by judicial pronouncements. The Courts now order any legislature removed to refund his salaries and allowances.[73]

Powers and Control over Public Funds at State level- public fund will include the statutory allocation from federation account and internally generated Revenue.

Establishment of Consolidated Revenue Fund

All revenues or other money's raised or received by a State (not being revenues or other moneys payable under this Constitution or any Law of a House of Assembly into any other public fund of the State established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the State.[74]

No moneys shall be withdrawn from the Consolidated Revenue Fund of the State except to meet expenditure that is charged upon the Fund by this Constitution or where the issue of those moneys has been authorised by an Appropriation Law, Supplementary Appropriation Law or Law passed in pursuance of section 121 of this Constitution.[75]

No moneys shall be withdrawn from any public fund of the State, other than the Consolidated Revenue Fund of the State, unless the issue of those moneys has been authorised by a Law of the House of Assembly of the State.[76]

No moneys shall be withdrawn from the Consolidated Revenue Fund of the State or any other public fund of the State except in the manner prescribed by the House of Assembly.[77]

The States have their own Consolidated Revenue Fund and the withdrawals from the Fund are subject to the authorisation by an Appropriation Law, Supplementary Appropriation Law or as provided for by the Constitution. The Legislature of the State is the House of Assembly a single Chamber House-but 1t performs all the functions which would normally be performed by the National Assembly for the federation.

Authorisation of expenditure from Consolidated Revenue Fund

[73] 'S-Court sacks APC lawmaker in Edo, gives him 90 days to refund salaries', available on www.vanguardngr.com>2017/12 ; 'Breaking: Supreme Court sacks Taraba senator Abubakar Danladi, orders him' available on www.vanguardngr.com>2017/06 ; 'Court sacks A'Ibom senator, to refund salaries, allowance' available on punchng.com>court-sacks-aibom-senat…
[74] Section 120 (1)
[75] Section 120 (2)
[76] Section 120 (3)
[77] Section 120 (4)

The Governor shall cause to be prepared and laid before the House of Assembly at any time before the commencement of each financial year estimates of the revenues and expenditure of the State for the next following financial year.[78]

The heads of expenditure contained in the estimates, other than expenditure charged upon the Consolidated Revenue Fund of the State by this Constitution, shall be included in a bill, to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the State of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.[79]

Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned.[80]

If in respect of any financial year, it is found that -

the amount appropriated by the Appropriation Law for any purpose is insufficient; or

(a) a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Law,

A supplementary estimate showing the sums required shall be laid before the House of Assembly and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.[81]

In the State, the Governor is the Chief Executive and it is his duty to present his budget to the Legislature, which is the Unicameral House of Assembly.

Authorisation of expenditure in default of appropriations

If the Appropriation Bill in respect of any financial year has not been passed into Law by the beginning of the financial year, the Governor may authorise the withdrawal of moneys from the Consolidated Revenue Fund of the State for the purpose of meeting expenditure necessary to carry on the service of the government for a period not exceeding six months or until the coming into operation of the Law, whichever is the earlier;

Provided that the withdrawal in respect of any such period shall not exceed the amount authorised to be withdrawn from the Consolidated Revenue Fund of the State under the provisions of the Appropriation Law passed by the House of Assembly for the corresponding period in the immediately preceding financial year, being an amount proportionate to the total amount so

[78] Section 121 (1)
[79] Section 121 (2)
[80] Section 121 (3)
[81] Section 121 (4)

authorised for the immediately preceding financial year.[82] This goes along the line of the federal situation already discussed earlier.

Contingencies Fund

A House of Assembly may by Law make provisions for the establishment of a Contingencies Fund for the State and for authorising the Governor, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from the Fund to meet that need.[83]

Where any advance is made in accordance with the provisions of this section, a Supplementary Estimate shall be presented and a Supplementary Appropriation Bill shall be introduced as soon as possible for the purpose of replacing the amount so advanced.[84]

Contingency fund of the State is to assist any part of the State that may have suffered any crisis or natural disasters. Each State in recognition of its autonomy, has the right to fix any amount as the Contingency Fund, and there is no reason why any State should have the same amount as another State.

Remuneration, etc., of the Governor and certain other officers

There shall be paid to the holders of the offices mentioned in this section such remuneration and salaries as may be prescribed by a House of Assembly, but not exceeding the amount as shall have been determined by the Revenue Mobilisation Allocation and Fiscal Commission.[85]

The remuneration, salaries and allowances payable to the holders of the offices so mentioned shall be charged upon the Consolidated Revenue Fund of the state.[86]

The remuneration and salaries payable to the holders of the said offices and their conditions of service, other than allowances, shall not be altered to their disadvantage after their appointment.[87]

The offices aforesaid are the offices of Governor; Deputy Governor, Auditor-General for a State and the Chairman and members of the following bodies, that is to say, the State Civil Service Commission, the State Independent Electoral Commission and the State Judicial Service Commission.[88]

Provisions may be made by a Law of a House of Assembly for the grant of a pension or gratuity to or in respect of a person who had held office as Governor or Deputy Governor and was not

[82] Section 122
[83] Section 123 (1)
[84] Section 123 (2)
[85] Section 124 (1)
[86] Section 124 (2)
[87] Section 124 (3)
[88] Section 124 (4)

removed from office as a result of impeachment; and any pension granted by virtue of any provision made in pursuance of this subsection shall be a charge upon the Consolidated Revenue Fund of the State. [89]

Apart from the Governor and his Deputy the office holders for which the State is responsible are those officers (specifically employed) whose sole responsibilities are to the State, hence Judges of the High Court of the State, Judges of the Sharia Court of Appeal, where there are any. In this regard only the Northern States operate the Sharia Law and therefore have the Sharia Court of Appeal.[90] Presidents and judges of Customary Courts of Appeal, are more likely to be restricted to the Southern States which have a system of customary courts.[91] Plateau State has appointed a President of the Customary Court of Appeal so have the Oyo and Lagos States. There seems to be a general agreement on the salaries being paid to the Governors and their deputies as well as those fixed for the legislators.[92] The pensions of governors and their deputies are now subject of controversial because the House of Assembly of each state just rubber stamped the proposal of the executive without considering the financial capability of the States.

Public Revenue

The income of the government through all sources is called public income or public revenue. According to Dalton, however, the term public income has two senses, narrow and wider. In its wider sense it includes all the income or receipts which a public authority may secure during any period of time. In its narrow sense, however, it includes only those sources of income of the public authority which are ordinarily known as revenue sources. To avoid ambiguity, this, the former is termed public receipts and the latter public revenue[93].

Distributable pool account

The Federation shall maintain account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.[94]

The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into

[89] Section 124 (5)
[90] See, Obilade, 'The Nigerian Legal System', (Sweet & Maxwell, 1979), p. 183n
[91] Ibid, p. 203
[92] No one knows the remuneration of Governors, Deputy Governors and the legislature today. They are kept in secret. This is against the principle of transparency which democracy stands for.
[93] www.yourarticlelibrary.com>finance accessed on 6th June 2018
[94] Section 162 (1)

account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density:

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.[95]

Any amount standing to the credit of the Federation. Account shall be distributed among the Federal and State Governments and the local government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.[96]

Any amount standing to the credit of the States in the Federation Account shall be distributed among the States on such terms and in such manner as may be prescribed by the National Assembly.[97]

The amount standing to the credit of local government councils in the Federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.[98]

Each State shall maintain a special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the local government councils of the State from the Federation Account and from the Government of the State.[99] The National Assembly is vested with enormous power with regard to control of the Federation account(s).

Each State shall pay to local government councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.[100] Instead of State to pay to local Government from its revenue states are rather deducting huge sums of money from local Government allocation under the pretext of joint account.

The amount standing to the credit of local government councils of a State shall be distributed among the local government councils of that State on such terms and in such manner as may be prescribed by the House of Assembly of the State.[101]

Any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Council for disbursement to the heads of courts established for the Federation and the States under section 6 of this Constitution.[102]

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[95] Section 162 (2)
[96] Section 162 (3)
[97] Section 162 (4)
[98] Section 162 (5)
[99] Section 162 (6)
[100] Section 162 (7)
[101] Section 162 (8)
[102] Section 162 (9)

For the purposes of subsection (1) of this section, revenue" means any income or return accruing to or derived by the Government of the Federation from any source and includes -

(a) any receipt, however described, arising from the operation of any law;

(b) any return, however described, arising from or in respect of any property held by the Government of the Federation;

(c) any return by way of interest on loans and dividends in respect of shares or interest held by the Government of the Federation in any company or statutory body.[103] However in Nigeria, the States are fond of spurious deductions from local Government account to the detriment of the administration of local Government. So many local government cannot pay salary of staff because of the State governors spurious deductions. This is common to almost all the States of the federation. The National Assembly made a law to curb this menace but the Supreme Court Struck down this law as being ultravires their enumerated powers in the Constitution.

Allocation of other revenues

Where under an Act of the National Assembly tax or duty is imposed in respect of any of the matters specified in item D of part II of the Second Schedule to this Constitution, the net proceeds of such tax or duty shall be distributed among the States on the basis of derivation and accordingly -

(a) Where such tax or duty is collected by the Government of a State or other authority of the State, the net proceeds shall be treated as part of the Consolidated Revenue Fund of that State;

(b) where such tax or duty is collected by the Government of the Federation or other authority of the Federation, there shall be paid to each State at such times as the National Assembly may prescribe a sum equal to the proportion of the net proceeds of such tax or duty that are derived from that State.[104] This is to allow for equity and to encourage other States to promote ventures that will generate higher taxes.

Federal grants-in-aid of State revenue

The Federation may make grants to a State to supplement the revenue of that State in such sum and subject to such terms and conditions as may be prescribed by the National Assembly.[105] Under this section the federal Government has granted bailout to States and remitted to States Paris Club refund but this did not pass through the National Assembly in violation of the Constitution.

The Federation may make external grants to a Foreign State or any international body in furtherance of the foreign policy objectives of Nigeria in such sum and subject to such terms and

[103] Section 162 (10)
[104] Section 163
[105] Section 164 (2)

conditions as may be prescribed by the National Assembly.[106] Nigeria has granted aid to some African Countries with Approval of National Assembly.

Each State shall, in respect of each financial year, pay to the Federation an amount equal to such part of the expenditure incurred by the Federation during that financial year for the purpose of collection of taxes or duties which are wholly or partly payable to the State pursuant to the provisions of this Part of this Chapter or of any Act of the National Assembly as is proportionate to the share of the proceeds of those taxes or duties received by the State in respect of that financial year.[107] This provision allows the States to reimburse the federal government for administrative expenses incurred in collection of certain taxes on behalf of the states.

Set-off

Any payment that is required by this Part of this Chapter to be made by the Federation to a State may be set-off by the Federation in or towards payment of any sum that is due from that State to the Federation in respect of any loan made by the Federation to that State.[108] This proviso allows the Federal Government to deduct the administrative expenses from source before remitting the balance to the States.

The right of set-off conferred by subsection (1) of this section shall be without prejudice to any other right of the Federation to obtain payment of any sum due to the Federation in respect of any loan.[109] This shows that a State can apply for loan from the federal government in addition to grants or bailout. It is the loan that should be repaid or set off while grants or bailout are gifts or financial assistance to states. But unfortunately the Federal government has treated the bailout given to States as loan instead of financial assistance as contemplated by the Constitution.

Sums charged or Consolidated Revenue Fund

Any payment that is required by this Part of this Chapter to be made by the Federation to a State shall be a charge upon the Consolidated Revenue Fund of the Federation and any payment that is so required to be made by a State to the Federation shall be a charge upon the Consolidated Revenue Fund of that State. [110]

Provisions with regard to payments

Where any payment falls to be made under this Part of this Chapter, the amount payable shall be certified by the Auditor-General for the Federation;

[106] Section 164 (2)
[107] Section 165
[108] Section 166 (1)
[109] Section 166 (2)
[110] Section 167

Provided that a provisional payment may be made before the Auditor-General has given his certificate.[111]

The National Assembly may prescribe the time at and manner in which any payment falling to be made under this Part of this Chapter shall be effected and provide for the making of adjustments and provisional payment.[112]

Financial Control by Parliament in Britain

Historically, much of Parliament's assertion of power over the Crown has been in its refusal to vote Supply (that is, money) unless grievances were redressed. This principle is expressed nowadays in the necessity for Parliament to approve the Government's proposals for expenditure and taxation. The financial procedures of Parliament are complicated; the main features of the annual financial cycle are now summarised.[113]

The following basic principles underlie public finance in Britain:

1. The House of Commons is paramount in financial matters; the House of Lords has virtually no say.
2. Only the government, not Private Members, can propose expenditure and taxation.
3. Money voted by Parliament can be used only for the purpose initially specified.
4. All taxes must be paid into, and all expenditure financed from, the Consolidated Fund, which is an account at the Bank of England.[114]

About 90 per cent of government expenditure comes under the heading of Supply Services, which means that it must be voted annually. The remaining parts are known as Consolidated Fund charges and are not subject to annual vote, the main items being interest on the National Debt and the salaries of High Court judges, the Speaker and a few public officials like the Parliamentary Commissioner for Administration. The reason for making these items a permanent charge is that it makes them, at least technically, beyond the undesirable political interference that could take place if they were subject to annual renewal.[115]

The Estimates

Every autumn each government department has to submit to the Treasury its estimates of expenditure for the next financial year beginning on 1st April. Before that date the needs of the government services must be provided for until the estimates can be finally voted, usually in early

[111] Section 168 (1)
[112] Section 168 (2)
[113] S. G. Richards (1978), Introduction to British Government Macmillian Press Ltd London P. 62
[114] Ibid
[115] Ibid

August. This is done by means of Votes on Account, one for the Civil departments and one for Defence, on which Consolidated Fund Bills are passed in February and March respectively.

The Budget

Usually just before or just after the beginning of the financial year on 1st April, the Chancellor of the Exchequer introduces his budget, he gives a general review of the economic situation, surveys national income and expenditure over the past year and presents his taxation proposals for the coming year. After the Chancellor's speech, the House of Commons passes the Budget Resolutions which give immediate legal authorisation for the collection of specified taxes. This is permitted by the Provisional Collection of Taxes Act 1968 but only until 5 August, by when the budget proposals must have been given permanent effect in the Finance Act. Just before the summer adjournment the Appropriation Act is passed to lay down that the monies voted must only be spent for the purposes indicated in the Estimates.

Control of expenditure

The Public Accounts Committee was appointed for the first time in 1861 and is constituted at the beginning of each session. It consists of 15 Members reflecting party strengths in the House, with the senior Opposition Member as its Chairman. The main functions of the Committee are to ensure that the money voted by Parliament has been spent on the purposes prescribed and that economy has been observed in the expenditure of the various departments. The Committee is assisted by the Comptroller and Auditor General, who is an officer of Parliament appointed to audit public funds He can be dismissed only by resolution of both Houses of Parliament and his salary, like those of High Court Judges, is a permanent charge on the Consolidated Fund. This protects him from governmental influence in carrying out his duties, which are exclusively concerned with probing into the financial efficiency and probity of governments.

Financial Control by the Congress in the United States of America

The annual budgets of the United States are complex, comprising thousands of items covering nearly a thousand pages of fine print in a book of quarto size. It is a full-time occupation to become well acquainted with just a portion of the budget. No individual congressman has enough time to devote to the budget to master it. The President, on the other hand, has an organization of some 500 employees, the Office of Management and Budget, whose functions are the formulation of the budget and supervision of its operation. Their expert knowledge is unmatched in Congress. Except for important policy matters now and then, presidential spending recommendations survive intact through congressional scrutiny and enactment.[116]

[116] Rotin Bennett Posey (1975) American Government Littlefield, Adams & Co. Newjersey p. 97

The appropriation of money by Congress was not placed on a coordinated basis until the passage of the Budget and Accounting Act of 1921. This law set up the Bureau of the Budget and provided certain procedures designed for central control and guidance of federal expenditures.

Budget Preparation

A budget is a plan containing estimates of income and pro-posed expenditures, applicable to the ensuing fiscal year. The various agencies of the federal government submit to the Office of Management and Budget (formerly called the Bureau of the Budget) by September 15 of each year their requests for the funds they would like to be able to spend in the forth-coming fiscal year. The Office assembles and consolidates the requests. In the meantime, it has received from the Department of the Treasury careful estimates of expected revenues. The requested expenditures always exceed the funds in sight.

Under the general guidance of the President on matters of broad policy, the personnel of the Office pare down the requested expenditures. Decisions of the Office are reversible only by the President. The consolidated and revised schedules of proposed expenditures, along with revenue estimates, are forwarded by the President to Congress in January, along with his budget message.

Appropriations

Proposals for new taxes go to the House committee on Ways and Means and the Senate Finance Committee. Proposed expenditures are analysed by the House and Senate appropriations committees. The appropriations committees Split up into subcommittees, to hold hearings and study sections of the budget.

Congress tried to consolidate all appropriations into one immense appropriations bill in 1950, instead or dividing the budget into 14 or 15 bills, as had been the previous practice. The result was a greater delay, so in the next year, Congress reverted to the practice of a number of bills. Even so, Congress often has difficulty in enacting appropriations by July first, when the new fiscal year begins.

The president must approve or veto an appropriation bill in its entirety, he cannot veto individual items

The taxing power of the national government is broadly stated in Section 8 of Article I of the Constitution;

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States…

Upon the provision there are two restrictions of note: (1) duties, imposts, and excises must be uniform, and (2) direct taxes must be proportioned among the states according to population. The

second proviso does not apply to income taxes, which are exempted from it by the Sixteenth Amendment.

The spending power of the national government is derived from the constitutional clause quoted above. Obviously the government may spend by paying its debts, by providing for the defense of the country, and most significant of all because of its breadth by providing for the general welfare. There are three constitutional restrictions upon the spending power:

1) no money may be spent except upon appropriation made by Congress,
2) a statement of receipts and expenditures must be published from time to time, and
3) appropriations for the Army may not extend for a longer period than two years.

The borrowing power of the national government is set forth in the same clause of the Constitution quoted above. Congress may "borrow money on the credit of the United States." There is no constitutional restriction of any kind upon the borrowing power. Purpose of borrowing, amount to be borrowed, interest rate to be paid, term of bonds, total size of the national debt: all these are up to Congress itself to determine, or to let the Treasury Department determine.[117]

Fixing the Remuneration of Public Office Holders in Nigeria

The duty to fix remuneration of civil servants or public servants in Nigeria is vested by law in the National Salaries, Incomes and Wages Commission of Nigeria.[118] While the duty to fix remuneration for public office holders like president, Vice President,[119] Governors and deputy Governors[120], National Assembly members[121] and States Houses of Assembly members[122] and other political appointees is vested in the Revenue mobilisation Allocation and Fiscal Commission subject to the approval of the National Assembly.

For president and his Vice President and their appointees the Revenue mobilization, Allocation and Fiscal Commission is vested with the power to fix their remuneration but subject to the approval of the National Assembly.[123] While for the Governors his deputy and other appointees, the National Revenue mobilization Allocation and fiscal commission is vested with power to fix the remuneration subject to the approval of the National Assembly.[124]

As for the National Assembly members (Senate and House of Representatives) the body charged with the responsibility of fixing their remuneration is the Revenue mobilization, Allocation and

[117] Rollin Bennet Posey (1975), American Government, Library of Congress Cataloging in Publication Data, Printed in the United State of America, p. 189
[118] Section 3(3) of Salaries Incomes and Wages Commission Act Cap N 72 Laws of the Federation 2004
[119] Section 84
[120] Section 124
[121] Section 70
[122] Section 111
[123] Section 84
[124] Section 111

Fiscal Communication.[125] It is this same body that has the responsibility to fix the remuneration of the members of the States Houses of Assembly.[126] RMAFC is expressly given the mandate under section 6[127] of RMAFC Act in addition to the sections 70, 84, 111 and 124 of the Constitution.

The big question that follows is that where does the National Assembly derive the power to allocate to its members running cost running into N13.5m per month? The payment of N13.5m to members of the National Assembly by the National Assembly is a violation of the constitution of the Federal Republic of Nigeria which they all swore to uphold. Any law made by the Assembly granted itself the power to take the money is null and void and any money collected so far should be refunded to National treasury.

Who can challenge this illegality?

Any citizen of Nigeria, or the Civil Society Organisation or the Revenue Mobilization, Allocation and Fiscal Commission can challenge the National Assembly on this illegality. The Nigeria Bar Association and the Nigerian Labour Congress can also challenge this illegality on behalf of Nigerians. Nigerian law makers should not be law breakers. The Revenue Mobilization, Allocation and Fiscal Commission should make public what it approved as remuneration for the members of the National Assembly so that that can be enforced on them by law in order to save the nation from wastage and frugality that is presently happening with regard to the remuneration of the members of the National Assembly. The National Assembly has no power to fix its remuneration nor to add to any remuneration approved for it by the RMAFC.

Conclusion

We have shown in this paper that the National Assembly has enumerated powers in the Constitution of Nigeria. Even through the powers seem to be wide, it is still not absolute or arbitrary. Therefore, the National Assembly should restrict itself to its enumerated powers in the constitution. But the National Assembly should wake up to its responsibility by not allowing the executive to perform its function through National Economic Council or any other executive body.

The National Assembly should also be cautious not to commit illegality by voting money to itself without recourse to law, fixing its own remuneration, contrary to Revenue mobilization Allocation Fiscal Commission Act, and clear provisions of the Constitution Padding of budget and illegal constituency projects that are used to siphon money from the National treasury. There should be cooperation and collaboration between the legislative and the executive so as to guarantee good governance, but this does not mean any organ of government should be indolent or abdicate its constitutional responsibility on the altar of harmonious relationship with each other.

[125] Section 70
[126] Section 124
[127] Section 6 of Revenue Mobilisation, Allocation and Fiscal Commission Act Cap R

All account of the federal government should be approved and made subject to control of the National Assembly in accordance with the provisions of the Constitution. Excess Crude Account and any other account must be opened with the approval of the National Assembly and any withdrawal therefrom must be with the approval of the National Assembly and not any executive body.

The Paris Club refund and the recovered Abacha loot and any other money recovered by the Economic and Financial Crime Commission ought to go back to the Federation account for sharing to the federal, States and local governments. These moneys do not belong to the federal government but to the Federation which consists of the Federal, States and Local governments.

Whatever law made by the National Assembly in respect of this remuneration should be challenged in the Court of Law to test its legality and if found to be illegal, the court should set it aside because, with the dwindling oil revenue the remuneration is not sustainable.

The National Assembly, the British Parliament and the American Congress have wide powers over control of public funds. This is deliberately made to be so in the laws and conventions so as to ensure proper checks of the executive by the legislature and also to ensure transparency and probity in governance. The American congress and the British parliament seem to have more power on the executive than the National Assembly, because of British parliamentary supremacy while in America because of the provision of her constitution. But by and large, the three legislatures have far reaching powers to control public spending by the executives.

IMPROVING EXECUTIVE/LEGISLATIVE RELATIONS IN NIGERIA

Obinne C. Oguejiofor*

The Presidency's single most important political Relationship is with the Congress.[1]

Abstract

Recent trends in Nigeria show that the simmering feud between the executive and legislative arms of government has degenerated to open conflict. As the 2019 general election approaches, this issue has become more concerning. Stability of the relations between these arms of government is essential to deepening democratic processes and fostering the growth of the country. Independence of the arms of government is an absolute necessity for the enthronement of civil liberties in any democracy. By the very nature of the presidential system, tension is unavoidable in legislative/executive relations. Nonetheless, political actors in the two branches are expected to manage their relationship with a view to ensuring that it translates to good governance for the overall benefit of citizens. There is, therefore, a need to establish good relations between these two arms of government in order to ward off disastrous consequences for the country's nascent democracy. This paper discussed the appropriate legal and policy mechanisms to improve in the relationship of the two arms. From legal standpoint, certain sections of the constitution need to be altered to clarify the legislative powers to screen executive nominations and the limits of such nominations; and to clarify the power of appropriation of the National Assembly. With regards to policy measures, there is need to deepen executive understanding of the strategic of the legislative branch in the entire democratic architecture in order to avoid the apparent prevailing impression that the legislative branch is an undesirable meddlesome interloper in governance.

Key Words: *Executive, Legislative, Presidential System, Relations*.

INTRODUCTION

Federalism and the Constitution require the President and National Assembly to work constructively together for the benefit of Nigerians.[2]Since the return to democracy from military dictatorship in 1999, it has become the norm for the executive arm to meddle in the legislative activities of both houses of the National Assembly. Frosty relations between the executive and legislative arm of the government breeds economic stagnation, inflation, dearth of foreign investors, unemployment, loss of public confidence, lawlessness, and anarchy,

* LLB (Nigeria), LLM (Essex) BL PhD (Nigeria.), Department of Jurisprudence and Legal Theory, Faculty of Law, University of Nigeria Enugu Campus, Nigeria

[1]Nigel Bowles 'The Presidency and Congress' in Nigel Bowels, Robert K. McMahon (eds.*) Government and Politics of the United States* (New York: Palgrave Macmillan 2014) 159.

[2]C.N. Truman 'The President and Congress' (2015). Available at https://www.historylearningsite.co.uk

among others. Equally, decisions are too often taken based on prejudices, party interests, ethnicity and religion but not on national prosperity. The goal of both the executive and legislative arm should be to have a lasting legacy and etch their names in gold not squabbles and infighting.

Politics and by extension governance that emerges from it is not so much about the morality of men as to their ability through consensus building and constant engagement with other stakeholders to win even the most skeptical of men to the point of view that they want to project. There is indeed a possibility that everyone currently occupying a seat in the National Assembly may be a selfish money monger with a criminal past, but they have been elected by the people to represent them at those chambers. Until the law catches up with them or the people who put them in office recall them or refuse to renew their mandate, as the case may be, the president needs these people to realize whatever vision he has for the country.[3]The better option is to craft ways to work with the lawmakers and make them less antagonistic to presidential policies.

This article is divided into six parts. Part II immediately explores the executive legislative conflict in perspective, exposing why this issue is rife in the Nigerian political scene. Part III discusses the hidden costs and implication of frosty relations between the executive and legislative arms of the government. Part IV analyses the American model of governance to show how frosty relations between the legislative / executive relations is resolved in that country; this is particularly pertinent as Nigeria copied the presidential model of governance from the USA. Part V chronicles the standoff between the President and Senate since the return to civil rule. Part VI borrowing a leaf from Christenson's treatise analyses the rules a president should adhere to, to obtain cooperation from the legislative arm. Part VII concludes the work by making recommendation on how excellent relations between the legislative and executive arms of government can be achieved.

The paper excluded from its purview, executive/ legislative relationship in the constituents states of Nigeria

[3] N. Adedokun, 'Buhari vs National Assembly: The Fight Between Good And Evil?', *The Cable online*, 25 March 2018, available at < https://www.thecable.ng/buhari-vs-nass-fight-good-evil >

PRESIDENTIAL-NATIONAL ASSEMBLY CONFLICT IN PERSPECTIVE

Presidential regimes are considered to be prone to produce institutional deadlocks. Presidentialism lacks a built-in mechanism to induce cooperation between the executive and legislative branches of the government.[4]These institutional deadlocks are however not without cause. Presidential democracy abhors enthroning despots. The hallmark of a presidential model of government is a written constitution and the compartmentalizing of the duties of the arms of government. The National Assembly passes legislation and can override vetoes. It is a given that the executive in a presidential system of government cannot perform certain duties without the legislature, for instance declaring war on an enemy country[5] or declaring a state of emergency in any part of Nigeria.[6] One great source of conflict between the president and the legislature is their different constituencies. Only the president along with his vice-president is elected by the entire nation.[7] Each member of National Assembly is elected by only a fraction of the populace.[8] Inevitably, the president must form a broader electoral coalition in order to win his office than any member of the legislature. Another source of conflict between these two arms stems from the fact that the senate must approve the budget, ratify treaties, confirm presidential appointments to the cabinet, the federal courts, regulatory commissions, and other high offices of state.[9] It equally acts as a watch dog in oversight functions especially in the area of public spending, and passes executive sponsored bills.[10] These oversight functions of the legislative body over the executive were designed to prevent any single branch from dominating government in a presidential system and to ensure that policies have wide input especially in appointment of officials to sensitive and exalted posts.[11]With these institutional checks, presidential system of government confers a great deal of independence on each arm of the government.

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[4] A.C. Figuereido and L. Fenando , 'Presidential Power , Legislative Organisation And Party Behaviours in Brazil' (2000) *Comparative Politics*, Vol.32, No.2 pp. 151-170. See also J. Linz, 'Presidential or Parliamentary Democracy: Does it make a Difference?' in Juan Linz and Arturo Valenzuela, (eds.), *The Failure of Presidential Democracy: Comparative Perspectives* (Baltimore: Johns Hopkins University Press, 1994), pp.3-87; Scott Mainwaring, 'Presidentialism, Multipartisanism, and Democracy: The difficult Combination', (1993) *Comparative Political Studies*, Vol. 26, pp.198-222.

[5]S. 5(4)of the Constitution of the Federal Republic of Nigeria 1999 (CFRN)

[6]S. .305, ibid

[7]S. 132 (1), ibid

[8]S. 77, ibid

[9] G. C. Edwards, 'The President and Congress: The Inevitability of Conflict', (1978) *Presidential Studies Quarterly*, Vol.8, No.3, pp. 245-257

[10]S.88 CFRN, 1999. See also B.A. Rockman, 'Legislative Executive Relations and Legislative Oversight, (1984) *Legislative Studies Quarterly*, Vol. 9 No. 3, pp. 387-440.

[11]B. F. Crisp, S. W. Desposato, K Kanthak. 'Legislative Pivots, Presidential Powers, and Policy Stability' (2011) *Journal of Law, Economics, & Organization*, Vol.7 No.2, pp. 426-452.

Nigerian politicians perceive this independence wrongly; ambition is pitted against ambition as presidents and legislators respond to distinct manifestations of voters interests. Equally, institutional, political and cultural environments in Nigeria defeat this independence.[12] For instance a good number of Nigerian presidents were former military officers used to giving orders to their subordinates. It is therefore alien to them to wait for approval from the legislative arm in making key decisions in their presidency. The issue becomes more complex as these presidents /officers previously took over the reins of power through military coup d'états.[13]

Institutional retaliation is normally the weapon of choice by these two arms of government when they feud. The vast majority of retaliatory tools used by these arms of governments against each other include budget reductions, fund starvation, declining to confirm appointments to executive posts, delays in bills passage especially budgets, veto of bills, passing of revenge legislation among others.[14]It is conceded that a certain degree of opposition is expected from the two organs i.e. the executive and the legislature such that each would be anxious to guide and assert its autonomy which is good for the citizens and democracy. This need for autonomy should be blended with co-operation.

Conversely in parliamentary systems, the governmental powers are concentrated in the hands of the winning party. The prime minister is first and foremost a member of the legislature, likewise his/ her cabinet members. If a parliamentary backbencher publicly criticizes the executive or its policies to any significant extent then he/she faces a much higher prospect of losing his/her party's nomination, or even outright expulsion from the party. Even mild criticism from a backbencher could carry consequences serious enough (in particular, removal from consideration for a cabinet post) to effectively muzzle a legislator with any serious political Ambition.

PRESIDENTIAL/LEGISLATIVE STANDOFF: HIDDEN COSTS AND IMPLICATIONS

[12] Some commentators theorise that it is the incessant criticism of the person of the president of the federal republic of Nigeria that triggered this siege on deputy senate president's residence. See P. Opara, 'Ekweremadu And His Increasing Anti-Buhari Rant', Sahara Reporters online, 23 July 2018 available at http://saharareporters.com/2018/07/23/ekweremadu-and-his-increasing-anti-buhari-rants-peter-claver-oparah

[13]President Obasanjo who was elected president in 1999 was a former military Head of State from 1976-1979; President Buhari, Nigeria's current president who was elected president in 2015 was Nigeria's former military ruler from 1983 -1985.

[14] GN Rosenberg,. "Judicial Independence and the Reality of Political Power." *Review of Politics* [1992] (54) (3) 369

Besides giving Nigeria a bad image in the comity of nations, executive legislative standoff has some hidden costson an already bleeding economy. The standoff is a key political risk for Nigeria as it routinely gets in the way of the effective functioning of the economy.[15] The country is losing in terms of investment, job creation, money circulation and missed business opportunities. The uptake of loans, consumption patterns, bank returns and retail sector performance show declining performance as investment decisions take a back seat.

Furthermore, in January 2018, a standoff between the Presidency and the Senate over confirmation of new members of the Central Bank of Nigeria (CBN)'s Monetary Policy Committee (MPC) threatened the apex bank's independence and damaged fragile investor confidence in Africa's biggest economy; MPC's lack of quorum after the Senate refused to approve President Buhari's nominees for the panel, meant that the Central Bank could not formally set interest rates.[16] The legislature cited the refusal of the president to sack the acting chairman of the anti-corruption agency, Economic and Financial Crime Commission, (EFCC) in accordance with the legislators' recommendation as the reason for their grouse.[17] Nigeria needs less if any of this grandstanding by both the leadership of legislature and executive arms of government; the country is bigger than any individual. The arms of governments should focus on delivering on Nigeria's Economic Recovery and Growth Plan (ERGP) 2017-2020.

Also, Nigeria has been experiencing delays in its budget process since the return to democratic rule in 1999, owing to power tussle between the executive and the legislature. Seven months after President Buhari submitted a draft copy of the 2018 Appropriation Bill to the National Assembly it was finally signed into law on 20th of June 2018 with controversies. The President stated that he submitted a budget proposal of N8.621 trillion but the legislative returned a budget of N9.12 trillion, this means the initial figure was inflated by N508 billion.[18] There is little need for the president to append his signature on an inflated budget; he should have the courage of convictions and should have flatly refused to sign the budget. If he sticks to his gun as matter of principle , his administration would not be cash strapped because s. 82 of the 1999 Constitution of the Federal Republic of Nigeria permits the president to withdraw funds from

[15] DV Doya, Y Ibukun, P Wallace, 'Nigeria Political Deadlock Threatens Economic Rebound'(22nd January 2018) <https://www.bloomberg.com/news/articles/2018-01-22/nigeria-s-political-deadlock-threatens-economic-rebound >accessed 24th July 2018

[16] R Khan, Nigerian Political Standoff Threatens Central bank Independence.(23rd January 2018) available at< https://www.reuters.com/article/nigeria-cenbank-politics/nigerian-political-standoff-threatens-central-bank-independence-idUSL8N1PI4V8> accessed 24th July 2018

[17] O Mayowa, 2018 Budget Delay, Dire Implications On Economic Growth (13th March 2018) available at <https://punchng.com/2018-budget-delay-dire-implications-on-economic-growth/ >accessed 24th July 2018

[18] The issue of padding of budget by the Nigeria National Assembly is beyond the scope of this paper.

the consolidated revenue account to run the government where the budget is pending approval by the legislative arm of the government.

The implication of this stalemate on the economy is hydra-headed; the stock market fell amid fears that monetary policy was being held hostage by the spat between President's office and the Senate over government appointments. Investors shunned Nigerian assets over the past three years and that put pressure on the currency and the economy. The stalemate in the relations of the two arms of government may because investors to divert their investment capital to other countries particularly South Africa. Equally the delay in signing the budget triggers loss of job opportunities, thereby saturating the labour market and endangering the economy. Analysts have also expressed the fear that the government may not be able to execute up to 50 percent of capital expenditure; consequently, there would be low aggregate of income, as government borrows to pay salary. This does not bode well for an economy that is just emerging from the pangs of recession.[19]Till the executive is able to resolve the tense situation with the legislative arm economic activities in the country will be governed by these highly incendiary conflicts.

EXECUTIVE/LEGISLATIVE RELATIONS: THE AMERICAN MODEL

Executive-legislature standoff is not alien to the presidential systems of government. The presidential model of government is designed to be so by the introduction of checks and balances and oversight functions for the legislature. Nigeria is not the only country that experiences executive/legislative conflict. USA undergoes the same challenges.The difference between the Nigerian and US experiences is that in the US the conflict is institutional in form and principled in spirit. It is also ultimately about the people and not the personal benefit of any of the parties involved in the misunderstanding.[20] Government shutdowns are familiar to most Americans; the result of government fallout in America triggers the government shutdown which happens when Congress fails to allocate funds for the ongoing functions of government. Where this happens, federal workers working in non-essential services are

[19] National Bureau of Statistics, International Monetary Fund.

20. However the 50th Speaker of the United States Congress Newt Gringrich confessed that he triggered a government shut down during the Clinton presidency because he was relegated to back of presidential flight on going for Israeli prime minister's Yitzhak Rabin's funeral in Israel and was asked to deplane by the rear door Gingrich: Snub Caused Impasse -- Treatment On Air Force One Blamed.," <http://community.seattletimes.nwsource.com/archive/?date=19951116&slug=2152925 > accessed 29th September 2018 . In1998, Gingrich said that these comments were his "single most avoidable mistake" as Speaker. N Gingrich, *Lessons Learned the Hard Way.*(New York: HarperCollins. 1998) 42–46.

furloughed.[21] For instance, in January 2018 the United States of America was caught in a bi-partisan standoff, which led to a shutdown of government for a few days. Democrats stalled on a must-pass spending bill over the refusal of the Trump administration and Republican lawmakers to immediately discuss an Immigration Bill in the interest of young illegal immigrants. This resulted in an impasse in which government funding capacity was limited for about 48 hours.

Any student of American history would appreciate the 36th President of the United States Lyndon Baines Johnson's mastery of legislative executive relations in the history of American democracy. During his presidency, he understood the way the Senate worked; what senators needed and what they wanted.[22] He had biographies on each of them so that he knew what their tastes, intentions, aims, desires, wishes and hopes were. He used this knowledge to negotiate with individual senators in return for a vote. He could get up every day and learn what their fears, their desires, their wishes, their wants were and he could then persuade them. He understood that what really made things work in the Senate were personal relationships and Johnson was just strictly the best at that. Johnson's skill at handling the legislature shows that those who do well as leaders in a democratic society are not those who look down on other members of society as irreversibly perfidious souls but those who are able to explore the corruption of the minds of others to bring out the best for society.

CHRONICLE OF STANDOFF BETWEEN PRESIDENT AND SENATE (1960-2018)

Nigerian political system since her independence in 1960 has experienced a high level of feud orchestrated by political figures in the country thereby either over-heating the already tensed system or at best, running the Nigerian entity more or less like a private estate.[23]In the first republic (1960-66), Nigeria practised a parliamentary system of government. The executive legislative tensions were non-existent.[24]This is owing to the fact that the legislature was also the executive, the cabinet members were first and foremost members of the legislative house. [25]During military rule in Nigeria, there was also no such conflict between the executive and

[21]The conflict does not degenerate into limitation of fundamental freedoms of legislators or arresting them.
[22] R D Novak, *'Lyndon B Johnson: The Exercise of Power'* (New York: The New American Library, 1966), 380-381.
[23] O Omo. *Democratization in Africa*: (Benin City: African Perspectives. 1994) 5.
[24]In parliamentary system, there is fusion of powers as the party with the most votes in the parliament forms the executive cabinet
[25] The third tem bill of president Obasanjo where he sought to get the national assembly amend the constitution to elongate the tenure of the president was defeated though the president's ruling part PDP had majority numbers in the National Assembly. President Kennedy's civil rights equality bill languished in American congress though he the democrats which is the president's party had majority numbers at the congress.

legislative arm of government, the reason is simple, Nigeria was not running a democracy; there was fusion of powers; the functions of the executive and legislative powers were fused into the executive powers. The Federal Military Government on assumption of power promulgated Decree No. 1 of 1966.This decree abolished parliament and the regional legislature. Section 3 provided that the Federal Military Government has the power to make laws for the peace, order and government of Nigeria. The above provision vested absolute legislative powers in the Federal Military Government. Thus separate arms of government were fused in the military at the centre. The head of state ruled the country through an advisory body -the supreme military council.[26] Legislations were drafted by him and implemented by him or his foot soldiers. The Military ruled Nigeria for thirteen years (1966-1979) after the 1966 Military Coup d'état until it finally handed over power to a democratically elected government of Shehu Shagari on 1st October, 1979. President Shehu Shagari's administration recorded little fracas with the legislature .His general attitude to the legislature and governing in general was liberal.[27] His party the National party of Nigeria (NPN) did not secure an absolute majority in the National Assembly (House of Representatives and Senate) but it still managed to survive through consensus and consultation-attitudes lacking in the subsequent years.[28]

At the dawn of return to democracy in 1999. President Olusegun Obasanjo was elected as president; he immediately moved to install a lame duck legislature subservient to his will. According to a former speaker of the House of Representatives, Ghali N'abba, he opined that the history of the frosty relationship between the executive and legislature was triggered by the move by Obasanjo to impose a leadership on the National Assembly and the resolve to fight back by the lawmakers.[29]The relationship between the National Assembly and the executive arm thus became characterized by antagonism and strife. It is noted that it has been eleven years Obasanjo left office. The executive and the legislative should have matured enough to craft sterling relations in their dealings.

President Umaru Musa Yar'Aduaon winning the 2007 presidential elections cited the principle of rule of law as one of the cardinal points of his administration. Respect for law and due process which was a governing principle of late President Yar'Adua laid the foundation for the

[26]Or armed forces ruling council as the fancy catches the current leader.

[27] AM Awotokun 'Legislative Control Of The Executive In Nigeria Under The Second Republic 1979-1983' unpublished thesis Obafemi Awolowo University Ile Ife 76.

[28] O Nwaubani , 'The Legislature and Democracy in Nigeria, (1960-2003): History, Constitutional Role and Prospects' *Journal of Research on Humanities and Social Sciences* [2014](4) (15) 85-86.

[29] W Odunsi 'How Obasanjo Caused War Between Executive And Legislature N'Abba' <http://dailypost.ng/2017/04/15/obasanjo-caused-war-executive-legislature-naabba/>

harmonious executive-legislature relations. The Goodluck Jonathan administration reactivated legislative/ executive feud in Nigeria when it unsuccessfully interfered in the election of the speaker of House of Representatives.[30] This triggered off another frosty round of relations between the executive and legislature. What can be deduced from these developments is that the legislative arm is resentful of interference of the executive in election of her key officers. It has also been shown that Nigerian presidents rarely succeed in foisting a leader on the National Assembly. Furthermore, the preferred candidate of the legislature once he gets sworn in rarely forgets that his mandate was almost stolen. He then gets to work laying landmine for executive bills and appointments. The executive resentful of the fact that the legislature did not toe the line, in electing her candidate unleashes the machinery of governance on the legislature by slamming its members with corruption charges, harassing them with the police, meddling in their constituencies in form of spearheading a recall of the "disobedient and headstrong" law maker,[31] the reason for this that the executive is very comfortable with rubber stamp legislature and fearful of a truly independent legislative arm. In having a rubber stamp legislature, the president's key nominees for high offices are sure to sail through senate screening.

With the current 8th Senate, history repeated itself. It has been an uphill task to maintain good relations between her and the executive. The first clash of the arms of the government stemmed from the senate president "snatching" the reins of power from a candidate preferred by the executive.[32] He was charged to Code of Conduct Tribunal (CCT)for falsification of assets. The Senate on its part retaliated by asking a committee of the Senate to in turn, investigate allegations of corruption against the chairman CCT.

The Centre for Literacy and Leadership (CALL) a democracy group summarized the current state of relations between the executive and legislative arms of government:

> *This is actually the worst executive-legislature relationship since 1999. For the first time, a sitting Senate President was arraigned twice. His only crime was that he was preferred and legitimately elected Senate President by his colleagues against the will of the executive. "For the first time, the executive arraigned the Senate President and his Deputy on trumped up charges of forgery of Standing Rule, whereas even the*

[30]N Ikeke 'Defection Saga: Jonathan, Tambuwal Settle Differences', available at< : https://www.naija.ng/344573-jonathan-tambuwal-resolve-feud.html#344573 >accessed 25th July 2018

[31]S 69 (a) of The Constitution Of The Federal Republic Of Nigeria.

[32] J Erunke, 'Saraki's Senate Struggles, Successes' (29th December 2015) available at <https://www.vanguardngr.com/2015/12/2015-sarakis-senate-struggles-successes/ > accessed 25th June 2018. See also J Egbas, Is Saraki the smartest politician in the country? 24th July 2018 available at< https://www.pulse.ng/news/politics/is-saraki-the-smartest-politician-in-the-country-id8652469.html >accessed 25th July 2018.

cooked up police report neither mentioned any of their names let alone indict them. "For the first time, the nation heard something like a missing budget, with allegations that it was rewritten and returned through the back door. Even some Ministers denied the budgets of their ministry during budget defence. For the first time, the executive illegally keeps in office people nominees rejected by the National Assembly. Today, can we say that the Economic and Financial Crimes Commission is properly constituted? "For the first time, the President appointed 1,258 members of boards amid allegation that there was not a single input by the principal officers of the National Assembly, including the Senate President.. "What manner of best relationship do you have when the budget has never been passed earlier than May since this administration came on board because of lack of pre-budget consultation.[33]

Table below shows time line of instances of selected run-in between the legislative house and executive May 1999- July 2018

Year	Event	**Outcome**
June 1999	Presidency foisted the leaders of the Senate on members. The senators were cajoled to vote Evan Enwerem as the Senate President.	The Senate President was impeached
November 2014	President Jonathan locked out members of the National Assembly. Police teargassed them and they had to climb the fence to get to the National Assembly.	Impeachment notice against president circulated among the members of the National Assembly
2015	**Nigeria's Senate President, Dr. Bukola** Saraki faces trial at Code Of Conduct Tribunal	He was cleared of misconduct. Government appealed the decision
June 2016	**Nigeria's Senate President, Dr.BukolaSaraki and his deputy, Senator Ike Ekweremadu charged to court on charges of alleged criminal conspiracy and forgery of the Senate Standing Rules, 2015.**	The government withdrew these charges

[33] B Orji in L. Jeremiah Executive, Legislative Relations Worst Under Buhari (i4th January 2018) available <http://www.theadvocate.ng/executive-legislature-relationship-worst-under-buhari-group/>accessed 25th July 2018.

December 2016	Senate declined to confirm the appointment of Ibrahim Magu as substantive chair of the country's premier anti-graft agency, the Economic and Financial Crimes Commission (EFCC)	The President resubmitted his name and he was rejected again
April 2018	Senator Dino Melaye arrested for crime	Granted bail.
May 2018	Inspector General of the police refuses to appear before senate to answer queries relating to insecurity in Nigeria	
July 2018	President of the Senate connected with armed robbery by the police force and invited for questioning	He shunned the invitation
July 2018	Police encircles the Senate President's house.	Speculations were rife that he will cross over to opposition party because of frosty relations between the National Assembly and the executive.
July 2018	Police encircles the Deputy Senate President's house and grills him on corruption charges.	He was released without charges.
August 2018	The President of the Senate defects to opposition party	The Presidents party APC lost the highest ranking position in the National Assembly to the opposition.

Information gleaned from the table confirms the stance of call. The Buhari administration has more run-ins with the legislature than any other administration since the return to civilian rule by Nigeria in 1999. Equally this defection is the culmination of three years of open conflict between the executive and legislature. The president's party APC has lost the position of the house leadership which management of the relations could have forestalled. As this defection

has largely show, the 8th Senate, has nothing to lose by engaging in this power play; the weight is on the presidency.[34]

GOOD RELATIONS BETWEEN THE EXECUTIVE AND THE LEGISLATIVE: RULES OF ENGAGEMENT

Successful presidents have to master the ability to persuade. The president has no power over National assembly. Hence he has to negotiate and bargain. No-one in the presidential staff is a member of the legislature. Legislature does not even have to physically respond to any presidential recommendation as they can pretend that it does not exist. Therefore a president has to rely on developing good relations with the legislature, good tactics, good powers of persuasion and bargaining in order to win support.[35]The failure of the government does not affect the legislators' political survival, thus they have few incentives to support the government. In other words the legislature can make life difficult for the president and frustrate his goals, plans and legacy. Nigerian presidents therefore resort to subterfuge and win at all cost strategy to install the leadership of the National Assembly in order to have a smooth sailing with them. This strategy has proven so many times not to work as the legislature fight back.

We draw inference from the stamp of authority of Reo M Christenson (1918 – 2015) in his treatise on presidential legislative relations.[36]He gave several rules about how good relations with the American congress should be cultivated by the president. This is recommended for adaptation to Nigerian context to strengthen the very important relations between the two arms of government.

Christenson opines that the President ought to know the political players intimately. He gave an example of Lyndon B. Johnson's Administration, before Vietnam crippled his leadership. President Johnson's ability to get his policies sail through the Congress is recognized by both political parties. The President knows the deck. He knows the value of everyone. He knows the players intimately and he works at it night and day. Doing this is a popular and delicate art. Depiction of Lyndon Johnson as an arm twister while partly true, debase and distort a much more intricate, delicate, and positive art. He knew where the wires of power lie, who are the

[34]*Attorney General Of The Federation v Abubakar (2007) 20WRN 1.*

[36]R M Christenson, Presidential Leadership Of The Congress: Ten Commandments Point The Way. *Presidential Studies Quarterly*, [1978] (8) (3) 257-268.

key men, what one group wants that other opposing groups can be persuaded to accept and a third group is likely to tolerate, however unwillingly.

First Law: Knowledge is still power even in political realm; knowledge of men, of the legislative milieu, of the contours and permutations of power is essential. Having this knowledge does not guarantee one can use it wisely; not knowing it can handicap the president by his unfamiliarity with the folkways, nuances and personalities of the three arms zone scene. One needs to understand the particular political environment in which one operates and this can only come from experience. In applying this assertion to the Nigerian political terrain, Former president Goodluck Jonathan if he had known the personality of former Speaker of the house of Representatives, Aminu Tambuwal, he would not have antagonised him rather he would have courted him assiduously. He made the costly mistake of picking up fights with him, it therefore cost him his 2015re-election.[37]

Furthermore, the President needs to establish his priorities, in terms of both substantive importance and legislative strategy. He needs to know therefore, what matters most to him and to concentrate his best efforts there. Ordinarily, then, The President should not lack a sense of domestic priorities. During the Obasanjo years, he travelled abroad so many times without any clear indication of where his priorities lay. President Obasanjo antagonised the Senate so much with his incessant foreign trips that they retaliated by impeaching the Senate President Senator Evan Enwerem who they dubbed his "boy'. The impeachment occurred one November afternoon in 2000 as Enwerem followed the presidential entourage to the airport to see the President off to yet another foreign trip, a group of Senators collected signatures to sack Enwerem. As the presidential plane lifted up, the deed was done and Obasanjo returned to the country to meet a new Senate President

Second Law**:** the President should consult with party leaders in Congress before launching major policy initiatives foreign or domestic. Always! Especially when he doesn't want to. Yet there are compelling reasons for submitting proposals to party leaders before the president's decisions have crystallized. If his party leaders raise considerations a president has overlooked or interpreted differently, his basis for decision is improved. If they don't, the president can move forward with increased confidence. The Congressional leadership will be more

[37] E Ejere, 'Tambuwal: The Rebellion That Caused Jonathan's Downfall' (18th May 2015) <http://hallmarknews.com/tambuwal-the-rebellion-that-caused-jonathans-downfall/> Accessed 24th July 2018

cooperative and more willing to press hard for legislation if they've had their hands in the dough. And if things go badly later on, the President will be less vulnerable for having sought their advice. The leadership of the legislature can give the president invaluable advice on the political reception which the bill will receive. Any President who doesn't want the best political intelligence he can get is not much of a politician.

A consistent practice of consulting with party leaders of both Houses has another tremendous advantage. It tends to convert the President's program into a party program. The pardon of former speaker of the house Salisu Buhari (who falsified educational certificates)by president Obasanjo could not have been said to be a collective decision made after consultation with members of the National Assembly. This pardon caused public belief in his dedication to fight corruption to drop. From then on, the belief of his government's sincerity on eradication of corruption in Nigeria went downhill.

Third Law: A President needs a first-rate legislative liaison staff. While Congressional leaders are indispensable political advisors, the President needs a more refined intelligence network to keep him well-informed on a day-to-day basis of the temperature of Congress and the status of legislation. For this task there is no substitute for a competent liaison staff. The presidential liaison officer with the National Assembly 2011- 2013 Senator Joy Emodi was faced with serious challenges in the performance of her duties especially the seeming reluctance of the President to assent to resolutions and bills passed by the National Assembly. Their seething anger nonetheless, the Honourable members of the House and Senators almost always capitulated to the entreaties of Emodi. Her persuasive abilities could not have been further confirmed than by the passage of the 2013 budget of the Federal Government in December, 2012.A laudable feet in the Nigerian Political terrain.

Fourth Law: the President should build rapport with the rank and file of Congress. Time does not permit any President to personally keep in touch with this rank and file but an active and skilful staff can help. Liaison does provide intelligence, especially when the staff works closely with party whips. It is rare that a president can alter the outcome of a legislative struggle in Congress unless the pending division on a bill is fairly close. It is imperative therefore, that a President knows when this situation exists. Almost any president can win over a few votes by personal appeals. Invitation to the presidential villa for dinners no matter how mundane it seems will go a long way in creating interpersonal relationship with the congressmen. The

President should not be tempted to distribute cash for votes as it will expose him to charges of vote buying which would impair both the President's moral standing and his political power. It didn't bode well for President Obasanjo for the third term neither did it bode well for President Goodluck Jonathan. The result is that the senators will take the money and vote against the bill to pass the message that their votes are not for sale.

Fifth Law**:** The President should respect Congress as a co-equal institution, and respect its individual members. This is obvious but history shows that presidents sometimes ignore the obvious. Woodrow Wilson's attitude toward members of the Senate is the prime example. Wilson once referred to Senators opposing him as "contemptible . . . narrow . . . selfish . . . poor little minds. More importantly, his general demeanour towards members of the Senate was once described as that of "the schoolmaster incarnate.[38] In Nigeria, the actions of some principal officers of the executive like the Inspector General of the Police declining Senate summons depict this feeling of superiority that the executive metes out to the legislature; this is inevitably offensive to members of the Senate. The continued invitation of the Senate President ,Deputy Senate President by the police to answer criminal charges, the siege and cordoning off their homes by the Nigeria police force shows anything but respect for the members of the legislature. This is one of the reasons why many senators from the President's political party defected to the opposition party in July 2018.

There is no contradiction between firm presidential leadership and unfailing courtesy toward one's opponents. The temptation to lash out at one's Congressional foes will become intense, from time to time, but yielding to it will only produce resentments that will someday foster revenge. Today's opponents are tomorrow's potential allies a fact no president should ever forget. Lyndon Johnson's treatment of members of Congress was exemplary during at least the early years of his administration. Not only was he careful to show public respect for the equal dignity and status of the legislative branch of government, but he went out of his way, following the passage of important bills, to praise individual members for their support making sure that TV cameramen were on hand to appropriately record the event. Congress men, like all politicians, have perpetually voracious egos, and the President who gives cooperative congressmen the publicity they yearn for, will often find the crooked places made straight.[39]

[38]G Smith, *When the Cheering Stopped* (New York: William Morrow, 1964) 56
[39] Stephen Wayne, *The Legislative Presidency*, (New York: Harper and Row, 1978), 24.

Sixth Law**:** A President should seek bipartisan support for his policies. This is particularly relevant where foreign policy is concerned, but is of no small moment in other issues as well. President Kennedy's solicitous attitude toward Republican senators during the Test Ban Treaty struggle provides an illuminating contrast. On domestic legislation, Kennedy's persistent cultivation of Republican Senators minority leader won him the minority leader's critically important support on many occasions. Eisenhower's excellent relations with Senate Majority leader and Speaker helped produce unusually amicable relations with Congress, despite Democratic control of both Houses. Obviously, a good deal of discretion needs to be exercised in dealing with members of the opposite party. A President's own party may resent undue solicitude to members of the other party, especially if it seems to blunt the partisan advantage members feel their party properly merits on certain bills. Members of the opposition party may also be wary of excessive efforts to woo them in order to strengthen the President, and therefore, his party, during the next election. Nonetheless, in a political system which lacks party unity and party discipline and in which virtually all successful bills receive bipartisan support, a president is derelict if he ignores potential votes from opposition ranks. Wooing them is a delicate operation but there are various quiet and informal ways of cultivating friendly and informal ways of cultivating friendly and fruitful relations with potentially cooperative members of the other party. A President who is respectful and appreciative of them is sure to experience serendipity from time to time.

Seventh Law: A President needs to be able to compromise and to know when to do it. If he yields too soon, he will lose more ground than he needs to. If he waits too late, the decision may be out of his hand. If he becomes too stubborn to compromise at all, he will be doomed, doomed to disaster, with only the time table uncertain.[40] Woodrow Wilson's intransigence on the League of Nations and Herbert Hoover's stubborn adherence to his hobbling economic ideology are cases in point. In Nigeria, the President should have submitted the names of another incorruptible citizen of Nigeria to replace Ibrahim Magu who the senate rejected twice as the head of the anti-corruption agency EFFC in a show of compromise. The nominee Ibrahim is not the only upright Nigerian qualified for the job. Per chance he gets confirmed and sheds off this mortal coil, there would indeed be replacement for him. Compromise is not the same as weakness. In submitting anther candidate's name, the President would have gained some political capital at the National Assembly which he could spend freely in other issues.

[40]JD Barber, *The Presidential Character* (Englewood Cliffs, N.J.: Prentice Hall, 1972) 8.

Finally the President must learn who to trust, it may be his party leaders, his liaison staff, a member of a Congressional committee, a journalist with sure political instincts. Above all, the President should not be misled by "can do" aides who ignore convincing evidence that he is persisting in a lost cause or by his own ego-involvement in that cause. It is imperative that the president should have in his inner circle an experienced person who is not subservient to him at all or kowtows to him; a Nathan to his David. The advice of an independent intelligent and experienced person who is not in his payroll is often invaluable. He needs to bounce his ideas off him.[41] This would prevent his political ruin.

CONCLUSION

The one thing that neither the legislature nor the President should accept, is a public perception of two squabbling bodies which are meant to be the pinnacle of political power within Nigeria. To this end, the Constitution of the Federal Republic of Nigeria 1999 ought to be amended so that re-fielding rejected candidates by the president will become a thing of the past. Furthermore s.171 of the 1999 constitution should be amended to put rest to the argument about which executive appointments require the senate's confirmation and vice versa. The amended section should state strictly the comprehensive list of those appointments that require senate confirmation in order to bring uniformity in interpretation. Furthermore amendment of s. 171 will align it with s.2 (3) of the EFCC Act. Secondly, s 81 of the Constitution should be amended to reflect unequivocally the constitutional powers of both arms of government in the preparation, passage and execution of the nation's Appropriation Bill. This will put paid to the blame game and passing of buck regarding late passage of budgets. Finally a policy measure to be adopted in settling this rift would be educating the officers of the executive about the co-equality of the legislative arm of government.

[41] S Hess Organizing the Presidency (Washington: Brookings, 1976), p. 37.

EVALUATION OF HUMAN SECURITY UNDER THE CONSTITUTION

Chukwudi Victor Odoeme*

Abstract

Human security is about human life and dignity expressed as freedom from fear and freedom from want. To that extent human security has in its embrace issues such as environmental degradation, human rights, equity, maximizing human potentials, health, labour standards, organized crime, small arms proliferation, religion, ethnicity, gender identity, governance, civil society, hunger, and internal conflict. A state's provision for the guarantee of human security of her citizens is the basis for her success or failure because the sovereignty of the state is guaranteed only if it derives from the sovereignty of her citizens. This article argues that by placing the all-important positive rights with human security potentials and reciprocal citizens' duties to the state in a part of the 1999 Constitution that is not justiciable, the Nigerian state has robbed itself of the recipe for survival and risks failing as a state. This work advocates the integration of diplomacy, military force, intelligence, law enforcement, internal security, education, health and human services into a single system that can respond to basic threats to human security of citizens such as terrorism, weapons proliferation, climate change and hunger by sweeping reforms that will synchronize the fundamental objectives of state policy with the fundamental rights provisions of the 1999 Constitution so to erase the notion of a chasm between the state and her citizens and guarantee survival of the Nigerian state.

Keywords: *Constitution, Developing State, Security, Human Rights, Sovereignty.*

* LLB, LLM, BL, PhD (Public International Law), MSc, PhD (International Relations); Notary Public, Legal Adviser and Head of Legal Unit, Nigerian Educational Research and Development Council, Abuja, Nigeria; vicodoeme@yahoo.com 080 6565 5005

INTRODUCTION

National security deals with the safety of sovereign political communities or states. The common understanding has always been that the security of individual constituents of a sovereign political community is a deliverable that naturally flows from the safety of sovereign political community i.e. national security. This relationship, it is assumed, arises by virtue of the individual's membership, residence or allegiance to a particular sovereign political community and a belief that sovereign political communities are entitled and competent to determine the nature of their security interests and how best to address them.[1]

The concept of security is most often captured in the constitutions of various sovereign states. It is as well substantiated by the practice of the international community wherein all sovereign states are deemed legally equal,[2] so entitled to preserve what is of value and their way of life from the jealousies and intrigues of their neighbours.[3]Also relevant in this respect are the non-interference, territorial integrity, and political independence principles of international law. However, failed, failing and unjust states who still retain the rights granted by their constitutions, practice of the international community, and the fundamental principles of international law even when such states have become unable and or unwilling to provide security for their citizens or have as much become threats to their own citizens and constituents do present for the international community a new set of problems. Part of the problem currently includes the existence of conflict between the rights the states are willing to guarantee or guarantees for her citizens and the rights the citizens are entitled to as citizens of a global village. It is against this background that this article sets out to isolate and interrogate the human security components of the Nigerian 1999 Constitution with the view to ascertaining whether or not Nigerian citizens have a fair deal in terms of actualizing or meeting their human security needs.

HUMAN SECURITY

Human security as a concept became quite popular by its appearance in the United Nations Human Development Report of 1994[4] wherein it was posited that the main concern of human security is not weapons but human life and dignity.[5] To that extent human security has in its embrace issues such as "environmental degradation, human rights, equity, human potential, health, children, labour standards, narcotic trafficking, organized crime, small arms proliferation, religion, ethnicity, gender, identity, governance, civil society, and internal conflict."[6] Concrete expressions of human security are found in international community milestones such as the Ottawa Treaty (which prohibits Antipersonnel Mines), the

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[1] W.W. Bain, 'National Security, Human Security, and the Practice of Statecraft in International Society' paper presented at the Conference on Global Governance and Failed States, Purdue University, Florence, Italy, April 6-10, 2000, p.2.

[2] Article 51 of the United Nations Charter.

[3] Bain, note 1

[4] United Nations Development Programme, *Human Development Report* (New York: Oxford University Press, 1994), p. 22.

[5] In contrast, the main concern of national security is weapons (nuclear deterrence, military balances, zero-sum games, competing power blocs, and inter-state diplomacy and war).

[6] Bain, note 1

International Criminal Court (that subjects international criminals to some sort of punishment for crimes prohibited by international law), Child Rights Laws (that seeks to protect children so as to guarantee regeneration of the human society), global fight against AIDS (to stem the tide of degenerative human health and curtail discrimination and guarantee respect for human dignity), and changing ideas about the use of armed forces in humanitarian emergencies.

Human security may well have originated from the United Nations Millennium Development Goals.[7] Albeit, it has ever since found further expression in the activities of states such as Canada, Japan and Switzerland who have incorporated the concept of human security into their foreign policies, and through which the concept of human security has percolated into the language of the European Union,[8] foreign policies, states, international and regional organizations as well as academic discusses. By the emergence of the concept of human security, the meaning of security in international law now extends beyond the security of the state (national security) to cover that of individual constituents of a state. This has become the basis for action to prevent injustice and to respond when all other efforts aimed at preventing injustice fails. It also founds justification for the international community's action to prevent armed conflicts, protect internally displaced people, alleviate hunger, support victims of environmental disasters or protect whole races of people threatened with genocide, and generally respond to humanitarian emergencies which otherwise would have remained totally within the jurisdiction of the affected state.[9]

In spite of being been termed ambitious[10] because it encompasses too wide a range of threats to individual humans,[11]the coverage of the concept of human security now extends to cover human life and dignity by protecting fundamental freedoms that are the essence of life, and by creating socio-political, environmental, economic, military and cultural systems that cumulatively provide for people avenues for their survival, livelihood and dignity.[12] Furthermore, human security extends human life and dignity by seeking to safeguard humans from the notorious threats to human security broadly defined as "people's freedom from fear and freedom from want."[13] In specific terms, the seven threats to human security, as identified in the Human Development Index, include economic, hunger, disease, environmental, personal, community and political - matters that directly impinge on people's

[7]J. Kotsopoulos, 'A Human Security Agenda for the EU?' (2006) European Policy Center, Issue Paper No.48.
[8] Ibid
[9] Ibid, p 6
[10] Ibid

[11] By encompassing conflict prevention, crisis management, responsibility to protect, human development, genocide, slavery, natural disasters, food, health, housing, political stability, justice and sustainability, and massive violations of the rights. See M. Kaldor, M. Martin & S. Selchow, 'Human Security: A European Strategic Narrative' (2008) *International Policy Analysis*, Feb, p.2.
[12] Human Security Unit, Human Security Unit: Overview and Objectives, New York: OCHA quoted in Kotsopoulos, note 7, p.10.

[13] O.A. Gómez & D. Gasper, 'Human Security, A Thematic Guidance Note for Regional and National Human Development Report Teams.' United Nations Development Programme, Human Development Report Office 2013, p.1.

security.[14] Others include human development which essential deals with enlarging people's choices and freedoms[15] in confidence that the opportunities they have are protected.[16]

As it relates to communities, human security's specter covers and addresses the security needs (freedom from fear and freedom from want[17]) of communities of people through concepts like conflict prevention, crisis management, and responsibility to protect. Human security's specter further extends to cover matters like genocide, slavery, natural disasters, food, health, housing, political stability, justice and sustainability, massive violations of the rights, the security of individuals and communities including dealing with crime, human rights violations,[18] displacement and joblessness which are the hallmark of a secure state.

STATES AND HUMAN SECURITY

Many developing sovereign states are having issues operationalizing human security within their territories. Their excuse has been that the scope of human security is too wide to be easily accomplished with dwindling national resources and lean budgets based on the perception that a larger section of the world's population lives in continual state of insecurity.[19] Besides historical developmental issues associated with the concept of human security,[20]and the decline in traditional state-vs-state security threats in the aftermath of the Cold War, many states contend that the transnational nature of some recent security threats (environmental degradation, organized crime, international terrorism) have economic implications that they find impossible to provide for. However, it has been observed that it is not exactly about absence of capacity in many developing states to contain them but sheer reluctance to address the critical mass of human security issues in their state particularly where the internal and external security issues have become practically inseparable[21] and have the potential of attracting adverse and dangerous consequences whenever either is threatened;[22] more so because of the possibility of such human security situations attracting foreign economic intervention.

Aggravating the forgoing precarious situation is the recent understanding that the international community would ordinarily not sit to observe the escalation of security threats that have human security implications. By the fact of the understanding that "individual security does not necessarily follow from the security of the political community,"[23] the

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[14] IIbid. Note that the UN Charter identified human security in liberal terms as 'fundamental freedoms' See also Article 1 (3) of the UN Charter.

[15] "New Dimensions of Human Security" Human Development Report (New York, UNDP, 1994). Available at http://hdr.undp.org/en/reports/global/hdr1994/ p.23.

[16] Gómez & Gasper, note 13 p. 2; UN General Assembly, 66th Session 'Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome' (A/RES/66/290). 25 October 2012

[17]Kaldor, Martin & Selchow, note 11, p.1.

[18] They referred to the 'Final Report of the Commission on Human Security,' 1st May 2003. Available at http://www.humansecurity-chs.org/finalreport/index.html

[19]Kotsopoulos. Note 7, p.6.

[20] This refers to evolution of human security from the concept of 'comprehensive security' or 'societal security', which liberally implied extending the concept of security beyond the confines of the state.

[21]M. Kaldor & M. Glasius (eds.) *A Human Security Doctrine for Europe* (London: Routledge, 2006), p.4

[22]Kotsopoulos, note 7, p.8.

[23]Ibid

international community has often taken decisive actions in matters of massive human sufferings and abuses by weighing peoples' rights to security above a state's right to autonomy.[24] Consequently, many developing states are abdicating their responsibilities to their citizens on this pedestal, believing that help would come from above.

In addition to traditional external military responses, recent international attempts at addressing human security has placed higher premium on issues relating to human rights, economics, the environment, drug traffic, epidemics, crime, or social injustice[25]a well as small arms and light weapons proliferation. Consequent upon the multidimensionality of security and paucity of resources, specifications are being proposed as to what "values to protect, from which threats, by what means, and at what cost."[26] However, these proposal stem from perceived difference between the pre and post cold war specifications of security that are but reflections of the many varieties of security. But indeed there are no real difference between human security and national security as both have similar impact(s) on the human person (citizen). What has changed is that advanced economies are meeting their human security needs by sweeping reforms. An example is the 2007 US Project on National Security Reform that laid the foundation for the reorganization of the US government's national security system to meet twenty-first century threats such as cyber terrorism, international terrorism, weapons proliferation, failing states, climate change, and some old threats with modern twists such as piracy.[27] In the main, the reforms[28] set out to integrate US diplomacy, military force, intelligence, law enforcement, foreign aid, homeland security, education, transportation, and health and human services into a single system that could respond to new threats associated with the end of the Cold War era such as globalization, telecommunications revolution, and September 11 attacks.[29]

Recent postulations extend human security to nations, to individuals, to international system, to physical environment, to biosphere, to military, to politics, to economics, to social life, to international institutions, to regional or local governments, to nongovernmental organizations, to public opinion and the press, to the markets, to political responsibility for

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[24] Report of the Commission on Global Governance, *Our Global Neighbourhood*, (Oxford: Oxford University Press, 1995), p71

[25] D.A. Baldwin, 'The Concept of Security' (1997), Review of International Studies, Vol. 23, pp. 5-26

[26] Ibid

[27] G. Lederman, 'National Security Reform for the Twenty-first Century: A New National Security Act and Reflections on Legislation's Role in Organizational Change' (2009) *Journal of National Security Law & Policy*, Vol. 3, p.363.

[28] The United States' National Security Strategy (NSS) of May 2010 is the policy foundation for the expansion of US national interests beyond industrial growth and military containment of geopolitical threats for the purpose of accommodating emergent human security issues such as the economy, education, immigration, infrastructure, science and innovation, alternative forms of energy, health care, climate change, refugees flooding into US, drug trafficking and criminal syndicates, damage to information infrastructure through cyber-attacks etc. see L.K. Donohue, 'The Limits of National Security, (2011) American Criminal Law Review Vol. 48, p.1573, *Georgetown Public Law and Legal Theory Research Paper No. 12-118*

[29] Ibid

ensuring security; and even to the abstract forces of nature.[30] Also included are states responsibility to make for the meeting of basic human needs, political and social freedoms, reducing incidences of organized political violence and other forms of violence, threats of natural disasters, disease, environmental degradation, hunger, unemployment and economic downturn. The philosophy behind this development is that the sovereignty of a state is guaranteed only if it derives from the sovereignty of her citizens.[31] After all, the strength and central idea behind human security as a concept "is the primacy of human life as the objective of security policy"[32] as against the primacy of the state in spite of her citizens.[33]

It is considered that many developing states' seeming apathy for human security stems from the penchant and ability of human security to conscript into matters concerning citizens' rights the universal sense of immediacy and urgency associated with the word 'security.'[34] States have reasoned that operationalising human security within their domestic jurisdictions would unduly increase states responsibilities to her citizens. In the face of under-development (characteristic of many developing states) this presupposes that governments would no longer have the "right" to misappropriate national resources and perhaps decisively deal ruthlessly with citizens;[35] and in times of humanitarian emergencies, be required to provide citizens comprehensive economic assistance, relief, rehabilitation, and general welfare. This is particularly the challenge in a milieu where governments see human security as seeking to induce legal commitments that will fill a normative gap in the global system for protecting human welfare by protecting people from acute threats even if they do not emanate from persons or institutions owing legal duties to them.[36]

States are therefore afraid of conceding certain rights to their citizens, under the doctrine of human security, because it would imply a corresponding duty on the part of governments to provide and guarantee the realization and enjoyment of such rights including assisting citizens in need, and if that duty is held to fall only on the government whose nationals are in need, it would increase the size and scope of government responsibility to citizens. Furthermore, the fear is that the specter of human security would compel the governments of other states to question an abdication of such state responsibility to citizens. This unfortunately may entail the evaluation and possible condemnation of such a state's

[30] Rothschild, E. 'What Is Security?' (1995) Daedalus, Vol. 124, No. 3, the Quest for World Order (Summer), p. 55

[31] The sovereignty of citizens of a state has been described as "the one genuine sovereignty." See VA Havel, *Summer Meditations* (New York: Alfred A. Knopf, 1992) p.33; John Stuart Mill, On Liberty (London: Penguin, 1974), p.141

[32]Ibid

[33] T. Farer, 'Human Security: Defining the Elephant and Imagining its Tasks' (2010) *Asian Journal of International Law*, Vol.1 No.1 pp.1-14

[34]Ibid

[35] Suppression of opposition, summary execution, torture, displacement, punishment without due process, detention without trial, disobedience to court order, and other cruel and inhuman treatment

[36] Farer, note 33, pp..5 - 6

domestic policies, its actions and omissions - an exercise that would amount to an infringement of the rigid Westphalia conception of sovereignty.[37]

Besides the foregoing, it is further feared that the concept of human security would impose obligations on the generality of humanity to "treat the needs of non-nationals as having normative value equal to the needs of one's own nationals."[38] More so:

> [o]nce a commitment to human security becomes the litmus test of governmental legitimacy, state elites can no longer speak openly as Charles DeGaulle was said to have done in conveying the belief that he owed his allegiance to France rather than the French people of whom he thought not very much. In other word the state as icon is replaced by the state as human utility maximizer.[39]

CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

The Constitution of the Federal Republic of Nigeria is the supreme law from which other laws in Nigeria derive their viability. It is so supreme that all laws that are inconsistent with the provisions of the constitution are void to the extent of their inconsistency.[40]

This constitution has within it provisions that are prima facie foundations for the actualization of human security in Nigeria. Such provisions include those relating to non discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties;[41] the duty of the state to promote national integration by the provision of adequate facilities for and encourage free mobility of people, goods and services throughout the Federation, securing full residence rights for every citizen in all parts of the Federation, inter-marriage among persons from different places of origin, religious, ethnic or linguistic association.[42] Others include provisions as to the use of the nation's resources to promote national prosperity and self-reliant economy as well as securing the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; citizens participation in certain areas of the economy; promotion of a planned and balanced economic development; use of material resources of the nation to serve common good; operating the economy in such a manner as not to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; provision of suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled for all citizens;[43] equality of citizens rights, obligations and

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[37] Ibid, p.6

[38] *Ibid*, p.7. On the invocation of human security as an assault on the very core of the classical national sovereignty/national interest conception of international law and an assault on the national state see A. Acharya, & A. Acharya, 'Human Security in Asia: Conceptual Ambiguities and Common Understandings'. Available at http://www.yorku.ca/drache/talks/pdf/acharya_delhi.pdf

[39] Ibid

[40] S1(3) The Constitution of the Federal Republic of Nigeria 1999

[41] S15(2)

[42] S15(3) (a-c)

[43] S16

opportunities before the law; recognition of the sanctity of the human person and human dignity; integrity of courts of law and easy access to justice; security for adequate means of livelihood; adequate medical and health facilities;[44] educational opportunities;[45] protection and improvement of the environment including water, air and land, forest and wild life of Nigeria;[46] protection, preservation and promotion of Nigerian cultures;[47] and free press.[48]

These isolated provisions essentially relate to issues of human security. Their presence in the supreme law of the state presupposes the intendment of the constitution to ensure human security at its best. However, like the many states that are not comfortable with "overbearing" nature of the concept of human security, these laudable provisions are captured in the part of the constitution that is merely philosophical and of no legal consequences. This evidence of compliance signifies an intention to make for, and an obvious unwillingness to provide. The implication is that whereas the Nigerian state has shown interest in spelling out the state's obligation to its citizens it has inadvertently withheld the political will to provide as well as denied citizens the right to demand them.

The extent of the negative impact of this seemingly innocuous act of the National Assembly is evident in the many cases[49] instituted to challenge the political misadventure of the Federal Government of Nigeria in the mismanagement of state oil resources as well as the sad activities of the oil multinationals in the Niger-Delta. Many of the cases end with phony but expected legal interpretations that border on pulling down some significant barriers to access to justice in Nigeria such as delays in dispensing justice,[50] locus standi,[51] jurisdiction,[52] imposition of higher standards of proof in civil suits almost to the point of

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[44] S 17

[45] S 18

[46] S 20

[47] S 21

[48] S 22

[49] These issues were discussed in some details in C.V. Odoeme, 'From Rio to Johannesburg: Reflections on the Role of Judges in Ensuring Access to Justice' (2012/2013) *Commercial and Industrial Law Journal (CILJ)*, Faculty of Law, Kogi State University, Vol. 3 No.2, pp. 92 – 104

[50] See *EEA v CSN* (1999) (unreported) cited in S. Stephen (ed.) *Handbook on access to justice under the Aarhus Convention* (2003) pp. 191 – 192. In this case, a Spanish NGO was denied access to inspection reports prepared by a Government agency relating to nuclear facilities. It started proceedings for judicial review in High Court of Madrid Autonomous Region in 1995 which were decided in its favour four years later by the first court, but by July 2002 the appeal was still pending and access to the reports had still not been granted

[51] See *Oronto Douglas v Shell Petroleum Development Company Ltd Unreported Suit No. FHC/CS/l/573/93* of 17/2/1997 - where the plaintiff's suit challenging the operation of the Liquefied Natural Gas Projects without first complying strictly with the Environment Impact Assessment Act of 1992, was struck out by the Federal High Court on the ground that the claim was baseless, and the plaintiff had shown no prima facie evidence that his right was affected nor any direct injury caused to him

[52] See *Abu v Odugbo* [2001] 7 M.J.S.C 87 at 91 where it was held that what determines jurisdiction of the court to entertain a suit is the claim of the plaintiff. See also *Adediran and Anor v. Interland Transport Ltd (1991) 9 NWLR (pt. 214) 155*, where the residents of the *Ire-Akari Housing Estate, Isolo,* (appellants) had brought an action for nuisance due to noise, vibrations, dust and obstruction of the roads in the estate. The Nigerian Supreme Court held that in the light of section 6(6)(b) of the 1999 Constitution, a private person cannot commence an action on public nuisance without the consent of the Attorney-General, or without joining him as a party.

proof beyond reasonable doubt as was the case in *Seismograph v Mark*,[53] and *Shell BP v Usoro*,[54] and matters of representative actions.[55]

There will be no significant change is the woes of citizens or respite in the demand for the many aspects of human security unless and until the constitution is amended to reflect that true sovereignty rests with the people and not the state as an entity.

FUNDAMENTAL HUMAN RIGHTS ISSUES IN THE NIGERIAN 1999 CONSTITUTION

The chapter of the Nigerian 1999 constitution that deals with matters of human rights deemed to be fundamental is a charade when compared with the chapter of the same constitution that dealt with fundamental objectives and directive principles of state policy wherein rights that represent human security are detailed.

The rights designated in chapter four (fundamental rights) of the Nigerian 1999 constitution are highly selective. The expression of those rights in the negative forms constitutes an inordinate abuse of their potential to meet citizens' human security needs. The issue with the rights being "fundamental" is merely as regards their so being inserted in the constitution and called and interpreted as such.[56] It has nothing to do with the states intention to designate them as fundamental or their being of very significant human security value to the human person and citizen of the Federal Republic of Nigeria. Some of the rights are examined hereunder:

Right to life[57]

The right to life of the human person is not by virtue of the existence of the constitution. After all, the constitution was made by man for himself. The man had been in existence before the constitution became needful. What the constitution did was not to create man or provide for his existence but to make it punishable for anyone to wilfully deny another the right to continue to live. This provision is even superficial because in as much as the desire or the need may arise for a person to take away the life of another, people do not always want to except in exceptional circumstances. What would be very significant for the citizen as regards human security's specification for protection of his life by the constitution is the provision of amenities and circumstances that would guarantee living a fulfilled life.

The 1999 constitution did rather concentrate on declaring that persons have right to life and no one's life shall be taken intentionally except in execution of the sentence of a

[53] [1993] 7 NWLR (pt.304) 203, where failure to establish a link between cause and effect cost the plaintiff his desirable remedy

[54] (1960) SCNLR 121, where the difficulty in establishing the link between seismic survey and environment damage cost the plaintiff the desired remedy

[55] In *Jonah Gbemre v Shell PDC Ltd and Ors [2005] (2005) Suit No. FHC/B/CS/53/05* Federal High Court sitting in Benin granted leave to the applicant to institute proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria, and to apply for an order enforcing or securing the enforcement of their fundamental human rights to life and human dignity as provided by sections 33 (1) and 34(1) of the 1999 Constitution of Nigeria, and reinforced by Articles 4, 16 and 24 of the African Charter on Human an Peoples' Right Cap. A9 Vol. 1, LFN 2004

[56] Note that the human security potent rights (described as objectives and directive principles of state policy) listed in chapter two of the constitution are called fundamental even though they are cosmetic

[57] S 33

court or in other circumstances permitted by law e.g. self-defence, defence of property, effect a lawful arrest, prevent the escape of a person lawfully detention, for the purpose of suppressing a riot, insurrection or mutiny - matters that relate to the taking of the life it set out to guarantee. The constitution failed to provide for positive matters that relate to ensuring fulfilled living of the same life it set out to guarantee.

Dignity of person[58]

The right to dignity of person as provided by the constitution is more about how not to infringe on a person's right to dignity. It is not about the how to ensure that citizens live their lives with the measure of dignity life deserves. Ostensibly, dignity of the human person has more to it that are very distant from the provisions of the constitution that affirms it as a right. Whereas it is commendable that the constitution proscribed for the purpose of respect for the dignity of the human person acts of torture, inhuman or degrading treatment, forced or compulsory labour, it made no provision for preventing hunger, providing food, treating disease and healthy environments that are better foundations for the actualization of human dignity within the auspices of human security.

Right to Personal liberty;[59] *Fair hearing;*[60]*right to Privacy;*[61]*Freedom of Thought, Conscience and Religion;*[62] *Freedom of Expression;*[63] *Freedom of Assembly and Association;*[64] *Freedom of Movement*[65]

These rights are essentially about not detaining a person without the authorization of the law; hearing his opinion and defence in a matter; letting a person have some private space and time; letting a person have his own opinion on issues, beliefs and manner of worship; letting a person expression himself; letting a person meet and associate as he deems right; letting a person move about as he desires. However, they would be far more meaningful if the state were to provide basic human needs, address threats of natural disasters, disease, environmental degradation, hunger, unemployment and economic downturn (freedom from want) as against political and social freedom (freedom from fear), and reducing incidences of threats such as organized political violence, other forms of violence.

Freedom from Discrimination[66]

This is one right that is guaranteed in breach. Whereas it looked like the state had gotten it right by prescribing that a person should not be subjected to acts of discrimination, popular practical issues with foundations in law, such as quota system, state or origin, religion, sex, poverty (issues that attract great attention in political and job recruitment process in Nigeria) as recognized forms of discrimination renders section 42 impotent from conception.

[58] S 34
[59] S 35
[60] S 36
[61] S 37
[62] S 38
[63] S 39
[64] S 40
[65] S 41
[66] S 42

The Right to own Property[67]*and not to be Denied Ownership without Just Compensation*[68]
These rights do not bring about ownership of any property but permits an interested and capable person to own one; and to have some compensation paid in case the state wants to take such away.
Whereas these rights as granted by the constitution, they are superficial negative rights and mere repetition of universal rights. The rights were not properly branded. The use of such words as "fundamental rights" gives them a larger than life nature leaving the impression that they are almost absolute. But they are not and where not so intended. Whereas the limitations, apart from the ones identified and associated directly with human security in this article, are evident within rights granted in sections 33 to 36 section 45 reduces the rest of the rights the more. Section 45 of the constitution dismisses and discharges the rights granted by sections 37 to 41 when defense, public safety, public order, public morality or public health are involved or for the purpose of protecting the rights and freedom of other persons or during periods of emergency.

THE NIGERIAN STATE AND HUMAN SECURITY

As can be seen above matters of human security are replete in the Constitution of the Federal Republic of Nigeria. But it is obvious that the Nigerian state has not been very successful as regards the expectation that she will preserve what is of value and her citizens' way of life. This failure is responsible for the violation of citizens' rights at the domestic level as well as in the international as Nigerian citizens have their human security not guaranteed and protected by the Nigerian state. This is responsible for interference in citizens' rights and lives by the state and powerful individuals and corporations, violation of Nigerians territorial integrity and citizens rights by terrorists and religious extremists who bank on the Nigerian government's perceived unwillingness or inability to protect her citizens and constituents as well as the absence of human security standards to perpetrate their nefarious acts.

States fail by their inability or loss of capacity to guarantee human security within her borders. And the failure is guaranteed when states deliberately deny her citizens the rights associated with human security which is the basis for citizens' allegiance to the state. Ordinarily, the problem with failed and failing states and provision for human security is expressed in the existence of conflict between the rights the states are willing to guarantee her citizens and the rights the citizens expect of state as citizens of a global village. In Nigerian the case is very pathetic. In her clumsy crafty effort to provide without guaranteeing human security of her citizens, the Nigerian 1999 Constitution captured the elements of human security in details in the part of the Constitution that is deemed not justiciable.[69] Unfortunately it is within the same part of the constitution that citizens' duties to the state were captured.[70] The unintended implication of this arrangement is that neither the state nor her citizens owe each other any duties. The citizens cannot demand of the Nigerian state

[67]S 43
[68]S 44
[69] Cap 2, Ss 13 - 22
[70] S 24

human security "rights" that have been spelt out in the chapter two of the constitution and the state in turn cannot demand allegiance from her citizens as both are reciprocal but here mutually excluded.

Whereas at the international level, concrete expressions of human security are found in international community milestones,[71] in Nigerian and many other developing economies icons of human security (that serve for the provision of human security of her citizens) such laws, courts, child and old persons rights, health care, respect for human dignity are in a state of disarray. Whereas the Nigerian constitution had indicated an intention not to discriminate on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties[72] those are the prominent features of employment application forms, recruitment procedures and general documentation in Nigeria public service; securing full residence rights for every citizen in all parts of the Federation is a mirage as Nigerian citizens are engaged in political offices and even in the army on the basis state of origin; inter-marriage among persons from different places of origin, religious, ethnic or linguistic association[73] is in practice forbidden; as per the use of the nation's resources to promote national prosperity and self-reliant economy as well as secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity and its sister proposal not to operate the economy in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group the order is that the nation's wealth is in the hands of a few reluctant givers. Similar irregularities are replete in all other human security related provisions of the Nigerian 1999 Constitution - adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, employment, sick benefits and welfare of the disabled for all citizens,[74] equality of citizens' rights, obligations and opportunities before the law; recognition of the sanctity of the human person and human dignity, integrity of courts of law and easy access to justice, security for adequate means of livelihood, adequate medical and health facilities,[75] educational opportunities,[76] protection and improvement of the environment including water, air and land, forest and wild life of Nigeria,[77] protection, preservation and promotion of Nigerian cultures[78] and free press.[79]

The Nigerian state has also failed in her international law obligation of preventing threats to individual human citizens as regards human life and dignity. These include the

[71] such as the Ottawa Treaty (which prohibits Antipersonnel Mines), the International Criminal Court (that subjects international criminals to some sort of punishment for crimes prohibited by international law), Child Rights Laws (that seeks to protect children so as to guarantee regeneration of the human society), global fight against AIDS (to stem the tide of degenerative human health and curtail discrimination and guarantee respect for human dignity), and changing ideas about the use of armed forces in humanitarian.

[72] S15(2)

[73] S15(3) (a-c)

[74] S16

[75] S 17

[76] S 18

[77] S 20

[78] S 21

[79] S 22

protection of citizens' fundamental freedoms[80] by creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity[81] as well as safeguard citizens from fear and want[82] and other threats to human security.[83]

Also the Nigerian state has failed in terms of enlarging citizen's choices and freedoms[84]as well as building their confidence that the opportunities they have are protected.[85] Although the Nigerian constitution did not guarantee human security related opportunities, the rate at which Nigerian citizens lose their sources of livelihood and available opportunities is alarming.

As per security of communities from "fear" and "want" through the prevention of conflict, crisis management, responsibility to protect as well as prevention of genocide, slavery, political instability, dealing with crime[86] the Nigeria state has been found wanting. The many communal conflicts, "unknown" herdsmen killing and displacement of Nigerian citizens, militancy, kidnapping, bombing and agitation for division of the state are all expressions of loss of confidence in the Nigerian state's ability to provide for her citizens. Similar incidents include abduction and forceful giving to marriage of underage girls under the supervision of powerful individuals, emergence of war lords and many outlaws, trafficking in persons, mass killing of Nigerian citizens by terrorists and the Nigerian armed forces.[87]

CONCLUSION

It has come to be understood that human security provides better approaches to responding to current threats to human life[88] including ethnic and religious conflicts, civil wars, deepening of globalization, the widening gap between rich and poor, and other threats to human rights. Therefore it is conceded that human security is the most important concept that emerged out of the "post-Cold War search for a new security paradigm"[89]

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[80] This is by no means related to the freedoms guaranteed in Chapter IV of the 1999 Constitution of Nigeria

[81] Human Security Unit: Overview and Objectives, New York: OCHA quoted in Kotsopoulos, note 7, p.10

[82]See Article 1 (3) of the UN Charter

[83]Economic, hunger, disease, environmental, personal, community and political. See Gomez, & Gasper, note 13, p.1

[84] New Dimensions of Human Security, *Human Development Report*, note 15

[85]OA Gómez, & D Gasper. *op cit*, p. 2; UN General Assembly, 66th Session "Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome" (A/RES/66/290). 25 October 2012

[86] Kaldor, Martin & Selchow, note 11

[87] See 'Stars on their shoulders. Blood on their hands: War crimes committed by the Nigerian military.' *Amnesty International*, June 2015

[88] Current threats to human security do not target only the states territorial integrity and sovereignty but also its people. They include terrorism, proliferation of weapons, and failed states. They cannot be addressed by purely military means since the root causes fall well outside the realm of the military. See R. Gropas, 'What Role for Human Rights in the European Security Strategy?' in T. Debiel, & S. Werthes, "Human Security on Foreign Policy Agendas: Changes, Concepts and Cases" (eds.) INEF Report 80/2006 Institute for Development and Peace, p.57.

[89] E. Atanassova-Cornelis 'Defining and Implementing Human Security: The Case of Japan' in T. Debiel, & S Werthes (ed) "*Human Security on Foreign Policy Agendas: Changes, Concepts and Cases*" INEF Report 80/2006 Institute for Development and Peace

Provision of human security is a recurrent way of reassuring citizens of their rights and dignity in any civilized society. Indeed it might be the only way to close the security gap created by the application of conventional state-centric military approaches to security[90] in places such as Iraq, Afghanistan, Lebanon, Africa, the Middle East, the Balkans, Central Asia and the Caucasus where millions of people live in situations of deep insecurity that can only be addressed through the operationalization of the concept of human security within domestic jurisdictions.

The ambitious outlook of human security is for the good of both the state and her citizens. Guaranteeing of the human security of citizens is the difference between a successful state and a failed or failing state as it is the determining factor for citizens' allegiance from which many developed states draw their strength.

The Nigerian state needs to do more than substantial compliance with its international law obligation for which it has showcased in her constitution rights deemed to substantiate human security. Like in the developed world sweeping reforms are recommended that will synchronize the fundamental objectives of state policy with the fundamental rights provisions of the 1999 Constitution. This will essentially erase from the constitution and the practice of the state the notion of a chasm between the state and her citizens constantly expressed in the rift between the "government" and the people.

The Nigerian national security system must be adjusted to be able to meet twenty-first century threats such as terrorism, weapons proliferation, climate change and hunger by integrating diplomacy, military force, intelligence, law enforcement, internal security, education, transportation, and health and human services into a single system that can respond to basic threats to human security of her citizens.

[90]The root causes of current threats to human security fall well outside the realm of the military. See Gropas, note 88

ENFORCEMENT OF JUDGMENTS OF THE ECOWAS COURT OF JUSTICE

Tony Anene-Maidoh*

I. INTRODUCTION:

The judicial mandate of the ECOWAS Community Court of Justice (ECCJ) has been clearly spelt out by the Revised Treaty, the Protocol on the Court as amended and various Community texts. As was set out in the preamble of the 1991 Protocol on the Court, "the essential role of the Community Court of Justice is to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions…" The ECCJ was established as an interstate Court with the primary responsibility of interpreting and applying the Revised Treaty and ECOWAS Community texts.[1]

There was a paradigm shift in the mandate of the Court in 2005, following the adoption of Supplementary Protocol A/SP.1/01/05 which amended the initial Protocol on the Court. The Supplementary Protocol expanded the judicial mandate of the Court. Essentially, the ECOWAS Court of Justice by its current mandates consists of four Courts in one, which can be categorized as follows:

a. Mandate as a Community Court, which involves the interpretation and application of ECOWAS Community texts and the giving of Advisory Opinions[2].
b. Mandate as ECOWAS Public Service Court which gives the Court competence to adjudicate on any dispute between the Community and its officials[3].
c. Mandate as a Human Rights Court which gives the Court jurisdiction to determine cases of violation of Human Rights that occur in any Member State[4]. The unique feature of this jurisdiction is that there is no requirement for the exhaustion of local remedies[5].
d. Mandate as Arbitration Tribunal which gives the Court the power to act as Arbitrators pending the establishment of the Arbitration Tribunal under Article 16 of the Revised Treaty[6].

The initial Protocol on the Court did not provide the method of enforcement of the judgments of the Court. This lacuna was remedied by the Supplementary Protocol which provided the method of enforcement in a new Article 24. The provision gave each Member State the

* Chief Registrar, Community Court of Justice, ECOWAS.

[1] Article 9(3) of 1991 Protocol on the Court.
[2] Article 9(1) of Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.
[3] Article 9(2) of Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.
[4] Article 9(4) of Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.
[5] Article 9(4) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.
[6] Article 9(5) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.

responsibility for the enforcement of the judgments of the Court in accordance with its Rules of Civil Procedure[7].

Although Article 24(3) of the Supplementary Protocol on the Court, provides that each Member State shall appoint a National Authority for the purpose of reception and processing of the execution, only four Member States have complied. This is therefore poses a challenge for the enforcement of the judgments of the Court. However, it is noteworthy that some countries that are yet to appoint national authorities have complied with decisions and judgments of the Court.

Notwithstanding the provision of a method of enforcement of the decisions of the Court in the Protocol as amended, the compliance rate with the judgments of the Court remains unsatisfactory. No Member State has communicated to the Court the status of decisions and judgments complied with so far. However, the Court has been able to get unofficial information from lawyers and parties involved in some cases. The statistics on compliance with the enforceable judgments of the Court which the Court has compiled from such sources, shows that about 13 Member States have complied in varying degrees with some judgments of the Court[8]. It equally shows, that although some Member States that have not determined the appropriate national authority for the enforcement of the Judgments of the Court, they have in several cases complied with the Judgments of the Court[9]. It must however be noted, that a majority of the judgments of the Court are yet to be enforced or complied with. The Statistics of the Court shows that out of 64 (Sixty Four) enforceable decisions delivered by the Court against Member States and ECOWAS Institutions, since the adoption of the Supplementary Protocol on the Court, only 35 (Thirty Five) of the said decisions have been complied with.

The Court is still facing challenges in the enforcement of its judgments. It is not in doubt that most international Courts and Tribunals have challenges in the enforcement of their judgments but some fare better than the others. The ECCJ like other international Courts, does not have any direct coercive power over non- compliant Member States. This paper will therefore review

[7] Article 24(2) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.

[8]
Federal Republic of Nigeria	-	11 judgments
ECOWAS Commission	-	5 judgments
Republic of Liberia	-	1 judgment
Burkina Faso		2 judgment
Republic of the Gambia	-	3 judgments
Republic of Niger	-	3 judgments
Republic of Togo	-	5 judgments
Republic of Senegal	-	1 judgment
Republic of Mali	-	1 judgment
Republic of Ghana	-	1 judgment
Republic of Sierra Leone	-	1 judgment
West African Monetary Agency	-	1 judgment

[9] See (2) Report on the enforcement of the decisions of the Community Court of Justice.

the enforcement mechanism of the judgments of the ECOWAS Court of Justice, highlight the challenges militating against it, do a comparative analysis of the enforcement mechanism of other regional courts and explore ways and means of improving compliance or strengthening the enforcement mechanism in accordance with international best practices.

I. OVERVIEW OF THE METHOD OF ENFORCEMENT OF THE JUDGMENT OF THE ECOWAS COURT OF JUSTICE.

Basic Principle of *Pacta Sunt Servanda*[10]

The basic principle governing the enforcement of judgment of international Courts is ***pacta sunt servanda***, which can be construed as meaning that every treaty in force is binding upon the parties and must be performed by them in good faith. This Latin phrase, which may be literally translated as "treaties shall be complied with," describes a significant general principle of international law—one that underlies the entire system of treaty-based relations between sovereign states. State practice over the centuries has recognized the fundamental significance of *pacta sunt servanda* as a principle or rule of international law. The good faith element of this principle suggests that states should take the necessary steps to comply with the object and purpose of the treaty. States may not invoke restrictions imposed by domestic law as good reason for not complying with their treaty obligations.

The ECOWAS Community texts that provide that the judgments of the Court are binding have their basis in the maxim "*Pacta Sunt Servanda"* as enunciated in Article 26 of the Vienna Convention on the Law of Treaties of 23 May, 1969, in respect of implementation of decisions, which provides that every treaty in force is binding on parties to the treaty and must be executed in good faith. The treaty requires that States meet their obligations in good faith.

It is therefore expected that Member States will implement the ECOWAS Revised Treaty and the Protocol on the Court which are binding on them in good faith in accordance with the principle of *pacta sunt servada*. Secondly, the Member States also have an obligation to comply with the decisions of ECCJ since they amount to their treaty obligations, in

[10] See Article 26 of the Vienna Convention on the Law of Treaties of 23 May, 1969.

accordance with the framework of the Revised Treaty, Protocol on the Court and the Supplementary Act on Sanctions on Member States that Fail to Fulfill their Obligations.[11]

Judgments are Binding Obligations

The ECOWAS Revised Treaty provides that judgments of the Court are binding on Member States, institutions of the community, individuals and corporate bodies[12]. The Supplementary Act on Sanctions against Member States that Fail to Honour Their Obligations to ECOWAS also has a similar provision[13]. The initial Protocol on the Court, also provides[14] that the decisions of the Court shall be final and immediately enforceable. The Protocol further provides that Member States and institutions of the Community shall take immediately all necessary measures to ensure execution of the decisions of the Court[15]. These provisions are founded on the principle of pacta sunt servanda. Although the initial Protocol on the Court did not provide the method of enforcement, the lacuna was filled by Article 24 of the Protocol on the Court as amended, which prescribed for the first time, the method of enforcement of the judgments of the Court. However, an intriguing dimension was introduced by Article 24(1) which provides that: *"Judgments of the Court that have financial implications for nationals of Member States or Member States are binding".*

It was not clear why this distinction between judgments that have financial implications and judgments that do not have financial implication was made. Does this presuppose that judgments of the Court that do not have financial implications for nationals of Member States or Member States are not binding? This provision is unnecessary and should otherwise have been redundant in view of the provisions of Article 15 (4) of the Revised Treaty that provides that judgments of the Court shall be binding on the Member States, the institutions of the Community and on individuals and corporate bodies. Fortunately, this unnecessary distinction between judgments with or without financial implications was removed by Article 5 of Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations, which provides that:

> *"The Community Court of Justice shall deliver Judgments which include but not limited to financial sanctions against Member*

[11] See Article 2(3) Supplementary Act on Sanctions (2012)
[12] Article 15 (4) of the ECOWAS Revised Treaty, 1993. Article 5 and 6 of the Supplementary Act on Sanctions, 2012
[13] Article 2(3) ibid
[14] Article 19(2), Protocol A/P1/7/91on the Community Court of Justice, ECOWAS.
[15] Article 22 (3) now 23 (3)

States in application of Article 24, paragraph 1 of the Protocol relating to the Community Court of Justice as amended by Article 6 of Supplementary Protocol A/SP.1/01/05 of 19th January, 2005 when it notices that they have failed to honour their obligations as stated in the Community texts"[16].

Article 24: Method of Implementation of the Judgments of the Court

Under the Protocol on the Court as amended, Member States are given the responsibility of executing the Judgments of the Court in accordance with their Rules of Civil Procedure. "Execution of any decision of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the Rules of Civil Procedure of that Member State"[17]. It also provides that "upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced"[18]. Furthermore, that "all Member States shall determine the competent national authority for the purposes of receipt and processing of execution and notify the Court accordingly"[19]. "The writ of execution issued by the Court may be suspended only by a decision of the Community Court of Justice"[20].

Notwithstanding the above provisions, enforcement of the decisions of the Court still remains a major challenge. As stated earlier, since the adoption of the Supplementary Protocol in January 2005, only Four (4) Member States have appointed the competent national authority for the enforcement of the judgments of the Court as stipulated by Article 24 (4) of the Protocol as amended[21].

It however appears that the provisions of Article 24 of the Protocol as amended do not go far enough as there are obvious shortcomings. According to Kamara:

"The lack of sufficient provisions in Community Instruments to ensure the enforcement of the decisions of the court and the fact that Articles 20 and 24 of the Protocol on the court as amended and Article 77 of the ECOWAS Revised Treaty, are regrettably

[16] Articles 5 & 6 of the Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS.
[17] Article 24 (2) Supplementary Protocol A/SP.1/01/05 (2005) amending the Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.
[18] Article 24 (3) *idem*
[19] Article 24 (4) *idem*
[20] Article 24 (5) *idem*
[21] Guinea, Nigeria, Mali and Burkina Faso

insufficient to ensure that decisions of the court are enforced, as the enforcement of said decisions are still dependent on authority of Member States[22]".

In 2012 another Community text was added to the enforcement mechanism of the judgments of the Court. The **Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS** provides for political and judicial sanctions against Member States or their leaders that fail to honour their obligations to the community[23], including the judgments of the Court. Although the details of the political sanctions were provided[24], there were no details of the judicial sanctions. Although some see this as a drawback, others are of a different view, as it gives the Court discretion to impose whatever judicial sanctions it deems fit. For instance, the Court could follow the precedence of the European Court of Justice, which imposes lump sum or day to day sanctions until compliance.

Confronted with the problem of non-compliance with the judgments of the European Court of Justice, the EU Member States added with the Treaty of Maastricht a new provision to the EC Treaty which seeks to secure respect for ECJ judgments. The new procedure according to Article 228 of the EC Treaty is a special judicial procedure for the enforcement of judgments that provides for the imposition of penalty payments or lump sums by the ECJ on a Member State which fails to comply with an earlier judgment of the ECJ that a Member State is in breach of its obligations under Community law[25]. For instance, the European Court of Justice ordered Sweden to make a lump sum payment of 3 Million Euro for failing to comply with a decision of the Court within the time limit for adopting the laws, regulations and administrative provision, necessary to comply with a directive. The Commission had brought a subsequent action asking the Court to order Sweden to pay a daily penalty for each day that Sweden delays in complying with the Judgment. However following the adoption by the Swedish Parliament of measures to comply with the directive, the Commission withdrew the request for a daily penalty payment but maintained its claim regarding the payment of a lump sum. The Court

[22] Kamara .J (2006): The Law and practice of the ECOWAS Community Court of Justice, http://www.carl.sl.org/home/articles/132-the-law-and-practice-of-the-ecowas-community-court-of-justice.
[23] Article 3(1) of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS
[24] Article 5 & 6 of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS.
[25] Memo/05/482, Brussels, 14 December 2005, Financial Penalties for Member States who fail to comply with Judgments of the European Court of Justice: European Commission clarifies rules

held that it was necessary to order Sweden to make a lump sum payment as it had failed it to fulfil its obligations under EU law[26].

It should be noted that the **Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations** to ECOWAS also provides that "the sanctions defined in Article 5 to 11 of the Supplementary Act shall be enforced in increasing order of severity[27]". Obviously the said Supplementary Act adds to the options available to the Court.

The continued non-compliance with the decisions of the Court by some Member States and attempts by others to narrow the court's jurisdiction, constitute an existential threat to ECCJ. We however received cheering news from Femi Falana, SAN recently, in the following words:

> "*I am delighted to inform you that recent political developments in the region and our pressure have changed the attitude of some governments with respect to compliance with the judgments of the Court. Pls find below our progress report:*
>
> *1. The current government in The Gambia has pledged to pay the damages awarded by the Court in the cases of Ebrima Menneh and Musa Saidykhan. I have been in touch with the Attorney-General of the country on the matter.*
>
> *2. The government of Sierra Leone negotiated the damages awarded to El Tayib- Bah and eventually paid him $150,000.*
>
> *3. The Attorney-General of Nigeria has arranged a meeting with us to negotiate the sum of N80 billion damages awarded to the victims of bombs and mines in the south east. I will give you a report next week on the rate of compliance with other judgments of the Court by the Government of Nigeria.*
>
> *4. I am going to meet the President of Ghana in Accra after the Easter holiday to press for the payment of the $250,000 damages awarded in favour of Mr. Oguikwe whose 15-year old son was killed in Ghana.*
>
> *5. The two leading political parties in Sierra Leone are discussing with ex-VP Sam Sumana on their readiness to comply with the judgment of the ECOWAS court. The picture will become clear by next week after the rerun election"*[28].

II. THE ROLE OF MEMBER STATES IN THE ENFORCEMENT OF THE JUDGMENTS OF THE ECOWAS COURT OF JUSTICE AND THE CHALLENGES MILITATING AGAINST THE EFFECTIVE ENFORCEMENT OF THE JUDGMENTS OF THE COURT BY MEMBER STATES.

[26] https://www.insideprivacy.com/data-security/sweden-hit-with- 3m-penalty-payment-fo...27/03/2018

[27] Article 13 of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS

[28] Email from femifalana15@gmail.com to tamaidoh@yahoo.com, dated 25th March, 2018 at 7:00am.

Article 24 of the Protocol on the Court specifies the role of Member States in the enforcement of the judgments of ECCJ. The Protocol gives Member States the responsibility to enforce the judgments of the Court in accordance with their Rules of Civil Procedure. The Court amplified the role of Member States in its declaration of the Community legal order[29], in ***Jerry Ugokwe v. FRN***[30], where it made it clear that the Court relies on the national Courts of Member States for the enforcement of its decisions. In the words of the Court:

> "*The distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, the kind of relationship existing between the Community Court and these National Courts of Member States are not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order."*

The Court reaffirmed the Community legal order in ***Bakary Sarre & 28 ORS v. Republic of Mali***[31], in the following words:

> *"Now, in its Judgment No ECW/CCJ/JUD/03/05 of 7 October 2005 (paragraph 32), relating to Suit No ECW/CCJ/APP/02/05, Jerry Ugokwe v. Nigeria and Christian Okeke, the Court stated that cases made against decisions of national Courts of Member States do not form part of its jurisdiction, the specific nature of the Community legal order of ECOWAS being that it sanctions a judicial monism without necessarily endorsing the primacy of the Community law; if the obligation to enforce the decisions of the Community Court of Justice is binding on the domestic Courts of the Member States, that obligation does not imply a hierarchy in the judicial order between the Community and Member States, but requires an integrated Community legal order. The Court of Justice of ECOWAS is not an appellate Court or a Court of cassation over the national Courts[32]".*

We have earlier observed that a majority of the Member States have not appointed a competent national authority for the enforcement of the judgments of the Court in accordance with Article 24 of the Protocol on the Court as amended. We have equally observed that the rate of compliance with the judgments of the Court by the Member States is not very satisfactory.

[29] Jerry Ugokwe v Federal Republic of Nigeria ECW/CCJ/JUD/03/05 and Bakary Sarre v Republic of Mali ECW/CCJ/JUD/03/11.
[30] (2004 -2009) CCJELR 37
[31] (2011) CCJELR 57
[32] Paragraph 29 of the Judgment

Even the Member States that are willing to comply have legal constraints, arising from the non-domestication of ECOWAS Revised Treaty and the Protocol on the Court and the absence of enabling legal framework for the enforcement of the judgments of the Court in their countries. These and several other challenges are militating against the enforcement of the judgments of the Court by the national Courts of Member States and will be discussed in the following paragraphs.

Challenges

Non Appointment of Competent National Authorities:

The failure of eleven (11) Member States to appoint a competent national authority despite repeated demands by the Court, is a breach of their treaty obligations, which is having an adverse effect on the enforcement of the judgments of the Court by their national courts. The importance of the competent national authorities cannot be over emphasized because they are responsible for receiving, verifying and processing the Writ of Execution from the Court and for rendering returns to the Court[33]. In other words, they are responsible for the enforcement of the judgments of the Court before the national courts of the Member States, in accordance with their Rules of Civil Procedure. Therefore, the competent national authorities constitute the link between the ECOWAS Court of Justice and the national courts of Member States. Failure to appoint the competent national authorities is a huge handicap.

Lack of Domestic Legislation or Legal Framework for the Enforcement of the Judgments of ECCJ by National Courts:

Another challenge the national courts of Member States may have in respect of the enforcement of the judgments of the ECOWAS Court of Justice is the absence of domestic legislation or legal framework enabling or empowering them to recognize, receive and enforce the judgments of ECCJ. The national courts do not have domestic legislation which specifically mentions the judgments of the ECOWAS Court of Justice and the specific method of enforcement on which to anchor applications for enforcement of the judgments of ECCJ. Scholars have debated this point at length. According to Enabulele:

> *"The need for a complete synergy between the Community Court Protocol and the laws of Community States is further stressed by the fact that Article 24 of the Protocol relies on the institutions of the Community States in line with the relevant*

[33] Article 24(2), (3) & (4) of the Protocol on the Court as amended

Civil Procedure Rules for the enforcement of its judgment. In this regard the relevant constitutions of Community States must be obliged by their municipal law to receive and enforce the judgment of a non-forum Court. This underscores, the enactment of legislation permitting the recognition and enforcement of foreign judgments to give legal backing to forum Courts to recognize and enforce same"[34].

He further warned that;

"Unless a strong regime of enforcement mechanism anchored on municipal law, and having international consequences for violating countries is fashioned out, the Community Court, like its sister Courts in Africa, will exist only in name and structure without any effective contribution to individual well-being within the sub region. In this wise, it is important for Community States to take a cue from their European Communities (EU) and Council of Europe counterparts in respectively creating a Court that will drive the desired integration, as did the European Court of Justice (ECJ) and one provides an effective mechanism for human rights enforcement, as the European Court of Human Rights (ECEHR)[35]*"*

Failure to Domesticate the Revised Treaty and the Protocol on the Court by Member States:

Another challenge militating against the enforcement of the judgments of the Court is the non-domestication of the Revised Treaty and Protocols on the Court by Member States in accordance with the Revised Treaty. Article 5(2) of the Revised Treaty provides as follows:

"Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty".

Failure to domesticate the Revised Treaty and the Protocol on the Court as required by the above provision, constitutes a major challenge for the enforcement of the judgments of

[34] Enabulele, A O (2010): Reflections on ECOWAS Community Court Protocol and the Constitutions of Member States, (International Community Law Review) 12 (2010) 111- 138 at page 113

[35] Enabulele, A O (2010): Reflections on ECOWAS Community Court Protocol and the Constitutions of Member

ECCJ by national courts of Member States, especially for the dualist common law countries, since the ECOWAS community texts do not have the force of law without domestication. For such countries, international law does not confer enforceable rights on individuals within the state until the international law has been domesticated, no matter how beneficial the treaty is to the nationals[36]. Scholars have dwelt at length on this issue. In the words of Enabulele:[37]

> *"This is because it is an established principle acted upon by Courts of dualist countries, that unimplemented treaties cannot have the force of law. In Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v. Medical and Health Workers Union of Nigeria, both the Nigerian Court of Appeal and the Supreme Court held that the International Labour Organization Convention, not having been domesticated by the National Assembly, cannot be applied in Nigeria. In Dow v. Attorney General of Botswana, the Botswana Court of Appeal held that international Human Rights instruments do not have automatic application in Botswana's domestic law, unless incorporated by legislation. In the Swaziland's case of Professor Dlamini v. The King, it was held that the provisions of the African Charter on Human and Peoples' Rights, cannot be enforced by the domestic Courts unless Parliament has by legislation incorporated them into the municipal law of Swaziland. On the other hand, the Nigerian Court of Appeal and the Supreme Court had no problem enforcing the African Charter on Human and People's Rights in Nigeria in the case of Abacha v. Fawehinmi, the said treaty having been passed into law by the National Assembly as "The African Charter on Human and People's Rights (Ratification and Enforcement) Act."*

The negative impact of non-domestication was recently highlighted by the decision of a High Court in Accra, Ghana, in ***Chude Mba v Republic of Ghana***[38].The High Court refused to enforce the judgment of ECCJ in the above case on the ground that the Protocol on the Court had not been incorporated into the domestic law of Ghana. According to Hon. Justice Suurbaareh

> *"…. It is true that Protocols of ECOWAS Community Court have been ratified as can be seen from Exhibit "NAA 2" but does this alone make the orders of the Court enforceable by this Court? Since Ghana is a dualist state, after the*

[36] (2001) AHRLR 172 (NgSC 2000)

[37] Enabulele, A.O : Reflections on the ECOWAS Community Court Protocol and the constitutions of Member States published in the International Community Law. Review 12 (2010) 111 – 138.

[38] In Suit No:HRCM/376/15 (2/02/2016). Chude Mba v Republic of Ghana.

ratification of treaties by Parliament, the position of municipal law will not be altered until they are incorporated into municipal or Ghanian law by legislation. Without legislation making the orders of the ECOWAS Community Court binding on or enforceable by our Courts, the mere ratification of Protocols will not make them have the force of law. DATE-BAH JSC. IN THE REPUBLIC VRS HIGH COURT (COMMERCIAL DIVISION) ACCRA; (NML CAPITAL LTD & ANO – INTERESTED PARTIES); CIVIL MOTION NO J5/10/2013 delivered on the 20th day of June, 2013, held that the mere fact that a treaty has been ratified by Parliament in one of the ways provided by the Constitution 1992, does not of itself mean that it has been incorporated into Ghanian law. In the view of the learned Judge, a treaty may come into force and regulate the rights and obligations of the State on the international plane without changing the rights and obligations under municipal law. The learned Judge went on to state that the need for legislative incorporation of treaty provisions into municipal law before domestic Courts can apply them, was not only reflective of the dualist stance of the Commonwealth Common Law Courts, but was also backed by a long line of authorities (some of which he proceeded to refer to) and concluded that this Common Law position is not altered by the directive principles of state policy and to the Executive contained in articles 40 and 73 respectively of the Constitution 1992 as they cannot be interpreted to alter the dualist stance of Ghanian law and do not authorize Courts to enforce treaty provisions that change rights and obligations in the municipal law of Ghana without legislative backing.

From the foregoing, as it is not in doubt that Parliament has not enacted any legislation incorporating the ECOWAS Community Court Protocols into municipal law and that the ECOWAS Community Court is not stated in the schedules to LI1575, it means that its orders cannot be enforced by this Court. The application therefore fails and the same is dismissed. I make no order as to cost."

The decision of the Ghana High Court has grave implications for the continued existence of the ECOWAS Court of Justice. It is therefore expedient that urgent measures be taken by all Member States to domesticate the ECOWAS Revised Treaty and the Protocol on the Court in accordance with the provisions of the Revised Treaty.

Non- involvement of ECOWAS Political Authorities

It has been noted that the Revised Treaty and Protocol on the Court do not provide any roles or involvement of the ECOWAS Political authorities in the implementation of the judgment of the Court like the political authorities in some regional systems. This is a handicap because political authorities are better suited to provide the necessary monitoring and supervisory roles for the implementation of the judgments of the Court. They are also better suited to provide the political will that is required for compliance or enforcement. The ECOWAS Council of Ministers ought to be involved in the enforcement of the judgments of the Court, in order for the enforcement mechanism to have the necessary bite. The mere fact of naming and shaming defaulting Member States before the Council of Ministers will spur some of them to comply. For instance there is an effective involvement of the political authorities in the implementation of the judgments of the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights which would be discussed later in this paper.

ECCJ plays no role in the enforcement of its judgments

It is also a challenge that the Revised Treaty and Protocol on the Court do not provide any role for the ECOWAS Court of Justice in monitoring and supervising the implementation of its judgments. Under the current enforcement mechanism, once the Court pronounces its judgment, it has no powers to monitor and supervise the implementation of the judgments, like some other regional courts e.g. the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter- American Court. However, since the **Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations** gives it power to impose judicial sanctions, it could be argued that on an application by a judgment creditor, the Court could impose whatever judicial sanctions it deems fit. A Member State that fails to comply with the judgments of the Court may in addition be liable to political sanctions[39] in accordance with the provisions of the above Supplementary Act.

Dilemma: Are ECCJ Judgments Foreign judgments or Community Judgments directly applicable in Member States in the Context of ECOWAS Community Law

There is a challenge arising from the uncertainty as to how the national courts of Member States should recognize and receive the judgments of ECCJ. The question is, should national courts of Member States receive and enforce the judgments of ECCJ as foreign judgments in accordance with the Rules of enforcement of foreign judgments or are the judgments directly

[39] Article 6, 7, 8, 9, 10, 11 & 12 of Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations

applicable in Member States as the judgments of community court that is supranational in nature? It has been contended in some quarters that the Judgments of the Court could be enforced by Member States as foreign Judgments[40]. Some Member States therefore view the judgments of the Court as foreign judgments. The simple justification for this viewpoint is that they are not the judgments of the national courts but that of a non-forum court and must therefore be foreign judgments. Secondly there already exists domestic legislation for the recognition, reception and enforcement of foreign judgments, especially for common law countries in the form of Foreign Judgments Enforcement Act. In their view, the judgments of ECOWAS Court of Justice neatly fall into this pigeon hole and should therefore be enforced by the national courts of Member States as foreign judgments.

On the other hand it has been contended that in the context of ECOWAS community law, the judgments of ECCJ cannot be viewed as foreign judgments because they ought to be directly applicable in Member States, in accordance with the integrated community legal order as declared by the Court. According to Enabulele:

> *"It has been argued that the decisions of the ECCJ should be directly applicable in Member States because its basis is community law, which ought to be of superior weight to decisions of national courts. That the national courts are required by provisions of the 1991 Protocol on the ECCJ to execute decisions of the ECOWAS Court. It has been advocated for the decisions of the ECCJ to be enforced by the Supreme Courts of Member States in order to reinforce the fact that the judgment of the ECCJ becomes automatically part of the national law and the highest precedential value. Also, that the ECCJ ought to enforce provisions of the Revised Treaty on Member States, through its decisions"*[41].

The basis of this argument is that ECOWAS is a supranational authority and ECOWAS Court of Justice is a supranational Court, therefore the Regulations of ECOWAS and judgments of ECCJ are directly applicable in Member States in the context of ECOWAS community law. In the words of ECCJ in ***Musa Saidykhan V. Republic of the Gambia***[42]:

> *48. "…. ECOWAS is a supra national authority created by the Member States wherein they expressly ceded some of their sovereign powers to ECOWAS to act in their common interest.*

[40] See paper presented by the Chief Registrar of the Supreme Court of Ghana at the Court's Anniversary Conference in Accra.

[41] Enabulele, A O (2010): Reflections on ECOWAS Community Court Protocol and the Constitutions of Member

[42] (2010) CCJELR 139

Therefore, in respect of those areas where the Members States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersede rules made by individual Member States if they are inconsistent. The Revised Treaty of ECOWAS was ratified by all the Member States of ECOWAS, including the Defendant/Applicant herein. This Court is the offspring of the Revised Treaty; and this Court is empowered by the Supplementary Protocol on the Court of Justice, which is part of the instruments of implementation of the Treaty and has the same legal force as the Treaty, to adjudicate on issues of human rights arising out of the Member States of ECOWAS.

49. Therefore, it is untenable for a Member State of ECOWAS to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdiction in respect of that matter. Defendant/Applicant herein, being bound by both the Revised Treaty and the Supplementary Protocol on the Court of Justice which granted jurisdiction over human rights causes are matters essentially within their domestic jurisdiction and for which reason this Court ought not to interfere with them.

50. Article 2 of the United Nations Charter, which seeks to prevent interference in the domestic affairs of sovereign states is not applicable here. Article 2 of that Charter applies to matters that are essentially domestic in nature and over which the state in question has not acquired any international obligation in respect thereof. When a sovereign state freely assumes international obligations and is being held accountable in respect of those obligations, that state cannot renounce those obligations under the pretext that the matter in question is one that falls essentially within its domestic jurisdiction. Defendant/Applicant, being a Member State of ECOWAS, is bound by the obligations that it has assumed under the Revised Treaty and the Protocols thereof. Consequently, Article 2 of the United Nations Charter does not ensure to the benefit of Defendant/Applicant in this case[43]."

Member States guard their sovereignties jealously but it must be pointed out that in agreeing to establish a supranational authority like ECOWAS, they must necessarily cede part of their sovereignty to ECOWAS to act on their behalf in areas of common interest. Furthermore, the

[43] (2010) CCJELR 139 (Paragraphs 48, 49 and 50 of the Ruling of the Court of 30th June 2009 in Musa Saidykan V. The Republic of the Gambia, ECW/CCJ/APP/11/07)

new legal regime of ECOWAS[44] envisages the direct application of Regulations made by the community in the Member States. The need for Member States to recognize that they have ceded part of their sovereignty in the areas of common interest and therefore subsume their municipal law in areas of common competences to the overriding competence of ECOWAS was emphasized by Ebobrah in the following words:

> *"The amalgamation of diverse sovereignties into ECOWAS with shared and exclusive competences cannot be achieved without huge cost to national competences which have either been ceded to, or have to be shared with ECOWAS. By the integrative nature of its provisions, the Revised Treaty stands upon an undertaking that Member States would align to, and subsume their municipal law in areas of coincident competences to the overriding competence of ECOWAS. It is by no means possible for a subject to be regulated by two different systems of law when each claims superiority. This is even as ECOWAS consists of 15 sovereignties whose national interests and policies do not always coincide, so that it is not an option to allow each to take unilateral policies or actions in the area of competence of ECOWAS. Such would only amount to inventing centrifugal forces that would pull the organization in diverse directions"*[45].

III. COMPARATIVE ANALYSIS OF THE METHODS OF THE ENFORCEMENT OF THE JUDGEMENTS OF REGIONAL COURTS AND THE NEED FOR THE INVOLMENT OF THE ECOWAS COUNCIL OF MINISTERS IN THE ENFORCEMENT MECHANISM.

Enforcement of the decisions of international courts is a systemic problem in the International human rights system. Due to the fact that some human rights treaties provide for only rudimentary enforcement procedures, they experience challenges in the enforcement of their judgments. This could be attributed to lack of adequate legal and institutional framework and good faith that are necessary for the implementation of the judgments. Every Regional system has a method of enforcement of its judgments that is peculiar to it and some have a better rate of compliance than others. In order to benefit from international best practices, and learn from the experience of others, it is desirable to conduct a comparative analysis of the different methods of enforcement of the judgments of some regional courts.

[44] New Article 9 of the Revised Treaty Supplementary Protocol A/SP.1/06/06

[45] Ebobrah. S. T, Enforcement of Judgments of the ECOWAS Court of Justice: Matters Arising.

Currently there are three major regional systems. These are: the African human rights system, the Inter-American system, and the European system. The key features of the methods of enforcement of their judgments are discussed hereunder.

- **The African Court on Human and Peoples' Rights:**

The African Court on Human and Peoples' Rights is a continental Court established by African countries to ensure the protection of human and peoples' rights in Africa. The Court reinforces and compliments the African Commission on Human and Peoples' Rights. Articles 29, 30, and 31 of the Protocol on the Court provide the method of enforcement of the judgments of the Court. The Protocol provides that "*Parties to a case should be notified of the judgments of the Court and the said judgment is to be further transmitted to Member States of the OAU and the Commission*"[46]. The Protocol further provides for the "*Council of Ministers to be notified of the judgment and monitor its execution on behalf of the Assembly*"[47]. States parties to the Protocol also undertook *"to comply with the judgment in any case to which they are parties within the time stipulated by the Court and they are to guarantee the execution of same*"[48].

Also, "*the Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgment*[49]". In the same vein, the Rules of the African Court on Human and Peoples Rights provide that "*the judgment of the Court shall be binding on the parties*[50]*"* and that *"the Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly*"[51]. Furthermore, the Protocol contains similar provisions on the binding nature of judgments similar to those in the Protocol on ECCJ. It clearly provides that "*the decision of the Court shall be binding on the parties and that subject to the provisions of paragraph 3, Article 41 of the present Statute, the judgment of the Court is final*[52]".

Also, *the parties must comply with the judgment made by the Court in any dispute to which they are parties. This compliance is expected to be within the time stipulated by the Court and shall guarantee its execution*"[53]. "*Where a party has failed to comply with the judgment, the*

[46] Article 29(1) of the Protocol on the establishment of the African Court on Human and Peoples' Rights.
[47] Article 29 (2) of the Protocol on the establishment of the African Court on Human and Peoples' Rights.
[48] Article 30 of the Protocol on the establishment of the African Court on Human and Peoples' Rights.
[49] Article 31 of the Protocol on the establishment of the African Court on Human and Peoples' Rights.
[50] Rule 61(5), Rules of the African Court on Human and Peoples' Rights.
[51] Rule 64(2), Rules of the African Court on Human and Peoples' Rights.
[52] Article 46(1) of the Protocol on Statute of the African Court on Human and Peoples' Rights
[53] Article 46(3) of the Protocol on Statute of the African Court on Human and Peoples' Rights

Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment[54]. "*The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act*[55]"

The various provisions above are clear on the method of enforcement of the Court's decisions. It provides for "*the Court to refer matters to the Assembly where parties fail to comply with judgments and decisions of the Court. The Assembly in turn, is empowered to decide upon measures to be taken to give effect to that judgment*"[56].

The ECCJ does not have a similar provision in its Protocol that allows it notify and transmit judgments and decisions to Member States and the Commission or to monitor the implementation of the judgments. Furthermore, the Council of Ministers of ECOWAS are not empowered to monitor the enforcement of the Court's judgments, unlike that of the African Court, where both the Council of Ministers and Executive Council, monitor the execution of judgment on behalf of the Assembly. Nothing empowers the ECCJ to refer defaulters that fail to comply with its judgments to the Commission, the Council of Ministers or the Authority of Heads of States and Government. The African Court system shows active political involvement in the implementation mechanism and therefore rests within the political realm.

- **The Inter-American Human Rights Court**

Under the Inter-American Human Rights system, the Commission is vested with the power to request state report from Member States regarding their human rights situation. The Commission is vested with broad powers in relation to country reports. Article 65 of the American Convention establishes the obligation of the Court to submit an Annual Report to the General Assembly of the Organization of the American States (OAS) concerning the work of the Court and this report has to specify the cases in which a State has not complied with the Court's judgments[57]. The Inter-American Convention also provides that to each regular session of the General Assembly of the Organization of American States the Court is to submit, for the Assembly's consideration, a report on its work during the previous year. The report is to

[54] Article 46(4) of the Protocol on Statute of the African Court on Human and Peoples' Rights
[55] Article 46(5) of the Protocol on Statute of the African Court on Human and Peoples' Rights
[56] Article 46 (1), (2), (3),(4) and (5) **PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS**
[57] Article 65, American Convention on Human Rights.

specify, in particular, the cases in which a state has not complied with its judgments and make recommendations[58].

The Court considered that in order to be able to inform the OAS General Assembly, it was necessary for the Court itself to know the degree of compliance with its decisions. The Inter-American Court has read this provision as allowing it to issue *ad hoc* judgments assessing whether a state has complied with the remedial measures imposed upon it by the Court. Thus, the Inter-American Court has taken upon its shoulders the need to further guide states on compliance strategies.

The procedure for monitoring compliance with the judgments and other decisions of the Court requires the submission of reports by the state and observations to those reports by the victims or their legal representatives. In turn, the Commission presents observations to the state's reports and to the observations of the victims or their representatives. Interestingly, the Court may require from other sources of information, relevant data regarding the case in order to evaluate compliance. To that end, the Court has been authorized to request the expert opinions or reports that it considers appropriate. In case of a finding of non-enforcement, additional, more detailed obligations may be imposed upon the state in order to ensure compliance[59].

The ECCJ is not vested with similar powers by its Protocol to submit a report to the Council of Ministers or the Authority of Heads of State and Government on its work during the previous year and the cases in which a State has not complied with its judgments. Although, the ECCJ submits its Annual Report to the ECOWAS Commission for inclusion in the President of the Commission's Annual Report, it does not include the status of implementation of its judgments.

- **The European Court of Human Rights**

The European system is set up under the auspices of the Council of Europe. The

Principal Convention of the system is the European Convention on Human Rights and Fundamental Freedoms which entered into force in 1953. The method of enforcement of the decisions of the ECCJ is remarkably different from the method of execution of judgment of the

[58] **Article 65 of the American Convention** (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969).
[59] Article 69 (2) of the Rules of Procedure of the Inter-American Court and **The Inter-American System of Human Rights: A Research Guide** *By Cecilia Cristina Naddeo.*
http://www.nyulawglobal.org/globalex/Inter_American_Human_Rights.html

European Court on Human Rights which is more result oriented. Before the establishment of the current system, the European system had both a Commission and a Court.

The Committee of Ministers is a body of the Council of Europe entrusted with the tasks of supervising the implementation of the decisions of the European Court of Human rights. The Committee of Ministers has developed its own rules for exercising its task of supervising the implementation of the decisions of the court of human rights. Monitoring and ensuring execution of judgments of the European Court on Human Rights (ECHR) is done through one of the most advanced treaty- based systems in the field of human rights[60].

Two basic provisions govern Article 46 of the ECHR, which provides for the supervision of the ECHR Judgments, also Article 39 of the ECHR, provides for the supervision of the terms of friendly settlements. Article 46 entrusts the task of monitoring the states parties' implementation of the Court's Judgments to the Committee of Ministers (CM). The European system is generally recognized as having the highest level of compliance with decisions on individual complaints, in particular with regard to monetary compensation.

The judgment of the Court is transmitted to the Committee of Ministers, which supervises its execution. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it could refer the matter to the Court for a ruling on the question of interpretation. Where the Committee of Ministers considers that a party refuses to abide by a judgment in a case to which it is a party, it may, after serving formal notice on that party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken[61]. ECtHR Committee of Ministers has an Execution Department staffed by lawyers.

Unlike the European System, where the Convention provides for the Committee of Ministers to monitor compliance with the judgments of the European Court of Human Rights, the ECOWAS Court of Justice Protocol does not have any provision similar to that.

[60] Shelton. D (2013): The Oxford handbook of International Human Rights Law, (Oxford University Press)

[61] Article 46, European **Convention for the Protection of Human Rights and Fundamental Freedoms** Rome, 4.XI.1950

The role of the ECOWAS Council of Ministers in the enforcement mechanism of the ECOWAS Court's decisions is yet to be defined like in the case of the European Court of Human Rights.

IV. RECOMMENDATIONS/MEASURES FOR IMPROVING THE ENFORCEMENT MECHANISM OF THE JUDGMENTS OF ECOWAS COURT OF JUSTICE

There is a need to review the enforcement mechanism of the judgments of the ECOWAS Court of Justice and to adopt desirable measures from other Regional Courts in order to strengthen the enforcement mechanism. In the light of the above, the following recommendations are made to improve the enforcement mechanism:

1. Domestication of the Revised Treaty, Protocols on the Court and other ECOWAS texts by Member States (incorporation into the domestic laws of Member States) in accordance with Article 5(2) of the Revised Treaty.
2. Enactment of legislation by Member States for the recognition and enforcement of the judgments of ECOWAS Court of Justice.
3. Involvement of the ECOWAS Commission and political actors in ECOWAS, like the Council of Ministers and Authority of Heads of States and Government in the enforcement mechanism of the ECOWAS Court of Justice.
4. A Committee of Ministers should be constituted to monitor and supervise the enforcement of the judgments and decisions of the Court like in the European Court system enforcement mechanism.
5. The Court should be empowered to send its own Annual Report to the ECOWAS Council of Ministers or the Authority of Heads of State and Government on the status of compliance of its judgments like in the Inter-American Court of Human Rights enforcement mechanism.
6. Upon delivery of a judgment, a copy should be sent to the President of ECOWAS Commission and all the Member States, notifying them of the decision of the Court in order to ensure that steps are taken towards enforcing same.
7. A Unit should be established at the ECOWAS Commission for the purpose of monitoring the enforcement of Judgments of the Court. The Unit should be given the mandate to follow-up, investigate and verify the level of compliance with the decisions of the Court.

8. The Court could be empowered, to include specific time-limits or general guidelines for compliance with its decisions and judgments. After the expiration of such time or on the initiative of the winner, the winning party could reapply unilaterally for a declaration of non-compliance.
9. The Court should also be empowered to impose judicial sanctions, day to day or lump sum for non-compliance.
10. The ECCJ should also be empowered to monitor the execution of its judgments.
11. There is the need for necessary amendments to the constitutive texts of ECCJ to strengthen the mechanism on enforcement of the judgments of the Court.

CONCLUSION

The ECCJ enjoys the respect of ECOWAS Member States as its decisions are not summarily dismissed by any Member State. Despite the non-compliance with the decisions of the ECCJ by some Member States, non-state actors still have confidence in the Court. However, the continued non-compliance with the Court's decisions by Member States may give rise to loss of confidence by the public. The key selling points of the Court are its independence, boldness and impartiality. In the administration of justice, there is a corollary between the speedy dispensation of justice by a Court, its independence, impartiality, boldness and effectiveness and public trust and confidence. In the West African sub-region, the Community Court of Justice, ECOWAS has gained credibility for its bold judicial pronouncements. There is therefore a need to strengthen the enforcement mechanism of the Court in order not to render the Court a toothless bull dog.

The Court, like other international tribunals relies on the cooperation of States to comply with its decisions in good faith. The Court can only provide effective legal remedies when its judgment are complied with by Member States in accordance with the principle of Pacta Sunt Servanda. The judgments of the Court are binding and Member States have an obligation to comply.

A Critique of the Constitution Alteration Process in Nigeria's' 7th and 8th National Assemblies

Usman Ibrahim*

Abstract

Since the beginning of the Fourth Republic in 1999, Nigeria has witnessed 3 successful Constitutional alterations. Secondly, during the regimes of President Olusegun Obasanjo and President Goodluck Ebele Jonathan about two proposals for the Constitutional alterations failed. It was noted that the procedures adopted for these alteration processes are in one way or the other, the same. One fundamental problem that kept on re-occurring in all the processes is the manner of involving the public in the alteration process. The only time the National Assembly (NASS) attempted to get it right was in the 7th NASS alteration process where the House of Representatives used the methodology of Peoples Public Hearing. Under this methodology, the Hon Speaker of the House directed all members of the House to go back to their constituents to seek their opinion on each item of the Constitution that was being considered for the alteration. In an attempt to comply with the direction of the Hon. Speaker, the members centralized the hearing in a particular location of each constituency. The Senate on its part, adopted the methodology of town hall meeting, regional, and national public hearing and international visits to the advance democracies, and discussions with experts on Constitutional law and federalism was adopted. The Senate also set a secretariat for collection of all memoranda from the general public. In the 8th Assembly, the NASS reviewed the 7th Assembly proposal that failed together with CONFAB report without seeking the opinion of the general public. This research examines these problems and many more and makes a little comparison with the South African and Switzerland approaches of involving the public in the law making process and made recommendations on the way forward.

Keywords: Alteration, Bill, Constitution, Legislative Aides, Public Hearing.

INTRODUCTION

The Constitution of the Federal Republic of Nigeria1999 (as altered) can be altered either by the Legislature [1] (the law makers themselves) as provided under section 9 of the Constitution and in accordance with procedure set out in the Standing Orders of both Houses.[2] It can also be altered by the Judiciary,[3] in exercising its power to review the functions of the other arms of government. This is usually carried out at the time of its interpretation, in order to give effect

* LL.B, LLM, BL, Research Fellow National Institute for Legislative and Democratic Studies (National Assembly) Abuja, Nigeria smnibrahim2@gmail.com 08036263860

[1] Section 4 and 58 of the Constitution of the Federal Republic of Nigeria

[2] Order XIII Rule 98 of the standing orders of the House of Representatives of July, 2014

[3] Note 1, Section of 6 of the Constitution.

to a certain provision or to ensure that some actions conform to the provision of the Constitution or to nullify some of the provision of a statute. In line with the above, this paper discusses the procedure of altering the Constitution under the 1999 Constitution; Constitutional alteration by the Judiciary; and the role of Legislative Aides in Constitutional Alterations. The objective of this research is to appraise 7th and 8th Assemblies Constitutional alteration process with the view of making recommendation on how to improve the subsequent processes. The paper also discusses the roles of legislative aides of the members of the NASS in the alteration process, with the view of making recommendation on the way forward.

However for the purpose of clarity, the paper provides clarifications for key concepts that are relevant to this research which includes: Bill Constitutional Alteration, Public Hearing and Legislative Aides. Bill: A bill is a legislative proposal and the first step in creating a new law. Every bill is assigned a unique number that either begins with "HR or HB" (to show the bill originated in the House of Representatives) or "S or SB" (to show it originated in the Senate). Most bills never become law. For a bill to become a law, the bill, in the case of National Assembly, must be passed in identical form by both the Senate and House of Representatives and then assented to by the President or Governor, in the case of a State. Constitutional Alteration, also referred to as 'Constitutional amendment, is a means by which the Constitution can be modified, altered, or changed, through the legislative assemblies. Public Hearing: Otherwise referred to as involving the public or public participation, is a hearing that within a reasonable limit, is open to anyone who wishes to observe, such a hearing is often characterized by the right to appear and present a memorandum before a given committee. Public hearing is a legislative decision that is open to the public held for the purpose of taking contributions on a bill that is under legislative scrutiny. Legislative Aides: is person who assists member (s) of the National and State Assembly in the performance of their Constitutional functions.

PROCEDURE FOR ALTERING THE CONSTITUTION

The authority to alter the Constitution by the Legislature is derived from section 9 of the 1999 Constitution[4]. The Constitution provides that an alteration cannot be passed by the National Assembly unless the proposal is supported by the votes of not less than two-third majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the states.[5] Where the proposal for alteration relates to the alteration

[4] Note 1 Sections 6.
[5] Note 1. Section 9.

of Section 8 (state creation and boundary adjustment), section 9 and chapter IV (Fundamental Human Rights), the proposal must be supported by the votes of not less than four-fifths majority of all the members of each House and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the states. The provision of section 9 of the Constitution shows that the proposal for altering the Constitution shall emanate from the NASS and passed by the NASS, before sending the proposal to State Houses of Assembly for approval. In carrying out the alteration, areas of alteration must be identified in order to determine the number of votes required.

Find below a table showing some of the proposal for the fourth alteration and the number of votes required, that did not succeed in the 7th Assembly

S/N	SUBJECT	SECTION OF THECONTITUTION	VOTE
1	Rotation of power	New provision	
2	Local government	Section 7	2/3
3	State police	Section 214	2/3
4	Political structure	Sections 221 to 229	2/3
5	Judicial reform	Chapter VII	2/3
6	Citizenship question, settler and indigene ship dichotomy	Chapter III	2/3
7	Security	Section 11	2/3
8	Politicization of religion and pro-ethnicity.	Section 10	2/3
9	Dispensing with Presidential Assent	Section 58	2/3
10	Altering Section 9 of the Constitution.	Section 9(4)	4/5
11	Financial Autonomy to State Houses of Assembly	New provision	
12	Revenue sharing,	Section 162 to 163	2/3
13	States creation,	Section 8	4/5

The National and State Houses of Assembly are guided by the provisions of the 1999 Constitution (as altered) and its Standing Orders (brought pursuant to sections 60 and 101 of the Constitution which empowers the Legislature to regulate its proceedings). The procedure, in relation to a bill, means subjecting a bill at the floor of the House to the proper legislative processes (from its introduction to the final assent or overriding-veto) as prescribed by the Constitution and the standing orders. The law-making process is, perhaps, the most captivating of all the roles and duties performed by the legislature under a Constitutional framework.

The alteration process consists of several stages. A draft bill is prepared, scrutinized, adopted and published in the bills journal. Every bill must receive three readings before its passage, namely, first reading, second reading and third reading which shall be in different days unless the House unanimously directs otherwise. The procedures for introducing legislation and seeing it through committee are similar in both the House and Senate. Legislative proposals originate in a number of different ways, but no matter where a legislative proposal originates, it can only be introduced by a member of the Legislature. The first and second readings of any Bill for altering the provision of the Constitution shall be considered and proceeded with in accordance with the procedure on Bills as provided in the same Constitution,[6] and the House Standing Orders[7]. After the 2nd reading, the Bill is committed to a Special Committee of the House on Constitutional Alteration for further legislative action. In Constitution alteration, the legislative action of the committee starts after second reading, and usually includes public that will give opportunity for members of the public to make input.

ANALYSIS OF PUBLIC HEARINGS IN THE ALTERATION PROCESS

Involvement of the public in Constitutional alteration process in Nigeria is a requirement in the legislative process[8]. This system is sometimes called stakeholders hearing or public hearing. The hearing is usually carried out after the Constitution alteration bill has passed through second reading[9] in a legislative house of the National Assembly and referred to a relevant committee for further legislative action. The hearing gives the public opportunity to make input in the bill on important issues that relate to substance of the bill and the modalities for the implementations.[10] On certain controversial legislative issues, it can be important to conduct a thoughtful public process in advance of any public hearing.[11] Hearings often occur late in the process and may leave citizens with the impression that local officials do not want to hear their ideas. The format of hearings often leaves little, if any, room for reasonable discussion, give or take, or response to prior testimony. There are reasons for holding a public hearing in Constitution alteration such as to open discussions about a bill; To communicate and clarify needs about a bill; to communicate a sense of community concern about a bill; to increase

[6] Section 58 subsection (1) to (5) of the Constitution.
[7] Note 2, Oder XII Rules 79 to 88
[8] Ibid
[9] Ibid
[10] A research report on *transparency and public participation in law making process (a comparative overview and assessment of the situation in Macedonia) in 2010,* commissioned by the Organization for Security and Co-operation in Europe (OSCE) Spillover Monitor Mission in Skopje. It was developed by Emina Nuredinoska (Macedonian Center for international Cooperation – MCIC, Macedonia) and Katerina Hadzi-Miceva Evans (European Center for Not-for-Profit Law - ECNL, Hungary) at pages 17 to 18
[11] ibid

community awareness about a bill; to attract media attention about a bill; to show your side of controversial issues about a bill; to re-open public dialogue on issues that have fallen out of the public mind about a bill; to counter your opponents' arguments against your group or initiative about a bill; to find a solution to a community problem about a bill; to gather information for the bill.

Participation in law-making processes means a possibility for the citizens, civil society organizations (CSOs) and other interested parties to influence the development of policies and laws that affects them.[12] The importance of involving the public in these processes is increasingly recognized by European Union (EU) institutions, and national governments.[13]

BENEFITS OF INVOLVING THE PUBLIC IN LAW MAKING PROCESS

Involving the public in the law making process has practical, philosophical and ethical benefits, and below are some of such benefits: It helps meet internal regulations and requirements of a legislative assembly, such as standing orders of a given assembly. Many programs, laws and rules require some level of public participation; it adheres to democratic principles[14]. Some peoples' culture and society embrace the notion that people have the right to influence what affects them.

Paying attention to the public's ideas, values and issues results in more responsive and democratic governance; it can create more substantive decisions and outcomes. Better results occur when decision-makers have access to more information. Public involvement brings more information to the decision, including scientific or technical knowledge, knowledge about the context where decisions are implemented, institutions involved, history and personalities. More information can make the difference between a good and poor decision.

More perspectives. Additional perspectives expand options and enhance the value of the ultimate decision. The more views you gather in the process of making a decision, the more likely your final choice will meet the most needs and address the most concerns possible. Increased mutual understanding. Public participation provides a forum for decision makers and stakeholders to understand each other's' issues and viewpoints. The discussions broaden the

[12] Ibid
[13] Ibid
[14] Ibid

knowledge base as each one contributes to the decision. Free consultation, involving the public provides free consultation to public projects. Members of the public bring technical expertise, specific knowledge about the effects of decisions, local experience and history, and other specialized experience to the decision-making process. It can identify problems that can and should be solved. Good public participation processes help to quickly identify key difficulties, challenges or opportunities; create better, deeper understanding of the situation, problems, issues, opportunities and options for action; manage single-issues advocates; build better relationships; manage conflict more effectively; build a coalition of support; get it right the first time. It can enhance future problem-solving capacity. A good process can greatly enhance, rather than diminish, future problem-solving capacity. Participants will see and experience success that can be applied to future situations[15]. It can also assist in strengthening democracy; preventing conflict among different groups and between the public and the government and increasing confidence in public institutions[16].

CONSTITUTIONAL ALTERATION PROCESS

In the 7th Assembly, the House of Representatives used the methodology of Peoples Public Hearing[17]. Under this methodology, the Hon Speaker of the House directed all members of the House to go back to their constituents to seek their opinion on each item of the Constitution that is being considered for the alteration. In an attempt to comply with the direction of the Speaker, the members centralized the hearing in a particular location of each constituency. After the hearing reports were submitted to the House Committee on Constitution Alteration for consideration and reporting to the Committee of the whole House. The hearing took place only in a single area selected by the member representing the constituency. The methodology adopted by the House of Representatives, actually, attempted to conduct a public hearing in line with report for the National Campaign for People's Right to Information (NCPRI) of April, 2011 and UN Human Rights Committee on Public Participation in law making process.[18] However, the members did not reach the grass root. This is because as the hearing was centralized, the average Nigerian may not be able to transport and feed

[15] Note 10 at pages 17 to 18
[16] Note 7, PP 12 to 14.
[17] 7th National Assembly Report on the Constitutional Alteration Bill
[18] Note 7

himself to the venue of the hearing[19]. Secondly, the members did not properly embark on serious sensitization campaign to enlighten the people on the content and the rationale behind the alteration process[20]. As a result of these shortcomings, most of the people that voted followed the voice vote without actually knowing how the law would affect them. Thirdly, the deaf, dumb and blind persons were not carried along in the process. This is because the members of the House did not use special communication experts and brails for this category of people. Furthermore, the hearing did not capture a reasonable percentage of the people in the constituency[21]. These deficiencies made the entire process grossly defective, but nevertheless, is a good attempt in the right direction compared to previous alteration processes.

In the 7th Senate, the methodology of town hall meeting, regional, and national public hearing was adopted[22]. The Senate also set a secretariat for collection of all memoranda from the general public. Thus, the "participatory" approach constituted a key guiding principle of the entire process.[23] This approach is critical to achieving the broad principles of Constitution review, especially those relating to building an active citizenry and an effective governance framework. The Senate also invited seasoned experts on Constitutional law and federalism as consultants to provide research papers and reports on the many areas of Constitutional governance for the consideration of the committee[24]. The Senate also undertook study tours to the International Law Institute in Washington DC, Forum of Federations in Ottawa, Canada and to India where the Committee met and interacted with parliamentarians, judges, government officials, scholars and Nigerians living in diaspora[25]. They were able to gain new insights into the practice and challenges of federalism. Furthermore, they met and consulted with Civil Society Organizations and organized interest groups in order to learn from them the strengths and weaknesses of the Constitution[26]. In this methodology, the same problem suffered by the methodology adapted by the House of Representatives repeated itself here. As it is did not cure the defect observed in the process.

[19] This what I personally witnessed at the hearing.
[20] Ibid.
[21] Ibid.
[22] Note 17.
[23] Ibid
[24] Ibid
[25] Ibid
[26] Ibid

This is because, the methodology of House of Representative is better in terms of involving the public from grass root. The town hall meetings were not properly organised, because the hall cannot accommodate 1 per cent of the population of the various area[27]. Where the meeting was carried out in an open place no reliable public address system, the forum became more of political rallies than public hearing. At the regional and national public hearings, the official language was English and not all people understand or communicate in English Language[28]. The Senate did not make provision for transportation, feeding and other logistics that would enable reasonable number of people to attend[29]. Similarly, the Senate did not properly embark on serious sensitization campaign to enlighten the people on the content and the rationale behind the alteration process[30]. The deaf, dumb and blind were also not carried along in the process[31]. These deficiencies made the entire process grossly defective and more of academic exercise than public hearing but it is also a good attempt in the right direction compared to previous alteration processes.

In the 8th Assembly, both the Senate and House of Representatives started the process from reviewing the literature developed by the 7th Assembly to find out what went wrong and to examine some of the challenges that led to the failure of the exercise[32]. In the 7th Assembly process, the alteration bill was one and the entire process died because the President did not give his assent. In the light of the above, the 8th National Assembly reviewed the 7th Assembly proposal, while adapted some recommendations from the CONFAB Report of 2014 with few additions for the consideration by NASS. The joint committees held retreat in Lagos where speakers and majority leaders from all the Houses of Assembly of the States as well as one female legislature from each house of assembly attended. Since the process is more or less literature review, both the Senate and House of Representatives did not embark on public hearing. Though, the public were not properly involved in the 7th Assembly Constitutional alteration process, it could have been a better opportunity for this National Assembly to learn from previous mistakes and set a better phase for the process, particularly in public participation. The only observable innovation is that the 8th Assembly Alteration Bill was

[27] This problem was noticed at the venue of all the meetings.
[28] Ibid
[29] Ibid
[30] Ibid
[31] Ibid
[32] https://www.vanguardngr.com/2017/07/national-assembly-to-vote-on-32-constitution-alteration-bills accessed on 15/01/2018

divided based on the item considered for alteration. This system enables the President to give assent to all the Bills or select few and give assent instead of rejecting the entire process.

All the observable shortcomings in the mechanisms adopted by the 7th Assembly in public participation in the alteration process are still active. This is because no attempt has been made by this Assembly to make improvements. At the end of the public hearings, the Special Committee reports back to the House, while the Committee of the whole House considers the report of the Special Committee. In the clause by clause consideration in Committee of the whole, a clause or question shall be deemed passed if it is supported by positive vote of 2/3% majority of all the members of the House[33]. If the alteration dealt with sections 8 and/or 9 the percentage is 4/5% of all the members of the House[34]. Thereupon, a clean copy of the Bill shall be prepared and read the third time, by a vote of 2/3% or 4/5 majority of the members. The Bill as passed shall be forwarded to the Senate for concurrence or to the House as the case may be. In the event of variation between the Senate and House versions, a conference committee will be set by the leadership of both houses for resolution. The conference committee will submit harmonized copy of the Bill to each house for adoption in the plenary.

At the conclusion of the process in the NASS, a clean copy of the alteration Bill as passed by the NASS will be transmitted to each Clerk of the 36 State Houses of Assembly, by the Clerk to the NASS for approval by resolution. Each of the State Houses of the Assembly shall communicate its resolution on all the clauses, and the clause(s) that got the required votes shall stand passed. At this stage, the State Assemblies are expected to involve the public within their various constituencies to make input in the process. The input of their people shall determine the resolution of a given Assembly. Unfortunately, the members, usually, restrict themselves to the precincts of their complex and pass a resolution on each item as transmitted to them by the NASS[35]. This is the second opportunity for perfecting the Bill, which supposed to remedy some of the deficiencies observed in the processes carried out by the NASS. But the opportunity was not utilized. When the alterations are approved by 2/3 of all the State Houses of Assembly, a clean copy, certified by the Clerk to the NASS, shall, as soon as possible, be presented to the President of the Federal Republic of Nigeria for his assent, within 30 days. This was where Nigerians witnessed a little controversy, in the 6th National Assembly alteration

[33] Section 9 of Constitution (as altered) Note 7 Order XII Rules 79 to 88 of House Standing Orders 2014.
[34] Ibid
[35] Ibid

Bill, on whether the presidential assent is required in Constitution alterations (in Third Alteration) see the case of *Olisa Agbakoba VS NASS*[36] where Justice Okechukwu Okeke of Federal High court, sitting in Lagos, nullified the amendment of the 1999 Constitution by the NASS without the assent of President Goodluck Jonathan. The veto power gives the Executive right to participate decisively in the legislative process. It is a feature of Presidential system of government whereby, upon receipt of a bill passed by the legislative assembly, the President or the Governor of the State, as the case may be, may decide to veto the bill by not signing it into law, and return same to the Legislature with a statement stating grounds of his objections. This is what happened in the case of alteration proposed in the 7th Assembly. Upon receipt of the Executive veto, the Legislature may re-examine the grounds of objections and, if the grounds are found to be meritorious, the NASS may make alterations and the bill shall again be sent to the President for assent.

If however, the Houses are of the opinion that the Presidential veto lacks merit, they can ignore the alteration and override the Presidential veto by passing the Bill into law by two-thirds majority of each of the Houses[37]. Upon the President assenting, the Bill becomes an Act or when the veto is overridden by 2/3[38], the bill automatically becomes law without assent of the President. The process of enrolment begins after the presidential assent or when veto is overridden. The Clerk, to the NASS shall cause the Government printer to publish the Act in triplicate. The printer publishes the Act accordingly on vellum and returns them to the Clerk of the National Assembly.

The latter shall retain one copy for his records, delivers one copy to the President and the other copy to the Chief Justice of Nigeria for enrolment, where it is enrolled in the Supreme Court and it becomes an Act of the NASS.

JUDICIAL REVIEW AS ANOTHER MEANS WAY OF LEGISLATIVE PROCESS

The attempt to alter the Constitution for the 4th time in the 7th Assembly was checked by the Court in the exercise of its power to review the legislative and executive powers. At the conclusion of the alterations by the National and State Houses of Assembly, the National Assembly transmitted clean copy of the alterations to President Goodluck Jonathan for

[36] Unreported cases delivered by at Federal High Court Lagos in 2010.
[37] Section 58 of the 1999 Constitution as amended.
[38] Ibid

Presidential assent in fulfilment of requirements stipulated under Section 58(1). However On Wednesday, 15th April, 2015, the President of the Senate, David Mark, read on the floor of the Senate during plenary sitting, a letter addressed to the Senate by President Goodluck Jonathan.

In the letter, the President pointed out what he considered as defects that may not make the bill for the 4th Alteration of the Constitution enjoy his assent unless and until such defects are reviewed or reconsidered by the National Assembly. Particularly, the President faulted Section 4 of the 4th Alteration Bill, 2015, which attempts to alter Section 9 of the Constitution by inserting a new subsection 3A, which in effect has jettisoned the assent of the President in the process of Constitutional alteration. The President advanced reasons for withholding his assent as he stated in his letter as follows: ''However, this alteration can only be valid if the proposal was supported by votes of not less than four-fifth majority of all the members of each House of the NASS and approved by a resolution of the House of Assembly of not less than two-thirds of all the states as provided by Section 9(3) of the 1999 Constitution." This is a fundamental requirement of the Constitution and in the absence of credible evidence that this requirement was met in the Votes of Proceedings of the National Assembly, it will be unconstitutional for the President to assent to the Bill.

In light of the above, the NASS started exploring ways of exercising powers given to them under section 58(5) to override the veto of Mr. President. On realizing this development, the Attorney General of the Federation filed a suit against the National Assembly at the Apex Court[39] praying for an Order to stop the NASS from exercising the powers given to them under section 58(5). Consequently, the Supreme Court stopped the National Assembly from going ahead with its plan to override the veto of Mr. President. This can be seen in a ruling delivered by Chief Justice of Nigeria Justice Mahmud Mohammed (as he then was) " in order to give learned Senior Counsel to the Plaintiff time to address the Court on the salient issues surrounding this case regarding the proper parties having regards to requirement of the Supreme Court (Additional Jurisdiction) Act Cap S16 LFN 2004 and Sections 232 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) prescribing original jurisdiction of court and the parties and the parties can invoke that original jurisdiction. This case is further adjourned to 18/6/2015 for the parties to address the Court on the issue. Meanwhile, pending the hearing of the parties on 18/6/2015. Status quo ante shall be maintained in the matter. In

[39] SC214/2015.

other words, no steps shall be taken to alter the current position of the subject matter of the suit by the defendant or the Plaintiff.". Since then, the parties did not resume the trial.

In another development, Olisa Agbakoba (SAN) was dissatisfied with the decision of the NASS to remove the powers of the President of giving assent under constitution alteration. He instituted a case against the NASS and the case was titled *Olisa Agbakoba Vs National Assembly*[40]. Federal High Court sitting in Lagos ruled that the alteration of the 1999 Constitution as passed by the NASS and approved by more than two-thirds majority of the State Houses of Assembly cannot take effect unless assented to by the President.

For the purpose of clarity, this paper throws more light on the concept 'Judicial Review'. It is another form of legislative process where the decision of court becomes a law. Judicial Review is the power of the courts to interpret a given statute to declare it proper or contrary to the Constitution in line with our legal system.[41] It also includes reviewing the executive act either contrary to, or in accordance with, the Constitution, with the effect of rendering the act invalid or vindicating its validity and so putting it beyond challenge in future.[42] In the case of *Abdulkarim v Incar Nig, Ltd*.,[43] the Supreme Court of Nigeria, per Nnaemeka Agu JSC, succinctly highlighted the scope of judicial review within the Nigerian Constitutional jurisprudence as follows: In Nigeria, which has a written presidential Constitution, judicial review entails three different processes; namely: (i) The courts particularly the Supreme Court, ensuring that every arm of government plays its role in the true spirit of the principles of separation of powers as provided for in the Constitution. (ii) That every public functionary performs his functions according to law, including the Constitution; and (iii) For the Supreme Court, that it reviews court decisions including its own, when the need arises in order to ensure that the country does not suffer under the same regime of obsolete or wrong decisions. It is significant to note from the outset that in Nigeria, the power of judicial review is expressly conferred on the courts by the Constitution.[44]. This power of Judicial review is to ensure

[40] Note 14.

[41] Imo Udofa, (2015) *The Power of Judicial Review in the Promotion of Constitutionalism in Nigeria: Challenges and Prospects.* Journal of Law, Policy and Globalization ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.40.

[42] B.O. Nwabueze, The Presidential Constitution of Nigeria (London: C.Hurst & Company (Publishers) Ltd in Association with Nwamife Publishers Ltd., 1982) p. 309.

[43] (1992) 7 NWLR (Pt. 251) 1.

[44] 1999 Constitution, as amended s. 4(8); s. 6(6)(a).

obedience to its provisions by all persons and authorities since any violation of its provisions will be an illegality.[45]

The Constitution's supremacy is also assured since any derogation from it will be declared void because it is unconstitutional. The vesting of executive powers of the federation in the President and the exercise of such powers by him are made subject to the provisions of the Constitution.[46] The executive power so vested in the President extends to the execution and maintenance of the Constitution itself and all laws made by the National Assembly. Thus, the President shall ensure by his actions that the provisions of the Constitution are observed and enforced. The President, subject to the provisions of the Constitution, may exercise the executive powers by himself either directly or through the Vice President and Ministers of the government of the Federation or officers of the public service of the Federation.[47] It follows that executive acts or omissions could relate not only to the direct acts or omissions of the President but also to the acts or omissions of the entire executive arm of the federal government including institutions constituting the public service of Nigeria. The provision of section 1(2) of the Constitution of the Federal Republic of Nigeria, 1999 stresses the supremacy of the Constitution and insists that Nigeria can only be governed in accordance with the provisions of the Constitution. By means of judicial review, the judicial organ of government exercises a measure of control and check over the legislature and the executive. The power of court to give meaning of a statute or an act of the executive may render a statute a nullity or amend an existing law or policy. Where the law is declared a nullity, the legislature must repeal the law or amend the law to bring it in conformity with the decision of court. Similarly, where the judicial decision add or reduce something from the construction of the statute, it may also form the basis for amending the existing law. These are some of the reasons why judicial review forms an important component of legislative research.

The Provisions of section 30 of *Legislative Houses (Powers and Privileges) Act*[48] has ousted the jurisdiction of court, which violates the principles of separation of powers. The adverse effect of this provision which appeared both undemocratic and uncivilized has paved way for

[45] Chales Manga Fombad, "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa". www.saifac.org/docs/repapers/RPS%20NO%2018paf. Accessed 10/01/2018.
[46] 1999 Constitution, as amended, section 5.
[47] Ibid.
[48] *Cap. L12 LFN, 2004.*

the decision of the Court of Appeal in the case of *Hon. Mike Balouwu and 3 others VS Peter Obi*[49] declare section 30 of the Act a nullity.

COMPARATIVE CONTEXTS[50]

SOUTH AFRICA

Legislative Structures and Relevant Provisions in South Africa National legislative authority is vested in Parliament which consists of two houses: the National Assembly (NA) and the National Council of Provinces (NCOP).[51] The Constitution also provides for provincial legislatures and local government structures, which have varying degrees of legislative power. The NA and the NCOP represent different interests in the legislative process, with the NA representing "the people . . . to ensure government by the people" and the NCOP representing "the provinces to ensure that provincial interests are taken into account" in the legislative process.[52] The participation of both houses of Parliament is required in the legislative process. If either of these democratic institutions fails to fulfill its Constitutional duty in relation to a bill, which includes the duty to facilitate public participation, Parliament has failed to fulfill its duty.[53] The Constitutional duty to facilitate public involvement in the Legislative and other processes is found in section 59(1)(a) for the NA; section 72(1)(a) for the NCOP; and section 118(1)(a) for provincial legislatures. Section 1(d) sets out the founding values of a multi-party system of democratic government, which, according to the court, include ensuring accountability, responsiveness and openness. The Preamble of the Constitution expresses the values that underpin the goals agreed upon for the establishment of a society based on democratic values: social justice and fundamental human rights.[54] The Court interpreted the provision in the Preamble which states that─ "The foundations for a democratic and open society in which government is based on the will of the people" as indicating that "the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created."[55]

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[49] pt. 1028 (2007) 5 NWLR at pg 488-502-503

[50] An article produced by Karen Syma Czapanskiy and Rashida Manjoo tiled "The Right of Public Participation in the Law Making Process and the Role of Legislature in the Promotion of this Right" published on Duke Journal Of Comparative & International Law [Vol 19:1 accessed at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1060&context=djcil on 28/08/2014

[51] S. AFR. CONST. 1996 ch. 4, §§ 42 (1), 43(a), 44(1).

[52] Ibid..

[53] Doctor for Life Int'l V Speaker of the National Assembly & Others 2006 (12) BCLR 1399 (CC) (S. Afr.).

[54] S. AFR. CONST. 1996 pmbl. ("We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . .

[55] Supra- Doctors for Life, 2006

The right to political participation is further strengthened by the political rights found in Section 19 of the Constitution and the clause protecting freedom of expression found in Section 16 of the Constitution.[56] Altogether, according to the Court, this language indicates a broader notion of political participation than simply the right to vote.[57] The applicant in this case, an advocacy organization called Doctors for Life,[58] complained that, during the legislative process leading to the enactment of four statutes, the NCOP and some of the Provincial Legislatures did not comply with their Constitutional obligations to facilitate public involvement in their legislative processes. They argued that there had been a failure to invite written submissions and conduct public hearings on these statutes. The court referred to the four statues collectively as 'health statutes.[59] The respondents denied the allegations and argued that both the NCOP and the various provincial legislatures had complied with the duty to facilitate public involvement in their legislative processes. The respondents also challenged the applicant's assertion as to the scope of the duty to facilitate public involvement. Their contention was that, although the duty to facilitate public involvement requires public participation in the law-making process, essentially all that is required of the legislature is to provide the opportunity to make either written or oral submissions at some point in the national legislative process.

The majority of the Court found that, regarding section 72 (1)(a) of the Constitution, Parliament had failed to comply with its Constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act and the Traditional Health Practitioners Act. Adopting a social and historical context approach, the Court held that certain statutes require mandatory public consultations. Which statutes require such consultations can depend on such things as the nature and importance of the bill, requests received for consultations, and whether or not promises had been made in response to such requests. Public consultations in such circumstances would be an indicator of respect for the views of affected

[56] See S. AFR. CONST. 1996 ch. 2, §§ 16, 19.

[57] Supra- Doctors for Life, 2006

[58] According to the website of Doctors for Life International, "Doctors for Life stands for the following 3 principles: For sound science in the medical profession, the sanctity of life from conception till death, and for a basic Christian ethic." Doctors for Life International, Mission Statement, http://www.doctorsforlifeinternational.com/about/mission.cfm (last visited July 29, 2008) cited by the authors of the article- Karen Syma Czapanskiy and Rashida Manjoo tiled "The Right of Public Participation in the Law Making Process and the Role of Legislature in the Promotion of this Right"

[59] Supra-Doctors for Life, 2006. The health statutes mentioned included the: Traditional Health Practitioners Act 35 of 2004 (intending to bring about a new dispensation of recognizing and regulating traditional health healers); Choice on Termination of Pregnancy Amendment Act 38 of 2004 (making provision for registered nurses, other than midwives, to perform termination of pregnancies at certain public and private facilities); Dental Technicians Amendment Act 24 of 2004 (making provision for persons who have been employed as dental laboratory assistants for a period of not less than five years under the supervision of a dentist or dental technician, and who have been trained by these professionals, to perform the work of a dental technician); and the Sterilisation Amendment Act 3 of 2005. There was no dispute as to whether the National Assembly had fulfilled its constitutional obligation to facilitate public involvement in connection with the 'health statutes.' This had taken place through the acceptance of written submissions made to the National Portfolio Committee on Health, and also by the holding of public hearings.

people. Adequate consultation is even more crucial in contexts where the affected groups have been previously discriminated against, marginalized, silenced, received no recognition, and have an interest in laws that will directly impact them. The Court concluded that both the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were adopted in a manner inconsistent with the Constitution and both were declared invalid.

SWITZERLAND

The Swiss Confederation or *Confoederalio Helvetica* is a federal state, with a political structure comprising three governmental levels: the Confederation, 26 cantons and 2551 communes. This three-level polity is also mirrored in the concept of a three-fold citizenship- federal, cantonal and municipal.[60] Switzerland has a strong tradition of participatory democracy, with the cantons enjoying wide-ranging powers of 'self and shared rule.' As regards the former, cantons possess their own legislative, executive, and judicial bodies ie each canton has its own Constitution, parliament, executive, and judiciary, with the opportunity of making decisions about its own democratic system and Organization[61]. Cantons even has treaty making powers.[62] (Unlike the system in Nigeria where only the National Assembly can legislate on treaty) By virtue of the shared rule, Cantons are guaranteed active participation in the decision making at the federal level in three levels—

(a) through their elected representatives in the Council of State (one of the chambers of the Federal)Assembly;

(b) in the Constitution-making process- according to Article 140(I)(a) of the Constitution, amendments to the Constitution must be submitted to the vote of the people and the cantons. Consequently, revisions of the Constitution are only accepted if a majority of the people and cantons 109 approve the amendments; and

(c) in the federal law-making process- when drafting provisions of a federal act, the Federal Council or the Parliamentary committee have to initiate

[60] See Article 37(1) of the Swiss Constitution.

[61] Thomas Fleiner, Alexander Misic, Nicole Topperwien, Swiss Constitutional Law (2005) made available at fn. 58 at page 39.

[62] Note 90, Article 56(1) of the Constitution.

a consultation procedure, which allows the cantons, political parties and other interested groups to express their views about the new law

Apart from these provisions for cantonal participation, Article 147 also imposes a duty to consult with the public before introducing or amending a law—

> *'The Cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation or other projects of substantial impact as well as in relation to significant international treaties.* '

The Consultation Procedure Act[63] sets out the requirements for public participation in the law-making process. The aim of the consultation procedure is to allow 'the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation.' In particular, the following participants are invited to submit an opinion in order to obtain information on the material accuracy, feasibility of implementation and public acceptance of a federal law— a. The Cantons; b. The political parties represented in the Federal Assembly; c. The National umbrella organizations for the communes, cities and mountain regions; d. The National umbrella organizations for the economic sector; and e. Any other interest groups relevant to the individual case.

REFORMING THE ALTERATION PROCESS: SOME RECOMMENDATIONS

The following set of recommendations are made to ensure a fair, transparent, efficient and effective ways of Constitutional alteration, particularly on how to carry the general public in the process:

1. The strongest method of Constitutional alteration is by enhancing involving the public in the process. This can be achieved through a Constitutional amendment imposing a duty to facilitate adequate public participation, which is similar to the South African approach.

2. Where Constitutional amendment is considered too tedious (as is the case in Nigeria) to facilitate public participation, a statute setting out the main

[63] Federal Act on Consultative Procedure (CPA, SR 172.601).

requirements governing the legislative and law making process ought to be enacted, similar to the Swiss approach.

3. A Code of Practice for public consultation can be developed to provide modalities for public participation that could be used to reach a wider audience e.g. a young person's version, a Braille and audio version and other language versions and an 'easy-read' version.

4. Consultations should be Flexible and ought to be granted to the local authorities to determine the manner in which to conduct consultations. However, certain basic principles must be observed. Thus, consultations ought not to be confined only to inviting written comments; public hearings should also be held to enable oral presentations.

5. The consultation documents should be clear, simple and concise and in a language most suited to the target audience.

6. It is also important for the legislators/government to explain the reasons for its final act/rule/decision, by responding to 'key' or 'major' criticisms and providing explanations for the rejection of 'significant' plausible alternatives.

7. Some legislative authorities and their staff lack the human capital to effectively facilitate public participation, information distribution and education campaigns. The government should imbibe the culture of periodic capacity building for both the legislators and legislative staff to have a broader understanding of legislative process. In the alternative consultants that specialized in the area of public hearing can be engaged in the process.

CONCLUSION

This paper criticized Constitutional alteration procedure in the 7th and 8th Assemblies. From the criticisms, it can be observed that since the beginning of the fourth republic in 1999, Nigeria has witnessed 3 successful Constitution alterations. Secondly, two proposals for the Constitutional alterations failed in administration of President Obasanjo and Good luck Jonathan One fundamental problem that kept on re-occurring in all the processes is the manner

of involving the public in the alteration process. The only time the National Assembly attempted to get it right was in the 7th National Assembly alteration process where the House of Representatives used the methodology of Peoples Public Hearing.

The Senate on its part, adopted the methodology of town hall meeting, regional, and national public hearing and international visits to the advance democracies, and discussions with experts on Constitutional law and federalism was adopted. In the 8th Assembly the National Assembly reviewed the 7th Assembly proposal that failed together with CONFAB report without seeking the opinion of the general public.

An Analysis of Nigeria's "Compulsory Treatment and care for Victims of Gunshots Act, 2017."

Chinedu Anita Ikpeazu*

Abstract

Gunshot victims in Nigeria have for a long time found it very difficult to get prompt medical care in hospitals and healthcare centres all over the country. This is motivated by the practice of demanding for a police report from injured persons before they can be treated by medical personnel; a practice which is occasioned by the application or misapplication of the provisions of the Robbery and Firearms (Special provision) Act Cap R11 LFN, 2004. This has undoubtedly led to hardship to the citizenry and has in a plethora of times resulted in loss of lives under conditions where the deaths could have been averted. Consequently, in December 2017, President Muhammadu Buhari assented to the Compulsory Treatment and Care for Victims of Gunshot Act 2017, which makes provisions for the compulsory treatment and care for the victims of gunshots regardless of the reason for which they were shot. This paper analysed this recently passed law and determined the implication for the Nigerian populace and the Nigerian legal system, making comparative analysis with International Legal Frameworks and the provisions in other Jurisdictions and recommends that effective implementation is crucial for the success of the Act by taking a holistic approach, which recognizes key stakeholders, sensitizes healthcare practitioners, hospital authorities, the police and other security agents with a view to changing attitudes forged over the years.

Keywords: *Gunshot, Victims, legislation.*

1. Introduction

Over time, the need for immediate medical attention for gunshot victims in Nigeria has been shrouded in controversy and concern, with divided opinions on what, how and when medical attention should be given to gunshot victims. The plight of gunshot victims in Nigeria has for the longest time been a social problem and a source of concern for the nation. Gunshot victims are routinely rejected by hospitals as a result of the tendency of the police to harass and incriminate medical personnel for commencing treatment without obtaining clearance. This erroneous assumption by the police is attributed to the belief that every gunshot victim was wounded as a result of engaging in criminal activities. However this cannot be farthest from

* Chinedu Anita Ikpeazu, LL.B, BL, LL. M, Research Officer, Bills and Legislative Drafting, Department of Legislative Support Services, National Institute for Legislative and Democratic Studies.

the truth, as gunshot wounds are occasioned by various factors, which are sometimes unforeseen. Additionally, when these accidents take place, it is expected that the victims are instantly given medical attention irrespective of the reason why they were shot. Unfortunately, this is not the case in Nigeria, as hospitals or healthcare centres blatantly refuse to treat gunshot victims unless a police report is obtained.[1]

The proclivity of hospitals and other healthcare centres to deny treatment to gunshot victims until police report is obtained has been an issue of concern, as it has in numerous occasions' endangered lives and resulted in death in situations where the deaths could have been averted, and even though the right to life is guaranteed by the constitution,[2] gunshot victims are still denied treatment. Furthermore, the National Health Act[3] makes provision for emergency treatment of persons for any reason whatsoever. Notwithstanding these provisions, gunshot victims are still denied treatment and subjected to inhuman treatment. Consequently, the Compulsory Treatment and care for Victims of Gunshots Act, 2017 (Gunshot Victim's Act, 2017) was enacted. This new legislation empowers medical personnel to provide medical attention to gunshot victims without waiting for police report. This legislation is a welcome development and underscores the sanctity of life.

Therefore, this paper conducts an in-depth analysis of the Act, the objectives and the implication of its provisions. It delves into background of the Act, its key components and its alignment with international best practices and other jurisdictions; and concludes that the law

[1] The Vanguard Newspaper 16th May 2018 "Stop rejecting gunshot victims, Lagos police warn doctors" https://www.vanguardngr.com/2018/05/990725/ Accessed 19 July 2018; The Guardian Newspaper 12th January 2018 "Treatment of Gunshot Victims" https://guardian.ng/opinion/treatment-of-gunshot-victims/ Accessed 19 July 2018.

[2] Section 33(1) Constitution of the Federal Republic of Nigeria, 1999, as altered.

[3] Section 20 of the National Health Act, No. 8 2014 provides (1) A health care provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason whatsoever. (2) Any person who contravenes this section is guilty of an offence and is liable on conviction to a fine of ₦100, 000.00 (one hundred thousand naira) or to imprisonment for a period not exceeding six months or to both.

is a step in the right direction. However some of its provisions must be revisited, and that specific actions must be taken to move the law from words on paper to active implementation.

2. Background and overview of the Compulsory Treatment and care for Victims of Gunshots Act, 2017

The predilection of hospitals and other health facilities to deny traumatized gunshot victims medical attention until police report is obtained has been a serious flaw in the Nigerian Legal System which has endangered the lives of many. This practice is occasioned by the application or misapplication of the provisions of the Robbery and Firearms (Special provision) Act.[4]

With the end of the Nigerian Civil war, armed robbery became a significant phenomenon in the country.[5] The immediate causes are not farfetched. Both separatist forces and some members of Nigeria`s Armed Forces, especially volunteers and those who were conscripted, had just been disbanded and much of the arms used in prosecuting the war had not been effectively mopped up.[6] There were several clusters of abandoned arms and combat-gear which soon found their way into wrong hands.[7] The temptation to go into armed robbery increased due to the economic setback and austerity which followed the end of the war as many people lost their means of livelihood and properties to the war.[8] Thus, in order to deal with the menace, the military Government responded by promulgating the Robbery and Firearms (Special Provision) Decree no. 47 of 1970 (now Robbery and Firearms Act, CAP R11 LFN, 2004.[9]

Unfortunately, the incidents of robbery were still on the increase, as some perpetrators of the robberies who got wounded would escape and get themselves treated, and resume their terrorization of the citizenry.[10] As a result of this, the Government, in order to enable the police

[4] CAP R11, Laws of the Federation of Nigeria, 2004.
[5] O Marenin, "The Anini Saga: Armed Robbery and the Reproduction of Ideology in Nigeria" (1987) *The Journal of Modern African Studies,* Vol. 25, No. 2.
[6] O Aigbovo and O Eidenoje, "Theorising Nigerian Crime Problems" (2016) *Mizan Law Review,* Vol. 10, No.1.
[7] *Ibid* at p. 230.
[8] *Ibid.*
[9] R A I Ogbobine, *Armed Robbery in Nigeria, Causes and Prevention*, (Warri: Rufbine Books Centre, 1982)
[10] E Nnadozie, A Akpor and E Usman, "Victims of firearms crime : The case of Guardian Editor , Bayo Ohu and others" Vanguard Newspaper 26th September 2009

to arrest and prosecute wounded armed robbers, amended the Robbery and Firearms (Special Provisions) Decree No. 21 of 1984 in 1986 by inserting a new provision in Section 4(2) of the Decree.[11]

Section 4(2) of the Robbery and Firearms (Special provision) Act provides that "it shall be the duty of any person, hospital, or clinic that admits, treats, or administers any drug to any person suspected of having bullet wounds to immediately report the matter to the police." This section is the pivot which the police used in issuing a directive banning emergency medical attention for gunshot victims without prior police permission.[12]

The objective of this Act, which has largely been misinterpreted, is to facilitate easy apprehension of criminals carrying gunshot wounds when they seek medical attention. But in the process of trying to realise this seemingly laudable goal, many innocent victims of armed robbers, hired assassins, stray bullets and so on have lost their lives.[13]

Arguments have been canvassed on whether or not the police are justified in issuing the directives. The school of thought that argued against the directive predicated their arguments on the notion that health workers were by the directives, compelled to watch helplessly as patients with gunshot wounds bled to death, while awaiting police clearance for them to administer medical care[14]; others have defended the directive on the notion that it is intended to enable doctors distinguish between wounded armed robbery suspects escaping from scenes of violent crimes from their innocent victims or motorists and commuters hit by the accidental discharge of rifles.[15]

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https://www.vanguardngr.com/2009/09/victims-of-firearms-crime-the-case-of-guardian-editor-bayo-ohu-and-others/ Accessed 10 July 2018;

[11] *Ibid.*

[12] *Ibid.*

[13] T Ogunbiyi, "Gunshot victims and police report" The Guardian Newspaper, 21st March 2018. https://guardian.ng/opinion/gunshot-victims-and-police-report/ Accessed 15 October 2018; I Madike, "Hospitals' Refusal to treat Gunshot Victims: The Lies, The Truths" New Telegraph Newspaper June 2 2018, https://newtelegraphonline.com/2018/06/hospitals-refusal-to-treat-gunshot-victims-the-lies-the-truths/ Accessed 15 October 2018.

[14] *Ibid.*

[15] *Ibid*.

Nevertheless, It may be argued that a clear interpretation of Section 4(2) above shows that nothing precludes hospitals or healthcare centers from initiating treatment for gunshot victims immediately they are brought in. Hospitals and health care centres are only mandated by the Act to report such treatments to the Police timeously, as failure to do so amounts to an offence and as such, punishable under the Act.[16]

The interpretation of the Robbery and Firearms (Special provision) Act clearly puts the cart before the horse. Victims of gunshot wounds must first be ferried to the police station to secure police report before they are taken to the hospital to be attended to by medical personnel. This practice is inconsistent with cross-country experience.[17] For instance in the wake of the upsurge in knife and gun violence in the United Kingdom, civil rights activists and the police in 2007 demanded an attitudinal change to official response to emergencies.[18] "The patient should remain the medical team's prime concern at all times and the police's arrival should not be allowed to delay or hamper treatment or compromise the patient's recovery. The healthcare team and the police must abide by this decision."[19]

Indeed, treatment of the victims should come first and takes precedence over and above any other consideration, as the first responsibility of the healthcare team is to the patient's welfare.[20] However in Nigeria, questions must be asked by medical personnel in liaison with the police before they can attend to life-threatening, emergency cases of gunshot wounds. This procedure is absurd and also completely at variance with the Hippocratic Oath which requires physicians to, among others, place the highest premium on saving lives.

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[16] Section 4(3) Robbery and Firearms (Special provision) Act.

[17] In the UK, Doctors are required to inform the police whenever they treat a suspected victim of gun or knife crime. The revised guidance on confidentiality from the General Medical Council (GMC) 2017, extends the previous policy of mandatory reporting of gunshot wounds to clearly stating that doctors should consider whether disclosing confidential information is in the 'public interest.'

[18] "Compulsory Treatment of gunshots victims" The Punch Newspaper, January 12th 2018.

[19] Ibid.

[20] C Bentley, "When should doctors report gunshot, knife wounds and other violent injuries?" (2017) https://www.bevanbrittan.com/insights/articles/2017/when-should-doctors-report-gunshot-and-knife-wounds/ Accessed 10 July 2018.

Thus, in what smacks of sheer ineptitude and insensitivity, the relevant authorities would rather allow the lives of all victims of bullet wounds to be put in jeopardy than for some felons to escape justice. There are a plethora of reports in the media of gunshot victims who were rejected by hospitals because of the propensity of the police to harass and incriminate doctors and other medical personnel for treating them without obtaining clearance.[21] This erroneous assumption by the police have been attributed to the phenomenon that every gunshot victim might have been an armed robber, who escaped from their bullets.[22]Ironically, the real victims of this inadequate law are innocent persons; because well organised criminal gangs often have their trusted medical personnel who attend to their wounded members outside the public glare, while some other less organized criminal gangs seek alternative means of medical assistance to treat gunshot wounds.

Consequently, the signing into law of the Bill that empowers medical personnel to provide care to gunshot victims without waiting for police clearance has given legal backing to the persistent call by the citizenry for higher premium to be placed on life and to preserve the fundamental right – right to life as enshrined in Section 33 (1) of the Constitution of the Federal Republic of Nigeria 1999, as altered. Thus no one, the Constitution emphasizes, shall be deprived of his life save in the execution of the sentence of a Court in respect of a criminal offence for which the person had been found guilty.

The Gunshot Victim's Act, 2017, provides generally that a person with gunshot shall be received for immediate and adequate treatment by any hospital in Nigeria with or without police clearance[23]; further, it states that a person with gunshot wounds shall not be subjected

[21] E Nnadozie, A Akpor and E Usman, art. cit; C Unini, "Gunshot victims and Police report" (2018) http://thenigerialawyer.com/gunshot-victims-and-police-report/ Accessed 10 July 2018; The Tide Newspaper 17th November 2017 "Banigo Decries Hospitals' Rejection Of Gunshot Victims" http://www.thetidenewsonline.com/2017/11/17/banigo-decries-hospitals-rejection-of-gunshot-victims/ Accessed 26 July 2018.

[22] C Unini, art cit.

[23] Section 1, Compulsory Treatment and case for Victims of Gunshots Act, 2017. (Gunshot Victim's Act, 2017)

to any inhuman or degrading treatment by any person or authority, including the police and other security agencies, in the process of having his or her life saved.[24]

From the above overview, the law certainly, represents a step forward in an attempt to respect human dignity and preserve life. It is uncivilized, and undeniably inhuman, to abandon a traumatized and distressed person who urgently needs medical attention on the flimsy notion that there is no police clearance on the circumstance of the injury sustained.

3. Comparative Analysis of the Gunshot Victims Act 2017 with International Legal Frameworks and other Jurisdictions

Matters that have long troubled the populace, for example the difficulty faced by medical personnel in administering treatment to victims of gunshot wounds without police clearance or the blatant refusal by some health care centers and hospitals to treat gunshot victims without initial monetary deposit are addressed in this Act. The key questions that may arise, however, are; (i) how well does the Act protect gunshot victims? and (ii) are there further gaps in the Act that may need to be addressed in the future?

In an attempt to provide answers to these questions, this study begins by identifying briefly some legal instruments that have developed internationally and in other jurisdictions. The aim is to measure the Gunshot Victims Act against international standards that have developed over time. Under International Human Rights Law, a plethora of instruments exist to ensure protections of persons against inhuman and degrading treatment or torture, as well as preservation of the right to life.

Article 3 of the Universal Declaration of Human Rights 1948 (UDHR)[25] provides that "Everyone has the right to life, liberty and security of person." Similarly, Article 5 UDHR provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment

[24] Section 2 of the Gunshot Victim's Act, 2017.
[25] Universal Declaration of Human Rights 1948 (UDHR) http://www.un.org/en/universal-declaration-human-rights/ Accessed 19 July 2018.

or punishment." These Articles are widely regarded as expressing customary international law.[26] Within the United Nations framework, torture and other cruel, inhuman or degrading treatment or punishment are explicitly prohibited under a number of international treaties, which are legally binding on those States which have ratified them.[27] The International Covenant on Civil and Political Rights (ICCPR) was the first universal human rights treaty that explicitly included prohibition of torture and other cruel, inhuman or degrading treatment, which aims to protect both the dignity and the physical and mental integrity of the individual;[28] in addition, Article 6 (1) of the ICCPR states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 2 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, provides that "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."[29]

Similarly Article 4 of the African Charter on Human and Peoples' Rights (African Charter)[30] states that "Human beings are inviolable. Every human being shall be entitled to respect for

[26] "Torture in International Law, a guide to jurisprudence" *Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL),* (2008) https://www.apt.ch/content/files_res/jurisprudenceguide.pdf Accessed 11 July 2018.
[27] Article 5 of the Universal Declaration of Human Rights 1948; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article, A/RES/39/46 adopted by the UN General Assembly on 10th December 1984, http://www.un.org/documents/ga/res/39/a39r046.htm Accessed 15 October 2018.
[28] Article 7 International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf Accessed 11 July 2018.

[29] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. https://www.ohchr.org/en/professionalinterest/pages/declarationtorture.aspx 19 July 2018.
[30] African (Banjul) Charter on Human and Peoples' Rights. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) http://www.achpr.org/instruments/achpr/ 19 July 2018. (African Charter)

his life and the integrity of his person. No one may be arbitrarily deprived of this right;" while Article 5 states that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[31]

In addition, the African Charter also emphasises that the Member States of the Organization of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them[32] and that "Every individual shall have the right to enjoy the best attainable state of physical and mental health."

Further, the participation of doctors and other medical personnel in acts of torture or other cruel, inhuman or degrading treatment or punishment is prohibited by the Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the UN General Assembly in 1982 (Principle of medical ethics).[33] "It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment of punishment.[34]

Other international bodies representing medical professionals have also established guidelines and ethical principles against the participation of doctors in practices amounting to torture and

[31] *Ibid.*
[32] Article 1, African Charter.
[33] Principles of Medical Ethics, A/RES/38/118 (1982) http://www.un.org/documents/ga/res/37/a37r194.htm Accessed 16 July 2018.
[34] *Ibid* at Principle 2.

cruel, inhuman or degrading treatment or punishment. According to World Medical Association's Guidelines for physicians concerning torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment, "The physician shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedure is suspected, accused or guilty and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife.[35] Further, the physician shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment.[36]

With regard to other jurisdictions, in the US for instance all but five states have laws mandating that health care providers report knowledge and/or treatment of certain injuries,[37] For instance the provision of the law in the State of Alaska generally states that "A health care professional who initially treats or attends to a person with… a bullet wound, powder burn, or other injury apparently caused by the discharge of a firearm… shall make certain that an oral report of the injury is made promptly to the Department of Public Safety, a local law enforcement agency or a village public safety officer."[38] This provision envisages that the healthcare professional would have initiated treatment of the victim before making the report to the appropriate authority. Notably, this provision is largely mirrored in nearly all US States.[39] Similarly, in

[35] Declaration 1, Declaration of Tokyo – Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, adopted by the 29th World Medical Assembly, Tokyo, Japan, October 1975. https://www.wma.net/policies-post/wma-declaration-of-tokyo-guidelines-for-physicians-concerning-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-in-relation-to-detention-and-imprisonment/ 19 July 2018. (Declaration of Tokyo).
[36] *Ibid at* Declaration 2.
[37] These injuries include Gunshot wounds, see Mandatory reporting of non-accidental injuries: A State by State guide (2014) Victim Rights Law Center. https://www.victimrights.org/sites/default/files/Mandatory%20Reporting%20of%20Non-Accidental%20Injury%20Statutes%20by%20State.pdf Accessed 16 July 2018.
[38] AS08.64.369. Health care professionals to report certain injuries. http://www.touchngo.com/lglcntr/akstats/Statutes/Title08/Chapter64/Section369.htm Accessed 16 July 2018.
[39] Mandatory reporting of non-accidental injuries: A State by State guide, *art cit.*

various legislation enacted in Canadian districts, a health care facility or emergency medical assistant who treats a person for a gunshot or stab wound must disclose the information to the local police or authority"[40]Again treatment must also have been commenced on the victim.

The commonality of the provision of the law in these jurisdictions is that the right to life is respected above all, healthcare professionals are mandated to report certain injuries (including gunshot wounds) to the appropriate authority, and in doing so, are not deterred from administering medical treatment to the victims as soon as they are admitted.

Further, as has been established previously in this study, the Constitution of the Federal Republic of Nigeria, 1999, provides for fundamental human rights to include right to life[41] and right to respect a person's dignity and the prohibition to be subjected to torture or to inhuman or degrading treatment.[42] The Gunshot Victim's Act encompasses the provisions of the international instruments as outlined above, with a view to aligning the Nigerian legal system with international best practices on the protection of the gunshot wounded; thus the Act expressly makes provision for immediate treatment of any person with a gunshot wound as well as prohibiting the subjection of gunshot victims to inhuman and degrading treatment or torture by any person or authority.[43]

4. Analysis of the Gunshot Victim's Act, 2017

One of the key ingredients of an ideal legislation on the treatment and care for victims of gunshots in Nigeria will be the acknowledgment of the right to immediate and adequate treatment for gunshot victims; and recognizing the harrowing experience of gunshot victims

[40] Gunshot and Stab Wound Mandatory Disclosure Act, Statutes of Alberta, 2009 Chapter G-12; The Gunshot and Stab Wounds Mandatory Reporting Act, Statutes of Saskatchewan, 2007 Chapter G-9.1; Gunshot And Stab Wound Reporting Act Statutes of Newfoundland and Labrador, 2011 Chapter G-7.1; Gunshot and Stab Wound Disclosure, 7 Statutes of British Columbia, 2010.
[41] Section 33(1) 1999 Constitution, as altered.
[42] Section 34(1) (a) Constitution 1999 Constitution, as altered.
[43] Sections 1 and 2(2) (b) Gunshot Victim's Act.

and their families as well as the needless loss of life occasioned by failure to administer medical treatment.

Section 1 of the Gunshot victims Act stipulates that every hospital in Nigeria whether public or private shall accept for immediate and adequate treatment with or without police clearance, any person with a gunshot wound. This section imposes a compulsory duty on all hospitals to receive and immediately treat gunshot victims without waiting for police clearance. This section certainly, represents a step forward in an attempt to respect human dignity and preserve life.

Accordingly, the Act provides for the duty to assist in section 2, which specifically compels every person, including security agents, to render every necessary assistance to ensure that a gunshot victim is taken to the nearest hospital; while also providing for compulsory treatment of gunshot victims by hospitals *without initial monetary deposit*. The importance of this provision cannot be over emphasised, because apart from fear of being implicated by the police, some hospitals refuse gunshot victims purely on the basis of demanding for an upfront payment of the cost of treatment. Notably, implementing this section may be problematic, as hospitals may have to bear the cost of treatment where the victims lack the money to pay after they have been treated or where the patient dies in the course of or after treatment have been administered. However, given the complexity of this provision, it should not be out of place for the State to defray the cost of treatment of gunshot victims that cannot afford treatments within reasonable limits. In addition, the section provides that a gunshot victim shall not be subjected to inhuman and degrading treatment or to torture by any person or authority;[44] thus ensuring that the

[44] Section 2 (2) (b) Gunshot Victims Act 2017.

fundamental rights of the victims are protected in line with international law provisions and the Constitution.[45]

Further, the right created by section 1 of the Act establishes a corresponding duty on hospitals and other healthcare institutions to report the fact to the nearest police station within two hours of commencement of treatment, to enable the police to immediately commence investigation with a view to determining the circumstances under which the person was shot.[46] Consequently, any hospital that fails to make a report to the police upon commencement of treatment commits an offence under the Act and shall be liable to pay a fine of ₦100,000, while every doctor directly involved with the treatment shall be liable on conviction to a term of 6 months imprisonment or to a fine of ₦100,000 or both.[47]

In general, the Act provides extensively for the treatment of gunshot victims, and as well provides protection for all person that may in one way or the other be involved with gunshot victims. The Act penalizes defaulters of its provisions, (including cooperate bodies)[48] and also provides for an order of restitution, (in addition to any other penalty under the Act) ordering convicted persons or corporate bodies to pay to the victim an amount equivalent to the loss sustained.[49] Additionally, the Act provides for the respect and protection volunteers or helpers of a victim from being subjected to unnecessary and embarrassing interrogation in their genuine attempt to save life.[50]

While the Act represents a ground-breaking effort to provide the citizenry with solace on the issue of the treatment of gunshot victims, there are however some deficiencies with the

[45] Principle 2, Principles of Medical Ethics; Declaration 2, Declaration of Tokyo (1975); Article 5 African Charter; Section 34(1) (a) of the Constitution of the Federal Republic of Nigeria, 1999.
[46] Section 3 Gunshot Victims Act, 2017.
[47] Section 5 Gunshot Victims Act, 2017.
[48] Section 13 of the Gunshot Victims Act, 2017.
[49] *Ibid.*
[50] Section 8 of the Gunshot Victims Act, 2017.

provisions of the Act. For instance, section 6 provides thus: “A person who receives the report under section 3(2) of this Act shall furnish or the hospital on demand, with background information on the victim as he may be compelled to incriminate the victim.” This section appears perplexing as the question now arises as to why the hospital will require information to incriminate the victim? It is not the duty of the hospital to conduct investigations, as according to section 3(1) of the Act, hospitals are only required to make a report to the police. It is noteworthy that section 3(2) provides that upon receipt of the report from the hospital on the commencement of treatment of a gunshot victim by the police, the police shall commence investigations with a view to identifying the circumstances under which the person was shot. Consequently, it may be argued that the intention of this section is to compel the hospital to furnish the police, on demand with information that may incriminate the victim, however this was not properly captured in the section. It is imperative that this section be amended for the purpose of clarity in interpretation.

In addition, Section 9 provides “A person who commits an offence under the Act which leads to or causes substantial physical, mental, emotional and psychological damage to the victim, commits an offence and is liable on conviction to imprisonment for a term of not more than 15 years and not less than five years without the option of fine. The keyword in this section is substantial. Arguably, this presents a difficulty as to the determination of what constitutes “substantial physical, mental, emotional and psychological damage to the victim.” The interpretation section in the Act does not define “substantial” as it relates to the Act. Moreover, section 11 provides that “Any person or authority including any police officer, other security agent or hospital who stands by and fails to perform his duty under this Act which results in the unnecessary death of any person with gunshot wounds commits an offence and is liable on conviction to a fine of ₦500,000 or imprisonment for a term of five years or both.”

It may be argued that section 11 encompasses the essence of the Act, as it imposes certain duties and failure to perform those duties constitutes an offence and punishable under section 11. Taking into consideration the provisions of section 11, this paper now ponders on the necessity of section 9 of the Act, given its ambiguity. As established the determination of what constitutes "substantial physical, mental, emotional and psychological damage to the victim" poses a difficulty, and it is speculative at best.

5. Conclusion

The Gunshot Victim's Act, 2017 is a ground-breaking effort to provide the citizenry with the protection of law against the inhuman treatment meted out to gunshot victims. Despite its deficiencies, it is wide-ranging and covers protections, duties and offences not previously provided for in the Nigerian legal system. The provisions of the Act would aid in ensuring that no person nor institution, particularly healthcare institutions and security officers act in a manner which would jeopardize the life or health of a gunshot victim.

Unfortunately, the legal framework protecting gunshot victims face either the challenge of interpretation or implementation; as previously established, no law specifically required police report as a prerequisite for the treatment of gunshot victims, the practice was developed as a result of the misinterpretation of the Robbery and Firearms (Special Provisions) Act. And despite the plethora of directives by relevant authorities to abolish the practice; it subsisted.[51] Similarly Section 33 (1) of the 1999 Constitution provides for the fundamental right to life, and yet healthcare institutions and security agents, including the police, disregard the sacrosanct

[51] E N Iwuala, "Treatment of Victims of Gunshot and Police Reports in Nigeria" (2010) http://nigeriancommentaries.blogspot.com/2010/01/treatment-of-victims-of-gunshot-and.html Accessed 19 July 2018; Premium Times Newspaper 21 August, 2015 "Police IG: Hospitals free to treat all accident, gunshot victims" https://www.premiumtimesng.com/news/top-news/188795-police-ig-hospitals-free-to-treat-all-accident-gunshot-victims.html Accessed 19 July 2018.

nature of the constitution in this regard. Apart from the constitution, the National Health Act[52] also makes provision for emergency treatment of persons for any reason whatsoever.

Although there is much to applaud about the Gunshot Victims Act, it is not a perfect legislation. Thus amendments to address the issues pointed out in the analysis of the Act are of importance and should be considered in the near future. Additionally, to ensure implementation of section 2 of the Act, with specific regard to the treatment of victims without initial monetary deposit, an option may be to ensure that the National Health Insurance Scheme (NHIS) facilitates such treatment, by including the treatment of gunshot victims in its scope of coverage. Notably, section 3(1) of the National Health Act provides that the Minister, in consultation with the National Council on Health, may prescribe conditions subject to which categories of persons may be eligible for exemption from payment for health care services at public health establishments.[53] Also, one of the objectives of the scheme as provided by its enabling Act is to "protect families from the financial hardship of huge medical bills."[54]

Nevertheless, it is important to recognise that legislation is only one instrument amongst others in eliminating the inhuman attitude of hospitals, healthcare institutions, the police and other security agencies towards gunshot victims. Legislation alone will not be sufficient to eradicate longstanding practices which are deeply rooted. Education and enlightenment are key to making laws like the Gunshot Victims Act truly effective.

No one would argue that it is imperative that this Act achieves its objective, as it has the potential to change the way gunshot victims are treated in Nigeria, therefore effective implementation is crucial for its success. The Act will also have a fuller effect when taking a holistic approach; an approach that recognizes key stakeholders, sensitizes healthcare

[52] Section 20 National Health Act, No. 8 2014.
[53] Section 3(1) National Health Act, No. 8 2014.
[54] Section 5(b) National Health Insurance Scheme Act, CAP N42 Laws of the Federation of Nigeria, 2004.

practitioners, hospital authorities, the police and other security agents with a view to changing attitudes forged over the years, as well as creating a nationwide publicity of the law, in order to keep the citizenry abreast of its provision.

APPRAISAL OF THE ROLE OF THE NATIONAL ASSEMBLY IN THE APPROPRIATION PROCESS IN NIGERIA: HINTS FROM CROSS-COUNTRY SURVEY

BY

DR. SAMUEL OGUCHE*

Abstract

One of the crucial functions of the National Assembly (NASS) is appropriation of funds for the running of the government. Appropriation is one of the key components of legislative oversight which earns the legislature power of the purse. One of the challenges that have plagued performance of the NASS in recent time, particularly the 8th Assembly, is the allegation of 'padding' in the appropriation process which has brought the legislature to ridicule in public domain. This paper undertakes an analysis of the role of the NASS in the appropriation process and contends that an appropriation bill is like every other bill. The paper finds succour in section 59 of the Constitution which clearly gives the NASS powers over appropriation bills. It contends that going by the clear provisions of the Constitution as well as judicial authorities, especially the unassailable judgment of the Federal High Court in FALANA V. THE PRESIDENT, FEDERAL REPUBLIC OF NIGERIA & 3 ORS, the NASS has the powers to alter an appropriation bill presented by the President. It further maintains the position that what the President lays before the NASS is a mere proposal which the latter is not bound to accept wholly. The completely dismisses the notion of 'padding' and, among others, recommends pre-budget consultations between the legislature and the executive to reduce disagreements in the process of passage. It also recommends passage of a budget process law to regulate appropriation process in Nigeria.

Key words: Appropriation, National Assembly, Constitution, Budget, Assent

1.1.Introduction

The beauty of democracy lies in the effectiveness of the voice of the majority. Nigerian democracy, like many others in the world, thrives on the principle of separation of powers under which each arm of government has constitutionally assigned roles in governance. No economic policy tool at the disposal of the government can be said to be more significant than the budget, which is a comprehensive assemblage of the priorities of the nation. In view of the place of budget in the governance of the nation, the legislature is the appropriate institution to scrutinise it in line with the identified needs of the nation, vis-à-vis available resources.

* **SAMUEL OGUCHE** is a Research Fellow, National Institute for Legislative and Democratic Studies, National Assembly, Abuja. Email: oguchesamlaw@yahoo.com, samuel.oguche@nils.gov.ng

Appropriation process is a significant aspect in the governance of any country, hence the heated debates often associated with it. Since the enthronement of democracy in Nigeria in 1999, appropriation process at the federal level has often left tongues wagging in the context of the powers of the NASS to alter an Appropriation Bill laid before it by the Executive Arm of government. This singular issue has led to deterioration in the relationship between the legislature and the executive, with the attendant negative effects in the governance of the country. The recurrent friction between the executive and legislative arms of government on the powers of the NASS to alter budget estimates placed before it by the executive resulted in unholy delay in the passage of the 2016 budget estimates. Lawyers, scholars and other commentators are not agreed on the extent of powers the NASS exudes over an Appropriation Bill. While some are of the view that the NASS can alter an Appropriation Bill, others believe that it has no such powers and can only approve what is sent by the Executive by passing it into law or reject same and refer it back to the Executive for further action. Malpractices associated with public finance management in Nigeria are connected with the budget process.

This paper examines the relevant constitutional provisions relating to the powers of the NASS in the budget process, taking hints from other jurisdictions. It x-rays the legal framework and procedure for enactment of an Appropriation Act, including pre-budget and post budget laying roles of the NASS. The paper contends the in view of the clear and unambiguous provisions of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended), the NASS cannot be a rubber stamp legislature in the passage of an Appropriation Bill laid by the President. It concludes that mutual respect and understanding among the arms of government, within defined constitutional limits, is indispensable in the passage of an Appropriation Bill and good governance.

The purpose of this paper is to make recommendations that would facilitate passage of appropriation bills and reduce legislature/executive frictions in Nigeria.

1.2.Legal Framework and Procedure for Enacting an Appropriation Act

Passage of money bills in Nigeria is regulated by the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) and the Fiscal Responsibilities Act, Cap. F40, Laws of the Federation of Nigeria, 2004. The statutes provide for the extent of involvement of the legislature and the executive in the national budget process. From the provisions of the Constitution, the executive is not permitted to expend monies that have not been appropriated by the NASS, subject to a few exceptions. The budgeting pattern under the Constitution is

rooted in Chapter II that spells the Fundamental Objectives and Directive Principles of State Policy, directing the state to "harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy" and also "control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity".[1] The Constitution vests the NASS with power of purse by providing as follows:

> No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorised by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.[2]

In addition to the above, the Constitution prohibits withdrawal of moneys from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorised by an Act of the NASS.[3] The power of the purse means that the government can only spend money for purposes authorized by the Legislature. Consequently, the NASS is vested with the sole power of prescribing the manner of withdrawal of moneys from the Consolidated Revenue Fund or any other public fund of the Federation; such prescribed manner being the only means of withdrawal of monies from those funds.[4]

The budget process begins with the initiation of the Appropriation Bill by the President who is empowered by the Constitution to "cause to be prepared and laid before each House of the NASS at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year".[5] Certain issues are apparent from this constitutional provision. First, the budget process is initiated by the President. By the expression "cause to be prepared…" the budget is prepared through an Appropriation Bill at the instance of the President who takes responsibility for the contents of the Bill. This position is strengthened by the Constitution vesting executive powers of the Federation in the President which shall 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.[6] Second, the budget is laid before both Houses of the NASS after preparation. Third, the preparation and

[1] Section 16(1) (a) & (b)
[2] Ibid, section 80(2)
[3] Ibid, section 80(3)
[4] Ibid, section 80(4)
[5] Ibid, section 81(1)
[6] Ibid, Section 5(1)(a)

laying of national budget is done at any time within the year but not within the year to which it relates. The implication is that the budget of a particular year must be laid at any time in the preceding year. Fourth, what the President lays before both Houses of the NASS are mere estimates that cannot qualify as a budget by any standard. The Budget itself is a law which is an Act of the NASS and not that of the Executive.

The Constitution vests the power of initiation of budget in the President because, being the head of the executive arm of government, has the function of implementing or executing Acts of the NASS. Consequent upon such direct involvement of the executive arm in governance, it accords with common sense to vest such powers in the executive.

1.3.Procedure for Enactment of Appropriation Act by the National Assembly

As stated above, what the executive lays before the NASS are mere estimates. On the basis of section 81(2) of the Constitution, the heads of expenditure contained in the estimates (other than expenditure charged upon the Consolidated Revenue Fund of the Federation by the Constitution) shall be included in a bill, to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein. Once an Appropriation Bill is laid by the President in line with section 81 of the Constitution, each House commences legislative action on it in line with the provisions of the Constitution and the Standing Orders.[7]

It is interesting that the Constitution, particularly section 81, does not specifically provide for procedure for passage of the Appropriation Bill. This may be due to the fact that elaborate provisions are already contained in sections 80 and 4. Section 59 which elaborately covers money bills vests the NASS with final authority over passage of the bill into law.

The point must be made here that section 80(2) of the Constitution that prohibits withdrawal of moneys from the Consolidated Revenue Fund except upon appropriation by the NASS, admits of an exception under the Constitution. The exception is that if by 1st of January the appropriation bill has not been passed into law, President is allowed to authorise the withdrawal of moneys in the Consolidated Revenue Fund of the Federation for the purpose of meeting expenditure necessary to carry on the services of the Government of the Federation for a period not exceeding months or until the coming into operation of the Appropriate Act, whichever is

[7] Aduba, J.N. & Oguche, S.: *Key Issues in Nigerian Constitutional Law* (Lagos, NIALS Press, 2014)p.303

the earlier.[8] The essence of this provision is to prevent the running of government from being grounded in the absence of the appropriation bill being passed into law. However, such withdrawal of unappropriated funds must not exceed six months and recourse shall be had to the Appropriation Act of the preceding in terms of the amount to be withdrawn within the specified period. It is submitted that the timeframe of six months is too long and this constitutes a shortcoming in the appropriation process.

1.4.Pre-Budget Laying Role of the National Assembly: Constitution of the Committee on Appropriations

The Appropriation Committee is one of the Standing Committees at both the Senate and the House of Representatives. Standing Committees are established along policy lines have specific areas of jurisdiction and their life may be as short as the consideration of one specific bill or as long as the life of the Parliament.[9] The Committee on Appropriations is established by the Standing Orders of both Houses of the NASS.[10] In the House of Representatives, it consists of a minimum of 37 and maximum of 40 members and must be constituted at the commencement of the life of the House.[11] This means that this Committee, like others, does not outlive the life of the House. The Committee is vested with jurisdiction to appropriate funds for execution of government programmes and projects, as well as holding hearings on the Budget as a whole.[12] It must be noted that the Committee must hold hearings within 30 days after the transmittal of the budget to the NASS each year, with particular reference to the basic recommendations and budgetary policies of the President in the presentation of the budget; and the fiscal, financial and economic assumptions used as basis in arriving at total estimated expenditures and receipts.

It can be said with certainty that despite the fact that the budget is initiated by the President, representing the executive, the role of the NASS in the appropriation process actually begins before the budget is laid, since the Committee on Appropriations is constituted at the commencement of the life of the Assembly.

1.5.Post-Laying Role/Procedure

[8] Section 82
[9] Hamalai, L., (Ed.): *Committees in the Nigerian National Assembly: A Study of the Performance of Legislative Functions, 2003-2013* (2nd ed.) (Abuja, National Institute for Legislative Studies, 2014) p.25
[10] Order XVIII, Rule 130 of the Standing Orders of the House of Representatives and Order 88 of the Senate Standing Orders 2011 (As Amended).
[11] Rule 30(1)
[12] Rule 30(2)

Budget Presentation/Speech: The immediate budget role of the NASS begins by the laying of the budget by the President, including the budget speech at the time of laying. The Appropriations Bill is laid or presented at a joint sitting of both Houses. The Appropriations Bill presentation speech of the President is deemed to be the First Reading of the Bill. This means that the first reading of an Appropriation Bill is done at a joint sitting of both Houses. After this step, the Rules and Business Committee of each House comes in to fix a date for second reading of the Bill.

Second Reading: Unlike the first reading that is done at a joint sitting, the second reading is done at a separate sitting of each House. At the second reading, the Bill is debated at different sittings of each House during which the general principles and import of the Appropriation Bill are debated.[13] The Committee on Appropriations takes over and coordinates the process, where each Standing Committee transforms into a Sub-Committee of the Appropriations Committee. It has been said that on the date of the presentation of the Sub-Committee's Report, including the recommendations, the Chairman of the Appropriation Committee is the 'Floor Manager' while the Chairman of the Sub-Committee whose Report is being presented is the 'Assistant Floor Manager.'[14] The motion for the second reading of the Appropriation Bill is moved by the Leader and seconded by the Deputy Leader. Debate is confined to the general, financial and economic state of Nigeria as well as the government financial policy. Unlike a general bill, a money bill cannot be killed at the second reading stage but all Members have the right to debate the bill. Significantly, Committee work on the budget centres on budget defence as opposed to Committee hearings as is the case in general bills.[15] At the close of the sub-committee work, the Appropriation Committee collects, collates and compiles a report which it lays at plenary. Consequently, each sub-committee of the Appropriations Committee is given charge over the Heads of Estimates of the Ministry for which it has oversight responsibilities.[16] At this stage, legislative responsibilities are shared between the Committee on Appropriations and the sub-committees, hence the Appropriation Bill itself is handled by the former while the Heads of Estimates, which details the expenditure requests, are handled by the sub-committees, who are

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[13] Dan-Azumi, J., & Gbahabo, T. (Eds.): *16 Years of Law Making: 4th-7th National Assembly* (Abuja, National Institute for Legislative Studies, 2016) p.9

[14] Ahmadu, R.A., "Appropriation Procedure - An Aspect of the Budgetary Process of Nigeria", Ouagadougou Session, 2001, www.asgp.co/sites/default/files/...//HCTENHNRMSMTPRLLHXSESQUUQTPIOM.pdf *(Accessed on 20/6/2016)*

[15] Sam-Tsokwa, A.T. & Ngara, C.O.: "The National Assembly and the Budget Process in Nigeria's Fourth Republic: Tackling the Challenges of Timeliness", Canadian Social Science Vol. 12, No. 5, 2016, pp. 1-7 @p.4

[16] See Policy and Legal Advocacy Centre: "A Guide to Nigerian National Assembly", 2015, p.26, available at http://placng.org/wp/wp-content/uploads/2017/05/A-Guide-to-the-Nigerian-National-Assembly.pdf (Accessed on 25/6/2017)

at liberty to extend invitation to the relevant Ministries, Departments and Agencies (MDAs) to appear in defence of those Heads of Estimates. This is the popular budget defence in the Appropriation process.

All Sub-Committees deliberate and report their findings to the Appropriations Committee, after which a clean copy of the Report is prepared and presented on the Floor of the House on a date to be fixed by the Rules and Business Committee. The actual presentation of the Report entails circulation of copies to all Members, and the Chairman of the Rules and Business Committee sets a date for formal consideration of the Report by the whole House as one Committee to pass resolutions on each item of the Head of Estimates. For this purpose, the "Committee of the Whole" is referred to as the "Committee of Supply" and presided over by the Speaker or Senate President or their Deputies. Here, each item of expenditure for each ministry is considered one after the other and any change adopted during consideration must be effected before the third reading.[17]

Reporting: This is the stage where the Appropriations Committee submits its final report which contains a summary of amendments agreed to by the House and the amount approved for each Ministry, Department or Agency (MDA).

Third Reading: After adoption of the Report as submitted by the Appropriations Committee, the Bill goes through Third Reading whereupon it is passed as the Appropriation Bill. Third Reading procedure in an Appropriation Bill is exactly as it is in a general bill. According to PLAC, the Appropriation Bill passed at Third Reading is sent to the other House for concurrence.[18] This position is not correct. Our position here is predicated on the fact that since it is a constitutional requirement that President lays the Appropriation Bill before both Houses, no question of one House transmitting the Bill to the other House for concurrence arises. On the contrary, where the Bill is passed by one of the Houses but is not passed by the other House within a period of two months from the commencement of a financial year, the President of the Senate shall within fourteen days thereafter arrange for and convene a meeting of the Joint finance committee to examine the bill with a view to resolving the differences between the two Houses.[19] The intervention of the joint finance committee becomes necessary largely due to the possibility of both Houses ending with different outcomes. Where, however, the joint finance committee fails to resolve the differences, the Bill shall be presented to the NASS

[17] Ibid
[18] *Ibid*, p.28
[19] Section 59(2), CFRN

sitting at a joint meeting where each legislator has a vote, and if the Bill is passed at such joint sitting, it shall be presented to the President for assent.[20]

Assent: Assent in the context of legislation signifies formal approval of a bill as passed by the legislature. Where an Appropriation Bill is passed by the NASS, it is transmitted to the President for assent; such transmission being the function of the Clerk to the NASS. The President has 30 days from the date of receipt of the Bill within which to signify assent, or otherwise.[21] A combined reading of section 59(3) and (4) discloses that the President may either assent, fail to signify his assent or withhold assent. Failure to signify his assent is tantamount to withholding assent. However, the difference between failure to signify his assent and withholding of assent lies in the fact that in case of the former, the President keeps mute and does nothing about the Bill while in the case of the latter he expressly refuses assent. It is submitted here that failure to signify his assent means implied withholding of assent. In either case where the President does not give assent within 30 days of after the presentation of the Bill to him, the bill shall again be presented to the NASS sitting at a joint meeting, and if passed by two-thirds majority of members of both houses at such joint meeting, the bill shall become law and the assent of the President shall not be required. What does the Constitution intend by the bill being passed by two-thirds majority of members of both Houses in a joint sitting? Is this requirement satisfied by all the members merely voting at a joint sitting? This question was answered in ***National Assembly v. President***[22] where it was held that for the Bill to be validly passed by the joint meeting of the National Assembly after the President withholds his assent, it has to go through the whole process of law making again. This means that the entire process of passing an Appropriation Bill after the presentation of the Budget by the President must be repeated.[23]

1.6.Contestations on the Power of the National Assembly to Alter the Budget Presented by the President

[20] Ibid, section 59(3), CFRN
[21] Ibid, section 59(4), CFRN
[22] (*2003*) 9 NWLR Pt. 824 p. 104
[23] The position in the United States of America is less rigorous and has automatic effect. In the US, if the President does nothing within 10 days after a bill (general or money) is presented to him when Congress is on session, the bill shall automatically become law.

Recent developments in Nigerian have provoked commentaries, arguments and counter-arguments as to the extent of the powers of the NASS as regards the budgeting process. Lawyers and other commentators are not agreed as to the limits of powers of the NASS. While some share the view that the NASS has powers to alter the budget[24], some contend that the Appropriation power enables the NASS to reduce but not to increase expenditure and that it lacks power to introduce new items into the Budget. On the other hand, others believe that such powers are unavailable to the legislative arm[25], hence the position that makes the NASS a mere rubber stamp in the budgeting process. Indeed many commentators, including Lawyers, have contended that the power of NASS is restricted to examining the Budget and making corrections where necessary.

Language of the Constitution

For proper appreciation of the legal position, an understanding of the provisions of section 59 of the Constitution is imperative. It is clear from the provision that the budget is laid before the NASS as a bill (Appropriation Bill). The effect is that the budget is an Act which only the NASS has constitutional power to enact.

Implication of Section 59(1)

This provision makes brings budget to the class of bills (Appropriation Bill or Supplementary Appropriation Bill). The implication of this is that an Appropriation Bill is passed in the same form like every other bill. As stated above, the bill process at the NASS is a function of certain stages such as first reading, second reading, committee stage, reporting, third reading, concurrence by the other chamber, conference committee where necessary for harmonisation and assent. At the committee stage, public hearings are conducted and inputs of stakeholders and the general public is aggregated and necessary improvements made to the bill before reporting/laying at plenary. In the same way, it is expected that an appropriation bill be subjected to scrutiny in the interest of the nation. That being the case, an appropriation bill is not expected to remain intact as laid by the President.

[24] Dogara, Y.: "Legislative perspectives on the budget process in Nigeria", being an address by the Hon. Speaker of the House of Representatives at the first edition of The *Gallery Colloquium* series organised by Orderpaper.ng on 26th September, 2016, at the Ladi Kwali Hall, Sheraton Hotel Abuja.

[25] See "National Assembly Wrong To Alter Budget, Falana Says", Sahara Reporters, available at http://sahrareporters.com/2017/06/26/national-assembly-wrong-alter-budget-falana-says (Accessed on 26/6/2017)

Implication of Section 59(2)[26]

In acknowledgment of the obvious fact that the NASS is expected to alter the Appropriation Bill presented by the President, the subsection foresees a situation where a House delays passage of the Bill as a result of controversies arising therefrom. Hence, the subsection provides remedial action in case of such deadlock by empowering the Senate President to convene a meeting of the joint finance committee to ensure that the differences are resolved. By this provision, it can be said with accuracy that the drafters of the Constitution intended to give the NASS the power to alter the budget laid by the President.

Effect of Section 59(3)[27]

The implication of this provision is that the joint meeting of both Houses of the NASS is superior to the joint finance committee. Consequently, in the event of failure of the joint finance committee to resolve the differences in the versions of both Houses, the bill goes back to joint sitting of the Houses for passage after which it is presented to the President for assent. Again, it is the intention of the framers of the Constitution that the NASS has the powers to effect alterations to the budget and that is the essence of the assent of the President. If the framers of the Constitution had intended that the NASS be a mere rubber stamp, the requirement of assent of the President would not have been there as such assent would mean nothing in a document submitted by the President that has not been altered. Assent here signifies approval or acceptance of an act or omission.

Effect of Section 59(4)[28]

Just like the position with general bills, this subsection gives veto power to the President and a corresponding power to the NASS to override the veto power of the President. Talking about legality of alteration of the budget by the NASS, why does the Constitution envisage a situation where the President vetoes a bill that is intact as he had presented or laid before the NASS? Is

[26] This subsection provides that "Where a bill to which this section applies is passed by one of the Houses of the National Assembly but is not passed by the other House within a period of two months from the commencement of a financial year, the President of the Senate shall within fourteen days thereafter arrange for and convene a meeting of the joint finance committee to examine the bill with a view to resolving the differences between the two Houses."

[27] This provides that "Where the joint finance committee fails to resolve such differences, then the bill shall be presented to the National Assembly sitting at a joint meeting, and if the bill is passed at such joint meeting, it shall be presented to the President for assent."

[28] Where the President, within thirty days after the presentation of the bill to him, fails to signify his assent or where he withholds assent, then the bill shall again be presented to the National Assembly sitting at a joint meeting, and if passed by two-thirds majority of members of both houses at such joint meeting, the bill shall become law and the assent of the President shall not be required.

the President reasonably expected to invoke his veto powers if the bill has not been altered? Those who share the view that the NASS cannot alter a budget presented by the President have the above few questions to contend with. A further exposition of the clear intention of the framers of the Constitution lies in the overriding power of the NASS. If the NASS can proceed to pass the Appropriation Bill without requiring the assent of the President, it shows that the Constitution vests ultimate power over the budget making in the NASS and not the President.

One obvious fact from section 59(3) and (4) of the Constitution is that the ultimate power in the passage of an Appropriation Bill resides in the House of Representatives. Passage of the Appropriation Bill where the joint finance committee fails to resolve the differences is by the joint sitting of both houses.[29] Similarly, overriding the veto power of the President is by two-thirds majority of all members of both houses at a joint sitting. Under the Constitution, the House of Representatives is made up of 360[30] members while the Senate has 109[31] members, bringing the total number to 469. Simple arithmetic from the above figures shows that two-thirds of 469 is 313, hence the House of Representatives that has 360 members has more than what it takes to pass the budget without stress. On this note, the present writers hold the firm view that the framers of the Constitution, in their wisdom, divided powers between both houses. While the Senate reserves the power of confirmation of appointments, the ultimate power over budget resides with the House of Representatives.

According to Hon. Gbajabiamila[32], three key stakeholders are involved in the budget process thus: the executive represented by the President who presents the budget, the legislature and legislators who approve the budget and authorise spending in line with its approval and the Nigerian people who are meant to be the ultimate beneficiaries.[33] The seasoned legislator, while canvassing the position that the NASS has constitutional powers to alter budget estimates laid by the President, drew the following analogy:

> For simple understanding, the President is analogous to the head of the family, the legislature is the family banker who keeps and gives money to the family for spending based on its stated needs, and the people are the children in the family who are the ultimate beneficiaries. The father presents the needs of his children

[29] section 59(3)
[30] Ibid, section 49
[31] Ibid, section 48
[32] Leader of the House of Representatives
[33] Gbajabiamila, F: "Budget and Budgeting Process in National Assembly", being the text of a paper delivered at the Progressive Governors'/Legislators/Civil Society Organizations Roundtable on 24th of March, 2014 at Barcelona Hotel, Wuse 2, Abuja

> and family to the bank for necessary approval and funds, the bank in this case legislature after going through income and expenditure of the family grants approval so that the family can continue to develop and grow, produce and reproduce.[34]

The legislature as the family banker in the above analogy exposes the centrality of the legislature in the budgeting process. Apart from the provisions of the Constitution examined above, the Fiscal Responsibility Act (FRA) 2007 has far-reaching provisions relating to appropriation. The Act empowers the Fiscal Responsibility Commission to, among others, monitor and enforce the provisions of the Act and by so doing, promote the economic objectives contained in section 16 of the Constitution.[35] The said section 16 of the Constitution which contains economic objectives under the Fundamental Objectives and Directive Principles of State Policy, enjoins the State to direct its policy towards ensuring "that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens."[36]The same section 16 prohibits operation of the economy in such a way that permits concentration of the commonwealth or the means of production in the hands of a few individuals or of a group.[37] According to Ekpu and Iweoha[38], the critical importance of section 3 of the Fiscal Responsibility Act is that where the President presents a budget in contravention of section 16 of the Constitution, the NASS may be brought under public pressure (through Public Hearing opportunities) to include estimates which would make the budget comply with the provisions of section16.

Apart from the above, the FRA makes provision for a Medium Term Expenditure Framework (MTEF) which the Federal Government is mandated to, in consultation with the States, place before the NASS. The MTEF is to cover a period of three (3) years, to serve as a macro-economic framework.[39] The significance of the MTEF is further unveiled by its being the basis for the preparation of the estimates of revenue and expenditure required to be prepared and laid before the NASS under section 81 (1) of the Constitution.[40] A combined reading of the various provisions of the FRA discloses beyond doubt that the NASS is empowered by the

[34] Ibid
[35] Section 3(1)(a), FRA
[36] Section 16(2)(d), CFRN 1999 (As Amended)
[37] Section 16(2)(c)
[38] Ekpu, A.O. & Iweoha, P.I.: "Powers of the Executive and Legislature in Budget Making Process in Nigeria: An Overview", Journal of Law, Policy and Globalization (online), Vol. 57 2017, p.48
[39] Section 11
[40] Section 18(1) FRA

legal framework for budgetary processes in Nigeria to alter budgetary estimates prepared and laid by the President.

Our position that the NASS can alter budget estimates laid before it by the President has received judicial blessing through the verdict of the Federal High Court in ***Falana v. The President, Federal Republic of Nigeria & 3 Ors***.[41]In this case, the Plaintiff instituted the suit in which the 1st and the 3rd Defendants (the President and NASS respectively) were sued, being the executive and the legislative arms of the Government of the Federation. The 2nd Defendant is the Attorney General of the Federation while the 4th Defendant is the Auditor General of the Federation. In his originating summons, the Plaintiff set down the following four questions for determination of the Court:

1. Whether by virtue of section 81 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the 3rd Defendant is competent to increase or review upward any aspect of the estimates of the revenues and expenditure of the Federation for the next financial year prepared and laid before it by the 1st Defendant.
2. Whether by virtue of section 85 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the 3rd Defendant is competent to audit the public accounts of the Federation, appoint auditors for statutory bodies or conduct periodic checks of all government statutory corporations, commissions, authorities, agencies, including all persons and bodies established by an Act of the NASS in any manner whatsoever and howsoever.
3. Whether by virtue of sections 88 and 89 of the Constitution, the 3rd Defendant is competent to summon corporate bodies and private individuals while conducting investigation into any matter.
4. Whether by virtue of section 214 of the Constitution, the 3rd Defendant is competent to probe or investigate the allegations of corrupt practices, fraud, murder and other criminal offences committed in statutory corporations, commissions, authorities, agencies, including all persons and bodies established by an Act of the NASS in any manner whatsoever and howsoever.

Arguing that the NASS (3rd Defendant) has no powers to alter budget estimates submitted to it by the President of the Federal Republic of Nigeria (1st Defendant), the Plaintiff contended that

[41] (Unreported) Suit No. FHC/ABJ/CS/259/2014

once budget estimates are submitted by the President to the NASS, it is the duty of the NASS to pass same as "Appropriation Bill" into law. It was further argued that the preparation of the budget being an "executive function", the NASS is excluded from making inputs into it. The Federal High Court refused to be convinced by this reasoning and held that it lies within the legislative competence of the NASS to alter budget estimates laid before it by the President. The Court made the following remarkable pronouncement:

> In the light of these analysis (sic), I will answer question one in the "Originating Summons" in the *negative*. The 3rd Defendant was not created by the drafters of the Constitution and *imbued* with the powers to receive "budget estimates" which the 1st Defendant is *constitutionally empowered to prepare* and *lay* before it as a "*rubber stamp" parliament.* The whole essence of the "budget estimates" being required to be *laid* before the 3rd Defendant, is to enable the 3red Defendant as the assembly of the representatives of the people, to debate the said "budget proposals" and to make its own *well informed legislative inputs* into it. What the 3rd Defendant cannot do, is to *prepare* "budget estimates" for the 1st Defendant or to disregard the *proposals laid before it* and *substitute* it with its *own estimates.*[42]

The rationale for the above position of the Court is clear from the judgment. It is the Executive Arm under the leadership of the President that controls and superintends all agencies, corporations and commissions that generate the revenue for the running of government. Consequently, it will amount importing into the provisions of section 81 of the Constitution what the drafters neither intended nor put into it to say that the NASS is not competent to increase or review upward any aspect of the estimates of the revenues and expenditure of the federation for the next financial year prepared and laid before it by the President of the Federal Republic of Nigeria.

The position taken by the Federal High Court is faultless based on the long established principle of literal interpretation of the Constitution which the Court gave a nod to. The literal approach is adopted where the wordings of the Constitution are clear and unambiguous. This is the plain meaning approach to the interpretation of the Constitution, which states that if the precise words used in the Constitution are plain and unambiguous, the court is bound to construe them in their natural ordinary (grammatical) sense. In this case, it is immaterial whether or not such interpretation leads to manifest injustice or absurdity. The rationale behind this rule is that words are the only ways through which intentions of human beings are declared and if words

[42] Per Hon. Justice G.O. Kolawole at p. 15 of the Judgment delivered at the Federal High Court Abuja on the 9th day of March, 2016.

are clear and unambiguous, then effect must be given to them in their natural ordinary or grammatical sense.[43] The rationale for this approach is that the drafters of our Constitution are not fools and that they intended the natural meaning and consequences of their words. In interpreting the law, the role of the court here is determined by the language used. If the language is plain and clear, the court will give the wordings therein their literal meaning and the court has little or nothing to add. In this case, the court's opinion is no different from that of an ordinary man. In ***Attorney-General of the Federation v. Abubakar[44]***, the Supreme Court held thus:

> What appears to be a settled principle of interpretation from all the authorities cited before us and others I have had the opportunity to read is that, where the language used in the provision of a statute and or the Constitution is plain and unambiguous, effect must, of necessity, be given to its plain and ordinary meaning. It is that clear and unambiguous language that best conveys the intention of the lawmaker. The lawmaker must be taken to have intended the meaning expressed in such clear and unambiguous language and the court will not be at liberty to go outside the very provision in an ostensible bid to ascertain the intendment and purpose of the provision. The obvious duty of the court in such a situation therefore is not the determination of what the lawmaker meant, but the meaning of the plain language used which, without more, best expresses his intention....[45]

In totality, the above authorities establish without any iota of doubt that the NASS as the representative of the people in Nigerian representative governance cannot rubber stamp budget estimates without debates and inputs in line with the spirit of the Constitution. Consequently, it is a misconception of the law to say that budget proposals as presented to the NASS by the President must be passed into law as presented. This calls for a short voyage into the United States of America (USA) for comparative analysis of appropriation processes.

1.7.Law and Practice in the United States of America

Budgeting process in Nigeria is modelled after the USA as enshrined in its Constitution which provides that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law."[46] This provision has similar ingredients as section 80 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended). Certain common

[43] Oguche, S.: "The Approaches and Canons of Interpretation of the Constitution and other Statutes: A Panoramic Survey of Recent Developments", University of Maiduguri Law Journal, Vol.8 (2010), pp. 1-24
[44] (2007) All FWLR (part 375) 405
[45] Per Akintan JSC (Delivering the Lead Judgment) at P. 460, paras F-H.
[46] Article 1, Section 9 of the United States Constitution

ingredients arising from Article 1, section 8 and section 80 of the Constitution of the USA and the Federal Republic of Nigeria respectively are as follows:

- In the USA, all monies are paid into the USA Treasury while all Funds are paid into the Consolidated Revenue Fund or other Public Funds of the Federation in Nigeria.
- In the USA, no money can be withdrawn from the Treasury except through Appropriation. Similarly, in Nigeria, any withdrawal from the Consolidated Revenue Fund or other Public Funds of the Federation can only be made as authorised by the NASS.

The centrality of the legislature to the appropriation process in the United States has been emphasised at various forums. Commenting on this, Madison had this to say:

> The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[47]

An appropriations bill is treated as a regular legislative bill and is sent to the President for approval or veto. Congress can impose its will on the President by "overriding the veto" with a two-thirds vote of each chamber.[48] Following the growing complexity of the size and scope of government, coupled with series of disputes with the President relating to budget, the Congress, in 1974, passed the Congressional Budget and Impoundment Control Act of 1974, which was a milestone in the budget process in the United States. For the first time, the Act made provisions for an internal congressional budget process and created the two main instruments for enforcing compliance with the internal procedures: the House and Senate Budget Committees and the Congressional Budget Office (CBO). The Budget Committees draw up an annual overall budget resolution – an internal congressional agreement on spending and receipts – and then with the help of CBO "scorekeeping", enforce the aggregate levels agreed to at the beginning of the year.[49]

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[47] Madison, J.: "The Federalist No. 58 - Objection That the Number of Members Will Not Be Augmented as the Progress of Population Demands Considered", in Hamilton, A., *et al*: *The Federalist Papers*, (New York, Palgrave Macmillan, 2009) p.146

[48] Blöndal, J.R., *et al*, "Budgeting in the United States", OECD Journal on Budgeting – Volume 3 – No. 2, 2003, p.18

[49] Ibid, pp.18-19

In USA, federal spending falls into two categories – mandatory and discretionary funding. Mandatory funding is spending on entitlement programs that are required by law and continue from year to year, such as Social Security, Medicare, and Medicaid. Mandatory funding accounts for the majority of federal spending (about 60%). The other category of spending is discretionary spending. This funding must be approved each year through the appropriations process. It has been observed that nearly all of the federal funding that helps to advance the work of America Forward and its Coalition organizations comes through discretionary programmes.[50]

The President must submit an annual budget proposal to Congress to kick off the annual budget and appropriations cycle, and this must be done on or before the first Monday in February.[51] This proposal includes the President's recommendations for spending levels for various federal programs and agencies. A significant part of the United States' budgetary process is that the President's Budget proposal is a request and holds no obligatory authority over Congress. Once the President's budget proposal is submitted to Congress, the Appropriation Subcommittees of both the House of Representatives and Congress commence hearings on parts of the budget within their respective jurisdictions for the purpose of ascertaining justification for the funding requests of administrative agencies.

Not later than six weeks after the President submits his Budget request, Committees submit views and estimates to Budget Committees. Senate Budget Committee must report concurrent resolution on the budget on or before the 1st day of April. Budget resolution is an agreement between the House and Senate that establishes overall budgetary and fiscal policy to be carried out through the appropriations process. The budget resolution is not sent to the President and does not become law. It is a guide for Congress as it considers budget-related bills such as appropriations and tax legislation. Congressional adoption of the budget resolution is required by Title III to be done on or before 15th of April. It has however, been noted that there is no penalty if the resolution is not completed by April 15th or at all, and has been rare in recent Congressional sessions. Instead, each chamber of Congress will pass its own resolution or pass a simple resolution that sets the total level of discretionary funding for the next fiscal year.[52]

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[50] See "America Forward: Federal Budget and Appropriations Primer", America Forward Blog, http://www.americaforward.org/the-federal-budget-and-appropriations-process-a-primer/ (Accessed on 4/8/2017)

[51] Title III, sec. 300 of the Congressional Budget Control and Impoundment Act, 1974.

[52] America Forward Blog, note 50 above

It is a precondition for consideration of Appropriation Bill by the Appropriations subcommittee of the House and Senate that Budget Committee hearings on the President's budget request be completed and the level of funding. It is only when this is done that the Appropriation subcommittees can commence consideration of the under their jurisdiction and report them to their respective full committees. Upon report of an appropriations bill to the full House or Senate by their respective Appropriations Committees, the bill becomes ready for general chamber consideration. 15th June is the target date for completion of action on reconciliation legislation by the Congress. Similarly, the House is required to complete action on annual appropriation bills on or before June 30.

As established above, the United States Congress can alter an appropriation bill. However, the Senate Rules prohibits amendments that are not germane to the subject matter in the bill.[53] The standards and procedures for determining whether or not an amendment is germane are not the same in the Senate and the House.[54]

1.8.Comparative Notes

- Appropriation Bills are originated by the Executive and laid before the legislature in both jurisdictions, Congress and NASS in the US and Nigeria respectively.
- In Nigeria, the President is required to lay the budget proposal before the NASS at any time in each financial year for the next following financial year. In the USA, there is a timetable with respect to the congressional budget process for any fiscal year under which the President is required to submit the budget to Congress on or before the first Monday in February.
- While "financial year" in Nigeria means any period of twelve months beginning on the first day of January in any year, it means twelve months beginning on the 1st day of October to the 30th day of September in the USA.
- In both jurisdictions, the legislature has powers to make alterations to the budget proposals submitted by the President after subjecting the proposals to debate.

[53] Senate Rule XVI

[54] Saturno, J.V., *et al*,: The Congressional Appropriations Process: An Introduction, being a Congressional Research Services Report prepared for Members and Committees of Congress, 2016, p.7 https://www.senate.gov/CRSpubs/8013e37d-4a09-46f0-b1e2-c14915d498a6.pdf (Accessed on 4/6/2017)

- While issues of appropriations are handled by the Subcommittee on Appropriations in the US Congress, they are handled by the Committees on Appropriations in the NASS which are Standing Committees.
- Committees on Appropriation in the US and Nigeria report their recommendations to the full house for consideration.
- Both houses of Congress and NASS harmonise their versions of the Appropriation Bill before presentation to the President for assent. In the USA, once both houses agree to amendments made, the Measure is presented to the President for action which may be assent or veto. This position is the same in Nigeria.
- Both Congress and NASS have powers to override the President's veto. In the US, after a measure is presented to the President, he has 10 days to sign or veto the measure. In the event that no action is taken by the President, the bill automatically becomes law at the end of the 10-day period if Congress is in session. If the President decides to veto the bill, he sends it back to Congress. It is interesting that the Congress may override the veto by a two-thirds vote in both houses. The requirement in Nigeria is also two-thirds of members. However, in the case of Nigeria, the President has 30 days to signify his assent or otherwise.

1.9.Recommendations

Against the backdrop of the foregoing discourse, the following recommendations are proffered:

- There should be pre-budget presentation consultations and cross-fertilisation of ideas between the NASS and the President so as to minimise controversies and contentions between the two arms of government over the Appropriation Bill.
- The Offices of the Senior Special Assistants to the President on NASS matters (both Senate and House of Representatives) should take up the responsibility of fostering harmonious relationship between the Legislature and the Executive. Some of the controversies arising from consideration of Appropriation Bills can be easily averted with good relationship of both arms of government.
- The budget reform process in Nigeria should be fast-tracked to meeting emerging trends. In this case, the US model can be adopted to set timetable for budget process as it is in the Congressional Budget and Impoundment Control Act of 1974.
- The process of preparation and implementation of the budget should strictly be guided by the provisions of the Fiscal Responsibility Act, especially as it relates to the MTEF.

- The timeframe within which the President is authorised to withdraw moneys from the Consolidated Revenue Fund of the Federation in default of passage of the appropriation bill into law by 1st of January as provided in section 82 of the Constitution should be reduced from six months to three months by way of Constitution amendment.

1.10. Conclusion

The task of preparation of budget lies with the Executive arm of government as provided for in the Constitution of the Federal Republic of Nigeria 1999 (As Amended). However, once the Appropriation Bill is laid before the NASS, the legislative arm of government (NASS, takes control to debate on the general principles of the bill in the spirit of economic objectives provided in Chapter II of the Constitution and can alter its provisions in the overall interest of the nation. Bad blood generated between the two arms of government over the appropriation bill is avoidable with proper understanding and synergy. Since both arms of government act in the interest of the masses, they must understand that the budget is neither the property nor the exclusive right of any of them, therefore necessitating multi-stakeholder involvement in the budget process for the purpose of economic advancement and prosperity of the nation.

"Strategies for Improvement of the Quality of Bills and Legislative Drafting in Nigeria"

By

Dr. Tonye Clinton Jaja*

Abstract

"…a systematized,...developed approach"[1]or framework for legislative drafting is a necessity for the production of quality Bills or legislation which in turn contributes to the overall national development of any democracy. In the field of legislative drafting the Seidmans[2] are among "some experts [who] have developed a whole theory about how [legislative] drafting can help third world development" [3]

Conversely, an unorganised or "unsystematic approach"[4] to legislative drafting is often identified as one of the major reasons for poor quality legislation in Nigeria and other transitional and developing countries as is established. Another authoritative study in legislative drafting, has established that "...a near complete lack of unified methodology in the drafting of legislation nationally" "especially in the third world and emerging democracies"[5] is the single most important cause for poor quality Bills and legislation.

The focus of this research is to persuade and make a case for the key actors and stakeholders within Nigeria's legislative process to adopt a holistic strategy for the improvement of the quality of Bills and legislation in Nigeria through legislative drafting and other related strategies.

* Senior Research Fellow, National Institute for Legislative and Democratic Studies, Abuja

[1] See T.Drinoczi, Quality Drafting-The Case of Hungary (2010) *Legisprudence*, 4 (2) pp.157-170 at p.158

[2] See generally Ann and Robert B.Seidman, 'Drafting Legislation for Development: Lessons from a Chinese Project' (1996) *American Journal of Comparative Law*, 1-44

[3] See Constantin Stefanou, The Policy Process and Legislative Drafting in C.Stefanou and H.Xanthaki (eds) *Manual in Legislative Drafting* (Department for International Development, 2005), p. 3

[4] Svetlana Pisarenko, *The Drafting of Laws* (Canada-Ukraine Legislative Drafting Programme, 1999) 7

[5] See.Constantin Stefanou and.Helen Xanthaki (eds) *Manual in Legislative Drafting* (Department for International Development, 2005) 4

The quality of Bills and legislation which is at the centre of this research is important and significant considering that: "…The quality of legislation can strongly influence economic development and the well-being of the citizen"

The relationship between "quality legislation and economic development", and the idea that quality legislation can promote economic development is applicable to Nigeria and other countries whose primary national goal is to achieve development as enshrined in section 16(2) (a) (b) of the Constitution of the Federal Republic of Nigeria, (CFRN), 1999 (as amended) which provides that one of the objectives of Nigeria's economic policy and legislation is to "promote economic development".

Keywords: *good quality legislation, Bill and legislative drafting*.

Introduction

One of the major arguments and key recommendations of this research paper is that professionals with expertise in legislative drafting ought to be engaged for the development of such a national strategy for the improvement of the quality of Bills and legislation in Nigeria. The rationale for seeking specialist textual quality reforms as stated by Patchett is:

> "Governments may not have the time or the expertise to carry out an overall review as to the form in which legislation is generally drafted, and particularly of textual and structural improvements that may make legislation easier to use and understand. There may be advantage in drawing on external resources, e.g. from academic institutions, lawyers and judges, to make recommendations for changes that will raise the textual quality of law-making instruments generally"[6]

The key criteria that can be distilled from the above are: (1) specialist must have expertise in law [legislative] drafting, and (2) the specialist must be an external resource person.

On this point, all the legal studies on legislative drafting in Nigeria unanimously admit that the use of "private legal practitioners"[7] is a current drafting practice to fill the need for a specialist other

[6] SIGMA PAPERS NO.18, 29

[7] See Kevin N. Nwosu (ed) *Law and Practice of the Legislature in Nigeria* (Nayee Publishing Company Limited, 2003), p.279.

than the government employed Nigerian drafters and legislators. Esegbabon[8] calls them "experts"; Okon and Essien[9] describes their function to Nigerian drafter or legislator thus: "the help of a professional legal draftsman to polish up the draft..."

As Opeibi[10] has rightly demonstrated in his recent study, Nigeria is in dire need of an "official policy" that defines and elevates the quality of language used in the texts of legal documents, especially legislation.

The national strategy to be developed by such legislative and legislative drafting experts will be characterised by robust consultations, inter-dependence (synergy) amongst all the major stakeholders that are involved in the production of Bills and legislation, it will also involve deliberate strategic thinking that features the "...introduction of procedures and practices that would make it more likely that ***properly thought out answers*** will be provided on fundamental questions of policy and approach, especially for complex and difficult reforms"[11].(italics and bold mine).

Such a strategy or systematic approach would be different from the major current and prevalent approach(es) that is often adopted by Nigerian government officials and institutions that are involved in the production of Bills and legislation in Nigeria is due to the lack of ***properly thought out answers*** or strategy, the policy and legislation development process is mainly reactive (as

[8] R. Esegbabon, *Nigerian Legislative Process-Bills, Budget and Committee System* (Abuja: Law Links Ltd., 2005),p. 72.
[9] Emmanuel Okon and Aquaowo Essien, *Law-Making Processes in Nigeria-At the National and State Houses of Assembly* (Spectrum Books Limited 2005), P.117
[10]Tunde Opeibi, 'Between Obscurity and Clarity in Nigerian Legal Discourse: Aspects of Language Use in Selected Written Texts' in Anne Wagner and Sopie Cacciaguidi-Fahy (eds.) *Obscurity and Clarity in the Law-Prospects and Challenges* (Ashgate, 2008) p. 216
[11] ibid

opposed to proactive) and unsystematic characterised by: "...feverish and ejaculatory response from a government accustomed to adopting a 'fire-fighting approach'..."[12]

As a long term strategy, this research study found that of all the prevalent models of legislative drafting, Patchett's strategy for the improvement of legislative drafting is the most relevant functional, beneficial and appropriate model that Nigeria could adopt and adapt to achieve its twin goals of improving the quality of the "ingredients" and the "key actors" involved in Bills and legislative drafting. Patchett's model, is a tried and tested method, considering that it was successfully applied in achieving improvement of quality legislation in all the Eastern and Central European Countries from the date of its publication in the year 1997 till the date of their full membership of the European Union in the early and mid-200s. In a nutshell,

The seven strategies within Patchett's framework are:

(i) creating and enforcing a regulatory framework for law drafting;

(ii) improving policy development prior to drafting;

(iii) setting and maintaining law drafting standards;

(iv) making fuller use of consultations;

(v) applying equivalent procedures and standards to parliamentary initiatives;

(vi) applying equivalent procedures and standards to secondary law-making; and

(vii) improving access to legislation.

[12] See Oluseye Arowolo, 'Nigeria's downstream sector deregulation crisis: what are the unresolved issues' (2005) I.E.L.T.R. 10, 16

In the short and medium term, this research paper found that the Acts Authentication Act, 1961 of Nigeria, unwittingly contains the twin elements namely "the key ingredients" and identifies "the firm of bakers" or the key actors which can be applied as an interim measure for the improvement of the quality of Bills, the "ingredients and "key actors" in the legislative process.

Statement of the Problem/Case Studies of some poor quality Nigerian Bills and Legislation

Regardless of the fact that it is acknowledged that quality legislation is an important tool for achieving national and economic development, the reality is that in Nigeria since the inception of our nascent democracy in the year 1999, there is a persistent failure with regards to the production of good quality Bills and legislation that are capable of translating into national economic development of Nigeria.

As evidence of the above fact, one recent study of the Nigerian National Assembly by the National Institute for Legislative Studies, cited in one of the most recent and authoritative textbooks on legislative drafting in Nigeria rightly stated that "over 50% of the Bills received" at the National Assembly are poor quality Bills, that emanate not out of the desire to promote national economic development but instead are "submitted by the desire of legislators to be listed as having sponsored bills"[13].

[13] See S. Imanobe, *Principles of Legal and Legislative Drafting in Nigeria* (Abuja:Imhanobe Law Books Limited, 2014) p. 239

As we acknowledged in the Abstract of this research study, the major root cause of the problem is the absence of a concrete or documented strategy for production of good quality Bills and legislative drafting in Nigeria that governs or guides the key actors involved in the process of production of legislation.

In the field of legislative drafting, it has been established that ideally the rules that govern legislative drafting, and the production of good quality Bills and legislation, ought to be clearly and "unequivocally" stated and specified within the provisions of the constitution (the supreme law) of any democratic society that upholds the rule of law. It is further stated, whenever the constitution is silent, there ought to be either a primary legislation, subsidiary legislation or a manual that could stipulate the rules that govern legislative drafting and production of good quality legislation. This approach to legislative drafting was first expressed by Lord Henry Thring in his 1902 treatise on legislative drafting and re-echoes in the 2009 study by Professor Bates, thus:

> "....I found that the subjects of Acts of Parliament, as well as the provisions by which the law is enforced, would admit of being reduced to a certain degree of uniformity; that the proper mode of sifting the materials and of arranging the clauses can be explained; and that *the form of expressing the enactments might also be made the subject of regulation"*[italics mine][14]

In a nutshell, Lord Thring implies that the drafting of legislation should be undertaken in accordance with laid down rules, principles or guidelines that are "applicable to Acts of

[14] Lord Henry Thring, First Parliamentary Counsel of the United Kingdom, 1869-1901, cited in Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (John Murray, 1902) 4

Parliament" and with "little adaptation may, be applied to every sort of composition..." including delegated legislation.[15]

Contrary to Lord Thring's recommendation, this research found that neither the 1999 Constitution of the Federal Republic of Nigeria (hereinafter referred to as the 1999 CFRN) nor any existing legal framework stipulates in any clear detail the procedure for drafting or improvement of law drafting and the quality of legislation. This gap in the Constitution serves as a justification for the relevance and application of Patchett's framework (specifically strategy no.1) which recommends the establishment of a regulatory framework for law drafting consisting of rules and standards contained in both primary and secondary legislation. In addition, another justification is derived from the fact that the gap in the 1999 CFRN is an exception to the assertion by Bates that separate rules of legislative drafting are "legally unnecessary as they do no more than reiterate"[16] the rules and principles of drafting already contained and "unequivocally stated in the constitution". In other words, there is the presumption that the legal framework or body of rules for legislative drafting must be already "unequivocally stated in the constitution" or another primary legislation, which is not the case in Nigeria.

According to Lord Thring, the regulation of legislative drafting is an "essential requisite" to ensure that legislation "...accomplishes the design of the law giver"[17] .

[15] Lord Thring Ibid

[16] T.St.J.Bates, 'Legislating for Drafting: The Moldavian Experience', (2009) Statute Law Rev 30 (2): 123-139 at p. 134.

[17] In this respect Thring quotes John Austin: "I will venture to affirm that what is commonly called the technical part of legislation is incomparably more difficult than what may be called the ethical. In other words it is far easier to conceive justly what would be useful law, than to construct the same that it may accomplish the design of the law giver"-Thring, Henry Thring, First Parliamentary Counsel of the United Kingdom, 1869-1901, cited in Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (John Murray, 1902) p.3

This research study found that the above presumptions do not apply in Nigeria and this is one of the reasons for poor quality Bills and legislative drafting, the absence of a concrete documented legislation or guide for legislative drafting which results in lack of uniformity in the content and structure of Bills in Nigeria. This is evident by the fact that a mere cursory examination of the Bills that are drafted by lawyers employed at the Legal Drafting Departments of the Federal Ministry of Justice and the Legal Services Directorate of the National Assembly of Nigeria respectively reveals fundamental differences in style and structure. For example, whereas the Interpretation (Definition) Clauses are amongst the preliminary provisions of the Bills drafted by lawyers of the Federal Ministry of Justice. The Interpretation (Definition) Clauses are placed as part of the Final provisions in the Bills that are drafted by the lawyers of the National Assembly. This often results in lawyers of the National Assembly having to expend time and other resources in re-drafting of the Executive Bills that are drafted by the lawyers of the Federal Ministry of Justice whenever such Bills are submitted to the National Assembly for enactment.

Another problem that this research study found is that the involvement of non-professionals, i.e. lawyers with cognate experience, formal qualifications and expertise in legislative drafting, is one of the major causes for poor quality Bills and legislative drafting in Nigeria.

This is admitted by a former clerk (Dr. Adamu Fika) of the Nigerian National Assembly thus:

"***Lawyers who draft legislation engage in a highly technical aspect of law that requires competence***. A failure to properly translate the substantive policy into the appropriate law

adversely affects the policy, the lawyers are like ***midwives*** in the birth of laws and so it behoves them to strive hard to help bring forth laws that are ***effective, clear, precise, intelligible and capable of only one interpretation, which is the true purpose and intent of the policy as envisaged by the policy initiators***"-*Clerk, National Assembly of Nigeria. The Nation newspaper of September 2, 2014.*

In the statement above, the former Clerk of Nigeria's National Assembly used the analogy of the critical role of "midwives" to describe the highly important role (life-and-death) and competence thereof that legislative drafters must possess if they are to play any role in delivery of effective legislation that achieves the desired results.

The first issue that Dr. Fika's statement acknowledges is that ***"Lawyers who draft legislation engage in a highly technical aspect of law that requires competence"***.

Elsewhere, this view point is also expressed thus: "***Legislative drafting is an area of specialist legal practice***[18]…A country that wishes to improve the quality of its legislative drafting…cannot assume that, because an officer has legal qualifications, he or she is competent to undertake law drafting at every level required. More than in the past, quality [legislative] drafting calls for

[18] It now recognised that legislative drafting is a "new sub-discipline of law" or the legal profession, see generally H.Xanthaki, Legislative Drafting: A New Sub-Discipline of the Law is Born (2013*) Institute of Advanced Legal Studies, University of London, IALS Student Law Review* , Volume 1, Issue 1, Autumn 2013, pp. 57-70, available online: http://sas-space.sas.ac.uk/5234/1/1706-2278-1-PB.pdf accessed 10/04/2015

persons who have systematically prepared themselves for this kind of ***specialist legal work***"- Keith Patchet[19]

As stated at the onset of this research paper, the problem of poor quality Bills and legislation in Nigeria exists because there has not been a deliberate and formal effort to identify, define, formulate and apply the "key ingredients" and "the roles of the key actors" as part of an overall national strategy for improvement of Bills and legislative drafting in Nigeria.

For example, Nigeria does not yet have a national policy, or legislation or any elaborate and adequate provision(s) within the 1999 Nigerian Constitution which clearly defines the criteria for what constitutes good quality Bills or legislation. Without such a clear definition of what constitutes good quality legislation, it is difficult if not impossible for the legislative drafters and other key actors within Nigeria's legislative process to produce any

Although it now generally agreed that in the field of legislative drafting, it is trite that "effectiveness" is the key criterion of good quality Bills and legislation. In the field of legislative

[19] See Law Drafting, SIGMA Paper No.18, 1997, p.42: Keith Patchett, OECD (1997), "*Law Drafting and Regulatory Management in Central and Eastern Europe*",SIGMA Papers , No. 18, OECD Publishing, p.42 available online: http://www.oecd-ilibrary.org/docserver/download/5kml618wrlg7.pdf?expires=1425023249&id=id&accname=guest&checksum=BB018D2A25486AF3E984713A9897ECFD accessed 10/04/2015. Late Professor Keith Patchett was of the School of Law, Cardiff University, U.K.

drafting, "effectiveness" means that the legislation "manages to introduce adequate mechanisms capable of producing the desired regulatory results"[20].

It is not just failure to achieve national economic development in Nigeria that is the only consequence and symptom of poor quality legislation and Bills, resort to litigation to interpret the provisions of such poor quality Bills or legislation, which in itself involves diversion of scarce financial resources to fund such litigation is another consequence and indicator of poor quality Bills/legislative drafted is acknowledged by one of the notable studies in the field of legislative drafting:

"Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, and the citizen with the earnest desire to conform is confused. Often, lack of artful drafting results in failure of the statute to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation. Failure to comply with certain constitutional requisites may produce total invalidity"[21] Professor Albert R. Menard, Jr.,

Although there are a plethora of examples that illustrate this issue, this research shall provide three representative examples and case studies of poor quality Bills, legislation and legislative drafting in Nigeria, as examined below:

[20] See H.Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?'(2010) Legisprudence, Vol.4, No.2, pp.111-128 at p.115.
[21] Legislative Bill Drafting, 26 Rocky Mountain Law Review 368 (1954)

(i) Failure to undertake robust consultations during the legislative, legislative drafting processes and the attendant wastage of national resources is evident in the cost of paying and re-repaying legislative drafting staff and legislative drafting consultants to draft and re-draft Bills. For example, the Petroleum Industry Bill (PIB) has at least five (5) versions. Each of these five (5) version was drafted by a different team of legal/legislative drafting consultants.

The first version 2007 version was drafted as an Executive Bill by the legislative drafters at the Federal Ministry of Justice based on instructions provided by the Oil and Gas Implementation Committee inaugurated by former President of Nigeria-Mr. Olusegun Obasanjo in the year April 24, 2000.

The second version of the PIB, the 2008[22] version was drafted by a team of lawyers headed by Prof.Yinka Omorogbe, the then Company Secretary and Legal Adviser of the Nigerian National Petroleum Corporation (NNPC). This Legal Team was a sub-committee of the re-constituted OGIC which was on September 7, 2007, the federal government administration under President Umaru Musa Yar'Adua appointed Dr. Riwlanu Lukman to chair a reconstituted OGIC.

The 2009 version[23] of the PIB was drafted by an international legal consultant Dr. Pedro van Meurs who was hired by the Ministry for Petroleum Resources. Due to complaints of non-inclusion of

[22] Available online: http://www.iaee.org/documents/newsletterarticles/408wumi.pdf accessed 29 March 2017
[23] Available online: http://petrocash.com/documents/free/65184056.pdf

the interests of the concerns of the international oil companies (IOC), a 2010 version of the PIB was drafted.

Due to the failure of the Seventh National Assembly in May 2015 to enact the PIB before expiration of their tenure, with the beginning of the Eighth National Assembly in June 2015, a new 2015 version of the PIB was drafted which sought to harmonise and consolidate the provisions of the House of Representatives and Senate's versions of the PIB.

As of the time of writing this policy paper (May 2018), it is reported that:

"…PIB as it is today has been split into four parts by the National Assembly as follows - the Petroleum Industry Governance Bill (PIGB), the Host Communities, Fiscal Reforms and the Administration Bill"[24].

(ii) Failure of the legislative drafters to undertake pre-legislative scrutiny and in-depth research of existing laws when drafting instructions are issued resulting in the loss of federal government revenue due to drafting of legislation that creates federal government agencies (statutory corporations) that duplicate the functions of already existing federal government agencies. For this reason, it was report in February 2018, that President Buhari withheld assent[25] to a Bill for the Establishment of the Peace Corps of Nigeria, stating that the said agencies is a duplication of the functions of existing security agencies.

[24] Available online at: http://saharareporters.com/2018/05/04/national-assembly-will-conclude-work-pib-2018-nnpc-gmd-assures accessed 04/05/2018

[25] Available online at: http://www.punchng.com/breaking-buhari-withholds-assent-on-peace-corps-bill/ accessed 04/05/2018

Ideally, when a legislative drafter receives legislative drafting instructions to draft a Bill to establish a federal government agency, such a legislative drafter ought to conduct preliminary legal research to ensure that the existing laws of the Federation of Nigeria do not contain an existing government agency that is already performing the same or similar functions. However, in practice, it is evident that legislative drafters at the House of Representatives do not follow this procedure.

This is evident by the fact that it was recently reported[26] in January 2017 that legislative drafters and legislators still drafted legislation for the establishment of twenty-five additional federal government agencies. This is alarming considering that a simple preliminary research by the legislative drafters would have revealed that creation of additional federal government agencies is not consistent with the current economic reality and the direction of the Federal Government in line with the recommendations of the Stephen Orosonye Report, 2011.

According to the Stephen Oronsoye Report on the Rationalisation of Federal Government Agencies and Parastatals, 2011. According to the Report: "There are 541 government parastatals, commissions and agencies (statutory and non-statutory) in the country,'[27] Mr. Oronsaye said. "Going by the recommendations of the Committee, the figure of statutory agencies is being proposed for reduction to 161 from the current figure of 263."

[26] Reported by DAILY TRUST NEWSPAPER: https://www.dailytrust.com.ng/news/general/national-assembly-to-create-25-new-agencies/183118.html accessed March 2017

[27] Reported in PREMIUM TIMES NEWSPAPER, available online: http://www.premiumtimesng.com/news/top-news/4678-presidential_committee_asks_government_to_scrap_102_agencies.html accessed 29 March 2017

As evidence that this problem is not abating, it was recently reported on May 3, 2018, that there are forty (40) Bills[28] seeking the establishment of forty (40) new universities within Nigeria listed for enactment by the House of Representatives of the Nigerian National Assembly.

(iii) Ignorance or failure to apply the basic rules of legislative drafting regarding inclusion of "Interpretation (Definition) Section or Clauses" within Bills and legislation that impose penalties. A very fundamental rule of law and legislative drafting as stipulated within Section 36 (12) of the 1999 Nigerian Constitution (as amended) is that there must be a "definition" or "statement" of what constitutes any offence or "the prohibited act or omission"[29] that is mentioned within any Bill or legislation as a precursor before prescription of the penalty or "sanction". However, majority of Nigerian Bills and legislation have often flouted this basic rule. For example, section 24 of the Cybercrimes (prevention and prohibition) Act, 2015, mentions the word "cyberstalking" without providing a definition of what are the elements of the said offence, this has resulted several law suits such as *Solomon Okedara v. Attorney-General of the Federation*[30] seeking the court to provide an interpretation of this particular section of the said legislation. This researcher has recently drafted an amendment of the said legislation that is currently undergoing debate and consideration on the floor of the House of Representatives of the National Assembly.

[28] http://www.punchng.com/40-bills-seeking-creation-of-new-varsities-before-reps/ Accessed 7 May 2018
[29] See G. Thornton, *Legislative Drafting* (London: Butterworth, 1996) p.349
[30] http://thewillnigeria.com/news/lawyer-files-suit-against-cybercrime-act/solomon-okedara-v-attorney-general-of-the-federations-suit0004/ accessed 7 May 2018

(iv) Another problem that creates poor quality Bills and legislation in Nigeria, is the failure or neglect to undertake thorough scrutiny of Bills to prevent the allegation of mischievous and fraudulent insertion of "new" clauses by legislators or staff of the legal departments of legislatures when they are assigned to "clean-up" a Bill before the stage of third reading and final enactment of the Bill. This illegal practice which is often commonly practiced with regards to Appropriation (Budget) Bills/Legislation has new notoriety in Nigeria and led to the coinage of a new phrase and addition to Nigerian legislative lexicon as "budget padding" phenomenon. For example, in February 2018, it was alleged that there was a "fraudulent" insertion of a 0.5%[31] tax on companies as a source of funding the operations of the proposed Federal Competition and Consumer Protection Commission, which was undergoing enactment at the National Assembly as the Federal Competition and Consumer Protection Bill, 2017. It was alleged this 0.5% tax was not contained in the original version of the said Bill, nor was it mentioned during the debates and public hearing (consultations) stages of the legislative process, it only appeared in the final version of the Bill that was submitted to the President for assent.

Ideally, under section 5 of the Acts Authentication Act, 1961, it is the duty of the Clerk of the National Assembly to scrutinize the Bills (to confirm that the contents are accurate reflection of the versions as enacted by both chambers of the National Assembly) before they are submitted to the President for his assent. However, in actual practice, the Clerk of the National Assembly as a matter of tradition delegates this responsibility to the Legal Services Directorate of the National Assembly which is established by Section 14 of the National Assembly Service Act, 2014.

[31] https://www.lawyard.ng/neca-rejects-additional-tax-inserted-in-federal-competition-and-consumer-protection-bill/ accessed 7 May 2018

Ideally, the general rule of law is that a legislative drafter cannot and is not at liberty to change the substance of a Bill or legislation on his own volition but must draft to reflect only the express instructions, intentions of the legislators or whosoever is instructing the drafter with a view to translating policy into legislation. The duty of loyalty and confidentiality[32] to legislators and the officials providing drafting instructions are core ethical and professional responsibilities of legislative drafters which every drafter is under

Furthermore, after, the Public Hearing and after Committee Report of a Bill (which is before the third and final reading stage of the legislative process), no new item ought to be included in a Bill. However, in actual legislative drafting practice in Nigeria, a former Nigerian senator and lawyer has alleged that:

> "There is the common practice that after bills may have been passed by the Senate and the House of Representatives, the legal department now re-drafts the bills, perhaps, changing certain words to give them a presentation in a legal draftsman's perfect legislative draft. This, in my view, is inconsistent with the provisions of the law."[33]

(v) Lack of adequate time and resources devoted to the research, debate and consultations on Bills by the National Assembly of Nigeria.

As we mentioned at the Abstract of this research study, it is the norm and not the exception that adequate time and resources is not expended on conducting research and consultations before

[32] C. Stefanou, Ethics and Legislative Drafting in C.Stefanou and H. Xanthaki (eds.) *Manual in Legislative Drafting* (London: IALS & Department of International Development, 2005) pp.6 & 7

[33] https://www.vanguardngr.com/2016/08/budget-padding-occurs-ita-enang/ accessed 7 May 2018

enactment of Bills. In June 2015, it was reported that within ten (10) minutes the Senate of the 7th National Assembly of Nigeria enacted forty-six (46) Bills, the said Senate "deemed all the bills as having passed first, second and third readings and passed them"[34]. One of the senators alleged that it was not in violation of any laws but in accordance with "Order 1 (b) of the Senate Standing Order 2011, as amended and also suspended Order 79 (1) of its Standing Orders." However, majority of lawyers condemned the said action as "legislative recklessness and laziness"

(vi) High turn-over and low educational qualifications of legislators as one of the underlying causes of persistent poor quality Bills legislative drafting by the National Assembly.

The Rt. Hon. Speaker of the 8th House of Representatives of Nigeria has alleged that there is a very high rate of turn-over[35] which occurs during elections that take place every four (4) years undermines the quality of Bills and "legislation" that is enacted by the National Assembly.

Furthermore, it has also been alleged that due to low educational qualifications[36] of a large percentage of some legislators, limits their ability to contribute to debates which in turn undermines the quality of Bills and legislation that are enacted by the National Assembly.

(vii) Failure of the wordings of certain Bills and legislation to confirm to the provisions of the 1999 Nigerian Constitution (as amended).

Although, Section 1 (3) of the 1999 Nigerian Constitution (as amended) expressly stipulates that the wordings of every Bill or legislation must be consistent with the provisions of the 1999

[34] http://thenationonlineng.net/passage-of-46-bills-its-legislative-recklessness-say-lawyers/ accessed 7th May 2018.
[35] http://www.nta.ng/news/politics/20170420-turnover-national-assembly-legislation-dogara/ accessed 7 May 2018.
[36] https://www.dailytrust.com.ng/news/general/revealed-40-reps-5-senators-parade-o-level-certificates/174424.html accessed 7 May 2018.

Nigerian Constitution (failing which such Bills and legislation are deemed illegal and void to the extent of such inconsistency), this study has found that some Bills and legislation, fail this basic constitutional requirement. It implies that either the legislative drafters or the legislators themselves and even the President whose responsibility it is to provide assent to legislation, do not undertake adequate scrutiny to ensure this very important constitutional test.

For example, Section 3 (1) of the Treaties (Making Procedure, etc.) Act, 1993 provides for a classification of treaties and states that certain category of treaties do not require the National Assembly to ratify and enact them. This provision is in direct conflict with the provisions of section 12 of the 1999 Nigerian Constitution (as amended). Sections 15 of the National Commission for Refugees (Establishment) Act, Chapter N121 Laws of the Federation of Nigeria, 2004 and section 5 of the National Human Rights Commission (Amendment) Act, 2010, which contains self-executing provisions of treaties by reference, are contrary to the provisions for direct enactment of treaties by the National Assembly as a pre-requisite before their application within Nigeria as stipulated under section 12 (1) of the 1999 Nigerian Constitution (as amended).

From the foregoing, although the problems, causes and symptoms of the poor quality Bills and legislative drafting in Nigeria are legion, the focus of this research is not to dwell on a discussion of the problems but to undertake a research that reveals the solution(s). A key to uncovering the solution lies in identifying an appropriate research methodology and theoretical framework that will be applicable for this research as is discussed hereunder.

Methodology

This policy brief research is essential a desk library research. As a legal research study, it adopts the doctrinal legal research methodology as its major methodology.

However, as a complement, the case study and comparative legal research methodologies are also applied for the purpose of identifying strategies for improvement of Bills and legislative drafting in Nigeria that are not explained by the current prevalent doctrines of legislative drafting that are relevant or provide explanations of the different approaches to improvement of the quality of Bills, legislation and legislative drafting by defining the "ingredients" and "key actors" which is the focus of this research.

The doctrinal approach will be combined with the comparative law method, and the case study methodology, the possibility of combining these is confirmed according to Hutchinson:

"A modified case study approach is very possible within a legal research project. It can be combined with a doctrinal study and allow typical examples to be explored according to varied legal outcomes" [37]

Literature Review

[37] See T. Hutchinson, *Researching and Writing in Law* 2nd edn (Lawbooks/Thomson Reuters, 2006) p.104

At the epicentre of this research is the question: "what constitutes "quality legislation"? In other words "what are the ingredients of good quality Bill/legislation and legislative drafting?". To find the answer, it will be necessary to examine the relevant literature in the field of legislative drafting.

The quest for a definition of quality legislation or achievement of quality legislation in the field of legislative drafting has generated different initiatives,[38] criteria[39] and approaches to drafting among drafters in different jurisdictions. For example under European Union law, the definition of quality legislation has resulted in the enunciation of such principles as "subsidiarity", "proportionality", "impact assessment", "cost/benefit analysis", "accessibility", "transparency in decision-making"[40]etc, in relation to legislation. Efforts to improve the quality of legislation resulted in the adoption of certain guidelines on how Community legislation is to be drafted, namely, the EU Inter-Institutional Guide for persons involved in the preparation of legislation within the EU Community (IAG) 2003.[41] In the United Kingdom, which is the archetype of common law drafting, the Renton Committee of 1975 tended to define quality legislation as accessible legislation in simple, clear, plain English. However, evidence suggests the Committee's recommendations are yet to be followed[42].

This research study asserts that the criteria or definition of "quality legislation" must depend on the objective of the legislation. As Vanterpool rightly stated:

> "…the pursuit of quality in legislation therefore advocates a certain balance arising from the foundation that legislation achieves its highest quality when it has attained its true function. This essentially means that as legislation is intended to govern and impact upon wide audiences, the texts should be accessible, in that they are unambiguous and simple to comprehend but yet precise and most *effective* [italics mine] in achieving the desired intention of the sponsors"[43]

[38] See H.Xanthaki, The SLIM Initiative (2001) Statute Law Rev.. 22(2) 108 According to Xanthaki, the concern for quality in EU legislation was influenced by the call for greater accessibility of legislation and the principle of direct effect of EU legislative text respectively.
[39] Luzius Mader. Evaluating the Effects: A Contribution to the Quality of Legislation (2001) Statute Law Rev. 22(2): 119-131
[40] See J.C.Piris, The Quality of Community Legislation: the viewpoint of the Council of the Legal Service, in A.Keller, et al (eds) *Improving the Quality of Legislation in Europe* (1998) 25-38
[41] Available online at: eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2003**:0770:FIN:EN:DOC · DOC file accessed on 17 October 2011
[42] See R.Thomas, Plain English and the law, (1995) Statute Law Rev. 139, 148
[43] Vareem Vanterpool, A Critical Look at Achieving Quality Legislation (2007) EJLR 167-204 at 170

Flowing from the above, it is discernible that "effectiveness" is the defining element of "quality legislation" in the field of legislative drafting. Xanthaki has rightly defined effectiveness thus: "effectiveness" means that the legislation "manages to introduce adequate mechanisms capable of producing the desired regulatory results."[44] In other words, "effectiveness" focuses on the "effects produced by legislation and the purpose [objective] of the statute passed…"[45] Accepting effectiveness as the key criterion of quality legislation in legislative drafting, inevitably leads to acceptance of "…clarity, precision and unambiguity…as tools of effectiveness".[46] Xanthaki has further observed that "Clarity, or clearness, is the quality of being clear and easily perceived or understood. Precision is defined as exactness of expression or detail. Unambuiguity is certain or exact meaning..."[47]

However, it must be noted that "...while the drafter will significantly contribute to the overall quality of legislation, the final achievement of *quality legislation* [effectiveness] is not one which the drafter can achieve alone". To the contrary, "…the quality of the legislative product can only be achieved through collaborated efforts of the legislative sponsors or the relevant Ministry or Department, the drafter and the Legislators".[48]

The relevance of quality legislation to this current thesis is that Patchett apparently suggests that a regulatory framework for law drafting is a strategy (indeed the first strategy) for improvement of

[44] See H.Xanthaki, Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules? (2010) Legisprudence, Vol.4, No.2, , pp.111-128 at p.115
[45] See H.Xanthaki, On Transferability of Legislative Solutions: The Functionality Test in C.Stefanou and H.Xanthki (eds.) *Drafting Legislation: A Modern Approach* (Ashgate Publishing, 2008) pp.1-18 at p.6
[46] Ibid p.12
[47] See H.Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in law or Impediment to the Necessity of Dynamism of Rules' (2010) Legisprudence Vol. 4, No.2 pp.111-128 at pp.111, 116.
[48] Vareem Vanterpool, A Critical Look at Achieving Quality Legislation (2007) European Journal of Law Reform, 167-204 at 170

the quality of legislation, considering that the seven strategies for improvement of law drafting will inevitably result in improvement of the quality of legislation in CEE countries and, by extension, to Nigeria as proposed in this thesis. The analogy is that improving the quality of the foundation is likely to improve the quality of the building (final product). In this equation the regulatory framework is the foundation, whereas the legislation is the final product.

Previous legal studies on legislative drafting in Nigeria have a tendency to concentrate on the procedure for producing a legislative draft (Bill) and the drafting process with insufficient consideration of such important issues as improving policy development; making fuller use of consultations and improving access to legislation which are key elements of Patchett's framework.[49]

The first comprehensive study on legislative drafting in Nigeria is Azinge (1994)[50]. He examined law-making and legislative drafting under military regimes in Nigeria. He analysed the procedure for policy formulation, law making and drafting of legislation. He further analysed the role of the Attorney-General as the personnel with responsibility for drafting federal legislation.
However, considering that Azinge (1994) dwells on law drafting under military regimes, its relevance to improving law drafting in a democracy is limited. Nonetheless, his work provides a background understanding of the underlying problems or constraints for law drafting in Nigeria.

Azinge's work was followed shortly by Adesiyan (1996)[51] which dwelt entirely on the procedure for composition of legislative drafts (bills). In that short work there is no reference to policy

[49] See generally D.O.Adesiyan, *A Handbook on Legislative Drafting* (Tefton Books,1996); R.Esegbabon, *The Nigerian Legislative Process* (Law-Link Consults, 2005)
[50] Epihany Azinge, *Law-Making under Military Regimes-The Nigerian Experience* (Oliz Publishers 1994)
[51] D.O.Adesiyan, *A Handbook on Legislative Drafting* (Teton Books 1996)

development, or access to legislation, just to mention a few or other important aspects of drafting that are relevant for improvement of law drafting as Patchett's framework has provided. This thesis is of the view that Adesiyan's work by not discussing the role of policy development in the drafting process does not provide the reader with a complete picture of drafting. Whereas the prevailing view in the field of legislative drafting is that the "drafter alone"[52] cannot achieve that goal of effective and quality legislation but must collaborate with policy developers, a "multiplicity of actors" and other members of a drafting team. The modern view is that "...drafters play a more significant policy development role after drafting instructions have been issued. They identify policy gaps and arrange for consultations with relevant advisors..."[53] In turn this approach to drafting, wherein drafters are regarded as "active partners and not merely scribes"[54] ties in with another important view in the field of legislative drafting that achievement of effectiveness of legislation and quality legislation ought to be undertaken in a systematic manner that involves the drafter on the one hand and "an interrelationship between actors in policy process",[55] the implementation, enforcement and compliance process on the other hand.

Nwosu (2003)[56] provides an introductory or rudimentary understanding of legislative drafting in Nigeria. The majority of chapters in the book are dedicated to a discussion of aspects of the law-making process in Nigeria such as "the relevance of committees and committee system in the exercise of legislative powers"; "dispute resolution in the legislature" just to mention a few. Indeed only one chapter out of eighteen chapters is dedicated to a discussion of legislative drafting in

[52] Xanthaki, p.5,
[53] Pisarenko, supra, p. 48
[54] ibid 35
[55] Xanthaki, p.7
[56] Kevin N. Nwosu (ed) *Law and Practice of the Legislature in Nigeria* (Nayee Publishing Company Limited, 2003)

Nigeria in the strictest sense which is at the core of this thesis. However, its major contribution with respect to the seven strategies of Patchett's framework, is that the only mention of checklist as a tool for improving law drafting in Nigeria is made by Nwosu (2003)[57].

Esebagbon (2005)[58] is a major contribution to knowledge in the field of legislative drafting in Nigeria, therefore out of all the literature reviewed this thesis makes more references to it. It provides a discussion of the taking of instructions as part of the drafting process which is part of the policy development process (Patchett strategy no.2) although, it fails to identify the personnel or the government department that is charged with this responsibility. This does not assist the reader in the analysis of co-ordinating authorities which is a sub-element of Patchett's framework. Esegbabon also provides valuable information on "explanatory memorandum" which is analysed under Patchett's strategy no.3.

Some of the latest published studies in the field of legislative drafting in Nigeria that have also been analysed include those by Onwe[59], Imhanobe[60], and Jaja[61].

References have also been made to other foreign texts by Thornton[62], Seidmans and Abeyesekere;[63]Salembier[64] and McLeod[65], this is in addition to academic publications in the

[57] ibid., p.280
[58] Ray Esebagbon, *The Nigerian Legislative Process-Bills, Budgetary Control, Committee System* (Law-Links 2005)
[59] See generally H. Onwe, *Groundwork for Legislative Drafting* (Enugu: Snaap Press Ltd., 2009)
[60] See generally S. Imhanobe, *Principles of Legal and Legislative Drafting* (Abuja: Imhanobe Law Books Ltd., 2014)
[61] T.C.Jaja, *Legislative Drafting and Statutory Interpretation: An Introduction* (Lagos: Malthouse Law Books, 2017)
[62] G. Thornton, *Legislative Drafting* (London: Butterworths, 1996)
[63] Ann Seidman, Robert B.Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law Publishers, 2001)
[64] Paul Salembier, *Legal and Legislative Drafting* (Ottawa, LexisNexis, 2009)
[65] Ian McLeod, *Principles of Legislative and Regulatory Drafting* (Hart Publishing Limited, 2009)

leading law journals on legislative drafting namely the *Statute Law Review* and the *International Journal of Legislative Drafting and Law Reform.*

Comparative Law Analysis/Cross Country Experience

As we mentioned in the Abstract of this research, a "…a systematized,...developed approach"[66]or framework for legislative drafting is a necessity for the production of quality Bills or legislation which in turn contributes to the overall national development of any democracy.

The comparative law analysis under this section, is to examine the "systematic" approaches and strategies that some selected countries have adopted to improve the quality of their legislation.

Although, this research argues that Patchett's seven strategies is the most appropriate (as a holistic and long-term strategy) for improvement of the quality of Bills and legislative drafting in Nigeria, the purpose of this comparative law analysis is to identify appropriate (short-term) strategies that other countries have successfully applied that Nigeria could adopt and adapt.

There are two categories of countries that have been selected for comparative law analysis in this research paper. The first category (France, United States of America, and United Kingdom) is the comity of countries with high level of economic development considering that they are

[66] See T.Drinoczi, Quality Drafting-The Case of Hungary (2010) *Legisprudence,* 4 (2) pp.157-170 at p.158

ranked amongst the top ten economies in the world[67]. The high rate of economic development in these selected countries is relevant to the analysis in this research study considering in the Abstract of this research study, we already initially adapted a prevailing theory and thesis in the field of legislative drafting that there is a nexus between good quality Bills, legislative drafting and economic development wherein [legislative] drafting can help third world development" [68]

Although it is not a country, the European Union (EU) has been selected considering that it provides an example of providing a concrete, documented definition of the "elements of good quality legislation" as a guide for legislative drafters. Also, some elements of the EU approaches to improving quality of Bills and legislative drafting is instructive for Nigeria considering that Nigeria is a member of the Economic Community of West African States (ECOWAS) whose legal, administrative structure and legislative and legislative drafting system is modelled after the EU institutions.

Also, the EU was deliberately selected as a comparative case study considering that the Patchett's seven strategies which this research study advocates has already been successfully tried-and-tested as an EU initiative for certain central and eastern European countries as a perquisite for their enrolment as full-fledged members of the EU.

[67] https://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp accessed 7 May 2018
[68] See Constantin Stefanou, The Policy Process and Legislative Drafting in C.Stefanou and H.Xanthaki (eds) *Manual in Legislative Drafting* (Department for International Development, 2005), p. 3

The second category of countries (South Africa and Kenya) are amongst the top ten economies in Africa[69], the successful application of "systematic" strategies for improvement of their Bills and legislative drafting would provide examples and inspiration for Nigeria.

Below are some details of the strategies for improvement of the quality of Bills and legislative drafting that are applied by the case studies selected, the details are not exhaustive but rather a representative samples, they are as follows:

1. United States of America (USA)-For the purposes of drafting all Federal legislation, the USA Congress (the federal legislature) has put in place some strategies that improve the quality of Bills and legislation as listed below:

(i) an institutional arrangement for legislative drafting that is encapsulated within a legal/legislative framework which consists of the Offices of Legislative Counsel for the Senate and House of Representatives respectively. According to the establishment legislation, the Office of Legislative Counsel of the Senate of the US Congress was established in the year 1919. Section 1 of the said legislation reads: "There shall be in the Senate an office to be known as the Office of the Legislative Counsel, and to be under the direction of the Legislative Counsel of the Senate", a brief information of the Office is provided on the website as follows:

"The Office of the Legislative Counsel was established in 1919 to assist "in drafting public bills and resolutions or amendments thereto" upon the request of any Senator, committee, or office of the Senate. The Legislative Counsel of the Senate was appointed by the President pro tempore of the Senate solely on the basis of his or her qualifications to perform the duties of the position. The

[69] https://answersafrica.com/largest-economies-africa.html accessed 7 May 2018

Legislative Counsel was authorized to appoint Senior Counsels, Assistant Counsels, support staff, and other employees, to establish salaries, and to otherwise administer the Office. All appointments were made without regard to political affiliation and were subject to the approval of the President pro tempore of the Senate."[70]

(ii) The Offices of Legislative Counsel of the US Senate and House of Representatives are at the forefront of improving and maintaining high quality of Bills and legislation in the USA considering that the Legislative Counsel who is the Head of the Office, has the responsibility of scrutinizing all Bills and legislation before their enactment and publication. Each of these two offices have published a ***"Legislative Drafting Manual"*** which serves a drafting guide/manual and tool for undertaking scrutiny of legislation. These legislative drafting manuals are available online on the websites of both offices[71].

(iii) In addition, to the legislative drafting manual, a tailor-made bespoke computer legislative drafting software and laptop computer is made available to each legislative drafting lawyer of both Offices for undertaking Bill and legislative drafting assignments.

As of 2012, it is on record that at least 33 state legislatures out of the legislatures of the 50 States of the USA have their own tailor-made legislative drafting software that is used by the Offices of legislative Counsel of the State legislatures. Also as of April 2018, it is reported that 33 state

[70] https://catalog.archives.gov/id/10534712 accessed 7 May 2018
[71] https://www.slc.senate.gov/Drafting/drafting.htm accessed 7 May 2018

legislatures out of the 50 State legislatures in the USA have published their own Bill/legislative drafting manuals[72].

(iv) Also, staff of both Offices of Legislative Counsel of the USA Congress undertake periodic formal training programmes in legislative drafting. The Legislative Counsel of the US Senate informed this researcher that a two week induction training in legislative drafting is a mandatory training programme for all newly recruited staff and he was gracious enough to grant opportunity for two staff of NILS and the National Assembly to attend the 2016 version of this training. In the field of legislative drafting, a combination of both formal training programmes and "mentorship-through-on-the-job-training" respectively are the two methods for redress the "worldwide shortage of legislative drafters…"[73]

(v) High Remuneration as a strategy for staff retention. During a formal interview, his researcher was informed by the Head of the Legislative Counsel Office of the US Senate, that his salary and the salary of other legislative drafting lawyers of that Office was higher than the salary of any senator of the USA Congress. The said Head of the Legislative Counsel Office retired in March 2018 after thirty-seven (37) years of employment in the Office of Legislative Counsel, USA. This is due to the high remuneration which prevents high turnover.

(vi) Ratio of legislative drafting lawyers (30)[74] per senator/legislator (100)[75] is good and workload is manageable. This is not the case in Nigeria where there are only eleven (11) legislative drafting

[72] http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx accessed 7 May 2018.

[73] S. Markman, Training Legislative Counsel: Learning to draft without Nellie" *Commonwealth Law Bulletin* (2010) Vol. 36, Issue 1, available online at: https://www.tandfonline.com/doi/abs/10.1080/03050710903573431 accessed 7 May 2018

[74] https://www.gpo.gov/fdsys/pkg/CDIR-1997-06-04/pdf/CDIR-1997-06-04-SENATECOMMITTEES-3.pdf accessed 7 May 2018

[75] https://www.senate.gov/reference/reference_index_subjects/Senators_vrd.htm accessed 7 May 2018

lawyers and staff of the Legal Drafting Unit of the Legal Services Directorate of the National Assembly to attend to one hundred and nine (109) senators.

(vii) Division of labour between the Office of Legislative Counsel and the Congressional Research Service (CRS). Unlike the situation in Nigeria, wherein legislative drafting lawyers have to combine the tasks of drafting Bills as well as scrutiny of Bills, in the US Congress the lawyers in the Offices of Legislative Counsel are completely devoted and dedicated to drafting of Bills while the staff of the CRS are dedicated to providing in-depth scrutiny and analysis of Bills for legislators. During a study visit to the CRS by a delegation of NILS in the year 2015, it was noted that the CRS receives an average of 30 to 50 requests per week. It is estimated that the CRS has about 600[76] staff/employees.

(viii) Format of Bill scrutiny/analysis Report

During the 2015 NILS study visit[77] to the CRS it was reported that the CRS has a tradition of providing a two page CRS Bill scrutiny and analysis report that "captures all the relevant information and makes it easier for legislators to read". This is not the case in Nigeria, wherein the prescribed format of Bill Scrutiny and Analysis Report by National Institute for Legislative and Democratic Studies makes it susceptible to wordiness and lengthiness.

2. United Kingdom-The United Kingdom also applies similar strategies for improvement of Bills and Legislative Drafting considering that there is an Office of Parliamentary Counsel consisting of over seventy lawyers, the said office was established in the year 1869 and its sole responsibility

[76] https://en.wikipedia.org/wiki/Congressional_Research_Service accessed 7 May 2018.
[77] L. Hamalai, Report of the Visit to the United States Congress and the UK Parliament by the National Assembly and NILS Delegation, 20-23 October 2015.

is to draft Bills and legislation for the UK Parliament. Just like its counterpart Offices in the USA, it has published its own legislative drafting manual.

The additional measures for improving the quality of Bills and legislative drafting in the UK are:

(i) the Legislative and Regulatory Reform Act, 2006. In a nutshell, this legislation prescribes the procedures to be applied for enactment of legislation and Regulations (secondary legislation). For examples, it stipulates that holding consultations with citizens and others who are likely to be affected by prospective legislation or Regulation is a mandatory part of the legislative and regulation process and documented evidence of undertaking such consultations must be provided by government officials. This piece of legislation is significant considering that it demonstrates a keen understanding of the fact that as a supplement or complement to legislation, regulation (secondary legislation and other alternative tools) could be applied to solve certain problems. This is the equivalent of "alternatives to legislation" as it is called under Patechett's seven strategies. This is one of the problems that Nigeria is yet to address, namely the over-reliance on legislation as a tool for solving all of its problems.

(ii) pre-legislative scrutiny (primary and secondary legislation) committees of the UK Parliament: Since the year 1998, the UK Parliament established two standing committees to undertake scrutiny of any and every Bill, primary and secondary legislation as a pre-requisite before its consideration and enactment by the UK Parliament. More recently in the year 2013, the UK Parliament established the Political and Reform Committee which advocated five key reforms with a view to improving the quality of legislation in the UK.[78] Publication of a draft Code of Legisaltive Standards and Pre-and post-legislative scrutiny are part of the reforms advocated. Also, the UK

[78] A. Samuels, Ensuring Standards in the Quality of Legislation , *Statute Law Review* (2013) Vol. 34, Issue 3, pp. 296-299 at 296

Office of Parliamentary Counsel, published its own GOOD LAW Initiative[79] as a statement of the principles that would guide legislative drafters in addition to its legislative drafting manual.

(iv) Financial Memorandum and cost-benefit analysis of proposed Bills/legislation

Beginning from the 1998/1999 Parliamentary Session, the UK Parliament made it a mandatory requirement that every Bill that is submitted for debate and legislative consideration must be accompanied by a Financial Memorandum that states the financial implications that are involved in implementation of the proposed Bill or legislation. Historically, this was as a result of UK's membership of the EU which made it a requirement amongst EU member states to undertake and publish a "rudimentary cost-benefit analysis"[80] of proposed Bills/legislation.

It is noteworthy, that this strategy is already been adapted and applied in Nigeria since the year 2011, when the Senate of Nigeria's legislature blazed a trail when it enacted Order 77 (3) of the Standing Orders of the Senate, 2011, this provision made it a mandatory requirement for any senator who sponsors a Bill to submit an accompanying document named a Compendium of Financial Implications of any proposed legislation (Bill).

[79] https://www.gov.uk/guidance/good-law accessed 7 May 2018

[80] See C. Stefanou, Drafters, Drafting and the Policy Process in C.Stefanou and H. Xanthaki, (eds) *Drafting Legislation-A Modern Approach* (Aldershot, UK: Ashgate Publishing, 2008) pp.321-346 at p.327, its rightly stated: "One point to note here is that in some small jurisdictions (or in jurisdictions where drafting takes place inside a ministry) the drafters are even expected to complete relevant Regulatory Impact Assessment (RIA) checklists or even (for minor bills) a rudimentary cost-benefit analysis.20 This is not the case in large common law jurisdictions where RIAs are prepared by specialists in the relevant ministries."

(3) France: In a seminal article published in the *International Journal of Legislative Drafting and Law Reform*[81], (this researcher is the Editor-In-Chief of the said law journal) a foremost legislative drafting lawyer from France[82] outlined the major strategies that France has adopted to improve the quality of its legislation as follows:

(i) application of a legislative drafting manual (legistique[83]) and other legislative drafting circulars of 7th July 2011 issued by the Government of France;

(ii) use of alternatives to legislation;

(ii) application of cost-benefit analysis (regulatory impact assessment-RIA);

(iv) legislative drafting by non-lawyers, civil servants and staff of the various Ministries of government;

(v) scrutiny of Bills by the conseil d'etat (Council of State comprised of lawyers, retired judges and other experts) before submission to parliament of France

(4) South Africa- There are several initiatives for promoting good quality Bills, legislation and legislative drafting in South Africa, some of them are:

(i) "Tagging" of Bills as a mechanism of the Parliament of South Africa to scrutinize and ensure good quality Bills. Tagging[84]occurs "as soon as a Bill is introduced in Parliament it needs to be classified into one of the 4 categories mentioned above by the Joint Tagging Mechanism (JTM). This is called "tagging" and will determine the procedures the Bill must follow to become law. The JTM consists of the Speaker and Deputy Speaker, and the Chairperson and permanent Deputy Chairperson of the Council. These office-bearers are assisted by the parliamentary legal advisors".

[81] http://www.cambridgescholars.com/international-journal-of-legislative-drafting-and-law-reform accessed 8 May 2018.
[82] http://www.montin.com/documents/legistics.pdf accessed 7 May 2018
[83] http://www.guide-legistique.fr/guide.pdf accessed 8 May 2018
[84] https://www.parliament.gov.za/how-law-made accessed 8 May 2018

(ii) certification of Bills and legislation by the Office of the Chief Law Adviser[85], Department of Justice, Government of South Africa. Other legislative drafting duties of the Office of the Chief Law Adviser include: (a) Assist municipalities in drafting by-laws & training in drafting of by-laws; (b) Legislative drafting training internally and in other departments (c) Translation and drafting in indigenous languages.

(iii) Legislative drafting training programmes at three South African universities: University of Pretoria[86], University of Cape Town[87] and the University of Johannesburg[88]. South Africa represents the country with the highest number of number of formal legislative drafting programmes by law schools of Universities.

(5) Kenya-"A Guide to the Legislative Process in Kenya"[89] published in the year 2015 by the Law Reform Commission of Kenya is the official publication and guide for the procedure(s) and the officials responsible for pre-legislative scrutiny of legislation and legislative drafting. The Legislative Drafting Division[90], Office of the Attorney-General of Kenya is responsible for drafting of Bills and legislation.

(6) EU- In broad terms, this thesis found that it is possible to deduce that there are two prevalent models for quality of legislative and legislative drafting within the EU.

[85] http://www.justice.gov.za/ocsla/services.html accessed 8 May 2018.
[86] http://www.ce.up.ac.za/Course?tabid=58&Course=733593e7-b8f2-df11-9e88-0050569b0004 accessed 8 May 2018.
[87] http://www.lawatwork.uct.ac.za/legislative-drafting accessed 8 May 2018.
[88] https://www.uj.ac.za/faculties/law/Documents/Legislative%20Drafting.pdf accessed 8 May 2018.
[89] http://www.klrc.go.ke/images/images/downloads/klrc-a-guide-to-the-legislative-process-in-kenya.pdf accessed 8 May 2018.
[90] http://www.statelaw.go.ke/legislative-drafting-division/ accessed 8 May 2018.

The first model, which is contained in the Inter-Institutional Agreement for persons involved in drafting EU legislation of 2003 (IAG), applies to the institutions of the EU involved in the drafting of EU legislation as well as to the institutions involved in transposing and domesticating EU legislation within the founding older and existing EU member states.

In terms of the application of the first model by EU institutions, according to Robinson, the drafting of EU Acts or legislation is generally the responsibility of the European Commission" divided into over 20 technical departments or Directorates General (DG) dealing with the different sectors of the EU activities. Each DG is responsible for preparing and drafting the legislative acts and implementing the acts in its sector."[91]

The first model set out in the Inter-Institutional Guide for persons involved in the preparation of legislation within the EU Community (IAG) 2003[92] and other relevant EU directives on drafting legislation. Generally, it is characterised by non-legally binding rules or drafting manuals. The norms are generally couched in the form of guidelines and principles such as "subsidiarity, proportionality"[93], impact assessment, cost/benefit analysis, accessibility, transparency in decision-making" etc. It is noted that only 9 out of the older 15 EU member states have introduced drafting manuals[94].

[91] William Robinson, 'Drafting of EU Acts: A View from the European Commission', in Constantin Stefanou and Helen Xanthaki (eds.) *Drafting Legislation-A Modern Approach* (, Ashgate Publishing Limited, 2008) 177-197 at 193

[92] Available online at: <eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2003**:0770:FIN:EN:DOC · DOC file> accessed 20 August 2010

[93] See J.C.Piris, The Quality of Community Legislation: the Viewpoint of the Council of Legal Service, in A.Kellerman et al (eds.) *Improving the Quality of Legislation in Europe* (1998) 25-38 cited in V.Vanterpool, A Critical Look at Achieving Quality in Legislation, (2007) EJLR, 167-204 at p.170

[94] See P.V.Lochem and P.Westerman, Rules on Rulemaking-Introduction, (2010) *Legisprudence, International Journal for the Study of Legislation*, 107-109 at p.108

The second model on the otherhand is based on Pactchett's framework and other subsequent SIGMA and OCED models[95] such as the SIGMA Paper No.15 (SIGMA Paper No. 15 *Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe*)[96] specifically designed for the application by those transitional Eastern and Central European countries seeking EU ascension and membership. One of the requirements for the second model is the requirement for approximation of the national legislation with the legislation of the European Union (EU), which is undoubtedly one of the basic criteria of the membership of an aspirant country within the European Union. The core of this process constitutes the adoption of the European legislation, *acquis* of the EU (*aqcuis communautaire*)[97] in the domestic legal system.

In view of the commonality or similarity in terms of the level of development between Nigeria and CEE countries, this research is of the view that the first model which applies to developed EU member states is not appropriate considering that Nigeria is currently not at the same level of development as these developed and industrialised EU countries and does not yet possess the tools to operate such principles. For example in recent times and in recent surveys of level of development, transparency[98] and corruption among public government institutions, Nigeria rates very poorly on transparency in terms of its institutions of government whereas the EU states rate higher.

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[95] A full list of SIGMA and OECD papers can be found at the website: <http://www.oecd-ilibrary.org/governance/sigma-papers_20786581> Accessed 8 January 2013

[96] Available online at: http://www.oecd.org/site/sigma/publicationsdocuments/39543130.pdf Accessed 8 January 2013

[97] The *acquis communautarire* refers the legal corps of the EU, which is composed of primary legislation (Treaties) and secondary legislation (regulations, directive etc), as well as the jurisprudence of the Court of Justice of the European Union which is able to interpret European Union law. The term *acquis communautaire* will be used as result of the legal acts of that time.

[98] See generally M.J.Trebilcock and R.Daniel, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing Limited, 2008)

(i) The Patchett Framework for Transitional Countries (SIGMA NO.18)

In a nutshell, considering that Patchett's model was inspired by the twin fundamental objective(s) of promoting the rule of law and promoting socio-economic development for CCE countries which incidentally is also listed as one of the fundamental objectives of the Nigerian government in sections 1 (3) and Chapter 2 of the 1999 CFRN it is logical that Patchett's Framework[99] or the second EU model is the most suitable model for Nigeria given the fundamental similarities between Nigeria and CEE countries.

The seven strategies within Patchett's framework are:

(i) creating and enforcing a regulatory framework for law drafting;

(ii) improving policy development prior to drafting;

(iii) setting and maintaining law drafting standards;

(iv) making fuller use of consultations;

(v) applying equivalent procedures and standards to parliamentary initiatives;

(vi) applying equivalent procedures and standards to secondary law-making; and

(vii) improving access to legislation.

Furthermore, as demonstrated earlier, Patchett's framework is appealing relevant and suitable to Nigeria, considering that Patchett's framework embodies such modern, universal and international

[99] "common standards and uniform practices for preparing and drafting legislation are set most effectively through the provision of a single set of directives, which have behind them the authority of Government and, as needed Parliament. In the present circumstances of many Central and European countries, the essential elements are most likely to be regulated by law. Not only is this the most powerful means by which reforms can be effected, but for the time being it may by the only sure way by which a single set of standards can be set to bind both Government and the Parliament. Those provisions can be amplified by secondary instruments, such as Standing Orders, made by Government or the Parliament to deal with matters that are of separate concern to them"See K.Patchett, 'Setting and Maintaining Law Drafting Standards: A Background Paper on Legislative Drafting' in C.Stefanou and H.Xanthaki (eds) *Manual in Legislative Drafting* (Department of International Development, 2005) pp.44-60 at pp.46 and 47

good practices in law drafting such as impact analysis of legislation[100] derived from a combination of principles of legislative drafting derived from common law, civil law and European Union law jurisdictions. This is important when viewed in the commercial context considering that both CEE countries and Nigeria are interested and recipients of the "... rapid expansion of international trade and technological advances...related to doing business in a global marketplace"[101] fraught upon them by the "growth of multinational corporations and when viewed in the context of the current trend of internationalisation and globalistion to It was specifically designed from a blend or a combination of legislation and subsidiary legislation as a framework for promoting effectiveness in drafting legislation in transitional countries in Eastern and Central European. Details of how the Patchett model can apply to Nigeria would be discussed hereunder.

Recommendations/way forward

Short Term options and "quick wins"/interventions

The quickest method(s) to improving the quality of Bills and legislative drafting in Nigeria is for the Clerk of the National Assembly to undertake a diligent implementation of the responsibilities assigned under the provisions of the Acts Authentication Act, 1961 in the following ways:

[100] See page 12 of the thesis, See Raul Narits, Good Law Making Practice and Legislative Drafting:Conforming to It in the Republic of Estonia, (2004) Juridica International, Vol.IX, 4-10 at p.6 Law Journal of the Faculty of Law, University of Tartu, Estonia available online at <http://www.juridicainternational.eu/?id=12615> Accessed 7 January 2013

[101] See the Editorial: Anthony A. Tarr, Globalisation, Comparative Law and Law Reform (2003) EJLR, Vol.5,Issue1/2, pp.1-5 at p.1

1. issuance of a certificate of accuracy for Bills as prescribed under Section 2 (1) of the Act, this could serve as a quality assurance or scrutiny mechanism considering that the Clerk will be required to compare the final version of the Bill enacted to ensure that it is consistent with the debates as contained in the Hansard.

2. publication of a Register/Schedule of Acts with their numbers in accordance with sections 2 (2), 4 and 5 of the said Act.

3. appointment of a Legal Editor, Engrossment and Enrollment Clerk for the National Assembly by the National Assembly Service Commission based on the recommendation of the Clerk of the National Assembly in accordance with Section 6 (1) (viii) of the said Act which states: "holders of other offices that shall be created by the Commission on the recommendation of the Clerk to the National Assembly."

4. publication of a Legislative Drafting Manual by a joint committee of lawyers from the Legal Departments of the Federal Ministry of Justice and the Legal Services Directorate of the National Assembly and National Institute for Legislative and Democratic Studies (NILDS).

5. publication of a checklist for scrutiny of the quality of Bills and legislation by the Office of the Clerk of the National Assembly. This checklist must contain a statement or definition of the elements of good quality legislation as internationally recognized namely: "effectiveness" is the defining element of "quality legislation" in the field of legislative drafting. Xanthaki has rightly defined effectiveness thus: "effectiveness" means that the legislation "manages to introduce adequate mechanisms capable of producing the desired regulatory results."[102] In other words, "effectiveness" focuses on the "effects produced by legislation and the purpose [objective] of the

[102] See H.Xanthaki, Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules? (2010) Legisprudence, Vol.4, No.2, , pp.111-128 at p.115

statute passed…"[103] Accepting effectiveness as the key criterion of quality legislation in legislative drafting, inevitably leads to acceptance of "…clarity, precision and unambiguity…as tools of effectiveness".[104] Xanthaki has further observed that "Clarity, or clearness, is the quality of being clear and easily perceived or understood. Precision is defined as exactness of expression or detail. Unambuiguity is certain or exact meaning..."[105].

(6) publication of format for DRAFTING INSTRUCTIONS: The Office of the Clerk of the National Assembly in collaboration with NILDS would publish a format for submission of Drafting Instructions by legislators. It is important for the Drafting Instruction to contain a section that asks whether the problem could be addressed by the use of "Alternatives to Legislation".

This idea of "alternatives to legislation" was advocated by Professor Keith Patchett in his work: "Law [Legislative] Drafting in Central and Eastern Europe " wherein he listed the alternatives to legislation thus:

Alternatives to Legislation

Legal traditions in many CEE countries may mean that considerable emphasis is placed on dealing with social, economic and administrative issues through legislation (primary or secondary) — the so-called "command and control" approach. In many OECD Member countries, attempts are being made to control the tide of legislation by wider use of alternative devices. These may involve more frequent use of administrative directives of various kinds, often issued in the form of circulars, i.e. instruments do not lay down normative rules that are directly enforceable through courts, but are

[103] See H.Xanthaki, On Transferability of Legislative Solutions: The Functionality Test in C.Stefanou and H.Xanthki (eds.) *Drafting Legislation: A Modern Approach* (Ashgate Publishing, 2008) pp.1-18 at p.6
[104] Ibid p.12
[105] See H.Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in law or Impediment to the Necessity of Dynamism of Rules' (2010) Legisprudence Vol. 4, No.2 pp.111-128 at pp.111, 116.

intended to be made effective by other means, e.g. by administrators or by superior officials. The following are the kinds of documents that may be issued:

(i) administrative directives

(ii) Instructions,

(iii) Practice Directions,

(iv) Codes of conduct"[106] just to mention a few.

From the list above the most commonly used "alternatives to legislation" in Nigeria is the use of Practice Directions and Code of Conduct.

For example, in October 2016, the Chief Judge of the High Court of the Federal Capital Territory (F.C.T), signed into law the Practice Direction For Enforcement Of Judgment And Orders Of Magistrates And Judges In The FCT. The Nigerian Securities and Exchange Commission which is the regulator of the Nigerian Stock Exchange also enacted its own Code of Corporate Governance for Public Companies, 2008

Medium and Long Term Legislative Approaches

1. creation and establishment of Offices of Legislative Counsel for the House of Representatives and the Senate of the National Assembly respectively through an enactment of a legislation. Also, the establishment of the Office of the Legislative Counsel of the Federation under the supervision of the Office of the Attorney-General of the Federation, this Office would be responsible for drafting of all Executive Bills.

2. enactment of a legislation that prescribes the personnel, format, and structure of Bills and legislative drafting in Nigeria.

[106] Available online at the OECD website: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(97)176&docLanguage=En accessed 04/10/2018

3.amendment of the Acts Authentication Act, 1961 to include the requirement for the Clerk of the National Assembly to maintain a Register of all Secondary Legislation in Nigeria similar to the Office of the Registrar of Regulations[107], Office of Legislative Counsel, Department of Justice, Government of the Province of Yukon, Canada.

Conclusion

Synergy and robust consultations is the common thread that contributed and still contributes to the successful implementation Patchett's model in Eastern and Central European Countries and other models for the improvement of the quality of Bills and legislation that were examined in this research.

Similarly, the proposals in this research will not be successfully implemented unless and until there is synergy and cooperation from the Nigerian Law Reform Commission, the Federal Ministry of Justice and the Office of the Attorney-General of the Federation even though the Office of the Clerk of the National Assembly and NILDS would be the coordinators of the projects.

Finally, unless and until professional legislative drafters with cognate experience and formal qualifications are involved in this project from inception to completion, the successful outcomes desired will be doubtful.

[107] http://www.justice.gov.yk.ca/general/index.html accessed 8 May 2018.

Electricity theft in Nigeria: How effective are the existing laws?

Augustine C. Osigwe, Chukwuemeka O. Onyimadu, Chinedu A. Ikpeazu, Adaobi J. Ofordeme*

Abstract
There is an overwhelming concern that if electricity theft is not controlled urgently, it will contribute immensely to a continued cycle of mountain debts and inefficiencies for not just the DISCOs but also for the GENCOs. There is an estimated average loss of about N21 billion annually in the power sector to energy theft. Against this backdrop, this paper provides a menu of options for the DISCOs in controlling electricity theft. In doing this, existing laws and regulations prohibiting energy theft in Nigeria and relevant empirical literatures were duly reviewed. Cutting edge ideas on how to combat electricity theft were drawn from cross country experiences. Experience from the United Kingdom, United States of America and South Africa coupled with Nigeria's peculiarities informed the issues raised for legislative consideration**.**
Keywords: *Electricity theft, existing laws, Nigeria.*

1. Introduction

The privatization of the power sector in 2013 brought about the division of Power Holding Company of Nigeria (PHCN) into three, namely; the Generating Companies (GENCOs), Transmission Company of Nigeria (TCN) and the Distribution Companies (DISCOs). To understand the extent of the detrimental effect of electricity theft on the power sector, the link between the three and power efficiency, must be established. The GENCOs are responsible for transforming hydro and gas power into electricity and transmit this electricity to the TCN; the TCN uses their transmission grid to collect bulk electricity from the GENCOs and transmit to the DISCOs; and the DISCOs buy electricity from the TCN and distributes to consumers for a price

* National Institute for Legislative and Democratic Studies (NILDS), National Assembly, Abuja, Nigeria. Contact: acosigwe@yahoo.com , 080 3872 8652; onyimaduchukwuemeka@yahoo.com; 081 7991 1078; anitaikpeazu@gmail.com; soniachucks@yahoo.com.

(tariff).[1] While the GENCOs and DISCOs are privately owned, the TCN is owned and controlled by the Federal Government.[2]

Privatizing the Power Sector was premised on the need for constant and adequate power, which is a pre-requisite for promoting industrialization and economic growth[3]. On this basis, the expectations from privatizing the power sector included an increased efficiency in the generation, transmission, and distribution and billing system. Ultimately, privatization was supposed to reduce the power sector infrastructure deficit and ensure efficient distribution.[4]

However, the expected benefits of privatization has been limited. The GENCOs average electricity generation stands at 3,000 MW compared to Nigeria's installed generating capacity of 10,396 MW. Limited access to foreign exchange as well as unfavourable exchange rate shocks are among the major threats to power generation.[5] For TCN, Nigeria's average electricity consumption per inhabitant is only 150 kWh per capita which is one of the lowest in the world[6]. High number of system collapses, inadequate manpower to ensure proper maintenance of transmission equipment, and the continuous vandalization of transmission equipment have contributed in the low electricity consumption per inhabitant.[7] Also, the DISCOs are in huge debt and are poorly funded. This is as a result of poor revenue collection framework and inefficient supply from the National Grid.[8]

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[1] M T Ladan, *Electricity Law, Policy and Reform implementation in Nigeria* (Zaria: Ahmadu Bello University Press Limited, 2014)
[2] The Norton Rose Fulbright Publication July 2013 "Investing in the African electricity sector" http://www.nortonrosefulbright.com/knowledge/publications/100580/investing-in-the-african-electricity-sector Accessed 4 July 2018.
[3] I O Joseph, "Issues and Challenges in the Privatized Power Sector in Nigeria" *Journal of Sustainable Development Studies*, Vol. 6(1).
[4] *Ibid.*
[5] B Oladejo, "Understanding the Nigerian Power Sector (GENCOS)" (2017) http://sparkonline.com.ng/2017/01/understanding-the-nigerian-power-sector-gencos.html Accessed 4 July 2018.
[6] B Oladejo, "Understanding the Nigerian Power Sector (TCN)" (2017) http://sparkonline.com.ng/2017/01/understanding-the-nigerian-power-sector-tcn.html Accessed 4 July 2018.
[7] *Ibid.*
[8] *Ibid.*

Further, the Federal Government as well as the National assembly have both asserted that the privatization process has not worked as expected and agreed for the need for urgent actions in the power sector, which will involve the review of the privatization process.[9] The Federal Government has undoubtedly taken vital steps in resuscitating the electricity sector – from privatisation, intervention funds, meter procurement, and investment in new power plants to mention a few; however there is still much needed improvement in the sector.

While there are other challenges confronting the power sector in Nigeria, Electricity theft confronting the DISCOs poses a great challenge. It is the criminal act of using electricity without paying for it; it includes but not limited to rigging an electricity line from the power source by bypassing the meter, unlawful direct connection to the distribution source, tampering with the meter for lower readings, billing irregularities by using employees of electricity companies and unpaid bills. The challenge of electricity theft therefore must be put into consideration to the needed improvements in the power sector as it will boost supply in the nation.[10] This paper discusses the challenge of electricity theft in Nigeria, existing legal framework to curb the menace, makes comparative analysis with other jurisdictions on combating electricity theft and proffers recommendations for legislative consideration.

2. Issues on Electricity Theft in Nigeria

Electricity theft is a serious problem to the entire value chain of the power sector.[11] Theft of electricity increases prices for customers and reduces safety. It leads to misallocation of costs among suppliers, which can distort competition and hamper the efficient functioning of market

[9] N Francis, "FG to Review Power Sector Privatization" This Day Newspaper October 13th 2017 https://www.thisdaylive.com/index.php/2017/10/13/fg-to-review-power-sector-privatisation/ Accessed 4 July 2018.
[10] R Okere, M Egbejule, I Akpan-Nsoh, "CPC, DISCOs seek end of energy theft to boost power supply nationwide" The Guardian Newspaper 23 May 2018 https://guardian.ng/news/cpc-discos-seek-end-of-energy-theft-to-boost-power-supply-nationwide/ Accessed 7 July 2018.
[11] A Adeniran, "Mitigating Electricity Theft in Nigeria" (2018) http://cpparesearch.org/nu-en-pl/mitigating-electricity-theft-nigeria/ Accessed 7 July 2018.

operators.[12] When Electricity theft occurs, the cost of purchasing electricity from the GENCOs through TCN will be higher than the revenue collected from the sales of electricity to consumers. This is so because, electricity theft allows consumers to use electricity without paying for it. Electricity theft leaves the DISCOs with a huge liability. The DISCOs are unable to pay for electricity transmitted from the GENCOs, which makes them reject electricity while remaining indebted to the GENCOs.[13] In turn, this reduces revenues to the GENCOs while increasing the cost of generating electricity. The GENCOs cannot meet their obligations to gas suppliers, rendering them highly indebted with a reduced effectiveness in performing their primary function.[14] Electricity theft induces a cycle of indebtedness and ineffectiveness for both the DISCOs and GENCOs.

The occurrence of electricity theft has become dire. For instance, in 2014, the Ikeja Electricity Distribution Company (IKEDC) reported that 43,000 prepaid meters out of 134000 installed by the company have already been tampered with by their owners in a span of five years.[15] Similarly, the Port Hacourt Electricity Distribution Company (PHED) in 2017 reported a loss of about 30% of expected revenue to energy theft. The distribution company noted that energy theft represented a huge revenue leakage to the company.[16] Also, the Enugu Electricity Distribution Company (EEDC) reported a loss of about 43% of its expected monthly revenue to energy theft.[17] Further,

[12] H N Amadi, E N C Okafor, F I Izuegbunam, "Assessment of Energy Losses and Cost Implications in the Nigerian Distribution Network" (2016) *American Journal of Electrical and Electronic Engineering*, Vol. 4, No. 5.
[13] *Ibid.*
[14] *Ibid.*
[15]The Ikeja Electricity Distribution Company (IKEDC) June 10th 2014 "43,000 Installed Prepaid Meters Already Tampered With" http://www.nigeriaelectricityhub.com/tag/electricity-theft/ Accessed 8 July 2018.
[16] S Daniel, "Energy theft: PHED moves against perpetrators" The Vanguard Newspaper 31st August 2017 https://www.vanguardngr.com/2017/08/energy-theft-phed-moves-perpetrators/ Accessed 8 July 2018.
[17] E Uzodinma, "Energy Theft: EEDC introduces whistle blowing" The Daily Post October 6th 2017 http://dailypost.ng/2017/10/06/energy-theft-eedc-introduces-whistle-blowing/ Accessed 8 July 2018.

more recently, the Eko Electricity Distribution Company (EKEDC) reported that it was losing over ₦1.2 billion monthly to energy theft and commercial losses in its network.[18]

2.1 Existing Laws and Regulations Prohibiting Energy Theft in Nigeria

The Nigerian Legal system makes provision for the prohibition of electricity theft and also imposes penalties for perpetrators of the offence. Thus Section 94 (3) of the Electric Power Sector Reform Act (EPSRA) 2005 provides that 'Notwithstanding anything contained in any other law, any person who wilfully destroys, injures or removes equipment or apparatus of a licensee commits an offence and is liable on conviction to imprisonment for a period of not less than five (5) years and not more than seven (7) years.[19]

The Miscellaneous Offences Act (MOA)[20] also consists of provisions dealing with tampering with electrical equipment's. Section 1(9) of the MOA provides that "any person who unlawfully disconnects, removes, damages, tampers, meddles with or in any way whatsoever interferes with any plant, works, cables, wire or assembly of wires designed or used for transforming or converting electricity shall be guilty of an offense and liable on conviction to be sentenced to imprisonment for life". Section 1(10) of the MOA additionally provides that "any person who unlawfully disconnects, removes, damages, tampers, meddles with or in any way whatsoever interferes with any electric fittings, meters or other appliances used for generating, transforming, converting, conveyancing, supplying or selling electricity shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding 21 years."

[18] PM NEWS Nigeria February 22nd 2018 "Electricity theft: Eko Disco loses N1.2 billion monthly" https://www.pmnewsnigeria.com/2018/02/22/electricity-theft-eko-disco-loses-n1-2-billion-monthly/ Accessed 8 July 2018.
[19] Electric Power Sector Reform Act No. 6, 2005.
[20] Miscellaneous Offences Act CAP M17 Laws of the Federation of Nigeria 2004.

Additionally, pursuant to section 96(2) of the EPSRA 2005 which confers power to make regulations on the Nigerian Electricity Regulatory Commission (NERC), the NERC has made several regulations, of particular importance is the regulation to deter the theft of electricity, theft and destruction of electricity supply infrastructure, and penalties for such theft and or destruction for electricity offences theft and Other Related Offences Regulations (2014).

The NERC Theft and Other Related Regulations, 2014[21] provides in Regulation 1 that, "any person who wilfully and unlawfully (a) taps, makes or causes to be made any connection with overhead, underground or - under water lines or cables, or service wires, or service facilities of a licensee, or (b) tampers with a meter, installs or uses a tampered meter, current reversing transformer, shorting or shunting wire, loop connection, receives electricity supply by by-passing a meter, or uses any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in diversion in a manner whereby electricity is stolen or wasted; or (c) damages or destroys an electric meter, apparatus, equipment, wire or conduit or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity, so as to abstract or consume electricity or knowingly use or receive the direct benefit of electric service through any of the acts mentioned in paragraphs (a), (b) and (c) or uses electricity for the purpose other than for which the usage of electricity was authorized, so as to abstract or consume or use electricity shall be guilty of an offence under Sections 383 and 400 of the Criminal Code, Sections 286 (2) of the Penal Code and Section 1 of this Regulation, and shall be punishable with terms of imprisonment as applicable, provided under Sections 390 of the Criminal Code, Section 287 of the Penal Code or Section 94 of the EPSR Act."

[21] Electric Power Sector Reform Act (No. 6 Of 2005) Regulations to deter the Theft of Electricity, Theft and Destruction of Electricity Supply Infrastructure, and Penalties for such Theft and or Destruction for Electricity Offences.

3. Brief review of empirical literature

According to Smith[22] electricity theft can be in the form of fraud (meter tampering), stealing (illegal connections), billing irregularities, and unpaid bills. The study undertook estimates of the extent of electricity theft using a sample of 102 countries for 1980 and 2000. The results showed that theft is increasing in most regions of the world. The financial impacts of theft are, reduced income from the sale of electricity and to charge more to consumers. The study revealed that electricity theft is closely related to governance indicators, with higher levels of theft in countries without effective accountability, political instability, low government effectiveness and high levels of corruption.[23] The study further therefore recommended that electricity theft can be reduced by applying technical solutions such as tamper-proof meters, managerial methods such as inspection and monitoring, and in some cases restructuring power systems ownership and regulation.[24]

Utilizing data from the power corporation of Uttar Pradesh, India's most populous state, Golden, and Min[25] studied the politics of electricity theft over a ten year period (2000-09). Their results showed that electricity theft is substantial in magnitude and that the extent of theft varies with electoral cycle of the state. They also found that in the years when elections to the State Assembly are held, electricity theft is significantly greater compared to the non-election years. Theft is increasing with the intensity of tube wells, suggesting that it is linked to unmetered electricity use by farmers. Incumbent legislative members of the state assembly are more likely to be re-elected as power theft in their locality increases.[26] Their interpretation of the various results was that power

[22] T B Smith, "Electricity theft: a comparative analysis" (2004) *Energy Policy* 32, 2067–2076.
[23] *Ibid.*
[24] *Ibid.*
[25] M Golden and B Min, "Theft and Loss of Electricity in an Indian State" Paper presented at the 2011 Annual Meetings of the American Political Science Association September 2–5, Seattle and at the 2nd IGC-ISI India Development Policy Conference, December 19–20, 2011, ISI Delhi Center. https://www.theigc.org/wp-content/uploads/2014/09/Golden-Min-2012-Working-Paper.pdf Accessed 16 July 2018.
[26] *Ibid.*

theft exhibits characteristics consistent with the political capture of public service delivery by local elites.[27] Their results however fail to substantiate that theft is linked either to political criminality or is the product of weak institutions.

Nielsen[28] found that illegal electricity usage has a positive correlation with rate of illiteracy and regular events of violence, such as terrorism. According to the study, if the illiteracy rate and terrorist events in a region or city are higher, illegal electricity usage is expected to be higher because high illiteracy and terrorism usually indicate low income in that region or city. Investments to a city or region are discouraged due to insecurity. This finding was corroborated by Steadman[29] who discovered that regions with higher murder rates and lower household incomes are using more illegal electricity.

Jamil and Ahmad[30] acknowledged that electricity theft is a common problem in many countries and that energy worth billions of dollars is stolen annually from electricity grids. According to the authors, the problem has socioeconomic, political, environmental and technical roots, but the solution is generally sought solely through technical. In the light of the foregoing, they empirically investigated the effects of various factors including electricity price, per capita income, probability of detection, fines collected from offenders, weighted temperature index and load shedding, that may explain electricity theft.[31] The study employed annual panel data obtained from nine electricity distribution companies in Pakistan for the period 1988–2010. The study estimates the Fixed Effects models through the Least Squares Dummy Variable (LSDV) technique and

[27] *Ibid.*
[28] S Nielsen, "Smart Meters Help Brazil Zap Electricity Theft" (2012) http://www.businessweek.com/articles/2012-03-08/smart-meters-help-brazil-zapelectricity-theft. Accessed 16 July 2018.
[29] K Steadman, "Electricity Theft in Jamaica" PhD dissertation, State University of New York at Binghamton. (1999) http://www.academia.edu/1566775/Electricity_Theft_in_Jamaica Accessed 16 July 2018.
[30] F Jamil, E Ahmad, "An Empirical Study of Electricity Theft from Electricity Distribution Companies in Pakistan" (2014) *The Pakistan Development Review*, Vol 53:3.
[31] *Ibid.*

Generalised Method of Moments (GMM). The results indicated that per capita income has significant negative and electricity price a positive effect on electricity theft with sufficiently high coefficient values. The probability of detection variable appears with a positive sign in both estimations indicating a poor deterrence. The results of LSDV showed a positive impact of fine on conviction on electricity theft. But in GMM estimation, this variable appears with a right sign. The results from both models were robust in the case of load shedding and temperature variables. The findings showed that economic variables are most significant in explaining electricity theft.

Jumale, *et al*[32] in a study for India found that electricity distribution authorities loose a large chunk of income, due to illegal connections or dishonesty of customers for their personal gains. According to the authors, various systems are introduced by researchers to detect the theft and diminish the non-operational loses. The methods like Support Vector Machine (SVM), Fuzzy C-means Clustering, Fuzzy logic, User profiling, Genetic Algorithm, among others, are used to detect theft in electricity. The authors noted that two disadvantages associated with using these systems based on this methodologies is accuracy and also the infrastructure needed to employ them (like smart energy meter). They proposed new system which tries to enhance the accuracy of theft detection.

4. Comparative analysis with other Jurisdictions on Combating Electricity Theft

Country	**Legislation**	**Method of Combating Electricity Theft**
United Kingdom	Section 13 of the Theft Act, 1968 provides for Abstracting Electricity, which is a statutory offence in	- Confidential reports by citizens.

[32] P Jumale, A Khaire, H Jadhawar, S Awathare, and M Mali, "Survey: Electricity Theft Detection Technique" (2016) *International Journal of Computer Engineering and Information Technology*, Vol 8, No. 2.

	the UK. It provides that a person who dishonestly uses without due authority or dishonestly causes to be wasted or diverted any electricity on conviction or indictment be liable to imprisonment for a term not exceeding five years.	- Use of Smart Meters for billing as well as at distribution points in order to ensure electricity balancing analysis. (AMI technology) - Training and Education - TRAS: Electricity Theft Tip-Off Service – ETTOS - Artificial Intelligence and Machine Learning methods[33].
United States of America	The laws on theft differ among states. For example, the state of Louisiana (2006 Louisiana Laws - RS 14:67.6 — Theft of utility service; inference of commission of theft; penalties), provides as follows- "C(1) On a first conviction, the offender shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned for not more than six months, or both. (2) On a second or subsequent conviction, regardless of whether the second or subsequent offense occurred before or after an earlier conviction, the offender shall be fined not less than one hundred dollars nor more	- Meter readers need training to quickly review each meter and socket for signs of tampering, removal and other irregularities. - Along with educating the paying public, utilities provide a secure web portal and confidential toll-free phone number for customers to report suspected energy theft.

[33] TRAS: Theft Risk Assessment Service https://www.electralink.co.uk/services/governance-management/theft-risk-assessment-service/ Accessed 16 July 2018.

	than three thousand dollars or imprisoned, with or without hard labour, for not more than two years, or both". D. The provisions of this Section shall not apply to the attachment on the customer's side of the customer's main electric disconnect of any device which lowers the quantity of utilities actually used and does not divert such utilities or prevent their proper registration"[34].	- Reporting through the internet to remain anonymous. Utilities provide a secure web portal and confidential toll-free phone number for customers to report suspected energy theft. - Use of AMI technology. - Special meter locks are installed to prevent meter removal for those previously caught or suspected of energy theft. Transparent socket covers deters tampering also[35]
South Africa	Section 13 of the Greater Johannesburg Metropolitan Council Standardisation of Electricity By-Laws,[36]provides that - (1) When the council is satisfied that a meter has ceased to register correctly, the reading shown thereby shall be disregarded and the consumer-	- Install prepaid meters in vandal-proof boxes to avoid user interference and tampering; - Encourage report of illegal electricity connections;[37]

[34] 2006 Louisiana Laws - RS 14:67.6 — Theft of utility service; inference of commission of theft; penalties https://law.justia.com/codes/louisiana/2006/146/78623.html Accessed 17 July 2018.
[35] S Eckles, S Clark, El Paso Electric Company, "Pulling the Plug on Energy Theft" (2007) http://www.elp.com/articles/powergrid_international/print/volume-12/issue-9/features/pulling-the-plug-on-energy-theft.html Accessed 17 July 2018.
[36] Notice 1610 of 1999, Greater Johannesburg Metropolitan Council Standardisation of Electricity By-Laws https://joburg.org.za/bylaws/electricity_bylaws.pdf Accessed 17 July 2018.
[37] ESI Africa August 25 2017 "Combating crime remains an ongoing reality for SA power utility" https://www.esi-africa.com/combating-crime-remains-reality-sa-power-utility/ Accessed 17 July 2018.

	(a) shall be charged, in respect of the current meter reading period, the same amount as the consumer has paid in respect of the corresponding period in the preceding year subject to the adjustment necessitated by any alteration to the electrical installation or the charge determined by the council; or (b) if the consumer was not in occupation of the premises during the corresponding period referred to in paragraph (a), shall be charged on the basis of his consumption during the three months preceding the last date on which the meter was found to be registering correctly; or (c) if the consumer was not in occupation of the premises during the whole of the period referred to in paragraph (b), shall be charged on the basis of his consumption during the three months following the date from which the meter was again registering correctly. (2) If it can be established that the meter has been registering incorrectly for a longer period than the meter reading period referred to in sub clause (1), the	- Targeting these neighbourhoods with load shedding; - Operation Khanyisa Campaign to combat electricity theft and mobilise South Africans to use power legally;[38] - Extended penalties to the owners of any property where electricity theft occurs.

[38] M Rycroft, "Operation Khanyisa" (2013) *ee publishers*, http://www.ee.co.za/article/operation-khanyisa-352-03-interview-with-maboe-maphaka-operation-khanyisa.html Accessed 18 July 2018; ESI Africa October 16 2018 "Operation Khanyisa is paying off" https://www.esi-africa.com/operation-khanyisa-paying-off/ Accessed 17 July 2018.

	consumer may be charged with the amount determined in accordance with the said subsection or for a longer period: Provided that no amount shall be so charged in respect of a period in excess of 38 months prior to the date on which the meter was found to be registering incorrectly.	

5. Conclusions and issues for legislative consideration

Borrowing from the UK, this study recommends confidential reporting by citizens. The already existing whistle blowing policy of the Federal government should be extended to energy theft. Accordingly, ideals should be borrowed from the USA to the extent that along with educating the paying public, a secure web portal and confidential toll-free phone number should be provided for customers to report suspected perpetrators of energy theft.

Further, there should also be an increased liability for owners of property where electricity theft occurs. This will pass some burden of monitoring from the DISCOs to the owners of such property. The property owners will ensure that electricity theft does not occur, in order not to bear any form of loss through fines nor imprisonment. On this basis, this study recommends that the Electric Power Sector Reform Act 2005 be amended to reflect these measures, to serve as a deterrent aimed at mitigating electricity theft in Nigeria.

In addition, for consumers who are meter billed, the use of AMR meters should discontinued, as this will aid in combating electricity theft. AMR meters do not allow for a two way

communications between the DISCOs and the consumer,[39] consequently, when they are tampered with, there are time lags between when the tampering occurred and when the DISCOs become aware of it.[40] As an alternative, this study proffers recommendation for the installation of Smart meters (an example is the Open Smart Grid Protocol (OSGP) commonly used in Europe or Elster REX mesh network reading and time-of-use meters commonly used in the USA). These smart meters allow for the recording of electricity consumption on an hourly basis and relate same to the DISCOs for monitoring.[41]

Accordingly, the instalment of Smart meters with AMI technology should not be restricted to consumer locations only. They should also be installed at distribution and sub – distribution (small transformers and larger (grid) transformers) points. The essence of this is to allow for efficient monitoring and balancing of distributed electricity from the DISCOs and reported electricity consumption from the consumers. With any difference, it will be easy to detect electricity theft and localise where the theft has occurred.

On the other hand, given that a large proportion of electricity consumers are unmetered, the DISCOs should increase their efforts in monitoring electricity consumption. There should be a collaboration between DISCOs and the NERC, to establish a joint task force with the sole responsibility of monitoring illegal connections and meter tampering; also at the end of every month, when consumer electricity bills are being delivered for unmetered consumers, the task force should investigate for all forms of electricity theft, and ensure that perpetrators are punished for their offences. Further, this study recommends for random walk-ins by officials of the DISCOs, to

[39] N Uribe-Pérez, L Hernández, D de la Vega, Itziar Angulo, "State of the Art and Trends Review of Smart Metering in Electricity Grids" (2016) *Applied Sciences* Vol 6(68).
[40] *Ibid.*
[41] A Yvs, "Smart Meter" https://www.scribd.com/document/281793525/Smart-Meter Accessed 17 July 2018.

carry out inspection checks for metered consumers, as this will aid in combating widespread electricity theft in Nigeria.

EXCLUSION BY ELECTORAL LAWS IN NIGERIA: A CRITICAL ANALYSIS

BETHEL UZOMA IHUGBA[*] and DORIS DAKDA AARON[**]

ABSTRACT

This paper examines the electoral laws in Nigeria to determine their impact on political exclusion and inclusion in the Nigeria democratic process. This study is necessary because participatory governance is a key requirement of sustainable democracy, particularly in representative government. When sections of society are excluded from contributing to national debate, in development of national legal framework, and governance, the governance dividends and services become biased and unrepresentative. Such scenarios create distrust amongst citizens and gradually lead to corruption and crisis in society. Put simply, democracy fails when the right to vote and be voted for in elections is skewed against sections of the society either deliberately or as unintended consequences of legislation. On this background, this paper critically examines the legal framework on electoral process in Nigeria to determine its impact on the perception and reality of electoral exclusion and suggests approaches for improvement. The paper adopts a doctrinal approach by focusing on analysis of existing electoral legal framework, including the Constitution, Electoral Act and political party constitutions, and how they, directly or indirectly, disenfranchise sections of the society. The paper finds that the electoral regime is structured in a way that perpetuates electoral exclusion of the poor and young people via the imposition of divisive financial and age requirements. The paper recommends an alteration of constitutional provisions on qualification to contest election by reducing the age requirement and jettisoning financial requirements for participation.

Key words: Inclusive Democracy, Elections, Enfranchisement, Exclusion, Money Politics, Poverty

[*] Bethel Uzoma Ihugba, LLB, LLM, PhD, BL, Legal Research Division, Department of Legislative Support Services, National Institute for Legislative and Democratic Studies (NILDS), National Assembly, Abuja, Nigeria.

[**]Doris Dakda Aaron, LLB, LLM, BL, Legal Research Division, Department of Legislative Support Services, National Institute for Legislative and Democratic Studies (NILDS), National Assembly, Abuja, Nigeria.

1. INTRODUCTION

The right to vote and be voted for in elections is the major criteria of democratic governance. Hence to ensure a representative government the legal framework for participation in election either as a voter or a candidate must be inclusive and non-repressive. It is this concept of inclusiveness that elevates a government from fascist, oligarchy, dictatorship or other non-democratic government to a democracy. Accordingly, government is regarded as government of the people because the people have a voice in government through active participation both as the electorate and as candidates. Thus, depending on whether the people are involved in the electoral process and their level of participation, a despotic self-serving or a people-oriented government may be elected as a product of the process. Achieving either of the above results depends largely on the electoral regime and its provisions on participation in governance.

In Nigeria, the level of political inclusiveness is determined by a combination of the Constitution, the Electoral Act and other electoral regulations and party constitutions and practices. These laws and their provisions stipulate requirements as to participation using criteria like financial status, nationality, age and length of membership of and sponsorship by a political party[1]. Undoubtedly, recent agitations for more open systems suggest that the provisions of these laws and party constitutions do not meet the optimum requirement for democratic governance[2]. Key areas of contention are age and financial requirement. It is contended that by maintaining the status quo, on age and financial contribution, the rich are perpetuating exclusion of the poor and youth in political governance in Nigeria, particularly in political representation through the legislature. The argument is that this exclusion results in policies and laws established to deliberately disenfranchise the poor and subjugate them to the will of the minority rich and socially connected.

It is against this backdrop that it is necessary to critically examine the legal framework on electoral process to determine the validity of this perception and suggest approaches for improvement, if any. This means that this paper will focus on analysis of existing electoral legal framework including political party constitutions in order to explore how the laws, directly or indirectly, disenfranchise sections of the society. To explore this issue, the paper is

[1] See Table 1 below for sections of the CFRN 1999 and Electoral Act 2010 on qualifications for electoral positions.
[2]Premium Times "Lawmakers decry high cost of parties' nomination forms" Premium Times Online, October 27, 2014. Available at: <https://www.premiumtimesng.com/news/top-news/170219-lawmakers-decry-high-cost-of-parties-nomination-forms.html> accessed 18th June 2018; 2019: Daily Times "Stakeholders decry expensive nomination forms" Daily Times Online, June 18, 2018, Available at: <https://dailytimes.ng/2019-stakeholders-decry-expensive-nomination-forms/> accessed 18th June 2018

structured as follows. The next section will provide conceptual clarification for the key concepts of the discourse. This is followed by a literature review on political participation in Nigeria. Next is a presentation and analysis of the body of laws on electoral process in Nigeria to determine its contribution to exclusion of a section of the society or otherwise. This is followed by a recommendation on how to reverse any observed or perceived undemocratic practices. The paper ends with a conclusion.

2. CONCEPTUAL CLARIFICATION

In the course of this research some key concepts will be recurrent and accordingly need to be succinctly defined for proper understanding of the argument herein. These concepts include poverty, disenfranchisement (political exclusion) and electoral laws. According to the Black's law dictionary[3] poverty is "a term used to denote a condition in which people are unable to meet their basic necessities, due to lack of money or skill. There are two primary terms used to denote poverty; absolute and relative. Absolute poverty "measures poverty in relation to the amount of money necessary to meet basic needs such as food, clothing, and shelter [4].'' The International poverty Center of the United Nations Development Programme (UNDP) gave some dimensions of poverty to include; income-poverty, material lack or want, and capability deprivation among others. This often led to a web of poverty disadvantages amongst which are lack of information, legal inferiority and lack of political clout.[5]

Enfranchisement on the other hand is defined as 'act of making free; giving a franchise or freedom to; investiture with privileges or capacities of freedom, or municipal or political liberty. Admission to the freedom of a city; admission to political rights, and particularly the right of suffrage...' Going by the definition some key elements of enfranchisement include; freedom (in this context freedom to choose who governs you). The importance of the enfranchisement is demonstrated by the case of *Westbury v. Sanders*[6] *wherein it was held that: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which ... we must live. Other rights ... are illusory if the right to vote*

[3] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

[4]UNESCO "Learning To Live Together: Poverty. UNESCO. Available online at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty/>

[5] See particularly Sakiko Fukuda-Parr "The Human Poverty Index: A multidimensional measure" in Poverty in Focus A publication of the International Poverty Center of the UNDP Dec 2006 available online on <http://www.ipc-undp.org/pub/IPCPovertyInFocus9.pdf> accessed 13th June 2018.

[6] 376 U.S. 1, 17-18 (1964)

is undermined". Disenfranchisement thus means 'to deprive of a franchise, of a legal right, or of some privilege or immunity; *especially*: to deprive of the right to vote e.g. *disenfranchising* the poor and elderly'[7] While the right to vote is widely recognised as the key element of constitutional democracy and a fundamental human right,[8] the deprivation of this right in whatever guise is a denigration of democracy. The right to vote here includes the right to be voted as we believe both to be inherent in each other. Consistently disenfranchised groups include non-citizens, young people, and minorities, those who commit crimes, the homeless, disabled persons, and many others who lack access to the vote for a variety of reasons including poverty, illiteracy, intimidation, or unfair election processes.[9] In many cases, these disenfranchisement and political exclusions are abetted by electoral laws of the state. Electoral laws are laws that regulate who votes, when and how they vote, for whom they can vote, how campaigns are conducted, and how votes are recorded, counted, and allocated. In Nigeria Electoral Laws include, the Constitution, the Electoral Act and election guidelines and political party constitutions and regulations.

3. LITERATURE REVIEW

The discourse on political exclusion in the democratic process is one that has been ongoing for a while. In most jurisdictions, the debate has significantly moved away from exclusion caused by gender bias to exclusion caused by wealth gap and poverty[10]. A recent debate, particularly in Nigeria is exclusion caused by age bias. All these factors have been argued to lead to development of policies and laws that are unfavorable to persons within these groups because they are not properly represented[11].

The legislative tools that help perpetuate this exclusion are the legal framework on party financing, campaign funding and political contribution. On one spectrum of the argument is the perception that too lax regulation on campaign financing encourages political capture by

[7] Merriam Webster dictionary

[8] "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot or by equivalent free voting procedures." The Universal Declaration of Human Rights, Article 21.

[9] University of Minnesota Human Rights Library, Study Guide: The Right To Vote available online at http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html

[10] *Beetseh, Kwaghga and Akpoo, Tarfa, "*Money Politics And Vote Buying In Nigeria: A Threat To Democratic Governance In Makurdi Local Government Area Of Benue State" *International Journal of Public Administration and Management Research (IJPAMR), Vol. 2, No. 5, March 2015. Available online at: <http://www.academix.ng/search/paper.html?idd=3300017168> accessed 13th June 2018.*

[11] See Mahmoud Alfa and John Marangos "An empirical appraisal of the role of money in Nigerian politics" *Int. J. Economic Policy in Emerging Economies, Vol. 9, No. 1, 2016*

the wealthy and corporations[12]. The argument is that once this group of political stakeholders get involved in political participation through financing candidates, it makes it easier for them to control policies and laws because such candidates become indebted to them[13]. The other spectrum to the argument is that the cost of political campaigns are so high that majority of poor but qualified individuals are schemed out of running for elective positions[14]. In addition to campaign funds, most people cannot afford the registration and notice of interest payments that candidates are often asked to pay. The result of these exorbitant fees in many cases is the political exclusion and disenfranchisement due to poverty.

This is perhaps why many jurisdictions have within their electoral laws and policies public funding of political parties and political campaigns. A study of the Electoral legal framework all over the world conducted by International IDEA discloses that out of 174 countries studied, 117 countries have either full or partial funding for political parties. A few examples from three continents include: in **Asia** –Thailand, Indonesia and Japan; in **Americas-** Canada, United States of America and Mexico; in **Africa** – Democratic Republic of the Congo, United Republic of Tanzania and Algeria. Then in **West Africa**- Niger, Mali, Ivory Coast, Togo and Burkina Faso. The regularity of this practice suggests that it is a positive approach to inclusive democracy. In apparent confirmation of its functionality, many of the well advanced democracies have some form of public funding or the other[15].

[12] See Omobolaji Ololade Olarinmoye "Godfathers, political parties and electoral corruption in Nigeria" African Journal of Political Science and International Relations Vol. 2 (4), pp. 066-073, December 2008. Available online at: <http://www.academicjournals.org/AJPSIR> accessed 13th June 2018; Victor A. O Adetula "Godfathers, Money Politics, and Electoral Violence in Nigeria: Focus on 2015 Elections" Available online at: <http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-Paper-by-Victor-Adetula.pdf> accessed 13th June 2018

[13] Julio Bacio Terracino and Yukihiko Hamada "Financing Democracy: Supporting Better Public Policies and Preventing Policy Capture" OECD publications 2014.

[14] ibid

[15] See International IDEA, Political Finance Database, International IDEA. Available online at:<https://www.idea.int/data-tools/question-countries-view/548/20/reg> accessed 29th June 2018.

Tabular Representation of distribution of countries providing public funding for Parties

Continent	Yes, regularly provided funding	Yes, in relation to campaigns	Yes, both regularly provided funding and in relation to campaigns	No	No data	Countries researched
Africa	20 (42.6%)	4 (8.5%)	6 (12.8%)	15 (31.9%)	2 (4.3%)	47
Americas	4 (11.8%)	5 (14.7%)	12 (35.3%)	13 (38.2%)	0 (0.0%)	34
Asia	15 (41.7%)	5 (13.9%)	4 (11.1%)	11 (30.6%)	1 (2.8%)	36
Europe	19 (44.2%)	0 (0.0%)	19 (44.2%)	5 (11.6%)	0 (0.0%)	43
Oceania	2 (14.3%)	2 (14.3%)	0 (0.0%)	9 (64.3%)	1 (7.1%)	14
Total	**60**	**16**	**41**	**53**	**4**	**174**

Source: *Reproduced by permission of International IDEA from "Are there provisions for direct public funding to political parties?" © International Institute for Democracy and Electoral Assistance June 2018. Available at :<https://www.idea.int/data-tools/question-view/548> accessed 29th June 2018*

What the above data and recurrence of finance in extant literature demonstrates is that money is a key part of politicking and it has the (perhaps) unintended consequences of undermining the constitutional right of some category of persons to participate in elections and governance. However, there appears to be few research in Nigeria which explores the constitutional and statutory provisions on electoral participation and their implication on cost of politics and policy development in Nigeria. This paper explore this concept from the perspective of the exclusionary role of electoral laws in Nigeria and its implication to equal representation and national development.

4. THE LEGAL FRAMEWORK ON FINANCE AND AGE REQUIREMENT IN THE ELECTORAL PROCESS IN NIGERIA

There are several constitutional and statutory provisions on age and financial requirement for contesting elections in Nigeria. These domestic legal frameworks do their best to effectuate International conventions on democracy which all emphasise the necessity of an inclusive governance. To ensure this, the law should provide the framework for all persons to participate in governance either as voters or elected. For instance, *Article 21* of the Universal Declaration of Human Rights ("UDHR"), provides that "*The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures*". The International Covenant on Civil and Political Rights (ICCPR) captures better the necessity for an inclusive government in its provision in *ICCPR Article 25* thus, *Every citizen shall have the right and opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;*

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic election which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the elections;

(c) *To have access, on general terms of equality, to public service in the country*.

In Nigeria however, other domestic legal framework like statutory and constitutional provisions tend to impose limitations to inclusive governance through constraints like age limits for participation in different electoral positions to financial deposits or fees required of the candidate. Others include provisions on the monitoring and auditing requirement on party campaign financing. Each of these provision contribute in making elections into the available elective positions in Nigeria less inclusive. Under the CFRN 1999, available elective positions are: President – section 131, Vice- President – section 141, Governor – section 176, Deputy Governor- Section 186, National Assembly members (Senate and House of Representatives) – Sections 65 and State Assembly Members- Section 106. There are however other elective positions recognised under the Electoral Act. These are Chairmanship of area council and

Councillorship of area council under *section 91 of the* E.A. 2010. The financial and age requirements in extant laws have made the positions less open to the citizenry. These laws and there provisions are as follows:

4.1. Constitutional provision on electoral participation in Nigeria.

Section 153 (1) (f) of the 1999 constitution established for the Federation the Independent National Electoral Commission whose composition and function is as stated in part 1 schedule III (F) of the constitution. Some key sections that relates to electoral offices as stated in the constitution include: ***Section 106*** of the Constitution dealing with eligibility into the ***State House of Assembly***. It provides that: '… a person shall be qualified for election as a member of a House of Assembly if- a. he is a citizen of Nigeria; b. he has attained the age of thirty years; c. he has been educated up to at least the School Certificate level or its equivalent; and d. he is a member of a political party and is sponsored by that party. ***Section 65 (1)*** gives the criteria for election into the National Assembly, it provides that: '…a person shall be qualified for election as a member of: a. ***the Senate***, if he is a citizen of Nigeria and has attained the age of 35 years; and b. the ***House of Representatives***, if he is a citizen of Nigeria and has attained the age of 30 years;

(2) A person shall be qualified for election under subsection (1) of this section if: a. he has been educated up to at least School Certificate level or its equivalent; and b. he is a member of a political party and is sponsored by that party. ***Section 177*** gives the criteria for election as ***governor of a state***, it provides that: 'a person shall be qualified for election to the office of Governor of a State if a. he is a citizen of Nigeria by birth; b. he has attained the age of thirty-five years; c. he is a member of a political party and is sponsored by that political party; and d. he has been educated up to at least School Certificate level or its equivalent, while ***section 131*** provides for election into the office of the ***President***. It provides that; 'a person shall be qualified for election to the office of the President if- a. he is a citizen of Nigeria by birth; b. he has attained the age of forty years; c. he is a member of a political party and is sponsored by that political party; and d. he has been educated up to at least School Certificate level or its equivalent.

Table 1: Tabular representation of Constitutional and Statutory Requirements to contest in elective positions

S/N	Office	Nationality	Age	Education	Party membership
1	***House of Assembly Section 106 CFRN 1999***	Citizen	30 years	School Certificate	member of a political party and is sponsored by that party
2	***House of Representatives Section 65 (1)b CFRN 1999***	Citizen	30 years	School Certificate	member of a political party and is sponsored by that party
3	**Senate** ***Section 65 (1)a CFRN 1999***	Citizen	35 years	School Certificate	member of a political party and is sponsored by that party
4	***Governor Section 177 CFRN 1999***	Citizen **by birth**	35 years	School Certificate	member of a political party and is sponsored by that party
5	***President section 131 CFRN 1999***	Citizen **by birth**	40 years	School Certificate	member of a political party and is sponsored by that party
6	***Councilor Section 106 of Electoral Act 2010***	Citizen	25 years	School Certificate	member of a political party and is sponsored by that party
7	***and Chairman Section 106 of Electoral Act 2010***	Citizen	30 years	School Certificate	member of a political party and is sponsored by that party

In addition to the above provisions, there are other requirements that are applicable to Legislative and Executive positions at the Federal and state Levels. However, two key differences arise. For a Presidential or Gubernatorial candidate, citizenship must have been obtained by birth. Any other form of citizenship, including Naturalisation and Registration will

disqualify the candidate[16]. These limitations does not apply to Legislators at State and Federal levels[17]. Another set of limitations peculiar to executive positions under the constitution are that elective positions are limited to only two tenures of 4 years each irrespective of sequence[18]. For Legislators, there are no tenure limitations. Also the President or Governor shall not, during his tenure of office, hold any other executive office or paid employment in any capacity whatsoever[19].

Aside the above peculiar limitations, all candidates for elective positions are bound by the following requirements: (a) must not voluntarily acquired the citizenship of another country; (b) not be adjudged to be a lunatic or of unsound mind; (c) not under a death sentence or imprisonment or fine for an offence involving dishonesty or fraud (d) not convicted within a period of less than 10 years of an offence involving dishonesty or contravention of the Code of Conduct; (e) not an undischarged bankrupt, (f) not employed in the public service of the Federation or of any State not less than 30 days before the date of election; (g) not a member of a secret society; (h) not indicted for embezzlement or fraud by Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Governments respectively; or.(i) not presented a forged certificate to the Independence National Electoral Commission[20].

4.2. Statutory provisions on Qualification for participation in electoral position in Nigeria.

The criteria for participation in electoral position as provided for by the constitution is not enough to secure a ticket for any candidate under any political party. This is because there are other laws and criteria that must be adhered to in order to be eligible to contest. The Electoral Act 2010, being the extant statute, other than the constitution, makes further requirements that must be met by political parties and candidates. Political parties also have their own guidelines (including party constitutions), with requirements for contesting in elections. Since there is no provision for independent candidacy under the Nigerian constitution, every aspirant for a political party must be sponsored by a political party, hence each candidate must adhere to

[16] Section 131(a) and 177 (a)of the CRRN 1999 for President and governor respectively
[17] See Sections 65(1) a & b, 106(a), for Federal and State legislators respectively.
[18] Section 137(1) b and 182(1) b, of the CRRN 1999 for President and governor respectively.
[19] Section 138 and 183 of the CFRN 1999 for President and governor respectively
[20] See section 66 (1), 107(1), 137(1) and 182(1) of the CRRN 1999 for Federal Legislators, State House of Assembly legislators, Governors and President respectively.

party constitution and guidelines or the other. The key requirements which parties and candidates must meet border on age and finance.

For instance, under the Act, parties have a financial threshold above which they must not spend for electoral campaign purposes. The Act in *sections 91(8) and (9)* defines what electoral expenses are and the maximum donations an individual may make to a political party or candidate for election purposes[21]. According to section 91(9) the maximum amount is ***one million naira (N1, 000,000)*** *to any candidate*.

A reading of the above provision suggests that an individual could make as much donations as the individual can afford as far as it is to a candidate. In other words, in a particular state, an individual may choose to sponsor three senatorial candidates all from the same party or different parties. In such a scenario, if all the candidates succeed, the sponsor would have succeeded in capturing three senators in any particular state. This does not augur well with inclusive democracy. It rather opens the door for governance capture by wealthy individuals or organisations.

The definition of what constitutes electoral expenses, also limits the effects of the provisions on curtailing commercialisation of electoral participation. This is because the excluded expenses, which are quite huge, does have the capacity of deterring a number of potential candidates from participation. Example is the huge amount of money, sometimes running to tens of millions, required of candidates like Presidential and Gubernatorial candidates. This for example is provided under *section 91(8)* of the Electoral Act, to the effect that electoral expenses does not include *(a) any deposit made by the candidate on his/her nomination in compliance with the law; (b) any expenditure incurred before the notification of the date fixed for the election with respect to services rendered or material supplied before such notification and (c) Political party expenses in respect of the candidate standing for a particular election.*

The above provisions have far reaching consequences for inclusive and representative democracy in Nigeria. They undermine the limitation of expenses imposed on candidates and political parties, particularly when you consider that for some positions, parties expect candidates to deposit between 22 and 27 Million Naira[22]. This amount of money can only be

[21] See table 2 below entitled *"Tabular representation of maximum campaign expenses of political parties under section 91 E.A. 2010".*

[22] Jideofor Adibe 'Exorbitant party nomination forms and systemic corruption' Daily Trust Newspaper Wednesday, May 02, 2018. Available online at: <https://www.dailytrust.com.ng/daily/columns/thursday-columns/39371-exorbitant-party-nomination-forms-and-systemic-corruption> accessed 13th June 2018.

afforded by very few and in the alternative provided by political godfathers to the detriment of effective representation.

Table 2: Tabular representation of maximum campaign expenses of political parties under section 91 E.A. 2010.

S/N	Office	Maximum Amount
1	Presidential Election	One Billion Naira - N1, 000,000,000
2	Governorship Election	Two hundred million naira N200, 000,000
3	Senatorial Seat Election	Forty million naira N40,000,000
4	House of Representatives	Twenty million naira - N20, 000,000
5	State Assembly Election	Ten million naira - N10, 000,000
6	Chairmanship Election of Area Council	Ten Million Naira - *N10, 000,000*
7	Councillorship Election of Area Council	One Million Naira - *N1, 000, 000*

4.3. Constitutional provisions on financial contribution and audit in electoral process in Nigeria.

The Constitution recognises the place of money in political participation in Nigeria. It accordingly empowers the National Assembly to make laws for distributing funds to parties for purposes of election. It also creates a provisions for auditing the finance of political parties. The import of these provisions are that it is necessary to ensure that political parties are truly representative and are not under the control of single individuals or groups, whether local or international who can fund their activities. These are provided for under sections 225, 226 and 228 of the CFRN 1999.

On financial auditing of political parties, section 225 (1) provides that "*Every political party shall, at such times and in such manner as the independent National Electoral Commission and publish a statement of its assets and liabilities. (2) Every political party shall submit to the Independent National Electoral Commission a detailed annual statement and analysis of its sources of funds and other assets together with a similar statement of its expenditure in such*

form as the Commission may require". ***Section 226*** also requires Independent National Electoral Commission, to prepare and submit each year to the National Assembly a report on the accounts and balance sheet of every political party.

Still on financial auditing and to prevent political capture by foreign interests, the constitution in ***section 225(3)*** prohibits accepting and retaining funds or assets from outside the country. On this issue, the CFRN provides thus*: (3) No political party shall - (a) hold or possess any funds or other assets outside Nigeria; or (b) be entitled to retain any funds or assets remitted or sent to it from outside Nigeria.* A similar prohibitions is provided for in section 88 of the Electoral Act 2010. Under the Electoral Act, it is an offence for a party to breach the provisions against receiving foreign funds or assets punishable by forfeiture of the funds or assets bought with the funds and a fine of N500, 000.00. However, under the constitution, a contravention may lead to the disqualification of an individual who abets or aides in contravention of the provision from holding public office.

To ensure that alternate sources of funds are provided for political parties to carry out their political advocacy and campaigns during elections and that the interests of the party remains national and representative, the CFRN empowers the National Assembly under ***section 228 (c),*** to make laws for public funding of political parties through annual grants. It is instructive to note that the Electoral Act 2002, section 80 had provisions for the disbursement of funds to political parties provided under section 228 of the CFRN 1999. This provisions was deleted in the Electoral Act of 2010 and the National Assembly has since failed to appropriate and allocate funds to INEC for disbursal to qualified political parties.

4.4. Implications of Financial Requirements to Political Participation

It would appear that these provisions on auditing and financial contribution limits are to check the excesses of political parties by curtailing extravagant spending in promoting their candidates. However, although the amount are stated as maximum, they are quite high and readily deters most otherwise eligible candidates and political parties. This is because of the unintended consequences in that it indirectly sanctions the commercialisation of the electoral process in Nigeria. For instance, making the maximum contribution that can be given to a political party by an individual or entity as One million naira ***(N1, 000,000.00),*** without also providing financial support from the government as envisaged under section 228(c) of the CFRN 1999, is an indirect sanctioning of commercialisation of political participation. Little wonder the political parties in the bid to generate money internally, sell nominations forms at exorbitant rates (clearly above the reach of the average income earner in Nigeria), and also seek

for donations through fund raising and other means clearly in breach of section 91(9) of the electoral act.[23] The electoral act itself[24] recognises that; candidates of political parties will incur expenses on their nomination in compliance with the law, which expenses will not be counted as election expenses under *section 91 (2)-(7).*

It will appear that these provision is what the political parties are capitalizing on to impose nomination fees on candidates, which rates are usually very high. For example Article 18 of the PDP Constitution[25] provides for the funding of the party, it provides that; 'There shall be established and maintained for the party a fund into which shall be paid all: Subscription, fees, and levies from membership of the party, Proceeds from investments made by the party, and Subventions and donations etc. Although it is not clearly stated how much candidates vying for different positions under the party will pay to ***obtain nomination forms***, it has been reported that for the People's Democratic Party (PDP), presidential forms were priced at N22m each; Governorship forms were priced at N11million; Senatorial seats, House of Representatives and state Houses of Assembly forms cost N4.5m, N2.5m and N1.2m respectively. [26]

The same report is given for APC as its constitutions and internal party regulations give room for Commercilisation and exclusion[27]. For APC, aspirants for the office of the President were required to pay ***N27.5m***; those for House of Assembly would be required to pay N500, 000; those aspiring for the House of Representatives must be ready to pay N2m, for the Senate the price tag for the forms is N3m while for the Governorship it is N5m. In addition to the cost of the nomination forms, APC also charges *separately for expression of interest* forms – ranging from N50, 000 for State Houses of Assembly to N500, 000 for those aspiring to be Governors while for those hoping to fly the party's flag in the presidential election it is N2.5m.

Interestingly APC also sets prices for those aspiring to be ***party officials***: under the guidelines for the conduct of the congresses released by the national secretariat of the party, aspirants for

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[23] It was reported that individuals contribution to political parties and their candidates in the last decade in Nigeria to the tune of over 5 billion naira. See Kura S.Y.B (2011), "Political Parties and Democracy in Nigeria: Candidate Selection, Campaign and Party Financing in People's Democratic Party" *in Journal of Sustainable Development in Africa, Vol. 13, No. 6.*

[24] Section 91(8)(a)

[25] Peoples Democratic Party Constitution, Available online at <http://peoplesdemocraticparty.com.ng/?page_id=71> accessed 18th June 2018.

[26] Jideofor Adibe 'Exorbitant party nomination forms and systemic corruption' Daily Trust Newspaper Wednesday, May 02, 2018. Available online at: <https://www.dailytrust.com.ng/daily/columns/thursday-columns/39371-exorbitant-party-nomination-forms-and-systemic-corruption> accessed 13th June 2018.

[27] Article 22 APC Constitution. Available online at: <https://officialapcng.com/downloads/APC-Constitution-Amended.pdf> accessed 18th June 2018.

the office of the state chairman are expected to pay N100, 000 while aspirants for state executive will be required to pay N30, 000. Similarly those hoping to become local government chairmen must pay N25, 000 for the forms while those who want to be on local government executive will have to find N10, 000. For individuals seeking to be ward chairman of APC, they must be ready to part with N10, 000 while N2000 if are required of candidates for APC party ward executives.[28] The party offers its female aspirants a *50 per cent* discount for all positions. The story is the same for most registered political parties in Nigeria. This impunity keeps happening unchecked because the election monitoring board in Nigeria (INEC) is apparently not effectively controlling party campaign finances and sourcing of funds as provided for in the Electoral Act.

These impositions of nomination fees, either by parties or electoral body, have several disturbing implications. Firstly, the process of individuals running for political offices should not be different from persons seeking for employment in the public service. Each wants to render his or her service to the country. For persons seeking employment in the public service, it is clear that it is illegal to sell to them application forms. Such persons are exercising their right as citizens and individual to seek gainful employment within the government and for this government should not and does not require them to purchase application forms. It is therefore contradictory to impose such onerous task on persons seeking political office. Secondly, seeking political office is not contract bidding exercise but an exercise of the constitutional right to vote and be voted for in furtherance of the freedoms of association and principle of government by the people. Also the CFRN 1999[29] and Electoral Act 2010 has already made stipulated requirements for contesting for political offices. Further requirements outside the Constitution that further reduces the opportunity of citizens is unconstitutional. This has been the decision of *Osun State High Court in Action Congress v Osun State Independent Electoral Commission*.[30] Thus imposing nomination fees on candidates effectively shuts out individuals who cannot afford to make such payments[31]. It means that such persons have been denied of their right to freedom of expression and to participate in government.

[28] ibid

[29] See for example *sections 7(4), 106 and 107 CFRN 1999*

[30] See unreported cases, *Alliance for Democracy and 9 others v Osun State Independent Electoral Commission* per Justice J.O.Bada on a March 2004 jugdements held nomination fees unconstitutional. Same decision was held 4 years later in *Osun State Chapter of Action Congress v Osun State Independent Electoral Commission* Suit No: HOS/71/2008 and HOS/72/2008

[31] See Daily Times, June 18 2018. 2019: Stakeholders decry expensive nomination forms, Daily Times, June 18 2018. 2019

It is also worth noting that quite a couple of unreported high court cases, in newspaper reports are anything to go by, have held that payment of nomination fees are illegal and unconstitutional[32]. It is therefore worrisome that this illegality continues to exist despite its unconstitutionality and contribution to the exclusion of sections of the population from the political representation and participation.

5. CHALLENGES AND CONSEQUENCES OF THE LEGAL FRAMEWORK ON AGE AND FINANCIAL REQUIREMENTS.

The constitutional and party regulatory requirements pose some challenges to inclusive participation in the electoral process in Nigeria. These challenges fall into two main groups - age requirements and financial requirements. These are discussed below.

a. Age Requirements

Age limits imposed on political aspirants is serious challenge to effective representation. This is particularly with regards to participation in the legislative arm of government. Going by the constitutional limitations of age, the youngest an individual can be to participate in election, House of Representative of the National Assembly is 30years. This is a direct exclusion of over 40% of the Nigerian population. This means that the interests, fears, concerns and aspirations of over 40% of the population, equating about 60million persons will not be taken into consideration in the law making process.

This has a more far reaching consequence than limitation of age on executive positions. This is because while the executive implements the law, the Legislature makes the law that is implemented by the executive. It is thus necessary to make the Age limit as inclusive as possible. It is worth noting that Nigeria has seen the logic in this argument hence the enactment of the Not too young to run Bill. The Act lowers the age to contest for House of Representatives to 25years etc. This is a great achievement. It is however still very high. All adults, who are qualified to marry, enter into a contract, and pay tax as defined by the law, should have the

[32] See Democratic Socialist Movement, 2004, NCP LISTS CONDITIONS FOR PARTICIPATING IN THE COUNCIL POLL" Available online at: <http://www.socialistnigeria.org/paper/2004/march/10.html> accessed 18th June 2018. Where the report cited an Osun State High Court as declaring payment for nomination forms illegal; Vanguard Newspapers "LG polls: NCP to sue LASIEC over nomination fee" Vanguard Newspapers Online. Available at: <https://www.vanguardngr.com/2017/04/lg-polls-ncp-sue-lasiec-nomination-fee/> accessed 18th June 2018. It is, at the time of completion of this paper, unknown whether this case succeeded.

capacity to contest for membership of the legislature. This will widen the pool of representation and ensure that the law covers most persons.

b. **Financial Requirements**

Financial requirements fall into two main groups. These are regulatory provisions on Campaign finance and registration requirement for parties and candidates.

One of the negative features of the development experience during the past 50 years is that poverty in the developing world remains widespread. One quarter of the world's people continue to live in absolute poverty, unable to meet their most basic needs, and surviving on less than a dollar a day[33]. Nigeria is not exempted. Some of the definitions of poverty list income-poverty, material lack or want, and capability deprivation as characteristics. This circumstances it is argued leads to a web of disadvantages that effectively reduces political participation. This means therefore that low income earners if not accommodated by the removal of financial obstacles to political participation can neither make any meaningful impact in the Nigerian Political space nor get their interests represented. Poverty as a cause for non-inclusiveness, manifests itself in two ways in the Nigeria political process: Campaign financing and financial requirement of candidates.

Campaign financing laws relate to regulations governing sourcing of funds and its spending for political campaign by parties and candidates. As already discussed above, under the Nigerian electoral legal regime, there are maximum amounts which parties are allowed to spend in electoral campaigns for particular elective positions starting from presidential elections to legislative office in State Houses of Assembly. Such money are supposedly to be used in financing campaign activities of the party and candidates. This appear to be in line with arguments that money is crucial for democratic politics, and that political parties need to be well funded to play their roles in the political process. This however does not mean that the raising of such funds should constitute a deterrent to effective representation[34].

On the other hand, it is not to suggest that regulation of campaign funding, as a way of controlling the adverse effect of too much money in campaigns, should be used to stifle healthy competition among political parties. Rather the intent should be to device ways of making funds

[33] Sulaiman Khalid 'The Politics of Poverty Eradication in Nigeria' Department of Sociology Usman Danfodiyo University Sokoto available on line at <www.gamji.com/article6000> accessed 10th June 2018.
[34] Jideofor Adibe note 18,

available, for the services for which funds are required, to political parties and candidates and thus eliminate the unintended consequences of commercialisation of political representation. An example is the regulation of campaign contributions and donations.

In the US for instance, although attempts to regulate campaign finance by legislation dates back to 1867, there are still several loopholes that are exploited by candidates and their supporters. A good case in point is the Federal Election Campaign Act (FECA) of 1972. This Act was amended in 1974 with the introduction of statutory limits on contributions. It attempted to restrict the influence of wealthy individuals by limiting individual donations to $1,000 and donations by political action committees (PACs) to $5,000. Despite this, it was quickly found that while this reform could control 'hard money', (those donated directly to the candidates) it proved ineffective in reigning unregulated contributions or 'soft money' (funds which are not contributed directly to candidate campaigns such as those used in running a candidate's support organisations). For instance, *in Citizens United v Federal Election Commission*,[35] a landmark case in the USA in 2010, the US Supreme Court *held* that corporate funding of independent broadcasts supporting or opposing a candidate for an election could not be regulated as it would infringe on the rights of such entities to free speech.

Although this decision is hinged on fundamental rights of free speech, it has the unintended consequence of subverting the electoral legal regime on limits of campaign contributions. The laws were put in place to avoid political capture by a wealthy group. The perennial debate in the US on gun control is one of the feared effects of political capture to the detriment of the majority. This is because it is often alleged that the National Rifle Association (NRA), which is the anti-gun control lobby in the US is able to dictate the policy and law on gun control in the US because it has through financial contribution effectively captured most of the legislators and political office holders and effectively gun regulation in US. [36]

The above example is a demonstration of what happens when a section of the society has financial control over governance either by giving too much or making it financially difficult for others to participate in decision making. The present situation in Nigeria falls within both divide, i.e., susceptibility to political capture and exclusion of the poor.

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[35] 558 U.S. 310 (2010)

[36] Guardian Newspaper USA 'Why is the National Rifle Association so powerful?' The Guardian Newspaper USA, Nov 17, 2017 available online at: <https://www.theguardian.com/us-news/2017/.../nra-gun-lobby-gun-control-congress> accessed 10th June 2018.

Susceptibility to political capture happens because, although law regulates the maximum amount that can be spend for election, it says nothing about pre-election spending or like the US, money spent by Political Action Committees in support of candidates. The effect is that individuals or group of persons may effectively take control of a candidate by funding all the candidates' pre-election expenses, including purchase of nomination forms[37]. The result is an elected official, who because of working towards placating political financial sponsors, may end up mismanaging government funds in order to recoup or pay off sponsors or build a war chest for re-election. This has far reaching consequences because the poor though also citizens who need adequate representation, particularly, at the law making level, get both disenfranchised due to the high cost of political participation and their interest are ignored due to prioritisation of interest of political godfathers. [38]

5. RECOMMENDATIONS AND WAY FORWARD

As demonstrated above, the commercialisation of political participation effectively shuts out the less privileged in society. Similar exclusion happens with age limit. In both situations, government policies become only for the privileged, the rich and wealthy while recognising the poor as tokens or votes for sale. These challenges could however be resolved via some practical actions as follows.

a. Specifically prohibit payment for Nomination Forms either to parties or electoral commission

Amend the electoral act to specifically prohibit payment for nomination forms. The fear that if made free all and sundry will pick the forms will not matter as parties can establish and carry out internal checks including primary elections to choose a particular candidate. Also other non-financial requirement could be introduced to reduce the list of candidates representing each party to only committed party members. Candidates who want to run for offices may also be required to submit a certain number of signatures from bona fide members of the party who endorse their candidacy as a prerequisite to take part in the primaries. This will ensure that candidates are truly representatives and not impositions.

[37] Note it is our considered opinion that as has been demonstrated by some unreported High Court Cases, payment of nomination forms is illegal and inimical to democratic principles.

[38] See other views by Alabi Abdullahi 'Democracy and Politics of Godfatherism in Nigeria: The Effects and Way Forward' *International Journal of Politics and Good Governance Volume 4, No. 4.2 Quarter II 2013* available online at <www.onlineresearchjournals.com/ijopagg/art/124.pdf> accessed 10th June 2018.

b. Reduce the Age limit to age of consent

Democracy is more likely to develop and endure when all segments of a society are free and able to participate and influence political outcomes. In Nigeria, youths constitute the majority of the work force. It is therefore illogical to deny them voice in the political process, particular as representatives of communities and sectors of the society. The constitutional age limit for vying into political positions should therefore be reduced. The agitation for and successful signing of the Not-Too-Young-To-Run bill also known as the Reduction of Age for Election bill, via a constitution alteration, is a demonstration of the necessity for this amendment.

c. Amendment of party constitutions and guidelines to emphasise capacity and commitment

Parties should amend their constitutions and guidelines to emphasis capacity, commitment, financial prudence, accountability, and dedication in the allocation of party nomination forms. These are criteria that will ensure that only truly dedicated individuals are given the opportunity to run for office and that such persons are not limited by financial considerations or captured by money bags. These requirement although they may seem abstract can easily be ascertained. For instance, issues of accountability and financial prudence could be ascertained or at least deduced from criminal record checks, financial history (Bankruptcy and debt records), and contributions to party funds via payment of dues, where applicable.

d. Amendment of electoral act to require government to finance electoral campaign

The amendment should impose on government the duty to finance electoral campaigns and particularly to give relevant parties equal platform for the dissemination of their message. This will ensure that the necessity for parties to devise means of raising funds from the citizenry, which may impact on the control of the party or candidate, will be reduced. The foundation for this is already provided for under section 228(c) of the CFRN 1999. The Constitution however has not made it compulsory for the National Assembly to enact such a law or fur government to make such disbursement. It is noted that INEC at some time did disburse funds to political parties under an INEC regulation and under *section 80* of the Electoral Act 2002[39]. This was however a discretionary provision which only, like the constitution, empowering the National Assembly to enact a law giving grant to political parties. The sustainability of this approach is in doubt hence the recommendation for an amendment of the Constitution and Electoral Act to

[39] Electoral Act 2002,NO4 Laws of the Federation of Nigeria, 2004

make it a compulsory requirement. To enhance the utility of the funds disbursed to parties, they should be required to present their candidates for compulsory community interactions at different levels. This will give the electorate the opportunity to ask questions of the candidates and their party. For the candidates and their party, it will also be opportunity to communicate to the public their manifesto.

6. CONCLUSION

Democracy is arguably the best form of government. Its effectiveness however depends on the level of its inclusiveness. Democracy needs to be inclusive to ensure that as the definition implies, it is of the people, by the people and for the people. Anything less is not democracy. The best way to ensure inclusiveness is to ensure it is a constitutional democracy where every adult citizen who is able to vote is also able to contest for political position. This ensures that the voice of the citizenry is truly heard in the policy making process. This requires eliminating all factors that may exclude a majority of the citizens from political participation. In Nigeria, for the purpose of this paper, these factors that cause political exclusion and disenfranchisement are mainly age limits and financial requirements.

Age limits and financial requirements limit the opportunity for effective representation of the citizenry. This is because only about 5% of the population of over 180 million citizens, under the current electoral law and policy, may be able to meet both the financial and age requirements to have the opportunity to independently vie in political representation positions. Further factors like interests, educational qualification, party membership etc., will further whittle down this number thereby reducing the pool of potential representatives. This implies that the interests, aspirations and fears of the remaining 170 million or so citizens may not be represented except where their interest coincides with that of the elite. A taste of this is already reflected by the lukewarm attitude of government towards development and implementation of people oriented policies and programmes. Practical examples are the poor funding of Education, Health sectors, ineffective power supply and near-none existent pipe borne water. These are services which the poor cannot afford but which the rich can purchase. Unfortunately, these are essential services for a healthy living, but for which the rich have ready alternatives and care little whether government provides them or not. The supposition here is

that this would have been different where all sections of the citizenry are fully represented. The best way to achieve this is through the amendment of the relevant laws. The aim should be to remove all unconstitutional and undemocratic barriers including the financial requirements; reintroduction of public funding of political parties, enforcement of auditing requirements and making qualification age for political candidacy same as age of consent.

A CENTURY OF LAWMAKING IN NIGERIA: A REVIEW

By

Professor Edoba B. Omoregie*

PUBLISHERS/DATE OF PUBLICATION: National Institute for Legislative Studies (National Assembly), 2014.

VOL/EDITION/NO. OF PAGES/CHAPTERS: Single volume, edited by Professor Ladi Hamalai, 381 pages of 11 Chapters. It has a supplementary compendium which is of five (5) volumes, containing all treaties, constitutions and constitution-drafting committee/assembly reports from 1851 to date of publication of the book (2014), except the report of the National Constitutional Conference of that year.

SUBJECT MATTER: This is a book of essays which seeks to provide "an in-depth and critical assessment of the *Nigeria legislature* and *legislative processes* from colonial years" through independence and post-independence Nigeria.

PURPOSE/OBJECTIVE OF BOOK: The book's main purpose/objective is to accomplish one of the mandates of the National Institute for Legislative Studies (NILS, the predecessor of NILDS) which is to act as a centre of excellence for research and publication on democratic governance, and legislative practice and procedure. The book therefore seeks to accomplish this by setting out the history, politics and processes of legislative governance in Nigeria from colonial period to the present. In this regard, the book is divided into six (6) sections of eleven (11) chapters as follows:

Chapter One – This chapter addresses the role of lawmaking in a democracy. It's a theoretical evaluation of conceptual aspects of the processes of lawmaking. It offers a historical discourse of law making tracing it to the beginning of human existence, and civilization. The chapter identifies the systematic approach to lawmaking pioneered by Athenians and narrows down to the traditional forms in Nigeria. The chapter appraises the modern form of law making from the time of commencement of representative government in England as well as the unique approach introduced by the American Revolution. In summary, according to the author, the

* Head, Legal Research Division, Department of Legislative Support Services, National Institute for Legislative and Democratic Studies, National Assembly, Abuja

idea of lawmaking is a celebration of the will of the people to be governed by the government of their choice. The American Revolution marks a watershed in that popular resolve without which lawmaking will be a meaningless, detached process. Lawmaking is therefore an expression of the will of the people through their freely elected representatives in parliament. The starting point of law making in Nigeria is traced to the concession granted to the Royal Niger Company by the British government for the company to exploit the territory now known as Nigeria. The concession was later withdrawn pursuant to a Bill passed by the British pursuant to the Foreign Jurisdiction Act of 1890, a statute of general application in England. The chapter extensively discusses the various mechanisms of law making and their net implications for the economic, social and political wellbeing of the Nigerian people. It concludes on the note that lawmaking is the "pen that crystallizes the inalienable rights of humanity, without which there would be inconsistency in the protection of men's proprietary rights". Thus, it's important that lawmaking must be undertaken in such a way as not to infringe on the inalienable rights of citizens, but rather to further and enhance them.

Chapter Two – The chapter discusses the constitutional development of Nigeria through pre-colonial era, then to the colonial period and post-colonial times till the present. It identifies the first constitution of Nigeria as the Clifford Constitution of 1922 followed by the Richards Constitution of 1946, Macpherson Constitution of 1951 and the Littleton Constitution of 1954 all of which were promulgated by British Colonial administration with minimal input of Nigerians, except for the last two in which consultations were held between local political leaders and British colonial administration. The chapter also identifies post-colonial constitutions such as the Independence Constitution of 1960, Republican Constitution of 1963, the 1979 and the current 1999 Constitutions. The chapter identifies some important features of each of these constitutions including the introduction of elective principle (1922), introduction of national representative council (1946), grant of self-rule and introduction of quasi-federal system (1951), introduction of full-fledged federal system (1954) grant of independence and constitutional guarantee of human rights (1960), adoption of republicanism (1963), introduction of presidentialism and centralist federal system with consociational mechanism to manage diversity (1979), continuance of presidentialism and centralism, with consociational mechanism (1999). The chapter concludes that the current constitutional framework is un-autochthonous to the extent that military junta superintended the process of its making and largely dictated its terms.

Chapter Three –This chapter addresses parliamentary democracy and law-making in the context of the role of federal parliament in the politics and governance of the first republic. The relevant period covers 1960-1964. The chapter deals with how the House of Representatives in conjunction with political stakeholders handled three significant national issues namely: creation of regions, federal-regional relations with reference to declaration of State of Public Emergency in Western Region by the federal government, and the Anglo-Nigerian Defence Pact and the reaction of the general public to them with concomitant impact on the survival of the Balewa government.

Chapter Four discusses regional parliaments and governance in Nigeria during the First Republic. It provides a historical outline of regional legislatures from 1946 when they were introduced in the Eastern, Northern and Western provinces. The chapter discusses the crisis in the Western Region and its impact on legislative business in the region shortly after independence. It also examines specific aspects of regional policy governance in areas of educational and particularly university education and establishment of universities by regional governments in Ife, Nsukka and Zaria; "regional" police and native authority administration. The chapter concludes that in the final analysis regional assemblies exhibited qualities consistent with most multi-party democracies underscored by "debates, bitter opposition and sometimes crisis". The author expresses the view that despite this, key issues were successfully deliberated in all regional assemblies which yielded progress in the area of local administration, education and community development.

Chapter Five – The chapter discusses presidential democracy and lawmaking in Nigeria. It provides a background to adoption of presidentialism in the country. The author suggests that the adoption of the "system in 1979 was a deliberate political choice made by the Nigerian political elite informed by the experience of premature collapse of the first democratic experiment in 1966", and believes that the "tussle for exclusive power between a ceremonial President (Head of State) and an executive Prime Minister (Head of Government) was at the centre of a festering political crisis which dovetailed into the collapse of the Republic". These conclusions are contentious since the republic was too young for constitutional provisions

creating these two positions to be fully tested for informed conclusive evaluation. The conclusion also seems to ignore the impact the wave of coup-making across Africa and South America had in the minds young officers who toppled the democratic government, or whether the alleged tussle for power weighed on the minds of the coup-makers in truncating democratic government. The officers largely complained of corruption and related matters, which charge appears to remain the most populist reason to justify such unconstitutional takeover, and seems to be a powerful rallying point even in the hand of long-standing political opposition. The chapter gives the verdict that the legislature of the second republic under-performed in discharging its law-making power, except for the effort to robustly address the challenges of federalism and its concomitant impact on intergovernmental fiscal relation. The chapter skips the third republic to address the fourth republic law-making experience. Still founded on the presidential system, the Fourth republic parliament is assessed as having cultivated a high level of public confidence despite its initial travails. The chapter concludes on the note that strengthening law-making process and conduct of routine elections as constitutionally prescribed are critical elements for institutionalizing democracy in Nigeria

Chapter Six – The chapter reviews lawmaking in Nigeria by the military. It commences by citing the coup day speech of Major Kaduna Nzeogwu by which he pronounced the toppling of constitutional government and imposition of martial law over the "Northern Provinces of Nigeria". The chapter avoids a discussion of the justification for the coup of 15 January 1966. Instead it notes that that coup set the stage for subsequent military intervention at various times thereafter until restoration of democratic rule in 1999. During the period, the military ruled by decrees. The chapter examines the legality of military rule in the country reasoning that military coups are criminally and constitutionally outlawed. Despite this, the critical determinant of whether effect can be given to this prohibition is if the coup succeeds or not. The chapter notes that the jurisprudence in Nigeria appears to endorse the legality of a successful coup; meaning that a forceful take over which gains popular support to the point that the coup-makers are able to assert authority, is made legitimate by these chain of events despite extant constitutional and statutory censor of coup. The chapter discusses framework for law-making during military rule, procedure for lawmaking during the era and identifies seven sectors or items in which the regimes were most active in lawmaking. They include federalism and state creation, education, agriculture and land development, trade and investment, and constitution-making, among

others. The chapter concludes with the author proposing a revision of some of the laws made during military era in order to bring them up to conformity with democratic standards.

Chapter Seven – The chapter addresses the issue of creating a durable constitution. It is discussed from the perspective of Senate Constitution Review Committee. The chapter sets the tone by offering a brief review of constitution making in Nigeria. It then addresses the specific questing of how to evolve a durable constitution in the country. Seven parametres are set to achieve this namely: inclusivity, participation, diversity, autonomy, transparency, accountability and legitimacy. The chapter identifies a number of issues focused on, in the effort by the Seventh National Assembly constitution review exercise. They include nature of federal structure, local government, security/policing and fiscal federalism. The chapter also identifies a number of challenges which make constitutional alteration process difficult. They include high but apparently unrealistic public expectations, lack of procedural template to accomplish the task, ethnic bias, apathy and a lack of political will. The author concludes that in order to mobilize robust support for constitutional review endeavor, the general public has to gain good enlightenment on the necessity of the exercise in addition to their active participation to secure legitimacy for the review process.

Chapter 8 – The chapter explores ways by which democracy can be deepened through constitution review, using the House of Representatives as the paradigm. It offers an appraisal of constitution review in the country with specific reference to the exercise conducted by the 4th National Assembly (1999-2003), 5th National Assembly (2003-2007), as well as the 6th Assembly (2007-2010) and the 7th Assembly (2011-2015). The chapter identifies some unique innovation introduced in the review process including Technical Committee of Experts and the Peoples Public Session adopted during the exercise conducted by the 6th and 7th Assemblies respectively. The chapter concludes that despite their best efforts, the House of Representatives has been unable to fully see through a number of its constitutional review proposals due to the intrinsic rigidity of constitutional alteration process.

Chapter 9 – The chapter discusses the legislature and democratic rights. The chapters attempts to draw a nexus between the legislature as the platform for the people to be represented in

government and the need for such representation to guarantee some basic rights to citizens including the right to secure their social and economic well-being, without which the entire democratic system would appear to be meaningless to the populace.

Chapter 10 – The chapter discusses the legislature and the politics of succession in the fourth republic. The author admits that strictly speaking, the legislature (the National Assembly) has no direct powers to deal with challenges of orderly political succession. Nonetheless, due to a number of factors bordering on the political structure of the country, the National Assembly inevitably gets drawn into the vortex of such issue. The chapter examines the role played by the Assembly in resolving crisis of succession which has threatened the country's democratic stability since 1999 and situates the crisis within the general dynamics of Nigeria's political economy, including the framing of competition for power through the party system and projection of ethno-regional and religious identities. The author concludes that the National Assembly has effectively used its strategic position as the venue for manifestation of Nigeria's diversity to blunt succession politics, especially during President Olusegun Obasanjo regime and in the peaceful resolution of the crisis of succession precipitated by the ill-health of President Umar Musa Yar'Adua.

Chapter 11 – The eleventh and final chapter addresses legislative lawmaking and gender in Nigeria. It raises the question "why gender"? While answering the question, the chapter connects it with Nigeria's legal system and the role of the legislature in promoting gender balance and gender equality. It also appraises the number of seats held by women in the legislature showing a low statistical outlook against their male counterpart. The author concludes by underscoring the need for increased political participation by women for the overall development of the country.

GAPS/RECOMMENDATIONS: This is a book of essays published in 2014 as part of the centenary celebration (100 years) of Amalgamation of the Northern and Southern Protectorates in 1914. The content of most of the chapters are still fresh, although there have been some significant developments since then including subsequent constitutional review process conducted by the 8th National Assembly culminating in a number of Constitutional Alteration

Acts, 2018. The 5th Chapter could have been better enriched by evidence-based research explaining what motivated the adoption of presidential system in Nigeria. The conclusion reached on alleged tussle for power between the Head of State and Prime Minister as the cause of the coup of January 15 1966 seems to be unsupportable. In any event, the Report of the Constitution Drafting Committee (CDC) headed by Chief Rotimi Williams and deliberations of the Constituent Assembly (CA) which examined the report seem to be more reliable avenues to discover reasons for adoption of presidentialism in place of parliamentary government in 1979 by the military. The chapter made only passing reference to the CDC report and the deliberation of the CA without specifically identifying any conclusion on motivation for rejection of parliamentary government and adoption of presidential government in its place. Despite this obvious gap, the book is complete in itself as it was published to mark a particular episode in Nigeria's political and constitutional history which is the 100th year of the making of the country. No recommendation for further action is necessary and same is not made in this review.

PARTY DEFECTION UNDER THE CONSTITUTION: *ABEGUNDE V ONDO STATE HOUSE OF ASSEMBLY & ORS* [2015] 61 (Pt. 3) NSCQR 1857 REVISITED

BY

EBELE GLORIA OGWUDA*

Abstract

Defection or Carpet-Crossing by Political Office holders or Nigerian politicians generally is not a new phenomenon but one that has persisted since the First Republic in the period leading to independence of Nigeria as a sovereign nation. Most defection cases in Nigeria have been primarily informed by personality clash, financial considerations, power tussles, personal glorification, etc. The practice has continued without obvious consequences for the perpetrators. It is in the light of the foregoing that the paper examines the trend of defection among political office holders in view of the 2015 decision of the Supreme Court in the case of Abegunde v. Ondo State House of Assembly & Ors where the Court had to interpret and apply the provisions of sections 68(1) (a) & (b) and 222 (a), (e) and (f) of the 1999 Constitution to ascertain whether the appellant's case falls within the exception (proviso) envisaged under section 68(1) (g). Using the doctrinal approach to research, the paper addresses issues which emanated from the decision of the court which in the opinion of the paper will henceforth agitate the minds of political office holders who stand the risk of vacating their seats for such acts of defection and also recommends amongst other things that section 68(1)(g) of the Constitution should be amended to include ***automatic loss of seat.*** *It thereafter concludes that Abegunde's case should become a locus classicus to be referred to in all cases of party defection in Nigeria.*

Keywords: Defection, political office holders, political parties, lawmakers

1. INTRODUCTION

Across the globe, it is not out of place for politicians to change their party affiliations. There are those who are of the conviction that this is in line with the exercise of an individual's fundamental freedom to dissent, which invariably gives democracy its unique meaning and power.[1] What is however unusual is for politicians already elected on the platform of one party to either the Parliament or Executive, as the case may be, to defect to another party during or before the expiration of the term.[2]

Defection[3] or Carpet-Crossing by political office holders or Nigerian politicians generally is not a new phenomenon but one that has persisted since the First Republic in the period leading to independence of Nigeria as a sovereign nation.[4] In advanced democracies, reasons adduced by politicians for defection amongst others include divergent views on the operations of parties' philosophy or idealogy, crisis, factionalisation or division, and party leaders reneging on

*Research Fellow, Nigerian Institute of Advanced Legal Studies, Abuja. Email-ebeleogwuda@yahoo.com

[1] 'Defection Politics' <https://www.ifp.co.in/page/items/38920/defection-politics/> accessed 11 July 2018 Political defection in India for instance, was before now a norm until the practice was pushed to the limit by politicians so much so that it became necessary to introduce a law to some extent limit acts of defection. In 1985 by virtue of the 52nd Amendment to the Constitution (the 10th Schedule), an Anti-Defection Law was introduced. This law prohibits legislators from defecting to another party. The earlier arrangement before the 91st Amendment to the Constitution in 2003 in which the clause was removed was that they could do so if a group of them formed one third of their original party.

[2] ibid

[3] This trend which is generally referred to as party defection, cross- carpeting, party-switching, floor-crossing, party-hopping, canoe-jumping, decamping, party- jumping, etc. are employed to mean the same thing as defection. For further reading, see Peter Mbah, 'Party Defection and Democratic Consolidation in Nigeria, 1999-2009' *AAJSS* 2(2.3) (2011) <http://onlineresearchjournals.com/aajoss/art/68.pdf > accessed 9 May 2018

[4] Adewale Ademola, 'The History and Law of Political Carpet-Crossing in Nigeria' <http://squibguest.blogspot.com/2009/11/history-and-law-of-political-carpet.html> accessed 6 May 2015. Defection first crept into the country's political lexicon in 1951, when some members of the National Council for Nigeria and Cameroon (NCNC) were lobbied to cross over to the Action Group (AG), both defunct, to stop the former from forming the government in the then Western Region. The NCNC had won 42 out of the 80 seats in the region's House of Assembly, but in one swoop lost 20 of them to the AG. This stopped Dr. Nnamdi Azikiwe, an Igbo and leader of the party from becoming the premier of the Western Region. The trend continued in the First Republic (1960-1966). Notable defections in that era were that of Chief Ladoke Akintola, who left AG due to personality clash between him and the leader of the party, Chief Obafemi Awolowo. A similar disagreement between Azikiwe and one of his lieutenants, Dr. Kingsley Mbadiwe, forced the latter to dump the NCNC to form the Democratic Party of Nigeria Citizens (DPNC). For further reading, see Nwaneri,Felix, 'Defection: New Power Play Ahead of 2015' <http://newtelegraphonline.com/defection-new-power-play-ahead-of-2015/> accessed 7 May 2018

agreements.[5] In Nigeria of late, most defection cases, have been primarily informed by personality clash, financial considerations, power tussles, personal glorification, etc.[6] From 1999 to date, many politicians at the Local, State and Federal levels have moved from one political party to the other. Some did so abandoning the parties on which platform they were elected into public office, while others after losing elections found it the best option to jump to another party without obvious consequences.[7] Also, it is commonplace to have frequent acts of defections in the period leading up to elections.

Following preparations for the 2019 general elections in Nigeria, there has been a gale of defections in which sitting Governors, the siting Senate President as well as Senators, the Speaker and other members of the Legislature have had cause to defect, embrace and declare their political interests under new political platforms (political parties).[8] This has occurred without any repercussion or obvious consequences for the perpetrators or strict application of constitutional provisions on defection. It has been said that defection is a choice and considered part of politics.[9] However, it becomes a challenge where the defector does so while occupying the office won under his former party. By virtue of section 221 of the 1999 Constitution, it is political parties that win elections, not individuals.[10] Political parties canvass for votes, and have their names printed on the ballot papers during elections.[11] It should consequently not be

[5] Ademola (n 4)
[6] ibid
[7] ibid
[8] For further reading on political office holders that defected see, Chioma Gabriel, 'Political Defections: In whose interests?' <https://www.vanguardngr.com/2018/08/political-defections-in-whose-interests/> accessed 12 November 2018
[9] Peter Claver Oparah, 'Dealing with the Aftermaths of Defection in Nigerian Politics' <http://saharareporters.com/2018/08/06/dealing-aftermaths-defection-nigerian-politics> accessed 13 November 2018
[10] See also the case of *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1080) p. 227 at 315
[11] Oparah, (n 9)

out of place for such political office holders seeking to defect to either resign or lose their seats upon such defection.

It is in the light of the foregoing that the paper examines the trend of defection among political office holders. This becomes necessary in view of the 2015 decision of the Supreme Court in the case of ***Abegunde v. Ondo State House of Assembly***[12] (hereinafter referred to as *Abegunde's* case) where the Court had to interpret and apply the provisions of sections 68(1) (a) & (b) and 222 (a), (e) and (f) of the 1999 Constitution to ascertain whether the appellant's case falls within the exception (*proviso*) envisaged under section 68(1) (g).[13] The Court also had to determine whether the lower courts' interpretation and application of same was valid. In so doing, the paper answers some posers or nagging questions which have agitated the mind of the researcher and probably most Nigerians as to the effect of this landmark decision with respect to constitutional provision on defection. Before attempting to answer these questions, it becomes imperative to look at the meaning of party defection, the provisions of the 1999 Constitution on party defection and a synopsis of the case.

2. MEANING OF PARTY DEFECTION

Political party defection or party-switching is said to occur when any elected party representative within a political structure such as the parliament or the Executive, embraces a different political or policy perspective that is incompatible with that of the party he or she previously represents.[14]

Also, party defections could mean any change in political party affiliation of a partisan public figure, usually one who is currently holding an elected office. In several nations, party defection

[12] (supra). The judgment was delivered on the 19th of March, 2015
[13] Section 222 of the 1999 Constitution stipulates the conditions for eligibility of an association to be recognised as a political party
[14] Mbah, (n 3)

takes the form of politicians refusing to support their political parties in coalition governments.[15]

3. ANALYSIS OF CONSTITUTIONAL PROVISION ON PARTY DEFECTION

The provisions of party defection are clearly spelt out in section 68 of the 1999 Constitution. Section 68(1)(g) stipulates that a member of the Senate or the House of representatives **shall** vacate his seat in the House if he becomes a member of another political party before the expiration of the period for which that House was elected.[16] What this means is that a person stands the risk of losing his seat if he defects during the subsistence of his tenure. We may want to ask at this juncture whether this provision has ever been activated to punish erring political office holders or whether it requires judicial activism to ensure effective application as will be discussed in the course of this paper when analysing issues arising from the decision of the court in *Abegunde's* case. It is imperative to point out that there is a proviso to section 68(1)(g), the effect of which is that the erring politician may escape punishment under (g) if his defection is as a result of a division in the political party which he was previously a member or a merger of two or more political parties or a situation of faction. Another important provision is subsection (2) which is on the role of the Senate President or Speaker of the House of Representatives who is required to give effect to the provisions of subsection (1) by presenting

[15] 'Politics of Party Defections, Ethnicity and Effect of 2015 Presidential Election in Nigeria' <https://hyattractions.wordpress.com/2015/11/02/politics-of-party-defections-ethinicity-and-effect-of-2015-presidential-election-in-nigeria/> accessed 11 July 2018

[16] Section 68 of the 1999 Constitution (as amended) generally spells out conditions for vacation of seat in the House by the legislators at the federal Level ranging from being a member of another legislative house, disqualification, where he ceases to be a citizen, becomes president or vice president, etc., defection to another party and so on. See section 109 for similar provisions for members of a House of Assembly of a State. The import of this provision is that a member of either House of the National Assembly duly elected for a term of four years may lose his seat in any of the aforementioned circumstances. For further reading see, J O Akande, *The Constitution of the Federal Republic of Nigeria 1999* (MIJ Publishers, 200) 166

satisfactory evidence that any of the provisions has become applicable. This provision will be discussed extensively in the course of the paper.

4. SUMMARY OF *ABEGUNDE'S* CASE

The Appellant, who contested and won the Akure North/South Federal Constituency election under the platform of the Labour Party, after a while, defected to Action Congress of Nigeria (ACN) in 2011. He gave the reason for his defection as a division in the Ondo State Chapter of the Labour Party. The Appellant filed an Originating Summons at the trial Court (Federal High Court) seeking interpretation of Section 68(1) (a) and (g) of the 1999 Constitution. He sought declaration to the effect that by virtue of the *proviso* to the stated section 68(1)(g), he was entitled to retain his seat in spite of his defection and urged the Court to restrain the respondents from tampering with his seat. The trial Court dismissed his claim. Being dissatisfied with the judgment, he appealed to the Court of Appeal, which dismissed the appeal and affirmed the trial Court's decision. He further appealed to the Supreme Court. The Supreme Court in affirming the decisions of the lower Courts held that the appellant did not come within the exception created under section 68(1) (g) of the Constitution. In its judgment, the Court stated that the division in the State Chapter of the party did not justify the appellant's defection as the division must be such that affects the national structure or leadership of the party at the Centre and not at State or Local Government or Ward level.[17] The Court therefore ordered the appellant to vacate his seat.

In the light of the foregoing, some questions have arisen which we shall now attempt to answer.

[17] See the cases of *FEDECO v. Goni* (1983) NSCC vol. 14 pg.481 at 4885 (SC) and *Abubakar v. AG Federation* (2007) 10 NWLR (Pt 1041) where the Courts enunciated the principle that it is only such factionalisation, fragmentation or division that makes it impossible for a political party to function by virtue of the proviso to section 68(1)(g) that will justify a person's defection to another party and subsequent retention of his seat in spite of the defection. This reasoning was adopted in Abegunde's case to the effect that his alleged claim of division in the state chapter of the party did not excuse his defection and as such he had to vacate his seat

5. *ABEGUNDE V ONDO STATE HOUSE OF ASSEMBLY & ORS*: EMERGING ISSUES

Recall that we mentioned earlier in the paper that certain questions bothering on the decision of the court has arisen which this paper shall attempt to answer. This section of the paper will now deal with these issues.

5.1 Does the Decision go far enough to make the Suggestion of Automatic Loss of Seat redundant?

In attempting this question, It is important to reproduce the provisions of section 68(1)(g) of the 1999 Constitution (as amended) for the purpose of emphasis. Section 68(1) (g) provides thus:

> *68 (1) A member of the Senate or the House of Representatives shall vacate his seat in the House of which he is a member if-*
>
> *(g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected.*

Provided that this membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored.

The decision of the Court in *Abegunde's* case was merely an order that compelled the Appellant to comply with the provisions of section 68(1) (g) of the 1999 Constitution (as amended) as his case did not fall within the exception contemplated by the *proviso*. It will be important at this stage to point out that the Constitution does not spell out what amounts to division in the party.[18] Even though the Supreme Court in various cases have pronounced that division which entitles a legislative member to retain his seat in the face of defection must be such that affects

[18] The word 'division' could be subjected to different interpretations. It could mean division between the national Executives of the party or between the National and the state party executives, etc.

the national structure or leadership of the party, it still remains vague and as such requires explicit review by the lawmakers.[19]

Furthermore, when section 68(1) (g) is read together with subsection (2) of the same section, it becomes succinct that the president of the Senate or Speaker of the House of Representatives has to give effect to the provisions of sub-section (1) by presenting satisfactory evidence to the House that any of the provisions of that sub-section has become applicable to the legislative member concerned. What this means is that inaction on the part of the Senate President or Speaker of House becomes a loophole for the provisions of the section to be jettisoned. When this happens, it then becomes the duty of the Courts in exercise of their interpretative jurisdiction to give meaning and effect to this provision at the instance of an aggrieved party. This is because it is only a matter that is brought before the Court that can be adjudicated upon.

As part of the efforts to strengthen national unity and consolidate democratic governance in Nigeria, the 2014 National Conference (CONFAB) was inaugurated by the former President Goodluck Ebele Jonathan. The conference made far reaching recommendations, one of which was the need for defectors to automatically lose their seats regardless of the reasons.[20] It is however interesting to note that the decision of the Court in the above case does not render the automatic loss of seat recommended by the National Conference (CONFAB) in 2014 redundant. This is because CONFAB's recommendation is all encompassing as it cuts across both the Legislature and the Executive and also advocates that elected office holders who defect for whatever reasons should automatically vacate their seats save for merger of political

[19] See the cases of *FEDECO v. Goni* (supra) *AG Federation v. Abubakar* (supra) and *Abegunde v. Labour Party* (supra) on the court's interpretation of what amounts to 'division' in a party

[20] Some of the recommendations include restructuring, resource control, power sharing/rotation, creation of more states, etc. For further reading see, 'Key National Conference Recommendations You Need to Know' <https://www.premiumtimesng.com/national-conference/key-national-conference-recommendations-need-know/> accessed 14 November 2018

parties.[21] We have in recent times had several cases of defection by political office holders without punitive or stringent repercussions as envisaged under the Constitution.

5.2 Is there any Constitutional Provision covering members of the Executive that defect?

Political leaders are of the opinion that the continuous defection or cross-carpeting among either members of the Legislature or Executive in the country if not checked, could have destabilising effects on the country's nascent democracy.[22] It is quite saddening that in respect of members of the Executive at both Federal and State levels that is the President, Vice President, Governor and Deputy Governors, the Constitution is remarkably silent on the issue of defection. This in itself poses a big problem because it would appear that there is no sanction or restriction on members of the Executive. This means that members of the Executive can defect at will without obvious consequences which entail vacation of seat. It is as a result of this lacuna in the law that the Supreme Court in *AG Federation v. Abubakar*[23] on the legality of the defection of Alhaji Atiku Abubakar, the Vice President from People's Democratic Party (PDP) to Action Congress (AC) held *inter alia* that no similar provision i.e. section 68(1) (g) was made for the Vice President and the President. It was stated that if the legislators had intended the Vice President or even the President to suffer the same fate, they would have asserted that provision in clear terms. The absence of clear provisions also applies to the offices of Governor and Deputy Governor. The Court also held that it is the settled philosophy of the law that the duty of the court is *jus dicere* and not *jus dare* – "to declare the law and not make law." The Court further stated that "law making" in the strict sense of that term, is not the

[21] The reasoning behind this recommendation is so that there can be end to defections on flimsy reasons of division in the party whether at national, state, local government or ward level and also to stop the blatant abuse of the exception created under the Constitution. See volume 1, p. 302 of the National Conference Report, 2014
[22] Ndukwu, Ebere. 'Curtailing Cross-Carpeting by Elected Politicians' <http://nationalmirroronline.net/new/curtailing-cross-carpeting-by-elected-politicians/> accessed 11 May 2018
[23] (supra)

function of the Judiciary and as such there should be no incursion by one arm of the government into that of the other as that will be an invidious trespass.

What we can garner from the foregoing decision is that Law making is the exclusive preserve of the Legislature. It therefore becomes imperative for our lawmakers to address this lacuna by inserting punitive measures in the 1999 Constitution against members of the Executive that defect. Otherwise such acts even though they are spiteful and unacceptable will neither be declared illegal or unconstitutional by our Courts because they lack statutory impetus. The paper strongly suggests that the recommendation of the National Conference (CONFAB, 2014) on the amendment of section 68(1)(g) to effect automatic loss of seat for any elected official whether Executive or Legislative who defects to another political party be keyed into.

5.3 Why is there need for a conscious enforcement of Section 68?

The intention of the lawmakers in inserting the provision was to punish acts of defection to another political party by an elected legislative member before the expiration of the period for which he was elected.[24] What the drafters overlooked which somewhat defeats the aim was the need to insert the magic phrase, **'automatic loss of seat'** thus making it mandatory or sacrosanct for anyone who is in breach of section 68(1)(g) to vacate his seat without delay and prompting from either the Senate president or Speaker of the House of Representatives[25] or the Courts. This will make it have the force of law and the author also believes that outlawing defection by political office holders will put an end to political prostitution and strengthen our nascent democracy. Also the provision that requires the Senate President or Speaker of the House to give effect to the provisions of subsection (1) by presenting satisfactory evidence

[24] See *AG Federation v. Abubakar* (supra)
[25] See section 68(2) of the 1999 Constitution

should be expunged. This will go a long way in deterring such acts of defection by political office holders.

5.4 Effect of Recall on the Integrity of the House Leadership

In addressing this poser, it is imperative for us to avert our minds to subsection (2) of section 68 of the Constitution which empowers the House leadership (either the Senate President or Speaker of the House) to effect any of the provisions of subsection (1) by presenting satisfactory evidence that any of the provisions of that section has become applicable to the affected member. What this means *stricto sensu* is that until the House Leadership makes reference to such acts of defection, they are deemed as inconsequential. If Abegunde had not gone to Court and of course 'shot himself in the leg,' the matter would have likely gone unnoticed like most acts of defection in Nigeria or perhaps we would have had a rare case of recall pursuant to the provisions of section 69 of the 1999 Constitution (as amended) .[26] This ineptitude of the House Leadership i.e. the Senate President and the Speaker who coincidentally may also be guilty of this act has indeed led to rampant cases of defections with no obvious call to order. It therefore becomes a matter of urgency for the section on defection to be re-couched or reviewed by including the phrase **'automatic loss of seat'**.

5.5 Effect of Defection by members of the Executive

As stated earlier, there are no Constitutional provisions prohibiting Members of the Executive from defection and as such any attempt to declare the seat of either the Governor or Deputy Governor vacant on the grounds of defection will be declared illegal and history will indeed repeat itself as was the case in *AG Federation v. Abubakar*.[27] This is because under section

[26] Section 69 provides to the effect that a member of the Senate or House of Representatives may be recalled by means of a petition which is signed by 50% of registered voters of his constituency and presented to the INEC Chairman alleging their loss of confidence in that member. See section 110 for similar provisions for members of the State House of Assembly

[27] (supra)

188[28] of the 1999 Constitution (as amended), defection is clearly not one of the grounds for impeachment. Until it is given the force of law, it will indeed not lead to vacation of seat even though it is deemed to be an unconscionable act. It behoves on the lawmakers to act fast in addressing this lacuna by outlawing acts of defection by the Members of the Executive in order to restore integrity in politics and put an end to the upsurge in defections in Nigeria.

6. RECOMMENDATIONS/CONCLUSION

The issue of defection in Nigerian politics is one which needs to be timeously addressed and nipped in the bud before it further cripples our democracy. The paper is of the view that such cases of defection will continue which, if not properly challenged in Court, will be swept under the carpet until section 68 of the 1999 Constitution is amended to include **'automatic loss of seat'**. This will give life to the provision of section 68 and also deter our political office holders from toeing that path.

The paper therefore recommends that political office holders who defect for whatever reasons should automatically lose their seats and be given an opportunity to contest on the platform of their new political parties. This position should apply to the legislative and executive arm of Government because the mandate for any elective post is usually won on the platform of a political party.[29] Also sub-section (2) of section 68 which empowers the House Leadership to give effect to the provisions of the section should be expunged.

The effect of the decision of the Court is that the division that will entitle a political office holder to defect must be at the national level. *Abegunde's* case therefore becomes a *locus classicus* to be referred to in all cases of defection. This does not however take away the fact

[28] Under section 188, a Governor or his Deputy may be removed from office on allegation and investigation of gross misconduct in the performance of the functions of his office
[29] See Section 221 of the 1999 Constitution

that section 68 needs to be amended to include **‘automatic loss of seat’** for all political office holders.

JUDICIAL ATTITUDE TO LEGISLATIVE ACTIONS WHICH TEND TO RESTRICT ACCESS TO COURT THROUGH CONSTITUTIONAL AND STATUTORY PROVISIONS

By:

UWAKWE ABUGU,Ph.D*

AND

NDUKAUBA C. NWAGBO ESQ*

ABSTRACT

The right of access to court cannot be attenuated by a futuristic legislation as contemplated by either a statute, constitutional provision or even the National Assembly or any Legislature. The Courts guard right of access to court by the citizenry as they guard their own jurisdiction. The Courts are willing to apply the cannons of interpretation of constitutional and statutory provisions to favour the right of access to court with due deference to the derogations as contained in the substantive derogation provisions of the Constitution. This judicial prowess and sagacity have been aptly demonstrated by Valie Bairam Vahe FJ in S.A.L. FAJIMI -VS- WESTERN STATE HOUSE OF ASSEMBLY (2011) Vol.5 WRN 1 in general and in particular C.C. Nweze JSC in SKYE BANK PLC -VS- IWU (2017) 16 N.W.L.R. (Pt. 1590)24 in respect of the right of access to Court of Appeal by litigants to appeal against the decisions of the National Industrial Court in civil matters to the Court of Appeal with Leave of the Court of Appeal. It all means that the National Industrial Court is no longer the final court in respect of the decisions in the civil jurisdiction of the National Industrial Court. Again, it is incumbent on the Legislature, that is to say, the National Assembly and the State Houses of Assembly to avoid inserting clauses in the Constitution and Statutes that make right of access to court dependent on non-existent or futuristic legislations or insert the causes of action and the procedure in subsidiary Legislation at the same time and pass it. Subsidiary legislations have the force of law by the provisions of Section 18 of the Interpretation Act, LFN 2004. This is because the judicial attitude to such legislations are unfavorable to the Legislature as the courts will not lend credence to putting citizens right of access to court in abeyance when the substantive provisions of the Constitution have given them right of access to court.

PREFATORY

Oftentimes, a statutory or constitutional provision that passed through the crucible of legislative action will contain provisions that intentionally or unintentionally tend to restrict right of access to court by the citizenry. Noteworthy is the process of legislation or constitutional amendment that passes through the scrutiny of legal minds, legal draftsmen, legal officers in the National or State

* Director, Sullan Maccido Institute of Peace , Leadership and Development Studies, University of Abuja and Associate Professor, Department of Public and International Law, Faculty of Law, University of Abuja Nigeria.

* Lecturer Department of Public and International Law, Faculty of Law, University of Abuja, Nigeria

Assemblies, the executive, legislative aides and the offices of the Attorneys-General of the States or the Attorney-General of the Federation in the case of Nigeria. In any legislative drafting lecture or institution, the lecturer or the chief executive would insist on three things when reviewing a legislative bill or drafting one from the scratch to wit:

(a) Bring the Constitution of the country and place on your legal drafting table to ensure that the new piece of legislation or constitutional amendment is not unconstitutional or in breach of any provisions of the Constitution.

(b) Bring your Law Dictionary and English Dictionary to ensure that your words are understandable by both legal and non-legal minds.

(c) Bring similar legislations to ensure there is no double legislation on similar issues or an Act of the National Assembly has covered the field on the bill a State Assembly is working on.

In advanced democracies such as the United States of America, there must by involvement of the people who will be impacted by the legislation to get their in-puts. The legislature and their research consultants usually legal, economic, political or social and often technocrats and technical experts and non-governmental organisations in that particular area that piece of legislative covers must interface with the local communities.

A peer review of outcomes of meetings, interviews and views of the communities and inputs of the professionals, consultants and non-governmental organizations will have to be undertaken and agreements reached on key issues in the proposed legislation that is distilled from a commonality of consensus especially those to be impacted by the legislation. This is however, absent in the Nigerian legislative system where the public hearing is at Abuja and there are no community participations for fashioning out a legislation that will impact the communities and at State Capitals where the State Houses of Assembly are quartered. Legislation becomes more of a political instrument of vendetta that widens the rift between either the executive and the legislature or the government as a whole and the ordinary citizenry in their various communities trying to irk a livelihood. This is prevalent in oil and natural resources legislations in Nigeria and the impending legislations in grazing reserves. Involving the groups of experts above will remove politics from legislations and ensure that politics become part of the solution instead of exacerbating the crisis or mischief legislation is trying to solve.

The judicial attitude to legislations in statutes and constitutional amendments that curtail right of access to court are viewed strictly as those provisions that oust the jurisdiction of courts and the courts without fear or favour will act in defence or right of access to court but in deference

with overriding binding provisions of the Constitutions such as Section 1(1) and (3) of the Constitution[1].

1. PECENT HISTORICAL ANTECEDENTS OF JUDICIAL ATTITUDE IN NIGERIA ON CONSTITUTIONAL AND STATUTORY PROVISIONS THAT TEND TO RESTRICT RIGHT TO ACCESS TO COURT

The first and recent judicial attitude on this subject was discovered by some researchers, one of whom has contributed to this article when the Nigerian judiciary below the Supreme Court was thrown into a quagmire in respect of the interpretation of the provisions of Section 243(3) and its proviso of the Third Alteration of the Constitution[2]. It is pertinent to state the said provisions and proviso to Section 243(3) of the Constitution[3] verbatim thus:

> **An Appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly: Provided that where an Act or Law prescribes that an appeal shall lie from decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal**

2.1 THE ERSTWHILE POSITION OF THE COURT OF APPEAL ON THE INTERPRETATION OF SECTION 243 (2) AND (3) AND PROVISO TO SECTION 243 (3) OF THE CONSTITUTION AS ALTERED.

Before the decision of the Supreme Court in SKYE BANK PLC.v. IWU[4] the following were the dominant position of the Court of Appeal:

i) Any party who is aggrieved by the decision of the National Industrial Court can appeal against such decision to the Court of Appeal as of right, which means that he does not require leave of either the National Industrial Court or the Court of Appeal to do so, PROVIDED however, that the decision he seeks to appeal against must arise from questions on fundamental right as contained in chapter IV of the Constitution as altered in so far as it relates to a matter upon which the National Industrial has jurisdiction to entertain or any other jurisdiction as may be conferred upon the National Industrial Court by an Act of the National Assembly. In other words, the only decisions of the National Industrial Court from which a party can exercise a right of appeal without much ado is where it emanates from questions of fundamental rights but limited to those contained in Chapter

[1] The Constitution of the Federal Republic of Nigeria 1999 as altered
[2] ibid
[3] opcit
[4] (2017) 16 N.W.L.R. (Pt. 1590)24

IV of the Constitution as altered as contained in Section 243(2) of the Third alteration in the Constitution.

ii) The above restriction does not extend to the right of appeal against the decision of the National Industrial Court in Criminal matters pursuant to Section 254 (C) (5) and (6) which is also as of right.

iii) Any other appeal apart from (i) and (ii) above from the decision of the National Industrial Court and pertaining to any cause or matter in which jurisdiction is conferred on the National Industrial Court shall only be as prescribed by an Act of the National Assembly PROVIDED however that where such an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal on any other matter, such appeal shall be with the LEAVE of the Court of Appeal and not even first with the leave of the Lower Court (National Industrial Court). That is to say:

a) Any other subject matter shall be as prescribed by an Act of the National Assembly.

b) Such appeal shall only be with the leave of the Court of Appeal.

iv) As at then, no such Act of the National Assembly has been enacted prescribing what other causes and matters in which an appeal shall lie against the decision of the National Industrial Court and until such Law is made, the decision of National Industrial Court from which a party can appeal to the Court of Appeal remains circumscribed to only appeals in questions of fundamental rights and criminal matters within the Constitutional subject matter jurisdiction of the National Industrial Court and nothing more.

v) The Honourable President of the Court of Appeal constituted a full panel of five justices of the Court of Appeal to entertain an application for leave to appeal and to appeal against the decisions of the National Industrial Court not based on fundamental rights or criminal matters in the case of COCA-COLA (NIG) LTD & 2ORS v. AKINSANYA[5]. One of the issues for determination in this case was whether the absence of a specific Act of the National Assembly vesting appellate jurisdiction on the Court of Appeal, the appellate jurisdiction of the Court of Appeal from decisions of the National Industrial Court as provided for under the Constitution as altered is only limited to questions of fundamental rights and criminal causes or matters.

The full panel of the Court of Appeal sitting in Lagos Division held at pages 58 to 59 of the Law Report inter alia that:

> **It would therefore appear incontrovertible that given the provisions of Section 243 of the amended Constitution the only right of appeal to this Court (Court of Appeal) against the decision of the lower Court (National Industrial Court)**

[5] (2013)1 ACCELR 28

as presently donated by the Constitution is solely that of right on questions of fundamental right as contained in Chapter IV of the Constitution as it relates to matters upon which the lower court has jurisdiction[6]

The same Court of Appeal sitting in Lagos extended the above position to criminal matters arising out of matter for which jurisdiction is conferred on the National Industrial Court as it is covered by Section 254 (C) (5) and (6) of the Constitution as altered in the case of LAGOS SHERATON HOTELS & TOWERS v. HOTEL & PERSONAL SERVICES SENIOR STAFF ASSOCIATION[7] where it held at P.363 thus:

As presently constituted therefore, the law is that a litigant who is not satisfied with the decision of the National Industrial Court can only appeal as of right where such decision relates to questions of fundamental rights as contained in chapter IV of the Constitution of the Federal Republic of Nigeria 1999 as amended, or in criminal cases as they relate to matters upon which the National Industrial Court has jurisdiction as to other causes or matters not so specified, appeal shall only lie from decisions of the National Industrial Court to this Court as may be prescribed by an Act of the National Assembly and such appeal shall be with leave of this court only.

There is presently no such Act of the National Assembly and until there is an enactment to that effect or subsequent amendment of sections 243 of the Constitution, the National Industrial Court remains the final and ultimate court in all causes or matters upon which it has jurisdiction except in decisions relating to questions of fundamental rights connected with Chapter IV of the Constitution or in criminal cases[8].

The Court of Appeal did not stop there. It envisaged a situation where parties will weave the issue of fair hearing into just any subject matter in order to bring the subject matter of their appeal from final decisions of the National Industrial Court within the ambit of Section 243(2) of the Constitution even where issue of fundamental right is not there. It proceeded in this Lagos Sheraton's case to admonish litigants who make such attempt per Oseji JCA in the following words:

I will add here that litigants who seek to circumvent or evade the provisions of Section 243(2) and (3) of the Constitution by seemingly waving the magic wand of fair hearing or breach of fundamental right with the main motive of having access to appeal against a decision of the National Industrial Court on matters falling outside the allowed scope should be advised not to underestimate the sharp sense of perception and wisdom of the appellate courts to sift the wheat from the chaff. Undoubtedly in discerning cases, the Court will not relent in

[6] Cited with approval at page 362 of Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association
[7] (2015) ALL FWLR (Part 765)340
[8] Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association (2015) ALL FWLR (pt. 765)340 at 363

defending the course of justice given its status as the dynamic agency for the protection of the rule of law[9].

The Court of Appeal adopted the literal rule of interpretation of Section 243(3) of the Constitution as altered. It held that the wordings of Section 243(2) and (3) of the Constitution as altered are quite clear and unambiguous and gave them their ordinary plain meaning in order and with a view to avoid reading into the provisions, meaning not intended by the lawmakers (in this case framer of the Third Alteration to the Constitution). It relied on a number of Supreme Court decisions including AMAECHI v. INEC (2008) ALL FWLR (Pt. 407) 1. Where it held that the fundamental duty of the judge is to expound the law and not to expand it. He must decide what the law is not what the law might be.

2.2 THE NEED FOR A BETTER INTERPRETATION OF SECTION 243(3) OF THE CONSTITUTION AS ALTERED (SECTION 5(3) OF THE THIRD ALTERACT ACT)[10].

It is submitted that the constitution as altered is made by the people of Nigeria for themselves. The preamble to the Constitution states partly thus:

WE THE PEOPLE of the Federal Republic of Nigeria: HAVING firmly and solemnly resolved:

DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following Constitution:

It is submitted that as a people, Nigerians could not by any stretch of imagination have expected that the access to the Court of Appeal by aggrieved litigants they gave to themselves by Sections 1(1), 6(5), 6(b), 243 (1) (3), 254C(5) and (6) of the Constitution as altered would be whittled down, obliterated or removed entirely by the fact that the National Assembly has not enacted any law prescribing which other causes or matters in which an appeal shall lie against the decision of the National Industrial Court other than in questions of fundamental rights and criminal matter upon which appeals lie as of right from the decisions of the National Industrial Court to the Court of Appeal.

Even the Court of Appeal was people minded enough to opine and identify the apparent lacuna in Cola-Cola's case[11] per Ikyegh JCA where he stated inter alia thus:

As the position stands now, there is no enactment of the National Assembly conferring a right of Appeal from any decision of the National Industrial

[9] Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association (2015) ALL FWLR (pt. 765)340 at 364

[10] 2010

[11] op cit

> **Court outside the fundamental rights relating to matters within its civil jurisdiction to the Court of Appeal while the lacuna may help to reduce the work load of the Court of Appeal, it is doubtful whether leaving the National Industrial Court as the final or Supreme Court in such civil matter of mega jurisdiction would augur well for aggrieved litigants especially as anything to do with employment affects the livelihood of members of the work force; and invariably, their dependents**[12]

Hon. Justice Ikyegh JCA is right on point with the conscience and mind of Nigerians who gave themselves the Constitution. They are not content to contend with not being able to appeal to the Supreme Court from decisions of the Court of Appeal by virtue of the provisions of Section 243(4) of the Constitution as altered which states thus:

> **Without prejudice to the 254 (C) (5) of the Act, the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final.**

The foisting upon Nigerians a *fait accompli* by their own framers of their own Constitution as altered and the judicial interpretation of Section 243(3) and its proviso require a second and deeper search for Supreme Court decisions to release the access to Court of Appeal. This has become necessary in view of the importance of employment to livelihoods of Nigerians. There is a popular saying by fundamental rights lawyers that right to life is meaningless without means of livelihood to sustain it. Ikyegh JCA alluded to this above when he referred to the decision of the National Industrial Court as being final by Section 243 (4) and National Industrial Court being the Supreme Court of matters that are not on questions of fundamental right or criminal matters.

The National Assembly was then not even aware or conscious of the decisions of the Court of Appeal Lagos in Cola-Cola and Lagos Sheraton cases otherwise they would have taken a proactive step as they did when the Supreme Court rendered its decision in N.U.E.E. v. B.P.E[13] declaring the National Industrial Court Act, 2006 by implication null and void because the National Assembly had no Constitutional vires to create a court with the jurisdiction of a superior court of record. The National Assembly rallied round the National Industrial Court and altered the Constitution as in the third alteration making the National Industrial Court a creation of the Constitution albeit with the controversy surrounding Section 243(3) and its proviso.

2.3 THE NEED FOR SENSIBILITY AND REASONABILITY IN THE CONSTRUCTION OF CONSTITUTIONAL PROVISIONS

[12] Cited with approval at page 362 of Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association

[13] (Jan – March 2010) 41 NSCQR 811

It is submitted that the Constitution is made for the people of Nigeria not that the people of Nigeria are made for the Constitution in accord with the popular aphorism that the law is made for man not that man is made for the law.

Sometimes, in the interpretation of the Constitution, the literal rule may work hardship and the word "shall" used ought to be interpreted as directory not mandatory to discern the intention of the legislature.

The Supreme Court interpreted the third use of the word "shall" in Section 11(2) of the NNPC Act[14] as being directory and permissive not mandatory. We submit that this could be applied by the Courts in interpreting the "shall" in Section 243(3) to make it permissive and directory that whether or not the National Assembly has enacted a law or not prescribing what other causes and matters in which appeals shall lie against the decisions of the National Industrial Court, litigants do not have to wait for National Assembly to enact any law before exercising their constitutional right of appeal or right of access to Court of Appeal when they are aggrieved by decisions of the National Industrial Court not based on questions of fundamental right and criminal matters.

The Court of Appeal in Lagos Sheraton's case alluded to the sensibility and reasonability factors in the construction of constitutional provisions by quoting in *extenso* the decision of the Supreme Court per Chukwuma Eneh JSC as he then was in MARWA v. NYAKO[15]

> **It is crucial to adopt a more sensible and reasonable construction so that where there are two possible constructions of a provision or enactment as in this matter, the more reasonable and sensible construction of it should prevail as preferred and avoid incongruous results and absurd situations. See Central London Rly Co v. Inland Revenue Commissioners (1937) AC 77. To achieve that purpose the Court has further to adopt the basic approach of liberal interpretation as enunciated in such cases as Rabiu v. The State (1980) 8 - 11 SC 130 by giving the words used in the Constitution their simple literal and natural meaning. In other words, as an aid to achieving a broad or liberal construction against the narrow interpretation and where the context dictates as used in their popular senses and so get to the true meaning of the words intended by framers of the Constitution in this way get to the true intendment of the constitution which is the most primary goal of constitutional interpretation[16].**

It is submitted that the more reasonable and sensible construction of Section 243(3) and its proviso of the Constitution as altered is to interpret the "shall" used therein as directory not mandatory.

[14] Captain C.C. Amadi –vs- N.N.P.C. (2000)6 SCNJ 1
[15] (2012) 6 NWLR (Pt. 1296) 299 AT 306
[16] Cited with approval at page 361

2.4 THE SUPREME COURT'S DECISION ON 30TH DAY OF MARCH, 1962 IN SALAWU LASUPO ADEDAYO FAJIMI v. THE SPEAKER OF WESTERN STATE HOUSE OF ASSEMBLY[17]

It is apposite to state here that this case was in the law reports while the Court of Appeal was of the opinion that since there was then no Act of the National Assembly prescribing what other causes or matters in which an appeal shall lie against decisions of National Industrial Court and until such law is made, the decision of the National Industrial Court from which a party could appeal remain circumscribed to only appeals in questions of fundamental rights and criminal matters which are within the constitutional subject matter jurisdiction of the National Industrial Court and nothing more. This excluded right of access to appeal to the Court of Appeal from decisions of the National Industrial Court in civil matters. It meant as was held by the Court of Appeal that the National Industrial Court was the final court in civil matters[18].

2.5 THE FACTS AND HISTORY OF FAJIMI'S CASE[19]

The facts and history of this case are that the Plaintiff/Appellant S.L.A. Fajinmi sued the Speaker, House of Assembly, Western Region, Federation of Nigeria for a declaration that he is entitled to take his seat as a validly elected member in the House of Assembly of the legislature of the Western Region of the Federation of Nigeria and in the alternative a declaration that his seat therein is not vacant and an injunction restraining the Defendant/Respondent from preventing him from taking his seat as a validly elected member in the said House of Assembly. Pleadings were ordered, filed and exchanged in which the Plaintiff/Appellant stated how he had been elected to the House of Assembly as a member for a particular constituency on 8th of August, 1960 and sworn in.

The Defendant/Respondent contended that the Plaintiff/Respondent was not entitled to the reliefs sought in his Writ of Summons and statement of claim and that the suit be dismissed as:

(1) Being not properly before the Court

(2) Frivolous and vexatious

The Learned trial judge heard argument on the preliminary points of law set down for hearing before the trial and delivered judgment on the 13th July, 1961 stating towards the end of the judgment that ***"the matter in issue is, whether the seat is vacant or not"*** pointing out that the parliamentary Electoral Regulations of 1960 dated 15th July, 1960 (to be found at page B317 of

[17] (2011)Vol.5WRN1

[18] Lagos Sheraton Hotel & Towers v. Hotel & Personnel Service Senior Staff Association (2015) ALL FWLR (Pt.765)340

[19] ibid

the 1960 volume of Legislation of Western Region) contain no provisions on the said matter and goes on to pose this question:

> **Is there any provision in existence which the court can follow to enable it to exercise the jurisdiction conferred upon it by Section 16(1)?**

The trial judge cited two English Court decisions which the Supreme Court held not to be applicable to facts of the case and proceeded to dismiss Plaintiff's/Appellant's action in limine by holding thus at page 9 lines 28 – 44 of the Law Report:

> **In my judgment, the jurisdiction conferred upon the High Court by Section 16(1) of the Constitution of Western Nigeria to determine the question whether the seat of a member of the Western House of Assembly has become vacant is a special jurisdiction governed not by the ordinary rules of the court but to be exercised according to such provisions as the legislature itself may lay down in accordance with section 16(2) of the Constitution of the Region as was done by the Governor by the provision of Regulation 117 of the 1955 Constitution. For this reason, I rule that this action is not properly, before the court and dismiss it.**
>
> **Dissatisfied with the judgment of the High Court, the Plaintiff/Respondent appealed to the Supreme Court. The issue determined by the Supreme Court was: "whether the High Court of the Western Region has jurisdiction to hear and determine whether a seat in the Legislative House of the Region is vacant or not[20].**

The Supreme Court unanimously allowed the appeal and remitted the matter back to the High Court of the Western Region for trial. VAHE BAIRAMIAN FJ (delivered the leading judgment) held partly thus among others at pages 8 – 13 of the law report;

> **The present appeal is from the decision which Morgan J then Acting C.J. gave on the 13th of July, 1961 dismissing the Plaintiff's action on the ground that it was not properly before the court[21].**

The question in this appeal turns on Section 16 of the Constitution of Western Nigeria in the 8th Schedule to the Nigeria (Constitution) Order-in-Council, 1960. That Section provides as follows:

16 (1) the High Court of the Region shall have original jurisdiction to hear and determine any question whether:

- **a) Any person has been validly selected or elected as a member of a Legislative House of the Region; or**
- **b) The Seat in a Legislative House of any member of that house has become vacant**

(2) the Legislature of the Region may make provision with respect to:

- **a) The persons who may apply to the High Court of the Region for the determination of any question under this section;**

[20] Fajimi v. the Speaker of Western State House of Assembly (2011)Vol.5WRN1 Page 9

[21] Fajimi v. the Speaker of Western State House of Assembly (2011)Vol.5WRN1 Pages 8 - 13

b) The circumstances and manner in which, and the conditions upon which any such application may be made; and

c) The powers, practice and procedure of the High Court in relation to any such application.

Vahe Bairannia FJ at page 9 of the Law report continued thus:

> **The effect of that view (the view of Morgan J) is that the Constitution of the Region confers by subsection (1) of Section 16 a jurisdiction on the High Court to hear and determine any question whether:**
>
> ***(a)*** **A person has been validly elected or**
>
> ***(b)*** **A seat has become vacant and by sub-section (2) empowers the Legislature of the Region to DISABLE THE COURT from exercising that jurisdiction by omitting to make provision under subsection (2): in other words, subsection (1) can be made a DEAD LETTER by the Legislature which with respect CANNOT BE RIGHT.**
>
> **On that view presumably if the Legislature made no provision in regard to the hearing of a question whether a person had been validly elected, the High Court would not be able to entertain an election petition either. The REASONABLE course is for the legislature to make provision under subsection (2) for the matters in both (a) and (b) of subsection (1); and if it so happens that the legislature THROUGH INADVENTENCE has not made any provision on the question in (b) a member who asks the High Court to determine such a question, as it is within the court's jurisdiction OUGHT NOT TO BE DRIVEN FROM THE JUDGMENT SEAT BUT SHOULD BE HEARD**
>
> **Those 1960 Regulations provide in Regulation 70 to 127 for election petitions; they do not provide for the hearing and determination of a question whether the seat of an elected members has become vacant and the lacuna should be drawn to the notice of the Attorney General of the Region.**
>
> **IN THE MEANTIME, THE HIGH COURT HAS A DUTY TO HEAR AND DETERMINE THE CASE IN HAND AND RESOLVE THE QUESTION RAISED. THE PLAINTIFF HAS, IN THE ABSENCE OF OTHER PROVISIONS, BROUGHT HIS CASE IN THE FORM OF AN ACTION, WHICH IS THE ORDINARY WAY OF APPROACHING THE COURT FOR MAKING A REQUEST TO HAVE A MATTER IN DIFFERENCE DECIDED AND RELIEF GRANTED AND THE ACTION SHOULD NOW PROCEED. I would ALLOW THE APPEAL AND SET ASIDE THE DECISION DISMISSING THE ACTION[22].** Lionel Brett FJ and Adetokumbo Ademola CJF concurred (*underlining and capitalisation for emphasis*).

The location of this decision of the Supreme Court of Nigeria delivered on the 30th of March, 1962 restores the hope for the Litigant employees and employers to ventilate their grievances up to at least the Court of Appeal whether the decision of NICN appealed against is based on question of fundamental right, criminal matter or not.

The constitutional provisions in Section 243(3) and its proviso are not meant to grant a constitutional right of appeal and make the application of the Third Alteration which had commenced being in operation to depend on the whims, caprices, disposition or inadvertence of

[22] Fajimi v. the Speaker of Western State House of Assembly (2011)Vol.5WRN1 Page 9

the Legislature for its enforcement. That is to say, the Legislature can by omission or commission prevent access to court to ventilate or enforce a constitutionally granted right. The Supreme Court does not agree that the Right of Appeal constitutionally granted litigants should be made a DEAD LETTER because the National Assembly (Legislature) has not enacted a law pursuant to Section 243(3) of the Constitution as altered.

2.6 APPLICATION OF THE SUPREME COUTR'S DECISION IN FAJINMI'S CASE TO SECTION 243(3) AND ITS PROVISO AND THE CURRENT POSITION OF THE COURT OF APPEAL.

Section 243(3) of the Constitution as altered bears repetition here with its proviso and it states thus:

> **An appeal shall ONLY lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly: PROVIDED that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with leave of the Court of Appeal**.

It is submitted that the Proviso to Section 243(3) is not a problem to both Court of Appeal and the litigants or intending appellants. The Court of Appeal ought to feel able to exercise its constitutional jurisdiction to entertain applications for leave to appeal against the decisions of the National Industrial Court not based on fundamental right or crucial matters. The Court of Appeal surprisingly feels hamstrung by the main provision of Section 243(3) of the Constitution as altered. From the decisions in Coca-Cola's and Lagos Sheraton Hotels cases, the Court of Appeal has treated the main provision of the said Section 243(3) as an albatross to exercising its jurisdiction to entertain such applications for leave to appeal against the decisions of the National Industrial Court not based on fundamental right or criminal matters. In other words, it feels that a condition precedent to the exercise of its jurisdiction to entertain applications for leave to appeal and appeal against the decisions of the National Industrial Court which is the enactment of a law by the National Assembly, prescribing those causes or matters as are within the exclusive jurisdiction or special jurisdiction of the National Industrial Court as contained in Sections 254(C) and D of the Constitution as altered is absent since the National Assembly has not enacted such law.

It is therefore submitted with utmost respect and due deference to the Court of Appeal that these decisions which it has rendered in two judgments in Coca-Cola's case and Lagos Sheraton's case are not, cannot, and no longer be good law. What these decisions portend is that the inadvertence, failure or even refusal of the National Assembly to perform its Constitutional function of making laws for the Federation of Nigeria is capable of extinguishing or denying litigant appellants access

to Court of Appeal to exercise their Constitutional Right of Appeal even though it is with leave of the Court of Appeal. The decisions of the Court of Appeal in those two cases by implication say that as long as the litigant is not appealing against the decision of the National Industrial Court as of right as in fundamental right or criminal matters, he does not have a Constitutional right to apply for leave to Court of Appeal to appeal against the decision of the National Industrial Court on causes or matters within the exclusive and special jurisdiction of the National Industrial Court even though the Constitution so provides in Section 243(3) and its proviso.

Incidentally, as a result of dearth of research, none of the Counsel representing the Applicants in those two cases at the Court of Appeal, Lagos Division adverted themselves to the 1961 decision of the Supreme Court in FAJINMI'S case, if they did, it is submitted that perhaps, the Court of Appeal, Lagos Division and indeed, all the divisions would have to come to a different opinion on the interpretation of Section 243(3) of the Constitution as altered and its proviso in the following terms to wit:

i) That the Court of Appeal has unfettered constitutional jurisdiction to entertain applications for leave to appeal and grant same or refuse same to litigants who apply to it to appeal against decisions of the National Industrial Court not based on questions of fundamental right or criminal matters provided the subject matter of the appeal is within the exclusive constitutional jurisdiction or special jurisdiction conferred upon the National Industrial Court by an Act of the National Assembly pursuant to Sections 254(C) and 254(1) of the Constitution as altered.
ii) That the jurisdiction of the Court of Appeal to hear such applications and Appeals cannot be fettered by the inability or inadvertence of the National Assembly to enact a law prescribing the causes or matters in which an appeal shall lie against the decision of the National Industrial Court with leave of the Court of Appeal.
iii) That access to Court of Appeal and the exercise of the constitutional right of appeal donated by Section 243(3) and its proviso cannot be denied litigants on the ground that the National Assembly has not enacted a law to prescribe those causes or matters in which an appeal shall lie against the decision of the National Industrial Court with leave of the Court of Appeal.
iv) There is nothing in the Constitution as amended that empowers the Legislature (National Assembly) to disable the Court of Appeal from exercising jurisdiction to entertain applications for leave to appeal and appeal against the decision of the National Industrial Court not based on questions of fundamental right or criminal matters as long as the subject matter of the appeal is within the exclusive and special jurisdiction of the National Industrial Court as provided by Section s 254(C) and 254(D) of the Constitution as altered.

v) That in the absence of such enactment, the litigants are not to be driven from the judgment seat.

vi) That it cannot be right in law for the Legislature to make Section 243(3) and its proviso a dead letter by omitting to enact a law prescribing those causes or matters in which appeals shall lie against the decisions of the National Industrial Court which are not questions of fundamental right or based on criminal matters with leave of the Court of Appeal.

vii) It is submitted that in in the meantime, before the National Assembly enacts such law prescribing the causes or matters in which Appeals shall lie against decisions of the National Industrial Court to the Court of Appeal, the Court of Appeal has a constitutional duty to hear and determine applications for leave to appeal and appeals against such causes, or matters not based on questions of fundamental rights or criminal matters brought before the Court of Appeal in the ordinary way of approaching the Court of Appeal for leave to Appeal and to appeal against the decisions of the National Industrial Court or High Court or Federal High Court to have a matter in difference decided and relief granted.

This is the application of the Supreme Court's decision in FAJINMI'S case which interpreted analogous words and provisions in Section 16 of the Constitution of Western Nigeria in the 4th Schedule to the Nigeria (Constitution) Order-in-Council 1960 quoted above to Section 243(3) and its proviso to the Constitution of the Federal Republic of Nigeria 1999 as altered (Third Alteration).

With the discovery of FAJINMI'S case, it is submitted that the decisions of the Court of Appeal in Coca-Cola's and Lagos Sheraton's cases are no longer good law or the law in respect of the Interpretation of Section 243(3) of the Constitution and its proviso. It is taken that these decisions had been rendered in ignorance of a binding decision of the Supreme Court which interpreted a similar provision in Fajinmi's case. The law is that any judgment of the Court of Appeal which ignores the binding decision of the Supreme Court is given per *incuriam*, that is to say, in error. See the decision of the Supreme Court in ALL PROGRESSIVE GRAND ALLIANCE (A.P.G.A.) v. ALMAKURA[23] per Nweze JSC where he stated thus:

> **Suffice it to say this is a sacrilegious affront to the doctrine of stare decisis … In effect any decision of that Court (Court of Appeal) that ignores the binding decisions of this Court (Supreme Court) is given per incuriam, that is given in error[24].**

[23] (2016)5 N.W.L.R. (Pt. 1505) 316,346 (paras E – G)
[24] Ibid page 346 (paras E – G)

2. THE SUPREME COURT OF NIGERIA AGAIN PUTS PAID TO RIGHT OF ACCESS TO COURT OF APPEAL FROM DECISIONS OF THE NATIONAL INDUSTRIAL COURT IN CIVIL MATTERS IN SKYE BANK PLC v. VICTOR ANAEMEM IWU[25]

In a lead judgment delivered by the eminent distinguished jurist and a Professor of Law Chima Centus Nweze JSC on the 30th of June, 2017 in the case of SKYE BANK PLC v. VICTOR ANAEMEM IWU[26] his Lordship applied the LIVING TREE canon of interpretation of Constitutional and Statutory instruments to hold that the Court of Appeal has the jurisdiction to entertain appeals in all civil causes emanating from the National Industrial Court. The implication of this judgment is that the decisions of the Court of Appeal in Coca-Cola Nigeria Ltd[27] and Lagos Sheraton Hotel & Towers v. HSPSS supra inter alia that the Court of Appeal has no jurisdiction to entertain appeals against decisions of the National Industrial Court in all civil matters or causes and other causes not based on questions of fundamental right or criminal matters are no longer good law including the holding that the decisions of the National Industrial Court is final in all civil matters.

By the same decision, the long availed bill at the National Assembly which has passed second reading to prescribe those causes or matters for which appeals could lie with leave of the Court of Appeal from National Industrial Court to the Court of Appeal may be necessary but its absence can no longer prevent the litigants from having right of access to the Court of Appeal by way of appealing decisions of the National Industrial Court to the Court of Appeal with leave of the Court of Appeal in matters within the subject matter jurisdiction of the National Industrial Court in civil matters.

Furthermore, the rest of similar cases before the Supreme Court on the same issues stand resolved in favour of litigants' right of appeal and access to Court of Appeal when aggrieved by the decisions of the National Industrial Court in all civil matters that it has the constitutional and statutory jurisdiction to entertain.

3.1 THE TRAJECTORY OF SKYE BANK PLC v. IWU

In the beginning, the Third Alteration to the Constitution of the Federal Republic of Nigeria 1999 as altered[28] by Section 5 states that:

[25] (2017) NWLR (Pt. 1590)24 Note: This discourse is taken from the raw and certified true copy of the judgment to avoid the opinions of Law Report editors
[26] ibid
[27] op cit
[28] Third Alteration Act No. 3, 2010

1) "Section 243 of the Principal Act is altered by
   (a) Inserting immediately after the words "Federal High Court" in the marginal rate, the words "National Industrial Court", and
   (b) Inserting immediately after the existing Section 243, new subsection "(2) – (4)"
2) An appeal shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of this Constitution as it relates to the matters upon which the National Industrial Court has jurisdiction;
3) An appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may by prescribed by an Act of the National Assembly; (*underlining for emphasis).*

Provided that where an Act or law prescribed that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.

The underlined portion of Section 5 of the Third Alteration Act is what threw up conflicting decisions of the Court of Appeal, Ekiti Division on the one hand and the Court of Appeal Lagos Division.

The Court of Appeal, Ekiti Division had held in four cases that litigants have a right to appeal to the Court of Appeal in all civil matters whether the National Assembly had by a legislation (Act) prescribed such causes or not as there is no provision in the Constitution preventing such exercise of vested right of appeal with leave of the Court of Appeal by the proviso to Section 243(3) of the Constitution as altered in the Third Alteration on the one hand. The Ekiti Local Government cases" as termed by His Lordship C. C. Nweze JSC are as follows:

i) LOCAL GOVERNMENT SERVICE COMMISSION EKITI STATE & ANOR v. JEGEDE[29]
ii) LOCAL GOVERNMENT SERVICE COMMISSION EKITI STATE & ANOR v. BRAMISAYE[30]
iii) LOCAL GOVERNMENT SERVICE COMMISSION; EKITI STATE & ANOR v. OLAMIJU[31]
iv) LOCAL GOVERNMENT SERVICE COMMISSION & EKITI STATE & ANOR v. ASUBIOJO[32]

[29] (2013) LPELR – 12231(CA)
[30] (2013) LPELR – 20407(CA)
[31] (2013) LPELR – 20409(CA)
[32] (2013) LPELR – 20403(CA)

The Court of Appeal Lagos Division in more recent decision held that the National Industrial Court's decisions in all civil matters other than decisions based on questions of fundamental rights and criminal matters are final since the National Assembly has not prescribed by an Act that such civil appeals shall lie from the decisions of the National Industrial Court to the Court of Appeal by way of Constitutional interpretation of Section 243(3) of the Constitution as altered on the other hand.

The Court of Appeal, Lagos cases are:

i) Coca-cola Nig. Ltd v. Akinsanya[33]

ii) Lagos Sheraton Hotels & Towers v. Hotel Personnel Senior Staff Association (HPSSA)[34].

The onus fell on the Apex Court to resolve the above divergent constitutional interpretations of two divisions of the same Court of Appeal. Section 237(1) of the Constitution as altered provides that there shall be a Court of Appeal. It is trite that there is only one Court of Appeal and its decisions on the same subject matter shall by the same and not divergent. The Apex Court was already saddled with over five appeals relating to the divergent views of the Court of Appeal and braced and live up to its constitutional responsibility of ensuring certainty in the law in a judgment in a case stated to it by the Court of Appeal, Abuja in SKYE BANK PLC v. VICTOR ANAEMEM IWU[35] per C.C. Nweze JSC who delivered the lead judgment.

Since the issue in contention was on a constitutional matter by way of interpretation, a full panel of seven Justices of the Supreme Court was empanelled namely:

Honourable Justices Mary Ukaego Peter-Odili JSC, Musa Dattijo Muhammad JSC, Clara Bata Ogunbiyi JSC, Kumai M.O. Kekere-Ekun JSC, China Centus Nweze JSC and Ejembi Eko JSC.

The reasoning of the Court of Appeal, Lagos Division, it is submitted, is the main plank upon which the Counsel to the Appellant in SKYE BANK PLC v. VICTOR ANAEMEM IWU[36] applied for a case to be stated by the Court of Appeal, Abuja Division to the Supreme Court which application was granted on November 11, 2014.

His Lordship C.C. Nweze, in the lead judgment summed up the three issues formulated by the Court of Appeal, Abuja Division for the determination of the Supreme Court thus:

> **Whether the Court of Appeal as an appellate court, created by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has the jurisdiction to the exclusion of any other court of law in Nigeria to hear and**

[33] (2013) 18NWLR (Pt. 1386)225
[34] (2014) 14 NWLR (Pt. 1426)45
[35] SC. 885/2014 unreported, delivered on the 30th of June 2017 now reported in (2017) 16 N.W.L.R. (Pt. 1590)24
[36] ibid

determine all appeals arising from the decisions of the National Industrial Court of Nigeria[37].

This singular issue was disaggregated by his Lordship beginning with the treatment and elucidation of the established principles for interpretation of constitutional provisions applicable to the corpus juris of Nigeria and elsewhere which the same approaches to constitutional interpretation have been espoused with titles of the cannons submitted and supplied for dearth of nomenclature to wit:

a) BROADER CANNON - There is the very fundamental prescription that in interpreting the Constitution which is the supreme law of the land, mere technical rules of interpretation of statutes are to some extent, inadmissible in a way so as to defeat the principles of government enshrined therein, NAFIU RABIU v. STATE (1980)[38]. Therefore, where the question is whether the Constitution "has used an expression in the wider or in the narrower sense…… this court (Supreme Court) should whenever possible and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carryout the objects and purpose of the Constitution.
b) AGGREGATION CANNON – All Sections of the Constitution are to be construed together and hence, it is impermissible to construe sections in isolation, see A-G, FEDERAION v. ABUBAKAR[39] and ELELU-HABEEB –VS - AG, FEDERATION (2012) LPELR (SC) 281/210.
c) THE LITERAL CANNON – Where the words of the Constitution are clear and unambiguous, a literal interpretation will be applied, that is, they will be accorded their plain ordinary grammatical meaning. See A – G. FEDERATION v. A-G. LAGOS STATE[40].
d) RULE AGAINST AMBIGUITY CANNON – However, where there is inherent ambiguity in any section of the Constitution, a holistic interpretation would be resorted to in order to arrive at the intention of its framers, see INEC v. MUSA[41].
e) RULE AGAINST REDUNDANCY CANNON – Since the draftsperson of the Constitution is not known to extravagate words or provisions, it is anathematic to construe a section in such a manner as to render other sections redundant or superfluous, N.U.R.T. v. R.T.E.A.N[42].
f) MISCHIEF RULE CANNON - The rule against ambiguity states that if the words of the Constitution or a statute are ambiguous, then the lawmaker's intention must be sought, first in

[37] Skye Bank Plc v. Iwu (2017)16 NWLR (Pt. 1590)24 at 74
[38] N.S.CC. 292,300
[39] 2007 ALL FWLR (Pt. 389) 1264, 1289 - 1291
[40] (2013) 16NWLR (Pt. 1380) 249302
[41] (20003) 3 NWLR (pt. 806) 72, 102
[42] (2012) 10 NWLR (Pt. 1307)170

the Constitution or Statute itself, then in other legislations and contemporary circumstances by resort to the mischief rule; see the A-G of EKITI STATE & ORS v. ADEWUNMI[43].

g) LIBERAL CANNON – The liberal cannon of interpretation of the Constitution "should be … one of liberalism, in other words, that it would be improper to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another Constitution, equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends" see NAFIU RABIU v. STATE[44].

h) PURPOSE CANNON – His Lordship C.C. Nweze JSC held that the Supreme Court recently summed up the foregoing seven prescriptions on constitutional interpretation in SARAKI v. FRN[45] quoting himself (per C.C. Nweze JSC) thus:

> **One of the guiding posts in the interpretation of the provisions of the Nigerian Constitution is that the principles upon which its (the Constitution) was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions, Global Excellence Communications Ltd. v. Duke (2007)16 NWLR (Pt. 1059) 22[46].**

i) REGULATION CANNON C.C. Nweze JSC further stated that the rationale of all binding authorities is that a narrow interpretation that would do violence to the provisions of the constitution must be avoided. In other words, where alternative constructions are equally open, the construction that is consistent with the smooth working of the system which the Constitution read as a whole has set out to regulate is to be preferred see DIAPIONG v. DARIYE[47].

j) EFFECTIVE RESULT CANNON – He further stated that the principle that underlies this construction technique is that the legislature should legislate only for the purpose of bringing about an effective result, see IMB v. TINUBU[48].

k) LIVING TREE CANNON – He held further that the liberal cannon of interpretation of the Constitution is consistent with the LIVING TREE doctrine of constitutional interpretation enunciated in EDWARD v. CANADA[49] which postulates that "the Constitution must be capable of growth to meet the future".

l) HOLISTIC CANNON – His Lordship endorsed that position that the construction of any document and this includes the construction of the precious and organic document known as

[43] (2002) 1 SC 45, 51 see also UGWU v. ARARUME (2007) 12 NWLR (Pt. 1048) 365
[44] ibid
[45] (2016) 3NWLR (Pt. 1500 531, 631 - 632
[46] Skye Bank Plc v. Iwu (2017)16 NWLR (Pt. 1590) 24 at 88
[47] (2007) 8 NWLR (Pt. 1036)
[48] (2000) 16 NWLR 9Pt. 740690) see also NAFIU RABIU v. STATE (1980) 8 – 9 SC 130
[49] 1932 AC 124

the 1999 Constitution is a holistic endeavor see ABEGUNDE v. THE ONDO STATE HOUSE OF ASSEMBLY[50]

3.2 KEY DECISIONS IN THE RESOLUTION OF THE DIVERGENT VIEWS OF THE COURT OF APPEAL BY HON. C.C. NWEZE JSC.

After a review of the cannons of interpretation of the Constitution,

i) His Lordship found and held that on a harmonious construction of Sections 240, 242(1), 243(1)(a) and 243(4) of the 1999 Constitution as altered, a litigant who is aggrieved by a decision of the trial court in other civil matters can exercise a right of appeal with the leave of the lower court. the only snag in this regard is that it makes the Court of Appeal the final court with respect to all civil appeals arising from the National Industrial Court of Nigeria to the Court of Appeal[51] His Lordship called in aid the meaning of "any" used in Section 243(4) of the Constitution as altered which states thus:

> **Without prejudice to the provisions of Section 254C(5) of this Act the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final to hold that "any" in Section 243(4) meaning any appeal in respect of the exercise of the civil jurisdiction of the National Industrial Court. Hence, a litigant who is aggrieved by a decision of the National Industrial Court in other civil matters can exercise a right of appeal with the leave of the Court of Appeal.**

ii) It cannot be that the provision of Section 243(3) makes a right of appeal in civil matters arising from decisions of National Industrial Court with leave of the Court of Appeal to be contingent on a futuristic exercise of the powers of the National Assembly.

iii) There is no procedural lacuna in the Constitution on the mode of exercise of a right of appeal with leave of the Court of Appeal against the decisions of the National Industrial Court.

iv) The litigant's exercise of his right of appeal against all decisions of the National Industrial Court to the Court of Appeal bequeathed to him by Section 240 and with respect to Section 243(4) of the 1999 Constitution as altered "any appeal from any civil jurisdiction", all a prospective Appellant needs to do is to amble within the compass of Section 24(1) of the Court of Appeal Act[52] an extant enactment by the National Assembly which provides thus:

> **Where a person desires to appeal to the Court of Appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that is applicable to the case.**

[50] (2015) Vol. 244 LRCN 1374
[51] Section 243(4) of the 1999 Constitution as amended
[52] Cap C36 LFN, 2004

v) The appellant needs equally to rely on and comply with the provisions of Order 6 Rules 1,2,5,7 and 10 of the Court of Appeal Rules 2016, a subsidiary legislation whose potency traces its pedigree to the constitutive Act, Section 18(1) of the Interpretation Act [53] see DIN v. A-G. FEDERATION[54], see also OLAREWAJU v. OYEYEM [55]

vi) These two enactments set out the procedure of appeals in civil matters from the National Industrial Court to Court of Appeal either as of right or with leave of the Court of Appeal.

vii) A holistic interpretation of Sections 240 and 243(1) of the 1999 Constitution as altered, appeals lie from the National Industrial Court to the Court of Appeal.

viii) All decisions of the National Industrial Court are appealable to the Court of Appeal as of right in criminal matters (Section 254C (5) and (6) and fundamental rights cases (Section 243(2) and with the leave of the Court of Appeal in all other Civil matters where the National Industrial Court has exercised its jurisdiction (Section 240 and Section 243(1) and (4) of the Constitution read conjunctively).

ix) The following therefore are the answers to the questions posed to the Supreme Court in the case stated in SKYE BANK PLC v. VICTOR ANAEMEM IWU[56]

a) The Court of Appeal has the jurisdiction to the exclusion of any other Court in Nigeria to hear and determine all appeals arising from the decisions of the National Industrial Court of Nigeria.

b) There is no constitutional provision that expressly divest the Court of Appeal of its appellate jurisdiction over all decisions on civil matters emanating from the National Industrial Court.

c) The jurisdiction of the Court of Appeal to hear and determine civil appeals from the decisions of the National Industrial Court is not limited only to fundamental right matters and it is submitted criminal matters but includes civil matters too.

3.3 THE IMPLICATIONS OF THE SUPREME COURTS DECISION IN SKYE BANK PLC v. VICTOR ANAEMEM IWU[57]

i) The National Assembly that has prepared a bill which has scaled second reading may still go on to complete the process of complying with Section 243(3) of the Constitution but litigants

[53] Cap 123 LFN, 2004
[54] OLAREWAJU –VS- OYEYEM
[55] (1986) 1 NWLR (Pt. 17) 471, (2001) 2 NWLR (Pt. 697) 229
[56] Op cit
[57] ibid

or prospective Appellants who wish to appeal decisions of the National Industrial Court can do so without waiting for the bill to be passed.

ii) By the tenor of this judgment it is submitted subject to further interpretation by the Apex Court that if the ground of Appeal in a Civil Interlocutory Appeal to the Court of Appeal from the National Industrial Court is on ground of law, leave is still required by virtue of the provision of Section 243(3) of the Constitution.

iii) All Civil Appeals lie to the Court of Appeal from the National Industrial Court with the leave of the Court of Appeal sought first and obtained.

iv) Since the civil Appeal is not as of right, the Court of Appeal still has to exercise the discretion whether to grant the Application or leave or not and if leave is refused, Section 243(4) holds that refusal as a final decision which we submit still amounts to a denial of right to appeal as the Applicant cannot go to the Supreme Court by way of appeal.

It is submitted that decongestion of courts is not a legal reason to deny prospective applicants leave to appeal decisions of National Industrial Court to Court of Appeal in civil matters. A consideration of the Notice and Grounds of Appeal especially in cases of employer-employee relationships and trade disputes which have to do with lives and livelihoods should not be taken lightly and leave ought to be readily granted upon minimal interest and grievance shown.

4. CONCLUSION

Although their Lordships did not make reference to the much earlier decision of the Supreme Court in FAJIMI v. SPEAKER OF WESTERN STATE HOUSE OF ASSEMBLY[58] which was the first in time, the decision in SKYE BANK PLC v. IWU[59] does not derogate from FAJIMI'S case as both yield the same result that the prospective Appellant does not need to wait for a futuristic legislation of the National Assembly before exercising his right to appeal a decision of the National Industrial Court in a civil case to the Court of Appeal with leave of the Court of Appeal.

However, the decision in FAJIMI'S case is wider in scope in that it covers all situations where a Constitution or statute states that a right of access to court shall be dependent upon a futuristic legislation on the causes and procedure for exercising such right of access to court.

[58] Op cit
[59] Op cit

The prospective Appellants against decisions of the National Industrial Court in a civil matters can now appeal such decisions to the Court of Appeal albeit with leave of the Court of Appeal.

In all other matters, right of access to court is guaranteed and litigants will not be restricted from exercising such right based on a futuristic legislation.

Therefore, the judicial attitude of courts in respect of legislative actions which restrict access to court through Constitutional and Statutory provisions both old as in FAJIMI'S case and new as in IWU's case is in favour of the exercise of right of access to court barring substantive provisions of the Constitution.

5. RECOMMENDATION AND CONCLUSION

It can now be seen from the foregoing submissions that it is better not to include a clause in a Constitution or statute that makes it contingent upon a futuristic or further legislation before litigants can exercise their right of access to court. The courts frown at such impediments as it tantamount to suspending existing provision of the Constitution on right of access of court in Sections 6, 36, 241, 251, 277 among others.

It also behooves the Legislature to use both private or public professional legislative research consultants and draftsmen to instantly draft and pass subsidiary legislations to provide for those causes of action and procedures for institution of those actions or appealing such decisions.

This is because the courts will not lend their judicial support to constitutional and statutory provisions that put citizens' right of access to court in abeyance when the substantive provisions of the Constitution have given them right of access to court.

Again, it is incumbent on the Legislature, that is to say, the National Assembly and the State Houses of Assembly to avoid inserting clauses in the Constitution and Statutes that make right of access to court dependent on non-existent or futuristic legislations or insert the causes of action and the procedure in subsidiary Legislation at the same time and pass it. Subsidiary legislations have the force of law by the provisions of Section 18 of the Interpretation Act[60].

It is submitted that Fajinmi's case supra is a Supreme Court's decision and final authority that when a matter arises at any level of the judicial system and hierarchy affecting a person's right of access to all levels of Court and the Constitutional or statutory impediment is that, the right of access to

[60] Interpretation Act, LFN 2004

such level of court is curtailed or obliterated because the Legislature at any tier of government has not made a law, the person can approach the particular level of Court in the ordinary manner of approaching the court under existing laws and the provisions of the Constitution until such a law is validly enacted

It is therefore submitted that the Court of Appeal has jurisdiction to hear appeals from decisions of the National Industrial Court of Nigeria in causes or matters not based on Fundamental Rights or criminal matters, that is to say non-fundamental Rights matters and non-criminal matters such as civil causes or matters based on Supreme Court's decision in SKYE BANK PLC v. VICTOR ANAEMEM IWU[61].

The summation of the foregoing submissions is that when the Legislature, in a Constitution or Statute makes provisions that the right of access to court is dependent upon a futuristic legislation, the attitude of the Courts will be that the provisions of the Constitution or Statute granting right of access to court are not made dead letters. The litigants are allowed to exercise their right of access to court by the extant provisions in the Constitution and Statutes enabling such access to court and the litigant is not to be driven from the judgment seat but his claim must be heard and decided upon. The legislature is therefore advised.

[61] op cit