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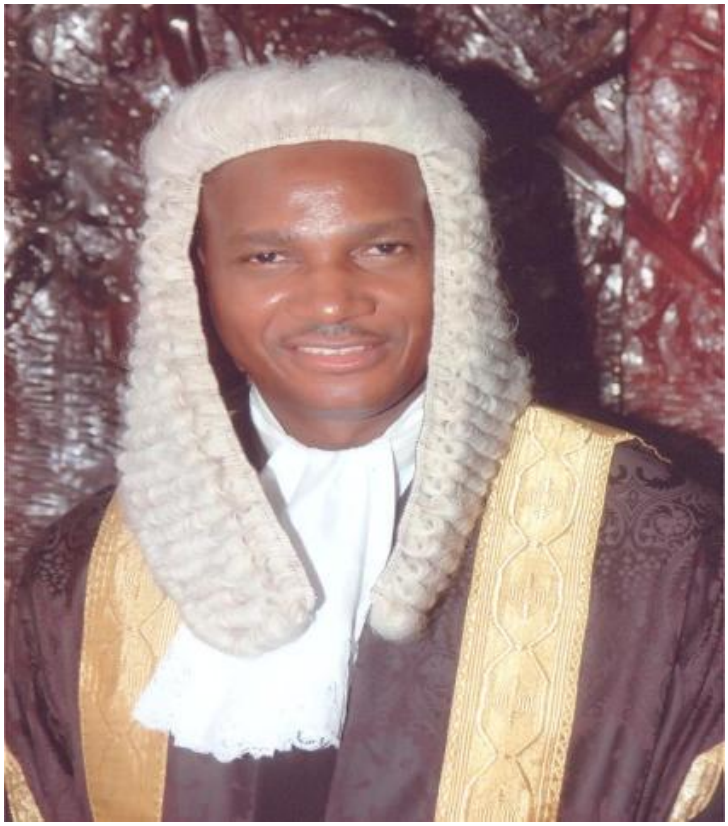
EDITOR'S NOTES

The Ahmadu Bello University Journal of Commercial Law (ABUJCL) is a brainchild of the Department of Commercial Law, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria. It's ultimate goal is to stimulate legal research into societal challenges with a view to providing workable solutions. In the context of academic excellence, this edition discusses diverse vexing legal issues in the best tradition of intellectual analysis and robust engagement. The incisive and highly provoking discourse in this edition will be highly invaluable to legal practitioners, law makers, policy shapers, research institutions and development scholars.

With law reform as cornerstone and building strategic alliance for law development, this edition honours one of Nigeria's greatest law reformist, James Kalu Ukoh, SAN. The editorial committee is indebted in gratitude to all contributors and patrons. Work on the next edition of the journal has started. Thanks.

Editor-In-Chief.

BRIEF PROFILE



JAMES UKO KALU IGWE, SAN.

LL.B (1990–Abia State University); B.L (1990–Nigerian Law School); LL.M Comparative Law (1996 - University of Lagos); LL.M United States and Global Business Law (Suffolk University Law School, Boston, United States); Chief Research and Training Officer, Law Development, Research, Publications and Consulting Limited; Managing Solicitor, J.U.K. Igwe's Chambers; Editor-In-Chief, Law and Investment Journal: elevated to the rank of Senior Advocate of Nigeria, 2011.

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(Head, Legal Sub-Committee), 2001; Member, National Committee On Information Technology Legislation In Nigeria (2004); Member, Editorial Committee, National Conference On Financing the 7-Point Agenda of the Federal Government of Nigeria Through the Capital Market (2008); Member, Editorial Board, Securities Market Journal (SMJ) of Nigeria's Securities and Exchange Commission; Member of Faculty, Nigerian Capital Market Institute (2006); Organiser, Annual Capacity Building/Training programme on Capital Market Laws, Ethics and Judicial Interpretations for Justices and Judges in Nigeria; Consultant to the Nigerian Law School/International Bank For Reconstruction and Industry on Evaluation and Impact Assessment of the New Curriculum of the Nigerian Law School (2011); Consultant to the National Assembly of Nigeria on the training of Legislative Aides (2009 & 2010); Member, Committee to Review Bills Impacting on National Security (2012).

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A Law reform expert, J.U.K. Igwe SAN has contributed immensely to financial sector law reform in Nigeria and beyond.

FINANCIAL INDEPENDENCE AND THE PERFORMANCE OF THE JUDICIARY*

1.1. Introduction

Judicial power by its very nature embodies the subliminal application of state power. Indeed, justice is the fundamental yearning of every citizen and all structures and paraphernalia of vast and varied legal systems are prima facie designed to make it available to man consistent with similar urges of his fellow men.

Judiciary, as the sacred organ of state[1] with power to dispense justice in the final analysis to individuals and groups, inevitably comes to occupy a unique status which is promotive of human values and welfare within the ideals set out in the Constitution. As courts become the effective pillars of justice within Nigeria, they naturally should promote the level of individual consciousness which, in turn influences national consciousness dislodging narrow loyalties and sectarian perceptions of the destiny of man. It is thus proper that under present prevailing national circumstances wherein the role of the government: the executive, the legislature and now the judiciary has come under public scrutiny that discuss should reflect on the performance of the judiciary in Nigeria, not only to have a social audit of its contribution but also to project its problems and limitations.

1.2. Legal Framework for Financial Independence of the Judiciary

Section 81(3) of the 1999 Constitution of the Federal Republic of Nigeria, recognizes a measure of accounting autonomy of the judiciary. The subsection enacts that any amount standing to the credit of the judiciary in the Consolidated Revenue Fund (CRF) shall be paid directly to the National Judicial Council (NJC) for disbursement to the heads of the courts established for the federation and states under section 6 of the constitution. Given that section 6 creates both federal and state courts, it becomes of striking significance that section 121(3) of the constitution provides that any sum standing to the credit of the judiciary in the CRF of the state shall be paid directly to the heads of the courts concerned. The worrisome thing is, if allocation meant for the judiciary is paid directly to the NJC, what sum then will stand to the credit of the judiciary at the state level? Unless the implication is that there is a contemplated distinction between Superior Courts of Record as actually created under section 6 and other courts, the lower Bench, such that while the NJC cater for the superior courts, the states are left to cater for the inferior courts.

The effect of this arrangement will definitely be awkward in relation to the financial administration of the judiciary with the inevitable consequence of rendering nugatory the much fancied financial autonomy of the judiciary.

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[1] Constitution of the Federal Republic of Nigeria, 1999 as amended.

All said, it must be pointed out that these constitutional provisions highlight difficulties in respect of fiscal federalism as it relates to the judicial branch in Nigeria and as to the status of the courts within our federal structure. A simple illustration of such problems created by constitutional provisions will suffice. During the tenure of Senator Ahmed Tinubu as Governor of Lagos State, his administration announced an upward hike in judges' emoluments. It was considered that this salary hike was contra constitutional since there is presently interposed the NJC as the competent body responsible for judges' salaries. The Lagos State Government, wriggled its way out of constitutional palaver by asserting that all it did was to increase allowances and not salary, whatever that really means.

Furthermore, funds due to the judiciary being a charge on the CRF of the Federal Government presupposes that an exception has been made on the very principle of federalism in that both State and Federal Courts are accorded a unitary status. The most visible manifestation of this assertion is to be found in the overriding control of the NJC over courts in Nigeria.

1.3. Financial Independence and Judicial Performance

The ability of a judge in terminating rival contentions of the parties before him, and dispensing justice to litigants is not solely a function of financial independence of the judiciary. Other factors must be considered as well. To the extent that our constitutional scheme as discussed above has largely ensured financial autonomy for the nation's judiciary, the performance or non-performance of judges in discharging the sacred functions of their office must be sought outside the exclusive confines of financial inadequacies.

In judicial systems that derive inspiration and guidance from English common law the role of judges and justices in interpretation of statutes, in structuring tested judicial remedies, in influencing policy development and in legislating for social justice is still a matter of perennial dispute between conservatives and activists. Rigid adherence to so-called judicial restraint, literal interpretation, strict conformity to outdated procedures and precedents, and the avoidance of policy issues have railroaded the judiciary in Nigeria to the point of becoming socially inconsequential and professionally incapacitated.

Sensitivity to human suffering and a passion for delivering justice are essential qualities for a judge that do not derive from enhanced financial allocation, but find expression in different shades and emphases over a vast spectrum of judicial creativity and statesmanship.

In Nigeria, the approaches and attitudes, the methodology and inference each judge employs is not a function of financial independence of the judiciary but largely a function of his education, true worth, nobleness of character and his understanding of what his role is in society. Since many a judge have no formal training or orientation in this regard their

response depends on their own personality and environment. This is a risky venture more so in the context in which some commentators canvass the concept of independence of judiciary. This will most certainly translate into judicial non-accountability and a veritable capitulation to romantic notions of restraint, isolation and integrity which in reality do not exist in. functional terms, as the behavior and decision of judges revealed especially under past military and second republican political dispensations. Sadly, the same degraded spectacle of judicial decline visibly manifested itself when recently learned brethren from the judicial echelons, whose doyen diction from the summit temples of justice (and chief justiceship) of our country must command our respectful attention, decided to embarrass themselves, the judiciary and the Nigerian nation before civilized humanity.

The Nigerian judiciary is passing through a crisis of honour and identity. The institutional decay, compounded by internal antagonisms, aggravated by para-political latencies and exacerbated by smug complacency, has comprehensively afflicted the functionalism of the judicial process. This discussion skips here such other pathologies which make the Court-system, from the lowest rung to the apex an instrument of escalating incredibility and stultifying disutility.

Their lordships are well paid, well accommodated and well defended from any threats (real or imagined) from the hoi polloi yet the system has continued to degenerate. Clearly, there is a compelling need for change.

1.4. The Need For Change.

It is certain that the judiciary has not fully met the expectations of the citizenry in their quest for justice. The inability to fulfill its mandate is not owing to any lack of financial independence on the part of the judiciary. The challenges to the judiciary today stem more from ideological confusion and moral dilemma.

The need of the hour and the demands of social justice impel an objective assessment of traditional concept of judicial role in the evolving dynamics and requirements of society and a determination to experiment with bold and courageous initiative in judicial structure, methods, remedies and roles.

Judges, more particularly in superior courts of record, throughout Nigeria would be well admonished to begin asking questions, however unpleasant, in respect of their role, their perceptions, the concepts and tools with which they operate and their accountability to society, national and even international. In this endeavour judges throughout Nigeria have common concerns and problems. In the analysis of these concerns and problems as well as in structuring appropriate responses on a continuing basis, judicial cooperation at state and federal levels is imperative in order to attain a national judicial consciousness that rejects narrow primordial loyalties and sectarian perception of the destiny of the nation.

Now more than ever before there is the need for the judiciary to work towards a unified field of consciousness capable of ushering in a new *modus vivendi* for all. The judicial process is eminently suited for the role of bringing about far-reaching change without making it appear radical or revolutionary and thus moderating change in a style that is rational and enduring based on universal principles. It is possible to cite examples from history which demonstrates this remarkable role of judicial institutions in almost every land and clime which has undergone change, some radical and others not so radical. For instance, it took the epochal pronouncement of Lord Chief Justice Mansfield in the James Somerset case[2] to abolish slavery in England and beyond. However, the challenge now presented is not the ordinary one; it calls for fundamental restructuring of approaches and methods, a near total break from the jurisprudence of Victorian vintage and a bold thrust into a pan Nigerian vision of human evolution where man is understood as part of Nature and differences are perceived as diverse manifestations of the very same consciousness. In mundane terms, this demands a re-examination of human mind and motivation, the nature and scope of legal sanctions in social control, the factors promoting nationalism in support of a new *modus vivendi* and the concept of justice in relation to man in society.

1.5. Judicial Appointments

A respectable number of judges presently serving in the judiciary especially at the superior levels owe their elevation to military era inspired patronage, politics of ethnic balancing and preferment. These are not the kind of persons whose thoughts are sublime and their pronouncements made solely from good conscience and courage of conviction. These calibre of judges and justices only tend to mollify those who appointed them. Their professional conduct sometimes trigger loss of faith in the judiciary, and thus raise issues of legitimacy, credibility and utility of the judicial process in the context of social justice. Indeed, a former Chief justice of Nigeria was quoted by newspaper as defending military rule. He said of the military: "Yes they came to cure a malady in our national development; a malady of ineptitude; a malady of divisive tendencies and so many others."[3] Now, for whom does the bell toll? A new approach to the appointment of judges and justices must be fashioned if the judiciary is not to collapse under the weight of its own contradictions.

"Who will bear the whips and scorns of time.. .or the spurns that patient merit of the unworthy take"? When the unworthy get appointed to high judicial office, justice becomes inverted. Eminently qualified jurists who are denied elevation to higher echelons of the judiciary deeply resent such injustice and the quality of justice becomes strained. As Anatole France[4] acidly stated:

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[2] (1771-1772) K.B. 12

[3] Per Belgore JSC-See The Roll Call of Chief Justices- http//www.thenationonlineng.net/2011 reported on the 28/08/2011.

[4] Anatole France,quoted by Hon. Justice V.R.Krishner Iyer, in Democracy of Judicial Remedies: A Rejoinder to Hidayatullah" (1984)4SCC(J) at page 46.

> So long as society is founded in injustice, the function of the Laws will be to defend and sustain injustice. And the more unjust they are the more respectable they will seem.

1.6. Judicial Activism.

There is a solemn need for the judiciary to embrace a pro-active role as well as adopt certain minimum standards and goals in judicial administration. If today foreign precedents have persuasive value in our courts and if some celebrated foreign judgments have acquired a more authoritative character, then it is because of the justice content in the decision. What a Nigerian court decides will have inevitable impact outside its jurisdiction and if a decision does not conform to certain minimum standards it may well aggravate the areas of tension and conflicts.

It is perhaps for this reason that one became instantly benumbed when Roseline Ukeje J; Chief Judge of the Federal High Court (as she then was) delivered judgment during the third week of September, 2004 to the effect that our Laws do not recognize the office of the President of the Nigerian Labor Congress (NLC) as a litigant on behalf of the citizenry in the matter of petroleum products price hike[5].

It was a sad day for the judiciary of the twenty first century Nigeria, that such a decision could be rendered in the face of naked human misery pitched against executive high-handedness and misguided arrogance of power. A pro-active judge conscious of the social mission of law and of the role of judges as reformers should have recognized the NLC as a litigant under the canopy of public interest litigation. By so doing, the judge gives the law a "human face". Let it be said for the records that judges and justices are in fact involved in articulating and upholding the principles which sustained the French, American, and English Revolutions, the last of which gave the world the Magna Carta; and the Bill of Rights.

The great Lord Denning while commenting on the role of judges in developing the law, observed inter alia:

> Many of the judges of England have said that they do not make law. They only interpret it. This is an illusion, which they have fostered. But it is a notion, which is now being, discarded everywhere. Each new decision on every new situation — is a development of the law. Law does not stand still. It moves continually. Once this is recognized; then the task of the judge is

[5] This unreported decision was sequel to a suit brought against the federal government of Nigeria by the Nigerian labour congress under the leadership of comrade Adams Oshiomole, seeking to nullify fuel price hike by the federal government and was widely reported in the popular press at that time. See Adegboruwa,E.,"Court Verdict on NLC and Strike,Where Justice Ukeje Erred"- http://dawodu.com/adegboruwa1.htm accessed on the 20/02/2014.

> put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to overall design. He must be an architect thinking of the structure as a whole — building for society a system of law which is strong, durable and just. It is on his work that civilized society itself depends[6].

In his lifetime Lord Denning was revered even by Lord Lane, the Lord Chief Justice of England, as being a benign phenomenon of British justice. Commenting on the phenomenon of Justice v Law, Lord Denning has this to say:

> My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law, which impairs the doing of justice then it is the province of the judge to do all he legitimately can to avoid that rule — or even to change it — so as to do justice in the instant case before him. He need not wait for the Legislature to intervene: because that can never be of any help in the instant case. I would emphasize, however, the word "legitimately": the judge is himself subject to the law and must abide by it[7].

If in spite of this, and if in spite of the Fundamental Objectives and Directive Principles enshrined in the Constitution, the judiciary in Nigeria continues to make law and justice "estranged neighbours", and if national peace, security and stability are brought into greater jeopardy today than ever before, the judiciary has to share part of the blame though it is not often publicly accused for the situation.

1.7. Conclusion

The quest for a fearless and independent judiciary in Nigeria must rest on a deep-rooted and well-articulated commitment to judicial activism, courage of conviction and nobleness of character among our judges. The inclination to be bold, creative and reformist is the need of the hour. In contemporary times there is a global march towards equal justice and this justifies the right to access to court as a foremost human right. The dynamics of social justice demand creative mutation in Nigeria's judicial process to attain a functional reversal of decades of inaction.

Financial independence provisions alone cannot guarantee a free and fearless judiciary in Nigeria. To attain this goal, the cadres charged with the administration of justice must have the right orientation, correct grasp and pro-active judicial inclinations. All efforts aimed at achieving a clean and sound judiciary will be meaningless if those charged with the

[6] Lord Denning, in a foreword to Tripathi, R. D,(1977): "Supreme Court of India, A Socio-Legal Critique of its Juristic Techniques".
[7] Lord Denning, quoted by Hon. Justice V.R.Krishner Iyer (1984) 4 SCC(J) Supra.

administration of justice are deficient in their roles. The appointment and elevation of judges should not be anchored on patronage, politics of ethnic balancing and preferment. Recent developments impel the nation to review the modalities for constituting the NJC and the powers of the CJN in appointing members thereof.

The constitution of Nigeria promises a new social order where good government and welfare of all persons in the country shall be anchored on the principles of freedom, equality and justice. The President of Nigeria has promised the nation a new transformational order based on the rule of law. These are great promises, but the finest hour of the rule of law, is when law disciplines life and matches promise with performance. As Nigeria looks forward to the dawn of this new era, let us hope that it will bring with it an independent, fearless and well performing judiciary capable of upholding the dignity of man as man and delivering justice with the fear of God.[8]

[8] The author is grateful to the Association of National Accountants of Nigeria (ANAN) who first invited him to examine the subject of financial independence and the performance of the judiciary in Nigeria. Grateful acknowledgement is also made to Hon. Justice Benedict Bakwaph Kanyip,Phd, Presiding Judge, National Industrial Court, Lagos Division, for assistance received in preparing this paper.

RECENT TRENDS IN REGULATING MONEY LAUNDERING & TERRORISM FINANCING IN THE BANKING, INSURANCE AND CAPITAL MARKET SECTORS OF THE FINANCIAL ECONOMY OF NIGERIA: ROLE OF THE FINANCIAL REGULATORS*.

1.1. Introduction

In the recent past, more countries are becoming vulnerable to the risks of money laundering and its contagious effects. According to the International Monetary Fund (IMF), the scale of money laundering globally could be between 2% and 5% of World Gross Domestic Product at the very lowest. This translates into a range of anything between USDollars 590 billion to USD 1.5 trillion of laundered money per year.[1] According to a very recent release by the Nigerian Economic and Financial Crime Commission (EFCC), an estimated $129 billion dollars (equivalent to N21 trillion Naira) was illicitly transferred out of Nigeria in the last ten years (2003-2013). The sources of the funds are often corruption, tax avoidance, tax evasion, illegal mining activities, drugs and human trafficking. The Nigerian Financial Intelligence Unit domiciled with the EFCC estimate that between 2009 and 2013, about $25.4 billion dollars were moved out of the country through cross border physical movement of cash and financial instruments. That while the figures may not be necessarily indicative of the proceeds of crime but it shows vulnerabilities associated with cash movement within and outside the West African sub-region.[2]

The African region and indeed most of the developing countries are vulnerable to money laundering and terrorist financing particularly because of their cash-based and open economies. In Africa, this is further aggravated by the porous and weak controls at the borders. Combating money laundering and terrorist financing in these economies is further complicated by weak or ineffective regulation of financial institutions, lack of comprehensive legal framework, weak law enforcement agencies and poor coordination and collaboration between law enforcement agencies and financial regulatory bodies.[3]

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[1] See IMF Washington DC, USA Fact Sheet (2009): www.imf.org/external/np/exr/facts/aml.htm/septermber2009.

[2] See Daily Trust Newspaper, Abuja, Wednesday, November 27th, 2013 at p.10. see also www.dailytrust.com.ng vol. 33, No. 53.

[3] See Ladan M.T., (2004): The Effectiveness of Legal and Enforcement Framework in Fighting Advance Fee Fraud and Money Laundering Activities. Being a Paper presented at the 3rd National Seminar on Economic Crimes: On the Theme: Combating Advance Fee Fraud and Money Laundering: - A Renewed Approach. Organized by the Federal Government of Nigeria through the Central Bank of Nigeria, Securities and Exchange Commission etc., Abuja. Date: - 27 –29th June 2004. Venue: - Shehu Musa Yar'adua Centre, Abuja – Nigeria. See also Ladan, M.T., (2013), Appraisal of Legal, Regulatory and Institutional Frameworks

Recent studies, including the ones carried out by the Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) and the Financial Action Task Force (FATF), suggest that advances in technology and the progressive tightening of Anti-Money Laundering (AML) regulations are leading money launderers to make more complex arrangements outside the formal financial services industry, such as the use of various professional services, and in particular the real estate business, legal practitioners, tax consultants, chartered accountants and designated Non-Financial Institutions or sectors, such as the International football, casinos and gaming, hotels, supermarkets, dealers in luxury goods, cars and jewelry.[4]

The above opportunities and skills acquired by money launderers and their collaborators led to the renewed strategy and initiatives adopted by the Nigerian Government between 2011 and October 2013 in combating money laundering and terrorism financing in Nigeria.[5] This resulted in the promulgation of the Money Laundering (Prohibition) Act, No. 11, 2011, which inter alia, repealed the 2004 Act, made comprehensive provisions to prohibits the financing of terrorism, provide for appropriate penalties and expand the scope of supervisory and regulatory authorities so as to address the challenges faced in the implementation of the anti-money laundering regime in Nigeria. A year later, amending the 2011 Act, the Money Laundering Act, No.1, 2012 introduced new initiatives that greatly improved and added value to the provisions of sections 2, 3, 6, 9, 11, 15, 16, 20, 23 and 25 of the amended 2011 Act. Furthermore, the other recent trend is the provision for liability regime for financing of terrorism under the Terrorism (Prevention) Act, 2011 as amended by the 2013 Terrorism (Prevention)(Amendment) Act and strengthened by the 2013 Regulations on the Freezing of International Terrorists Funds and other related Measures.[6]

It is against this background that this paper seeks to realize the following objectives: -

1. To examine why and how is combating money laundering and financing of terrorism a top priority for the international community;

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in Combating Money Laundering and Terrorism Financing in Nigeria. See for download of this paper http://ssrn.com/abstract=2336025.
Also see Charles G., and Anneli B, (2004): - "African Commitments to Combating Crime and Terrorism: - A Review of Eight NEPAD Countries", in African Human Security Initiative, www.africanreview.org.AHS/Papaer3/July2004, pp.1-10.

[4] See GIABA Dakar, Senegal (2009): - Final Report on Typologies of Money Laundering through the Real Estate Sector in West Africa. Pp.1-40. See also GIABA 2012 Annual Report, pp.1-161. See also GIABA and FATF Report: - Terrorist Financing in West Africa, October, 2013, pp.1-48; See also GIABA Typologies Report on Tax Crimes and Money Laundering in West Africa, May 2012, pp.1-33.
Also see FATF 2008-2009 Annual Report (2009) www.FATF-GAFI.org: - New Studies on Typologies, boxes 3 and 4 at pp.18-19.

[5] Ladan, M.T., (2013), Appraisal of Legal, Regulatory and Institutional Frameworks in Combating Money Laundering and Terrorism Financing in Nigeria. See for download of this paper http://ssrn.com/abstract=2336025.

[6] Ibid, at pp. 25-40.

2. To appraise the development and initiatives reflected in the legal and institutional frameworks in combating money laundering and financing of terrorism in Nigeria.

3. To highlight the critical roles of financial regulators in regulating money laundering and terrorism financing in the banking, insurance and capital market sectors of the Nigerian economy;

4. To conclude with some recommendations.

1.2. Why And How Combating Money Laundering And Terrorist Financing Is A Top Priority For The International Community?

Money laundering is a process in which the illicit source of assets obtained or generated by criminal activity is concealed to obscure the link between the funds and the original criminal activity.[7] Terrorist activities may also be financed with funds that represent the proceeds of illegal activities.[8] Perpetrators of these activities constantly seek new ways to launder the funds in order to use them without drawing the attention of authorities to the source of the funds and the links with the underlying crimes. Money laundering is inextricably linked to underlying criminal activities that generate it and in the process undermines the criminal justice system.[9] In most African states with weak anti-money laundering systems, drug and human trafficking, corruption, illegal arms dealings and tax evasion are common crimes.[10]

The international community has made the fight against money laundering and terrorist financing a priority[11] due to the following reasons: -

i. Money Laundering Undermines the Integrity of National Financial Institutions and Economic Policies

The hallmark of any financial institution is its reputation for integrity. This reputation can be seriously undermined if funds from criminal activity can be easily

[7] Ladan M.T., 'Prevention and Control of Money Laundering in Nigeria: - A critical analysis of the Money Laundering Decree No.3 of 1995' in Nigerian Current Law Review (1997): - Nigerian Institute of Advanced Legal Studies, Lagos, Chapter 2 at pp.1-2.

[8] IMF Fact Sheet Supra note 1 at p.1

[9] Ladan M. T., (2010): - Enhancing Access to Justice in Criminal Matters: - Possible areas for Reform in Nigeria. A Paper presented at a 3 day National Workshop on Law Development organized by the Nigerian Law Reform Commission, Abuja, on 12-13 January 2010 at New Chelsea Hotel, Abuja at pp. 5-13.
Also see Ladan M. T., Supra note 3.

[10] See Ladan M. T., Crime Prevention and Control and Human Rights in Nigeria (1998) ECONET Publishing Co. Zaria, Nigeria, at pp. 125-165.

[11] See FAFT (2009) supra note 4.

processed through that particular institution thus creating a perception of active complicity in criminal networks.[12]

Evidence of such complicity will have a damaging effect on the attitudes of the financial intermediaries and of the regulatory authorities, as well as ordinary customers. In some African states there is evidence of financial institutions that have collapsed due to their involvement in money laundering and parallel banking activities.[13]

Other far reaching effects of money laundering on majority of developing economies and least developed economies in Africa include: - a) Distortion of market prices by fuelling inflationary tendencies in essential commodities and real estate market by increasing money supply that is not matched by production of goods and services; b) Eliciting unfair competition against genuine businesses thus killing entrepreneurship; c) Diverting capital away from meaningful national economic activities to activities that enhance individual gain at the expense of economic development; d) Oiling corruption particularly through the process of compromising the criminal justice system and the rule of law with the resultant consequence of increased criminality and ultimately depressing Foreign Direct Investments.[14]

ii. Money Laundering and Terrorist Financing threaten International Financial Stability and Vibrancy

The International The international community has made the fight against money laundering and terrorist financing a priority. The IMF is especially concerned about the possible consequences of money laundering and terrorist financing on its members' economies and on international financial stability.

Money laundering and terrorist financing activities can undermine the integrity and stability of financial institutions and systems, discourage foreign investment, and distort international capital flows. In an increasingly interconnected world, the problems presented by these activities are global, as are the links between financial stability and financial integrity. Money launderers exploit differences between

[12] See the rationale behind FATF Recommendations 4-25, Special Recommendations VII and the Interpretative Notes to Recommendation 5, 12 and 16: - on Measures to be taken by financial institutions and non-financial businesses and professions to prevent money laundering and terrorist financing. See also FATF 2013 Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems, pp.1-163.

Also see FATF Reference Document (2009): - Methodology for Assessing Compliance with the FATF 40 + 9 Recommendations (updated February 2009) at pp. 15-33.

[13] See Charles and Anneli supra note 3.

[14] See Aremu J.A., Attracting and Negotiating Foreign Direct Investment with Transnational Corporations in Nigeria (2005), Market Link Communications, Lagos, Nigeria, at pp. 167-201.

national anti-money laundering laws and systems, especially in jurisdictions with weak or ineffective controls where they can move their funds more easily. Moreover, problems in one country can quickly spread to other countries in the region or in other parts of the world.

Strong AML/CFT regimes enhance financial sector integrity and stability, which in turn facilitates countries' integration into the global financial system. They also strengthen governance and fiscal administration. The integrity of national financial systems is essential to financial sector and macroeconomic stability both on a national and international level.[15]

iii. Strategic Objectives of the International Community's response in Combating Money Laundering and Terrorist Financing

For the international community, the objective in combating money-laundering is three-fold. It involves simultaneously protecting the international financial system, preventing criminals from enjoying the proceeds of their crimes, and preventing them from utilizing the formidable economic power they have amassed to challenge the stability of governments.

The approach in which organized crime is attacked by combating dirty money has many advantages. Given the financial power of criminal organizations and the fact that they are not defeated by any one measure, cracking down on money-laundering is a way to weaken the organizations without confronting them physically at a time when traditional methods of fighting them have shown their limitations the "war on drugs" decreed by Ronald Reagan in the 1980s had limited effects. Combating the money from crime also means suppressing the ultimate purpose of criminal activities making profits. It is a way to suppress the means for doing harm and, finally, a way for law enforcement to penetrate organized crime.

The task is theoretically made easier because criminal organizations cannot operate using their traditional methods of threats, blackmail, violence or racketeering in order to launder the proceeds from their crimes. To give their profits the appearance of being legal, they must necessarily go through legal channels (the financial system) and use legal methods (corporate law, banking law) a terrain where it is easier to combat them.

Therefore, combating money-laundering is an important means in the fight against organized crime, as was stated in the global action plan adopted at the World Ministerial Conference on Organized Transnational Crime,[16] which called upon the States to "ensure

[15] See IMF Fact Sheet supra note 1.

[16] Held in Naples, November 21-23, 1994. See report to the United Nations General Assembly on the World Ministerial Council on Organized Transnational Crime, A/49/748.

that the fight against organized transnational crime is based on strategies aimed at defeating the economic power of criminal organizations."[17]

The means

The strategy implemented through a series of legislative measures taken by governments and revolving around three axes:

- Prevention, the goal of which is to prevent the finance al system from being used for purposes of money-laundering, particularly through a general requirement to precisely identify originators, as well as placing and limitations on certain transactions that serve as vehicles for money-laundering;

- Detection of money-laundering operations through legislative provisions allowing for the centralization of information by authorities charged with combating such operations (reporting suspicions) and implementation of specialized investigative measures (access to computer systems and commercial and banking information, etc);

- Suppression of money-laundering activities and associated crimes, as well as confiscation measures that are complements to enforcement, and preventive measures such as freezing and seizing assets.

The arsenal of measures is as strong as its weakest link-criminal proceeds tend to move toward countries that have not put such measures into place. It is thus necessary to ensure that the implementation of these measures is as uniform and as widespread as possible. The efforts of the international community have sought to encourage countries to institute the necessary legislative framework through international legal instruments designed to harmonize standards or through initiatives that seek to compel recalcitrant countries to adopt them. For example, this is the goal of the efforts made by the Financial Action Task Force (FATF).

It must be noted that this objective remains far from being reached. Many countries have not yet developed the necessary legislation, and even where they have done so, the implementation of the measures may depend on the extent to which they receive support.

Pierre Kopp (1995) explains that one of the problems in combating money-laundering "comes from the information asymmetry in principal-agent relationships between the State (the principal) charged with implementing the fight against money-laundering, and the financial sector (the agent)," the only entity that has the data on illegal transactions.

[17] Political Declaration and Global Action Plan against Organized Transnational Crime, report to the United Nations General Assembly, *op.cit.*, Para. 35.

The difficulty thus lies in the fact that the authorities charged with implementing policies to combat money-laundering have the power to act but do not have access to information that would allow them to act. It is the financial institutions that have this information but they do not have power to act.

Therefore, the detection of money-laundering operations necessarily involves collaboration and information exchange between the financial sector and the authorities responsible for legal procedures. Without this collaboration, there is little chance that money-laundering operations could ever become known, as they are by nature hidden. Given the confidentiality of the information held by banks, it has been necessary to establish bridges between prosecution and enforcement authorities and financial institutions in order to allow this information to circulate while honoring confidentiality requirements. These bridges take the form of Financial Intelligence Units (FIUs).

Notwithstanding, law enforcement's access to this information, officials would not be in a position to identify, among the mass of information generated by the daily financial transactions of a financial sector institution, operations that are suspicious or that conceal money-laundering activities. This is all the more true because the suspicious nature of a transaction most often results not from the intrinsic characteristics of the transaction itself but rather from factors extraneous to the transaction.[18]

A reporting system has thus been introduced in most jurisdictions requiring professionals subject to this requirement to inform the legally designated authority of any transactions he believes could be linked to money-laundering operations. This is the system for reporting suspicions that has been progressively adopted by most States.[19] It transforms the financial sector professional into a filter responsible for separating economically justified operations from operations linked to the activities of a criminal organization. Bankers, particularly due to their knowledge of their clients and of the economic and financial arena, have detection measures that go beyond the formal criteria that might characterize a suspicious transaction. This is all the more important because in most cases there is no difference in the manner in which money-laundering operations and legal operations are carried out.

It is in this spirit that the international community in the late 1980s instituted an international legal framework which is still in its developing, specifically to confront new threats, but also to remain informed of new money-laundering techniques.

[18] For example, the absence of a connection between the transaction and the economic activity of the operator; his nationality; numerous complex transactions within a short period of time.

[19] On this issue see, Thony J.F. (1997) Processing Financial Information in Money Laundering Matters: - The Financial Information Units, European Journal of Crime, Criminal Law and Criminal Justice, 1996-3, p.257.

1.3. Why Empowering Financial Regulators And Assessing Technical Compliance With The FATF Revised 2012 Recommendations And The Effectiveness Of Anti-Money Laundering And Combating Financing Of Terrorism System?[20]

Recommendation 26 on Regulation and Supervision of Financial Institutions provides that: -

1) Competent authorities or financial supervisors should take the necessary legal or regulatory measures to prevent criminals or their associates from holding (or being the beneficial owner of) a significant or controlling interest, or holding a management function, in a financial institution.

2) Core Principles financial institutions should be required to be licensed. Other financial institutions, including those providing a money or value transfer service or a money or currency changing service, should be licensed or registered. Countries should not approve the establishment, or continued operation, of shell banks.

3) Countries should designate one or more supervisors that have responsibility for regulating and supervising (or monitoring) financial institutions' compliance with the AML/CFT requirements.

Recommendation 27 on Powers of Supervisors provides that:

1) Supervisors should have powers to supervise or monitor and ensure compliance by financial institutions with AML/CFT requirements.

2) Supervisors should have the authority to conduct inspections of financial institutions.

3) Supervisors should be authorised to compel production of any information relevant to monitoring compliance with the AML/CFT requirements.

4) Supervisors should be authorised to impose sanctions in line with Recommendation 35 for failure to comply with the AML/CFT requirements. This should include powers to impose a range of disciplinary and financial sanctions, including the power to withdraw, restrict suspend the financial institution's licence.

For its 4th round of mutual evaluations, the FATF has adopted complementary approaches in February 2013,[21] for assessing technical compliance with the revised FATF Recommendations adopted in February 2012 and for assessing whether and how the AML/CFT system is effective.

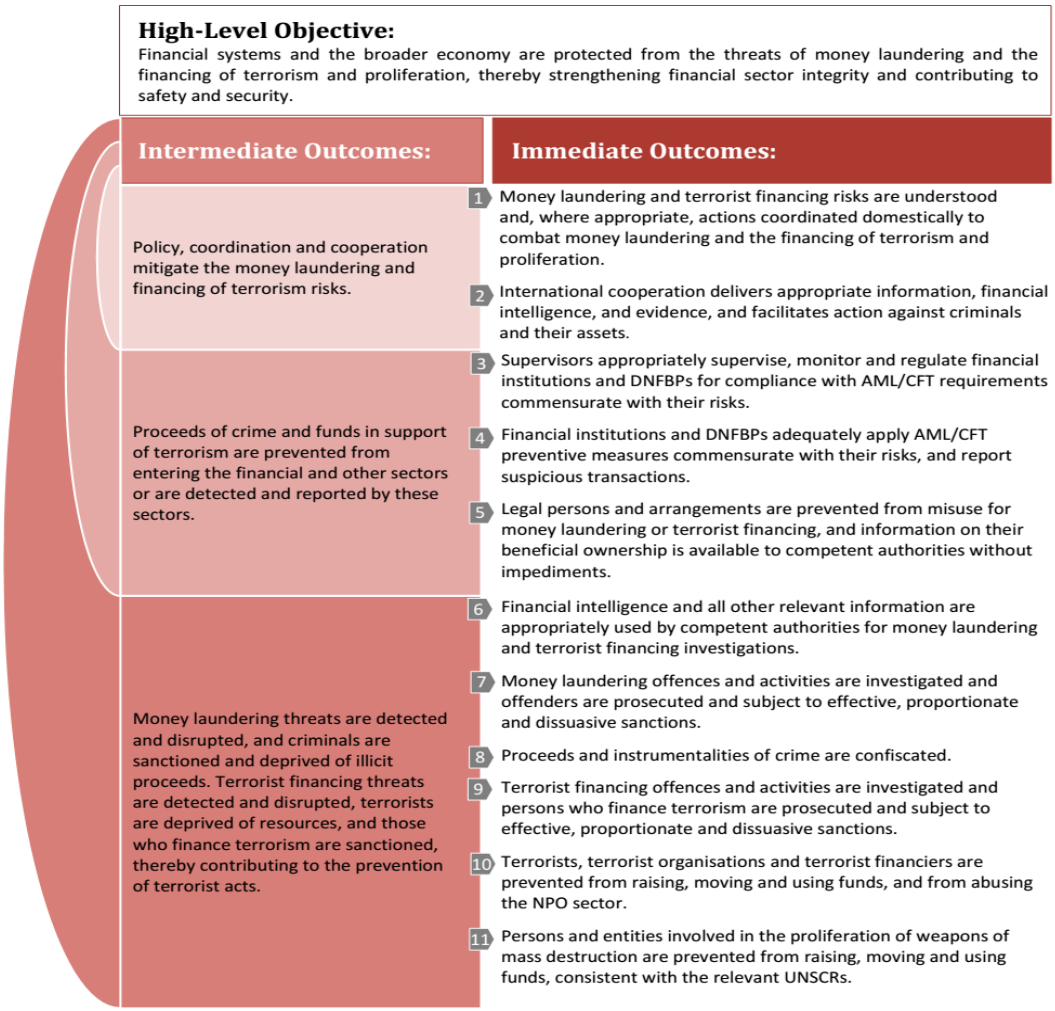
[20] Supra note 20, FATF (2013).
[21] Printed in October 2013.

The assessment of the effectiveness of a country's AML/CFT system is equally as important as the assessment of technical compliance with the FATF standards. Assessing effectiveness is intended to: (a) improve the FATF's focus on outcomes; (b) identify the extent to which the national AML/CFT system is achieving the objectives of the FATF standards, and identify any systemic weaknesses; and (c) enable countries to prioritise measures to improve their system. For the purposes of this Methodology, effectiveness is defined as "The extent to which the defined outcomes are achieved".

In the AML/CFT context, effectiveness is the extent to which financial systems and economies mitigate the risks and threats of money laundering, and financing of terrorism and proliferation. This could be in relation to the intended result of a given (a) policy, law, or enforceable means; (b) programme of law enforcement, supervision, or intelligence activity; or (c) implementation of a specific set of measures to mitigate the money laundering and financing of terrorism risks, and combat the financing of proliferation.

For its assessment of effectiveness, the FATF has adopted an approach focusing on a hierarchy of defined outcomes. At the highest level, the objective in implementing AML/CFT measures is that "Financial systems and the broader economy are protected from the threats of money laundering and the financing of terrorism and proliferation, thereby strengthening financial sector integrity and contributing to safety and security". In order to give the right balance between an overall understanding of the effectiveness of a country's AML/CFT system, and a detailed appreciation of how well its component parts are operating, the FATF assesses effectiveness primarily on the basis of eleven Immediate Outcomes. Each of these represents one of the key goals which an effective AML/CFT system should achieve, and they feed into three Intermediate Outcomes which represent the major thematic goals of AML/CFT measures. This approach does not seek to assess directly the effectiveness with which a country is implementing individual Recommendations; or the performance of specific organisations, or institutions.

The relation between the High-Level Objective, the Intermediate Outcomes, and the Immediate Outcomes, is set out in the diagram below:



1.4. Central Bank Of Nigeria (Anti-Money Laundering And Combating Of Financing Of Terrorism In Banks And Other Financial Institutions In Nigeria) Regulations, 2013.[22]

The CBN Governor made the following Regulations on 29th August 2013 in the exercise of the powers conferred upon him by the provisions of Section 51(1) of the Banks and Other Financial Institutions, Act, 2004 and all other powers enabling him in that behalf.

In terms of structure and contents, the 133 Regulations are divided into thirteen parts and three schedules. Part 1 deals with the objectives, scope and applications of these regulations. Part 2 covers Anti-Money Laundering and Combating the Financing of

[22] No. 65 of 3rd September, 2013: - Official Gazette of the Federal Republic of Nigeria, Vol. 100: - Date of Commencement, 29th August 2013.

Terrorism (AML/CFT) Directives: - AML/CFT institutional policy framework; risk assessment; risk mitigation; designation and duties of AML/CFT Compliance Officers; and cooperation with competent authorities. Part 3 deals with Offences, Measures and Sanctions: - scope of offences; terrorism financing offences; targeted financial sanctions related to terrorism financing and proliferation; limitation of secrecy and confidentiality laws. Part 4 covers customer due diligence, higher risk customers and activities of politically exposed persons: - customer due diligence ('CDD') measures; identification and verification of customers; verification of beneficial ownership; application of enhanced due diligence to higher risk customers and activities; attention to high risk countries; politically exposed person (PEP); cross-border and correspondent banking; new technologies and non face-to-face transactions; money or value transfer (MVT) services; foreign branches and subsidiaries; wire transfers; simplified due diligence applicable to lower risk customers, transactions or products; timing of verification; existing customers; failure to complete CDD; and reliance on intermediaries and third parties on CDD function. Part 4 covers maintenance of records: - maintenance of records on transactions; attention on complex and unusual large transactions; suspicious transaction monitoring; and procedure for the monitoring and reporting of suspicious transactions. Part 6 deals with monitoring, internal controls, prohibitions and sanctions: - internal controls, compliance and audit; sanctions and penalties for non-compliance; prohibition of numbered or anonymous accounts, accounts in fictitious names and shell banks; other forms of reporting; AML/CFT employee-education and training programme; monitoring of employee conduct; protection of staff who report violations; additional areas of AML/CFT risks; additional procedures and mitigants; testing for the adequacy of the AML/CFT compliance; formal board approval of the AML/CFT compliance; and culture of compliance. Part 7 covers guidance on know your customer (KYC): - three tiered KYC requirements;; duty to obtain identification evidence; nature and level of the business; application of commercial judgment; identification; factors to consider in identification; time for verification of identity; exceptions; additional verification requirements; identification of directors and other signatories; joint account holders; verification of identity for high risk business; duty to keep watch of significant changes in nature of business; verification of identity of person providing funds of trust; savings schemes and investments in third parties' names; personal pension schemes; timing of identification requirements; consequence of failure to provide satisfactory identification evidence; identification procedures; new business for existing customers; certification of identification evidence; concession in respect of payment made by post; term deposit account ('TDA'); and investment funds. Part 8 deals with general information: - establishing identity; private individuals – general information; private individuals resident in Nigeria; and electronic checks. Part 9 covers financial exclusion for the socially or financially disadvantaged applicants: - "Financial Exclusion" for the socially or financially disadvantaged applicants resident in Nigeria; private individuals not resident in Nigeria; non face-to-face identification; refugees or asylum seekers; students and minors; and quasi corporate customers. Part 10 deals with trust, policy, receipt and payment of funds: - trust, nominees and fiduciaries; off-shore trusts; conventional family

and absolute Nigerian trusts; receipt and payment of funds; identification of new trustees; life policies placed in trust; and powers of Attorney and third party mandates. Part 11 covers executorship, client accounts, un-incorporated and corporate organizations: - executorship accounts; "Client Accounts" opened by professional intermediaries; un-incorporated business or partnership; limited liability partnership; pure corporate customers; the identity of a corporate company; non face-to-face business; public registered companies; private companies; higher risk business relating to private companies; foreign financial institutions; bureau de change; designated non-financial businesses and professions (DNFZBPs); occupational pension schemes; registered charity organizations; religious Organizations (ROs); three-tier of government and parastatals; and foreign consulates; and intermediaries or other third parties to verify identity or to introduce business. Part 12 deals with introductions, applications and foreign intermediaries: - introductions from authorized financial intermediaries; written applicants; non-written application; foreign intermediaries; corporate group introductions; business conducted by agents; syndicated lending; correspondent relationship; acquisition of one financial institution and business by another; vulnerability of receiving bankers and agents; categories of persons to be identified; applications received through brokers; applications received from foreign brokers; and multiple family applications. Part 13 covers linked transactions, foreign accounts and investment: - linked transactions; foreign domiciliary account (FDA); safe custody and safety deposit boxes; customer's identity not properly obtained; exemption from identification procedures; one-off cash transaction, remittances and wire transfers; re-investment of income; amendment or revocation of these regulations; interpretation; and citation.

Finally, schedules 1-3 of these Regulations relate to the following maters respectively: - sanctions and penalties; information to establish identity; and money laundering and terrorist financing red flags.

a) Rationale, scope and applications

The rationale behind the AML/CFT 2013 Regulations made by the Governor of Central Bank of Nigeria, is to ensure that the banking industry and other financial institutions of the Nigerian economy comply with the subsisting Anti-Money Laundering an Combating the Financing of Terrorism Legislations (namely, the Money Laundering (Prohibition) (Amendment) Act, No.1, 2012, the Terrorism (Prevention) (Amendment) Act 2013 and the Terrorism Prevention (freezing of international terrorists funds and other related measures) Regulations, 2013).

Accordingly, the objectives of these Regulations are to: (a) provide Anti-Money Laundering and Combating the Financing of Terrorism ("AML/CFT") compliance guidelines for financing institutions under the regulatory purview of the Central Bank of Nigeria ("CBN") as required by relevant provisions of the

Money Laundering (prohibition) Act, 2011 (as amended), the Terrorism Prevention Act, 2011 (as amended) and other relevant laws and Regulations; (b) enable the CBN to diligently enforce AML/CFT measures and ensure effective compliance by financial institutions; and (c) provide guidance on Know Your Customer ("KYC") measures to assist financial institutions in the implementation of these Regulations.

In terms of scope, these Regulations cover the relevant provisions of the Money Laundering (Prohibition), the Terrorism Prevention Act, 2011 (as amended) and any other relevant laws or Regulations. These Regulations cover – (a) the key areas of Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Policy; (b) development of Compliance Unit and function; (c) Compliance Officer designation and duties (d) the requirement to co-operate with the competent or supervisory authorities; (f) monitoring and filing of suspicious transactions to the Nigerian Financial Intelligence Unit ("NFIU") and other reporting requirements; (g) reporting requirements; (h) record keeping; and (AML/CFT employee training.

These Regulations shall apply to banks and other financial institutions in Nigeria within the regulatory purview of the Central Bank of Nigeria.

b) Scope of offences, limitation of banking secrecy and confidentiality laws, sanctions and penalties

Under Regulation 9, a financial institution shall identify and file suspicious transaction reports to the NFIU, where funds, assets or property are suspected to have been derived from any of the following criminal activities – (a) participation in an organized criminal group and racketeering; (b) terrorism, including financing; (c) trafficking in persons and migrant smugglings; (d) sexual exploitation, including sexual exploitation of children; (e) illicit trafficking in narcotic drugs and psychotropic substances; (f) illicit arms trafficking; (g) illicit trafficking in stolen and other goods; (h) corruption; (i) bribery; (j) fraud; (k) currency counterfeiting; (l) counterfeiting and piracy of products; (m) environmental crime; (n) murder; (o) grievous bodily injury; (p) kidnapping, illegal restraint and hostage-taking; (q) robbery or theft; (r) smuggling, including smuggling done in relation to customs and excise duties and taxes; (s) tax crimes, related to direct taxes and indirect taxes; (t) extorting; (u) forgery; (v) piracy; (w) insider trading and market manipulation; or (x) any other predicate offence under the Money Laundering (Prohibition) Act, 2011 (as amended) and the Terrorism prevention Act, 2011 (as amended).

By virtue of Regulation 11, a financial institution shall report the NFIU any assets frozen or actions taken in compliance with the prohibition requirements

of the relevant United Nations Security Council Resolutions ('UNSCRs') on terrorism, financing of proliferation of weapons of mass destruction, any future successor resolutions and the Terrorism prevention (Freezing of International Terrorist Funds and Other Related issues) Regulation, 2013, and any amendments that may be reflected by the competent authorities.

The reports in sub-regulation (1) of this regulation shall include all transactions involving attempted and concluded transactions in compliance with the Money Laundering (Prohibition) Act, 2011 (as amended), Terrorism (Prohibition) Act, 2011 (as amended) and the Terrorism Prevention (Freezing of International Terrorist Funds and Other Related Issues) Regulation, 2013 shall be imposed by the CBN on institutions under its regulatory purview.

The administrative sanctions contained in Schedule 1 to these Regulations or in the terrorism Prevention (Freezing of International Terrorist Funds and Other Related Measures) Regulations, 2013 shall be imposed by the CBN on institutions under its regulatory purview.

Regulations 12 provides for limitation of banking secrecy and confidentiality laws as follows: - (1) That financial institutions' secrecy and confidentiality laws shall not in any way, be used to inhibit the implementation of the requirements of these Regulations having regard to the provisions of section 38 of Economic and Financial Crimes Commission Act, 2004; section 13 of Money Laundering (Prohibition) Act, 2011 (as Amended) and section 33 of the CBN Act, 2007. (2) The relevant laws cited in sub-regulation (1) of this regulation have given the relevant authorities the powers required to access information to properly perform their functions in combating money laundering and financing of terrorism, the sharing of information between competent authorities, either domestically or internationally, and the sharing of information between financial institutions necessary or as may be required. (3) Banking secrecy or preservation of customer confidentiality shall not be invoked as aground for objecting to the measures set out in these Regulations or for refusing to be a witness to facts likely to constitute an offence under these Regulations, the relevant provisions of the Money Laundering (Prohibition) Act, 2011 (as amended), the Terrorism Prevention Act, 2011 (as amended) and any other relevant subsisting laws or Regulations.

Schedule 1 elaborates on the applicability of sanctions by considering, among other things, the nature and seriousness of contravention and/or exceptions observed; the conduct of the regulated financial institution or person concerned in its management after the contravention; and other general considerations.

Sections 15 and 16 of the Money laundering (Prohibition) Act, 2011 (as amended) provide for fines or term of imprisonment or both upon committing money laundering or aiding abetting money laundering activities. The administrative sanctions outlined in this document will be imposed consequent upon the examination of a financial institution and observance of contraventions by CBN Examiners and other agencies.

In determining the sanctions to apply, all the circumstances of the case will be taken into account, including – 1-(a) whether the contravention was deliberate, dishonest or reckless; (b) the duration and frequency of the contravention; (c) the amount of any benefit gained or loss avoided due to the contravention; (d) whether the contravention reveals serious or systemic weakness of the management systems or internal rules relating to all or part of the business; and (e) the nature and extent of any AML/CFT crime facilitated, occasioned or otherwise attributable to the contravention – (i) whether there are a number of smaller issues, which individually may not justify administrative sanction, but which do so when taken collectively and (ii) any potential or pending criminal proceedings in respect of the contravention which will be prejudiced or barred if a monetary penalty is imposed pursuant to the Administrative Sanctions Procedure. 2 –(a) how quickly, effectively and completely the financial institution or person concerned in its management brought the contravention to the attention of the CBN or any other relevant authority; (b) the degree of co-operation with CBN Examiners or other agency provided during the examination; (c) any remedial steps taken since the contravention was identified, including; taking disciplinary action against staff involved (where appropriate); addressing any systemic failures; and taking action designed to ensure that similar problems do not arise in the future; (d) the likelihood that the same type of contravention will reoccur if no administrative sanction is imposed; and (e) whether the contravention was admitted or denied. 3 – The previous record of the financial institution or person concerned in its management: (a) whether CBN has taken any previous action resulting in a settlement, sanctions or whether there are relevant previous criminal convictions; (b) whether the financial institution or person concerned in its management has previously been requested to take remedial action; and (c) general compliance history. 4 – (a) prevalence of the contravention; (b) action taken by CBN in previous similar cases; and (c) any other relevant consideration.

Further, according to Schedule 1, the penalties that the CBN shall apply for contraventions of the MLPA 2011 (as amended), Terrorism Prevention Act (TPA), 2011 (as amended), Terrorism Prevention (Freezing of International Terrorists Funds and Other Related Measures) Regulations, 2013 and CBN AML/CFT Regulation 2013 (comprise revocation or suspension of the operating

license, non-monetary and financial penalties) shall be as permitted by BOFIA or any other relevant laws or any regulations issued by the Attorney General of the Federation.

1.5. National Insurance Commission (Anti-Money Laundering And Countering The Financing Of Terrorism) Regulations, 2013.[23]

In the exercise of the powers conferred on it by Section 101 of the Insurance Act, 2003 and all other powers enabling it in that behalf, the national Insurance Commission, with the approval of the Honourable Minister of Finance, made the following Regulations on 29th August 2013.

The 34 Regulations are structured into ten parts. Part 1 deals with the objectives and applications: - objective; application and general requirements. Part 2 covers AML/CFT institutional policy and programme: - proceeds of crime; anti-money laundering and countering the financing of terrorism institutional policy framework. Part 3 deals with customer due diligence measures: - customer due diligence (CDD); customer due diligence measures; customer due diligence for beneficiaries of life insurance policy; enhanced customer due diligence (ECDD); simplified customer due diligence (SCDD); timing of verification; failure to complete customer due diligence; establishing a business relationship; existing customers; reinsurance; and on-going due diligence. Part 4 covers suspicious transaction (STR) and currency transaction report (CTR): - suspicious transaction report (STR); and currency transaction report (CTR). Part 5 deals with AML/CFT training: - AML/CFT training programme. Part 6 covers designation of compliance officer and money laundering reporting officer. Part 7 deals with internal control measures and record keeping: - AML/CFT programme audit; and record keeping. Part 8 covers other high risk activities: - new technology and non face-to-face transaction; offshore operations; risk classification of policy holders; complex and unusual large transactions; and payment under life insurance. Part 9 deals with sanctions. Part 10 covers miscellaneous: - interpretation; revocation; and citation.

a) Rationale, application and general requirements

The rationale behind the National Insurance Commission (NAICOM) (Anti-Money Laundering and Countering the Financing of Terrorism) Regulations, 2013 is to regulate and ensure that the insurance industry complies with subsisting Anti-Money Laundering and Countering the Financing of Terrorism Legislations in Nigeria.

[23] No. 62 of 9th September, 2013: - Official Gazette of the Federal Republic of Nigeria, Vol. 100.

In terms of application, Regulation 2 provides that these Regulations shall apply to all insurance institutions in Nigeria including their agents and insurance brokers, and to all insurance transactions.

Setting out the general requirements for compliance by all insurance businesses, Regulation 3 provides that all insurance businesses shall comply with the requirements of the Insurance Act, 2003, National Insurance Commission Act, 2004, Money Laundering (Prohibition) Act, 2011 (as amended), Terrorism (Prevention) Act, 2011 (as amended) and Terrorism Prevention (Freezing of International Terrorists Funds and other Related Measures) Regulations 2013, including successor laws and Regulations. 2 – The obligation to establish AML and CFT (AML/CFT) programme shall apply to all insurance institutions and an insurance company shall in addition integrate its agents and insurance brokers into its AML/CFT framework in order to ensure and monitor compliance with the programme. 3 – An insurance institution shall comply with requests made pursuant to AML/CFT subsisting legislations and provide information to the Nigerian Financial Intelligence Unit ("NFIU") and relevant law enforcement agencies. 4 – A procedure for responding to authorized requests for information in respect of money laundering and terrorist financing shall meet the following minimum requirements – (a) development of an electronic data base for all records retention and preservation; (b) prompt search of records to determine whether it has issued any policy or has engaged in any transaction with any individual, entity or organization named in the request; (c) prompt report of the outcome of the search under paragraph (a) of this sub-regulation, to the requesting authority; (d) ensure the protection of the security and confidentiality of a request; and (e) send a copy o the report to the National Insurance Commission (Commission). 5 – An insurance institution shall not in any way inhibit the implementation of the requirements in these Regulations. 6 – An insurance institution shall direct its employees in writing to always co-operate fully with these Regulations and with law enforcement agents. 7 – An insurance institution shall – (a) make it possible for employees to report any violation of the institution's AML/CFT compliance programme to the AML/CFT Compliance Officer or Money Laundering Reporting Officer; (b) where the violation involves the Compliance Officer or Money Laundering Reporting Officer, ensure that employees report such violation to a designated higher authority, the Commission or the NFIU; and (c) ensure that it informs its employees in writing to make the report of a violation confidential and that they shall be protected from victimization for making such report. 8 – An insurance institution shall – (a) render quarterly returns on its level of compliance to the Commission and the NFIU; (b) identify, review and record other areas of potential money laundering and terrorist financing risks which may not have been specifically mentioned in these Regulations and report same to the

Commission, monthly; and (c) guide against any act of structuring in order to avoid filing of mandatory reports required by AML/CFT subsisting legislations. 9 – An insurance institution shall not charge or receive premiums in excess of the actual premium on an insurance policy that may result in refunding the excess amount paid or with the intent of returning the excess to the insured or interested party thereafter. 10 – The AML/CFT Chief Compliance Officer shall designate a sanction desk officer to always confirm or ascertain whether the name of a person or entity that wants to undertake business relationship with the insurance institution is on a sanction list issued by the appropriate authority as required by the Terrorism Prevention (Freezing of International Terrorist Funds and Other Related Measures) Regulations, 2013 and such list shall be used to monitor an already established business relationship with any person or entity on an ongoing basis. 11 – An insurance institution shall report to the Commission any action taken in compliance with the prohibition requirements of the relevant United Nations Security Council Resolutions (UNSCRs) on terrorism, terrorism financing, proliferation of weapon of mass destruction and the provisions of the Terrorism Prevention (freezing of International Terrorist Funds and Other Related Measures) Regulations, 2013. 12 – All insurance institutions shall have regard to the requirements of the Terrorism (Prevention Act), 2011 (as amended) in undertaking any transaction with persons or entities and shall not solicit, acquire, provide, collect, receive, possess or make available funds, property or other services by any means to terrorists or terrorists organizations, directly or indirectly with the intention or knowledge or having reasonable grounds to believe that such funds or property will be used in full or in part to carry out terrorist acts by the terrorist or terrorist organization.

b) Institutional policy framework on proceeds of crime and sanctions

The Regulations provide that an insurance institution shall in the course of its transactions identify and report to NFIU, any suspected proceeds of crime derived from the following – (a) participation in an organized criminal group and racketeering; (b) terrorism and terrorist financing; (c) trafficking in persons and migrant smuggling; (d) sexual exploitation, including sexual exploitation of children; (e) illicit trafficking in narcotic drugs and psychotropic substances; (f) illicit arms trafficking; (g) illicit trafficking in stolen and other goods; (h) corruption and bribery; (i) fraud; (j) currency counterfeiting; (k) counterfeiting and piracy of products; (l) environmental crimes; (m) murder and causing grievous bodily injury; (n) kidnapping and hostage taking; (o) robbery or theft; (p) smuggling, including one done in relation to customs and excise duties and taxes; (q) extortion; (r) forgery; (s) piracy; (t) tax crimes, in respect of direct and indirect taxes; (u) insider trading and market manipulation; and (v) any other criminal act specific in any subsisting AML/CFT legislation or any other law in Nigeria. 5 – An insurance institution shall have an AML/CFT programme

designed and implemented on a risk based approach and such programme shall include – (a) internal policies, procedures and controls, based on the insurance institution's assessment of the money laundering (ML) and financing of terrorism (FT) risks associated with tits business, and designed to reasonably anticipate and prevent money laundering and terrorism financing; (b) customer due diligence (CDD); (c) appointment of a chief Compliance Officer (CO) or Money Laundering Reporting Officer (MLRO) at the management level; (d) suspicious transaction report (STR) and currency transactions report (CTR); (e) on-going or regular training for its employees and agents; (f) record keeping; and (g) independent audit of the AML/CFT programme.

Regulation 28 deals with sanctioning strategies ranging from fine to suspension or withdrawal of licence and appropriate disciplinary action. 1 – Subject to the provisions of the Insurance Act, 2003 and subsisting AML/CFT legislations, contravention of any of the provisions of these Regulations by an insurance institution shall attract a fine of not less than One Million Naira (N1,000,000.00) and an additional fine of Ten Thousand Naira (N10,000.00) for everyday the offence subsists, and in addition, may include suspension or withdrawal of its operating licence. 2 – Where a person being a director, senior management,, manager or other employee of an insurance institution, either acting alone or in partnership with others, contravenes the provisions of these Regulations under any circumstance he shall be subjected to any or all of the following sanctions – (a) have his appointment terminated on the direction of the Commission and be blacklisted from working in the insurance industry; (b) have the name of the officer penalized reflected in the institution's financial statements and published in the newspapers; and (c) report the defaulting officer to the Financial Reporting Council (FRC) and the professional body he/she belongs to, for appropriate disciplinary action. 3 – In addition to sanctions in sub-regulations (1) and (2) of this regulation, particulars of a defaulting insurance institution or individual shall be forwarded to the relevant anti-graft authorities such as the Economic and Financial Crimes Commission (EFCC), Nigeria Police Force (NPF), Independent Corrupt Practices and other Related Crimes Commission (ICPC), among others for possible criminal investigation and prosecution. 4 – A person who tips off a customer or discloses issues that are the subject matter of an ongoing investigation or regulatory sanction commits an offence and shall on conviction be punished in accordance with the relevant provisions of the Money Laundering (Prohibition) Act, 2011 (as amended).

1.6. Securities And Exchange Commission (Capital Market Operators Anti-Money Laundering And Combating The Financing Of Terrorism) Regulations, 2013.[24]

In the exercise of the powers conferred on it Section 13(n), (aa) and (dd), and section 313 of the investments and Securities Act, 2007 and all other powers enabling it in that behalf, the Securities and Exchange Commission (SEC), made, on 29th August 2013, the following Regulations.

In terms of structure and contents, the 96 Regulations are divided into eleven parts. Part 1 deals with the objectives; applications and scope. Part 2 covers AML/CFT institution policy framework: - general guidelines on institutional policy; duties of an AML/CFT compliance officer; co-operation with relevant authorities; identification of proceeds of crime; secrecy and confidentiality laws; and anonymous and numbered accounts. Part 3 deals with customer due diligence: - customer due diligence measures; correspondent relationships with high risk foreign banks; on-going due diligence; application of enhanced customer due diligence (ECDD) for higher risk clients; lower risk categories of clients; timing of verification; application of CDD to existing clients; determination of a politically exposed person; measures to prevent the misuse of new technologies and non face-to-face transactions; reliance on intermediaries and third parties on CDD measures; keeping and maintenance of records of transactions; and complex and unusual large transactions. Part 4 covers internal controls, compliance and audit: - internal procedures, policies and controls. Part 5 deals with monitoring and reporting of suspicious transaction: - suspicious transaction "Red Flags"; and business relationships with persons from countries which do not apply the FATF recommendations. Part 6 covers employee education and training programme: - comprehensive employee education and training programmes; monitoring of employee conduct; protection of staff who report violations; additional areas of AML/CFT risk; additional procedures and mitigants; testing for the adequacy of the AML/CFT compliance programme; and board approval of the AML/CFT compliance manual. Part 7 deals with know your customer and identification procedures: - guidance on know your customer; duty to obtain identification evidence; identification procedure; verification of identification requirements; cancellation and cooling-off rights, redemptions and surrenders; new business transaction by an existing client; certification of identification documents; recording identification evidence; concession in respect of payment made by post; and investment funds. Part 8 covers establishing identity: - establishing of identity under these regulations; general information; private individuals resident in Nigeria; physical checks on private individuals resident in Nigeria; electronic checks; private individuals not resident in Nigeria; information to establish identity; identification guidance for institutions; other types of operators; retirement benefit of operators; retirement benefit programmes; mutual or friendly, cooperative and provident societies; charities, clubs and associations; trusts and foundations; professional intermediaries; false identifies and impersonations; refugees and asylum seeker; identification procedures for opening

[24] No. 63 of 2nd September, 2013: - Official Gazette of the Federal Republic of Nigeria, Vol. 100.

accounts for students or young person; establishing the identity of trust, nominees and fiduciaries; offshore trusts; conventional family and absolute Nigerian trusts; receipt and payment of funds on behalf of a trust; power of Attorney and third party mandates; executorships accounts; unincorporated business or partnerships; verification of legal existence of a corporate client; non fact-to-face business; low risk corporate business; private and public unquoted companies; high risk business relating to private or public unquoted companies; foreign capital market operator; charities in Nigeria; registered charities; clubs and societies; occupational pension schemes; religious organizations (ROs); three-tiers of government and parastatals; and foreign consulates. Part 9 deals with intermediaries or other third parties to verify identity or to introduce business: - introductions from authorized financial intermediaries; written applications; non-written application; introductions from foreign intermediaries; corporate group introductions; business conducted by agents; correspondent relationship; and acquisition of a capital market business by another. Part tem covers receiving capital market operators and agents: - vulnerability of receiving bankers and agents to money laundering; who to identify; applications received via brokers; multiple family applications; linked transactions; and exemption from identification procedures. Part 11 deals with miscellaneous: - sanctions for non-compliance with the provisions of these regulations; revocation; interpretation; and citation.

a) Rationale, application, general guidelines on institutional policy, duties, cooperation, identification of proceeds of crimes, secrecy and confidentiality laws

The rationale behind these Regulations is first, to provide protection to the capital market against fraud, reputational and other financial market risks faced by the Capital Market; second, to protect the integrity of the security market against all forms of abuse, fraudulent and unfair trade practices, money laundering, proceeds of crime and financing of terrorism; and third, guide the capital market operators in the implementation of Know Your Customer (KTC) and Customer Due Diligence (CDD) requirements for the capital market.

The 96 Regulations are meant to apply to the activities of money laundering and financing of terrorism in the Nigerian capital market operations and related matters.

Regulations 3 provides for the following general guidelines on institutional policy. That a Capital market Operator shall: - (a) adopt polices stating its commitment to comply with Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) obligations under the law and regulatory directives to actively prevent any transaction that facilitates criminal activities; (b) formulate and implement internal controls and other procedures that will deter criminals from using its facilities for money laundering and terrorist financing and to ensure that its obligations under subsisting laws and Regulations are met; (c) designate AML/CFT

Chief Compliance Officer at the management level, with the relevant competence, authority and independence to implement the institution's AML/CFT compliance programme; and (d) comply with the requirements of the Money Laundering (Prohibition) Act, 2011 (as amended), Terrorism (Prevention) Act, 2011 (as amended) and Terrorism Prevention (Freezing of International Terrorists Funds and other Related Measures) regulations 2013, including related laws and Regulations.

The duties of an AML/CFT Compliance Officer include: - (a) developing an AML/CFT Compliance Progamme; (b) rendering returns on mandatory disclosure and suspicious transactions reports to the Nigerian Financial Intelligence Unit (NFIU); (c) rendering returns n Foreign Exchange Transactions reports to the Securities and Exchange Commission (SEC) and the NFIU; (d) receiving and vetting suspicious transaction reports from staff; (e) rendering "nil" reports to the NFIU and the SEC, where necessary to ensure compliance; (f) ensuring that the Capital Market Operator's compliance programme is duly implemented; (g) coordinating the training of staff in AML/CFT awareness, detection methods and reporting requirements; (h) servicing as liaison officer to both the SEC and NFIU; and (i) servicing as a point of contact for all employees on issues relting to money laundering and terrorist financing.

In terms of cooperation with relevant authorities, Regulation 5 provides that, Capital Market Operator shall comply promptly with all the requests made pursuant to subsisting laws and regulations and shall provide relevant information to the SEC, NFIU and other relevant law enforcement agencies on AML/CFT matters. 2- Where there is a request for information on money laundering and terrorist financing, a Capital Market Operator shall – (a) search immediately and without delay but not later than 24 hours the institution's records and electronic data-base to determine whether it maintains or has maintained any account for or has engaged in any transaction with any individual, entity or organization named in the request; (b) report promptly to the NFIU the outcome of the search; and (c) protect the security and confidentiality of such requests.

Identification of proceeds of crime is mandatory under Regulations 6. It provides that a Capital Market Operator shall in the course of its business identify and report to the NFIU, any suspicious transactions derived from the following criminal activities – (a) participation in an organized crime groups and racketeering; (b) terrorism and terrorist financing; (c) trafficking in human beings and migrant smuggling; (d) sexual exploitation, including sexual exploitation of children; (e) illicit trafficking in narcotic drugs and psychotropic substances; (f) illicit arms trafficking; (g) illicit trafficking in stolen and other goods; (h) corruption and bribery; (i) fraud; (j) Counterfeiting currency; (k) counterfeiting and piracy of products; (l) environmental crime; (m) murder, grievous bodily injury; (n) kidnapping, illegal restraint and hostage taking; (o) robbery or theft; (p) smuggling;

(q) extorting; (r) forgery; (s) piracy; (t) insider trading and market manipulation; and (u) any other criminal act specified in the Money Laundering (Prohibition) Act, 2011 (as amended), Terrorism (Prevention) Act, 2011 (as amended) or any other law.

On waiver of financial sector secrecy and confidentiality laws, Regulation 7 emphasises, that a Capital Market Operator's secrecy and confidentiality laws shall not inhibit the implementation of the requirements of these Regulations in view of the provisions in the Economic and Financial Crimes Commission Act; Money Laundering (Prohibition) Act, 2011 (as amended), Terrorism (Prevention) Act, 2011 (as amended) and other relevant subsisting laws and Regulations and in giving the relevant authorities, either domestically or internationally, power to access information to properly perform their functions in combating money laundering and financing of terrorism.

Further, Regulation 8 is to the effect that a Capital Market Operator shall not keep anonymous accounts in fictitious names; and where nominee accounts are maintained, details of the beneficial owners shall be provided on request.

b) Sanctions for non-compliance

The sanctioning regime under Regulation 93 ranges from imposition of fine to licence suspension and termination of employment. That failure to comply with the provisions of these Regulations shall attract appropriate sanctions in accordance with the provisions of the Money Laundering (Prohibition) Act, 2011 (as amended) and the Terrorism (Prevention) Act, 2011 (as amended). 2 – A Capital Market Operator who fails to comply with the provisions of these Regulations or contravenes the provisions of these Regulations may be subjected to administrative sanctions by the SEC, NFIU and any other relevant authority. 3 – A Capital Market Operator or its officer that contravenes the provisions of these Regulations shall be subject to applicable sanctions by the SEC as follows – (a) imposition of a penalty not exceeding N500,00 from the first to the fifth instances on each offence; and (b) in addition, suspension of the license issued to the Capital Market Operator for failure to comply with these Regulations. 4 – Any individual, being an official of a Capital Market Operator, who fails to take steps to ensure compliance with the provisions of these Regulations, shall be sanctioned accordingly. 5 – Any person being a director, senior management, manger or employee of a Capital Market Operator, either acting alone or in partnership with others, who contravenes the provisions of these Regulations under any circumstances shall be subject to any or all of the following sanctions – (a) on the first two infractions, be warned in writing by the Capital Market Operator and reported to SEC; (b) on the third infraction, the operator may consider terminating then employee's appointment; and (c) in each instance, the names of the officers penalized, the nature of the offence and the

sanction imposed shall be reported to the SEC. 6 – For purpose of emphasis, incidence of false declaration or false disclosure by the Capital Market Operator or its officers shall be subject to administrative review and appropriate sanctions meted out subject to the provisions of these Regulations.

1.7. Role Of The Nigerian Financial Intelligence Unit (Nfiu) In Combating Money Laundering And Terrorism Financing In Nigeria[25]

The rationale behind the establishment of the Nigerian Financial intelligence Unit (NFIU) is to safeguard the Nigerian Financial system and contribute to the global fight against money laundering, terrorism financing and related crimes through the provision of credible financial intelligence.

Considering that there are different FIU models, Recommendation 29 of the Financial Action Task Force (FATF) does not prejudge a country's choice for a particular model and applies equally to all of them. The Recommendation however emphasizes that countries should establish an FIU with responsibility for acting as a national centre for receipt and analysis of suspicious transaction reports and other information relevant to money laundering, associated predicate offences and terrorist financing; and for the dissemination of the results of that analysis.[26] Further, the FIU should be operationally independent and autonomous in carrying out its core and distinct functions and be free from any undue political, government or industry influence or interference, which might compromise its operational independence.

Accordingly, the NFIU is the Nigerian arm of the global financial intelligence Units (FIUs) domiciled within the EFCC as an autonomous unit and operating in the African Region. The NFIU seeks to comply with international standards on combating Money Laundering and Financing of Terrorism and proliferation.

The establishment of the NFIU is based on the requirements of Recommendation 29 of the Financial Action Task Force (FATF)[27] Standards and Article 14 of United Nations Convention Against Corruption (UNCAC). The NFIU was admitted into the Egmont

[25] www.nfiu.gov.ng.

[26] This should include information from open or public sources, as well as relevant information collected and/or maintained by or on behalf of other authorities and, where appropriate commercially held data.

[27] FATF is the International Standard Setter on combating money laundering and the financing of terrorism & proliferation of weapons of mass destruction. Recommendation 29 requires that Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis.

Group of FIUs in 2007[28]. The Egmont Group is the global body responsible for setting standards on best practices for FIUs and is made up of more than 131 FIUs from 131 jurisdictions. It was founded in 1995 to foster international collaboration in the exchange of intelligence by member states. It also supports and influences the work of FATF as it relates to the mandate of FIUs under FATF Recommendations 29 and 40. The NFIU, as a member of Egmont Group has reached out to other African FIUs by sponsoring and mentoring them to join the Egmont Group.[29]

In response to the FATF recommendation and in fulfillment of the UNCAC requirements, the NFIU was formally established in 2004 and became fully operational in 2005. The Unit has since then sought to develop standards and procedures for the receipt, analysis and dissemination of financial intelligence to law enforcement agencies, perform onsite and off-site examination of financial institutions, enhance compliance with the legal and regulatory regimes on Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) in Nigeria as well as respond to the global trends by collaborating with other FIUs worldwide..

Powers/Mandate: - The NFIU largely draws its powers from the Money Laundering (Prohibition) Act 2011 as amended in 2012 and the Economic & Financial Crimes Commission (EFCC) establishment Act, 2004. The core mandate of every FIU as required by international standard is to serve as the **"national center for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of the analysis to law enforcement and anti-corruption agencies.[30]**

Other Functions of the NFIU: - The NFIU has the responsibility to: Receive currency transactions reports, suspicious transactions reports; currency declaration reports and other information relating to money laundering and terrorist financing activities from financial institutions and designated non-financial institutions (DNFIs)[31]; Receive reports on cross-border movement of currency and monetary instruments; Maintain a comprehensive financial intelligence database for information collection, analysis and exchange with counterpart FIUs in the jurisdiction and law enforcement agencies in Nigeria; Advise the government and regulatory authorities on prevention and combating of

[28] National centre for the collection, analysis and dissemination of information regarding potential money laundering.

[29] See also Egmont interpretation of FIU in Egmont Charter and statement of principles.

[30] For detailed list of financial institutions required to submit reports to the NFIU, see Section 25 of the Money Laundering Prohibition (MLP) Act, 2011 as amended in 2012.

[31] The FATF interpretation section refers DNFIs as designated Non-Financial Businesses and Professions (DNFBPs). A comprehensive list can be found in Section 25 of the MLP Act, 2011. The Federal Ministry of Commerce responsible for coordinating the DNFIs has further issued a Regulation to expand the list of DNFIs.

economic and financial crimes; Provide information relating to the commission of an offence by entities and subjects linked to another jurisdiction to foreign financial intelligence unit based on the membership of Egmont Group or on the basis of bilateral cooperation; Promote public awareness and understanding of matters relating to economic and financial crimes, money laundering & financing of terrorist activities; Liaise with compliance officers and ensure strong compliance culture by reporting entities.

The NFIU Reporting Requirement: - The NFIU, as part of its regulatory mandates, works closely with all the core regulators of financial, other-financial institutions and designated non- financial businesses and professions, namely Central Bank of Nigeria (CBN), National Insurance Commission (NAICOM), Securities & Exchange Commission (SEC), Special Control Unit against Money Laundering (SCUML), particularly in the receipt of the following reports:

i. Report of international transfer of funds and securities exceeding US$10,000.00 or naira equivalent as required by Section 2 (1) of the MLP.

ii. Suspicious Transaction Reports (STRs) related to potential money laundering activities from reporting entities.

iii. The STRs mentioned under Section 6 (2) of the MLPA 2011 shall be reported exclusively to the NFIU to aid intelligence gathering and in line with Financial Action Task Force (FATF) 2012 Recommendations 20 and 29.

iv. Declaration reports of more than 10,000 USD or its equivalent made to the Nigerian Customs pursuant to the Foreign Exchange Act, 1995 and Section 2 (3) of the MLP Act, 2011 as amended.

v. Currency Transaction Reports (CTRs) that should be submitted directly to the NFIU from the reporting entities as provided in Section 10 of the MLP Act 2011 as amended.

vi. Application of freezing measures under Section 6 (5) (b) of the MLP Act 2011 as amended.

vii. Mandatory Disclosures by financial institutions and any other individual (voluntarily) – related to single transaction, lodgment or transfer of funds in excess of N5, 000,000 or N1, 000,000 by an individual and N10, 000,000 or N5, 000,000 by a corporate entity as provided Section 10 (1) and (2), MLP Act.

viii. Determine the flow of transactions and the beneficiaries for individual and corporate accounts as provided by Section 14 MLP Act, 2011 as amended.

ix. Receive STRs on transactions that may relate to Terrorism or terrorist financing from reporting entities as provided under Section 14 of the Prevention of Terrorism Act

2011 as amended in 2013; The financial institutions shall also have regard to the Regulation on the freezing of terrorist assets issued in 2012 by the Attorney General of the Federation and United Nations Security Council Resolutions as issued from time to time.

x. Other statutory reports mandated by the regulators in their AML/CFT Regulations must also be complied with and the reports filed with the NFIU and the regulators.

List of Reporting Institutions: - Section 25 of the MLP Act 2011 as amended in 2012 defines the reporting institutions to include but not limited to[32]:

Financial Institutions: - Commercial Banks; Primary Mortgage Institutions; Micro Finance Banks; Finance Companies; Discount Houses; Bureau de change (BDCs); Development financial institutions (NEXIM, Agric, Rural and Urban development banks, FMBN etc); Money Service Businesses and Transmitters.

Capital and Stock Market Operators: - Stock brokers; Issuing houses; Registrars; Trust Fund and Assets Managers; Investment and Portfolio Managers.

Insurance Sector: - Insurance companies; Reinsurance Companies; Insurance Brokers.

Designated Non-Financial Businesses and Professions (DNFBPs)[33]: - Non-Governmental Organizations (NGOs); Estate surveyors and Valuers; Dealers in Precious Stones and Metals; Trust and Company Service Providers; Casinos, Pool Betting and Lottery; Dealers in jewelry, cars and luxury goods; Chartered/professional accountants and Audit firms; Tax Consultants; Legal practitioners; supermarkets; Hotels and Hospitality Industries; and Casinos.

1.8. Conclusion

In spite of the elaborate legal and regulatory frameworks in Combating Money Laundering and Financing of Terrorism in Nigeria, little can be said to have been achieved. Statistics has shown that very few politically exposed persons have so far been tried because such trials were stalled by mirage of preliminary objections which run up to the highest court of the land. In both the cases of *Okeke v. Federal Republic of Nigeria*[34] and *Alamieyesgha v. Federal Republic of Nigeria* (supra), the Court of Appeal emphasized the need for a quick

[32] See Section 25 of the MLP Act 2011 as amended for detailed list.

[33] Note that in January 2005, the Federal Ministry of Commerce (Now Fed Min of Trade & Investment)/ Special Control Unit Against Money Laundering (SCUML) has expanded the scope of DNFBPs to include Dealers in Precious Metals & Stones, Trust & Company Service Providers, Estate Surveyors & Valuers, Pool Betting, Lottery and Non-Governmental Organizations (NGOs). The law has also defined DNFBPs to mean Designated Non-Financial Institutions (DNFIs).

[34] (2009) 9 NWLR (Prt 1145) 94

dispensation of justice in the sense that it is the duty of all parties as well as the Court to ensure that the proceedings in a case and its determination are not unnecessarily delayed.

This is in consonance with the provision of Section 40 of the Economic and Financial Crimes Commission Act where it provides: -

> Subject to the provisions of the Constitution of the Federal Republic of Nigeria 1999, an application for stay of proceedings in respect of any criminal matter brought by the Commission before the High Court shall not be entertained until judgement is delivered by the High Court.

It is also suggested that all parties involved in the administration of criminal justice shall collaborate to ensure that criminal cases particularly Anti-Money Laundering and Combating of Financing of Terrorism are properly investigated, prosecuted and tried with minimum delay.

It is evident from the above analysis of the initial good efforts and the renewed approached in combating terrorism financing and money laundering activities that the issue of economic and financial crimes in Nigeria is so widespread and deep-rooted that it cannot be fought by legislation alone. The moral tone of the society must also be raised buy all and sundry. Moe serious efforts should be made to remove socio-economic injustices, imbalances and inequities in the society, alleviate the suffering of the people, provide job opportunities and the right atmosphere for genuine business and investment to thrive. A re-orientation in our sense of values is very necessary starting from the highest echelons of society downwards.

Undoubtedly, the promulgation of the new Money Laundering Act 2011 and the new Terrorism (Prevention) Act, 2011 as amended in 2013 and the EFCC Act 2004 and spirited implementation of their provisions will introduce a more effective and radical change in the fight against terrorism financing and money laundering activities in Nigeria.

In all, the 2011-12, Money Laundering and 2011-13 Terrorism (Prevention) Acts and their Sectoral Regulations for the Banking, Insurance and Capital Market sectors of the economy are welcome and necessary improvements on the 2004 and 2011 legal mandates and powers of the institutional regimes in combating money laundering and terrorism financing in Nigeria and such development conduces to the healthy growth of the economy.

CHALLENGES IN TAXATION OF COMPANIES IN NIGERIA*

1.1 Introduction

Nigeria has depended largely on crude oil as major state revenue since its discovery in Oloibiri in 1956. The exhaustible nature of this resource, environmental abuses that go with its exploitation resulting in restiveness in the Niger Delta region and the shocks to the economy by unpredictable fluctuations in global oil market have collectively brought to the fore the dangers in continued over dependence on oil revenue. This reality has awakened the need for an enduring revenue sources to fund government programmes and policies. It is desired that non-oil revenue will eventually account for a substantial portion of the country's total revenue. Taxation as a viable alternative now occupies the front burner in national debates.

On the international arena, there is cause for concern. The USA is the largest importer of Nigeria's oil[1]. The country has discovered large deposit of crude oil in some of her States and may soon join the league of exporters of refined petroleum and possibly rival Saudi Arabia and Russia, the two largest oil producers in the world. This portends a major impending loss of market for Nigeria's oil justifying a serious consideration of alternative revenue sources[2].

Taxation is one of the avenues by which governments worldwide realize revenue to fund critical expenditures such as defense, law and order, health services, education, social welfare and economic infrastructure. Taxation from time immemorial has been deployed by government as fiscal weapon to plan and direct the economy to bring about economic growth and development. It has also served the useful egalitarian purpose as instrument for social equalization. It is the goal of every tax system that taxes are yielded voluntarily or compelled at very minimal compliance cost. Taxation occupies a strategic position in the economy of Nigeria. It is a primary source of revenue for the state. The Federal Government of Nigeria realized N2.2 trillion in the year 2009, N2.8 trillion in 2010[4], N4.62 trillion in 2011 and N5.0 trillion in 2012[5]. In the first eight months of 2011 alone the sum of N434.3 billion was collected from companies' income tax representing about 25% of the total revenue generated from taxation for that period.

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[1] FIRS Staff News Bulletin(2012) December, Volume 2, P.2.

[2] Monye S., "Economic Renaissance in Nigeria; A non-oil Approach", Paper presented at the 9th All Nigerian Editors Conference held on the 22/08/2013 at Asaba, Delta State. See also Vanguard Newspaper,8/09/2013,p.2.

[4] Aganga,O,Federal Government Made N2.8tn from taxes in 2010 reported by Onuba I, www.nigerianbestforum.com accessed on 8/04/2011.

[5] Okonja,O, Premium Times,Nigeria generated N5.tn tax revenue in 2012.www.premiumtimesng.com/busimess/11 accessed on 13/08/2013

The evolution of the company is about the greatest contribution by men of commerce, lawyers and judges to our industrial and commercial world. The corporate form has opened the vista to perpetuate creativity provided the basic framework for undertaking industrial and commercial enterprise on a vast scale nationally and across borders[6]. Functionally, companies are employers of labour, provider of goods and services and the subject of every conceivable right and obligation. They are special investment vehicles and the chauffeur of foreign direct investment and foreign portfolio investments. Also as a citizen, it is under a legal obligation to discharge its civic duty of payment of tax. Properly harnessed from its limitless scope of activities, tax receipts from companies is a veritable source of national wealth.

This paper examines some of the challenging issues in taxation of companies in Nigeria. Essentially expository, the discussion advances recommendations to make corporate tax assessment and collection in Nigeria more robust. The long term objective is to make corporate taxation in Nigeria more efficient and internationally competitive.

1.2. Conceptual Clarification.

Tax is a compulsory contribution under the authority of a legislation or directive of constituted authority for public purposes[7]. In its nature, tax is compulsory. It is not levied in return for any particular service unlike other sources of government revenue like fees and rates. Payment of tax entails the public appropriation of private assets against the innate human inclination for self preservation of property. This thinking is sometimes stretched far when tax collection is viewed as a foe to be outfoxed by foul or fair means. This attitude carried far translates to tax evasion and avoidance. It is the delicate balance of the right to assets preservation and the civic duty to 'render unto Caesar the things that are Caesars' (pay tax) that is represented by the provisions of section 47(2) of the 1999 constitution. While the Constitution proclaims the right to assets preservation, moveable and immoveable, this obligation stops short when the citizen is obliged to pay tax. Simply put, payment of tax is constitutionally charged. It is the duty of every citizen to declare his income honestly to appropriate and lawful agencies and pay his tax promptly[8].

Taxation is a broad social science discipline. It is equally as important in law as it is in economics and accounting. It is a field for legal practitioners, actuarial scientists and the

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[6] According to Loss "… *the corporate form has proven to be one of the most flexible and adaptable economic tool ever devised…[the corporate form] has been unique as an institution in its ability over time, to perpetuate creativity and managerial efficiency in an environment which during the last 100 years of the corporations rise to economic predominance, has undergone unprecedented technological and social changes…"* Loss,L.,Trends in Corporate Governance and Investors Protection(1981) Lagos,University of Lagos Press,JIC Taylor Memorial Lectures Series

[7] Mathew v. Chicory Marketing Board(1938)6CLR 263,270: United States v. Butler 2279,US 1 936,961.

[8] 1999 Constitution. Section 24(f)

economists. Thus a robust approach to issues of taxation must proceed from this broad perspective.

Because of its expropriatory nature, tax laws are construed strictly. There is no room for intendment, there is no equity about tax, no presumption at all and nothing is to be read in and nothing to be implied[9]. A good tax system must exhibit certain features. It must maintain neutrality across board as far as economic activities are concern. The deployment of tax revenue for growth must be visible to justify assessment and collection. The tax system must be fair, simple and convenient for stakeholders. Administrative efficiency is the hall mark of any progressive and efficient tax system.

Nigeria is a federation of 36 states and 774 Local Government Areas. In line with the structure, the state maintains fiscal federalism with delineated spheres where the federal, states and local government councils can assess, collect, and account for tax in their domains. To lighten the burden of ascertaining the exact scope the Taxes and Other Levies (Approved List for Collection) Act, 2004, provides the list of taxes that can be collected by the various tiers of government.

1.3. Taxation Of Companies In Nigeria.

The Companies Income Tax Ordinance[10] of 1939 introduced companies' income tax for the first time in Nigeria. In 1940, the Income Tax Ordinance[11] was enacted for taxation of companies and individuals. This framework for taxation of individuals and companies continued until 1961 when the Companies Income Tax Act[12] was enacted. This law remained in force until 1979 when the Companies Income Tax Act[13], 1979 came into force. With the revision of laws in Nigeria between 1987-1990, the Companies Income Tax Act[14], 1990 was passed into law. This law was integrated into the Laws of the Federation of Nigeria, 2004 as the Companies Income Tax Act, CAP C21 (CITA). This substantially remains the law although added to by the Companies Income Tax Amendment Act[15], 2007. The body of corporate tax principles in Nigeria is largely derived from legislations, judicial pronouncements, budget speeches[16], committees report and international treaties[17].

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[9] Halliburton W/Africa v. FBIR (2006) 7CLRN,138,158: Ahmadu v. Governor of Kogi State (2002) 3 NWLR,502,522.

[10] No. 14,1939.

[11] No.3,1940

[12] No.22,1960

[13] No.28,1979.

[14] CAP 60,1990.

[15] No.11, 2007.

[16] For instance, in the 1975 budget speech by the then Head of State, General Yakubu Gowon the rate of company income tax was reduced from 45% to 40%. In addition the first N600 of any company's profit was exempted from tax to encourage small business. However in the 1977 budget speech of General Olusegun Obasanjo, it was increased to 45% on profits of companies in excess of N6000. In the same speech, the

Directly, the Companies Income Tax Act, 2004 as amended; Petroleum Profit Tax Act, 2004; Capital Gains Tax Act 2004; Value Added Tax Act, 2004 and the Stamp Duty Act 2004, Education Tax Act, 2004, Taxes and Levies (Approved List For collection) Act, 2004[18], the Federal Inland Revenue Service (Establishment) Act, 2007[19] provide the regime for tax payable by companies in Nigeria. The Federal Inland Revenue service is charged with control and administration of these laws.

According to section 9 CITA tax for each year of assessment shall be payable upon the profits of any company accruing in, derived from, brought into or received in Nigeria in respect of-

(a) any trade or business for whatever period of time such trade or business may have been carried on;

(b) rent or any premium arising from a right granted to any person for the use or occupation of any property and where any payment on account of such a rent as is mentioned in this paragraph is made before the expiration of the period to which it relates and is included for the purposes of this paragraph in the profits of a company, then, so much of the payment as relates to any period beginning with the date on which the payment is made shall be treated for these purposes as accruing to the company proportionately from day to day over the last mentioned period or over the five years beginning with that date, whichever is the shorter;

(c) dividends, interests, royalties, discounts, charges or annuities[20];

(d) any source of annual profits or gains not falling within the preceding categories;

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maximum period for which unabsorbed losses could be carried forward was pegged at four years. Decree No.47 of 1972 allowed companies to claim such losses incurred in the preceding year of assessment but did not specify the limit as to the number of years such loses could be carried forward. Also the use of tax clearance certificates were introduced and reflected in the Capital Gains Tax Decree making their presentations obligatory before the Commissioner of Stamp duties could accept document for stamping and registration. Since its introduction, the production of the tax clearance certificate has become a major requirement of our tax system-See section 101 of the Companies Income Tax Amendment Act, 2007.

[17] A country that is desirous of attracting foreign investments seeks to remove restrictions and disincentives to business. One major policy instrument is the use of avoidance of double taxation agreements, refered to as double taxation agreements. They are reciprocal agreements whereby two countries agree not to tax the income of individuals or companies brought or received into their countries if such income had already been taxed in the other country. They are tools which fosterand encourage international trade and commerce as they are geared towards reducing the cost of doing business across borders. Between 1987 and 2000,Nigeria signed comprehensive DTA with United Kingdom,France, the Netherlands,Belgium,Canada,Pakistan,Romania,South Africa and China.

[18] NLNG v. FBIR (2011)5 TLRN 98;

[19] On the superiority of FIRS Act pursuant to section 68(1)-See Oando Supply Trading Ltd v. FIRS (2011) 4 TLRN 113.

[20] See Act No. 3,1993.

(e) any amount deemed to be income or profit under a profit under a provision of this Act or, with respect to any benefit arising from a pension or provident fund, of the personal income Tax Act;

(f) fees, dues and allowances(which ever paid) for services rendered;

(g) *any amount of profits or gains arising from acquisition and disposal of short-term money instruments like Federal Government securities, treasury bills, treasury or savings certificates, debenture certificates or treasury bills, treasury or savings certificates, debenture certificates or treasury bonds.*

According to section 40(1) there shall be levied and paid for each year of assessment in respect of the total profits of every company, after deducting all expenses wholly, exclusively, necessarily, and reasonably incurred in the production of the profit, tax at the rate of thirty kobo for every naira. This effectively translates into thirty percent of the net profit of a company for a period in question. Where a company has not made profit in any year of assessment, it is nonetheless obliged to pay tax[21]. According to section 33, CITA where in any year of assessment, the ascertainment of total assessable profits from all sources of a company results in a loss or where a company's ascertained total profits results in no tax payable or where the tax payable is less than the minimum tax, there shall be levied and paid by the company the minimum tax as computed by the Act. The rationale for the minimum tax is to ensure that Government receives a fair share of return from companies.

In the case of companies engaged in petroleum operations, the assessable tax for any accounting period shall be an amount equal to 85% of its chargeable profits of that period after the allowable deductions[22]. In the case of the Value Added Tax, the rate is computed at 5% on the value of all taxable goods and services as provided by the law. In the case of stamp duties the several rates are indicated in the law in accordance with the instrument in respect of which the duty is to be paid. In the case of gains accruing to any person from the disposal of assets, The Capital Gains Tax Act prescribed the rate of tax payable at 25%[23]. Clearly the scope of corporate tax in Nigeria covers companies' income, services and transactions.

1.4. The Challenges In Taxation Of Companies In Nigeria.

The challenge of an efficient tax system in Nigeria is no doubt a daunting one. The challenges essentially settle around tax evasion and tax avoidance. According to Ayua

[21] In Oando PLC v. FBIR 1TLR.61-Tax is notwithstanding due from a company that made no profit in a current year but paid out dividends to its shareholders.
[22] Petroleum Profits Tax Act. Sections 21 and 10
[23] Capital Gains Tax Act, 2004.

One of the greatest economic problem facing Nigeria is the Problem of tax avoidance and evasion which is prevalent in the country. There is general agreement from many quarters that there is tremendous gap between actual and potential tax collections. The government has repeatedly complained of the wide spread incidence of tax avoidance and evasion in the country with companies and other taxable persons employing all kinds of tax avoidance devices to escape or minimize their tax not to talk of deliberately fraudulent ways and means of evading tax altogether, sometimes with connivance of the revenue officials[24].

This lamentation is a consummate restatement of the problems of taxation in Nigeria. Complex payment schemes are designed by companies to avoid the tax master's path. The bitter struggle for space between the tax payer to keep his wealth and the revenue to keep its due is patently obvious. In ***Chapman v Chapman***[25] the court described the struggle between the legislature and the tax payer thus: "Parliament imposes a charge: the (tax) adviser finds a way to avoid it. Parliament enacts anti-avoidance legislation, advisers' device a more elaborate avoidance"

In the first instance "Tax payers are perfectly free to arrange their business affairs as they may choose and thereby seek to avoid revenue's incursion into their piles of gains just as Revenue always ensures that it covers and guards all holes and loopholes through which all those who may come under its hammer will seek to escape"[26]. Graphically, the Lord President Blyde in the case of ***Ayrshire Pallman Motor Services and David U. Ritche v. Commisssioner of Inland Revenue***[27] painted the picture thus;

> "No man in this country is under the smallest obligation, moral or other so to arrange his legal relations to his business or property as to enable the Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow-and quite rightly to take every advantage which is open to it under the taxing statutes for the purpose of depleting the tax payer's pocket. And the tax payer in the like manner is entitled to be astute to prevent so far as he honestly can, the depletion of his means by the Revenue.

In ***Aluminium Industries Aktien Gesellschaft v. Federal Board of Inland Revenue***[28], the appellant a Swiss company was the beneficial owner of all the issued share capital of the Aluminum Manufacturing Company Nigeria Limited (Alumaco). The Swiss company was assessed for tax in various sums based on interest payable to it by Alumaco under the provisions of section 17, Companies Income Tax Act, 1961 which provided inter-alia " interest shall be deemed to be derived from Nigeria if there is a right to payment of the

[24] Ayua, I.A.,The Nigerian Tax Law(Lagos,Spectrum Law Publishing,1996) p.6.
[25] (1942) AC 429,468.
[26] Offshore International v. FBIR Ibid. p.86
[27] (1929)14 Tax Cases 754,763.
[28] (1971) NMLR 339.

interest in Nigeria". The interest payable to the Swiss company arose from a liability incurred by Alumaco against the parent company as a result of which the two companies agreed that a sum of 3000,000 pounds should be transferred to a loan account in Zurich, Switzerland which was to bear interest of 5% per annum and the loan which was in Swiss franc was to be repaid in the same currency. The Lagos High Court held that the interest in question was subject to tax since it was derived from profits made by Alumaco in Nigeria. On appeal, the Supreme Court held that the only place under the terms of the loan where the Swiss company had the right to payment of interest was in Switzerland and the only place where it could recover in swiss currency is Switzerland. Therefore the claim for tax could not be brought within the provision of section 17, Companies Income Tax Act,1961.

This decision gave rise to an amendment to the CITA 1961 which position is reflected in the Companies Income Tax Act, 2004. Section 9 (2) (a) and (b) of the Act provides that interest shall be deemed to be derived from Nigeria if:

(a) There is a liability to payment of the interest by a Nigerian company or a company in Nigeria regardless of where or in what form the payment is made; or

(b) The interest accrues to a foreign company or person from a Nigerian company or a company in Nigeria regardless of whichever way the interest may have accrued.

Some of the cases have posed a challenge for the regulatory authority.

In ***Stabilini Visinoni Ltd v. FBIR***[29] The appellant's claim was that the provisions of Section 20, Value Added Tax Act which established the defunct Value Added Tax Tribunal violated the provisions of section 251 of the Constitution of the Federal Republic of Nigeria, 1999 and prayed the court to dismiss the suit on the ground that the Tribunal lacked jurisdiction to hear the suit. After considering the relevant provisions, the Court held that section 20, Value Added Tax Tribunal Act was inconsistent with the Constitution and was thereby declared null and void.

The Federal Inland Revenue Service (Establishment) Act[30] 2007 established[31] the Tax Appeal Tribunal in place of the Value added Tax Tribunal. Even with this the Federal High Court on the 30th October, 2013 set the dogs among the pigeons with its decision in the case of ***TSKJ Constuces Internacionals Sociadade Unipessoal LDA v. Federal Board of Inland Revenue***[32]**.** In this case TSKJ Construces Internacionals Sociadade LDA, a non resident company secured a contract for the construction of the Nigeria Liquefied National Gas (NLNG) plant in Nigeria and used TSKJ Nigeria Ltd to provide support services in the course of executing the contract. In filing its returns on deemed profit basis the Appellant

[29] (2009)1TLRN 1.
[30] No.13,2007.
[31] Ibid, section 59.
[32] Suit No:FHC/ABJ/TA/11/12

deducted the recharges paid as cost to its subsidiary which the Federal Inland Revenue Service disallowed on the basis that they were not deductable cost under the deemed profit basis of assessment. The Federal Inland Revenue Service issued additional assessment of about USS12 million on the company. Dissatisfied, TSKJ appealed to the Tax Appeal Tribunal which upheld the FIRS assessment hence the appeal to the Federal High Court. The Federal High Court held inter-alia that the powers of the Tax Appeal Tribunal as provided by the Federal Inland Revenue Service (Establishment) Act, 2007 were inconsistent with section 251 of the 1999 Constitution which gave the Federal High Court exclusive jurisdiction on these matters. The Court further ordered the Minister of Finance to disband the Tax Appeal Tribunal.

The Tax Appeal Tribunal was conceived as an administrative dispute resolution mechanism to compliment the formal court system and engender confidence in the tax regime. It is not in any way in contention with the jurisdiction of the Federal High Court. Appeal from the Tax Appeal Tribunal lie to the Federal High Court. It does appear, with due respect, that the decision of the Federal High Court in the ***TSKJ v. Federal Board of Inland Revenue*** lost sight of this fine point. Instructively, though it may not count so much in law, the Appellant who raised the issue of jurisdiction of the Tribunal before the Federal High Court, itself hoisted the appeal against the decision of the FIRS at the domain of the Tax Appeal Tribunal. This is clearly bad faith and makes mockery of the judicial system.

Impressively, some landmark decisions have been rendered by the Nigerian Courts to knock down tax avoidance and tax evasion schemes or to maintain the fiscal federalism character of Nigeria's taxing system. The regime would not permit companies to use artificial transactions[33] or the subterfuge of subsidiary/holding company to evade tax obligation.

In ***Shell Petroleum Development Company Limited v. Federal Board of Inland Revenue,***[34] **i**n the Shell Petroleum Development Company (SPDC) returns submitted for the period 1st January - 31st December 1973 to the Federal Board of Inland Revenue (FBIR) the FBIR disallowed four expenses claimed as deductible items on the ground that such expenses were not deductible in computing chargeable tax under the Petroleum Profits Tax Act, PPTA. The four items were:

a. Exchange losses on payment of petroleum profits tax;

b. Central Bank commission for payment of petroleum profits tax;

c. Scholarship expenses; and

d. Gifts and donations.

[33] Companies Income Tax Act,2004. Section 22.
[34] [1986]8NWLR256

SPDC appealed to the Body of Appeal Commissioners(BAC). At the hearing before the BAC, the company abandoned the fourth item on gifts and donations. The BAC dismissed the appeal and confirmed the revised assessment issued by the FBIR. SPDC proceeded to the Federal High Court, which allowed the appeal in respect of exchange losses on payment of petroleum profits tax and Central Bank commission. The Court dismissed the appeal against scholarship expenses. Both parties appealed to the Court of Appeal; SPDC against the confirmation of the assessment on scholarship expenses and the FBIR against the setting aside of the assessments on exchange losses and Central Bank charges. The Court of Appeal dismissed SPDC's appeal and allowed the appeal by the FBIR. Dissatisfied with the judgment, SPDC appealed to the Supreme Court. The Supreme Court unanimously allowed the appeal. In allowing exchange losses as deductible, the Supreme Court relied on agreements entered into by SPDC and the FBIR which required the oil company to pay tax in Pound Sterling into the account of the Central Bank of Nigeria with the Bank of England in London. Shell therefore had to convert United States Dollars, which is the currency of transaction into Naira and then convert the Naira again into the Pound Sterling to pay into the CBN's account in fulfillment of the agreements. This procedure was subject to fluctuations in foreign exchange and did give rise to exchanges losses. These were the losses the oil company sought as "deductible" arguing that the losses were incurred as expenses attributable to "petroleum operations" as defined under Section 2 of the PPTA.[35]

The Court in no uncertain term has affirmed the fiscal federalism character of Nigeria's tax regime. In ***Lagos State Board of Internal Revenue v. Eko Hotels Ltd. & Anor***[36] This was an appeal to the Court of Appeal from the decision of the Federal High Court. The core of the decision of the court was that Value-Added Tax and sales tax are the same as VAT is ordinarily a national tax on sales of goods and services. With reference to whether the provisions of the VAT Act and Sales Tax Law creates double taxation, the court held in the affirmative as the tax is charged on similar consumable items as defined in the Schedules of both the VAT Act and the Lagos State Sales Law. It affirmed that with respect to VAT collection and remittance, the 1st respondent is an agent only to the 2nd respondent and as such is obligated to collect and remit VAT to same. The court further held that in the circumstances, VAT has covered the field of tax on consumption of the services provided by the 1st respondent.

The import of this decision on the Nigerian tax system is that whereas the House of Assembly of a State may legislate on the residual field, where the National Assembly has already legislated on such an item, the law passed by the House of Assembly is null and void because the field in question has already been covered.[37]

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[35] In response the Finance (Miscellaneous Taxation Provisions) Decree No. 30 of 1996 was passed. Section 41 thereof provided that all tax computations under the PPTA shall be made in the currency of transaction.
[36] [2008]ALL FWLR(PT.398)235
[37] Ifueko.O.O.(ed)(2012) A Comprehensive Tax History of Nigeria. Federal Inland Revenue Service, Safari Books Ltd, Ibadan, p.307.

The courts have stood firmly against double taxation. In ***Fast Forward Sports Marketing Ltd v. The Port–Harcourt City Local Government Area Council***[38] The plaintiff was served with demand notices by agents and officers of the defendants in respect of Agricultural Development Levy for 2008 as well as the Rivers State Board of Internal Revenue for 2008 Economic Development Levy respectively. The plaintiff filed the suit to challenge the action of the defendant after it had been threatened with seizure and/or distrain repeatedly by the latter. The court in its judgement held *inter alia* that the imposition of the Agricultural Development Levy and Economic Development Levies by the Port Harcourt Local Government Area Council and Rivers State Government on the plaintiff amounts to double taxation. The court also held that the Local Government Council acted outside the scope of Part III Schedule 1 of the *Taxes and Levies (Approved List for Collection) Act.*

In ***Lagos State Board of Internal Revenue v. Nigerian Bottling Company & Anor***[39] The Lagos State Board of Internal Revenue informed the Nigerian Bottling Company that sales tax had been re-introduced in Lagos State and that the rate shall be 5% flat on goods/services produced in or brought into the State. After the service of the Notice of Assessment, the company objected to the legality of the Sale Tax Law. The court followed the decision in *Lagos State Board of Internal Revenue v. Eko Hotels Ltd. & Anor. (supra)* to the effect that the defendant is under no obligation to collect additional tax on its services to its customers in that the VAT had covered the field of tax on consumption of the services provided.

However the court will not countenance a scheme calculated to avoid tax. In ***Marina Nominees Ltd. v. FBIR***[40] Peat Marwick Casseleton Elliot (Peat Marwick), a firm of accountants using its employees acted as secretaries to number of its client companies. Every time any such employee left its service, the company was compelled to file a return at the Company Registry on change of secretaries. To get around this problem, the firm incorporated Marina Nominees Ltd to perform the secretarial services. The latter had no staff except the staff of Peat Marwick. On charge to tax, Marina Nominees claimed to be an agent of Peat Marwick and had no assets or profit on which to be assesses for tax. The Court held that Marina Nominees Ltd was a duly incorporated company separate and distinct from Peat Marwick. It was liable to pay corporate tax on its trade under the Companies Income tax Act, 1961.

In the case of ***Offshore International SA v. FBIR***[41] the plaintiff a company incorporated in panama with principal office in Houston, Texas, USA executed oil drilling contracts with companies in Nigeria. The main contract with Shell BP and other companies in Nigeria

[38] (2011)4 TLRN 45.
[39] (2011)4TLRN 45.
[40] (1986) 2 NWLR(pt.20)48
[41] (2011)4 TLRN 58

were executed in Texas. The company had no office in Nigeria but carried out its obligations under the contracts through a fully own subsidiary incorporated in Nigeria known as IDC (which actually performed the oil drilling operations and with whom the company had a subcontract). The FBIR was of the view that the company was chargeable to tax in respect of the various payment made to it for the contracts. The company contended that as an offshore company it was not liable to pay any tax under the Companies Income Tax Act, 1961.

The court held that there was no provision in the CITA that grants exemption or immunity from payment of tax on a company because it is not incorporated in or resident within Nigeria or because it has no office or place of business in Nigeria. The fact that the plaintiff decided to perform the oil drilling operations in Nigeria through another company simply shows the mode the plaintiff adopted to honour its obligations under the contract.

Clearly the artifice of incorporating subsidiary, transfer pricing, over invoicing, round tripping of capital, rent seeking activities calculated to circumvent the payment of tax or proper tax[42] are deprecated[43].

The Companies Income Tax Act, 2004 provides for some the allowable deductions. Recently the Central Bank of Nigeria created further inroad into the obligation to pay corporate tax. The Central Bank of Nigeria issued its regulations on Scope of banking Activities and Ancillary Matters, No.3, 2010 repealing the erstwhile universal banking license regime. This regulation modifies the scope and framework for banking business in Nigeria. In line with requirements of the CBN regulations, banking groups in Nigeria are restructuring their business operations by incorporating one or more holding companies to aggregate shareholders' capital and hold ownership interest in operating companies conducting banking and other permitted businesses separately. As a result, the FIRS pursuant to its powers under section 61 of the FIRS Act, 2007 issued the Guidelines to provide an enabling tax framework for compliance with the CBN Regulation. Under the Guidelines, any dividend paid by subsidiary companies within each group to their parent holding company is franked investment Income which would not form part of the said holding company's total profits for tax purposes including consideration of total profits for tax purposes.

In the light of this and to the extent that any holding company's income profile may consist of dividend received from its subsidiaries, such dividend will not be subjected to any

[42] Boots, a chemist chain founded in Nottingham in 1853 was purchased 6years ago by an Italian billionaire and a US private equity firm. It moved its headquarters to low tax Switzerland. The private equity bosses borrowed 9billion pound to buy the firm in 2007. They used interest due on the huge debt to slash Uk tax bills by 95% even when the accounts of its subsidiary Alliance Boots show the firm has ended with an overall tax credit worth 130 million pounds

[43] In the recent case of tax avoidance by Boots in Uk, a precepient observer retorted "Tax avoidance is now part of the DNA of a corporate British culture that is rotten to the core."

further tax. However, this exemption does not extend to any other income or profits earned by the holding company from other sources aside from dividends from its subsidiaries.

The CBN Regulation has mandated banks to divest from non-banking activities. Consequently banks have to reorganize and move assets around their successor entities. The transfer of such assets will likely result in an exposure to capital gains tax but no capital gains tax is chargeable as no capital gains would result from the transaction.

1.5. Enforcement Of Taxation In Nigeria.

The essence of every tax system is to maximize the discharge of tax liabilities by every subject of tax and where possible at the least cost by voluntary compliance. Compliance provisions provide the process for the discharge of tax liabilities. Where the tax subject has commendably discharged its civic duty of payment of tax, it is entitled to a certificate of an affirmation of this good conduct. According to section 101CITA, 2004,

> "Where the board[44] is of the opinion that tax assessed on profit or income of a person has been fully paid or that no tax is due on such profit or income, it shall issue a tax clearance certificate to the person within two weeks of the demand for such certificate by that person or, if not, give reasons for the denial"

Instructively, subsection 2 states in clear and affirmative terms that any ministry, department, or agency of government or any commercial bank with whom a tax subject deals shall demand from such person a tax clearance certificate before undertaking the following transactions:

a. Application for government loan for industry or business,

b. Registration of motor vehicles,

c. Application for firearms licence,

d. Application for foreign exchange or exchange control permission to remit funds outside Nigeria,

e. Application for certificate of occupancy,

f. Application for award of contract by government and its agencies and registered companies,

g. Application for trade license

[44] Now Federal Inland Revenue Service statutorily constituted by operator of key sectors of the economy.

h. Application for approval of building plan

i. Application for transfer of real property,

j. Application for export or import license,

k. Application for plot of land,

l. Application for buying agent license,

m. Application for pools or gaming license,

n. Application for registration as a contractor,

o. Application for distributorship,

p. Stamping of guarantor's form for Nigeria's passport,

q. Application for registration of a limited liability company or of a business name,

r. Application for allocation of market stores,

s. Stamping of statement of nominal share capital of a company to be registered and any increase in the registered share capital of any company,

t. Stamping of statement of the amount of loan capital.

Regrettably notwithstanding this unambiguous provision, this law is obeyed more in breach. Ministries, departments and agencies of government do not consider the request and production of tax clearance certificate as a necessary prerequisite for transacting the business expressly mentioned by law. Commercial banks in obtaining a banking account do not demand a tax clearance certificate as part of the documentation for establishing a banker customer relationship.

Giving a choice, no company will voluntarily yield up its assets to payment of tax hence the need to compel compliance by resorting to enforcement. Tax enforcement may be defined as measures put in place to compel compliance with the provisions of tax laws. The FIRS is empowered to resort to enforcement mechanism where tax is due and remains unpaid after proper notice to the tax payer has been given. The entire Part V of the FIRS Act, 2007 is on tax administration and enforcement.

In the administration of the Act, The FIRS is at liberty to call for any relevant information from any subject of tax or from a bank on any transaction in the threshold of N500,000 or N10,000,000 in the case of an individual or corporate body respectively. For the purpose of

accessing information, the Service may access any land or building where such records are kept.

Where a tax due is not voluntarily paid, it shall be paid on demand made by the Service. If it is still not paid, the tax payer is in default and liable to pay the full tax and the penalty of an amount equal to the tax due[45]. This section encourages voluntary tax compliance to avoid the sanction of default payment of twice the amount that voluntary and timely payment would ordinarily have avoided.

Section 31 FIRS Act gives the FIRS the power to appoint a person as an agent of a tax payer and to require the agent to pay the tax payable by the tax payer from *"any money which may be held by the agent of the taxable person"*. Where the agent defaults, the tax shall be recoverable from him directly. The exercise of this power is very similar to garnishee proceedings[46] where a judgment creditor may, by an order of court, attach the judgment debtors' funds in the hands of a third party. This power at the disposal of the FIRS will prove very potent against financial institutions holding funds of a defaulting tax payer. This no doubt will require intelligence gathering and an up to date database of taxpayers. The membership of the Governor of Central of Nigeria in the FIRS board can be helpful at accessing the necessary information for the beneficial use of this power.

By virtue of section 32, FIRS Act, where a tax payer fails to pay the relevant assessment as at when due, the default shall attract additional liability of 10% penalty. In the case of naira and foreign currency remittances the tax due shall carry interest at the prevailing minimum rediscount rate plus spread to be determined by the Minister of Finance[47]. Where there is good tax education, this punitive consequence should deter tax evaders

A potent tool for enforcement of tax payment in Nigeria is the power to distrain. According to section 33(1) FIRS Act,

> *Without prejudice to any other power conferred on the board for the enforcement of payment of tax due from a company, Where an assessment has become final and conclusive and a demand notice has, in accordance with the provisions of the relevant tax laws in the First Schedule to this Act, been*

[45] FIRS Act. section 27(2).
[46] Webb v. Stenton (1883) 11 QB 518.
[47] It Is now monetary policy rate of CBN and no longer minimum rediscount rate. The reason behind vesting the Minister with the power to determine the spread in this section is difficult to rationalize. This is a power that should ordinarily reside with the Chairman of the FIRS or the Board of the FIRS. Introducing unnecessary bureaucracy into a purely fiscal matter or creating room for government patronage of political affiliates or cronies in the law is unneeded stumbling block at this stage of national development. It is submitted that this section be amended and the Minister should be replaced with the FIRS Board as in section 32(3).

served upon the taxable person or upon the person in whose name the taxable person is chargeable, then, if payment of the tax is not made within the time limited by the demand notice, the Board may in the prescribed form, for the purpose of enforcing payment of the tax due-

(a) distrain the taxpayer by his goods or other chattels, bonds or other securities;

(b) distrain upon any land, premises or place in respect of which the tax payer is the owner and, subject to the following provisions of this section, recover the amount of tax due by sale of anything so distrained.

The substance of this provision is also contained in Companies Income Tax Act[48], 2004. The power to sign the Warrant of Distrain is vested on the Chairman of the Service[49]. The law provides for the keeping of the distrain goods for 14 days and thereafter sold to redeem the tax liability. Nothing in section 33 shall be construed to authorize the sale of any immovable property without any order of a High Court[50]. Regrettably, this provision has not enjoyed any serious use in Nigeria. According to Adedokun[51]:

> *However lack of courage, ignorance and apathy on the part of tax collectors has not made this enforcement procedure yield a positive result. In the last couple of years, events have revealed that tax administrators are exhibiting ignorance of the explicit procedures governing distress. They grope in darkness in a so manifestly obvious manner that when they intend to distrain, they embark on sealing up of business premises of companies which method is alien to Nigerian(sic) income tax laws.[A.M.Shittu v.NACB Ltd & 2 Ors (2001)10 NWLR, (Pt.721) p.298]*

An enforcement tool for the FIRS is the power of search and seizure[52]. The Service may enter into any premises covered by a search warrant to search for, seize and take possession of any book, documents upon reasonable suspicion that an offence involving any form of

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[48] Cap C21,Laws of the Federation of Nigeria,2004.

[49] Section 33(2) FIRS Act. 4th Schedule to the Act. It has been argued that this power is a judicial one and not one to be exercised by the executive. If the power to execute a warrant for search and seizure is , there is no reason why the far reaching power of distrain should not be subject to a judicial oversight.

[50] . Ibid. section 33(6)

[51] Adedokun, K.A., Surveillance, Investigation and Enforcement of Tax Law in Nigeria: Raising the Standard and Protecting Rights And Responsibilities, Paper Presented at a 2 Day Interactive Worship on Tax Laws, Ethics and Judicial Interpretation for Superior Court Judges and Senior Tax Law Officers Organized by the FRS, NIALS And JUK Igwe Chambers at Transcorp Hilton Abuja from the 18th-19th, December, 2012

[52] Personal Income Tax Act, Cap P8, LFN, 2004, section 53(1); Companies Income Tax Act, C21, LFN, 2004, section 64.

total or partial non disclosure of information or any irregularity or an offence in connection with or in relation to tax has been committed. Under section 36, FIRS Act, a tax officer armed with a warrant issued by a judicial officer and accompanied by a number of law enforcement officers can enter any premises covered by the warrant to search and seize records used or suspected to be used in the commission of a tax offence. The interposition of judicial action in this process is to provide objective assessment of the situation or threat before any intrusion into the private right of the citizens

Legal proceedings may be undertaken by the FIRS to enforce the payment of tax due. Legal proceedings for this purpose may be civil[53] or criminal. Under section 34(1), the Act[54], the Service is empowered to sue for recovery of tax in a court of competent jurisdiction with full costs of the action from the tax defaulter as a debt due. For this purpose, the amount claim is a special damage and the cause of action must have accrued.

The Act has criminalized certain conducts. Part VI of the FIRS Act is on offences and penalties. Failure to deduct or remit tax, obstruction of authorized officers of the service, false declaration, counterfeiting documents, demanding gratification and making false return, impersonation are offences under the Act with appropriate sanctions. Jurisdiction in this respect is vested on the Federal High Court[55]. This is without prejudice to disputes and controversies being referred to the Tax Appeal Tribunal[56]. The FIRS however has the power to compound any offence under the Act by accepting such sum of money not exceeding the maximum fine specified for the offence[57]. This provision is commendable and in tandem with the fast growing jurisprudence on victim compensation, non custodial sentences and restorative criminal justice.

From the regulatory perspective there appears to be no hiding place for corporate tax defaulters in Nigeria. The regulatory frame work is relatively adequate to ensure a vibrant corporate tax regime in Nigeria. There is no gainsaying the fact that a major challenge of tax implementation in Nigeria is weak institutional framework. Short of abusive behaviour, the FIRS must be more aggressive in tax law and policy implementation.

1.6. Conclusion

The company has become a social institution bearing on every facet of the society. It is imperative that companies operate as responsible citizens discharging their civic responsibility of disclosing their income and paying tax appropriately. Issues of

[53] Where a civil action is brought to recover tax, it must be claimed as special damages-FBIR v. Akwa Ibom Water Co. (2010)3TLRN,114.

[54] See also section 8 Companies Income Tax Act, LFN, 2004, section 87(1).

[55] See section 25 Constitution of the Federal Republic of Nigeria, section 251 (1) & (3).

[56] The administrative mechanism created by the FIRS Act to ensure prompt settlement tax disputes.

[57] FIRS Act, section 48. The administrative mechanism created by the Act to ensure prompt settlement of tax disputes.

adjudication and robust enforcement of the tax system are serious challenges for taxation of companies in Nigeria. The FIRS is armed with legal provision to ensure compliance and enforcement of corporate tax laws in Nigeria. The FIRS must aggressively wield its statutory enforcement sword.

The FIRS must pursue a robust observance and enforcement of the provision of section 101, CITA, 2004. Government ministries, departments, and agencies must demand and obtain tax clearance certificate before doing any of the twenty transactions mentioned therein. This the FIRS could seek even at the pain of an order of mandamus. There is the need to amend sub section 2 to include among the transactions therein "any application to open an account with a bank". This will ensure that a good number of the tax defaulting companies are brought within the tax net.

The great potential of naming and shaming as instrument for exposure of tax defaulters and a deterrent to prospective defaulters has neither been fully appreciated nor resorted to in Nigeria. Under section 94,UK Finance Act, 2009, the HM Revenue and Customs is empowered to publish details of deliberate tax defaulters who have received penalties either for deliberate errors in tax returns or deliberately failing to comply with their tax obligations[58]. The negative effect on being on such list cautions against tax wrong.

The Service enforcement actions must be complemented by a robust and incisive education on tax obligation and the use to which this tax is put. The citizen must be encouraged to demand accountability from government on the use of their tax payment and to report known cases of tax cheats via phone and emails. This way all will become more involved in taxation in Nigeria.

There is the need to amend section 2 of the FIRS Act, 2007 on the constitution of the FIRS board. While the money market is represented on the board, the capital market is not. This cannot be deliberate in the light of the importance of the capital market to every economy. There is the need to include the Director-General of the Securities and Exchange Commission or his representative on the board. This inclusion will provide invaluable first hand information on the activities of capital market where some of the multinational and blue chip companies are quoted and their shares traded. The regular supply of information on these companies (subjects of corporate tax) in the capital market will enable the FIRS monitor these concerns for appropriate payment of tax.

There is no gainsaying the fact that government is in dire need of revenue to implement welfare programs for the citizens and develop infrastructure. With an environment that is not at the moment enabling and the cost of doing business high, the corporate tax rate of 30% is disproportionate to the reality of the business environment. A reduction to 20% will

[58] See the current list of the Published Details of Deliberate Defaulters(PDDD) verion of 14/08/2013- http://www.hmrc.gov.uk/defaulters/defaulters-list pdf retrieved on the 25/10/2013

enable companies have more disposable income to further invest, create more jobs, empower the private sector and grow the economy. If this is done, more companies will find it convenient to pay their requisite tax, remain in business and this will generally reduce compliance cost. Section 40(1) CITA, 2004 needs to be amended for this purpose.

There is the urgent need for a comprehensive data base for tax use in this country. The importance of this to tax planning, tax policy implementation and realistic tax projection can never be overemphasised. Although this is provided for in section 8 of the FIRS Act, eight years after the enactment of this law, the Service can still not boast of a comprehensive data on taxpayers in Nigeria. A good synergy with the Corporate Affairs Commission will allow the FIRS into the world of registered companies in Nigeria.

Multiple taxes constitute a serious challenge for corporate taxation in the Nigeria consigning tax payers to the unenviable position as beasts of burden. Replication of taxes under various names does not only leave companies shortchanged but impugns confidence on the tax regime. The need for a very thorough job in this regard by the Ministerial Implementation Committee on Harmonization of Taxes in Nigeria for the prevention of multiple taxes in Nigeria[59] cannot be over emphasized.

The real function of taxation is to accomplish positive social and economic objectives beyond the revenue. This is achievable if companies compliment government initiative of providing the enabling environment for business to thrive. This is attainable if companies pay their taxes as at when due. Although the law on corporate taxation in Nigeria is fairly adequate, more needs to be done in the area of administration to check evasion and avoidance of tax by companies.

[59] See Sun Newspaper,22/10/2013.P.1

INTERCONNECTIVITY IN TELECOMMUNICATIONS IN NIGERIA: LAW AND PRACTICE.*

1.1 Introduction

Transformation of telecommunications market is occurring in the changing structure of demand, in the convergence of services, and in the changing structure of the industry due to introduction of competition. A little above ten years ago, the conventional "fixed" voice telephony dominated the revenues of all telephone companies. Unprecedented growth in mobile telephone and internet has fundamentally altered the level of demand in this sector. Convergence between telecommunications, broadcasting, cable television, and the internet has happened at a very rapid pace. Mobile telephony has become a substitute for fixed telephony in most countries.[1] There has been a fundamental shift in the industry from monopolistic to a multi-operator environment. Resale of network services is also becoming an increasingly important business as separating network ownership from service delivery becomes operationally and commercially viable.

Telecommunications is now clearly a multi-product sector with several alternative service delivery mechanisms that permit competition in service provision. Thus, the regulatory agenda has shifted from minimizing the price of subscribing to local telephone service or maintaining cross-subsidy to managing multiple issues related to competition, entry, pricing and cross-subsidies.[2] In such a scenario, **interconnection** between networks and between different service providers assumes utmost importance. In other words, as telecommunications markets have opened to resultant diversity and enjoy unhindered, transparent services, the networks must be interconnected. That is, where there is more than one operator, interconnection is currently the only way to connect to the different telecommunication networks so that all users can freely communicate with all the networks.

Interconnectivity basically means the connection of two telecommunications systems in a manner that enables the subscribers on both systems to seamlessly access each other. Nigerian circumstance has incorporated into the definition, the carrying of private operators' traffic by Nigerian Telecommunications Limited ("NITEL"). Very first attempt at negotiation of interconnectivity agreement was in 1985 between NITEL and Mobile Telecommunications Service Limited ("MTS"). First formal interconnectivity agreement

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Source: ITU, World Telecommunication Development Report 1996/97(Geneva, 1997).
[2] . Ibid

was negotiated and executed between NITEL and Private Telecommunications Operators ("PTOs") in 1996. That Agreement was reviewed by a Ministerial Committee that was established in 1998 and duly revised the interconnectivity agreements, the revised version of which were executed by the parties in 1999, with the advent of Digital mobile licensees such as MTN, GLO, AIRTEL, etc. This forms the basis of interconnection in telecommunications in Nigeria.

1.2. The Concept of Interconnections in Telecommunications

The complexity of interconnection has given rise to a variety of definitions, and demands a significant regulatory effort in the form of a telecommunications law. Interconnections is therefore, defined in different ways in the different regulatory and policy regimes that deal with it. As a starting point, interconnection may be said to be the sum of all the commercial and technical arrangements which operators and service providers of one network use to connect their equipment, networks and services so as to provide their customers with access to the customers, services and networks of other service providers. Thus, according to the World Trade Organization (WTO), interconnection refers to "linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.[3]

Under the provisions of the European Directive of 30th June 1997, interconnection means "the physical and logical linking of telecommunications networks used by the same or a different organization in order to allow the users of one organization to communicate with users of the same or another organization, or to access services provided by another organization. Services may be provided by the parties involved or other parties who have access to the network.[4] On the 12th July, 2000, the European Commission Directive of 30th June 1997 was amended and the term access was introduced into the European Commission Directive, 2000. Under the 2000 Directive, the definition of interconnection as contained in the 1997 Directive was retained.[5] This definition differs from others in that it includes interconnection of networks used by the same undertaking and not just networks of different operators. The European Commission Directive also differs from some other regulatory interconnection regimes in that it includes a separate concept of 'access,' defined differently from interconnection.

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[3] . WTO agreement on basic telecommunications,14 July 2000; Telecommunications Services: Reference Paper, 24 April 1996. Downloaded from http://www.wto.org/english/tratop e/serv e/telecom e/tel23 e/htm

[4] . Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). Official Journal L 199, 26/07/1997 P. 0032-0052.

[5] . See Article 2 CEC (2000d).

Under the Directive "access" means the making available of facilities and /or services, to other undertaking, under defined conditions on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers *inter alia*:

a. Access to network elements and associated facilities and services, which involve the connection of equipment by wire or wireless means;

b. Access to physical infrastructure including buildings, ducts and masts;

c. Access to software system, including operational support system;

d. Access to number translation or systems offering equivalent functionality;

e. Access to mobile networks, in particular roaming; and

f. Access to conditional access systems for digital television services.

The 12th July, 2000, new Directive on access to and interconnection of electronic communication of, electronic communications networks and association facilities seeks to respond to the convergence phenomenon by covering a broader range of electronic communications networks and services.[6]

By the understanding of International Telecommunication Union, interconnection is comprised of those commercial and technical arrangements by which service providers connect their equipment, networks and services so that their customers can have access to the customers, services and networks of other service providers.[7]

Statutory definition of interconnection is provided by The Telecommunications Regulatory Authority of India (TRAI), 2006 which defines interconnection to mean the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers.[8] In the same vein, the Nigerian Communications Act, 2003 defined interconnection to mean" the physical and logical linking and connection of communications systems used or operated by the same or different licensees in order to convey messages to and from the respective systems for the provision of services."[9]

These different definitions make it clear that successful interconnection must guarantee the interoperability of telecommunications networks and services. Therefore, in

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[6]. Ibid,(com (2000)334)

[7]. Interconnection: Regulatory issues. Report of ITU Colloquium, 1995

[8]. See Timothy J. Tardiff, "The Economics of Access and Interconnection Charges in Telecommunications", in Michael Crew and David Parker, eds., The International Handbook of Economic Regulation (Cheltenham: Edward Elgar,2006) Chapter 13.

[9]. See Section 157(1) of the NCA, 2003

telecommunications, interconnection is the physical linking of a carrier's network with equipment or facilities not belonging to that network. The term may refer to a connection between a carrier's facilities and the equipment belonging to its customer, or to a connection between two (or more) carriers. In other words, interconnection is the linking of two networks for the mutual exchange of traffic. One of the primary tools used by regulators to introduce competition in telecommunications markets has been to impose interconnection requirements on dominant carriers.

The term applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken. Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

i. Under non- discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

ii. In a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that he does not require for the service to be provided; and

iii. Upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction necessary to additional facilities.

As technology has changed and competition has intensified, many forms of interconnection have developed. All involve the linking of networks to enable customers of one network to communicate with customers of another network or to have access to services offered by another network operator. Examples of interconnection include:

i. Two adjacent, non-competing telephone networks interconnect so that subscribers on one network can call those on the other.

ii. Long-distance carriers obtain access to the facilities of a service provider and compete against that provider in providing long-distance services to a common customer base.

iii. Traditional wire line telephone and new wireless mobile carriers interconnect so that subscribers of the traditional phone service can call wireless subscribers, and vice versa.

iv. New competitive local telephone carriers interconnect with the incumbent carrier so that they can attract subscribers in the common service territory, and enable those subscribers to call subscribers on the incumbent's network. Such competitive local carriers may also lease specific network elements from the incumbent.

v. Customers of the incumbent telephone carrier make calls to their dial-up internet service provider, which in turn is a customer of a competing local carrier.

vi. Firms offering a service in which part of the call is routed by voice over internet protocol (VoIP) interconnect with tradition local service providers to complete the call.

The regulatory framework should provide for interconnection on fair terms, in line with international recommendations such as those of WTO, which makes the following stipulations about interconnection in a reference document:

a. Interconnection with a supplier is to be ensured at any technically feasible point in the network under non-discriminatory technical and pricing terms;

b. Interconnection negotiation procedures must be open to the public;

c. The transparency of interconnection arrangements must be assured;

d. Dispute resolution (within a reasonable period of time) before an independent body must be available at all times.[10]

There are two broad forms of interconnection: *one-way interconnection* and *two-way interconnection*. One-way and two-way interconnection can co-exist. For example, new entrants often obtain parts of their networks from the incumbent carrier (one-way interconnection), and then exchange traffic with the incumbent (two-way interconnection).

i. One-way interconnection: one service provider or carrier must obtain inputs from another carrier in order to offer services to its customers. The carrier supplying the inputs may or may not compete with the firm purchasing the inputs. For example, prior to 1996, local exchange carriers in the United States were prohibited from offering long-distance

[10] . http://www.wto.org/english/news_e/pres97_e/refpap-e.htm.

services. Long-distance carriers such as AT&T, Sprint and MCI obtained access from these local exchange carriers, to offer long-distance services to customers on the local exchange network.

Payment for one-way interconnection is always from the interconnection operator (i.e, the long-distance carrier) to the interconnection provider (i.e, the local exchange carrier). One-way interconnection also occurs in other industries, for example when rail operators seek access to rail networks.[11]

ii. Two-way interconnection: Two or more carriers must connect their facilities (networks) so that customers of one carrier can call customers served by other carriers (and vice versa). There are several approaches to structuring interconnection payments for two-way interconnection.

Two-way interconnection also occurs in other industries. For example, credit cards such as VISA and MasterCard are provided over interconnected networks of member banks and participating merchants. Cardholders, member banks and merchants pay fees to access a credit card network. The operator's willingness to interconnect will vary depending on the form on interconnection and, in particular, whether the interconnecting parties are competitors.

Types of interconnection: Classifications of interconnection based on the type of service interconnecting parties are involved in may be explained as follows:

1. **Interconnection between local access providers for local calls**: The originating service provider collects a retail charge from the subscriber and pays a termination interconnection charge if the call has to be terminated on another local service provider's network via a point of interconnection (POI).

2. **Interconnection between local access providers for long-distance calls**: The long-distance carrier collects the retail charge for the long-distance call. The originating and the terminating parties receive origination and termination interconnection charges for their respective services.

3. **Fixed to mobile interconnection**: Where fixed line telephony is still in use, interconnection may arise from fixed to mobile line or vice versa.

Other interconnection options include the capacity based interconnection/Time based interconnection and the built operate and transfer concession.

[11] . Gabel, R. (1969) "The early competitive era in telephone communications,1893-1920", Law and Contemporary Problems, Spring.

1.3. Principles Applicable To The Provision Of Interconnection Services In Telecommunications

The following general principles apply to the provision of interconnection services in telecommunications industry.

a. **Providing Advance Regulatory Guidelines:** There continue to be a regulatory debate about the relative advantages of providing ex ante or advance interconnection guidelines versus ex post regulation. Proponents of the ex post approach generally favour negotiation of interconnection agreements between operators with recourse to regulatory dispute resolution or competition law remedies, if negotiations fail.[12]

Several years ago, there were more advocates of the ex post approach. This approach was based on the belief that regulation should be minimized in competitive markets. Many regulators recognized that the financial, technical and operational detail of interconnection arrangements could be complex. They considered that incumbent operators and new entrants would generally have a much better understanding of these arrangements than regulators. They were also concerned that inappropriate regulatory intervention in interconnection matters could impose high costs on the sector.[13] For these reasons, a large number of regulators and telecommunications experts promoted industry negotiation as the main approach for developing interconnection arrangements. Ex-ante regulatory intervention was discouraged. The focus of regulatory attention was on dispute resolution, in the event industry negotiations broke down.

In recent years, there have been increasing doubts about the effectiveness of the ex-post approach. There appears to be a growing consequences that advance regulatory guidelines, or even specific interconnection rules, are necessary to facilitate successful negotiations. This view has been expressed by the European commission in its Directive on access and interconnection in 2000 where the Commission stated that "… there is a consensus that ex-ante sector specific rules will continue to be needed alongside competition rules to regulate access and interconnection until such time as there are full competition rules to regulate access and interconnection, until such time as there is full and effective competition in all segments of the market."[14] This view has long been held by regulators and policy makers. Thus in Nigeria, the Nigerian Communications Commission (NCC) issued a series of detailed guidelines on most aspect of interconnection with dominant operators, including interconnection roles and technical terms and conditions.[15]

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[12] . See Hank Intven, et. al (eds) Telecommunications Regulation Handbook (Washington, DC: The World Bank, 2000) p.3.6

[13] .Ibid

[14] . See European Commission Directive on Access and Interconnection, CEC/2000C

[15] . See Competition Practices Regulation, 2007 and Telecommunications Networks Interconnection Regulations, 2003,etc

b. Focusing interconnection obligations on the incumbent operator: One generally accepted means of minimizing regulatory intervention is to limit imposition of interconnection obligations to dominant incumbents. In practice, this is seen as the most effective and efficient means of utilizing limited regulatory resources. Others suggest that universal imposition of interconnection obligations would provide more interconnection opportunities for all operators. This may not altogether be correct because the consensus view is that universal imposition of interconnection obligations on all operators, large and small, generally amounts to over-regulation.[16] In principle, only firms with a dominant market position have the ability to establish interconnection terms independently of competition. Non-dominant competitors would find it difficult to independently maintain excessive interconnection rates, or discriminatory conditions. Other service providers wishing to interconnect could avoid such unfavourable interconnection arrangements by interconnecting with a competitor, including the dominant supplier. Overtime, as markets become increasingly competitive, it may be possible to deregulate more interconnection arrangements, including those of once dominant operators. However in the transition period to full competition, a degree of asymmetric regulation is required in order to level a playing field that is tilted in favour of incumbents. This represents the principles of interconnection of networks in Nigeria.

c. Transparency: Transparency is a major policy objective of multilateral trade agreement as well as the national telecommunications policies of many countries. In Nigeria, this is provided for in section 97 (1) (b) of the Nigerian Communications Act, 2003 which states that "all interconnection agreements between licenses shall be in writing and shall comply with the principles of neutrality, transparency, non-discrimination, fair competition, universal coverage, access to information, equality of access and equal terms and conditions." While there is a lot to be said for protecting the confidentiality of business agreement, in a competitive market place, interconnection with dominant incumbents, is generally considered an exception. Confidential treatment of interconnection arrangements would provide incumbents with an opportunity to act strategically to thwart competitors. For example, such operators could enter into confidential interconnection agreements that provide unfavourable interconnection arrangements with competitors, and more favourable ones with affiliates. Dominant operators could also limit the functionality of the types of interconnection offered, levy excessively high charges, and other wise act strategically to limit competition.

Transparency of interconnection arrangements is an effective means of discouraging anti-competitive strategic behaviour, by dominant operators. It is easier for regulators to detect and remedy such behaviour if interconnection arrangements are made public. Publication of arrangements also makes it easier for regulators and all industry participants to compare interconnection rates, terms and conditions. Transparency also assists in developing

[16] . Hank Intven,Op. Cit. P.3.7.

industry standards and benchmarks, as well as best practices on operational and administrative issues.[17]

Many countries require publication of reference interconnection offers or model interconnection agreements. To further promote transparency, some regulators maintain public registries of interconnection agreements, or require publication of agreements by operators. In some cases, interconnection agreements are available over the internet. Thus, in Nigeria under section 98 (1) of the NCA, 2003, all interconnection agreements shall be registered with the commission, by either or both parties thereof, within (30) thirty days from the date of execution thereof.

d. Non-Discrimination: Avoidance of discrimination is a central objective of most interconnection policies. Discrimination in interconnection arrangements can take several forms. One form involves discrimination by a dominant operator in interconnection arrangements entered into with several different new competitors.[19] For example, new entrant A may obtain better arrangements than new entrant B. Such discrimination is relatively easy to detect if interconnection agreements are made public. It should be noted that interconnection arrangements may vary from one competitor to another without being unduly or unjustly discriminatory. The two competitors may have voluntarily agreed to different arrangements, for example to suit their different operating conditions. The real test, therefore, should not be "discrimination" in the sense of "differences" in the interconnection arrangements. The test should be unjust, undue or unfair discrimination, in the sense that an interconnecting competitor is placed at a significant disadvantage as a result of less favourable interconnection arrangements.

The other major form of discrimination is often harder to identify. It involves the provision of more favourable interconnection arrangements by a dominant firm to its own operations or its affiliates than to competitors. Disputes or complaints about this form of discrimination are often difficult for regulators to resolve. For example, it is sometimes impossible to grant a competitor exactly the same type of interconnection arrangements as it is possible to provide to an internal operation.[20] Various approaches have been developed to identify and resolve cases of discrimination of the second type. Since interconnection arrangements need not be identical, the objective of preventing undue discrimination has been described as one of developing "comparably efficient" interconnection arrangements.[21]

Some incumbents discriminate against competitors by treating them as "customers" rather than "peers" or "co-carriers". This approach often leads to higher prices and inferior

[17] . Ibid
[19] . See Regulation3(3) of the Telecommunications Networks Interconnection Regulation, 2007
[20] . See Hank Intven, Op. Cit. p.3.8
[21] . Ibid

interconnection arrangement. Regulators should generally insist that interconnection carriers should be treated on an equal and reciprocal basis, as peers and not customers.[22]

One type of discrimination can be vital to the prospects of competition. It involves providing insufficient network capacity to interconnecting operators; as compared to an incumbent's own services. Network congestion can be anti-competitive barrier. Regulators must sometimes intervene to ensure non-discrimination rationing of network access and transport facilities. They must often also ensure that established PSTN operators construct sufficient capacity to handle growing demand that can be expected in a competitive telecommunications market.

One regulatory approach to reduce, or at least assist in the identification of, discrimination between a dominant firm and its competitors involves the establishment of structural or accounting separations or divestiture. Under structural separation approaches, a dominant firm is required to move its competitive operations into a separate affiliated company, with separate management, accounting records, etc. Divestiture involves selling all or part of the separate affiliate to other persons. Accounting separations involve setting up separate accounting records only, and not actually requiring the establishment of a separate legal entity for the competitive business.

e. Cost-Orientation: Interconnection principles, such as those set out in the Reference paper for the WTO's Agreement on Basic Telecommunications and the European Union's Interconnection Directive; require interconnection Charges to be cost-oriented. The Telecommunications Networks Interconnection Regulations, 2007 also provide for cost orientation. Thus, the interconnection agreement shall be in writing and comply with the principles of neutrality, transparency, non-discrimination, fair competition, cost orientation, universal coverage, and access to information, equality of access and equal terms and conditions.[23]

There are various reasons for specific provisions that interconnection charges should approximate costs. Without a cost-based standard for setting interconnection charges, an established monopolist or dominant operator would have an incentive to demand a high price for terminating calls that originate on a new competitor's network. Similarly, a dominant operator would have an incentive to pay little or nothing to the competitor to terminate calls origination on the dominant network. In the absence of regulatory intervention, some new competitors might have little choice but to accept such a deal or remain unable to interconnect.

Serious problems can result from a dominant firm charging competitors interconnection prices that are significant above cost. First, it deters market entry and the development of

[22] . See Regulation 3 (3) (b) of the Telecommunications Networks Interconnection Regulations,2007, see also section 97 (1) (b)of the NCA,2003

[23] . See Regulation 3 (3) (b)

competition. Second, customers of the competitors will ultimately have to pay for these excessive charges. Third, the excessive prices can provide a pool of revenues that the dominant firm can use to subsidize losses, for example, losses incurred as a result of predatory pricing action taken by the dominant firm to drive competitors out of a market.

f. **Equal access**: On a level competitive playing field, telecommunications users should be able to access the service of new entrants as easily as those of incumbent operators. Without equal ease of access, new entrants will find it difficult to attract customers. While access may not be exactly equal, accessing a competitor should not be significantly more difficult.

In the early days of long-distance competition in Canada and the United States, for example, customers were often require to dial up to 20 or more extra digits to route calls to new entrant's networks. This significant difference in access was due to the historical design of the PSTN. The operator's switches had been programmed for a monopoly environment. The additional digits were required to permit the operators' switching software to identify the new entrant to which the call should be routed as well as to provide billing details for the customers. It is not surprising that the new entrants initially found it difficult to encourage customers to switch services from the incumbents.

Over time, many incumbents and telecommunications equipment manufacturers redesigned their switches and related software. These facilities are now far more adaptable to the requirements of a multi-operator environment. Dialing parity is easy to achieve with the right software package. This has made it much easier to implement equal access requirements of the regulatory policy.

There are basically two approaches to providing equal access. The first is through call by call customer selection. Under this method, customers select the operator of their choice for each call. They usually do this by dialing a short code or prefix for their selected operator. The main requirements to provide this type of equal access on an efficient basis are:

I. trunk-side interconnection by new entrants to incumbent switches.

II. A numbering plan that allocates equivalent numbers to the incumbent operators and new entrants (for example similar access codes for long distance and international competitors; and equivalent blocks of access numbers for local and mobile operators).

III. Provision of basic signaling services by incumbents to new entrants including calling the identification (CLI); answer and disconnect supervision.

IV. Appropriate billing and audit arrangements to permits direct billing by each operator or billing by one and remission to the others. For example, the local operator might do all billing and remit long distance charges to the other operators.[24]

The second approach is through operator pre-selection. Under this approach, customers select an operator for some or all of their calling. For example, an operator other than the incumbent might be selected for all long distance and international calling. After the selection is made, all calls from these customers will be routed to the operator of choice until their selection is changed. The main requirements for this type of equal access are:

I. Trunk-side interconnection by new entrants to incumbent switches.

II. Switch software features to identify customer selection and to route and bill calls appropriately to the selected operator.

III. Appropriate billing and audit arrangement to permit direct billing by each operator or billing by one and remission to the others. As with the call-by-call approach, the local operator might do all billing and remit long distance charges to the other operators.[26]

The implementation of equal access has been uneven around the world to date. In some countries, equal access is unavailable due to limitations in installing switching and software facilities. In others, it is due to delay in implementing a numbering plan that allocates equivalent numbers to competitors. Still in others, regulators have simply not seen equal access as a priority. Market experience in more open market has demonstrated that there is considerable inertia among telecommunications customers. Regulators that wish to expedite the development of fully competitive markets will, therefore, want to consider equal access as a useful approach.

g. Quality of service: It is good regulatory policy to require a reasonable quality of interconnection services and facilities. Without such a policy, it would be possible for an incumbent to frustrate a competitor's ability to provide competitively attractive services. For example, if an incumbent connected its own new customers' circuits within days, but delayed connection of a competitor's customers' circuits for months, customers in a hurry would likely choose the incumbents services. The WTO Regulation reference paper deals with quality of interconnection with major suppliers in signatory countries. It requires interconnection to be ensured under terms and conditions that are no less favourable than those provided for their own similar services. Interconnection must also be no less

[24] . See Hank Interven, op. cit.
[26] . Ibid

favourable than that provided to a major suppliers subsidiaries, its other affiliates or to non-affiliated service suppliers.

This type of policy can also be useful in less developed countries, such as Nigeria, where the quality of service provided by an incumbent is below international standards. This low quality of service is often due to financial constraints on the quality of service provided to a new entrant, provided the new entrant pays for it. For example, a new entrant may be willing to pay for new trunk circuits between the point of interconnection at a congested customer service exchange and a tandem exchange. Such payments can be a win-win situation for the incumbent and new entrants. Arrangements of this type are best negotiated between incumbents and interconnecting operators. However, some regulatory supervision may be required to ensure new entrants do not have to pay excessive charges. Similarly, the regulator may need to ensure that the incumbent does not require payments for new entrants to construct facilities to improve the incumbent's competitive advantage, as a condition of providing adequate and quality service.

1.4. The Law And Practice Of Interconnection In Nigeria

In Nigeria, the law and practice of telecommunications is categorized into two, namely, the law and practice applicable to all service providers and the law and practice applicable specifically to dominant service providers.

The general principles applicable to all service providers are such that interconnection arrangements should encourage efficient and sustainable competition. All service providers must enter into good faith negotiations to complete interconnection agreements with other service providers and foreign service providers. Interconnection disputes should be resolved quickly and fairly. All service providers and other concerned parties may at any time seek clarification for guidance from the commission on interconnection principles and issues affecting them. The Telecommunications Networks Interconnection Regulations, 2007 makes provisions that are applicable to all service providers. By regulation 13(1) all licensed telecommunications operators shall maintain the highest level of service and meet any priorities set by the commission and shall take full account of the obligations on emergency situations under their operating licenses when requesting and providing interconnection and when designing, implementing and operating their interconnection arrangements. The commission shall take all necessary steps to – (a) impose, where appropriate, conditions on interconnection, to ensure that the availability of the public telecommunications network is maintained in the event of catastrophic network breakdown or in exceptional cases of force majeure, such as extreme weather condition, earthquakes, flood, lightning or fire; (b) ensure that the integrity of the public telecommunications network is maintained and the need to maintain network integrity does not however, constitute a valid reason for refusal to negotiate terms of interconnection.

The commission shall ensure that all the conditions for interconnection in relation to the protection of telecommunications network integrity are proportionate and non-discriminatory in nature and are based on objective criteria identified in advance. The commission may impose conditions in interconnection agreements in order to ensure:

(a) Interoperability of services, including conditions designed to ensure satisfactory quality for the end-to-end services provided to users and such conditions may include implementation of specific technical standards, specifications or codes of conduct and any quality of service standards specified by the commission;

(b) The protection of data, to the extent necessary to ensure compliance with relevant legal and regulatory provisions on the protection of data, including protection of personal data, the confidentiality of information processed, transmitted or stored and the protection of privacy.

Where the commission imposes conditions in an interconnection agreement based on the essential requirements set out in the Regulation, these conditions shall be published to the members of the public in accordance with regulation.[28]

Where a licensed telecommunications operator has the right to install facilities on, over or under a private land or take advantage of a procedure for the expropriation or use of property, the commission shall encourage the sharing of such facilities and property with other licensed telecommunications operators, in particular, where other license telecommunications operators do not have access to viable alternatives. The terms and conditions for collocation or sharing of facilities shall be subject to a commercial and technical agreement between the parties concerned and the commission nevertheless may intervene to resolve disputes arising thereof.[29]

Licensed telecommunications operators shall publish details of and provide technical interfaces for interconnection according to the relevant Nigerian regulations which are elaborated on the basis of international standards or recommendations adopted by International telecommunications Union.

The commission shall, from time to time, publish or ensure that there is published up-to-date information on interconnection agreements and the information shall be published in such a way as to provide easy for users of that information and be made available on request to interested parties during normal working hours. All licensed telecommunications operators shall provide the commission with all such technical, operational and accounting information as the commission may reasonably require. The commission shall ensure that

[28] . See Regulation 16(1)of the Telecommunications Networks Interconnection Regulations, 2007
[29] . See Section 97 (2) NCA, 2003

any information provided to it which is expressed to be confidential is maintained as such in accordance with the provisions of the Regulations.[30]

The general principle that applies to Dominant Service Providers(DSPs) are contains in regulations 10, 11 and 12 of the Telecommunications Networks Interconnection Regulations, 2007. By Regulation 10(1), a telecommunications operator that has been determined by the commission as being a dominant operator shall:

(a) Meet all reasonable requests for access to its telecommunications network, in particular access at any technically feasible point on its telecommunications network;

(b) Adhere to the principle of non-discrimination with regard to interconnection offered to other licensed telecommunications operators, in particular, it shall apply similar conditions in similar circumstances to interconnected licensed telecommunications operators providing similar services and provide interconnection facilities and information to other licensed telecommunications operators under the same conditions and of the same quality as it provides for its own services or those of the group of companies or partners;

(c) Make available on request to other licensed telecommunications operators considering interconnection with its telecommunications network, all information and specifications within the next six months, unless agreed otherwise by the commission.

(d) Submit to the commission for approval and publish a Reference interconnection offer, sufficiently unbundled, giving description of the interconnection offerings broken down into components according to market needs and the associated terms and conditions including tariffs; and

(e) Provide access to the technical standards and specifications of its telecommunications network with which another operator shall be interconnected.

The commission may impose or prohibit conduct by a dominant telecommunications operator, if the operator is violating the obligations imposed on it, and declare interconnection agreements wholly or partially invalid to the extent that such dominant telecommunications operator abuses its dominant position in the market. However, before

[30] . See Regulations 7 and 8 of the Telecommunications Networks Interconnection Regulations, 2007

taking the action, the commission shall first of all request the dominant telecommunications operator to refrain from the abuse to which the objection has been made.[31]

A dominant telecommunications operator shall, except where the commission has determined interconnection rates, set charges for interconnection on objective criteria and observe the principles of transparency and cost orientation and the burden of proof that charges are derived from actual costs lies with the licensed telecommunications operator providing the interconnection service to its facilities. The commission has the right to request that the dominant telecommunications operator justify fully its interconnection charges and where appropriate may request for the adjustment of the charges. The burden of proof that charges are derived from relevant costs, including a reasonable rate of return on investment, shall lie on the dominant operator providing interconnection to its facilities.[32]

The dominant operators may set different tariffs, terms and conditions for interconnection of different categories of telecommunications services where such differences can be objectively justified on the basis of the type of interconnection provided. The commission shall however ensure that such differences do not result in the distortion of competition and in particular that the dominant operators apply the appropriate interconnection tariffs, terms and conditions when providing telecommunications for its own services or those of its subsidiaries or affiliates in accordance with the principle of non-discrimination.[33]

A dominant telecommunications operator shall:

(a) Give written notice of any proposal to change any charges for interconnection services in accordance with the procedure set out in the guidelines on interconnection adopted by the commission and the provisions of the operation license;

(b) Offer sufficiently unbundled charges for interconnection, so that the licensed telecommunications operator requesting the interconnection is not required to pay for any item not strictly related to the service requested;

(c) Maintain a cost accounting system which: (i) in the opinion of the commission is suitable to demonstrate that its charges for interconnection have been fairly and properly calculated, and (ii) provides any information requested by the commission;

(d) Make available to any person with a legitimate interest, on request, a description of its cost accounting system showing the main categories under which costs are grouped and the rules for the allocation of costs to interconnection and the

[31] . Ibid, Regulations 10(2)&(3)
[32] . See Regulation 11(1)&(2)
[33] . Ibid, Regulation 11(5)&(6)

commission or any other competent body independent of the dominant telecommunications operator and approved by the commission, shall verify compliance of the dominant telecommunications operator with the cost accounting system and the statement concerning compliance shall be published by the commission annually.

If interconnection services are not provided through a structurally separated subsidiary, a dominant operator shall keep separate accounts as if the telecommunications activities in question were in fact carried out by legally independent companies, so as to identify all elements of cost and revenue with the basis of their calculation and the detailed attribution methods used. A dominant operator shall maintain separate accounts in respect of interconnection services and its core telecommunications services and the accounts shall be submitted for independent audit and thereafter published. A dominant operator shall supply financial information to the commission promptly on request and to the level of detail required by the commission. The commission may publish such information in order to contribute to an open and competitive telecommunications market, while taking account of considerations of commercial confidentiality.[34] Generally, the terms of interconnection should not discriminate between service providers or between a dominant service provider's own operations and those of interconnecting competitors, except under circumstances that are objectively justified.

1.5. Issues In Interconnection Agreement, Procedures And Rights Of The Parties

This section deals with issues in interconnection agreements, procedures for interconnection and the rights of the parties in interconnection agreement and other related issues.

Interconnection is a very sensitive matter in telecommunication. An incorrect interconnection agreement can have serious consequences on the investment and business decisions for the operators. There are various issues involved in interconnection which need to be dealt with when entering into interconnection agreement. These can be broadly classified into three – framework and procedural issues, commercial issues and finally technical and operational issues.

Framework and procedural issues: Issues under this category include:

i. Adequacy of regulatory guidance for interconnection negotiations;

ii. Availability of interconnection with incumbent operators for various types of services;

iii. Access to standard interconnection terms with incumbent operator;

[34] . Ibid, Regulation 12

iv. Independent and timely dispute resolution;

v. Non-discriminatory access to interconnections facilities and services;

vi. Access to PSTN network specifications.

Commercial issues: Commercial issues relates to the followings:

i. Level and structure of interconnection charges; basis of calculation (i.e type of costs to calculate charges, revenue sharing, bill and keep, etc);

ii. Unbundling of interconnection charges for different network components and related services;

iii. Payment of network modifications to facilitate interconnection;

iv. Confidential treatment of competitive and customer information.

Technical and operational issues: Technical and operational issues concerns:

i. Open network standards and network compatibility;

ii. Location of POIs (points of Interconnection);

iii. Access to billing systems, advanced digital features, billing system, operations support systems, call- related databases and other software to provide advances services;

iv. Equal ease of customer access to competitive networks (e.g. customer dialing party);

v. Access to numbers and implementation of number portability;

vi. Collocation and sharing of infrastructure (e.g. buildings, poles, conduits,);

Above all, there must be provision relating to quality of interconnection, including availability of sufficient interconnection capacity to avoid congestion, and to ensure the timely provisioning of interconnection services and facilities. Both the Nigerian Communications Act, 2003, and the Telecommunications Networks Interconnection Regulations, 2007, provide for the procedures to be followed in applying for interconnection and the rights and obligations of the parties to such agreement. In interconnection agreement, there are usually two parties, the requesting party and the requested party.

By Regulation 19 of the Telecommunications Networks Interconnection Regulations, 2007 the "**Requesting party**" means a licensed telecommunications operator who desires to interconnect its telecommunications network with the telecommunications network of another licensed telecommunications operator. The **"Requested party"** means a licensed telecommunications operator who has been asked by another licensed telecommunications operator to provide interconnection to the telecommunications network of the other licensed telecommunication operator. Thus, where the requesting party desires to interconnect its telecommunications network with that of the requested party, a request shall be made to the requested party.[35] All requests made for interconnection by paragraph 2 of the Regulations 5 shall –

(a) Be made in writing to the requested party;

(b) Contain sufficient information in relation to the form of interconnection, the suggested date for the commencement of negotiations, the date from which the interconnection is required and an estimate of the interconnection capacity required; and

(c) Be brought to the notice of the commission by the requesting party.

This is line with the provisions of the Act which provides further that all interconnection agreements between licensees shall be in writing and shall comply with the principles of neutrality, transparency, non-discrimination, fair competition, universal coverage, and access to information, equality of access and equal terms and conditions.[36] The requested party shall inform the requesting party in writing within fourteen days of the receipt of a request for interconnection, if:

(a) It can supply the form of interconnection requested; and

(b) It shall be able to do so within the time frame requested by the requesting party.[37]

By section 96 of the Nigerian Communication Act, 2003, a network services or facilities provider shall have an obligation to interconnect its communications system with the other licensee's network at technically feasible locations, in accordance with the principles specified in the Act and pursuant to terms and conditions negotiated between the parties in good faith. This means that the request for interconnection may be refused only on reasonable grounds. Note that such refusal shall be justified in writing by the party

[35] . See Regulation 5(1)of the Telecommunications Networks Interconnection Regulations,2007.
[36] . See section 97(1)(b)NCA,2003
[37] . See Regulation 5(3)

requested to provide the interconnection and the commission shall be notified of the reason for the refusal.[38]

According to Regulation 5 (5) where the requested party is required to have in place a Reference interconnection offer and, unless that party notifies the requesting party of a refusal in accordance with provisions of the Regulation, an interconnection agreement on the terms and conditions set out in the Reference Interconnection offer must be executed within a period of no more than seven days from the expiry of the fourteen day period specified in Regulation 5(3) unless the requesting party considers that the terms and conditions set out in the Reference Interconnection offer are not acceptable and has notified the requested operator accordingly.[39]

Where the requested party is not required to have in place a Reference Interconnection offer and unless that party notifies the requesting party of a refusal under regulation 5(4), an interconnection agreement must be executed within a period of no more than forty two days from the expiry of the fourteen day period specified in regulation 5(3), unless the requesting party considers that the terms and conditions being offered by the requested party are not acceptable and has notified the requested operator accordingly.

By Regulation 5(7), where the parties cannot agree within twenty eight days from the date of first request ion the date upon which to commence negotiations, the commission has the power to compel both parties to commence negotiations on an interconnection agreement on a date prescribed by the commission. This is in line with the provisions of the Act as stated in section 97(2). By that provision, the terms and conditions of interconnection agreements shall primarily be agreed upon between the parties thereto and the commission may intervene and make binding rulings at its instance or at the instance of either or both parties to the agreement –

(a) If the commission determines that the agreement or any provision thereof is inconsistent with the provisions of the Act or its subsidiary legislation; or

(b) In the event of a failure of consensus between the parties on specific issues or a delay in reaching such consensus; or

(c) If the commission considers it in the public interest for it to so intervene at its own instance and without any invitation from either or both parties to the agreement.

Regulation 7(1) states the points of interconnection and interconnection links shall – (a) only be requested after the execution of an interconnection agreement and approval or deemed approval of the agreement by the commission; and (b) where agreement on the

[38] . See Regulation 5(4)
[39] . Ibid, Regulation 5(6)

number and location of interconnection links cannot be reached, be provisioned by each interconnecting licensed telecommunications operator according to their own requirements.

A licensed telecommunications operator seeking interconnection has the right to request from another licensed telecommunications operator that interconnection be provisioned and maintained at any technically feasible and economically reasonable point in that licensed telecommunications operator's telecommunications network. The requesting party shall provide sufficient details to the requested party in relation to a point of interconnection in order to enable the requested party assess what system conditioning may be required and to estimate the costs of provisioning the point of interconnection. The costs of interconnection incurred by both interconnection operators may vary depending on the points of interconnection.

Licensed telecommunications operators shall provide to any requesting operator and to any interconnected licensed telecommunications operator details of the networks of other operators can interconnect with them. This information shall also be provided to the Commission and may be published by the Commission in accordance with Regulation 16 in a form that disguises the exact physical location of the point of interconnection and meets any other reasonable concerns about security of such points of interconnection specified by the operator.[39]

Where a licensed telecommunications operator desires to interconnect at points other than the standard points of interconnection, such interconnection shall be made available upon request and the requesting party may be required to pay charges that reflect the cost of the construction of the necessary additional facilities. Where the requested party has not notified the requesting party in writing that a point of interconnection requested has insufficient capacity, points of interconnection shall be provisioned and ready for use within such period as may be agreed by the parties or, in the absence of agreement, not later than forty-five days from the date of the request. Where the requested party has notified the requesting party that a requested point of interconnection has insufficient capacity, it shall provide to the requesting party a date by which the requested point of interconnection shall be ready for use.[40]

The requested party shall, at the same time as it notifies the requesting party, notify the commission that a requested point of interconnection has insufficient capacity, providing to the commission an explanation for the determination that it is ready for it plans to take in order to provision the point of interconnection so that it is ready for use by the requesting party by the date provided to that party. The commission, following a review of such information, may determine that the timeframe provided by the notifying party or other relevant information concerning the steps to be taken is not appropriate and may impose on

[39] . See Regulation 7(5)&(6)
[40] . Ibid, Regulation

the notifying operator, by notice in writing, requirements for such other steps to be taken, including in relation to the timeframe for provision of capacity as may in the commission's reasonable discretion be necessary.[41]

Telecommunications Networks Interconnection Regulations, 2007 has placed some responsibilities on the parties to interconnection agreement. Thus, by regulation 8(1), interconnected agreement shall ensure that:

(a) They provide to each other sufficient technical information to enable each party to plan its interconnection arrangements, including information on the technical characteristics of its telecommunications network;

(b) They do not, on the grounds that the standards and specifications are proprietary, withhold information necessary to ensure efficient interconnection arrangements for both sides; and

(c) They take full account of the standards defined as being suitable for the purpose of interconnection, including the international standards and specifications adopted by the International Telecommunication Union.

Where the requesting party requests a new form of interconnection, it shall do so in writing and provide the requested party with reasonable information in relation to the following matters: (a) the form of interconnection; (b) the approximate date the interconnection is required; and (c) they take full account of the standards defined as being suitable for the purpose of interconnection, including the international standards and specifications adopted by the International Telecommunication Union. Where the requesting party requests a new form of interconnection, it shall do so in writing and provide the requested party with reasonable information in relation to the following matters: (a) the form of interconnection; (b) the approximate date the interconnection is required; and (c) an estimate of the capacity required. Interconnection and capacity at those points of interconnection services, including new points of commission at the time the request is made to the requested operator. Note also that the requested party shall inform the requesting party in writing within twenty eight days of the provision of the information above if: (a) it is able to supply the form of interconnection requested; or (b)it shall be able to do so within the time frame requested by the requesting party. Where the requested party has informed the requesting party that it is able to provide the interconnection, it shall ensure that the system conditioning and the provisional procedures required to provide that system interconnection are undertaken within the time frame required by the requested party.[42]

[41] . Ibid, Regulation 7(10)&(11)

[42] . See Regulation 9 of the Telecommunications Networks Interconnection Regulations, 2007.

Where the requested party rejects the interconnection request of the requesting party as unreasonable, the requesting party may appeal to the commission in accordance with the Regulations. An interconnection licensed telecommunications operator shall provide six months written notice to an interconnection operator of planned changes to its telecommunications network that may materially impact the telecommunications services of the interconnected operator.[43]

1.6. Rights And Obligations Of Parties To Interconnection.

All licensed telecommunications operator shall on receipt of a request for interconnection from another licensed telecommunications operator have an obligation to interconnect its telecommunication network with that licensed telecommunications operator's network in accordance with the principles of section 97 of the Act, these Regulations and any guidelines on interconnection adopted by the commission. A licensed telecommunicating operator shall, for each number area for which it has been allocated numbers by the commission within the range ascribed for fixed services in the national numbering plan, designate a minimum of one point of interconnection located in the geographic location of that number area. A point of interconnection shall be designated by notice in writing to the commission setting out the location of that point of interconnection and details of the number area that it serves.

Where a licensed telecommunications operator cannot, within [three months] from the date these Regulations take effect, designate a point of interconnection in a number area for which it has been allocated numbers, the licensed telecommunications operator shall designate on an interim basis for a limited period of no more than [three months] an existing point of interconnection located as close as possible to the geographic location of that number area as the designated point of interconnection for that number area and other areas, such interim designation to be made only with the prior approval of the commission.

The commission may agree to limit the obligation required under paragraph (1) of the regulation, if, as determined by the commission in its reasonable discretion: (a) an interconnection agreement is prohibited by law; or (b) the license issued to an operator does not authorize the services for which interconnection is requested; or (c) the requested interconnection is rendered impossible as a result of technical specifications; or (d) such interconnection would endanger life or safety or result in injury or harm to the licensed telecommunications operator's property or hinder the quality of the services provided by the licensed telecommunications operator. Any limitation imposed by the commission as stated above shall be published by the commission.[44]

The commission shall –

[43] . Ibid, Regulation 17

[44] . See Paragraph (1)of Regulation 16

(a) Encourage and secure adequate interconnection and interoperability of services;

(b) Carry out its functions in a way that promotes efficiency, sustainable competition and gives the maximum benefit to users;

(c) Take care, all necessary measures to remove any restrictions which may prevent licensed telecommunications operators from effectively negotiating interconnection agreements between themselves; and

(d) Take all necessary measures to ensure that licensed telecommunications operators who receive information during the course of negotiations following a request for interconnection shall only use that information for the purpose for which it is given and that such information is not passed to any person to whom it may provide a competitive advantage.[45]

Licensed telecommunications operators shall ensure that –

(a) Where information is acquired from another licensed telecommunications operator during the process of negotiating interconnection agreements, the information shall be used solely for the purpose for which it was supplied and that at all times the confidentiality of the information transmitted or stored is respected; and

(b) The information shall not be passed to any other party, in particular, other departments, subsidiaries or partners for which such information may provide competitive advantage. Interconnection agreements shall be negotiated freely and in good faith between the parties involved and each negotiating party shall not – (a) intentionally mislead the other party; or (b) coerce the other party into making an agreement that it would not otherwise have made; or (c) intentionally obstruct negotiations. The terms and conditions for interconnection of telecommunications networks shall be set on the basis of the agreement reached between the interconnecting licensed telecommunications operators and taking into account regulation 2(3) and regulation 3(10), may include at a minimum the service descriptions, terms and conditions included in the Model interconnection offer published by the commission under regulation 2(3). The interconnection agreement shall be in writing and comply with (a) the provisions of the Act, these Regulations and any guidelines on interconnection adopted by the commission; and (b) the principles of neutrality, transparency, non- discrimination, fair

[45] . See Regulation 2 of the Telecommunication Networks Interconnection Regulations, 2007.

competition, cost orientation, universal coverage, access to information, equality of access and equal terms and conditions

An interconnection agreement shall cover all the issues set out in the Schedule to these Regulations and in particular, each interconnection agreement shall contain mutual obligations and responsibilities of the interconnecting licensed telecommunications operators to protect the interests of the users as well as the interconnecting operators.

All interconnection agreement shall be registered with the commission not later than thirty days from the date of the execution of the interconnection agreement or such other periods as may be specified in the license granted to that operator, and in any event, before any interconnection links are bought into service. Copies of interconnection agreements shall be made available by the commission on request to interested parties in accordance with regulation 16 of these Regulations.

Any party to an interconnection agreement may, upon the registering of such agreement with the commission, mark provisions containing trade or operating secrets, in which case, such party shall additionally submit to the commission for review a modified version of the agreement which does not, in that party's view, disclose the said trade or operating secrets. Where the commission considers the marking unjustified, it shall consult with the relevant licensed telecommunications operator prior to taking a decision on allowing third parties to inspect such agreements in whole or in part and it may subsequently restrict inspection to the modified version of the interconnection agreement.[46]

The parties to an interconnection agreement shall furnish to the commission any additional information that the commission requires in respect of an interconnection agreement. The commission may evaluate the terms and conditions and the charges set out in the interconnection agreement where in its reasonable view, the agreement does not include all or any of the service descriptions, terms and conditions included in the model interconnection offer published by the commission under regulation 2(3). Where the commission considers that an interconnection agreement registered with it should be evaluated, it shall notify the parties to that agreement within ten days of the registration of the agreement.

The parties to an interconnection already approved by the commission may amend or modify such agreement by giving the commission thirty days prior written notice, together with a copy of the proposed amendment or modification, before that amendment or modification takes effect. Where the commission does not request additional information on the modification or does not rule on the amendment or modification of the interconnection agreement within thirty days of the receipt of the notice, then the

[46] . See Regulation 3(7) &(8) of the Telecommunications Networks Interconnection Regulations, 2007.

amendment or notification shall be deemed to be approved by the commission.[47] Where modifications to the interconnection agreement are requested, the parties negotiate and make the necessary amendments to the agreement in order to comply with the commission's decision. Where the terms and conditions of any agreement or amendment made cease to be reasonable, the requested party shall, within thirty days, offer to the requesting party or agree with the requesting party, as the case may be, to amend the interconnection agreement, so that its terms and conditions are reasonable. Interconnection agreement may be terminated by common consent of the parties, breach of the agreement or as a result of force majeure.

Termination by may occur by assignment of interest. From the date of assignment, the assignee becomes responsible, and the assignor ceases to be responsible, for meeting all obligations to the other carrier to the part of the agreement that has been assigned.

Note that by Regulation 4 paragraph 8, a licensed telecommunications operator shall not terminate an interconnection agreement without the prior written consent of the commission and, where requested by the operator seeking prior consent, the commission shall notify the operator of its decision no more than thirty five days after receipt by the commission of the request for termination.

Telecommunications operators will interconnect voluntarily in some circumstances. If two operators are not in direct competition with each other, then generally they will have an incentive to interconnect. This is because interconnection increases the value of a network to its subscribers, by increasing the number of people they can call and the range of information communication technology services they can access, sometimes referred to as *network externalities*.

Sometimes incumbent operators will have little incentive to allow access to their network, or to allow access on reasonable terms. Where the interconnection seeker is a potential competitor, an incumbent may seek to limit competition, and preserve its market power. This it can do by adopting any of the following devices:

i. Refusing to interconnect;

ii. Offering interconnection at a price, or on other terms, that make it difficult for an efficient entrant to compete; or

iii. Seeking to "sabotage" the entrant by providing a lower quality interconnection service to the entrant than the incumbent provides for itself.[48]

[47] . See Regulation 4(1) & (2)of the Telecommunications Networks Interconnection Regulations,2007.
[48] . Ibid

In these cases regulatory intervention can lead to a more efficient outcome. The motivation for interconnection regulation is that efficient competition in "downstream" markets would be difficult, or even impossible, unless entrants can access the incumbent's network at appropriate prices, terms and conditions. For example, the European Union's interconnection directives allow National Regulatory Authorities to impose interconnection or unbundling obligations on carriers that have significant market power, in "situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-users' interest.[49]

In Nigeria, the Nigeria Communications Act, 2003, impose an obligation on services or facilities providers to interconnect their communications system when there is request to do so. Thus, section 96 of the Act provides that "if a network services or facilities provider receives a request for interconnection from another licensees, then the service or facilities provider shall have an obligation to interconnect its communications system with the other licensee's network at technically feasible locations, in accordance with the principles specified under the Act and pursuant to terms and conditions negotiated between the parties in good faith.[50] In any market, regulation needs to be able to adapt to changing circumstances. This is especially important in the information communication technology (ICT) industry, where outdated regulations risk stifling market growth and innovation.

Interconnection allows countries to reach certain objectives, in that it makes it possible to: (i) meet consumer needs, particularly in terms of the provision of a wide range of high-quality services; (ii) promote infrastructure development and innovation; (iii) contribute to the economic and financial development of the country by increasing the level of international investments; and (iv) ensure network connectivity, and thereby service interoperability. However, the effectiveness of interconnection depends on the regulatory framework and how it is applied. This is because interconnection may delay or impede the entry of competitors in the marketplace by leveling high charges for interconnection, or by refusing to construct adequate interconnection capacity or to make it available. Competitive market functioning therefore generally requires the intervention of a regulator, whether it is to define the rules or to monitor that they are effectively being applied.[51]

1.7. Challenges Of Interconnectivity Of Networks In Nigeria

In implementing interconnection, operators are confronted with a number of problems; these challenges are not only commercial in nature, but also procedural and technical. They include the followings: technical availability of interconnection with incumbent operators

[49] . "Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and association facilities (Access Directive)", Official Journal of the European Communities, Article 12.

[50] . See section 97(2) & 2003

[51] . Ibid, sections 97 (2)& 99 (1) & (2)

for different types of service (compatibility of services and networks); publication of an Reference Interconnection Offer (RIO); existence of guidelines for negotiating interconnection contracts; contract transparency; absence of discrimination between operators in granting access to interconnection services; the level, structure and basis for calculation of interconnection charges; equal access for clients of competitor networks; quality of interconnection; handling the costs of universal service; unbundling of network elements; existence of rapid, independent procedures for resolving disputes, and the means for enforcing the rules.

Many of these challenges apply to all countries, but are more difficult in countries with weak legal systems or no tradition of decision-making by independent regulators. In this regard, what are the particular challenges that may be significant for Nigerian regulator? The major challenges include:

i. The physical state of telecommunications networks in Nigeria,

ii. Transparency and access to information,

iii. When state-owned operators are part of the industry,

iv. Free trade negotiations, and

v. Dispute resolution.

Infrastructure Challenges: Compared to developed countries, telecommunications infrastructure in developing countries, such as Nigeria, have a number of features that create both challenges and opportunities:

i. Developing countries may not have extensive telephone network coverage, particularly outside main population or urban centres,

ii. Wireless and mobile operators often play a significant role, particularly in rural and remote areas. Typically, wireless demand in developing countries exceeds wireline demand, sometimes by significant amounts,

iii. Fibre-optic systems are often not widely rolled-out (or not all fibre is “lit” with the necessary electronics). Customers may have limited or no access to broadband services, particularly in rural areas.

iv. The technology in use, and network architecture, are often outdated.

These factors create a number of challenges. In particular, significant investment may be needed to achieve universal service goals, or to make broadband service widely available.

At the same time, developing countries that are designing interconnection regimes now have the opportunity to design better regulatory regimes. The fact that traditional wireline technologies are not deeply embedded in many developing countries enables regulators to implement interconnection policies that are more appropriate to wireless networks, VoIP, and other emerging technologies, for example:

i. The prominence of per-minute rates is a product of wireline technology. Per-minute rates may be irrelevant, or even counterproductive, when applied to VoIP service,

ii. Policies seeking to "unbundle" network elements assume that the wireline incumbent enjoys a near monopoly position in the provision of critical telecommunications infrastructure. This assumption is not valid in Nigeria with the demise of NITEL.

The absence of a well-established interconnection regime may allow regulators in developing countries to bypass policies that are no longer appropriate, in favour of arrangements that are sustainable, minimize opportunities for arbitrage, and are more in line with emerging technologies.

The Challenges of Transparency: Many countries require dominant operators to make the terms and conditions of interconnection transparent. In addition, the World Trade Organization requires members to ensure that agreements or model interconnection offers of major suppliers are made public. The objective of such transparency is generally to prevent dominant operators from discriminating between different competitors, or otherwise acting to limit competition. For example, a dominant operator could enter into confidential interconnection agreements that provide unfavourable interconnection arrangements with competitors, and favourable terms for affiliates.

Requiring operators to publish interconnection agreements enables regulators and other operators to monitor interconnection terms and agreements, and identify discriminatory or potentially anti-competitive behavior. Transparency is also important in regulatory processes. For a regulator's decisions to be credible, the regulated firm and other stakeholders must have confidence in the decision making process. Ways to achieve this include public consultation processes, and requirements for regulators to publish the reasons for their decisions on a regular basis.

Regulatory transparency may be difficult to implement in countries with weak legal and administrative structures, and no tradition of transparency like Nigeria. However, with the establishment of the Independent regulator-NCC, this provides an opportunity to introduce procedures for regulatory transparency in the sector.

The challenges of access to information: In order to regulate effectively, a regulator needs access to detailed information about the regulated firm. For example, regulators often

require detailed cost information and information on the regulated firm's cost of capital. In many developing countries, including Nigeria, such detailed information is simply not available. The incumbent firm may not have sufficiently detailed network data to enable long run incremental cost modeling. Or the regulator may not have sufficient powers to require the regulated firm to provide the information. Where this is the case, alternative or less data intensive approaches can be taken. For example:

i. Top down cost model can be used. Top down cost models are based on the firm's existing financial accounts. The ITU's COSITU model is a top down cost model that has been designed for use in developing countries, such as Nigeria.

ii. International benchmarking can be used to estimate interconnection prices, or individual inputs for costing exercises. (For example, COSITU provides benchmark data for the inputs needed to estimate cost of capital, where this information is not available).

Challenge of regulating state-owned operators: In countries where the incumbent telecommunications operator is government owned, it may be challenging for the regulator to be independent, or to be perceived as independent. Entrants may have little confidence that their interests and those of their customers will be given due weight. Key questions for entrants and the government are whether the regulator will have sufficient influence over the state-owned provider to:

i. Effectively mandate access to the state-owned provider's network, and

ii. Be able to enforce terms and conditions for access that will allow equally efficient new entrants to compete with the state-owned service provider.

Recent research has concluded that in the European Union, regulatory outcomes tend to favour government-owned incumbent operators.[52] This favoritism is largely mitigated when the regulator is independent from governmental interference. This requires:

i. An arm's relationship with political authorities, and

ii. Organizational autonomy, such as earmarked funding and exemption from restrictive civil service salary rules. Without organization autonomy, political actors may influence decisions indirectly, for example, by threatening the regulator's funding or sacking the management team of the regulator at will.

Regulatory independence can be difficult or even impossible, in some countries. Even where formal structures separate regulators from political authorities, ministers may seek to

[52] . See, for example, Geoff Edwards and Leonard Waverman, "The Effects of Public Ownership and Regulatory Independence on Regulatory Outcomes," Journal of Regulatory Economics, Vol.29, No.1, 2006, Pp.23-67.

use their personal influence to affect regulatory outcomes. Where this is the case it may be better, in designing the regime, to explicitly recognize the role of ministers in decision making. For example political decisions should be explicitly made by policy makers. These would include:

a. Decisions to proceed with liberalization, which involve trade-offs between maintaining the value of the state-owned company on the one hand, and introducing effective competition on the other,

b. Decisions to rebalance retail tariffs, or otherwise remove implicit subsidies.

Challenges of International Organizations: The World Trade Organization (WTO) Agreement on Basic Telecommunications came into force in 1998. The agreement includes obligations relating to interconnection. WTO members, or countries seeking to join the WTO, must comply with these rules. If a member country fails to comply with its WTO obligations, other members may take a dispute to the WTO. Key WTO obligations for interconnection are as follows:

a. Interconnection with "major suppliers" must be assured:

    i. At any technically feasible point in the network,

    ii. In a timely fashion,

    iii. On non-discriminatory and transparent terms (including quality and rates),

    iv. Sufficiently unbundled to avoid charges for unnecessary components,

    v. At non-traditional interconnection points, if the requestor pays charges.

b. Procedures for interconnection to major suppliers must be made public.

c. Agreements for the model interconnection offer of major suppliers must be made public.

It is therefore necessary for all WTO member countries to comply with its requirements in the formulation of their interconnection regime and policies. Finally, there is the challenge of poor network or epileptic services by service providers.

1.8. Conclusion

Telecommunications service providers need access to networks owned by others in order to provide services to their customers. Without interconnection, a customer cannot call subscribers on other networks, access internet content located on another networks, and so on. Networks interconnect with each other for a number of reasons. These include:

i. To provide a service that is not economically feasible without interconnection, for example, calls to customers on another operator's network;

ii. To increase profitability. Where interconnection increases the value of telecommunications services, or the range of services operators can provide, it can be in the mutual interests of the operators to interconnect;

iii. To expand or improve services that is valuable to customers;

iv. Increasing competition across the world;

v. Interconnection is essential for the inter-operability of networks;

vi. Increases convenience and value for consumers, as an efficient interconnection agreement would lead to reduction in call charges, etc.

Interconnection has been important for telecommunications providers since the invention of the telephone. Even before competition emerged, adjacent carriers interconnected with each other so that their customers could make long distance and international calls. With recent technological developments the range of services that depend on interconnection has increased. Interconnection is an essential input to local services, internet access, e-mail and messages services, broadband data transmission, and a wide range of multi-media services.

Interconnection plays an important role for operators and consumers. For operators, it is crucial for capturing market share. For incumbents, faced with new competition after many years of monopoly, the temptation to restrict access to their network and protect the monopoly status quo is very strong. This can take the form of certain anticompetitive practices affecting interconnection. Examples of such practices that are intended to inhabit or delay the entry of new operators into the market include: (a) prohibitive interconnection charges; (b) refusal to grant access to some parts of the network; (c) refusal to unbundle the network elements needed for effective interconnection, etc. From the viewpoint of a new operator, the conditions of market entry are largely determined by the interconnection policy on the market in question, in particular the level of interconnection charges. Interconnection is thus important for new entrants because it can allow them to offer their services on the market without the need for heavy capital expenditure.

From the viewpoint of the consumers, interconnection is indispensable for users in one network to be able to communicate with other users and make use of the full range of services, independently of their network of origin. It is thanks to interconnection between the many different kinds of network that residential and business users around the world have reaped numerous benefits in recent years. Interconnection has made telephone accessible anywhere in the world, in addition to access to the internet and the services provided there (e-commerce, use of ATM in banking services, etc).[53]

Finally, if conditions for healthy competition are to be established, telecommunications end users should be able to access the services of new market entrants as easily as they can access those of the incumbent operators. Without equal or at least comparable- ease of access, new entrants will find it difficult to attract customers. This is facilitated by requiring dominant local exchange carriers to offer equal access for long distance carriers to reach potential customers. This requires redesigning the switches and related software, so as to make them easily adaptable to the requirements of multi-operator environment. Implementing dialing parity usually requires incumbent carriers to alter operating procedures and reprogram their equipment. Above all, the challenge of poor networks or reception should be tackled with all seriousness it deserves.

[53] . See The West African Common Market Project: Harmonization of Policies Governing the ITC market in the UEMOA-ECOWAS space-Interconnection (EU, ITU, 2004) P.10.

THE INVESTMENTS AND SECURITIES TRIBUNAL: ACHIEVEMENTS, CHALLENGES AND PROSPECTS*

1.1. Introduction.

The Investments and Securities Tribunal *is* an independent specialised judicial body established under Section 274 of the Investments and Securities Act[1] of 2007 to interpret and adjudicate on all capital market and investments controversies arising under the Act and the Rules and Regulations made there under.

In addition, by virtue of the Pensions Reforms Act[2], 2004, the Investments & Securities Tribunal (1ST) is also empowered to adjudicate on pensions disputes in Nigeria. The pension jurisdiction presently however appears to be a limited one in view of the provisions of Section 254 (c) (i) (k) of the Third Alteration Act 2010, to the 1999 Constitution of the Federal Republic of Nigeria.

To this end the Tribunal's pension jurisdiction is limited only to issues of regulation as well as disputes that may arise from the investments of pension funds in the capital market. Though no judicial pronouncement have been made in this regard by the apex court, it remains to be seen what their position would be.

By virtue of sections 315(1)(a), (4)(b) and 316(1) of 1999 Constitution, the Investments and Securities Act and the Investments and Securities Tribunal are deemed to be an 'existing' law and court respectively, enacted and created by the National Assembly.

The Tribunal in line with the provisions of section *275* (i) (a-c) of the Investments and Securities Act consists of 10 persons to be appointed by the Minister as follows:

(a) A full time Chairman who shall be a legal practitioner of not less than 15 years with cognate experience in capital market matters;

(b) Four other full time Members, three of whom shall be Legal practitioners of not less than 10 years experience and one person who shall be knowledgeable in Capital Market matters who shall devote themselves to issues relating to adjudication and shall not exercise any administrative function.

Chianakwalam,N.,(Ph.D) Honourable Chairman, Investments and Securities Tribunal of Nigeria (IST).

[1] No.29,2007(ISA)

[2] No.13,2004.

(c) Five other part time members who shall be persons of proven ability and expertise in corporate and capital market matters.

By virtue of section 276 (i) ISA 2007 and for the purposes of exercising any jurisdiction conferred on this Act, the Tribunal shall be duly constituted if it consists of not less than 3 members of the Tribunal.

The Chairman of the Tribunal may also pursuant to section 276 (2) ISA 2007 constitute a panel of three (3) from *its* membership whenever he deems it necessary for the purposes of exercising the jurisdiction vested in the Tribunal by this Act or any other Act provided that:

(a) A member presiding as Chairman of any panel shall be a legal practitioner: and

(b) For the purposes of this Act, the sitting of any of such panel shall be deemed a sitting of the Tribunal.

1.2. Jurisdiction

The Tribunal is empowered pursuant to section 284 of the Investments and Securities Act to:

The exclusion of any other court of law or body in Nigeria exercise jurisdiction to hear and determine any question of law and dispute involving:

(a,) A decision or determination of the Commission in the operation and application of this Act, and in particular relating to any dispute:

(i,) *Between capital market operators;*

(ii) Between capital market operators and their clients;

(iii) Between an investor and a securities exchange or capital trade point or clearing and settlement agency;

(iv,) Between capital market operators and self regulatory organization

(b) The Commission and self regulatory organization;

(c) A capital market operator and the Commission;

(d) An investor and the Commission;

(e) An issuer of securities and the Commission; and

(f) Disputes arising from the administration, management and operation of collective investment schemes.

Additionally any person aggrieved by any action or decision of the Commission under this Act, may institute an action in the Tribunal or appeal against such decision within the period stipulated under this Act[3] provided that the aggrieved person shall give to the commission 14 days notice in writing of his intention to institute an action or appeal against its decision.

1.3. Achievements.

The Tribunal as at the month of October, 2013 adjudicated on about 256 cases and an additional 35 complaints / cases have been resolved through its Alternative Dispute Resolution window with monetary claims of about N351.9 Billion. Examples of capital market disputes adjudicated upon by the tribunal include; Misappropriation of client's money by market operators; Non-remittance of issue proceeds by an Issuing House to the issuer/company; Non-remittance of dividends by a Registrar/Public company / Stockbroker; Late transfer and/or registration of shares/stocks by any stockbroker; Disputes over mergers and acquisitions between the shareholders and the public quoted company, self regulatory authority, the Commission etc; Disputes arising from any decision, notice and / or decision issued by the Commission; Disputes/claims arising from non-disclosure, misrepresentation or false statements in offer documents or in a securities transaction; Disputes between operators and any SRO in the market (e.g. stockbrokerage firm and a stock exchange and dispute between a registrar and exchange); Disputes arising from the rules, regulations and such other guidelines made by the Commission, or any securities exchange; Appeals against disciplinary measures by the Commission such as suspension and/or baring participants from the market; Appeals against delisting of any security or company by an Exchange.

Mindful of the novel, complex and technical nature of Capital Market adjudication and the need for the infusion of capital market expertise in the dispute resolution framework of the Tribunal, the Investments and Securities Act provides for the incorporation in the Tribunal's membership of persons of proven ability and expertise in corporate and Capital Market Matters, thus embellishing the adjudicatory process with Capital Market expertise. Consequently the membership of the Tribunal is not an all lawyers affair, but an infusion of capital market expertise with the adjudicatory know-how.

Several of the Tribunal's judgments have impacted positively on the Nigerian Capital Market with its implication for enhanced investors' confidence thereby attracting both foreign direct investments as well as both local and foreign portfolio investments. Only recently the Securities and Exchange Commission (SEC) announced that the Investor's

[3] ISA, Section 289.

Protection Fund (IPF) would soon be in operation as the Board of Trustees of the IPF, is working hard to ensure that there is a robust and sustainable framework to address the issues in line with global best practice.

It is instructive to note that the Investors Protection Fund was established to compensate investors who suffer losses and are victims of fraudulent practices of stockbrokers. It is the Capital Market equivalent of the Nigerian Deposit Insurance Corporation (NDIC), for depositors in the money market.

Hitherto the fund had remained largely unutilized in performing the above functions. However it took the intervention of the Tribunal through its decision in ***Chief Ezemegbe Livinus vs. Nigerian Stock Exchange & Anor***[4]**,** which ordered SEC and the Nigerian Stock Exchange to work out modalities for the operation of the fund, resulting in the recent inauguration of the Board of Trustees (BOT) for the IPF.

FIS Securities Ltd. vs. Securities & Exchange Commission (SEC) In Re SEC vs. Bonkolans Investments Ltd & ors[5] was an appeal from the decision of the Administrative Proceedings Committee (APC) of SEC. Here, a syndicate acting through some 20 stock broking firms forged the certificates of the shares of Nestle, Union Bank, First Bank etc and sold same on the floor of the Nigerian Stock Exchange. The Tribunal, in its decision, varied SEC's order on the Appellant to buy back the shares to avoid a multiple buy-back effect, as the shares had passed through several bonafide purchasers for value without notice. It also upheld the order of refund with interest where the value of the shares had appreciated. In ***SEC Vs. Access 2 Finance Ltd. & 47 Ors***[6]***; SEC Vs. All Green Investments Nig. Ltd & 53 Ors***[7]**; and** ***SEC Vs. Rehoboth Inv . Ltd & 45 Ors***[8] Ponzi and pyramid schemes or "wonder banks" transactions were found to be unregistered and unregulated businesses. Accordingly the Tribunal by its judgments ordered the sealing of the various premises and freezing of the assets and accounts of the companies. This has immensely helped in bringing sanity to the market by ridding it of quack market operators out to defraud unsuspecting innocent investors.

In ***Light House Assets Management Company Ltd vs. SEC***[9] the Administrative Proceedings Committee (APC) of SEC at the end of its hearing, awarded costs to itself. In upturning APC's decision, the Tribunal held that costs are for the parties and that an adjudicating body or an administrative body performing quasi judicial functions (as APC) is not allowed to award costs to itself.

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[4] 3,NISLR,P.113.
[5] (2004) 1 NISLR 162,202.
[6] (Unreported Suit No.IST/OA/03/09
[7] (2012) 4 NISLR 25
[8] (Unreported.Suit No. IST/OA/04/09.
[9] (2004) 1NISLR 81,110.

*In **SEC Vs. Tiamiyu R.A Bodunde**[10]* Empire Securities Limited notified the Securities and Exchange Commission that Tiamiyu Bodunde was involved in unethical market practices and suspected fraudulent activities as its Managing Director and Chief Executive Officer. Having been suspended indefinitely by the board of Empire Securities Limited, he was alleged to have taken up employment with another stock broking firm and has continued to deal with client's funds in the market. The Tribunal in *its* judgment vacated its earlier order of interlocutory injunction made, restraining Tiamiyu Bodunde from participating in any capital market transactions and the order retraining him from trading or disposing of his shares and stocks in the CSCS account.

This judgment accentuates the need for board supervision, compliance with reporting standards as well as the need for the entrenchment *of* real corporate governance principles in the administration of companies.

1.4. Expeditious Resolution Of Disputes.

It is in its recognition of the time sensitive nature of the market that the drafters of the Investment and Securities Act 2007, deemed it fit to recommend a time line for the disposal of cases within the Tribunal's case docket. Section 289 (5) ISA 2007, provides;

The Tribunal, shall in the exercise of its powers under this Act, conduct its proceedings in such manners as to avoid undue delays and shall dispose of any matter before it finally within 3 months from the date of the commencement of the hearing of the substantive action.

This provision no doubt has laid to rest whatever confusion existed in the provision of Section *236 (5) of ISA 1999**, now repealed and replaced by the provisions of ISA 2007,*** which had given the time line for the final determination of cases before the Tribunal to be *three months from the date of the commencement of the action*[11].

However the Tribunal has endeavoured to live up to this expectation in an appreciable manner, though for some obvious constraints prevalent in the administration of justice it has not attained 100% realization of its objectives.

In keeping to this mandate the Tribunal has to its advantage the benefit of a Rules of Court[12] that is *"user friendly"* in the sense that it is primarily concerned with an overriding

[10] (Unreported) Suit No.IST/LA/OA/05/09.

[11] See the Court of Appeal's judgment in *International Standard Securities V. Union Bank of Nigeria Pie (Registrars Department)* where the ratio in *Egbe V Adefarasin (1987)1 NWLR (pt. 47)1 at 20 G-H* was applied to the effect that commencement of action is nothing other than when the suit is first instituted, that is, filed by a writ or originating process.

[12] Investments and Securities Tribunal (Procedure) Rules 2003 (The Rules)

objective of doing substantial justice by dealing with cases before it fairly and justly, and devoid of technicalities. Rule 2 (1) of the Rules specifically provides;

The Overriding objective of these rules is to enable the Tribunal with the assistance of the parties to deal with cases fairly and justly.

Rule 3 (1) & (2) of the Rules, empowers the Tribunal to mandatorily give effect to the said **overriding objective** while exercising any power under its Rules or interpreting them, and manage cases actively in accordance thereof. In **Rule *2(2)(a-f)*** we find the definition of the expression **"dealing with a case fairly and *justly"*** as including:

"Providing a reliable, informed, expedient, flexible and affordable dispute settlement mechanism for investors, public companies, capital market operators, self regulatory organizations and other market participants"

Consequently the Tribunal, in order to be guided by its overriding objectives, has provided in **Part III** of its Rules a lot of case management powers which are aimed at achieving the overall objectives of the Rules of the Tribunal. These case management powers enable the Tribunal to ensure quick dispensation of justice by avoiding technicalities and formalities which, not only delay but sometimes, deny justice in the traditional courts. Some of these powers include the following under Rule **30** of the Rules:

a) To extend the time appointed by or under the Act or by or under these Rules for doing any act even if the time appointed has expired;

b) (Particularly to enable the case to be settled amicably among the parties) to postpone the date or time or change the place fixed for any hearing or adjourn any hearing;

c) To require a party or a party's representative to attend the Tribunal; d) To require the parties to provide a statement of agreed facts, facts in dispute, and issue or issues to be decided by the Tribunal including a list of agreed documents;

e) To hold a hearing and receive evidence by telephone, through a video link or by using any other method of direct oral communication provided the Tribunal is satisfied that this would not prejudice the administration of justice;

f) Decide that part of any proceedings be dealt with as separate proceedings;

g) To stay the whole or part of any proceedings or decision either generally or until a specified date or event;

h) To decide the order in which issues are to be considered;

i) To exclude an issue from consideration;

j) If the appellant or applicant shall at any time give notice of the withdrawal of his or her appeal, to dismiss the proceedings;

k) Subject to the proviso below, to order the striking out or amendment of any notice or statement of reasons for appeal, reply, supplementary statement or written representation because it is scandalous or vexatious;

l) Subject to the proviso below, to order the striking out of any appeal or application if it is not diligently pursued by the appellant or the applicant: but before exercising the power conferred by subparagraph (k) or this sub paragraph, the Tribunal shall send notice to the party likely to be affected by the exercise of the power giving that party an opportunity to appear before the Tribunal to state whether or not the power should be exercised.

m) To take any other step or make any other decision for the purpose of managing the case and furthering the overriding objective[13].

Prior to the establishment of the 1ST, investors were wary of the reckless dispositions of certain market operators. With the Tribunal's intervention, some of these excesses have been curbed as investors are guaranteed a fast-tracked adjudicatory process that addresses their complaints in record time often within the three month period outlined by the Act.

The 1ST endeavouring to deepen the jurisprudence in the area of investments and securities law as well as assist legal practitioners, investors and participants in the markets, have continued to publish its judgments in the now well known **Nigerian Investments and Securities Law Report (NISLR).** In addition, it also publishes it's the Fast Track Journal which helps to create awareness and enlighten investors/participants in the market on the operations of the Tribunal as well as provide a guide on how to access the Tribunal.

The Tribunal in line with global best practice is fully automated and thus undertakes electronic verbatim recording of its proceedings. The transcripts of recordings are now available to members of the public a few days after the proceedings. This has greatly enhanced the operation of the Tribunal, and has continued to be of immense help as the Tribunal endeavours to meet its statutory mandate of dispensing with matters before it within a period of 3 months from the date of commencement of the hearing of the substantive action.

[13] See Rule 3o(3)(a-m) of the Rules.

1.5. Challenges

Funding remains a thorny issue in the Tribunal's quest to deliver on its statutory mandate. Apart from the Federal government's yearly budgetary allocations which have proven grossly inadequate, the Tribunal has no other source of funding though it is a very significant institution in the realization, of the. dire need to build and retain the confidence of investors for the growth and stability of our Capital Market as well as the well being of our national economy.

Though enhanced budgetary allocation will in the interim serve to obviate the funding constraints of the Tribunal, it is desirable that a more lasting and permanent solution is sought. To this end the Tribunal has been making several representations on the need for it to be funded from the transaction fees from the market, which presently only inures to the benefit of all other players in the market, but the 1ST. Whilst this option will in no way impact on the transaction cost in the market on the one hand, it will on the other ease the pressure on government.

It must be noted that the remuneration and condition of service of the Chairman, Members and the Chief Registrar of the Tribunal *is* benchmarked with that of the Chief Judge, Judges and the Chief Registrar of the Federal High Court in line with Section 280 ISA, 2007. Unfortunately the Chairman, Members and the Chief Registrar of the Tribunal have continually been deprived of the perquisites of office as is required under the law such as Cars for judges, Medical welfare, Accommodation for the Honourable Chairman and Members, Security, befitting Chambers etc.

Akin to the foregoing is the provision of section 283 (2) ISA 2007, which provides that the remuneration (including allowances) and terms and conditions of service of the staff of the Tribunal shall be as may be determined by the Tribunal provided that it is not less than what is obtainable in similar institutions in the Capital Market.

The 1ST as a specialised tribunal is saddled with the enormous task of resolving complex investment and securities market disputes. It necessarily follows therefore that the Tribunal must have highly competent professional staff and should be able to retain them through competitive remuneration packages in order to preserve the independence and protect the integrity of 1ST as well as minimize turnover of skilled professionals that have been trained by the Tribunal. Unfortunately all efforts to secure a competitive salary and remuneration for staff as provided in the enabling Act has not been fruitful.

Office infrastructure is of utmost importance if the Tribunal must continue to deliver on its mandate. It is embarrassing that over ten (to) years after its establishment the Tribunal is yet to have proper and secure buildings for its sittings.

The Tribunal operates currently from rented premises which are not suitable for its operations because of lack *of* adequate space, security and chambers for the Honourable Chairman and Honourable members. The court rooms are *grossly* inadequate, necessitating, one panel having to wait for the others to rise before sitting, leading to sittings being prolonged sometimes into the night.

Furthermore office accommodation is grossly inadequate with the resultant effect that departments are cramped into existing spaces, whilst some members are poles apart from their support staff whilst part time members are cramped into one room.

The very existence of the Tribunal continues to be threatened by the fact of its non inclusion in the constitution. Only very recently at a judgment of the Federal High Court in the case of ***Staffords Nig. Ltd & Anor. V. 1ST*** & ***5 Ors***[14] delivered on August **20, 2013** per Justice G.O. Kolawole, the issue of the Tribunal's jurisdiction vis —a-viz the Federal High Court reared its ugly head again to the end that it was contended by Plaintiffs counsel inter-alia that the 1ST is unconstitutional, null and void on the account of it being conferred with jurisdiction which has already been exclusively conferred upon the Federa1 High Court by section 259 constitution of the Federal Republic of Nigeria.

Interestingly the Honourable Justice G.O. Kolawole refused to be misled by this submission of counsel to the plaintiffs that the provisions of section 284(1) ISA 2007 has eroded the Federal High Court's jurisdiction pursuant to section 251 (i)(d) and (e) of the 1999 constitution when he held inter-alia:

*I had expressed this view in the course of this judgment arid I am unable to see any conflict as it will amount to reading what section **251** (i)(d)and (e) of the constitution have not specifically stated into it in order to construe it as somewhat similar to the provisions of section **284(1)** of the Investments and Securities Act supra.*

In posturing as above the learned justice notwithstanding continued to maintain that the Investments and Securities Tribunal being a product. of an Act of the National Assembly can only be a Tribunal with subordinate jurisdiction to the Federal High Court and the Federal Capital Territory and State High Courts; a sentiment also being expressed by several other persons. It is thus not surprising that conflicting judgments now exists on the jurisdiction of the 1ST vis —a- viz the Federal High Court in the Court of Appeal sitting variously at the Lagos and Abuja divisions.

Accordingly it has become imperative to pursue the amendment of the 1999 constitution of the Federal Republic of Nigeria to incorporate the 1ST as one of the listed superior courts of record as was done in the case of the National Industrial Court. This in my view will bring needed resolution to this somewhat confused state of affairs.

[14] *(unreported) Suit no. FHC/ABJ/CS/49*

Akin to the imperative for the amendment of the constitution incorporate the 1ST, is the dire need to amend the ISA 2007, with view to seeking an enlargement of its Original jurisdiction. A party seeking a redress presently is firstly mandated to afford the Securities and Exchange Commission (SEC) the opportunity of enquiring into the matter. It is only a party dissatisfied with the decision of SEC that is required to approach the Tribunal for redress by way of an appeal

The Tribunal is by its enabling Act only imbued with an original jurisdiction in matters where the SEC is a party or in disputes arising from the administration, management and operations of collective investment schemes[15].

This provision is very restrictive of the right of an aggrieved investor of access to justice. To this end an amendment of the ISA 2007, has become very imperative, considering that pursuant to the repea1 ISA 1999, the Tribunal was afforded original jurisdiction in all disputes and controversies arising under the Act and rule and regulation made there under, in addition to all appeals that may arise from persons aggrieved by the decisions of the Secl1nitie5 and exchange Commission.

It is therefore very obvious to see that the legal framework for the Nigerian Capital Market is once again back to the era prior to the establishment of the 1ST where investors filed their complaints with the Administrative Proceedings Committee of the Securities and Exchange Commission or the Federal High Court.

The resultant consequence in this is the undue delay being occasioned in the resolution of Capital Market disputes which can only serve to erode investors' confidence, in an otherwise volatile market.

The judgment enforcement mechanism of the Tribunal has remained a major snag in its operations in the administration of justice. Section 293 (3) of ISA 2007 provides:

"An award or judgment of the Tribunal shall be enforced as it were a judgment of the Federal High Court upon a registration of a copy of such award or judgment with the Chief Registrar of the Federal High Court by the Tribunal."

This enforcement procedure leaves much to be desired as it is fraught with loopholes and liable to be exploited by an obstinate judgment debtor to frustrate a judgment creditor from reaping the fruit of his judgment. Still, this circuitous process further exposes the litigants to post judgment disputes and litigation at a new forum — the Federal High Court.

This certainly negates the real intention of the Investments and *Securities* Act and *thus* accentuates the dire need for an amendment of the ISA **2007** to give the Tribunal full

[15] Section 284 (i)(d-f) and () ISA 2007.

powers to enforce its judgments to further realize its overriding objective of fostering investor confidence in the Nigerian capital market.

1.6. Prospects Of The 1nvestments And Securities Tribunal.

The Investments and Securities Tribunal maintains a physical presence in Lagos, Kano, Enugu and Port Harcourt where it presently has zonal offices as well as in Awka and Yenegoa where it has desk offices and has continued to survey *ways* of taking its presence closer to the doorsteps of investors by having a greater geographical spread, within the limit of its resources.

The Investments and Securities Tribunal is similar to the Market Misconduct Tribunal of Hong Kong, The Securities Appellate Tribunal of India and the Financial Services and Market Tribunal of the United Kingdom. It is the first of its kind in Africa, and a trail blazer in securities matters adjudication.

Indeed the US Securities and Exchange Commission and its staff Mr. Z. Scott Birdwell at a recent global workshop of the US Securities and Exchange Commission's International Institute Programme on Securities Market Development in Washington DC commended the 1ST as a superior judicial model for securities markets and recommended the 1ST model for emulation, globally.

Many of the Tribunal's decisions today have formed the bedrock of the Nigerian Capital Market jurisprudence. In recognition of the relevance of the Tribunal in the overall well being of the Nigerian economy a case is being made for the 1ST to assume the adjudicatory framework to handle all adjudicatory matters arising from the entire financial services sector of the nation under the vision 20:20:20 project.

1.7. Conclusion

The Tribunal has remained very key and strategic in Nigeria's transformation agenda and needs to be further strengthened to enable it to continue to deliver on its mandate, particularly now that the market is gradually picking up and investors' confidence on the upward trend after the immediate past global economic meltdown with its consequences and impact for the confidence of investors.

The need to leverage and build on the successes and the milestone already accomplished by the Tribunal in the past **10** years of its existence has thus become more imperative than ever. Consequently in our collaborative efforts at justice delivery, we can ensure that these successes are consolidated, whilst we seek to do more.

EVALUATION OF JUDICIAL ATTITUDE TOWARDS TAX OFFENCES AND PENALTIES: CASES, ANALYSIS AND RECOMMENDATIONS*

1.1 Introduction

Taxation is a compulsory levy by the government on the incomes of individuals, properties and corporate bodies for the upkeep of the government. The failure of taxpayers to pay their income tax amount to tax evasion and tax avoidance The tax laws classified them into civil and criminal offences[1]. The act, commission or omission for not paying income tax constitutes tax offences in which the tax statutes visits with penalties. This paper considers the ways and manners in which the judiciary adjudicates on tax offences and the penalties against corporate bodies according to the laws on company taxation. The problems associated to this is that, despite the provisions of the law against tax offences, the penalties appears to be ineffective to deter the commission of tax evasion and avoidance. The court of law are saddled with the responsibility for the trial of tax defaulters and often apportion civil and criminal sanctions against them as can be observed from several cases brought before it. Thus, it is expedient to have a strong judiciary that can legally adjudicate on tax matters without any iota of fear and favour. But the judicial arm of government cannot be effective without formidable civil and criminal sanctions in our taxing provisions. It is therefore left to the legislature to enact effective laws that will counter the commission of tax offences by making strong and effective penalties against the breach of tax laws and for the tax administrative organs to bring forth any infringement of the tax lax laws to book.

It is the function of the judiciary to resolve legal issues and in doing so, the courts are called upon to determine whether in view of the facts proven and the language employed in the tax statutes, the taxpayer is or is not subject to the prohibition or burden of the tax statutes.

Tax evasion and avoidance by corporate bodies is of serious concern in Nigeria for at least three reasons. First, it results to loss of tax revenue amounting to over several billions of Naira.[2] Secondly, although tax evasion differs among taxpayers, it impairs chances of realizing the distributional or equity goals of taxation. Thirdly, if tax evasion becomes too widespread and beyond control, honest taxpayers may lose faith in tax administration and may be tempted to join the rank of tax evaders which is very inimical to revenue generation in the economy.

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1 Sections 92-95 Companies Income Tax Act, Cap C21 LFN 2004

2 Jegede; Osuala J. & Nwosu T. (1988) Five Billion naira Lost Through tax evasion; the president 31st July, Vol. 1 No. 3 p. 12

In developing country like Nigeria, where all hands must be on deck to revamp the economy, but the prevalent magnitude of tax evasion and tax avoidance by corporate bodies especially, is too high. The negative activities of multinational companies especially, the crude oil companies like Shell Petroleum co. plc, Chevron co. plc, Texaco co. plc. e.t.c. that extracts and sell Nigerian crude oil overseas, leaves much to be desired taking into account that crude oil forms 80% of our sources of revenue.

The tax administrative organs such as the Federal Inland Revenue Service (FIRS) and the judicial arm of the government such as the Tax Appeals Tribunals (TAT) and the Federal High Courts e.t.c that handles tax matters seems not to be properly strengthen to meet the challenges posed by tax evasion and avoidance by corporate bodies due to myriad of reasons such as inadequate man power, laxity and corruption by revenue authorities to bring these tax defaulters to justice.

It is also difficult to provide reliable statistical evidence of the seriousness of tax evasion by companies in Nigeria because of persistent distrust of statistics which are more often politicized as it is linked to the distribution of the nation's resources**.** The main objective of this paper is to critically analyse and discuss how the judiciary especially, the Nigerian courts adjudicates on the cases of tax evasion and tax avoidance by defaulting taxpayers brought to them for trial by the revenue authorities

The problem to be discussed in this paper is identifying tax offences that may constitute tax evasion or avoidance and the approach of these issues by the courts at the trial. At the end, plausible solution and recommendations will be advanced respectively. In this vain, doctrinal method of the study shall be applied.

Hence, it is on this premise that this paper focuses on the evaluation of the judicial attitude towards tax offences and penalties in Nigeria particularly by corporate bodies that handles the most important aspect of revenue generation in Nigerian economy.

This paper shall first examine some major meanings of key terms such as the judiciary, tax administrative organs, some tax offences and penalties by corporate bodies. The tax offences and penalties shall be discussed in line with the manner the judiciary treat such tax matters brought before it for trial and how it is handled on case by case basis.

1.2 Understanding the Key Terms

At this juncture, it is pertinent to understand the meaning of some terminologies used to describe basic issues that relates to the subject matter for clearer understanding namely:

a.) **The Judiciary**

While the legislature makes the law[3], the judiciary interprets the law and not only explains it, but also applies the laws according to the matters brought before it for trial[4]. Thus, cases brought before it are examined based on facts and law, decisions are made for clearer understanding of the justice system. In this paper the decisions of the Tax Appeals Tribunal (TAT}, the Federal High Court, Court of Appeals and Supreme Court shall be made reference to.

b) Tax Offences and Penalties

An act, commission or omission (actus reus and men rea –action and evil mind) constitutes offences which can be civil or criminal as defined by law[5]. In this paper, it is related to tax evasion and tax avoidance by corporate bodies (Tax payers)[6]. Some of these tax offences penalties include: failure to make returns for income tax or capital gains tax[7], failure to make returns for corporate bodies[8] and incorrect returns or accounts[9] e.t.c

c) Federal Inland Revenue Service (FIRS)

This is the administrative body that is responsible for the assessment, collection and prosecution of corporate tax defaulters. It was formally known as the Federal Board of Inland Revenue (FBIR) before it was changed to Federal Inland Revenue Service (FIRS) in 2007and is saddled with more administrative responsibilities under the new Act[10].

d) Tax Appeal Tribunal (TAT)

This is the appellate body responsible for hearing tax appeal cases generally which are brought to it from the Joint Tax Board (JTB), the FIRS and the State Boards of Internal Revenue (SBIR). Formerly, tax appeals lies from the Body of Appeal Commissioners (BAC) to the Federal High Court (FHC). But by the establishment of the Tax Appeals Tribunal (TAT)[11], all appeals lies to TAT and then to the Federal high Court, Court of Appeal and finally to the Supreme Court as the case may be respectively.

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3 Section 4(1) Constitution of Federal Republic of Nigerian (LFN) 1999 (as amended)
4 Section 6(1) LFN 1999 (as amended)
5 Kharisu S.C (1981) The law of crimes in Nigeria A.B.U University press Zaria,pp.9-12
6 See Sections 92-95 companies Income Tax Act, Cap C. 21 LFN 2004
7 Section 92 Companies Income Tax Act (CITA) CAP C.21 LFN 2004
8 Section 93 CITA CAP C.21 LFN 2004
9 Section 94 CITA CAP C.21 LFN 2004
10 Federal Inland Revenue Service (Establishment) Act. 2007
11 See the Tax Appeal Tribunal Procedure Rules, 2010

1.3 Tax Offences: 'Tax Evasion And Tax Avoidance'

It is necessary to give a proper appraisal of the problems of tax evasion and avoidance in Nigeria. Therefore, understanding the distinction between "tax evasion" and "tax avoidance" is a pre-requisite in that, they have not been defined in Nigerian tax legislation.

"Tax evasion" is usually defined to mean the failure to pay one's tax or the reduction of one's tax liability through illegal or fraudulent returns or failure to make a return or even failure to pay tax on time. The evasion is therefore not only morally wrong but also it involves a breach of the tax laws.

Tax evasion must be distinguished from tax avoidance which is the minimization of tax liability by so arranging one's affairs as to take advantage of provisions in the tax law. In this way, the tax payer pays less tax than otherwise would have been payable. Tax avoidance does not necessarily denote an activity that is in all cases obnoxious. Indeed, tax avoidance may be considered by some people as being legal.

Of course, at first sight, it might seem difficult to see why a taxpayer should not get the benefit of statutory provisions which are part of a tax structure by adopting its legal position for that purpose. But the matter is not as simple as this might appear. Where there are manipulations of various kinds which have the effect of reducing considerably the revenue that is due to the government, such practices should be prevented. No one says that a person should not so arrange his personal affairs that the Revenue Authority can put the largest shovel in it, however, the tax law requires and expects the observance of its rules, the underlying purpose of which is to ascertain the true amount of taxable income. Where a taxable person embarks on artificial arrangements for the purposes of escaping or reducing tax liability otherwise due, such arrangements would be circumscribed and condemned as reprehensible or obnoxious. There is an even greater justification in a developing country like Nigeria where capital formation is badly needed for penalising tax avoidance schemes. We shall now consider the two terms beginning with tax avoidance and later on tax evasion

The Nigerian tax statutes provides no legislative definition of tax evasion but from the various offences and penalties sections, the offences provide an insight into what may be regarded as tax evasion. Tax evasion may thus be perpetuated in some of the following ways:

a. Failure to make return for income tax or capital gains tax;

b. Failure to make return for corporate tax;

c. Incorrect return or accounts.

The various acts must be done with fraud, willful default or neglect[12] and knowingly[13] for them to constitute the offence of tax evasion. This approach of stating acts which constitutes tax evasion is similar to other common law jurisdictions. In the United Kingdom[14] United States[15], Australia[16] New Zealand[18] Canada[19] and India[20] the law recognizes the distinction between tax evasion and tax avoidance but there is no statutory definition. It is however accepted that to come within the ambit of tax evasion, an activity must include some elements of fraud or unlawful conduct, accompanied by intent on the tax payers' part to deliberately defraud the Revenue. The inability to statutorily define tax evasion has however not precluded its usage in the various tax laws.

The use of the terms " tax avoidance" and "tax evasion" was considered in the case of ***FAGBOHUN V LAYADE***[21]. The Court of Appeal held that; *"the word 'avoidance' is to be contrasted with the word 'evasion'. It involves the notion of escaping by any device or artifice but conveys simply the notion of actually escaping through not being called up to pay."*

Also, in the case of ***Ahmadu v Kogi State Government***[23] it was held, amongst other issues *that "... it means more than avoid and also more than a mere withholding of information or the mere furnishing of misleading information. It is probably safe to say that some blame worthy act or omission on the part of the tax payer or those for whom he is responsible is contemplated"*

Where the tax payer escapes payment of tax by mere failure to furnish information, mere furnishing of misleading information or where for some other reasons he is not called upon to pay the correct amount of tax on his true taxable income, then the term "avoidance of tax" is applicable.

Thus, in the absence of any statutory definition of the term "tax evasion" a review of some of the approaches by certain government enquiries provides an alternative to the statutory

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12 Companies Income Tax Act (CITA) Cap C 21 LFN 2004
13 Personal Income Tax Act (PITA) Cap. P 1 LFN, 2004
14 Taxes Management Act 1970 Part X
15 Internal Revenue Code 1954
16 Income Tax Assessment Act 1936
18 Income Tax Act 1976
19 Income Tax Act ss. 239(1)
20 Income Tax Act 1961 Chapter 21
21 (1999) 11 NWLR (PT 628) 543. See also ***Federal Commission of Tax v Westgarth (1985) 18 Commonwealth Law Report (C.L.R) 396 at p. 414***
23 ***(2002) 3 NWLR (PT 650) 565. See also Denver Chemical Manufacturing Co. v Commissioner of Taxation (N.S.W) (1949) 79 (C.L.R) 296 at p. 313 quoted with approval by Fullagar J in Australasian Jam Co. Pty Ltd v Federal Commissioner of Taxation (1953) 88 (C.L.R) 23 at pp. 37.***

definition, since these enquiries are set up by government and nearly in all cases, the government adopts their recommendations.

No commission of enquiry on taxation in Nigeria has offered any definition of tax evasion till date as they all seem to concern themselves with matters more relevant to politics than taxation. From the Phillipson Commission of 1946 to the Aboyade Technical Committee on Revenue Allocation of 1978, the terms of reference was mainly with Revenue Allocation[24]and Division of Taxing Powers[25].

The view of the tax Authorities in this respect is also relevant as to what amounts to tax evasion. The definition offered by the Canadian Department of National Revenues[26] is quite comprehensive and of immense assistance in the quest for an acceptable definition. They stated that:

> Tax evasion is the commission or omission of an act knowingly with intent to decide so that the tax reported by the tax payer is less than the tax payable under the law, or a conspiracy to commit such an offence. This may be accomplished by the deliberate omission of revenue, the fraudulent claiming of expenses or allowances, and the deliberate misrepresentation, concealment or withholding of material facts.

An adoption or endorsement of this view in Nigeria would indeed make the routes of escape extremely narrow, but opinions or circulars or legislation is not self operative. Their applicability depends on the interpretation given to them by the courts.

It is the function of the judicial branch of the government to resolve the doubt, and in performing their judicial function the courts are called upon to determine whether in view of the facts proven and the language employed in the statute the individual or corporate body is not subject to the prohibition or burden of the statute.[27]

In determining the question what is tax evasion? It was pointed out **in *Seven up Bottling co. ltd v Lagos state Board of Inland Revenue***[28] that , it does not appear to their Lordships that an examination of the decisions in which the word 'evade' has been the subject of the comment leads to any tangible result. Everybody agrees that the word is capable of being

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[24] Hicks/Phillipson Committee (1951, Chicks Commissions 1953 Binn's Commission 1964 Dina's Interim Revenue Allocation Review Committee 1968 Aboyade Technical Committee on Revenue Allocation 1978

[25] Raisman Commission 1958

[26] Canada Narrow Information Circular No. 73, 1999

[27] Angell M.B Iterpretation of Taxing Statutes: An overview. B.TR.pp 50-61

[28] (2000) 3 NWLR(PT 650) 565

used in two senses, one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable.

These decisions have added little to the legislative meaning and in essence have adopted them. The meaning of tax evasion is therefore dependent upon a descriptive definition setting out the acts that constitutes evasion in contrast to tax avoidance. This view was endorsed long ago by the Supreme Court of Nigeria in ***Akinsete Syndicate v Senior Inspector of Income Tax***[29] where Bairamian, J.S. C stated that " *a person may use lawful means to avoid tax, what he may not do is to try to evade it. What he does should be genuine not merely a veil to hide or dissemble the reality of things".*

The cases quoted above shows that the basic ingredient in tax evasion is *mens rea* and absence of any credible explanation for fraud, willful default or neglect.[30] It now appears that the definition of tax evasion is dependent upon the presence of two elements in the acts prohibited by the tax statutes. These two elements are the act itself (false statement of evasion of tax) and the guilty intent of the accused (mens rea). A lengthy list of cases confirms this conclusion and the bulk of jurisprudence currently being elaborated in the area of tax evasion addresses itself to determine whether the relevant facts demonstrate these two elements. It is therefore necessary for the prosecution to prove that the evader knowingly made a false or deceptive statement in his return of income or that he willfully (with guilty intent) evaded or attempted to evade payment of taxes.[31]

To the professional mind, the phrase "tax evasion and tax avoidance" has since been familiar for many years, for the legal problems which are implied by the phrase arose with the passage of the Nigerian Income Tax Ordinance in 1943.[32] Through official use and wide appearances in the press, the phrase is now brought home to the public generally; with it are feared, rather bewildering consequences. Charges of "tax evasion and avoidance" have been broadcast and there was public outcry against tax "evaders and avoiders".[33] Care in language and precision of statement have been lost and laymen unversed in the fundamental canons of statutory interpretations which have been applied for centuries, have lead to conclusion which in many instances are unwarranted.

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29 F.S.C 164/63 30/10/64 (Unreported)

30 (1941) 2 Australian Income Tax Report (A.I.T.R)

31 Potvin J. (1977) Tax Evasion in Canada, Canada tax journal Vol. XXB No 2 May – June 1977 p. 240

32 Section 17

33 Olorunleke, D.A (1981) Business Times No. 2 1981 see Punch Dec. 1 1988 Vol. 13 where it was reported that the Minister of Finance and Economic Development has appealed to the public to help fight tax evasion by passing confidential information to the tax authorities through P.M.B 77 GP Marina Lagos, See also Ogun Y. (1989) The Guardian Feb. 27 1989 and Ayua I.A (1982) op cit p2.

The confusion perhaps is the result of the use of words, rather than of any difficult wording which often occurs where a word or phrase is employed for the sake of brevity. "Avoidance" – "evasion": in the defined meaning, as appearing in the Oxford English Dictionary, there is perhaps only a slight difference in shade between the two. The verb "avoid" is defined as "to avoid, escape from by guilt or trickery; avoid doing or answering directly".[34] Each is given as a possible synonym of the other. Thus, in common use the two words have only a shade of difference, though that shade indicates the fundamental difference between the two words have always had in the field of income tax interpretation, or in fact, in the application of any statute which undertakes to draw within its field certain situation, while excluding others.

1.4 Judicial Attitude Towards Tax Offences And Penalties

It is apt to examine the attitude of our courts to the issue of tax evasion. There is no doubt that taxation is the creation of statute. However, a great deal not only depends on the interpretation of the statute by the courts; we also require the courts to enforce some of the provisions of the tax laws, particularly those such as the ones considered under the preceding heading. So far, as the issue of tax evasion is concerned regrettably, our courts have not made a far reaching impact. The fault is not so much with the courts, but more so with the tax authority that has not prosecuted tax offenders with much vigour.

The basic doctrine of the construction of tax statutes is also very fundamental to the role of the judiciary in the battle against tax evasion. The doctrine is that no tax can be imposed on the subject unless there are clear words in the statute showing an intention to impose a tax on the person as was decided in the case of ***Phoenix Motors ltd v National Providence Fund Management Board***[35]. The onus is on the state (i.e taxing authority) to discharge. Once this is successfully done the next issue is how the court construes the facts of the fact before it to determine if the defendant being prosecuted for tax evasion is liable as charged. Here again, the issue of strict interpretation of the tax statutes lurks behind the decision of the judge as was delivered in the case of ***Ahmadu vs. Governor of Kogi State***[36]. It has been said that there is no equitable construction with regard to a tax statute. The court simply has to adhere to the clear words of the statute. The Supreme Court of Nigeria emphatically made it clear in the case of ***Shell Petroleum Development co. ltd V FBIR*** that there is no room or an intendment and no equity about a tax.[37] Judges are enjoined not to read

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34 The Oxford Dictionary of Current English 1985 Ed.

35 (1992) 1 NTC 205. See also Employers Mutual Insurance Association Ltd v Inland Revenue Commission (1944) 27 T.C. 344

36 (2009) 1 TLRN 319.

37 (1996) 2 NWLR (Pt. 256) 386. See also Intercontractors (Nigeria) ltd v National Providence Fund Management Board (1990)FHCR 76.

anything into or imply anything into the tax statute but to simply consider fairly the language used.[38]

We shall refer to some cases to appreciate the stance of our courts.

The courts were therefore called upon to pronounce on the propriety or otherwise of this tax avoidance schemes. An overview of Nigerian courts judgments in the late 1960s and 1970s on these issues leaves much to be desired[39]. In particular, they displayed an apparent lack of judicial will to strike down the infamous device through piercing the corporate veil of the Nigerian subsidiary Companies as independent legal entities to see the realities of the state as English court often do.

For instance, in the case of ***Reiss and Co. (Nigeria) Ltd. V Federal Board of Inland Revenue***[40] this lack of judicial dynamism was quite glaring. In this case, the question arose as to whether the Federal Revenue Court (now Federal High Court) could disregard the legal entity of the Nigerian subsidiary Company for the purposes of taxing the profits of the expatriate parent company Reiss and Co Amsterdam which were derived in Nigeria. Justice A.G. Karibi — Whyte (as he then was) has this to say:[41]

> Considerable importance has been attached and emphasis laid on the relationship between appellants and Reiss & CO. (Amsterdam), it is evidence that appellant was before 2nd September, 1960 only an overseas branch of Reiss & Co (Amsterdam) following upon the promulgation of the Companies Decree, 1968 and in compliance with the promulgation of the Companies Decree, the Nigerian branch became incorporated as a separate legal entity with its own managing Director and Board of .Directors. There is however evidence before me that Reiss & Co (Amsterdam) still has a controlling share of 55 percent of the appellant company.

In spite of this evidence and the fact that the judge himself has conceded that there is a considerable dark cloud of suspicion regarding the genuineness of the transactions between the two companies, he surprisingly concludes that[42]

> The separate legal identity of appellants and Reiss & Co (Amsterdam) cannot be denied; ***Salmon v Salmon & Co***.

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38 Supra.
39 Aluminium Industries Aktien Geselishaft v F.B.I.R (1971) NMLR 339
40 Suit No. FRC/LIA 76
41 Ibid at pp. 19 -20
42 Suit No. FRC/LIA/76 of P.2 6

> [43]Respondent cannot impugn the legal situation successfully without adducing sufficient evidence to the contrary.

From the foregoing it becomes evident that our judges in the late 1960s and 1970s are just too ready to take the law and the legal consequences of transactions as they find them without the willingness to set the legal form of transactions and see what lies behind them. In this way, they seem to encourage tax avoidance schemes particularly those cleverly devised by multinational enterprises operating in Nigeria through their subsidiaries.

It is not therefore surprising that a number of Companies legislation has been made in 1979[44] and 2004[45] to promote its purpose and arrest the mischief which it is intended to deter the manipulation of Companies accounts with the intent of hiding their profits and in that manner have been avoiding tax which they ought to have paid.

First, any company entering into any agreement (whether oral or written) in respect of fees, dues and allowances (wherever paid) for services rendered in Nigeria must make a full disclosure to the Board in writing of the terms of such agreement[46]. This will certainly strengthen the Revenue Board's hand in dealing with cases where the main purpose or one of the purposes of the transaction is the avoidance of tax and consequently this could have a restraining influence on both the Nigerian and expatriate Companies.

Now, interest is deemed to be derived from Nigeria, if there is liability to payment of the interest by a Nigerian Company or a Company in Nigeria regardless of where or in what form the payment is made or regardless of which every way the interest may have accrued[47]

Previously, interest was only taxable in the hands of the recipient if there was a right to payment of the interest in Nigeria. This, among other things as has been stated earlier, created a loophole through which expatriate companies could evade tax liability on interest they received in respect of operations carried on in Nigeria by so contracting that payment

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43 For instance, Lord Denning in the case of Littlewood (Mail Order Stores Ltd v McGregor (1961) 45 T.0 519 and 536 said this "The doctrine laid down in Salmon v Salmon & Co(19897) A.0 22 has to be watched very carefully. It has often been supposed to cast a veil over the personality of a Limited Company through which the courts cannot see. But that is not true , the courts and can often do, draw aside the veil. They can and often do pull off the mask. They look to see what really lies behind." Thus in this case Lord Denning declined to treat a subsidiary of the Littlewoods as an independent company for tax purposes.

44 CITA, 1979, SS 10, 17-18 respectively.

45 CITA Cap C 21 LFN, 2004 S. 30A

46 CITA 1979 SS.10, 17, 18; CITA 2004 S.30A

47 CITA 1990 S. 8(2) (a) & (b), CITA 2004 (S30A)

of interest was effected outside Nigeria by their subsidiaries[48]. The new law however is that interest is taxable irrespective of the place of payment.[49]

Now, with the enactment of the Companies and Allied Matters Act (CAMA) 2004, Companies Income Tax Act (CITA), 2004, Federal Inland Revenue Service Act (2007), judicial decisions appear to be proactive in matters brought to them for adjudication unlike in the 1970s.

For instance, in the case of ***Sevenup Bottling Co. ltd v Lagos State Board of Internal Revenue (LSBIR)[50],*** the Court of Appeal held that failure to remit tax deducted from salaries and emoluments of its employees was a debt to LSBIR which is enforceable and recoverable in the Court of law. The Court was also emphatic that refusal to deduct Withholding tax from Contractors for the supply of spare parts, goods and services etc was unlawful.

This goes on to show that, tax evasion and avoidance and all non-deductions and non-remittances are recoverable taxes for the Revenue as was held in the case of ***Aboud's case.[51]***

Also, in the case of ***A.G of the Federation v A.G Abia State***[52] , the Supreme Court held that the collection of Personal Income tax, Capital Gains tax, Stamp duties, Value Added tax etc shall be distributed among the States on the basis of derivation and the net revenue collected from any of the States by the Federal Government must be paid back to those States according to Constitutional Provision.[53]

Likewise, in the case of ***Union Trust ltd v A.G Federation and A.G Ogun State[54],*** the Ogun State Government forced a limited liability Company to pay double stamp duties after the Company paid same to the Federal Government earlier. Although, the Court declared that only the FGN can collect stamp duties from the Companies, but the recovery of the tax already paid to the state government was almost impossible.

Even in the matters of interpretation of tax statutes, our present Courts appear to be proactive such as in the case of ***Nigerian Agricultural and Cooperative Bank ltd. V Jigawa state Board of Internal Revenue[55]*** MUSTAFA JCA held that in the context of the

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48 See ***Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue (1971)NMLR 339*** "

49 CITA 1990, S.8 Cap 60 LFN 1990

50 (2000)3 NWLR (Pt.650) 565

51 (1992) 1 NTC 12 and **Akinsete's case (Supra)**

52 (2002) 6 NWLR (Pt. 764) 542

53 S 163, 1999 CFRN (as amended in 2011-2012)

54 (1990) FHCLR 45

55 (2002) NRLT 62

taxing provisions, to ***'impose'*** is active and legislative, while to ***'collect'*** is passive and merely administrative.[56]

The decision of the courts in the cases above shows clearly that our courts now look beyond mere form to the substance of the case to justify the intendment and spirit of the provision of the tax statutes, which in the instance cases is to dissuade the tax evaders.

However, our courts have very rightly drawn a distinction between the construction of the statute on the one hand, and the action of the tax authorities in purported compliance with the tax statute on the other. In this sense, our court have not hesitated to import the principles of equity and good conscience to resolve issues arising from the exercise of some discretionary powers vested on the tax authority by the tax statute. This was the holding of the court in the case of ***I-D Sam Nig. Ltd. Vs. Lagos State Internal Revenue Service***[57]. The trial judge made it emphatically clear in his ruling that tax officers making best of judgment (BoJ) assessment must not be vindictive, arbitrary or capricious. He must ensure that it is based on a fair reasonable percentage of the company's turnover for the relevant year.

Generally speaking, the attitude of the judiciary in tax evasion cases suggests that if the role of our courts in the battle against tax evasion is fully enlisted, we would be on the right path to substantially reducing the incidence of tax evasion in this country.

Another device through which foreign companies evade tax lies in the use of management fees, technical assistance fees and other similar fees to transfer profits ahead. A tax benefit is usually the reason for the discretionary use of both royalties and management fees. Thus in the words of S. Robbins:[58]

> The use of royalties and management fees typically brings tax advantages to the system when a subsidiary's local tax rate is higher than that of its parent. The royalties and management fees are tax deductible locally; but if such a subsidiary remits by means of dividends, it must pay a tax on its earnings prior to the distribution. Though the parent receives a tax credit, the amount it is entitled to effect against the foreign payment is limited by the lower tax rate of the parent. Accordingly, the fee — paying subsidiary benefits to the extent of the

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[56] See **also Knight Frank and Rutley ltd. V A.G Kano state (1998) 7 NWLR (Pt. 556) 1 at 222**

[57] (2011) 5 TLRN 41

[58] S. Robbins and L Stobaugh, Money in the Multinational Enterprise: A study of Financial Policy (London) Longman Group Ltd; 1974) p. 89

differential between the tax rate prevailing in its country and that in the country of the parent.

Thus, multinational enterprises are more concerned with higher margin of profit than with the forms they take — whether for example, they are recorded as royalties, management fees, cost charges or dividends from their subsidiaries and if they can get higher profits through management fees and royalties, they would surely accept these forms in order to prevent the avoidance of tax through the transfer of profits in these forms. Section 61 of the Companies Income Tax Act 1990 provided for the taxation of management fees or royalty when one company pays or credits such fee to another company. Head office expenses incurred for and on behalf of any company in Nigeria were specifically prohibited as allowable deductions.[59]

1.5 Findings And Observations

We have in this paper attempted to elicit the salient statutory measures against tax evasion and the attitude of the courts and while we noted that no amount of legal reforms will make people and corporate bodies pay tax voluntarily. It is also evident that all the foregoing tends to suggest that Nigeria's tax effort has not been as high as is desirable. Thus, from the threshold, the pertinent issue arising from what possible legal solutions can be proffered in the circumstances, a developing country like Nigeria is seriously handicapped in several ways quite apart from the fact that existing provisions were drafted at the time the problem was not clearly recognized. Factors inhibiting the effectiveness of the government include the following.

Firstly, there seems to be difficulties faced by the tax authority in determining 'arm's length' prices as there are hardly comparable market substitutes. Arm's length pricing seems to be the best approach in arriving at profits of corporate bodies for tax purposes where reliable accounts are not kept.

Secondly, there is the difficulty in obtaining from firms the data necessary to reconstruct prices on the basis of actual costs and their position is further worsened by the fact that often the information necessary to determine the reasonableness of transfer prices for particular products of foreign companies in Nigeria has to be obtained from abroad. The problem is accentuated by the possibility that subsidiaries may claim that they do not have access to the information required in that it is with the parent company and even where the companies are willing to provide the information to foreign authorities; their respective governments may not allow them to do so.

[59] See Finance Miscellaneous Taxation Provisions Act 1993-1996, See also Finance (miscellaneous Taxation provisions) Decree 1979 Part III, S. 22

In a discussion of the possible legal solutions to tax evasion, certain considerations have to be borne in mind. Firstly, it should be appreciated that it is not possible to totally eliminate tax evasion, but that it can be reduced. Secondly, what is suggested here are only possible legal solutions which are not exhaustive, and while it is conceded that the effects of tax evasion by corporate bodies have wide societal implications, our discussion of the possible solutions are concerned mainly with the legal aspects only and thirdly, the suggested possible legal solutions are primarily concerned with the possibility of their application in Nigeria whilst also considering the experience of the jurisdiction where some of these solutions have been tried.

There is also a further need for a clear definition of what exactly amount to tax evasion which on its own could reduce the incidence of the above confusion. Whilst it is appreciated that a definite statement of what amounts to tax evasion could provide a clear leverage for evaders, it is still necessary to have broad guidelines on the matter instead of the situation where evasion is identified by way of the punishment provided for by the act. The act must be capable of identification independent of the punishment provided to tackle it, only then can we begin to move forward.

All forms of taxes in Nigeria are to some extent avoided or evaded largely because the administrative machinery to ensure effectiveness is weak. There are insurmountable problems confronting the administration. We will like to concentrate on the administration of income tax not only because from this bulk amount of revenue should accrue to government but because most of the problems of tax administration are typical.

1.6 SUGGESTIONS AND RECOMMENDATIONS

An adequate equitable system of penalties that is used effectively is a necessary component of good tax administration, low penalties have been found to be ineffective while excessive high ones are rarely applied by tax administration or the court and create ill-will when they are.

There must be a social and legal will to enforce the tax laws. Honest enforcement of tax law is a necessary component of good tax administration, one would like to see tax officials reprimanded or dismissed for failing to evoke the penalties of the law when necessary.

Tax defaulters should always be prosecuted to serve as deterrence to potential evaders. The principle of laissez-faire being pursued by many of the revenue departments as of now will not help. If people see their equally prosperous neighbours paying all substantially less or enjoying tax free expense account living, the tax payer's morale will decline. The submission of an honest taxes are separate from ethic fulfil civic responsibility would be in favour of the revenue.

From the analysis, it can be concluded that tax administration in Nigeria is in dire need of revitalization. The establishment of FIRS Act 2007 and TAT are good steps to the right direction on tax administration. Some of the ways by which this can be achieved have been discussed in the body of the paper.

Taxation being an involuntary payment by the subject for the support of his government, care must be taken to reduce the tax payer's discontent. This can be achieved through the judicious application of tax revenue. Towards this end government should increase the pace of the current efforts at ensuring accountability by public officers. The introduction of Tax Identification Number (TIN) signals good beginning.

The existing tax laws in the country are in a confused state. In order to make for the taxpayer's understanding and reduce administration problems, the amount of tax payable, the circumstances and time of payment should be clearly defined and delineated. Towards this end the various tax laws which are scattered in both federal and state enactments should be harmonized and codified as stated above

In the process of codifying the tax laws, both the states and the federal governments should be involved. Towards this end, it is proposed that a National Commission on State Taxation should be constituted along the lines of the national economic council established by the 1979 constitution. To this end, the Join Tax Board (JTB) should be properly organized.

The National Commission on state taxation should be charged with the responsibility of formulating policies touching on those taxes that are imposed by the federal government for the benefit of the states, such as taxes on the incomes profits and capital gains of persons other than companies. Here also, the establishment of the National Tax Policy (NTP) is a good step to the right direction.

An "amnesty" in the case of income tax may be given consideration in the context of an anti-evasion drive in Nigeria where evasion has hitherto been widespread. The government wishes to tackle evasion in earnest but also to give evaders an opportunity in the transition from a lower to a higher tax morality, to square accounts, with the tax authorities by disclosing items previously omitted and settling their true liability.

A CRITICAL REVIEW OF NON-OIL EXPORT INCENTIVE LEGISLATION IN NIGERIA – ISSUES OF ENFORCEMENT AND PRACTICE*.

1.1 Introduction

Export Incentive has been defined as a monetary, tax or legal regime designed to encourage businesses to export certain types of goods or services.[1] Export incentives can also be seen as measures adopted by governments to promote the expansion of exports by domestic companies.[2] Such measures can include direct subsidies, bounties, tax exemption on profits made from exports, reduced import tariffs for components where they are incorporated into exported products, taxation concessions etc.[3] They are simply devices used by countries to encourage exports which may include exemptions from the normal provisions of anti-monopoly legislation, preferential access to capital markets etc.[4] A government providing export incentives often does so in order to cushion the effect of a harsh economic climate especially infrastructural deficiencies like power, water, roads etc.

The practice of providing incentives to exporters is near universal, and Nigeria is no exception. However, the extent and the form of export incentives vary from country to country depending on the country's economic structure (including its fiscal structure), its overall resource availability, its export potential, and the effectiveness of export incentives in realising its export potential.[5] Within its overall budget constraint, each country decides how best to structure its export incentives that are consistent with the World Trade Organisation rules and at the same time achieve the objective of the export promotion needs of that country.[6]

In Nigeria various export incentive laws have been enacted to effectively motivate and sensitize exporters on the need to export. The laws are designed to ensure competitiveness of made in Nigeria products in international markets and also to guarantee high returns on investment in export business. They are structured in such a way as to create sound domestic conditions that would help assuage the adverse effects of external competition and address the major problems of supply, demand and price competitiveness of Nigeria's

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[1] Export Incentives: http://www.investopedia.com/terms/e/export-incentives.asp#ixzz1frd8ykIJ Retrieved December 7th 2012.

[2] Goode W (2003) *Dictionary of Trade Policy Terms*, 4th Edition, Cambridge University Press at p. 131

[3] Ibid

[4] Black J (2002) *A Dictionary of Economics* Oxford University Press, p. 152.

[5] *Export Incentives*: Retrieved December 7th 2011 from http://www.investopedia.com/terms/e/export-incentives.asp#ixzz1frd8ykIJ

[6] Ahuja R (2001) *Export Incentives in India within WTO Framework*, Paper Presented at the Indian Council For Research On International Economic Relations July, 2001

export. However, the problems associated with these laws have been, among other things, the issue of none implementation or enforcement.

It is worth noting that Nigeria has created about 16 export incentives since 1986 but not more than one is working well...[7] While some of these incentives are moribund, like the Duty Draw Back Scheme which has been abandoned since 2003 without any justifiable reason,[8] others have been merged by Government without amending the enabling laws to accommodate such merger.

An example is the Export Processing Factory scheme which was merged with the Manufacture in Bond scheme in 1999.[9] Due to this, many exporters have been "disenfranchised" from accessing those incentives which has ultimately affected the volume of exports.

The laws that were designed to serve as incentives to non oil exports have ironically become disincentive to exports. Ultimately, this has one way or the other affected the overall non-oil performance in particular and the Nigerian economy in general.

The objective of this paper therefore is to bring to fore the major laws enacted in Nigeria to provide incentives to non-oil exports and determine the extent of applicability of those laws. The defects inherent in those laws and the problems arising from their applicabilty shall also be discussed. For the purpose of this paper, our attention shall primarily be focused on laws governing non-oil export incentives in Nigeria. This includes some multilateral arrangements where Nigeria is either a signatory or has adopted such an enabling instrument.

While analyzing the various laws, we shall highlight the defects inherent in those laws and the attendant effect on the Nigerian economy. We shall also attempt to proffer suggestion or recommendation that will assist policy makers and regulators on the one hand and the exporters who are beneficiaries of the schemes on the other hand.

1.2 Non-Oil Export Incentive Laws In Nigeria

1.2.1 Export (Incentives and Miscellaneous Provisions) Act

Since the Export sector has always been recognized the world over as an engine for economic growth and development in view of its foreign exchange earning potentials, the Federal Government in a bid to create an enabling environment for Nigerian Exporters

[7] Onukogu C (2004) Export Incentives as National Strategic Resources. Daily Champion, August 13. P 32
[8] Tambawal H.A (2003) Current non-oil Incentives in Nigeria. Seminar paper on Export Incentives held at Jos, 9th Septemeber. P 11
[9] Ibrahim M.O (2007) Administration of export Incentives in Nigeria. Seminar Paper on Export Forum on Onions/Garlic, held at Aliero Town, Kebbi State, 4th December. p 2

enacted the Export (Incentives and Miscellaneous Provisions) Act.[10] The Act introduced various incentives regimes which are aimed at promoting, stimulating and enhancing increase in volume of non-oil export as well as to broaden export products and market coverage in order to diversify the productive base of the economy. Though some of these schemes offer cash incentives to exporters others offer non-cash incentives such as exemptions from payment of income tax, waiver/refund of import duties on their imported inputs. Some of the incentives provided for in the Act include;

(i) Export Development Fund

Section 4 of the Act established the Export Development Fund.[11] The Fund is to be used to provide financial assistance to exporting companies to cover part of their initial expenses in respect of export promotion activities.[12] Though the quantum or nature of the financial assistance is not specifically stated in the Act, this is however left at the discretion of the Trustees of the Development Fund set up by the Act to determine.[13] The Fund which is to be administered and disbursed by the Nigerian Export Promotion Council covers export promotion activities like;

(i) Participation in training courses, symposia, seminars and workshops in all aspect of export promotion.

(ii) Advertising and publicity campaigns in foreign markets.

(iii) Export market research and studies Product design and consultancy.

(iv) Participation in trade missions, buyer oriented activities, overseas trade fairs, exhibitions and stores promotion etc.[14]

For an exporting company to be eligible for grant under this Fund, such company must among other things; be registered with the Nigerian Export Promotion Council and must be an exporter or potential exporter of any product of Nigerian origin. Finally the applicant must submit a detailed report of undertaken activities which should contain among other things; evidence of expenditure related to the export activities for which the initial funds have been provided.[15]

From the foregoing, it is clear that the Export Development Fund is one of the key incentives available to exporters or those venturing into the export market. As the name

[10] Cap E19, Laws of the Federation of Nigeria, 2004.
[11] Section 4(3), Ibid
[12] Section 4 (4), Ibid
[13] Section 3, Ibid .
[14] Section 4 (3) (a) – (e) Cap E19 LFN 2004
[15] Obiora M: (2007) Export Financing,, Multimix Export Academy Press. P 35

connotes, it is an *export development incentive* which applies to only promotional campaigns and other related matters pertaining to export promotion. It also applies to markets in which the branded products have not previously been advertised and promoted.[16] In practical terms, a prospective exporter is expected to conduct a market research on the product he intends to export and the market he intends to access. The outcome of such market research is a market intelligence report which should specify the product required, price, packing and packaging methods, issues of quality and standards, custom tariffs etc. The report would normally indicate any cultural bias against the product, if any, in the country he intends to export. Apparently, this also requires some financial muscle which a small and medium scale entrepreneur may lack.

The Export Development Fund was therefore established to serve as a major incentive to small and medium size Nigerian Exporters to assist them venture into new markets despite attendant risks. With this scheme, the fear of the unknown is curtailed as the Exporter is aware of the fact that expenses incurred in venturing into the unknown terrain would be defrayed under the scheme.[17]

However, it is worthy to note that since the enactment of the Act in 1986, the Export Development Fund has not been implemented.[18] In fact, the Board of Trustees to oversee the fund and determine the use of incomes and profits accruing from investment under section 4(5)(b) is yet to be constituted.[19] In effect, no firm has benefited or accessed this scheme. Ultimately, this has hindered the emergence of new businesses into the export market and has consequently affected the volume of exports from Nigeria.[20] It has also discouraged Small and medium scale firms from exploring the export market.[21] The non implementation of this scheme has been attributed to lack of budgetary provisions by Government to finance the scheme.[22]

(ii) Export Expansion Grant Fund (EEG)

The Export Expansion Grant Fund is a post –shipment export incentive that was established by virtue of section 5 of the Export (Incentives and Miscellaneous Provisions) Act as amended.[23] The Fund is used;

> "To provide cash inducement for exporters who qualify to benefit from the Expansion Fund based on the value of their semi manufactured or

[16] Ibid
[17] Export Incentives: Retrieved 30th January 2012, from http://www.inw.org.za/Business/InvestmentIncentives/tabid/86/Default.aspx
[18] ibid
[19] NEPC Incentives Unit (2012) Questionnaire
[20] Onukogu C. (2004) Op Cit
[21] ibid
[22] Export Watch Magazine (2010), Vol. 2 No 1, May/June 2010 p 33.
[23] Cap E19 LFN 2004

manufactured products as prescribed by order from time to time made by the Nigerian Export Promotion Council to enable exporters increase their volume and value of exports; and diversify export products and coverage". [24]

The Export Expansion Grant scheme is a very vital incentive required for the stimulation of export oriented activities that will lead to significant growth of the non-oil export sector.[25] The scheme is aimed at assisting exporters to expand their volume and value of non-oil export markets and make them more competitive in international markets.[26] Eligibility to the scheme is not limited to export of a particular product. To be eligible;

i. An intended beneficiary must be registered with the Corporate Affairs Commission as a firm and must also be registered with the Nigerian Export Promotion Council (NEPC) as an exporter. [27]

ii. An eligible exporter shall be a manufacturer producer or merchant of products of Nigerian origin for the export market (i.e. the products must be made in Nigeria).[28]

iii. An exporter must have a minimum annual export turnover of N5 million and evidence of repatriation of proceeds of exports. [29]

iv. An exporter-company shall submit its baseline data which includes audited Financial Statement and information on operational capacity to NEPC. [30]

v. The export proceeds must have been repatriated into a domiciliary account in Nigeria and confirmed by the Central Bank of Nigeria.[31]

Once the requirements for accessing the EEG are met, the beneficiaries of the scheme are then paid with Negotiable Duty Credit Certificate (NDDC). The NDDC is designed for payment of import and excise duties. Holders of the instrument could however, discount same to a third party for cash if there are no such duties to pay.[32]

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[24] Section 5, Ibid
[25] Export Incentives: Retrieved January 30th 2012. Retrieved from www.nepc.gov.ng
[26] NEPC Brochure (2010): Administration of Export Expansion Grant (EEG) Scheme in Nigeria, pg 6
[27] Ibid at page 7
[28] ibid
[29] ibid
[30] ibid
[31] ibid
[32] Onwubiko D.N (2007) Export Procedures, Documentation & Incentives in Nigeria: Seminar Paper at Export Seminar held at Ni'Imah Guest Palace Hotel Kano, Nigeria, 29th March.

Since its creation in 1986, the scheme remains the most effective export incentive scheme in Nigeria.[33] The disbursement of grants under the EEG has witnessed a large turnover of beneficiaries and provided a sort of compensatory income to exporters, who are more often made to face high cost of production, due to inadequate and undeveloped export infrastructure, sluggish demand, incessant power disruption, water shortage etc.[34]

From year 2005 – 2010 a total number of 130 companies have benefited from the EEG with the payment of the sum of N202,325,686,382.74. As a fall out to this 82,508 Nigerians have been directly employed by the beneficiary companies.[35]

The EEG has increased awareness in the mind of entrepreneurs to inculcate export culture. Similarly, a reasonable degree of product diversification as could be witnessed from the emergence of new and varied products in the country's export basket has been achieved. Importantly, a consistent increase in the country's non-oil export both in terms of quantity and value has been recorded.[36]

In 2005 and 2006 the Scheme was redesigned by the Federal Ministry of Finance.[37] This therefore led to the introduction of the submission of a baseline data and the use of the Weighted Eligibility Criteria in assessing applications for EEG. Another feature that was introduced in the redesigned EEG was the use of "company specific rates" as against "product specific". The re-designed EEG also banned the concept of double dipping i.e Exporters are not allowed to benefit from two or more incentives simultaneously. An Exporter must therefore choose one among existing incentives.[38]

Furthermore, the exercise afforded the Organized Private Sector the opportunity to be fully involved in producing the final templates, which was done in such a way that exporters can even compute their EEG rates from their baseline data. Presently, for a company to benefit from the scheme, it must comply with the ten golden rules of processing EEG claims;

(i) -5% + 10 % - Under this rule, an exporter entitlement of the repatriated value must not be less than 5% of the of the invoice value i.e 95%, and must not be more than 10% of the invoice value i.e 110%. This rule was

[33] Onukogu C (2004) Export Incentives as National Strategic resources, Daily Champion Newspaper, August 13,2004 at page 32.
[34] Ibrahim M.O(2007) Administration of Export Incentives in Nigeria, Seminar Paper at the Export Forum on Onions/Garlic at Aliero town, Kebbi State, Nigeria, 4th December.
[35] NEPC (2012) Memo to the Joint Committee on Commerce and Customs Services on alleged misuse of Export Expansion Grant by some Industrialist. P.6
[36] Ibrahim M.O (2007) Op cit.
[37] Fed. Min of Finance (2006): Circular on "Guidelines for Re-designed Export Expansion Grant Scheme" Ref: No. BD.12237/S.123/VOL/41, April 25th.
[38] NEPC (2010) EEG- The realities of Implementation, NEPC newsletter

designed to accommodate price fluctuation and ensure that actual export proceeds are not under or over repatriated.[39]

(ii) The 300 Day Rule – For an exporter to qualify for EEG, the export proceeds must have been repatriated within 300 days from the date of export. Therefore any claims repatriated after 300 days without prior approval from CBN and NEPC would not be processed for payment. This rule which was initially 180 days was changed to 300 days by the Central Bank of Nigeria who succumbed to the yearning of exporters that the 180 day rule was inadequate.[40]

(iii) The Export Date Rule – Notwithstanding the means of transportation, the actual date of export must be clearly indicated on the transport document, e.g bill of lading, airway bill etc.[41]

(iv) The FOB > 0 Rule- This rule stipulates that the amount on the FOB (Free on Board) must be greater than zero. This means that there must be correlation between the invoice value and the NXP (Nigeria Export Form).[42]

(v) The EEG Rate >0 Rule – An EEG applicant is expected to submit a baseline data of the company. Upon computation of such a data against the weighted eligibility criteria, the rate must not be zero. [43]

(vi) Amount Repatriated >0 Rule – Amount repatriated must be greater than zero. The amount repatriated must also have a relationship with the NXP and invoice. Only claims with confirmed proceeds from CBN can be processed for approval.[44]

(vii) The Currency Conflict / Cross rates Rule – An export transaction could occur in dollars while payment would be made in euro. Similarly, a transaction may occur in a specific currency at a particular rate. That rate may fluctuate prior to repatriation of the export proceeds. In either situation, the currency rates must be in line with what is obtainable at the CBN at every point in time.[45]

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[39] NEPC Brochure (2010): Administration of Export Expansion Grant (EEG) Scheme in Nigeria, pg 12
[40] ibid
[41] ibid at page 13
[42] Ibid
[43] Ibid
[44] ibid
[45] ibid

(viii) The Exchange Rate > 0 Rule – The exchange rate used as at the time of the transaction must not be greater than zero. In other words the prevailing exchange rate as at the time of export must be used.[46]

(ix) The CCI Rule – Before an export transaction is undertaken, there must be a pre-shipment inspection of the goods after which a Clean Certificate of Inspection (CCI) would be issued. Under the CCI rule, the date of inspection must not be after an export transaction.[47]

(x) The Non –oil Export Data Form Rule. The non – oil export data form which is obtained from the NEPC prior to export must be attached to the application for EEG. The data form is designed to capture export data of individual companies for statistical purpose. The form contained such information as name of exporter, product exported, quantity, invoice value, name of Customer etc. [48]

It is observe that the use of "company specific rates" as against "product specific rates" in determining applications for EEG is not only wrong but against the spirit of the Export (Incentives and Miscellaneous Provisions) Decree No. 65 of 1992. Section 5 clearly states that the EEG shall be used to provide cash inducement for exporters ... based on the value of their semi manufactured or manufactured products.[49]

Glaringly, the drafters of the Decree intended that EEG be calculated based on products exported or "product specific" and not based on performance or growth of exporting companies ("company specific") as the present practice. Similarly, the present Government policy or practice where employment is given a threshold of 20% for at least 500 employments as one of the EEG criterion is, not only a disincentive to Small and Medium Scale Enterprises, but also not within the ambit of the law and should therefore be reviewed forthwith. The source of this redesigned is unknown to law as it is in conflict with the Export Incentives (Miscellaneous Provisions) Decree. It is the author's firm opinion that a government circular or policy cannot invalidate the provisions of a subsisting Act. The appropriate regulators should therefore consider the reversion of the EEG to conform with the provisions of its enabling laws. Alternatively the extant laws should be amended accordingly to reflect the current practice.

On the issue of double dipping there seems to be no legal backing for such practice. There is no law which invalidates the right of an Exporter to benefit from two or more existing export incentive schemes. It is probably a policy statement which should not override the

[46] ibid
[47] ibid
[48] Ibid
[49] CAP E19 LFN 2004

provisions of an Act in force. This practice is therefore counterproductive and also disincentive to export promotion.

The redesigning of the scheme by the Federal Ministry of Finance is a clear contravention of the Export (Incentive and Miscellaneous Provisions) Act. Section 2 of that Act states that "The Nigerian Export Promotion Council shall, to the exclusion of any other Government body or authority, be charged with the responsibilities for administering the incentives contained in this Act" Further, the Act states that "The Nigerian Export Promotion Council shall be responsible for the day to day administration of the Export Expansion Grant and shall also "issue, from time to time, guidelines for the effective administration of the scheme".[50] Therefore. the issuance of guidelines or policy directives in respect of the EEG Incentive Scheme by the Federal Ministry of Finance is a lucid interference on the operation of the scheme and should be discontinued.

Despite the foregoing, the impacts of the EEG on the Nigerian economy as measured against its objectives have been highlighted as follows;

(i) There is increasing flow of foreign exchange into the economy as a result of improvement in the culture of formalized export by the Nigerian business community. The EEG is therefore a motivating factor with over 300 registered exporters in the scheme.[51]

(ii) Available statistics shows that formal non oil export repatriation proceeds rose from US$957,305.37 in 2006 to US$1,398,823.19 in 2007 (30.73% increase) and US$1,398,823.19 in 2007 to US$1,828,700.32 in 2008 (an increase of over 46 %).[52]

(iii) Non-oil Export Repatriation proceeds grew by 126.83% from 2005 to 2009 compared to 117.66% between 2001 and 2005.[53]

(iv) Evidence from inspection of facilities of EEG beneficiaries companies revealed that exporters have utilized their claims to procure more machinery to expand their production for export, thereby generating more employment. Additionally, Nigerian exporters now keep proper records of their transactions, and are more organized.[54]

[50] Export(Incentives and Miscellaneous Provisions) Act, section 5 (4) & (5)
[51] NEPC (2010), The review and relevance of Export Expansion Grant (EEG) Scheme- A submission to the Ministerial EEG Review Committee, at pages 28-30.
[52] Ibid
[53] ibid
[54] ibid

1.2.2 Nigerian Export Processing Zones Authority Decree

The Nigerian Export Processing Zones Authority (NEPZA) was set up by NEPZA Decree No. 63 of 1992.[55] The Authority which was basically set up to provide incentive to Nigeria's Exporters is charged with the responsibility of licensing, monitoring and regulation of Free Zones Scheme in Nigeria.[56] Several factors are responsible for the adoption of Free Zones Scheme in Nigeria , amongst which are the diversifications of the revenue base of the economy, employment generation and to encourage export through local production.

The NEPZA enabling law provides a lot of incentives for firms. For example the domestic laws on taxes, levies, duties and foreign exchange regulations do not apply within the zones, and approved enterprises operating within them are exempted from all government taxes and levies.[57] Furthermore, new industrial undertakings, including foreign companies and operations inside or outside an EPZ in Nigeria, are allowed full income tax holidays for three consecutive assessment years certain provisions.[58]

Similarly, up to 25% of production may be sold in Nigeria against a valid permit, and on payment of duties in force.[59] Foreign investment including capital gains, in the zones may be repatriated at any time.[60] Profits and dividends earned by foreign investors in the zones may also be remitted at any time.[61] No import or export licenses are required.[62] Land is provided rent-free at construction stage.[63]

One of the attractive incentives offered by NEPZA is contained in section 11 of the NEPZA Act. The section states that where an approved enterprise operating within the zone supplies goods and services to customers within the customs territory, that enterprise shall be entitled to receive payment for such goods and services in foreign currency and for the purposes of such payment, the normal rules and regulations applicable to importation of goods and services into Nigeria and repatriation of proceeds of sales and services shall apply.[64]

From the foregoing, it is apparent that the Export Processing zone concept, which is clearly an instrument of export promotion, may be considered a composite export incentive under which artificial enabling conditions are created within geographical enclaves to attract

[55] CAP N107 LFN2004
[56] NEPZA enabling Act, Retrieved January 31st 2012, from www.nepza.gov.ng
[57] Section 3. ibid
[58] Incentives: Retrieved January 31st 2012, from www.nepza.gov.ng
[59] Incentives: Retrieved January 31st 2012, from www.nepza.gov.ng
[60] ibid
[61] ibid
[62] ibid
[63] NEPC (2005) A Framework of National Export Strategy 2005-2010 at page 44.
[64] NEPZA Act. Op cit

companies to establish export oriented factories and other industrial facilities.[65] In this vein, twenty five (25) Free Trade zones have been licensed; three of which are owned by the Federal Government while the other are operated on the basis of Public – Private Partnership (PPP) arrangement.[66]

Despite the basket of incentives offered to exporters under the EPZ scheme, there are extant issues of enforcement that have threatened the establishment of the Free zones. One of such issues is poor site locations entailing heavy capital expenditures.[67] Some of the Free Zones that are sited in landlocked areas like the one in Kano are at a competitive disadvantage. This is because transport linkages to the hinterland is made more difficult by long distances, poor road network and difficult terrain.[68] This is in contrast with Free Trade Zones that are accessible to ports.

Another challenge at enforcement is undue interference by Government. "The interference of other government agencies with different regulations and diversified interpretation of the legal instrument establishing the zones have never been healthy for the success of any free zone.[69]

Finally, some investors that have been issued licenses have failed or refused to utilize such licenses by investing in the Free Trade zones.[70]

1.2.3 Ecowas Trade Liberalization Scheme (Etls)

The treaty establishing the Economic Community of West African States (ECOWAS) was signed in 1975 by members States (Nigeria inclusive)[71] as a sub regional economic bloc aimed at removing trade barriers and encouraging the harmonized development of their respective states.[72] The treaty which was later revised at Cotonou on 24th July 1993 introduced the ECOWAS Trade Liberalization scheme (ETLS). [73]

The ETLS was therefore established with a view to eliminating customs duties and levies of equivalent effect, removal of non tariff barrier, and establishment of a Common External

[65] NEPC (2005): A framework of National Export Strategy 2005 -2010. P 43
[66] FMT&I (2012): Report of the 5th National Council on Trade & Investment (NCTI-05), held at Justice Idris Kutigi International Conference Centre, Minna, Niger State, 4th -8th June. P 50
[67] Nbibe C.O (2007) Understanding the Free Zones Scheme (The Nigerian Perspective), Pacific Publishing Limited, P.136.
[68] Ibid
[69] Ibid
[70] Agboluaje A (2012): Free Trade Zones, Catalyst for job Creation, Trade & Investment Today (Quarterly Journal) Vol. 1 No.1, July, P.53
[71] Other ECOWAS member states include Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Senegal, Sierra Leone and Togo.
[72] NEPC (2005): A Framework of National Export Strategy 2005-2010 at page 43
[73] Bundu A: ECOWAS Comes of Age, West African Magazine, 19-25 July 1993, Page 1251.

Tariff (CET) to protect goods produced in member states[74]. The scheme is designed to encourage local manufacturing outfits in member countries to compete favorably with cheap imported products that may be dumped in their markets as well as remove all tariff and non tariff barriers to trade between the countries of the region.[75] It encourages exports through entrepreneurial development because it provides preferential treatment among member states.[76]

The scheme covers three groups of products namely:

(i) Unprocessed goods which include fish, plant or minerals which have not undergone industrial transformation.

(ii) Traditional handicraft products which include products made by hand with or without the use of tools or machineries such as wood, articles of wood, basket works, carpet mats, lace embroidery etc.

(iii) Industrial products of Community origin. [77]

The three groups of goods mentioned above are granted the following concessions; (a) Total exemption from import duties and taxes; (b)No quantitative restriction; (c) Non-payment of compensation for loss of revenue for items (i) and (ii) as a result of their importation.[78] For enterprises and products to benefit from the ETLS, application for participation are processed and scrutinized by the National Approval Committee subject to the some conditions one of which is that the goods must originate in member states of the community.[79] So far, over 1,099 companies have been admitted into the scheme with over 3,188 products ranging from textiles, cosmetics, soap, insecticides etc have been admitted into the scheme.[80]

The ETLS scheme has been marred by some challenges which includes lack of adequate awareness and sensitization of the scheme, hence the inability of companies to tap fully the opportunities it provides. Another challenge being faced by the scheme is the rejection of some products by member states from total tariff exemption even after admission of companies to the scheme and barriers to movement of goods due to road blocks at border posts.[81] Despite these challenges the ETLS is a laudable incentive which is an effective tool for export promotion and capable of engendering real and rapid growth of Nigeria's

[74] ECOWAS TLS: Retrieved 28th December 2011 from http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en
[75] ibid
[76] ETLS: Retrieved 20th December 2011 from http://www.cenbank.org/monetaryPolicy/ecowas.asp
[77] ETLS: Retrieved 30th January 2012 from http://www.customs.gov.ng/Guidelines/etls.php
[78] Ibid
[79] Ibid
[80] Gadin R (2009): Provisions, Procedures for admission and exporting under the ETLS: Seminar Paper at a two day Workshop on Strategies for penetrating Foreign Markets at Osogbo, Osun State, 15-16 July. P.3
[81] ETLS: Retrieved 30th January 2012 from http://www.customs.gov.ng/Guidelines/etls.php

non oil exports.[82] The effective implementation of the ETLS will lead to export development and expansion, as exporters from Nigeria would have larger markets for their products.[83]

1.3 Observation/Recommendation

From the foregoing, it is observed that adequate incentive regimes have been enacted to provide succor to Nigerian exporters. It is further observed that most of the Nigerian Exporters are yet to benefit or access those incentives.[84] The underlying factor that has hindered exporters from accessing those incentives have been none or inadequate implementation of the relevant laws, lack of adequate publicity on the existence of those laws and constant intervention bothering on the operation of the various non-oil incentives. The present incentives regime as presently constituted have been said to be elitist and monopolistic and leads towards empowering foreign multinationals and highly placed firms.[85] It is therefore actually a disincentive to the average Nigerian Exporter.[86] A review of companies at the NEPC benefiting from the EEG indicates that though the companies are of Nigerian origin, however 79% of Directors of such companies are non Nigerians.[87]

The combined and resultant effect of the above has been characterized by low non oil export patronage. Consequently, this has increased unemployment rate and also lowered Nigeria's foreign exchange earnings. It has also led to technological stagnation and also denied Government the revenue which should have been accrued from exports.

Furthermore, successive Governments have been paying lip service to the implementation of the various incentives schemes. "Today, Nigeria is the only country in the world that doubts and queries publicly its export incentives as a national strategic resource".[88] The non implementations of some export incentives regimes have made the standard and quality of export products to drop, while the identification and development of new exportable products have been frustrated.[89]

Based on the foregoing, it is hereby recommended that efforts should be made to improve on existing incentives or initiate more incentive schemes for the Nigerian exporter. The NEPC should initiate such incentives that will accommodate and encourage the growth of

[82] Ibid
[83] Ibid
[84] The Punch Newspaper (Editorial) (2010). Meeting the challenges in non-oil sector, Nov. 10 p.14
[85] Editorial (2010). Export Trade as a National Necessity, Export Watch Magazine, Vol. 2 No.1 May/June
[86] ibid
[87] Ibid
[88] Onukogu C (2004) Op Cit
[89] Odozi V (2002). Towards resuscitating Nigeria's non-oil export sector. The Comet Newspaper, January 24 p 11.

Small and Medium scale Enterprises. Similarly, there is need to formalize the informal trade sector. This can be done by establishing an incentive regime targeted at firms engaged in informal trade. Such incentive programmes would serve as bait for informal exporters to formalize their trade.

In the same vein, there is need for the reactivation of other moribund incentive schemes and also need to expand the product categorization under the EEG to capture excluded product sectors and designs a new basket of incentives (intangible product) to support Nigeria's quest for a place in the top twenty global economies by 2020[90]. Furthermore; Facilitators of the ETLS scheme should be trained and re-orientated through exchange programmes, towards the successful implementation of the scheme and their institutions properly funded and upgraded. A proper education and enlightenment campaigns by government on the various incentives schemes particularly the ETLS should be undertaken.[91]

1.4 Conclusion

In conclusion, it is apparent that the various incentives schemes have to a large extent been responsible for the large volume of non oil exports in Nigeria. The schemes have succeeded in cushioning the effect of the difficult terrain of production for export characterized by infrastructural deficiencies. The issues of enforcement and practice are artificial bottlenecks that can be wholly tackled by the various regulatory institutions.

[90] Communiqué issued at a one day Stakeholders' forum on the non oil export Incentives scheme, held at MAN House, Awolowo Road Ikeja Lagos, 21st July 2010 p 4

[91] Communiqué at a two day National Workshop on the ETLS, organized by NACCIMA/ECOWAS Secretariat, held at the Lagos airport, Ikeja, Lagos, 19th and 20th May 2007.

THE ROLE OF THE NATIONAL PENSION COMMISSION IN ENSURING COMPLIANCE WITH THE PENSION REFORM ACT 2004*

1.1. Introduction

Prior to the Pension Reform of 2004[1], Nigeria had operated, particularly in the public sector, a defined benefit (DB) pension scheme, which was largely either unfunded or under-funded. The DB scheme led to accumulation of massive pension debt, which became unsustainable largely due to lack of adequate and timely budgetary provisions as well as increases in salaries and pensions. The administration of the scheme was also very weak, inefficient, less transparent and cumbersome. The situation in the private sector was characterized by low coverage and compliance, leaving most workers with nothing or inadequate retirement benefit arrangement.

Consequently, in 2004, the Federal Government reformed the Nigerian pension system by introducing a Scheme that is sustainable and has the capacity to achieve the ultimate goal of providing a stable, predictable and adequate source of retirement income for each worker in Nigeria. The PRA was accordingly enacted to establish a mandatory contributory pension scheme (CPS) for the employees of the Federal Government, the Federal Capital Territory and the private sector organizations with five or more employees. The Act also established the National Pension Commission ("the Commission" or "PenCom") as the sole regulator and supervisor of all pension matters in Nigeria. In the light of the significant change in the pension regime in Nigeria, an exposition of this new framework is imperative. The objective of this expose is to create awareness of the features of the CPS and enable stakeholders to buy into it and ensure its success. This ultimately will improve the financial system and enhance the growth of the economy.

The key objectives of the pension reform as stipulated under Section 2 of the PRA and indirectly stated elsewhere in the Act include, among other things, to:

(a) Ensure that every person who has worked in either the public or private sector receives his/her retirement benefits as and when due;

(b) Assist improvident individuals by ensuring that they save to cater for their livelihood during old age;

(c) Establish a uniform set of rules and regulations for the administration and payment of retirement benefits in both the public and private sectors;

(d) Stem the growth of outstanding pension liabilities; and

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[1] No.2,2004.(PRA)

e) Reduce fiscal cost to Government, stimulate domestic savings, generate pool of long-term funds for financing developmental projects and increase private investments.

However, the PRA did not only establish the CPS for the above mentioned categories of Nigerian workers but also recognized the pension rights and obligations of existing pensioners as well as the categories of persons exempted from the CPS. The Act recognized Pension Departments and Offices charged with the responsibility of administering the pension and other retirement benefits of persons under the DB Scheme, which is also known as the Pay-As-You-Go Scheme.

The categories of persons exempted from the CPS include the following persons:

i. Judicial Officers whose retirement benefits are provided for under Section 291 of the Constitution of the Federal Republic of Nigeria 1999 (as amended);

ii. The personnel of the Military and the Intelligence and Security services[2]; and

iii. Those that had three (3) or less years to retire as at June 2004 when the PRA 2004 took effect[3].

University lecturers at professorial cadre are still under the CPS although by virtue of the Universities (Miscellaneous Provisions) Amendment Act 2012, their tenure of employment has been extended to 70 years and with full salary as pensions upon their retirement.

It must be remembered however, that the PRA has, by the combined effects of Sections 15, 20, 21, 30(4) and 35 of the Act, mandated PenCom to superintend over both the Contributory Pension and the Defined Benefits Schemes.

1.2. Legal and Institutional Frameworks of the Nigerian Pension System

Unlike the DB scheme, the CPS is contributory in nature, fully funded, based on individual portable accounts called the Retirement Savings Accounts (RSAs) and managed and kept in custody by licensed private operators such as the Pension Fund Administrators (PFAs), the Closed Pension Fund Administrators (CPFAs) and Pension Fund Custodians (PFCs).

The success of the CPS is hinged on the availability of funds to contributors when they retire. In this regard, a number of strict provisions are contained in the PRA as well as in the Regulations and Guidelines issued by PenCom, all of which are directed towards

[2] Pension Refrom (Amendment) Act,2011.
[3] PRA,section 8

achieving the singular objective of ensuring the safety of pension fund assets. Some of these provisions are listed below:

(a) *Separation of Administrator and Custodian:* One of the key safeguards of the CPS is the separation of the functions of PEA and PFC. Thus, the PFA only manages the assets and has no physical access to the assets, which are in the custody of the PFC.

(b) *Guarantee of Pension Assets under Custody:* The PRA requires that guarantee shall be given by the owners of the PFC (i.e. the bank), to the tune of the value of pension funds and assets held in custody by the PFC[4].

(c) *Government's Pension Contribution:* Section 11(8) of the PRA also requires that Government's pension contribution for its employees shall be a charge on the Consolidated Revenue Fund of the Federation. In the event of default by the Government in the payment of contributions, the PRA has empowered the Commission under Section 11(9) to direct the Accountant General of the Federation to deduct the amount due as contribution at source and remit same to the RSAs of employees of the Government.

(d) *Pension Fund Investment:* By virtue of Sections 72 to 78 of the PRA and the Regulations on Investment of Pension Fund Assets issued by the Commission, investment of pension assets can only be made on the floor of a Stock Exchange recognized by the Securities and Exchange Commission (SEC) or a money market platform approved by the Central Bank of Nigeria (CBN) or Money Market Association of Nigeria. All instruments must have rating grades stipulated in the Investment Regulations issued by PenCom before Pension Fund Assets are invested in them. The Commission requires that the Risk Rating Institutions that will rate these instruments and/or their issuers, must possess the professional capacity to undertake the rating of the instruments using international acceptable best practices. They should also be licensed by the relevant authority to rate the risk of investment instruments.

(e) *Statutory Reserve Fund:* The PFAs are also required under Section 69 of the PRA 2004 to set a Statutory Reserve Fund (i.e. 12.5% of PAT). This Fund will be available to absorb any losses that may be occasioned on the pension funds from the operations of the PFA.

(f) *Compliance with Rules and Regulations:* All pension fund operators must fully comply with the provisions of the PRA as well as all Regulations and

[4] Section 52(1),PRA

Guidelines issued by the Commission. Pursuant to Section 68 of the PRA, Compliance Officers are employed by PFAs and are responsible for ensuring compliance with the provisions of the law as well as the internal rules and regulations of the particular PFA.

(g) *Returns Rendition:* Similarly, PFAs are required to make a regular report of their activities to the Commission. This is in view of the volume and nature of the funds the PFAs will handle, which necessitates that the Commission must be able to spot any problem early and take remedial action.

(h) *Sanctions:* The Commission can apply sanctions on any operator, its agent or the Compliance Officer for non compliance. Sanctions could either be legal or administrative or both and could range from N250,000 to N10,000,000 as well as from 3 to 10 years imprisonment or both fine and imprisonment depending on the magnitude of the offence. To this effect, all activities of the pension fund operators and their agents must be transparent. They are also required by law to publish their audited accounts.

With regards to the categories of persons exempted from the CPS, Section 8(3) of the PRA provides that they will continue to derive their retirement benefits under the DB Scheme in accordance with the First Schedule to the PRA. This will be administered by the Pension Transitional Arrangement Department (PTAD) under the superintendence of PenCom. Of course, judicial officers would derive their retirement benefits in accordance with the provisions of Section 291 of the 1999 Constitution (as amended) and this is administered by the National Judicial Council in line with the provisions of the Federal Judicial Officers (Administration of Pensions) Act 2007.

1.3. Compliance and Enforcement Functions of the National Pension Commission

By virtue of Section 15 of the PRA, the principal object of PenCom shall be to regulate, supervise and ensure the effective administration of pension matters in Nigeria. However, Section 20 of the Act provides in more elaborate terms, the functions of the Commission. These functions could be summarized as follows:

(a) To regulate and supervise the CPS established under the Act;

(b) To issue guidelines for the investment of pension funds;

(c) To approve, licence, regulate and supervise PFAs, PFCs and other institutions relating to pension matters;

(d) To establish standards and guidelines for the management of pension funds;

(e) To ensure the maintenance of a National Data Bank on all pension matters;

(f) To carry out public awareness and education on the establishment and management of the Contributory Pension Scheme;

(g) To promote capacity building and institutional strengthening of PFAs and PFCs; and

(h) To receive and investigate complaints of impropriety levelled against any PFA, PFC or employer or any of their staff or agent.

It has earlier been mentioned above that the Commission is further mandated under Section 35 of the PRA to regulate and supervise the activities of the Pension Departments who administer the DB Scheme in order to ensure compliance with the provisions of this Act.

Thus, in order to discharge the above functions, the PRA accorded to the Commission under Section 21 and other several sections of the Act, certain powers. These include the power to;

(a) Formulate, direct and oversee the overall policy on pension matters in Nigeria;

(b) Request or call for information from any employer or pension administrator or custodian or any other person or institution on matters relating to retirement benefit;

(c) Charge and collect such fees, levy or penalties, as may be specified by the Commission;

(d) Establish standards, rules and regulations for the management of the pension funds under this Act;

(e) Investigate any pension fund administrator, custodian or other party involved in the management of pension funds;

(f) Impose administrative sanctions or fines on erring employers or pension fund administrators or custodians;

(g) Order the transfer of management or custody of all pension funds or assets being managed by a pension fund administrator or held by a custodian whose licence has been revoked under this Act or subject to insolvency proceedings to another pension fund administrator or custodian, as the case may be; and

(h) Do such other things which in its opinion are necessary to ensure the efficient performance of the functions of the Commission under the Act.

Pursuant to its statutory functions and powers therefore, PenCom plays several roles towards ensuring the compliance with the provisions of the PRA 2004. The following are highlights of the major instances where the discharge of these roles manifest themselves:

Compliance by Employers and Employees: By virtue of Section 11 of the PRA, every employee covered by the CPS is mandated to open an RSA with a PFA of his choice and submit his/her RSA Personal Identification Number (PIN) to his employer for the purpose of remitting his pension contribution. On the other hand, the employer is obligated to remit to the employee's RSA, both his portion of contribution and that of the employee, within seven (7) days from the date of payment of salary. Failure of the employer to make remittance of the pension contribution within the stipulated period attracts liability under Section 11(7) of the PRA 2004 which is payment of the unremitted contributions plus a penalty of not less than 2 per cent to be stipulated by the Commission. These shall also be recoverable as a debt owing to the employee's RSA.

The challenge with ensuring employees comply with the requirement of opening an RSA is that there is neither a sanction against an employee who refuses to open an RSA nor is there any obligation on the employer compel the employee to do so[5]. However, the Commission currently engages in extensive public enlightenment campaigns to sensitize employees on the need to open RSAs.

With regards to compliance by the employer, several efforts are employed by the Commission in this regards. These include:

i. Implementation of the Regime of Sanctions and Penalties for Non- compliance with the PRA, issued by the Commission. This involves issuance of Letters of Demand, Warning, or Caution; Naming and Shaming: legal action by way of prosecution of non- compliant organizations.

ii. Implementation of the provisions of the Public Procurement Act which requires companies wishing to bid for contracts in public (institutions to show evidence of compliance with the PRA 2004.

iii. Collaboration with other regulatory agencies and Government institutions to ensure that entities under their purview comply with the PRA 2004.

Compliance by Licensed Pension Operators: In order to ensure compliance with the PRA by the licensed pension operators, the Commission has put in place strict licensing requirements and developed robust regulatory and supervisory frameworks.

[5] This is sought to be rectified under the proposed amendment to the PRA 2004, which is currently before the National Assembly

Directors and managers of the operator companies are subjected to rigorous screening including the competence and "fit and proper person" test. Appointment to the position of Directors, Chief Executive Officers and Top Management of operator companies are by virtue of Section 67 subject to the approval of the Commission.

The regulatory framework is rule-based and limits oriented. Every PFA is required under Section 66 of the PRA to establish two Standing Committees of the Board: the Risk Management and the Investment Committees. There is also continuous review of Rules and processes to ensure efficiency and effectiveness of operators.

The supervisory framework has been developed pursuant to Sections 79 to 84 of the PRA, in line with the principles of proactive and "riskbased' supervision. Extensive disclosure is required from licensed operators. There is both off-site and on-site supervision of operators either on routine or need basis where Examiners review the operations of operator companies. Review of investment activities and valuation report is carried out on a daily and monthly basis.

Pursuant to the above principles and frameworks, the Commission has issued subsidiary legislations in the form of Regulations, Guidelines, Frameworks and Codes to guide the operations of licensed operators at the level of registration of contributors and accumulation of assets; at the level of investment of assets and customer service; and at the level of administration of retirement benefits or terminal benefits[6]. Some of the subsidiary legislations include:

(a) Guidelines for the Operations of Pension Fund Administrators;

(b) Guidelines for the Operation of Pension Fund Custodians

(c) Guidelines for the Appointment of Directors and Top Management of Licensed Pension Operators

(d) Regulations for Compliance Officers

(e) Regulation on Investment of Pension Fund Assets

(f) Code of Corporate Governance for Licensed Operators

(g) Code of Ethics and Business Practices by Pension Operators

(h) Regulations on the Administration of Retirement and Terminal Benefits

(i) Regulations on Valuation of Pension Fund Assets

[6] All the subsidiary legislations can be found on the Commission's website: www.pencom.gov.ng.

(j) Regulations on Fees Structure

(k) Guidelines for the Operation of Transitional Pension Departments

(i) Framework for the Regime of Sanctions and Penalties.

(m) Framework for the Resolution of Failing Pension Operators.

(n) Guidelines on Life Insurance Policy for Employees.

(o) Regulation on Annuity for Retirees.

Compliance by Holders and Managers of Legacy Pension Assets: From the commencement of the PRA, only licensed PFAs and PFCs are, by virtue of Sections 44 and 46 of the Act, permitted to manage or keep custody of pension fund assets as the case may be. It therefore became illegal for any unlicensed person or entity to deal with pension assets. Consequently, the law[7] provides that such companies and institutions shall transfer all pension funds and assets held by them to licensed PFA and PFCs as may be determined by the Commission. It has been a challenge for the Commission getting employers, insurance companies and fund managers to appropriately quantify and transfer legacy funds and assets managed by them prior to the enactment of the PRA 2004.

Related to the above is the issue of pension payment arrangement for pensioners of Parastatals. This involved payments of funds from the Budget Office (BOF) to insurance firms, which in turn released such funds to the Board of Trustees (BOTs) of the Parastatals for onward payment to the pensioners. The arrangement is inconsistent with the provision of the PRA 2004 and the Government should have stopped engaging insurance companies in the payment of pension. Indeed that arrangement has so far faced serious implementation challenges, including insufficient funding, diversion of pension funds by the insurance companies, inadequate documentation maintained by the BOTs and consequently, lack of accountability. This situation is sought to be addressed by the proposed amendment to the PRA through the PTAD arrangement.

Compliance by Pension Departments: Section 30 of the PRA established the Pension Transitional Arrangement Department (PTAD) for the Public Service of the Federation and the Federal Capital Territory. It also specified the composition of the PTAD to comprise the Pension Departments, Boards or Offices in the Public Service of the Federation and the Federal Capital Territory (FCT), as the case may be, which existed at the commencement of the PRA 2004. However, the Pension Departments, Boards or Offices operated within their parent MDAs, with same administrative/operational structure. This arrangement weakened the regulatory and supervisory oversight of the Commission over the Pension Departments due to lack of centralization of the oversight functions. This has resulted in a

[7] Section 50(3)&(4),PRA

situation where the Commission is unable to exert supervisory control over the Pension Departments as they do not regard the Commission's supervisory role over them. This is a clear violation of Sections 30-38 of the PRA.

Accordingly, the proposed PRA 2013 Bill makes provisions for enhanced regulatory authority and efficiency of PenCom to provide greater oversight on, and the repositioning of, the PTADs. This will ensure greater efficiency and accountability in the administration of the DB Scheme such that payment of pensions would be made by the Accountant General of the Federation directly into pensioners' bank accounts in line with the current policy of the Federal Government.

1.4. Enforcement Mechanisms for Ensuring Compliance.

Section 21 of the PRA empowers PenCom to, among other things, impose administrative sanctions or fines on erring employers or PFAs or PFCs. Specifically, the powers of the Commission regarding supervision and examination are provided for under Sections 79 to 84 of the PRA 2004. Furthermore, Sections 85 to 91 of the PRA make provisions for offences, penalties and additional enforcement powers of the Commission which includes removal of erring Directors from office. Sections 92 to 94 of the PRA 2004 make provisions for dispute resolution process while Section 95 of the Act deals with issues of legal proceedings in cases involving the Commission.

Flowing from the above, it would be observed that the Commission employs both administrative and judicial mechanisms towards ensuring compliance with the PRA This can be illustrated as follows:

(a) *Administrative Mechanism:* The Commission has issued a Framework for the Regime of Sanctions and Penalties for Non-compliance with the PRA[8]. The Framework provides administrative sanctions for infractions of not only the provisions of the PRA but also Regulations, Guidelines and Codes issued by the Commission. The overall objective of the Framework is to define a regime of sanctions and penalties that could be used as deterrents to secure maximum compliance with the Act among operators and employers. The Framework would also promote high standards of conduct in the Pension Industry, by deterring operators and employers who have breached the Act or regulatory requirements from committing further contraventions, deter other operators and employers while rewarding compliant behavior. The rage of administrative sanctions and penalties include issuance of Letter of Advise, Letter of Caution, Letter of Warning, Monetary Penalties, Naming and Shaming, to Removal or Suspension from Office. When these administrative sanctions fail to yield positive results, the matter graduates to

[8] Section 21(h).

Legal Proceedings. In some instances, the Commission may invoke it powers to revoke the licence of an operator where any of the licensing conditions has been violated.

(b) *Judicial Mechanism:* By virtue of the provisions of Sections 85 to 91 of the PRA, offences or violations committed by employers or operators that are punishable upon conviction are liable to prosecution before a court of law in accordance with the procedure stipulated by the Act. Legal proceedings may also be considered in other civil causes and matters including situations where the administrative sanctions failed to yield the desired result. In this regard, criminal cases and other cases relating to the operations of the licensed pension operators in their capacity as corporate entities are usually instituted in the Federal High Court. As a court of unlimited jurisdiction, the High Court may also be seized of jurisdiction to hear and determine many other causes and matters.

By virtue of the provision of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, causes and matters relating to payment of pensions is now within the jurisdiction of the National Industrial Court (NIC). Furthermore, by virtue of Section 93 of the PRA 2004, the Securities and Investment Tribunal (1ST) may hear and determine issues relating to investment of pension fund assets.

The Commission, within a decade of the implementation of the PRA, has significantly achieved the objectives of the pension reform despite the various compliance challenges. Highlights of the achievements of the pension reform may be summarised as follows:

(a). The Commission initially licensed 26 PFAs, 7 CPFAs and 5 PFCs. Presently reduced to 20 PFAs, 7 CPFAs and 4 PFCs due to mergers and acquisitions

(b). The number of registered contributors = 5.52 million as at March 2013. The public sector (including States & LGAs) accounted for 53% of the total registrations

(c). As at March 2013, there are 67, 709 retirees receiving pensions as and when due under the CPS.

(d). Total pension fund assets had grown to over N3.4 trillion as at March 2013. The average monthly contributions is about N30 billion. The assets were equivalent to about 7% of the Nigerian GDP.

(e). Many States and Local Governments have adopted and are at various level of implementing the CPS. As at May 2013, three (3) States, Lagos, Jigawa and Osun, have fully implemented the CPS; six (6 States have partially

implemented the CPS, 12 States have enacted the enabling Laws but are yet to commence implementation: 14 States are still at the Bill stage; while one State, Adamawa, is yet to commence any action.

(f). A new structure for the PTAD has been approved by Mr. President, which is being rolled out under the supervision of the Coordinating Minister of the Economy/Honourable Minister of Finance. This is also captured in the proposed amendment to the PRA 2004 which is currently receiving legislative attention by the National Assembly. The new structure seeks to make pension administration under the DB Scheme more efficient and transparent under the superintendence of PenCom.

The next focus of the Commission includes among other things, putting in place structures that would ensure the deployment of the pool of funds accumulated from the CPS towards instruments that support economic development without compromising the fundamental objective of safety of the pension assets.

1.6. Conclusion

The terrain of pension administration in Nigeria has significantly been altered by the promulgation of the PRA in 2004. Nigeria has largely migrated from the defined benefit pension system to a contributory pension regime. PenCom is the institutional apex regulator of the pension industry in Nigeria. The Commission is currently focused on expanding the frontiers of its compliance and enforcement activities and it is aware that new challenges would arise from time to time in the course of this activities. Proposals have been made in the PRA 2013 Bill currently before the National Assembly, to expand the coverage of the CPS and enhance the powers of the Commission to extract compliance. However, there is no gainsaying the fact that the judiciary would play a critical role in ensuring the success of the Commission's enforcement and compliance efforts.

Thus, as it strives towards unlocking the opportunities inherent in the Contributory Pension Scheme for socio-economic development of Nigeria, the Commission looks forward to the support of the judiciary in implementing provisions of the PRA 2004 in a way that promotes transparency, accountability and operational efficiency of the institutions that operate both the CP and the DB Schemes.

THE CONCEPT AND SCOPE OF "FRAUDULENT PERSONS": IS THE COMPANIES AND ALLIED MATTERS ACT EFFICACIOUS?*

1.1 Introduction

In an attempt to protect the public from dishonest and unfit directors, the Companies and Allied Matters Act (CAMA)[1] has provided for disqualification of directors. A person could be disqualified as a director on grounds of underage that is, below 18 years, mental disorder, insolvency and fraud[2]. The issue of fraud has been particularly addressed by an earlier section 254[3] which provides for "restraint of fraudulent persons" from being directors of companies in Nigeria. The purpose of section 254 is to protect the public and in particular potential creditors of companies, from losing money through companies becoming insolvent when the directors of those companies are people unfit to be concerned in the management of a company.[4] The fact that companies operate through the agency of human beings means that inappropriate people must be prevented form acting as directors to prevent harm to companies and investors. This paper intends to focus on the issue of fraud because it is one of the serious factors that impacts negative consequences and even some times leads to collapse of companies, not only in Nigeria but across the globe.

In the year 2006 the Nigerian Securities and Exchange Commission constituted an in-house Committee that investigated the activities of Cadbury Nigeria Plc between 2002 and 2005 and confirmed the report of misstatements in the accounts of Cadbury to the tune of approximately N13 billion. Upon hearing of the matter by the Administrative Proceedings Committee (APC) of the Nigerian Securities and Exchange Commission in 2007 and 2008 some startling discoveries were made. It was found out that some directors had engaged in unethical practices such as use of stock buy backs, cost deferrals, trade loading and false suppliers stock certificated to manipulate its financial report that were issued to the public. In addition, an undocumented and undisclosed offshore account was maintained and operated by the company from which some directors were paid offshore remunerations without the approval of the committee responsible for fixing remunerations and not recorded in the company's financial reports and account[5].

In the United Kingdom (UK), a Mori survey found out that two-thirds of 100 leading United Kingdom (UK) finance directors admitted that their companies had been victim of

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[1] Cap. C20, Laws of the Federation of Nigeria, 2004
[2] Section 257, Ibid.
[3] Ibid
[4] *Re Sevenoaks Stationers* (Retail) Ltd (1991) Ch 164 CA; *Re Blackspur Group Plc* (1998) I WLR 422 at 426
[5] Oloyi, L. (2008) SEC Sanctions Cadbury over Misstatements in Published Accounts. *Journal of the Nigerian Securities and Exchange Commission.* Volume 4 No. 2. Pp. 5, 6 & 7.

fraud by employees and in two-thirds of the cases the perpetrators was a director or senior or middle manager.[6]

It has been noted that "fraud now has become endemic and has developed a fresh momentum of its own; its ubiguitousness raises the level of temptation even for those who would otherwise have stood apart."[7] The Fraud Advisory Panel was quoted to have stated that "fraud knows no boundaries. It afflicts both private and public sectors, small and large businesses. It hits the pensioner and the shareholder. Fraud leeches up to £12 billion a year from its rightful owners and it is uncomfortably apparent that current social and technological trends will facilitate its growth."[8] It has been warned that fraud causes a lot of cost to business and if not seriously fought against, it will continue to haunt businesses for many years.[9]

It is against the backdrop of the damaging consequences of fraud on businesses that this paper intends to analyse the provisions of the Companies and Allied Matters Act on "restraint of fraudulent persons". The aim is to find out whether the statutory provisions are really efficacious in providing companies with the right caliber of persons as directors.

1.2 The Responsibility Of Directors In The Company

The role of directors in the management of companies cannot be overemphasized. The success or failure of a company largely depends on the caliber of its directors. Prudent and honest directors are more likely to manage a company better than imprudent and dishonest directors. In view of the important position of directors, their role in the company has been clearly defined under the Companies and Allied Matters Act and other subsidiary legislation. Section 63(3)[10] provides that "except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Act or the articles required to be exercised by the members in general meeting". By way of definition a director has been considered as a person duly appointed by the company to direct and manage the business of the company.[11] Any other person who is not duly appointed by the company but is concerned in any way with the management of a company are deemed to be directors. Such persons are regarded as shadow directors. They are persons on whose instructions and directions the directors are accustomed to act.[12] A shadow director for all intent and

[6] Chambers, A and Weight, C. (2008). *Corporate Governance Handbook.* Toltel Publishing, West Sussex. p.794
[7] Ibid. p.802
[8] Ibid.
[9] Ibid p. 279
[10] CAMA. Op.cit
[11] Section 244(1). Ibid
[12] Section 245(1) CAMA. Op.cit; Sealy, L. and Worthington, S. (2010) Sealy's Cases and Materials in Company Law, 9th Edition, Oxford University Press, p. 419; Ultgraframe (UK) Ltd v. Fielding (2005) EWHC 1638 Ch.D

purposes manages a company albeit indirectly. He is therefore subject to the regime of regulation of company directors.

From the above statutory perspective, directors have the overall responsibility of directing the affairs of the company and managing its business. They are therefore expected to ensure that the company achieves its objectives. Directors become the focal point of consideration in the determination of whether a company is run well or properly managed to produce the desired outcomes. In underpinning the responsibilities of directors, the Securities and Exchange Commission Code of Corporate Governance (SEC Code)[13] categorically states that "the board is accountable and responsible for the performance and affairs of the company"[14] and that "the principal objective of the board is to ensure that the company is properly managed"[15] the code further enjoins the board to inter alia observe the highest ethical standards.[16]

It is the recognition of the sensitive role directors' play in the management of companies that the CAMA places the legal position of directors in the company as trustees and agents, and imposes a fiduciary relationship.[17] The fiduciary relationship imposes on the directors the duty to observe utmost good faith towards the company in any transaction with it or on its behalf. This requires that a director should act at all times in what he believes to be the best interest of the company as a whole. It is hereby postulated that a fraudulent person who has been recommended for appointment as director or who is already a director is most likely to work against the interest of the company in the performance of his duties. The pertinent issue is the determination of who is a fraudulent person.

1.3 The General Definition Of Fraud

To start with its simple and ordinary meaning, 'fraud' has been defined as a "deliberate deceit; an act of deception; a deceitful person; an impostor[18]. Under criminal law, the Penal Code Law has not defined the word "fraud" but defines the word "fraudulently" which is an adverb of fraud. Section 17[19] says "a person is said to do a thing "fraudulently" or "with intent to defraud" who does that thing with intent to deceive and by means of such deceit to obtain some advantage for himself or another or to cause loss to any other person".

In a similar vein, fraudulent acts include situations where "a person who by false pretence, and with intent to defraud, induces any other person to confer a benefit on him or on any

[13] SEC Code, 2011
[14] Section 2.1 Ibid
[15] Section 2.2 Ibid
[16] Section 2.3 Ibid
[17] Section 283 and 279, CAMA. Op.cit
[18] Geddes & Grosset (2005) *Webster's Universal Dictionary & Thesaurus.* David Dale House, Scotland., p.203
[19] Penal Code Law, Cap. 89 Laws of Northern Nigeria, 1963, Fourth Edition, 1987

other person by doing or permitting a thing to be done on the basis of benefits paid or on the understanding that the benefits will be paid"[20]. The Acts of inducements to obtain benefits contemplated under the above section are perpetrated in corporate organizations as well. What the directors of Cadbury Nigeria Plc did by making the company to operate an offshore account from which directors were paid offshore remunerations without approval and which was not recorded in the company's financial report and accounts amounted to nothing less than fraud.

In the corporate realm also, fraud has been variously defined in the following perspectives. The earliest definition of fraud was considered as a "dishonesty for gain with concealment".[21] It was further stated that "any act which seeks a profit at the expense of another party through the practice of deception, collusion or any other means of perpetuating unethical activity"[22] amounts to fraud. The definition of fraud in the new Institute of Internal Auditors standards glossary has been quoted as "any illegal acts characterized by deceit, concealment or violation of trust… frauds are perpetrated by individuals and organizations to obtain money, property or services; to avoid payment or loss of services; or to secure personal or business advantage."[23]

From all the definitions above, the key words that feature prominently are "deceit", "deceive" and "deception". These words in their respective tenses inputs the conduct of dishonesty on the person. One of the definitions quoted above indeed defines fraud in its simplest as "dishonesty for gain with concealment". What amount to dishonesty has been defined in its adverb under the Penal Code thus: "a person is said to do a thing "dishonestly" who does that thing with the intention of causing a wrong gain to himself or another or of causing wrongful loss to any other person."[24]

The word dishonest is an antonym of 'honesty'. Honesty refers the quality of being truthful, trustworthy; sincere.[25] It means that a dishonest person is prone to commit fraud. The element of dishonesty goes to the integrity of the individual. It is an issue of character of a person. It is a vice as against virtue. A person of moral turpitude falls for temptation to commit fraud. It has been admitted that "moral constraints which mitigated against fraud have weakened; so now… it would seem that so many resist anything except for temptation".[26] Having said that the issue of fraud takes root from the moral depravity of a person, a fraudulent person can commit fraud anywhere he has opportunity to do so whether in the public sector or corporate sector.

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[20] Section 1(2) Advance Fee Fraud and other Related Offences Act, Cap. A6 Laws of the Federation of Nigeria, 2004
[21] Chambers, A. et al. op.cit, p.793
[22] Ibid
[23] Ibid
[24] Section 16, Penal Code Law. Op.cit.
[25] Geddes & Grosset, op.cit
[26] Chambers, A. et al op.cit p.802

It can also be seen from all the definitions that the common object of fraud is to obtain benefits or gain to the detriment of another person. This is irrespective of whether the fraud is committed between individuals or involves corporate organizations. Every where fraudulent act is dome, it amounts to fraud.

1.4 The Concept And Scope Of Fraud Under The Cama

In order to understand the subject of fraud and who a fraudulent person is under the Companies and Allied Matters Act, it is important to reproduce section 254(1).[27] The section provides for "restraint of fraudulent persons" that:

> Where –
>
> (a) A person is convicted by a High Court of any offence in connection with the promotion, formation or management of a company; or
>
> (b) In the course of winding up a company it appears that a person –
>
> (i) Has been guilty of any offence for which he is liable (whether he has been convicted or not) under section 506 of this Act; or
>
> (ii) Has otherwise been guilty, while an officer of the company of any fraud in relation to the company or of any breach of his duty to the company, the court shall make an order that that person shall not be a director of or in any way whether directly or indirectly, be concerned or take part in the management of a company for a specified period not exceeding 10 years.

Section 506 referred to under paragraph (b)(i) above provides for "responsibility for fraudulent trading" to the effect that the court may direct that any persons who were knowingly parties to the carrying on of business with intent to defraud creditors of the company or creditors of any other person for any fraudulent purpose shall be held personally responsible.

The term "fraudulent trading" as used in insolvency law occurs when an individual including a director or a company, allows the company to continue trading when

[27] CAMA. Op.cit

insolvent.[28] However, some examples of fraudulent trading involve the falsification of a company's affairs, or making false representation to creditors with intention of persuading them to come to a financial settlement with the company.[29] The incident of the investigation of Cadbury Nigeria Plc in 2007 and 2008, the APC minced no words in stating that the directors' use of stock buy backs, cost deferrals, trade loading and false suppliers amounted to fraudulent conduct.[30]

The application of section 254 stated above appears to have two levels to wit, (1) where the company is a going concern, and (2) where the company is in the course of winding up. Subsection (1)(a) in its general term in relation to any offence includes fraud committed during the promotion, formulation or management of a company, but which was later discovered by the company. On the other hand, subsection (1)(b) is explicit in its application in the course of winding up of the company. The extended time frame to cover the entire life span of the company is commendable in the sense that any officer of the company who committed offence against it can be held responsible and accountable for his actions at any time.

Another aspect of the application of section 254(1) is in respect of persons covered by the section. This is the crux of this paper. By the clear wordings of section 254(1), it is apparent that the persons affected are those who commit offences in relation to a company. Such persons can be restrained when they are nominated for appointment as a director in a company, or could be restrained from being directors where they are already directors. The implication is that fraud must be committed in relation to company affairs before it could be used against the person to restrain him from being a company director. A fraudulent person therefore means a person who had committed fraud in company matters.

Some key element and acts of corporate fraud have been defined by some professional bodies. The Auditing Practices Board defines fraud as comprising:

> Both the use of deception to obtain an unjust or illegal financial advantage and intentional misrepresentations affecting the financial statements by one or more individuals among management, employees or third parties, fraud may involve:
>
> - Falsification or alteration of accounting records or other documents;
>
> - Misappropriation of assets or theft;

[28] Coyle, B. (2009) The ICSA *Study Text in Corporate Governance* 6th Edition, ICSA Information & Training Ltd London, p. 69.
[29] Ibid.
[30] Oloyi, (2008) SEC Sanctions Cadbury over Misstatements in Published Accounts. Op. cit. p. 7

- Suppression or omission of the effects of transactions without substance; and

- Intentional misapplication of accounting policies, or willful misrepresentation of transactions or of the entity's state of affairs[31].

The Audit commission in defining fraud puts it this way: "intentional distortion of financial statements or other records by persons internal or external to the organization, carried out to conceal the misappropriation of assets or otherwise for gains".[32]

By virtue of section 254(1) of CAMA, all or any of the above elements of fraud must be committed in relation to company affairs before the perpetrator could be regarded as a fraudulent person for the purpose of restraining him from being a director. It means that where a person is known to have been involved in the things stated above but not in company affairs, he/she is not a fraudulent person for the purpose of applying restraint orders under section 254 of CAMA.

1.5 The Effect Of The Concept Of Fraudulent Person Under CAMA.

The concept of 'fraudulent person' under the CAMA does not admit of fraud committed in organizations other than companies. There is no gainsaying that acts of fraud as indicated by the Auditing practices Board and Audit commission stated above are committed severally in government organs, parastatals, agencies, public and civil service in Nigeria. The notorious and ignominious case of the former Inspector General of police, Tafa Balogun for misappropriation of public funds which led to his prosecution and confiscation of some of his assets by the Federal Government is of common public knowledge. More recently, the Senate Ad-hoc Committee on Subsidy Reinvestment and Empowerment Programme, SURE-P has raised alarm that N500 billion realized from subsidy programme of the Federal Government was missing[33]. In a similar vein at the House of Representatives Ad-hoc Committee probing alleged illegal land allocations and racketeering in the federal capital territory, FCT, Abuja, the Chairman of the Independent Corrupt Practices and other Related Offences Commission, (ICPC), Mr. Ekpo Nta testified that his agency had seized a total of 61 houses, 45 plots of land at different locations within the FCT and duplex from an officer of the Nigeria Security and Civil Defence Corps, NSCD in the course of ongoing investigations into land scams in FCT.[34]

[31] Chambers, A. et al. Op.cit p.793
[32] Ibid.
[33] Agbakuru, J.B and Erunke, J. N500 bn Subsidy Proceeds Missing-Senate. Vanguard, Wednesday November 6, 2013.p.9
[34] Nwabughiogu, L. and Ovuakporie, E. ICPC Recovers 61 Houses from NSCDC Officer. Vanguard, Friday November 8, 2013. Pp.1&5

The above examples are simply to buttress the argument of high level of fraudulent activities in Nigeria which are within public knowledge. The extent of moral decadence in Nigeria now gives the impression that the normal way to get rich is by fraudulent means. However, if one may pause to ask what was the rationale of "restraint of fraudulent person" under section 254(1) of CAMA? The assumption should not be difficult. The provision is aimed at providing a sanitized environment for sourcing, recruiting and maintaining credible persons of integrity as directors of companies in Nigeria. The goal is to raise the standards of honesty and diligence in corporate management.[35]

The laudable objective of ensuring honest persons to be company directors appears to be illusive as far as fraudulent persons under the CAMA are those who commit fraud in relation to company matters only. It means that a person might be so fraudulent in other organizations to the extent that makes him a public disdain, he still qualifies without restraint to be a company director. This statutory permissiveness provides opportunity for all manner of persons of moral turpitude with tract record of fraudulent activities to find their ways in company boards of directors. These kinds of persons are those who have the tendency to commit fraud in the company. The idea of allowing them until they commit fraud in the company before they could be considered as fraudulent persons capable of being restrained is simply inefficacious.

The provisions of CAMA under section 254(1) does not cover persons who have never been involved in company affairs before, hence they could not have been convicted of any offence in connection with the promotion, formation or management of a company, nor found guilty of fraudulent trading or fraud in relation to the company or breach of duty to the company. It has however, been accentuated in this paper that there are many cases of corrupt and fraudulent activities that are being perpetrated by people in organizations and institutions other than companies. Those people are for all intent and purposes fraudulent persons. However, the CAMA does not regard them as fraudulent persons as long as their fraudulent activities were not in relation to any company. It means that when such a person is nominated for appointment as a company director he/she cannot be restrained or disqualified on the basis of being a fraudulent person. Such a person if appointed as a company director may pose a high tendency to commit fraud in the company.

Another angle which section 254(1) has failed to consider is where a person is already a company director but his offences and fraudulent activities are not in relation to the company. It means that where a company director commits fraud outside company affairs he cannot be restrained from being a director until when he commits a fraud in relation to the company. A fraud is committed before any redress is sought, by the then the harm of the fraud would have been inflicted on the company which may be irreparable. It is therefore better to take proactive approach by preventing any person from continuing as

[35] *Re Barings Plc* (1998) BCC 583 at 590; *Re Blackspur Group Plc* (1995) 1 WLR 422 at 426.

director who is convicted or been guilty of fraud in any place so that he/she does not manifest such conduct in the company as he continues as a director.

From the above argument it is humbly postulated that the provisions of CAMA on 'restraint of fraudulent persons' from being directors does not provide sufficient safety net to actually prevent inappropriate people from acting as company directors. The best approach should be to prevent fraudulent persons generally within and outside company affairs from being directors. The restraint of fraudulent person's provision should be a proactive remedial measure to forewarn dishonest people who want to become company directors that they must pass through reformative period before they could be given opportunity to be directors. This should be applicable to persons who commit fraud in any organization including organizations other than corporate enterprises. In this respect those that would be company directors might reasonably be individuals of integrity with upright personal character. It is believed that a board of directors composed of honest persons would perform their duties for the overall interest of the company.

1.6 Conclusion

There is no doubt that fraudulent activities are perpetrated in corporate organizations and public/civil service in Nigeria. Persons who are appointed as directors of companies and have the responsibility of ensuring the proper management of the company are in many cases involved in fraudulent activities against the interest of the company, creditors and other stakeholders. A company that has a board that is composed of honest people is more like to be protected from fraud. The object of the provision of CAMA for restraint of fraudulent persons as directors is for all intent and purposes to ensure that only persons of integrity and honesty are concerned with management of companies.

This paper argues that the scope of the concept of fraudulent person which is limited to only acts of fraud committed in company matters makes it impracticable to prevent other people who are fraudulent outside company affairs from being directors. The implication is that persons of questionable character that is, dishonest persons might find their way as company directors. The likelihood of such persons conducting themselves fraudulently exists.

It is therefore recommended that the restraint of fraudulent persons as directors should be extended to cover fraud committed by persons not only in company matters but also in public and civil service as well as private life. This will go a long way in sanitizing corporate management as only people with good record of integrity would be fit as directors.

COPYRIGHT LAW: THE RIGHT OF THE OWNER VS THE FREEDOM OF THE USER TO COPY.*

1.1. Introduction

Across the world, it is indisputable that what drives economy and social development is innovation. If people's innovations are not protected, then the society is not safe. In every country, there are intelligent people who have the ability to innovate and it is hoped that the capacities of such people are invited positively for national economic development. It is in recognition of this and the need to encourage and protect innovations that the idea of intellectual property was mooted. Copyright is one of the many rights that encapsulate the term, intellectual property. Intellectual property rights have been under serious threat over the years, particularly, in Nigeria. This has been responsible for the various laws that have been promulgated and the various amendments as well as the various international conventions and resolutions. This article looks at the meaning of copyright, the concepts of 'copy' and 'right' under the Copyright Act. In particular, the article examines the extent to which the copying prohibitions in texts operate in practice having regard to the rights conferred by the Copyright Act. The ultimate objective of this discussion is to improve the copyright regime in Nigeria and consequently encourage innovations that would stimulate national economic growth and wellbeing.

1.2. Brief History Of Copyright In Nigeria

Although intellectual property has long been recognised as rights in various parts of the world long before the 19th Century, it assumed universal posture in 1886 with the adoption of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. The first most composite copyright legislation in England is the Copyright Act of 1911[1] which brought the various copyrights within a single text and at the same time, put rights in even unpublished works on a statutory footing.[2] By an Order-in-Council No. 912 of 24th June 1912, the English Act of 1911 was made applicable to Nigeria as a then Colony. This was the Act that was in operation in Nigeria until 1970 when the first indigenous law the Copyright Decree No. 61 of 1970 was promulgated.

A careful look at the 1970 Decree would reveal that it could not take care of the issues of the 20th Century development. The Decree was lacking in several areas such as the absence of any effective administrative structure for implementation of its provisions,[3] absence of

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[1] Hambala, Y. "The Emergence and Historical Development of Copyright Law in Nigeria" University of Ilorin Law Journal vol. 7 2011 p. 113-133 citing Babafemi F. "Intellectual Property: The Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria" 1st ed. Justinian Books, 2007 p. 107

[2] Ibid.

[3] The Nigerian Copyright Commission was not in existence then.

effective enforcement mechanism as the organ of enforcement was the police who already had their hands full of other security matters, the life span or duration which was limited to 25 years after the death of a right holder in the case of literary, artistic or musical arts and 25 years after the end of the year in which the recording was made or the broadcast took place in the case of sound recording and broadcast.[4] It was therefore a relief when the Copyright Decree No. 47 of 1988 was passes into law. This was followed by the amendments in 1992 and 1999.

Copyright has been defined as the exclusionary right that the owner of an intellectual creation has to make copies of his work, the right in use, production and exploitation.[5] It consists of a bundle of different rights dealing with a range of circumstances in which works embodying them may be made available.[6] To economists, copyright is a grant of monopoly. According to Towse, 'the oldest and most standard of these is that copyright is a grant of monopoly and therefore is anti-competitive but that is necessary to enable the author to be compensated'.[7]

Quoting from the famous words of Macaulay, Hadfield reports:

> Copyright is a monopoly and produces all the effects which the general voice of mankind attributes to monopoly. . . .the effect of a monopoly is to make articles scarce, to make them dear, and to make them bad. . . .It is good that authors be remunerated; and the least exceptional way of remunerating them is by a monopoly. Yet monopoly is an evil; for the sake of good, we must submit to evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good."[8]

Copyright infringement cases typically involve some evaluation of the degree of similarity between two works using tests of substantial similarity.[9] Once a plaintiff proves ownership of a copyrighted work, this evaluation of similarity becomes a predominant inquiry in

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[4] The term of years of a copyright before the work reverts back to the public domain has been substantially increased, precisely to 70 years. See section 2 of the Copyright Act as well as the First Schedule to the Act.

[5] Waziri, K.M. 'Copyright Ownership and Transfer in Nigeria' Kogi State University of Bi-Annual Journal of Public Law Vol. 4 No. 1 2012, quoting Cornish W.R. Intellectual Property: Patent, Copyright, Trademark and Allied rights 4th ed. London, Sweet & Maxwell Ltd. 1999, p. 459.

[6] Towse, R., Handke, C & Stepan, P." The Economics of Copyright Law: A Stock take of the Literature" Review of Economic Research on Copyright Issues, 2008, vol. 5(1) pp. 1-22 at p. 2. Available at: http://ssrn.com/abstract=1227762. The authors in this article examines copyright largely from the economists' lens

[7] Ibid

[8] Hadfield, Gillian K. "The Economics of Copyright: A Historical Perspective", Copyright Law Symposium (ASCAP), 38; 1992 1-46 at pp. 29-30. This represents the economists' view on copyright. It is quite harsh and definitely not cognizant of the proprietary character of intellectual property.

[9] Feist Publications v Rural Tel. Services Company 499 U.S. 340, 361 (1991) where the court noted with emphasis that finding of copyright infringement rests on two distinct elements: copyright ownership and copying of constituent elements of a work that is original.

determining infringement. Courts use varied terminology and formulations in copyright infringement cases. In assessing the similarity between works, the fact finder typically considers evidence of whether the allegedly infringing defendant had access to the work that the defendant may have copied, the extent to which the two works are similar, and the extent to which any copying constitutes an unlawful appropriation.[10]

It is important to mention at the outset that in more advanced countries particularly where we are drawing most of our decided cases from in this article, the concern of judges when dealing with copyright issues is the question of determining whether a particular work infringes the copyright of another, perhaps by considering the question of substantial similarity between the two works and access of the alleged infringer to the plaintiff's work. Unfortunately, in Nigeria, our case is cruder in the sense that what preoccupies the minds of authors and law enforcement agencies is the outright page by page photocopying or reprinting of a copyrighted work with impunity.

The main purpose of copyright law just like in the case of other intellectual property laws across the world is to protect works that are protected by copyright from copying by others without authorization. To succeed in establishing that the defendant has infringed the copyright of the plaintiff, the plaintiff must establish that he has the copyright to the work by showing that the work is original. Additionally, he must prove that the defendant copied constituent elements of the original work.[11] In other words, the plaintiff has to establish that he is the copyright owner and that the defendant infringed it by copying same. On the general nature of copyright, section 6(1) of the Copyright Act[12] provides:

> Subject to the exceptions specified in the Second Schedule to this Act, copyright in a work shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is, in the case of a literary or musical work, to do and authorize the doing of any of the following acts:

i. Reproduce the work in any material form;

ii. Publish the work;

iii. Perform the work in public;

iv. Produce, reproduce, perform or publish any translation of the work;

v. Make any cinematograph film or a record in respect of the work;

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[10] Arewa, O. "The Freedom to copy: Copyright, creation and context" Public Law and Legal Theory Series No. 07-06 2007, Vol. 41:477 pp. 477-538 at 484. Obtainable at http://ssrn.com/abstracts=964054. Last visited on 23rd December, 2013.

[11] Feist Publications v Rural Tel. Services Company 499 U.S. 340, 361 (1991)

[12] Cap c28 Laws of the Federation of Nigeria, 2004

vi. Distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement;

vii. Broadcast or communicate the work to the public by a loudspeaker or any other similar device;

viii. Make any adaptation of the work;

ix. Do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-paragraphs (i) to

x. Of this paragraph

1.3. Determining Originality And Infringement.

Virtually all over the world, the basis for granting copyright to a work is the originality. The author must have put in substantial work showing creativity and innovation. Generally, the following works are recognized by the Act to be eligible for copyright protection: literary work, artistic work, musical work, cinematographic work, sound recording and broadcast. Specifically, Section 1(2) of the Copyright Act[13] provides:

> A literary, musical or artistic work shall not be eligible for copyright unless—
>
> (a) Sufficient effort has been expended on making the work to give it an original character;
>
> (b) The work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.
>
> (c) An artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process.
>
> (d) A work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involved an infringement of copyright in some other work.

The provisions of subsection (4) of section 1 of the Act seem to belie the intendment of the entire provisions of the Copyright Act. If what the Act sets out to protect is the creativity

[13] Cap c28 Laws of the Federation of Nigeria 2004

and innovation of the original right owner, one wonders then why the Act would provide that

> A work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involved an infringement of copyright in some other work.

In my humble view, the literal interpretation of the above provisions is that if you successfully infringe another person's copyright by plagiarizing his work and make out your own work out of it, the new work is still eligible for copyright protection even if the agency concerned is aware that the work is an infringement of an existing copyright. In other words, if I reproduce another author's work and put my name as the author, my work which is an infringement of another person's copyright would still be elig.ble for protection. A careful look at the provisions of sections 1,6,12 and 15 of the Act would clearly suggest that the protection offered by the Act seem to cover a narrow area. It seems to protect only against photocopying for commercial purposes. This query is all the more important against the background that copyright is not granted by the issuance of a copyright certificate by the Copyright Commission or by any other body. Nor does the Act require registration of the copyrighted work with the Commission or any other body. All that the Commission asks for is the notification of publication. If then, I take a chapter from Mr. A's book, another chapter from Mr. B's book and yet another chapter from Mr. C's book and give it a title and put my name as the author, it would be be most absurd to say that my work is still eligible for copyright protection which, literally, is what subsection (4) seems to be suggesting.

The provisions of section 1(2)(a) is material. It provides that to be eligible for copyright sufficient effort must have been expended on making the work to give it an original character. The question of originality came up in the case of *Offrey v Ola*.[14] Briefly put, the facts of the case are as follows: In 1963, the plaintiff designed a school record book known as New Era Scheme of Work and Record Book. It was evident before the court that the main contribution in the work consisted of the 'drawing of several horizontal and vertical lines'. In 1967, the plaintiff discovered that the 1st and 2nd defendants produced some record books which were materially the same with New Era Scheme of Work and Record Book designed by the plaintiff especially from pp.1-42. It was also evident before the court that the defendants were aware of the plaintiff's record book as the 1st defendant worked as Administrative Assistant of Anglican Schools at Osogbo at the time the plaintiff was Headmaster of All Saints School in Osogbo and when the record book was designed. In fact, it was the 1st defendant who instructed the 2nd defendant to do the printing. The plaintiff sued the two defendants claiming among other things, accounts, damages for unlawful infringements of copyright and an injunction to stop further production. At the trial, the question arose whether the work was copyrightable, that is, whether sufficient

[14] Unreported Suit No. HOS/23/68 decided on 27th June 1969 reported by Babafemi, op.cit.

work was expended by the plaintiff to give it original character. The court held that there was no evidence that the plaintiff had put into his production substantial amount of work. It held further that the record book merely showed a "neat layout of vertical and horizontal columns on pages 1-42." The court concluded that such a layout could not be called an original literary work or an original compilation for giving ready, convenient and accurate information to people who need such information.

With due respect to the learned trial judge, the present writer is most uncomfortable with the holding of the court in this case. For one, as the court rightly observed, the question of the amount of labour, skill and judgment or ingenuity required to support a successful claim for copyright is a question of fact, not law. It is our submission that the court did not avert its mind to the fact that what the court should look out for when considering whether a work is copied are: i) substantial similarities and, ii) access to the work by the defendant.[15] These two are present here. Again, we think that it would amount to over simplicity to refer to the work in question as 'merely neat layout of vertical and horizontal columns'. The question is: though consisting of 'mere neat lines' did the book serve the purpose for which it was originally designed by the plaintiff? Was the work acceptable by its target audience, the school world? If the above questions are answered in the affirmative, then it is, in our humble view, worthy of protection. Furthermore, if one may ask, was there a work of that nature in existence at the time the plaintiff put the design together? This question, in our view, should be answered, bearing in mind the predicate question: was there a need for such a record book in the school world? If there was, did the book meet that need? If it did, we submit that the book was worthy of protection by way of copyright.

By and large, it has been held by the court that the degree of similarity required to establish that a challenged work is a "copy" is evaluated using tests of substantial similarity.[16] Tests of similarity are used to both establish that copying has occurred and evaluate whether such copying constitutes an unlawful appropriation or infringement[17]

The question of whether a latter work copied an earlier one is a question of facts to be determined by the court based on the evidence adduced by the plaintiff. In some cases, it may be a little difficult to establish that the defendant copied the plaintiff's work. Where that is the case, as is often the case, then circumstantial evidence is resorted to. The plaintiff is then required to demonstrate that the defendant had access to the plaintiff's work. To establish this also may be a herculean task as direct evidence of this may be unavailable. The court has held that the fact that the defendant had access to the infringed work may be

[15] Infra

[16] SAS Institute Incorporated v S & H Computer Systems Incorporated 605 F. Supp. 816, 829 (M.D. Tenn. 1985)

[17] Arewa, op. cit. p. 486 citing the case of Arnstein v Porter 154 F.2d at 468 where the court held the view that where the allegation is that a new work copied an existing one, the determination of the issue must involve an examination of whether the similarities between the two works are sufficient to prove copying.

proved by the plaintiff showing: that '(1) the infringed work has been widely disseminated; or (2) a particular chain of events exists by which the defendant might have gained access to the work.'"[18]

1.4. Meaning Of 'Right' In Copyright

The right in copyright is that intangible right to the innovation and creativity in the work. What this means is that it is not the proprietary right in the end product of the work that is protected by copyright. Rather, it is the intangible legal right which is like a chose in action which rights include the right to produce the work, reproduce the work, circulate the work, withdraw the work from circulation and even control its sale and usage. Waziri buttresses the point further when he drew this analogy:

> Property in a book is different from copyright in the book as property in a painting is different from copyright in the painting. While an owner of a book purchases an absolute and exclusive right over the physical material to act on it as he wishes, he cannot fetter with the copyright[19]

Therefore, ordinarily, to successfully complain of infringement of a copyright in such work, it need not be shown that the defendant actually and intentionally copied the work of the plaintiff. It would appear that it is enough that there are striking similarities between the defendant's work and the plaintiff's earlier work and once it can be shown that the defendant had access to the plaintiff's work, liability can be imputed.[20] However, the court seems to be swayed by the argument of subconscious copying. Relying on the case of *Francis Day v Bron*[21] Cornish and Llewelyn argue that the particular difficulty arises when the defendant denies any intention to copy the plaintiff and the court believes him. *Some judges have accepted that copying could occur subconsciously where a person reads, sees or hears a work, forgets about it but then reproduces it, genuinely believing it to be his own.*[22] This argument does not impress me very much. In the case of literary work, I think there is an obligation, even if a moral one, to look at the work done in an area before embarking on one's own to avoid plagiarism. But, that aside, is it conceivable to read something now, forget it entirely, and then, after a while begin to produce the same thing as your entirely new idea? But the good news is that the court also made efforts to clarify the position in the above case to say that where that is the case, proof of copying would depend on:

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[18] See Tuff N' Rumble Mgmt. Inc. v. Profile Records Inc., No. 95 Civ. 0246 (SHS) 1997 WL 158364 at *12 (S.D.N.Y. Apr. 2, 1997)

[19] Waziri, op.cit. (note 2 above) p. 33. See also Asein J.O. , 'Nigerian Copyright Law and Practice' Nigerian Copyright Commission, Abuja (2003) p. 51

[20] Feist Publications v Rural Tel. Services Company (supra)

[21] (1963) Ch. 587

[22] Cornish, W. & Llewelyn, D. Intellectual Property: Patents, Copyright, Trademarks and Allied Rights 6th ed. London: Sweet & Maxwell, 2003 p. 453

> A number of composite elements: the degree of familiarity (if proved at all or properly inferred) with the plaintiff's work, the character of the work, particularly its quality of impressing the mind and memory, the objective similarity of the defendant's work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences on the defendant …the quality of the defendant's own evidence on the presence or otherwise in his mind of the plaintiff's work.[23]

The general understanding in copyright theory is that what is protected is creativity devoid of copying. It is also understood that where a work copies another work, it is antithetical to creativity and originality.[24]

1.5. The Concept Of 'Copying' In Copyright.

In considering the question of misappropriation of copyright by infringers, Cornish and Llewelyn looks at the various ways by which copying may take place. These, according to them, include: causal connection, subconscious copying, indirect copying, substantial taking and unaltered copying.[25] We have made the point above that one needs the permission of the copyright owner to copy a work protected by copyright. But a right in copyright, like in cases of virtually all types of rights is not absolute.[26] In fact, absolutism in copyright, in our view, is capable of stifling intellectual growth. A level of copying is tolerable to allow for intellectual development. Indeed, as Arewa opines, new works are expected to derive from existing works.[27] In literary circle, it is improbable, indeed, impossible and of course, intellectually incomprehensible to make any headway to research on an area without reference to what has been done in that area before the current research. Thus, what is important is not whether existing work may be copied but, rather, the limitation to such copying. Arewa posits:

> Consequently, copyright doctrine does not adequately accommodate the varied ways in which many artists actually create works. Dominant assumptions in copyright theory do not take sufficient account of the ways in which copying is often an inherent part of processes of creation in a wide range of artistic fields. Instead, copyright theory typically reflects an assumption that copying is antithetical to originality and creativity. As a

[23] Per Wilberforce, J at p. 614
[24] Arewa op. cit. p. 477
[25] Cornish, W. & Llewelyn, D. op.cit. at pp. 452-457
[26] Even the fundamental right to life guaranteed by the constitution is not absolute. See section 33 of the 1999 Constitution that guarantees right to life also recognizes that in some circumstance, the same may be taken away.
[27] Infra

result, copyright analysis in infringement cases is often based on restricted and outdated assumptions about creativity and processes of creation.[27]

The name 'copyright' seem to have derived from the period when copyright was a publisher's right to copy texts to market to the exclusion of all other persons including the authors. Copyright was originally a publisher's right until the coming into effect of statutory provisions, particularly, the statute of Anne of 1710. As a publisher's right, it used to be the right of a person to copy written texts which also arose in England within the context of the 'publishing monopoly of the Stationers' Company, a guild of scribes, bookbinders and booksellers'.[28] With the coming into force of the Statute of Anne in 1710 and subsequent legislation on the rights of authors being recognized as copyright owners, the notions of authorship and originality became nagging issues.[29]

1.6. Originality And Copying.

The question of originality and copying in the case of literary work has been a problem since copyright became an author's right and shall continue to be a problem as long as the law fails to set the parameters for the extent of the monopoly enjoyed by a copyright owner. An outright prohibition of copying will, in my view not only be counter-productive, it will be seriously resisted by new entrants into the literary world. Let us take example of a Law text. In the case of a law text, the work normally centers on statutory provisions which are in the statute books for anyone to access and discuss as well as decided cases. It is often very rare to have a textbook on any area of the law apart from, perhaps, Jurisprudence and Legal Theory that does not involve an examination of a statutory provision and /or pronouncement of the court. Thus, what the author does in effect, is to expatiate or put down his opinion based on the statutory provision, and where applicable, the pronouncement of the court on such provisions. In such a case, can another author, say Mr. B. be conceivably held liable of copyright infringement if he deals with the same laws and cases dealt with by Mr. A, except of course, Mr. B follows the same line of argument and expression as Mr. A without as much as acknowledging the earlier work on the same subject? The fact, for example, that Mr. B. takes a whole paragraph or a few sentences of Mr. A.'s work without citing him, but rather presenting same as his own opinion would be a clear case of plagiarism, another aspect of copyright breach.[30] The permitted copying

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[27] Arewa p. 480

[28] Paul Goldstein, 'Copyright's Highway: From Gutenberg to the Celestial Jukebox' 32-41 (2003)

[29] Martha Woodmansee, 'On the Author Effect: Recovering Collectivity in The Construction of Authorship, Textual Appropriation in Law and Literature 10 Cardozo Arts & Entertainment L. J. 279 (1992).

[30] Some hold the view that there is a wide difference between copyright and plagiarism. Bast C.M. & Samuels L.B. argue that *plagiarism and copyright infringement are not coextensive, though the same copying can potentially give rise to both claims. As previously discussed, plagiarism extends to the use of another's words without attribution, and even can extend to the use of another's information and ideas. While plagiarism is certainly an ethics violation, it may or may not give rise to a criminal or civil action under the copyright law. Copyright infringement is a legal wrong*

which is recognized in practice is that Mr. B quotes Mr. A or refers to particular parts of Mr. A's work, then adds his own opinion which may include agreeing with Mr. A's views or disagreeing with him or partly agreeing and partly disagreeing. This is even the more so as the court has held that there can be no copyright in the 'ideas' disclosed but only in their 'expression.'[31] I am further fortified in my belief in this position by the decision of the American court as far back as 1845 when in the case of *Emerson v Davies*,[32] the court held inter alia:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.[33]

This view is underscored by Arewa in his earlier write-up[34] while he was dealing with the concept of originality:

> …a conception of the creative process that imagines that new works are original and autonomous may often be at odds with actual acts of creation that in many instances involve copying, collaboration, and other uses of existing works… although what constitutes an original work is often contested and difficult to determine with precision.[35]

One of the fundamental principles of copyright law is that an idea cannot be copyrighted; only an author's original expression of an idea can be copyrighted.[36]Copyright has a life span. It does not enure in favour of the right holder in perpetuity. Section 2(2) of the Copyright Act provides that the term of Copyright conferred by section 2 of the Act shall

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based on the theory that an author has a property interest in the authored text. The copyright statute provides the author a legal remedy against one who has infringed his rights. However, copyright protection does not extend to facts or ideas, nor, as more fully explained below, does it protect a document in the public domain. Because it is often difficult to show actual economic damage, authors who can prove a copyright violation, but who cannot prove actual damages, may elect to receive statutory damages. See Bast C.M. & Samuels L.B. 'Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty' Catholic University Law Review, Vol. 57:777 (2008) p. 777 at 790.

[31] Peter Pan Fabrics Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) and *Nichols*, 45 F.2d at 121;
H.R. REP. NO. 94-1476, at 56 (1976) noting that Copyright does not preclude others from using ideas or information revealed by the author's work.

[32] 8 F. Cas. 615, (C.C.D. Mass. 1845) (No. 4436)

[33] At P. 619

[34] Arewa O, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C.L. Rev. 547, 564-568 (2006)

[35] Ibid

[36] Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of "Authorship*," 2004 BYU L. REV. 69, 95

be calculated according to the table in the Fist Schedule to the Act. According to the Fist Schedule to the Copyright Act:

> Literary, musical or artistic works other than photographs Seventy years after the end of the year in which the author dies; in the case of a government or a body corporate, seventy years after the end of the year in which the work was first published.

Thus, when an author of a book dies, the copyright shall subsist in favour of his estate for seventy years after his death before it reverts to the public domain.

1.7. Conclusion

The need to protect copyright and to enforce copyright prohibitions has become more manifest now than ever before especially with the activities of pirates all over the nooks and crannies of Nigeria. As clarion as the call for strict enforcement of copyright provisions has become, there is the need to recognize that some level of copying must be tolerated, particularly with respect to literary work. Apart from those who engage in outright photocopying, flagrant reproduction of constituent elements of a particular work and clear cases of plagiarism, there is the need to allow for fair use of existing materials. In considering whether a particular work is eligible for copyright, there is the need for the Copyright Commission to consider the possibility of infringement of other existing works. Where it is clear that a work is an infringement of another work, such latter work should not be eligible for copyright. It is in this light that it is proposed here that section 1 (4) of the Copyright Act should be repealed as soon as the opportunity to do so presents itself.

REGULATORY AND ENFORCEMENT INSTITUTIONS UNDER THE INVESTMENT AND SECURITIES ACT, 2007: AN INTROSPECTIVE ANALYSIS*

1.1. Introduction

The Investment and Securities Act[1] is a comprehensive legislation in respect of investment in shares and generally in securities business. It is a product that is in answer to the short falls noticed in application of previous laws on investment in securities. These previous laws include specifically, the Securities and Exchange Commission Decree[2] of 1979 and Securities and Exchange Act of 1988.[3]

The legislators in drafting these laws proceeded on the basis that having a securities law that would provide a framework for and guide to securities business without a legal body with oversight functions and disciplinary powers would be a legislative act in futility. The result of this type of situation can be likened to the great stock crash of 1929 which led to the slump of the U.S. economy. This prompted Government of the United States to enact the Securities Act of 1933 thus providing guidelines for securities business without an oversight/regulatory body. One year after the Act[4] became operative, it was discovered that it lacked an oversight body to provide the needed control to prevent a re-occurrence of the previous stock crash. So, in 1934 the Securities and Exchange Commission Act of 1934 was enacted. Thus the foundation was laid for the regulation of securities business in the United States of America and other nations.

In Nigeria, the first regulatory body was created in 1979 by the Securities and Exchange Commission Decree of 1979, which was later replaced by another Commission established by the Securities and Exchange Commission Act of 1988. The present Securities and Exchange Commission was created[5] by current securities law, that is, Investments and Securities Act of 2007.

This article will dwell essentially on two most important institutions created by ISA 2007 for the purpose of carrying out the provisions and intendment of the law on securities. These two are the Securities and Exchange Commission (SEC) and the Investments and Securities Tribunal (1ST). It is hoped that at the end of this article the problems and limitations that bedevils these institutions would have been highlighted and recommendations for reforms made as appropriate.

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[1] No. 29, 2007(hereinafter referred to as ISA, 2007).

[2] No. 71, 1979.

[3] No. 29, 1988.

[4] The United States Securities Act of 1933

[5] Section 1 Investments and Securities Act, 2007.

1.2. Securities And Exchange Commission (Sec)

This body was created by Section 1 of the Investment and Securities Act, 2007 (ISA 2007). In creating the SEC the ISA 2007 made it a body corporate with juristic characteristics[6] and headquarters at Abuja[7] and power to create zonal offices throughout the states of the Federation.[8] Its composition[9] is inclusive of a Chairman; representatives of the Finance Ministry; Central Bank of Nigeria; two full time Commissioners; the Director - General and five Commissioners. All except the Director - General and the two (2) full-time Commissioners are appointed on part time basis.

The function of the SEC is provided for in section 13[10]. The function enunciated in section 8[11] can be grouped into three broad areas. They are: -

(a) Investor Protection

(b) Capital Market Development

(c) Educational

Investor Protection involves the registration of securities and operators within the market. It also includes inspection .of books and processes, keeping and maintaining registers, disciplining offenders or those who breach the securities laws, protecting the integrity of the securities market against insider trading.

The capital market development functions include facilitating the establishment of a nationwide system for securities trading in Nigeria capital market. The function includes facilitating the linking of all markets in securities through modern communication and data processing facilities, and inspection of stock exchanges and capital trade points.

The Educational function envisages the organization of seminars, workshops and conferences for the purpose of enlightenment of the public and sensitizing the citizenry towards the development of share investment friendly attitude.

In the discharge of its duties the SEC has had to use various methods towards achieving the desired goals as stipulated by ISA 2007. Thus, in using registration as a tool for regulation SEC mandates all fund raisers to register the instruments through which such funds are to

[6] Ibid Section 1(2)
[7] Ibid Section 1(3)
[8] Ibid
[9] Ibid Section (2)
[10] Investment and Securities Act, 2007
[11] Ibid.

be raised whether through shares, debentures or bonds. It also requires that all players within the capital market should register with the SEC. This is with a view to streamlining and having strict control over players and activities within the market. Thus, in *SEC vs PRUDENTIAL SECURITIES & 9 ORS*[12] the Securities and Exchange Commission (SEC) instituted an action which sought to restrain the Defendant/Respondents, their agents, servants and privies from participating in the capital market without due registration with SEC. It is observed that in the above case and in another similar one,[13] the defendants hastened to perfect the registration while the cases were on-going. It follows, therefore, that registration with the SEC is a prerequisite for participating in the capital market and failure to do so will lead to legal action.

As in all human activities, the SEC, as an apex regulatory body, saddled with the primary responsibility of investors protection, and development of the capital market, is hampered in the performance of these functions by some practical problems. Some of the practical problems are considered under this subheading.

The SEC, by government policies, is a parastatal under the Federal Ministry of finance and by this fact, the SEC is statutorily required to report to the finance ministry. This, however, presupposes that a start-off grant of finance for the SEC to carry out duties was given to it by the finance ministry through budgetary provision. Now the SEC is empowered by ISA to establish, and maintain a fund into which will be paid money provided by the Federal Government to the Commission. This provision appears to suggest that government gives subvention to SEC but the Director-General in an interview which he granted, claimed that SEC does not receive any money whatsoever from the government.[14] Therefore, SEC relies for funds on the charges, fees and fines realized in the performance of its duties.[15] The monies generated by this means alone are barely enough to cover over-head, which leaves nothing for effective policing of the securities business and capital market.

The inadequate funding of SEC translates also to the lack of up-to-date technology which enhances activities regarding regulation of the securities business and the capital market. The absence of a V-SAT has made it difficult for the zonal offices and the headquarters to be inter-linked. Globalization is a concept that acts to remove economic barriers and thus widen the fund raising horizon of many corporate organizations and government, but this opportunity can hardly be fully and effectively harnessed where the apex regulatory body is starved of funds to complement this effect of globalization.

The inadequate provision of sufficient funds to work with is informed by the disinterest which the federal government has for securities market because over fifteen years prior to 2002, the federal government had never accessed the capita market to raise funds for

[12] (1992) 1 S.L.R 34
[13] Securities and Exchange Commission Vs Dominion Trust Ltd. (1992) 1 S.L.R 53
[14] SEC News Vol. 1 No. October 2002 at page 13
[15] As provided for in Section 19(b) of ISA 2007.

financing deficit budget.[16] This disinterest is exemplified in the way government directs, its budgetary policies towards the money market segment of the financial market. Thus, in formulating monetary and fiscal policies recourse is never had to SEC for input, making the policies bank-driven. By this neglect, the government loses sight of the fact that as an engine of a nation's economy, the greater and more efficient the capital market is the more and better profits public companies make, leading to greater dividends on the part of the shareholders as the public companies source and raise funds for expansion of their business resulting in the creation of jobs. The ultimate of the chain reactions of government accessing the capital market is to leave more funds in the hands of the government by means of revenue from taxes-company income tax from the profits of the public companies, personal income tax from earnings of employees, value added and excise tax from the company's sale of its products, withholding tax from the dividends of shareholders and capital gains tax from the disposal of shares by shareholders. The revenue thus realized empowers the government to carry out its social responsibilities. It has been suggested[17] that in order to deepen the capital market and to foster investor confidence, the government should access the capital market for funds which will engender full participation by the citizens in the capital market. The viability of the capital market would have been enhanced had the government raised the sixty-four billion naira (₦64 billion) used in the construction of the national stadium at Abuja which hosted the 8th All African Games.[18] This is in sharp contradiction with Australia where the funds for the construction of all the stadia that hosted the 2000 Olympics was raised in the capital market with the understanding that the projects would offset the cost of construction and probably in future raise further revenue for the government of Australia.[19]

The immediate consequence of this lack of interest in the SEC and capital market affairs is that the reviews and amendments of the laws governing securities business are too far apart and irregular. This translates into a SEC operating under a legal regime that is obsolete compared with international trends and practices. The Companies and Allied Matters Act (CAMA) 1990, for example, is over twenty (20) years old since its commencement, and no overall review has been done. The ISA 2007 came into existence after the Securities and Exchange Commission Act, 1988 had been repealed by it eleven years after its promulgation or enactment. The ISA 2007 is, itself, due for a review after five years of its application. The insufficiency of the law and the draconian nature of the provisions of the ISA 2007 make for flouters and breaches to go with the most liberal punishment ever by any securities law. The U.S.A. for example, is the most liberal and deregulated economy in the world, but its securities laws are not as liberal as would be imagined. This is so because

[16] Ibid.
[17] Ekineh, D.: Deepening the Nigerian Capital Market: Regulatory, Supervisory and Operational Imperative in a Global Financial Environment, being a paper delivered at the 1st Annual National Capital Market Conference at Sheraton Hotel & Towers on 13th & 14th October, 2000.
[18] Ibid at p.13
[19] Ibid at p.13

the capital market, the world over can easily be prone to manipulations so as to cheat the system or defraud the innocent investors. The seriousness attached to the SEC in the U.S. as well as securities business is illustrated by the swift government reaction to the recent wave of corporate collapses (particularly Enron and WorldCom) by the introduction of an accounting bill designed to install corporate responsibility and punish criminality. The bill also seeks to increase to ten (10) years the penalty for securities fraud and to empower the U.S. SEC to freeze payments to corporate executives under investigation.[20] This was followed by a granting of one hundred million dollars ($100m) to the U.S. SEC to further empower it in its regulatory responsibilities which will forestall a repeat of the capital market crash of 1929.[21]

What has equally been a problem for SEC is the all-out effect of misconduct by members of some of the professional bodies acting within the capital market, which negatively impact on the success of public quoted companies and erode investor confidence. For example, instances abound such as Enron companies in America and African Petroleum (AP) in Nigeria, where the accounting report of public quoted companies painted the company as doing very well, whereas, opposite is the case prompting the collapse of an erstwhile successful company. The case of the American corporate giant Enron is too fresh to be forgotten. A Houston Jury had found the Finance Director of the company guilty of falsifying accounting records which artificially boosted the profits of the company.[22] Here in Nigeria, the case of AP is still generating shock in investors across the country. As a result of this, the SEC has been holding talks with these professional bodies, such as the Nigerian Accounting Standards Board and Institute of Chartered Accountants of Nigeria (ICAN) with a view to sensitizing its members as to the consequence (for the companies and for themselves) of such falsification of accounting records.[23]

The attitude of Nigerian investors (buy-to-hold-attitude) impacts negatively on the viability of the securities market. This attitude brings about an apparent dearth of securities speculators through whose activities there is a high rate of securities turn-over in the capital market. This may not directly affect the duties of SEC, but a buy-to-hold (sometimes up to 15 years) attitude reduces the availability of tradable stocks.

1.3. Limitations On The Power And Functions Of The Securities And Exchange Commission.

The Securities and Exchange Commission is under the Federal Ministry of Finance which acts as a supervising ministry over the activities and affairs of the SEC. It is to this ministry that the SEC reports. The Federal Ministry of finance by the provisions of section 309 can, exempt any person or class of persons who deal(s) in investment business or securities

[20] Sec News Vol. 1 No. 1 October 2002 at page 19.
[21] Ibid page 13
[22] Business Times of Nov. 8-12, 2004 at page 42.7
[23] SEC News Vol. 1 No. 1 Oct. 2002 at page 30.

market from the operation of the provisions of the ISA 2007. Where this happens it presupposes that the SEC has no power whatsoever, be it supervisory, disciplinary or managerial, over the exempted. This in totality undermines the power and functions of SEC. To such exempted person, the ISA 2007 exists as though it does not. The section provides the ground upon which the Minister may exempt such person or persons, that is, in the public interest, but what amounts to public interest in this circumstance is subjective.

The ISA 2007 gave the SEC powers to resolve disputes amongst operators in the capital market and to sanction breaches of the laws, rules and regulations applicable thereto. To achieve this, therefore, SEC, in schedule VII of its rules and regulations created and empowered the Administrative Proceedings Committee (APC) to discharge SEC function of adjudicating over issues and breaches within the capital market. Therefore, the sole purpose of APC, as a quasi-judicial, body, is to give opportunity for hearing to capital market operators and other institutions in the market who are perceived to have violated or have actually violated or threatened to violate the provisions of ISA and rules and regulations made pursuant, thereto or such operators against whom investors have lodged complaint.

The establishment of the APC by the SEC has been one of its most effective moves in the regulation of the capital market. A law is ineffective where there are no sanctions for its breaches. The sanctions remain irrelevant and inapplicable where there are no adjudicative bodies to establish breaches and infringements so as to apply those sanctions. The SEC would have been a moribund and ineffective body had it not been given powers of over sight within the capital market, but what orderliness would there have been were the SEC to be given regulatory or oversight powers without an accompanying disciplinary powers?

The APC as a committee of the SEC is empowered, by the rules of procedure of the Administrative Proceedings Committee of the SEC, rule 10, to examine issues on:

a. Suspension or cancellation of registration of capital market operators;

b. Revocation of the certification of a Securities Exchange or Capital Trade Point;

c. Review of disciplinary actions taken by a Securities Exchange or Capital Trade Point against its members;

d. Dealing in securities or sale of securities to the public by unregistered persons; and

e. Abuses of insider trading and others;

With the full take off of the IST the APC may become redundant because parties may doubt the importance of APC if any party dissatisfied with its decision can always appeal to

the IST. Besides, the mandate of the APC is also within the terms of jurisdiction of the IST. So, it may be more reasonable, even economical to go straight to the IST rather than expend energies at the APC level. This situation can only be avoided where the IST is vested with appellate jurisdiction only thereby making all operators, both institutions and individuals, within the capital market and other complainants to first seek redress at APC. In the alternative, the APC should be abolished now that the IST has commenced sitting.

The belief that SEC is amply living up to expectation in respect of instilling discipline in the capital market is deduced from the number of complaints looked into by APC and the readiness with which parties accept its decisions. In the year 2000, for example, twenty administrative hearings were freshly handled out of which eight involved the corporation of *DE-CANON INVESTMENT LTD.*[24]

What has always been the question in respect of the APC decisions is whether the doctrine of fair hearing has been adhered to. This question often arises because the composition of the APC leaves much to be desired and may be said to breach the legal maxim that no one can be a judge in his own cause[25]. The Commission may be a complainant, and through its APC, be the judge, whose decision will also be confirmed by the Commission. This state of affairs may engender a spate of certiorari actions by those who feel that the doctrine of fair hearing has been infringed upon.

1.4. The Investment And Securities Tribunal (1st) And Its Jurisdiction

The Investment and Securities Act, 2007 in section 274 created the Investment and Securities Tribunal (hereafter referred to as IST) to exercise adjudicative powers conferred on it by the law. This means that the IST is not a department or committee of the SEC, but a creation of statute, which members, shall be appointed by the Federal Minister of Finance. This power to appoint conferred on the Finance Minister appears to be absolute as there is no confirming authority. Out of the nine members, a chairman will emerge who shall be a legal practitioner with at least a fifteen (15) years post - call cognate experience particularly in capital market matters. Under the strict rule of literary interpretation capital market matters is narrow and this will not allow for expansion to accommodate matters of securities not dealt with in the capital market (Exchanges). For instance a lawyer who has worked with SEC or in an investment department of a bank and not with or in the capital market may stand disqualified from acting as chairman of the Tribunal. There is, in section 224(2),[26] a curious provision which is in conflict with section 234.[27] Section 224(2)[28] provides that the Minister of Finance shall specify the matters and places in relation to

[24] SEC's Annual Report and Accounts for 2000 at page 47.
[25] Garba v. Unimaid.
[26] Investment and Securities Act, 2007.
[27] Ibid.
[28] Ibid.

which the tribunal may exercise jurisdiction.[29] These 'matters' referred to in the section were equally stated in section 234(1)[30] as the matters on which the tribunal may adjudicate. The question then is who as between the Act and Minister of Finance shall have final power to decide matters on which the tribunal can adjudicate? It is the supposition that in legal drafting and interpretation the last in time takes currency or precedence. Applying this, therefore the Minister of Finance powers have been superseded by the later provisions of Section 234(2).[31]

The IST has been granted both powers and matters on which to adjudicate in the law establishing it. Section 284[32] authorizes the (IST) to determine issues relating to; the interpretation of any law, enactment or regulation to which Investment and Securities Act, 2007 applies; disputes between capital market operators and the Securities Exchanges or Capital Trade Point; disputes between capital market operators and their clients; and disputes between quoted companies and the regulators (Commission) or the Securities Exchanges.

A critical analysis of the matters upon which IST can adjudicate will reveal that states of the federation or local government matters or issues involving securities business have been excluded. Does this mean that, in spite of the right to assess the capital market in order to raise revenue by the issue of bonds, the state and local governments do not come under the jurisdiction of IST in the event of any misconduct or breach of the rules and regulations on their part? This issue may be resolved by the principle of derivation as the local and state governments issues can be conveniently handled under the disputes between capital market operators and their clients as well as in issues that go on appeal from the APC. The APC, on the question of jurisdiction, has wider reach over matters on which it can adjudicate than the IST. In all matters in respect of securities and capital market, the IST is a court with both original and appellate jurisdiction.

One peculiarity with the IST is that the law establishing it has statutorily fixed the time frame within which it must dispose of any matter that is before it.[33] What makes it peculiar is that the law has not just admonished it to expedite matters before it, but that such matters shall (mandatory) be disposed of within three (3) months from the date of the commencement of the action. This is an improvement on the worrisome delay and clustering of matters in the traditional courts where cases stay as long as five years or more.

The IST, apart from matters into which it can inquire, has been empowered to do certain acts in the realization of it's mandate. This includes power to; summon and enforce the attendance of any person and to examine him on oath, that is power to subpoena; require

[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid
[33] Section 236(5) Investment & Securities Act, 2007.

the discovery and production of documents; receive evidence on affidavits; call for the examination of witness or documents; review its decisions; dismiss an application for default or dealing matters ex-parte; set aside any order or dismissal of any application for default or any order passed by it ex-parte; and do anything which is incidental or ancillary to its functions.[34] All these functions and powers are in relation to investment and securities matters which make the IST a specialized civil court, and being so, criminal jurisdiction has not been conferred on it. Section 304[35] provides that where, in the course of investigation (and also during APC hearings) the Commission discovers evidence of possible criminality, the (Commission) shall obligatorily pass such information to the appropriate criminal prosecuting authorities, such as, the Attorney, General of the Federation or State.

The judgement of the IST must be in writing of which certified true copies shall be supplied to the parties upon request. Any party is free to enforce an award or judgement of IST when the party has registered a copy of such award or judgement with the Chief Registrar of the Federal high Court so as to enable the Federal High Court enforce it as if it were its own judgement. This procedure raises a fundamental question of legal status of the 1ST. The implication of this is germane in determining how the public views the judgement and decisions of the IST.

First, it implies that the IST has no enforcement powers in respect of its judgements and awards. If a court, established by an Act of the National Assembly, cannot enforce its judgements or awards then where is the relevance of its existence, activities and decisions? Parties may be discouraged in the first instance, from seeking justice from the IST knowing that whatever decisions taken thereat cannot be enforced except and until the Federal High Court is brought in[36]. Obedience to this provision will presuppose additional expenses on the part of the party desirous of enforcing and award or judgement.

Second, this provision, that is section 241(3)[37] brings to the fore the inherent contradiction and conflict between a subsequent section that is, section 243[38] and section 6(4)(a) of the Constitution of the Federal Republic of Nigeria 1999[39]. The IST is a creation of the National Assembly and therefore legitimate, but the legitimacy of its creation -was derived from the combined effect of the provisions of section 6(4)(a) and 5(j) of the Constitution of the Federal Republic of Nigeria.[40] Section 6(4)(a) of the 1999 constitution states that: "Nothing in the foregoing provisions of this section shall be constructed as precluding the National Assembly or any House of Assembly from establishing courts; other than those to

[34] Ibid Section 237(2).
[35] Investment and Securities Act, 2007.
[36] by virtue of subsection 3 of section 293 of Investment and Securities Act, 2007
[37] Investment and Securities Act, 2007
[38] Ibid.
[39] As Amended 2011.
[40] Ibid.

which this section relates, with subordinate jurisdiction to that of a-High Court" (underscore provided). The implication of this provision is to empower the National Assembly or House of Assembly of a state to create courts, but that such courts tribunal must of necessity have subordinate jurisdiction to that of a High Court either a Federal or a State High Court which presupposes that appeals ought to lie from such created courts to the State or Federal High Court's or FCT High Court. By virtue of section 293(3)[41] fulfills the intendment (IST being a tribunal of subordinate jurisdiction) of the 1999 constitution when, in the absence of appeals from IST to the High Courts, the tribunal enjoined parties wishing to enforce the IST's award or judgement to register same with the Chief Registrar of the Federal High Court (FHC) which registration implies an adoption of the awards or judgement by the FHC as its own.[42] If this is so, then the provision of section 295[43] is in direct conflict with the 1999 constitution particularly, section 6(4)(a)[44] when it equates the IST with the High Court by making appeals lie from the IST to the Court of Appeal. It is the position of this paper that this provision of section 243-295 of ISA 2007 has been enacted in order to avoid a legislative quagmire that would ensue if after registering the awards or judgements of the IST with the Federal High Court (thereby assuming the IST's awards or judgement to be its own) appeals still lie to the FHC on judgement it has assumed, adopted or registered as its own.

1.5. Conclusion

This paper has stressed the existence and importance of the institutions in the enforcement and regulation of securities business and discipline within the capital market. The relevance of these institutions is such that the government and the stakeholders must do everything that will positively impact on the business securities. It is true that no system is ever perfect, but attempt must be made to bring as near perfection as possible the activities, institutions and operators in the capital market. This desired situation is underscored by the fact that every progressive and vibrant economy must be a consequence of an effective capital market, which has been described as an engine room of any nation's economy.[45]

An effective capital market requires a proactive Securities and Exchange Commission that will easily adapt to international standards, cause a regular review of the securities law and engender obedience of the laws operators within the capital market.

Thus, it is the recommendation of this work that adequate funds for effective oversight functions and capital market developments be made budgetary in the fiscal policies of the

[41] Investments and Securities Act, 2007,
[42] Section 241(3) investments and Securities Act, 1999.
[43] Investments and Securities Act, 2007,
[44] CFRN, 1999 as amended 2011
[45] Anyameluhor T. *Understanding the Market: An Overview of the Nigerian Financial Market SEC News* Vol. 1 No.2 Jan 2003 Page 21

government and provided to the Securities and Exchange Commission. This is necessary as availability of money underlies the effective accomplishment of its (SEC) statutory duties.

The securities laws of the country and the rules and regulations should be reviewed regularly to bring the provisions in line with international standards and developments in securities business. This would ensure the dispensing with obsolete provisions that cast doubt on the credibility and integrity of the Nigerian capital market.

The Investment and Securities Tribunal's Jurisdiction should be clearly provided for by the abrogation or amendment to the provision of section 295 of Investment and Securities Act 2007. Or in the alternative, where amendment will be cumbersome the courts, as suggested[46] could use its inherent jurisdiction to apply the principle of judicial review or blue pencil rule[47] to pronounce the offensive provision null and void and of no effect.

[46] Akume A.A. "*The unconstitutionality of the Investment and Securities Tribunal in Nigeria"* BSULT Vol. 3 2004 at page 64.
[47] Ibid at page 66.

TOWARDS EASING THE INCORPORATION PROCESS IN NIGERIA*

1.1 Introduction

Today, business is often the life-line of any nation. Whatever resources a nation possesses is often harnessed and put to use via the media of several pro-profit arrangements. The socialist ideology having gradually become unpopular, the more prevalent capitalist system encourages private enterprise, which is often epitomized by the corporation (or company). Through this entity, money is easily invested, generated and circulated in the economy.[1]

The law, in recognizing the creation of the corporation, opened the world of business to endless opportunities: there are very few things a human being can do today, which a corporation cannot. As a *legal person* at law, it is granted all the powers of a natural person, and more. The attendant benefits of incorporating a company suggest that deciding to pursue the process would be good business judgment, depending on the circumstances.

The World Bank (WB) and International Finance Corporation (IFC)'s report on the ease of doing business in 2013 places Nigeria at 138 out of 189 economies.[2] Projections for the year 2014 show that Nigeria loses further by nine points, causing it to be placed farther down at 147.[3] The Federal Government had hoped to improve by at least 103 points by 2015,[4] but at this rate, this feat is hardly attainable. Nigeria's low ranking explains the current 23.9% unemployment rate[5] and comparatively low foreign direct investment inflow,[6] considering the country's abundant resources. The much publicised Nigeria Vision

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[1] *African Encyclopedia for Schools and Colleges*. (1974). London Oxford University Press, Ely House, London, p. 102

[2] International Finance Corporation and The World Bank. (2013). Ease of *Doing Business in Nigeria 2013*. Retrieved December 5, 2013 from www.doingbusiness.org/data/exploreeconomies/nigeria/#starting-a-business. Cf. South Africa which ranks more favourably at 41.

[3] Ibid.

[4] Federal Ministry of Trade and Investment. (2013). *An Inclusive Economic Transformation Agenda*. Retrieved December 5, 2013, from http://www.fmti.gov.ng/about-nigeria/history/117-an-inclusive-economic-transformation-agenda.html.

[5] Data according to Dr Yemi Kale, Statistician-General, National Bureau of Statistics. See Emejo, J. (2013, May 9). NBS Puts Nigeria's Unemployment Rate at 23.9%. *This Day Live*. Retrieved December 5, 2013, from http://www.thisdaylive.com/articles/nbs-puts-nigeria-s-unemployment-rate-at-23-9-per-cent/147135/.

[6] Which, according to the Nigerian Minister for Foreign Affairs, stood at US$8.9bn at the end of 2012. See Okocha C. (2013, August 2). Ashiru: Nigeria's Foreign Direct Investment Now $8.9bn. *This Day Live*. Retrieved December 5, 2013, from http://www.thisdaylive.com/articles/ashiru-nigerias-foreign-direct-investment-now-8-9bn/155175/.

20:2020[7] is about addressing these economic deficiencies. The vision statement published by the National Planning Commission declares that

> *By 2020, Nigeria will have a large, strong, diversified, sustainable and competitive economy that effectively harnesses the talents and energies of its people and responsibly exploits its natural endowments to guarantee a high standard of living and quality of life to its citizens.*[8]

Among the parameters used by the WB/IFC report on doing business, is the ease of "starting a business" which includes incorporation, where Nigeria currently ranks at 114.[9] The present administration has identified small and growing businesses (SGBs) as agents of growth and development of the economy[10] and has therefore set out to put in place measures to address the challenges faced by the sub-sector. Among such measures is easier registration process with the Corporate Affairs Commission.[11] This administration hopes to thereby spearhead an "all-inclusive economic transformation agenda" which requires "the private sector to key into the vision."[12] In order to achieve this, the desired growth has to be spurred from within the country, as experience suggests that foreign investors would be more likely to join in when smaller businesses are given the chance to launch and flourish.[13] Besides, it is hardly arguable that the big businesses of today once started as small enterprises. Thus, this paper is intended to briefly consider the process of

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[7] An economic transformation agenda aimed at making Nigeria one of the 20 top economies by the year 2020.

[8] Nigeria National Planning Commission. (2009). *Nigeria Vision 20:2020 Economic Transformation Blueprint*. Retrieved December 5, 2013, from www.**npc**.gov.ng/vault/Abridged_Version_of_Vision2020.pdf.

[9] International Finance Corporation and The World Bank. (2013). *Ease of Doing Business in Nigeria 2013.* Retrieved December 5, 2013, from http://www.doingbusiness.org/data/exploreeconomies/nigeria/#starting-a-business.

[10] Per Mr. Olusegun Aganga, Minister for Trade and Investment. According to him, about 17.2 million SGBs are reported to have offered employment to about 32.4 million people. See Abellegah, D. (2013, January 14). FG to Support Initiation, Growth and Development of Small Businesses. *Business News*. Retrieved December 3, 2013, from http://businessnews.com.ng/2013/01/14/fg-to-support-initiation-growth-and-development-of-small-businesses/.

[11] Per Mr. Olusegun Aganga, Minister for Trade and Investment, on the occasion of the Quarterly Business Networking for SGBs at the Pan African University, Lekki, Lagos. See Nigerian Investment Promotion Commission. (2013, January). Small and Growing Businesses Create 32.4 Million Jobs in Nigeria. *NIPC News*, vol. 2 (No. 1), p. 1. Retrieved December 3, 2013, from www.nipc.gov.ng/nipcnews/ecopy_NIPC_newsleter.pdf.

[12] Federal Ministry of Trade and Investment. (2013). *An Inclusive Economic Transformation Agenda.* Retrieved May 1, 2013, from http://www.fmti.gov.ng/about-nigeria/history/117-an-inclusive-economic-transformation-agenda.html.

[13] Edmiston, K. (2007). *The Role of Small and Large Businesses in Economic Development.* Federal Reserve Bank of Kansas City, p. 1. Retrieved December 5, 2013, from http://www.kc.frb.org/publicat/econrev/PDF/2q07edmi.pdf.

incorporation of the more prevalent company limited by shares (public or private), the difficulties therein, as well as the policies so far made to address them under the transformation agenda. This discussion in the tradition of knowledge democratisation restates basic company law principles to widen the base and frontiers of company stakeholders in Nigeria. This, it is intended will stimulate economic activities in Nigeria and grow the financial system in the process.

The corporation is that organization that is registered by a government agency and thereby granted legal personality. Its liability may be unlimited, or limited by shares or guarantee. The institution of the corporation occupies an important position in modern economies. A business operating as a corporation or registered company often earns the confidence of investors. This is because financial institutions and individuals are more willing to invest in or provide loans for such ventures that are highly organised, with clearly structured managements that are statutorily regulated.[14] More money going into the business translates into more output from the venture and eventually, more profit and then more money circulating in the economy. In other words, when the public invests in a company by buying its shares, it capitalizes the company's operations. Ideally, when a company has enough capital, it can more successfully deliver on the purpose of its establishment—production. The more it produces, the more goods it sells or services it provides and therefore, the more profit it generates. The profit companies make translate into dividends for shareholders,[15] which may be reinvested by buying more shares, thus ensuring that the cycle continues.

Substantial revenue can also be derived from businesses that have incorporated. Corporate bodies are subject to various taxes. Apart from special taxes paid by companies engaged in special types of operations such as mining and oil and gas production, all companies are also subject to Companies Income Tax, Capital Gains Tax and Education Tax. Besides, the stamp duty payable at incorporation, also constitutes tax. In turn, the business enjoys the advantages of being a corporation. Perhaps, the two benefits that stand out the most are limitation of liability and separate existence. Essentially, shareholders are liable only to the extent of shares they hold which are unpaid for[16] and, because the company has a distinct identity from those of its members,[17] it owns its properties exclusively[18] and bears its own

[14] Ogbuanya, N.C.S. (2010). Essentials *of Corporate Law Practice in Nigeria.* Novena Publishers Ltd. Lagos, p. 53.
[15] A good example and a success story is Dangote Cement, which is the Nigerian Stock Exchange's biggest listed firm and currently accounts for a third of Nigeria's market capitalization. This success has seen it expanding its operations throughout Nigeria and Africa.
[16] Refer to Section 21(1)(a) of the CAMA.
[17] Refer to sections 37 & 38 of the CAMA. See also *Salomon v. Salomon & Co. Ltd.* (1897) AC 22.
[18] *Coleg Elidyr (Caerphill Communities Wales) Ltd. v. Koeller* (2005) 2 BCLC 379.

burdens as well.[19] Thus, the role of the registered company in the development of the national economy is not overrated.[20]

1.2 The Incorporation Process

The registration and incorporation process for companies in Nigeria is supervised by the Corporate Affairs Commission[21] (the Commission) under the provisions of the chief company legislation: the Companies and Allied Matters Act[22] (the CAMA).[22]

Incorporation refers to the process of registering a business entity with a government agency under the law, through a process that grants it the status of a corporation or company. Put in other words, it refers to the process of the formation of a legal corporation.[23] There are procedures and requirements under the CAMA for the formation of a company, as considered below.

A. Deciding the Incorporators

A preliminary step in the process of company formation is deciding the incorporators or subscribers, that is, the persons who are going to be the first members of the company. This is important because according to section 18, only two or more persons can form a company.[24] The Act does not contemplate a "one-man company", although, in practice, some private companies are run by one person with the other being either in fact non-existent or simply included in the records just to fulfil the statutory requirements of having at least two members. Thus, it would appear that this requirement is sometimes observed in the breach.

B. Engaging a Professional

Before the promulgation of the Companies Regulation 2012,[25] the Commission restricted access to its offices from the public for the purpose of transacting any business under Part A of the CAMA, which specifically covers transactions relating to companies. A preliminary step in the incorporation process hitherto required engaging the services of a professional who must have been duly accredited with the Commission. This was not a

[19] *Habib (Nig) Bank Ltd. v. Ochete* (2001) 3 NWLR (Pt. 699) CA 114.
[20] Orojo, J.O.(2008). *Company Law and Practice in Nigeria* (5th ed.). LexisNexis Butterworths, South Africa, p.5.
[21] Having offices in every state of the federation.
[22] Chapter C20, Laws of the Federation of Nigeria, 2004.
[22] Unless otherwise stated, any sections mentioned herein refer to its provisions.
[23] Garner, A.B. (Ed.). (2004). *Black's Law Dictionary* (8th ed.). West Publishing Co. U.S.A., p. 781.
[24] One of whom must not be a minor, if there are only two and none of whom must be insane, bankrupt or disqualified from being a director under the CAMA. Refer to Sections 20(1) and 80.
[25] Published in the Federal Republic of Nigeria Official Gazette No 75 Government, Notice No 199, dated 19th September 2012.

requirement of the CAMA per se, but a practice regulation observed by the Commission. The power of the minister for trade to promulgate such a regulation appears to be inherent in sections 16, 585 and 609 of the CAMA. Accordingly, the following were the only professionals licensed to transact incorporation business with the Commission before now:[26]

i) A legal practitioner or a firm of legal practitioners

ii) A chartered accountant or a firm of chartered accountants;

iii) A chartered secretary or a firm of chartered secretaries.

The aforementioned professionals had to be accredited with the Commission in order to obtain an identification card with an accreditation number, which they would present at the Commission, whenever they went to transact any business involving the incorporation of a company. Further, every incorporation form submitted by the accredited professional bore the accreditation number. The legal practitioner in this case was particularly favoured by the law in that the CAMA required that he/she alone could fill and file the statement of due compliance form.[27] In effect, where prospective incorporators engaged the services of a chartered accountant or secretary, they still required a legal practitioner to render the statement of due compliance. The services provided by any of the aforementioned professionals included reservation of a name for the proposed company and obtaining a set of pre-incorporation forms, the filling of which they would supervise and subsequently file at the commission.

However, since the Companies' Regulation 2012 came in to force on January 1, 2013, the rules of procedure have changed. It is no longer necessary to engage the aforementioned professionals for the incorporation of a company. The subscribers themselves or the proposed directors of the company can have direct access to the Commission in order to present the necessary documents and fulfill the requirements, although they are still required to pay accreditation fees. It is submitted that understanding the processes and procedures required, at least for incorporating a company, is not so technical as to be beyond the comprehension of the average businessman who can read and write. Having to engage a legal practitioner is therefore, superfluous. However, with respect to the statement of due compliance, which is among the incorporation documents to be filed, the law still remains as set in Section 35(3) that the prescribed form has to be filled and filed by a legal practitioner. In other words, the incorporators still have need for a legal practitioner.

[26] For transactions under parts B and C involving business names and incorporated trustees, these professionals were not required in principle.
[27] Form CAC4

C. Preparing and Filing Incorporation Documents

In order to incorporate a company in Nigeria, the law requires a number of documents to be made available by the incorporators to the Commission.[28] Most of the documents to be submitted are in a prescribed form. A set of such forms is simply obtained from the Commission for a fee, filled with the necessary information and then filed. The documents include:

a) *Form CAC1, or Availability Check and Reservation of Name Form*:- This is obtained at the Commission for a fee. To begin the incorporation process, a name for the company has to be decided and then reserved, in order to observe the rest of the incorporation procedures using the particular name reserved. It is necessary to check the name in order to ascertain whether it is already in use by another entity or whether it is contrary to law.[29] The proposed name would bear the appropriate "statutory ending": *Ltd* for a private company limited by shares and *Plc* for a public company limited by shares. In practice, it takes close to two weeks simply for the Commission to get back to incorporators on their request for name approval. However, beginning 2013, it is now possible to have the proposed name checked and approved— indeed complete the whole incorporation process—within a day in the Abuja and Lagos offices of the Commission.[30] Under the law, where the name is eventually approved by the Commission, it is reserved for sixty days to enable the incorporators complete the process,[31] should it take that long. And where they are unable to complete the process within that period, an application can be made for an extension of time.

b) *The Memorandum of Association*:- This is the fundamental constitution which defines and regulates the external affairs of the company.[32] The format which this document takes has been proposed in the First Schedule attached to the Companies Regulation. Furthermore, section 27 provides for the content. It must, among others, include the name, registered office address, nature of business and the status of the company being either private or public. It must also include any restrictions on the powers of the company, if there is any, as well as the liability of the members, being either limited by shares or guarantee or even unlimited as the case may be. Where the company is intended to be limited by shares, the nominal amount and the division of the shares into a certain number, as well as the price of each share, must be included. Most importantly, the memorandum contains the *subscription clause* signed by each of the first members of the company, called "the subscribers" wherein they formally agree to form the company and each takes a number of

[28] Refer to Section 35.
[29] Section 30 prohibits and restricts certain names.
[30] It is true that hitherto, incorporation within a day was possible after the payment of some special fee.
[31] Refer to Section 32(1).
[32] Bhadmus, Y.H. (2009). *Bhadmus on Corporate Law Practice.* Chenglo Limited, Enugu, p.37.

shares in their name, so that the total subscription taken by them together must add up to at least 25% of the total share capital of the company. Two copies of the memorandum are required by the Commission.

c) *The Articles of Association*:- This is a document containing the regulations intended to govern the proposed company, much like a constitution. Table A of the First Schedule to the CAMA has also made provision for model articles of association which any company may decide to adopt without alterations. Any issues regarding the internal management of the company are here addressed. Particularly for private companies limited by shares, a clause must be included in the articles that restricts the transfer of the shares within the company in accordance with the law.[33] It is pertinent to note that the articles of association generally contain most of the information contained in the other incorporation documents. Also, like the memorandum, the articles are signed by each of the subscribers to the memorandum of association in the presence of at least one witness who must attest the signature.[34] Two copies are required by the Commission and they must be stamped at the Stamp Duty Office of the Federal Inland Revenue Service, after payment of stamp duty, before filing with the Commission.

d) *Form CAC2, or Statement of Authorized Share Capital*:- This is particularly important for a company intended to be limited by shares. The CAMA requires private companies limited by shares to have at least N10,000 share capital and public limited companies, a minimum of N500,000. At least 25% of the shares must be taken up by the subscribers who are to be the first members of the company.[35] The statement will include the nominal amount and number of division of shares and the price of each share. These details are also to be supplied in the memorandum of association. Before filing this form with the Commission, it has to be stamped at the Stamp Duty Office after payment of the appropriate stamp duty, which is calculated based on the number of shares in the statement. There is no fixed amount as the fees change from time to time.[36]

e) *Form CAC3, or Notice of Situation of Registered Office*:- Here, the official address to be recognized by the Commission in any correspondence between it and the company, is provided. It is also required that this should be a place within Nigeria. This fact is also reflected in the memorandum of association. A postal box or private bag address is not acceptable.[37]

[33] Refer to section 22(2)
[34] Refer to section 34(3).
[35] Refer to section 27.
[36] Orojo, op. cit., p. 41.
[37] Refer to Section 35(2)(b).

f) *Form CAC4, or Declaration of Compliance with the Provisions of the CAMA*:- This is the only document which must be filed by a legal practitioner. Therein, he/she swears to an oath that the requirements for incorporation as provided in the CAMA have been duly complied with. However, the filing of this declaration, even by a legal practitioner, still does not prevent the Commission from satisfying itself that the requirements for incorporation have been duly complied with.[38] Accordingly, the certificate of incorporation to be issued is not conclusive, but *prima facie*, evidence that the requirements of the CAMA have been complied with. It would appear therefore, that the legal practitioner's oath has no practical value.

g) *Form CAC7, or Particulars of First Directors*:- It is necessary for the first directors of the proposed company to be decided even before the company comes into existence, not only in order to sign incorporation documents, but also to set the business going, before subsequent directors are decided by the members. The law requires every company to have at least two directors.[39] The consent of the persons to be the first directors is required to be in writing, together with their particulars. It is especially important to state their nationality, due to the expatriate quota regulations in the country.[40]

h) *Any other document required by the commission to satisfy the requirements of any law relating to the formation of a company*:- In practice, the Commission may require some other documents to be submitted apart from the aforementioned. This is particularly in order to satisfy requirements under other laws apart from the CAMA. Thus, for example, if the company intends to go into banking or insurance business, some additional documents may be required, obtained from agencies in charge of banking and insurance business in Nigeria. Likewise, where foreigners are among the subscribers to the memorandum or first directors of the company, the Commission would require business and residence permits granted under sections 8 and 9 of the Immigration Act 1963.[41] Under section 23 of the Companies Regulation 2012, the Commission also requires the photocopy of the information page of the international passport or national identity card of each subscriber and director of the proposed company.

Once all incorporation requirements have been met and the Commission is satisfied with the procedure, a certificate of incorporation is issued. The moment a company comes into being, the law provides that it shall be known by the name contained in its memorandum. The company shall then be able to exercise all the powers of a natural person of full capacity and function as an incorporated entity. In practical terms, the company can

[38] Refer to section 36.
[39] Refer to section 244.
[40] Certain posts are reserved for citizens and aliens can only be appointed where there is allowance by expatriate quota in that office.
[41] Chapter 11, Laws of the Federation of Nigeria, 2004.

contract and employ in its name; acquire and dispose of property; borrow and mortgage; sue and be sued and perhaps most importantly, solicit for capital from the public by issuing shares, where it is a public company that has met the requirements of the Securities and Exchange Commission and the Nigerian Stock Exchange. Indeed, in more developed economies, such as the United States of America, some companies appear to be richer than many countries.[42]

It can be observed that the information required in most of the documents mentioned appear to be duplicating the memorandum and articles of association and simply increasing the cost of incorporation. The information in the memorandum and articles too could have been contained in one single document.[43] Yet, the law requires several documents, each paid for. Further, stamp duty is payable on two copies of the statement of share capital as well as the articles of association. It is submitted that this constitutes double taxing.

According to the schedule of fees attached to the 2012 Companies Regulation, a set of incorporation forms for limited companies costs N500 plus a standard registration fee of N10,000 for private and N20,000 for public, companies with increasing fees depending on the share capital with which the company is to be incorporated. It is conceded that the registration fees are fair, considering the country's inflation rate.[44] This aside, however, there is N5,000 to be paid as accreditation fee by the person or persons (whether subscribers or directors of the proposed company) who would be in charge of the incorporation process with the Commission. Also, certified true copies of certain incorporation documents as well as the certificate of incorporation, attract extra costs. The requirement for so many documents has contributed to the cost of incorporation. So has the requirement that a lawyer should file a statement of due compliance, for his services are unlikely to come cheap. Name approval is also time-consuming. It takes about two weeks to get a name reserved and, should the name be declined in the end, the process has to be repeated all over again, with the attendant consequences. Further, the requirement for at least two persons to incorporate a company greatly dissuades sole proprietors desirous of keeping their businesses to themselves.

These considerations may discourage small businesses from opting for the registered company, thereby denying the nation some much needed revenue[45] and the economy, some

[42] J.P. Morgan Chase is reputed to be one such company, with assets of $2 trillion, 240,000 employees and offices in 100 countries. The same can be said of Exxonmobil, Chevron, etc.

[43] Cf. the practice in Ghana, where a single document called "company regulations" takes the form of the memorandum and articles.

[44] Put at 7.8% as at October 2013. See Central Bank of Nigeria. (2013). Accessed December 5, 2013, at http://www.cenbank.org/.

[45] Between January and October 2012 alone, the Commission generated more than N6 billion in revenue. See *The Punch.* (2012, December 19). Retrieved December 5, 2013, from http://www.punchng.com/business/business-economy/170582-firms-registered-in-10-months-cac/. If the process of registration were easier, this amount could have been larger.

much needed growth. It is submitted that they justify the imperative for easing the process of incorporation.

1.3 Towards Easing the Process of Incorporation

The fact cannot be overemphasised that when incorporation is made easier, more enterprises would be incorporated and this would result in a win-win-win situation for the economy as well as stakeholders: the ventures enjoy all the advantages of being legal and juristic persons, including the profits from having more access to capital; the public gets more services and also employment; and the government gets revenue from the fees and taxes payable.

The Registrar-General of the Commission[46] has, on many occasions,[47] reiterated his vision for the agency to meet the expectations of its customers and standardize its processes and procedures in line with global best practices for company registries. The Commission has therefore effected the following changes to the incorporation process that are expected to reduce the cost of registering a company by at least 50% in a bid to further make it an "investment attracting agency in line with the transformation agenda of the federal government":[48]

(a) Designated professionals are no longer required for the transaction of any business with the Commission involving the incorporation of a company;

(b) The Commission has enhanced its ICT infrastructure so that electronic payment and filing is possible and reservation of name is no longer delayed. It is possible to get feedback within a day in some offices of the Commission;

(c) The Commission has successfully began to implement its 24-hour start-to-finish business registration process, especially in its Abuja and Lagos offices, complete with certificates of incorporation;

(d) The Commission has collaborated with other government agencies, such as Nigeria Immigration, Federal Inland Revenue Service and Financial Reporting Council of Nigeria to open offices within its premises so that

[46] Currently Mr. Mahmud Bello.

[47] For instance, while addressing ICT journalists on April 6, 2013 and also while presenting the CAC's report at the Annual General Conference of the Nigerian Bar Association at Calabar, Cross Rivers State, August 25-30, 2013.

[48] Per Otunba Funso Lawal, Chairman of the CAC on the occasion of his courtesy visit to the Nigeria Stock Exchange. See Nnorom, N. (2013, May 3). CAC to Increase Registration Fees for Limited Liability Companies. *Vanguard*. Retrieved December 6, 2013, from http://www.vanguardngr.com/2013/05/cac-to-increase-registration-fee-for-limited-liability-companies/.

customers can have easy access to their services in the course of incorporation or doing business with the CAC.

The CAC has a vision of becoming a world class companies' registry. It is hardly arguable that to achieve that feat, it must make itself more easily accessible to the public and its processes less cumbersome and time consuming.

So far, these changes spearheaded by the Ministry of Trade and Investment through the Commission, have shown real commitment on the part of the government towards its goal of improving the ease of doing business in Nigeria in line with its agenda for economic transformation. Although it has been observed that much sill remains to be done, it is also conceded that much of what is left requires more of legislative, than executive action. The Registrar conceded as much in his address to the public thus:

> *It is hoped that the regulation will fill some of the gaps in the substantive provisions of the Companies and Allied Matters Act (CAMA). The Commission will continue to pursue a comprehensive review of CAMA to address the inadequacies that could only be resolved by amending the substantive law.*[49]

In fact, it has been opined in several quarters that the CAMA is overdue for review.[50] However, the issue of the incorporation procedure is of particular importance.

1.4 Conclusion

It is commendable that the federal government has particularly recognised the role of the private sector in achieving its objectives under the transformation agenda. The registered company is an inextricable part of the process. It would seem, therefore, that easing the process of incorporation would be a proper starting point for achieving the economic objectives in the transformation agenda.

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[49] Per Bello Mahmud, Registrar General, Corporate Affairs Commission, in the Preface to the Companies Regulation 2012.

[50] See for example Egwuatu, P. (2012, July 3). IFC Africa Calls for Review of CAMA. *Vanguard*. Retrieved August 21, 2012, from www.vanguardngr.com/; Eboh, M. (2009, September 24). Dematerialisation: Stockbrokers Call for Review of CAMA. *Vanguard*. Retrieved December 12, 2013, from: http://www.vanguardngr.com/2009/09/dematerialisation-stockbrokers-call-for-review-of-cama/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A%20vanguardngr%2FdIeb%20%28Vanguard%20News%20Feed%29; Ekwere, U. (2010, November 1). Former SEC DG Calls for Amendment of CAMA. *Punch*. Retrieved December 6, 2013, from www.allianzeglobal.com/Market_News/.../AG_Market_News_011110_02.doc

The Ministry of Trade and Investment, through the Commission, has introduced some much needed changes in the incorporation process. While these are laudable achievements for this administration, there is more to be done in order to further improve the investment climate.

It is conceded that the Federal Government, through the Commission, has done all it can do under its powers to ease the incorporation process and much of what is left is in fact the preserve of the legislature. The Commission should, therefore, vigorously pursue a review of the CAMA. Accordingly, it is recommended that:

(a) The requirement for a legal practitioner to file statement of compliance should be done away with. Section 35(3) should be deleted or, at the very least, amended by replacing "legal practitioner" with "director of the company";

(b) Requiring information from incorporators to be in several documents is of no practical purpose, but simply adding to the cost of incorporation. A single document in place of the memorandum and articles of association would effectively serve the purpose;

(c) The requirement for at least two persons to form a company may have greatly discouraged some sole-proprietors from opting for the registered company. The law should be reviewed to allow a single business owner to incorporate a company all by himself for there appears to be no practical reason why this should not be the case. Thus, "two or more persons" in section 18 should be deleted and replaced with "person," simply;

(d) The requirement for the payment of stamp duty on the articles of association should be abrogated, at least with respect to companies limited by shares which still have to pay duty on the statement of share capital;

(e) The requirement for accreditation also unnecessarily adds to the cost of incorporation. The Commission is a government agency funded with public funds: incorporators should have free access to it without paying any fees for accreditation;

(f) The 24-hour service delivery observed by the Commission's offices in Abuja and Lagos should be extended to the whole country.

These recommendations have the potentials of easing incorporation process for economic transformation in Nigeria.

AN EXAMINATION OF ADMISSIONS AND CONFESSIONS UNDER THE EVIDENCE ACT 2011*

1.1. Introduction

Admissions and confessions are two related topics. They are joined together in this article for convenience. The rules governing admissions and confessions are also different. In Nigeria, the Evidence Act (hereinafter referred to as the Act) is the primary statute governing admissions and confessions. This article examines what constitutes an admission and also confession under the Act.

1.2. Admissions

An admission is a statement, oral or documentary, or conduct which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, mentioned in this Act.[1] Any statement or assertion made by a party to a case and offered against that party.[2] An acknowledgment that facts are true. This definition given above relates to what is often referred to as informal admissions (hereinafter referred to as admissions). Formal admission is usually found in pleadings and facts admitted in a pleading may be taken as established without proof.[3] Formal admissions are conclusive and binding. They operate only in the litigation in which they are made.[4] An admission is therefore a statement made either by a litigant or by one in privity with or occupying the same legal position as the litigant. As an exception to the hearsay rule, it is admissible whether or not the person is available as a witness.[5] Admissions are admissible because the Act declares it so. The rationale for the exception is that a party is unlikely to make such adverse admissions unless they are true.[6]

Persons whose admissions are relevant under the Act

The persons who can make admissions are enumerated in sections 21-23 of the Act. Under section 21(1) of the Act, statements made by a party to the proceeding or by an agent to any such party, whom the court regards, in the circumstances of the case, as expressly or impliedly authorized by him to make them are admissions. Statements made by parties to

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[1] Section 20 of the Act

[2] *Black's Law Dictionary*, 9th Edition (2009)

[3] Aguda, *The Law of Evidence*, 4th Edit (Ibadan: Spectrum Books, 1999) at p. 38

[4] M.A. Owoade, "Admissions and Confessions" in Afe Babalola Edit, *Law and Practice of Evidence in Nigeria* (Ibadan: Sibon Books, 2001) at p. 47.

[5] *Black's Law Dictionary*, supra note 2

[6] Nwadialo, *Modern Nigerian Law of Evidence*, 2nd Edit (Lagos: University of Lagos Press, (1999) at p. 268.

suits, suing or sued in a representative character, are not admissions unless they were made while the party making them held that character.[7]

Under subsection (3) of section 21, statements made by persons who have any proprietary or pecuniary interest in the subject matter of the proceedings, and who made the statement in their character of persons so interested, or from whom the parties to the suit have derived their interest in the subject matter of the suit, are admissions, if they are made during the continuance of the interest of the person making the statements.

From the above provision, statements made by the following persons are admissions.

(a) By a party to the proceeding

A statement made by a party to a proceeding is an admission. For such a statement to amount to an admission, it must be against the interest of the maker. A statement made by a party to a proceeding which is in his favour is not an admission under the Act.[8] If the party had no personal knowledge of the matter admitted then, according to Cross and Tapper,[9] "the admission was worthless". Cross and Tapper cites the case of *Comptroller of Customs v. Western Electric Co. Ltd*[10] to support this view. Nwadialo[11], also submits that, "the admission must be based on the personal knowledge of the maker." Nwadialo cite the Supreme Court's decision in *Seismograph Services Nigeria Ltd v. Eyuafe*[12], as supporting his view. Cross and Tapper[13]also refer to the case of *R v. Korniak*[14], as an authority on this point. This case according to Cross and Tapper, requires the maker of the statement to have personal knowledge in order to establish a subjective and objective intent in a case involving handling of stolen goods. A statement made by a person outside his personal knowledge only proves his belief that the goods were stolen without proving that they really were stolen. However, if the statement is within the maker's personal knowledge, both the subjective and objective intent required by the law would have been satisfied. We do not agree with the above views. First, admissions are an exception to the hearsay rule. Statements made by parties within their personal knowledge will then be direct evidence. Also the authorities cited by Cross and Tapper must be treated with some caution. In *Customs Comptroller v. Western Electric Company*, Lord Hodson said: "If a man admits something of which he knows nothing, it is no real evidential value."This statement is concerned with the evidential value of the statement and not whether the statement is an

[7] Section 21 (2) of the Act
[8] See Section 24 of the Act. Under the common law, a statement made by a party to a proceeding which is in his favour is an admission.
[9] *On Evidence*, 9th Edit (London: Butterworths, 1999) at p. 558
[10] (1966) AC 367, (1965) 3 All ER 599
[11] Supra, note 6 at p. 269-270
[12] (1984) 1 S.C. 1
[13] Supra , note 9 at p. 558
[14] (1983) 76 Crim. App Rep 145

admission. Also the Nigerian case of *Seismograph* cited by Nwadialo, as authority on the point, does not really support his proposition. The Supreme Court said in this case that:

> Where, however, an admission is not based on personal knowledge of the maker of the facts admitted such admissions can hardly be on any value.

Again, the court was referring to the evidential value of the statement and not whether the statement is an admission. Consequently, the authorities cited by Cross and Tapper and Nwadialo, do not stand for the proposition that an admission must be based or the personal knowledge of the maker. Instead, they stand for the proposition that a statement made by a person not within his personal knowledge have little or no evidential value.

(b) By an agent of a party to a proceeding

The Act requires that the agent must have the express or implied authority to make the statement. Whether an agent has the express or implied authority of a party to the proceeding to make the statement is a question of law. The general rules is that statements made by an agent (referred to by Cross and Tapper as vicarious admissions) within the scope of his authority to third persons during the continuance of the agency could be received as admissions against his principal in litigation to which the later was a party.[15] Under section 21 (1) of the Act, the agent must have the express or implied authority of a party to the proceeding to make the statement. Once this requirement is satisfied, the principal (a party to the proceeding) will be bound by the statement. Also, under section 21(1) of the Act, it would be necessary to prove the existence of the agency before the admissions of the agent would be received against a party to the proceeding.[16] It is sometimes possible to imply the existence of the agency from the surrounding circumstances. In *R v. Turner*,[17] it was held that, acting as a barrister representing a party was sufficient to make the barrister an agent. However in *Wagstaff v. Wilson*[18], this was held not to be sufficient.

(c) By a person suing or sued in a representative character

Under section 21(2) of the Act, any statement made by a party to a suit who sues or is sued in a representative character will amount to an admission only if made by him at the time he was acting in that character. If the statement was made before he assumed that character

[15] Supra, note 9 at p. 559
[16] ibid
[17] (1975) 61 Crim. App Rep 67
[18] (1832) 4 B & Ad 339

or after he has ceased to hold that character, the person represented will not be affected by any admissions made.[19]

(d) By a person having any proprietary or pecuniary interest

Under section 21(3)(a) of the Act, any statement made by a person who has any proprietary or pecuniary interest in the subject matter of the proceedings and who made the statement in his character of a person so interested is an admission.

(e) By a predecessor in title

Under section 21(3) (b) of the Act, any statement made by a person from whom a party to a suit has derived his interest in the subject matter of the suit, may also amount to an admission if it was made during the continuance of such an interest. In the Old English case of *Smith v. Smith*[20], the plaintiff sued the defendant, an executor, to recover a watch the plaintiff claimed that the deceased had given to him before he died. During his lifetime, the deceased had said that he had given the watch to the plaintiff. It was held that, this statement by the deceased was evidence against the defendant.

(f) By persons whose position must be proved as against party to a suit

Statements made by persons whose position or liability it is necessary to prove as against any party to the suit are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made, whilst the person making them occupies such position or is subject to such liability.[21] This section according to Aguda[22], "does note err on the side of clarity). It is explained by the following illustration.[23] X undertakes to collect rents for Y. Y sues X for not collecting rent due from Z to Y. A statement by Z that he owed Y is an admission and is admissible as against X if he denies that Z owed this rent.

(g) By persons expressly referred to by a party to suit

Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.[24] An illustration will suffice. X brings an action against Y in the High Court claiming ownership of a piece of land. X writes a letter to Z seeking for information concerning ownership of the land. The

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[19] See *Legge v. Edmonds* (1855) 25 L.J.Ch 125 referred to in Aguda, supra, note 3 at p. 42
[20] (1836) 3 Bing N.C. 29, referred to in Nwadialo, supra, note 6 at 237
[21] Section 22 of the Act
[22] Supra, note 3 at p. 42. See also *Law and Practice Relating to Evidence in Nigeria,* 2nd Edit (Lagos: MIJ Publishers, 1998) at p. 69, para. 4.15
[23] Nwadialo, supra note 6 at p. 273
[24] Section 23 of the Act

statement made by Z is an admission.[25] In *Elewuju* v. *Onisaodu,* [26] a dispute arose between the families of the appellants and the respondents as to the ownership of a piece of land. Consequently, the appellants instituted an action at the High Court against the respondents claiming a declaration that they are entitled to certificate of customary right of occupancy in respect of the piece of land and also injunction restraining the respondents from further acts of trespass on the land. Both parties called witnesses to testify in support of there case, However, one of the witnesses (D.W.2) called by the respondents testified during cross examination that the land in dispute belonged to the appellant's family. The trial court did not accord much weight to the evidence of the respondent's witness who testified that the land belonged to the appellants. On appeal to the Court of Appeal, the court held that, by virtue of section 22 of the Evidence Act (now section 23 of the Act), statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions. In the instant case, the admission by D.W.2 that the land in dispute belongs to the appellants' ancestors is against the interest of the respondents who called him as a witness ostensibly to establish the fact that the land in dispute belongs to them (respondents). Admissions are relevant and may be proved against the person who makes them and not against a third party.[27] In *Oyakhire v. State*[28], it was held that, a statement made by an accused person to the police may amount to an admission of the offence for which he is charged and such a statement and the facts admitted are admissible only against the maker of the statement. Under section 25 of the Act, oral admissions as to the contents of a document are not relevant, and therefore inadmissible, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents. This is examined in chapter 16 on documentary evidence. In civil cases, no admission is relevant, if it is made upon an express condition that evidence of it is not to be given, or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.[29] If 'A' writes a letter to 'B' in which he admits that he was negligent towards 'C' and it is made upon on an express condition that evidence of its content should not be disclosed by 'B'. Under this section, the admission by 'A' is irrelevant and therefore inadmissible. This section bears some similarity with section 196 of the Act, which deals with statements in documents marked "without prejudice." It appears that this section is wider than section 196 of the Act. Statements made 'without prejudice are a good illustration of this section. Oral or written admissions made during negotiations are irrelevant, if the negotiations were understood to be without prejudice. The words 'without prejudice, on the letter suffices to bring into operation section 196 of the Act. Statements marked "without prejudice" are discussed in details in chapter 15 on privilege communications. A legal practitioner is not exempted

[25] See *Williams v. Innes* [1808] 1 camp. 364, *R* v. *Mallory* (1884) 13 QBD 33
[26] [2003] 3 NWLR, part 647, p. 95.
[27] Section 24 of the Act
[28] [2006] 15 NWL.R. part 1001, p. 160
[29] Section 26 of the Act

from giving evidence of any matter of which he may be compelled to give evidence under section 192 of the Act.

Facts admitted need not be proved

Under section 123 of the Act, no facts admitted in any civil proceeding which the parties to the proceeding or their agent agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hand, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleading. However, the court may in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Admissions are usually made in pleadings and facts admitted do not require any proof. An admitted fact is no longer a fact in issue and does not require any proof. The above section not only gives statutory recognition to the fact that it is not only in pleadings that facts in a civil case can be admitted, but that parties or their agents can admit the facts of a case at its hearing and that such admitted facts need not be proved unless the court hearing the case in its discretion requires that the admitted facts be proved otherwise than by the admission.[30]

Formal Admissions

Formal admissions are made by a party to a civil proceeding so as to relieve the other party of the necessity of proving the matters admitted.[31] If a party in a civil proceeding admits a fact in his statement of claim, such fact need not be proved by the other party. Section 123 of the Act provides that:

> No facts needs to be proved in any civil proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings. Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Formal admission is one of the ways by which a fact can be established without proof by evidence. They are conclusive with respect to the facts admitted. Formal admissions may be made by pleadings, i.e. statement of claim or statement of defense, in answer to notice to admit under the High Court Rules, or in answer to interrogatories, or by counsel and by agreement between the parties.[32]

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[30] See *Central Bank of Nigeria* v. *Dinneh* [2010] 17 NWLR, part 1221, p. 125.
[31] Owoade, supra, note 4 at p. 58 - 59
[32] Nwadialo, supra, note 6 at p. 27 - 30

1.3. Confessions

Definition and nature of confessions

Confession as used in criminal law, is a criminal suspects oral or written acknowledgment of guilt.[33] The distinction between admissions in criminal cases and confessions by the accused is the distinction in effect between admissions of fact from which the guilt of the accused may be inferred and the express admission of guilt itself.[34] Confession is defined in section 28 of the Act as, an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Admission in relation to a crime refers to some fact relevant to that crime, while confession refers to full admission of guilt.[35] Confessions are governed by different rules and are therefore treated separately from admissions. A confession can be judicial or extra judicial. A judicial confession is a plea of guilty or some other direct manifestation of guilt in court or in a judicial proceeding.[36] An extra judicial confession is a confession made out of court and not as a part of a judicial examination or investigation.[37] A confession may be made orally or in writing. However, a confession made in writing may carry more evidential weight than an oral confession. This is because it may be easier to prove. A confession must be direct and positive not equivocal. In *Afolabi v. Commissioner of Police*[38], it was held that the alleged confession was neither direct nor positive. It was therefore inadmissible.

The fact that an accused has denied making the confession does not make it inadmissible. In *Sule v. State*[39], the Supreme Court held *inter alia*, that:

(i) A confessional statement is part of the evidence adduced by the prosecution. A court can still convict on a confessional statement alone even if the accused person resiles from it.

(ii) A confession does not become inadmissible merely because an accused person denies having made it. In this respect, a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession.

(iii) The failure to object to the admissibility of a confessional statement and its later retraction cannot vitiate the proceedings.

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[33] *Black's Law Dictionary*, supra, note 2
[34] William Richardson, *The Law of Evidence*, 3rd Edit (1928) referred to in *Black's Law Dictionary*, ibid
[35] See Nokes, *An Introduction to Evidence*, 4th Edit, referred to in Nwadialo, supra, note 6 at 275
[36] *Black's Law Dictionary*, supra, note 2
[37] Ibid
[38] [1961] All NLR 654. See also *Ibrahim Bature v. The State* (1994) 1 SCNJ, p. 19.
[39] [2009] 17 NWLR, part 1169, p. 35. See also, *Bright* v. *State* [2012] 8 NWLR, part 1302, p.297

In *R v. Itule*[40], the court held that a confession does not become inadmissible merely because the accused person denies having made it and that a confession made to the police by a person under arrest is not to be treated differently from any other confession. Also in *Eke* v *State,*[41] the Supreme Court held *inter alia*, that were a confessional statement is challenged on the ground that the accused person did not make the statement, the statement should be admitted since its admissibility is not affected. It is now settled law that a court can convict an accused person based on his confessional statement. In *Tanko v. State*[42], the Court of Appeal held *inter alia*, that:

(i) When the rules and law governing the method for making confessional statements are complied with, an accused person can be convicted solely on his confessional statement.

(ii) A voluntary confession of guilty by an accused is sufficient to warrant conviction without corroborative evidence, if it is direct, positive, duly made and satisfactorily proved. However, it is desirable to have, outside the confession, some evidence of circumstances, no matter how light, which makes it probable that the confession was true especially where the accused retracted from the statement.

(iii) A trial court must exercise caution in pronouncing conviction and sentence on an accused upon a retracted confessional statement. In this case, the trial court exhaustively considered exhibit C along with the evidence of PW2 and came to the conclusion that the appellant, made the statement, and that it was a confessional statement voluntarily made.

In *Akpa v. State*[43], it was held *inter alia* that:

(i) Confession in criminal procedure, like admission in civil procedure, is the strongest evidence of guilt on the part of an accused person. It is stronger than the evidence of an eye witness because the evidence comes out from the 'horse's mouth", who is the accused person. There is no better evidence and there is no need for further proof since what is admitted needs no further proof.

(ii) A confession is an admission made by a person. The duty of the court is to consider the circumstances under which it was given and to decide what weight is to be attached to it.

[40] [1961] All NLR 462
[41] [2011] 3 NWLR, Part 1235, P. 589
[42] [2008] 16 NWLR, Part 1114, p. 600. See also *Arogundare v. State* [2009] 6 NWLR, part 1136, p. 168
[43] [2008] 14 NWLR, part 1106, p. 74

(iii) Where an accused person confesses to a crime, in the absence of an eye witness to the killing, he can be convicted on his confession alone once the confession is positive, direct, and properly proved. In other words, a free and voluntary confession of guilt, direct and positive, and if duly made and satisfactorily proved, is sufficient without any corroborative evidence so long as the court is satisfied as to the truth of the confession. In the instant case, the confession of the appellant to the killing of the deceased was positive and direct.

(iv) Where an accused person denies making a confessional statement, the trial court is expected to admit the statement in evidence as an exhibit and in its judgment decide whether or not such denial avails the accused person. Thus, a confession does not become inadmissible merely because an accused person denies having made it. In this respect, a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession. In short, the denial of an accused person of making a statement to the police is an issue of fact to be decided in the judgment as the issue does not affect admissibility of the statement.

Also in *Ismail v. State*[44], the Court of Appeal held, *inter alia* that, once a confession of guilt is shown to have been made freely and voluntarily, be it judicial or extra judicial, if it is direct, positive and properly established, it constitutes proof of guilt and is enough to sustain a conviction so long as the court is satisfied as to its truth. The court further held that, although an accused person can be convicted solely on his confessional statement, it is desirable to have some evidence outside the confession which would make it probable that the confession was true. A similar decision was arrived at in the case of *Sunday Abiodun* v. *The State*,[45] the accused in his confessional statement gave a vivid story of how the robbery was committed and how he took part in it. The court held that from the totality of the evidence adduced, the prosecution proved beyond reasonable doubt that the appellant committed the offence of conspiracy to commit armed robbery and armed robbery. The court further held that, an accused person can be convicted solely on his confessional statement, which must be direct and positive. Where however, an accused person retracts his confessional statement, the court should look for independent evidence outside what is contained in the retracted statement to establish or prove the offence.[46]

[44] [2008] 15 NWLR, part 1111, p. 594
[45] [2012] 7 NWLR, part 1299, p.394. See also *Nigerian Navy* v. *Lambert* [2007] 18 NWLR, part 1066, p. 303
[46] [2010] 6 NWLR, part 1190, p. 280.

When confession is relevant

Under section 29(1) of the Act a confession made by a defendant may be given in evidence against him if it is relevant to any matter in issue in the proceedings. A confession may be excluded by the court if it is represented to the court that the confession was obtained:

(a) By oppression of the person who made it, or

(b) In consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence.[47] The burden of proving that a confession was not obtained in a manner contrary to the provisions of this section is on the prosecution. The court may on its own motion require the prosecution to prove that the confession was not obtained as mentioned in either subsection (2)(a) or (b) of this section.[48]

Section 29(1), (2) and (3) of the Act is a new introduction into our evidence law. Under the repealed Evidence Act 2004, section 27(2), confessions, if voluntary are deemed to be relevant facts as against the persons who make them only. Most of the cases were decided under the old section 27(2) of the repeal Evidence Act. We do not however envisage a major change in the law, because there is some similarity between section 27(2) of the repealed Act and section 29(1) (2)(3) and (5) of the Act. Under subsection(5) of section 29 of the Act, oppression is defined to "include, torture, inhuman or degrading treatment and the use of threat of violence, whether amounting to torture. Let us examine some cases decided under the old section 27(2) and see if a court will arrive at the some conclusion under the new section 29(1),(2),(3) and (5) of the Act. In *Eke v. State*[49], the appellant was arraigned before the Kaduna State Armed Robbery and Firearms Tribunal on a charge of armed robbery contrary to section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act Cap. 398, Laws of the Federation of Nigeria, 1990. The appellant pleaded not guilty to the charge. To prove its case, the prosecution called five witnesses and tendered five exhibits. One of the exhibits tendered was the confessional statement of the appellant (Exhibit 5). At the point of tendering same, learned counsel to the appellant objected to its admissibility on the ground that it was involuntary made, in that the appellant was tortured to make same. Learned counsel then called for a trial-within-trial to determine whether Exhibit 5 was voluntary. However, the trial court did not accede to the request of counsel for the appellant and went ahead to admit Exhibit 5 in evidence. The appellant testified in his defense and in a bid to extricate himself, he raised for the first

[47] Section 29(2) of the Act

[48] Section 29(3) of the Act

[49] Supra, note 40. See generally, Ochem Emeka, "The Relevance of Confessional Statement in Criminal Proceeding in Nigeria" (2011) Igbinedion University Journal of Jurisprudence Vol. 1 No. 2 P. 1, where the writer argues that testimonial untrustworthiness should be the guiding principles as to whether a confession should be admissible or not. See also the case of *Godwin Ikpasa v. AG. of Bendel State* [1981] 9 S.C. 7

time the defense of *alibi*. In its judgment, the tribunal relying solely on the evidence of prosecution witnesses without employing Exhibit 5, convicted the appellant of the offence of robbery *simpliciter* instead of the offence of armed robbery as charged and sentenced him to 21 years imprisonment. The appellant appealed against the judgment of the Tribunal to the Court of Appeal, Kaduna Division. The gravamen of the appeal was that the tribunal was wrong in admitting Exhibit 5 the way it did and that the prosecution did not prove its case beyond reasonable doubt to sustain the conviction of the appellant for the offence of robbery as there were material contradictions in the evidence of prosecution witnesses. The Court of Appeal in its judgment, held that the admissibility of Exhibit 5 did not occasion a miscarriage of justice as the Tribunal did not rely on it in giving judgment the way it did and that the prosecution proved its case against the appellant before the Tribunal to sustain the conviction and sentencing of the appellant for the offence of robbery. The Court of Appeal therefore affirmed the conviction and sentence of the appellant and dismissed the appeal. Still aggrieved, the appellant appealed to the Supreme Court. The Supreme Court (unanimously dismissing the appeal) held:

(i) The test for admissibility of a confessional statement is its voluntariness. Once the issue of involuntariness is raised as in the instant case, it must be resolved or settled one way or the other before its admission or otherwise.

(ii) Where a confessional statement is challenged on the ground that the accused person did not make the statement, the statement should be admitted since its admissibility is not affected. That the statement was made voluntarily or otherwise does not arise for consideration. However, where a confessional statement is objected to on the ground that it was not voluntary, that is to say, the accused person says he was forced or induced to make it, then a trial–within trial must be held.

(iii) When the admissibility of a confessional statement is challenged on the ground that it was not made voluntarily, it is incumbent on the judge to call upon the prosecution to establish that it was voluntarily made by conducting a trial within trial. Such a procedural step must be taken at the point when the objection is raised.

Fabiyi, J.S.C. said:

> It is clear to me that the trial Judge at the Tribunal goofed in failing to carry out the mandatory trial-within-trial to determine the voluntariness of the statement credited to the appellant.

(iv) At the end of a trial-within-trial, if the court is satisfied that the confessional statement was not voluntary, then the statement is not admissible in evidence as an exhibit and the trial Judge should rule accordingly.

Rhodes-Vivour, J.S.C. said:

> In this case at the point of tendering the confessional statement the accused claimed that he was beaten up and forced to write the statement. The trial court ought to have ordered a trial within trial to find out if the accused person's contention that he did not write the statement voluntarily was true. Failure to conduct a trial within trial was wrong. The Court of Appeal fell painfully into the same error when it said on page 91 of the Record of Appeal that the learned trial judge was right to admit the document as exhibit 5 without having to conduct a trial within trial.

(v) A trial within trial is designed to determine if a confessional statement was voluntary.

(vi) At a trial within trial, the accused person must give evidence before witnesses called by him give evidence.

If this case where to be decided today, the issues the court will have to consider are, whether the confession was obtained (i) by oppression, i.e. by torture, inhuman or degrading treatment, and the use or threat of violence, whether or not amounting to torture, or (ii) in consequence of anything said or done, which was likely, in the circumstances existing at the time, to render unreliable any confession made by the defendant. In the above case the accused alleged that it was as a result of the torture that he made a confessional statement. If after conducting a trial within trial the judge is of the view that the accused was tortured, then his confession would be inadmissible. The trial within trial procedure appears to have received statutory backing under section 29(3) of the Act. Under this subsection, the court may on its own motion require the prosecution to prove that the confession was not obtained in contravention of subsection 2(a) and (b) of section 29. The following cases would still be decided the same way under the new section 29(2). In *R* v. *Baba Haske*,[50] the accused was charged for the offence of murder. The accused was suspected of having committed the crime. The Head Chief summoned the villagers and said to them: "all of you will be in the case and will be goaled if you do not tell the truth". He also told the accused that he will inform the police of the circumstances giving cause for suspecting him and added: " l hear that you followed this man with a gun , if you shot him please let me know". It was held that the confession made by the accused was inadmissible. This case will fall within section 29(2) (b) of the Act. In *R v. Ebhomien and Others*,[51] policemen investigating a case of alleged murder took some men, women and children away from their village and detained them at the police station. A police inspector later informed elders from the village to confess so that those innocent among them can be

[50] [1961] All NLR 330
[51] [1963] 1 All NLR 365

released. The accused consequently confessed to the crime. It was held that the confession was inadmissible. Again, this case will clearly come within section 29(2) (b) of the Act. In the case of *R* v. *Ebong*[52], the court held that threat of harm by 'juju' was not sufficient to render a confession inadmissible. The court said that: "to find otherwise would be getting perilously near to the fallacious theory that a genuine belief in witchcraft might be a possible defence to a charge of murder". According to Aguda:[53]

> The question of fear is always a subjective one and that when a person is frightened by any object whatsoever, his action or utterance thereafter becomes one done or uttered under a threat or fear.

We agree with the learned author's view criticizing the decision of the court. This criticism can be sustained on the interpretation of the repealed section 28 under the old law, where the question of fear was indeed a subjective one. If the accused person was put in fear as a result of the threat of 'juju' then his confessional statement should not have been admitted under the old law. However, under the new section 29, there appears to be no reason why the confession would not be admissible.

Oppression under section 29

Under subsection (5) of section 29, oppression includes, torture, inhuman or degrading treatment, and the use of threat of violence, whether or not amounting to torture. In the old English case of *R v. Baldry,*[54] Baron Parke said:

> In order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession

Also in *Callis v. Gunn,*[55] Lord Parker C.J. said:

> It is a fundamental principle of law that no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements.

[52] (1947) 12 WACA 139
[53] Supra, note 3 at p.52
[54] (1852) 2 Den 430 at p. 44. See Owoade, supra, note 3 p. 74 - 75
[55] (1964) 1 QB 495 at p. 501

In *R v. Prager*,[56] the Court of Appeal held that, a prolonged though interrupted interrogation which led to the confession was obtained from oppression. The Court of Appeal adopted a statement by Sachs J. in *R v. Priestley and Mason*[57], where he said:

> To my mind, this word.. imports something which tends to sap, and has sapped that free will which must exist before a confession is voluntary … whether or not there is oppression in an individual case, depends, upon many elements .. They include such things as the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement.

Section 29 of the Act unlike section 28 of the old law, did not specify persons from whom the oppression or other conduct should proceed from. Under section 28 of the old law the threat must proceed from, "a person in authority". Under section 29 of the Act, an oppression we believe could proceed from persons engaged in the arrest, detention, investigation, examination, prosecution or punishment of the defendant. If a confession is made after the oppression or other conduct has ceased, in the opinion of the court, the confession becomes relevant and would be admissible. If the oppression under which the first confession is made still persists, when the second confession is made, then it is inadmissible.[58] A trial within trial procedure applies only where it is contended by the defense that the statement made by the accused was not voluntary (i.e obtained by oppression or other conduct). The judge should then hear evidence on the point from both parties before making a ruling on the admissibility of the confession. The burden of proving that the confession was not obtained in contravention of section 29(2)(a)(b) is on the prosecution.[59] In *Michael Okaroh v. The State*,[60] the appellant and one Tanko Anyankar Ayiku were charged with conspiracy and culpable homicide punishable with death. The prosecution's case was that the appellant had conspired with Tanko (now at large) to kill the deceased who was appellant's brother. The appellant had lured the deceased to a pre-arranged spot on the pretext that he was going to show him his house. Tanko attacked the deceased with a cutlass wounding him fatally. The appellant had hired Tanko and paid him some money for his part in the whole scheme. He also reported the incident to the Police and made a confessional statement which was tendered in evidence at the trial as Exhibit A. In the confessional statement, the appellant admitted hiring Tanko to kill the deceased and

[56] (1972) 1 All ER 1114, [1972] 1 WLR 260
[57] (1985) 19 ACR 338
[58] See *R v. Baba Haske*, Supra note 50. See also *The State* v. *Audu* [1971] NNLR 91
[59] Section 29(3) of the Act. See also *Eke* v. *State*, supra, note 41 and *Olabode v. State* [2009] 11 NWLR, p. 261.
[60] (1988) 3 NWLR, p. 214. See also, *Obidiozo* v. *State* (1987) NWLR, part 67, p. 748 and *Queen v. Eguabor* (1962) 1 All NLR 287.

taking the latter to the scene of the crime. The appellant had prior to the incident had some misunderstanding with the deceased for his failure to give him ₦6,000 to commence business. The appellant in his evidence feigned ignorance of who killed the deceased, he also alleged that he was beaten and tortured before making Exhibit A hence it was not made voluntarily, but the allegation of involuntariness was not made at the time the statement was tendered. The appellant was convicted by the learned trial judge and sentenced to death. On appeal, it was contended *inter alia*, that the trial Judge erred in relying primarily on the confessional statement (Exhibit A) in convicting the appellant when the said confessional statement was never received in evidence. It was also submitted that the trial Judge erred in holding that Exhibit A was voluntarily made without first holding a trial within a trial especially as the appellant had given evidence that he signed the alleged confessional statement under the threat and fear of further torture. Counsel submitted that the fact that defence counsel failed to object to the tendering of the confessional statement does not exempt the trial court from observing the conditions laid down in Section 28 of the Evidence Act.

The Court of Appeal (Unanimously Dismissing the Appeal) held:

(i) The appropriate point to raise the involuntariness of a confessional statement is when it is about to be tendered in evidence especially where, as in this case, the accused person is represented by counsel, and it is assumed he ought to know what to do at each stage of the proceeding.

(ii) It is only where an issue arises as to whether a confession was made voluntarily that the exceptional procedure of holding a trial within a trial should be adopted by a trial court.[61]

(iii) The purpose of a trial within a trial is not to determine whether the accused made the statement.

(iv) In the instant case, as counsel did not object to the confessional statement being admitted, there is no reason why the trial judge should have taken it upon himself to order a trial within a trial when he was satisfied that the statement was not obtained by inducement, threat or promise. It was therefore wrong for the accused to challenge the confession.

[61] For a detailed discussion as to whether a trial within trial is part of Nigerian Criminal Procedure, see Niki Tobi, *The Nigerian Lawyer* (Lagos: Law Research and Development Forum, 2002) at p. 345-350, where the Learned author after examining the decision of the Supreme Court in *Gbadamose and Others* v. *The State* [1996] 6 NWLR, part 196, p. 182 (where the court approved the procedure), said that the procedure wastes so much trial time and that the Supreme Court should have rejected the practice of a trial within trial as part of Nigerian law. See also the case of *Auta* v. *The State* [1975] 1 All NLR, part 1, 165.

(v) In considering the weight or value to be attached to a confessional statement, the following tests should be applied:

(a) Is there anything outside the confessional statement to show that it is true?

(b) Is it corroborated?

(c) Are the relevant statements made in it, of facts, true as far as they can be tested?

(d) Was the prisoner one who had the opportunity of committing murder?

(e) Is this confession possible?

(f) Is it consistent with other facts which have been ascertained and have been proved?

In the instant case the tests were rightly and properly applied by the trial court. The same test was approved in the case of *Adeniyi* v. *Adekoya*.[62] Section 29 of the Act was copied from section 76 of the English *Police and Criminal Evidence Act 1984*.[63] This section provides as follows:

(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance to this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it represented to the court that the confession was or may have been obtained-

(a) By oppression of the person who made it; or

(b) In consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution prove to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

[62] [2012] 9 NWLR part 1306, p.419

[63] This section is based on Art. 3 of the ECHR, which provides that no one shall be subjected to torture or inhuman or degrading treatment.

(3) In any proceeding where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection(2) above.

Section 76(8) defines oppression as: including torture, inhuman or degrading treatment and the use or threat of violence (whether or not amounting to torture). An examination of some English cases would throw some light on the interpretation of section 29 of the Act. In *R* v. *Paris, Abdullahi, Miller,*[64] it was held that it was oppressive within the meaning of section 76 (2) for police officers to shout at a suspect and tell him what they had wanted him to say after he had repeatedly denied any involvement in the offence. In *R* v. *Fulling,*[65] the court said that oppression should be given its ordinary meaning. It went ahead to define oppression in section 76(2)(a) as "exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferior, etc, or the imposition of unreasonable or unjust burdens". While conduct amounting to oppression under section 76(2)(a) may be easier to establish, section 76(2)(b) may not be. In *R*. v. *Crampton*[66], the court said that in applying this section, the court must consider:

(a) What was said and done;

(b) The circumstances existing at the time; and

(c) Whether in consequence of what was said or done a confession would be likely to be rendered unreliable, defined as "cannot be relied on as being the truth".

There is no doubt that the courts in Nigeria are likely to adopt similar interpretation of section 29 of the Act.

Effect of confession on co-accused

Section 29(4) of the Act provides that, where more persons than one are charged jointly with an offence and a confession made by one of such persons in the presence of one or more of the other persons so charged, is given in evidence, the court shall not take such statement into consideration as against any of such other person in whose presence it was made unless he adopted the said statement by words or conduct. From the above, it is clear that a confession is evidence only against the person who made it and not against his co-accused. In *Oyakhire v. State,*[67] the court held that a statement made by an accused person to the police may amount to an admission of the offence for which he is charged and such a

[64] (1993) 97 Crim. App. R. 99
[65] [1987] QB 426.
[66] (1990) 92 Crim. App. R 369
[67] [2006] 15 NWLR, part 1001, p.163

statement and the facts admitted therein are admissible only against the maker of the statement and not against a co-accused. But where the accused goes into the witness box and repeats, on oath, the contents of his statement to the police, they become evidence for all purposes, admissible in law and can be acted upon by the court against a co-accused. In *Tanko v. State*,[68] it was held *inter alia* that, by virtue of the provision of section 27(3) of the Evidence Act (now section 29(4) of the Act), where more persons than one are charged jointly with an offence and a confession made by one of such persons in the presence of one or more of the other persons is given in evidence, the court shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct. Also in *Ozaki v. The State*[69], the Supreme Court held, *inter alia,* that:

(i) A confessional statement of an accused person once expunged from the record of the court no longer constitutes evidence for the purpose of the judgment of the court.

(ii) A confession of murder induced by threat is inadmissible in evidence.

(iii) A confessional statement of a co-accused is no evidence against an accused person unless the latter has adopted the statement either by words or conduct. In the instant case, as the 1st appellant did not adopt or confirm the statement of the 2nd appellant in court but instead denied it, it is no evidence against the 1st appellant upon which he can be convicted.

Obaseki, J.S.C. said:

> It is an error in law to convict an accused on the statement of another accused to the police. It is a travesty of justice and a gross violation of all known rules of evidence. Section 27 of the Evidence Act, (now section 29 of the Act), forbids the use of such statement even when it is confessional. It is my opinion that an incriminating statement made even in the hearing of an accused defendant, even in an occasion which could reasonably be expected to call for some explanation from him is not evidence against him on his trial of the facts therein stated save in so far as he has accepted the statement and where the statement is used to found or secure a conviction, the conviction must on appeal be quashed.

[68] Supra, note 42. See also *Titilayo* v. *State* [1998] 2 NWLR, part 537, p. 235.
[69] [1990] 1 NWLR , p. 90. See also *Suberu* v. *State* [2010] 1 NWLR, part 1176, p. 495

Confession made under promise of secrecy or in consequence of deception

If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on the defendant for the purpose of obtaining it, or when he was drunk or because it was made in answer to questions which he need not have answered, whatever may have been the form of these questions, or because he was not warned that he was not bound to make such statement and that evidence of it might be given.[70]

In *James Igbinovia v. The State*,[71] the Supreme Court held that, the confession made by the appellant in consequence of a deception on him by the police was admissible as a confession. In this case, the police investigating a case of murder, disguised some policemen to be locked up in a cell where the suspects where also locked up. One of the policemen boasted to the suspect that he was a notorious criminal and murderer. As a result of this, one of the suspects confessed that he took part in the killing of the deceased and mentioned the date and time. The confession was held admissible.

Evidence in other proceeding amounting to a confession is admissible

Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject matter as the proceeding in which it is to be proved, and although the witness must have refused to answer the question put to him, but if, after refusing to answer any such question the witness is improperly compelled to answer it, his answer is not admissible as a confession.[72]

Under this provision, if 'A' makes a confessional statement in a proceeding on oath, it may be used against him in another proceeding, subject to the other conditions specified in the section.

1.4. Conclusion

The above examination has shown that the Act has made some minor changes with respect to confessions. However, these changes are not likely to substantially affect the present state of the law. It is obvious that in the interpretation of the Act, reference will have to be made to the English law from which the new rules on confessions where copied. It is hope that the courts will adopt a purposive approach in the interpretation of section 29 of the Act.

[70] Section 31 of the Act
[71] (1981) 2 SC 5
[72] Section 32 of the Act

JUDICIAL CHALLENGES IN OIL POLLUTION LITIGATION IN NIGERIA*

1.1 Introduction.

It is common knowledge oil, the black gold of the twentieth century and one of the most lucrative sources of wealth, is now the most important energy source of the world [1]. While its exploitation has created some of the largest fortunes and has helped to achieve impressive economic growth and development, little or no attention has been paid to the associated impact of its exploitation on the environment of the oil producing areas. In other words, despite the importance of this resource, unfortunately too, it has become a source of monumental pollution and debilitating challenge to the people who live near where it is explored, mined and refined. In the view of the writer, the judiciary is the only arm of government that can restore such normalcy through its power of interpretation of the law and making orders. This paper therefore, appraises the attitude of the Nigerian judiciary toward oil pollution litigation and some other technical factors restraining victims of oil pollution from obtaining adequate compensation/ environmental justice. The paper advocates for judicial activism to minimize the procedural roadblocks faced by litigants in their quest for redress in oil pollution cases.

The paper is structured as follows: first, there shall be a general overview of the Nigerian judiciary vis-à-vis its adjudicatory powers in oil-related and other matters; this shall be followed by the challenges of compensation for oil pollution victims under our law, which include *inter alia*: the problems of pre-action notice, statute of limitation, jurisdiction, requirement of expert witness, standard of proof in oil pollution litigation, proof of special damages etc. Finally, the paper will take a look at the attitude of the courts on environmental litigation and a perceived paradigm shift in judicial attitude to oil pollution cases in Nigeria, before drawing a conclusion

1.2 Overview of the Nigerian Judiciary.

The statement of Lord Denning on the nature of the judiciary holds true for every purpose in any common law jurisdiction, including Nigeria.[2] The judiciary is an indispensable arm of the government due to the vital role it plays in the determination of rights, responsibilities and obligation between persons, institutions and different levels of government.

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[1] Ikein, Augustine, the impact of oil on a developing country; the case of Nigeria. Praegers Publishers (New York) 1990. P.25

[2] Lord Denning stated that "in theory judges do not make law, they merely expound it. But as no one knows what the law is until the judges expound it, it follows that they make it". See Ogbodo, Dr. S. Gozie (2009) "*Environmental Protection in Nigeria: Two Decades After the Koko Incident*," *Annual Survey of International & Comparative Law*: Vol. 15: Iss. 1, Article 2. p .11 Available at: http://digitalcommons.law.ggu.edu/annlsurvey/vol15/iss1/2

Under the 1999 Nigerian Constitution as amended, *sections 230-284* provide for the establishment, composition, jurisdiction and powers of both federal and state courts. The cumulative effect of *section 230-284* is that the courts in Nigeria have the mandate to protect and enforce fundamental human rights; to hear and determine civil and criminal cases; to entertain and decide on ample cases subject to their various jurisdiction and powers. The Judiciary further, has power to resolve inter-personal, institutional and inter-governmental disputes. Also to interpret and enforce constitutional provisions in the administration of justice; and review legislative actions/decisions. A perusal of the above invaluable functions and duties of the Nigerian court system has led Honuorable Justice Nnamani to candidly describe the judiciary as,

> . . .the guardian of our constitution, the protector of our cherished governance under the rule of law, the guardian of our fundamental human rights, the enforcer of all laws without which the stability of society can be threatened, the maintainer of public order and public security, the guarantee against arbitrariness and generally the only insurance for a just and happy society[3].

The judiciary is a creation of the constitution; it hence derives its powers from the enabling constitution. *Section 6 of 1999 Constitution as amended* vest judicial powers in courts established under *section 6(5),* and that *section 6* provides that;

> The judicial power of the federation shall be vested in court established for the federal republic of Nigeria and judicial power of the state vested in the courts being established for the states.

The present judicial system in Nigeria is in a pyramid-shape, with the Supreme Court at the peak and Sharia, customary and the area courts at the base of the structure. Between these two ends are the three main grade of courts starting from the Supreme Court, as the highest and final appellate body, followed by Court of Appeal which is subordinate to the Supreme Court, but hears appeal from the lower courts, next is the Federal High Court, State High Court including the High Court of the FCT. Abuja, which has coordinate jurisdiction in their different spheres of authority. Also established is the Sharia Court of Appeal and Customary Court of Appeal which exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of customary and Sharia law respectively[4].

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[3] Ben .O. Igwenyi ; *Modern Constitutional law in Nigeria*, p.275

[4] See in detail, "Section 6(5) and chapter VII of the 1999 Constitution as Amended and they are the superior Courts in records in Nigeria.

1.3 Compensation Challenges for Oil Pollution under Our Law.

Every court is guided by procedures and rules of practice, compliance to any procedure so require is a condition precedent for commencement of any action and failure by a victim to follow the rules of law on procedure and practice for commencement of action shall risk such case being struck out even if he has good cause of action. That not withstanding, active judicial officers have a way of standing on the part of justice when procedure and technicalities tend to undermine or blur the course of justice. Indeed, judges in the UK attach far too little significance to technicalities and strict rules of procedure in courts proceedings and sentencing processes if no injustice or prejudice to the defendants is involved. Because, as Lord Neuberger reasoned, in *Thorner v Major* [5], "focusing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity"

> Of course, the prevailing approach to litigation in many jurisdictions nowadays is that cases are decided fairly on their merits, and not on procedural requirements that are of a technical nature when they do not result in real prejudice and injustice to the defendants. For instance, as far as legal technicalities are concerned in Britain, courts rarely consider the procedural technicalities in reaching their decisions; what matters in such proceedings is justice and, provided procedural technicalities do not interfere with the overall justice of the case they are simply overlooked. Lord Steyn, in Attorney General's Reference (No 3 of 1999) [2001] 2 A.C. 91, underscores the inclination towards justice or fairness by the courts in England and Wales, against formalism and technicality, stating that: "Serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests …. the accused, the victim … and the public"[6]

Before we consider the case-law on how our judicial system has fared in being dogged in meeting the justice of protecting the environment and victims of environmental pollution in oil and gas cases, let us look at the stumbling blocks which *ab initio* pose threats to oil pollution litigants.

[5] *Thorner v Major* [2009] UKHL 18 at p. 98.
[6] p.118.

1.3.1 Pre Action Notice.

Pre action notice is a procedural aspect of litigation and where any enabling statute existing between the parties provides for it, and makes same condition precedent for commencement of action against any of the party. In order to enable such party to prepare itself or to seek any other means of settling the dispute outside the court, thus must be complied strictly with and failure to adhere to such provision will cause the plaintiff to risk his case being struck out not considering how good it may be.

In *NNPC v. Sele*,[7] the court in determining the effect of non-issuance of pre-action notice raised by the appellant/Defendant held that pre-action notice is a condition precedent which must be complied with and that the applicable principles to pre-action notice are:

(a) Provision prescribing pre-action notice are mandatory

(b) Non compliance to such mandatory provision can be waived;

(c) Non compliance with such provisions is an irregular in the exercise of jurisdiction which should not be confused with a total lack of jurisdiction;

(d) Non compliance with a condition to the commencement of an action must be pleaded.

The court stated this principle in consideration of *section 12 (2) of Nigerian National Petroleum Corporation Act*, which provides that:

> No suit shall be commenced against the corporation before the expiration of a period of one months after written notice of intention to commence the suit shall have been served upon the corporation by the intending plaintiff or by his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of claim, the name and place of abode of the intending plaintiff and the reliefs he claims

It means that requirement of pre-action notice is not a trivial issue, but goes to the root of what will make the institution of the action valid and will enable the court to exercise the jurisdiction so conferred on it. For once the objection is raised the court will stay the main issue in the suit to determine the preliminary objection. Failure to comply with the above

[7] [2004] 5 NWLR (pt 866) 379 at 443

subsection (2) of section 12 of NNPC Act[8] or any equivalent provision will render any suit ineffective and cause it to be struck out.

1.3.2 Limitation of Action.

Another procedural problem of compensation is the issue of limitation of time of bringing action. There is limited period within which a plaintiff in an oil pollution case is expected to bring an action and this period is calculated from the day cause of action is said to have arisen. Section 7(4) of the Limitation Act[9] provides that:

> Subject to the provision of Section 8 of this Act an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrues

In *NNPC v. Sele,*[10] the court held on the issue of period of action against the appellant (NNPC) thus:

> …Cause of action accrues to the respondents when the spillage occurred as a result of which the respondent community was adversely affected….

Also in *Egboigbe John v. N.N.P.C*[11] the court in this case held that generally a cause of action accrues on the date on which the incident giving rise to the cause of action occurs.

Furthermore, in *Shell Pet. Dev. Co. Nig v. Chief George Uzoanu &* Ors,[12] the court was of the view that where the Statute of Limitation prescribed a period within which an action must be commenced, legal proceeding cannot be properly or validly instituted after the expiration of this prescribed period. Also the court explained the basis why Statutes of Limitation were drafted in such strict form to include:

(a) That long dormant claims have more of cruelty than justice in them;

(b) That the defendant might have lost or forgotten the evidence relating to the case;

(c) The person with good cause of action should pursue it with reasonable diligence because delay defeats equity.

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[8] Cap.N123, LFN 2004
[9] Limitation Act of 1988
[10] [2004] 5 NWLR (pt 866) 379 at 443
[11] [1994] 5 NWLR (pt 347) 659
[12] [1994] 9 NWLR (pt 366) at 51 see also *Shell Pet. Dev. Coy Ltd v. Farah (Supra)*

(d) That those who go to sleep on their claims should not be assisted by the courts in recovering their property and

(e) That there should be an end to every dispute.

It then suffice to say that a victim in an oil spillage whose properties and means of earning his living have been totally destroyed by oil pollution will stand a chance of not recovering anything from the oil company that caused such loss if the victim do not act timeously, for equity aids the vigilant and not the indolence. In the same vein limitation begins to count from the day cause of action arises. In *Shell Pet. Dev. Co (Nig) v. Farah,*[13] the court held that:

> Statute of Limitation begins to run from the moment the cause of action arose and it is immaterial that the party was absent from the jurisdiction or that there was no court within the jurisdiction to entertain the claim. Similarly, illiteracy will also not avail a plaintiff because ignorance of the law is not an excuse.

1.3.3 Jurisdiction.

Jurisdiction is the very basis of which any court or tribunal tries any case. It is the lifetime of every trial[14]. The issue of jurisdiction is of greater important that need to be considered timeously. That means it must therefore be looked into first because if any court lacks jurisdiction to entertain a case and goes ahead to hear that case, no matter how well the case is being conducted, without jurisdiction, it will be totally a nullity.[15]

In *7up v. Abiola,*[16] a the Supreme Court held that the court have as its fundamental issue in any matter the question of jurisdiction which must be determined first before any other issue pertaining to that case is attained and where it appears that the court does not have jurisdiction all proceeding relating thereto will be a nullity.

The above decision of Supreme Court is directed towards recognition of the necessity and need to caution victims and prevent at early stage any proceeding where the court lacks jurisdiction. Due to hardship they are likely to suffer if such issue is raised at the concluding part of the case, as it can be raised at any stage in a proceeding. In *S.P.D.C Ltd v. Isaiah & 2 Ors,*[17] Belgore J.S.C, stated that:

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[13] *Supra.*
[14] *Edu v. Agbor Hemson (*2004) FWLR (pt 188) 935
[15] *ibid*
[16] [2001] 5 MJSC 93 at 97
[17] [2001] 6 NWLR (pt 723) at 184 - 185

> Once jurisdiction of a court is ousted the court assuming jurisdiction does so as an exercise whether in moot or as an academic exercise but certainly to futility.

The issue of jurisdiction can be raised at any time in a proceeding, even on appeal to the Supreme Court. It is the claim of the plaintiff that determines whether a court has jurisdiction to entertain a suit or not[18]. A victim in an oil spill case will be prejudiced in his action where if he does not take due diligence in filing his case in appropriate court that have statutory authority to entertain such matter through his personal representation (Legal practitioner). Where a valid claim of losses in an oil pollution is erroneously filed in a court that does not have statutory backup to hear such matter the court may at the tail end of such matter have his case struck out if the issue of jurisdiction is raised. This is done not-withstanding how good his case may be, even if the facts and circumstances of that case is in the same echelon with of that of *Farah*, the matter will be struck out if it was filed in a court that does not have jurisdiction to entertain the matter.

In the case of *shell Pet Dev. Coy (Nig) Ltd vs. Abel Isaiah*[19] the Supreme Court was called upon to decide the issue of Whether the State High Court has jurisdiction in case pertaining to mines and mineral including oil fields e.t.c. By virtue of the Federal High Court (Amendment) Act[20] and section 230(1) (o) of the Constitution (Suspension and Modification) Decree No. 107 of 1993, the court held that judgment in the *Abel's* case was delivered on 11 march 1994 after coming into force of the decree No. 60 of 1991 and Decree 107 of 1993 and was caught by the provision of those Decrees, and by this the court has no jurisdiction in oil spillage cases. Because decree number 107 of 1993 substitute a new subsection for section 230 (1) of the 1979 Constitution also granting exclusive jurisdiction to the Federal High Court, it therefore means that any cause of action arising from oil mining or oil spillage can only be filed in Federal High Court. Though many legal experts have condemned the Supreme Court decisions, which vest exclusive jurisdiction on the federal high court pointing out that this judgment has further compounded the problem of compensation for victims as the number of Federal High Court within the oil areas cannot cope with the number of cases pending before it.

1.3.4 Expert Witness.

The requirement of expert evidence or witness in proving extent of causation and losses suffered by a party in oil pollution case have escalated the problems of oil pollution victims from obtaining adequate compensation and even goes further to discourage the poor victims from seeking remedy through court. A victim claiming compensation for damage sustained as a result of oil pollution needs an environmental expert to adequately prove his

[18] *Chief M. A. Inegbedion v. Dr. Selo-Ojemin &* Ors (2004)12 NWLR (pt 887) 411 at 415
[19] [2001] 6 NWLR (pt 723)
[20] 29 Decree No. 60 of 1991

case, owing to the fact that the nature of the case is highly technical, scientific and most time likely to be outside the experience and knowledge of the judges[21]. And this therefore makes expert opinion necessary so as to furnish such information to court. In *Shell Pet. Dev. Co. (Nig.) Ltd v. Adamkue*,[22] the court on the issue of who is an expert; held that *"An expert is a person who is specially skilled in the field in which he is giving evidence*". And often the victims are unable to have access to such expert, rather, most times they resort to technical experts who are not qualified and whose evidence cannot withstand that of the oil company because of high cost of fee involved in employing qualified and established expert.[23]

The problem, however, is that the poor stricken communities who have suffered severe environmental damages arising from spillage can not engage the services of qualified experts to conduct their case considering the cost of litigation. This situation may lead the victims to accept payment outside the court, which are inadequate to remedy their losses just because of the technical and high cost of embarking on litigation.

1.3.5 Standard of Proof in Oil Pollution Litigation.

Apart from the statutory burden of proof provided in the Evidence Act[24], the burden of proof is on the plaintiff as expressed in the Latin maxim "*ei qui affimat non qui negat incumbit pro batio"*, which means that the burden of proof lies on him who affirms, and not on him who denies. Usually the burden lies on him who desires the court to make any pronouncement in his favour as to any legal rights on the existence of facts to which he asserts, conversely a party who is brought upon some allegations made against him, is duty bound to satisfy the court that those allegations are unfounded.

The nature of determining the party, who has the onus of proof in an oil pollution trial, will depend on the requirements of substantive law upon which the action arises. This is because where a victim of oil pollution files an action under torts of negligence or nuisance, will thereby have the burden of proving carelessness on the part of the oil company as a resultant cause of the oil pollution, thus in *S.P.D.C. v. Otoko,*[25] the court held that, in action for negligence, the onus is on the plaintiff to establish that the defendant acted in want of care.

Conversely, where a victim of oil pollution files an action and relied under the rule in *Ryland v. Fletcher,* the effect will be that once the plaintiff is able to establish and proof escape of the thing accumulated by the defendant on his land which is non natural to the use of such land, and thereby raise a *prima facie* presumption of negligence on the part of

[21] *Shell Pet. Dev. Co. Nig v. Farah (supra) see also SPDC v. Otoko* [1990] 6 NWLR (pt 159) 693 at 713
[22] [2003] 11 NWLR (pt 832) 533 CA
[23] *Seismograph services v. Benedict onapana (1975) RSLR 126*
[24] Section 135 – 137 of Evidence Act. Cap. E 14. LFN, 2004
[25] [1990] 6 NWLR (pt 159) p. 700

the defendant and goes ahead to place onus on the defendant squarely of proving that there was no negligent on their part as to the cause of the escape[26].

Oil pollution litigation being civil in nature, require the party who have onus of proving to do same upon preponderance of evidence or balance of probabilities. Where the claim is for damaged property, then the plaintiff must prove ownership to the property damaged[27] And in a claim for loss or destruction of farm crops, farm land and economic trees, the court held in *Uhunmwangbo v. Uhunwangbo.*[28] That the plaintiff must adduce evidence to show inter-alia; the name, nature and number of economic tress allegedly destroyed.

1.3.6 Special Damages.

In an action for damages suffered as a result of oil pollution, the plaintiff who has suffered such losses can claim for special and general damages. His ability to succeed on claim for special damage will depend on whether he can strictly proof it. The court held in the case of *Shell Pet. Dev. Co. (Nig.) Ltd v. Otoko,*[29] that "it is settled law that special damages must be strictly proved and strict proof in this context means no more than such proof as would readily lead itself to qualification or assessment.

In *Shell Petroleum Development Co. of Nigeria Ltd v. Tiebo VII.*[30] In this case the plaintiff claimed the sum of ₦64, 146, 000.00 as special and general damages arising from the defendant negligence as a result of crude oil that spilled on his land, creeks, lakes and Shrines of the plaintiff. The trial court awarded ₦600,000 and ₦400,000 as special damages for lost of drinking water and raffia palms respectively. ₦5 million for general damages and ₦ 1 million as cost to the plaintiff. The defendants appeal to the Court of Appeal and his action was dismissed and he further appealed to the Supreme Court. One of the problems canvassed before Supreme Court was whether it was proper for the trial court to award special damages when there is no strict proof.

The Supreme Court held that any one making a claim in special damages must prove strictly that he did suffer such special damages claimed. According to Niki Tobi J.S.C; (as he then was):

> Proof of special damages to strict. Where the plaintiff is unable to prove special damages, his case crumbles and trial court cannot compensate him lay way of general damages.

Also according to Oguntade J.S.C, he stated that

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[26] *Op cit*
[27] *Sommer and Ors vs. Federal Housing Authority (*1992) NWLR (pt 219) 548
[28] [1992] 2 NWLR (pt. 226) 709
[29] *Op cit*
[30] [1996]4 NWLR (pt 445) 657

> The rule in special damages requires credible evidence of such character (strict proof), as would suggest that he is entitle to an award under the head.

In this case the plaintiff could not strictly prove his loss of raffia palms, cost of purchasing alternative drinking water and that used for domestic purposes, yet the trial court awarded N400, 000,00 and N600,000,00 as special damages respectively. Though, the award of N5,000,000 million as general damages and N1,000,000 million as cost for the case was rightly awarded by the trial court and as for the special damages awarded it was struck by Supreme Court as same requires strict proof.

1.3.7 General Damages.

General damages on its own need not to be proved so strictly for such damages are regarded as damage resulting from the defendants tortuous conduct[31], unlike claim for special damages, once a victim is able to establish that he suffered damages as a result of the defendant's default, the victim will be entitled to general damages as the court will award such victim damages for losses suffered from such oil pollution depending on the extent of his loss. It therefore means that the standard of proof required here is minimal.

1.4. The Courts on Environmental Litigation - a Paradigm Shift?

The oil industry plays a vital role in the Nigerian economy. It has also fashioned out a remarkable economic landscape for the stability and growth of the Nigerian economy. Since 1970, sale of oil has accounted for more than 80 percent of the Nigerian revenue and presently 95 percent of export earning of the country.[32] Though behind the above glory of oil industry to Nigerian economy is the devastating and negative impact of oil exploration and exploitation which has resulted to long term serious environmental consequences to Niger Delta oil producing communities.

Over the years, the judiciary has been reluctant in ordering the oil companies whose operation are hazardous to the environment and human beings to cease such operation or activities complained of[33]. In the case of *Allan Irou v. Shell B.P. Coy. Ltd*[34], the presiding judge refused to grant an injunction in favour of the plaintiff whose land, fish pond and creek had been polluted by the activities of the oil company because in his opinion, nothing should be done to disturb the trade (such as mineral oil) which is the main source of Nigerian revenue. Also some other cases have followed the flow of the above case though not so blatantly to prioritise healthy and clean environment to the unwitting rule of

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[31] *ibid*

[32] Ben .O. Igwenyi, *Modern Constitutional Law in Nigeria*, at p.276

[33] Egbeku, K. *;"Judicial Attitude to Redress for Oil Related Environmental damage in Nigeria*",p.6 vol.(2) 2003, 199-203

[34] suit No W/89/71, Warri High Court 26/11/73 (unreported)

economic development. This attitude of the court towards environmental litigation emanating from oil pollution have made the enforcement of environmental laws ineffective. The judges fail to realize that economic development can be compatible with environmental conservation.[35]

In some cases, judicial interpretation of amount which is fair and adequate do not tend to favour victims of oil pollution. It therefore makes litigation less attractive as a means of obtaining redress for losses suffered by a party. In *Mon Tonye v. Shell Pet. Dev. Co. Ltd,*[36] the court found that the spillage from the defendant pipeline caused enormous damage to the plaintiff's fishpond but awarded only two hundred thousand naira (N200,000) as damages for the plaintiff's loss. Also in *Nneka v. Agip Oil Co. Ltd,*[37] the court merely awarded the exact amount initially offered by the defendant but was rejected earlier by the plaintiff. The passive attitudes of the Nigerian judiciary do not end at the above highlighted situation.

Owing to the fact that between 1990 and 2004 there have been several oil related cases in Nigeria ranging from loss of income, loss of property, contamination of drinking water leading to diseases and some of these cases include: *Shell v. Isaiah*[38], *Shell v. Tiebo VII,*[39] *Shell v. Ogiala,*[40] *Shell v. Ambah*[41] and *Seismograph Services v. Mark;*[42] there had always been elements of uncertainty in the attitude of the judiciary towards oil pollution litigation, but has scarcely satisfied the full prayers of the litigant whose land has been polluted.

The general characteristics that run through all these cases are that they are all claims for compensation for the operation of the oil companies in their local communities, and they are claims for loss of income, fishing ponds, farm land, pollution of drinking water, damage to lands, and crops, and health. But the court in the various cases refrained from making order for remediation of damages done to the physical environment, land and water, or granting an injunction restraining the perpetrators from carrying on with its environmental nefarious activities.

A shift in paradigm appears to have gathered gusto when the challenge of oil pollution is seen from the angle of violation of human rights (e.g. right to life, right to property, right to religion etc.). In other words, the Nigerian Constitution[43] though does not contain

[35] M. A. Ajomo and O. Adewale; Environmental law and sustainable Development in Nigeria also available at http://www.iucnael.org/en/documents/doc_download/70-adajonwo-osho-the-evolution-of-human-rights-approches -to-environmental-protection-in-nigeria-.html
[36] (1992) 1 NWLR(pt .71) p.182
[37] (1976) 10.S.C101
[38] [1997] 6 NWLR (pt 508) 236
[39] [1996] 4 NWLR (pt 445) 657
[40] [1997]1 NWLR (pt 480) 148
[41] [1999] 3 NWLR (pt 593) 1
[42] [1999] 3 NWLR (pt 593) 1
[43] From 1960, 1963, 1979 and 1999 Constitutions of the Federal Republic of Nigeria

provisions on the right to a healthy environment[44] however, the court in some jurisdiction have explicitly recognized the link between human rights and environmental protection and has incorporated the later, and by so doing has interpreted environmental right as part of human right. Thus, the connection between human rights and environmental protection is indisputably synonymous to each other and should be interpreted as such because both have as their main objective duty of ensuring good health and standard of living free from inhuman treatment.

Environmental degradation has an adverse effect on the quality and enjoyment of life as against the constitutional provision of right to life as provided in section 33 of the Constitution. It is however acceptable that the protection of human beings involves protection of the environment, the converse is also true[45]: because the Constitution also guarantees citizens basic fundamental human rights such as right to life, the right to justice and interestingly the right to healthy environment.

There have been several instances in the recent past where the right to life has been successfully invoked in the pursuit of environmental claims and protection in Nigeria resulting from gas flaring, water, soil and air pollution which was as a result of unguarded oil exploration and exploitation. In the recent case of *Jonah Gbemre v. Shell Pet. Dev. Co. Nig. Ltd and NNPC,*[46] the plaintiff sued SPDC, NNPC and Attorney General of the Federation on the following grounds:

- A declaration that the constitutional guaranteed fundamental right to life and dignity of human person provided in section 33(1) of the Constitution of the Federation 1999, and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap A9, Vol. 1 LFN 2004 inevitably includes the rights to clean, poison-free pollution-free and healthy environment.

- A declaration that the applicant have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment to their development.

[44] However, section 20 of the 1999 Constitution for the first time recognised the duty of state to protect Nigerian water, land, air and forests from abuse and violation. Although this provision has been lauded by many, environmental experts and human rights activist maintain that the provision of section 20 of CFRN can only be meaningful if it is transferred from Part II to Part IV (made a Fundamental Human Right enforceable by the courts).

[45] Oluwatoyin Adejonwo Osho; the evolution of human rights approaches to environmental protection in Nigeria; p.1 available at http://www.iucnael.org/en/documents/doc_download/70-adajonwo-osho-the-evolution-of-human-rights-approches -to-environmental-protection-in-nigeria-.html

[46] Suit No FHC/B/CS/53/05, Benin judicial Division, 14th November (2005) unreported . also available at http://www.law.ed.ac.uk/eventerpriseslf/files/Tc/REPORTNIGERIA.pdf

The court declared that the action of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter, the court further declared that the 1st and 2nd respondents; SPDC and NNPC were to be restrained from further flaring of gas in the applicant community and were to take immediate steps to stop the further flaring of gas in the applicant community. The court made the following declarations:-

1. That the constitutionally guaranteed fundamental rights to life and dignity of human persons provided by section 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Art 4, 16 and 24 of the African charter on Human Procedure Rules (Procedure and Enforcement) Act, cap A9 Vol. 1 LFN 2004 inevitable includes the right to clean poison-free, pollution free and healthy environment.

2. That the action of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the constitution and African charter.

3. That the provision of section 3(2) (a)and (b) of the associated Gas Reinjection Act, Cap. A25 Vol. 1, Laws of the Federation of Nigeria 2004 and Section 1 of the Associated gas Reinjection (continued Flared gas) Regulations under which the continued flaring of Gas in Nigeria may be permitted are inconsistent with the rights to life and/or dignity of human person enshrined in the Constitution and the African Charter and are therefore unconstitutional, null and void by virtue of section 1(3) of the Nigerian Constitution.

This case is the first case of judicial activism by Nigerian courts in the area of oil and gas pollution. It is indeed the first judicial authority to declare that gas flaring is illegal, unconstitutional, a breach of the fundamental human right to life and should cease. However it should serve as precedent for other cases.

Though, recently the attitude of the Nigerian judiciary have deviated from the above active reasoning, in some in a few other cases this paradigm shift is holding sway, giving rise to much advocated judicial activism. In *Shell v. Farah*,[47] apart from asking for compensation, the plaintiff specifically asked the courts to make an order for the rehabilitation of their damaged land. The court in this case creatively awarded same to the plaintiff.

[47] [1995] 3 NWLR (pt 382) 148

Upon this development, it is trite to assert here that there has been a definite shift in the attitude of the Nigerian judiciary, because from the judicial decisions analysed above, there has been a radical change in the attitude and approach of the Nigerian judges toward oil pollution litigation, reason being that the judges have come to attach greater importance to the substance of law by exercising their powers to favour victims of oil pollution. We commend this position for the sake of our environment and the health/wellbeing of the citizens

1.5. Conclusion.

We have attempted a concise analysis of the attitude of the courts in Nigeria towards pollution generated from the oil and gas industry. We discovered, unarguably, that crude oil has contributed greatly and has had profound impact on the Nigerian political and economic development more than any other natural resources in history and records. It was also our finding that unfortunately, but for a few cases, the courts in Nigeria has given paramount consideration to economic issues than to the effect these pollution sources can have on the environment, health of the people, flora and fauna. We advocate for judicial activism on the part of Nigerian judges. How? By recognising *inter alia* that damage to the environment is an infringement on the victim's right to life and right to own property. Similarly, the true spirit of revenue sharing especially as contemplated by the Constitution is an astute balancing of political and economic considerations.[48] Thus, the emphasis should be on how to adequately cater for and compensate victims in the oil producing communities, rather than simply on some complex legal definition of state and federal geographic boundaries. The case of, *Jonah Gbemre v. Shell Pet. Dev. Coy. Nig. Ltd and NNPC,*[49] has revealed that a paradigm shift is possible in considering emerging cases in oil pollution cases in Nigeria in favour of victims.

A littoral state that is bearing the full burden of hosting oil exploration and production activities and incidental environmental damage cannot be said not to be resource bearing alone. To do so would be to open a Pandora's Box of grave political crisis that will make nonsense of the efforts of the past years to bring stability to oil and gas operations. It is submitted that a situation in which the Federal Government only has become preponderant in revenue sharing due to a flawed and unfederal[50] legacy of the military is unhealthy and should be redressed. Clinging to this will continue to spell doom to the already devastated environment of the Niger delta due to oil and gas pollution. This is a wakeup call for Nigerian courts to stand up and interpret our laws in such a balanced manner so that Peter is not robbed to pay Paul, while Paul's means of livelihood is destroyed. This amounts to double jeopardy which our laws are against. .

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[48] See Austin Avaru, "The Trouble with Onshore/Offshore Dichotomy', this Day Monday, February, 5, 2001.
[49] Suit No FHC/B/CS/53/05, Benin judicial Division, 14th November (2005) unreported . also available at http://www.law.ed.ac.uk/eventerpriseslf/files/Tc/REPORTNIGERIA.pdf
[50] The distortion of the tenets of true federalism in Nigeria via unitarist tendencies in policies and governance.

AN OVERVIEW OF CO-OPERATIVE SOCIETIES UNDER NIGERIAN AND ISLAMIC LAWS*

1.0 Introduction

The co-operative society is another form of business organization. It evolved from the need to jointly pool resources for the socio-economic advancement of its members within the confines of the co-operative principles and the enabling laws. In almost every part of Nigeria, it is not uncommon to find persons who come together to form a unity of purpose for the protection of their common interests and assuming an identity, calling themselves a name which includes the word "co-operative" without appreciating the legal implication of doing so.[1] Thus the term "co-operative society is not a mere social terminology but a legal one with legal implications.[2]

The roots of co-operative movement can be traced to multiple influences and extend worldwide. The co-operative movement has evolved rapidly from the peasantry level some decades ago to a highly sophisticated business concern following the wide acceptance of co-operative way of life by a spectrum of all classes of people.

Available records seem to suggest that the first ever co-operative movement under the common law was started by ROBERT OWEN in the year 1844 with 28 members and called "Rochdale society of equitable pioneers."[3] It was a consumer co-operative society. From the humble beginning of these 28 members in the tiny city of Rochdale, the concept of co-operative societies developed into a universal movement, and from the rather simple social groupings of individuals to a complex institution regulated by law, not only at local levels but at national and international levels.

It is interesting to note that the concept of co-operative societies is also known to Islamic jurisprudence. Islamic law recognizes co-operative societies as it encourages co-operation among the people.[4] Islam aims at establishing a social order where all individuals are united by bonds of brotherhood and affection like members of one single family.[5] However, the concept of brotherhood and equal treatment of all individuals in the society and before the law is not meaningful unless accompanied by economic justice such that everyone gets his due for his contribution to the society or to the social product and that there is no exploitation of one individual by another.[6] Having noted this, it is also important

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[1] Emiaso, M.(2011) *Co-operative Societies: Law and Practice in Nigeria*, Peakmans Ltd., Lagos, p.1
[2] Ibid
[3] Ibid, p.2
[4] Www.Islamicfinance.woccu.org, p.1; Accessed on 10 /4/2013
[5] Ibid
[6] Ibid

to acknowledge that the design and delivery of financial products and services, under Islamic jurisprudence, often requires the application of Islamic law and principles.

By and large, the complexity of modern co-operative enterprise with the high volume of business turn-over makes it imperative for co-operative managers, ordinary members as well as other stakeholders to be well vast with co-operative laws and practices. It is against this background that this paper seeks to examine the concept of co-operative societies under both Nigerian and Islamic laws.

1.1 Meaning Of Co-Operative Societies

From the ordinary meaning of the word "co-operative", the meaning of the term "co-operative society" should ordinarily be obvious. It must mean a "society" where "co-operation" is the guiding philosophy. A "society" where such ideas such as collaboration, joint effort, team spirit etc. form the basis of the coming together of the group. The term "co-operative society", therefore, has been defined in various ways. It is described as a form of organization wherein the persons voluntarily associate together as human beings on the basis of equality for the promotion of economic interests of themselves.[7]

In another perspective, it is defined as a voluntary association of people with similar socio-economic problems who come together to find solutions to their common problems using legal and democratic means.[8]

The International Labour Organization, in a similar vein, defined co-operative society as an association of persons, usually of limited means, who have voluntarily joined together, to achieve a common economic end, through the formation of a democratically controlled business organization, making equitable contributions to the capital required and accepting a fair share of risk and benefits of the undertaking.[9]

From the above definitions, the characteristics features of a co-operative organization can be summarised thus:

(a). Voluntary and open membership;

(b). Democratic member control;

(c). Economic participation by members;

(d). Autonomy and independence;

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[7] Emiaso, M. op.cit. p.7

[8] Bello, S.M,(1992) *Essentials of Co-operative Administration For Primary Societies in Nigeria*, Clerc Publications, p.6.

[9] www.preservearticle.com; Assessed on 08/11/2013

(e). Co-operation among members; and

(f). Concern for the community.

1.2 Types Of Co-Operative Societies

Co-operative societies are of various types depending upon their objects and nature of operation. Some of the important types of co-operative societies includes, but not limited to, the following:

1. Consumers co-operative society;
2. Producers co-operative society;
3. Agricultural co-operative society;
4. Housing co-operative society;
5. Artisan and industrial co-operative society;
6. thrift co-operative society; and
7. Credit co-operative society.

A brief explanation of these types of co-operative societies is provided below.

A voluntary association of people who contribute materials and managerial skills to buy and sell daily human necessities among themselves is known as consumer co-operative society, while an association which produces commodities for sale is called producers co-operative society.[10] An Agricultural cooperative society is an association of farmers who meet voluntarily to produce farm products at minimal prices, loan and sell their produce to members and non-members.[11] Their inputs are fertilizer, improve seedlings, pesticides, tractors and farm implements.

The main concern of Housing co-operative society is to purchase building materials and services in order to build houses for rent and sales to members and non-members.[12] It consists of carpenters, masons, painters, electricians etc.

Artisan and industrial co-operative society is an association of artisans and/or industrial workers who volunteer to contribute their material and industrial skills in order to produce

[10] Abdul-Yakeen, M.,(2012) *characteristics, structure, types, advantages, problems and prospects of cooperative societies;* available at www.kwasu. Info/index.php/en/ assessed on 12/11/2013
[11] Ibid.
[12] Ibid.

goods and services at a minimal cost and sell to members and non-members at least cost.[13] Members of this type of co-operative society includes, but not limited to, vulcanisers, tailors, Barbers and other craftsmen.

Thrift co-operative society is the type where people contribute a portion of their income before they can obtain loans. These people may include civil servants, market women, farmers, and labourers. Conversely, credit co-operative society is the type where people need not contribute any portion of their income before they can obtain loans.[14] The Federal Government of Nigeria joined this specie of co-operative by establishing Nigerian Agricultural and Co-operative Bank (NACB) to provide loans to small and medium scale farmers.

1.3 Co-Operative Societies Under Nigerian Law

Generally, co-operative society falls under the concurrent legislative list, as provided in the second schedule of the 1999 Nigerian Constitution, in respect of which both the federal and state governments may legislate upon. It is, therefore, regulated by both the federal and the various states laws of the federation.[15] Unless otherwise specifically stated, it is intended to, in this research work, rely on the prevailing legal instruments governing the conduct of the business of co-operative societies in Kaduna state. It should, however, be noted that the laws and regulations governing the activities of co-operative societies in Kaduna state, save for slight modifications, are substantially *impari materia* with all other co-operative statutes in Nigeria.

Having stated this, it is imperative to observe that a co-operative society under Nigerian law may be registered with limited or unlimited liability; with the last word in a co-operative Society's corporate name been "limited" or "unlimited".[16]

A co-operative society may also be registered as an industrial co-operative society, or as a primary or secondary co-operative society. No industrial co-operative society can be registered unless it has at least six (6) persons as its members,[17] and provides evidence that it is commercially viable.

A primary co-operative society may be registered if it has at least ten (10) persons, each of whom must have attained the age of eighteen (18) years old, and all of whom must be resident in the area where the co-operative society will be operational.[18] However, an

[13] Ibid.
[14] Emiaso, M. op.cit. p.116
[15] See, for example, Co-operative Societies Law, cap. 37 Laws of Kaduna State-Nigeria; 1991.
[16] Legal Alert (Feb.2013) *co-operative societies: Laws, Taxes and Regulations*, P.1; Available at www.jdsupra.com; Accessed on 12/11/2013.
[17] Ibid
[18] Sec. 5 (1) and sec. 24 (1) of Kaduna State Co-operative Societies Law, 1991.

educational institution's cooperative society could be granted exemption from the age limitation requirement if it makes a successful application to the federal or state Director of co-operatives in the area where the co-operative society will be resident.

A secondary co-operative society may also be established and registered if it has at least two (2) registered co-operative societies as its prospective members[19]. No member, however, is allowed to hold or own more than one-fifth of the share capital of such co-operative society.

Application for registration must be submitted to the federal director of co-operatives or state's registrar of co-operatives as the case may be[20]. All applications for registration must be accompanied by the bye-laws of the applicant co-operative society.[21]

The bye-laws of a co-operative society are the rules and regulations which govern the affairs of the co-operative society, with its members and by implication, its non members.

The primary implication of the registration of co-operative society is that such a society assumes corporate personality with the right to sue or be sued in its own corporate name.[22] It also assumes perpetual succession with a common seal to enter into contracts or agreements it its own name. A further benefit of the registration of a cooperative society is that it has the authority to own movable and immovable property, of any description, in its corporate name.[23]

It must be stressed that co-operative societies are exempted from paying taxes in respect of all their profits and gains from all trade or business such co-operative societies engages in, on behalf of its members.[24] Also, all legal instruments executed by or on behalf of a registered co-operative society, in relation to the business of such a co-operative society, are exempted from stamp duties assessment and payment, and from such similar tax provisions regulating the registration of such legal instruments[25].

Registered co-operative societies are further exempted from the application of the provisions of the companies and allied matters Act, Trade unions Act, the Arbitration and Conciliation Act, the Money Lenders Law and the Pawn Broker's Law[26].

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[19] Ibid, sec.5 (2)
[20] Ibid, sec.6 (1)
[21] Ibid, sec.10 (1)
[22] See for Example the case of CHIEF PETER AMADI NWANKWO & ANOR V. ECUMENICAL DEVELOPMENT CO-OPERATIVE SOCIETY, Unreported, Suit No. Sc/33./2002.
[23] Sec.8. of Kaduna State Co-operative Societies a Laws 1991.
[24] Sec. 23 (1) (b) of the Companies income Tax Act Cap. C21 LFN, 2004, and Sec. 26 (1) (c) of the Capital o Gains Tax Act, Cap. C1 LFN, 2004.
[25] Sec. 23 of *Kaduna State Cooperative Societies Law, 1991.*
[26] Legal Alert, Op. Cit. P.3

It is however, instructive, to note that co-operative societies, and not their members, are listed among the institutions that enjoy exemption from the provisions of value added tax Act (Vat) (as amended).[27]

By and large, the income of a registered co-operative society is exempted from the provisions of the personal income tax Act (as amended).[28] It is, however, contestable whether the individual members of a co-operative society can claim individual exemption from the re-distributed profits that they earn from the already exempted co-operative society's profit. It is submitted that members cannot claim exemption from their share of redistributed profit as that has become their personal income which is taxable.

The Nigerian co-operative society's Act requires that, at least one-fourth (1/4) of a registered co-operative society's net profits must be paid into a reserve fund, unless where the director of co-operatives grants written exemption from this mandatory statutory provision.[29]

In Lagos state, registered co-operative societies are required to, from the second year of their registration, pay one percent (1%) of their profit to Lagos state Directorate of co-operatives as audit and supervision fees.[30]

A registered co-operative society may receive deposit and take loans from persons who are not members of the co-operative society.[31]

It cannot, however, extend credit or loans to any person or institution who is not a member of the co-operative society except the express approval of the regulatory director or register of co-operatives is obtained.[32]

1.4 Cooperative Societies Under Islamic Law

Islamic law permits co-operative societies in the forms of partnership (*Sharika*) provided each member receives the percentage of profit proportionate to the capital he invested.[33] Islamic law also recognizes and approves asset-backed ownership such that ones holdings are real. Therefore, in view of the fact that a member of a co-operative society acquires the status of a co-owner with the right to share in the capital, income or assets of the co-operative society, investment could be said to be permitted by Islam.

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[27] See Sec. 3, parts 1 and 2 of *Value Added Tax Act* (as amended) which exempted certain goods and service from compliance with the provisions of the Act.
[28] Sec. 19 (1), Paragraph 22 of the third schedule of the *Personal Income Tax Act* (As Amended).
[29] Legal Alert, Op. Cit. P.4
[30] Ibid.
[31] Sec. 34 (1),(2) and (3) of *Kaduna State cooperative societies Laws, 1991*
[32] Ibid, Sec. 33 (1) and (2)
[33] Qayrawani, Y. (1992) *The Risala*, Islamic Education Trust, P. 146

Among the most important virtues of Islam which is aimed at establishing justice and eliminating exploitation in business transactions is the prohibition of all source of unjust enrichment. The Holy *Qur'an* unequivocally enjoins Muslims not to acquire each others property wrongfully.[34] One of the important sources of wrongful or unjustified earning is receiving any monetary advantage, excluding justified profits, in a business transaction without giving a just counter value.[35] In Islamic value system *Riba* represents a prominent source of unjustified advantage.

Riba literally means increase, addition, expansion or growth.[36] Although *Riba* generally refers to usury, some scholars have given it a much wider scope to cover any increase in wealth or income which results from the lending of money or the exchanging of fungible goods. *Riba* is a legal wrong and a sin under Islamic law. There is consensus among Muslim scholars that this prohibition extends to any and all forms of interest and there is no difference between interest-bearing funds for the purposes of consumption or investment.[37]

Therefore, a co-operative society under Islamic law cannot engage in an interest based transactions (*Riba*). This is because while the earning of profit is uncertain, the payment of interest is predetermined and certain. The profit may or may not be realized. Hence, there can be no doubt that the payment of something definite in return for something uncertain inflicts a wrong.

Again, under Islamic jurisprudence, a co-operative society can only engaged in *Shari'a* compliant businesses. It is prohibited to do business in alcoholic beverages, intoxicants, dangerous drugs or any of such whose consumption and use Islam prohibited.[38] It, therefore, follows that investing in any co-operative society engaged in any of these activities is automatically prohibited.

Be that as it may, scholars have developed a number of *Shari'a* compliant products for co-operative societies. These includes, but not limited, to the following:

1. Al-WADIA (share savings):-

Al-wadia is referred to as "safe keeping of member's money", it is an accepted way of receiving members deposits according to Islamic finance principles. Under this framework, members are able to keep their money in a savings or current account, and any share of profit the co-operative makes by mobilizing the members savings is divided among account holders. In this *Shari'a* compliant arrangement, the co-operative provides a guarantee to

[34] Holy Qur'an Chapter. 2: 188
[35] Hafsat, S. (2006) *Investment in shares, The Islamic Perspective;* Journal of Islamic and Comparative Law (CILS), A.M.D. Press, Zaria, P. 257.
[36] Ibid
[37] Ibid, P. 259.
[38] Qaradawi, Y. Op. Cit. P. 141.

members that the money will be available when needed for withdrawal and has the authority to use the deposits as financial advances to other members.[39] The co-operative society agrees to invest member's deposits in *Shari'a* compliant businesses only.

2. MURABAHA (working capital loan):-

The classical *Murabaha* provide goods to members on credit with no cash involved. The co-operative society purchases the requested goods and transfers ownership to the members. Mark-up is calculated based on a declining balance, and no additional mark-up is charged after the loan matures. If members pay off their *Murabaha* prior to maturity, they pay the full mark-up for the entire term of financing. Any excess mark-up paid is then deposited into the member's co-operative account as a withdrawal share.[40]

With the modern *Murabaha* product a member is considered an agent (*Wakil*) of the co-operative society. The agent signs an agreement with the co-operative society and receives cash to purchase the desired goods. Members must keep receipts of all purchased goods, as the co-operative society may ask members to show proof that they used their financial advance for the intended purpose.[41] If members pay off their *Murabaha* prior to maturity they are only required to pay the mark-up to date, not for the entire term.

3. MUDARABA (financial investment):-

Mudaraba is a partnership agreement between the co-operative society and a borrower for the purchase of a commodity specifically used to generate profit. The co-operative society retains ownership of the commodity, and profit is equally distributed between the co-operative society and the member.[42] It should be noted that only the co-operative society is liable for potential losses during the partnership.

4. IJARA (financial lease):-

This type of financial lease allows the co-operative society to purchase and lease equipments to members while maintaining ownership until the member repays the entire purchase price. Under the *Ijara* arrangement, the co-operative society owns the asset and the borrower's repayment are considered rent.[43] In essence, the borrower pays for the right to use the equipment until its purchase cost are completely repaid, generally within three (3) to four (4) years, at which time title passes to the member.

[39] www.Islamicfinance.woccu.org, p.1; Accessed on 11/10/2013
[40] Ibid.
[41] Ibid, p.2
[42] Ibid.
[43] Ibid.

5. IJARA AND MURABAHA (hybrid loan):-

The hybrid product consists of two inter linked components, Viz:

(a) A lease of a fixed asset (*Ijara*) to existing business to expand operation or to start a new income generating activity; and

(b) A line of credit working capital loan (*Murabaha*) to support the use of the fixed asset(s).[44]

1.5 Differences Between Co-operative Societies Under Nigerian And Islamic Laws

Under Islamic jurisprudence, in contrast to Nigerian law, interest based transactions (*Riba*) are prohibited to co-operative societies. This makes co-operative societies under Islamic law members-owned institutions. Profits and losses are shared equally among members. But in Nigerian law, Co-operative societies can lawfully engage in interest based transactions.

Again, transactions under Islamic jurisprudence, in contrast to Nigerian laws, must be backed by assets rather than financial speculation. Financial contract must provide details of the product/service being bought or sold. In addition, loans are provided by purchasing a physical asset and either:

(1) Leasing it to members (*Ijara*); or

(2) Transferring ownership to the member who pays a mark-up (*Murabaha*).

Similarly, in contrast to Nigerians laws, co-operative societies, under Islamic law, are prohibited from financing activities considered harmful to the society. Such activities include, but not limited to, producing alcoholic beverages, intoxicants, dangerous drugs or trading in any thing prohibited by Islam. Co-operative societies, therefore, can only engage in *Shari'a* compliant businesses. But in Nigerian law, Co-operative Societies can lawfully engage in the production of intoxicants.

1.6 Conclusion

This paper has examined the concept of Co-operative Societies under both Nigerian and Islamic laws. The paper, however, observed that Co-operative Societies under Nigerian law enjoys some benefits and advantages just like incorporated Companies but without being subjected to the kind of legal demands which incorporated Companies are faced with. For instance, incorporated Companies are subjected to a cumbersome and expensive

[44] Ibid.

registration and incorporation requirements; Co-operative Societies are not. Similarly, incorporated Companies pay taxes; Co-operative Societies do not.

The paper also noted that Co-operative Societies enjoys certain protective rights under the law which other organizations do not enjoy. For instance, the exclusion of their members' shares and interests from attachment or sale in satisfaction of the judgment of court makes Co-operative Societies more attractive.

In conclusion therefore, the paper recommends that government at all levels should embark on sensitization campaign to enlighten Nigerians on the benefits of joining Co-operative Societies. This will, in the opinion of this paper, create jobs for the country's teaming unemployed, reduce dependency on white collar jobs and create wealth. It will equally contribute to the socio-economic development of the Nigerian economy

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