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Legal Imperatives for an Effective Restructuring and Reform Program in Developing Countries

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LEGAL IMPERATIVES FOR AN EFFECTIVE RESTRUCTURING AND REFORM PROGRAM IN DEVELOPING COUNTRIES

BY

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BEING AN AWARD WINNING ESSAY SUBMITTED TO LEGAL RESEARCH INITIATIVE, THE BRITISH COUNCIL AND THE LAW SOCIETY OF ENGLAND AND WALES IN 2005

NOTE: The law is stated as at the end of 2005 and the views expressed in this essay are those of the author. They do not represent in any way the views of Legal Research Initiative, the British Council and the Law Society of England and Wales.
INTRODUCTION

This paper evaluates the legal imperatives for an effective restructuring and reform program in developing countries with an assessment of the impact of legal regimes on programs, possible critical areas of legal reform that must be carried out to ensure success of reform programs; country comparative experience on justice sector reforms and general reforms and restructuring, and legal perspective on restructuring questions such as Privatisation and liberalization.

However, it is pertinent in a paper such as this to give a brief meaning of key words and phrases. The Cambridge International Dictionary of English defines the word “legal” as ‘connected with or allowed by the law’. The word “imperative” is defined to mean ‘extremely important or urgent; needing to be done or given attention immediately’. The word “restructuring” is ‘to organize something in a way to make it operate more effectively’, while “reform” means to ‘make an improvement especially by changing a person’s behaviour or the structure of something’. The word “program” means a ‘plan of activities to be done or things to be achieved’, and the phrase “developing countries” means the poorer countries of the world which include countries in Africa, Latin America and Asia (with very few exceptions) which have less advanced industries. Thus, legal imperatives for an effective restructuring and reform program in developing countries simply means those areas of the law that require urgent changes in less developed countries to enable such countries operate effectively; or put differently, it means the necessary or immediate legal reforms to be undertaken by third world countries to re-position them effectively.

THE IMPACT OF LEGAL REGIMES ON REFORM PROGRAMS

There is no doubt that successive administrations in developing countries such as Nigeria, Tanzania, Kenya, etc have initiated various economic, social, political, cultural, etc reform measures that have
nevertheless failed to achieve the desired result. Not until very recently did research show that policies dependent on classic theories of development are no longer enough unless accompanied by legal and regulatory reforms which have been missing in reform agendas of developing countries. It is now well established that the quality of a country’s legal and regulatory regimes have a direct bearing on its development and performance. In other words, legal and regulatory reforms must be integrated into the reform process to make it work effectively\(^2\).

The Research Findings of the 2004 Doing Business Report\(^3\) indicates, for example, that with a view to creating a vibrant private sector in which firms are making investments, creating jobs and improving productivity, government around the world have implemented wide ranging reforms, including macro-stabilistion programs, price liberalization, privatisation, and trade barrier relations, but for many, entrepreneurial activity remained limited, poverty high and growth stagnant in spite of these initiatives. The reason being that although macro-polices are unquestionably important, the quality of business regulation and the institutions that enforce it are major determinant of prosperity. Thus, it has been argued that on average, laws in developed countries have been enacted or amended much more recently than those in developing countries, whose laws often date to colonial times\(^4\).

**POSSIBLE CRITICAL AREAS OF LEGAL REFORMS IN DEVELOPING COUNTRIES WITH EMPHASIS ON NIGERIA AS A CASE STUDY.**

It must be pointed out that developing countries share peculiar problems such as poverty, unemployment, slow justice delivery, human rights abuses etc, and the legal reform challenges

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\(^2\) See, Inam Wilson, “Nigeria: Enhancing Nigeria’s Economic Development: A case for Institutional and Regulatory Reforms in Nigeria’s Banking Sector”, being a paper presented at the BBI 2\(^{nd}\) National Stakeholders Forum on Removing Bottlenecks to Business in Nigeria, held at Nicon Hilton, Abuja, Nigeria on the 19\(^{th}\) and 20\(^{th}\) April 2005 @ 1

\(^3\) The Report is a co-publication of the World Bank, the International Finance Corporation and Oxford University Press. The 2004 Doing Business Report is the first product of an ambitious study of the determinants of private sector development carried out in 133 countries around the world including Nigeria

\(^4\) See, Inam Wilson, Op. cit @ p. 2
facing developing countries are many. For the purposes of this paper and in order to give a personal
time, knowledge/experience of possible critical areas of legal reform, I have decided to focus on Nigeria
(of which I am a citizen). However, it is firmly believed and hoped that other developing countries
can also benefit from such legal reforms. These possible critical areas of legal reforms in Nigeria are
discussed below:

**CONSTITUTIONAL REFORMS:** It is said that no group of people can progress if they do not agree on
certain rules of engagement, rewards for obeying such rules and punishment for flouting them. For
a nation, the “ground norm” for such rules is the constitution which, if it is to be obeyed with dignity
and not flouted with impunity should be the peoples’ constitution, with input from and periodic
changes by them, understood by them, and taught to them from cradle to grave. Our present 1999
constitution is now agreed by an overwhelming number of Nigerians to be unsuitable for the kind of
diverse nation that we are\(^5\). It is the product of thirty-five years of military rule, less four years of
civilian rule, exhibiting all the military features of such a military rule, in anti-thetical opposition to
a truly federal structure\(^6\) even though it is proclaimed to be federal\(^7\).

Although for space constraints I do not intend to go into the nitty-gritty of the reforms needed for
our constitution, yet I assert that whatever the course:

i) The people must be involved intimately in the construction and approval of a new
constitution.

ii) It must result in the greater devolution of power from the center to the states and local
government.

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\(^5\) This prompted the agitation for restructuring of Nigeria along true federalist line, through the instrumentality of the National Political Reform Conference (NPRC) which ended after delegates from the South-South geo-political zone staged a walkout, following disagreements over resource control. See also, Victor Efeizomor, “Pronaco’s proposed Conferences”, Daly Independent, Thursday 21st July, 2005


\(^7\) See, Section 2(1) & (2) of the Constitution of the Federal Republic of Nigeria, 1999
iii) It must result in a justiciable and easily understood individual Bill of Rights and responsibilities of the Nigerian citizen, which weds him or her proudly to the nation.

**HUMAN RIGHTS REFORMS:** Upon the attainment of independence by Nigeria in 1960, the indigenous political class that stepped into the shoes of the erstwhile colonial masters decided to reform all the structures that had militated against the enjoying of fundamental rights by the generality of Nigerians. Victims of violations of human rights who turned to the courts for succour were frustrated by a conservative judiciary that adopted a restrictive interpretation of the fundamental rights embodied the constitution. Although, the rights guaranteed under the constitution are said to be fundamental and inalienable, yet they are not absolute as they are subject, from time to time, to all manner of derogations and restrictions in the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons. This has drawn sharp criticism from scholars as so far reaching as to empty the guarantee of meaningful content.

Again, although the fundamental rights guaranteed under chapter IV are limited to political and civil rights and its infringement or threatened infringement can be challenged in the appropriate High Court, yet the economic, social and cultural rights which are covered under the Fundamental Objectives and Directive Principles of State Policy contained in chapter II of the 1999 constitution are not justiciable. Though the rights contained in chapter II are not justiciable, they contain guidelines as to what the courts should do when confronted with problem of interpretation of the

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8 See, Femi Falana, “Fundamental Rights Enforcement”, Nigeria –Lagos: Legal Text Publishing Co. Ltd., 2004 @ 6
9 See, Section 33-44 of the Constitution of the Federal Republic of Nigeria, 1999 (Chapter IV of the Constitution)
10 Ibid, Section 45. See also; Ogunybesan & Ors. V. Minister of Health and Social Services (1995) FHCLR 168 @ 190
12 See, Section 46(1) of the CFRN, 1999
13 Okogie v. A.G. Lagos State [1981]2 NCLR 337 @ 350
constitution\textsuperscript{14}. It is suggested that because this three category of human rights depend fundamentally on the right to life and personal liberty which is a core human right the time has come for Nigerian courts to borrow a leaf from India where an activist judiciary has compelled the government to enforce certain aspects of the directive principles of state policy\textsuperscript{15}. However, realizing the limitation of employing judicial activism to ensure enforcement of the Directive Principles of State Policy the constitution of South Africa has specifically provided for the justiciability of socio-economic rights which was judicially confirmed in the case of \textbf{GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA V. GROOTBOOM}\textsuperscript{16}. This path should be followed by other developing countries.

Also, there is need for a proper legal or regulatory framework for human rights to vulnerable groups such as children, women, refugees, people with disability, and people living with HIV/AIDS (PLWHA) or people affected by HIV/AIDS (PABA) which should ensure that the principles of equality and a rights-based framework, as embodied in international instruments, are mainstreamed into the policies, programmes and activities of all actors in development\textsuperscript{17}. This is to ensure for greater protection of these vulnerable groups of people.

\textbf{INVESTMENT SECTOR REFORMS:} With a view to strengthening the capital base of banks and promote more professional approach to banking business, laws\textsuperscript{18} were passed by the government to address operational problems in the sector and the economy at large which placed regulatory and

\textsuperscript{14} See, Damisha v. Speaker, House of Assembly, Benue State [1983]4 NCLR 675
\textsuperscript{15} See, the Inaugural Address by Hon. Justice P.N. Bhagwatt; former chief justice of India and Governor of the Judicial Collquim in Bangalore, 24-26 February 1988 in Developing Human Rights Jurisprudence, a Commonwealth Secretarial Publication, 1988, @ XXII - XXIII
\textsuperscript{16} (2001)36 WRN 137 @ 162-163
\textsuperscript{17} See generally, Ayo Atsenuwa, "Human Rights of vulnerable Groups: Issues and Challenges in Mainstreaming Human Rights in Governance", being the text of a commissioned paper delivered at the 2005 Annual Conference of the N.B.A. held at Jos, Plateau State, Nigeria from 28\textsuperscript{th} August to 4\textsuperscript{th} September 2005
enforcement functions over banks and other financial institutions on the Central Bank of Nigeria (CBN), the Nigerian Deposit Insurance Corporation (NDIC), and the judiciary. Notwithstanding these reforms, the banking sector has failed to engender development due to certain regulatory problems. For instance, within the context of raising credits for business a borrower must deal with a bank (to open an account and secure the loan, among other things), the corporate Affairs Commission (to among other things register a company or enterprise which banks deal with regarding granting credits in preference to individuals), the Land Registry and the Government Office (to verify the borrowers title to land used as security and to protect the security for the loan, among other things), the tax office (to obtain tax clearance certificate needed to open an account and secure the loan), and perhaps the Central Securities Clearing System Ltd. (CSCS) an affiliate of the Nigerian Stock Exchange (to perfect shares used as collateral). It is my view that the Land Use Act has made land security, which incidentally is the most widely used, non-viable either by making land transfer too restrictive or by making it too expensive or unnecessarily time consuming. For instance, there can not be a “conveyance of land” in mortgage transactions; in case of revocation compensation is payable to borrower or holder of the right revoked and not the lender; agricultural land is not available for use as security; and the procedure for obtaining consent is cumbersome and very expensive with adverse effects on commerce. Thus, it is suggested that in order to enhance economic development, sections 21, 22, 28, 36(5)(7) & (8), and 51 of the Land Use Act be amended/ reviewed to make land fungible, reduce costs and protect private property rights.

21 See, Section 1 of Land Use Act that vested radical title in the Governor of a State with Nigerians left only with a right of occupancy
22 The definition of Holder under S. 51 of the Act excludes a mortgage
23 See Section 36(5) (7) & (8) of the Land Use Act
24 See Ss. 21 and 22 of Land Use Act. See also Savanah Bank (Nig) Ltd. v. Ajilo [1989] NWLR (Pt. 97) 305 @ 329 where Obaseki, J.S.C. observed that “the Land Use Act is bound to have suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from banks...if these (consent) provisions are to be implemented".
Also, in many parts of the developed world, security in personal chattels is being encouraged because creation of such security is cheaper and easily realizable\textsuperscript{25}. However, the law governing creation, protection and enforcement of security in personal chattels in Nigeria are antiquated, retrogressive and non-functional. Mortgage/pledge of personal chattels remains subject to the inefficient and unnecessarily formal provisions of the Bills of Sale Law\textsuperscript{26} which constitutes a trap for the unwary\textsuperscript{27}. The whole operation of the Bills of Sale Law remains barely on paper and the transaction under it remains rather dangerous and harmful to the interest of the creditor\textsuperscript{28}. The global trend in the area of security over personal chattels is to lean toward registration of interest in personal security at all times. Unlike the situation in Nigeria whereby security interests over personal chattels cannot be registered, there being no pledge registry, it is interesting to note that in the Untied States and Canada, all security interests in personal chattels are registered in a pledge registry and lenders can easily conduct a search to ensure that no outstanding security interest is unidentified. The Registry is accessible to everybody and it would notify searchers of the existence of pledges. Priority among pledged holders is based on the date of registration. Security interests that are not registered have no legal standing. Thus, it is suggested that the Bill of Sale Laws be amended/reviewed to enhance the creation, protection, registration and enforcement of security in personal chattels.

Furthermore, although the CSCS de-emphasized the use of share certificates security for advances by replacing the old system of delivering share certificates to settle loan obligations with the credits

\textsuperscript{25} Security over chattels is generally not subject to too many restrictions unlike the case with security over real property. Formalities for creation and enforcement are not complex and the possibility of having dominion of chattels makes the control over same easier.

\textsuperscript{26} In Nigeria, the Federal Law is the Bills of Sale Act of 1923, Cap. 27, Laws of Nigeria 1958 ed; omitted in Laws of the Federation of Nigeria (LFN) 1990, and is a re-enactment of the English Bills of sales Acts of 1878 and 1887 as amended by the English Bills of Sale Acts of 1890 and 1891

\textsuperscript{27} See, Hilton v. Turker (1888)9 Ch. D 669; See also, Sewell v. Burdick (1884)10 AC 7 @ 78

\textsuperscript{28} The procedure for documentation is cumbersome and priority upon registration is partial. See generally, I.O. Smith. Op. cit @ 173-174
and debits of shareholders stock, yet one fundamental question that has arisen is whether the CSCS has legal power to effect transfer of shares without a certificate in view of section 147 of Companies and Allied Matters Act (CAMA) 1990\textsuperscript{29}. Notwithstanding the recognition of the new system under the Investment and Securities Act No. 45 of 1999, the utility of share certificates as evidence of title to shareholdings has not been diminished in any way under CAMA. Accordingly, it is suggested that section 147 of CAMA be amended/reviewed to recognize and protect the interest of a lender who has a lien or charge on the shares of the borrower.

In the area of insolvency practice, Nigerian does not have a developed insolvency practice. Rather the Bankruptcy Act covers bankruptcy proceedings against individual debtors while the CAMA deals with winding up of companies. Although there are provisions in CAMA for arrangements and compromises, this is hardly used in practice. The thrust of CAMA is to liquidate and terminate the life of companies without the debtor company being given an opportunity to recognize and pay its debt over time. While liquidation is the last resort in developed jurisdictions, in Nigeria it is used as a first option resulting in the untimely death of many companies which could have been salvaged if given the chance to properly manage their debts. Hence it is my suggestion that the Bankruptcy Act and the CAMA be amended/reviewed to harmonize and modernize insolvency practice into a comprehensive modern corporation rehabilitation vehicle.

Turning our focus to the capital market\textsuperscript{30} there is need on the legal regime for regulating the capital market as a tool for secured investment in Nigeria. It has been observed that there are inadequacies

\begin{footnotesize}
\textsuperscript{29} S. 149 of CAMA provides that a certificate under the common seal of the company specifying any shares held by any member shall be prima facie evidence of the title of the member to the shares
\textsuperscript{30} The Capital Market is undoubtedly a cheaper source of finance for the purpose of raising funds for long-term investment compared to the money market, and is made up of primary market (where new securities are issued) and secondary market (which facilitates trade in existing securities subsequent to the issue in the primary market). See generally Anthony I. Idigbe (SAN), “Legal Regime for the Regulation of Capital Market as a Tool for Secured Investment in Nigeria”, being a paper delivered at the Annual General Conference of the NBA, at Jos, Plateau State, Nigeria from 29\textsuperscript{th} August – 2\textsuperscript{nd} September 2005 @ p.1
\end{footnotesize}
in the existing laws regulating capital market operations in Nigeria which have not been able to curb the market abuse such as insider trading, thus there is need for a stricter regulatory framework. This can be controlled through a regulatory regime as in the Financial Services and Market Act (FSMA) 2000 that eliminates the information asymmetry between the insider and the investing public. For instance, there should be simultaneous release of the results of quoted companies to the Nigerian Stock Exchange (NSE), Securities and Exchange Commission (SEC) and the public. The current practice of first getting NSE approval before publication of results to the public is capable of leading to information asymmetry, which can be abused by capital market operators. Again, there is need for clear civil and if necessary, criminal sanction for violation of non-disclosure requirements imposed on the insider. Furthermore, rules as to non-disclosable information, or when information can be disclosed and to who must be made clear. In order to forestall situations where transactions that are perfected on the floor of the NSE are disregarded by quoted companies, SEC should be given power over publicly quoted companies. The investments & Securities Act 1999 does not sufficiently empower SEC to act in case of malpractices varying from transfer of shares on the floor with no evidence of payment for the shares, declaration of dividend when no profits were made, misleading financial statements which under stated debt position of the companies, etc. Also, the power of SEC to impose restriction orders in circumstances outside the purview of section 97 of the ISA should be clarified. Furthermore, there should be a specified duty imposed on stockbrokers in the ISA 1999, apart from the general standard of due diligence under the law of contract and tort. Also, there should be adequate provisions for regulations of the conduct of stockbrokers particularly in the secondary market. Finally the laws on the surveillance powers of SEC need to be

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31Ibid @ 14
32 now Cap 124 LFN 2004, which replaced the Securities and Exchange Commission Decree No. 29 of 1988 aimed at providing a more efficient and viable capital market, positioned to meet the country's economic and developmental needs.
reviewed so as to protect whistle blowers. This will keep the flow of relevant information to SEC to assist its investigative functions.

**ECONOMIC AND FINANCIAL CRIMES REFORM:** In Nigeria, one of the reasons that corruption thrives at present is the obvious weakness of the institutions that are meant to fight the monster\(^{33}\). For example, because there is no provision for a citizen or the press to ascertain from the Code of Conduct Bureau the declared assets of any public officer before and after holding office, this loophole allows a secrecy that protects corrupt officials who driven by corrupt intent, declare assets in advance of acquiring them. Accordingly we recommend as a matter of urgent national importance the passing into law by the National Assembly the Freedom of Information Bill. Although, there is already sufficient number of institutions\(^ {34}\) and laws to effectively minimize corruption in the public they need to be strengthened\(^ {35}\). For instance, the Economic and Financial Crimes Commission (EFCC) given its broad mandate and wide powers should not report to and be under the control of the President\(^ {36}\). The simple reason is that it would be amenable to misdirection. This is in fact the accusation leveled against it at present, and one which the commission’s trend of activities fails to disprove. Accordingly, it is opined and submitted that the enabling law of the commission should be amended so that it reports to the National Assembly, the arm of our government that represents the widest spectrum of Nigerians.

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\(^{33}\) See generally Ondotimi Songi, “Legal Responses to Economic and Financial Crimes: The Nigerian Experience”, being an award winning essay submitted to Legal Research Initiative (LRI) for the 2\(^{nd}\) Annual Hon. Justice Karibi Whyte (Rtd) Essay Competition.

\(^{34}\) The EFCC, The Independent Corrupt Practices and other related offences commission (ICPC), etc.

\(^{35}\) “To Fight Corruption”, The Guardian, Wednesday, October 26, 2005 @ p. 16

\(^{36}\) The FFFC at present is dogged by a widely held suspicion that it goes after only persons not in the good book of its paymaster – The Presidency or more spastically, the President Olusegun Obasanjo
COUNTRY COMPARATIVE EXPERIENCE ON JUSTICE SECTOR REFORMS AND GENERAL REFORMS

A key problem with previous efforts at judicial and legal reforms in developing countries has been the inability and unwillingness of governments to invest in the justice sector. There is need for a vision for a system of justice which I suggest must “give every person fair and equal access to justice, and guarantees the dignity, rights and security of every person, and of all communities, regardless of ethnic group, gender, money or any other difference.

In the areas of civil justice reforms, a massive programme of court modernisation is underway in Nigeria aimed at stamping out delays in the legal system\textsuperscript{37}. The changes are the result of civil justice reforms brought out earlier last year, the most significant of which is the introduction of Alternative Dispute Resolution (ADR) centers handing mediations and arbitrations in the High Courts in Abuja and Lagos. Similar facilities are also proposed for Ibadan and Port Harcourt. It is anticipated that the ADR Centres will reduce the volume of court litigation and the amount of time spent handling disputes. Some critics claim that the centers are more efficient than England’s equivalent system, which arose out of the Access to Justice Act\textsuperscript{38}. ADR has the potential to facilitate access to justice and create an effective dispute resolution framework, which in turn is a sine qua non for the attraction and protection of foreign investment in any jurisdiction\textsuperscript{39}. Thus, it is suggested that our civil procedure rules be amended to include ADR so as to enhance effective justice delivery\textsuperscript{40}.

\textsuperscript{37} See, “Civil Society organisations fault Ajibola’s Committee on Juvenile offenders”, Vanguard Newspaper, obtained from the website: \url{http://www.vanguardngr.com} posted to the web, Friday, June 03, 2005.
\textsuperscript{38} See, Nigeria Brings ADR as part of Court Reforms obtained from the website: \url{http://www.lawyer.com} on the 6\textsuperscript{th} of January 2006
\textsuperscript{39} See, Kevin N. Nwosu, “Alternative Dispute Resolution (ADR) as a tool for Attraction and Protection of Business Investments in Nigeria”, being the text of a commissioned paper delivered at the 2005 Annual General Conference of the NBA held at Jos, Plateau State, Nigeria from 28\textsuperscript{th} August to 4\textsuperscript{th} September 2005
\textsuperscript{40} See generally, Prof. Yemi Osibanjo, “Reforming Civil Procedure Rules to Enhance Access to Justice in Nigeria. The Lagos State Experience”, being paper presented at the 2005 Annual General conference of the NBA, held at Jos, Plateau State, Nigeria from 29\textsuperscript{th} August to 2 September, 2005
As regards the criminal justice system, it has been criticised for the way it treats victims of crime, especially when they are women and children. Nigerians say that the justice system has marginalized victims and that it does not respond to their needs because we are too preoccupied with offenders. Thus, we suggest the need for a Victims Rights Bill to create a framework, not only for victim compensation, but also for victim empowerment.

It must be pointed out that a major challenge faced in the administration of court cases is posed by the rapid development in technology, the advent of computer and information technology\(^1\). The Evidence Act\(^2\) and the Criminal Procedure laws in operation in Nigeria are about half a century old enacted at a time present development in technology were never in contemplation. The cascading torrent of these developments, no doubt, bespeaks the cogency of the clamour for legislative intervention to modernise the Act\(^3\), to allow for efficient justice delivery\(^4\).

Other justice sectors that require reforms are the prisons and the legal aid scheme. There is need for New Prisons Act establishing a legal framework which is the first step in creating the proper context for a humane prison system clearly defining prisoners’ rights and minimum standards for all aspects of prison life. This can be achieved by incorporating and expanding upon existing legislation relating to prisons and prisoners in a new legislation. And as regards legal aid which is a fundamental feature of our justice system, there is need for a legal framework that should recognise legal aid as an essential public service, like health care, providing access to legal advice and representation to low income individuals. This is because without legal aid, the most disadvantaged

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\(^1\) See, Hon. Justice Oyewole of Lagos High Court, “Adjudicating Corruption in the Nigerian Context” being a paper delivered at the Anti-Corruption Training Workshop held at Abuja, Published in the Guardian, Tuesday, November 1, 2005 @ 69

\(^2\) Cap. 112, LFN 1990, (now Cap. E 14 LFN 2004), formerly Evidence Ordinance passed in 1943 but came into effect in June 1945

\(^3\) See, Pats-Acholonu, J.C.A (as he then was) in Egbeu v. Araka [1996]2 NWLR (Pt. 433) 710 where he stated that “our Evidence Act is …completely out of tune with the realities of the achievements of modern technology”.

\(^4\) For a detailed discussion see, Hon. Justice, C.C. Nweze “Technological Developments and the Law of Evidence in Nigeria”, being a paper presented at the NBA 2005 Annual General Conference, Jos, Plateau State, Nigeria, from August 29th to September 2nd, 2005
people in our society would be effectively barred from protecting their rights and interests through the legal system. Our sense of justice demands that this barrier be removed.

Finally, developing countries have to take deliberate steps to strengthen other institutions that support access to justice, such as Public Complaints Commission, and the National Human Rights Commission (NHRC). There is need to give constitutional recognition to the NHRC, which is an important measure to ensure the protection and promotion of rights.

LEGAL PERSPECTIVE ON RESTRUCTURING QUESTIONS SUCH AS PRIVATISATION AND LIBERALISATION

Privatisation is the means whereby state owned property is transferred into private hands\(^{45}\). In other words, it is the process of changing the ownership of government companies (public enterprises) to private ownership through the sale of the shares of such companies to individuals who will manage the companies efficiently and profitably\(^{46}\). This could either be total or partial transfer of either ownership or management/control or both. “Liberalisation” on the other hand, is a unilateral or multilateral reduction in tariffs and other measures that restrict trade. In general it refers to a relaxation of previous government restrictions usually in areas of economic policy\(^{47}\).

Until a decade ago or thereabout, Nigeria largely operated a controlled economy through state-owned enterprise operating as monopolies. The primary focus of privatisation is profitable operation of the enterprises\(^{48}\). As Nasir Ahamed El-Rufai has noted, “the current move towards economic liberalisation competition and privatisation is partly informed by gross failure of public


\(^{46}\) Visit website: http://www.bpeng.org, the official website of the Bureau of public Enterprises, Nigeria on “What you should know about Privatisation”.

\(^{47}\) Visit website: http://www.giagroup.com for web definition

\(^{48}\) See generally, Statement by President Olusegun Obasanjo on the occasion of the inauguration of the National Council on Privatisation, Presidential villa, Abuja, Tuesday 20th July 1999 entitled “The imperative of Privatisation” obtained from the website: http://www.bpeng.org on the 3rd of January 2006
enterprises. However, a contrary view has been held. It must be noted that privatisation is also part of the liberalisation of the economy and thus will be addressed within this context.

In Nigeria, the legal instrument that governs the ongoing process of privatisation of government owned enterprise is the Public Enterprises (Privatisation and commercialisation) Law of 1988. An initial shift to adequately reflect the government’s resolve to privatise state owned enterprises (SOEs), saw the placement of the process via the National Council on Privatisation (NCP) directly under the office of the Vice-President (but now moved to the office of the President in 2003). And in order to carry out all activities for the successful privatisation of slated enterprises, the Technical Committee on Privatisation was set up, but the BPE is the administrative body entrusted with the process. Although these bodies are supposed to be impartial and transparent, this has not always been the case, as allegations are always rife about the corrupt tendencies of the parties involved.

The law among other things stipulates that shares must be sold to all Nigerians from every part of the nation and every social stratum. In addition one percent of the shares must be reserved for the workers of the SOEs to be privatised. Also, in the case of over-subscription, the BPE is to ensure that no individual holds more than 0.1 percent of the shares. Section 12 deals with the issue of share assortment and focuses on the wide geographical spread of the allotment. Multiple applications are

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49 In an article entitled, “Liberal Democracy, Competition and the Privatisation Process; by Mallam Nasir Ahmed El-Rufai (Head, Bureau of Public Enterprises, the Nigerian Privatisation administrative body) in special forum, Tell Magazine, No. 10 March 10, 2003 @ 68-70
50 See, C.Don Adinuba, “Sam Egwu and Privatisation Debate”, Financial Standard, October 24, 2005 @ 13 where it is argued that the Nigeria’s governments confidence in the private sector is exaggerated
51 See, O.A. Odiase, Alegimenien, op. cit @ 1-2
52 This may seem to indicate a lack of confidence in the ability of the NCP previously under the Vice President to effectively handle the privatisation process
53 See generally, sections 9-11, and 12 –22 of the Law
54 Ibid, Section 5
Privatisation has a lot of objectives including divestment of shares from public to private sector; redistribution of shares from one segment of society to the other; raising of capital for development needs, debt repayment, and recoup expenditure loss on SOEs, and as a development policy objective, etc. Nevertheless, if these objectives had been achieved, then there would hardly be cause for appraising the privatisation process today. The truth is that privatisation simpliciter, without a productive base will not achieve any progress or development in any nation. For privatisation to be successful, it must be complemented with the appropriate infrastructural and structural support of the economy. If efficiency of the SOEs is the hallmark of privatisation, then patently this can not be achieved in an atmosphere of poor policy choice implementation, inconsistency and poor regulation by the government. This fact is shown by constant tinkering with the legal framework of the process.

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55 Ibid, S. 9(4)
56 Section 13(1) of the Act makes it clear that a primary objective of privatisation is divestment of shares to the private sector which has been criticised as fragmenting the ownership structure of the enterprises making it difficult for effective functioning. However, it is my view that this criticism is not valid because majority of successful companies have diverse ownership structure and this has not hindered their operative success.
57 The government handling of the communications sector privatisation/liberalization and the introduction of the Global Satellite Mobile Systems of Communication (GSM) is a case in point. The high cost of the license has led the operators seeking to recoup their investment in a short time, the outcome of this is the high tariffs for the users, to which the regulators have no answers.
58 For a detailed discussion, see A.O. Odiase-Alegimenien, op.cit., See also, Joe Kyari Gadzama, “Privatisation in Africa: Legal issues”, The Guardian of Tuesdays October 25, November 1 and November 8, 2005
OTHER ISSUES

CHILDREN/WOMEN LABOUR AND TRAFFICKING: This is a major problem faced by developing countries even though there are legislations\(^59\) to combat the menace. The key factor is that the illegality is often lost in the prism of acceptable cultural practices or economic expediency of survival, weak enforcement structures, and lack of political will\(^60\). It is suggested that public enlightenment on the ills and dangers of child/women labour and trafficking must be intensified, and government must exercise some political will to fight the crime; the same way HIV/AIDS is being challenged. Other reform measures aimed at combating this social problem include designing strategies that protect the privacy and identity of victims freed from trafficking, providing basic education to women and children, and most importantly, providing a framework for the establishment and implementation of rehabilitation programs for victims of trafficking\(^61\).

CONCLUSION

It is self evident that developing countries have urgent need for reforms for effective restructuring of such countries to enhance their growth and development. The law as an instrument of change should be utilised to create an enabling environment or framework for the advancement of such reform programs to ensure their effective performance. It is hoped that such legal frameworks are not just put in black and white but implemented.

\(^59\) Se, generally, Child Rights Act 2003; Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003; and the Labour Act, Cap. 198 LNF 1990

\(^60\) See, Pfof. Bolaji Owasanoye, Child Labour and Child Trafficking in Nigeria: Trends and Implications, "being a paper delivered at the 2005 Annual General Conference of the NBA held in Jos, Plateau State. Nigeria, from 28\(^{th}\) August – 4\(^{th}\) September 2005 @ 1

\(^61\) For details, see Prof. Bolaji Owasanoye, Ibid.
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