

RIGHT OF APPEAL IN CRIMINAL APPEALS: EXPANDING OR EXPOUNDING? AN EXAMINATION OF *BRIGADIER GENERAL JAMES OMEBIJE ABDULLAHI V NIGERIAN ARMY, IN RE: ABDULLAHI**

Abstract

By Section 243(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), a right of appeal in criminal trials inures in favour of an accused person or the Attorney General of the Federation or State as the case may be. The courts have decided that the victim does not have a right of appeal where the trial court acquits the defendant. In the case of *Brigadier General James Omebije Abdullahi v Nigerian Army, In Re: Abdullahi* (2018) 14 NWLR (pt. 1639) 272 the Supreme Court held that in certain circumstances, there may exist a right of appeal by persons other than the defendant. Commentaries after this decision have tended to argue that the right of appeal in criminal appeals has been expanded to include the victim or his beneficiaries. In other words, there is an expansion of the constitutional right of appeal conferred by section 243(1) (a) of the Constitution. We shall review this case and argue that the Supreme Court has not expanded the constitutional provision but only expounded it within the context of the facts of the instant case. We shall also make recommendations on what to do to expand the constitutional right of appeal in criminal cases.

Keywords: Right of Appeal, Criminal Appeals, *Brigadier General James Omebije Abdullahi v Nigerian Army, In Re: Abdullahi*, Expanding, Expounding, An Examination

1. Introduction:

At the conclusion of a criminal trial before a court of first instance either of the parties to the trial, that is, the Prosecution or the Defendant (convict) may be dissatisfied with the Judgment or Sentence imposed by the court. The law allows them to file an appeal before a higher court seeking to set aside the judgment and/or sentence of the lower court. Right of Appeal is a constitutional right.¹ A right of appeal must be statutory.² The legal implication is that where a party cannot refer to the relevant statute conferring the requisite right, it is nonexistent.³ No court has an inherent jurisdiction to entertain an appeal and accordingly section 6 (6) (a) of the Constitution is inapplicable to confer the power on the court to entertain an appeal where such powers are not expressly conferred.⁴ Furthermore, the limit and condition precedent to the exercise of that right as stated in the statute or constitution must be strictly complied with, otherwise the appeal will be incompetent and liable to be struck out.⁵ This is the situation with the right to appeal in criminal trials in Nigeria.

2. Courts of General and Special Appellate Criminal Jurisdictions in Nigeria

Various courts in Nigeria exercise original and appellate criminal jurisdiction. Whereas the criminal jurisdiction of the Customary Courts,⁶ Area Courts,⁷ Magistrate Courts,⁸ High Court,⁹ Court of Appeal¹⁰ and the Supreme

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¹ Constitution of the Federal Republic of Nigeria, 1999 (as amended) ss. 241,243

² *Adigun v Attorney General Oyo State* (1987) 2 NWLR (Pt. 56) 197,230; *Pan Ocean Oil Corporation v FMON (Nig.) Ltd* (2018) LPELR 44173

³ *Adili v The State* (1989) 2 NWLR (Pt. 103) 305; *Rabiu v State* (1980) 12 NSCC 291

⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 242(1); *Dankofa v FRN* (2019) 9NWLR (Pt. 1678) 468, 487

⁶ See the Customary Courts Law of Lagos State 2004, s 17 and part 2 of the 2nd schedule to the Law, Customary Court Law of Anambra State, s 12(2).

⁷ Area Court Edict 1967 s 18, Criminal Procedure Code s 12(2).

⁸ Magistrates' Court Law of Lagos State, 2009 s 29 (2) & (6), Magistrates' Court Law of Edo State, s 21(1).

⁹ Criminal Appeals from Magistrate Courts go to the High Court. MCL Lagos ss 67 & 68, MCL Edo s. 41, CFRN s 272(2), High Court Law of Lagos State 2004, s 28, Criminal Procedure Code Act, ss278,279, Administration of Criminal Justice Act, 2015, s 485(1) (9)

¹⁰ CFRN 1999 (as amended) s 240,241(1), 243. The criminal jurisdiction is only appellate.

Court¹¹ are general, the Federal High Court¹², National Industrial Court¹³ and the Court martial¹⁴ exercise special criminal jurisdiction.¹⁵

3. Right of Appeal in Criminal Trials in Nigeria

An aggrieved convict has a constitutional right of appeal but the exercise of the right and the limitations thereof is regulated either by statute or the constitution. Section 243 (1(a) of the Constitution dealing with exercise of right of appeal from the Federal High Court, National Industrial Court, or a State High Court provides as follows:

- (1) Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this constitution shall be-
- (2) exercisable...in the case of criminal proceedings at the instance of an accused person or, subject to the provisions of this constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of a State to take over and continue or to discontinue such proceedings, at the instance of such other authorities or person as may be prescribed.¹⁶

We submit that these are the only categories of persons that can appeal in criminal trials in Nigeria. This is in contrast with the right of appeal in civil cases available to the Claimant, Defendant and subject to leave of court, Persons Interested.¹⁷ If the accused/appellant (convict) dies during the pendency of the appeal, the appeal abates.¹⁸ The result will be the same if it is the Prosecution that appeals against an acquittal of the accused as no possible order can be made against a dead person. It would seem to be settled therefore that only two categories of persons can appeal in criminal proceedings in Nigeria, viz the prosecutor and the defendant (convict). In *Inspector General of Police v Adegoke Adelabu In Re : Akinbiyi*,¹⁹ Mr Adegoke Adelabu was prosecuted by the Inspector General of Police at the Magistrates' Court Ibadan Magisterial District under section 133(1) of the Criminal Code for having shown 'disrespect in speech' to Chief D.T. Akinbiyi, a member of the Ojaba 11 Native Court, 'to wit by referring to him as a fool and as mad'. Adelabu was convicted and sentenced to two months imprisonment with hard labour. The appeal to the High Court was allowed. Mr Akinbiyi the complainant, appealed to the Federal Supreme Court challenging the decision of the High Court. The Federal Supreme Court dismissed the appeal holding that the Mr Akinbiyi being neither the convict nor the prosecutor in the case had no right of appeal. In some cases, a criminal appeal may survive the convict/appellant, and therefore will not abate. An example is where the judgment of the court can be satisfied by or executed against the estate of the deceased appellant or respondent as the case may be. *Afortiori*, the estate should be able to appeal against such judgment. Sentence of fine is one such case where the appeal may not abate. Section 75, Magistrates' Court Law of Lagos State provides that: 'Every Criminal Appeal, other than an appeal from sentence of fine, shall abate on the death of the appellant'.²⁰

In the foreign case of *R v Rowe*,²¹ in which a convict/appellant died after filing a notice of appeal against the conviction on a charge of false pretenses and sentenced to 18 months' imprisonment. The convict's widow applied for leave to continue the appeal against the conviction and sentence. The application was refused. In refusing the application, the court held that although the widow would be glad to clear her husband's name, that sentimental interest was not sufficient interest to confer a right of appeal. Since there is nobody affected by the judgment as it was a sentence of imprisonment and the convict had died, the appeal abated. In drawing a distinction between custodial sentence and fine, Lord Goddard, CJ stated:

If a person is sentenced to pay a fine and dies having appealed, or even if he dies after payment of the fine-it might be immediately afterwards-it may be that the court would

¹¹ CFRN 1999 (as amended) s 233 (2). The criminal jurisdiction is only appellate. The court has no original criminal jurisdiction. See s 232 proviso, *AG Fed v AG Lagos State* (2017) LPELR 42769

¹² CFRN 1999 (as amended) s 251(3), Federal High Court Act LFN 2004 s 7 (2) & (3).

¹³ CFRN 1999 (as amended) s 254C (5)

¹⁴ Armed Forces Act LFN 2004 s 104-114.

¹⁵ The term 'general' or 'special' is used to denote the categories of subject or persons over which the named courts have jurisdiction.

¹⁶ See also section 233(5) on right of appeal to the Supreme Court

¹⁷ CFRN 1999 (as amended) s 243 (1)(a), *In re Ugadu* (1988) NWLR (Pt. 93) 189, *In re Madaki* (1996) 7 NWLR (Pt. 459) 153

¹⁸ See *Ajilore v State* (1993) 4 NWLR (pt. 289) 572.

¹⁹ (1956) SCNLR 109. See also *Inspector General of Police v Andrews* (2014) LPELR 22310

²⁰ Criminal Procedure Code Law, s 291. *R v Rowe* (1955) 39 CAR 57

²¹ *ibid*

allow executors or administrators to appeal merely on the ground that if the conviction were quashed they could recover the fine for the benefit of the estate of the deceased which they are bound to administer.

However, the recent decision of the Supreme Court in the case of *Brigadier General James Omebije Abdullahi v Nigerian Army & Ors In Re: Abdullahi*,²² would seem to expand this right of appeal to include Personal Representatives of the Convict. It will be shown that this case is not an authority expanding the categories of persons that have a right of appeal in criminal cases but can only be situated within the facts to establish that where a sentence affects the estate of a deceased, a limited right of appeal may exist. It will also be shown that unless there is alteration of the constitution, the constitutional right of appeal in criminal trials remains limited.

4. Facts of the Case of *Abdullahi v Nigerian Army & Ors In Re: Abdullahi*

Brigadier General Abdullahi was tried on a 6 count charge and convicted on 5 counts by a General Court Martial (GCM). He was sentenced to 2 years imprisonment each on the 5 counts. The sentence was to run consecutively which means he was to serve 10 (ten) years in prison. The court also ordered the forfeiture of his landed property at plot 741, Cadastral Zone B2, Durumi District, Abuja and covered by certificate of occupancy No: FCT/ABU/BN/897. The Army council confirmed the conviction but reduced the sentence to 1-year imprisonment on all the counts which are to run concurrently not consecutively meaning that he was now to serve a term of 1 (one) year only. He was ordered to refund the sum of N33,500,000.00 (Thirty-Three Million Five Hundred Thousand Naira) only to the Nigerian Armed Forces within 90days from the date of the order. If there is default in refunding the money, the personal property is to be confiscated to recover the said amount. The convict was dissatisfied with the decision of the General Court Martial as affirmed by the Army council. He appealed to the Court of Appeal which dismissed the appeal and affirmed the decision of the General Court Martial and ordered the forfeiture of the convict/appellant's landed property. Still dissatisfied, the appellant appealed to the Supreme Court. During the pendency of the appeal, the appellant died. The wife and son obtained letters of administration of his estate including the landed property the subject of forfeiture and appeal. Afterwards, they applied to the Supreme Court to be substituted for the deceased appellant for the purpose of arguing the only ground of appeal (no. 9) related to the forfeiture of the landed property which they contended that the Army Council did not order the forfeiture of the appellant's landed property. It was argued *inter alia* that the applicants and other children of the deceased had a legal interest in the difference between the actual value of the property and the sum of N33,500,000.00 the Army Council ordered the deceased appellant to pay as the property was valued N83, 100, 000.00 (Eighty Three Million and One Hundred Thousand Naira) only as at 2005. They submitted that their interest in the appellant's estate survived the appellant's death.

The Supreme Court in its decision on the application for substitution, considered section 233(1) and (5) of the Constitution and held that ordinarily that the position of the law is that only an accused person (in the instant case convict) may appeal against a decision of the court and such appeal abates on the death of the accused.²³ The court recognized that the applicants made it clear that they do not wish to continue the appeal as regards the custodial sentence which is the 'personal punishment of the deceased appellant', but they wish to continue the appeal for the purpose of arguing only ground 9 of the appeal that has to do with the estate of the deceased Brigadier, to protect their rights as successors and administrators of his estate.²⁴ To further put this case in perspective, Augie, JSC in the leading judgment stated as follows:

With regard to criminal cases, prosecution ceases with the death of an accused, which goes without saying, since no sentence can be passed on the accused, who is already dead. To put it in clear perspective, in a civil trial, if the plaintiff or defendant dies, their estate would usually continue. So, if the plaintiff dies, the beneficiaries and heirs to the plaintiff's estate inherit the lawsuit, and they may choose to continue to press for damages, which becomes their property.

Similarly, when a defendant dies during a civil lawsuit, his estate may be forced to defend the suit in order to prevent a judgment that is detrimental to the case, and the estate is, therefore, substituted for the deceased defendant.

In a criminal trial, there is no plaintiff, and that role is taken by the State, which cannot die. If the accused or defendant dies, that is the end of the case. In this case,

²² (2018)14 NWLR (pt.1639) 272.

²³ Ibid 295.

²⁴ Ibid 288H

the deceased appellant died after he filed an appeal in this court, wherein he raised the complaint in the said ground 9 of his grounds of appeal.²⁵

5. Review of the Case

It is important to understand the scope of the application made by the parties who sought to have their names substituted in the place of the deceased and to continue to argue the appeal before the court. The court did not pronounce on the merits of the case but only on the application for leave to be substituted for the deceased appellant for the purpose of pursuing only one ground of appeal related to the estate of the appellant of which they are beneficiaries (ground 9).²⁶ This was identified as the issue for determination by the court and accordingly becomes the only *ratio decidendi*.²⁷ The Supreme Court granted the application and substituted the name of the deceased appellant with that of the applicants (wife and son) for the purpose of continuing with the prosecution of ground 9 of the grounds of appeal in the original notice of appeal with consequential leave to amend the notice of appeal and the briefs of argument respectively. In arriving at the decision to grant the application, the court stated that there is no Nigerian authority on the issue and relied on the doctrine of *ubi jus ibi remedium* and the case of *Bello v Attorney General of Oyo State*.²⁸ Foreign cases such as *R v Rowe*,²⁹ *R v Jefferies*,³⁰ and *Hodgson v Lakeman*³¹ were referred to. We submit that on the facts and circumstances of this case, the Supreme Court rightly exercised its discretion in favour of the applicant relying on the doctrine of *ubi jus ibi remedium*. We also emphasize that this decision must not be extended beyond granting of leave to substitute a deceased appellant in a criminal appeal on sentence of fine. With due respect, that a right of appeal survives a deceased appellant in non-custodial sentences is recognized only under the Magistrates Courts Law³² and the Criminal Procedure Code Law.³³

Secondly, in the case of *Pan African Bank Limited v State*,³⁴ a similar situation arose and the court granted leave to appeal to a party who was neither the accused nor the prosecutor. In this case, six accused persons were arraigned before the Kano State High Court for various charges of fraud committed on the account of one Alhaji Ta'ambu, a customer of the appellant bank. All the accused persons, except 3rd and 6th, were convicted and sentenced accordingly by the trial court. In passing sentence, the court made consequential orders which included an order directing the appellant (Pan African Bank) to pay the sum of N2.5m to Alhaji Ta'ambu being the amount he lost to the fraudulent acts of the accused persons especially the negligent acts of the appellant's former manager, who was the 1st accused. The appellant, as an interested party sought and obtained the leave of the High court to appeal to the Court of Appeal against the order to pay Alhaji Ta'ambu the sum of N2.5m. An issue raised for determination by the appellant was whether the court was right in law to have made the order to pay Alhaji Ta'ambu the sum of N2.5m. The Court of Appeal did not set aside the leave granted by the High Court. It went ahead to consider the appeal on its merit and allowed the appeal by Pan African Bank Limited. The import of this authority is that irrespective of section 243(1)(a) of the constitution which limits the right of appeal in criminal proceedings to accused or the Attorney General, in appropriate cases, leave to appeal may be granted by the court in criminal appeals if the order made in the criminal trial affects the right of third parties especially when it is pecuniary. This is what is likened to an 'interest' in the *Rowe case*. In the case of *Inspector General of Police v Daniel Andrew*,³⁵ the court emphasized that joinder of a party is not known to criminal jurisprudence, as the two recognized parties in criminal trial are the accused and the prosecutor representing the State. What may be a 'joinder' can only occur if the accused persons are jointly charged for the offence. This will invariably be when the accused joined in committing the same offence or is an accessory before or after the fact and can be conveniently tried together.³⁶

²⁵ Ibid 289D-G

²⁶ See prayer 1 in the application, Ibid 280B

²⁷ Ibid 284C

²⁸ (1986) 5 NWLR (pt. 45) 828

²⁹ (1955)39 CAR 57

³⁰ (1968) 3 All ER 238

³¹ (1968) KB 15

³² See MCL Lagos State, 2009 s 75.

³³ CPCL s 291.

³⁴ (1997) 4 NWLR (pt. 499) 296

³⁵ (2014) LPELR 22310

³⁶ *ibid*

6. Position of the Law in Some Foreign Jurisdictions

The position of the law relating to the continuation of appeal by relatives of a dead appellant in an appeal commenced before his/her death in foreign jurisdictions, appear conflicting. In Scotland, Section 303A of the Criminal Procedure (Scotland) Act³⁷ provides:

(1) Where a person convicted of an offence has died, any person may, subject to the provisions of this section, apply to the High Court for an order authorizing him to institute or continue any appeal which could have been or has been instituted by the deceased.

(2) An application for an order under this section may be lodged with the clerk of judiciary within three months of the deceased's death or at such later time as the Court may, on cause shown, allow. (...)

(4) Where an application is made for an order under this section and the applicant-

(a) is an executor of the deceased; or

(b) otherwise appears to the Court to have legitimate interest, the Court shall make an order authorizing the applicant to institute or continue any appeal which could have been instituted or continued by the deceased ; and, subject to the provisions of this section, any such order may include such ancillary or supplementary provision as the Court thinks fit.

(5) The person in whose favour an order under this section is made shall from the date of the order be afforded the same rights to carry on the appeals as the deceased enjoyed at the time of his death and, in particular, where any time limit had begun to run against the deceased the person in whose favour an order has been made shall have the benefit of only that portion of the time limit which remained unexpired at the time of the death.

'(6) In this section 'appeal' includes any sort of application, whether at common law or under statute, for the review of any conviction, penalty or other order made in respect of the deceased in any criminal proceedings whatsoever.

It should be noted that the above right does not extend to the rights of the victims or relatives of the deceased to have a right of appeal for a review of the conviction of the person accused of the crime against them provided that the applicants fail to disclose sufficient legitimate interest. This view was further re-emphasized by the *Scottish Criminal Cases Appeal Review Commission* in denying the relatives of the Lockerbie victim's right to seek review of the conviction relying on the ground that it would not serve the interest of justice and that they do not have legitimate interest as the law did not have them in contemplation.³⁸

It is submitted that from the above provisions, any person whether or not he is a family member of the deceased may bring an application to the High Court seeking for leave to continue the appeal. Under the Scottish law it does not matter whether or not the appeal has been commenced as the person who is bringing the application may commence a fresh appeal or continue an already filed appeal before the death of the appellant. From the section under reference, the applicant must show good cause and legitimate interest why he/she should be permitted to continue or commence the appeal. The condition precedent for the leave to be granted to the applicant is that such application must have been brought within a period of three months of the deceased death or any other longer period the court may permit upon good cause shown. It should be noted that the grant of this leave to commence or continue the appeal after the death of the deceased is not restricted to where the subject of the appeal is pecuniary in nature affecting only his estate, but covers such appeal seeking to overturn the conviction imposed on the deceased. Assuming, the scenario of the *Abdullahi's case* played out in Scotland, the position would have been different as the wife and the son would only be required to file the application for leave not later than a period of three months after the death of the deceased and it would be granted as a matter of course.

In the Indian jurisdiction, the position of the law is as captured in Section 394³⁹ of the Indian Criminal Code which deals with appeals after the death of appellant in a criminal appeal. The section provides as follows:

(1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.

³⁷ Section 303A Criminal Procedure (Scotland) Act 1995

³⁸ <http://www.journalonline.co.uk/News/1020649.aspx#.XbfBgVVKjIU> visited on 28th October 2019 at 05:55 am; *Associated Newspapers v Wilson* (1995) 2 AC 454-490 at 475

³⁹ Code of Criminal Procedure 1973

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant: Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

From the above statute, it is deducible that an appeal not relating to sentence of fine abates upon the death of the appellant as an exception to the general rule. However, where the subject of the appeal was against conviction and imposition of sentence of death or of imprisonment, but appellant dies during the pendency of the appeal, any of his relative shall not later than a period of thirty days of his death apply to the appellate court for leave to continue the appeal. However, in *Girija Prasad (dead) by legal representative v State of M.P.*⁴⁰ the Court allowed the continuation of the appeal by the widow of the deceased irrespective of delay of 149 days. In the Canadian judicial jurisdiction, it is generally agreed that appeals are creations of statutes and thus where the statutes does not confer a right of appeal on any person such person cannot appeal so held the court in *Millis v Queen*.⁴¹ Where an appellant dies after conviction while his/her appeal was pending, the appeal is generally referred to as being moot. Section 73 (1)⁴² of the Canadian Supreme Court Act on the death of an appellant provides as follows:

In the event of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant, may, by leave of the Court or a judge, file a suggestion of the death, and that he is that legal representative, and the proceedings may thereupon be continued at the suit of and against the legal representative as the appellant.

The implication of the above provision is that the grant of leave for continuation of the appeal by the legal representatives of the deceased appellant is at the discretion of the court based on the circumstances of each case. In *R v Smith*⁴³ the Canadian Supreme Court affirmed the decision of the Court of Appeal and exercised discretion not to allow the continuation of the appeal perhaps because counsel waited for a period after nine years of Smith's death before the application for continuation was brought. But the court stated that an appeal may be allowed based on 'exceptional circumstances and in the interest of justice' irrespective of the death of the appellant where available new evidence points irresistibly to the innocence of the appellant. In this case the court reasoned that the appeal had already been filed before the death of the appellant which entails that deceased appellant had already exercised personal right prior to his death which weighed a little in favour of the continuation of the appeal but was ultimately disregarded as not being sufficient enough to meet the requirement for grant of leave. In a more recent case of *R v Poulin*⁴⁴ the Canadian Supreme Court was split 4-3 on whether or not to proceed in an appeal after the death of the Respondent. Hitherto, to this decision there has been a 30 (thirty) years settled position of the law regarding the interpretation of section 11 (1) of Canadian Charter of Rights.⁴⁵ However, in the instant case the majority resolved to proceed with the appeal irrespective of the death of the Respondent while the appeal was pending based on the circumstances of the case as the court reasoned that the Crown contributed to the delay of perfecting the hearing of the appeal. In summary the decision was reached on the basis of the following conclusions;

1. There was a proper adversarial context because the deceased's counsel submitted a full length factum and advocated for the deceased's position at the hearing. Additionally, two of the three interveners made submissions that aligned with the respondent's perspective.
2. The Crown's appeal was 'clearly more than 'arguable'' because the interpretation of section 11(i) 'has not yet received comprehensive treatment in the jurisprudence'.
3. The constitutional question was a 'legal issue of general public importance' which 'transcends the death' of the respondent,

⁴⁰ A.I.R (2007) SC 3106; *Shankar Prasad Ghosh (Dead) vs. State of Bihar & Anor.* (2008) 11 SCC 373

⁴¹ (1986) 1 S.C.R 863 at 958; *Kourtessis v M.N.R* (1993) 2 S.C.R 53 at 67-70; *R v Meltzer* (1989) 1 S.C.R (1989) 1764 at 1773

⁴² Supreme Court Act (R.S.C 1985)

⁴³ (2004) 1 SCR 385; In *R v Jette* (1999) 141 C.C.C (3d) 52 the Quebec Court of Appeal allowed the continuation of a criminal appeal despite the death of the convicted appellant on the ground of interest of justice and fresh evidence which prima facie pointed to the deceased innocence where the prosecution star witness admitted that he had lied during trial.

⁴⁴ (2019) SCC 47; <https://www.osler.com/en/blogs/appeal/october-2019/supreme-court-of-canada-splits-4-3-on-whether-to-proceed-with-moot-appeal> visited on 28th October 2019 at 12:05 pm

⁴⁵ Section 11 Canadian Charter of Rights & Freedom 1982

4. It was more efficient and fair to decide the questions of national importance on this appeal, as opposed to imposing the costs of doing so on other courts and justice system participants.
5. Deciding the appeal would not intrude into the legislative role because interpreting the scope of *Charter* rights was for the courts, not Parliament.⁴⁶

Therefore, the Canadian judicial position is now more favorable disposed towards granting leave for legal representatives of the deceased appellant to continue the appeal in deserving circumstances.⁴⁷ In the United States of America jurisdictions, there is no uniform position as the position varies from State to State. Some States adopt the abatement *ab initio* position while others do not. The States that adopt the abatement *ab initio* position reasoned that firstly to maintain the conviction of a deceased appellant without testing veracity of the conviction on appeal is unsafe, and secondly that the primary purpose of criminal justice is to punish and correct the behavior of convicts and to warn others in the society not to take to crime as it does not pay, thus by the death of the deceased appellant such cannot be achieved. The first United States Supreme Court case where the abatement *ab initio* doctrine was adopted was *List v. Pennsylvania*.⁴⁸ In *March v. State*⁴⁹ a Texas Court of Appeal upheld the application of the doctrine of abatement *ab initio* holding that criminal proceedings are still pending during appeal. The Supreme Court of the State of Illinois in *O'Sullivan v People*⁵⁰ held that there cannot be enforcement of judgment when the convict has ceased to exist. The Supreme Court in the State of Connecticut in 1971 refused to apply the doctrine of abatement *ab initio* in the case of *State v. Raffone*.⁵¹ In *Commonwealth v. Walker*⁵² the Supreme Court of Pennsylvania stated that it was in the interests of the accused's estate and society that a challenge instituted by the accused in his lifetime to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appeal process, notwithstanding the death of the appellant.

Subsequently, towards the end of the 20th century and the beginning of the 21st century the need to preserve the rights of victims of crimes emerged and subsequently their interest was taken into consideration in arriving at a decision.⁵³ The clamor for the rights of the victims to be recognized and the injustice inherent in the doctrine of abatement *ab initio* obviously compelled the then President of United States of America Ronald Reagan in 1982 to commission a task force on victim's rights that recommended amending the Sixth Amendment of the US Constitution to ensure victim's right to be 'heard' in all phases of criminal proceedings, called *President's Task Force on Victims of Crime* which invariably led to the enactment of the Victim Witness Protection Act.⁵⁴ In the more recent case of *United States v Libous*⁵⁵ the New York Court relying on the Common Law doctrine of abatement *ab initio* vacated the jury conviction of former New York State Senator Thomas W. Libous and cancelled restitution order and fines paid and ordered it to be returned to his estate. In the State of Massachusetts in the United States of America, the Supreme Judicial Court on March 13, 2019 held that the doctrine of abatement is outdated and no longer applies in the State of Massachusetts. The court therefore affirmed that the conviction of Aaron Hernandez stands and will not abate. This was the judgment of the court in the case of *Commonwealth v Hernandez*⁵⁶ wherein the court reinstated Aaron Hernandez conviction which had hitherto been vacated by Judge E. Susan Garsh of Bristol County Superior Court that had previously made an order vacating Hernandez's murder conviction after his suicide on 19 April, 2017.⁵⁷

⁴⁶ Ibid

⁴⁷ See *R v Morin* (1992) 1 S.C.R 771

⁴⁸ (1888) 131 U.S 396.

⁴⁹ (1879) 5 Tex. Ct. App. 450

⁵⁰ (1892) 32 N.E 192;

⁵¹ 285 A.2d 323, 325-26 (Conn. 1971)

⁵² 288 A.2d 741 (1972); *State v. Jones*, 551 P.2d 801 (Kan. 1976), at p. 804

⁵³ Wayne R. LaFave et al., *Criminal Procedure* § 1.4(k) (2d ed. 2000); Timothy A. Razel, *Dying To Get Away With It: How the Abatement Doctrine Thwarts Justice--And What Should Be Done Instead*, 75 Fordham L. Rev. 2193, 2202 (2007)

⁵⁴ Victim Witness Protection Act 1982

⁵⁵ 15-3979 (2nd Cir. 2017); See also *Nelson v Colorado* 137 S. Ct. 1249 (2017)

⁵⁶ 481 Mass. 582 (2019); <https://nulronlineforum.wordpress.com/2019/07/31/update-massachusetts-supreme-judicial-court-finds-doctrine-of-abatement-ab-initio-outdated-reinstates-aaron-hernandezs-conviction/> visited on 30th October 2019 at 8:27 am

⁵⁷ See Victor Mather, *Aaron Hernandez's Murder Conviction is Nullified*, N.Y Times, May 9, 2017

In England, ‘the death can’t appeal’ line of cases is the train of judicial decisions. In *R. v. Kearley (No. 2)*,⁵⁸ the court held that where a case is remitted by the House of Lords to the Court of Appeal (Criminal Division) under section 35(3) of the Criminal Appeal Act 1968 and the appellant dies before the case is heard in the Court of Appeal, the appeal abates on the appellant's death and the Court of Appeal has no jurisdiction to deal with the case. The House of Lords concluded that a criminal appeal abates upon death, but leaving the conviction and the sentence intact, per Lord Jauncey, at p. 253 opined:

My Lords, as a pure matter of construction untrammelled by authority I should have had little hesitation in concluding that a right of appeal to the Court of Appeal under Pt I of the 1968 Act was personal to the convicted person.

Although in that case, the House of Lords recognized that abatement could cause injustice in some circumstances, but it concluded that any reform was a matter for Parliament. Subsequently, Parliament enacted the *Criminal Appeal Act*⁵⁹ which has now established the Criminal Cases Review Commission vested with the power in specified circumstances, to refer the conviction or sentence for review by the Court of Appeal even in the absence of an appeal commenced in the lifetime of the convicted person.

7. Conclusion

The decision of the Supreme Court in *Re Abdullahi* has not expanded the right of appeal in criminal cases but it expounded it by recognizing the pecuniary rights of legal representatives or near relatives of the deceased appellant in matters affecting the estate of the deceased. The court in that case only granted leave to the beneficiaries in the circumstances of the case, to appeal against an order of court that can be enforced against the estate. It must be so understood within the narrow issue decided. It is recommended that sections 243(1) (a) and 233 (5) of the Constitution be expressly amended to give right of appeal to the near relatives of a deceased appellant as expounded in the case of *Re Abdullahi* in deserving cases affecting the pecuniary interest of the estate in matters relating to fine. It is recommended that the Indian model be adopted in part by the National Assembly in amending sections 243(1) (a) and 233 (5) of the 1999 Constitution to finally codify the judicial pronouncement contained in the *Re Abdullahi*'s case.

⁵⁸ [1994] 3 All E.R. 246

⁵⁹ Criminal Appeal Act 1995 (U.K)