CONSTITUTIONAL PREREQUISITES FOR THE COMPOSITION OF THE EXECUTIVE COUNCIL OF THE FEDERATION BY THE PRESIDENT- A CRITICAL LEGAL ANALYSIS

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Abstract

One of the many measures provided in the Nigerian constitution to ensure good governance is the requirement that the President has the exclusive responsibility to appoint qualified Ministers into the federal executive council who will advise him on national affairs. To fastrack this leadership recruitment process, a recent constitutional requirement was added requiring the President to appoint the Ministers within a given time frame although it did not state what should happen when this is breached? This paper deployed the doctrinal research method to examine the constitutional parameters for the composition of the executive council of the federation and the mandatory timeline allowed the President to compose the Federal Executive Council among other things. The paper found that there is a lacuna in the law as the constitution did not expressly prescribe any penalty should the President not submit a comprehensive list of Ministerial appointees from at least one State of the Federation and or within the approved time limit to the Senate for confirmation. Hence, it was recommended among other things that since the breach of any constitutional provision is a gross misconduct, failure, refusal or neglect by the President to comply should form a ground for removal of the President from office by the legislature because a President who is unable to obey the constitution is unfit to hold office and liable to be removed from office.

Keywords- federation, executive powers, composition, president, breach of constitution

Introduction

The three arms of government recognised and created under the Nigerian constitutional order are the legislature,[19] the executive[20] and the judiciary.[21] This paper seeks to interrogate the procedure for composition of the Executive Council of the Federation which is critical in the discharge the executive powers of the federation vested in the President. The Executive Council of the Federation[22] otherwise interchangeably called the "Federal Executive Council"[23] is very important and indeed indispensable in the governance of the nation. The primary role of the FEC is advising the President to determine the direction of government although the President is and remains the ultimate executive decision-maker and Chairman of the FEC. In order to strengthen the curve of good governance via the exercise of the executive powers of the federation, this paper will be divided into segments to examine the irreducible constitutional conditionalities for the composition of the FEC and specifically on whom the power is vested; the minimum number of members of the FEC; qualification and disqualification criteria of ministerial nominees; procedure for

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19 *Section 4* of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

20 *Section 5* of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

21 *Section 6* of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

22 The Constitution of the Federal Republic of Nigeria, 1999 as amended alludes to the "Executive Council of the Federation". See *section 144(1)(a)* thereof. In *section 144(5*, it is provided that in this section, the reference to "executive council of the Federation" is a reference to the body of Ministers of the Government of the Federation, howsoever called, established by the President and charged with such responsibilities for the functions of government as the President may direct.

23 Hereinafter abbreviated and referred to as "the FEC".

confirmation of ministerial nominees, and the import of the recently promulgated sixty days timeline for composition of the FEC. In addition, the paper will interrogate the question of consequences or penalty for breach or non-compliance with the mandatory provisions for the composition of the FEC. Recommendations will be made on the way forward and the conclusion will be reached highlighting that the FEC should be composed of men and women of high impact and vision to assist the President effectively exercise the enormous executive powers of his office.

Executive powers of the federation- on whom vested and how exercised

Without too much ado, the executive powers of the federation are vested on the President. It is expressly provided under *section 5(1)* of the CFRN, 1999 as amended that-

> Subject to the provisions of this Constitution, the executive powers of the Federation:
> (a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and
> (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.

The foregoing constitutional provision puts it beyond argument that the President is directly vested with the executive powers of the federation which may be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation.[24]

The office of the President of the federation is created under *section 130(1)* of the CFRN, 1999 as amended and the President shall be the Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation.[25] Despite the humungous powers of the President as outlined above, it is not the contemplation of the constitution that the President should be a sole administrator or preside over the executive arm of the government alone. Therefore, the President is required to be assisted or advised by Ministers who are members of the Executive Council of the Federation. Aside the Vice-President[26] who is elected alongside with the President, *section 148(1)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended requires the President to appoint Ministers and assign responsibilities to them as members of the Executive Council of the federation. How then is the President required to compose the FEC and within what timeline? Who is the authority empowered to confirm Ministerial nominees? These queries will be interrogated exhaustively and suitable answers provided in the ensuing paragraphs of this paper.

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24 *Section 148(1)* of the CFRN, 1999 as amended.

25 *Section 130(2)* of the CFRN, 1999 as amended.

26 The office of Vice-President is created in *section 141* of the CFRN, 1999 as amended. Under *section 146(1)* of the CFRN, 1999 as amended, the Vice-President shall hold the office of President if the office of President becomes vacant by reason of death or resignation, impeachment, permanent incapacity or the removal of the President from office for any other reason in accordance with *section 143* of this Constitution. In *Buhari & Anor v Obasanjo v Ors* (2005) LPELR-815(SC) (Pp. 103 paras. C-C), it was held that "'President" or "Vice-President" means the President or Vice-President of the Federal Republic of Nigeria." In *Attorney-General of the Federation & Ors v Alhaji Atiku Abubakar & Ors* (2007) LPELR-3(SC) (P. 49, paras. E-A), it was held by the Supreme Court, per Akintan, JSC, that "Unlike the Ministers, the Vice President cannot be removed by the President. The process of removal of the President or the Vice President is provided for in *section 143* of the Constitution. It is through the process of impeachment which is to be conducted by the National Assembly as set out in that section. *Section 143(10)* of the Constitution specifically ousts interference of the court from the proceedings leading to the impeachment of the holders of the two offices."

Composition of the Executive Council of the Federation, by whom and how

The composition of the FEC is a very serious exercise that is subject to subject certain irreducible and non-negotiable constitutional stipulations. These complex pre-conditions can be serially identified as follows:

The President has the sole or exclusive power to appoint Ministers

Section 147(1) of the CFRN, 1999 as amended provides that "There shall be such offices of Ministers of the Government of the Federation as may be established by the President." This provision gives the President the latitude, liberty or exclusive right or prerogative (the word "may" is used)[27] to create as many offices of Ministers as he may desire or wish. Thus, no person can successfully question the constitutional power of the President to appoint any number of Ministers he desires so long as they do not fall short of the mandatory minimum number stipulated under *section 147(3)* of the CFRN 1999 as amended.

Qualification to be appointed a Minister and disqualifying conditions

The President can only appoint qualified persons as Ministers into the FEC. A person is qualified to be appointed as a Minister if he is qualified to be elected as a member of the House of Representatives. This draws from the provision of *section 147(5)* of the CFRN 1999 as amended which provides that no person shall be appointed as a Minister of the Government of the Federation unless he is qualified for election as a member of the House of Representatives. Out of abundant caution, under *section 65* of the CFRN 1999 as amended a person shall be qualified for election as a member of: the House of Representatives, if he is a citizen of Nigeria and has attained the age of 25 years; has been educated up to at least School Certificate level or its equivalent; and he is a member of a political party and is sponsored by that party. Under *section 66* of the CFRN 1999 as amended, it is provided thus-

> (1) No person shall be qualified for election to the Senate or the House of Representatives if:
>
> (a) subject to the provisions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, has made a declaration of allegiance to such a country;
>
> (b) under any law in force in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind;
>
> (c) he is under a sentence of death imposed on him by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for an offence involving dishonesty or fraud (by whatever name called) or any other offence imposed on him by such a court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court;
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> (d) within a period of less than 10 years before the date of an election to a legislative house, he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of a contravention of the Code of Conduct;
>
> (e) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in any part of Nigeria;

[27] In *Taiwo v FRN* (2022) LPELR-57826(SC) (Pp. 6-10 paras. C), it was held that in a statute, when 'may' is used it is generally accepted that it is permissive but exceptions exist when 'may' could be mandatory. See the case of *Edevot v Uwegba & Ors (*1987) LPELR-1009 (SC) where the apex Court gave this explanation, it said: "Generally the word 'may' always means 'may'. It has long been settled that may is a permissive or enabling expression. In *Messy v Council of the Municipality of Yass* (1922) 22 S.R.N.S.W 494 per Cullen, CJ at pp 497, 498 it held that the use of the word 'may' prima facie conveys that the authority which has the power to do such an act has an option either to or not to do it. See also Cotton, L.I. in *Re Daker, Michell v Baker* (1800) 44 CH.D 282. But it has been conceded that the word may acquire mandatory meaning from the context in which it is used".

(f) he is a person employed in the public service of the Federation or of any State and has not resigned, withdrawn or retired from such employment 30 days before the date of election;
(g) he is a member of a secret society;
(h) he has been indicted for embezzlement or fraud by Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Governments respectively; or.
(i) he has presented a forged certificate to the Independence National Electoral Commission.

(2) Where in respect of any person who has been-
(a) adjudged to be a lunatic;
(b) declared to be of unsound mind;
(c) sentenced to death or imprisonment; or
(d) adjudged or declared bankrupt,
any appeal against the decision is pending in any court of law in accordance with any law in force in Nigeria, subsection (1) of the section shall not apply during a period beginning from the date when such appeal is lodged and ending on the date when the appeal is finally determined or, as the case may be, the appeal lapses or is abandoned, whichever is earlier.

(3) For the purposes of subsection (2) of this section "appeal" includes any application for an injunction or an order certiorari, mandamus, prohibition or habeas corpus, or any appeal from any such application.

Thus, a person is not eligible to be nominated as a Minister if he or she is caught in the web of the disqualifying criteria comprehensively enumerated above and if erroneously nominated, the person is liable to not to be confirmed as a Minister by the Senate.

Federal Character must be reflected-there must be at least one Minister from each State of the Federation

Under *section 14(3)* of the CFRN, 1999 as amended, it is expressly provided the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies. Consequently, to reinforce the requirement of inclusion and inclusivity in the composition of the government of the federation, *section 147(3)* of the CFRN 1999 as amended enacts that

> Any appointment under subsection (2) of this section by the President shall be in conformity with the provisions of *section 14(3)* of this Constitution:- Provided that in giving effect to the provisions aforesaid the President shall appoint at least one Minister from each State, who shall be an indigene of such State.[28]

[28] The proviso herein is mandatory as the word "shall" is used. In a recent decision in the case of *Aliyu v Namadi & Ors* (2023) LPELR-59742(SC), the Supreme Court, per Kekere-Ekun, JSC, reiterated that "It is a correct statement of the law that generally, when the word "shall" is used in a statute, it is interpreted to be mandatory. However, whether it is used in a mandatory or directory sense depends on the context in which it is used." See also *Katto v C. B. N.* (1991) 9 NWLR (Pt.214) 126; (1991) LPELR - 1678 (SC) @ 25-26 F - D, *BPS Construction*

It is clear from the foregoing that the President shall appoint at least one Minister from each State of the federation. This means that the President can also appoint more than one Minister from any given or all the States. As there are thirty six States of the Federation, it means that the minimum membership of the Ministers in the Executive Council of the Federation shall be thirty six. Clearly, the above mandatory provision of *section 147(3)* serves to guard against marginalisation of any component State out of the 36 States created in the federation under *section 3* of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Out of abundant caution, it needs to be noted that the 36 States in Nigeria expressly created in *section 3(1)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended are Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara. Only qualified Ministers can be appointed from these States. No person shall be appointed as a Minister of the Government of the Federation unless he is qualified for election as a member of the House of Representatives.[29]

Confirmation of Ministerial Nominees by the Senate

Ministerial nominees must be confirmed by the Senate. Thus, it is provided in *section 147(2*) of the CFRN 1999 as amended that any appointment to the office of Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the Senate, be made by the President. When interpreted, this provision gives the Senate the power to receive a list of Ministerial nominees from the President and thereafter confirm or reject such ministerial nominees as they may wish in their absolute discretion subject however to the cumulative provisions of *sections 147(5), 65 and 66* of the Constitution of the Federal Republic of Nigeria, 1999 as a mended. Only Ministerial nominees duly confirmed by the Senate can be sworn into office by the President. This provision is mandatory for compliance as the word "shall" is used.[30] It is an obligatory discharge of duty and must be complied with and any contravention or non-compliance is fatal.[31]

Deemed Confirmation of Ministerial nominees by the Senate

Under *section 147(6)* of the CFRN 1999 as amended, an appointment to the office of Minister shall be deemed to have been made where no return has been received from the Senate within twenty-one working days of the receipt of nomination by the Senate. This simply means that the Senate, as the sole screening authority, has a constitutional duty to expeditiously screen Ministerial nominees and make a return (whether the Ministerial nominee is cleared or not) to the President within twenty one working days of the receipt of the nomination. Failure, refusal or neglect to do the needful within the constitutional timeline will amount to deemed confirmation.

Mandatory timeline for composition of the FEC

From 29 May 1999 when there was a return to democratic rule under the Constitution of the Federal Republic of Nigeria, 1999 and up to 17 March 2023, there was no constitutional time limit within which the President must compose the FEC or submit the Ministerial nominees to the Senate for confirmation. Consequently, this right to appoint Ministers at will and without any time limit was abused as some past Presidents delayed up to six months or more after being sworn into office

& Engineering Co. Ltd v FCDA (2017) 10 NWLR (Pt. 1572) 1; and *Umeakuna v Umeakuna* (2019) 14 NWLR (Pt. 1691) 61.

29 *Section 147(5)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

30 This was the decision of the Supreme Court in *Buhari v Yabo* (2018) 9 NWLR (Pt. 1624) 197 followed by the in *Nwokidu v George & Anor* (2022)LPELR- 58045(CA).

31 See *Ideal Insurance Ltd v Ajaokuta Steel Co Ltd* (2014) 7 NWLR (Pt. 1405) 165 and *Okpe v Fan Milk PLc* (2017) 2 NWLR (Pt. 1549) 282.

before appointing Ministers of the Government of the federation. At the State level, some State Governors delayed for nearly six months, one year or even more before appointing Commissioners of the Government of a State.[32] To cure the mischief, one of the last minute novel constitutional amendments by the 9th NASS and signed into law by erstwhile President Buhari on March 17, 2023 was the alteration which mandates the President and Governors to submit the names of persons nominated as Ministers or Commissioners within 60 days of taking the oath of office for confirmation by the Senate or State House of Assembly.[33] This obligatory provision is designed to ensure that the President or Governors hits the ground running with requisite members of their cabinets so soon after being sworn in. Although it does not expressly provide any penalty for its breach, but breach of constitutional provision is never treated lightly and it is treated as gross misconduct. In *section 143(11)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended, "gross misconduct" is interpreted to mean "a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct." It is submitted that the requirement of nominating Ministers or Commissioners within 60 days is simple and uncomplicated and ought to be obeyed fully and completely being a constitutional provision which the President and Governors swore to uphold.

Consequences for breach of constitutional provisions on the composition of FEC by the President

The law is ensconced like the Rock of Gibraltar that the Constitution is the supreme law of the land. *Section 1(1)* of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) expressly states that the Constitution is supreme its provisions shall have a binding force on all persons and authorities throughout Nigeria. In the very recent of *NPF & Ors v Police Service Commission & Anor',*[34] the Supreme Court held among other things that it is both a fundamental and elementary principle of our law that the Constitution is the basic law of the land. It is the supreme law and its provisions have blinding force on all authorities, institutions and persons throughout the country. All other laws derive their force and authority from the Constitution.[35] Relating this to the issues under consideration, it is submitted that breach of the provisions of the constitution in the composition of the FEC by the President is "gross misconduct" that can lead to his removal from office by the National Assembly. As noted earlier, under s*ection 143(11)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended "gross misconduct" is interpreted to mean "a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct."

Thus, breach of constitutional provision by the President on any issue is severe. It can lead to removal of the President from office by the National Assembly. In *A-G Federation & Ors v*

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32 *Section 192(1)* of the CFRN, 1999 as amended provides that "There shall be such offices of Commissioners of the Government of a State as may be established by the Governor of the State."

33 See Fifth Alteration (No.23). the Bill which was signed into law on 17 March 2023 sought to alter the Constitution of the Federal Republic of Nigeria, 1999 to require the President and Governors to submit the names of persons nominated as Ministers or Commissioners within sixty days of taking the oath of office for confirmation by the Senate or State House of Assembly; and for related matters.

34 (2023) LPELR-60782(SC) (P. 154, paras. A-F), per Jauro, JSC . See also *Madumere & Anor v Okwara & Anor* (2013) LPELR - 20752 (SC), *Marwa & Ors v Nyako & Ors* (2012) LPELR - 7837 (SC), *First Bank v T.S.A. Industries Ltd* (2010) LPELR - 1283 (SC), *Olafisoye v FRN* (2004) LPELR - 2553 (SC), *INEC v Musa* (2003) LPELR - 24927 (SC). *Kalu v Odili & Ors* (1992) LPELR-1653.

35 This principle was laid firmly in *A-G Bendel State* v *A-G Federation & Ors* (1981) LPELR 605; *Adediran & Anor v Interland Transport Ltd* (1991) LPELR 88; *Bakare v Lagos State Civil Service Commission & Anor* (1992) LPELR 711 and *Abacha & Ors v Fawehinmi* (2000) LPELR 14.

Abubakar & Ors,[36] the Supreme Court clarified that the power to remove the President and Vice-President is provided for in *section 143* of the Constitution. The provision clearly gives the role of removing the two public officers to the National Assembly. The Constitution has not conferred on the court the power to declare the office of the holder of the two offices vacant for whatever reason. Succinctly stated, it is very grievous and serious for the President who swore to uphold the constitution as a condition precedent to the assumption, holding and exercise of the powers vested by the Constitution in him as the holder or the office of President, to be accused of the deliberate violation, breach, contravention or non-compliance with any provisions of the Constitution which he swore to preserve, protect and defend in the discharge of the duties and performance of the function of the office. The time fixed by the Constitution for the doing of anything can be extended.

In *Ode v Uzor & Ors*,[37] the Supreme Court per Okoro JSC held as follows:

> This Court has held in a plethora of decided cases that when it comes to the time fixed by the Constitution for doing anything, such time cannot be extended. It is immutable, fixed like the rock of Gibraltar. It cannot be extended, elongated, expanded or stretched beyond what it states. See *Marwa & Ors v Nyako & Ors* (2012) LPELR-7837 (SC), *Eze v Umahi & Ors* (2022) LPELR-59157 (SC), *Nyako v Adamawa State House of Assembly & Ors* (2016) LPELR-41822 (SC), *Useni v Atta & Ors* (2023) LPELR-59880(SC), *Besong v Ochinke & Ors* (2022) LPELR-59622(SC).

Way forward

As submission of list of ministerial nominees by the President to the Senate is predicated on a fixed constitutional timeline, in order to improve upon and fastrack this focal leadership recruitment process, the following are suggested namely-

(a) At all material times, the President should be obliged or be compelled to obey the national constitution just like all public holders and indeed every person or authority in Nigeria. Therefore, constitution should be amended to mandate the Senate to consider failure, refusal or neglect of the President to submit a complete or comprehensive list of Ministers containing at least a nominee from each State of the federation within the stipulated timeline of sixty days from the date of inauguration as President an impeachable offence. Consequently, the National Assembly should be empowered expressly to take steps to commence procedure for removal of such erring President.

(b) There should be a constitutional amendment to introduce a clear provision on the time limit the President shall take to fully reconstitute the FEC in the event of a cabinet dissolution. It is suggested that the constitution should be amended to require the President to reconstitute the FEC within sixty days of dissolution or to re-appoint a Minister from a State that is not represented in the FEC in the event of disengagement.

(c) In carrying out the screening and confirmation of Ministerial nominees, the Senate should see the need to exercise that responsibility with utmost seriousness to ensure that Ministerial nominees are vigorously screened and meet the qualifying criteria and are not caught in the web of disqualifying conditions set down by the Constitution before confirmation. The procedure of "take a bow and go" often adopted by the Senate in the confirmation of Ministerial nominees should be discouraged as it does not afford the senate and indeed Nigerians the opportunity to see

[36] (2007) LPELR-3(SC) (Pp. 58 paras. A) per Akintan, JSC.
[37] (2023) LPELR-60346(SC).

ahead of time that each of the Ministerial nominee asked to take a bow and go has the requisite qualification, capacity and competence to deliver.

(d) Although under *section 147(6)* of the CFRN 1999 as amended, an appointment to the office of Minister shall be deemed to have been made where no return has been received from the Senate within twenty-one working days of the receipt of nomination by the Senate, it is suggested that the Senate should approach this responsibility with every sense of urgency and patriotism. Except where good cause is shown, in no circumstance should a Ministerial nominee assume office without rigorous screening and confirmation by the Senate. The idea of deemed confirmation is good but it is in the national interest that Ministerial nominees be duly screened and confirmed by the Senate.

Conclusion

It has been shown that the national Constitution has set down the parameters for composing the FEC with respect to membership, minimum number and time limit for its composition which should be rigidly observed or obeyed. As the Constitution is the organic law or grundnorm,[38] the President should feel obliged to strictly comply with the stipulated irreducible minimum conditions for composition of the FEC as already exhaustively discussed. The interregnum or period between declaration of a winner in a presidential election and the swearing in day is enough for the President to have put together his list of Ministerial nominees and submit same to the Senate for confirmation without any further waste of time. Thus, the additional 60 days allowed the President from the date of taking oath of office to submit the names of persons nominated as Ministers for confirmation by the Senate should be more than enough for the President to comply. Where the President fails, refuses or neglects to comply, this should amount to gross misconduct which the National Assembly should be empowered expressly to view strongly as a ground for removal of the President from office. The executive powers of the President to compose the FEC must not be exercised inconsistently with Constitution. Much as the President is at liberty to appoint Ministers into the FEC, he does not however have the liberty to disobey, disregard or neglect constitutional stipulations.

[38] See *Osho v. Phillips* (1972) 7 NSCC 172 at 178; (1972) 4 SC 259; *A-G., Abia State v A G Federation* (2002) 6 NWLR (Pt. 763) 264 at 269; *A-G Federation & Ors v Abubakar & Ors* (2007) LPELR-3(SC).

EXAMINATION OF THE LEGAL AND INSTITUTIONAL FRAMEWORK OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN NIGERIA

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Introduction

The object of this monograph is to critically examine the legal and institutional framework of ADR. We shall look at the concept of ADR and thereafter examine the legal framework of ADR. We shall conclude the article by examining the legal and institutional framework of ADR. This will go a long way in proper understanding of the role of ADR in settlement of disputes.

The concept of ADR

ADR is an acronym for Alternative Dispute Resolution. According to Wikipedia, "Alternative Dispute Resolution or External Dispute Resolution (EDR), typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party.[1] It refers to a variety of processes that help parties resolve disputes without trial.

ADR may be described as a spectrum of informal procedures for resolving disputes-ranging from negotiation, to non-binding third party intervention,[2] to binding third party intervention,[3] outside the formal circuit of the courtroom.[4] Although the use of ADR has faced some resistance in the past,[5] today many lawyers in different jurisdiction across the world function as dispute resolve spending much of their professional lives helping their clients settle disputes through ADR methods. There are a number of studies[6] that have indicated a strong settlement culture in the United States and the U.K and the reluctance of lawyers to have to go to trial.[7] ADR processes can be tailored to diverse kinds of conflicts. Disputes, parties and transactions, some requiring expertise in the subject matter (such as scientific and policy disputes) and spawning new hybrid processes such as consensus building, which engage multiple parties in complex, multi-issue problem. More than anything else, ADR is becoming the first port of call for resolution of every type of dispute, from business disputes to labour management disputes, and to interpersonal disputes. ADR, more than anything else, seeks to address one fundamental question. What is the best way for people to deal with their conflicts, grievances and differences?

The scope of ADR

ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration.

Negotiation

This is a consensual dispute resolution process whereby parties in a dispute come together to discuss directly or indirectly, the matter in dispute between them in order to agree on the form of any joint action which they might take in the resolution of the dispute: Essentially, negotiation allows

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1 Australian Securities and Investments Commission -Complaints resolution schemes.

2 Such as mediation.

3 Such as arbitration.

4 Gem, H. Judging Civil Justice Cambridge University Press, 2009. p. 80.

5 Redfern M., The Element in the Room should pre-litigation Mediation be mandatory? leadr kon gres, Brisbane, Austrial, 2011.

6 See Sarat A. and Feistiner W., Divorce Lawyers and their clients, Oxford: Oxford University Press, 1995.

7 Barbieri; G.L., Alternative Dispute Resolution Centre Manual: Guide for practitioners on Establishing and Managing ADR Centres.

two or more parties to accomplish by agreement what no single party could, or would want to do alone.

Mediation

This is also a consensual dispute resolution process, though it involves a neutral third party called a mediator who helps the disputing parties to make decisions and reach agreements on matter of dispute between them. It is worthy of note that the mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves. Mediation may be particularly useful in the following areas: family members, neigbourhood, and community quarrels, business partners, divorce and custody cases, medical malpractice, auto-mobile accident cases, etc.

Collaborative Law

Collaborative law, also known as collaborative practice, divorce or, family law is a legal process enabling couples who have decided to separate or end their marriage to work with their collaborative professionals including collaboratively trained lawyers, coaches and financial professionals in order to avoid the uncertain outcome of court and to achieve a settlement that best meets the specific needs of both parties and their children without the underlying threat of litigation.[8] It is a problem-solving process that gives divorcing parties and their lawyers a way to end a marriage and restructure families without the stress, delay and expense of litigation.

Arbitration

A dispute resolution process where a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome. Arbitration is less formal than a trial and the rules of evidence are often relaxed. Arbitration could be binding or non-binding.

Legal framework of ADR

The legal framework of ADR is divided into three:

i. Customary law Arbitration
ii. Domestic statutory framework
iii. International obligations under various international instruments**.**

Customary Law Arbitration

Customary law as stated in the case of *Oyewunmi v. Ogunesan*[9] is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, it controls the lives and transactions of the communities subject to it and it is the mirror of the culture of the people and imports justice to the lives of the people. "The basic aims of dispute resolution in customary law are reconciliation, peace and the assuagement of feelings that might otherwise dislocate social cohesion and solidarity. Customary law arbitration has judicial recognition.[10] In *Okpuruwa v. Okpokan*[11] Oguntade JCA observed:

> during the pre-colonial times when regular courts had not been there, Nigerians surely had a simple and cheap method of adjudicating over disputes occurring among them. The parties were usually referred to elders or a body set up for that purpose.

8 https:en.m.wikipedia.org.
9 (1990) 3 NWLR (Pt. 137) 182.
10 See Onwusike v. Onwusike (1962) ENLR 10.
11 (1998) 4 NWLR (Pt. 90) 554 at 586.

Domestic Legal Framework

The advent of judicial development in dispute settlement has necessitated putting in place proper legal framework for arbitration and ADR in Nigeria, hence the Arbitration Ordinance of December 31, 1914. Today, there are Federal and States laws and rules regulating the practice of ADR, in Nigeria.

The Principal Federal Legislation is the Arbitration and Conciliation Act, 2004. This Act provides "a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of International commercial arbitration.

Moreover, the Civil Procedure Rules of the various States equally provide a veritable legal framework of ADR in that they encourage and facilitate settlement of ADR. For instance, Order 4 of the High Court of Anambra State (Civil Procedure) Rules, 2019, provides for "interface with ADR."

Order 4, Rule 8 (c)[12] Provides:

> Case Evaluation shall be conducted on every substantive suit begun by Writ of Summons by the DCR (Evaluation) in the presence and with active participation of the parties and their legal practitioners to determine if the matters are to be dealt with in the High Court by litigation or is suitable to be transferred to AnMDC.

Order 4, rule 8(f)[13] provides

> that at the end of the interface with ADR, the DCR (Evaluation) shall make a report. The report should state whether any of ADR options are preferred.[14]

Still with reference to the domestic legal framework, there is the Nigerian investment Promotion Commission (NIPC) Act.[15] This Act[16] deals with investment promotion in Nigeria with specific provision for the resolution of disputes arising between an investor and any government of the Federation or any agencies of government, through arbitration.

There is yet the Multi-Door Court House (MDCH) which is a court initiated court-centered dispute resolution mechanism. As a State managed ADR process, it is usually set up to provide facilities for the resolution of (Civil) disputes within the court premises; thereby providing a range of alternative means for the disposition of those disputes, short of court trial.

International Legal Framework

This refers to legal framework of non-domestic origin or nature. For example, the United Nations Commission on International Trade Law (UNCITRAL), the New York Convention, and International Centre for Settlement of Investment Dispute (ICSID), etc. UNCITRAL was established by the United Nations General Assembly to enable United Nation to play a more active role in reducing or removing legal obstacles to the flow of International trade. The preamble to the resolution noted divergences from the laws of different States in matters relating to International trade and this constituted obstacles to the development of world trade.

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12 High Court of Anambra State (Civil Procedure) Rules, 2019.

13 *Ibid*.

14 See also the preamble to the High Court of Lagos State (Civil Procedure) Rules 2012 which encourages an "amicable resolution of disputes by use of Alternative Dispute Resolution (ADR) mechanism."

15 Law of the Federation of Nigeria, 2004.

16 *Ibid*.

The aim of the New York Convention is to ensure the enforcement of arbitration awards worldwide.

ADR contract clause

ADR contract clause is a clause in an agreement by which the contracting parties agree to attempt to resolve any disputes between them by the use of one or more ADR processes.[17] The clause may specify, a particular

ADR Procedure, such as mediation or leave the parities to agree on one as and when a particular dispute arises.

The inclusion of ADR clause in a contract obliges the parties to resolve their dispute through ADR. In other words; ADR clause is legally enforceable. *In Cable and Wireless Plc v. IBM United Kingdom Ltd*,[18] Colman J. upheld an ADR clause in a commercial contract. One of the parties sought to bypass the ADR clause by starting litigation in England; on the party's application, the court granted a stay of proceedings, thereby effectively forcing the claimant to pursue the claim through the agreed dispute resolution process.

To summarize, this segment of this monograph, it is clear that the following provide the legal framework of ADR (i) customary law (in Africa), (ii) Statues, (iii) Common Law; (iv) International Conventions (v) International Treaties (vi) Express agreement of the parties.

Institutional Framework of ADR

Institutional Framework of ADR refers to the institutions, organizations, or bodies that drive the ADR processes. These bodies, organizations or institutions help to provide the necessary platform, and support for ADR. They encourage and facilitate the operation and utilization of ADR mechanisms. Some of these Arbitral institutions include:

(1) *The International Centre for Settlement of Investment Dispute (ICSID)*

The ICSID is an International arbitration institution established in 1966 for legal dispute resolution and conciliation between investors and States. It has its headquarters in Washington, D.C, United States. It is a member of the World Bank group. Its availability to investors and States helps to promote International investment by providing confidence in the dispute resolution process.

(2) *The International Court of Arbitration of the International Chamber of Commerce (ICC)*

The ICC International Court of Arbitration is an institution for the resolution of International Commercial disputes. It operates under the auspices of the International Chamber of Commerce. It was founded in 1923. It consists of more than 100 arbitrators from roughly 90 countries.

(3) The London Court of International Arbitration (LCIA)

The LCIA was founded in 1892 and is based in London, United Kingdom and provides the service of International arbitrators. It is universally recognized as one of the World's leading arbitral institutions.

(4) *The International Centre for Dispute Resolution (ICDR)*

The ICDR was established in 1996 as the International division of the American Arbitration Association (AAA). The ICDR is one of the most recognized and prominent providers of international dispute resolution services in the world.

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17 Abdulsalam O. Ajetunmobi, Alternative Dispute Resoultion and Arbitration in Nigeria, Law, Theory and Practice, Princeton & Associates Publishing Co. Ltd, 2017, p.52.

18 (2002) 2 ALLER (Comm) 1041.

(5) *The United Nations Commission on International Trade Law (UNCITRAL)*

The UNCITRAL, established by the United Nations General Assembly plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.

(6) *Permanent Court of Arbitration (PCA)*

The PCA, established by treaty in 1899, is anointer governmental organization, providing a variety of dispute resolution services to the international community. It is located in Hague, Netherlands. Other International Arbitration institutions include the Stockholm Chamber of Commerce (SCC); the Swiss Chambers Court of Arbitration and Mediation (SCCAM); the German Institute for Arbitrations (DIS); the World Intellectual Property Organization) Arbitration and Mediation Centre (WIPO) in Geneva; the American Arbitration Association (AAA) etc. At the continental level, there is the Cairo Regional Centre for International Commercial Arbitration established by the government of the Arab Republic of Egypt in conjunction with the Asian-African Legal Consultative Committee (AALCC) in 1979. The Cairo Centre offers specialized services to settle trade and investment disputes, through arbitration. It offers advice to parties to international commercial and investment contracts, with regards to drafting these contracts, promote arbitration and other ADR techniques in the Afro-Asian region.

At the national level, there is the Lagos Regional Centre for International Commercial Arbitration established by the Nigerian Government in collaboration with the Asian-African legal Consultative Committee.

Conclusion

From the foregoing, both the legal and institutional framework of ADR have become highly developed and diversified. The result will be that investors fear are being allayed as any trade or commercial dispute that may arise will be fairly and expeditiously settled.

FINDING AN EQUILIBRIUM BETWEEN TECHNICALITIES /TECHNICAL JUSTICE AND SUBSTANTIAL JUSTICE

Okoro, Jude Tobechukwu*

Abstract

The Courts and tribunals are temples of justice and established to dispense or do justice according to the law. There are situations where extant laws establishing these courts or rules of Court prescribe a particular mode or manner for institution of an action and a departure from it would inevitably lead to a striking out or dismissal premised on lack of procedural compliance or otherwise on technical grounds. Sadly, such situations have arisen where an inadvertent departure from a prescribed mode for instituting an action have led to the termination or death by way of striking out or outright dismissal of many otherwise actions with a good cause of action and a consequential miscarriage of substantial justice. It is most glaring when the cause of action is within the jurisdiction of the court yet suffers a dismissal anchored on technicalities. This to say the least defeats the essence of fairness, equity, good conscience and natural justice and takes the judicial system back to the rigid and inflexible Common Law judicial system or era where letters of the law are slavishly followed and enforced. This work therefore recommended among others amending or expunging strict liability provisions of laws or rules of court which prescribe the mode or manner of instituting an action. This will ensure that suits inadvertently instituted in breach or violation of any prescribed mode or manner of instituting an action can be regularized and determined on the merit in the interest of justice and by extension equity.

Keywords: Court, Equity, Law, Practice and Procedure, Justice.

Introduction

The courts as established by the Constitution of the Federal Republic of Nigeria, 1999[1] are designated to dispense justice according to the law. Courts are referred to as courts of law and justice. Law and justice are two sides of the same coin and cannot be isolated from each other. The law is the wheels on which justice runs. In our legal jurisprudence and by extension practice and procedure, there is what is known and referred to as technical justice on one part and substantial justice on the other part. These are interwoven and intertwined composite parts of justice and therefore not mutually exclusive. The two are best illustrated with Olympic circles.

As stated earlier, the law is the wheel on which justice runs and the corollary is that justice must be done according to the spirit and letters of the law for if justice is not dispensed as prescribed by the law, then it is not justice. It therefore means that where the law has prescribed a way for dispensing justice, it must be followed as prescribed and any departure from same would amount to breach or violation of the law and consequently a miscarriage of justice.[2] It goes without saying that justice is the end product of application of the law. However, justice cannot be a slave to or hostage of the law for the law is the vehicle that drives justice to its destination or otherwise the instrument through which justice is delivered or dispensed. Therefore, in any situation where

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1 SS 230, 237, 249, 255, 260, 265, 270, 275, and 280.

2 *Larmie v. D.P.M and Services Ltd*. [2006] All FWLR (Pt. 296) 775 at 778 where the Supreme Court defined and described miscarriage of justice as "… the decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial rights of a party. … Miscarriage of justice means a reasonable probability of more favourable outcome for the defendant. A miscarriage of justice therefore means such a departure from the rules which permeate a judicial procedure as to make that which happened not in the proper sense of the word a judicial procedure at all".

justice cannot be dispensed using the law as an instrument, then a situation of absurdity arises and one can arguably assert that the law has failed in its sacred duty to do or dispense justice.

Definition, meaning and nature of justice in law

It is logical to first but in brief espouse what "law" in the context of justice is because the concept of justice according to the law is incomplete without the law. In fact, there cannot be a comprehension of justice without the law for it is the law that prescribes what justice is in any given context. Law is defined as "a body of rules of action or conduct prescribed by controlling authority and have binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law"[3]. On the other hand, "Justice" is fairness, moral rightness, a scheme or system of law in which every person receives his/her or its due from the system, including all rights, both natural and legal.[4] The Black's Law Dictionary defines justice as protecting rights and punishing wrongs using fairness; the fair and proper and proper administration of law.[5] Justice, in its broadest sense is the concept that individuals are to be treated in a manner that is equitable and fair.[6] This broad definition was captured by Plato[7] when he opined thus: "justice is keeping what is properly one's own and doing one's own job".

From a microscopic view of the above definitions, it is clear that justice is not an absolute legalistic term or something that is stuck in rigidly and slavishly following the dry letters of the law void of equity and fairness. The corollary is that the idea and meaning of justice does not include laws which though legal may be unjust and consequently impose injustice, inequality or a deprivation in its application. A system where the application of laws does not fairly, equitably and accordingly give each one his/her due cannot be described as justice.

The nature of justice is that it is a rule against bias and the right to a fair hearing.[8] By necessary implication, justice in this sense is well beyond the dry letters of the law but extends to natural justice which embodies viz- fairness, equity and good conscience. Natural justice is also known as substantial justice or fundamental justice or universal justice or fair play in action.[9] Lord Esher M. R. in *Vionet v. Barrett* defined natural justice as the natural sense of what is right and wrong.[10] It is a systematic process of rendering justice by the judicial, quasi-judicial and other administrative authorities.[11] The rules of natural justice embodies three cardinal principles viz: rule against bias, rule of fair hearing and rule of reasonableness and the sole purpose of this is to prevent the miscarriage of justice.[12] A judicial or an abjuratory system void of the principles of natural or

3 Henry Black, *Black's Law Dictionary*, (6th edition, Springer, 1991) 1002

4 Geral Hill, *The Peoples Law Dictionary*, available at >https://dictionary.law.com/Default.aspx?selected=1086< accessed 10th August, 2023.

5 Bryan Garner, *Black's Law Dictionary* (9th edition, West, 2009) 942

6 Morris Ginsberg, 'The Concept of Justice' (1963) 144 Journal of the Royal Institute of Philosophy, 99.

7 A Greek philosopher who lived between 428/427 – 348/347 BCE and authored "The Republic" and translated by Desmond Lee, (England: Penguin Books Ltd.), 1974, cited by P C Obioha, *The Nature of Justice*, published in Journal of Social Sciences, 29 (2): Pp183-192, 2011, at page 3

8 *Newswatch Communications Ltd. v. Atta* [2006] All FWLR (Pt. 318) 580 at p. 583 where the Supreme Court on *contents of principles of fair hearing* stated: Fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing the parties case should be fair and impartial without it showing any degree of bias against any of the parties.

9 M. A. Aslam, 'Principles of Natural Justice in the Light of Administrative Law' (2020) available at > https://www.legalserviceindia.com/legal/article-1659-principles-of-natural-justice-in-the-light-of-administrative-law.html< accessed 10th August, 2023.

10 [1885] 55 LJ RB 39

11 Pritam Banik, *Principles of Natural Justice with Case Laws*, available at >https://strictlylegal.in/principles-of-natural-justice-with-case-laws-and-explanation/< accessed 10th August, 2023.

12 *Ibid*

substantial justice will render the administration of justice impossible and unpleasant as we have seen and witnessed in recent cases[13] decided by the Supreme Court of Nigeria. In Cooper v. Wandsworth,[14] it was stated thus:

> Even God did not pass a sentence upon Adam before he was called upon to make his defence. "Adam" says God, "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat".[15]

In view of the above, it can be deduced that administration of justice must be rooted in fairness and by extension determination of the substantive law. The Latin maxim "*fiat justitia ruat caelum*" [16] captures succinctly and aptly the whole essence of justice.

Technicalities/Technical Justice

Legal technicality ordinarily means a strict adherence to the words of a statute to determine the spirit of justice. In Benedict Orji *v.* Ozo Nne Illoputaife[17] the Court of Appeal, defined technicality to mean "immaterial, not affecting the substantial rights, without substance." Justice Niki Tobi (Rtd.) offered an answer to what legal technicalities are in *Yusuf v. Adegoke*[18] when he said thus:

> What is technicality? *In Adedeji v. The State*[19], I said at page 265: "I realize that courts of law seem to be using the word technicality out of tune or out of turn, *vis-a-vis* the larger concept of justice. In most cases, it has become a vogue that once a court is inclined to doing substantial justice by deflecting from the rules, it quickly draws a distinction between justice and technicality so much so that it has become not only a *cliche* but an enigma in our jurisprudence. In most cases when the courts invoke the substantial justice principle, they have at the back of their minds the desire to put to naught technicalities which the adverse party relies upon to drum down an otherwise meritorious case. We seem to be over-stretching the technicality concept. We should try to narrow down the already onerous and amorphous concept in our judicial process. A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case. A technicality arises if a party quickly takes an immediately available opportunity, however infinitesimal it may be, to work against the merits of the opponent's case. In other words, he holds and relies tenaciously unto the rules of court with little or no regard to the justice of the matter. As far as he is concerned, the rules must be followed to the last sentences, the last words and the last letters without much ado, and with little or no regard to the injustice that will be caused the opponent."[20]

Technical justice or technicalities in the dispensation of justice is akin to a judicial system rooted in Common Law. This makes justice a slave to the dry letters of the law and consequently reduces it to legalism. Idowu[21] stated that the practice of technicalities or technical justice is rooted in the Common Law of England which is one of the cardinal sources of the Nigerian legal jurisprudence. The Common Law is well known for its rigidity and inflexibility and hence after its incorporation

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13 See *APC v. Machina,* Suit No.: SC/CV/1689/2022; [2023] LPELR- 59953 (SC)

14 *[1863] 143 ER 414*

15 King James version, *Bible*, Genesis 3:11.

16 *Let justice be done though the heaven falls.*

17 [2011] LPELR-9199 (CA) 24, Para A-E.

18 [2007] LPELR – 3534 (SC).

19 [1992] 4 NWLR (Pt. 234) 248.

20 Adeleke v. Oyetola: Technicality and the Judicial Process, reported in the Cable, July 29, 2019 <accessed on 28th August, 2023>

21 O I Idowu, *The Supreme Court of Nigeria and the Stains of Justice by Technicalities: Why APC v. Machina is Wrong*, (2023) 3 (1) Redeemer's University of Nigeria Journal of Jurisprudence and International Law, 5.

into our legal system, the inherent rigid rules and technicalities became part and parcel of our judicial and legal system till present.[22] The effect or consequence of technicalities is that a cause of action though within the jurisdiction of the court could still be defeated for want of form or failure to file the appropriate Writ.[23] In other words, any error in mere form is sufficient to terminate a cause of action without even a hearing and determination of the facts of the case or the substantive suit. The Supreme Court in *Akeredolu v. Abraham*[24] held thus:

> Technicality in the administration of justice shuts out Justice. A man denied justice on any ground, much less a technical ground, grudges the administration of justice, it is therefore better to have a case heard and determined on merit than to leave the Court with a shield of 'victory' obtained on mere technicalities.

The recent case of *APC v. Machina*[25] is a *locus classicus* on this point.

The facts of the case in brief were that pursuant to the Independent National Electoral Commission (INEC) guidelines, the All Progressives Congress on 28th May, 2022, conducted a valid primary election in respect of the Yobe North Senatorial District wherein Bashir Sherrif Machina emerged as the undisputed winner under the statutory supervision of INEC. Ahmed Lawan[26] was absent and did not participate because he voluntarily withdrew his candidature to pursue nomination as a presidential candidate. Subsequently, the APC conducted another primary election on 9th June, 2022 where Lawan emerged as the candidate and in which Machina did not participate. This second primary election was in breach of Section 84 (5) of the Electoral Act as APC never cancelled the primary election that produced Machina. Also, INEC did not monitor/supervise the second primary election that produced Ahmad Lawan and was not put on notice either by the APC. However, the APC strangely forwarded Lawan's name to INEC as its duly elected candidate for the Yobe North senatorial district election. Aggrieved by the wrongful exclusion of his name, Machina approached the Federal High Court (FHC) in Damaturu, challenging the action of the APC and among other things sought an order declaring him as the APC's authentic and valid candidate for the Yobe North Senatorial district. The suit was commenced by Originating Summons[27] in line with the Practice Direction of the Federal High Court which specifically prescribes Originating Summons as the form of commencing pre-election matters. In the supporting affidavit accompanying the Originating Summons, allegations of criminality (fraud and forgery) were raised against the APC. The totality of the arguments canvassed by the parties was: Whether, in consideration of the provision of Section 115 (1) (d)[28] of the Electoral Act, 2022,

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22 An example of a legal principle which reflects the rigidity of Common Law is the *locus standi* principle which still heavily applies in our judicial system.

23 *APC v. Machina* Suit No. SC/CV/1689/2022, [2023] LPELR- 59953 (SC); In *Pinnel v. Cole* [1602] 5 Co. Rep 117a, Lord Coke recognized that the Plaintiff ought to fail in his action based on the merit of the case, yet succeeded as a result of the technical flaw in the Defendant's pleadings. At the time, Common Law was expressed in Latin as *forma non observata infertur adnullatio actus* meaning, when forms are not observed a nullity of the act is inferred.

24 [2018] LPELR- 44067 (SC)

25 Suit No. SC/CV/1689/2022, [2023] LPELR- 59953 (SC)

26 The immediate past President of the Senate and Senator representing Yobe North Senatorial District in the National Assembly (Senate- the Upper House and otherwise known as the Red Chambers)

27 This is one of the forms of commencement of a suit in a Court of Record or superior court and this form or mode is employed where a litigant or party seeks the interpretation of the law and actions and sets questions for the court to determine. It is used where the facts are not contentious and is supported by an affidavit which sets out the facts.

28 The section provides thus: "A person who signs a nomination paper or result form as a candidate in more than one constituency at the same election, commits an offence and is liable on conviction to a maximum term of imprisonment for two years." This was clearly a question of interpretation for which Originating Summons was the right and proper way to raise and determine the issue.

Senator Lawan could have lawfully participated in the 2022 Presidential and Senatorial Primary Elections of the APC?

The Plaintiff successfully challenged his party, the APC, at the Federal High Court and same was upheld on appeal by the Court of Appeal.[29] The Defendant not satisfied with the decision of the Court Appeal appealed at the Supreme Court. Before the Supreme Court, the question as raised by the APC was whether Machina's case was properly commenced at the trial court considering that allegations of fraud and forgery were raised in the grounds of the Originating Summons and allegations of facts of fraud and forgery were adduced or averred in the affidavit inn support.

In a strange twist, the Supreme Court allowed the appeal solely and on the ground that the action was wrongly instituted by way of an Originating Summons rather than by Writ of Summons since in the wisdom of the apex matter, the case was contentious in nature by virtue of the fact that there were allegations of fraud made by the Plaintiff. Consequently**,** the Supreme Court in a split decision of 3 against 2 dissenting judgments ruled[30] that the Defendant (Lawan) was the All Progressives Congress (APC) senatorial candidate for Yobe North Senatorial District instead of the Plaintiff (Machina). The two dissenting Justices held that the second primary election which produced Lawan was held in breach of the Constitution of the Federal Republic of Nigeria[31] and the Electoral Act, 2022[32] and consequently upheld the findings of the Federal high Court and the Court of Appeal as the APC never cancelled the earlier election held on 28th May, 2022 in respect of which Lawan had voluntarily withdrawn and did not participate in.

It should be noted that in the instant case, Machina followed the laid down procedure in the institution of the action. The Practice Direction of the Federal High Court specifically prescribes Originating Summons as the form of commencing pre-election matters.[33] However, because Machina had included "fraud" in his allegation as earlier stated, the apex court reasoned that he ought to have sought judicial intervention through a Writ of Summons because of the criminal nature of the allegation. While this position resonates with the law, because the Supreme Court has held in a plethora of authorities that the rules of court supersedes a practice direction; and by the rules of court, an allegation of fraud should be brought by way of Writ of Summons. However, it is also trite that the failure of a party to initiate proceedings by the appropriate mode is not fatal to his case. It is a mere procedural irregularity that can be cured by simply converting the suit to the proper mode. It is trite that equity follows the law. Equity won't look at the form but the substance of the matter. Where the Court puts form over substance then it adheres to a barren technicality. The age-long principle of law is that where an action is commenced by the wrong form, the proper thing for a court to do in such circumstances is to order the Plaintiff to bring the matter by the appropriate mode and not to dismiss the matter as the apex court did. This is the position the apex court adopted in *Udo v Registered Trustees of B.C.S.*[34] on *whether commencing action by wrong procedure constitutes jurisdictional issue* held thus:

> Commencing an action by wrong procedure does not constitute a jurisdictional issue since the lapse, except where specifically stated in the rules of court, does not defeat the Claimant's cause of action. If the subject matter of the Plaintiff's action is within the jurisdiction of the court, the cause of action would not be abrogated simply because it has been commenced by the wrong procedure. The lapse in that

[29] The Federal High Court and the Court of Appeal delivered their judgment on 28th September, 2022 and 28th November, 2022, respectively.
[30] The judgment was delivered on 6th February, 2023.
[31] S 285.
[32] S 84 (5).
[33] S 4 (1) Federal High Court Practice Direction.
[34] [2015] EJSC Volume 7 155 at page 158.

> regard is only an irregularity that gives the Defendant the right to insist that the Plaintiff adopts the proper procedure in approaching the court.[35]

In my opinion, and with due respect to the apex court, I do not subscribe to the view that the suit ought to have been instituted by way of Writ of Summons because the matter before the trial court was an issue relating to the interpretation of the Electoral Act and whether APC's action in submitting the name of another candidate (Lawan)- after it had conducted a primary election earlier where Machina emerged as a candidate is valid in the eyes of the law. It was an issue that could be resolved by affidavit evidence. This is supported by the Federal High Court pre-election practice direction, 2022 by virtue of section 4 (1) which states that pre-election matters should be instituted by originating summons. Relying on the fact that rules of court supersede practice direction to dismiss a cause of action is technical and barren justice to say the least.

It is trite that the essence of law is to serve as a vehicle for delivery of justice in our courts of law. Iguh, JSC, in *Famfa Oil Ltd v. A.G. Federation*[36] lucidly stresses this point thus:

> Accordingly, Courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedure irregularities that occasion no miscarriage of justice".[37]

Substantial Justice

According to the Black's Law Dictionary,[38] substantial justice is defined as "justice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." Substantial justice is justice on objective consideration of the merits or otherwise of a case. The Supreme Court in *Udo v Registered Trustees of B.C.S.*[39] on duty on court to do substantial justice held thus:

> The overriding duty of courts, including this court, however, is to do substantial justice between parties, a principle which entitles the appellate court to find exceptions to their primary duty of determining appeals solely on the basis of the issues raised and determined at the court below…

The spirit of substantial justice is rooted in the Latin maxim *fiat justitia ruat caelum,* which means "let justice be done though the heaven falls." "When the law becomes a science and system, it ceases to be justice."[40] This form of ideology has offended the law enthusiasts, who are of the opinion that the rules are integral parts of the law and any attempt to downplay the rules will make the law lifeless and susceptible to the whims and caprices of any judge.

The astute English legal luminary, Lord Denning, in addressing the endless and ever recurring conflict between justice and technicalities had this to say thus:

> My root belief is that the proper role of the judge is to do justice, if there is any rule of law which impairs the doing of justice, then it is the province of the judge to do

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35 See, *Okotie-Eboh v Okotie-Eboh* [1986] 1 NWLR (Pt. 16) 264; *Ijebu-Ode Local Government v Adedeji Balogun & Co. Ltd.* [1991] 1 NWLR (Pt. 166) 136.

36 [2003] LCN/ 3068 (SC); Suit No.: SC/305/2002, [2003] 18 NWLR (Pt. 852) 453.

37 See also, *Consortium MC v. N.E.P.A* [1992] 6 NWLR (Pt. 246) 132 at 142; *Bello v. A.G. of Oyo State* [1989] 6 NWLR (Pt. 45) 828; *Okonjo v. Dr Odje* [1985] 10 SC 267*; Falobi v. Falobi* [1976] NMLR, 169.

38 9th edition, p. 943.

39 [2015] EJSC Volume 7, 155 at page 156.

40 Walter Savage, English poet and philosopher.

> all he legitimately can to avoid the rule, even to change it, so as to do justice in the instant case before him.[41]

The Supreme Court in some of its judicial pronouncements had towed a similar path. In Dapianlong *v* Dariye[42] the erstwhile Chief Justice, Walter Onnoghen J.S.C., wittingly stated:

> "The reign of technical justice is over, on the throne now sits substantial justice, long may you reign, substantial justice."

In *Salawu Ajide v Kadiri Kelani*[43], Oputa J.S.C. (Rtd.), on the need for truth to prevail in order to ensure justice is done poignantly cautioned that:

> Justice is much more than a game of hide and seek. It is an attempt to discover the truth, on human imperfections, notwithstanding. Justice will never decree anything in favour of so slippery a customer as the present Defendant/Appellant on this note, our courts have admitted that justice and truth are on the same ticket and that in doing justice the courts and all ministers in her temple, that is lawyers and all other stakeholders, must strive at discovering the truth regardless of legal technicalities.

In *Aigbobahi v Aifuwa*[44], the Supreme Court on *Duty on Supreme Court as apex court to do substantial justice rather than technical justice* held thus:

> The Supreme Court is the court of last resort in some appeals in Nigeria. The attitude of the Supreme Court has changed from doing technical justice to doing substantial justice. This attitude envisages the possibility of hearing everyone on any complaint so as to enthrone and sustain the rule of law

The Court of Appeal in *Aturu v Akinleye*[45] held that cases must be fought not by mere technicalities but by determination of the substantial issues before the court. It is the duty of courts to aim at and do substantial justice.

It is trite that the law does not command the impossible but however and sometimes, we have seen judicial decisions apparently commanding the impossible and then using the hammer of technicalities to strike out or dismiss the merits of a case. In *Labour Party v APC*[46], the Court of Appeal held that a subpoenaed witness must frontload his witness deposition at the time of the filing of a petition.[47]

Okoro JCA., in *BALOGUN V. E. O. C. B (Nig.) Ltd*. said:

> Good law, in my opinion must have a human face; good law should not patronize technicalities that will give rise or room to undeserved victories in litigation. Good

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41 Joshua Ogwu, 'An Inspection of the Legal Tussle between Technicalities and Substantial Justice: A Need for balance' (2020) available at >https://unilaglawreview.org/2020/05/15/an-inspection-of-the-legal-tussle-between-technicalities-and-substantial-justice-a-need-for-balance/< accessed 28th August, 2023.

42 [2008] 8 NWLR (Part 1036) 332.

43 [1985] 1 NWLR 248 at 269.

44 [2006] All FWLR Pt. 303 202 at page 208.

45 [2006] All FWLR Pt. 337 526 at page 528.

46 Petition No.: CA/PEPC/03/2023 [Unreported].

47 Under the Electoral Act, 2022, a Petitioner has 21 days to file his petition against any election result and usually at the time of filing a petition, the Election Tribunals are yet to be constituted and inaugurated. In addition, a petitioner may not know if there may be need to file an application for a subpoena and have a witness subpoenaed with his witness deposition frontloaded with the petition. The practice is to apply to the court after commencement of trial to apply for a witness to be subpoenaed as the need arises and if necessary and this usually arises only after issues have been joined and the Respondent denying any allegations of facts in the Petitioner's or Plaintiff's claim which can only be rebutted by calling a subpoenaed witness to testify.

> law should discourage technicalities … good law will not encourage a situation where a party in litigation will only return home with pyrrhic victory which in reality is no victory at all.[48] The court is more interested in substance than in mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice.[49]

In affirming the above in other words, the Supreme Court in *Boniface Ebere Okezie V. Central Bank of Nigeria* held thus:

> Justice does not reside in the form of the processes of the court. Where there are sufficient provisions in the Rules of the court to sustain an action, the rules of natural justice demand that parties should be heard with a view to resolving their dispute once and for all. It is in the interest of justice that parties are not shut out prematurely from being heard in accordance with the laid down procedures in the court's Rules.[50]

In *Akeredolu v Abraham*[51] the Supreme Court in that case had said that:

> Technicality in the administration of justice shuts out Justice. A man denied justice on any ground, much less a technical ground, grudges the administration of justice, it is therefore better to have a case heard and determined on merit than to leave the Court with a shield of 'victory' obtained on mere technicalities.

The importance of substantial justice and fairness are vital such that where the letters of law [52] will occasion injustice to any other party in a judicial litigation or adjudication, the spirit of the law should be applied notwithstanding the direct, explicit and implicit letter of the law, otherwise, the party who succeeds by invocating the letters of the law will 'leave the Court with a shield of victory obtained on mere technicalities'.[53]

It is pertinent to state that the Constitution of the Federal Republic of Nigeria, 1999 contemplates and envisages that matters brought to the court for adjudication be heard on the merit and not to be struck out or dismissed on grounds of technicalities without being heard. The Constitution proceeds to state the function of the judiciary as to "extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person."[54]

Technicalities/Technical Justice and Substantial Justice: Striking a balance or finding an equilibrium

The conflict between technicalities or technical justice and substantial justice in our judicial system is a recurring decimal and perhaps a shifting parabola that plagues the dispensation of justice. Sometimes, Attorneys and Judges are often caught up more in procedure than in achieving justice by placing emphasis and reliance on technical justice or technicalities which are largely anchored on strict adherence to the letters of the Rules of court above substantial justice. This negates the spirit of natural justice, fairness and equity particularly when there is a meritorious cause of action.

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48 [2007] 5 NWLR (Pt. 1028) 584.
49 *Ibid.*
50 [2020] 15 NWLR (Pt. 1747) 181.
51 [2018] LPELR- 44067 (SC).
52 Especially Rules of Courts.
53 Akeredolu v Abraham [2018] LPELR- 44067 (SC).
54 S. 6 (6) (b).

However, the point must be made that where there is a need to approach the Court to enforce a right, duty, responsibility, obligation or redress, guaranteed by the law, it is proper to look at the legal procedures and processes to see whether the provisions of the law that established the Court, the rules, regulations and practice directions of the Court has been followed. This is because it is through the proper initiation of the provisions of adjectival laws that the provisions of substantive laws are enforced. This ensures that the substantive law is interpreted and enforced with predictability, certainty and stability.

Legal justice implies the application of the law as it is. This ordinarily implies that all the laws of the land, including procedural laws and rules of courts must be adhered to by all the litigants seeking justice before the court. However, in approaching the Court, there is probability of making mistakes inadvertently which in turn may lead to defect, failure, or mistake in a legal proceeding or lawsuit. These possible mistakes are normally described as irregularities which are departures from a prescribed rule/regulation prescribed by the adjectival law that should not be punishable either with a striking out or dismissal.[55]

Therefore, a distinction must be made between mere irregularities which are not and should not be fatal to a cause of action and substantial procedural irregularities which are fatal and irredeemable. The provisions of the Rules of Court are intended for the orderly conduct of cases before the Court and are therefore required to be complied with by litigants.[56] There are broadly speaking two types of irregularities in Law: substantial irregularities and non-substantial irregularities. The treatment the Court will accord a given irregularity depends on its nature and effect in law. When a non-substantial irregularity is discovered and proved to exist during a judicial procedure, if curable, the Court will grant leave to the party in error to correct the irregularity subject to the conditions specified by the trial Court so that the cause of action is not nullified.

In other words where non-compliance with the provisions of the rules is not intrinsically fatal to the proceedings the Court has the discretion under the rules to waive such non-compliance as a mere irregularity. Generally, a Court has the inherent powers and discretion to bend forward or backward and direct a departure from the provisions of its rule where the interest of justice so requires[57] to accommodate technical defects in a given proceeding.

Therefore, where a procedural irregularity can be cured without causing any injustice to the adverse party, an amendment will be granted to rectify the anomaly and restore normalcy. Such discretionary power may be granted to correct the name of a party even if doing so will have the effect of substituting a new party, provided the Court is satisfied that the mistake in question, being sought to be corrected, is honest, genuine and not one which will overreach and unduly encumber the adverse party. For example, the Court can also allow a plaintiff to amend his writ even after final judgment in the proceedings has been entered, for the purpose of substituting a party's correct name for the incorrect one.[58] The Court may enlarge the time provided by the rules for the doing of anything to which the rules apply, or may direct a departure from the provisions of the rules in

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55 Example, See Order 5 Rules (1), (2) and (3) of The High Court of Imo State (Civil Procedure); Order 2, High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2007; Order 5 of High Court of Ondo State (Civil Procedure) Rules, 2012; Rules, 2017, Order 5, Rule 1, the National Industrial Court Rules, 2007 (NIC Rules, 2007).

56 O D Amucheazi and P U Abba, *The National Industrial Court of Nigeria: Law, Practice and Procedure*. (Wildlife Publishing House, 2013), p. 124.

57 Order 21, Rule 2, Court of Appeal Rules, 2016; *Ogundalu v Macjob* (2006) 7 NWLR (Pt. 978) 148

58 Hon. Justice Mossud Abdurrahman Oredola, J.C.A. in *Njoku & Ors. v Onwunelega*, [2017] LPELR-43384 (CA), Pp. 41- 42

any other way where departure is required in the interest of justice.[59] It therefore goes without saying that mere irregularity does not go to the root of the cause of action and consequently does not divest the court of its statutory and inherent jurisdiction to hear and determine the cause of action on the merit.

On the other hand, once an irregularity is found to be substantial, the process becomes incompetent because same is ineffectual in conferring jurisdiction on the Court. It is the law that an incompetent process cannot be amended.[60] The Supreme Court in *Dickson Ogunseinde Virya Farms Ltd. v Societe Generale Bank Ltd*[61] reiterates that:

> A litigant cannot be heard to complain about fair hearing when the applications (s) he placed before the Court were incompetent. 'That is the exception to the fair hearing principle as it only applies where the party has the right to be heard and when that right does not exist on account of a process that is incompetent or dead on arrival, then the party has no leg on which to stand to cry out about fair hearing. Substantial irregularity is any irregularity that goes to the root of the proceedings or process. For instance, the failure to commence proceedings with a valid writ of summons goes to the root of the case and any order emanating from such proceedings is liable to be set-aside as incompetent and nullity because, 'it clearly borders on the issue of jurisdiction and the competence of the Court to adjudicate on the matter'. [62]

It is now settled law that Courts should not decide cases or resolve issues on mere legal technicalities.[63] Where a litigant inadvertently approaches a Court for the redress by a wrong procedure, it will amount to mere technicalities or irregularity to base a defence to such action on the fact that the action was instituted by wrong procedure.[64] At most, the adverse can only insist that the proper procedure be adopted but not to canvass for the striking out or dismissal of the suit. A person whose rights have been violated must be free to seek redress for such wrongs in the Courts.[65]

An irregularity is substantial when it touches on the legality of the whole proceedings or process and in such situation the technical failure is not a mere technicality but an irregularity that is transcendent to the realm of validity. A substantial irregularity is the one which causes a proceeding to have a smell of judicial sacrilege and to allow that kind of trial which is hostile to the law to stand is in itself, denial of fair of hearing.[66] A breach of a mandatory constitutional provision is more than a mere technicality, it is fundamental. The breach vitiates the entire proceedings before the Court.[67] So also a litigant must adhere strictly to his pleading, hence a litigant who ignores his pleadings and made a different case at the hearing will not be allowed to claim that such inconsistency is a mere technicality.[68] It is the law that parties must be consistent in presenting their cases to the Court. This means that the pleadings and the oral evidence or witness deposition should tell the same story because this goes to the root of the case and the rule

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59 Order 2, Rule 31, Rules of Supreme Court of Nigeria; Order 44 Rule 4, Imo State High Court (Civil Procedure) Rules, 2017

60 25 Nigeria Army v Samuel [2013] 14 NWLR (Pt. 1375) 466 at 483.

61 [2018] LPELR- 43710(SC).

62 *Kida v Ogunmola* [2006] All FWLR (Pt. 327) 402 at 412 - 413, [2006] 13 NWLR (Pt.997) 377 at 394.

63 E*golum v Obasanjo* (1999) 7NWLR (Pt. 511) 255, 413.

64 *General Sani Abacha & Ors v Chief Gani Fawahinmi* (2000) 6 NWLR (Pt. 660) 228.

65 S 6 (6) (b) CFRN, 1999.

66 Ojasanmi v FGN: (2018) LPELR-44331(CA).

67 Alhaii Nuhu v Alhaji Ogele (2003) 18 NWLR (Pt. 852) 251.

64 Kode v Yussuf (2001) 4 NWLR (Pt. 703) 392.

of pleadings. It is loud law that parties are bound by their pleadings and cannot give evidence in contradiction to their pleadings. In effect, a party cannot depart from his pleadings and give evidence of facts not duly pleaded therein, such departure is not in the eye of law a mere technicality but a substantial irregularity that goes to the root of the departing party's case since same has the potentiality to overreach and do injustice to the other party.[69]

It is an irredeemable irregularity for judicial officer(s) who did not sit through a trial to deliver judgment in the case. The main function of the trial Court is to see and observe the witnesses. 'He watches their demeanour, candour or partisanship, their integrity, manner etc. He can therefore decide on their credibility and this affects a substantial part of his findings of fact'.[70] The opportunity of a Court or Tribunal to observe the demeanour of a witness is an indispensable aspect of procedural jurisprudence, which is rooted in fair hearing.[71] Consequently, the Supreme Court in *Adeleke v Oyetola*[72] held that the decision of the Electoral Tribunal was a nullity because Justice Obiora who read and pronounced the majority judgment at the Tribunal was evidently absent from the proceedings, at least, one of the days of the trial and the failure of the absent panelist to be present on that day meant that the tribunal lacked the authorities to have given any judgment in the entirety of the matter.

The Supreme Court's majority decision in *Adeleke v. Oyetola* follows the West African Court of Appeal authority in the case of Nana *Tawiah v. Kwesi Ewudzi*,[73] where it was discovered that at least two of the Tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence. Thus, the Court (WACA) came to the conclusion that the absence of the judges "vitiates the whole trial, and in my opinion this Court has no option but to declare the whole proceedings before the Tribunal and the Provincial Commissioner's Court a nullity".[74]

Another instance of substantial irregularity that is incurable is when a process, for example, an election petition is not filed within the time specified[75] or the fees statutorily prescribed are not paid.[76] Generally, other forms of substantial irregularities include where a matter is filed before a Court that lacks jurisdiction to entertain the matter, non-service of relevant processes (including hearing notices) and in all these situations the procedure will amount to a nullity.[77]

The question that should be pertinent in coming to a resolution of this ever recurring conflict is whether an irregularity is fundamental and impacts negatively on the merit of a case? It must be borne in mind that the whole purpose of law and rules of Court is to ensure that the affairs of the Court during the administration of justice are carried out in an orderly fashion with reasonable degree of certainty that prescribed acts have been duly complied with by the parties in the interest of justice.[78] Thus, where the law prescribes a way of carrying out an act, such is the only way to be followed, when a date is specified for the doing of an act, that date becomes sacrosanct. This is because the rules of Courts and practice direction are made to be obeyed and no favour should be

69 *Kode v Yussuf* (Supra).
70 *Okereke v The State* (2016) 1 SCM 99 at p. 113.
71 *Woluchem v Gudi* (2004) 3 WRN, 20.
72 SC/553/2019.
73 3 WACA 52.
74 *Ibid*.
75 Electoral Petitions must be filed within 21 of the announcement of the elections results. See section 285 (5), Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010.
76 Paragraph 3 (4), First Schedule to the Electoral Act, 2010 (as amended).
77 *Okafor v A. G. Anambra* State (1991) 6 6 NWLR (Pt. 200), 659.
78 *F. S. B. Int. Bank Ltd Vs. Imano* (Nig.) Ltd [2000] 11 NWLR (Pt.679) 620 at 634.

shown for not obeying same.[79] However, it has also been judicially noted that strict and unreasonable adherence to technicality in the administration of justice shuts out justice.[80]

Technicalities, substantial justice and fair hearing

The conflict between technicalities and substantial justice centrally borders on procedural correctness and substantive fairness. It is in the interest of justice that parties are not shut out prematurely from being heard in accordance with the laid down procedures in the court's Rules. The whole essence of fair hearing is to ensure that parties are heard on the merit or strength of their case and that same is determined on the merit void of technicalities. This perspective supports the concept of justice been done in the eyes of a layman who leaves the court with the impression and satisfaction that justice has been done. It is a notorious principle of law, and also an essential attribute of the administration of justice that justice must not only be done, but it must manifestly be seen to have been done.[81] What this lucidly means is that it is not merely of some importance, but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[82]

In *Obaro v Hassan*[83] on test of fair hearing Per O. Ariwoola, JSC, said:

> In *Alhaji (Chief) Yekini Otapo v Chief B. O. Sunmonu*,[84] on the test of fairness in the trial and appellate courts, this court per Obaseki, JSC, states as follows:… The true test of a fair hearing is the impression of a reasonable person who was present at the trial, whether from his observation justice has been done in the case…

The court furthermore, on the importance of rules of court and failure to obey held thus:

> Rules of court are very vital in the process of justice administration. They are meant to be obeyed. Failure to do so can be counterproductive or negatively costly at times. A party who fails to obey court rules does so at his own peril. He can hardly be heard to complain.[85]

In *Boniface Ebere Okezie v. Central Bank of Nigeria*[86] the Plaintiffs filed an action by way of Originating Summons at the Federal High Court, Lagos, under section 303 of the Companies and Allied Matters Act, seeking leave of court to challenge the actions of the CBN Governor, on behalf of Union Bank of Nigeria, by derivative action. In the Originating Summons, the Plaintiffs did not raise any questions for answer, but set out their claims in declarations, injunctive reliefs and damages. In response to the Originating Summons, the Defendants filed a notice of preliminary objection, challenging the competence of the suit and the jurisdiction of the court to hear and determine the action of the Plaintiffs. The preliminary objection was heard and upheld by the trial court on the ground that the Originating Summons did not contain questions for determination. The appeal to the Court of Appeal was dismissed as lacking in merit, whereupon the Plaintiffs further appealed to the Supreme Court. The Apex Court wasted no time in chastising the trial court and the Court of Appeal, for clinging to technicality to rob the Plaintiffs of justice. The Court held as follows:

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79 *Williams v Hope Rising Funds Society* [1982], 2 SC 145 quoted with approval in *Jimoh O. Ojugbele v Mr. Musefiu O. Lamiidi* [1999] LPELR-CCN/1/99, Ratio 2.

80 *Akeredolu v Abraham & Ors* [2018] LPELR- 44067 (SC)

81 *Administrator & Executor of the Estate of Abacha v. Eke-Spiff & Ors* [2009] LPELR – 3152 (SC)

82 *R v. Sussex Justices Ex parte Mc Cathy* (1924) 1 K.B. 256 at 259

83 [2015] EJSC Volume 8, 126 at page 137

84 [1987] NWLR (Pt. 58), 587, [1987] LPELR 2822, [1987] 5 SC 228

85 See also, *Afolabi v Adekunle* [1983] 8 SC (Reprint) 75, [1983] 14 NSCC 398 at 405 and *University of Lagos v Aigoro* [1985] 1 NWLR (Pt. 1) 143.

86 [2020] 15 NWLR (Pt.1747) 181.

> There is need to keep the focus on the substantiality of justice and so each of these forms is valid as an originating summons for the determination of any question of right or of construction under an enactment.

Justice does not reside in the form of the processes of the court.

> Where there are sufficient provisions in the Rules of the court to sustain an action, the rules of natural justice demand that parties should be heard with a view to resolving their dispute once and for all. It is in the interest of justice that parties are not shut out prematurely from being heard in accordance with the laid down procedures in the court's Rules.
>
> There was no basis for the conclusion of the two courts below that the originating summons of the appellants was bad and must be struck out for not stating questions for determination. For effect, it was certain that the two courts below went the wrong way in reaching their conclusion and a miscarriage of justice ensued in the erroneous application of the procedural law or rules, hence the necessity for the Supreme Court's intervention and to come against concurrent findings of fact of two courts.

The paramount duty of courts is to do substantial justice and not cling to technicalities that will defeat the ends of justice. It is more in the interest of justice that parties are afforded reasonable opportunity for their rights to be investigated and determined on merit rather than parties shut out prematurely from being heard on the grounds of non-substantial compliance with rules of court. It is immaterial that there are technicalities arising from statutory provisions or technicalities inherent in rules of court. So long as the law or rule has been substantially complied with and the object of the provisions of the statute or rule is not defeated, and failure to comply fully has not occasioned a miscarriage of justice, the proceedings will not be nullified.

It must be borne in mind that as much as law is designed to dispense justice, there are safeguards provided by law to ensure its certainty and purity. When such safeguards are violated, then justice cannot be dispensed. This is different from "mere technicality". This is where the line is drawn and perhaps tenuous. A few examples will help. Courts have their jurisdiction spelt out in the Constitution and the statutes that create them.[87] If a litigant approaches the wrong court and a full trial is conducted where he ventilates all his grievances and he gets "justice", that justice will be short-lived as he is most likely to get a reversal of his euphoric justice on appeal. Another example is where the Defendant or someone affected by the outcome of a case is not served[88] with the originating documents of the suit, any judgment (or "justice" in our context) obtained through such process is likely to suffer a reversal on appeal by the person not served. A suit brought out of the time permitted under the limitation law for a suit to be commenced no matter how well the "justice" (again in our context) is dispensed will ultimately amount to nothing. There are so many examples of issues which may at a first look or appear technical, but which a deeper consideration will clearly show to be so fundamental to justice that they transcend the realm of mere technicalities in that they are not just simple matters of procedure, but matters which actually ensures that justice is dispensed.

The preceding paragraph is particularly true in election petitions which have been described as "*sui generis*", that is, in a special class. There are so many laws guiding the conduct of election matters. A few examples will be necessary. The constitution provides that election petitions are to

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87 Ss. 232, 239, 251, 257, 262, 267, 272, 277 and 282 of the Constitution of the Federal Republic of Nigeria.

88 Service of court processes is what among other requirements that confers jurisdiction on the court over the parties before it.

be commenced within 21 days, anything outside this stipulation will render any petition invalid. Judgment in an election[89] petition must be delivered in writing within 180 days any judgment which falls short of this constitutional requirement will sound a death knell for the Petition[90]. Therefore, if the Court holds a party to the standard required by these laws on the insistence of his adversary, the agreement of the court with such adversary will not be undue technicality, it will be obedience to the law. In marrying this scenario with the case of *Adeleke v Oyetola*[91], the Supreme Court upheld the decision of the Court of Appeal that the Judge who delivered the lead judgment at the tribunal was not present when some witnesses testified before the tribunal and therefore did not listen, see, or watch the witnesses and assess their demeanour but that in his Judgment he reviewed, assessed and applied the evidence of witnesses who testified in his absence, to give Judgment in the Petition. The Supreme Court held the same position in *Shanu v Afribank (Nig.) Ltd*.[92] and *Nyesom v Peterside*.[93] Indeed, as far back as the days of the West African Court of Appeal, the Court held in the case of *Nana Tawiah v Kwesi Ewudzi*[94] that thus:

> It is clear that at least two of the Tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence. This vitiates the whole trial, and in my opinion this Court has no option but to declare the whole proceedings before the. Tribunal and the Provincial Commissioner's Court a nullity.

The rationale for these decisions is Section 36 of the Constitution of the Federal Republic of Nigeria which makes copious provisions regarding fair hearing. It dictates that the composition of a panel is intrinsic to the fulfilment of the fair hearing requirements of the constitution. The right to fair hearing is a substantive right guaranteed by the constitution, obeisance to the constitutional provision guaranteeing fair hearing cannot by any stretch of ingenuity be a matter of technicality.[95]

The consequence of any decision reached in contravention of the fair hearing provision of the constitution is that the decision is a nullity. In *Dingyadi V INEC*[96], the Supreme Court stated the effect of proceedings held in breach of the right to fair hearing thus:

> The law is trite that the effect of breach of the right of fair hearing in any proceedings of Court as happened in the instant case rendered the proceedings including the judgment of 10th March, 2010 dismissing the appeal, a complete nullity.

Usually, the main argument of those who hold steadfast to technicalities is to rely on form to wave the age old cliché of miscarriage of justice or lack of jurisdiction which many advocates wave like a magic wand. I am of the opinion that where parties are not mistaken as to the nature of any event that occurs at trial, then it would amount to resorting to mere technicality because of form. In other words, form should not and never take precedence over substance more especially where the facts of the case are not either materially affected or affected in any way at all such as to weigh or bear on the outcome or end product.

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89 S 132 (7) and (8) of the Electoral Act, 2022.
90 S 285 (6) CFRN, 1999, S 132 (8) Electoral Act, 2022
91 Reported in 2019.
92 [2002] LPELR -3036 SC.
93 [2016] 7 NWLR (Pt. 1512) 452 @ 504.
94 3 WACA 52.
95 S 1 (1) of the CFRN, 1999 establishes it as supreme over all persons and authorities and subsection (3) provides that anything inconsistent with it is null and void.
96 [2010] LPELR– 40142 (SC), *Rasaki Salu v. Taiwo Egeibon* [1994] 6 S.C.N.J. 223, [1994] 6 N.W.L.R. (Pt. 348) 23 at 44.

In *EFCC v Kalu*[97], Senator Orji Kalu was charged alongside a former Commissioner of Finance of Abia State, Jones Udeogo and Slok Nigeria Limited for allegedly stealing over Seven Billion Naira from Abia State treasury. The Supreme Court quashed the judgment that convicted and sentenced the former Governor to 12 years imprisonment on the ground that trial Judge, Justice Mohammed Idris was no longer a judge of the Federal High Court as at the time he sat and delivered the judgment that convicted the defendants and as such lacked jurisdiction. According to the learned justices of the Supreme Court, Justice Idris, having been elevated to the Court of Appeal before delivering the judgment, lacked the *vires* to return to sit as High Court Judge. The apex court also held that the Fiat obtained by Justice Idris from the President of the Court of Appeal pursuant to section 396 (7) of the Administration of Criminal Justice Act ("ACJA") was unconstitutional.

The question to be considered at this stage is: how did the return of the Judge to deliver judgment cause miscarriage of justice having been the same Judge that presided over the trial, heard and took evidence of witnesses and witnessed their demeanours? Furthermore, how could a court that sat on a trial till the end before delivery of judgment suddenly lack jurisdiction to deliver judgment after trial? It can hardly be argued by any stretch of imagination or logic that it caused or led to a miscarriage of justice or that Justice Idris lacked jurisdiction to deliver judgment even in view of the Fiat obtained pursuant to the ACJA. It was a murder of justice on the altar of technicality.

Is it all matters that border on jurisdictional issue that must be quashed or nullified, especially where it does not lead to miscarriage of justice? It is trite that where a court lacks jurisdiction, the entire proceeding no matter how well conducted is a nullity. But I believe there should be a qualification to ascertain whether such lack of jurisdiction amounts to a miscarriage of justice, which should be the ultimate consideration. The issue of jurisdiction when raised most times, is merely a ploy to frustrate a good case on a technicality

In my opinion, the coming back of Justice Mohammed Idris from the Court of Appeal to the Federal High Court to deliver judgment in a matter he had been handling before his elevation to the Court of Appeal, had caused no miscarriage of justice. If anything, it has even done justice to all parties, because a judge who began the case, listened to witnesses, admitted evidence, heard counsel's adumbrations, also wrote and read the judgment. This is the position as envisaged by ACJA which the constitution perhaps, never envisaged. I do not think section 396 (7) ACJA is inconsistent with the Constitution. Rather, it is a welcome provision to fill up a lacuna long left uncovered by the constitution. The constitution does not expressly prohibit a judge of the High Court who had been handling a matter before being promoted to the Court of Appeal, from coming back to conclude his part-heard matters.

It was Walter Savage Landor, an UK (English) writer and poet who philosophized many years back that when law becomes a science and a system, it ceases to be justice.[98] In *Salawu Ajide v Kadiri Kelani*[99], Oputa J.S.C, on the need for truth to prevail in order to ensure justice is done poignantly cautioned that:

> Justice is much more than a game of hide and seek. It is an attempt to discover the truth, on human imperfections, notwithstanding. Justice will never decree anything in favour of so slippery a customer as the present defendant/appellant" on this note, our courts have admitted that justice and truth are on the same ticket and that in

[97] FHC/ABJ/CR/J6/07

[98] https://businessday.ng/opinion/article/of-technicality-justice-and-supreme-courts-decisions-1/ accessed on 28th August, 2023

[99] [1985] 1 NWLR 248 at 269

doing justice the courts and all ministers in her temple, that is lawyers and all other stakeholders, must strive at discovering the truth regardless of legal technicalities.

Recommendations

1. Emphasis should be placed to the effect that an action must be initiated by due process. It would be no injustice for a court to refuse entertaining a matter if it defaults in following the required process of the law. This should not be viewed as an anomaly, as the rationale behind this condition is to ensure sanity and check in legal processes. If the court is not stringent on such, gross abuse of process and illegalities will become the order of the day. Thus, if a substantive law spells out due process to be followed, the litigants should not be so negligent as to neglect the rules and argue technicalities with innocent faces in court. This was the position of the Supreme Court in *FBN* v *Maiwada*[100] where Fabiyi J.S.C., stated that no one should talk of technicality when a substantial provision of the law has been rightly invoked. This position reflects due process and rule of law.

2. Secondly, balance can only be achieved when the judiciary ensures that parties before the court get a fair hearing. In *Omoniyi* v *Central Board*[101] the Court of Appeal held that the true test of fair hearing is the impression of a reasonable person who was present at the trial and whether from his observation, justice had been done in the case. The judges in applying the rule of law to the facts of the case should have in mind that the end product of law is justice. Thus, they should be affirmed in all convictions that the trial was a fair one, whether controversial or not. The parameters for a fair judgment should be in line with *section 36 of the Constitution of the Federal Republic of Nigeria, 1999.*

3. Amendment of provisions of court rules or statutes that impose strict liability compliance and by extension, amendment of similar laws which establishes the courts and governs the institution of actions and conduct of proceedings. It is to be noted that judges do not make laws, but instead interpret the laws. The controversies that have paraded the legal scene on the issue of technicalities have always lingered on the interpretation of statute. The lack of precision and clarity in legal frameworks may somewhat move the judges towards applying judicial activism in offensive ways. There should be constant legislative reviews to enable the judges or courts ascertain the minds of the legislature on any matter.

4. There should be an adoption of a practice and procedure in our judicial system wherein all objections bordering on technicalities should be merged together with the hearing of the substantive suit and to incorporate all interlocutory appeals into the main case, such that the determination of the court can be made known on both in a single judgment, rather than pursue common issues of amendment or injunction up to the Supreme Court whilst the main case is guillotined thereby, on the altar of technicality.

Conclusion

Achieving a balance between substantial justice and technicalities is the ultimate safeguard for upholding the sanctity of justice. In the administration of justice every effort must be aimed at resolving or reducing social conflict and promoting social harmony. If justice is to be invoked rightly, then the law should be its solid backbone. Law and justice are inseparable and none can exist without the other. The system of dispensing justice is in two phases- the examination of the law and the application of the law to the facts. The judges depend on law to dispense justice and justice needs good laws to prevail.

[100] *Supra*.
[101] [1988] 4 NWLR PT 89 p. 448.

The judiciary must save itself from extinction and historical irrelevance; it must assert itself as the last hope of the common man, by ensuring that it digs very deep into each case presented before the court in order to give justice to those who deserve it. The incapacity of the court to do justice to the real issues before it goes back to the society itself, as litigants are then forced to embrace self-help, law enforcement agencies become dispute resolution merchants and arbitrariness sets in. We cannot continue to run a court system that delivers empty papers to the people as judgment, the contents of which do not birth any form of justice at all. A system where our learned justices are more interested in rewarding the brilliancy and creativity of lawyers in identifying loopholes and punching it, thereby sacrificing good judgment on the altar of mere technicality must be frowned at.

CYBERCRIME IN NIGERIA: ISSUES AND CHALLENGES

Emma Osuji[*]

Abstract

Information technology, especially the internet, has remained one of the most impressive scientific developments in the history of mankind. It has bonded personal relationships, facilitated trade and commerce across all levels, and made life easier. This welcoming benefit of internet advancement has also been identified as having its attendant problems, which include high growth rate of criminality known as cybercrime. This paper systematically investigates the challenges which inhibit the successful elimination of cybercrime in Nigeria. The paper emphasizes that weak enforcement mechanisms, a slow judicial process and the slow process of forensic analysis among others, contribute to the inadequacy of the fight against cybercrime. This paper puts forward recommendations for regulatory bodies which will bring about efficient and adequate prosecuting mechanism. This will ensure that this menace is minimized in Nigeria.

Key words: *Internet Technology, Cybercrime, Internet, Legal Framework.*

Introduction

Globally, digitalization and internet-based activities have grown, with Nigeria as no exception to the adaptation of the expansion.[1] As much as internet expansion in Nigeria has its advantages and disadvantages, the exponential rate of the usage of computers and the internet in numerous establishments has had a hugely beneficial influence,[2] on government, commerce, education and other spheres of activity relating to mankind. The alarming growth of the internet and its wide acceptance in society has led to an increase in security threats all over the world and in Nigeria too.

In Nigeria today, several internet-assisted crimes known as cybercrimes are committed daily in various forms, such as fraudulent electronic mails, pornography, identity theft, hacking, cyber harassment, spamming, spoofing, piracy and phishing[3] among others. It must be noted that cybercrime has become a threat to various institutions and internet users either through computers or mobile technology.

Hence, the rapid growth of computer technology carries with it the evolution of various crimes on the internet,[4] with Nigeria as no exception. Nigeria is the third most targeted country for cybercrime in Africa.[5] Between the first and second quarters of 2021 and now, there has been more than a 32 percent jump in Malware in Trojan horse attack in Nigeria.[6] By this, we mean that a Malware that misleads users of its true intent by disguising itself as a standard program is installed

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1 Anwana, E.J., Ogundale A.T., Olannde E.S., and Idem, U.J., "The Prosecution of Cybercrime in Nigeria: Challenges and Prospects. *researchgate.net/public*. Accessed 24/5/2023.

2 *Ibid*.

3 Omodunbi, B., Odiase, P.O., Olaniyian O., "Cybercrime in Nigeria: Analysis, Detection and Prevention" *researchgate.net/public*. Accessed 24/5/2023.

4 Okorie, C.K., and Mbachu S. C., Complexities, Issues and Challenges on Cybercrime in Nigeria (eds) Chukwumaeze, U.U. and Okorie C.K., Exellence at the Bench, Essays and Selected Judgments in Honour of Honourable Justice Bernadine Ngozi Ukoha, Administrative Judge, Owerri Judicial Division, Imo State Judiciary, 2019, 165.

5 The Guardian "How to Protect Yourself from Cybercrime in Nigeria" *guardian.ng/features /hc*. Accessed 24/5/2023.

6 *Ibid*.

to exploit security gaps unknown to the general public as well as access smart phone data before it becomes encrypted via other applications.

An application such as malware is used to perpetrate digital crime by anyone who actively seeks to exploit weaknesses in technology for illegal purposes.[7] This exploitation of weaknesses in technology which manifests in cybercrime, has done a lot of damage to individuals, government and the global community as a whole. It has become a major cause for concern worldwide including Nigeria, hence adequate mechanisms must be put in place to ensure that offenders of the said crime are properly prosecuted.

Conceptualization of Cybercrimes

Cybercrimes are transnational in nature.[8] Cybercrimes are crimes committed without the perpetrators being physically, present at the locus.[9] Cybercrimes are committed in the impalpable world of computer networks.[10] The Black's Law Dictionary describes cybercrime as cyber theft and defines it as the act of using an online computer service, such as one on the internet to steal someone's else property or to interfere with someone's else use and enjoyment of property.[11] It further cites examples of cyber theft as hacking into a bank account to wrongfully credit one's account and debit another and interfering with a copyright by wrongfully sending protected materials over the internet[12] among others.

Cybercrimes being technologically driven have continuously and ingeniously made it difficult for cybercrime investigators to find solutions to such cybercrime.[13] Crimes committed over the internet are very different in nature when compared to the physical world,[14] hence the difficulty in tracking offenders. Crimes relating to cyber space do not show any form of foot print, tangible traces or objects to track criminals down easily. They possess, huge amount of complications when it comes to investigations.[15]

Cybercrimes can basically be categorized into four parts, namely; against individuals, against property, against society and against organization.[16] Email spoofing is the act of sending email with false sender addresses, usually as a part of phishing attack designed to steal personal information or infect the computer with malware.[17] Cybercrime against individual also involves spamming which deals with the sending of multiple copies of unsolicited mails such as chain letters. Again cyber defamation is also an aspect of cybercrime against individuals, wherein someone publishes defamatory matters against a person through the email.[18] Cybercrimes against individuals involve spoofing. Spoofing as it pertains to cyber security is when someone or something pretends to be something else in an attempt to gain a victims confidence, get access to systems, steal data, steal money or spread malware. Spoofing attacks come in many forms including email spoofing, GPS spoofing, extension spoofing, Facial spoofing, caller ID spoofing, website and/or URL spoofing, among others.[19] Similarly, cyber stalking, which involves online

7 Bello, T., "Anatomy of Cybercrime in Nigeria: The Legal Chronicle *paoers.ssm.com*. Accessed 24/5/2023.
8 *Ibid*.
9 Welfinder, "Scope of Cyber Security" *www.wefinder24.com*. Accessed 24/5/.2023.
10 *Ibid*.
11 Gainer, B.A., Blacks Law Dictionary, West Group, St Paul Minn 1999, 392.
12 *Ibid*.
13 Weffinder, *op. cit.*
14 *Ibid*.
15 *Ibid*.
16 Mali, P., "Classification of Cybercrime" *www.lawyersdubindia.com*. Accessed 24/5/2023.
17 *https://www.malware.com/sppofing.* Accessed 24/5/2023.
18 *Ibid*.
19 *Supra*.

harassment where a person is subjected to a plethora of online message and emails which are intimidating in nature is another aspect of cybercrime against individuals.[20]

Another class of cybercrime is cybercrime against property.[21] Credit card fraud, intellectual property crimes, internet time theft which deals with stealing, destroying or misusing the source code are prevalent.[22] Cybercrimes can also be committed against an organization. This specie of cybercrime deals with unauthorized access to a computer network without the permission of the owner.[23] It can happen by way of deleting data or copying of confidential information. An organization's system can be contaminated for purposes of injecting a virus into it.

Cybercrime against society is another class of cybercrime that affects the society greatly.[24] In this instance, the cyber-criminal indulges in forgery of currency, revenue stamps, mark sheet, and also carries out cyber terrorism by using computers to intimidate or coerce people and carry out the activities of terrorism sentence could be restructured.[25] Web jacking as an aspect of cybercrime against society permits hackers to gain access and control over website of another, and even change the contacts of the website for fulfilling political objectives or for money. This is a three sentence paragraph and it is problematic. A paragraph is made up of at least 4 to 5 sentences; reflect this observation where necessary in this paper

It must be noted that the cyber space allow these attackers to easily carry out their activities and such intrusion can be made effortlessly with very little risk of apprehension.[26] The internet provides anonymity and safety for persons involved in Cyber offences. These perpetrators leave no traces of their actions and this makes it extremely difficult to trace them.[27]

Cybercrime has spread to such proportion that a formal categorization of the crime is no longer possible.[28] Every single day gives birth to a new kind of cybercrime, making every single effort to stop it almost a futile exercise.[29] Criminals have discovered that the internet can provide new opportunities and multiple benefits for illicit businesses.[30] These miscreants have employed the internet as a tool for not only fraud and theft among others but also drug trafficking and criminal organization rackets that are concerned with exploitation and disruption of the society[31] Cybercrime perpetrators are always one step ahead in the sense that they create technology or come up with techniques to perpetrate a particular crime, leaving law enforcement personnel with a puzzle to unravel the crime and bring the culprits to book.

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20 *Supra.*
21 Panda Security, "Types of Cybercrime" *www.pandasecurity.com*. Accessed 24/5/2023.
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 Sulaman, S., and Yunog, Z., "Understanding Cyber Terrorism from Motivational Perspectives" *www.jstor.org*. Accessed 24/5/2023.
26 Chowbe, V.S., "Concept of Cyber-Crime, Nature and Scope" www.researchgate.net. Accessed 24/5/2023.
27 *Ibid.*
28 Admindeepak, Nature and Scope of Cybercrime" deepakmiglani.com. Accessed 25/5/2023.
29 *Ibid.*
30 *Ibid.*
31 *Ibid.*