



The Journal of Sustainable Development Law and Policy



ISSN: 2467-8406 (Print) 2467-8392 (Online) Journal homepage: <https://www.ajol.info/index.php/jsdlp>

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To cite this article: Joash Ojo Amupitan (2023). Addressing Nigerian Economic Challenges through the Instrumentality of the Law. The Journal of Sustainable Development, Law and Policy. Vol. 14:1, 164-201. DOI:10.4314/jsdlp.v14i1.9s

To link this article: DOI: [10.4314/jsdlp.v14i1.9s](https://doi.org/10.4314/jsdlp.v14i1.9s)



Published online: May 31, 2023.

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ADDRESSING NIGERIAN ECONOMIC CHALLENGES THROUGH THE INSTRUMENTALITY OF THE LAW

Joash Ojo Amupitan, SAN*

Citation:

Joash Ojo Amupitan (2023).
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Instrumentality of the Law.
The Journal of Sustainable
Development, Law and Policy.
Vol. 14:1, 164-201.

“Under the new dispensation, lawyers should be more involved in political and social engineering. Being the light bearer by virtue of their special training, they should bear the light at every dark enclave to show hidden attempts at the lawyer in misgovernance, misrule, and maladministration. The new dispensation must be dogged and determined fighter for freedom and equity and to ensure that the ordinary citizen is protected from threatened abuse of his fundamental rights through reckless and arrogant exercise of state powers the lawyers should take their pride of place in society. They should jettison the garb of eggheads living like strangers in a splendid isolation in his own society oblivious of important development in the economic and social affairs of his country. The lawyers` role in the new policy should be that of an active participant in the platonic search for common good”. Aare Afe Babalola, SAN¹

ISSN: 2467-8406 (Print)
2467-8392 (Online)

1. INTRODUCTION

There is no better way to start this Lecture than the above quotation of our most respected celebrant, Statesman, Legal Luminary and a person likened to a deep sea flowing with majestic silence. This is a statement calling on us (Lawyers), by virtue of our special training, to act and be more involved in the political and social engineering that will rescue Nigeria from misgovernance, misrule and maladministration that has thrown the country into the present economic and social challenges. Nigeria is, no doubt, presently passing through its worst economic depression. Hence the choice of this year's theme "THE LAW AND THE ECONOMY: Finding a Pathway for a Prosperous Post-Election Nation Nigeria" of the NBA, Ado Ekiti Branch is no doubt appropriate.

I am very aware that this Lecture in Honour of Aare Afe Babalola, SAN, OFR, CON should have been held some years back, but as faith would have it, it is now coming at the inauguration of a new Government at all levels in Nigeria; at the Federal level, the handing over of the reign of Government to Asiwaju Ahmed Bola Tinubu. The new administration, would, no doubt be embroiled in a myriad of economic and social problems at inception. Organising this letter at this time and trying to set an agenda to address the economic problems through the instrumentality of the law is the right thing in the right direction and will give hope to Nigerians anxiously waiting for what the new Government has to offer. This Lecture affords the NBA, Ado Ekiti Branch and for that matter the National NBA an opportunity to be "an active participant in the platonic search for the common good".

Aare Afe Babalola, SAN, OFR, CON has been the mouthpiece for the downtrodden, a respected lawyer who has defended the cause of the masses right from the beginning of his legal practice

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¹ Afe Babalola, SAN, "Nigeria in search of a new polity: the role of lawyers". Essays in honour of Hon. Justice Mohammed Lawal Uwais: Edited by: J.A. Yakubu, Malthouse Press Ltd. P.70

and one of the few of his peers who speak truth to issues. This topic “Addressing the Nigerian Economic Challenges through the Instrumentality of the Law and Future Economic Prosperity” cannot be more apt than this present time when Nigeria is confronted with several economic woes and malaise. The prices of commodities have gone out of the reach of the common man, the value of the Naira compared to other foreign currencies is nothing to write home about, petroleum subsidy is about to be removed, the inflation rate has gone beyond 22%, there is mass unemployment, foreign debt is skyrocketing, the minimum wage is about the least in the World. The economy is monolithic as there is still dependence on crude oil as the main source of foreign exchange and the present rate of corruption at all levels is unprecedented. As a result of the above, there has been a brain drain of our best out of the shores of Nigeria.

The above economic challenges have been debated thematically and intellectually engaged without any viable practical solution. The vast majority of Nigerians are groaning as a result of these economic woes. Some individuals have, within the sphere of operations/influence, been able to alleviate the plight of the people around them but this is just the tip of the iceberg or what some people will say is just a drop in the ocean. One such well-meaning individual is Aare Afe Babalola, SAN, CON, CFR, the Are Bamofin of Yoruba land. By this title from the late Alafin of Oyo; His Royal Majesty, Alayeluwa Oba Dr. Lamidi Adeyemi II in 2008, he was decreed a “Royal Highness and tribal legend. He was forbidden from prostrating to any man again, except God and was required to carry himself in the manner of a royalty.” So permit me to say KABIYESI.

Aare Afe Babalola is one person who has ventured into several areas where the Government has failed to deliver in his bid to mitigate the gross deficit on the part of the Government at all levels. Every family is not an LGA. The establishment of this great University Afe Babalola University is one of the giant initiatives of this legend to provide a high-class quality education to Nigerians. The facilities in this University can compare to some of the best Universities in the World thus providing an impetus to the Yoruba saying that “What you are looking for in Sokoto is in this Sokoto”. This translates to the fact that what several Nigerians are looking for in Oxford, Cambridge, London School of Economics, Warwick, Harvard, MIT, Stanford, Yale, Toronto,

Alberta, British Columbia, York and some of the best Universities where there have to travel so far to Europe and America with so much cost and drain on our economy (Foreign Exchange) is available here in Nigeria, in South Western Nigeria, in the State of Ekiti, in Ado-Ekiti and in this place- ABUAD. You don't need to travel so long. This University (ABUAD) has justified the need to provide an international airport in Ado-Ekiti to enable Nigerians both within and in the diaspora to take advantage of this good gestures from one of this silent, salient and great Africa achiever of our generation. According to the Central Bank of Nigeria², between 2010 and 2022, Nigerian parents spent a humongous \$28.65 billion on foreign education on their wards; an amount close to Nigeria's external reserve. To worsen the situation, some West African Schools demand payment of their school fees in dollars from Nigerian students. Between 1998 and 2018, the number of Nigerians studying abroad soared from 15,000 to 96,702, and West Africa contributes over #30 million pounds annually to the United Kingdom education sector.

Let me quickly say that I have had the privilege of going on a tour of all the Colleges and Infrastructures in ABUAD including the Farm and the Teaching Hospital. The first time was when I was a member of the Council of Legal Education Resource Verification to ABUAD in 2010 and second, when I visited Aare Afe Babalola, SAN with my Vice-Chancellor, University of Jos accompanied by our Director of Physical Facilities to see things for ourselves like the proverbial Queen of Sheba's visit to King Solomon. The state of the earth equipment and technology in ABUAD is amazing. What is going on here is nothing but a REVOLUTION. The Teaching Hospital is World Class and will soon become a tourist haven. The Farm will soon emerge as a Centre of Excellence for Food Security in Nigeria. This University will turn Ekiti State to a tourist haven and become the cash cow in the area of agriculture for the state. The State Government should do everything possible to support this University to achieve this potential. Like Thomas Carlyle said, "*The History of the World is but the biography of Great Men*". Aare Afe Babalola is not just a colossus but a man of

² See Balance of Payments data Report by the CBN contained in Independent Newspaper of April 1, 2022. Available at <https://independent.ng/nigerias-39-66-billion-foreign-education-medical-tourism-cost/>. Accessed on 19th May 2023.

history. His biography is, no doubt, among the few that will make the World history to be complete.

Aare Afe Babalola is a book on his own to be read and he is visible to everyone. Some of us have had the privileged of reading him, and we will continue to read him. He is a giant we are blessed with in the legal profession and in Nigeria. Some people discovered him on time and climbed on his shoulders to see far. He is indeed an inspiration to so many of us. Sir Isaac Newton, the famous English scientist, once said, "If I have seen further, it is by standing on the shoulders of giants." ABUAD is one of the shoulders of Aare Afe Bablola that our Youths from all over Nigeria, irrespective of tribes and cultures are privileged to climb on and some of them are already conquering the World.

On this note, may I commend the NBA Ado-Ekiti Branch for organising this Lecture in honour of this Legal Luminary, Legal Colossus and Legal Icon. This would be another platform for the coming generation to stand on so that they can see further.

2. NIGERIA: A COUNTRY WITH GREAT POTENTIAL

Nigeria is a country endowed with one of the best natural resources and human capital that any country can boast of. There has always been this story of the rest of the world quarrelling with God at creation and that the best of the resources in the World were located in Nigeria. God said to the other Nations, just watch the type of people that will live in that country; they will so much fight themselves and may turn their riches to ashes and their resources may turn out to be a curse. In the midst of plenty, Nigerians have remained poor, the country is underdeveloped and the ambition of becoming a World Power has not been actualised.

Several African leaders, including the ebullient Professor Patrick Lumumba, have long stated that Africa cannot develop or get it

right except Nigeria is fixed. Professor Patrick Lumumba³ in his Keynote Speech during the Two-day Anti-Corruption Summit organised by the Nigerian National Assembly on 18th October 2016 said that “Africa is behind because Nigeria has not realized her potential. It’s time the leaders rise up because one in every five Africans is a Nigerian.”

In another fora⁴, he said “It is time for Nigerian leadership to recognise that Nigeria ought to be the political Mecca to which we pay pilgrimage... When the Nigerian leaders wake up to this reality, Africa will be great because Nigeria’s leadership is the missing link to Africa’s greatness... I remember that wherever Nigeria has provided leadership, the African continent always occupy her pride of place, be it in football, literature or medicine.” “The day Nigeria wakes up, Africa will never be the same again”. Who will wake this sleeping giant?

The World Bank Report corroborated the above facts thus:

Nigeria has the potential to be a giant on the global stage. But, despite this potential, Nigeria is struggling to keep pace with the GDP growth rates and economic transformation of its peers. Creating better jobs is a necessary condition for accelerating poverty reduction and economic transformation. However, even if job creation were to catch up with the expansion of the labor force, Nigeria workers would not fully benefit if other socio-economic conditions remain unchanged. Unlocking private investment is the only way to create more and better-quality jobs in a sustainable manner.

³ Professor Patrick Lumumba Keynote Speech titled “The Role of the Legislature in the fight against Corruption” At a Two-day Anti-Corruption Summit organised by the National Assembly on 18th October, 2016 at Nigerian Airforce Conference Centre, Abuja. Available at <https://www.premiumtimesng.com/news/top-news/213023-africa-remains-poor-nigeria-ex-kenya-anti-corruption-chief-says.html?tztc=1>. Accessed on 18th May, 2023.

⁴ at the Summit of the Alternatives, with the theme, “Citizens Framing the New Nigeria of Our Dream” organised by the Coalition of Civil Society Organisation held on 15th August 2018. available at <https://punchng.com/nigerias-leadership-deficit-missing-link-to-africas-greatness-patrick-lumumba/>. Accessed on 18th May, 2023.

The hard-won income gains from the 2000s evaporated between 2011 and 2021, due to the lack of deeper structural reforms, global shocks, conflicting macroeconomic policies, and increased insecurity. But, attracting private investment requires solid macroeconomic foundations, which have weakened in recent years by unlocking private investment, which is pre-conditioned on having a stable macro economy.”⁵

According to Wole Soyinka, “You go to conferences, and your fellow African intellectuals - and even heads of state - they all say: 'Nigeria is a big disappointment. It is the shame of the African continent.’”

I recall I attended a Conference on Constitutionalism in 2013 and I was the only Nigerian Professor. Nigeria was a reference for every bad thing said at the conference- corruption, military coup, sharia, 419. When it was my turn, I turned the story around.

3. NIGERIA’S ECONOMIC CHALLENGES

The macroeconomic challenges confronting Nigeria has been aptly summarised by Moghalu thus⁶:

“It is a given that the incoming Federal Government of Nigeria will have to tackle decisively the macroeconomic challenges of a fraudulent and wasteful petrol subsidy regime, our debt, revenue and resource allocation crisis, and a broken foreign exchange regime in order to get our economy back on track. But, if we are to put our country on a firm path to prosperity, we must go beyond these well-known challenges because they are only symptoms of deeper, more

⁵ World Bank Report titled “Nigeria Country Economic Memorandum : Charting a New Course - Synthesis Report (English)” of 15/12/2022. Available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099020012132216124/p1761970c336260ce0bd0e0ebd98a53275d>. Accessed on 17th may, 2023.

⁶ Kingsley Moghalu. Nigeria’s economy: The path to prosperity. Nigeria can be the next China – on its own terms. The foundation can be laid over the next four years. Premium Times Newspaper of April 21, 2023. Available at <https://www.premiumtimesng.com/opinion/594491-nigerias-economy-the-path-to-prosperity-by-kingsley-moghalu.html>. Accessed on 19th may, 2023.

foundational obstacles. Three BIG ISSUES have kept us poor – the absence of nationhood, the absence of political will for real reform, and knowledge gaps in economic policymaking. The links between these issues, on the one hand, and high rates of poverty and unemployment and low economic productivity, on the other, have not received adequate attention in the past”.

Some and many more are further described below.

i. One Product Economy – Oil

Oil revenue accounts for over 80% of the foreign exchange earning of the country. As a result of the over-dependence on this single commodity, any fluctuations in the market price of oil, adversely affects the developmental and operational activities of the country. Admittedly, efforts have been made by successive governments to diversify the economy away from oil; little success has been achieved so far. Before the exploration of Oil, Coca, Rubber, Cotton, Coffee, and Groundnut were on the export list, but today it has been extinguished. Gross domestic product (GDP), unemployment, interest rate, inflation, exchange rate, income, monetary and fiscal policies etc.

Despite the above, Nigeria is not an oil-producing nation but an oil-exporting nation. Singapore experience.

ii. Import Orientation:

Nigeria is a net importer of all Sorts of capital goods, industrial and consumer goods. Industries were been established Since independence, but their outputs do not meet up to 20% of the needs of the country, worse still, most industries that were established served only as extensions or branches of those located, either in Europe, Asia or America. The raw materials that fed the industries are largely imported even if local substitutes are available. Luckily, Structural Adjustment programme has drastically reduced this trend. It was after the foreign exchange crunch of the late seventies and early eighties that though came of mandating industries to develop and use available local raw materials. Today, with the current exchange rate of the Naira, importation has become unattractive thus, we are looking inwards.

iii. Corruption and Nepotism

On the issue of corruption, Professor Ayua explains⁷:

“Corruption is scourge of developed and development nations. Its baneful legacy has always been to defeat development and continuously multiply poverty. Indeed, it has been a major factor of poor governance and of political and economic instability in many countries particularly of Sub-Saharan Africa, Latin America and Asia. For almost 10 years, Nigeria has ranked either first, second or third in the transparency international global composite index on corruption, a situation which has not helped the development aspirations of the country particularly in the areas of attracting foreign direct investment, cancellation of it huge stock of external debt and promotion of economic stability”.

Obadan⁸ also said of corruption:

Corruption undermines the rule of law and the legitimacy of a state, destroys confidence in the integrity of institutions. It also accelerates crime, hurts investment, stalls economic growth, bleeds the national budget, burdens the poor disproportionately, and diverts scarce resources from basic human needs. It has, in addition been a source of social and political tension in corrupt developing countries... Corruption has thus been a major element of the poor governance and instability in most development and transition economies- a phenomenon that requires strong political will and concerted action to subvert.

iv. Under-Developed Natural Resources and Inadequate Capital Formation:

Nigeria is a land rich in resources-renewable and non-renewable. Among the renewable resources, the most important are water and forests. A large number of fresh perennial rivers are found all over the country, and forests cover more than half the country. The non-renewal resources include minerals of all sorts such as iron, ore, manganese, coal, tin, gold, bauxite, etc. However, a

⁷ Professor I. Ayua. Op. Cit at 7. Cited in Okesola, Op. Cit. at page 111.

⁸ Obadan, M.L. “Corruption Destabilization of Developing and translational Economics” Being a paper presented at the National Conference on the problems of corruption in Nigeria, organized by the Nigerian Institute of Advanced Legal Students: Abuja 25-29 March, 2001 at 1.

substantial part of these natural resources remains unexplored either because of a lack of capital, technical know-how or diversion of interest to other activities. Of the causes of failure to exploit natural resources, the most serious is the lack of adequate capital formation. The propensity to save and utilize & the savings for expanding our productive capacity is very low. Put in another way, Nigeria's propensity to consume imported goods is very high.

v. Population Pressures:

Nigeria is faced with the problem of population explosion, it was estimated that Nigeria's population at independence was 5 million, but as of today, the population was put at over 180 million, according to 2006 Census. The annual birth or growth rate is put at over 2.5% with the death rate decreasing. What this means is that the population will likely double every twenty years or less. In contrast, the growth rate of some industrialized countries whose per capita income is higher as depicted 0.1% for East Germany, zero per cent in Portugal, Western Germany and United Kingdom and between zero and 1% in all other industrialized countries. No wonder then, that Nigerians are getting poorer and more desperate each year. The extent of poverty in any country can be gauged by the poor quality of food consumed by the majority of the citizens, their clothing, housing, education and the quality of medical facilities available to them no need to look around to see abject poverty advertised on the faces of Nigerians. We now have able-bodied beggars on our streets today.

vi. Inequality In Income Distribution:

There are gross inequalities in the income distribution in Nigeria. It was estimated that Nigeria produced at each round of import license allocations more millionaires. These emergency millionaires are still with us today. One would not be surprised to see the result of a survey, which revealed that less than 10% of the population accounts for over 40% of the total income of the country. The introduction of IFEM and Bureau De change has brought with them another breed of wealthy Nigerians. There is, therefore, a widening gap between the income of the rich and the poor, indicating poor distribution of income in the economy. For the economy to improve there must be a more equitable distribution of wealth in Nigeria.

vii. Unemployment And Under-Employment:

Although this is a recent phenomenon in the Nigerian economic scene, unemployment and under-employment have come to stay like a stubborn cancer. There is a surplus of semi-skilled as unskilled labourers. The unemployment figure was put 'at over 6 million, a figure which is far from being accurate based on realities. The Nigerian economy is now producing university graduates in almost all declines who are becoming chronically unemployed up to five years after graduation who are even more. The problem is compounded by lack of part-time jobs and/or absence of venture capital to enable these graduates make a meaningful start towards self-employment efforts made by government through its agencies e.g. NAPPEP, NDE, etc. are only been shared among operators of the agencies.

viii. Technological Backwardness:

The technological backwardness of Nigeria has been a major source of its under-development. Stone-age technological is still in use in certain sectors of the economy such as agriculture, small scale industry and even in medicine. Occasionally, new and modern technologies may be introduced that attempt to coexist side by side with the old ones. An example of this dualism can be found in communication and textile industries. Impressed by what we find in developed countries we attempt to duplicate them by acquiring technologies that are hardly appropriate for our level of development. For example, we are moving fast into highly mechanized agriculture, which will mean high productivity per hectare of land cultivated but displacement of the rural dwellers whose main stay has been agriculture which was not addressed in any meaningful way. Particularly among the youths, labour, intensive industries should be encouraged. Where a displacement occurs as they must, alternative industries should be established and nurtured, i.e rate of inventions, mobile technology, internet, e-commerce and government spending on ICT.

ix. (Mis) Management of Natural, Financial and Human Resources:

There had been mis-management galore since independence. Public officers entrusted with natural and financial resources mis-appropriated them because of nepotism, sectionalism and religious interest, unqualified or dubious characters are placed in positions of influence and trust. The result is non-management or worse still embezzlement of funds. Those who could have done better given their training and level of commitment are left with no choice but

to leave the country or to go into totally unrelated fields. Nigeria is a country that is relatively rich in human and material resources but continues to suffer. It is pertinent to say that the greatest asset of any nation is in the human resources, yet we allow our trained and highly skilled manpower to lie in waste. No nation can aspire to be great when it constantly leaves out of the main stream of its best brains, efficient managers and effective educators as is the case in Nigeria.

x. Heavy Debt Burden and Weak Currency

Aare Afe Babalola, SAN recently⁹ informed the Nation that Nigeria external debt ran into trillion of dollars resulting in our weak currency.

xi. Fuel scarcity/increase in the pump price of petroleum

The Breton Woods have insisted that Nigeria must remove fuel subsidy by June this year. The World Bank is vehement that “Nigeria’s fiscal and debt pressures will increase if petrol subsidy is not phased out in June”.

xii. High Inflation Rate

The National Bureau of Statistics (NBS) had recently disclosed that the country’s inflation rate rose to 22.04 per cent in April 2023. This is the fourth consecutive increase this year and the highest rate recorded under the administration¹⁰.

xiii. Insecurity- Farmers/Herders conflict and land grabbing.

xiv. Socio-Cultural Factors:

Demographics, age distribution, population growth rate, level of education, distribution of wealth, social class and lifestyle etc.

xv. Environmental Factors:

Abandonment and inadequate development of natural resources etc

⁹ At a Lecture titled “Smart Infrastructure: Catalyst for Sustainable Development” by Professor Bamidele Adebisi held at Alfa Belgore Hall, ABUAD on May, 2023.

¹⁰ Available at <https://www.icirnigeria.org/inflation-rate-rose-59-times-under-buharis-eight-year-administration/>. Accessed on 21st May, 2023.

- xvi. **Legal Factors:**
Inadequate deployment of laws, regulations and government policies
- xvii. **Political Instability:**
One of the major challenges faced by the Nigerian economy is the instability in governance and unstable political environment, attitude of political parties and system of governance.

4. THE LAW AS AN INSTRUMENT OF CHANGE/ENGINEERING

Generally, defining legal terms is one of the most difficult things to do; the term Law is no exception. It is like the story of three blind men touching an elephant and defining an elephant from the part they touched. Therefore, the way a Natural Law Scholar will define law (as some rules based on ethics and morals- St Augustine and Aquinas) is different from how a Positive law scholar (like Austin defining it as a Command given by a superior to an inferior ("*commands, backed by threat of sanctions, from a sovereign, to whom people have a habit of obedience*" or the Command of the Uncommanded Commander)) or from sociological school like Roscoe Pound as a social engineering and realist school that law derives from prevailing social interests and public policy.

To avoid above controversy, we may just define Law as "a body of rules of action or conduct prescribed by a controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law"¹¹.

The question of whether law is a means of social change, or social engineering is a controversial one or better put which one should precede the other. Social change entails a large number of people deviating from the habits or behaviour of the past and imbibing a

¹¹ Black's Law Dictionary, 6th ed., s.v. "law." At 378.

new habit or mode of behaviour. It is something akin to a revolution.

One school of thought is that as society evolves and changes are brought about in the social, economic and political strata, the law would have to be updated to meet up with the developments in order to remain legitimate and relevant. Friedrich Savigny, the leader of the Historical School of thought and one of the greatest legal luminaries of his time in Europe believed that law must be constant with the spirit of the people and resisted a wholesome imposition of a legal code in Germany. He was of the view that it was impossible to create law out of whole cloth but it grows in a slow, unconscious, organic way from its primitive beginning in the minds of the people, that is, Law originated from the will of the people (the Volkgeist theory). He said Law is first developed by custom and popular faith, next by judicial decisions-everywhere, therefore, by internal silently operating powers, not by the arbitrary will of a law-giver.

Another school of thought is that law should take the lead and be used to change every aspect of society that is required to be changed. This accounted for Administrative Law Model especially in the United States. However, there is a “noticeable degree of symbiotic relations and interdependence between law and social change¹².”

Law by its definition is a means of regulating human conduct and can bring the desired change in a society. Oishika Banerji¹³ explains how law can be used as an instrument of change thus:

“Law can be simply defined as a system of rules that are used to regulate a society or rather control it. Why a society requires control is because there is always a necessity to keep a balance between society and the people living in it so that they can coexist interdependently which in turn will help in bringing social change. A society is a heterogeneous place where people of all class, caste, creed, colour, gender, background resides. It

¹² Okesola, Op. Cit. at 109.

¹³ How can the Law be used as an Instrument for Creating Social Change. Available at <https://blog.iplayers.in/can-law-used-instrument-creating-social-change/>. Accessed on 19th May, 2023.

is essential that no difference should be created among these people irrespective of their identities bringing homogeneity which can only be carried out by the subject of law. Social change is something that every society and its people look forward to because a change for good is always welcoming. Law plays an indispensable role in bringing in a social change. A lawless society is absent of harmony and peace between the people and the society.

As a society consists of all kinds of people, there is always a chance of one group of people to be in the position of authority and dominance due to certain factors like money, power, and status to rule over the other groups who are relatively weak. This scenario is nothing new for every society once in a while have experienced such a setup. Not only this but society is subjected to several other issues as well. Some of the notable being poverty, drug abuse, corruption, prostitution, rape, lynching, child marriage, acid attacks, child labour, discrimination in the form of caste, race, colour, gender etc. Law acts as a driving wheel for society to eliminate all forms of hurdles by bringing legislation and statutes that will help make a difference in the present and the future society. The society has been through several modifications in the past years and law has indeed been helpful in bringing changes but let's not forget that societal issues are not disappearing completely on the contrary they are accelerating. It is time for society to utilize the laws that are existing efficiently so that the laws can be effective to bring about a social change in its true sense. Therefore the solution to the question as to how can the law be used as an instrument for creating social change lies in the society and its people itself."

He opined further:

"Several researchers have opinionated that law is the best instrument for regulating social change but at times it is the social change that becomes a statute itself. Social transformation takes place due to the presence of several factors in the surrounding. These are the demographic structure, technological upliftment, change in the ideologies of the people in society, increase in the welfare of the people in society and so on. It was an American Judge named Benjamin Cardozo who said that law should not be viewed as a definite

instrument trying to bring in social change but as a flexible instrument of a necessity to bring in the welfare of the society. This is the essence of the Indian Constitution as well. The forefathers of the Constitution were clear with the fact that India after receiving independence should not be subjected to the similar kind of humiliation in any form as it has been for several years before 1947. The Indian Constitution can, therefore, be one of the citing examples to showcase how law can be used to bring in social change. Law is a very dynamic subject, and that helps it to take the shape of its surrounding. A society can, therefore, benefit from this subject in a lot of many ways.”

Law is a means of social change and also a mean of social engineering. The law can be used to achieve what Lumumba called “behavioural change culture” in Nigeria. Okesola¹⁴ provided empirical facts on how law can be used as an instrument of change and development thus:

“First it was engraved on stones, then on slates, thereafter inked on paper, through the Typewriter to the computer, its essence has remained the same; but the manner of its manifestation has been a roller coaster. Law is and has always been a means of social engineering. In recent times, the subject of law as an instrument of social change stands out indistinct lines as legal reforms in Nigeria and all over the world has been at the centre of agenda of government, admitting the fact that law, and its adequate enforcement is imperative to the achievement of behavioural change and social justice in a country. Law is a desirable necessity and an efficient means of inducing social change. It is axiomatic that law is the safety-pin that keeps human society together”.

There are also judicial decisions confirming that law can be and has been used as an instrument of change in the society. In the case

¹⁴ Dr A.O Okesola. Law as a Means of Social Engineering: Some Perspective on Nigeria. Nnamdi Azikwe University Journal of Commercial and Property Law, Vol. 9 (2) 2022 at pages 105-106.

of *Obasanjo & Ors v Buhari & Ors*¹⁵, Edozie JSC held at page 68, paras C-E thus:

"The beauty of law in a civilized society is that it owes its respect and due observance to the society. It should be progressive and act as a catalyst to social engineering. Where it relies on mere technicality or out-moded or incomprehensible procedures and immerses itself in a jacket of hotchpotch legalism that is not in tune with the times, it becomes anachronistic and it destroys or desecrates the temple of justice it stands."

Moreover, in the case of *AMCON v. Canvass Farms (Nig) Ltd & Ors*¹⁶, Georgewill, JCA held AMCON was created to strengthen the financial sector and prevent it from collapse. He held at pages 26-27 thus":

"Now, it is true, and must always be borne in mind, whenever the need for construing the powers of AMCON in the light of the AMCON Act 2010, as amended arises, that AMCON itself is a child of necessity and created to checkmate, and thus avoid the total collapse of the Nigerian Financial System and ultimately the Nigeria Economy after the unprecedented Banking crisis of 2009. AMCON is thus a special purpose vehicle carefully and thoughtfully designed and birthed by law to meet the purpose of ensuring that never again should the Nigerian Financial System, and indeed the Nigerian Economy, be ever threatened so grievously as it happened in 2009 due to unregulated debts management regimes resulting into humongous bad debts that almost collapsed the entire financial system and economy of Nigeria. Thus, the law setting up and ensuring AMCON of the unhindered exercise of its powers are therefore, not only special but in some way extraordinary and far reaching in effect much more than that the usual Companies and Allied Matters Act, 2004. AMCON mainly, specifically and specially, operates under the AMCON Act, 2010 (as amended) and ancillary under the Companies and Allied Matters Act, 2004, which is more of general application to it.

¹⁵ (2003) LPELR-813(SC)

¹⁶ (2021) LPELR-54651(CA)

Thus, whenever the issue becomes as between the AMCON Act, 2010 (as amended) and the Companies and Allied Matters Act, 2004 in relation to the powers of AMCON which would prevail, it is the AMCON Act, 2010 (as amended) that would prevail and be applied. See 60(z) of the AMCON Act, 2020 (as amended by the AMCON Act 2015."

Ikyegh, JCA in *Coscharis Beverages Ltd v. ITF & Anor*¹⁷ held that the scheme of the I.T.F. Act is explicit that the fund realised from the contribution shall be utilised to promote and encourage the acquisition of skills in industry or commerce with a view to generate a pool of indigenously trained manpower sufficient to meet the needs of the economy vide Section 2 of the I.T.F. Act."

See also *Macaulay v. R.Z.B of Austria*¹⁸, Ige JCA held that the Exchange Control Act of 1990 was enacted to promote and protect international trade for the benefit of Nigeria's balance of payment. In his words:

"First of all let us examine the provision of Sec. 8(1) of the Exchange Control Act of 1990. It reads thus- "8(1) - Subject to the provisions of this Section no person (1) resident in Nigeria shall without the permission of the Minister (2) make any payment outside Nigeria to or (3) for the credit of a person resident outside Nigeria or (4) take or accept any loan bank overdraft or other credit facilities." There is no doubt whatsoever that it is the intention of the legislature to arrest the irresponsible and reckless acts of the sixties which tended to have adverse consequences of the Nigeria Economy. See the cases of *Kolawole v. Alberto* (1989) 1 NWLR (Pt.89) 382; and *Adewunmi v. Attorney General Ondo State* (1996) 8 NWLR (Pt.464) 73 at 117."

Apart from above judicial decisions, there are abundant evidence that law has been used to transform several societies. For instance, Oishika Banerji opines that the Constitution of India is a classic example of how law was used to bring the desired social change and transformation to India. The Constitution brought the desired

¹⁷ (2021) LPELR-56849(CA) at pages 25-26.

¹⁸ (1999) LPELR-13079(CA) at page 12.

change by embedding the fundamental Rights provision in Chapter III of their Constitution and also the Directive Principles of the State Policy contained therein. Explaining this with reference to the relevant provisions of the Indian Constitution (which would also be helpful to understand the role of the Nigerian Constitution), he said:

“Article 14 of the Constitution talks about the right to equality and equal protection in the eyes of law. This very Article of the Constitution promises the rule of law as the very essence of the Constitution. Along with Article 14, the Constitution provides with several other Articles as well which have played a key role in bringing social change. It is not just the fundamental rights that the Constitution provides but also a set of principles that are to be followed by the State to regulate the social changes taking place in the nation. These principles came to be known as the Directive Principles of the State Policy provided in Part IV of the Constitution. Although there is no provision which says that these set of principles that explicitly provided for the State to adopt and follow are enforceable in the court of law, these principles are necessary so that the State does not fail to provide social justice to its people.

Social issues like poverty, discrimination, forced labour, untouchability have been deeply rooted in Indian society for several years. After the Constitution was enforced, these social issues were taken into the concern to be resolved and it is indeed true that India has overcome several social problems affecting the people and the nation at large. The Indian Constitution majorly had been brought about to maintain a balance between individual freedom and promulgation of social justice in the nation. It can be said that collectively Part III and Part IV of the Constitution together has been a driving force to bring in a social revolution in the country and therefore they formed a conscience for the Constitution”.

The United Kingdom is based on the common law which they exported to several countries and used to develop and underdeveloped several of the colonies. In the United States, the Constitution and the law were the tools of nation-building and sustainable democratic values and economic development. The

Soviet Union, Spain and China are not left out. As aptly summed up by Okesola¹⁹:

“The Soviet Union succeeded in making enormous changes in the society by the use of law. In Spain, law was used to reform agrarian labour and employment relations. China also managed to moderate through law its population growth and as a result devoted more of its resource to economic development and modernization. From the foregoing, history should teach us to believe that law can be a means of social engineering in any society”.

Most of the principles that can help Nigeria out of the economic challenges are embedded in the Fundamental Objectives and Directive Principles of State Policy discussed below.

4.1 The Nigerian Constitution as an Instrument of Economic Development

The Constitution is the basic law of a country and all other laws derives from the Constitution. If the law is to be used as an instrument to achieve economic prosperity, then the Constitution must provide the seed or the foundation. The three organs of Government are created by the Constitution and all other Government institutions and agencies are subject to the constitution. The 1999 Constitution of Nigeria as amended is the supreme law of Nigeria and the grundnorm. In the case of *Attorney-General Abia State v. Attorney-General of the Federation*²⁰, the Supreme Court held that the Constitution is supreme and the *fon et origo* of the legal system of Nigeria and that all the three organs or agency of government must show total obeisance and loyalty to the Constitution. Niki Tobi, JSC, of the blessed memory held at 381-383 PARAS C-E thus:

“The Constitution of a nation is *the fons et origo*, not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system. In Greek language, it is the alpha and the omega. It is the barometer with

¹⁹ Op.Cit at 108.

²⁰ (2006) 16 NWLR (PT. 1005) 265.

which all statutes are measured. In line with this kingly position of the Constitution, all the three arms of Government are slaves of the Constitution, not in the sense of undergoing servitude or bondage, but in the sense of total obeisance and loyalty to it. This is in recognition of the supremacy of the Constitution over and above every statute, be it an Act of the National Assembly or a law of the House of Assembly of a State.

The supremacy clause is provided for in section 1(1) of the Constitution of the Federal Republic of Nigeria, 1999. All the three arms of Government must dance to the music and chorus that the Constitution beats and sings, whether the melody sounds good or bad. Regarding the first place section 1 occupies in the constitution, I regard and christen it as the golden section of the Constitution, the adjectival variant of the noun gold. It is the same golden position in sports that the Constitution occupies in any jurisprudence and legal system, including ours.

While I recognise the constitutional right of the legislatures, that is, the National Assembly and the House of Assembly of the States, to amend the Constitution, until that is done, they must kowtow (using the Chinese expression) to the provisions of the Constitution, whether they like it or not.

From above, the Constitution is the first main instrument to be used to bring about the desired economic revolution in Nigeria. The Nigerian Constitution 1999, as amended contained some basic provisions in Chapter II- the Fundamental Objectives and Directive Principles of State Policy and also in Chapter IV dealing with fundamental rights. While certain provisions of Chapter IV have been used to promote economic development, favourable workplace, association and equitable distribution of resources such as the right to own property (section 43), right to freedom of expression and the press (section 39), right to human dignity (section 34), right to personal liberty (section 35), freedom from discrimination (section 42) right of fair hearing (section 36), the provisions dealing with Fundamental Objectives and Directive Principles of State Policy promote more the economic ideals and development of the country and assigned some responsibilities to the State.

4.2 The Fundamental Objectives and Directive Principle of State Policy

Chapter II of the Constitution of Nigeria 1999 as amended deals with the Fundamental Objectives and Directive Principles of State Policy. It was first introduced in 1979 by the Constitution Drafting Committee (CDC) led by another celebrated legal icon and luminary Chief Frederick Rotimi Alade Williams, QC, SAN of the blessed memory. The CDC²¹ clarified the distinction between “Fundamental Objectives” and “Directive Principles” thus:

“By Fundamental Objectives we refer to the identification of the ultimate objectives of the Nation whilst Directive Principles of State Policy indicate the paths which leads to those objectives. Fundamental objectives are ideals towards which the Nation is expected to strive whilst Directive Principles lay down the policies which are expected to be pursued in the efforts of the Nation to realise the national ideals.”

The purpose of enacting the this Fundamental Objectives and Directive Principle of State Policy was to provide “political ideas as to how society can be organised and ruled to the best advantage of all” and the need to address the increasing gap between the rich and the poor, the growing cleavage between the social groupings, all of which combined to confuse the nation and bedevilled the concerted march to orderly progress²².

The Fundamental Objectives and Directive Principle of State Policy derives from Jeremy Bentham’s Utilitarian Theory²³ of “the greatest happiness of the greatest number”. He said the greatest happiness of the greatest number is the foundation of morals and legislations and is the measure of what is right and wrong and that pleasure and pain are two sovereign masters who control the human life. The main aim of the humans is to increase the pleasure and to reduce the pain. So legislation should seek the happiness of the largest amount of people.

²¹ Report of the Constitution Drafting Committee, 1976, Volume 1, page iv.

²² Ibid.

²³ A Fragment on Government. 1776, Cosimo Classics; Reprint edition (December 3, 2012).

The economic objectives in section 16 of the Constitution provides as follows:

- 1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution-
 - a. harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;
 - b. control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;
 - c. without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;
 - d. without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

- 2) The State shall direct its policy towards ensuring-
 - a. the promotion of a planned and balanced economic development;
 - b. that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;
 - c. that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and
 - d. that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

- 3) A body shall be set up by an Act of the National Assembly which shall have power-
 - a. to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same; and
 - b. to administer any law for the regulation of the ownership and control of such enterprises.

- 4) For the purposes of subsection (1) of this section -
- a. the reference to the "major sectors of the economy" shall be construed as a reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation; and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this section comes into force, whether directly or through the agencies of a statutory or other corporation or company, shall be deemed to be major sectors of the economy;
 - b. "economic activities" includes activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and
 - c. "participate" includes the rendering of services and supplying of goods.

In the case of *Hung & Ors v. E.C Investment Co. (Nig) Ltd & Anor*²⁴, the Court of Appeal held per Tur, JCA at 63, paragraph D-F thus:

“The right of "any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy " is thrust on "the State... within the context of the ideals and objectives for which provisions are made in this Constitution." The State has the constitutional duty to "control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity" as provided under Section 16(1)(b) of the Constitution.”

Also, Owoade, JCA in *Jonathan v FRN*²⁵ that Section 16 (2)(c) emphasised that the economic system is not operated in such a manner as to permit the concentration of wealth or means of

²⁴ (2016) LPELR-42125(CA)

²⁵ (2018) LPELR-43505(CA).

production and exchange in the hands of few individuals or of a group.

Underlined for emphasis.

The Court has a duty to enforce the provision of section 16(1) in deserving cases for the purpose of the economic growth of the Nation. The role of the Court and Malaysia Professor experience. In the case of *City Securities Ltd v. Osom & Ors*²⁶, Oyawole JCA at 16-18, paras. E-B, it was held that section 16 of the Constitution could be relied upon to provide a remedy where an economic wrong has been proved even where there is no statutory provision.

"The argument of the Appellant that the award of damages made in favour of the 1st Respondent was not contemplated by the statute seems to have created a perfect scenario for invocation of the legal principle of *ubi jus ibi remedium*. It is common grounds to all parties that the Appellant had a duty to the 1st Respondent which it breached and in respect of which the 1st Respondent suffered. 1st Respondent was therefore deserving of a remedy irrespective of the failure of the statute to so provide. See *OYEKANMI VS. NEPA (2000) LPELR-2873(SC)* at 40. Any failure of the trial Tribunal to award damages in the circumstances presented would do incalculable damage to investor confidence in the operations of the Nigerian capital market with attendant implications for the Nigerian economy. Impunity as demonstrated by the Appellant in the circumstances presented here, must not be condoned by the Courts otherwise it would be failing in its duty to the economy of the nation as envisaged by Section 16 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)."

Also section 16(1)-(3) came into question in *Oguejiofor v. Access Bank*²⁷ and the provisions were used to promote free market economy. The Court held:

²⁶ (2020) LPELR-50818(CA).

²⁷ (2020) LPELR-49583(CA)

"The jurisprudence of labour and employment contract, has over the years with the aid of decisions of the Apex Court and of this Court, been fairly settled. The Courts will not allow any employee whose employment has been validly terminated when the employer has observed and complied with the judicial templates for termination or dismissal of an employee, to seek to void the decision of the employer by raking up issues of allegation of crimes when the employer's decision to terminate or dismiss the employee was anchored on misconduct for which the employee was accorded a fair hearing. To do otherwise would amount to a situation where it will almost be nigh impossible for an employer to exercise in good faith, its "sovereign" powers and authority in a free market economy as encapsulated in the provision of Section 16 (1); (2) & (3) of the Constitution, 1999 as to hire and fire any of its employees whose conduct was found to have contravened the terms and conditions of the employee's contract of employment."

As lofty as the above provisions are, the dream of using these provisions to address the several economic challenges that bedevilled Nigeria still remains a tall dream. This is because the Fundamental Objectives and Directive Principles have been made non-justiciable. Meaning that it cannot be enforced in a court of law. For any legal right to be enforceable, it must be justiciable. In the case of *Guda & Ors v Kitta*²⁸, Onalaja, JCA at pages 40-41, paragraphs E-C define the words justiciable as follows:

“Having decided that competent parties were before the Court to grant LOCUS STANDI the issue must be justiciable and there must be dispute between the parties.

"In *ELENDU V. EKWOABA* 1995 3 NWLR pt 386 page 704 at 744:- "Justiciable means a controversy or matter in which a present and fixed claim or right is asserted against one who has an interest in contending it. Rights must be declared upon state of facts that may or may not arise in future. A question that may properly come before a tribunal for decision. Courts will only consider a justiciable controversy, as distinguished from a hypothetical difference or dispute or one that is academic or

²⁸ (1999) LPELR-13095(CA).

moot. The term refers to real and substantial controversy which is appropriate for judicial determination as distinguished from dispute or difference of contingent hypothetical or abstract character."

Regrettably, the whole of Chapter II of the Constitution of Nigeria 1999 as amended deals with the Fundamental Objectives and Directive Principles of State Policy are not justiciable. This is apparent from section 6(6)(C) of the Constitution which provides:

"The judicial powers vested in accordance with the foregoing provisions of this section –

(c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution".

Pursuant to the above provision, the Supreme Court in the case of Attorney-General of Ondo State v. Attorney-General of the Federation & Ors²⁹, per Muhammadu Lawal Uwais JSC (as he then was) held thus at page 46:

"It is well established as per Section 6 subsection (6)(c) of the Constitution that rights under the fundamental objectives and directive principles of state policy are not justiciable except as otherwise provided in the Constitution- see also the case of Okogie v. AG of Lagos State (1981) NCLR 2187."

Thankfully, the Supreme Court, relying on Item 60(a) on the Exclusive Legislative List held in Attorney-General of Ondo State v. Attorney-General of the Federation & Ors³⁰ that Chapter II of the Constitution can be made justiciable through the instrument of the law, i.e legislative enactment. Item 60(a) on the Exclusive Legislative List vested on the National Assembly the power to make law on the establishment and regulation of authorities for the Federation or any part thereof to promote and enforce the

²⁹ (2002) LPELR-623(SC)

³⁰ *Supra*

observance of the Fundamental Objectives and Directive Principles contained in this Constitution. In addition, the Supreme Court held that the fundamental objectives and the directive principles of state policy are not only meant to be enforced by or against public authorities but extend to private persons, companies and private organisations. Uwais JSC (as he then was) at page 53 held:

"It has been argued that the fundamental objectives and the directive principles of state policy are meant for authorities that exercise legislative, executive and judicial powers only and therefore any enactment to enforce their observance can apply only to such persons in authority and should not be extended to private persons, companies or private organisations. This may well be so, if narrow interpretation is to be given to the provisions, but it must be remembered that we are here concerned not with the interpretation of a statute but the constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the constitution. See *Nafiu Rabiu v. Kano State* (1980) 8 - 11 SC 130; (1980) 2 NCLR 117; *Aqua Ltd. v. Ondo State Sports Council* (1985) 4 NWLR (Part 91) 622; *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt. 117) 517 and *Ishola v. Ajiboye* (1994) 6 NWLR (Pt. 352) 506."

Also lending support to why the Chapter must be made justiciable, an elder Statesman and politician of note Chief Olusegun Osoba³¹ opined thus:

"In a new constitutional order, the fundamental rights and duties of citizens and the directive principles of state policies imposed on governments must be fully justiciable in law, as this is the only way in which citizens can hold their governments to account when they fail in their duties, assumed under oath, to their people. This will obviate situations in

³¹ Olusegun Osoba. *The 1979 Constitution and its Legacy of Catastrophic Success of Governments*. This Day Newspaper of 26th April, 2019. Available at <https://www.thisdaylive.com/index.php/2019/04/26/the-1979-constitution-and-its-legacy-of-catastrophic-success-of-governments/>. Accessed on 18th May, 2018. He was in the CDC of 1976 and together with Dr Yusuf Bala Usman wrote a Minority Report.

which high government officials fail to provide basic health facilities for their people, ostensibly for lack of funds, but are able to find funds to treat themselves and members of their families for trivial ailments abroad; or situations in which legislators and ministers take many millions of naira home every week, but their governments are unable to pay workers' minimum wage of N18,000.00 a month.”

Re-echoing this point, Bayo Ogunmupe³²

Thus, the CDC majority in 1976 deliberately conferred on the 1979 Constitution to give the people socio-economic rights with one hand and take it away with the other by not making those rights justiciable. Moreover, if the provisions of Chapter 11 of the 1999 Constitution, which was inherited from the 1979 Constitution, were made justiciable, government would have been more serious in tackling poverty and inequality in Nigeria. Indeed, the profundity of the submissions of Osoba and Usman should nudge those approaching government with restructuring into greater agitation.

4.3 A Case for Judicial Statesmen

Judicial statesmanship started in the form of public policy consideration resulting in what Professor Waite described as “Judicial Legislation”. Writing on this form of initiative, Professor John Baker Waite, a Professor of Law at University of Michigan, United States in his article titled “Judicial Statesmen- Important Part Played by Decisions in Development of Law and Necessity for Training in Socio-Economic Science to Fit Lawyers as Safe Guides for our Social Future”³³ explains that lawyers can unconsciously take over the role of legislator through public policy and he cited two decisions in the United States to justify this conclusion- the case of *Parks v. Pie Co*³⁴ and *Chysky v Drake Bros Co*³⁵ where the Courts departed from precedent and imposed

³² Minority Report and Draft Constitution for the Federal Republic of Nigeria, 1976. *The Guardian* Newspaper of 4th September, 2019. Available at <https://guardian.ng/art/interrogating-minority-report-draft-constitution-of-1976/>. Accessed on 18th May, 2018.

³³ *American Bar Association Journal*, Vol. 8, (1922) at 375-376

³⁴ 93 Can 334 LRA (1915) C179

³⁵ 182 NY 459. See also *Ryland v. Fletcher* LR 3 H of L 380.

on manufacturers of food an arbitrary responsibility for their wholesomeness, regardless of fault. He described the role of Judicial Statesmen thus:

“But in fact lawyers do assume the duties of statesmen as a function of their profession. Unconsciously, perhaps and unpretentiously always, lawyers are constantly remoulding the old rules of law and making new rules to meet the changing needs of social and economic conditions. They, the lawyers of today- because they are motivating force behind the judges and of them are the judges- are in fact and indisputable legislators”.

Explaining further he said at page 376 thus:

“The decisions for which Chief Justice Marshall is so justly lauded were not decisions pointed out to him by precedent. They were judgments of policy. Had a man of different experience and other ideals been chief justice- a Jeffersonian, for instance, believing in state’s rights and popular control- the subsequent history of this nation might have been utterly different. But it was not a Marshall the “common lawyer”, deeply versed in precedent and trained in law who thus directed the course of the nation. It was Marshall the statesman, reacting to his own personal experience with the incompetency of state governments and the injustice of popular opinion.

Apart from using public policy argument, he argues that changes in law are made discretely through judicial custom under cover of mouth honour to the old rule and also through molecular action. In his words at pages 376-377:

“Many more changes in law, that is to say in judicial custom, are made by judges, actually, but under cover of mouth honour to the old rule. Hacker’s appeal is a good illustration although not precisely an example...

Not all of this judicial change in rule is so sudden as in the examples given. In fact, most of it is slow. AS Mr. Justice Holmes remarked Judges being precluded from making law by molar action do it by molecular action. The important fact however, and the point here stressed, is that they do change old rulings and make new ones, and they do it for pragmatic

reasons, out of regard of changing economic and social conditions.”

Dr Sam Amadi also echoed this view in his “Time for Judges to be Statesmen”³⁶ contained in This Day Newspaper of 8th May, 2023 when he opined thus:

The conventional theory of constitutional democracy holds that there are two political branches and one non-political branch. The political branches are the executive and the legislature. Members of these two branches are elected by the people and have the liberty to act in furtherance of their interests...

So, the judicial branch is not so designed. Judges are not representatives of the people. A judge does not represent his family, his friends, or his constituency. He represents God in the religious sense, or rationality in ultra-rationality. Judges do justice. And justice is giving people what they deserve, not what they desire. We can see from this social portraiture that judges have more gravitas and bona fides to act as statesmen in times of troubles than representatives and executives. As we say, politicians care about the next election, but statesmen care about the nation. Judges ought to be statesmen.

The concept of judges as statesmen has a strong implication for sustaining democracy in difficult times and places. In good times and places democracy is safe even with interest-based politics. The foundations of democracy rest on the rule of law. The rule of law means that all persons and authorities are subject to the law; that the law respects basic equality of all persons and the law is executed without deference to prerogatives and merits, apart from the merits of justice. Overlaying the foundations of rule of law is accountability. There is no exemption from the rigor of the law because the institutions of law enforcement are professionally committed to fair and equitable implementation. In such a society where justice is routinized in administrative practices, the court plays

³⁶ <https://www.thisdaylive.com/index.php/2023/05/08/time-for-judges-to-be-statesmen/>.

a passive role and is self-restrained. Judges merely adjudicate in matters where vagueness obscures fair and equitable administrative of justice by the political branches.

He continues:

But in a society where justice is not routinized as administrative practices become of political capture by a powerful minority or a numerical majority, the court moves from passivity to activism to reestablish the rule of law. The legendary Justice Oputa put this pointedly thus: “Whenever the law is used to foster social, racial, economic or sex oppression, the judiciary should quickly intervene to redress the imbalance and thus restore justice”. The court does not act when justice is routinized. The court acts when justice is denied, especially when it is structurally denied.

This articulation of judicial activism bodes well with a powerful theory about the judiciary propounded by Harvard professor Abram Chayes. It is the ‘governance’ theory of the court. Chayes argues that the court has a right to govern just like the other branches of government when the other branches fail to do the job. Ordinarily, the court forebears to govern trusting the more ‘political’ branches to govern. But where the two fail to govern, the court steps in. Then, judges become statesmen. This explains the various curves of judicial activism.”

Even the Supreme Court is not left out of the policy argument. In the case of Attorney-General of Ondo State v. Attorney-General of the Federation & Ors³⁷ thus:

"I have held in this judgment that the National Assembly can exercise the powers which it does possess for the purpose of assisting in carrying out a policy which may affect matters which are directly within its legislative competence. It can also exercise powers, which it does possess for assisting in carrying out a policy, which may affect matters not directly within its legislative powers. See *Osborne v. The Commonwealth* (1911)

³⁷ *Supra*, Per Ogwuegbu, JSC at 107

12 CLR 321 and *Radio corporation Pty. Ltd. v. The Commonwealth* (1938) 59 CLR 170."

Also Lord Denning in his book³⁸, said:

"If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule - or even to change it- so as to do justice in the instant case before him. He need not wait for the legislature to intervene: because that can never be of any help in the instant case. I would emphasise, however, the word 'legitimately': the judge is himself subject to the law and must abide by it."

In the case of *Parker v. Parker*³⁹ Lord Denning made the point pungently when he held thus:

"What is the argument on the other side? Only that no case has been found in which it had been done before. The argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both."

Also Justice P N Bhagwati of India said "It is the judge who infuses life blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society"⁴⁰.

Who else should lead this group of statesmen in Nigeria than our highly revered Aare Afe Babalola, SAN, OFR, CON, CFR who should arrange some elders in the profession consisting of Jurists, eminent Legal Practitioners, Leaders of the Bar and distinguished academic to put together a legal strategy or blue print for the legal profession to rescue Nigeria from her socio, economic and political conundrum.

³⁸ *The Family Story* (Butterworths, 1981 at 174

³⁹ (1954) All E.R p.22

⁴⁰ P.N. Bhagwati, *Judicial Activism in India* (last accessed on 19-6-2021) <https://www.seconline.com/blog/post/2022/03/04/a-comprehensive-analysis-on-judicial-legislation-in-india/>

In achieving this, the judiciary must be truly independent to perform the task of addressing the various socio economic problems that bedevilled this Nation. Chuwudifu Oputa, JSC⁴¹ of the blessed memory stressed this point unequivocally thus:

“Without judicial independence, no judge or justice however well prepared by qualities of heart, mind and professional training, can give full effect to the enduring values enshrined in our basic law – our constitution. Since the independence of the judiciary is a concept and a role which have been unconsciously and sometimes willfully misunderstood, as the judiciary trying to turn itself into a government within a government, it becomes necessary to emphasize that any freedom, any immunity, any privileges accorded to judges are not accorded so much for their own sake, as for the sake of the public. No judges try his own case, nor should he try any case in which his close relatives or friends are involved. Any power given to the judge, therefore is not given for the self-advancement or self-aggrandizement. Such powers are necessary for greater efficiency in the administration and dispensation of justice. They are given for the advancement of justice – that being free and independent – the judges may be free in thought and independent in judgment, so that they may better and more efficiently and more effectively perform their necessary duties to the course of justice including protecting all of us – the government and the governed; the powerful and the weak – from power and its abuse..... A weak-kneed and dependent judiciary can be an awful, and ill wind that blows no one any good”.

5. CONCLUSION

From the above discussion, it is glaring that certain actions are imperative.

⁴¹ Hon. Chukwudifu Oputa- “Towards Greater Efficiency in the Dispensation of Justice in Nigeria an essay in Law, Justice and Stability in Nigeria, essays in honour of Justice Kayode Eso CON”, LL.D.

First, Chapter II of the Constitution must be made justiciable. This will promote accountability and cause the nation's resources to be utilised for more important projects embedded under that Chapter and reduces the portion of resources available for stealing and misappropriation under whatever guise. Implementing Chapter II will promote the wellbeing, welfare and security of the average citizen, promote economic growth and development and ensure an egalitarian society. Then the Utilitarian concept of the happiness of the greatest number will be achieved. A collective and legislative action would be necessary to amend section 16 or Chapter II of the Constitution and make it justiciable. This will involve a lot of awareness and advocacy actions by the Nigerian Bar Association and Coalition of Civil Societies and the Judicial Statesmen.

Second, the Courts need to be more involved especially at the highest level- moving from just error correction to policy courts. We need the likes of Lord Denning, Justice Marshall of the United States, Justice Kayode Eso, Justice Obaseki, Justice Oputa, Justice Niki Tobi, and the like to reactivate the era of judicial activism in Nigeria. There must be an orchestrated judicial agenda to help fix the political, economic and social challenges being faced in Nigeria. The Judiciary and the legal profession cannot fold their arms any more while this country is being destroyed when they are the last hope of the common man. We need to have Legal and Judicial Statesmen who would midwife a judicial agenda for Nigeria. We need to create something (not in the like of Okija Shrine) that our leaders must fear.

May I use this occasion to propose a judicial hall of Fame for some of our Legal Heroes and Champions who would be our Legal Statesmen. This can be undertaken through a Non-Profit Organisation that will periodically use and evaluate the contributions of jurists and Lawyers to the cause of legal change/engineering. The Non-Profit Organisation will have the power to award fellows to deserving members. May I suggest that Aare Afe Babalola, SAN be the first to be enlisted in this Hall of Fame.

There is a need for a powerful lobby force at all levels to influence Executive policies and laws to be enacted by the National Assembly.

Our Appellant Court especially the Supreme Court should not just be an error correction Court, but a policy Court and in some deserving cases exercise its *jurisdiction in qua judex* and help discipline our leaders as was the case of *Amaechi v. INEC*⁴².

We need to revisit the recruitment process to the Bench. The best should be recruited, and it should not be politicked. Those recruited must be indoctrinated early enough before they are debriefed by hijackers and bad elements. What we need is having the right people in place. Justice Amina Augie, JSC once said that we need to rethink ourselves and not just our laws. According to Peter Drucker, “The ultimate resource in economic development is people. It is people not capital or raw materials that develop an economy”.

Mentoring programme for our students especially at the Undergraduate level. They should be taught that the law degree is not just a meal ticket but about making a desired impact in their society. While I was Dean of the Faculty of Law at the University of Jos between 2008-2014, I had described the General Philosophy of the LL.B offered at the University of Jos in the Student’s Prospectus thus⁴³:

“The LL.B programme is designed to ensure that the graduate of Law will have a clear understanding of the place and importance of Law in society. Because all human activities — social, economic, political, etc. - take place within legal framework, it is necessary that the student of Law should have a broad general knowledge and exposure to other disciplines in the process of acquiring legal education- Legal education should, therefore, act, first as a stimulus to stir the student into critical analysis and examination of the prevailing social, economic and political systems of his community and, secondly, as an intellectual exercise aimed at studying and assessing the operation, efficacy and relevance of various rules of law in the society”.

⁴² (2008) 5 NWLR, Part 1080, 227

⁴³ Faculty of Law, University of Jos. 2012/2017 Academic Prospectus, July 2012 at page 7.

As Aare Afe Babalola, SAN said in one of his quotable quotes-
“The only change that can be a lasting change, that would change the world and change the people, is changing the mind of the youths.” We should catch them young.

We also need to use forensic science in fighting crime in Nigeria. My B.A Criminal Justice and Security Administration can be revisited.

5.1 Tribute to Aare Afe Babalola, SAN, OFR, CON, CFR

Mr Chairman, Your Excellences, Distinguished Guests, let me end this Lecture by paying personal tributes to Aare Afe Babalola- a father, a mentor and a pace setter. He is Affable because he’s easy to talk to. He is Amiable because he’s friendly and nice, he is Charming because he has a “magic” effect that makes people like him, he is Polite because he’s good at saying “please,” “thank you,” etc, he is Likeable because he’s easy to like, he is Gregarious because he likes being with other people, he is Impartial because he doesn’t support just one side of a disagreement., he is Self-disciplined because he can control his own behaviour easily, he is Resourceful because he’s good at finding ways to solve problems, he is Proactive because he doesn’t wait for things to happen. he makes them happen, he is Practical because he’s good at finding the simplest and most efficient solution, he is Efficient because he can organise things quickly and clearly, he is Hardworking because he works hard, he is Diligent because he does his work carefully and cares about the details, he is Versatile because he can do different things depending on the situation, he is Intuitive because he can understand what’s happening using his feelings (not just facts), he is Dependable because If he says he will do something, he will do it, he is Trustworthy because you can trust him to be honest and sincere.

5.2 Conclusion

Mr Chairman, My Lords, we gather here today to celebrate someone who has been unanimously described as pristine, untainted, impeccable, exemplary, incorruptible, spotless, uncensorable, cerebral, and unblemished. All these qualities have been proved beyond the shadow of doubt by his indelible contribution to the Legal Profession and to Nation building at large.

Let me again end with the lucid words of Patrick Lumumba who said:

“Our country must morally re-arm. We cannot run a country where virtue is vice and vice is virtue. We cannot live in a country where the looters of yester-years assume they have undergone a Pauline conversion because they are in opposition and oppose the Government of the day. Some of our richest men and women are to be found in politics and their creed is, thou shall reap what thou hath not sown.”

The consequences of our remaining silent and inaction on our part are summed up by Okesola⁴⁴ thus:

“Someday, the aborted generation may take us to the court of postareerity and the tribunal of history; we will all be cross examined on our roles today. The charges will be charges of nonchalance, greed, selfishness, nepotism, neglect, grievous errors in judgment, failure to fight corruption and failure to abide by our conscience or the rule of law. The exhibit will be the victims of countless religious riots and terrorism, the millions of impoverished citizens and abused Nigerian children who have lost their future, the violation of the social contract by the leaders and betrayal of trust by people in authority. We must decide to follow the due process of law and abide by the laws of our country to achieve a positive social change. The problem is not inadequacy of laws but the ineffective enforcement of the laws. Social engineering begins from an individual”.

Thank you for listening.

⁴⁴ Op. Cit. 108.