

## CAN A STATE HOUSE OF ASSEMBLY ENACT PENSION LAW IN NIGERIA?\*

### Abstract

*Pension means regular payments made by the state to the disabled, widowed or by a former employer to an employee after long service or a periodical payment made especially by government, company or an employer in consideration of past services.<sup>1</sup> This paper seeks to review Nigerian pension laws with a view to identifying whether a state can enact a pension law to grant pension and gratuities to an ex-governor and if not what happens to the pensions so far collected by the ex-governors under the various states' pension laws? The paper concludes that only the federal government or National Assembly can make law on pension in Nigeria, therefore the various states' laws on pension and gratuity to Ex-Governors should be declared null and void.*

**Key words:** *Pension and Gratuity Law, State House of Assembly, National Assembly, Legislative Powers, State Governors who are senators or ministers*

### 1. Introduction

Since the various states' Houses of Assembly have refused to amend or abrogate outrageous life pensions for their former colleagues and ex-governors of their states, the discourse had also refused to die down too. Just recently, some Nigerians expressed outrage at the development in the light of the dwindling economic situation in the country and the inability of most states to pay worker's salaries. While the law recognizes pension for public servants, including governors, the introduction of generous packages into the scheme, especially when most of the beneficiaries retire into the National Assembly or federal cabinet, leaves much to be desired. Currently, about 21 former governors and deputies are drawing salaries from public purse as either serving senators or ministers. The Revenue Mobilization Allocation and Fiscal Commission (RMAFC) approves payment of 300 per cent basic salary as severance allowances for political office holders on leaving office but various states' Houses of Assembly had approved a wide range of entitlements for ex-governors and their deputies, including legislators.<sup>2</sup>

According to a Lagos State Pension Law approved by former governor, Bola Tinubu in 2007, a former governor will enjoy the following benefits for life: Two houses, one in Lagos and another in Abuja, estimated by property experts to cost #500 million and #700 million for Lagos and Abuja respectively. Others are six brand new cars replaceable every three years; furniture allowance of 300 per cent of annual salary to be paid every two years, and a close to #2.5 million as pension about #30 million pension annually). He will also enjoy security detail, free medicals including for his immediate families. Other benefits are 10 per cent house maintenance, 30 per cent car maintenance, 10 per cent entertainment, 20 per cent utility, and several domestic staff.

In Rivers State, the law provides 100 per cent of annual basic salaries for ex-governor and deputy, one residential house for former governor 'anywhere of his choice in Nigeria'; one residential house anywhere in Rivers for the deputy, three cars for the ex-governor every four years; two cars for the

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<sup>1</sup> B.A. Garner (ed), *Black's Law Dictionary*

B.C. Okoro, *Law of Employment in Nigeria*, Concept Publication Ltd, Lagos, 2013, p133

<sup>2</sup> The former governors who are now senators are Theodore Orji (Abia), Godswill Akpabio (Akwa Ibom) Bukola Saraki(Kwara), Rabiu Musa Kwankwaso (Kano) Kabiru Garya(Kano) Abdullahi Adamu (Nasarawa) Sam Egwu (Ebonyi), Joshua Dariye (Plateau) Jonah Jang (Plateau) and Shaaba Lafiagi (Kwara). Others are Ahmed Sani Yerima (Zamfara) Aliyu Magatakarda Wamakko (Sokoto) Danjuma Goje (Gombe), George Akume (Benue) Bukar Abba Ibrahim (Yobe) Isiaka Adeleke (Osun) and Adamu Aliero (Kebbi). Former deputy governors in the Senate are Enyinaya Abaribe (Abia) Ms Biodun Olujimi (Ekiti) while Danladi Abubakar Sani served as the acting governor of Taraba State. Former governors now ministers include Babatunde Raji Fashola (Lagos) Rotimi Amaechi (Rivers) Chris Ngige (Anambra) Kayode Fayemi Ekiti) and Dr. Ogbonnaya Onu (Old Abia). See *Daily Trust*, 20<sup>th</sup> February, 2017, p1; *The Guardian*, 31 January, 2017, p 30

deputy every four years. His furniture allowance is 300 per cent of annual basic salary every four years en bloc. House maintenance is 10 per cent of annual basic salary.

In Akwa Ibom State, the law provides for #200 million annual pay to ex governors and deputies. The governor/deputy governor enjoys a pension for life at a rate equivalent to the salary of the incumbent governor/deputy governor respectively. In addition to this are a new official car and a utility vehicle every four years; one personal aide and provision of adequate security; a cook, chauffeurs and security guards for the governor at a sum not exceeding #5 million per month and #2.5 million for the deputy governor. There are also free medical services for the governor and spouse at an amount not exceeding #100 million for the governor per annum and #50 million for the deputy governor. Also, there is a five-bedroom mansion in Abuja and Akwa Ibom State and an allowance of 300 per cent of annual basic salary every four years in addition to severance gratuity.

The Kano State Pension Rights of Governor and Deputy Governor Law 2007 provides for 100 per cent of annual basic salaries for former governor and deputy; furnished and equipped office, as well as a 6-bedroom house; 'well-furnished' 4-bed-room for deputy, plus an office. The former governor is also entitled to free medical treatment along with his immediate families within and outside Nigeria where necessary. It is same for deputy. Two drivers are also for former governor and a driver for his deputy, and personal staff below the rank of a Principal Administrative Officer and a PA not below grade level 10. There is a provision for a 30-day vacation within and outside Nigeria. The narrative is the same for Gombe, Kwara, Zamfara and Sokoto among others.

The legality of those laws and their inconsistency with the provisions of the Constitution and RMAFC still remain an issue yet to be determined by an Abuja Federal Court. The effect of the pension is also worrisome to most Nigerians who questioned the morality behind the scandalous payment to people who are also drawing remunerations. It also indicates that some Nigerian politicians are not only self-serving but lack sense of sacrifice at a crucial period of economic challenge.<sup>3</sup>

## **2. Discussion**

### **2.1. Rights to pension and Gratuity**

#### **Contractual Right to Pension**

The concept of pension developed as a result of the desire of the employer to induce an employee or worker to accept employment in his establishment, to arouse in the employee a feeling that his own interest is to some extent coterminous with that of his employer thereby inducing sense of loyalty and commitment to the cause of the employer and to engender confidence in the body of workers by practical demonstration of what each of them might expect from long faithful service.<sup>4</sup> The right to pension, therefore, rest upon mutual confidence and upon the terms of the contract. Once the right to pension is mutually agreed and incorporated into the contract of employment, it becomes an enforceable term at the instance of the employee. The law will therefore not permit an employer to resile from his obligations simply because the terms are one sided or burdensome. The maxim 'you cannot approbate and reprobate at the same time' or 'benefit and burden must run concurrently or together' will apply.<sup>5</sup>

#### **Constitutional Right to Pension**

No doubt, the right to pension originates from contract of employment but the Constitution which is the supreme law of the land made some elaborate provisions on pension rights which shall now be considered.

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<sup>3</sup> Ibid

<sup>4</sup> Sections 173 and 210 of the 1999 Constitution of the Federal Republic of Nigeria as amended

<sup>5</sup> E.T. Yebisi Review of the Legal Frameworks for Pension and Retirement Rights University of Ado Ekiti Law Journal vol.2 p291

1. The 1999 Constitution provides that subject to the provisions of subsection 2 of this section, the right of a person in the public service of a state to receive pension or gratuity shall be regulated by law.
2. Any benefit to which a person is entitled in accordance with or under such law as is referred to in subsection (1) of this section shall not be withheld or altered to his disadvantage except to such extent that is permissible by law ....
3. Pension shall be reviewed every five years or together with any state civil service salary whichever is earlier.
4. Pension in respect of service in service of a state shall not be taxed –see S.173 for pension in federal civil service.<sup>6</sup>

In addition to the above provisions, section 17 (3) (f) provides that the government shall ensure that children and young persons, and the aged are protected against any exploitation whatsoever and against moral and material neglect. While section 17 (2) (c) provides that governmental actions shall be humane, are our governors' action humane when they refuse to harmonise pension in accordance with the provisions of the Constitution? They rather went on to make generous provisions for themselves after leaving the office.

From above provisions of the law, it is clear that the Constitution confers pension right on both federal and state civil servant who retired having performed their own side of the contract of employment by serving meritoriously, faithfully and long enough to qualify them to rest, relaxation and peaceful living.<sup>7</sup>

### **The Right to Gratuity**

The same law that confers the right to pension also confers the right to gratuity. The Pensions Act, 1979 is also relevant here. It is however disheartening that some public servants who were compulsorily retired since 1995 and those retired in 1999 are yet to collect their gratuity. This is not a governmental action that can be said to be humane as provided in section 17 (2) (c) of the 1999 Constitution. Government should therefore without delay set its priorities right by attending to these matters of pension and gratuity in order to endear the heart of the people<sup>8</sup>. A stitch in time saves nine.

## **2.2 Pensions, Gratuities and Legislative Powers in Nigeria**

### **Legislative Power of National Assembly**

The power of National Assembly to make law in Nigeria is spelt out in section 4 (1), (2) and (4). While subsections (1) and 2 confer exclusive power on the National Assembly to make law on items or matters contained in the Exclusive Legislative List, subsection (4) further confers power on the National Assembly to make law concurrently with the State Houses of Assembly on matters in the Concurrent Legislative List as spelt out in Part II of the Second Schedule to the Constitution. By the tenor of subsections (1), (2) and (4), the National Assembly has wider legislative powers than the State Houses of Assembly. But that does not mean that National Assembly has arbitrary legislative powers. The legislative power of the National Assembly is still circumscribed by the provisions of the Constitution and the National Assembly cannot confer more legislative power on itself than that contained in the Constitution.<sup>9</sup> The National Assembly cannot extend or expand its legislative power to include legislating for a State or Local Government. It does not have broad, vague or unlimited powers but the

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<sup>6</sup> Sections 173 and 210 of the 1999 constitution

<sup>7</sup> F.R.A. William, *Constitutional Problem of Federalism in Nigeria* 1960 p.31; C. Ilegbune, 'The Nigerian Constitution 1999 and the Law Matter' in C.C. Nweze (ed), *Justice in the Judicial Process*, 2002, p. 308; O. Abifarin, *Essays on Constitutional and Administrative Law*, Mafolayomi press Kaduna 1999 p.9; O. Abifarin, *Essays on Constitutional and Administrative Law under the 1999 Constitution of Nigeria*, vol.2 Achiever Publication, Ilorin, 2000 p.168; O.A. Popoola, 'Law Making in a Federal System of Government: The Nigerian Experience', *Ibadan Bar Journal*, vol.2 No 1, 2003, p.94

<sup>8</sup> Ibid

<sup>9</sup> O. Abifarin and D.F. Atidoga, 'A Critical Analysis of the Scope and Limit of Legislative Powers of the National Assembly and States Houses of Assembly under the 1999 Constitution of Nigeria', *Confluence Law Journal*, vol.1 No.1 Jan. 2006 p.11

National Assembly may exercise such powers that was neither expressly granted nor prohibited just as it was held by the Supreme Court of the Congress of America: ‘This congress is not confined to the powers named in the Constitution. Congress may also exercise powers, which may be reasonably implied from the enumerated powers’.<sup>10</sup> It is also arguable that the concept of enumerated powers as limitation to the legislative power of the National Assembly could be excused on issues of foreign relations on ground of inherent powers. The power to wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties if they had never been mentioned in the constitution, would have vested in federal government via the National Assembly as necessary concomitants of Nationality thus in the field of foreign relation, the powers of National Assembly are inherent and therefore not limited<sup>11</sup>.

### **Legislative Power of the State Houses of Assembly**

The legislative powers of State Houses of Assembly are enumerated in the Constitution. Section 4 (6) of the Constitution provides that the legislative power of a State of the Federation should be vested in the House of Assembly of a State and the House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say:

- a. Any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.
- b. Any matter included in the Concurrent Legislative List set out in the first column of part II of the Second Schedule to this Constitution.
- c. Any other matters with respect to which it is empowered to make laws in accordance with the provisions of this Constitution (referred to as residual matters)

### **Limitations on the Legislative Power of the House of Assembly of State**

Apart from the specific jurisdiction of the House of Assembly of a state conferred on it by the constitution in the concurrent legislative list, the constitution also restricts the legislative power of the House of Assembly in the following ways: The supremacy of the constitution in section 1 (1) and (3) is the first limitation. Every law made by the House of Assembly must not be inconsistent with any provision of the constitution.<sup>12</sup> Section 4 (5) provides that if any law by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency be void. This is a restriction on the legislative power of the House of Assembly of a State. This restriction is to the extent that even while exercising its legislative power on the items on concurrent legislative list, such power should be exercised with caution so that it should not act ultra vires the National Assembly and the Constitution.

The House of Assembly of a State has to, for instance, conform to the manners, form and procedure prescribed by law. This shows that the House of Assembly of a State does not have wide power or absolute power to legislate even on items on concurrent legislative list and residual matters. The power of the House of Assembly to create Local Government shall also be exercised jointly with the Local Government Councils in respect of the area. The same also goes for boundary adjustment of Local Government.<sup>13</sup> Another important fact is that the legislative power of House of Assembly of a State is subject to judicial control or judicial review. That means that any law enacted by the House of Assembly of a State is subject to the judicial control or review by the High Courts when the constitutionality of the law is in question.<sup>14</sup> More still, the constitution also restricts the House of Assembly of a State to

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<sup>10</sup> *U.S v Curtiss Wright Export Corporation* 1936 (229) US 304; *Maryland v Mc Cullock* 4 Wharton 316 (1819)

<sup>11</sup> R.B. Rosey, *American Government*, Littlefield, Adams & Co New Jersey, 1974, p.79

<sup>12</sup> M.O. Adediran, ‘Critical Examination of the Constitutional provisions on the Legislative powers of the Federal and States’ in Proceedings of the Conference on the 1995 Nigerian Draft Constitution, p.11.

<sup>13</sup> O.Oluduro, ‘The Limit of Legislative Powers of the National Assembly with Respect to Local Government under the 1999 Constitution’, *Ondo State Law Journal* Akure, 2004, p.127; Sections 8 and 9 of the 1999 Constitution of Nigeria (as amended).

<sup>14</sup> S.M. Kanam, ‘An Appraisal of the Application of the Doctrine of the Ultra Vires Doctrine as a Ground for Review of Administration Action’, *Confluence law Journal*, vol. 1 No. 1 Jan. 2006 p.135.

making prospective laws only. The House of Assembly of a State cannot make retrospective or retroactive criminal law. This has been extended by judicial authorities to civil laws. The effect of these cases is that both the National Assembly and House of Assembly of a State have no power to make both retrospective criminal and civil law.<sup>15</sup> The doctrine of covering the field is another limitation of the legislative power of the State of House of Assembly. Under this doctrine, whatever the National Assembly has legislated upon on the concurrent legislature list cannot be legislated upon again by the House of Assembly of a State.<sup>16</sup>

Section 315 (4)(a), (1) and (11) empowers the president and the Governor being the appropriate authority to, as provided in section 315 (2), make such modifications in the text of any existing law to bring it into conformity with the provisions of this constitution. Existing law was defined in section 315 (4) (b) to mean any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which being passed or made before that comes into force after such date. The implication of section 315 is that the President and Governors are now conferred with legislative powers. The President in exercising his power under this section made an order via statutory instrument No. 9, 2002 modifying the Principal Allocation of Revenue Act. When this was challenged by the states in *AG Abia State v. AG Federation*, the Supreme Court upheld the power of the President to modify the Act.<sup>17</sup> It must be noted that a Governor can only modify an existing state law and not a federal law.

### **Who has power to make law on pension and gratuities in Nigeria?**

The Constitution of Nigeria not only guarantees right to pension and gratuities if a citizen is in the public service of a state or federation but goes on in the exclusive legislative list in item 44 to state clearly that pension and gratuities fall within the legislative competence of the National Assembly. This provision of the constitution is clear and unambiguous. Going by this provision, no state House of Assembly in Nigeria is competent to make pension and gratuity law for any public servant in Nigeria. Any attempt by any state to make pension law for the state shall be futile. Therefore, States Pension Laws are null and void.

### **Who then is a public servant or in the public service of a State or the Federation?**

Public Officer is defined in the Constitution as a person holding any office specified in part II of the Fifth Schedule to the Constitution. Part II of the Fifth Schedule lists public officers as:

1. The President of the Federation
2. The Vice-President of the federation
3. The President and Deputy President of the Senate Speaker and Deputy Speaker of the House of Representatives and Speakers and Deputy Speakers of Houses of Assembly of States and all members and staff of legislative houses.
4. Governors and Deputy Governors of States
5. Chief Justice of Nigeria, Justice of the Supreme Court, President and Justice of the Court of Appeal, all other judicial officers and all staff of courts of law.
6. Attorney-General of the Federation and Attorney-General of each state
7. Minister of the Government of the Federation and Commissioners of the Governments of the States
8. Chief of Defence Staff, Chief of Army Staff, Chief of Naval Staff, Chief of Air Staff and all members of the Nigeria Police and other government security agencies established by law.

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<sup>15</sup> P.O. Idonigie, 'Division of legislative power under the 1999 constitution in The Law and Practice of the Legislature in Nigeria', K.N. Nwosu (ed) p.85.

D.A. Ijalaiye, *The Imperatives of the Federal /States Relation in a Fledgling Democracy. Implications for Nigeria*, 2001, NIALS Lagos, p.18.

<sup>16</sup> B. Ogwo, 'Conflicts in the Legislative Process in Nigeria: The Relevance of the Doctrine Pith and Substance and Covering the Field', *Confluence Law Journal*, vol.1 No. 1, Jan 2006, p.112; A. Akintayo, 'The Doctrine of covering the Field and the Blue Pencil Rule in Legislative Enactments: A Judicial Revalidation', *Ilorin Bar Journal*, vol.2 August 2002, p.196.

<sup>17</sup> *A.G. of Abia State v AG of the Federation* (2003) 3 SCNJ 158.

9. Inspector –General of Police, Deputy Inspector-General of Police and all members of the Nigeria Police and other government security agencies established by law.
10. Secretary to the Government of the Federation, Head of the Civil Service, Permanent Secretaries, Director-General and all other persons in the civil service of the Federation of the State.
11. Ambassadors, High Commissioners and other officers of Nigerian Missions abroad
12. Chairman, members and staff of the Code of Conduct Bureau and Code of Conduct Tribunal
13. Chairman, members and staff of local governments and councils
14. Chairman and members of the Boards of other governing bodies and staff of statutory corporations and of companies in which the Federal or State Government has controlling interest
15. All staff of universities, colleges and institutions owned and financed by the Federal or State governments or local government councils
16. Chairman, members and staff of permanent commission or councils appointed on full time basis.

The true position of the law of pension and gratuities in Nigeria is that while Pension Act 1979 which was replaced by Pension Reform Act 2004 is for civil servants, public officers or public office holders ought to be given their own Pension Act in accordance with the provisions of the Constitution. Therefore, the practice whereby each State House of Assembly is enacting pension law for ex-governors is illegal and unconstitutional. It is only the National Assembly that has powers to make pension and gratuity law for our public officers in Nigeria and this includes the governors and their deputies.<sup>18</sup>

### **2.3. Ex-Governors, Pensions and Gratuities**

#### **Are Ex-Governors supposed to be entitled to pensions and gratuities?**

The answer to this question could be given in the negative if one looks at the position of an ex-governor in the United States of America where Nigeria copied its present presidential system of government. No governor in America takes pension or gratuity after leaving office. It is only the ex-Presidents of United States of America and their widows that are entitled to pension and maintenance allowance<sup>19</sup>. We are not bound to follow American system in toto but whatever adjustment we make in the Constitution must not be detrimental and burdensome to the economy. But in Nigeria, if we decide to give pension and gratuities to our ex-governors, the constitutional provision must be strictly adhered to. Severance allowance must give way for pensions and gratuities or vice versa. We can also consider contributory pension scheme for them because what is good for the goose is also good for the gander. If the civil servants who served for 35 years can only enjoy contributory pension scheme then the public office holder should be allowed to enjoy same if at all we consider them for pension. Service of a state for two terms of four years each is not up to 10 years that qualify a civil servant to enjoy pension under the Pension Act of 1979. Issue of pension and gratuity of ex-governors is not a residual matter since the Constitution covers it.<sup>20</sup> Multiple remunerations from the public treasury by our public officers should be proscribed by law. It is an anti-people policy and it promotes corruption and makes public offices attractive to politicians. An ex-governor who is a serving senator should take only one remuneration. He takes either pension or his salary and allowances as a senator. The same goes for other positions.

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<sup>18</sup> F. Dada, 'The Pension Reform Act 2004: A Critical Appraisal of pension Reform in Nigeria', *Joseph Ayo BABALOLA University Law Journal*, vol.1 No.1, 2014, p.226

<sup>19</sup> R.B. Posey, *American Government*, Op cit., p.26

<sup>20</sup> P.O.Odiase, 'Comparative Analysis of the Use of Residual Clause in the Distribution of Power in a Federation', *Journal of Dept of Public Law and Jurisprudence*, Usman Dan Fodio University, Sokoto, Vol.1 (2008/2009). p. 27

## **Double Payments for Ex-Governors now Senators or Ministers vis-À-vis The Code of Conduct for Public Officers**

Part 11 of the Fifth Schedule to the 1999 Constitution defines public officer to include but not limited to-

The president of the federation, the vice-president of the Federation, the President and Deputy President of the Senate, Senate Speaker and Deputy Speaker of the House of Representatives and Speakers and Deputy Speakers of the House of assembly of States, and all members and staff of the legislative house, Governors and Deputy Governors of States etc.

Therefore, it is crystal clear that the former Governors now serving Senators or Ministers are public officers and are not expected to receive double payment from their present office and pension from their respective State Pension Schemes.

Equally, the said Fifth Schedule to the Constitution provides as follows:

1. a public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities.
2. Without prejudice to the generality of the foregoing paragraph, a public officer shall not-
  - (a) Receive or be paid the emoluments of any public office at the same time as other public office; or
  - (b) Except where he is not employed on full time basis, engage or participate in the management or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming
- 4 (2) A retired public servant shall not receive any remuneration from public funds in addition to his pension and the emolument of such one remunerative position.

The said Schedule defines 'Emolument' to mean-

any salary, wage, overtime or leave pay, commission, fee, bonus, gratuity, benefit, advantage (whether or not that advantage is capable of being turned into money or money's worth, allowance, pension or annuity paid, given or granted in respect of any employment or office.

The question to be asked at this juncture is whether the above sections apply to Governors and Deputy Governors. If the above provision has defined public officers to include both governors and deputy governors of States, then the above provision of the Constitution on code of conduct bureau will be applicable and same should be binding on the ex-governors and their deputies who are now serving minister. In any event, they are open to the option of either remaining as ex governors/deputies alone and be entitled to their various pensions and emoluments or forfeit same when they go for a ministerial position since they are hell bent on serving their nation by becoming ministers. Better still, their pensions will be in abeyance while in public office on full time, but this is not even possible since as the pension laws are null and void, they are only entitled to severance allowance.

### **3. Conclusion**

Each legislative arm of the three tiers of government in Nigeria should keep itself within the ambit of the law in the business of legislation in order to enthrone the much desired peace, order and good governance. Therefore, state pension laws that provide pension and gratuities to ex-governors are illegal, null and void. The civil society organizations should challenge these laws in the courts since they are inconsistent with the provisions of the Constitution, and are not justifiable given the economic reality of Nigeria today. Payment of both severance allowance and pension and gratuity to ex-governors is wrong and it constitutes economic depression for the states in Nigeria. Whatever the Ex-Governors must have collected under a void law should be refunded to the state treasury without further delay. It is clear from the Constitution that no state in Nigeria can make law on pension and gratitude since matters of pension and gratuities are in the Exclusive Legislative List.