International Journal of Innovative Legal & Political Studies 9(3):27-41, July-Sept., 2022

© SEAHI PUBLICATIONS, 2022 www.seahipaj.org ISSN: 2467-8503

Is The Miscellaneous Offences Act Still Valid And Applicable In Nigeria?*

ABSTRACT

The Miscellaneous Offences Act (MOA) is a Nigerian statutory framework for varying offences enacted by the Federal Military Government as Decree No. 20 of 1984 and retrospectively commenced on December 31, 1983. This paper examines the true test of validity of MOA. With the aid of constitutional provisions and case laws, the work appraises the applicability of the MOA in Nigeria in the two folds of non-modification by the President of the Federal Republic of Nigeria and the retrospective criminal status of the MOA. The research reveals that the MOA is in direct conflict with constitutional provisions prohibiting retrospective criminal legislations. The research concludes that for all intents and purposes, the MOA remains invalid and inapplicable in Nigeria until the criminal statute is modified as contemplated by the present constitutional regime. The research proffers step by step recommendations to bring the MOA in conformity with our legislative and constitutional frameworks.

Keywords: Retroactive criminal legislations, offences, Decrees, Miscellaneous Offences Act, existing legislation, appropriate authority, and Nigerian legal system.

INTRODUCTION

Laws are to apply prospectively and they become anomaly when applied retrospectively. The principle of non-retroactivity is a general principle of law. The Regional Conference for Africa[1] expressly reaffirmed the principle that retrospective legislation, particularly in criminal matters is inconsistent with the rule of law.

The principle of non-retroactive application of law first emerged in Roman law, where it took the form of a rule against punishing an individual in the absence of a specific rule prohibiting certain conduct when committed.[2] Cicero, the Roman statesman, in explaining the importance of the non-retroactivity, stated that individuals should be able to rely on laws in the expectation that the state will not afterwards interfere with individuals' rights.[3] According to Cicero, this expectation helped to ensure equality of all before the law guarding predictability and legal certainty.[4] Although the principle of non-retroactivity is widely accepted in criminal law, it does not receive equal recognition in other areas of domestic law.[5]

In Nigeria, the prohibition of retrospective criminal laws is a fundamental principle of our legal system. The Nigerian legal system is influenced by the English legal system. The Nigerian criminal law as a law derived from the English common law[6] , in theory, is expressed to a substantial extent in the principle of nulla poena sine lege – that a man may be punished only in accordance with the law.[7]

---

* T.A.M Damiari LL.B (Hons), BL. Practice Manager in ASALAW LP and can be reached via his email address - temple.damiari@nigerianbar.ng.

[1] The conference was organized by International Commission of Jurists in January 1961 at Lagos, Nigeria.

[2] Y Kryvoi and S Matos, *Non-Retroactivity as a General Principle of Law*, (2021) 17(1) Utrecht Law Review 46. See also G Broggini, *Retroactivity of Laws in the Roman Perspective* (1996) 1 Irish Jurist 151, 168.

[3] Broggini, 168.

[4] Ibid.

[5] Y Kryvoi and S Matos (n 2) 46.

[6] C.O Okonkwo, *Okonkwo and Naish on Criminal Law*, (2nd ed Spectrum Books Ltd 2003)3.

[7] L Ali, *Corporate Criminal Liability in Nigeria*, (Malthouse Press Ltd 2008) 100. The above principle has found expression in the constitutional provision of section 36 (12) of the Constitution.

Criminal offences in Nigeria like the English system are essentially a creation of statute. Legislative and constitutional frameworks safeguard the procedure in criminal prosecutions in Nigeria. The Nigerian legal system is intermingled with Nigerian political development,[8] which traversed military and civil dispensations. Nigeria in post-independence witnessed a total of eleven coup, counter and abortive coup d'etats. Although the military incursion in politics is regarded as an aberration, their sojourn in the governance of the nation, left consequential impact on the Nigerian legal system, particularly with the infusion of law-making functions in the Federal Military Government at the material time.

One of the criminal statutes enacted by the military is the Miscellaneous Offences Act (MOA).[9] The MOA was enacted by the Federal Military Government vide Decree No. 20 of 1984 and took effect, albeit with a commencement date of December 31, 1983. From the long title of MOA, it is an "Act to create a number of miscellaneous offences with stiff penalties and for the trial of such offenders". The MOA predates the Constitution of the Federal Republic of Nigeria, 1999 (CFRN) (as amended) and is believed to be an existing law under Section 315 CFRN. Section 315 of the CFRN defines an existing law and provided procedural prescriptions in bringing a law in conformity with the Constitution as an existing law.

The paper interrogates the validity and applicability of the MOA in the light of decided case laws, legislative and constitutional frameworks. The paper examines the procedure in bringing into effect existing laws with necessary modifications and the role of the President of the Federal Republic of Nigeria. By judicial, statutory and constitutional authorities, the work found that there is an absolute ban of retrospective criminal legislation in Nigeria and that the retrospective commencement date in the MOA is in direct conflict with the provisions of sections 4(9) 36(8),(12) and 1(3) of the CFRN respectively and that the President has not exercised his powers under section 315 to modify the MOA to bring it in conformity with the Constitution.

This work is divided into seven broad parts. While the first part dealt with the definition of some terms and historic perspective of the MOA, the second part examines the true test of the applicability of the MOA in Nigeria. The Third part appraises the MOA as existing legislation in the light of the constitutional, legislative frameworks and case law decisions. The fourth part considers the propriety of executive exercise of law-making powers under section 315 of the CFRN and argument mostly posed against invalidating the MOA. The fifth part examines the present status of concluded and pending cases under the MOA. The work concludes in the sixth part by beckoning on the President of the Federal Republic of Nigeria to exercise his constitutional powers under section 315 of the CFRN to modify the MOA and delete the retrospective commencement date in the Act to bring it in conformity with the Constitution. The seventh part proffered recommendations for the modification of the MOA, review of laws and role of the National Assembly.

Definition of Some Terms

Appropriate authority under section 315(4) of the CFRN means –

(i) the President in relation to the provisions of any law of the Federation,
(ii) the Governor of a State in relation to the provision of any existing law deemed to be a Law made by the House of Assembly of that State, or
(iii) any person appointed by any law to revise or rewrite the laws of the Federation or of a State.

Existing legislation – By Section 315(4) of the CFRN, existing legislation means "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 have been passed or made before that date comes into force after that date."

[8] The decrees or laws at every point in time were, in most cases, a function of the political regime.
[9] Now contained in Cap. M17 of the Revised Edition (Laws of Federation of Nigeria) 2007.

Offence – By Section 494 of the Administration of Criminal Justice Act 2015, offence means "an offence against an Act of the National Assembly".

HISTORICAL PERSPECTIVE OF THE MOA[10]

Few years after independence, there were coup and counter coup of 1966 with the attendant civil war of 1967. General Gowon government was toppled in a bloodless coup on July 29, 1975 with General Murtala Mohammed emerging as the Military Head. General Murtala was killed barely after 7 months into his regime in an abortive coup of February 13, 1976. Gen. Olusegun Obasanjo, his deputy, succeeded him and handed over power to civilians on October 1, 1979.[11]

The Military staged another comeback to overthrow Shehu Shagari, the civilian President, in a coup on December 31, 1983 with Major-General Muhammadu Buhari as the Military dictator.[12] To grant legitimacy to the takeover by Major General Buhari, the Supreme Military Council led by Major General Buhari enacted Decree No. 1 of 1984. Though Decree no. 1 was enacted in 1984, it was however retrospectively applied to commence on December 31, 1983.

In similar vein, some of the Decrees enacted by the Buhari regime were retrospectively applied to the date of the takeover, apparently to enable the Buhari-led military junta properly assume jurisdiction over the offenders from the commencement of his rule. Buhari regime enacted several decrees, including Decree no. 20 of 1984. Decree no. 20 of 1984 was among Decrees used to try offenders and it was made to retrospectively apply from December 31, 1983. The Decree created a number of miscellaneous offences with stiff penalties and trial for offenders.

Decree no. 20 of 1984 later became Miscellaneous Offences Act and was later incorporated in the Laws Federation (LFN) 1990, subsequently in LFN 2004 and now in Cap M17 of the Revised Edition (Laws of Federation of Nigeria) 2007.

THE TRUE TEST OF THE APPLICABILITY OF EXISTING LAW

With the coming into effect of the 1999 CFRN, the drafters in section 315 CFRN provided certain prescriptions for the preservation of existing laws.

Section 315(1) CFRN provides as follows:

> (1) Subject to the provision of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be –
>
> (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make law, and
>
> (b) a Law made by the House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws.
>
> ……..
>
> (4) In this section, the following expressions have the meaning assigned to them, respectively –
>
> ……
>
> (c) "modifications" includes addition, alteration, commission or repeal.
>
> …….

[10] For historic perspective of Nigeria Criminal law, see C. Okonkwo, 4-17.

[11] TAM Damiari, *International Human Rights Day Celebration: Retrospect On Human Rights In Nigeria*, International Journal of Innovative Legal & Political Studies (2020) 8(4) 77-79.

[12] Ibid

Prima facie, the definition of 'existing law' under section 315(4) (b) of the CFRN would appear to state that any law, including rule of law, enactment or instrument that predates the passage of the section is an existing law. However, such interpretation would lead to absurdity, as the above subsection cannot be read in isolation from the other subsections of section 315 of the Constitution.

It is also pertinent to state that the historical antecedent of section 315 acts as a guide to the interpretation of the section. It is trite that a constitutional provision should be interpreted with recourse to its historical antecedents.

In **Shittu v Nigerian Agricultural & Cooperative Bank Ltd**,[13] Obadinna JCA put the position of the law succinctly: "That a Constitutional or Statutory Provision should be interpreted from its historical setting has the support of high authorities."

His Lordship Njeakor JCA in His concurring judgment in **Togun v Oputa (No.2)**,[14] stated the law in this regard in the following words:

> There is the need to look back and to have recourse to the historical setting of a constitutional or statutory provision, when seeking to interpret it. This helps to secure proper interpretation. Even previous decision on the issue ought to be borne in mind. …

Considering the true test of validity or applicability brevi manu, it can be stated that such test is only ascertainable by examining certain mandatory conditions set out in section 315 of the Constitution, which form the premise of the following posers:

1. Was the law made or passed before the passage of section 315 of the CFRN?[15]
2. Does the National Assembly or House of Assembly has the vires to make the law sought to be deemed as an existing law, bearing in mind the subject matters set out in the Exclusive, Concurrent and Residual lists in the CFRN?[16]

Under constitutional law, legislative power in a Federation is shared between the component federating units, i.e., the Federal, State and Local Governments, respectively. The implication is that where the legislature purports to act outside the contours of its powers - as delimited in the 2nd and 4th Schedules to the Constitution, such act would be ultra vires, invalid, null and void.

In **Togun v Oputa (No.2),**[17] the Court of Appeal held that:

> Nigeria is a Federal Republic with a Constitution, in which the legislative powers of the National Assembly and State Houses of Assembly are clearly defined. We have the Exclusive and the Concurrent Lists, in which the National Assembly could legislate. This leaves the State Houses of Assembly to legislate exclusively on residual matters not included in either the Exclusive or Concurrent Lists.

In **Doherty v Balewa**[18] the Learned Law Lords explicitly stated that: "The Federal Parliament can legislate for the Federation, only on those matters in respect of which it is specifically empowered to legislate under the Constitution".

In **Attorney-General, Benue State v Ogwu**,[19] Nasir PCA interpreting the provisions of section 274 of the 1979 CFRN which is in pari materia with section 315 of the CFRN, stated as follows:

---

[13] (2001) 10 NWLR (Pt. 721) 298 at 318

[14] (2001) 6 NWLR (Pt. 740) 597 at 664, para C.

[15] Section 315(4) (b) of the Constitution.

[16] Ibid, Section 315(1)(a) and (b).

[17] Togun v Oputa (n14) 664.

[18] (1961) 2 NSCC 248 at 252.

[19] (1983) 4 NCLR 213 at 217-218.

> The issue for consideration in this appeal is whether in fact the Act is inconsistent with the Constitution on the ground that the National Assembly has no power to enact such an Act. The issue raised a number of considerations.
> (i) Is the Act an existing Law?
> (ii) If it is an existing Law, does it take effect as a Federal or State Legislation?
> (iii) If it has taken effect as a Federal Legislation, has the National Assembly power to enact such law?[20]

It is only after crossing this hurdle, that the next questions can be considered.

3. Does the law sought to be deemed as an existing law offend: any other existing law made by either National Assembly or House of Assembly, or any provision of the Constitution?[21]
4. Has the appropriate authority, President or Governor, by order modified the text of the existing law by acts of addition, alteration, commission or repeal to bring it in conformity with the provision of the Constitution?[22]

In **Edet v Chagoon**,[23] the Court of Appeal considered the provisions of sections 315(1) and (3) of the CFRN and held as follows:

> By section 315 of the 1999 Constitution, the true test of the applicability of existing law is made or capable of being made by the National Assembly or by the House of Assembly of a State. Thus a Decree or an Edict which can be regarded as an existing law cannot have effect as, or be deemed to be a Law of the national Assembly unless it can be modified in such a way in conforming with the Constitution.

It is important to note that section 315 (1) proviso of the CFRN subjected the gamut of the section 315 to the superiority of other sections of the Constitution,[24] which means that the section was made with the clear and express intention that it would not offend any other provision of the Constitution. The draftsmen in order to emphasize the subservience of the provision of section 315 of the CFRN to other sections of the Constitution, deliberately inserted section 315(3) (d) of the CFRN, which empowers the Court to strike down any of provision of an existing law that offends any provision of the Constitution. The above considered conditions are cumulative and not in alternative.

IS MOA AN EXISTING LEGISLATION?

Having established the above mandatory conditions a law must pass to be deemed an existing law under the Constitution, the question remains whether in the light of the above-enumerated conditions, the MOA would be said to be an existing legislation. To answer the question, an attempt would be made to subject the MOA to the above test of applicability of an existing law.

1. It is not in doubt that the MOA predated the passage of section 315 of the CFRN.
2. We have already established that the MOA then Decree no. 20 of 1984 was enacted by the Supreme Military Council, making it safe to assume it would be deemed as an Act of the National Assembly.

---

[20] See INEC v Musa (2003) 3 NWLR (Pt 806) 72 at 157- 158m paras H- A.
[21] Section 315(3) of the Constitution.
[22] Ibid, Section 315(4)(a)(i)(ii) and (c).
[23] (2008) 2 NWLR (Pt. 1070) 85 at 107, para F.
[24] C/f Ngwuta JSC statement in the case of Opara & Anor v Amadi (2013) LPELR-20747(SC) 38 (c)-(d) that "one section of the Constitution cannot derogate from, or override the provision of another section of the same Constitution. The supremacy of the Constitution in section 1 thereof is shared and enjoyed by all the sections including the amended sections of the Constitution." See also Balarabe Musa v INEC (Ibid n 20 at 210, para A-B to the effect that the " Provisions in a Constitution are of equal strength and constitutionality. No provision is inferior to the other, and a fortiori, no provision is superior to the other".

However, it is debatable whether all the subject matter contained in the MOA are within the legislative competence of the National Assembly.[25] The research would demonstrate anon that section 17 of the MOA was made ultra vires using a count or charge of dealing in petroleum products without lawful authority under section 17 of MOA.

The MOA did not define the phrasal verb: "deal in". However, in its literal meaning it contemplates "to buy or sell particular goods as a business". Undoubtedly, the events contemplated under section 17 above are in relation to buying and selling petroleum products without lawful authority. These activities can be broadly summed as 'trade and commerce'. The question is - what are the contours of the powers of the National Assembly to enact a criminal legislation to regulate trade and commerce? The answer to this question will require a close examination of the powers granted to the National Assembly to make laws as set out in the Exclusive Legislative List. The item 'Trade and commerce' were provided for under Item 62 of the Second Schedule, Exclusive Legislative List, CFRN (as amended). The said provision is apposite and provides as follows:

> 62. Trade and commerce, and in a particular –
> ……
> (e) control of the prices of goods and commodities designated by National Assembly as essential goods or commodities.
> ……

From the above item 62, the National Assembly possesses the vires to regulate trade and commerce in Nigeria. However, that is not the end of it. The power of the National Assembly under Item 62 of the Exclusive Legislative List of the 1999 Constitution (as amended) is not at large but is to be exercised within the parameters of the 5 sub-items (a) – (e) of that provision. The powers of the National Assembly to regulate crimes purportedly committed in the course of a business transaction or any incident of trade and commerce is not without borders as they were circumscribed within the parameters of the stated subsections.

In the case of **Attorney-General of Ogun State v Aberuagba**[26] the Supreme Court held that incidents of trade and commerce which were not captured in identical provisions in the 1979 Constitution, were ultra vires the National Assembly. In that case, one of the questions stated by the Trial Court to the court of Appeal was whether the enactment of the Ogun State Sales Tax Law is an exercise of power with respect to trade and commerce in item 61 of the Exclusive List. The Court of Appeal answered the question in the affirmative. On appeal to the Supreme Court, His Lordship Bello JSC stated that:

> For the above reason, having regard to all the relevant provisions of the Constitution, I am of the firm view that, the Constitution does not confer on the Federation exclusive power over trade and commerce in item 61. I hold that all the Governments (Federal, State and Local) have been accorded their respective shares to control trade and commerce. Accordingly, I would construe the words "in particular" in item 61 to be words of limitation and that the trade and commerce power of the Federation is limited to the sub-items (a) to (f) therein. For the avoidance of any doubt, I may emphasize that the Federal Government had power to make law on the items specified in sub-items (a) to (f). In this respect international trade and commerce and inter-state trade and commerce are specifically reserved for the Federation, while trade and commerce within a State is left as a residuary matter to the States.

---

[25] The scope of this research would not undertake section by section analysis of the MOA to sieve the sections wherein the national Assembly would be acting ultra vires.

[26] (1985) 1 NWLR (Pt. 3) 395 at 415, para G-H.

It is pertinent to mention that item 68 provides that the power of the National Assembly to make laws shall extend any matter incidental or supplementary to any matter mentioned elsewhere in the list.[27] By paragraph 2(a) of Part III, Second Schedule this incidental powers includes inter alia 'offences'. What this means is that offences arising from trade and commerce under the Item 62 would be circumscribed within the subsections therein.

The question is: was the National Assembly in Item 62 of the Exclusive List denoted with the powers to regulate trade and commerce, and offences thereto outside the ambit of the subsections therein? The answer is No. It is submitted that such offences created under section 17 would only apply to the FCT as opposed to 36 states[28] of Nigeria as item 62 cannot be relied upon to regulate trade and commerce WITHIN A STATE of the federation. It is not within the constitutional remit of the National Assembly to enact a law on offences arising out of trade and commerce not contemplated under subsection (a) to (e) of Item 62.

Suffice it to say, that the National Assembly does not have the capacity to enact a general criminal law applicable across the country – unless, of course, to the extent to which it is specifically empowered under the Constitution.[29]

To the extent that **dealing in petroleum products** per se (or any other product for that matter) is excluded from Item 62 of the Exclusive Legislative List, the National Assembly acted ultra vires in enacting same. It follows that the offence under section 17 MOA, having been enacted ultra vires, the offence is unknown to law and is, therefore, inconsistent with the sacrosanct provision of section 36(12) of the Constitution(as amended).

In the recent case of **Dr. Joseph Nwobike v FRN**,[30] the Supreme Court per Abubakar JSC stated that:

> Against the backdrop of the unchallenged reasoning and conclusion of the trial Court, that section 97(3) of the Criminal Law does not define the offence of perversion of justice for which the Appellant was charged, tried and convicted, unless it is shown that the offence is defined under any other written law, it follows therefore that the aforesaid provision offends the provisions of and is inconsistent with section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

It is submitted that only "trade and commerce between States" generally is within the legislative competence of the National Assembly. It follows that criminal offenses allegedly committed in relation to or arising from such incidents cannot be proceeded against at the 36 States. In other words, anything done in the course of a business transaction, which is purportedly an offence under any federal law is only applicable in Abuja, the FCT, it is inapplicable across the 36 States.

It follows the National Assembly lacks the vires in enacting section 17 MOA to apply offence of dealing or trading in petroleum product as an incident outside the circumference of the subsections of Item 62 particularly subsection (e). In the circumstance, the courts at the appropriate time, are urged to strike down the provision of section 17 of the MOA for being ultra vires of the National Assembly in the light of the combined reading of Items 62 and 68 of the Exclusive Legislative List in Part II and Paragraph 2(a) of Part III of the 2nd Schedule to the 1999 Constitution (as amended).

The National Assembly lacks the vires to regulate trade and commerce outside the circumference of subsections of Item 62. The National Assembly exceeded its powers when it enacted section 17 of the MOA to criminalize activities arising from buying and selling petroleum outside FCT and beyond the subsections of Item 62 of the Exclusive Legislative list.

---

[27] Item 67 of the Exclusive legislative List provides that "any other matter with respect to which the national Assembly has power to make laws in accordance with the provisions of this Constitution."

[28] In Att-Gen. of Bendel State v Att-Gen. of the Fed**.** (1983) NSCC 181 at 201, the Supreme Court held that the National Assembly cannot unilaterally confer functions or impose duties on a State functionary.

[29] Doherty v. Balewa (n 18) 252.

[30] (2022) 6 NWLR (pt 1826) 293 at 353, paras B-C.

In any event, for the purposes of progressing in the research, we would assume that the MOA fulfilled the condition in this segment as an existing law, however, that is not the end of the matter.

3. The next phase is to consider whether the MOA offends any other existing, law made by either National Assembly or House of Assembly, or any provision of the Constitution?[31]

Aside the above detailed argument on section 17 of MOA made ultra vires, it is submitted that the MOA offends certain constitutional provisions. This brings us to the argument on constitutional prohibition against retrospective legislation, which is the meat of the present research.

It was earlier stated that MOA was enacted in 1984 and retrospectively applied to commence from December 31, 1983. The retrospection in the commencement of MOA is a feature, which brings the MOA in direct conflict with sections 4(9) and by extension 36(8) of the CFRN.

Section 4 (9) of the CFRN provides that - "Notwithstanding the foregoing provisions of this section, the National Assembly nor the House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect."

Section 36 (8) of the CFRN prohibits retrospective legislation in criminal matters. It provides that: "no person shall be held guilty of a criminal offence on account of any act of omission that did not at the time it took place constitute such offence ..."

Consequently, the National Assembly is by section 4(9) of the CFRN incompetent to enact a fresh criminal statute, which has retrospective effect. To the extent that the retrospection of criminal offence and by extension prosecution is absolutely prohibited by virtue of section 4(9) of the CFRN, section 315 cannot be relied upon to deem such legislation as an existing law due to the inherent defect of retroactivity.

It is important to state that the deletion of the retrospective commencement date in the MOA is paramount and may be made to commence from date of such modification. What the Constitution frowns at is the retrospection in criminal legislation and not the absence of a commencement date. Though it is tidier to insert a commencement date, it is submitted that the non-insertion of a commencement can be accommodated under section 2 of the Interpretation Act, which provides as follows:

(1) An Act is passed when the President assents to the Bill for the Act, whether or not the Act then comes into force;

(2) Where no other provision is made as to the time when a particular enactment is to come into force, it shall, subject to the following subsection, came into force –

> In the case of an enactment contained in an Act of the National Assembly, on the day when the Act is passed;
>
> In any other case, on the day when the enactment is made.

Case Law Decision: It is submitted that authorities are legion on the prohibition against retrospective legislation. In **Afolabi V. Governor of Oyo State**,[32] Eso JSC stated that:

> In my view the law has always been that unless a contrary intention is expressed, there is a presumption that an enactment has no retrospective operation. The principle is "Lex prospicit non est respicit", that is, the law looks forward and not back…

In **Akpan v Umah**,[33] Ekpe JCA stated the law thus:

> There is a presumption that the legislature does not intend what is unjust and therefore, the courts frown and lean against giving retrospective

[31] Section 315(3) of the Constitution. It would not be the scope of this work to make comparative analysis of the MOA, other existing laws and laws made by either the National Assembly or House of Assembly. Again, an assumption is made in favour of the MOA that it is not offensive to any of the above.

[32] (1985) 2 NWLR (Pt.9) 734 at 768, para H.

[33] (2002) 23 WRN 32; (2002) 7 NWLR (Pt. 767) 701 at 734-735, para D-A.

> operation to certain statutes... an interpretation giving a retrospective effect to a statute should not be readily accepted where that would affect a vested right or impose liability or disqualification for past events.[34]

In **Edet v Chagoon**[35], His Lordship Ngwuta JCA (as He then was) held as follows:

> In this case, the entire Cap 360, Laws of the Federation which became a Law of Cross River State by section 315 of the Constitution is in direct conflict with Laws Nos 4 and 5 made by Cross River State by section 315 (3) of the 1999 Constitution. I hereby declare the existing Law Cap 360 which was deemed as an existing Law made by the House of Assembly of Cross River State invalid for inconsistency with Laws Nos. 4 & 5 of Cross River State.

Also, **Owoade JCA**[36] in His Concurring judgment stated as follows:

> In relation to the instant case, the argument of the learned counsel for the Respondent that by section 315(1) of the 1999 Constitution, Pool Betting and Casino Gaming prohibition Act, Cap 360, LFN 1990 is an existing law deemed to have been enacted by the Cross River State Assembly cannot stand. This is because, Pool Betting being in the Residual List of Legislation, must necessarily be regulated by a law of the House of Assembly and not that of the National Assembly and Pool Betting and Casino Gaming Prohibition Act, Cap. 360, LFN 1990 cannot therefore be regarded as an existing Law of the House of Assembly of Cross River State under section 315(1) of the 1999 Constitution.

Prof Chuks[37] stated thus:

> Legislations should not overnight convert what was an innocent act or omission into an offence punishable under the law... (it) enacts the common law canon of statutory construction that legislations do not apply to a past but to a future state or circumstance.

Another important point is that the ban on retrospective criminal legislation is absolute unlike the general prohibition of restrospectivity of statutes (i.e non criminal laws), which admits of certain exceptions.[38] In the case of Ojokolobo v Alamu,[39] the Supreme Court held that "It is a cardinal principle of our law that a statute operates prospectively and cannot apply retrospectively unless it is made to do so by clear and express terms or it only affects purely procedural matters and does not affect the rights of the parties". In Afolabi v Governor of Oyo State,[40] it was held that statutes are to be interpreted as only applying to cases or situations which come into existence after they were passed, unless a retrospective effect is clearly intended. Nonetheless, Eso JSC[41] opined that even where the retrospection in the Statute appear clearly "…the society for whose welfare law is made criticizes it as the law of the tyrant."

---

[34] The Learned Law Lords at pages 715 to 716, of the report classified retrospective legislation in three categories, to wit: statutes that attach benevolent consequences to a prior events; statutes that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; and statutes that attach prejudicial consequences to a prior event. The Court concluded that the presumption against retrospective legislation befits the category which is against the retrospective operation of the law.

[35] Ibid (n 23) 104, paras E - F.

[36] Ibid at 107 – 108, paras A-C.

[37] O Chuks, *The right to a fair Hearing in Nigeria* (Matts Madek and C. 1991) 243-224.

[39] (1987) 3 NWLR pt. 61 pg. 377 at 396, para H.

[40] Ibid (n 32). See Maxwell on the Interpretation of Statutes(12th ed) 215 cited by Eso JSC in Afolabi v AG Oyo State (n 32) at 769.

[41] Ibid at 769, para D.

It is submitted that allowing offenders to be prosecuted under the provision of a retrospective criminal statute such as the MOA would grossly be unfair and a violation of their the right to equal protection of

the law under the Article 3(2) of the African Charter on Human and Peoples Rights,[42] particularly where there are also offenders facing criminal prosecutions in other laws, which are devoid of any criminal retrospectivity.

4. On the question whether the MOA has been modified by the appropriate authority in this circumstance being the President of the Federal Republic of Nigeria, till date, to the best of our knowledge, there has not been any such modification of the MOA by the President.

The modification required herein would be the President repealing or altering the commencement date of MOA and reflecting same to commence either on the date of enactment or any other day after date of enactment. It is submitted that in the absence of such modification of the MOA by the President, the MOA and its provisions would remain invalid. The effect of non-modification is that all the provisions, inclusive of offences under the MOA remains in direct conflict with section 4(9) of the CFRN and by extension section 1(3) of the CFRN.

The process of the repeal of a statutory provision must be specific and direct as a statutory provision cannot be repealed by implication. In The State v. Governor of Osun State, AG, Osun State and NURTW (Joined by order of Court ex parte: RTEAN,[43] it was held that "courts will lean against implied repeal of an existing legislation".

It is submitted that the provision of section 315 of the CFRN was deliberately designed to bring in existing laws in conformity with the letters and spirit of the legal regime under CFRN through some positive acts to be performed by the appropriate authority. It was considered that rather than make such affected existing laws inapplicable, the appropriate authority, through some positive acts, could make them valid and enforceable in the new regime.

In **Togun v. Oputa (No. 2),**[44] the Court of Appeal stated as follows:

> Cap 447 was promulgated as Decree No. 41 of 1966 by the Federal Military Government in 1966. Being an enactment of the Federal Military Government, it took effect on 28-5-99 as an existing law pursuant to section 315 of the 1999 Constitution of Nigeria by the appropriate authority, who is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap 447 as would bring it in conformity with the 1999 Constitution as provided under section 315 of the same Constitution. Only the President, as the appropriate authority can make such textual modification. ..

---

[42] African Charter on Human and Peoples Rights, 1981 now African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria, 2004. See N.N.P.C. vs. Fawehinmi (1998) 7 NWLR (Pt. 559) 698 at 616. See section 42(1) of the CFRN**.** The African Charter would prevail in event of a conflict with a domestic law (i.e Constitution) as the Legislature is presumed not to intend to violate obligation freely under an international treaty. See Articles 26 and 27 of Vienna Convention on Treaties 1969 and cases of *Aeroflot v Aircargo Egypt* - Uniform Law Review Biannual (1987)2, (UNIDROIT) International Institute for the Unification of Private Law, Rome, 669; *Chief J.E Oshevire v British Caledonian Airways Ltd* (1990)7 NWLR (Pt. 160) 507; *Alabama Claims Arbitration* (1872) Moore Arbitration 653. Also in the Free Zones case PCIJ Rep. Ser. A/B 46, P. 47: the Graeco-Bulgarian Communities Case (1930) PCIJ Rep. Ser. B. No. 17, 32 and in the Polish Nationals in Danzig case (1932) PCIJ Ser. A/B No. 44, p. 24. See also ABACHA v. FAWEHINMI (2000) NWLR (Pt. 660) 228 SC; ANPP v IGP (2007) 18 NWLR (Pt. 1066)457 CA. C/f *Joseph Ibidapo v Lufthansa Airlines*(1994)8 NWLR (PT 862) 355 (CA); (1997) 4 NWLR (Pt 498) 124 (SC). See Abugu J.E.O,'*Treaties on the Application of ILO convention in Nigeria'* (University of Lagos Press 2009) pp 15-16, 26 and Yinka Olomojobi, 'Human Rights and Civil Liberties in Nigeria Discussions, Analysis and Explanations', (Princeton & Associates Publishing Co. Ltd, 2016), 360.

[43] (2006) LPELR-11771(CA).

[44] Ibid (n 14) at 645, para E –H. See also Attorney General of Ogun State v Attorney General of Federation(1982) 1 & 2 SC 13 at 42 per Williams C.J.N

It is submitted that without the requisite modification by the President to make it conform to the Constitution by deleting its retrospective commencement), it would remain invalid and unconstitutional. The failure to accord such interpretation to the above Constitutional provision would render otiose section 315 of the CFRN.

PROPRIETY OF EXECUTIVE EXERCISE OF LAW MAKING POWERS UNDER SECTION 315 CFRN

The appropriate power under section 315(4)(a)(i) of the CFRN is the President. It is beyond doubt that the principle of separation of powers entails the vesting of legislative, executive, and judiciary powers of government in separate bodies. Under our constitution, the law-making functions of the federation are vested in the National Assembly by virtue of section 4 of the CFRN.[45] Section 315(4)(a)(i)denoted the President the law-making power to carry out any of the enumerated acts of 'addition, alteration, commission or repeal' in section 315(c) of the CFRN.

It is submitted that the propriety of executive exercise of law-making powers vide the President of the Federal Republic of Nigeria as 'the appropriate authority' in consummating the enumerated acts of modification under section 315 of the CFRN, may appear to cede law-making functions from the legislature to the executive, however such exercise having been given constitutional imprimatur remains a sacrosanct prescription of our legal regime. It is debatable whether the provision of section 315(4)(a)(iii) of the CFRN would have accommodated the legislature in the modification exercise in contradistinction to the literal letters of section 315(4)(a)(i) and (ii) of the CFRN.

More so, the Constitution would not have in one breadth empowered the President to exercise the legislative functions in section 315(4)(a)(i) of the CFRN and in another take away the same powers by section 4 of the CFRN. The draftsmen would not have intended such absurd result.[46] At best, section 4 of the CFRN can be seen as general legislative powers of parliament while the modification exercise under section 315 of the CFRN would be a special provision denoting to the President specific powers in furtherance of modification exercise therein. It is trite that special things derogate from general things and this is expressed in the Latin - 'specialibus generalia derogant' meaning 'the general does not detract from the specific.'[47]

John Locke[48] and Montesquieu[49] in respectively advocating for the principles of separation of powers were not primarily concerned with the forms of government but focused on minimizing the abuse of state power in order to preserve political liberty.[50] In any event, modern democracy is embroidered on the

[45] This is in respect of matters in the Exclusive Legislative List, Part 1, Column 1 of the 2nd Schedule and Items in the Concurrent Legislative List, Column 1, Part 2 of the 2nd Schedule to the CFRN.

[46] See A Sani, 'Can ACJA/ACJIL Regulate Practice and Procedure?' Thisday Newspaper (February 14, 2022), >https://www.thisdaylive.com/index.php/2022/02/14/can-acja-acjl-regulate-practice-and-procedure/, last accessed August 19, 2022 and the cases of Osadebay vs. Attorney-General of Bendel State (1991) 1 NWLR (Pt. 169) 525 (S.C) and Attorney-General of Federation v Abubakar, 2007) All FWLR (Pt. 375) 405 at at 472 (S.C).

[47]See the cases of Attorney General of The Federation v. Abubakar Ibid at 524 and Government of Kaduna State v Kagoma (1982) 6 S.C.87 at 107.

[48] J Locke, 2nd Treatise on Civil Government, (1632 -1704).

[49] Montesquieu, L'Espirit le lois, (1689- 1755).

[50] VB Ashi, *Judicial Review, the Basic Structure Doctrine and "the struggle of the Constitution": Current efforts at Amending The 1999 Constitution in Perspective,* Nigerian Bar Journal 6(2010) 49.

canvass of written constitutions.[51] Today, in several ways, both the executive and legislative arms are involved in interpreting and applying the constitutions in carrying out their respective functions.[52] There is no water tight separation of powers in any system, there is always overlap and co-operation of powers. To argue that only the legislature in a modern society can make every law is akin to saying only the legislature can advance the law. Such view would be out of place.

It is submitted that notwithstanding the expressed desirability of the vesting of the modification exercise in the legislature, the tenor of the express letters of the constitutional provision on modification of existing laws remain the law until set aside.[53]

Speaking on this, **Edet v Chagoon,[54]** the Owoade JCA stated:

> Indeed, the power to modify existing law in conformity with the Constitution is an abuse of the principle of the doctrine of separation of powers. It is essential to giving meaning to an existing law so that the Constitution itself is not abused.

ARGUMENT MOSTLY POSED AGAINST INVALIDATING MOA

Several arguments have been posed to justify the continuous retention of the MOA in our corpus juris.

1. Was Defendant misled on the counts or suffered any prejudice?

The tenor of section 315 of the CFRN does not permit a consideration whether the accused was misled or suffered any prejudice by reason of the charge or counts under MOA. The prohibition on retrospection of criminal statute was provided in the Constitution and not in substantive Criminal law statutes such as MOA or criminal procedure statute such as Administration of Criminal Justice Ac, Rules of Court or practice direction etc.

2. Offences were not Committed prior but after enactment of the MOA

There is the argument that the retrospection would only be justified if limited to offences that occurred in 1983 being that the law was enacted in 1984. This argument is a function of a strained construction of the provision of section 315 of the CFRN. Provided the vitiating feature of retroactivity is palpable or inherent in the commencement date of the legislation, the law remains null and void.

3. Equitable, Discretionary powers and inherent jurisdiction to validate MOA

The Court has no discretion in salvaging the MOA from its present state as such powers is not denoted to the Court under section 315 of CFRN. In Togun v Oputa (no. 2),[55] Oguntade JCA (as He then was) succinctly captured this point in the following words:

> Even if this Court is aware of what needs to be done, the best efforts of this Court would amount to no more than merely speculation. In any case, the court is without jurisdiction to exercise a power reserved in the constitution for only Mr. President as the appropriate authority.

It is hornbook law that where the Constitution or statute confers specific or special powers on any person or authority for the performance of certain acts, it is only that person or authority and no other that is contemplated in the performance of such acts.[56] Section 315 of the CFRN has specified the way and manner to bring existing law, MOA into conformity with the Constitution.

---

[51] Ibid.

[52] Ibid.

[53] According to Michael Kirby "In our form of society, the executive and the judiciary itself are also lawmakers, albeit to a lesser and more controlled extent." See *'Domestic courts and international human rights law The ongoing judicial conversation,' p5,*<https://www.researchgate.net/publication/41619233_Domestic_courts_and_international_human_rights_law_The_ongoing_judicial_conversation, last assessed August 19, 2021.

[54] Ibid (n 23) 107.

[55] Ibid (n 14).

[56] See Anya v Iyayi (1993) 7 NWLR (Pt. 305) 290 at 315.

The feature of retrospection is not subjective to peculiarities of individual cases but invalidates all offensive legislations containing the negating element of retrospectivity. More so, the words used in section 315 of the CFRN are clear, they should be given its natural and grammatical meanings and there is no need of resort to the principles of interpretation of statutes.[57]

4. Incorporation of MOA in the subsequent laws of federation cures defect

It is no moment that the MOA was incorporated from Laws of the Federation (LFN) 1990 and now contained in LFN 2007. The presence of retrospection in the commencement of the MOA is not a mere defect that can be cured or waived by subsequent acts of incorporation into laws. The defect goes to the root of the MOA and as such, incurable and irredeemable without the outright modification by the President as provided in section 315 of the CFRN.

5. Invalidity contemplated under inconsistency ground relate to any provision of the existing law and not entire law

Arguments have been that the invalidity on grounds of inconsistency is with regards to any provision of such affected existing law. To consider the merit in this proposition, a consideration of the provision of Section 315(3) of the CFRN is required. The section provides as follows:

> Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say -
>
> (a) Any other existing law;
> (b) a Law of a House of Assembly;
> (c) an Act of the National Assembly; or
> (d) any provision of this Constitution.

By the above provision, the argument may be anchored on the premise that the Judex is only empowered to declare **any provision** of an existing law invalid on ground of inconsistency with section 315 (3) (a) - (b) of the CFRN. The above provision applies to the declaration of invalidity of a provision of an existing law and not otherwise. However, it is submitted that an expansive interpretation of the said provision would justify the voiding of an entire law, such as the MOA in the instant case, in view of its retrospective commencement, which is inconsistent with sections 4(9), and by extension sections 36(8), (12) and 1(3) of the Constitution.

In any event, the voiding of the MOA in its entirety can be effected and completed vide the provision of sections 4(9), 36(8), (12) or 315(1) (a), (2), (4)(a)(i),(b) and (c) of the CFRN without reference to section 315(3) of the CFRN.

6. Age of the Criminal Statute

The argument is that due to the age of the MOA i.e about 39/40 years, voiding such Act would have adverse effect on pending and concluded cases. Firstly, the age of a criminal statute is immaterial in considering its validity. Secondly, it is only where it is accepted that the MOA is invalid in its present state that a consideration of its effect on concluded and pending case would become of any relevance.

7. The retrospection can be jettisoned and the Act given effect in its present state.

The Court does not have the powers to jettison the commencement date of the MOA in order to give effect to the Act. The Court cannot also rely on any saving provision in the MOA or any other law to cure this defect as such provision(s) would be contrary to section 1(3) of the CFRN.

[57] See AG of Ondo State v. AG of The Federation (2002) 6 S.C. 1 at 28, per Uwais, CJN. See also National Bank v Weide & Co. (1996) 8 NWLR (Pt. 465). 150 at 165, per Ogwuegbu, JSC; N.U.R v N.R.C (1996) 9 NWLR (Pt. 473) 490 at 503; Att-Gen. of Lagos v Dosunmu (1989) 3 NWLR (Pt. 111). 552 and Att-Gen of The Fed. VS. Sode (1990) 1 NWLR (PT. 128) 500 at 545.

The point must also be made that where the invalidity feature in the MOA is a product of a provision or some provisions of the MOA, the MOA would have still been saved by the court exercising its judicial powers to strike down the affected provision(s). However, the feature of retrospection contained in the commencement of the MOA goes to the root of the MOA and its entire provisions, thereby making it invalid until it is modified as required under section 315 of the CFRN, which would include among others, the alteration of the commencement date to remove the impinging feature of retrospection.

PRESENT STATUS OF CONCLUDED AND PENDING CASES UNDER MOA

Until the conflicting feature in the MOA is exorcised and the MOA brought in conformity with the regime by definite constitutional and legislative process as contemplated under section 315(4) (c) of the CFRN, the MOA remains in direct conflict with sections 4(9), 36(8)(12) of the CFRN and by extension section 1(3) CFRN.

For concluded cases, it is submitted that convictions and sentences under the MOA are valid and the Courts have become functus officio until it is set aside on appeal.

However, the position is different in pending cases, as the criminal defense attorney is at liberty[58] to bring relevant processes before the Court to contest the validity of charge, trial or judgment (where on appeal) founded on the MOA. This would enable the Judex to make pronouncement on the validity of the MOA vis a vis sections 4(9) and 315 of the CFRN. Where the MOA is invalidated due to retrospection inconsistent with the CFRN, the offences created therein would in addition of not constituting offences as at the time of their commission, become unknown to law as provided in sections 36 (8) and (12) of the CFRN.[59]

The proper order of the Court to make in the circumstance would be to the effect that by the combined reading of the commencement provision of the MOA, sections 4(9), 36(8 and (12),[60] 315(1) (a), (2), (3) (d), (4)(a)(i), (b),(c) and 1(3) of the CFRN, the MOA remains invalid and inapplicable for all intents and purposes as an existing law and criminal statute in Nigeria. The consequence may include inter alia, the quashing of affected counts in the charge, setting aside of conviction, discharge and acquittal.

CONCLUSION

The work has examined the anomalies inherent in the MOA and found that the MOA failed the mandatory tests of an existing law. The MOA has not been modified as required by law and still retains the retrospective commencement date in defiance of constitutional provisions against retrospective criminal legislations. There exists an absolute constitutional ban on retrospective criminal legislation and this prohibition has remained a cardinal principle of our constitutional and criminal jurisprudence. The task before the President of the Federal Republic of Nigeria is to exercise his powers under section 315 of the Constitution to modify the MOA and completely exorcise the law from the garb of the military by deleting the offensive retrospective commencement date and offensive provision(s) from the MOA to bring the law in conformity with our Constitution.

RECOMMENDATIONS

The President, as the appropriate authority, is urged to immediately modify the MOA by deleting the retrospective commencement date in the Act to remove its provision from direct conflict with the provisions of sections 4(9), 36(8), (12) and 315(1),(3)(d),(4)(c) and 1(3) of the Constitution, thereby bringing it in conformity with the Constitution.

---

[58] Provided such application is brought to the notice of the Court before an adjournment for the delivery of judgment or where the proceeding is commenced under the ACJA at the end of the trial or during final address.

[59] Bode George v FRN (2014) 5 NWLR (Pt. 1399)1 at 21 – 22, para H-F. See also JA Agaba, *Practical Approach to Criminal Litigation in Nigeria*, (3rd ed Bloom Legal Temple 2015)3.

[60] See the case of Omoju v FRN (2008) 7 NWLR (Pt. 1085) 38. It must be noted that sections 36(8) and (12) of the CFRN are not included in the specie of rights the State can derogate from under section 45 of the CFRN.

The act of law making is an imperfect science and there is need for law reform to properly articulate legislative policy and intention.[61] The prime consideration prompting law reform ought to be the development of law.[62] Reform is invaluable if there is a clear and compelling necessity for a change in the law or its structure.[63] There are in existence several criminal legislations in the category of the MOA with offensive provisions. The President must set up a Committee to look into all existing criminal laws to enable him exercise his powers of modification to bring them in conformity with the Constitution. Provisions of such laws, such as the considered section 17 of the MOA, made ultra vires the National Assembly, must be identified and deleted to avert a situation where offenders coast home free due to the deficiency in the Act.

Alternatively, the National Assembly may alter section 315 of the Constitution to properly and clearly define existing laws, the applicable tests, remove the law-making functions from the President, and properly situate it in the legislature. Upon such alteration of the CFRN, the National Assembly may collate all sundry legislations and amend or out rightly repeal them.

[61] AA Olawoyin, Enforcement of Maritime Claims: The Unintended Consequences of Constitutional Change on Admiralty Jurisdiction in Nigeria, The Gravitas Review of Business & Property Law (2021) 12(1) 1.

[62] AA Olawoyin, Admiralty Jurisdiction in the Federal Courts of Nigeria: Innovation or Incongruity under the Admiralty Jurisdiction Act 1991, Journal of Maritime Law and Commerce (2004) 1(35) 97. The object of law is to solve difficulties, adjust relations in social and commercial life. It must grow with the development of the Nation. It must face and deal with changing or novel circumstances. And unless it can do that, it fails in its function and declines in its dignity and value. See Mac Cardie in Pager v Claspell, Stamp and Hea Cock Ltd (1924) I KB 566 at 570 cited by Ogbuanya, N. S., Essentials of Corporate Practice in Nigeria (Novena Publishers Ltd. 2013). The above jurisprudential assertion is informed by the dynamic nature of the society. As a result, the legal fabric that holds the society must periodically examine itself to remain in tune with modern realities and demands. Little wonder then that laws are frequently modified even to the extent of challenging existing laws. See OJ John etal, Call Regulations in Nigeria: the Question of Constitutional Supremacy, Researchgate> https://www.researchgate.net/publication/324970785_Call_Regulations_in_Nigeria_the_Question_of_Constitutional_Supremacy last assessed August 23 2022. In Leo Melos Pharmaceutical Ind Ltd v Union Homes Savings & Loans Ltd Galinje JCA (as he then was) stated that "any law that does not provide for the transition of actions that are pending, cannot by any stretch of imagination be a good law."

[63] Ibid.