Commercial Law Reform in the Age of Integration: Of Stakeholders, Futility of Boundary-Marking and Strategies

By:

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Introduction

It is an extreme pleasure to present the keynote at the inaugural conference and workshop of the Commercial Law Research Network Nigeria (CLRNN). Let me first thank Dr. Bolanle Adebola and her amazing team of researchers for her vision, courage, hard-work, mobilization prowess and her legendary but harmless 'arm-twisting strategy' that has resulted in all of us being here today. Thanks to the audience for your graciousness in agreeing to listen in without calculating the 'risk'. Let me say upfront that looking across the audience (it feels like home away from home here) and the program for the next two days, it is not premature to observe that CLRNN has accomplished one of its crucial missions as a network even before it gets started.

My remarks will not shy from richly exercising my ‘keynote discretion’. Doing so, I intend to be deliberately provocative so that we can have enriching and cross-cutting conversations through the panels. Part of the risk I mentioned earlier derives from my limited knowledge of the very broad disciplinary and intra-disciplinary fields categorized as commercial law which defy any meaningful boundary-marking. As one whose legal practice repertoire falls in the ‘commercial law’ domain, I have always known that the relevance of that claim is far more in marketing than in substance. I have yet to know of a lawyer or legal academic who specializes in all aspects of commercial law assuming we can agree on its borders.

The Idea of Commercial Law

In a conventional sense, commercial law is the branch of *laws* regulating the conduct of persons, and entities involved in trade, distribution of goods, and provision of services and all aspects of commercial transactions. Even though the legal professionals and scholars make a fine distinction between corporate and commercial law, the latter also includes the formation and governance (corporate structuring) of special purpose vehicles for the conduct of commercial transactions, notably corporations and other entrepreneurial-driven contraptions. As a broad concept, commercial transactions engage virtually all aspects of law in the private and public realm – contracts, criminal law, torts; even law and development and so forth. For practical purposes, commercial law is an umbrella expression relating to the making and applications of laws, regulations and practices governing transactions that arise in all commercial contexts i.e. where legitimate money-making is involved.

Commercial Law in Technological Transformations

The interconnectedness of commercial and other mundane human transactions has never been more reified than it is since the advent of new Information and Communication Technologies (ICTs). Let me spare this distinguished audience the frequent regurgitations on the ubiquitous reach of ICTs and their impact. However, it bears observing that ICTs have helped in harnessing virtually every human and non-human endeavour into their commercial ramifications. Just a few examples: every human activity in all their detail in the social environment is now easily reduced into data as assets of incomparable commercial values.

Every environmental and social phenomenon can be mapped into a pattern that unmasks hitherto unknown commercial opportunities. Add to those the compacting of the entire society into a digital media playground. Each of these examples and many more are proverbial treasure troves of unprecedented entrepreneurial and commercial endeavours. Through the effect of ICTs, the society has been reduced into an ocean of unlimited commercial navigation and experimentation. With the implosion, melding and meshing of boundaries, it is hard to figure out what actually is the domain of commercial law.

Perhaps it is necessary at this juncture to offer a boring and endless litany of sites where human commercial activities are driven by ICTs and where their applications, outcome and regulations have been monumentally disruptive of the conventional boundaries of commercial law, if ever there was any. I am just attempting to say that today the “conventional” is an endangered concept in a way that requires us to re-interrogate primordial orientations.

So then, take the following phenomena – or whatever you prefer to designate them – they were hardly in use, in the way they are today, neither as concepts or expressions, nor as realities, about twenty-five years ago: Artificial intelligence (AI), machine learning and machine agency, the shared economy, the use of digital technology to drive information and communication, electronic contract/commerce, the internet and the internet of things, big data, data sovereignty, ‘datatization’, maker-movement, 3D printing, open-access, smart city, smart agriculture, smart everything, consumer protection online, domain names, online franchising, digital security, fintech, virtual currency, block chain technology, digital sequencing of information, genetic engineering and so forth.

These are sample features of the dawn of what analysts have now characterized as the Fourth Industrial Revolution; they are far from being exhaustive. Everyone here can imagine how profoundly impactful these trends have been and how much more so they would be. Those include how they have disrupted the human society as we know it. Perhaps most importantly, for our purposes, they have disrupted the seascape of commercial activities – unsettling and configuring actors, changing consumer behaviour, redefining entrepreneurship, obliterating jurisdictional boundaries, redistributing wealth

and, wait for it, ensuring that virtually no activity on earth is outside of the domain of commercial exploitation and opportunism.

An entirely new regime of business models and business modelling now drives practically all aspects of commercial activities and the professions in ways that compel any meaningful law reform to take a holistic approach. In these business model lies many contradictions. Just to name a few, not counting massive job loss and populations to be left behind: the threat and reality of mega global monopolies; higher concentration of massive wealth in far fewer hands; colossal democratization of access to commercial opportunities across jurisdictional boundaries; a new demographic of entrepreneurship where the very young call the shots.

As a result of these conflictual phenomena, never before has commercial activities been fused with the development and capacitation imperative. International financial, business and quasi-business organizations as well as NGOs and IGOs are now refining their interventions from capacitation and development perspectives. The most effective boardrooms today are those that are actively involved in social engineering as a business opportunity. No commercial entity or country can afford to stand alone or isolate itself from the tide. It is not even in their power to do so for several reasons. It is a matter of existential reality.

Posers for Commercial Law Reform

The last observation challenges us to think deeply what we mean by commercial law reform. Is it actually possible to embark on commercial law reform as an isolated disciplinary or intra-disciplinary endeavour? Framed differently, in the age of interconnectedness how could we effectively embark on law reform process that equips for effective and equitable optimization of open-ended commercial opportunities of the time? What could be the guiding principles of that kind of initiative? What kind of strategies could be effective with specific regard to the Nigerian current reality and contexts, however we frame those? I now attempt to reflect on these posers, without necessarily pretending to provide answers.

Integrative Approach to Commercial Law Reform

To my first question, in my subjective opinion, it is not feasible to talk about or even embark on commercial law reform as an isolated disciplinary or intra-disciplinary endeavour. Similarly, to a large degree, it is no longer fashionable to embark on law reform or even commercial law reform as a process benchmarked on a time period. The pace of social, technological and commercial changes in their overlapping and re-enforcing impact require equally fast-paced legal surveillance and flexibility to calibrate and re-calibrate legal responses on short, medium and, where feasible, long term frame. In order to do that, there has to be ongoing institutional and cross-sectoral conversations among a broad spectrum of multi- and interdisciplinary stakeholders and other social actors. That approach, in my view, responds to the second question. It is one that is capable of ensuring that reforms result in effective optimization of open-ended commercial opportunities of the time in the context of equity, capability and, ultimately, development.

Few Guiding Principles of Commercial Law Reform

1. *Inclusive and global approach*

To the question of guiding principle of effective law reform in the age integration, here are some of my thoughts in their nascent stage. First, as already observed, a **holistic, disciplinary inclusive and global approach** is important. Legal academic and legal professionals who operate in the commercial law realm ought to be ever conscious of the fluidity if not futility of disciplinary boundaries. Social impacts of innovation and resultant new business models and commercial practices are easily and competently mapped by sociologists, economists and other actors in the social sciences than lawyers are capable of. This is more so in jurisdictions, like Nigeria, where professional legal education is obtained at the first degree level. In a related vein, since virtually every idea has global commercial potential (for example, Kenya’s MPESA – mobile phone-based money transfer, the Nollywood movie phenomenon) a global approach to law-making or legal surveillance around ideas should be one of the core principles of law’s intervention. Disney’s controversial trademark: “hakuna matata” (“no problem/worries in Swahili”) makes a case for a global approach to cultural appropriation. Imagine a

trademark for "*kosi wahala*" or "*aghuf*"! Another example is the appropriation of age-long innovation of Ibadan (Nigeria) area traditional farmers that resulted in weevils-resistance cowpea. That innovation was hijacked by foreign "scientists" who obtained proprietary interests on the back of poor farmers. This is what scholars call 'biopiracy' –unrequited exploitation of traditional bio-cultural knowledge of indigenous peoples and local communities.

2. Active stakeholder involvement and elaborate consultation

The second but related principle is robust stakeholder participation and deliberate and elaborate consultation. One may wonder whether this principle is not in tension with the case I have made for fast-paced continuing legal surveillance and response. Not really. Robust stakeholder participation and the culture of consultation are supposed to evolve as aspects of social and institutional governance. They are vital part of the democratic culture. Where they are well developed, stakeholder participation and consultations are not, in actual fact, as time consuming as they are made out to be. Even where they get complicated, their effects on the legitimacy of law making process in a democracy are worth the cost. In a developing country such as Nigeria, active participation of reputable and relevant civil societies is imperative to leverage their capacity for community mobilization and information dissemination given the pervasive level of illiteracy.

Despite the veil of bias and reservations associated with NGOs and IGOs, they have proven to balance the overbearing effects of local and transnational corporate lobbies in law-making and law reform. For example, lack of informed stakeholder participation amidst transnational corporate lobby accounts for questionable biosafety legislation in Nigeria and many African countries. In the guise of biosafety, those legislation have opened the doors for genetic modified crops and foods without relevant social and environment impact parameters. The legal academy through its interdisciplinary outreach and the legal profession through its specialist practice tracks constitute a core catalytic stakeholder in law reform. Working in concert, they are capable of energizing and improving the quality of law reform in Nigeria. Therein lies the promise of the CLRNN.

3. Proactive, responsive and pragmatic approach

The third principle is that legal response and law reform in the age of integration should be proactive, responsive or reactive; as well as, overall, pragmatic; depending of the given phenomenon. The last point means that we do not need to re-invent the wheel. Perhaps, here the leap-frog cliché makes sense as well. As part of pragmatism, developed countries allowed the industry to take the lead in early regulation of the credit card as a business model. Then legal regulation stepped up from the prism of consumer protection and ethics among others. No wheels needed to be reinvented when credit card became global. Similarly, the global ramifications and scaling of commercial transactions means that some phenomenon, especially of the shared economy just get scaled up into other jurisdictions. Legal regulation in the new jurisdiction only leap-frogs and is inspired from what has happened elsewhere. The major concern will be the local context for the adaption of the trend. Such business models as *Airbnb* rental and *Uber/ lyft* share rides are examples where legal reform sails on borrowed wind.

4. Harnessing human capital – homeland and diaspora

The fourth principle is purposeful harnessing of human capital network with specific attention to homeland and diaspora interchange. As many of us have now fully realized, Nigeria's greatest asset is not oil or its abundant natural resources. It is its human capital. In virtually all major industrialised countries of the global north, Nigerian immigrants or persons of Nigerian ancestry rank among the highly educated, including in the professions, as well as the most intrepid entrepreneurs of any social demographic. ICTs have since reversed brain drain to brain train. Where one is physically located is no longer a barrier to where one's impact or contributions can be felt.

Today's inaugural convening of Commercial Law Research Network Nigeria in Reading, UK is a practical step in harnessing human capital niche in commercial law pursuant to a network model that draws together homeland and diaspora human capital resources. This strategic mix is a very pragmatic way to ensure

purposeful and complementary exchange to calibrate municipal and international realities in ways that have the potential to ensure that Nigeria periodically and continually remains up to date with evolutionary trends in commercial transactions and corresponding regulation. Now, it is an entirely different discussion how this kind of network could integrate itself into the critical stakeholder spaces in Nigeria in order to ensure that cutting edge commercial law research helps to shape policy and to drive reform. Time only allows me to flag that part of the conversation for now.

5. Activism at international level

The fifth and last principle that I have deliberately restricted my intervention is international engagement and activism. This fifth principle has direct relevance to the fourth principle. As many in this audience are well aware, as with the national initiatives, international and regional institutions and international fora are super busy exploring treaties, developing guidelines or operative principles in many of the transformative areas that shape commercial law and commercial transactions. These resulting guidelines and principles are often hard fought with full arsenal of experts in global best practices. Take for example ongoing negotiations and policy making relating international and regional trade, AI, block chain, specialist and alternative dispute resolution, intellectual property, environment, clean energy, climate change, agriculture, genetically modified organisms, cybercrime/cyber security, electronic commerce, large scale agricultural land acquisition and so forth.

Most progressive developing countries, Nigeria ideally inclusive, must position their bureaucratic and expert antennae to actively participate in these and similar fora. Effective participation ensures that information and outcomes are disseminated in consultative and cross-sectoral manner at home. The era of participation by MDAs (Ministries, Departments and Agencies) in silos should be over. In a time of integration, boundaries continue to meld making interagency coordination an imperative for bureaucratic competence and efficiency. Often, many developing countries bemoan the cost of participation in these fora. But the truth is that increasingly, participation is becoming less costly. With good homeland-diaspora human capital network such as the CLRNN potentially represents, quality international engagement and activism come at huge

discount if well harnessed; there is a role for the Nigeria Diaspora Commission. The same is true of the ability to disseminate and strategically step down or implement some outcomes from the international fora in order to ensure that Nigeria's commercial law, regulations and practices remain on the cutting edge.

Strategies for Commercial Law Reform in Nigerian Context

Finally, I turn to strategies for effective and progressive commercial law development in the Nigeria context. To avoid digression, I will spare any tirade about the "Nigerian context" which is my benevolent synonym of the "Nigerian Factor". This reference to the Nigerian Factor is also my shorthanded way of expressing loaded frustration and thereby sparing you the pent-up detail, which most of you can relate to.

This year marks twenty years of uninterrupted civil rule in Nigeria. A scan through the legislative agenda and accomplishments of both chambers of the National Assembly and a few State Houses of Assembly from the lens of commercial law bearing in mind the integration imperative is unequivocally not cheerful. This is so whether the focus is on the relevant items on concurrent or exclusive legislative list. But that is hardly surprising. Legislative agenda is informed by the vision and ideology of political players. Those are in turn informed by critical forces, internal and external, that exert influence on the political actors. The core fault line is that there is not politics of ideology in Nigeria.

But make no mistakes, good visions and ideas are in healthy supply in Nigeria. But our bureaucratic shelves are literally cemeteries where many studies and policy documents are interred, where visions are buried. Studies on virtually anything relevant for Nigeria's economic and commercial ordering are not lacking out there, but they hardly transform into laws, even when the exigencies are compelling.

Similarly, we are used to Nigeria often flexing its muscle at international stage during negotiations on cutting edge subject matters. Ironically, in most of these instances, there is huge domestic legislative vacuums and paucity of appetite to walk the talk at the domestic legislative front. Take for example, despite how

ICTs have defined trademark, and the radical transformations of the patent landscape in the era of biotechnology, substantive Nigerian laws on these subject matters are part of colonial legislative relic even though they are repackaged and white-washed into new editions of the Laws of the Federation.

After several decades, only recently did Nigeria take novel legislative step in competition law and consumer protection. It is now saddled with aligning institutions required to drive the Competition Act. Also, the last time I checked, Nigeria has no substantive domestic legislation on electronic commerce, electronic contract, and e-electronic government. The same is true about the protection of traditional knowledge which is a pivotal factor endowment of Nigeria's cultural industry and informal economy. I cannot overemphasize the relevance of traditional knowledge in industry, culture, commerce and all aspects of creativity and its potential for economic inclusiveness and the democratization of the innovation space.

What the above state of affairs shows is that a different strategy is required to drive purposeful development of laws in the commercial realm. The starting point is a full consciousness and audit of constitutive stakeholders at organizational level. The emphasis is at organizational level. Unequivocally, every citizen is a stakeholder. But influences are more effectively wielded and impacts made at organizational levels. In the present contexts, the Executive through its MDA, the Legislature through its members and specific committees, the commercial law specialist caucus of the legal professional body and relevant professional organizations, the academia through bodies of interdisciplinary research network such as CLRNN and, of course, the civil society and dedicated think tanks are key critical stakeholders. Naturally, these stakeholders do not necessarily share identical interests or agenda. That is why, arguably, none of them has greater credibility and moral force than a credible research network such as CLRNN, potentially. Why? It is because credible research outcomes are informed my evidence and are validated through a rigorous process.

Coordination, Partnering and Networking

The major task before stakeholders is coordination, partnering and networking. When all the three are in place, to a reasonable degree, in a jurisdiction, it becomes easy to rally actors and to ensure that they are not talking past one another. Over the years, interagency coordination in government has been most inefficient as a result of power tussle and jurisdictional boundary expansion and boundary marking. That has been one of the major obstacles to a healthy culture of law reform.

My sense is that a reliable research network, potentially like the CLRNN, is better placed to push the coordination imperative from outside the bureaucracy. Coordination, partnership and networking will assist to identify other resourceful entities in the law reform arena such as specialist albeit often duplicitous research institutes and institutions, centres of excellence in subject areas and, of course, the Law Reform Commission, and the Nigerian Institute of Advanced Legal Studies, to mention the few.

Conclusion

I have noted that in the age of integration law reform should be a continuing and holistic exercise that can be conducted through a combination of strategies and undergirded by a set of principles. I have also noted that ICTs have radically disrupted conventions in the commercial realms including business models, entrepreneurship and opened up unprecedented opportunities in which businesses have become inevitable actors in social engineering – for better or for worse –at the dawn of the Fourth Industrial Revolution. Unlike the trend in more progressive jurisdictions and at the international arena, there is a legislative lull in Nigeria. It is about time Nigeria considered a project to fast-track its laws to bring them in tune with today’s fast-paced commercial exigencies.

For too long, the courts have navigated cutting-edge concepts in the course of litigation without a national legislative compass. Granted that judicial rule-making is a cardinal feature of the common law, it hardly operates in a legislative vacuum. All stakeholders, the obvious and non-obvious ones, must be collectively invested in ensuring that Nigerian’s commercial law architecture must be tied to the countries fundamental economic and social objectives and

overall national aspirations. Despite Nigeria's lethargic profile, I see the CLRNN as bold initiative with catalytic potential. My wish is that all of us who have identified with this vision at its inaugural stage shall lend all we are capable to push it forward as we head home to next year in 2020 to the Nigerian Institute of Advanced Legal Studies.

Thank you for this great opportunity.

**Professor of Law, University of Ottawa, being a keynote address delivered at the Inauguration of the Commercial Law Research Network Nigeria (CLRNN) held at the University of Reading, England (September 13-15, 2019) with special thanks to the convener, Dr. Bolanle Adebola and members of Nigerian diaspora and homeland delegations who attended and participated at the CLRNN Inaugural Conference and Workshop.*

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