The Call and Practice of Reform

By:

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Nigeria is powered by robust and muscular factions and interest groups who each wish to have the law reflect certain preferences. Commercial law reform, even so called “black letter rules” is no exception. This pertains to a whole and vast range of issues: contracts, torts, property conflicts of law, and related matters of corporate law, estates and trusts, are contentious. Many other areas including emerging issues such as many in intellectual property present novel issues that require specialized guidance.

The USA also clearly presents as a nation with strong, muscular interests. Controversy about issues of reform in commercial law arise constantly. It is in this sense, like Nigeria, the norm. Gaps must be filled, or business flows stop or slow down.

This role, to reform commercial law is undertaken in the USA by certain organisations that suggest and provide model laws for adoption by public bodies in the Federal system, as discussed below. (There is also a robust level of interaction between the private sector, supported by lawyers, who suggest reforms to lawmakers. This includes many types of behaviours, including

comment on administrative law proposals in a huge swath of regulatory areas, such as securities law and the environment.)

Nigeria, similarly, must now contend with a whole range of issues discussed at the CLRNN. These issues demand attention in order to advance objectives of furthering social and economic development. Reducing legal uncertainty and unleashing the power of Nigerian enterprise to more efficiently tackle its' own challenges is a matter of the highest concern; in this way Nigeria can genuinely become the economic powerhouse it seeks to be, for Africa, and the world.

At a recent University of Reading September 2019 conference that included distinguished scholars and practitioners, an assessment of the state of Nigerian commercial law in depth was undertaken. The focus was how to best go about delivering genuine and meaningful reform.

One clear takeaway: a mechanism is urgently needed to ensure that judges are equipped with better tools to provide clear, and consistent application of the law. This is to help ensure law decisions are sound, just, and fair. The presence of sometimes conflicting legal precedents, at present, makes this a challenging task. And this is so for even the most astute and diligent of legal minds on the Bench. Thus, the need for some type of independent mechanism to provide further clarity as to Federal and State law can serve the interests of justice by facilitating greater consensus. This paves the way forward to harmonise the law. Bringing wise heads together can lead to enhanced legal certainty and to refinement of the law. To come and reason together, and to have the views of many parties considered and then skilfully draft well-reasoned and modernised law is central to progress.

A process to do just that exists in the USA. And the USA as is well known, as a complex legal system with many different interests and laws that sometimes conflict among its 50 states. Clarity, of course, promotes commerce. And legal certainty promotes the basis for Judges to feel supported in doing and taking the moral and legally sound approach. This is well articulated in guidance provided to them and to legislators making law in the commercial sphere.

Indeed, a mechanism that can do just that in Nigeria can help legislatures make

better informed choices and lead to creation of better laws through this process. This is good for the judiciary, good for the legislature, good for business, good for Nigeria and its citizens.

In the USA, there are two institutions-the American Law Institute (ALI), and the National Conference of Uniform State Laws (NCCUSL) that provide this vital independent support to the Judiciary and the Legislatures and the Legal Profession to ensure the modernisation of the law keeps apace with developments in practice, case law, and markets. This is an approach that has been viewed with favour by legal scholars such as Professor Roy Goode QC in the UK as essential and practical to keep commercial law robust and strengthen it.

So how does this work? And how could and would it work in Nigeria?

The ALI was founded in 1923. Its mission is to develop more robust laws and to make them more systematic in meeting the continual challenges of changing societal needs. Projects include Restatement of the Law where the state of the law is summarised and set out for use by lawyers and judges. Members and participants include judges, professors, and judges. The process includes meeting, drafting laws, and updating the law regularly. The Restatements themselves are not binding but highly persuasive and influential, and indeed frequently used as secondary authority. Examples of this include core areas of commercial law such as contracts and torts, with the broad purpose to better harmonise the common law in a code like fashion.

This is a proven and useful tool which is a vibrant; living model that has withstood the test of time and can be of service to the Nigerian judicial and legal community in helping to clarify and simplify the law. Oher noteworthy projects include articulating Principles of Corporate Governance, among others.

In addition, Model Codes are developed by the ALI as well as the National Conference of Commissioners on Uniform State Laws (NCCUSL) which sometimes work together jointly, and sometimes work independently. The types of projects here are also well known and include the development of the Uniform Commercial Code (UCC) which is the base, subject to adoption for

many laws in individual states as to core areas of contracts and remedies. The NCCUSL was founded in 1892 and is made up of Commissioners from each state that promote uniformity and clarity in statutory law. Members include practicing lawyers, judges, and professors, as well.

(This extends to representing public and private interests through Advisory Committees made up of citizen advisors who provide input on vital matters of International trade law in labour, environmental, agriculture, and various other areas. This system was created by the US Congress in 1974 and is intended to provide valuable input into how law making should take place and evolve in these crucial areas.)

In Nigeria, the proposed project to harmonise commercial law could and, if initiative is taken, should be established in 2020. Areas of commercial law reform may include, as above, contracts, secured transactions, torts, corporate law and governance, and could be applied to certain issue areas or sectors such as oil and gas law.

Logically, the first steps would be to select members for inclusion in this process. This could be done for example, by setting up a Trust by and under the auspices of leading members of the Bar. An Advisory Council could devise a working framework and focus on Restatements and or Model Codes in areas identified as highest priority with the support of relevant members of the Bar and Judiciary. (There are other models that may be applied, borrowing from the USA case, such as the USTR Advisory Committee approach, but this may be less feasible to set up in the shorter term, than the above method.)

The University of Reading may support this by facilitating a Rapporteur in order to provide academic law support and be a bridge to other institutions, as well as CLRNN. Determining a pragmatic focal point of study on one or two areas where there is a perception that modernization should be prioritised, and that is based on criteria such as need, and impact, consensus, and will would be essential.

The need for reform in commercial law was extensively discussed and was clearly the subject of consensus at the 2019 CLRNN conference. The writings of

the symposium issue here provide further evidence and support for this development. As the above shows, and it is respectfully submitted here, for a new day to dawn in commercial law reform, modernization must take place.

This process is essential in moving Nigeria forward. Members of CLRNN are encouraged to consider volunteering their good offices to explore the setting of such as process as a core CLRNN initiative and therefore to help renew, refresh, and revitalize the law.

If interested, please be in contact with me or Dr. Bolanle Adebola in the first instance at clrnnstreams@clrnn.net.

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