The Prohibition of Large Partnerships in Nigerian Company Law: An Essay into Postcolonial Legal Atavism

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ABSTRACT

Nigerian company law requires that partnerships of more than 20 persons be incorporated and penalizes those who conduct business in violation of this requirement. The requirement has its conceptual roots in the affairs that precipitated the English Bubble Act of 1720 and its doctrinal origin goes at least as far back as the Joint Stock Companies Registration, Incorporation and Regulation Act of 1844. This article argues that whatever may be the merits of the requirement as enshrined in English company law, the requirement is unconstitutional when transposed into federal legislation within the current constitutional framework of Nigeria. The article further argues that, beyond the issue of constitutionality, the requirement in question is, in policy terms, socially inefficient and illegitimate and that it thus implicates significant sub-optimality. From this basic position the article goes on to draw out broader lessons and implications for the theory and practice of legal transplantation, whether in the post-colonial context or in the current context of heightened harmonization of laws across jurisdictions.

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I. INTRODUCTION

Section 19 of the Nigerian Companies and Allied Matters Act (CAMA),[1] prohibits with a few exceptions, partnerships of more than twenty persons.[2] This article examines the doctrinal validity of this

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1. *See generally* Laws of the Federation of Nigeria, http://www.nigeria-law.org/LFNMainPage.htm (last visited Mar. 20, 2010).

2. Companies and Allied Matters Act (2004) § 19 (Nigeria). Section 19 of CAMA provides thus:

1. No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business for profit or gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act or is formed in pursuance of some enactment in force in Nigeria.
2. Nothing in this section shall apply to—
   a. any cooperative society registered under the provisions of the any enactment in force in Nigeria; or
   b. any partnership for the purpose of carrying on practice
      i. as legal practitioners, by persons each of whom is a legal practitioner; or
      ii. as accountants by persons each of whom is entitled by law to practice as an accountant.
3. If at any time the number of members of a company, association or partnership exceeds 20 in contravention of this section and it carries on business for more than 14 days while the contravention continues, every person who is a member of the company, association or partnership during the time that it so carries on business after those 14 days shall be liable to a fine of ₦25 for every day during which the default continues.
4. If at any time the number of members of a company, association or partnership exceeds 20 in contravention of this section and it carries on business for more than 14 days while the contravention continues, every person who is a member of the company, association or partnership during the time that it so carries

prohibition in constitutional terms as well its justification in policy terms. The article concludes that the prohibition lacks doctrinal support in the constitution and that this aside, it also lacks policy justification in light of realities of the economic and social processes. Given the English antecedents of Nigerian business legislation, the article is theoretically located within colonial and postcolonial comparative discourse.

Part II of the article gives a brief background and history of the prohibition. Part III examines its constitutional validity and Part IV provides an assessment of its policy justifications. Finally, Part V embodies concluding remarks.

II. BACKGROUND

The CAMA's prohibition of partnerships involving more than twenty persons is a carry-over from § 377 of the 1968 Companies Decree,[3] which adopted it from § 434 of the English Companies Act 1948[4] and § 120(1) of the English Companies Act 1967.[5] Indeed this provision has been a feature of English Companies legislation at least since the first statute permitting the routine incorporation of companies, the Joint Stock Companies Registration, Incorporation and Regulation Act of 1844.[6] This 1844 statute pegged at twenty-five the maximum number of persons permitted to carry on business as an association—as a partnership—without incorporation.

Prior to the enactment of the CAMA, the Nigerian Law Reform Commission (Commission) reviewed its predecessor, the 1968 Companies

on business after those 14 days shall be liable to a fine of ₦25 for every day during which the default continues.

3. Companies Decree No. 51 (1968) § 377 (Nigeria).
4. English Companies Act, 1949, 11 & 12 Geo. 6, c. 38, § 434 (Eng.).
5. The 1967 Companies Act of England introduced the exemption granted to accountants and solicitors to form partnerships of more than twenty persons. That exception, as modified, is now embodied in subsection 2 of § 19 of the CAMA discussed *infra* (footnotes 46–47 and related text). Companies and Allied Matters Act, *supra* note 2, § 19.
6. Joint Stock Companies Registration, Incorporation and Regulation Act, 1844, 7 & 8 Vict., c. 110 (Eng.). It should be noted that the prohibition of partnerships of more than twenty persons was lately contained in § 716(1) of the UK Companies Act 1985, which has now been repealed by Schedule 16 of the Companies Act 2006 and Art. 2 of the prior Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002, S.I. 2002/3203, art. 3 (U.K.), http://www.opsi.gov.uk/si/si200232. The prohibition has as such been omitted from the UK Companies Act 2006.

Decree. As part of the review process, it examined the prohibition at issue, but saw nothing problematic about it. The Commission therefore made largely token or ministerial adjustments to the provision, with the exception of the addition of an exemption for partnerships involving lawyers and those involving accountants. These professional partnerships may now exceed the twenty person limit without violating the law.[7] The prohibition, thus adjusted, was reenacted in § 19 of the CAMA. The Commission's working papers showed little evidence of deep analysis of the provision and its ramifications. It referred only to the Report of the Jenkins Committee in England[8] in justifying the prohibition as being for the purpose of protecting the public from the hazards of dealing with large and fluctuating partnerships.[9]

III. CONSTITUTIONAL VALIDITY

Nigeria operates as a presidential federalism broadly patterned after the American federal system and constitution. The Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution) (hereinafter referred to as the Constitution or the 1999 Constitution) in the exclusive legislative list thereto, delineates the province of the Nigerian Federal Government's (Federal Government) legislative competence. That province is extensive, but it does not go so far as to encompass the regulation of partnerships. The concurrent legislative list to the same 1999 Constitution similarly does not encompass partnerships as an item within the joint legislative competence of the Federal Government and the States. The 1999 Constitution therefore leaves partnerships and associated matters to the residual legislative list, which falls squarely within the legislative competence of the states. In essence, the 1999 Constitution has not empowered the Federal Government to enact provisions such as that in § 19 of the CAMA, which seeks to regulate the formation and size of partnerships. Some states of Nigeria such as Lagos and the states of the former Western Region have legislated on partnerships,[10] though many other states have not, relying seemingly on

7. *See* THE NIGERIAN LAW REFORM COMMISSION, WORKING PAPERS ON THE REFORM OF NIGERIAN COMPANY LAW, Vol. I (Review and Recommendations) Part II, "Incorporation of Companies and Incidental Matters" ¶¶ 10–14 (1987–1988).

8. BOARD OF TRADE, REPORT OF THE COMPANY LAW COMMITTEE, 1962, Cmnd. 1749, at 76.

9. THE NIGERIAN LAW REFORM COMMISSION, *supra* note 7, ¶ 10.

10. *See* The Partnership Law of Lagos State, Cap. P1, Laws of Lagos State of Nigeria 2003. *See also* The Partnership Act, (1959) Cap. 86, Vol. IV, Laws of the Western Region of Nigeria (adopted and reenacted by several states in the area of the former Western Region of Nigeria, an example being the Partnership Law, (1978) Cap. 84, Laws of Ondo

preexisting principles of common law or Statutes of General Application in force in England on January 1, 2000.[11] The fact that many states have not enacted laws concerning partnerships is however hardly important here, since the Constitution simply has removed the prerogative of legislating on partnership matters from the Federal Government and entrusted it exclusively to the states via the residual legislative list. The legislative jurisdiction is not a concurrent one shared between the federal and state governments.

It is possible for a reader to miss the significance of the foregoing point regarding the unconstitutionality of the prohibition in § 19 of the CAMA, seeing that it is so plainly stated. It therefore bears mentioning that the validity of that prohibition has for more than half a century been an article of faith amongst lawyers and regulators in Nigeria. To declare its constitutional invalidity is, therefore, to undertake an iconoclastic endeavor of no mean order. Indeed, while the point is rather simply presented in the foregoing paragraph, its derivation is neither simple nor apparent. This explains why the Commission which reviewed earlier versions of the prohibition as well as several other legislative agencies have, through the years, assumed the constitutionality of the prohibition and proceeded on that basis.[12] While ostensibly aware of the states'

State of Nigeria). Interestingly, § 2(3) of the Partnership Law of Lagos State seemingly acknowledges and yields to the provisions of § 19 of the CAMA which limits partnerships to no more than twenty persons. Perhaps this is a tip of the hat to Federal might, in recognition of the historical fact that under the 1960 and 1963 constitutions the federal government had the power to make laws for the Federal Capital Territory (Lagos) on any matter including partnerships. *See* CONSTITUTION, § 64 (1960) (Nigeria); *see also* CONSTITUTION, § 69 (1963) (Nigeria). Such a tip of the hat would however be quite outlandish given the fact that the Federal Government currently lacks constitutional authority over partnerships per se.

11. The notable English statute in this wise is the Partnership Act of 1890. The statutes of general application are enforceable in Nigeria by virtue of provisions such as § 32(1) of the Interpretation Act Cap I 23 Laws of the Federation of Nigeria 2004, and the various High Court Laws which mimic the Interpretation Act. The standard formula is for these provisions to import into and make applicable in Nigeria, the common law of England, the doctrines of equity and the statutes of general application in force in England on January 1, 1900. This scheme of importation aside, certain English statutes and orders in council enacted prior to October 1, 1960 were extended to Nigeria. (It has been noted however that the Revised Edition of the Laws of the Federation of Nigeria Decree #21 of 1990 precludes the continued application in Nigeria of certain imperial statutes and orders in council set forth therein, these being no longer relevant to Nigeria. *See* CHARLES MWALIMU, THE NIGERIAN LEGAL SYSTEM: PUBLIC LAW, VOL. I, 22–23 (2005).

12. *See* The Partnership Law of Lagos State, *supra* note 10 (promulgated by the legislature of Lagos State, which seemingly acknowledges and yields to the logic of § 19 of the CAMA which limits partnerships to no more than twenty persons).

legislative competence on partnership matters, these agencies have simultaneously taken for granted the Federal Government's power to legislate on the subject. In essence, they have assumed concurrent federal and state legislative competence at best, or worse, exclusive federal legislative competence by way of preemption. Beyond the foregoing, the unconstitutionality of § 19 as canvassed is also significant because the persistence through the years of the prohibition therein presents us with lessons and insights in the area of cross-border reception of laws or legal transplantation, especially in the colonial and postcolonial contexts. The prohibition in § 19 of the CAMA is after all, English in origin, while the constitutional framework in the context of which its invalidity is canvassed is an American style federal constitution enacted and applied in a plural postcolonial African social environment.[13] A multiplicity of legal cultures is therefore implicated, with opportunities for comparative analysis.

A. Derivation and Origins

If the regulation of partnerships is clearly within the legislative purview of the states under the 1999 Constitution, how is it then that the Federal Government has ended up legislating on it in § 19 of the CAMA? To understand the derivation of the prohibition in § 19 and hence the difficulties that militate against the ready appreciation of its constitutional status, a historical perspective is apposite.

The provisions on partnerships as embodied in the CAMA have some affinity to the provisions on private companies (i.e. close corporations). This is because most private companies are in a sense, incorporated partnerships.[14] So there has been a tendency for Anglo-Nigerian legislatures,

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13. Nigeria or parts thereof was a colony of Britain from the late nineteenth century until 1960 when it gained political independence from Britain. In that period English law and legal processes were transplanted into the colony, including English style parliamentary government. Federalism was incorporated into this Westminster style government in 1954. This federal arrangement was changed into an American style presidential government in 1979 with the introduction of the now-repealed 1979 constitution. The current 1999 constitution maintains this federal presidential system. *See* CONSTITUTION, § 130 (1999) (Nigeria), *available at* http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicofNigeria.htm.

14. Partnership is a business association undergirded by a high degree of interpersonal connection between the constituent members. Clive Schmitthoff, following an examination of a line of English cases, has noted the intimacy that is similarly at the heart of the relationship between the members of a private company. *See* Clive M. Schmitthoff, *How the English Discovered the Private Company*, in PIETER ZONDERLAND, QUO VADIS IUS SOCIETATUM? LIBER AMICORUM PIETER SANDERS 183, 187–91, 193 (Kluwer–Deventer Martinus Nijhoff-'S-Gravenhage, 1972). He opined that "[t]he essential characteristic of

in formulating companies legislation, to address aspects of partnership regulation that lie at the intersection of both forms of business organization. One of such aspects naturally is the relationship between large unincorporated partnerships and the incorporated company, especially in connection with relative size and the requirements of incorporation.[15] With particular reference to relative size, one of the perennial problems has been the delimitation of the point at which the partnership should end and the private company begin (i.e. the maximum number of members a partnership can have before it becomes so large as to necessitate a peremptory requirement as to its incorporation).[16] This tendency or perceived need to simultaneously address aspects of partnership law

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the private company in its true meaning is, as Lord Wilberforce put it, that it is an association founded on a personal relationship." *Id.* at 193. The private company is then as its conceptual core little more than an incorporated partnership. Many of such companies were effectively partnerships incorporated in order to secure limited liability, perpetual succession, and the other benefits attendant upon incorporation, a fact recognized in the judgment of Lord Wilbeforce in *Re Westbourne Galleries Ltd. See generally,* Ebrahimi v. Westbourne Gallaries Ltd. [1972] 2 All E.R. 492, 500 (Eng.).

15. The Nigerian Law Reform Commission made a statement that bears this point out. The Commission stated that it was discussing the prohibition of partnerships exceeding certain numbers only because the prohibition creates an obligation to incorporate a company in certain circumstances. *See* NIGERIAN LAW REFORM COMMISSION, *supra* note 7, ¶ 10.

16. This problem of delineating the boundary of the two business forms is quantitative as well as qualitative. Quantitatively the problem manifests itself as one of specifying the number of members beyond which a partnership must incorporate—and this is the form of the problem apparent in § 19 of the CAMA. Beyond this the problem also manifests itself qualitatively as one of specifying the nature of the constituents of a private company, for example whether a private company can meaningfully be constituted (and whether it ought properly be constituted) by persons who lack the sort of affinity and personal connections that attend the members of a partnership—connections that are indeed assumed by partnership law. If a private company can be constituted by persons who lack the intimacy that attends a partnership, then this qualitatively distinguishes the private company from the partnership and reinforces the quantitative limits placed on the membership of a partnership. If not, that quantitative limit may seem a little arbitrary, at least when not viewed from a securities regulation perspective. The qualitative aspect of the problem is more theoretical in character and is not reflected in the CAMA, although it is incipient in the case law. *See generally* Schmitthoff, *supra* note 14. *See also Westbourne Galleries*, 2 All E.R. 492, 498–500. In the United States, the decision in *Galler v Galler,* 32 Ill.2d 16 (1965) (Supreme Court of Illinois) also reveals an incipient, albeit less discernible, recognition of this problem. The court there spoke of the impossibility in close corporations (i.e. private companies) of securing "independent board judgment free from personal motivations concerning corporate policy." *Id.* at 584. Viewed qualitatively, the issue is whether the province of the partnership goes as far as encompassing that of the private company or whether the private company properly belongs instead within the same province as the public company.

together with aspects of private company regulation accounts, in significant measure, for the regulation of the size of large partnerships in earlier English company legislation and the British administrators' transposition of such treatment into colonial Nigerian companies legislation, and ultimately into the postcolonial successors to such legislation of which the CAMA is the latest. However, in the case of the CAMA the transposition was effected, not by British colonial administrators, but by Nigerian regulators unwittingly following a pre-established script or mindset that habituated them to such transposition. Nigerian regulators were, in so doing, yielding to a regulatory disposition that is too often manifest in postcolonial Nigerian legislation, in which the legislator turns instinctively and repeatedly to the easy routine of familiar colonial approaches, even while professing to strike out in a new direction. The result is legislative atavism in which old colonial rules and approaches reappear in a postcolonial setting, notwithstanding professions of change, implicit or explicit, by the legislature. We shall return to this theme later in this part of the article. Suffice it to say that at this point the persistence in CAMA § 19 of the ban on large partnerships, after the underlying constitutional framework was dismantled in the postcolonial era, is a result of this atavism.

As a historical matter, it should be noted that while English company law has for over a century distinguished between the private company and the public company,[17] the previous inexistence of the private company meant that early company legislation did not focus on the private company in trying to delineate the point at which the partnership should end. Rather, such legislation focused on the incorporated company simpliciter. In effect, such legislation made a distinction between all incorporated companies on the one hand, and impermissibly large partnerships, on the other.[18] Parliament's first Act permitting routine

17. The distinction between private and public companies first appeared in England in the Companies Act of 1907 (7 Edw. 7, c. 50) which created special exemptions from disclosure for private companies as encouragement for the use of the company by small businesses. *See* Judith Freedman, *Small Businesses and the Corporate Form: Burden or Privilege?* 57 MOD. L. REV. 555, 569 (1994). The 1907 Act was consolidated in the better-known Companies (Consolidation) Act of 1908 (8 Edw. 7, c. 69) which provided the basic structure for the first companies legislation in Nigeria—the Companies Ordinance of 1912. On the abiding character and importance of the distinction between private and public companies in British company law, see PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 12–14 (7th ed. 2003).

18. Early companies legislation were so preoccupied with drawing a boundary beyond which partnerships could not extend in size—a boundary beyond which partnerships must yield to the corporate form—that some of the early Acts did not specifically indicate the minimum number of persons required to incorporate a company, focusing only on the number

incorporation of companies in England, the Joint Stock Companies Registration, Incorporation and Regulation Act of 1844,[19] did not, for instance, make any distinction between private and public companies. Rather, its focus was on the control of large partnerships with freely transferable shares and fluctuating memberships, the indiscriminate formation of which had contributed to the stock market abuses that ostensibly precipitated the Bubble Act of 1720.[20] With the introduction of the private company into English companies law in 1907, the focus shifted away from the consideration of companies generally vis-à-vis large partnerships and, instead settled on the treatment of the private company vis-à-vis large partnerships. This focus on controlling large, fluctuating partnerships has since been carried forward in Anglo–Nigerian companies legislation as manifest in § 377 of the repealed Companies Decree 1968 and currently in § 19 of the CAMA.

The prohibition of unincorporated companies of more than twenty persons in § 19 of the CAMA is in essence a prohibition of large relatively unregulated partnerships, given the market abuses to which such large partnerships have historically been prone. This prohibition implicitly announces and endorses the relatively benign nature of unincorporated commercial associations of twenty persons or less, while simultaneously responding to the dangers inherent in larger unincorporated commercial associations by compelling the latter's incorporation. The logic of § 20 points to a putative regulatory regime which draws a broad distinction between unincorporated associations of twenty persons or

beyond which a partnership must become incorporated. In particular, the Joint Stock Companies Registration, Incorporation and Regulation Act of 1844 and the Limited Liability Act of 1855 specified only the maximum number of persons (i.e. twenty-five persons) permitted to carry on business as a partnership without incorporation. *See* Companies Registration, Incorporation and Regulation Act, 1844, 7 & 8 Vict., c. 110 (Eng.); *see also* The Limited Liability Act, 1855, 18 & 19 Vict., c. 133 (Eng.). The practice of specifying the minimum number of persons required for incorporation started with the Joint Stock Companies Act of 1856. *See* The Joint Stock Companies Act, 1856, 19 & 20 Vict., c. 47 (Eng.). These statutes were essentially aimed at chaperoning, if not controlling, the growth of partnerships or business organizations with freely transferable shares: The Bubble Act of 1720 having been repealed only about two decades earlier, there remained residual misgivings in policy making circles about the mischief that such associations could occasion.

19. An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, 1844, 7 & 8 Vict., c. 110 (Eng.).

20. The Bubble Act, 1720, 6 Geo. 1, c. 18 (Eng.).

less and incorporated bodies of largely more than twenty persons.[21] Such a regime seeks to bring business associations of more than twenty persons within the heightened oversight of the CAMA.

These provisions regulating the formation of large partnerships would have been valid in the 1968 Companies Act as well as predecessor Nigerian companies legislation operated under nonfederal constitutional frameworks. They would also have been similarly valid under post-1968 constitutional arrangements enacted outside the brief period of presidential federalism from 1979 to 1983.[22] Certainly these and related provisions were also valid under the various English companies legislation from whence they originated, especially given the unitary character of the English government and constitution. Transposed to Nigerian companies legislation operated under post-1954 federal constitutions with the division of legislative competence in their legislative lists, such provisions become problematic. They become problematic because neither the exclusive nor the concurrent legislative list under the 1979 and 1999 Constitutions specified partnerships as a subject matter for the federal Legislature. This was also the case under federal Constitutions of 1960 and 1963.[23] As such, the regulation of partnerships is an item that falls within the residual legislative list where it is reserved for state legislatures. As previously indicated, there has indeed been some recognition in practice of the states' prerogative in this area, as indicated

21. Largely more than twenty persons because, the law would still permit as few as two persons to form a company as is currently allowed by § 18 of CAMA. Companies and Allied Matters Act, (1990), Cap. 59, § 18 (Nigeria). Law of the Federation of Nigeria, Revised Edition, *available at* http://www.nigeria-law.org/LFNMainPage.htm.

22. Although Nigeria started operating a federal constitution in 1954, before the 1968 Companies Decree was enacted, that constitutional arrangement was supplanted by a new constitutional order following the military coups of 1966. On this it has been written that "after the military take-overs of January 15, 1966 and December 31 1983, the pre-existing Constitution is permitted to continue with suitable modifications and suspensions, its unsuspended provisions" being stated to be subject to the decrees of the military government. *See* B.O. NWABUEZE, MILITARY RULE AND CONSTITUTIONALISM IN NIGERIA 3 (1992). Accordingly there can be little dispute about the validity of the provision limiting the size of partnerships under the 1968 Companies Act, which was promulgated by a military decree and was operated under exclusively military governments until 1979.

23. Section 69 of the 1963 constitution (in Cap. 20 Laws of the Federation 1963) just like § 64 of the predecessor 1960 constitution (in the second schedule to the Nigerian (Constitution) Order in Council 1960) gave parliament the power to make laws for Nigeria on matters in the exclusive and concurrent legislative list, and for the Federal Territory (Lagos) on any matter whether or not on the legislative lists. CONSTITUTION, § 69 (1963) (Nigeria); CONSTITUTION, § 64 (1960) (Nigeria) These legislative lists did not include the regulation of partnerships.

by some state statutes regulating partnerships.[24] What has not been recognized is that the federal Legislature lacks concurrent or parallel legislative authority over partnerships and cannot therefore legislate on it jointly with the states so as to make its own legislation preempt or oust state legislation in the area. The federal Legislature completely lacks authority over partnerships per se. In furtherance of this position it should be noted that, suggestions to the contrary notwithstanding, nothing in the 1999 Constitution indicates that the federal Legislature is vested with the exclusive authority to regulate the forms of business association, so as to render the states incapable of legislating in that sphere. Indeed the legislative lists in the 1999 Constitution make it clear that the Federal Legislature's authority over business associations extends only to "bodies corporate," and even then it does not extend to all bodies corporate. Bodies corporate, established directly by a state law as well as cooperative societies are removed from the federal Legislature's competence.[25]

B. Ancillary Interpretive Issues

Section 19 of the CAMA, as a law made by the federal Legislature on the subject of partnership, is not saved by Section 4(5) of the 1999 Constitution, since such a law would not be validly made; nor is it saved by the broad powers of the Federal Government to make laws on any matter incidental or supplementary to other matters specifically mentioned on the exclusive legislative list.[26] Section 19, as already indicated, is a carryover from nineteenth century English legislation on companies, which sought thereby to protect investors from the hazards of freely transferable shares issued by large partnerships. The objective of investor protection from large fluctuating partnerships can now be properly secured through appropriate enactments under the Federal Government's power to control capital issues as provided in Item 12 to the 1999 Constitution. In essence, if a partnership issues instruments that are in the nature of securities, especially freely transferable

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24. See for instance the partnership legislation of Lagos and Ondo States mentioned, *supra* note 10.
25. *See* CONSTITUTION, § 31 (1979) (Nigeria); *See* CONSTITUTION, § 4, Item 32 (1999) (Nigeria) (in the Exclusive Legislative List in the Second Schedule).
26. *See* CONSTITUTION, § 4, Item 68 (1999) (Nigeria) (in the Exclusive Legislative List in the Second Schedule).

securities, then that partnership comes *ipso facto* within the jurisdiction of federal statutes that control such matters, notably the Investment and Securities Act 2007 and subsidiary legislation. This is quite different from a provision such as § 19 of CAMA that predicates federal regulation of such partnerships on the mere fact of their having a certain number of members. The latter approach bears no relevance to the federal policy interests in this area, and would therefore be unsustainable as a law related to or incidental to other specifically enumerated powers such as the power to regulate corporate bodies. Nothing about the partnership renders it intrinsically or conceptually an appendage of bodies corporate. Nor would § 19—given the broad prohibition it embodies—qualify as a law narrowly or reasonably tailored to secure federal interest in regulating bodies corporate. The prohibition in § 19 is not an appropriate means to the end of controlling widely distributed capital issues by partnerships. It is not plainly adapted to that end, nor is it in broad consonance with the spirit of the Constitution[27]—a federal constitution whose overarching framework necessitates the location of powers over local affairs in state and local governments. Partnerships, by nature, involve the most basic arrangements for social and economic interaction in diverse locales across the country. It is not an appropriate subject for federal legislation or oversight.

Given the foregoing, § 19 of the CAMA becomes a provision enacted in violation of the division and delimitation of legislative power embodied in the current Federal Constitution and reflected in predecessor federal

27. The argument here attempts to conform to the highly deferential standards enunciated by Chief Justice Marshall of the United States Supreme Court in articulating the doctrine of incidental powers under the United States Constitution. In this regard Justice Marshall declared: "Let the end be legitimate . . . let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *See* McCulloch v. Maryland, 4 Wheat. 316 (1819) *cited in* B.O. NWABUEZE, FEDERALISM IN NIGERIA UNDER THE PRESIDENTIAL CONSTITUTION 42–43 (1983). It is nonetheless submitted that this standard is too deferential to Federal legislative power in the context of Nigeria's more detailed constitutions. The prolix enumeration of powers under the various legislative lists to Nigeria's constitutions and the definition of incidental and supplemental powers under Part III of the legislative lists in the Second Schedule to the 1999 constitution all counsel a less expansive approach to the interpretation of the doctrine of incidental powers. CONSTITUTION, (1999) (Nigeria) (in the Legislative Lists in the Second Schedule). Part III to the legislative lists in the Second Schedule defines supplementary and incidental matters to include offences, aspects of procedure and judicial administration as well as land acquisition. *Id.* If we take this definition *ejusdem generis*, it is easily observed that it relates broadly to enforcement or implementation of laws made on items over which the Federal government has specifically enumerated powers, rather than the establishment of substantive powers of the Federal government. There is a case for limiting the meaning of incidental powers to issues or matters of this sort.

constitutions. Of this division of power, Sir Udoma has written that, "The Federal Government, according to established doctrine, being a government of enumerated powers only as contained in the Exclusive Legislative List and the Concurrent Legislative List, it would always be necessary at all times for it to justify its measures juridically by pointing to some particular clauses of the Constitution as the basis of the exercise of its power."[28] The current legislative lists, which can be traced back to the 1953 London Constitutional Conference and the resulting constitution of 1954 reflects an arrangement envisioning a Federal Government vested with limited (defined) powers, with the residue of powers assigned to the state governments. This residue, denoted by the residual legislative list, was potentially unlimited in nature, the intention of the framers of the 1954 Constitution was to strengthen the Regional (i.e. state) governments. "Nigerian political leaders with the support of their different parties wanted a clear and unambiguous definition and delimitation of the powers and functions, not of the regions, but of the central or general government and legislature. The powers and functions of the regional governments and legislatures were to be strengthened and therefore to be left undefined. They were to constitute the residue."[29] This basic conceptual structure of the Federal Constitution has not changed. Although successive constitutions have seen the progressive allocation of disproportionate powers to the Federal Government's exclusive legislative list—an arrangement that has relegated the powers in the residual list into legislative dregs of sorts. Notwithstanding this relegation, the basic structure of the legislative lists is sufficient to exclude the federal Legislature from legislating on partnerships.

It should be noted that under Section 315 of the 1999 Constitution, the provisions of § 19 of the CAMA are saved as an existing law. However, by virtue of Section 315(1)(b) of the 1999 Constitution it survives, not as an existing Federal law, but rather as a deemed enactment of the state legislatures since partnerships are now within the states' legislative competence.[30] It does not survive as an existing federal law. This means that any state can amend its partnership laws to override § 19 of

28. UDO UDOMA, HISTORY AND THE LAW OF THE CONSTITUTION OF NIGERIA 323 (1995) (commenting on the legislative lists under the 1979 and 1989 Constitutions).

29. *Id.* at 150 (commenting on the origins of the London Constitutional Conference of 1953 and the 1954 Constitution).

30. On the concept of existing laws under § 274 of the 1979 Constitution, which is similar to § 315 of the 1999 constitution, see NWABUEZE, *supra* note 27, at 46, 70–71.

the CAMA. Equally important for the future is the fact that legislative reviewers of the CAMA, a federal legislation, would henceforth be unable to reenact § 19 or its substance, since the concept of existing law would not save such reenactment. Given prior reviews of companies legislation that resulted in the 1968 Companies Decree and the subsequent CAMA (1990) there is now an expectation that a comprehensive review of Nigeria's companies legislation would occur approximately every two decades. Along this line of thinking, the year 2010 marks the twentieth anniversary of the CAMA and a review should be in the offing. Were this review to occur, it would be worth the reviewers' time to reassess § 19, in the light of the foregoing analysis.

C. Issues in Comparative Law

How is it that the prohibition in § 19 of CAMA has persisted for so long after the constitutional framework that originally gave it validity was formally replaced by a new constitutional framework under which that prohibition is no longer sustainable? In other words, why has the objective of constitutional change not been realized in the abandonment of the prohibition in § 19? In any case, is this a discrete oversight standing by itself or is it evidence of a more deep-seated and systemic problem in the process of legal transplantation, especially given the postcolonial setting?

Maitland famously wrote: "The forms of action we have buried but they still rule us from their graves."[31] Just as with the forms of action, so also with colonial doctrines. Colonial doctrines tend to be atavistic in the post colonial setting. Although they may lose their constitutional foundations, they sometimes continue to live on in the praxis. They seemingly acquire a life of their own, independently of the will of the legislature, and abide in the interstices of postcolonial norms and praxis. Changes in legal regime entail costs. Such costs are not exhausted in the expenses of formally enacting new legislation, but go further to encompass the expense of time, energy, and other resources needed for the relinquishment of established routines and entitlements at the level of the individual citizen who has to comply with the new regime. At this level, the citizen, like any rational maximizer of value—the quintessential homo economicus—often would match the gains of noncompliance or cost of compliance on the one hand, with the benefits of compliance or the cost of noncompliance on the other hand. Where the benefits of

31. FREDERICK W. MATILAND, THE FORMS OF ACTION AT COMMON LAW 2 (1st ed. 1936) (1909).

compliance or the cost of noncompliance do not meaningfully offset the cost of compliance, the citizen as a private actor or even as a public administrator would often retain the erstwhile rules in practice, accommodating same with de facto adjustments and rationalizations as necessary. The analysis here relies somewhat on Holmes' "bad man" theory of law. While this writer does not endorse that theory as a complete explanation of human incentives to comply with law, the theory holds true for a sufficiently significant number of people in certain circumstances to merit reliance in the present context.

The American states, for instance, severed their colonial ties to England centuries ago and rejected the English constitution. Yet in subsequently establishing their system of corporate governance they could not ultimately reject the fiduciary duty principles—a set of basic principles with clear derivation from longstanding English doctrines of equity as particularly applicable in agency situations such as those involving business managers. These fiduciary duty principles have come to constitute the backbone of American corporate governance. While it may not have been so in the past, no set of rules, statutory or otherwise, currently structures and bestrides the system of corporate governance in America as do the fiduciary duty principles. It is the basic body of rules to which all other principles of corporate governance have come to constitute but a gloss of sorts. This is so notwithstanding the strident protestation of American scholars that American corporate law is homegrown.[32] If ever those protestations were persuasive in the earlier days of American corporate law, their persuasiveness has been lost with the subsequent erosion of regulatory corporate law in the twentieth century—a development which has seen a decline in the dominance of mandatory and strict corporate governance rules in the statutes and a concomitant accentuation of enabling corporate governance rules that were relatively free of substantive regulation.[33] With the decline of regulatory corporate law, American corporate law, as manifest in the corporation statutes of the various states, effectively became deregulated in a fit of

32. *See* JAMES WILLIARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970 1–2 (1970); *see also* EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 1–2 (1954).

33. On the demise of regulatory corporate law and the rise of enabling corporate law statutes, see WILLIAM T. ALLEN, REINIER KRAAKMAN, AND GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 89–90 (2d ed. 2007).

interstate competition with Delaware in the lead. The strictures built into the erstwhile structure of corporate governance by earlier state legislatures largely vanished or waned in importance—the very strictures on the basis of which American corporate governance might conceivably have rightly claimed the "homegrown" status. The fiduciary duty principles—a colonial legacy—reasserted themselves as atavistically as any transplanted set of rules ever have, and have since become the basic overarching framework for regulating corporate affairs, of which several provisions of state corporate law statutes are but specific instantiations. In a field such as corporate law which is, at its roots, a scheme of private ordering, operators as rational maximizers of value were in essence quick to realize that the constitutional and ideological break with England notwithstanding, it made sense to reestablish and utilize English agency and fiduciary law principles as the foundation of corporate law given the relative balance of costs and benefits of not doing so.

Given the circumstances in which the American states became independent of British rule—the relatively radical, non-negotiated character of the American revolution and War of Independence—one would be forgiven for expecting a more radical break with the legacy of colonial legal doctrine especially in an area such as corporate law where the states seemed intent upon leaving an early mark. That colonial legal principles still play a dominant role in this field suggests that in countries where the end of the colonial relationship was negotiated, and therefore less radical, colonial doctrine may be harder to uproot. This is likely the case with many African countries, which became independent from colonial European powers after protracted but relatively peaceful negotiations.

Nigerian securities regulation yields an interesting example of rules which fail to yield to displacement. Since 1988, Nigeria has sought to implement American style securities laws.[34] She has found, however, that the change is not one that is so readily affected. Nigerian corporate governance and securities regulation laws rest on an English-style chassis of norms, assumptions, administrative agency structure, and interpretive traditions. American-style securities laws have had to attempt to take root atop this pre-existing chassis of English-style rules. The chassis seems endless in its reach and influence however, so that one would have to change several aspects of the regulatory framework in order to completely or substantially remove the preexisting English-style

34. See the now-repealed Securities Exchange Act, (1988) and the rules made thereunder. The current Investment and Securities Act, (2007) continues along same broad lines.

structure for securities regulation. The effect, therefore, is that the more one plumbs these preexisting English rules in a bid to completely circumscribe and remove them, the more one discovers that they are intricately intertwined with aspects of this chassis and that their reaches go farther than the extent previously anticipated, so that one is then forced to stop and reconsider the whole enterprise of eliminating them. The effect of this situation has been the persistence of an admixture of the English-style rules with American-style legislation in the field of Nigerian securities regulation, the former failing to give way and the latter failing to completely take root.[35] Significant regulatory suboptimality has been the result of this situation.

As new laws are increasingly transplanted and received in the new postcolonial environment, the atavistic nature of colonial laws suggests that we must be careful not only with regard to successful transplantation and establishment of the new laws, but also with regard to the initial choices made as to what laws to transplant. Transplanted laws present the same predicament as transplanted fauna. They may well take root aggressively and refuse to give way long after they have served their purpose or have become conceptually supplanted by other realities or necessities. Transplantation must therefore not be seen as a transient exercise. If anything, it may well be a permanent exercise of sorts since laws, once planted and established, organically grow and become interwoven into the legal and socioeconomic fabric of the receiving society. The notion that such laws can be completely removed or extinguished seems at best, a half truth. Unfortunately, some relationships are not readily amenable to a clean break and this seems to be one.

Concerning the difficulties of receiving foreign law into a host jurisdiction, a comparative law scholar has noted that:

> It is one thing to receive law from somewhere else, but quite another to ensure that it is as effective in the host jurisdiction as in the place where it was conceived and developed. It is all very well to harmonize, but the need for it, the possibility of achieving it, and the difficulties of maintaining it, are far more controversial and difficult issues than they first appear.[36]

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35. A specific instance of this can be seen in relation to the private placement of securities. *See* George C. Nnona, *Private Placement of Corporate Securities in Nigerian Law: Realigning the Perspective on Key Issues of Doctrine and Policy*, J. BUS. L. 318 nn.1–2 (2007).
36. Nicholas H. D. Foster, *Journal of Comparative Law: A New Scholarly Resource*, 1 J. COMP. L. 3 (2005).

Similar sentiments were expressed earlier in *Nyali, Ltd v. Attorney-General*, a case concerning the application of English law in British East Africa, in which Lord Denning declared that:

> The common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law . . . [i]n these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualification.[37]

As the foregoing indicates, comparative law scholars are acquainted with, or at least conscious of the difficulties of getting transplanted laws to take root in host jurisdictions such as colonial territories. However, scholars have yet to address the difficulty of getting such transplanted laws to give way to a new dispensation when the need arises because the colonial order has been supplanted or because the justification for the received law has otherwise ceased to exist. It would seem, however, that in a globalized world with exponentially multiplied opportunities for cross-border legal reception, the need for a focus on this aspect of legal reception can hardly be gainsaid. The realization that a piece of received legislation may not be easily eliminated from the social and legal fabric would, at the very least, lead to enhanced circumspection in the basic decision to receive foreign law on a subject matter, and the secondary decision regarding what particular foreign law to receive.

A constitution in particular seems not to be something that can be easily jettisoned after it has taken root. This is because of the extensive reach that a constitution has on the whole society, which it penetrates and structures in multiple ways. For legislation other than a constitution, the wider the reach of a law or statute, the more difficult it is to remove it or eliminate its influence even after formal repeal. This has relevance for many developing countries in particular where there appears to be an abiding belief in some quarters that legal revolutions can be effected with the same dispatch and certainty as changes in government personnel following political regime changes. The displaced legal order may not yield as readily as presumed, even after the regime that established it has been swept away.

It has been noted that "there is an increasing realization that all legal systems are to some extent mixed, not just those such as Scotland and South Africa, which are traditionally so regarded, and that mixing will

37. Nyali, Ltd v. Attorney-General, (1955), 1 All E.R. 653.

be a key component of law in the future."[38] Colonialism was indeed but one instance, albeit an unsavory one, of internationalization resulting in mixed plural legal systems. As we undergo another wave of internationalization in the new global order, and legal systems undergo increasing admixture, the lessons of the earlier internationalization and the resultant admixture ought to be borne in mind. While the political conditions under which laws were received in English-speaking Africa were vastly different from the conditions under which they are being received today in the former Soviet and communist states of East Europe as well as post communist China and the emergent commercial centers of the Arabian Peninsula, commonalities do exist. The received laws are foreign laws usually designed or organically developed and tested over long periods in foreign jurisdictions and transplanted into the receiving jurisdictions in the hopes of replicating or approximating successes achieved with the same laws in their jurisdictions of origin. Sometimes the reception of foreign law is effected at the behest of influential foreign nations or interests, or multilateral development agencies—a process that can entail same dynamics as the colonial context, given that the receiving country may be acting under the duress inherent in a domestic economic or political exigency. The reception may therefore prove to have been as coerced or compelled as reception in a colonial setting. The United States Securities and Exchange Commission (SEC) has, for instance, gone abroad on a proselytizing mission preaching the gospel of insider trader regulation.[39] While that gospel is not one that many outside of Western Europe found persuasive,[40] in an era of Pax

38. Foster, *supra* note 36, at 8 (citing Esin Örücü, *Mixed and Mixing Systems: A Conceptual Search, in* STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING 336 (Erin Örücü, Elspeth Attwool & Sean Coyle eds., Kluwer Law 1996), *available at* http://www.thejcl.com/pdfs/foster.pdf).

39. *See* George C. Nnona, *International Insider Trading: Reassessing the Propriety and Feasibility of the U.S. Regulatory Approach,* 27 N.C. INT'L L. & COM. REG. 185, 201–02 (2001).

40. Even in Western Europe not every constituency bought into the necessity or fairness of the insider trading prohibition. For instance Franz Steinkuhler, a German labor leader and member of the supervisor board of Daimler-Benz AG, traded in 1993 with inside information on the stock of an affiliated company. "Public support for Steinkuhler remained considerable, however, and Steinkuhler himself, while confirming that he had engaged in the trading, admitted no wrong doing, dismissing the charges as 'attempts to discredit my person.'" Daniel James Standen, *Insider Trading Reforms Sweep Across Germany: Bracing for the Cold Winds of Change,* 36 HARV. INT'L L.J. 177, 178 (1995). *See also* Nnona, *supra* note 39, at 215–16 & 236–38.

Americana, many jurisdictions adopted rules prohibiting insider trading, sometimes under great pressure or inducement from the SEC.[41] If and when it is eventually sought to jettison these rules, what would such abandonment entail in terms of time, process and impact and how successful will it be?

IV. POLICY CONSIDERATIONS

Going beyond constitutional or doctrinal validity and effectiveness, does the provision in § 19 of the CAMA restricting partnerships to no more than twenty persons make sense in the light of Nigeria's broader economic and social processes? We undertake the necessary analysis on this point and answer the question in the negative under the subheadings below.

A. Inefficiency and Social Sub-optimality

A partnership is basically an association of two or more persons carrying on business together for profit. No particular formality is required to form a partnership as persons who associate in business for profit are prima facie deemed to be partners. Indeed, people can become partners without knowing that they are viewed as such under the law, provided they share the profits of an enterprise under an arrangement that requires joint effort in pursuit of an endeavor.[42] It does not matter in this regard whether they call themselves partners or not; the law treats them as a partnership.[43] Where two or more persons carry on a business

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41. *See* Nnona, *supra* note 39, at 202.

42. "See for instance section 3(1) of the Partnership Law of Lagos State, Cap. P1, Laws of Lagos State of Nigeria 2003, which states that: "[P]artnership is the relationship which subsists between persons carrying on a business in common with a view to profit." Section 4(c) of the law reinforces the centrality of profits by declaring that, [t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business." Similarly, under the Partnership Act of 1890, where two or more persons carry on a business together with the intention of making profit, they are deemed in law to be a partnership. *See* C.S. OLA, COMPANY LAW IN NIGERIA 14 (Heinemann Educational Books, 2002).

43. An instructive case is S.A. Uredi v. Jacob Dada, [1988] N.S.C.C. 197. The respondent, Dada, was informed by the appellant Uredi, a longstanding friend of Dada, that Uredi had obtained a construction contract at Festival village, Lagos and that there was a lot of money to be made from the transaction. He asked Dada to provide him with the sum of ₦50,000 (Fifty Thousand Naira) under an arrangement whereby Dada would get a share of the profits of the contract. The arrangement was wholly an oral agreement. Dada made the money available to Uredi. The Supreme Court, just like the lower courts, had no difficulty in treating the arrangement as a partnership. Oputa J.S.C. stated thus: "The essential element common to all partnerships is the pooling together of resources—

together with an expectation of profit, they are deemed to be a partnership in law.[44] The sharing of profits from a joint enterprise is thus a prime indication of the existence of a partnership. The net result of this is that the provision of CAMA under consideration effectively renders illegal, myriad associations or arrangements under which people conduct sundry workaday activities ranging from hunting to trading in various communities across the Nigerian federation. A party of twenty-one, organized to hunt rabbits in the warrens of Aniocha, can end up an illegal association as easily as a similarly sized troupe of musicians playing for hire in Damaturu and environs. Such a result runs against the grain of good legislation. A statutory provision should not proscribe myriad interactions that form part of the workaday life of the average citizen; not without a roundly considered and clearly articulated reason of an unassailable sort, something that is apparently lacking here. To do otherwise would be to implement legislation that is difficult to enforce, socially disruptive if enforced, and on the whole suboptimal when juxtaposed with social and economic costs.

B. The Dictates of True Federalism

True federalism demands state independence—the robust assertion of the states' autonomy on matters falling within their legislative purview. There is no gainsaying that Nigeria has practiced a lopsided federalism—one in which the Federal Government is so dominant that its powers reach into the farthest recesses of local life.[45] This is conceptually a travesty of the basic idea of federalism. It also makes for a union of enfeebled states in which the struggle for control of federal power becomes an intense, no-holds-barred contact sport. There is thus a need for the assertion of state power whenever possible, in order to push back against the disconcerting dominance that results from the concentration of power at the federal level. Section 19 of the CAMA is perverse in this context. It accentuates the lopsided division of power in the Constitution,

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capital or labour or skill—for the purpose of business for the common benefit of the partners. This involves the sharing of profit." *Id.* at 208.

44. Ola, *supra* note 42, at 14.

45. *See* Sam Oyovbaire, *Federalism and the Balance of Constitutional Power Under the 1979 Constitution, in* ISSUES IN THE 1979 CONSTITUTION (Ignatius Ayua ed., Nigerian Institute of Advanced Legal Studies, 2000) (Oyovbaire notes and laments the over-dominance of the federal government over the state governments and the unsettled foundations of Nigerian federalism). As with the 1979 constitution, so also with the 1999 constitution. *See also* Nwabueze, *supra* note 27, at vi–vii.

by effectively encroaching on the legislative prerogative of the states over partnerships. It is thus a poster child for the destabilizing imbalance that afflicts Nigerian federalism—an obstacle on the path to true federalism.

C. Egalitarian Imperatives

A more than thin veneer of elitism attends § 19 of the CAMA. It grants a dispensation to partnerships involving accountants and those involving lawyers, the quintessential professions of the Nigerian elite. Specifically, under § 19(2) of the CAMA, such partnerships are permitted to have more than twenty members—hundreds or thousands if need be—without any liability. This elitist benediction deprives the provision of that degree of social legitimacy that is so essential, if a piece of legislation is not to constitute just another building block in the tottering superstructure of social privilege and preferences, to which the upper classes have for long dedicated their energies and imagination. A truly socially legitimate exception would be far more inclusive.

There is nothing suggesting that the legal and accounting professions in Nigeria have a better claim to exceptional treatment under § 19 than the other occupations that engage the energy of the majority of Nigerians, from farming to masonry. Indeed the non inclusion, for instance, of medicine as one of the beneficiaries of the benediction granted to professions by § 19(2) bespeaks regulatory manipulation. Nigerian physicians and their professional associations, unlike lawyers and accountants, are typically not drawn into policy discussions concerning business legislation. So, they are unlikely to have been aware of the leeway granted by § 19(2) to law and accountancy at the time § 19 and its predecessor provisions were being introduced. In any case, if they were aware, they clearly were not sufficiently astute in such matters to appreciate their importance, and were thus not involved in framing and charting the discourse as lawyers and accountants were.[46] While the

46. In the documentary exchanges and discussions that preceded the enactment of the CAMA, no physicians associations was represented, nor did any memorandum or other submission issue from such association to the Nigerian Law Reform Commission. Memoranda came principally from associations representing lawyers, accountants, and other players in the financial sectors such as Equipment Leasing Association. The workshop held in February 1988 to discuss the draft decree was similarly dominated in attendance by such financial sector groups and their members. For a list respectively of those who sent in memoranda to the Law Reform Commission and those who participated at the workshop, see THE NIGERIAN LAW REFORM COMMISSION REPORT ON THE REFORM OF NIGERIAN COMPANY LAW, Vol. I. apps. 9–10, at pp. 383–84 (1988), *available at* http://www.nlrc.gov.ng/publications.php?1d=2.

physicians thus slept on the issue, law and accounting stole a march on them and instituted the exclusive scheme of exemptions in § 19(2).[47] The exemption in § 19 is therefore little more than professional privilege and opportunism writ large. Were the exemption infused with any genuine policy advantages it would have been extended to physicians and perhaps other traditionally prominent professions in Nigeria. This is not to say that such extension would, by itself, have saved the exemption from being a pernicious manifestation of inegalitarian impulses. The failure of such extension does, however, reinforce or underscore the perverse provenance of the exemption.

The argument has been made that the exemption for law and accounting in § 19 is predicated on the fact that these professions are not permitted to practice as incorporated entities.[48] Granting, arguendo, the validity of this reason, it does not account for the non-extension of the same exemption to other occupations whose practitioners may for

47. Anyone who doubts the legislative or regulatory scheming that goes on inter-professionally should pay heed for instance to the squabble between lawyers and accountants over audit statements. Subsection 2 of § 359 of CAMA as promulgated in Decree #1 of 1990 provided originally that auditors' report shall be countersigned by a legal practitioner. This was a meal ticket inserted by lawyers into the legislation at the last moment to leach fees off accounting by charging either accountants or accounting clients for countersigning services. More broadly it was a professional coup d'etat that was meant to place lawyers in the driver's chair of the accounting enterprise by making them essentially supervisors of the accounting profession in the heartland of the latter's professional terrain—audit work. It was executed at a time when accountants were weakened by perceived failures in their audit processes as well as intra-professional rivalry between the Institute of Chartered Accountants of Nigerian (ICAN) and the Association of National Accountants of Nigeria (ANAN). Accountants resisted this requirement that lawyers countersign the auditors report, and were ultimately able to have it repealed by § 4 of the Companies and Allied Matters (Amendment) Decree No. 46 of 1991, which amended § 359 of the CAMA to remove the requirement. It is noteworthy that there was no provision requiring lawyers to countersign auditors' reports in the Draft Companies Decree prepared by the Nigerian Law Reform Commission in 1988 and circulated to various constituencies for comment ahead of the workshop on the reform of Nigerian companies law which was organized by the Commission from February 10–12, 1988 to discuss the draft. *See* THE NIGERIAN LAW REFORM COMMISSION REPORT ON THE REFORM OF NIGERIAN COMPANY LAW, Vol. II, DRAFT COMPANIES DECREE (1987–1988), *available at* http://www.nlrc.gov.ng/publications.php?id=2. Section 418(2) of this draft companies decree dealt with the auditors report and contained no requirement that lawyers countersign it.

48. *See* NIGERIAN LAW REFORM COMMISSION, *supra* note 7, ¶ 12. Also see § 120(1) of the English Companies Act of 1967 which amended § 434 of the English Companies Act of 1948 to introduce the exemption for partnerships of solicitors and accountants, as now reflected in § 19(2) of CAMA. (On this *see infra* note 5 and the related text.)

various reasons find incorporation equally burdensome. The average artisan, unlike engineers, stockbrokers and members of other literate professions or occupations would, for instance, often find the costs and complexities of incorporating and managing a company intimidating and downright limiting. A case can therefore be made for the exemption of artisans from the requirement in § 19.

Beyond the foregoing, the point can be made that indeed several options besides the exemption in question are open to lawyers and accountants. One clear option is for these professionals to limit their partnerships to nineteen persons or less. This sort of restriction on lawyers is not as unusual as it may seem at first sight, nor is it without policy justification. In many European jurisdictions, applicable rules (such as the *Unicite de Cabinet Rule* in France) historically had the effect of limiting the size of law partnerships or even eliminating the possibility of partnerships altogether. The idea was to, among other things, enhance the independence of the lawyer by making him beholden to no one other than the client and the courts—not even to his partners.[49] A second option would be for the federal legislature to provide for a modified business structure, such as the professional corporation, in order to grant lawyers and accountants the benefit of incorporation without losing the essence of the prohibition against lawyers practicing as a corporation. This approach has been adopted in many American states where lawyers and accountants can practice under a specially designed form of business organization, the professional corporation (PC).[50] The end result of this may be to deny Nigerian lawyers and

49. Under the *unicite de cabinet* or single-residence requirement an *avocat* (advocate) in France could establish chambers in one place only, which must be within the territorial jurisdiction of the regional court where he is registered. This effectively precluded partnerships with anyone other than someone registered and practicing as an advocate within the same city or environs. Partnerships could hardly grow large with this constraint. The *unicite de cabinet* rule ostensibly sought to limit an advocate's professional practice to one place only, in order to enable the courts there to exercise enhanced oversight of his activities—an oversight that would be more difficult if an advocate were to practice in multiple locations or have partners outside the place of his residence. On the *unicite de cabinet* requirement, see the European Court of Justice (ECJ) decision in Ordre des Avocats au Barreau de Paris v. Klopp, ECJ Case No. 107/83, reported in [1984] ECR 2971, [1985] 1 CMLR 99, which overruled its application in the context of the new economic freedoms introduced under various directives of the European Union.

50. A professional corporation is typically a corporation in which only professionals belonging to same profession can be members. The shares are not transferable to anyone who is not a member of the profession and the corporation may or may not possess limited liability depending on the preference of the legislature creating the enabling statute. On professional corporations see ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESS AND CLOSELY-HELD CORPORATIONS 254–59 (1996).

accountants the flexibility, economy, and privacy afforded by the partnership form of business association—the same benefits currently denied artisans and other ordinary folk who must incorporate any large partnerships with which they are involved or face the rigors of the law. But what is good for the goose ought to be good for the gander.

It is apposite to note here a relevant aspect of comparative colonial or postcolonial professional regulation. In England, lawyers per se have historically not been members of the aristocracy or upper classes. Indeed, an English legal career was seen in many quarters as simply a path to middle-class status.[51] In sharp contrast to this, it is a pervasive aspect of colonialism that in many colonies, the legal profession was not just an avenue to the attainment or maintenance of middle-class status. Rather the profession almost invariably constituted the "aristocracy" or elites especially in the postcolonial period. The reasons for this may be varied, but this is hardly the place to explore them. What is relevant is that in many Anglophone colonies, lawyers have in the postcolonial period assumed the status of an aristocracy themselves. Writing about the dominance and influence of lawyers in American political life, the French writer Alexis de Tocqueville had the following to say:

> In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society . . . . If I were asked where I place the American Aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar . . . . Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of the profession into the management of public affairs . . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice gradually penetrates beyond their walls into the bosom of society,

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51. *See* W. J. READER, PROFESSIONAL MEN: THE RISE OF THE PROFESSIONAL CLASSES IN 19TH CENTURY ENGLAND, at 1, 12, 23–24 (1966) (pointing out the deeply middle class character of the English professions, especially law, medicine and the clergy—professions for men who had no fortune either through lack of an inheritance or otherwise). Keith Macdonald writes that the lawyer, statesman and priest form part of the gentry and indicates that it was their younger sons who did not succeed to family estates that turned to the professions for livelihood. *See* KEITH MACDONALD, THE SOCIOLOGY OF PROFESSIONS, 75 (1995). In essence, only "fallen" gentry generally ended up in the professions, together with common folk looking for elevation into the middle classes. Gentry who succeeded to estates notoriously often had no need for real work of any sort.

where it descends to the lowest classes, so that at last the whole people contract the habits and tastes of the judicial magistrate. The lawyers of the United States form a party which . . . extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.[52]

These words ring as true today as they did almost two centuries ago when they were published. The influence and status of lawyers and their habits in America remain generally as strong today as it was in 1835 when De Tocqueville published these words.[53] While not rising to same level as in America, the political influence or dominance of lawyers as an elite class in colonial Nigeria has also been documented.[54]

In the light of the above differences between the status of English lawyers and the status of their counterparts in the colonies, a measure such as the exemption in § 19 of the CAMA could conceivably have been explained away in England as a measure aimed at sections of the middle class or as an otherwise unremarkable measure. Not so in Nigeria. Lawyers constitute a major segment of the uppermost echelon of society and an exemption such as that under consideration assumes a higher level of significance than might be expected in England, especially in late Victorian or early twentieth century England.[55] Those entrusted with reviewing and adopting such laws ought therefore be mindful of not just the capacity of the received law to thrive in the circumstances of the host jurisdiction—apparently the dominant consideration currently—but also the degree of alignment of such law with emergent notions and measures of social and political legitimacy. This is indeed another dimension of utility. An inutile or suboptimal law does not achieve much simply because it ultimately thrives and secures compliance by the citizens.

52. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278–80 (1835).

53. *See generally* MARY ANN GLENDON, A NATION UNDER LAWYERS 257–63 (1994); *see also* ANOTHONG KRONMAN, THE LOST LAWYER 4 (1993).

54. *See* OMONIYI ADEWOYE, THE LEGAL PROFESSION IN NIGERIA 1865–1962 169 et seq. (1977). The Daily Comet, a Lagos newspaper, challenging the dominance of lawyers in representative politics is reported to have written in 1945 that: "If butchers and coal miners could enter the House of Commons, there was no reason why the Legislative Council of Nigeria should be regarded as an exclusive preserve of lawyers." *Id.* at 169 (citing TAKENA TAMUNO, NIGERIA AND ELECTIVE RERESENTATION 1932–1947 64 (1966)).

55. It is instructive that the prohibition of partnerships of more than twenty persons in § 716(1) of the U.K. Companies Act 1985 has been repealed and omitted from the Companies Act 2006, which came into full force in October 2009. While such repeal is not a desideratum of legitimacy for the arguments canvassed in this paper, the repeal does provide further reinforcement for those arguments. *See supra* note 6.

V. CONCLUSION

Section 19 of the CAMA, in restricting the size of partnerships, implicates unconstitutionality and socioeconomic inutility. There is thus a clear need for its adjustment, especially in the context of future revisions of the CAMA. Even before such a revision occurs, the states whose constitutional competence is circumscribed thereby, should be quick to assert their powers in this area by contestations in court and out of court. Such contests should prove to be fertile grounds for the creativity of the Nigerian judiciary which should rise up to the task of enhancing federalism through the affirmation of robust state rights in the areas within the states' legislative competence under the Constitution. In the postcolonial Nigerian context, this would be an important step towards dispensing with the vestiges of subterranean unitarianism in constitutional praxis. It is tempting in connection with partnerships for states to be complacent, on the assumption that partnerships are not really economically important. This would be a very myopic perspective. Quite apart from the issues of principle involved is indeed the fact that the partnership as a form of business organization—existentially the oldest form—holds immense possibilities for economic benefits, if an imaginative mind is brought to its regulation and management.