

# Nigeria's Poor Leadership in Antitrust Regime in Africa: The Challenge of an Unegalitarian Society

Jude O. Ezeanokwasa<sup>1</sup>

## Abstract:

Antitrust or competition principle is a catalyst for business and economic growth because it creates free trade which results to increased efficiency of producers, better products, and consumer welfare. It is fashioned to promote and safeguard a transparent and competitive market from unjust and unfair business practices. The obvious benefits of the antitrust ideology to investments and economic development have made antitrust legislations a new bride for Africa such that within the last quarter of a century over two dozens of African countries have passed antitrust legislations. Interests in it have also been demonstrated at subregional levels. For instance, there is the ECOWAS Trade Liberalisation Scheme (ETLS) for the West African subregion, and there is also the Common Market for Eastern and Southern Africa (COMESA) which is a free trade area. The idea of free trade is not lost at the regional level. The African Union (AU) planned to establish in 2017 a Continental Free Trade Area (CFTA) in Africa in order to boost intra-Africa business investment. A big setback to this movement towards improving trade and investment is the fact that Nigeria, which has hitherto shown commitment and leadership in many issues affecting the development of Africa, for which it is dubbed the giant of Africa, is this time in reverse leadership. It has no comprehensive antitrust legislations. Legislative bills on the subject at the National Assembly mysteriously die off after second reading. Nigeria is very crucial for antitrust ideology in Africa because its strategic endowments. It has the biggest population and also the highest Gross Domestic Product (GDP) in the region, which are magnets for trade and investment. Its involvement in antitrust ideology through enacting a comprehensive antitrust regime would be a big boost to antitrust regulations in Africa as it will be an impetus and enhancer of the commitment of all countries to free trade. Nigeria's domestic commitment to antitrust regulation would give confidence subregional and regional initiatives on free trade. Unfortunately Nigeria is not playing this leadership role as it is still in an antitrust cold room. It worries this paper that the situation is so in Nigeria. The finding of the paper is that the situation is what it is because of the general culture of impunity in Nigeria which is characterized by abuse of office, nepotism, tribalism, religious bigotry and corruption. A strong measure against these ills in order for Nigeria to take its leadership role in Africa in enhancing trade and investment in the continent is to pass a comprehensive and robust antitrust legislation. The paper adopts the doctrinal methodology.

---

<sup>1</sup> Jude O. Ezeanokwasa, PhD (Law), PhD(Canon law), B.L., B. D. (Theology), B. A. (Philosophy), Lecturer, Department of International Law and Jurisprudence, Nnamdi Azikiwe University, Awka, Nigeria. E-mail-jo.ezeanokwasa@unizik.edu.ng

## 1. Introduction

Antitrust regime is a universally recognized engine of economic growth as it liberalizes market by prohibiting and punishing unethical and unfair commercial practices. African countries have discovered the efficacy of this business mechanism and have shown commitment to it. In the last quarter of a century over two dozens of African countries have passed antitrust legislations. Interests in it have also been demonstrated at subregional levels. Instances are the ECOWAS Trade Liberalisation Scheme (ETLS) and the Regional Competition Authority for ECOWAS, and the Common Market for Eastern and Southern Africa (COMESA). At the regional level the African Union has also shown interest in trade liberalization by planning to establish this year, 2017, a Continental Free Trade Area (CFTA) in Africa in order to boost intra-Africa business investments. Nigeria, as the leading country in Africa by reasons, *inter alia*, of being the most populous country as well as the country with the highest gross domestic product (GDP), is expected to play a corresponding leading role in advancing Africa's antitrust profile by passing antitrust legislations in Nigeria. Unfortunately Nigeria is lagging behind in this as it has no comprehensive antitrust regime in place. This situation deprives Africa of the investments and GDP-growth that would have come to the region if Nigeria had put in place a comprehensive antitrust regime. More importantly the absence of a comprehensive antitrust regime in Nigeria demoralizes the antitrust efforts of the African Union as not much can be done if Nigeria is on a different lane on trade liberalization issues. In ECOWAS the absence amounts to a breach of the ECOWAS treaty (Revised) which demands on member States municipal policies towards trade liberalization and integration.<sup>2</sup> The paper inquires into why Nigerian has not been able to pass into law any of the many antitrust bills presented at the National Assembly. The finding is that Nigeria's socio-political culture does not favour trade liberalization because it is not egalitarian,

---

<sup>2</sup> ECOWAS Treaty, art. 3(2)(a,d,f,g & h).

a feature without which trade liberalization is impossible. Unfortunately, many legislators, if not all, are victims of this dominant unegalitarian culture and so cannot give what they do not have. The paper recommends that this unegalitarian socio-political culture needs to be first addressed before Nigeria can rise up to the demands of its status as the giant of Africa by courageously leading the antitrust movement in Africa. The methodology of the paper is doctrinal and the approach is analytical.

## 2. Meaning of Antitrust

The term 'antitrust' is misleading when one looks for its meaning from the meaning of its lexical elements, 'anti' and 'trust' which respectively mean ordinarily 'against' and 'confidence'. From this approach 'antitrust legislation' would erroneously suggest something like a legislation geared to combatting confidence and trust. The trust in 'antitrust' was technically used in the U.S. in 1880s and 1890s to refer to a big business, particularly a large conglomerate that spanned through more than one state.<sup>3</sup> With the size and strength of trusts, they single-handedly controlled the nation's most important markets, thereby crushing all competitors, dictating prices, and erratically supplying goods and services to consumers.<sup>4</sup> Due to the spread of their economic power over many States, if their monopolistic tendencies were not checked, the economy would be worst for it through absence of competition and exploitation of consumers. Consequently, an antitrust legislation came to be a legislation geared to regulating the activities of these conglomerates in order to sustain free trade by securing a level playing field for all market players and new entrants. Thus the Black's Law Dictionary defines an antitrust legislation as a regulation which restricts the formation of oligopoly or monopoly power in order to promote free market competition.<sup>5</sup> Antitrust law is called Anti-Monopoly law in China and Russia while it is called Trade Practices law in United Kingdom and Australia. It is also referred to as Competition law. Central to the antitrust jurisprudence is the growth of the economy through free trade. It catalyzes the growth of economy through liberalizing trade and other commercial activities by

---

<sup>3</sup> 'Monopolies and Antitrust Law - Historical Background, Federal Law, Antitrust Enforcements, Monopoly Cases, Further Readings', <http://law.jrank.org/pages/22775/Monopolies-Antitrust-Law.html>, accessed 15 July 2017.

<sup>4</sup> *Ibid.*

<sup>5</sup> 'What is Anti-Trust?', <http://thelawdictionary.org/anti-trust/>, accessed 16 July 2017.

prohibiting unethical and fraudulent commercial activities that undermine transparency and freedom of people to engage in commercial activities. The close connection between free trade and economic growth implies a close connection between a free society and economic growth because free trade can only occur in a free society.

### 3. Antitrust Jurisprudence and Economic Growth

Antitrust law unleashes the growth potentials of any economy as it clears the obstacles to the free flow of goods and services into the market as well as catering for the welfare of consumers. This it does by outlawing and punishing unethical and unfair market practices. In this way it enhances national productivity and income on the one hand, and on the other consumer welfare. Unethical and unfair market practices impede the business freedom of producers, distributors and consumers and thus constitute a form of dictatorship in the market on the side of the perpetrators of the unfair practices. This is particularly so with monopolies, oligopolies and cartels. The need to free the U.S. market from this kind of dictatorship bolstered Senator John Sherman to sponsor the Bill that later became the Sherman Act. He wrote: "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life." Senator Sherman likened the stifling effects of a monopoly and other anti-competition activities on the economy and consumer welfare to the dictatorial machinations of a political king. The Sherman Act, which is still in operation in the first two sections, clearly prohibits monopoly and other acts that have the effect of restraining trade and commerce.

Section 1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...

Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or conspire with any other person or persons, to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony.

The dictatorship insinuated by Senator Herman is presented in the economic phrase, economic concentration. This is a situation where a few big corporations dominate the market in a particular sector of the economy.<sup>6</sup> The worry is that the more concentrated an industry is, the greater the likelihood of price and market manipulation.<sup>7</sup> Antitrust jurisprudence consequently abhors, for instance, one company dominating the production or distribution of salt or milk in a given country. A country that has many companies with such economic concentration will have the entire national economy in the hands of a few, a situation that would crash the GDP of the country – the yardstick for measuring the economic growth of country. The efficient antitrust regimes in places like U.S., Europe and other developed countries are responsible for their high GDP. This conclusion was confirmed by Peterson after his empirical study on the effect of antitrust law on economic development and democratic stability. He declared: “The results of this study suggest that antitrust law ... promotes economic development, but does little for democratization and the stability of democracy.”<sup>8</sup>

As already pointed out, antitrust legislations boost economic growth through the promotion and sustenance of competition and guarantee of consumer welfare.

### 3.1 Economic Growth through Competition

‘Competition’ generally refers to the situation where people or organizations struggle with each other for something that not everyone can have at the same time.<sup>9</sup> From the economic perspective, ‘competition’ means the ‘rivalry in which every seller tries to get what

---

<sup>6</sup> ‘Economic Concentration’, [http://en.termwiki.com/EN/economic\\_concentration](http://en.termwiki.com/EN/economic_concentration), accessed 17 July 2017.

<sup>7</sup> *Ibid.*

<sup>8</sup> N. Peterson, “Antitrust Law and the Promotion of Democracy and Economic Growth”, [https://www.coll.mpg.de/pdf\\_dat/2011\\_03online.pdf](https://www.coll.mpg.de/pdf_dat/2011_03online.pdf), accessed May 4, 2016.

<sup>9</sup> ‘Competition’, *Oxford Advanced Learner’s Dictionary*, 8<sup>th</sup> ed., (New York: Oxford Publishers, 2010) 293.

other sellers are seeking at the same time: sales, profit, and market share by offering the best practicable combination of price, quality, and service.’<sup>10</sup> For Godfrey, it is “the process of rivalry between firms striving to gain sales and make profits”.<sup>11</sup> He went further to state that competition is ‘the driving force behind markets.’<sup>12</sup> In this way it catalyzes economic growth and poverty alleviation. This it does through a number of ways.

- i. It puts pressure on production firms to increase their efficiency.
- ii. It guarantees that more efficient firms increase their market share at the expense of the less efficient ones. The lower efficiency firms may then quit the market, and their position taken over by higher efficiency firms; though in a manner that will not stifle competition.
- iii. In the presence of competition, firms will aim to innovate in order to gain a cost advantage, to differentiate their products, or to bring new products to the market place.<sup>13</sup>
- iv. It reduces inflation rates, both at the sectoral and aggregate level.<sup>14</sup>
- v. It is a defence against the entrenchment of vested interests and protectionism, thereby opening up markets to new entrants with possibly better products and services.<sup>15</sup>
- vi. Competition also increases the attractiveness of a country as a recipient of foreign direct investment.<sup>16</sup> This however is not automatic as other factors like security, good infrastructure, equitable tax regime, and easy facilities for remitting profit must come into play before foreign investors can come in.

---

<sup>10</sup> “Competition”, <http://www.businessdictionary.com/definition/competition.html>, accessed April 28, 2016.

<sup>11</sup> N. Godfrey, “Why is Competition Important for Growth and Poverty Reduction?”, <http://www.oecd.org/investment/globalforum/40315399.pdf>, accessed 28 June 2017.

<sup>12</sup> *Ibid.*

<sup>13</sup> “Competition and Growth: The Role of a Competition Agency”, [http://www.lse.ac.uk/researchAndExpertise/units/growthCommission/documents/pdf/contributions/lseGC\\_ofc\\_competition.pdf](http://www.lse.ac.uk/researchAndExpertise/units/growthCommission/documents/pdf/contributions/lseGC_ofc_competition.pdf), accessed 28 June 2017. “Why competition and consumer protection matter”, <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>, accessed 28 June 2017.

<sup>14</sup> “Competition and Growth: The Role of a Competition Agency”, *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

- vii. It contributes to an effective business environment which generates economic growth and employment.<sup>17</sup>
- viii. It creates possibilities for small and medium sized enterprises and removes barriers that protect entrenched elites and reduces opportunities for corruption.<sup>18</sup> By this token, competition is a factor in creating a level playing ground for all the actors in the market. In this line Godfrey stated that “crucially, competition facilitates greater equality of opportunity by breaking down the barriers to fair competition that often help to protect incumbent elites.”<sup>19</sup>
- ix. Competition increases a country's attractiveness as a business location, thereby triggering national and foreign investments.<sup>20</sup>

Be this as it may, the crucial role of market competition for free market and economic growth does not mean that antitrust law eschews every form of market restraint. This would be counter-productive as it would result to free market anarchy. What antitrust jurisprudence seeks to root out is unlawful or unreasonable trade restraints which smack of unethical and unfair practices in trade and commercial interactions. Thus, free trade which antitrust jurisprudence roots for is paradoxically consistent with those restraints that are necessary for the market to be free.<sup>21</sup> Without such restraints what would occur is extreme freedom or libertinism in trade relations, which in turn would undermine economic growth.

### 3.2 Economic Growth through Consumer Welfare/Protection

A consumer, according to the *Business Dictionary Online*, is “a purchaser of a good or service in retail; an end user, and not necessarily a purchaser in the distribution chain of a

---

<sup>17</sup> ‘Why Competition and Consumer Protection Matter’, <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>, accessed 17 July 2017.

<sup>18</sup> Ibid.

<sup>19</sup> N. Godfrey, “Why is Competition Important for Growth and Poverty Reduction?”.

<sup>20</sup> ‘Why Competition and Consumer Protection Matter’

<sup>21</sup> *Tulk v Moxhay*, [1848] EWHC Ch J34; *International Business Machines Corp. v. Papermaster*, No. 08-9078, 2008 U.S. Dist.

good or service.”<sup>22</sup> In other words, a purchaser who turns around and sells the product he bought is not a consumer with regard to that product, but a distributor. A consumer therefore is the end-user of a product or service. A consumer can be a physical or legal person. Consumer protection entails safeguarding a consumer from unfair trade practices, giving him due information about the products and services he buys, and if redress is available for the breach of any of the consumer protection rights, giving him information on that and making the redress accessible. Studies show that increasing consumers’ awareness and understanding of their rights and redress mechanisms will stimulate competition, productivity, and innovation,<sup>23</sup> and by so doing stimulate economic growth. The United Nations Conference on Trade and Development (UNCTAD) gives the following details on how this comes about.<sup>24</sup>

- i. Consumer protection benefits all consumers by ensuring that they have the right of access to: non-hazardous products; adequate information to enable them to make informed choices according to individual wishes and needs; and effective redress.
- ii. Empowered consumers, who are aware of their rights and enforce them, are subject to fewer abuses.
- iii. Consumer protection also contributes to creating a level playing field for businesses which have to apply a common set of standards in treating consumers.<sup>25</sup> This acts as a deterrence to the use of unfair business practices.

Although competition and consumer protection are two distinct goals of antitrust jurisprudence, they are intertwined and mutually assist each other. Competition helps prices to come down, which is a measure of consumer welfare. On the other hand, consumer satisfaction is a motivation for market players to keep innovating and improving on their products and services in order to compete better.

The close nexus between antitrust regime and economic development makes antitrust jurisprudence a *sine qua non* for developing countries that have embraced the priority of growing

---

<sup>22</sup> “Consumer”, <http://www.businessdictionary.com/definition/consumer.html>, accessed April 28, 2016.

<sup>23</sup> “Consumer Rights and Economic Growth”, p. 34, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274805/bis-13-915-ghk-report-Consumer-rights-and-economic-growth.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274805/bis-13-915-ghk-report-Consumer-rights-and-economic-growth.pdf), accessed 26 June 2017.

<sup>24</sup> ‘Why competition and Consumer Protection Matter’

<sup>25</sup> *Ibid.*

their economies through poverty reduction strategies. Africa consists of developing countries and it can be generously said that all of them talk of economic growth and poverty reduction. How far Nigeria has gone on the antitrust route becomes of interest given its prominent place in Africa as the giant of Africa.

#### 4. Nigeria and Antitrust Regime

##### i. Historical Setting

The history of antitrust in Nigeria is traced back to the Privatization and Commercialization Decree, 1988, which tried to liberalize Nigerian economy by bringing the private sector to take over the ownership and management of many enterprises which were hitherto monopolized by government.<sup>26</sup> Major sectors of the economy like power supply, telecommunications, civil aviation, petroleum, railway, mining, radio, and television were after independence monopolized by government. Over time it rudely dawned on government that it could not profitably run these enterprises. What is more, these enterprises could not support themselves by paying the salaries of their staff. Funds had to be sourced elsewhere to keep afloat. They became a financial drag on the government. The situation was so because of corruption and bureaucratic bottlenecks. A way out of the impasse was to adopt privatization. Privatization was not however for all the enterprises under the monopoly of government. Enterprises in sectors like power supply and telecommunication still remained with government till the return of democracy in 1999 when further efforts at privatization took place. The Consumer Protection Council Decree (No. 66) of 1992 created the Consumer Protection Council (CPC). Section 2 of the Decree established eleven functions for the CPC, which include providing speedy redress to consumers' complaints through negotiations, mediation and conciliations; seeking ways and means of removing or eliminating from the market hazardous products and causing offenders to replace such products with safer and more appropriate alternatives; and organising and

---

<sup>26</sup> C. K. Uwadineke, J. O. Ezeanokwasa and F. E. Okaphor, 'The Quest for Economic Growth in Nigeria: The Imperative of Enacting an Antitrust or Competition Legislation', (2016) *Unizik Law Journal*, (12)11-37, at 19

undertaking campaigns and other forms of activities as will lead to increased public consumer awareness. However, the CPC did not take off until after the return to democracy in 1999.

The selective manner in which privatization was begun and sustained makes it difficult to really ascribe antitrust intentions to the military government of the day. It appears that it only relieved itself of enterprises that were of greater financial burden. Antitrust jurisprudence goes beyond privatization and rivets on creating and sustaining the environment for free trade through the prohibition and punishment of unethical and unfair commercial practices, and guaranteeing consumer welfare. This was not done. Free trade can only exist in a free society and not in a society ruled with military decrees, nor in a society in which many constitutional provisions on fundamental human rights such as press freedom were suspended. Obviously *nemo dat quod non habet*, no one gives what he does not have. The military could not give free trade. This explains why despite the creation of the CPC and consumer rights, nothing could be done by the body by way of enforcing the rights until after the return to democracy. And if there is no consumer protection, then there cannot be competition in the market. All the same, the fact of privatization is an acceptance by government that its role is not in managing commercial enterprises but in regulating them. This much is something in favour of antitrust ideology under the then military regime.

## ii. Sectorial Antitrust Regime

Privatization continued after the return to democracy in 1999 and consistent with democracy, it was done through Acts of the National Assembly since they enterprises were initially nationalized through either Acts of the National Assembly or Military Decrees. Besides privatizing enterprises these Acts also provide for antitrust issues. For instance, the Electric Power Sector Reform Act, 2005 created the Nigerian Electricity Regulatory Commission (NERC). The statute also has provisions on consumer service and protection, license performance, and competition and market power.<sup>27</sup> The Civil Aviation Act, 2006 empowers the Nigeria Civil Aviation Authority (NCAA) to investigate any case or cases of unfair or deceptive

---

<sup>27</sup> Electric Power Sector Reform Act, 2005, ss. 26, 80-82.

trade practices or methods of competition, including the prices of airline tickets.<sup>28</sup> The Investment and Securities Act, 2007 requires the Securities and Exchange Commission (SEC) to prohibit market rigging and manipulation, insider rigging and all other forms of unfair and fraudulent trade practices in the Nigerian Stock Market.<sup>29</sup> The Nigerian Communication Act 2003 saddles the Nigeria Communication Council with the duty of promoting fair competition in the communication industry<sup>30</sup> and pursuant to this charge the Competition and Practices Regulation 2007 was issued by the Commission.

It is observable that all these antitrust regulations are sectorial and a few sectors for that matter. There is no comprehensive antitrust regulation for all commercial activities as is the case in developed countries. What this means is that a vast segment of Nigerian economy is not antitrust compliant. The performance of these sectorial antitrust legislations is generally dismal.<sup>31</sup> Even if the performance of antitrust principles in these sectors were to be commendable, they cannot do much to grow the economy if there is no all-embracing antitrust legislation that would provide the indispensable macro-background support.

### iii. Frustration of Comprehensive Antitrust Bills at the National Assembly

All efforts at passing a comprehensive antitrust bill for the country have hit a steel wall at the National Assembly. Records show that at least nine bills have so far been presented at the National Assembly in a bid to create a legal framework for competition in Nigeria.<sup>32</sup> They include the Federal Competition Bill of 2002 which was a bill for an Act to set up a Federal Competition Commission. It aimed at prohibiting restrictive contracts and business practices that substantially lessen competition. It was also to regulate the abuse of dominant position of market power and anticompetitive business practices. Another is a Bill sponsored in the same 2002 by the Federal Government through the Bureau of Public Enterprises (BPE) and it was presented as

---

<sup>28</sup> Civil Aviation Act, 2006, s. 30(4) (i).

<sup>29</sup> Investment and Securities Act, 2007, ss. 105-112.

<sup>30</sup> Nigerian Communication Act, 2003, s. 4(d).

<sup>31</sup> See C. K. Uwadineke, J. O. Ezeanokwasa and F. E. Okaphor, *op. cit.* at 25-30.

<sup>32</sup> See T. Osinowo, "Competition Law in Nigeria" in *This Day Newspaper*, October 21, 2014, <http://www.vitaveritasllp.com/competition-law-in-nigeria/>, accessed 14 July 2017.

an Executive Bill to the Senate. After its presentation, nothing was heard about it again.<sup>33</sup> Next is the Bill for an Act to provide for the establishment of the Nigerian Trade and Competition Commission and Other Matters, which was presented to the National Assembly in 2008. It passed the first and second readings before it was stalled till date. Efforts of advocates of free-market and competition in Nigeria did not stop there. Yet another is the *Bill for an Act to Encourage Competition in the Economy By Prohibiting Restrictive Trade Practices, Controlling Monopolies, Concentrations of Economic Power and Prices and for Connected Purposes*<sup>34</sup> was presented to the National Assembly in 2011, and again progress has eluded it. Prohibited activities under this bill include an agreement or arrangement between persons engaged in the business of selling goods or services to engage in a conduct that hinders the sale or supply or purchase of goods or services between person engaged in the selling or buying of goods or services.<sup>35</sup> The bill also addresses the problem of the unwarranted concentration of economic power, which, according to section 23(4) of the bill, is a condition prejudicial to economic factors in the country as it would have the effect of increasing unreasonably the production, supply, or distribution costs of goods or the provision of any service or increase unreasonably the price of goods or the profits from the production, supply or distribution of goods or from the performance of any service.<sup>36</sup> The effects of unwarranted concentration of economic power includes to reduce or limit competition in the production, supply or distribution of any goods (including their sale or purchase) or the provision of any service;<sup>37</sup> or to result in a deterioration in the quality of any goods or in the performance of any service.<sup>38</sup>

It is curious and worrisome why these bills have all gone underground at the National Assembly when government at different fora and in different ways announce the indispensable role of the private sector in driving the economic development of the country and making it a leading economy in Africa.

---

<sup>33</sup> See C. K. Uwadineke, J. O. Ezeanokwasa and F. E. Okaphor, *op. cit.* at 21

<sup>34</sup> Restrictive Trade Practices, Monopolies and Price Control Bill, 2011. See <http://www.nassnig.org/document/bills>, accessed 30 June 2017.

<sup>35</sup> Restrictive Trade Practices, Monopolies and Price Control Bill, 2011, s. 6(1)(a)(i).

<sup>36</sup> *Ibid.* s. 23(4)(a & b).

<sup>37</sup> *Ibid.* s. 23(4)(c).

<sup>38</sup> *Ibid.* s. 23(4)(d).

## 5. Challenges to a Comprehensive Antitrust Regime in Nigeria: Need for an Egalitarian Society.

Osinowo reported various reasons adduced for the non-passage of the antitrust bills.<sup>39</sup> One is the ignorance of the legislators regarding the importance of the bills. The non-passage according to him “seems to be due to an insufficient understanding of the nature and essence of the subject by our political leaders.”<sup>40</sup> Another is that the bills give enormous powers to the Minister, supposedly that of trade and commerce, under whose portfolio the oversight duty over the commission supervising the antitrust legislations would fall. Yet another reason is that Nigeria is already awash with various commissions and so there is no need for more. It is difficult to understand how the senators do not understand the essence of those bills when they had passed similar Bills liberalizing enterprises in a few sectors. The argument that an antitrust Act would give enormous powers to the Minister in charge of trade and commerce is rather insincere. Stalling the passage of a bill because of the supposed enormous powers given to the Minister is like throwing a baby away with the dirty bathwater. The ministry could be split into two or more if the duties are so many. The argument of Nigeria being awash with commissions is preposterous. There may be many commissions but no two are for the same thing. Moreover, proponents of this view could not point at any commissions created on general antitrust regulations. Of course that is not possible when there is no enabling law for the commission to exist. Gabriel advanced a more plausible reason for the non-passage of the bills. He posited that Nigerian businessmen, by nature, are averse to competition.<sup>41</sup> He stated further that “every one of them hates competition. They believe in zero-sum game, winner-takes all.”<sup>42</sup> All the same, his view is an over-generalization. It may be true that some or many Nigerian businessmen hate competition, but not every one of them. Moreover, it is not all the businessmen who hate competition that have the powers to frustrate the passage of competition bills. It is a few of them who have the money and connections for such an unpatriotic mission. This comes out vividly

---

<sup>39</sup> T. Osinowo, *op. cit.*

<sup>40</sup> *Ibid.*

<sup>41</sup> O. Gabriel, “Nigeria Needs Competition/Anti-trust law” <http://www.vanguardngr.com/2014/06/nigeria-needs-competitionanti-trust-law/>, accessed 14 July 2017.

<sup>42</sup> *Ibid.*

from his graphic presentation of the high-powered anti-competition undercurrents in the country. He wrote:

“In the last few months, the issue of the right standards for cement has been in the news. While not holding brief for any of the parties in the dispute, any discerning mind in the Nigeria business arena would see that there is a hand pushing for the strangulation of some cement manufacturers. In the days of sugar and rice importation, it was the exclusive preserve of some few Nigerian businessmen who have access to political power. Those who were not privileged to be in the exclusive club of rice and sugar importation were quietly run out of business. The story of how Peak Merchant Bank management imported a ship load of rice into the country and how the ship and its contents under mysterious circumstances sank at the Apapa Quay is fresh in the minds of those familiar with the hatred the average Nigerian businessman has for competition.”<sup>43</sup>

But even if the assertion of Gabriel that every Nigerian businessman hates competition is true, the fact that the anti-competition machinations of these businessmen have been allowed to reign unchecked to the point of frustrating the antitrust bills at the National Assembly symbolizes a failure of government to discharge its primary duty which is regulating the activities in the country for order, progress and development of the citizenry and the country as whole.

In truth, failure of government has dogged the development of the country since independence. Sony Okosun, a popular Nigeria artiste, sang in the 1980s that after many years of Independence that Nigeria was still finding it hard to start off. Chinua Achebe, the world acclaimed novelist and literary icon, in his book, *The Trouble With Nigeria*, identified leadership failure as the Achilles’s heel of the country. If Nigeria has consistently been unable to get real leaders that have the interest of the country at heart, the problem might well not be that of the individual leaders but that of the dominant socio-political culture that throws up these unpatriotic leaders. It is an adage that a people get the type of leaders they want. Consequently, the palpable frustration of antitrust bills at the National Assembly translates to the aversion of

---

<sup>43</sup> *Ibid.*

the society to such legislations. The question then is, is patriotism a dominant value in Nigeria? Is the welfare of and fairness to all segments of the country a dominant feature of the socio-political culture of the country? The following prominent characteristics of the Nigeria society compel a negative response to these questions with the effect that antitrust jurisprudence which thrives in a largely egalitarian society appears in Nigeria today to be like a tree planted in an acidic soil.

i. Monetized Elections

Elections in Nigeria are hyper-monetized with the effect that elected politicians concern themselves with how to recoup their money and even make profit on it instead of thinking of how to move the country forward. Much money is spent on voters, party officials in order to secure party nomination through the backdoor. It is also spent on some members of the agencies conducting elections for purposes of rigging. Financial expectations on the elected public servants also continue while they are in office. These demands usually sum up to figures that are higher than the salaries of these politicians. To meet these demands some elected leaders indulge selling their offices to the highest bidders in the form of either frustrating legislative bills or executive policies that may not be favourable to their bidders. The highest bidders are usually the wealthy businessmen, monopolies, oligopolies and cartels. Some elected leaders who don simultaneously the caps of elected leaders and businessmen are their own highest bidders. They make sure that bills or policies that go against their business interests do not see the light of the day. Osinowo noted this particularly as one of reasons why antitrust bills go under at the National Assembly.<sup>44</sup> The situation is not any different at the executive arm of government where some highly placed public officers are bought over by these unscrupulous businessmen to frustrate the enforcement of any legislations that go against their business interests. The general dismal performance of antitrust regulations in the few sectors of the economy that have them is alluded to this factor of non- enforcement of law.<sup>45</sup> Hence it is common knowledge particularly amongst jurists, legal practitioners and members of the judiciary that the problem with Nigeria is not much of absence of legislations but rather absence of the political will to enforce the law and

---

<sup>44</sup> T. Osinowo, *op.cit.*

<sup>45</sup> See C. K. Uwadineke, J. O. Ezeanokwasa and F. E. Okaphor, *op. cit.* at 25-30.

the judgment of courts. Businessmen who could cause the sinking of the ship load of rice imported by Peak Merchant Bank and got away with it could sway government away from taking any patriotic step that could hurt their interests. These corrupt ways of self-enrichment in elected positions have made elections a do or die affair and its corrosive spell has not spared the hallowed temple of justice in Nigeria, the judiciary. It is on record that highly placed members of the Nigerian judiciary have been dismissed for supposedly trading election petition judgments for money.<sup>46</sup>

ii. Ethnicism/Tribalism

Nigeria is a country of over 250 ethnic nationalities with the big three being the Hausa-Fulanis, Igbos and Yorubas. Tribe and religion, are regarded as the fault-lines of Nigeria, meaning that they are sensitive and explosive issues. Ethnic based discriminations and its opposite, ethnic based favoritism are rife in the country. The result is that the society does not appreciate the value of fairness to every citizen regardless of his ethnic provenance, a value on which antitrust jurisdiction is radically rooted. A tribalist legislator would be ill-disposed to passing any bill that would have the effect of undercutting businesses, monopolies and cartels thriving on tribal patronage from government or to building socio-political institutions, like an antitrust regime, that would result to every market operator being treated fairly and justly. Without any court order Nigeria has seen people's businesses shut down by government. The obvious interpretation to that is that the people do not come from the correct ethnic group.

iii. Religious Intolerance

Religion, as already pointed out above, is another fault-line of Nigeria. Like with tribalism, religion based discrimination and its opposite, religion based favoritism are dominant features of the Nigerian society. Like a tribalist, a religious bigot would be against any legislative or political initiative that would create a level playing field for all players in market competition.

---

<sup>46</sup> See Onyedika Agbedo, 'Nigeria's fallen Justices', <http://sunnewsonline.com/nigerias-fallen-justices/>, accessed 15 July 2017.

Another interpretation to the arbitrary closure of people's businesses by government without court orders, just mention above, is that they do not belong to the correct religion.

iv. Born-to-rule syndrome

Some segments of the Nigerian society claim that they are born to rule others. This is found at the national, state, and even local government politics. Such an arrogant claim to power arises from circumstance of demographic superiority within the political circumscription concerned. However, for the failure of leadership at the national level, the born-to-rule syndrome is a factor. It throws up the politics of where a person comes from rather than the politics of what a person can offer the community. The effect in governance is that laws and policies that would create a more egalitarian society like antitrust legislations would be resisted by the born-to-rules.

v. Flawed Constitutional Structure

There is a growing consensus on the fact that Nigeria needs constitutional restructuring. The present structure has been assessed to be unworkable and also judged to be the cause of the developmental retardation of the country. The clamour is for a return to true federalism in which a few powers would be reserved for the federal government whereas a lot more powers would devolve to the federating units. The present federal structure, for all practical purposes, is a unitary system in which almost all powers of the State are vested in the federal government. The effect is that the federating states lack the powers and resources to independently attend to their peculiar developmental needs. They must run to the federal government cap in hand for funds to run their States as all natural resources in the States are vested in the federal government. Also they must run to central government for permissions to engage in certain projects for their development. When the enormous powers and resources of the federal government are placed sided by side with fault-lines of tribalism, religious intolerance and born-to-rule syndrome, the States that fall out of favour with the leadership at the center would suffer untold neglect and marginalization. Under this unfair structural imbalance, access to federal government is easier for the born-to-rules because of their demographic size. The effect is that they can only support

legislations and policies that would guarantee their political dominance. Under this structural imbalance the society is not free and cannot support free trade as the will of the born-to-rule will, when the chips are down, prevail.

vi. Corruption

My listing of the problems of the Nigerian society would be considered grossly deficient if I do not mention corruption. The present federal government came to power on the mantra of war against corruption. I do not consider it necessary to engage in any intellectual definition of corruption for the purpose of this paper. There is hardly any human society that is corruption free. But I think that Nigeria was described by the former British Prime Minister, David Cameron, as fantastically corrupt because the corruption in Nigeria occurs in peculiar ways, which are monetized elections, ethnicism/tribalism, religious intolerance, born-to-rule syndrome, and flawed constitutional structure. It is the kind of corruption that is averse to antitrust jurisprudence and regulations.

6. Impact on Africa of the Absence of a Comprehensive Antitrust Regime in Nigeria

The indisputable role of antitrust regime for economic development has made antitrust legislations a new bride for Africa. The charm is such that within the last quarter of a century over two dozens of African countries have passed antitrust legislations. Countries that had abandoned their antitrust legislations have rekindled interest and commitments to them. Interests in it go beyond individual countries and include regional and subregional organizations. For the West African subregion there is the ECOWAS Trade Liberalisation Scheme (ETLS) which was adopted in 1979 and was reviewed in 1990.<sup>47</sup> Pursuant to the ECOWAS treaty, the scheme abolished, among Member States, customs duties levied on imports and exports of designated categories of products, and abolished also among Member States, non-tariff barriers.<sup>48</sup> Of course

---

<sup>47</sup> 'ECOWAS Trade Liberalization Scheme', <http://www.etls.ecowas.int/etls/about-etls/>, accessed 17 July 2017.

<sup>48</sup> ECOWAS Treaty, art. 3(2)(d)(i).

Nigeria is a member of the scheme. There is also the Regional Competition Authority for ECOWAS which was established on 19 December 2008 in Abuja at the 35<sup>th</sup> Ordinary Session of the Authority of Heads of State and Government. The duties of the authority includes

to keep under review commercial activities in the Community Market with a view to ascertaining practices which may distort the efficient operation of the market conduct or which may adversely affect the economic interests of consumers.<sup>49</sup>

For the Eastern and Southern African subregion, there is Common Market for Eastern and Southern Africa (COMESA). The COMESA makes the Eastern and Southern African subregions a free trade area. Like the ECOWAS Competition Authority, there is the COMESA Competition Commission. The idea of free trade is not lost at the regional level. The African Union (AU) planned to establish in 2017 a Continental Free Trade Area (CFTA) in Africa. The main objectives of the CFTA include to create a single continental market for goods and services, with free movement of business persons and investments.<sup>50</sup> The CFTA is also expected to enhance competition through exploitation of opportunities for scale production, continental market access and better reallocation of resources.<sup>51</sup>

As a leading member of both the West African subregion and African region, Nigeria is expected to play a corresponding leading role in the antitrust movement. Nigeria's leadership is based, *inter alia*, on its position as the most populous country in Africa and as the country with the highest GDP in Africa Nigeria's population is put at 193 million by the Nigerian National Population Commission (NPC).<sup>52</sup> 2016 records put the GDP is 405.1 billion USD.<sup>53</sup> The country

---

<sup>49</sup> Supplementary Act A/SA.2/06/08 on the Establishment, Function of the Regional Competition Authority for ECOWAS, art. 3(a).

<sup>50</sup> African Union, 'CFTA - Continental Free Trade Area', <https://www.au.int/web/en/ti/cfta/about>, accessed 16 July 2017

<sup>51</sup> Ibid.

<sup>52</sup> Jerrywright Ukwu, 'Nigeria's population figure has been put at 193,392,517', <https://www.naij.com/1080172-nigerias-population-1933-million-nbs.html>, accessed 16 July 2017.

<sup>53</sup> 'Nigeria/Gross Domestic Product', [https://www.google.com.ng/search?safe=active&rlz=1C2AVSK\\_enNG650NG650&q=nigeria%27s+gdp&oq=nigeria%27s+GDP&gs\\_l=psy-ab.1.0.014.5042.9397.0.19420.13.12.0.0.0.0.572.2068.2-5j1j0j1.7.0....0...1.1.64.psy-ab..8.5.1412...0i67k1.NIuWbY0S-oc](https://www.google.com.ng/search?safe=active&rlz=1C2AVSK_enNG650NG650&q=nigeria%27s+gdp&oq=nigeria%27s+GDP&gs_l=psy-ab.1.0.014.5042.9397.0.19420.13.12.0.0.0.0.572.2068.2-5j1j0j1.7.0....0...1.1.64.psy-ab..8.5.1412...0i67k1.NIuWbY0S-oc), accessed 17 July 2017.

following next is Egypt with 336.3 billion USD.<sup>54</sup> Hence, it is dubbed the giant of Africa. Being the giant of Africa, it is *ipso facto* the giant of West Africa. Unfortunately, its leadership position has been compromised with regard to antitrust regime by it not having a comprehensive antitrust legislation. This impacts negatively in a concentric manner on business in Africa, beginning from the West Africa subregion.

- i. By not having a comprehensive antitrust legislation Nigeria directly reneges on its obligation under the ECOWAS treaty to create a conducive environment for business enterprises<sup>55</sup> thereby flouting the treaty principle of *pacta sunt servanda*. As Nigeria is the biggest market in the subregion the efforts of the ECOWAS on trade liberalization would be as good as dead.

Little wonder then the Vice President of Ghana, John Dramani Mahama, complained that ECOWAS was lagging behind other African subregions in market integration.<sup>56</sup>

- ii. With the absence of a general antitrust regime Nigeria becomes a *refugium peccatorum* (refuge of sinners) for all manners of anti-competition practices from persons both within and without the West African subregion.
- iii. The overall weakness of free trade in ECOWAS on account of the absence of general antitrust legislations in Nigeria will negatively affect the overall free trade in Africa contrary to article 3(1) of ECOWAS treaty which obliges member-States to contribute to the stability and development of the African Continent.
- iv. We made the point that competition increases a country's attractiveness as a business location, thereby triggering national and foreign investments. Conversely, the absence of competition prevents foreign investments into the country and could also cause investment flight from the country. Nigeria has witnessed both non-entrance of genuine foreign investment into the country and investment flights from the country on account of the absence of a general competition law. The cumulative investment loss on account of this is a loss to both ECOWAS and Africa.

---

<sup>54</sup> *Ibid.*

<sup>55</sup> ECOWAS Treaty, art. 3(2)(a & g).

<sup>56</sup> See Lawrence Quartey, 'ECOWAS lagging behind SADC, EAC, COMESA in Integration', <http://www.theafricareport.com/West-Africa/ecowas-lagging-behind-sadc-eac-comesa-in-integration.html>, accessed 16 July 2017.

- v. For the absence of a comprehensive competition regime, Nigeria fails to be an exemplary role as regards the efforts of the region to liberalize trade and promote economic growth. Nigeria cannot be taken seriously by other less privilege countries of Africa on issues like CAFTA.

## 7. Conclusion and Recommendations

Nigeria has not lived up to its God's given responsibilities in Africa as the giant of the region in the area of free trade and the resultant growth of the economy of the region. This is because it has not keyed in sufficiently into the universally accepted principle that catalyzes economic development, that is, free trade based on market competition. The failure of Nigeria in this regard as the country with the biggest population in Africa and also the country with the highest GDP in the region amounts to a developmental deficit to Africa as a whole and West Africa as a subregion. This failure is based on the lack of political will of the elected leaders of the country, particularly the federal legislators who have repeatedly drowned all bills sent to the National Assembly on comprehensive antitrust regime in the country. However, the blame is not only on the political class but more actually on the general Nigeria society where the dominant socio-political culture is not favourable to an egalitarian social order which is the *prima conditione* (first condition) as well as the *conditio sine qua non* for a functional antitrust regime. Factors like money-politics, tribalism/ethnicism, religious intolerance, born-to-rule syndrome, flawed constitutional structures, and corruption deviate elected officials, particularly at the federal level, from pursuing legislations and policies that will serve the common good of the country and Africa.

It is, therefore, recommended that in order to live up to its responsibilities in Africa as the giant of the region in the area of free trade and economic development, Nigeria should first pursue the ideals of an egalitarian society. It should take measures to combat money-politics, tribalism/ethnicism, religious intolerance, born-to-rule syndrome, and corruption. The present broad consensus on restructuring the constitutional matrix of the country should be followed up assiduously so that Nigeria can have a new Constitution truly made by the people of Nigeria and

which will be truly federal in order to give a sense of belonging to all the peoples of Nigeria and so create the conducive business environment in the country and in Africa.