# INTERNAL CONFLICT OF LAWS IN NIGERIA: MAKING A CASE FOR THE CONSOLIDATION OF THE RULES OF JURISDICTION IN INTER-STATE DISPUTES*


## ABSTRACT

*Owing to the central place that jurisdiction occupies in the adjudication process in Nigeria, jurisdictional conflicts will continue to take up precious judicial time into the foreseeable future. A lesser-known facet of these conflicts is the one among the various High Courts in Nigeria in actions in personam. Until recently, Nigerian courts have had to resolve these conflicts and generally interpret internal conflict of laws questions without the benefit of the direction that legislation and high-quality academic works provide. This paper examined the position on the jurisdiction of courts in inter-State disputes especially in actions in personam. It analysed decisions which tackled territorial jurisdictional challenges in actions in personam with a view to highlighting their inherent errors. Ultimately, the paper proposed a hierarchical roadmap for Nigerian courts to adopt in the determining the issue of jurisdiction in inter-State in personam disputes which if followed, would potentially go a long way towards resolving the protracted jurisdictional conflicts between Nigerian courts, reduce the largely unnecessary challenges to these courts' authority, significantly reduce the notorious delays in the determination of cases in Nigeria, and eliminate one of the biggest impediments to the smooth administration of the justice delivery system in Nigeria.*



**Keywords**: Courts, Federal System, In Personam, Internal Conflict of Laws, Inter-State Disputes Jurisdiction, Nigeria, Private International Law, and Territorial Jurisdiction.


## INTRODUCTION

The unending jurisdictional conflicts between the various courts in Nigeria and the incessant challenges to these courts' authority by litigants contribute significantly to the well documented delays in the determination of cases in Nigeria[1] and therefore, constitute one of the biggest impediments to the smooth administration of the justice delivery system in Nigeria. The most pronounced of these conflicts is the jurisdictional conflict between the Federal High Court on one hand and the High Courts of the various States and the Federal Capital Territory, Abuja on the other hand. To a lesser extent, there have also been conflicts between the various High Courts and the National Industrial Court pertaining to the extent


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[1] The delay in the determination of cases in Nigeria has become so notorious that it has been taken judicial notice of by foreign courts especially in the United Kingdom. See for instance *IPCO(Nigeria) Ltd v Nigerian National Petroleum Corporation [2017] UKSC 16*.

and scope of the latter's jurisdiction since becoming the newest superior court of record in Nigeria. What are seldom talked about, but are by no means less important, are the jurisdictional conflicts among the various State High Courts and the Federal Capital Territory, Abuja in actions *in personam*.[2]

This paper examines the position of the law in Nigeria on the jurisdiction of courts in inter-State disputes especially in actions *in personam*. Inspired by the recently published seminal work on the subject of Private International Law in Nigeria[3], the paper aims to undertake an in-depth review of select decisions of appellate courts in Nigeria on the question of territorial jurisdiction of High Courts in actions *in personam*. The paper highlights the absence of well-established rules from which the courts can seek guidance to determine the question of their jurisdiction in actions *in personam* as the root of the inconsistency in the decisions of Nigerian courts on this critical issue. Consequently, the paper will recommend a hierarchical roadmap for Nigerian courts to adopt in the determination of the issue of jurisdiction in inter-State disputes, with a view to eliminating these unnecessary conflicts and hopefully enhancing the smooth administration of justice in Nigeria.

The paper is divided into seven parts inclusive of the present introductory part. The second part discusses the concept of conflict of laws or private international law[4] especially in the context of a federal State like Nigeria. The third part highlights the limits to the territorial jurisdiction of the State High Courts in Nigeria. The fourth part adopts a comparative analysis of the Nigerian and English law rules of private international law by reason of the similarities between the two legal systems owing to Nigeria's colonial heritage. The fifth part deals with the Nigerian rules of internal conflict of laws applicable in inter-State disputes. This part embarks on an analysis of select Nigerian decisions where judges have tackled jurisdictional challenges on grounds of territorial limits in *in personam* disputes with a view to bringing to the fore the fundamental errors that Nigerian courts have routinely made in resolving internal

[2] Nigerian courts have described an *action in personam* as an action brought against a person, to compel him to do a particular thing or not to take a particular course of action or inaction. A common example is a breach of contract claim. See *NPA v. Panalpina World Transport (Nig) Limited [1973] NCLR 146*. According to the Black's Law Dictionary, 10th Edn, an action is *in personam* when its object is to determine the rights and obligation of the parties in the subject matter of the action, however, the action may arise, and the effect of the judgment may bind the other. This can be contrasted with an *action in rem* which refers to a proceeding in which the subject matter of the suit, usually a ship or land, is sought to be directly affected. See *Rhein Mass Und See GMBH v. Rivway Lines Limited [1998] 5 NWLR (Pt. 549) 265 at 277, para. G*.

[3] Chukwuma Okoli and Richard Oppong, *Private International Law in Nigeria* (Hart Publishing: Oxford, 2020).

[4] The terminologies, Conflict of Laws and Private International Law mean one and the same thing are therefore used interchangeably. This paper will also employ both at will.

conflict of laws disputes. Part six proposes a hierarchical roadmap for Nigerian courts to adopt in the determination of the issue of jurisdiction in inter-State *in personam* disputes while the last part concludes the paper.

## PRIVATE INTERNATIONAL LAW

Private International Law is that branch of the law that deals with the determination of disputes that have foreign element(s). It is the part of the law that is administered between private citizens of different countries (nation-states). The term, Private International Law is thus used in contradistinction to Public International Law – or sometimes simply International Law – which is the branch of the law that is composed of the laws, rules and principles of general application that regulate the conduct of nation-states in International Law and international organisations among themselves or the relationship between nation-states and international organisations and persons. As the Court of Appeal stated:[5]

> …It is good law that all sovereign nations zealously guide and guard their sovereign status or sovereignty in international law. But because no country can operate in isolation or an island of its own, international diplomacy and international trade and commerce necessitate the formulation of rules of private international law, to resolve any conflict in the different municipal laws.

Private International Law is traditionally divided into three branches, namely: jurisdiction, choice of law, and recognition and enforcement of judgments. This paper focuses only on the first and perhaps most important branch, jurisdiction.[6]

## PRIVATE INTERNATIONAL LAW IN THE NIGERIAN CONTEXT

Nigeria is a federation of 36 States and a Federal Capital Territory. Under the federal constitutional legal system applicable in Nigeria, each State is a recognised autonomous entity with an independent judicial arm of government, and by implication, a fully-fledged court system. Thus, while Private International Law relates to conflicts involving private persons (natural and body corporates) having substantial connection with more than one country (hence the term international), in the peculiar case of federal systems, it also refers to conflicts involving persons who reside or carry-on business in different States. Thus, where

[5] *Nahman v. Wolowicz* [1993] 3 NWLR 443 at 459 (Tobi, JCA as then was).
[6] For a more detailed reasoning behind the conclusion that jurisdiction is the more important branch of Private International Law, see generally Trevor Hartley, *International Commercial Litigation* (2nd edn CUP 2015) 5 – 7.

there is a dispute as to which of the various State High Courts in Nigeria should exercise jurisdiction to hear and determine a matter, an issue of Conflict of Laws arises. For in the same way that Private International Law exists to resolve jurisdictional conflicts involving the legal systems of different countries, so do Conflict of Laws rules exist for jurisdictional conflicts involving the various State High Courts in a federation such as Nigeria.[7]

*The High Courts:* The High Courts of the States and of the Federal Capital Territory, Abuja are established by the Constitution of the Federal Republic of Nigeria 1999 (as amended). In accordance with *section 6 (1) and (2)* of the Constitution, the High Courts, together with the other courts enumerated in *section 6 (5)* thereof, constitute the only superior courts of record in Nigeria and are vested with the judicial powers of the Federation and of the States. The Constitution, in *sections 255 and 272*, confers on the High Courts, general jurisdiction[8]to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation, or claim is in issue.

Further, the enabling statutes of the various High Courts[9], that is, the High Court Laws of the various States and the FCT High Court Act provide that the judicial powers of the respective High Court shall extend to the jurisdiction, powers and authorities vested in the High Court of Justice in England.[10]

Although the Constitution - and Nigerian legislation generally - is silent on this point, it is, in the opinion of this writer, not really open to disputation with any reasonable level of rationality, that the jurisdiction of the High Courts is generally limited to the territorial boundaries of the State. The Nigerian Supreme Court articulated the fundamental rule of

[7]To ensure a coherent reading of this paper, the phrase 'Internal Conflict of Laws' is adopted to refer to inter-State jurisdictional conflicts.

[8] Under the 1979 Constitution, *section 236(1)* thereof which is *in pari materia* with *section 272(1)* of the 1999 Constitution adopted the phrase, "unlimited jurisdiction".

[9] It is interesting that virtually all the High Court Laws of the various States purport to establish the various High Courts. By the operation of the doctrine of covering the field, and to the extent that that the High Courts are already established by the Constitution, those provisions are at best inchoate and inoperative. See *AG. Abia State & 35 Ors. v. AG. Federation [2002] 6 NWLR (Pt. 763) 264*.

[10]An illustrative example is section 8 of the High Court Law of Lagos State which provides as follows: The High Court shall, in addition to any jurisdiction conferred by the Constitution of the Federation or by this, or any enactment, possess and exercise, within the limits mentioned in, and subject to the provisions of, the Constitution of the Federation and this enactment, all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England.

Nigerian conflict of laws on the territorial limits to the jurisdiction of courts by stating as follows:[11]

> Generally, courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction … It should be noted that except where there is submission to the jurisdiction of the court it has no jurisdiction over a person who has not been served with the writ of summons. The court has no power to order service out of the area of its jurisdiction except where so authorised by statute or other rule having force of statute.

The above notwithstanding, there are causes of action and subject matters arising from cross border disputes in respect of which two or more State High Courts are capable of exercising concurrent jurisdiction. These, in a nutshell, are the matters with which domestic private international law is concerned. Regrettably, neither the Constitution nor any Act of the National Assembly, to the knowledge of this writer, provides for the rules which govern such areas of conflicts. In the words of Wheeler, J. of the Kano State High Court,[12]"…[the] question of jurisdiction of various State High Courts, in the absence of legislation on the point, is governed by the rules of common law on the position in private international law."

Okoli and Oppong also agree that recourse must in such cases be had to the common law rules of conflict of laws to resolve such jurisdictional issues.[13] What are these common law rules of conflict of laws and how have Nigerian courts interpreted or applied them to resolve cases where jurisdictional conflicts exist?

## THE RULES OF JURISDICTION IN CROSS BORDER DISPUTES

*The English Common Law Rules of jurisdiction in cross border disputes:* Prior to 31st December 2020,[14] English courts faced with cross border disputes were bound to apply Regulation (EU) 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast Judgments Regulation) to answer the critical private international law questions of which courts have jurisdiction; what happens when the courts of one Member State are already

[11] *Nwabueze v. Okoye* [1988] 4 NWLR (Pt. 91) 664.
[12] *MISR Nigeria Limited v. Ibrahim* (Unreported judgment) in Suit No K/65/70- 23rd October 1970.
[13] Okoli, C. and Oppong, R. F. (n 3) above.
[14] i.e., the end of the Transition Period after which the Rome I Regulation - and by extension, European Law - is no longer applicable in England and Wales except as part of UK domestic law.

seised with jurisdiction; and whether the judgment of the courts of a Member State will be enforced in other Member States.

However, in the cases where the Recast Judgments Regulation does not apply, the traditional English Common Law position has always been that English courts have jurisdiction in actions *in personam* against any person who is present within the court's territorial jurisdiction when the writ of summons or other originating process is served on the person. Put differently, the process of commencing a suit involves the issuance of the originating process, that is, the claim form, and service of such process on the defendant. Once the defendant is present within the court's territorial jurisdiction, no matter how transient the presence, and is served with the process, the court assumes jurisdiction, but not otherwise.[15] With time, English law imported and indeed advanced the Scottish principle of *forum non conveniens*, as a result of which two fundamental questions emerged, in the determination of the jurisdiction of an English court to hear or determine a cross border dispute – Does the court have jurisdiction? And should the court exercise the jurisdiction? It is this common law rule of private international law that Nigeria received.

*The Nigerian Law Rules of Private International Law in inter-State disputes:* Unlike the position in English or European law, there is no legislation that clearly outlines the rules to be applied in resolving the internal conflict of law questions that typically arise in inter-State disputes in Nigeria, that is, the questions of which courts have jurisdiction and what happens when the courts of one State are already seised with jurisdiction.[16]Instead, the courts have had to resort to the common law rules of private international law for direction. Thus, Nigerian courts have had to meander through the maze of interpreting questions of private international law without the benefit of the clear direction that legislation and high-quality academic works provide. Admittedly, this is no mean challenge. Nevertheless, it must be asked, how have the courts fared?

[15]See *Colt Industries Inc v. Sarlie (No. 1)* [1966] 1 WLR 440 and *Maharanee of Baroda v. Wildenstein* (1972) 2 Q.B 283.
[16]i.e., the equivalent of the Recast Judgments Regulation.

## ANALYSIS OF DECISIONS OF NIGERIAN COURTS ON INTERNAL CONFLICT OF LAWS

As Okoli and Oppong correctly note[17], there are three circumstances under which a claimant may invoke the jurisdiction of Nigerian courts in an action *in personam*. The first is where the defendant is resident or present in Nigeria (or a State in Nigeria in the case of inter-State disputes) and is served with the originating process. The second situation is where the defendant submits to the court's jurisdiction either by accepting service and pleading to the merits of the case or having formally submitted to jurisdiction by executing a choice of court agreement. The third is where the claimant successfully seeks leave of court to issue and serve the originating process on the defendant outside jurisdiction.

Some of the factors that determine the court's jurisdiction include where the defendant resides or carries on business; where the cause of action arose, for instance, in the case of contract, where the contract was entered into, where the contract was performed or ought to be performed, or where the contract was breached; in the case of tort, where the wrong was committed, *et cetera*. These factors bear striking resemblance with the circumstances enumerated in the respective rules of court relating to the venue for instituting a claim as between the various judicial divisions of the same High Court. As will be demonstrated below, this has proved a major cause of confusion for the courts. It therefore follows that there must be circumstances under which a State High Court would have jurisdiction to entertain an action even where the cause of action arose in another State or where the defendant resides or carries on business in another State. Regrettably, not a lot of Nigerian courts appreciate this point.

In *Nwabueze v Okoye*[18]the Supreme Court per Obaseki JSC, referred to its previous decisions[19] and correctly noted as follows, "[I]n matters of jurisdiction, the common law rules [on private international law] apply as between States within the Federation of Nigeria." In the same vein, the Court of Appeal in *Ogunsola v All Nigeria Peoples Party*[20], per Oduyemi JCA stated thus on the same issue:

> When having regard to the cause of action or the place of residence or business of the parties, the matter falls entirely to be determined by the High Court of the Federal

[17] Okoli, C. and Oppong, R. F. (n 2) above page 55.
[18] (1988) 4 NWLR (Pt. 91) 664.
[19] *British Bata Shoe* Co *v Melikian* (1956) SCNLR 321; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1974) NMLR 82.
[20] *Ogunsola v All Nigeria Peoples Party (2003) 9 NWLR (Pt. 826) 462 at 480.*

> Capital Territory or of a State, one looks to the civil procedure rules applicable to determine the venue in the State whose High Court or in the F.C.T. Abuja would exercise jurisdiction. However, as in this case where the place of residence of the plaintiff is the same as that in which the cause of action arose i.e. Kwara State but not the place of business of the defendants – Abuja F.C.T. – one has to look into the domestic private international law applicable in Nigeria.

Similarly, in the case of *Muhammed v Ajingi,*[21]the Court of Appeal per Abiru JCA correctly stated and applied the law in this regard when it held thus:

> In resolving this issue, it is pertinent to have a clear understanding of the situation in this matter. It was not in contest between the parties that the Respondent, as plaintiff, resided and carried on business in Kano State while the Appellant, as defendant, resided and carried on business in Kaduna State, outside the territorial boundaries of Kano State. The Respondent commenced this action against the Appellant in Kano State High Court. The question is – whether the Kano State High Court can exercise jurisdiction over a defendant not resident or carrying on business within the territorial boundaries of Kano State? It is an inter-state matter, and it touches upon the territorial jurisdiction of Kano State High Court. It has nothing to do with judicial divisions of the High Court of Kano State which is an intra-state matter, and it is not governed by the High Court of Kano State (Civil Procedure) Rules. Thus, the references made to judicial divisions and to the High Court Rules in the submissions of Counsel to the parties were completely off the mark.

Regrettably, the above decisions appear to be in the minority. In their brilliant book, Private International Law in Nigeria, Okoli and Oppong categorised the errors that the majority of courts in Nigeria have routinely made in this respect into three.[22]Firstly, Nigerian courts may reach the right decision in light of an action *in personam*, but wrongly apply choice of venue rules to reach this right decision. Secondly, Nigerian courts may wrongly apply choice of venue rules and reach the wrong decision. Thirdly, Nigerian courts may also muddle the application of choice of venue rules with private international law rules to an action *in personam*. Time and space will necessarily restrict the number of examples of such errors that this paper will highlight.

*The first category of errors:* In *Nwankwo v. Ecumenical Dev Co Society*[23] an inter-State jurisdictional conflict arose between Enugu State High Court (where the defendants resided) and Ebonyi State High Court (where the farm, subject of the loan agreement was located), the Court of Appeal wrongly relied *inter alia* on the choice of venue rule in *Order 4 rule 3* of the High Court of Anambra State (Civil Procedure) Rules, 1988 (which was then applicable in

[21](2013) LPELR-20372 (CA).
[22] Okoli, C. and Oppong, R. F. (n 2) above page 89.
[23][2002] 1 NWLR (Pt. 749) 513

Enugu State) in determining which of the courts had jurisdiction over the claim.[24] Although the Court of Appeal was correct in holding that the Enugu State High Court had jurisdiction on the basis of the defendant's residence in Enugu, it should simply have done so from the internal conflict of laws perspective that the defendant's residence within the court's jurisdiction conferred *in personam* jurisdiction on the court over the defendant. Interestingly, the Supreme Court[25] upheld the decision of the Court of Appeal but on grounds completely unrelated to the question of the jurisdiction of the Enugu State High Court to hear and determine the case.

Another example of the first category is *First Bank of Nigeria Plc v. Abraham,*[26] instituted by the appellant in the Lagos High Court against the respondent for breach of contract arising from a loan agreement. The respondent was initially resident in London, United Kingdom and obtained the loan from the appellant's London office. However, by the time of the commencement of the action, the respondent had relocated to Lagos. The Supreme Court arrived at the correct decision that the Lagos State High Court had jurisdiction (based on the defendant's residence and also because Lagos was the place of performance), but reached this decision by erroneously relying on *Order 2 rule 3* of the High Court of Lagos State (Uniform Civil Procedure) Rules 1988, instead of relying on the private international law principle that the defendant's residence within the court's jurisdiction gives the plaintiff the right to invoke the court's jurisdiction in an action *in personam.*

In *Eastern Bulkcem Co Ltd v MOS Amobi*,[27] the Court of Appeal rightly held that both the Rivers State High Court and the Lagos State High Court had jurisdiction to entertain a case for recovery of fees of a legal practitioner because the defendant was resident within Port Harcourt, Rivers State and the contract was to be performed in Lagos State respectively. However, the Court of Appeal reached this decision by wrongly relying on the choice of venue rule contained in *Order 2 rule 3* of the High Court of Lagos State (Uniform Civil Procedure) Rules, 1983.

[24]Order 4 rule 3 provides that 'all suits for specific performance or upon the breach of any contract may be commenced and determined in the judicial division in which such contract ought to have been performed or in which the defendant resides'.
[25]*Nwankwo v. Ecumenical Dev Co Society* [2007] 5 NWLR (Pt. 1027) 377.
[26](2008) 18 NWLR (Pt. 1118) 172.
[27](2010) 4 NWLR (Pt. 1184) 381

Further, in *Theobros Auto-link (Nig) Ltd v. Bakely International Auto Engineering Co*,[28] the respondent (resident in Uyo, Akwa Ibom State) instituted an action against the appellant (resident in Aba, Abia State) at the High Court of Akwa Ibom State under the undefended list procedure for recovery of a liquidated money demand in respect of a contract concluded, executed, and performed in Uyo. The appellant entered unconditional appearance in the suit, and after finding that the appellant's notice of intention to defend and affidavit did not disclose a reasonable defence, the court entered judgment against the appellant. Aggrieved, the appellant appealed to the Court of Appeal, contending *inter alia* that the Akwa Ibom State High Court lacked jurisdiction as he was resident in Aba, Abia State which is also where the contract was to be performed. The Court of Appeal dismissed the appeal.

Although the Court of Appeal rightly held that the Akwa Ibom State High Court had jurisdiction in this case, it wrongly utilised the choice of venue rule contained in *Order 10 rule 3* of the Akwa Ibom State High Court (Civil Procedure) Rules, 1989, in concluding that the Akwa Ibom State High Court had jurisdiction because the contract was concluded in the State. Even at the risk of prolixity, it must again be stated that the Court of Appeal had no need to rely on the choice of venue rules in the Rules of court. The Court of Appeal should simply have relied on the internal conflict of laws rules to find that the appellant having unconditionally submitted to the jurisdiction of the Akwa Ibom State High Court, could no longer challenge that court's jurisdiction.

And in *Skye Bank Plc v. Chidiebere*,[29]the respondent sued the appellant at the High Court of Abia State for the negligent and unprofessional handling and management of a share margin trading facility granted to the respondent by the appellant. The appellant challenged the territorial jurisdiction of the trial court on the basis that the transaction, subject matter of the suit, took place in Lagos State; that its principal place of business is in Lagos State; and that at all material times that the relationship subsisted, the respondent also resided in Lagos. In response, the respondent averred that the transactions between him and the appellant started in Aba, Abia State, where the appellant has a branch, and was successfully packaged in liaison with the appellant's branch in Lagos State; that he is resident in Aba; and that the appellant carries on business in Aba. The trial court upheld the respondent's contention and assumed jurisdiction to entertain the suit. The appellant appealed to the Court of Appeal.

[28](2013) 2 NWLR (Pt. 1338) 337.
[29] [2017] 7 NWLR (Pt. 1564) 213.

In allowing the appeal, the Court of Appeal found that contrary to the respondent's contention, the transaction took place in Lagos and the appellant also resides in Lagos. However, rather than rely on the rules of private international law in striking out the suit, the Court of Appeal relied on *Order 6 rule 3* of the High Court of Abia State (Civil Procedure) Rules 2009 which deals with venue of institution and trial of suits as between the different judicial divisions of the High Court of Abia State.

*The second category of errors:* While it is easy to overlook the technical misconceptions in the above decisions since the ultimate outcome was correct, some litigants have not been so fortunate. This brings us to the second category of errors. A case in point is *Ocean Fisheries (Nig) Ltd v. Veepe Industries Ltd,*[30]where the appellant raised the issue of jurisdiction for the first time at the Court of Appeal in a case commenced at the Ogun State High Court for recovery of debt that the appellant owed the respondent for supplies made at the appellant's factory in Lagos State. The appellant's registered office was situated in Apapa, Lagos State while the respondent carried on business in Sango-Ota, Ogun State. The appellant defended the case on its merits and lost. The Court of Appeal wrongly relied on the choice of venue rule of *Order 10 rule 3* of the High Court of Ogun State (Civil Procedure) Rules, 1988, in holding that the Ogun State High Court did not have jurisdiction to entertain a case of breach of contract where the defendants were resident and carrying on business in Lagos State. If the Court of Appeal had resorted to the principles of private international law, it would have found that the appellant, having defended the case on its merits, had submitted to the jurisdiction of the Ogun State High Court and would not have struck out the case.

In *Dangote General Textiles Products Ltd v. Hascon Associates (Nig) Ltd*[31]the Supreme Court relied on *Order 10 rule 3* of the High Court of Sokoto State (Civil Procedure) Rules 1987 and held that the High Court of Zamfara State did not have jurisdiction for a claim of breach of contract because the defendants were all resident in Kano State, where the contract was also to be performed. It is once again contended that if the Court had applied the principles of private international law, the court would have found that the defendants' failure to challenge the court's jurisdiction at the High Court of Zamfara State, coupled with the defendant's filing of a defence on the merits and taking steps in the proceedings, amounted to submission.

[30][2009] 5 NWLR (Pt. 1135) 430.
[31][2013] 16 NWLR (Pt. 1379) 60.

*The third category of errors:* There are also other instances where the courts in Nigeria have simply conflated the choice of venue rules in the Rules of the various High Courts with the common law rules of private international law and thereby wrongly threw out cases that the courts ordinarily had jurisdiction to determine. More significantly, Nigerian courts have strictly applied the territorial jurisdiction rule to throw out *in personam* actions simply because the cause of action arose outside the State's territorial boundaries. With respect, this is not the law.

In *Benson v Ashiru*[32] the plaintiff brought an action against the defendants whose dangerous driving resulted in the death of Mrs Adetutu Ashiru at Ijebu Ode, in present day Ogun State. Although the plaintiffs lost the substantive suit on the merit, the Supreme Court recognised the powers of the Lagos High Court to assume jurisdiction in respect of an accident that took place outside its territorial jurisdiction in a case where the defendant was resident within the court's jurisdiction. In particular, the Supreme Court referred to the case of *Phillips v. Eyre*[33] and held that under the common law rules of private international law which apply in the High Court of Lagos, an action in tort may lie in Lagos for a wrong alleged to have been committed in another part of Nigeria.

Similarly, in *NPA v. Panalpina World Transport (Nig) Ltd,*[34] the Supreme Court followed its earlier decision in *British Bata Shoe v Melikian*[35]in holding that the Lagos State High Court had jurisdiction in an action *in personam* to entertain a cause of action arising in Warri (outside the court's territorial jurisdiction), as the defendants in the case were resident and carrying on business in Lagos State. In particular, the Supreme Court, in reversing the decision of the Lagos High Court to decline jurisdiction to entertain the case, stated that since both cases were actions in personam as between the parties and their conduct, they were matters in respect of which the High Court of Lagos State, applying and adopting the rules of jurisdiction of conflict of laws adopted and employed by Her Majesty's Court of Justice in England, should have exercised jurisdiction.

[32](1967) NMLR 363.
[33] (1870) L.R. 6 Q.B. 1
[34](1973) NCLR 146.
[35](1956) SCNLR 321.

On the contrary, in *Ogunde v Gateway Transit Ltd*,[36] the Court of Appeal held that the High Court of Ogun State lacked jurisdiction to entertain a claim of negligence that took place in Lagos State because it was Lagos State High Court that had exclusive territorial jurisdiction in the case. This was in spite of the fact that the defendants were resident in Ogun State.[37] The Court of Appeal was clearly wrong. As noted above, the residence of a defendant within the court's territorial jurisdiction is a factor that donates to a claimant the right to invoke that court's jurisdiction in an action *in personam*. In this case, the High Court of Ogun State and the High Court of Lagos State had concurrent jurisdiction to entertain the claim against the defendants, by reason of the defendants' residence in Ogun State and because the cause of action arose in Lagos State, respectively.

The Court of Appeal in *Ocean Fisheries (Nig) Ltd v Veepe Industries Ltd*,[38] was wrong, respectfully, when it held that the Ogun State High Court had no jurisdiction in respect of a contract that took place in Lagos State on the basis that it was the Lagos State High Court that had exclusive territorial jurisdiction in the case.

With respect, the Court of Appeal also wrongly held, in *George v SBN Plc*[39] that the FCT High Court could not entertain an action arising in Jos, Plateau State as the cause of action arose outside her territory. Here, the appellant a clerk at the Jos Branch of the 1st respondent, fought with another member of staff in the banking hall in Jos and was subsequently queried and ultimately dismissed. In an action against his dismissal, which was filed at the FCT High Court, the 1st respondent having defended the suit on the merit, taken part in the trial, and thereby submitted to jurisdiction, ultimately turned around in the middle of the trial and objected to the jurisdiction of the court on grounds that the action was instituted at the wrong venue.[40]In both of these cases, the defendants defended the suits on their merits and did not challenge the court's territorial jurisdiction. Thus, the Court of Appeal should simply have applied the private international law principle of submission and conclude that the trial courts in FCT Abuja and Ogun State possessed the requisite vires to hear and determine the cases. The courts' failure to countenance the principle of submission is problematic in many

[36](2010) 8 NWLR (Pt. 1196) 207.
[37] See also *International Nigerbuild Construction Co Ltd v Giwa*(2003) 13 NWLR (Pt. 836) 69.
[38](2009) 5 NWLR (Pt. 1135) 430.
[39](2009) 5 NWLR (Pt. 1134) 302, 319.
[40]Although this is beside the point, both the trial court and the Court of Appeal held that the suit was filed in the wrong venue, this is despite the Court of Appeal's decision that a consideration of venue involves the selection of the proper judicial division of the same court. A jurisdictional conflict between the Plateau State High Court and the FCT High Court cannot be characterised as an issue of wrong venue.

material respects. The fundamental question that must therefore be asked is, shall we continue to wallow in these erroneous decisions in the hope that some courts will arrive at the right decision?

With respect, the position adopted by most Nigerian courts, if stretched to its logical conclusion, implies that there cannot be submission to jurisdiction either by a waiver of the right to raise jurisdictional challenge at the earliest opportunity and pleading to the merits of the case or that the parties cannot legally enter into an agreement to select their preferred dispute resolution forum. This would mean, for instance, that an Aba based business man cannot enter into a supply contract with an Abuja-based purchaser and agree that any dispute between will be resolved by the High Court of Lagos State. That mindset does not belong to the 21st Century.

Choices of court or jurisdiction agreements are agreements as to where litigation will take place. As Hartley[41] notes, they are one of the most important jurisdictional devices of modern times. If the courts respect them, they enable the parties to know in advance where the case will be brought. This in turn makes it possible to plan ahead and to ensure that the terms of the contract, and the activities that take place under it, will not be regarded as unlawful by the court hearing the case. There are a number of benefits that accrue to parties who execute a choice of court agreement, especially in commercial cases. These include increased certainty and convenience, suitability of the forum in terms of the availability of evidence and witnesses, cost effectiveness, *et cetera*.

Thus, where parties have entered into a prior jurisdiction agreement to have their dispute resolved by a particular State High court or where, in the absence of such prior agreement, either party is sued in a particular State High Court, and that party voluntarily and unconditionally submits to jurisdiction, it would be inequitable to allow such party to resile from that position and subsequently challenge the jurisdiction of that court, simply because the outcome was unfavourable.

It is in this regard that the position of Nigerian procedural law to the effect that jurisdiction is a threshold issue, which can be raised at any time, and at any stage of the proceeding even for the first time on appeal; that once raised, it must be determined first; or that a party cannot

[41]Trevor Hartley, (note. 6 above).

waive an issue of jurisdiction,[42]must be understood in the context in which such pronouncements were made. There is a distinction between procedural and substantive jurisdiction.[43]

The court gave a more comprehensive exposition of the distinction in the case of *A.G. Kwara State & Anor v. Adeyemo & ors*[44]where the court explained that while jurisdiction as a matter of procedural law can be waived by a litigant, jurisdiction as matter of substantive law cannot be waived. For this reason, the court held that jurisdiction in procedural law must be raised at the earliest possible opportunity otherwise the litigant will be deemed to have waived such objection. Indeed, there is a body of Nigerian case law where the courts rejected procedural jurisdictional challenges that were raised "too late".

An example is *Zakirai v. Muhammad*[45] where the appellant challenged the trial court's jurisdiction to entertain the action on the ground that the respondent (as plaintiff) did not comply with the provisions of the Sheriffs and Civil Process Act. The challenge was raised after the appellant had filed his defence. Both the Court of Appeal and the Supreme Court were unanimous in their decision that the appellant had waived his right to raise the jurisdictional challenge. In particular, the Supreme Court stated that the appellant entered an unconditional appearance and also filed a counter-affidavit, which means he waived the irregularity that he complained of and had submitted to the jurisdiction of the court.

Consequently, Nigerian courts should give effect to the general jurisdiction granted to all the High Courts of the States and the FCT High Court by the Constitution and respect their inherent jurisdiction to entertain *in personam* extra-territorial disputes under the right circumstances. In particular, Nigerian courts must of necessity be cautious when throwing out cases on grounds of territorial jurisdiction to avoid wrongly declining jurisdiction in cases where the parties executed a jurisdiction agreement in favour of that court or where, in the absence of such agreement, the defendant has unconditionally submitted to the court's jurisdiction and thereby waived the right to raise a jurisdictional challenge.

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[42] See for example *Petrojessica Enterprises Ltd. v. Leventis Tech. Co. Ltd. (1992) 5 NWLR (Pt. 244) 675: Obiuweubi v. CBN (2011) K7 NWLR (Pt. 1247) 465 @ 494 D – F; Kotoye v. Saraki (1994) 7 NWLR (Pt. 357) 414*.

[43]*Obiuweubi v. C.B.N.* (2011) 7 NWLR Part. 1247 page 465.

[44] (2016) LPELR-41147(SC) (Pp. 14-15, Paras. E-C).

[45] (2017) 17 NWLR (Pt. 1594) 181, 230 – 231.

It is imperative to situate the above in the proper perspective regarding the powers of courts to assume jurisdiction in an action *in personam* where the defendant is present or resident in the jurisdiction, or submits to it, irrespective of where the cause of action arose.

First, in respect of land matters, the court of the *lex situs* (the court of the place where the land is located) possesses exclusive jurisdiction in land matters; a court has no jurisdiction to entertain matters concerning title or right to possession of immovable property outside its jurisdiction.[46] This must however be qualified to the extent that where the institution of a land matter is aimed at requiring the defendant(s) resident within the court's jurisdiction to perform a personal obligation, whether arising out of contract (such as specific performance) or implied contract, fiduciary relationship or fraud, foreclosure or redemption of equity, or other unconscionable conduct that will be frowned upon in the eyes of equity, it becomes an action *in personam* where another court can establish jurisdiction over a defendant resident within its jurisdiction.

An illuminating example is *British Bata Shoe Co v Melikian*[47] which was filed in the former Supreme Court of Nigeria.[48]The defendant was resident in Lagos (within the court's jurisdiction) but the claim was for specific performance (jurisdiction *in personam*) in respect of a property situate in Aba, in the then Eastern Region of Nigeria. The Supreme Court rightly relied on *section 9* of the High Court of Lagos Ordinance 1955, which vested the High Court of Lagos with the same jurisdiction as the High Court of Justice in England and applied the conflict of laws rule, by upholding the jurisdiction of the High Court of Lagos to determine the case.

This is also the position in the European Union as enunciated in *Webb v. Webb*[49] which concerned a dispute between a father and son in relation to a flat situated in the south of France. The father had purchased the property in his son's name when exchange control was still in force in the United Kingdom. When the two fell out, the father brought proceedings in

[46]*Lanlehin v Rufai* (1959) 1 FSC 184; *Societe General Bank (Nig) Ltd v Festus Aina (1999) 9 NWLR (Pt. 619) 414.*
[47](1956) SCNLR 321.
[48] This is the predecessor to the High Court of Lagos State. Before the suit came up for trial, the Supreme Court was replaced by five independent High Courts, each exercising jurisdiction within its territorial limits. The High Court of Lagos exercised jurisdiction in the then Federal Capital Territory of Lagos, while the then High Court of Eastern Nigeria exercised jurisdiction in respect of the Eastern part of Nigeria, including Aba in present day Abia State.
[49]European Court of Justice Case No. C-294/92 [1994] ECR I-1733

England for a declaration that the son held the property in trust for him and should be directed to do all that was necessary under French law to have the property registered in the father's name. The son challenged the jurisdiction of English courts to entertain a dispute in relation to real property located in France. The question was thereafter referred to the European Court of Justice whether English courts had jurisdiction to entertain the dispute in light of the provision of the then applicable *article 16(1)* of the Brussels Convention.[50] The European Court of Justice unequivocally held thus in affirming the jurisdiction of English courts to entertain the dispute:

> The aim of the proceedings before the national court is to obtain a declaration that the son holds the flat for the exclusive benefit of the father and that in that capacity, he is under a duty to execute the documents necessary to convey ownership of the flat to the father. The father does not claim that he already enjoy rights directly relating to the property which are enforceable against the whole world but seeks only to assert rights as against the son. Consequently, his action is not an action in rem within the meaning of Article 16(1) of the Brussels Convention but an action in personam.[51]

Further, a court cannot establish jurisdiction in an action *in personam* where it is mandatorily prohibited by the Constitution or a statutory enactment.[52] In other words, the various High Courts lack jurisdiction even in actions *in personam*, to entertain subject matters in respect of which the Constitution or other statute has conferred exclusive original jurisdiction on another court. As noted above, the Constitution confers the High Courts with general jurisdiction to determine civil proceedings. The jurisdiction of the State High Courts in civil matters therefore extends to all questions pertaining to the civil rights and obligations of parties and is only limited to the extent of the matters in respect of which the Constitution, as an attribute of its supremacy, confers exclusive jurisdiction on other courts.

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[50]*Article 16(1)* of the Brussels Convention provides, "[t]he following courts shall have exclusive jurisdiction, regardless of domicile: (1) in proceedings which have as their object rights *in rem* in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated…" A similar provision is contained in Article 24(1) of the extant recast Brussels Regulation 2012.

[51]Para 15. See also *Weber v Weber* Case C-438/12 para 42 where the European Court of Justice held that the exclusive jurisdiction of the courts of the [Member] State in which the property is situated does not encompass all actions concerning rights *in rem* in immovable property, but only those which are actions that seek to determine the extent, content, ownership, or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with protection for the powers which attach to their interest.

[52]*Swiss Air Transport Company Ltd v African Continental Bank Ltd* (1971) 1 NCLR 213; *Barzasi v Visinoni Ltd* (1973) NCLR 373.

The most notable exceptions are the matters in respect of which exclusive jurisdiction is conferred on the Federal High Court[53] and the matters in respect of which exclusive jurisdiction is conferred on the National Industrial Court.[54] Submission to jurisdiction in either of these circumstances is futile. It is also in this instance that the Nigerian procedural law position rings true, that parties cannot by agreement oust the jurisdiction of a court or confer on a court jurisdiction that the court lacks.[55] Other than these, two or more State High Courts are perfectly capable of being vested with concurrent jurisdiction in respect of the same cause of action or subject matter arising from cross border disputes. It bears repeating that these are the cases with which internal conflict of laws is concerned.

## RESOLUTION OF NIGERIAN INTERNAL CONFLICT OF LAW ISSUES IN INTER-STATE DISPUTES

What follows from the above discourse is that there is bound to be conflict when more than one State High Court has jurisdiction to entertain the same action. How can such disputes be resolved? Thankfully, the tried and tested European private international law model is available for adoption, with necessary modifications having due regard to the local and peculiar circumstances of Nigeria. This last part of the paper now proposes a hierarchical roadmap for Nigerian courts to adopt in the determination of the issue of jurisdiction in inter-State *in personam* disputes.

*Stage 1 – Jurisdiction conferred by the Constitution/Statute:* At the top of the hierarchy are cases whose subject matter falls within the scope of the matters in respect of which exclusive original subject matter jurisdiction has been conferred on another court. Where a State High Court or the FCT High Court is faced with a dispute in respect of which the defendant(s) challenge(s) jurisdiction or the court *suo motu* raises the issue of jurisdiction, the first question to ask is whether the subject matter falls within the scope of the matters in respect of which exclusive original subject matter jurisdiction has been conferred on another court by the Constitution or other statute. In such situation, the High Court involved must decline

[53]See section 251 of the 1999 Constitution.
[54] See section 254C 1999 Constitution.
[55] In *Lignes Aeriennes Congglaises v. Air Atlantic Nigeria Limited (2006) 2 NWLR (Pt. 963) 49 at 73 para. B* the Court of Appeal held that by reason of section 20 of the Admiralty Jurisdiction Decree, 1991 any agreement entered into or made by any person, whether a party to any cause, matter, or action which seeks to oust the jurisdiction of the court is null and void if it relates to admiralty matter and falls into any of the categories set out in the section. See also *JFS Inv. Ltd. v. Brawal Line Ltd. (2010) 18 NWLR (Pt. 1225) 495*.

jurisdiction and either strike out the case or transfer the suit to the appropriate court, in accordance with relevant law. It is immaterial where the cause of action arose or that the defendant submitted to jurisdiction. It is also irrelevant to the point that the defendant resides or carries on business within the territorial jurisdiction of that High Court.

*Stage 2 - Exclusive jurisdiction over land et cetera:* If the subject matter does not fall within the scope of matters in respect of which exclusive original jurisdiction has been conferred on another court by the Constitution or other statute, the next step is for the court to ask itself whether the action is in respect of a subject matter which another court alone can exercise original jurisdiction, such as matters concerning title or right to possession of immovable property within that court's jurisdiction. If the dispute relates to title or right to possession of immovable property situated in another State, then the High Court must decline jurisdiction in favour of the court of the State in which the property is situated. It does not matter that the defendant resides within jurisdiction or that the defendant has otherwise submitted to jurisdiction. Once again, this rule only applies to actions *in rem*.

*Stage 3 - Jurisdiction over actions in personam:* Where a High Court is satisfied that the subject matter of a case before it does not fall within the above two exceptions, that is, it is not a matter within the exclusive original jurisdiction of another court and the subject matter does not relate to title or right to possession of immovable property situated in another State, then subject to the *lis pendens* rule, that High Court has jurisdiction if, either the cause of action arose within jurisdiction, or the defendant resides or carries on business within jurisdiction, or the defendant submits or submitted to jurisdiction. This stage is further divided into different stages as outlined below.

*Submission to jurisdiction:* As noted above, parties to commercial transactions are entitled under the Common Law to enter into choice of court agreements or jurisdiction agreements regarding where litigation arising from their contract should take place. Where a court is faced with an action in an *in personam* inter-State dispute arising from an agreement in which the parties agreed to have their dispute resolved by that court, and the subject matter is not within the exclusive original jurisdiction of another court and does not relate to title or right to possession of immovable property situated in another State, that court has and should exercise jurisdiction over such subject matter. This accords with *article 25* of the Recast Judgment Regulation that provides that if the parties, parties of domicile, have agreed that a

court or the courts of a Member State have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.[56]

It should be emphasised that the above does not contradict or otherwise derogate from the Nigerian case law position that parties cannot, by consent, confer jurisdiction on a court that lacks jurisdiction and cannot oust jurisdiction of a court properly conferred with jurisdiction by law.[57]This is because it is not the choice of court or jurisdiction agreement executed by the parties that confers jurisdiction on the court but the Constitution which already confers general jurisdiction on the High Courts. All that the parties have merely done, is to select for themselves, which of the various High Courts with jurisdiction, should entertain their dispute. For the avoidance of doubt, it bears repeating that this does not apply in cases where the court is statutorily forbidden from exercising jurisdiction over that subject matter.

In the same vein, where a court is faced with an *in personam* inter-State dispute under the circumstance described above and there was no prior jurisdiction or choice of court agreement, the defendant can still submit to the court's jurisdiction by entering unconditional appearance and/or filing a defence on the merits without raising a challenge to the court's jurisdiction. In such circumstance, the defendant is considered to have waived his right to raise a jurisdictional challenge, and the court can exercise jurisdiction over the dispute.

*Concurrent jurisdiction:* Where the cause of action in an *in personam* dispute arose in one State; the defendant resides or carries on business in another State; and/or the defendant submits or submitted to jurisdiction in either of the above States or indeed yet another State, then all the two or three State High Courts involved can exercise jurisdiction subject to the *lis pendens* rule, which is otherwise known as the court-first-seised rule.

*The court first seised rule:* The Recast Judgments Regulation stipulates lis pendens or the court first seised rule which has largely limited the instances of conflicting decisions among

[56] Once again, illustrative examples of decisions of the European Court of Justice on choice of court agreements abound and can serve as a guide for Nigerian courts to resolve internal conflict of laws questions that arise on this issue.
[57]*Swiss Air Transport Company Ltd v African Continental Bank Ltd* (1971) NCLR 213; *Barzasi v Visinoni Ltd* (1973) NCLR 373.

the courts of EU Member States involving the same cause of action and between the same parties, and therefore provides a worthy example for State High Courts in Nigeria to minimise jurisdictional conflicts in inter-State disputes.

*Article 29* of the Regulation provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion, stay proceedings until such time as the jurisdiction of the court first seised is established. The Article further provides that where the jurisdiction of the court first seised is established, the courts of all other EU Member States must decline jurisdiction in favour of that court.

*Article 30* of the Regulation equally provides that where related actions are pending in the courts of different Member States, any court other than the court first seised shall of its own motion, stay proceedings. In other words, where the cases do not involve the same cause of action or between the same parties, but the cases are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings, where possible, only the court first seised should hear the cases.

The Recast Judgments Regulation goes further to provide how to determine which court is first seised by examining the time when the document instituting the proceedings is lodged with the court or in cases where such originating process must be served before being lodged with the court, at the time when the process is received by the authority responsible for service.

In Nigeria, it is very easy to replicate this rule in inter-State disputes by providing that where an inter-State dispute arises in respect of which more than one High Court is capable of exercising jurisdiction, once a party has filed the action before a State High Court, that court should exercise jurisdiction and all other High Courts must decline jurisdiction in favour of that first court. Proceedings are commenced in Nigerian courts when the registrar signs and/or seals the originating process and the time and date of such signing are endorsed on the originating process. It is therefore very easy to determine which of the High Courts is the court first seised.

There are also case law precedents that can enable Nigerian appellate courts to answer the question of the meaning of the relevant phrases, "the same cause of action"[58], "between the same parties"[59] and the circumstances under which different actions will be deemed to be related.

*Multiple defendants:* Another potential area of conflict in an *in personam* inter-State dispute is where a case involves multiple defendants who reside or carry on business in different States in Nigeria. Just like the situation above, the High Court in each of the States where a defendant resides or carries on business has concurrent jurisdiction with the High Court of the State where the cause of action arose as well as the High Court where any of defendants submits or submitted to jurisdiction. The court first seised rule should also apply in this case such that once the High Court of any of the above-mentioned States rightly assumes jurisdiction, all the other courts must decline jurisdiction.

*Jurisdiction over counter-claims:* Lastly, a High Court of a State in Nigeria that has jurisdiction to hear and determine a main claim in an action in personam should automatically possess jurisdiction to entertain a counter-claim. The application of this rule under *article 8(3)* of the Recast Judgment Regulations requires that in the case of contract, the counter-claim must be based on the same contract or facts as the main claim.

## CONCLUSION/RECOMMENDATION

This paper aimed to draw attention of the relevant stakeholders to a gaping hole in the Nigerian legal system which has gone unaddressed for far too long, that is, the absence of uniform rules from which Nigerian courts can draw guidance to resolve the everyday conflict of law questions that arise in inter-State disputes in Nigeria. It is not possible within the limits of a single paper to comprehensively address all the private international law issues that regularly arise before Nigerian courts in the context of inter-State disputes, as well as proffer solutions to them. All the paper aspired to, and has hopefully achieved, was to sufficiently highlight the problem and raise the consciousness of relevant stakeholders.

[58] *Gubosch Maschinenfabrik v. Palumbo* Court of Justice of the European Union Case 144/86 [1987] 4861.
[59] *Maciej Rataj (The Tatry) Case* C-406/92 [1994] ECR I-5439.

It is in this regard that the writer restates his call for the immediate convocation of a Nigerian Conference on Private International Law under the auspices of the offices of the Attorneys General of the Federation and of the various States, to brainstorm and potentially come up with a draft Uniform Conflict of Law Model Law for adoption by the various State Houses of Assembly. The paper noted at the outset that it only set out to discuss the rules relating to jurisdiction, which implies that a lot of work is also required for other branches of choice of law, and recognition and enforcement of judgments. This recommendation accords with those of Shasore and Bello who called for a National Justice Development Plan generally and in particular, the enactment of a Jurisdiction Act or Jurisdiction Law to deal holistically with all the conflict of law issues that arise in Nigeria.[60]

The foregoing, in the opinion of the writer, would go a long way towards resolving the protracted jurisdictional conflicts between the various courts in Nigeria, reduce the largely unnecessary challenges to these courts' authority by litigants, significantly reduce the notorious delays in the determination of cases in Nigeria, and most importantly, eliminate one of the biggest impediments to the smooth administration of the justice delivery system in Nigeria.

[60]Olasupo Shasore, &Akeem Bello, *Ministering Justice- Administration of The Justice Sector in Nigeria*, (Quramo Publishing2018).