

THE LEGALITY OF FINANCIAL BAILOUT: THE IMPERATIVE OF A LEGAL FRAMEWORK FOR STATE/MUNICIPAL BANKRUPTCIES IN NIGERIA¹

Abstract

A state can simply be defined as an organized political community living under a single system of government, while a municipal area is a town or city or its local government. A state/municipality can be said to be bankrupt when the available revenue can no longer meet the expenses of the state or municipal area. Unlike the natural person who is subject to bankruptcy proceedings, a state/municipality cannot be declared bankrupt under Nigerian law. The basic law regulating bankruptcy in Nigeria is the Bankruptcy Act Cap B2 LFN 2004. A person, organization or state who can no longer meet his financial obligations would naturally need to be bailed out of his financial distress. No wonder recently, some states in Nigeria were financially bailed out of their financial distress by the Federal Government. However, the question on the minds of most Nigerians especially those in the legal profession is as to whether the financial bailout granted to states by the Federal Government has a legal backing. This study explores the entire gamut of state/municipal bankruptcies in Nigeria, and critically examines the legality of financial bailout granted to states/municipalities in Nigeria. It also exposes and punctures the lacuna discoverable in the Bankruptcy Act and other laws as they relate to state/municipal bankruptcy in Nigeria. It further reviews the relevant bankruptcy and insolvency laws and practices in western jurisdiction particularly in America and Europe, in order to draw lessons from there in advocating for a reform of the Bankruptcy Act and other legal instruments in Nigeria on state/municipal bankruptcy or insolvency. To achieve this, there was reliance on text books, articles by eminent writers, seminars, workshop papers and other media sources including the internet, government policy papers and several write ups on state/municipal bankruptcies in Nigeria.

Key words: *Bankruptcy, Financial Bailout, Legality, Nigeria,*

1. Introduction

Individuals, business organizations and even states sometimes incur debts that they are unable to pay. There are many reasons for the inability to pay which includes poor management of fund, unwise use of credit, or even unforeseen difficulties. States and municipalities majorly are said to be insolvent when they can no longer offset workers' salaries, pensions, and gratuity or engage in basic projects within the state. This situation most times warrants them to seek for funds from sources outside the state. This fund may come from the Federal Government through policies warranting the grant of such fund. The process of granting financial assistance to these states is known as financial bailout. Recently in Nigeria, more than 80% of the total number of states went crying and lamenting of lack of fund especially to pay their workers. Some of them were trying to renegotiate the minimum wage with Labour and Unions even retrenchment of workers. However, how far this assistance from the Federal Government and even the retrenchment of workers can be of help to the states remains a matter for debate. Another issue for contemplation is as to whether there is any existing law granting the President Muhammadu Buhari led administration the power to issue directives to the Central Bank of Nigeria to grant financial assistance to financially unstable states in the country.

Etymologically, the word 'bankruptcy' is derived from Italian *banca rotta*, meaning 'broken bank' or bench. This stems from a custom of breaking a money changer's bench or counter to signify his insolvency and inability to continue with his business². It may however be a mere figure of speech³. The idea of forgiving debts dates back to the days of the Holy Bible. Mosaic Law provided that every seventh year should be known as a sabbatical year. In this year, all debts owed every Israelite by his fellow Israelites are to be forgiven and the debtor released from his obligation to pay⁴. The law

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² <https://en.m.wikipedia.org/wiki/bankruptcy> accessed on 3 February 2016.

³ *Ibid.*

⁴ The Holy Bible Deuteronomy 15: 1-3.

regulating bankruptcy in Nigeria is the Bankruptcy Act⁵. This was derived from the English Bankruptcy Act⁶. The Act makes provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee)⁷. When in state of insolvency or bankruptcy, the debtor usually goes into a quagmire of financial indebtedness. He thus immediately seeks avenues to be bailed out of his financial distress. This was/is the current state of many states/municipalities in Nigeria. This study would also examine the legality of the two financial bailouts, viz: the N804.7bn and N90bn granted recently to states by the Federal Government of Nigeria.

2. State Bankruptcy

A state as a sovereign and independent entity sometimes runs into financial distress. This occurs when the state can no longer pay workers' salaries, pay pensions and gratuities and worst of all pay contractors fee. When this occurs, the state is said to be insolvent. However, since insolvency does not bear same meaning as bankruptcy it is pertinent to find out the meaning of state bankruptcy. As was seen earlier, bankruptcy is a legal status of an individual, corporation/state against whom an adjudicatory order has been made by the court primarily because of inability to meet his financial liabilities. Thus a state can only be referred to as bankrupt when an order has been made by a court of competent jurisdiction in that regard. In Nigeria, our bankruptcy law⁸ do not permit a state to file for bankruptcy. Hence they remain under the torments of their creditors, little wonder in Zamfara state few months ago a creditor threatened to seize the funds in the states bank accounts⁹. A legal status of a state against whom an adjudicatory order has been made by the court because of its inability to meet his financial liabilities is thus state bankruptcy.

3. Municipal Bankruptcy

Most times municipalities or local government within the state engage in projects too expensive for their available capital or fund. Sometimes too they mis-manage the fund given to them by the state government. When this happens, these local governments find themselves in the chains of numerous debts. The consolation to these local governments or municipal areas at these time of distress is the court. Through a petition, the municipal area files for bankruptcy, the court (all things being equal) declares such municipal area bankrupt. This at least grants a little period of rest to the municipality thus preventing creditors from taking action to collect their debts. Municipal bankruptcy thus is the legal status conferred on a municipality by an order of court, major because of its inability to pay its debts. In Nigeria no Local Government Area has ever filed for bankruptcy because the Bankruptcy Act do not provide for such. Local Governments are however advocating for local government autonomy in other to directly collect funds from the Federal Government to prevent lack of funds within Local Governments.

4. Laws Regulating Bankruptcy and Insolvency in Nigeria

Bankruptcy law in Nigeria may be said to comprise of Common Law principles and the Bankruptcy Act of 1914, which is the modified version of the English Bankruptcy Act of 1914, as further amended in 1979 and now Bankruptcy Act Cap B₂ Laws of the Federation of Nigeria 2004¹⁰. The Bankruptcy Act has a subsidiary legislation known as the Bankruptcy Rules. These rules first came into force in 1990. It has one hundred and sixty-two (162) rules in twenty-three (23) parts. These rules guide bankruptcy proceedings and procedures employed in discharging the debtor's debts. Corporate bankruptcy and adjudicatory process is however regulated by the Companies and Allied Matters Act 2004 and the Companies Winding Up Rules¹¹. This Act first began operation in 1979.¹² It basically

⁵ Cap B2 LFN 2004.

⁶ English bankruptcy Act 1914.

⁷ The long title of the bankruptcy Act Cap B2 LFN 2004.

⁸ Bankruptcy Act cap B2 Laws of the Federation of Nigeria 2004.

⁹ D Sobowale, 'Black Christmas ahead-Bankruptcy Fear Hills states (2), *Vanguard*, December 20,2015,p.8.

¹⁰ *Halliday V. Alapatira* (1881) IN. L. R, see also M. Okany, *Nigeria Commercial Law* (Nigeria: African-FEP publishers) p.695.

¹¹ Companies Winding Up Rules 2001, First Enacted Ist October 1983.

¹² 20th April, 1979.

makes provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices and from practicing any regulated profession (except as an employee).¹³ The Act is made up of nine (9) parts and one hundred and forty three (143) sections. Part I which comprises of sections 1-31 makes a list of acts of bankruptcy, it provides for Proceedings consequent on order, public examination of debtor, composition and schemes of arrangements and adjudication of bankruptcy. Part II¹⁴ contains therein provisions on the administration of the property of the debtor. It further has the following headings ‘proof of debts, property available for payment of debts, effects of bankruptcy on antecedent and other transactions, realization of property, distribution of property’. Part III i.e. sections 72-75 contains provisions on appointment of an official receiver, his status and duties. For Part IV, we have the provision for trustees in bankruptcy, their appointment, powers, remuneration, and removal. Part V has provisions on the Constitution, procedure and powers of court in its sections 94-106. Part VI i.e. sections 107-125 has supplementary provisions like punishment issued in the event of disobedience of court order, evidence to be proffered in court, computation of time, service of notice etc. Part VII (sections 126-128) provides for certain disqualifications on a bankrupt, for example from being elected into any public office¹⁵. Part VIII (sections 129-141) makes a list of bankruptcy offences that can be committed by a debtor or bankrupt. Finally, Part IX i.e. sections 142 and 143, is the interpretation section and short title to the Act. According to Bankruptcy Act, the commission of any of the acts of bankruptcy by the debtor kick-starts issues in bankruptcy. A careful study of the entire gamut of the Bankruptcy Act reveals that it is only a person i.e. a debtor that can by an order of the court be declared bankrupt. Hence, the bankruptcy Act does not cover bankruptcy proceedings of corporate bodies,¹⁶ nor does it permit referring to a state or municipality as bankrupt.

5. Review of Recent State/Municipal Bankruptcies in Nigeria

Nigeria as a legal entity has over the years and especially in recent times suffered a lot of financial distress. It's States and Local Government Areas experience slow state of development due to poor finance. A look at Nigeria since the second quarter of 2015 can only reveal a government employing all fiscal policies to enable it to meet its current and especially capital expenditures. It can thus be rightly said that Nigeria is technically bankrupt. Although the definitions of bankruptcy as well stipulated in chapter 1 of this work only refers to a person, and our Bankruptcy Act does not support a state being declared bankrupt, the fact remains that ²/₃ of Nigerian states and consequently its local governments are unable to meet their financial obligations; workers' salaries are not paid, basic infrastructure are lacking etc. The basic question to ask then is ‘why are these states insolvent, thus unable to meet their financial obligations?’

6. Financial Bailout

To properly understand the term ‘financial bailout, it is imperative to look into the meaning of the word bailout. The term bailout is formed from two words ‘bail’ and ‘out’. Usually a person or thing is bailed when released or rescued from depressing predicament. Such as a prisoner been bailed or clearing water from a sinking boat. On the other hand ‘out’ ordinarily is the opposite of ‘in’. It denotes some kind of freedom. A bailout simply put is an act of giving financial assistant to a failing business or economy to save it from collapse. It is a colloquial term for giving financial support to a company or country which faces serious financial difficulty or bankruptcy. It may also be used to allow a failing entity to fail gracefully without spreading contagion¹⁷. It is most often a situation in which a business, individual or government offers money to a failing business in order to prevent the consequences that arise from a business downfall¹⁸. Cambridge dictionary defined it as an act of helping a person or organization that is in difficulty usually by giving or lending money. From the definitions above, it appears that a bailout is majorly financial in nature, ie to say the only way to redeem or rescue a government, institution or

¹³ The long title to the Bankruptcy Act.

¹⁴ Part II covers s.32-71.

¹⁵ For example the office of the President, Governor, or appointed a Justice of the Peace, Trustee etc.

¹⁶ *Ibid* s.108.

¹⁷ <<https://en.m.wikipedia.org/wiki/bailout>>accessed on 5 May 2016.

¹⁸ <<https://www.investopedia.com/terms/b/bailout.asp>> accessed on 5 May 2016.

business about to go bankrupt, is to grant it financial assistance. Thus, financial bailout simply means the use of finance to rescue an institution government or business in financial crisis or bankrupt. This finance could come in the form of a loan, bond, stock or physical cash. Finance given for bailout is often time not reimbursed. Some reasons for bailout include: helping to bring normalcy to the global financial system and markets; helping to instill confidence in investor; helping to circumvent the threat of recession; helping to restore business and thus prevent job losses; helping to keep liquidity in the markets; lessening state debt burden or possibly eliminates it. The opponents of bailout have these reasons against bailout: i. Bailout fund majorly comes from tax payer's money, so it increases tax burden on the ordinary citizens; ii. It can cause increase in budget deficit as the bailout will mean more government borrowing; iii. Banks, companies, government leaders, business owners will get away with their mistakes, no lessons learnt; iv. Government leaders waste public funds and are not brought to book, rather they are given more money¹⁹. Since bailout is basically financial in nature the basic question then is 'what is the source of the finance used to bailout a failing business/organisation, a bankrupt or a debt-ridden government? It is no doubt that a lot of economies carryout activities through tax payers money, or through revenue gotten from natural resources within the nation or any profit oriented business. Some of these monies are used to carry out capital and recurrent projects while others are saved in the government's banks. It is this reserved fund that is most times used in bailing-out a failing business or organisation or a state or local government that is debt-ridden. Even a bankrupt bailed out by friends or personal representatives is saved with revenue from profit oriented businesses or salaries. In Nigeria, the over N804.7 billion relief package used to bailout many states of the country especially from their unpaid salaries burden was generally gotten from taxation, ;particularly though, this money was raised from earnings from Nigeria Liquefied Natural Gas paid into the Central Bank on Nigeria. Other sources of bailout fund in Nigeria are the local loans from deposit money banks (DMB) and loans and grants from the World Bank, or the African Development Bank. It is however; important to point out that some members of the opposition party (PDP) argue that the relief package emerged from savings left behind by the Goodluck Jonathan led government in the excess crude account.

7. Review of the Efficiency of Bailout Fund Application in Nigeria

At this point it is important to examine the efficacy of the bailout fund granted to states in Nigeria to particularly pay worker's salaries. How well did these states and their local government's use this grant? Were there able to offset all outstanding debts and salaries or did the State Governors and Local Government Counsellors divert this fund? It is imperative to examine this point because some states and Local Governments within the states still cannot pay their worker's salaries. Recently, after thorough investigation the Independent Corrupt Practices and Other Related Offences Commission (ICPC) in collaboration with the Nigeria Labour Congress revealed that most of the states that received bailout funds from the FG diverted the money to other means. The effective use or otherwise of the bailout fund granted to the 32 states of the federation shall be examined sequentially. Although Zamfara State got N10b bailout fund, careful analysis of the documents provided and interaction with the Nigeria labour leaders in the state, the ICPC staff revealed that the state was not owing civil servants and pensioners any arrears as at the time the FG released the bailout funds. However, after receiving the cash, the state government made overtures to its House of Assembly to approve the use of money for the settlement of indebtedness to contractors and other purposes. This was judiciously done by the House of Assembly. In a different dimension of misuse, Imo State which collected the sum of N26, 806,430,000.00 from the CBN paid the amount into two commercial banks, and transferred part of the money into uses not related to workers' salaries. The ICPC said it discovered N25bn was lodged into a government house account, N2bn paid into Imo state project account, while another N2bn was lodged in a microfinance bank and a management fee of N21 million paid into an unspecified account out of bailout fund received by the state. Similarly, Adamawa State got N9, 578,360,000.00 as bailout cash but disbursed only N2, 378,360,000.00 with a balance of N7, 200,000,000.00. According to the report, the state could not adduce any reason for the slow process of off-setting the debt as at the time of the report. However, the state claimed not to owe outstanding salaries as at September 2015. In the case of Bauchi state, the report shows that out of the N8, 609,100,000.00 it received as bailout fund, it disbursed N8, 414,088,383.26 with a balance of n95, 011,616.74. The state claimed not to owe salaries as at

¹⁹<<http://www.thedigeratilife.com>> accessed on 17 May 2016.

September, 2015. Also Benue State received N12,503,439,787.48 as bailout fund and disbursed N10,852,536,702.96 with a balance of N1,650,903,084.52. Analysis of the document submitted a double payment of N37, 760,000.00 in favour of the office of the deputy governor. Cross River State only disbursed N3, 140,883,040.77 out of the bailout fund received, yet the state claimed not to have outstanding salaries to workers as at 19/11/2015, and the remnant of the fund cannot be accounted for. The same thing happened in Ekiti State, only N9, 213,816.252.44 was disbursed. Katsina State as at 18th February 2016 claimed not to owe any worker's salary; it didn't disburse the entire bailout fund and couldn't account for the undisbursed fund²⁰. Gombe State disbursed N6, 321,684,423.67 with a balance of N4, 678,315,576.33 unaccounted for, especially as it claimed not to owe any salary as at September 2015. Nassarawa State disbursed some of its bailout fund and claimed to use the remnant to pay its Local Government worker's salaries after the on-going verification exercise, ICPC found out that Ondo State owed one month salary and several months' arrears of gratuity/pension as at 30th September 2015, yet it disbursed only a part of the bailout fund. The last time Osun State workers received salaries was on July 2015, yet they received bailout fund. The fund received was not properly utilized rather only a portion of it was disbursed. Plateau State is also faced with the question of the where about of the remaining bailout fund given to the state since it disbursed only N5, 330,589,061.15 and still owed two months salaries as at 30th September 2015. Enugu State used its bailout fund to settle domestic debts and claimed that funds for the payments of staff salaries and emoluments were not assessed. Oyo State as at 7 April, 2016 still owes four months' salaries yet it was granted huge bailout fund for payment of worker's salaries. Delta and Kebbi State claimed to have cleared all outstanding arrears on salaries as at November 2015 and September 2015 respectively, it used only minimal portion of the bailout fund and cannot account for the balance. Kwara state equally cleared outstanding arrears on salaries as at 20th October, 2015 with a part of the bailout fund and couldn't account for the arrears. Kudos to Niger State and Ogun State who alone disbursed the entire grant for the payment of salary arrears²¹.

The above data points only to one direction, states did not effectively utilize the bailout fund granted to them for payment of workers' salaries. The high number of unpaid workers crying out each day in different states gives credence to this. No, wonder the Governor's forums are now engaged in discussions with the World Bank to obtain loans for these states crying foul. While the bailout of deposit money banks (DMB) by the CBN in 2008-2009 succeed because of the well stipulated policies earmarked for it and because the fraudulent chief executives of banks were changed and prosecuted. The bailout of states majorly did not solve any of their economic problems rather it prolonged the evil days mainly because President Muhammadu Buhari through the CBN recklessly without any well stipulated conditions 'dashed' these states/fraudulent Governors money, perhaps as a disguised way of paying the governors who invested in his campaign. The researchers believe that the whole issue of bailout of states and local governments in Nigeria is more or less a mirage.

8. The Central Bank of Nigeria and Bailout Payment

Nigeria do not have legion of laws in support of state/municipal bailout. However, the Constitution²² which is the ground norm is not silent on the issue of financial bailout. The Constitution in its s.164 makes certain provisions that may be referred to when talking about financial bailout. The said section provides as follows:

s.164(1) The federation may make grants to a state to supplement the revenue of that state in such sum and subject to such terms and conditions as may be prescribed by the National Assembly.

s.164(2) The federation may make external grants to a foreign state or any international body in furtherance of the foreign policy objectives of Nigeria in such sum and subject to such terms and conditions as may be presented by the National assembly.

²⁰ S Daniel, ' How states squandered FG Bailout Funds', *Vanguard*, April 23, 2016 pp 14-15

²¹ *Ibid*

²² 1999 Constitution (as amended).

Of peculiar interest to this research is S164 (1), this section permits the federation to make grants to state. The proposal for the giving of this grant must however be sent to the National Assembly who shall disapprove this grant or approve it based on certain terms and conditions. The drafters of the Constitution envisaged that may be periods when the allocation given to states by the federal government from the federation account by virtue of s.162, and when the allocation of other revenues to states by virtue of s.163 may not be enough to meet with its financial needs even when combined with the internally generated revenue of the state, thus it quickly inserted s.164. A section that has over the years remained dormant is now the section for debate by many.

Another section in the Constitution which is somewhat in support of state/municipal bankruptcy in Nigeria is s.83 (1) & (2), provides:

- s.83(1) The National Assembly may by law make provision for the establishment of a contingencies fund for the federation and for authorizing the president if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exist to make advances from the fund to meet the need.
- s.83 (2) Where any advance is made in accordance with the provision of this section, a supplementary estimate shall be presented and a supplementary appropriation bill shall be introduced as soon as possible for the purpose of replacing the amount so advanced.

This section permits the federation of Nigeria to have something like a contingency fund. This fund acts as a 'saver' when states are faced with unforeseen needs. If Nigeria were to have a contingency fund when state governors ran to the federal government for bailout, the federal government would have without much delay granted bailout to the states, the situation of backlog of unpaid worker's salaries been actually unforeseen. This indeed is another major focus of this research. As pointed out earlier in this work, shortly after the inauguration of the All Progressive Congress (APC) led national government many states through their governors went cap in hand to President Muhammadu Buhari's led federal government to assist them meet their financial commitments essentially to pay workers in the states. The federal government responded positively to this request. The irresistible question is whether the Federal Government is constitutionally empowered to accede to the state's request for grants or bailout. To answer this question i shall examine some sections of the Constitution. First and foremost, s.1 (2) of the 1999 Constitution (as amended) states; 'The federal republic of Nigeria shall not be governed nor shall any person or group of persons take control of the government of Nigeria or any part thereof except in accordance with the provisions of this constitution'. S164(1) also provides; the federation may make grants to a state to supplement the revenue of that state in such sum and subject to such terms and conditions as may be prescribed by the National assembly'.

The word federation used in the above quoted provisions of the constitution appears to be clear and as a matter of law, it must be given its ordinary meaning, this position has been given judicial approval in a plethora of cases by the apex court of the land. Some of such cases include *Rabiu v.A.G Kano State*²³, *Ishola v Ajiboye*²⁴, *Fawehinmi v IGP*²⁵ where the supreme court of Nigeria succinctly put the law thus: 'the proper approach to the interpretation of clear words of a statue is to follow them in their simple grammatical and ordinary meaning rather than look further because that is what prima facie them their most reliable meaning'. The word 'federation 'has been defined in the interpretation section of the constitution as the Federal Republic of Nigeria as such it is not left to the discretionary powers of court to ascribe definition(s) other than that ascribed to it in the constitution. Reading the provisions of s.164(1) with this meaning, what we have is 'the Federal Republic of Nigeria may make grants to a state to supplement the revenue of that state in such sum and subject to such terms and condition as may be prescribed by the National Assembly'. Applying the literal interpretation rule of constitution, it is the whole country i.e the Federal Republic of Nigeria that has the power to make grants to any state and

²³ [1982] 2 NCLR 117.

²⁴ [1994]6 NWLR (pt.352) 506.

²⁵ [2002] 7NWLR (pt. 767) 606.

not the 'Federal Government' which represents one of the three tiers that constitute the federal structure of Nigeria.

With the clear and unambiguous provisions of s.164 (1) of the constitution, the only authority empowered to make grants to the states is the 'Federal Republic of Nigeria' i.e the entire Nigeria itself and not the federal government. This distinction is further strengthened by the recent Supreme Court's decision in *A.G Lagos state v AG. Federation*²⁶ where their lordships specially held that government of the federation is not the same thing as federal government. Again the provisions of s.5 (1) provide to the effect that the executive powers of the 'federation' which has been defined to mean the Federal Republic Nigeria shall be exercised by the president. Any attempt to read 'federation' to mean 'federation government' would amount to reading into the constitutions what is not intended. This has been deprecated by the Supreme Court in the case of *Ojukwu V Obansajo & Ors*²⁷. Thus, nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. It is important to state here that irrespective of any supposed absurdity that may arise from giving effect to the express intention of the constitution especially in terms of international diplomatic relations which puts federal government in the front of decision making for the entire country, for instance where the Federal Republic of Nigeria is to make grant to foreign country, this decision is taken by the federal government on behalf of Nigeria. This would however not override the intendment of the constitution when considering the internal democratic structure of the country. Nigeria operates federalism its components are the federal, state and local governments. The federal government alone cannot (under the present constitutional government) take or unilaterally give out any sum of money from the pool of funds jointly owned by the federation in the federation account. The collective ownership of the funds is estimated in s.162 (1) of the constitution. Again, the reference here is not and cannot be federal government. It simply refers to the Federal Republic of Nigeria, sub section 3 of section 162 then follows up to state that;

Any amount standing to the credit of the federation account shall be distributed among the federal state governments and local government council in each state on such terms and in such manner as may be prescribed by the National Assembly.

It is thus conceded that the Federal Government may have its own account separately and can determine its funds in whatever manner it so pleases, subject to the approval of the National Assembly. In view of s.5(1) of the constitution therefore, it is submitted that President Buhari reserves the exclusive power to bind the 'federation' and can exercise the federation/Federal Republic of Nigeria's power to make grant to the state to supplementary revenue due to it. But even at that, this must still be subject to any law/ approval made by the National Assembly. This is what President Muhammadu Buhari's led government failed to do. They did not seek the approval of the National Assembly before distributing the bailout fund, even with their knowledge of the fact that appropriation of funds is the prerogative of the National Assembly. Perhaps, the fear of Senator Saraki or mere demonstration of power made the APC- led government not to do the needful²⁸. President Buhari did not see the need to present to the national assembly by virtue of S83 of the constitution, a bill for an act to establish 'contingencies fund' to address urgent need of the federating states of Nigeria before granting bailout to states²⁹. The researchers therefore believe that although President Buhari meant well for the states when he granted bailout to them through the CBN, he disregarded the principle of separation of powers as enshrined in the 1999 Constitution by omitting to obtain the approval of the National Assembly.

²⁶ [2014] All FWLR (pt740)1296 at 1331.

²⁷ [2004] 12 NWLR (pt 886) 169 at 209.

²⁸ C. Ubaka, "What is the Real Motive for bailout in Nigeria".

(<https://WWW.naija.com/491975-what-is-the-real-motive-for-bailout-in-Nigeria.html>) accessed on 28 may 2016.

²⁹ B Rarnom, 'Constitutionality of bailout Fund for states and Alternative Remedy', *Guardian*, January 26, 2016.

In the case of *Ugba v. Suswan*³⁰ the Supreme Court of Nigeria held in glorification of this concept that All provisions in the Constitution were put in by the accredited representatives of the people – the Legislature. For as long as they are not amended by the Legislature provisions in the Constitution remain sacrosanct the intention of the Legislature must be established.

The same was earlier reiterated in the case of *A.G. Abia State v. A.G Federation*³¹ when Belgore JSC said that

the principle behind the concept of separation of powers is that none of the three arms of government under the Constitution should encroach into the powers of the other. Each arm – Executive, Legislative and Judicial – are separate, equal and of coordinate departments and no arm can constitutionally take over the functions clearly assigned to the other. Thus, the powers and functions constitutionally entrusted to each arm cannot be encroached upon by the other. The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary powers by all the arms and thus prevent friction.

The action of President Buhari clearly violated or breached the above concept or doctrine and should never be allowed to happen again. Obeisance to the concept remains the hallmark of pure and unadulterated democratic governance.

9. Conclusion and Reform Projections

Having undertaken a critical appraisal of the Bankruptcy legislation in Nigeria, the financial bailout of states and that of other jurisdictions, the researcher comes to an obvious conclusion that the Bankruptcy Act³² is shrouded with a lot of flaws. This is not surprising given the fact that it is an adaptation of the English Bankruptcy Act of 1914, and the fact that it was promulgated during the era where the aim of insolvency was to punish bankrupts who are in default. Although the Bankruptcy Act was amended in 1992 it did not make significant changes. There is thus need for policy consideration on the exemptions provided under the Bankruptcy Act of Nigeria. The submission is that the assets excluded as seen under the Nigerian law are not sufficient to allow the bankrupt maintain a reasonable financial recovery. The recovery process under our Bankruptcy law is very slow; this impacts negatively on the economy. This is unlike the provision in other jurisdictions where exemptions are much. On the other hand, creditors should not be grossly disadvantaged. To create the right balance it is submitted that basic necessities should be exempted for the debtors. Tools of trade and other basic facilities required to enable the debtor function reasonably are necessary assets that must be exempted and the trustee should be empowered to make that determination and consider what necessary tools and assets are actually meant for the debtor. It is also a good approach to empower the trustee to replace the property of the debtor with a more modest item of that type. Where, in his opinion the original item has a realizable value that exceeds the costs of a reasonable replacement. Further still, retaining a sum as low as N2000³³ in our statute book with the state of the economy in Nigeria today as the basis of commencing a bankruptcy petition is unreasonable. And to have as fine a sum as low as N200 punishment for the commission of a bankruptcy offence is absurd. This must be amended. When this is done a law to enable bailout of persons, corporations, states and municipalities should also be enacted. Nigeria must thus make haste to reform its bankruptcy legislation borrowing a leaf from other jurisdictions; if not our bankruptcy legislation will continue to be a mere toothless bull dog. After a critical adventure through the

³⁰ (2015), WRN 1 at 64 Per Rhodes – Vivour, JSC.

³¹ (2007) 30 WRN 150. (2006) 16 NWLR (pt. 1005) 265 in *Gov. Ekiti State v. Olayemi* (2015) 6 WRN 120 at. 160 the Count of Appeal held that The doctrine of separation of powers means that none of the Legislature, the Executive and the Judiciary should exercise the whole or part of another’s powers”. Justice Brandeis had in the American case of *Myers v. United States* (1926) 272 US 112 held that “. . . . The doctrine of separation of power was adopted not to promote efficiency per se but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but by means of the inevitable friction incident to the distribution of governmental powers among the three departments to save the people from autocracy.”

³² Cap B2 LFN 2004.

³³ *Ibid* S129(a).

bankruptcy legislation in Nigeria and those of other jurisdictions vis-avis the legality of financial bailout granted to states in Nigeria, and having concluded that the state of Nigeria bankruptcy legislation leaves much to be desired the researcher therefore proposes that the following steps and measures be urgently put in place through a reformation of the legislation for the purpose of achieving a more viable and effective machinery for debt recovery via bankruptcy adjudication.

- a. There should be a reform or better still an overall of the totality of the substantive and procedural law of Nigeria bankruptcy legislation to the standard of that of other jurisdictions particularly the United States of America. We should copy from the United States of America and make bankruptcy proceedings applicable to natural persons, corporate entities and business by introducing the process of reorganization or restructuring of these corporate entities and businesses financially. Our bankruptcy legislation should also provide for the adjudication of a state/municipality as bankrupt as is the case under chapter 9 of the US bankruptcy code.
- b. A lot of other provisions in the Bankruptcy Act need to be cancelled from the provision dealing with the amount required for bankruptcy proceedings to commence to the punishment for bankruptcy offences etc.
- c. President Muhammadu Buhari's led administration has set a precedence by granting through the CBN bailout in form of soft loans, allocations etc to states. Since precedence has been set, it is more likely to reoccur in future. Hence to prepare for the future, there should be enacted a clear provision of the law permitting the Federal Government of Nigeria to grant such bailout. We must borrow a leaf from the USA whose bailout package was hinged on the Emergency Economic Stabilization Act 2008.
- d. In line with the provisions of s.83 1999 constitution (as amended) 2011, the President should deliver to the National Assembly a bill for the enactment of an Act creating Contingency Fund for the federation. With this fund the Federal Government of Nigeria can in the future bailout a financially distressed state without many troubles. The concept or doctrine of Separation of Powers under sections 4, 5 and 6 of the 1999 Constitution (as amended) must be respected and maintained by the three departments of Government particularly by the Executive.
- e. States and Local Governments should be more concerned with happenings within them.. They should properly utilize the allocation from the Federation Account. Furthermore, they should explore more avenues to increase their internally generated revenue (IGR).If states and local governments can effectively harness their tax system, in other to prevent tax evasion, states would have more money than they can actually utilize.
- f. Instead of squandering the nation's fund in the name of state/municipal bailout for payment of worker's salaries, the researcher advocates that the federal government bailout industries companies, factories that are smuggling. This of course would be a very good gift from the Buhari led federal government if done.
- g. As can be seen from the N90bn bailout about to be granted to states, Nigeria has indeed borrowed the idea of the other jurisdictions discussed above who signed MOU before bailout was granted, by setting out 22 stringent conditions for the grant of this bailout.
- h. After this second bailout, it is expected that states reduce its budget estimate, by so doing, it prevents the stress of seeking funds to supplement budget deficit. Spain adopted this was very well aware of this, no wonders it was the first step taken by them to 'bounce back' financially.

Finally Nigeria should reduce its dependence on oil revenue. It must just like the jurisdictions discussed above who increased their exporting capacity to recover financially, improve export of locally made goods.

When these recommendations are utilized the bankruptcy legislation in Nigeria will be as efficacious as those of other jurisdictions. After all, 'the object of law is to solve difficulties and adjust relations in social and commercial life. It must grow with the development of the nation. It must face and deal with changing and novel circumstances. And unless it can do that, it's fails in it function and declines in its dignity and values'³⁴

³⁴ Per MacCardie in *Pager v. Claspeil, Stamp and Heacock Ltd* (1924) 1 KB 566 at 570.