A LEGAL OVERVIEW OF THE NATURE AND ROLE OF CHURCH INTERNAL GOVERNANCE MECHANISMS

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Abstract

The article explores the nature of church internal governance mechanism and the role it plays in church governance from the legal perspective. It adopts a doctrinal research method to evaluate statutory provisions, church constitutions and internal orders, case law and literature dealing on church internal governance. Although it primarily evaluates Nigerian legal regime relating to church governance, on a few occasions, draw inferences from other jurisdictions for wider spectrum. The article submits that as a legal system is vital to the smooth governance of a state, so too is internal governance mechanism critical to the life of a church. It argues further that a church internal governance mechanism is necessary for the exercise of the right to church autonomy and essential for peaceful coexistence and sustainability of a church.

Keywords: Church autonomy, church constitution, church tradition, Christian denomination

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Introduction

One of the features of a church denomination[1] is the uniqueness of its polity, i.e. its structure of governance. This feature forms part of the right of a church to self-governance and also distinguishes one church denomination from another. However, the workability and effectiveness of church polity are a function of the internal governance mechanisms of the church. Thus, this article seeks to explore the nature of a church internal governance mechanism and the role it plays in church governance. The following questions are what this article seeks to answer. What constitutes the nature and scope of an effective church internal governance mechanism? How should the courts and state effectively deal with these mechanisms? The answers to these questions are essential because where a church has poor, weak or no internal governance mechanisms, the autonomy, growth and smooth governance of the church may be threatened. A church may also be exposed to the risk of disputes that may result in lawsuits.

The article adopts a doctrinal research method to evaluate statutory provisions, church constitutions and internal orders, case law and literature dealing on church internal governance. The article primarily examines the Nigerian legal regime relating to church governance, but on a few occasions draw examples from South African, North American and European authorities for wider spectrum and robust analysis. Although the foreign references may not be binding authorities with the Nigeria judicial spaces, they can

[1] In this context, a church denomination refers to a Christian congregation or religious community whose primary purpose is to conduct worship and proclaim the gospel of Jesus Christ, such as the Anglican Communion, the Redeemed Church of God, the Baptist Church, and so forth.

be highly persuasive and reference points where there are vacuum in the Nigerian law.

The article is stratified into six sections. The next section explores the meaning of internal governance mechanisms. Thereafter, the nature and scope of church internal governance mechanisms are examined. This section further critically explores how state legislation influence the scope of the internal governance mechanisms of churches within the Nigerian context. The fourth section examines the roles that internal governance mechanisms play in church administration. It also explores how legal disputes relating to church governance have become prominent in Nigeria, as well as the impact of these disputes in the life of the church and society. The last section gives the concluding remarks. The article submits that as a legal system is vital to the smooth governance of a state, so too is internal governance mechanism critical to the life of a church. A church internal governance mechanism is also necessary for the exercise of the right to church autonomy and essential for peaceful coexistence and sustainability of a church.

Meaning of a church internal governance mechanism

Because of the age of the church and the various legal issues affecting its governance in recent time, one would anticipate that academic discourse on issues relating to church internal governance mechanisms, particularly from the legal perspective, would be well developed, but this is not so. Legal scholars, Hill and Doe, for instance, confirm that although there is a general increase in the legal regulation of churches in recent years, only that of the Roman Catholic canon law has been studied to a certain degree, but that of other Christian traditions is less developed.[2] This limitation seems

[2] M Hill and N Doe "Principles of Christian Law" (2017) 19(2) *Ecclesiastical Law Journal* 138 at138.

to have also limited a robust definition of "church internal governance mechanism" or related concepts from the legal perspective.[3] Generally, scholars variously refer to church internal governance mechanisms as internal regulatory instruments, church law, church covenants, church order, church polity, church law, church legal orders, and church founding documents, among others. However, in the strict legal sense, each of these concepts may have their unique meaning in the context of their usage.

However, in their recent work, Hill and Doe describe church "law", "order" and "polity" as "the expressions used to describe systems of internal regulation by which differing denominations govern themselves."[4] Sandberg, although not restricting its definition to a Christian church, defines "religious legal order" as "a system of rules and a mechanism, however informal, to resolve disputes about validity, interpretation and enforcement."[5]The definitions offered by these scholars do not capture the full essence and nature of a church internal governance mechanism. Sandberg's definition is limited because it focuses only on the mechanisms for interpreting and resolving religious disputes. Although Hill and Doe's definition contemplates a wider scope, theirs is more focused on the internal legal affairs of a church. Whilst it is acknowledged that the legal and regulatory systems of a church may constitute the substratum of its governance mechanism, they are not all that a church internal governance mechanism entail. These scholars' definitions overlook some vital aspects of church internal affairs and practices that are not strictly legal or regulatory, but

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3 N Doe *Law and Religion in Europe* (2011) 123.

4 Hill and Doe 2017 *Ecclesiastical Law Journal* 138.

5 R Sandberg "The Impossible Compromise" in R Sandberg (ed) *Religion and Legal Pluralism* (2015) 1.

nevertheless form part of a church internal life, such as doctrines, creeds, beliefs, practices, and religious training, among others.

A more comprehensive definition of a church internal governance mechanism should in addition to the regulation of church affairs and dispute resolution as proffered by the scholars include other operating policies, rites, doctrines, customs and practices, religious ideology, performances, principles, spiritual and evangelistic standards that relate to the entire life and administration of a church. It would further include the fullness of faith and life enjoyed by the members of a Christian church and provide for the church ecumenical and secular relations. This description bears a resemblance to the definition of a church constitution proffered by Ekwo. Ekwo, a theologian and legal author, defines church constitution as "a set of rules, regulations, principles, doctrines or tenets by which the body has prepared itself to sanction its beliefs, activities and the relationship between the members *inter se* and amongst the association, its principal operators and its members."[6] This broad approach to the understanding of a church internal governance mechanism is essential because it can enhance a church's effort to have a broad and more comprehensive internal governance mechanism for the effectiveness of its administration.

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[6] IE Ekwo *Incorporated Trustees: Law and Practice in Nigeria* (2007) LexisNexis: Durban. The analysis articulated by Hill in another of his works is, however, more satisfactory. He says: "[c]hurch law exhibits three qualities – it is the product of theological reflection; it translates theology into practical norms of action; and its pastoral quality is evident in the principle that juridical norms are the servant of the community of the faithful seeking to enable and order life in witness to Christ." See M Hill "The Regulation of Christian Churches: Ecclesiology, Law and Polity" (2016) 72(1) *HTS Teologiese Studies/Theological Studies* https://hts.org.za/index.php/hts/article/view/3382/8901 (accessed 10 September 2018) 1 at 2.

Nature and forms of a church internal governance mechanism

The internal governance mechanism of a church can take different forms. It may be unwritten, although in most instances, it is set out in writing. In the case of the former, a court will enforce an unwritten practice as constituting a part of a church governance mechanism if it can be proven as an established practice or custom of the church. Regarding the efficacy of a church practice and custom, an American expert on church law, Richard Hammer, illustrates that "if an unincorporated church has no constitution or bylaws, or its constitution and bylaws do not deal with elections, then the *established practice of the church* should be observed."[7] Thus, a United States' court upheld a custom of the Baptist Church in the case of *Sherburne Village Baptist Society v Ryder*[8]that "*under the usage and custom of the Baptist Church*, the authority to employ or dismiss a minister lies not in the corporation, the trustees, or the deacons, but in the congregation itself."[9] Similarly, regarding the enforcement of unwritten church practice, a Nigerian court in *The Registered Trustees of the New Apostolic Church in Nigeria v Abolarin*,[10] affirmed that an employee of a church, especially a clergyman, might sue even on the terms of an oral contract.

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7 RR Hammar *Pastor, Church and Law* (1983) 32.

8 86 N.Y.S. 2d 853 (1949); Also, in *De Jean v Board of Deacons* 139 A. 2d 205 (Dela. 1958), another United States' court held that the common practice in the Baptist churches is to select ministers by majority vote of congregation; See also, *Holiman v Dovers* 366 S. W. 2d 197 (Ark. 1963).

9 See also, N Doe *Christian Law: Contemporary Principle* (2013)11. Doe observes: "*unwritten customs* also have the force of law in some churches." Italics added.

10 (2005) 4 WRN 111.

In practice, however, it is common for churches to have both written and unwritten forms of internal governance mechanisms. In the same vein, it is not impossible to have churches without any form of written governance mechanism. An instance of this may be found among the African Independent Churches (AICs)[11] that are located in rural areas where most members are not literate. What is unclear, however, is the criteria that a court will adopt to determine a practice or custom of a church that has become "an established practice and custom." Would a court adopt the criteria or standards applicable for determining and enforcing a secular or tribal custom and tradition? The fact is there is no known standard laid down in law for the court to follow. Whilst writing on the canonical traditions of the Orthodox Churches,[12] Patsavos opines that for a custom to be enforceable, it must "enjoy a long and steady practice", "consensus of opinion", "ha[ve] the force of law" and it should be "in full harmony with the holy tradition and scripture, as well as doctrine".[13] This opinion generates further enquiry, for instance, what will constitute "a long and steady practice" — is it a decade, two decades, or a century? What will amount to a consensus of opinion — is it the opinion of the leaders or members of the church or both? Where half of a church congregation agrees on a tradition, would it amount to a consensus? The answer to these questions poses some challenges.

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[11] AICs are churches that are started independently in Africa by Africans. they are churches that express Christianity in the African context. This category of churches constitutes the highest population of Christians on the African continent.

[12] H Chadwick *East and West: The Making of a Rift in the Church* (2003) 1-5.

[13] L Patsavos "The Canonical Tradition of the Orthodox Church' in FK Litsas (ed) *A Companion to the Greek Orthodox Church* (1984) 141.

Given the above, the major issue with an unwritten church governance mechanism is the task of proving such a church tradition, particularly where the tradition is not popular or where such tradition has not come before a court before to constitute a precedent in subsequent cases. Other challenges with an unwritten church governance mechanism include its uncertainty, inaccessibility, and non-sustainability by new members. In addition, new members[14] and non-members of the church may be ignorant of the practices. Given the above, it is advisable for churches, as far as possible, to have their internal governance mechanisms in writing. This will not only enhance the clarity and certainty of their mechanisms, but also their effectiveness.

Where the church internal governance mechanism is written, it can take different nomenclatures and exist under a variety of titles. It may be embodied in a single document, such as a constitution,[15] codes of canons,[16] charter, covenants and manual of laws. The governance mechanism of a church can also be in several documents, such as bylaws, informal administrative rules, some doctrinal or confessional texts like the Articles of Religion,

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[14] Meanwhile, in the South African case of *Mbewana v The Gospel Church of Power* [2011] ZAWCHC 380 para 42.1, a suit involving the proprietary of a church constitution, the court emphasised the need for a church governing document to be drafted in a language that will be understood by all members of the church to ensure its effectiveness.

[15] See, for example, the Constitution of the Church of Nigeria (Anglican Communion), 2020;

[16] The principal laws for the Catholic Church are Code of Canon Law (1983) for the Latin Church or the Roman Catholic Church, and the Code of Canons of the Oriental Churches (1990) for the Oriental Church. In the Latin or Roman Catholic Church, the Code of Canon Law 1983 replaced that of 1917. Pope John Paul II promulgated it after the revision following the Second Vatican Council in 1960.

guidelines, and policies that regulate specific aspects of church affairs.[17] These mechanisms could also be in hierarchical order in terms of the authority that they enjoy. Examples of written church governance mechanism include *The Principles of Canon Law Common to the Churches of the Anglican Communion*[18] applicable to the 42 provinces of Anglican Churches worldwide; *The Roman Catholic Church Code of Canon Law,* 1983[19] applicable to the Latin and Roman Catholic Church, and the *Code of Canon Law* 1990[20] applicable to the Oriental Catholic Church. Others include *Constitution of the Nigerian Baptist Convention*, *The Mandate Operational Manual* 2012 applicable to the Living Faith Church Worldwide and so forth.[21]

In some churches, the decisions of the ecclesiastical courts and tribunals form part of their internal governance mechanisms, which may be binding on the church. For instance, in the Anglican Church, article 24(14)[22] of *The Principles of Canon Law Common*

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[17] For instance, in the Nigerian case of *Egubson v Ikechiuku* (1977) LPELR-1050 (SC) 1, 10-11. Udo-Udoma JSC, delivering the lead judgment, said: "A church being a voluntary association of individuals bound together by the acceptance of common doctrines which identify them as a distinct religious community, it was irrelevant whether such doctrines are incorporated in a constitution, or Rules and Regulations of the association, or are set out in a separate book or document."

[18] The Principles of Canon Law Common to the Churches of the Anglican Communion (2008).

[19] Roman Catholic Church Code of Canon Law (1983).

[20] Catholic Church Code of Canon Law (1990) for Oriental Catholic Churches.

[21] The Mandate Operational Manual of the Living Faith Church Worldwide (2012).

[22] The section provides that "the decision of a church court or tribunal has such binding or persuasive authority for other church courts or tribunals as may be provided for in the law."

to the Churches of the Anglican Communion provides that the decisions of the church court or tribunal have binding or persuasive authority. Thus, in *Stanton (Bishop of Dallas) v Righter*,[23] the ecclesiastical court of the Episcopal Church of the United States[24] was confronted with the question of whether it can assume jurisdiction over the trial of Bishop Walter Righter for heresy as a result of ordaining Barry Stopfel, a gay man living in a committed relationship. In assuming jurisdiction, the ecclesiastical court held that the case of Bishop Brown of 1924, involving the retired Bishop of the Diocese of Arkansas, sets a precedent for the court. In this, the church court tried and convicted Bishop Brown for teaching contrary to the doctrine of the Episcopal Church. In light of this, case law can also be argued to be an essential tool to develop ecclesiastical jurisprudence and fill vacuums in the internal governance mechanisms of some churches. However, judicial precedent is said to be inapplicable in the Catholic tradition.[25]

In the development of a church internal governance mechanism, the theological standpoint of the church may or may not be an influencing factor in determining the nature and scope of the mechanism. Will Adam, an Anglican clergy and English legal scholar, strongly maintains the need for a church internal governance mechanism to acknowledge and reflect the existence of God and divine sovereignty as revealed to humankind in the Holy

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[23] (1996, Unreported). For the details of the facts of the case of *Stanton (Bishop of Dallas) v Righter*, see DE Cowan *The Remnant Spirit: Conservative Reform in Mainline Protestantism* (2003) 45-48.

[24] The Episcopal Church is the name the Anglican Church bears in the United States of America.

[25] Doe *Christian Law* 41.

Scripture.[26] He argues that a church internal governance mechanism should reflect the theology of a church. Adam's position mirrors the idea of the Anglican Church and perhaps most other church traditions where the church orders are regarded as "the servant of the church."[27] I am also of the firm view that divine law and theology should be the key influence on church internal governance mechanisms. In other words, an internal governance mechanism should reveal and implement the theological self-understanding and standpoint of a church. However, as will be discussed shortly, in some instances, this is not so. For example, in Nigeria, state regulations sometimes influence the contents and scope of the internal governance mechanism of churches. This situation often occurs where a statute prescribes what must be included in a church constitution or where a statute prescribes the conditions to be complied with for a church to access some state benefits, such as tax exemptions, conferment of legal personality[28] or obtaining a licence to conduct marriages.[29] Meanwhile, compliance with the provisions of these legislation may sometimes alter the theological standpoint and proposition of a church. Whilst the influence of statutes may be commendable in certain regards,

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[26] W Adam "Natural Law in the Anglican Tradition" in N Doe (ed) *Christianity and Natural Law: An Introduction* (2017) 60; See also, T Urresti "Canon Law and Theology: Two Different Sciences" (1967) 8 *Concilium*10. Urresti, a Roman Catholic canonist, is also of this idea that theology is a direct source for canon law.

[27] See, for example, Principle 2 of *The Principles of Canon Law Common to the Churches of the Anglican Communion* which deals with "Law as Servant."

[28] See the Nigerian Companies and Allied Matters Act 1 of 1990, ss 590-608.

[29] The effect of such statutory influence on church constitution is evident in the constitution of the Celestial Church of Christ in Nigeria, 1980, which provides in its article 197 that "[A]ll marriages solemnised in Celestial Church of Christ *shall be in accordance with the Marriage Actenacted by the government* under which our Church is licensed." Emphasis added.

its major effect on the internal governance mechanisms of churches is that it is capable of robbing a church of its autonomy to self-determine its governance structures.[30] Where theology does not dominate a church mechanism, it may influence its effectiveness, because a church being a spiritual body may have difficulty in complying with the secular laws.

Another feature of most church governance mechanisms is that although they may be essentially theological in origin and substance, they are mostly juridical in form. In most instances, they bear semblance with secular regulations in the sense that they could be prescriptive, permissive or prohibitive.[31] They do contain binding and obligatory norms of conduct. A church regulatory instrument may provide for ecclesiastical offences, sanctions and their mode of enforcement.[32] Hans Kelsen argues that the sanctions that religious norms impose may not be socially recognised, but are

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[30] For example, section 9 of the Nigerian Not-profit Organisations Governance Code, 2016 prescribes a maximum of a 10-year tenure for Nigerian church leaders without regard to the consideration of the theological viewpoints of the church. The nation-wide outcry and criticism of the Code by the members of the public and religious organisations forced the government to suspend the Code to avoid offending the polity. See, M Asake "Government has no Business Deciding who Runs a Church" *Punch* 14 January 2017 http://punchng.com/government-no-business-deciding-runs-church-asake-can-general-secretary/ (accessed 11 June 2017).

[31] For instance, in the Anglican Church, most of the principles of canon law do not bind those churches internationally but are of persuasive authority. However, at the international level, the *Code of Canon Law* of 1983 of the Roman Catholic Church binds all the faithful of the Latin Church including bishops, clergy and the laity.

[32] Article 169 of the Constitution of the Celestial Church of Christ in Nigeria provides that "The Parochial Committee of each parish shall have the power to apply disciplinary measures in minor cases affecting their parishes.

an act of "superhuman authority".[33] Examples of sanctions that churches impose include excommunication,[34] defrocking of a cleric, suspension, and termination of membership.[35] However, some components of a church internal governance mechanism may not be coercive, but simply in the form of a social order that is persuasive and voluntary. Similarly, a church internal governance mechanism can be enforceable at different levels, that is, at international, national, regional and local level.

Lastly, whilst some aspects of a church governance mechanism, particularly those that define the theological viewpoint of a church may be sacrosanct and fixed, some other aspects can be evolving and subject to change to reflect contemporary phenomena. Regarding this point, in the case of *Mazwi v Fort Beaufort United Congregational Church of Southern Africa*,[36]a South African High Court observed that "constitutions of voluntary associations such as ecclesiastical entities are revised from time to time in order to set out as far as is foreseeable, remedies to deal with possible disputes and conflict."[37] The implication of the above is that a church can discard an aspect of its governance mechanism that constitutes a

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[33] H Kelsen, "The Law as a Specific Social Technique" (1941) 9 *University of Chicago Law Review* 75 at 79–80; See also, R Sandberg "Towards a Jurisprudence of Christian Law" in N Doe (ed) *Christianity and Natural Law: An Introduction* (2017) 223.

[34] Excommunication is an official ban of someone from the sacraments and services of the Christian church.

[35] For instance, article 24(15) of *The Principles of Canon Law Common to the Churches of the Anglican Communion* provides that "Customary censures include deposition, deprivation, suspension, inhibition, admonition and rebuke."

[36] [2010] ZAECGHC 123.

[37] *Mazwi v Fort Beaufort United Congregational Church of Southern Africa* para 23.

limitation to its effective governance or that is capable of exposing it to risks and adopt new ideas that will enhance its governance, without necessarily altering its theological viewpoint.

Scope of a church internal governance mechanism

Identifying the scope of a church internal governance mechanism applicable to all churches is problematic. This is because of the pervasiveness of church polity. Doe rightly observes:

> "There is no global system of Christian law, human created, applicable to all of the followers of Jesus Christ. Each church or ecclesiastical community has its own laws or other regulatory instruments consisting of binding norms. These norms are as wide in scope as the visible activities of the churches themselves, though they by no means prescribe the fullness of faith and life enjoyed by Christians worldwide."[38]

A number of scholarships have dealt with some issues relating to the scope of internal governance mechanism of churches in recent times; however, most of them examined only individual church denominations, such as the Roman Catholic canon law,[39] the

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[38] N Doe *Christian Law* 1; see also, M Hill *HTS Teologiese Studies/Theological Studies* 2: Hill says "The church on earth, manifested in different institutional churches, has no single humanly created system of Christian law. Rather, each institutional church has its own regulatory system of law–order–polity dealing typically with ministry, governance, doctrine, worship, ritual, property and finance."

[39] See, for instance, *The Canon Law: Letter and Spirit: A Practical Guide to the Code of Canon Law* (1995). This work authored by the Canon Law Society of Great Britain and Ireland, summarises and incorporates the interpretations of the Code of Canon Law of the Catholic Church since it was promulgated in

Orthodox canon law,[40] or the law of the Church of England,[41] and so on.[42] Furthermore, some literature compare the laws of churches either between two churches of different traditions, such as the Anglican and Roman Catholic canon laws,[43] or the laws of several churches within the same traditions, such as those of Anglicanism[44] or the Reformed tradition.[45] The literature that can be identified as the first comprehensive work that comparatively considers the wider scope of church governance mechanisms across several churches is the study carried out by Professor Norman Doe. In his seminal work, Doe examines the juridical systems of one-hundred churches worldwide including churches in South Africa and Nigeria. The churches he examined are spread across ten different Christian traditions — i.e. Catholic, Orthodox, Anglican, Lutheran, Methodist, Presbyterian, Reformed, Congregational, United, and Baptist.[46] From his study, Doe found that in spite of the differences

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1983. The text illustrates the practical wisdom that has been gained in the 12 years of working with the Code.

40 See also, P Rodopoulos *An Overview of Orthodox Canon Law* (2007).

41 M Hill *Ecclesiastical Law* 3 ed (2007). This book offers a uniquely detailed and scholarly exposition of the law of the Church of England; See also, SB Odukoya *Church Management and Administration* (2008), which deals with the issues of governance in the Church of Nigeria (Anglican Communion).

42 See also, JL Weatherhead (ed) *The Constitution and Laws of the Church of Scotland* (1997).

43 N Doe *et al* "A Decade of Ecumenical Dialogue in Canon Law" (2009) 11 *Ecclesiastical Law Journal* 284. This is a 10-year report on the proceedings of the Colloquium of Anglican and Roman Catholic Canon Lawyers 1999-2009; Also, N Doe *The Legal Framework of the Church of England* (1996) compares the law of the Church of England with that of the Roman Catholic Church.

44 N Doe *Canon Law in the Anglican Communion: A Worldwide Perspective* (1998).

45 P Coertzen *Church and Order: A Reformed Perspective* (1998).

46 N Doe *Christian Law* 1.

in the doctrinal and confessional postures of the Christian traditions, there are significant similarities in the scope of their regulatory instruments and mechanisms.[47] He concluded that the juridical unity among the church traditions illustrates that Christians are engaged in similar actions in life regardless of their actual denominational affiliation.[48] He identified ten key subjects in the scope of church internal affairs that are common to the churches he investigated. These areas are namely, the sources and purposes of ecclesiastical corporation, the faithful — i.e. the laity and lay ministry, the ordained ministers, institutions of ecclesiastical governance, ecclesiastical discipline and conflict resolution, doctrine and worship, the rites of passage, ecumenical relations, church property and finance; and lastly, church, state and society.

To further Doe's seminal work and to widen the scope of the principles of Christian law, Doe together with Professor Mark Hill, convened a symposium in 2013 at the Venerable English College in Rome and invited several law and religion scholars. The invited scholars were selected not as representatives of their church denominations, but for their expertise in church law and polity of particular Christian denominations including Anglican, Baptist, Catholic, Lutheran, Methodist, Orthodox, Presbyterian and Reformed.[49] The objective of the symposium was to debate the degree to which different Christian church traditions share similar principles in the instruments governing their internal affairs and to consider how these instruments may enhance global church ecumenism. These experts have continued to meet annually. In

[47] N Doe *Christian Law* 1.

[48] N Doe *Christian Law* 1.

[49] Hill and Doe 2017 *Ecclesiastical Law Journal* 138.

2016, building on Doe's work, the panel of scholars agreed on a statement of principles comprising the scope of internal affairs that are dominant in most Christian churches. The statement lists ten areas of a conceptual framework of church internal life that are identical with those already identified by Doe.[50]

The efforts of Professor Doe and the panel of experts are significant and commendable for several reasons. Firstly, they have succeeded in articulating a category of principles of Christian law and filled some gaps that exist in the comparative analysis of church internal affairs that are common to several Christian churches globally. Although their research was limited to ten church traditions, the vast numbers of church mechanisms that were evaluated are commendable. At least, from the similarities identified, it is possible to deduce some shared juridical principles. Secondly, their works have created a platform to facilitate and stimulate scholarships towards enhancing the nature and purpose of church internal mechanisms. In 1974, the Faith and Order Commission of the World Council of Churches[51] recommended that the divided churches of Christianity should engage in an ecumenical discussion of legal systems to explore its role in the movement towards better and visible ecclesial unity; however, this

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[50] Hill and Doe 2017 *Ecclesiastical Law Journal* 138.

[51] The World Council of Churches (WCC) is a worldwide fellowship of churches seeking unity, a common witness and Christian service. It is the broadest and most inclusive among the many organised expressions of the modern ecumenical movement. The WCC brings together churches, denominations and church fellowships in more than 110 countries and territories throughout the world, representing over 500 million Christians. See "World Council of Churches" https://www.oikoumene.org/en/about-us (accessed 5 August 2019).

goal was never pursued.[52] The work of these scholars can be said to have initiated the implementation of the recommendation. As more people get involved in the debate on church internal mechanisms, more interests in the subject will be developed, and the field would be assisted in finding solutions to the myriad problems associated with church governance, particularly from the legal perspective.

Notwithstanding the above commendation, certain limitations can be identified in the work of the scholars. Firstly, as acknowledged by Doe and the panel of experts, their works focused mainly on ten Christian church traditions out of the twenty-two categories of church traditions recognised by the World Council of Churches.[53] The churches they focused on are mostly in Europe; perhaps to reflect where most of the participating panellists came from. Secondly, all the churches examined are mainline churches with ancient traditions. No African Independent Church (AIC) or Charismatic Pentecostal church that came into existence within the last century was among the churches studied.[54] Of all the churches studied, only five were from Africa; namely the Anglican Church in South Africa, Evangelical Lutheran Church South Africa, United Congregational Church of South Africa, Central Baptist Church, Pretoria, South Africa and the Nigerian Baptist Convention. These five churches are the expressions of their European mother churches. In present day Africa, AICs mostly express Christianity in the African context, and this category of churches constitutes the

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[52] Doe *Christian Law* 1-2.

[53] For details on the twenty-two church traditions recognised by the World Council of Churches, see World Council of Churches *Handbook of Churches and Councils* (2006) 20-76.

[54] Other categories of churches that the scholars did not investigate include the Salvation Army, Seventh Day Adventists, Free and Independent Churches, among others.

highest population of Christians on the continent. Rosalind Hackett, an American professor of religious studies and an expert on religion in Africa observes that the "mainstream religious organizations that have long enjoyed the patrimony of colonial and post-independence governments now find themselves threatened by newer religious formations."[55] The newer religious formations referred to are the AICs and Pentecostal-charismatic churches.

The third limitation is that the works of the scholars primarily focused on areas of commonalities in the legal instruments of churches and do not consider the unique themes that are peculiar to each church tradition that other church traditions may adapt to enhance their mechanisms and possibly promote unity in the global ecclesiology. The basis of these observations is because since church internal governance mechanism tends to change or be updated, ideas and views from other church mechanisms can form the basis of modifying the internal governance mechanism of some other churches to address some of the issues facing them, without necessarily changing their theological standpoints.

Furthermore, the scholars paid attention only to the aspects of church ecclesial life that have been part of the church tradition from time immemorial at the expense of the contemporary and evolving issues relating to church internal affairs. They also did not consider the likely future needs of church law or church governance mechanisms. Meanwhile, because of the changing context of the society in the last decades, the scope of church governance mechanisms also need fundamental changes. There are calls from academics and jurists alike for a re-evaluation of church

[55] RIJ Hackett "Regulating Religious Freedom in Africa" (2011) 25 *Emory International Law Review* 853 at 856.

governance mechanisms given the implication of the changing contexts for church polity.[56] These institutions, of course, include churches and religious organisations.

In light of the above observations and the degree of the legal and governance issues that churches face in recent times, such as the increase in inter-religious violence, church disputes, health and pandemic concerns, societal and technological developments that affect church activities, and the state's increasing willingness to regulate religions, it appears essential that this investigation take place. However, it is submitted that the conceptual framework listed by the scholars cannot be said to have sufficiently captured the needed scope of contemporary church internal mechanisms. A more comprehensive scope that would effectively guarantee church growth and sustainability, needs to include general risk policies, children policy, marriage and matrimonial issues, intellectual property management, employment, church and technology, church dealings with pandemic and health issues, human rights, leadership succession, insurance, schisms and resulting division of property, inter-religious violence and dialogue, contractual status of the church, among others. Curiously enough, most of these areas of church life have been the cause of litigation and disputes in churches in several parts of the world including Nigeria. It is imperative that a church internal governance mechanism contains

[56] H Van Coller "Church Polity and 'Constitutionalism'" in L J Koffeman and J Smith (ed) *Protestant Church Polity in Changing Contexts II* (2014) 147; See also, *Van Rooyen v S* [2000] 8 BCLR 810, *per* Chaskalson CJ; M Hill *HTS Teologiese Studies/Theological Studies* 1 at 2: "Proper internal governance needs greater sophistication if a church has many members and is evangelical in nature."

as much detail as the church desires. This is essential for effective administration and church governance.

The essence of having an internal governance mechanism that is wide in scope, as would soon be discovered, is to safeguard the interests of churches. However, as observed earlier, state regulations in most instances influenced the scope of church internal governance mechanisms. But not all the countries cases relating to this subject matter can be effectively examined. Accordingly, the next section briefly explores instances of how state regulations influence the scope and contents of the internal mechanism of churches primarily in Nigeria.

Statutory influence in Nigeria

Some Nigerian statutes touch on church internal activities; an example is Part F of the Nigerian Companies and Allied Matters Act of 2020 (CAMA). Section 827 of CAMA stipulates what the constitution of a church desiring to register its trustees so as to acquire a juristic personality under the provision of CAMA must contain. Such a constitution must include, amongst other details, the name of the church, and its aims and objectives. It must also contain provisions relating to the appointment, powers, duties, tenure of office and replacement of the trustees, the use and custody of the common seal of the church, church meetings, the composition of the governing body and the procedure for their appointment and removal, as well as their powers. It must also stipulate the types of subscriptions and other contributions the church will be collecting, the procedure for disbursement of church funds, and the keeping and auditing of church accounts.

Section 838 provides that the constitution must contain a clause that church income and property shall be applied solely towards the promotion of the objects of the church as outlined in its constitution. It must also stipulate that no portion of the church income would be transferred directly or indirectly, by way of dividend and bonus or otherwise by way of profit to the church member. However, a payment made in good faith, or reasonable and proper remuneration to any officer or servant of the church in return for any service rendered to the church is permissible.[57] It provides further that except for ex-officio members of the governing council, no member of a church council or similar governing body will be appointed to any salaried office of the church, or any office of the body paid by fees. In addition, no remuneration or other benefits in money or money's worth must be given by the body to any member of such council or governing body, except repayment of out-of-pocket expenses or reasonable and proper rent for premises leased to the church or reasonable fee for services rendered.[58] The failure to comply with these provisions attracts a fine.[59]

A major advantage of the above statutory intervention relating to church internal governance mechanism is that it prevents the governance mechanisms of a church being completely unwritten. A major limitation of the statutory provisions, however, is that the statutes have led to the politicisation of religion because churches have to adhere to the guidelines of statutes to obtain some state benefits. Meanwhile, there is the possibility that the peculiarities of

[57] CAMA, s 838(2).
[58] CAMA, s 838(6)(d).
[59] CAMA, s 838(3).

each church polity were not considered by the framer of the laws, who perhaps are not of the Christian faith.

Another limitation is that the statutory provisions may weaken the initiatives and ideas that can enhance the scope and effectiveness of internal governance mechanisms of churches. There is the tendency for churches to restrict the scope of their governance mechanisms to the matters outlined in the statutes without considering other aspects of their internal affairs that have the potential of exposing them to losses or threaten their sustainability. This argument becomes more imminent when one considers the fact that the Corporate Affairs Commission (CAC)[60] in Nigeria has now prepared model constitutions, which most churches adapt for their constitution for ease of registration under these statutes.[61] Meanwhile, it is clear that not all the contents of what is required to be in the constitutions as stipulated in the statutes are reflected in the model constitutions.[62] For a church mechanism to effectively serve its roles, it is important that besides what is provided for in the statutes and the model constitutions, churches need to develop a more detailed and comprehensive internal policy for each of the major areas of the church's governance, particularly those areas

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[60] Corporate Affairs Commission (CAC) is the government agency established in terms of section 1 of CAMA to register and perform oversight over companies and civil society organisations that register under CAMA.

[61] For the CAC's Model Constitution, see http://new.cac.gov.ng/home/wp-content/uploads/2013/11/MODEL_CONSTITUTION.pdf (accessed 26 March 2018);

[62] For instance, there are thirteen various headings outlined in the CAC's model constitution. They include name, address, aims and objectives, trustees, common seal, meetings, governing body, source of income, disbursement and application of funds, keeping of accounts, appointment of auditors, amendment of constitution and special clause.

that have been the bases of frequent disputes and legal controversies. It is submitted that there is nothing untoward, for instance, if churches seek guidance from risk management policies and practices that business entities use and adapt same to suit their purpose to enhance their governance mechanisms and reduce their exposure to risks of legal disputes.

It is noteworthy that besides the above, there are some constitutional principles that also impact on the internal governance mechanisms of churches. This is in light of the evolving nature of the horizontal application of human rights to private spheres, generally referred to as the doctrine of constitutional horizontality. According to Chirwa, traditionally, constitutional rights apply in the public sphere, but not in the private sphere. In other words, private actors were not bound by human right."[63] The effect is that private actors cannot be held liable or accountable to human rights obligations. However, by virtue of the doctrine of horizontality of human rights, the reach of constitutionalised human rights is extended to private spheres.[64]Some conducts that were hitherto in the exclusive province of private law are now subject of a constitutional action for redress in relation to a violation of

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[63] DM Chirwa "The Horizontal Application of Constitutional Rights in a Comparative Perspective" (2006) 10(2) *Law, Democracy and Development* 21; OO Cherednychenko "Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?" (2007) 3 (2) *Utrecht Law Review* 1; The authors also submitted that the traditional view was that fundamental rights such as those typically protected in bills of rights applied exclusively in the context of public legal relations between the state and its subjects.

[64] YK Brian Sang "Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Justice" (2018) 26(1)*African Journal of International and Comparative Law* 3.

fundamental rights.[65]Accordingly, non-state actors like religious organisations are held accountable for violations of the constitutionally guaranteed rights.[66]

There is no express mention of application of horizontality in the Nigerian 1999 Constitution, the doctrine can however, be inferred from the provisions of Order II Rule 1 of the Nigerian Fundamental Right (Enforcement Procedure) Rules, 2009 that provides:

> Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress.

As will soon be discussed, Nigeria has applied horizontality of human rights to private institutions. In the context of this article, two such constitutional rights that are horizontally applicable to church governance are worthy of examination — the rights to equality or unfair discrimination and fair administrative action. Regarding the right to equality or unfair discrimination, section 42 of the Nigerian constitution guarantees the right. Both the public

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[65] Brian Sang2018*African Journal of International and Comparative Law* 1; S Gardbaum "The 'Horizontal Effect' of Constitutional Rights" (2003) 102 (3) *Michigan Law Review* 388.

[66] Chirwa 2006*Law, Democracy and Development* 21; A Nolan "Holding Non-state Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland" (2014) 12(1)*International Journal of Constitutional Law* 61-93.

and private institutions are expected to observe the protection of the right. However, the doctrine and polity of a church may necessitate derogation from this constitutional right. For instance, the Catholic Church and Anglican Church in Nigeria by their doctrines do not ordain female as priests. These are a *prima facie* violation of the constitutional rights of non-discrimination against the women.

Now concerning the principle of fair administrative action, this right is protected in section 36 of the Nigerian Constitution[67] as the principle of "fair hearing".[68]By summary, private and public institutions are required to ensure fairness when taking disciplinary exercise over their members. This principle is also relevant to churches when exercising disciplinary actions over their clergy and members. Thus, where a disciplinary exercise is conducted without adhering to the principles of fair administrative action, a person who is adversely affected can approach the court for judicial review to set aside the disciplinary exercise and decision.[69]The failure of churches to adhere to the principle of fairness has resulted in a number of lawsuits[70] in Nigeria, indicating the application of the principle of constitutional horizontality in Nigeria. An example is

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[67] Constitution of the Federal Republic of Nigeria 1999.

[68] Obaseki JSC in the Nigerian case of *Garba v University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550, 584.

[69] This position in Nigeria can be contrasted with the position in the United Kingdom (UK) where a clearer distinction would be made between public and private bodies in respect of the imposition of natural justice standards. In the UK a party cannot get judicial review of a church tribunal because it is a private, not a public body; it is non-justiable in that jurisdiction. See, for instance, the decision of the Supreme Court of the UK in *Shergill v Khaira* [2014] UKSC 33.

[70] See the Nigerian cases of *Anyanwu v Okoroafor* (Unreported, Suit No. FCT/HC/CV/1889/2014; *Egubson v Ikechiuku* (1977) LPELR-1050 (SC)

the case of *Anyanwu v Okoroafor*.[71] The case is also a fundamental right enforcement suit brought by the applicant, Rev. Anyanwu, against the respondents for suspending him as a minister in the church. Immediately prior to the suit, the applicant was a minister and the District Superintendent, Abuja District of the church. The first respondent is the Assistant General Superintendent of the church. The 2nd to 11th respondents are leaders in the church. Some members of the church wrote a petition against the applicant to the Nigerian Police levelling against him allegations of mismanagement, stealing and/or conversion of 300 million Nigerian Naira[72] belonging to the church.[73] The applicant contended that the respondents set up an investigation panel (the panel) purportedly in terms of the church order to investigate the allegations against him. The panel found the applicant guilty of the allegations. Acting on the panel's recommendation, the respondents suspended the applicant as a minister in the church. The respondents further published the applicant's name and picture in a national daily as having been suspended and dismissed from the church.[74] The applicant challenged his suspension before the Federal High Court, Bwari on the grounds that the panel that investigated him was illegal and unlawful as its constitution did not follow the church's constitution and bylaws. He contended further that the panel is not a court or tribunal established by law and thus lacks the competence to investigate and to try him for the criminal offences with which he was accused. In addition, he was not given

[71] *Anyanwu v Okoroafor* (Unreported, Suit No. FCT/HC/CV/1889/2014.

[72] This is an equivalent of about two million US Dollars as at the time the suit was instituted.

[73] *Anyanwu v Okoroafor* 2 and 14.

[74] *Anyanwu v Okoroafor* 6.

the opportunity of presenting his defence or of being heard by the panel before he was purportedly suspended and dismissed.[75]

The court upheld the case of the applicant and declared that the allegations of mismanagement, stealing or conversion of 300 million Naira church funds with which the applicant was charged are criminal offences under the state legislation. Furthermore, that by virtue of section 36 of the Constitution of the Federal Republic of Nigeria, 1999, the applicant ought to be arraigned and tried before a court of competent jurisdiction established under the state law, not the investigative panel set up by the respondents to try the applicant. The court further held that the applicant is by virtue of section 36(5)[76] of the Constitution of the Federal Republic of Nigeria, 1999 presumed innocent of all the allegations made against him by the respondents, and on which he is yet to be tried and found guilty by a competent court. The court accordingly declared the investigative panel constituted by the respondents to investigate and try the applicant as illegal, unlawful, and unconstitutional. It also declared unlawful, unconstitutional and of no legal effect whatsoever, the entire proceedings of the panel declaring the applicant guilty and leading to his suspension, and for not affording the applicant a fair hearing.[77] In the words of the presiding judge, Musa J., "the constitution of a committee to[78] handle the allegations was a total breach of the rule of law and procedure".

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[75] *Anyanwu v Okoroafor* 6.

[76] Section 36(5) states: "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty."

[77] *Anyanwu v Okoroafor* 19-22.

[78] *Anyanwu v Okoroafor* 11.

The implication of the above discussion is that churches cannot exercise disciplinary according to their whims and caprices, but must also respect constitutional principle of fairness to avoid being dragged into legal disputes.

From the discussion above, it is established that the application of the principle of natural justice is critical to every church disciplinary procedure. Churches are therefore not only to ensure that the provisions that will guarantee the application of the principles of fairness are embedded in their internal governance mechanism, but also ensure that the church actors that are involved in disciplinary exercise understand what fairness means and the legal implications it has for a church where the rules are not observed during disciplinary exercise. Having regard to the far-reaching consequences which the decisions of these church investigative panels and tribunals may, and often do have, it is always appropriate that a church develop a comprehensive guideline or code on the legal requirements required by the investigating panel and the tribunal particularly as it relates to the principles of fairness and due process.

Roles and functions of a church internal governance mechanism

An internal governance mechanism of a church may state in clear terms the roles it seeks to achieve. However, as a state legal system performs general functions even when it may not be specifically stated in the law, so does a church governance mechanism perform roles in church administration. The general functions of church internal governance mechanisms are discussed under the three headings below.

(i) Expressing the theological viewpoint of a church

An important role that a church governance mechanism plays is that it gives meaning to the faith, doctrines and the religious identity of a church. It seeks to implement the theological ideas of a church as the norms of conduct of the church. In other words, it gives expression to the theological and ecclesiological contents of a church, particularly those that they can lay claim to as a right of a religious community. According to Professor Coertzen, a church juridical instrument must seek to fulfil the will of Christ for His church, accordingly, it must derive from the Bible what Christ's will for His church entails and then implement it in a contemporary manner.[79]

(ii) Promoting order and good governance

Another primary purpose of an internal governance mechanism of a church is to promote order, decency, and good governance and facilitate the ecclesiastical life and mission of a church. This function reflects the biblical injunction that "all things be done decently and orderly."[80] The internal governance mechanism of a church performs this role by setting out the objectives of the church, by giving an understanding of its nature and its place in the universal church. In line with this, Ekwo says a church mechanism "determines the legality of the actions and the activities that are carried on within the body and sets a boundary on its aims and objectives, beyond which it may not venture."[81] Thus, principles 1 and 25 of *The Principles of Canon Law Common to the Churches*

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[79] P Coertzen *Church and Order: A Reformed Perspective* (1998) 7.

[80] Holy Bible, I Corinthians 14:40. (King James Version); See also, AB Grobler and JL Van der Walt "An Assessment of the Management Skills Required of Ministers in the Reformed Churches of South Africa" (2008) 42(4) *In die Skriflig* 735 at 735.

[81] Ekwo *Incorporated Trustees: Law and Practice in Nigeria* 73.

of the Anglican Communion emphasise the idea that principles exist to assist the Anglican Church in its mission and witness to Jesus Christ. It is also to order and facilitate its public life; regulates its affairs for the common good; uphold the integrity of the faith, sacraments and mission, as well as provide good order.

From the foregoing, it can therefore be argued that as corporate governance defines how a business entity is run to maximise its objective of making a profit, a church governance mechanism identifies the missions and objectives of a church and provides how the church is run to achieve and maintain these objectives.[82] Ekitala's opinion on this point is also very apt. He says, "Therefore, a church order should not be seen as the essence of the church. Rather a church order is about the wellbeing of a church. A church order seeks to promote better church governance. The ecclesiastical laws are intended to promote the wellbeing of the Christian church."[83]

Further in promoting order in the church, the governance mechanism is the major instrument that sets out the institutions of governance of a church and defines their nature, the scope of their authority and the roles of each of the functionary and members. It sets out the rights, privileges, powers, duties, obligations, and liability of a church and its stakeholders. It can thus be summarised

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[82] J Coriden *An Introduction to Canon Law* (1991, revised 2004) 6. Coriden, referring to the Catholic Church, asserts, "The canons also help to create and maintain the metaphors and symbols which influence the faithful subtly but strongly." See also M Hill *HTS Teologiese Studies/Theological Studies* 1 at 2.

[83] LA Ekitala *Constitution or Church Order? A Church Judicial Analysis of the Church Documents in the Reformed Church of East Africa* (PhD thesis, Stellenbosch University, 2018) 10.

that an effective mechanism acts as a stimulus for efficiency, growth and sustainability of a church.

However, the fact that a church internal governance mechanism sets out the rights, duties and obligations of members and stakeholders of a church, raises some questions. What is the legal status of a church governance mechanism? Is it a contractual instrument between the church and its members and other stakeholders? How should the court evaluate a church internal mechanism?

Generally, in terms of common law applicable in Nigeria, the constitution of a voluntary association constitutes a contractual legal obligation between members. Accordingly, the members of the association have a duty to act in good faith towards one another or as they accept the responsibility of managing the affairs of the association.[84] In matters where there is a conflict of interest between the association and one or more of its members, the interest of the association is to be protected.[85] Members of a voluntary association can become personally liable if they act beyond the scope and limits of the constitution or if they conduct the affairs of the association recklessly or fraudulently.[86] From decided cases, most courts see the internal governance mechanisms of churches as having similitude in nature and implication as a constitution of secular non-profit organisations. The statement of

[84] *Rowles v Jockey Club of SA* 1954 (1) SA 363 (AD) 365; *Mkhando v Mangwende NO* 1977 (1) SA 851 (RAD) 854.

[85] *ECA (SA) v BIFSA* 1980 (2) SA 506 (W) 509.

[86] *Fortuin v Church of Christ Mission of the Republic of South Africa* [2016] ZAECPEHC 18.

Proudfoot VC in the English case of *Johnson v Glen*[87] perhaps summarises the position.

> To a great extent ... the church depends for the maintenance of its clergy and the ordinances of religion upon the voluntary obligations of the people. The lay element is recognized as a constituent in its Supreme Church Courts. And the rules adopted for its appointment of ministers and other purposes, derive their force only from the voluntary assent of the members of the church. They are matters of mutual contract, entered into by, and for the benefit of, those who choose to become members. They have not the force of laws imposed by the power of the State, and binding all who come within their influence, whether they assent to them or not. The rules for their interpretation are to be found in the law of contracts, not in that of statutes. The parties affected by them are contracting parties, and can only be held to have surrendered their freedom of action as far as their mutual agreement binds them."[88]

Doe also aligns himself with Proudfoot when he observes that "churches generally function in civil law as voluntary associations, their internal regulatory instruments have the status in civil law in terms of a contract entered into by the members and as such may be enforceable in the courts of the State, particularly in property matters."[89]

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87 (1879) 26 Gr. 162 (Ch.).

88 *Johnson v Glen* 181.

89 N Doe *The Law of the Church in Wales* (2002) 1.

In line with the above position, it has been held severally that the failure of a church or any of its functionaries to act within the scope of its internal mechanisms would constitute a breach and *ultra vires.*[90]Thus, where a church has internal governance mechanisms, it is required that it should abide by them.[91]When there is a church dispute relating to internal church affairs, the court will ordinarily resort to the church internal mechanism to resolve the dispute. Numerous cases[92] confirm the position that civil courts would validly intervene in a religious matter, interpret church mechanisms, and act accordingly where a religious authority in violation of its own rules makes a decision or when the religious authority lacks competence under those rules.

It is acknowledged that churches and religious organisations should be bound to follow their mechanisms to avoid abuse. However, I am of the view that there is a need for caution not to categorise church mechanisms as ordinary contractual instruments with which *church members voluntarily bind themselves,*[93] or to which the general principle of interpretation of contractual documents should apply. The reasons are as follows: firstly, evaluating church governance instruments as a contractual document may easily lead to court's entanglement. As was observed earlier, the fundamental nature of a church governance mechanism is that it reflects the doctrinal and theological relationships of a church. Thus, a court's

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90 *Yiba v African Gospel Church* 1999 (2) SA 949 (C).

91 *Taylor v Kurtstag NO* 2005 (1) SA 362 (W); *Fortuin v Church of Christ Mission of the Republic of South Africa.*

92 *The Registered Trustees of Faith Tabernacle Congregation Church Nigeria v Ikwechegh* (2000) 13 NWLR (Pt 683) 1; See also, E Nwauche "Law, Religion and Human Rights in Nigeria" (2008) 8 *African Human Rights Law Journal* 568 at 583.

93 Emphasis added.

attempt to evaluate the internal governance mechanism of a church using a similar approach to evaluating a contractual document is to consider the doctrinal or theological standpoint of the church.

Secondly, the fact is that some people are born into the church life and the beliefs and practices of the church permeate all aspects of their lives in such a manner that their membership of a church is not merely voluntary. Therefore, they are determined to follow the church traditions regardless of the consequences to themselves, including torture or death. One cannot therefore see churches as mere voluntary organisations that an individual voluntarily joins or withdraws from at will as comparable to secular non-profit organisations. The observation of Professor Evans on this issue is profound. She observes:

> Even when the state is not involved, leaving a religion is a far more complex matter than leaving other types of a private organization. For many people it is not 'voluntary' in the way in which social or political groups may be. To some people their religion is the source of truth and salvation. They may disagree with a particular aspect of its structure, such as the requirement, backed by legal sanction, to pay church taxes but leaving it could be seen to be of serious detriment to spiritual well-being.[94]

[94] C Evans *Freedom of Religion under the European Convention on Human Rights* (2001) 129; See also, HA Freeman "A Remonstrance for Conscience" (1958) 108 *University of Pennsylvania Law Review* 806 at 826; See also, G Du Plessis "The Constitutionality of the Regulation of Religion in South Africa — Untoward Restrictions of the Right to Religious Freedom?" (2019) 1 *South African Law Journal* 131 at 131.

The above point implies that the assumption on which it is argued that a church is a voluntary association which a member may voluntarily join or withdraw from is flawed and can implicate the reasoning of the court negatively. Thus, when it comes to religious rules, stating that it is a contract that is voluntarily undertaken is not sacrosanct.[95] At best, the religious rules should be taken as a *quasi*-contract.

(iii) Reducing conflict and safeguarding church autonomy

Church governance mechanisms can also reduce conflict and safeguard the autonomy of churches. This is, however, possible only where the internal governance mechanism is comprehensive and defined in clear terms. A church governance mechanism that is ambiguous may result in a dispute in the search for its meaning or interpretation. Where the mechanism of a church is expressed in clear terms, every member and non-member, including the courts can easily understand and respect the theological standpoint of the church. Therefore, the use of precise and appropriate choice of words in framing the contents of church mechanisms is imperative. An example of a situation where the contents of a church constitution were not clear is the Nigerian case of *Egubson v Ikechiuku*,[96] where the court noted that the use of the word "unlawful" to describe a violation of a dogma in a church governing instrument was inappropriate. The court noted that the word "sin" would have been more appropriate. Regarding the need for clarity of church constitutions, Ekwo rightly advises:

> For the purposes of clarity, the constitution should be written in consecutive paragraphs, either

[95] See also the Nigerian case of *Thomas v Olufosoye* (1986) LPELR-3237(SC) 1, 46,Oputa JSC.

[96] *Egubson v Ikechiuku* 19.

> numerically or alphabetically arranged. Where the words used therein are presumed to have meanings other than that which ordinarily or generally are attributed to them, such words should be specially defined. Simplicity of language is of the essence in any good drafting. A simply written constitution is a mirror which, when read, reveals the intentions of the body, and decisions or judgments based on such simplicity are more satisfying than those based on the rules of interpretation which the parties may not have envisaged.

The above advice is more significant as most secular courts do not have adequate knowledge of church law. Doe observes the point that there is "the low levels of knowledge of religious laws, including Christianity, in the pronouncements of government and the courts."[97] Therefore, an ambiguous mechanism can be detrimental to a church where the court interprets the mechanism of the church in ways that do not reflect its true theological standpoint. The fact is when religious doctrine is misinterpreted it can pose a threat to human dignity and religious freedom. Eso JSC of the Nigerian Supreme Court recognised this danger when he observed in *Thomas v Olufosoye*[98] that it may be possible for a Moslem judge, who is ignorant of how a church runs, to adjudicate a church dispute. Where such an instance arises, a judge may have

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[97] Doe *Christian Law* 9 citing R Williams "Civil and Religious Law in England: A Religious Perspective" (2008) 10(3) *Ecclesiastical Law Journal* 262; See also, R Sandberg *Law and Religion* (2011), especially chapter ten.

[98] (1986) LPELR-3237 (SC) 1.

no option than to apply his personal or religious opinion[99] or the secular law in resolving such religious or doctrinal disputes.[100] Eso JSC observes:

> What is very important in the case is the danger of bringing religion as such to the reasoning of jurisprudence. The reasoning in religion is one of God or Allah which passeth all jurisprudential understanding. The more so when Christian judges have to be called upon to settle Moslem disputes or Moslem judges adjudicate upon Christian issues. *The unbeliever in each case can only apply the laws of the State* … Yet judges, once they are seised of a matter have no choice but to apply the laws and not religious sentiments.[101]

Meanwhile, the Apostle Paul in his letter to the Corinthians had expressed this fear that the court observed in *Thomas v Olufosoye*. Paul urges Christian faithful to desist from taking their internal

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[99] Tsele has further observed, "It is near impossible to completely debunk one's religious outlook, even in the context of judging." See M Tsele "Rights and Religion; Bias and Beliefs: Can a Judge Speak God" (2018) 43(1) *Journal for Juridical Science* 1 at 15.

[100] In the Nigerian case of *Asani v Adeosun* (1966) NMLR 268, 274, a case involving a religious dispute among Moslems, the court applied secular law in the absence of an internal self-regulatory instrument. In the case, the Supreme Court held, "There is no evidence of any rules, which govern the practice of the community in the appointment of a Chief Imam and as the learned counsel for the appellants submits; the rules of the common law to the effect that in such cases the appointment should be made by the entire community."

[101] *Thomas v Olufosoye*31-32. Emphasis added.

disputes before secular judges for resolutions.[102] It is submitted that Paul's prescription is still pertinent to the protection of religious autonomy in multi-religious societies like Nigeria.

Another reason a church should make sure that its mechanism is comprehensive and clear is that where a dispute has arisen in an aspect of church life where the church mechanism is silent, it may be a challenge for the court to resolve such a dispute. The question that would arise in such an instance is the approach the court will take without being entangled in religious affairs of the church. Hammer, whilst illustrating with church elections, opines that the state regulations should apply where there is a vacuum in the church policy. He states that:

> Incorporated churches having no constitutional or bylaw provision dealing specifically with elections may be subject to the requirements of state corporation law. As an example, if an incorporated church has no constitution or bylaws, and the applicable state corporation law specifies the quorum, notice, and voting requirements, then these requirements must be followed.[103]

The implementation of Hammar's opinion, in my view, may not address the issues and neither serves the church best. The reasons for this are twofold. The first point is to consider the fact that state laws do not always cover all issues that concern church administration. At least, the provisions of CAMA that were observed previously in this article do not cover all the areas of

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[102] Holy Bible, I Corinthians. 6: 4-6; See a similar instruction that Jesus gave to his followers in Matthew 18:15-20.

[103] Hammar *Pastor, Church and Law* 32.

church affairs, so too the model constitutions issued by the CAC. The question then arises, what happens where there is also a vacuum in the state regulation regarding the specific area of a dispute before the court? In such an instance, the disputes in question would remain unresolved.

The second limitation is that it would be unreasonable to impose state regulations on a church. A better option therefore would be for the court to request that the church resolve the matter internally by filling the gap in its extant mechanism. This will assist the church to develop its governance mechanism in line with its own theological standpoint. This was the position adopted by the Nigerian court in *Owodunni v Registered Trustees of Celestial Church of Christ*.[104] In the case, the court was confronted with a leadership succession crisis in a church. The trial court identified the vacuum in the church's constitution in not providing effective processes for the emergence of a new leader for the church. The court did not engage in the issue of who is the rightful person to occupy the office of the leader of the church. Rather, it advised the church to amend its mechanisms to fill in the vacuum. Whilst addressing this issue on appeal at the Supreme Court, Ogundare JSC, delivering the lead judgment states: "The question then arises: What is the way out? The learned trial Judge provided an answer to this question. He advised: "It is the duty of the C.C.C. to fill the 'gap' by amending the Constitution accordingly."[105] This position best serves the church. Eso JSC gave similar advice in *Thomas v Olufososye*, which also involved a leadership dispute in the Anglican Church in Nigeria. Eso held: "Perhaps, religionists would

[104] (2000) LPELR-2852(SC) 1.

[105] *Owodunni v Registered Trustees of Celestial Church of Christ* 49.

assist themselves more, by devising a forum for settlement of their disputes and come to court only when that fails."[106]

The court can also adopt an advisory and admonitory approach. The comment from the Nigerian Supreme Court in *Awoyo v Opere*[107] is very instructive in this regard. The court states:

> This shall be the judgment of this Court. In conclusion, we appreciate the determination of both sides to serve their religion, but we are of the view that religion can best be served if the parties will try to reconcile their differences and units in service and we so advise.[108]

From the discussion so far, it can be summarised that a comprehensive and clear church mechanism can be a stimulus for smooth governance, a catalyst for church growth, and a tool for protecting the autonomy of the church. Professor Hill also recognises this position when he observes that the law of the church should be able to "prevent anything that may impede either the church itself or any of its members in their faith."[109] I submit that issues that may impede the church include legal disputes. Ekitala also submits that a church "constitution is a legal document that gives a denomination direction in ministry and *protection from lawsuits*."[110]

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[106] *Thomas v Olufosoye*32.

[107] (1976) NSCC 1.

[108] *Awoyo v Opere*9.

[109] M Hill *HTS Teologiese Studies/Theological Studies* 1 at 2. Emphasis added.

[110] Ekitala *Constitution or Church Order? A Church Judicial Analysis of the Church Documents in the Reformed Church of East Africa* 8. Emphasis added.

It can be garnered from the foregoing that church mechanisms should be able to limit the exposure of churches to disputes or what may threaten their growth and sustainability. However, the concern is that in spite of the statutory regulations relating to church governance mechanisms and the churches' self-developed mechanisms, several churches in Nigeria have recently been at the centre of legal disputes. The mainline, AICs, as well as the Pentecostal-charismatic churches are all experiencing the challenge. The concern is that these church legal disputes appear to be arising mostly from the internal governance activities of churches.

Conclusion

This article set out to highlight the nature and roles of church internal governance mechanisms from the legal perspective. Church internal governance mechanisms involve the policies that govern the entire internal affairs of the church, including the doctrinal and non-doctrinal affairs. Its basic features include the fact that it may be in writing or may be unwritten; it may be theologically and legislatively influenced; it is often juridical, and can be subject to change.

Whilst articulating a scope of church mechanisms that will apply to all churches is problematic because of the different polity of church traditions, it is observed that there are certain internal affairs of churches that are common to most Christian traditions. Of importance are the roles that a church internal governance mechanism performs in the ecclesial life and governance of a church. Where the internal governance mechanism of a church is clear and comprehensive, it could serve as a stimulus for effective church governance and growth. It can also limit churches' exposure to legal risks and court interference.